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TORT SUITS FOR INJURIES SUSTAINED DURING ILLEGAL ABORTIONS: THE EFFECTS OF JUDICIAL BIAS

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I. INTRODUCTION

SYMONE T., an eleven-year-old child, was raped in December 1987.[1] On May 25, 1988 she learned that she was pregnant, and, on May 26, her mother took her to a hospital where Symone underwent an abortion.[2] The abortion was illegal because Symone was 24.7 weeks pregnant.[3] The abortionist allegedly performed the procedure negligently, causing Symone to suffer neurological damage, for which she sued.[4] The Supreme Court of New York, Appellate Division, held that if Symone "submitted to an abortion which she knew to be illegal, she could not recover for the negligently inflicted injuries"[5] because those injuries would be "a direct result of a serious violation of the law involving hazardous activities which were not justified under the circumstances."[6]

Compare this treatment of Symone T. with that accorded to Bernard McCummings. On June 28, 1984 McCummings and two compatriots attacked and attempted to rob a seventy-two-year-old man.[7] A police officer, hearing the victim's cries for help, rushed to the scene.[8] McCummings tried to escape, and the officer shot to stop him.[9] The bullet hit McCum-

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1. *See* Symone T. v. Lieber, 613 N.Y.S.2d 404, 405-06 (App. Div. 1994).

2. *See id.* at 405.

3. *See* N.Y. PENAL LAW § 125.05 (McKinney 1997).

4. *See Symone T.*, 613 N.Y.S.2d at 405.

5. *Id.* at 406. The fact that the abortion occurred during the final trimester created the illegality.

6. *Id.* at 405 (quoting *Barker v. Kallash*, 468 N.E.2d 39, 41 (N.Y. 1984)).

7. *See* McCummings v. New York City Transit Auth., 613 N.E.2d 559, 562 (N.Y.), *cert. denied*, 510 U.S. 991 (1993).

8. *See McCummings*, 613 N.E.2d at 562.

9. *See id.*

mings in the back, causing severe injuries.[10] McCummings sued, claiming that the officer "did not exercise that degree of care which would reasonably be required of a police officer under similar circumstances."[11] The jury awarded plaintiff $4,343,721.24.[12] In affirming the award, the New York Court of Appeals noted that "established principles" required such affirmance, even though that result "may to some seem to be an unacceptable resolution of the factual disputes."[13] Despite its unease with the result, the Court of Appeals did not consider the possibility that McCummings might be barred from suing because he suffered his injury as a "direct result of a serious violation of the law involving hazardous activities which were not justified under the circumstances."[14] Instead, it concluded that McCummings' criminal conduct was irrelevant to his tort

10. *See id.* at 560.

11. *Id.*

12. *See* McCummings v. New York City Transit Auth., 580 N.Y.S.2d 931, 939 (App. Div. 1992).

13. *McCummings,* 613 N.E.2d at 562.

14. Symone T. v. Lieber, 613 N.Y.S.2d 404, 405 (App. Div. 1994) (quoting *Barker v. Kallash,* 486 N.E.2d 39, 41 (N.Y. 1984). Had the *McCummings* court done so, it is difficult to imagine that it would have concluded that McCummings' injuries failed to meet that test. As to the directness requirement, McCummings was shot as he tried to escape from the scene of his unfinished crimes. The only intervening events were his flight and the officer's decision to shoot to prevent the escape, neither of which should render the injury indirect. Both of these intervening acts were taken in response to the situation created by McCummings' criminal conduct; both occurred at the scene of the original crime; both took place at approximately the same time as McCummings' original criminal activity; both were eminently foreseeable. Intervening acts that flow from the original conduct and were a foreseeable risk of that conduct generally do not break the casual connection. *See, e.g.,* Derdiarian v. Felix Contracting Corp., 414 N.E.2d 666, 670 (N.Y. 1980). Nor were McCummings' injuries different in kind from what should have been anticipated. According to these established principles, McCummings' injuries were directly caused by his original criminal conduct. At a minimum, the relation is sufficiently direct to require some discussion. Furthermore, McCummings' attempt to escape was itself a serious crime, and no one would seriously contend that McCummings' injuries were not a direct result of his attempt to escape. *See* Johnson v. New York, 687 N.Y.S.2d 761 (App. Div. 1999).

McCummings' crimes were undeniably serious, hazardous and unjustified, fulfilling the other requirements set out by the Court of Appeals. He pled guilty to a class D felony, (N.Y. PENAL LAW §§ 110.05 (McKinney 1988), 160.10 (McKinney 1987)) and the facts (*See McCummings,* 613 N.E.2d at 563 (Bellacosa, J., dissenting)) show that, at a minimum, he also was guilty of assault in the first degree (a class C felony), (N.Y. PENAL LAW § 120.10 (McKinney 1987)) attempted robbery in the first degree (a class C felony), (*Id.* §§ 110.05, 160.15), attempted grand larceny in the fourth degree (a class A misdemeanor) (*Id.* §§ 110.05, 155.30), and resisting arrest (a class A misdemeanor) (*Id.* § 205.30; *In re* Anthony C., 547 N.Y.S.2d 396, 396-97 (1989)). Beating and attempting to rob a senior citizen, activities that the state classified as felonies, are very serious crimes, as are resisting arrest and attempted grand larceny. Obviously these crimes also are unjustified, and, as the facts of *McCummings* show, fraught with danger to the intended victims, the perpetrator, and others.

case because "it is the province of the criminal, not the civil, justice system to punish him."[15]

Why then was Symone T.'s possibly criminal conduct relevant in her negligence suit? Both Symone T. and Bernard McCummings asserted that they were injured by defendant's negligence.[16] Symone's crime, if any, was a class D felony,[17] no more serious than the crime to which McCummings pled guilty, and less serious than many of the crimes of which McCummings apparently was guilty. The conduct of twelve-year-old Symone was significantly less reprehensible than that of McCummings. Nevertheless, the courts awarded over four million dollars to Mr. McCummings, a career criminal injured while fleeing the scene of his violent crime, but refused to hear the claims of Symone, a young child victimized by both a rapist and her negligent doctor. If McCummings' crimes were irrelevant to his tort case, why was Symone's possibly criminal conduct relevant to hers? If it would have been wrong for the civil justice system to punish McCummings by disallowing his claim, why was it right for the civil justice system to punish Symone by disallowing her claim? Finally, is there such an obvious distinction between these two cases that there was no need for the *Symone* court to explain why *McCummings* did not apply?[18]

Decisions like those in *Symone T.* and *McCummings* are not unusual. Most courts hold that, by agreeing to have an illegal abortion, a woman forfeits her right to recover for injuries tortuously inflicted during that abortion.[19] Nevertheless, most courts do permit suits by those injured in the course of committing other crimes, and they usually do so without

15. *McCummings*, 613 N.E.2d at 559.

16. *See id.* at 560 (labeling McCummings' case as one for negligence). The dissenting judge at the Appellate Division stated that McCummings sued for "an intentional tort." *McCummings*, 580 N.Y.S.2d at 944. Regardless of the name given the cause of action, the basis for McCummings' claim was negligence: that defendant, in shooting him, "did not exercise that degree of care which reasonably would be required of a police officer under similar circumstances." *McCummings*, 613 N.E.2d at 560.

17. *See* N.Y. PENAL LAW § 125.45 (McKinney 1998). Because Symone was 12 at the time of the abortion, she could not commit a felony under New York law.

18. There is little doubt that the justices who decided *Symone T.* were aware of the decision in *McCummings*, a decision that received substantial coverage in the press. For example, the *New York Law Journal* published a letter written by the Chairman of the Public Relations/Community Information Committee of the Association of Justices of the Supreme Court of the State of New York criticizing the media "outcry" over the *McCummings* decision. *See* Charles A. Kuffner, Editorial, *Judges Fight Back*, N.Y.L.J., Jan. 10, 1994, at 2.

19. See FOWLER V. HARPER, THE LAW OF TORTS § 3.10, at 307-08 & n.41 (1986) (discussing cases in which plaintiff's consent to illegal operation bars recovery for damages); W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS §18, at 123 & n.91 (5th ed. 1984) [hereinafter PROSSER] (listing cases in which recovery was barred and cases in which recovery was allowed).

considering whether plaintiff's criminal conduct should prevent recovery.[20]

20. *See* PROSSER, *supra* note 19 § 18, at 122 (discussing mutual combat cases in which consent to illegal activity does not protect parties from liability for injuries); *see, e.g.,* Starkey v. Dameron, 21 P.2d 1112, 1113-14 (Colo. 1933) (awarding damages to man who was injured by spring gun when allegedly attempting to steal gasoline); Thomas v. Riley, 114 Ill. App. 520, 552 (1904) (holding that plaintiff could recover even though he was injured when he illegally assaulted defendant); Adams v. Waggoner, 33 Ind. 531, 534 (1870) (holding that party who willingly engages in illegal fight can recover damages); Katko v. Briney, 183 N.W. 2d 657, 660 (Iowa 1971) (holding that thief may recover for injuries caused by spring gun set by owner of house thief was robbing); Schwaller v. McFarland, 291 N.W. 852, 852-53 (Iowa 1940) (holding that plaintiff injured during illegal fight to which he had consented can recover damages for injuries arising from fight); Lund v. Tyler, 88 N.W. 333, 333 (Iowa 1901) (stating that person injured during illegal fight can recover for injuries sustained); McCulloch v. Goodrich, 181 P. 556, 556 (Kan. 1919) (same); McNeil v. Mullins, 79 P. 168, 169 (Kan. 1905) (holding that participants in illegal fights can recover for injuries sustained); Grotton v. Glidden, 24 A. 1008, 1009 (Me. 1892) (holding that people who consent to illegal fight, can recover damages); Jones v. Gale, 22 Mo. App. 637, 640 (1886) (same); Morris v. Miller, 119 N.W. 458, 459 (Neb. 1909) (same); Dole v. Erskine, 35 N.H. 503, 510-11 (1857) (holding that person who attacked another can recover for injuries he sustained when his victim used excessive force in self-defense); *McCummings*, 613 N.E.2d at 559 (holding that fleeing felon could recover); Humphrey v. New York, 456 N.Y.S.2d 861, 863 (App.Div. 1982) (holding that estate of drunk driver, who was killed in accident that was in part cause by his crime, can recover from defendant whose negligence contributed to accident), *aff'd*, 457 N.E.2d 767 (N.Y. 1983); Clark v. New York, 508 N.Y.S.2d 648 (App. Div. 1986) (permitting drunk driver to recover); Bikowicz v. Sterling Drug, 557 N.Y.S.2d 551 (App. Div. 1990) (permitting person who illegally obtained drugs to recover); Fernandez v. City of New York, 645 N.Y.S.2d 104 (Sup. Ct. 1996) (escaping criminal could recover); Lomonte v. A & P Food Stores, 438 N.Y.S.2d 54 (Sup. Ct. 1981) (permitting assaulter to recover); Allison v. Fiscus, 100 N.E.2d 237, 241-42 (Ohio 1951) (holding that plaintiff who entered defendant's property with intent to steal could recover for injuries sustained when dynamite trap exploded, if jury found that dynamite trap was excessive force); Barholt v. Wright, 12 N.E. 185, 186 (Ohio 1887) (holding that person who willingly participated in illegal fight could recover damages); Hulls v. Williams, 29 P.2d 582, 583 (Okla. 1934) (holding that felon injured while being arrested can recover from person who made arrest if that person used excessive force); Teeters v. Frost, 292 P. 356, 359-60 (Okla. 1930) (holding that those who willingly participate in illegal fights can recover damages); Colby v. McClendon, 206 P. 207, 208 (Okla. 1922) (holding that estate of person killed in illegal fight to which he consented could recover damages for combatant's death); Teolis v. Moscatelli, 119 A. 161, 162 (R.I. 1923) (holding that plaintiff's consent to illegal fist fight does not bar him from recovery for injuries inflicted when defendant stabbed him); Willey v. Carpenter, 23 A. 630, 631 (Vt. 1892) (holding that participant in illegal fight can recover); Milam v. Milam, 90 P. 595, 596 (Wash. 1907) (holding that party injured in illegal conflict to which he consented may recover for injuries caused by use of excessive force); Higgins v. Minagham, 47 N.W. 941, 942 (Wis. 1891) (holding that trespasser can recover for injuries inflicted by land owner if those injuries were unnecessary); Shay v. Thompson, 18 N.W. 473, 474 (Wis. 1884) (holding that those who willingly participate in illegal fight can recover damages); Condict v. Hewitt, 369 P.2d 278, 279 (Wyo. 1962) (same).

Part II of this Article explores and discredits the reasons offered for prohibiting recovery in abortion suits.[21] Part III analyzes, on a chronological basis, each state's decisions prohibiting such recovery.[22] Part IV discusses possible explanations for the abortion decisions, noting that these women's claims received remarkably different treatment from that accorded to people who were injured as a result of the types of criminal conduct typically engaged in by men.[23] The Article concludes that this disparate treatment is largely the result of a subtle type of gender bias that has received little attention—bias caused by "male identification with males."[24]

II. THE COURTS' ANALYSES PROHIBITING RECOVERY FOR INJURIES INFLICTED BY ILLEGAL ABORTIONS

A. *Plaintiff's Criminal Conduct Bars Her Recovery*

1. *Reasons Given for Prohibiting Recovery*

The maxim *ex turpi causa non oritur actio*,[25] which courts most frequently rely on when refusing to enforce illegal contracts, also has been used to explain why criminals should be denied recovery when they sue in tort for injuries resulting from their criminal conduct.[26] The reasons this maxim might support the courts' refusal to enforce an illegal contract, however, do not apply with equal vigor to tort suits in general, and they provide no cause for denying recovery in abortion cases.

Courts have advanced three justifications for denying recovery to people tortuously injured as a result of their criminal conduct: (i) it will prevent plaintiffs from profiting from their crimes;[27] (ii) it will deter illegal

21. For discussion of the reasons offered for prohibiting recovery in abortion suits, see *infra* notes 25-91 and accompanying text.

22. For a discussion of states' decisions to prohibit recovery in abortion suits, see *infra* notes 92-344 and accompanying text.

23. For a discussion of possible explanations of the abortion decisions, see *infra* notes 345-431 and accompanying text.

24. Norma J. Wikler, *Educating Judges About Gender Bias in the Courts*, *in* WOMEN, THE COURTS, AND EQUALITY 227, 235 (1987). As one judge stated, "[i]t is probably impossible for a man to respond, even imaginatively, to [the decision to have an abortion] not just because it is outside the realm of his personal experience (although this is, of course, the case) but because he can relate to it only by objectifying it, thereby eliminating the subjective elements of the female psyche which are at the heart of the dilemma." Morgentaler v. The Queen [1988] 1 S.C.R. 30, 171.

25. *See* BLACK'S LAW DICTIONARY 589 (6th ed. 1990) (defining *ex turpi causa non oritur actio* as meaning "out of a base [illegal or immoral] consideration, an action does [can] not arise").

26. *See* Francis H. Bohlen, *Consent As Affecting Civil Liability for Breaches of the Peace*, 24 COLUM. L. REV. 819, 819-21 (1924) (discussing principle of *ex turpe causa non oritur* action and when it is applied).

27. *See, e.g.*, Nash v. Meyer, 31 P.2d 273, 277 (Idaho 1934); Goldnamer v. O'Brien, 33 S.W. 831, 832 (Ky. 1896); Reno v. D'Javid, 390 N.Y.S.2d 421, 422 (App.

conduct;[28] and (iii) it will "maintain respect for the law . . . promote confidence in the administration of justice . . . [and] preserve the judicial process from contamination."[29]

a. Preventing Profit

The courts' desire to prevent criminals from profiting from their crimes is understandable, and rightfully plays an important role in cases such as *Riggs v. Palmer*.[30] There the court held that a murderer who had committed his crime to obtain an inheritance from his victim, could not so inherit.[31]

In tort cases, however, plaintiffs are not seeking profit, but compensation for losses they have suffered. At most, they will be compensated for those losses and so, in theory, "break even." In practice, the costs of prosecuting these suits ensure that plaintiffs will not be fully compensated for their injuries, leaving even the successful plaintiff to shoulder some part of the loss. Because plaintiffs can not profit from their crimes if they are allowed to recover in tort, this justification for prohibiting recovery is inapplicable in tort cases.[32]

Moreover, it is particularly perverse to rely on this rationale to deny compensation to women injured during illegal abortions, because in so

Div.), *aff'd*, 369 N.E.2d 766 (N.Y. 1977); Zysk v. Zysk, 404 S.E.2d 721, 722 (Va. 1990); Miller v. Bennett, 56 S.E.2d 217, 219 (Va. 1949).

28. *See, e.g.*, Skinner v. E.F. Hutton & Co., 320 S.E.2d 424, 427 (N.C. Ct. App. 1984) (barring inside traders from recovering), *rev'd in part on other grounds*, 333 S.E.2d 236 (N.C. 1985). *Accord* JOHN D. CALAMARI & JOSEPH M. PERILLO, CONTRACTS § 22.1, at 820 (4th ed. 1998) (discussing that refusing to allow recovery for contract that is against public policy will deter such contracts in future); II E. ALLAN FARNSWORTH, CONTRACTS § 5.1, at 2 (1990) (stating that court may refuse to enforce agreement to deter undesirable conduct). Although the deterrence argument is not made in the abortion cases, it remains a possible justification for the rule because of its importance in explaining the refusal to enforce illegal contracts, a refusal that is the primary authority cited for the tort rule. *See* CALAMARI & PERILLO, *supra*, § 22.1, at 820; II FARNSWORTH, *supra*, § 5.1, at 2; *see also* Sayadoff v. Warda, 271 P.2d 140, 143 (Cal. Dist. Ct. App. 1954); Hunter v. Wheate, 289 F. 604, 606 (D.C. Cir 1923); *Nash*, 31 P.2d at 280; Szadiwicz v. Cantor, 154 N.E. 251, 252 (Mass. 1926); *Miller*, 56 S.E.2d at 219; Androws v. Coulter, 1 P.2d 320, 321 (Wash. 1931); Holman v. Johnson, 98 Eng. Rep. 1120, 1121 (K.B. 1775).

29. Olmstead v. United States, 277 U.S. 438, 484 (1928) (Brandeis, J., dissenting), *quoted in Nash*, 31 P.2d at 281; Barker v. Kallash, 468 N.E.2d 39, 45 (N.Y. 1984) (Jason, J., concurring); Bowlan v. Lunsford, 54 P.2d 666, 669 (Okla. 1936). *Accord* CALAMARI & PERILLO, *supra* note 28, §22.1, at 820.

30. 22 N.E. 188 (N.Y. 1889).

31. *See id.* at 191.

32. If these plaintiffs were allowed to recover punitive damages they might profit, but that possibility can be avoided by prohibiting punitive damages. Furthermore, the fact that courts occasionally do award punitive damages to plaintiffs who were injured as a result of their criminal conduct casts doubt on the strength of their commitment to prevent such profits. *See* Starkey v. Dameron, 21 P.2d 1112, 1113 (Colo. 1933) (holding punitive damages could be awarded to accused thief injured by spring gun); Katko v. Briney, 183 N.W.2d 657, 662 (Iowa 1971) (affirming award of punitive damages to criminal).

doing, courts guarantee that the criminals who perform illegal abortions will retain all of the profits they make from their illegal services. The rule, by denying compensation to injured plaintiffs, ensures that profit will inure to criminal abortionists, a result directly contrary to the stated justification for the rule.

Furthermore, in the many jurisdictions where statutes provide that the woman who had the illegal abortion was not even an accomplice to the abortionist's crime,[33] reliance on this profit rationale is even more illogical. By refusing to compensate the non criminal, these courts thereby guaranteed that the only criminals involved, the abortionists, would retain the entire profit they made by committing the crime.[34] To do this in the name of preventing criminals from profiting is inexplicable.

b. Deterrence

The deterrence rationale is also untenable. Many doubt that deterrence is served by refusing to enforce an illegal contract.[35] If those who carefully plan and enter illegal contracts cannot be so deterred, there is little reason to believe that less calculating criminals who act without such planning, will be deterred by concern that, should they be tortuously injured during their crime, they will not be able to recover. Few career criminals deciding whether to commit a crime will even be aware of, much less consider, such a prohibition on recovery. Women who undergo abortions have not dedicated themselves to lives of crime, and so are less likely than career criminals to be aware of the effect of their criminal conduct on a possible suit for damages.

In the unlikely event that a would-be criminal did know this tort rule, how frequently would it deter him from committing the crime? For it to do so, the potential criminal would have to conclude that the inability to recover in tort for injuries sustained while committing the crime makes the otherwise acceptable risks of the crime (including prosecution and

33. *See Miller*, 56 S.E.2d at 220-21 (noting that anti-abortion statutes in District of Columbia, Kansas, Kentucky and Massachusetts do not make woman accomplice to abortion).

34. A similar argument exists in those states where the woman who has an illegal abortion does commit a crime, but the crime is less serious than that committed by the abortionist. *See* IDAHO CODE §§ 17-1810, 17-1811 (1932) (providing for two to five years imprisonment for abortionist and one to five years imprisonment for woman who had illegal abortion). *Compare* N.Y. PENAL LAW § 70.00 (Consol. 1976) (providing that abortionist would face up to four years imprisonment), *with id.* § 70.15 (providing that woman who had illegal abortion could be imprisoned for up to three months); *compare* OKLA. STAT. ANN. tit. 21, § 861 (West 1931) (providing that abortionist could be sentenced to up to five years in penitentiary), *with id.* § 862 (providing that woman who has illegal abortion may be imprisoned for up to one year or fined up to $1000). Barring the woman's suit in these jurisdictions ensures that the person whose conduct was more culpable will profit, and that the lesser criminal will not be compensated.

35. *See* HAROLD C. HAVIGHURST, THE NATURE OF PRIVATE CONTRACT 53 (1961) (asserting that policy of not enforcing contracts to deter illegal acts is ineffective).

physical injury), unacceptable. Few people would be willing to risk physical injury and jail only if they could sue for any injury that happened to be tortuously inflicted. Furthermore, most criminals injured during the commission of crimes would be particularly unlikely to bring tort suits because those suits would alert the authorities to their criminal conduct, making their prosecution more likely. Clearly, the prohibition on suing in tort does not deter a significant number of criminals.

Deterrence of women seeking illegal abortions is even less likely. If such a woman sued, she would publicize her immoral conduct, bringing disgrace as well as possible prosecution upon herself.[36] No one who is willing to shoulder the considerable financial cost of an illegal abortion, to assume the psychological injury that often results, to risk prosecution, to undergo great pain and to risk serious injury or even death,[37] would be deterred by the fact that the law deprived her of the rather unattractive option of suing if the abortionist negligently injured her.

Ironically, illegal abortions could almost certainly be deterred if injured women and their estates were allowed to sue abortionists for negligently inflicted injuries. Abortionists, who make their livelihoods from their criminal activity, are likely to know whether they can be liable if they negligently perform abortions, and they have every reason to be guided by the monetary ramifications of their conduct. If they must pay for the injuries they negligently inflict, they either will charge more or stop performing illegal abortions. Thus, by directly deterring some abortionists and causing others to raise their fees, a rule permitting injured women to recover for injuries negligently inflicted during illegal abortions would deter such abortions.

Moreover, if women were allowed to recover for their injuries, they (or their estates) would sue more frequently, thereby alerting the authorities to abortionists' illegal activities. The resulting increased possibility of prosecution would deter some abortionists. In addition, more of those who were not deterred would be exposed and prosecuted, further decreasing the availability of illegal abortions.

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36. While it may be debatable whether having an illegal abortion is considered immoral in 1999, there is no doubt that such conduct was widely condemned as immoral during the first half of this century, when most of these cases arose.

37. Most of the relevant abortion cases arose in the first half of this century. In 1913, at least one authority considered "induced abortion one of the most dangerous [operations] in obstetrics." JOSEPH B. DELEE, PRINCIPLES AND PRACTICES OF OBSTETRICS 1019 (lst ed. 1913). In 1935, it was estimated that for every 87 abortions performed in the United States, one woman died. *See* Note, *A Functional Study of Existing Abortion Laws*, 35 COLUM L. REV. 87, 93 (1935) [hereinafter *Functional Study*]. In 1941, it was estimated that 100,000 American women were seriously injured or killed by illegal abortions every year. *See* Kenneth A. Miller, Note, *Criminal Law—Abortion*, 42 DEL. L. REV. 41, 46 (1941). In 1946, it was estimated that 9,480 women died every year from abortions performed in the United States and that abortions caused "very many times that number" of serious injuries. TE LINDE, OPERATIVE GYNECOLOGY 475 (1946), *discussed in* Eugene Quay, *Justifiable Abortion—Medical and Legal Foundations*, 49 GEO. L.J. 173, 226-27 (1960).

Finally, the rule prohibiting suits destroys another type of deterrence. Abortionists who know that they cannot be held liable regardless of the negligence with which they perform the procedure may well act with less care than they would if they realized they might have to pay for injuries caused by their malpractice.[38] Thus, prohibiting recoveries in these cases leads to an increased number of injuries—a result that is contrary to public policy.

Thus, although the bar to suit deters few, if any, women from seeking illegal abortions, permitting suits by those tortuously injured would deter some providers of illegal abortions, lead to the conviction of others, and raise the cost of these procedures, thus reducing the availability of illegal abortions. An additional benefit of allowing these suits would be that abortionists would perform procedures with more care, thus injuring fewer women.

c. Protecting the Judicial Process from Contamination

In abortion cases, many courts state that a plaintiff's criminal conduct should bar her from recovering for injuries tortuously inflicted on her because permitting recovery would contaminate the judicial process. There is little support in either authority or logic for this proposition. The fact that this reason is rarely mentioned in tort cases brought by criminals injured while engaged in crimes other than abortion is some indication that the courts themselves do not find it terribly persuasive.

Two sources are cited as authority for the proposition that these suits must be prohibited to protect the judicial process: the rule against enforcing illegal contracts[39] and Justice Brandeis's dissent in *Olmstead v. United States*.[40]

In refusing to enforce most illegal contracts,[41] courts rely, in large part, on their conclusion that such a refusal is necessary to maintain public respect for the law.[42] Assuming that respect for the law would be undermined if courts enforced illegal contracts, that provides little reason to

38. Some insight into the amount of negligence involved in illegal abortions in this country in the first part of this century can be gained by comparing the death rate from illegal abortions in the United States (approximately 1 in 87) with the death rate from abortions in the Soviet Union, where abortions generally were legal (about 1 in 20,000). *See, Functional Study, supra* note 37, at 93.

39. *See, e.g.*, Sayadoff v. Warda, 271 P.2d 140, 143 (Cal. Dist. Ct. App. 1954) (relying on *Holman v. Johnson*, 98 Eng. Rep. 1120 (K.B. 1775), a contract case); Hunter v. Wheate, 289 F. 604, 606 (D.C. Cir. 1923) (same); Nash v. Meyer, 31 P.2d 273, 280 (Idaho 1934) (same); Szadiwicz v. Cantor, 154 N.E. 251, 252 (Mass. 1926) (same); Miller v. Bennett, 56 S.E.2d 217, 219 (Va. 1949) (same); Androws v. Coulter, 1 P.2d 320, 321 (Wash. 1931) (same).

40. 277 U.S. 438, 484 (1928) (Brandeis, J., dissenting), *quoted in e.g., Nash*, 31 P.2d at 281; Barker v. Kallash, 468 N.E.2d 39, 45 (N.Y. 1984) (Jason, J., concurring); Bowlan v. Lunsford, 54 P.2d 666, 669 (Okla. 1936).

41. Despite the general rule, some illegal contracts are enforced. *See* CALAMARI & PERILLO, *supra* note 28, § 22.2, at 822-26.

42. *See, e.g., id.* § 22.1, at 820.

conclude that permitting injured criminals to recover in tort would cause similar disrespect for the law. A court that enforced an illegal contract could well be seen as thereby endorsing the illegality; after all, it is requiring that the illegal agreement be fulfilled. There is no similarly close link between the illegality and the court action in tort cases. In these actions, the court is merely asked to require a tortfeasor to compensate an injured person for an unanticipated loss that the tortfeasor inflicted during a crime. Permitting such a recovery would not enforce an illegal agreement, so the possibility that the court's actions would be viewed as an endorsement of crime is significantly less than in contract suits.

Some courts also rely on Justice Brandeis's dissent in *Olmstead* to support the conclusion that courts must not countenance claims from those injured as a result of their crimes. Reliance on a dissent is questionable, particularly when, in so relying, the decision of the court is rejected. The *Olmstead* decision, in accord with the then widely followed common law rule that "the admissibility of evidence is not affected by the illegality of the means by which it was obtained," permitted the government (the plaintiff) to use evidence that had been illegally obtained by a government official.[43] Not only was the government allowed to prosecute the victim of the government's illegal conduct, it was allowed to use the evidence it had illegally gathered to obtain the verdict it sought. Thus *Olmstead* not only allowed the "criminal" to sue, it allowed him to use the fruit of his crime to prove his case, thus directly involving the courts in the criminal conduct. This did much more to contaminate the judicial process than would merely allowing a criminal to sue for injuries sustained during the crime. In ignoring the *Olmstead* Court's holding, the abortion decisions not only adopted a position that the Supreme Court had rejected, they extended it.

Thus, the authorities relied on to show that established law provides that victims of negligently performed abortions should not be allowed to recover for the injuries inflicted on them are not persuasive.

Nor, given the facts of the abortion cases, is it likely that people would become disaffected with the law if plaintiffs in those cases were permitted to recover. Defendants in most abortion cases were particularly unsavory characters: they had committed serious crimes, their purpose in doing so was to profit from those crimes, and they usually acted with reckless disregard for the likelihood that they would cause serious injury or death to their patients. Most people would criticize courts if they did not require such defendants to pay for the injuries they had tortuously caused, unless, perhaps, plaintiffs were even more abhorrent than defendants. But it is clear that these plaintiffs were not viewed as being as culpable as defendants. Juries uniformly found for plaintiffs in these tort-abortion cases, an improbable result if the community had concluded that it was improper to permit recovery. Courts frequently referred to women who had illegal abortions as "victims," and in many states it was not a crime for a woman to

43. *Olmstead*, 277 U.S. at 467.

have an illegal abortion.[44] Certainly the conduct of a non criminal victim, even if immoral, is less offensive than that of the criminal who tortuously injured her. Permitting such a victim to recover for her injuries could not undermine respect for the law.

There is even less reason to deny recovery in the name of preserving the courts' reputation when the plaintiff was not the person who engaged in the criticized conduct, but some innocent third party such as the estate of the woman who died as a result of the abortionist's negligence. In such cases, the beneficiaries of the lawsuit, often the deceased's children,[45] were totally innocent of all wrongdoing. It could not defile the law to permit such children to recover from the criminal who had tortuously killed their mother.[46]

Finally, it is particularly inappropriate to adopt a legal rule in order to maintain respect for the law when that rule decreases deterrence of the crime, ensures a profit to the criminal, and increases the likelihood that the crime will be negligently performed, causing serious physical injury or death. Indeed, a rule that leads to such results seems designed to breed disrespect for the law.

2. *The Courts' Failure to Consider Established Exceptions to the Prohibition*

The courts' use of the bar in abortion cases is troubling for other reasons. The prohibition on suits founded in criminal conduct is not complete; even in contract cases, where there is more reason for the prohibition and it "is most frequently asserted,"[47] exceptions exist, many of which appear to apply in abortion cases. Yet abortion plaintiffs are denied compensation in reliance on the bar, without even considering whether a recognized exception to the bar might apply.[48]

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44. *See, e.g., Hunter*, 289 F. at 606; Peoples v. Commonwealth, 9 S.W. 509, 510 (Ky. 1888); Dunn v. People, 29 N.Y. 523, 527 (1864); *Szadiwicz*, 154 N.E. at 251; Martin v. Morris, 42 S.W.2d 207, 207 (Tenn. 1931).

45. It was not unusual that the woman died as a result of the negligence of the abortionist, leaving children. *See, e.g.*, Castronovo v. Murawsky, 120 N.E.2d 871, 872-74 (Ill. App. Ct. 1954); Martin v. Hardesty, 163 N.E. 610, 611 (Ind. Ct. App. 1928); Kimberly v. Ledbetter, 331 P.2d 307, 309 (Kan. 1958); Joy v. Brown, 252 P.2d 889, 893 (Kan. 1953); True v. Older, 34 N.W.2d 700, 703 (Minn. 1948); Milliken v. Heddesheimer, 144 N.E. 264, 267 (Ohio 1924); Henrie v. Griffith, 395 P.2d 809, 811 (Okla. 1964); Miller v. Bennett, 56 S.E.2d 217, 221 (Va. 1949).

46. One authority who asserted that those injured as a result of their criminal conduct usually should not be able to recover in tort, also concluded that relatives of such a person who died as a consequence of the crime should be able to recover. *See* PERCY H. WINFIELD, THE PROVINCE OF THE LAW OF TORT 88-89 (1931).

47. Mischalski v. Ford Motor Co., 935 F. Supp. 203, 205 (E.D.N.Y. 1996). *Accord* Barker v. Kallash, 468 N.E.2d 39, 44 (N.Y. 1984) (Jason, J., concurring); Bohlen, *supra* note 26, at 820.

48. For examples of cases where an exception might well have applied, but was not discussed, see *Hunter*, 289 F. 604; *Szadiwicz*, 154 N.E. 251; Reno v. D'Javid, 399 N.Y.S.2d 210 (N.Y. 1977); Martin v. Morris, 42 S.W.2d 207 (Tenn. 1931); *Miller*, 56 S.E.2d 217; Androws v. Coulter, 1 P.2d 320 (Wash. 1931).

The first exception is that an illegal contract may be enforced if the plaintiff and defendant are not *in pari delicto* and the public welfare so requires.[49] In states where the woman's conduct was not criminal or where the woman's crime was less serious than the abortionist's, plaintiffs injured by negligently performed, illegal abortions seem not to be *in pari delicto* with the abortionist-defendants. The second requirement of this exception also is met in these cases. Allowing these women to sue would advance public welfare by deterring criminal conduct, deterring negligence on the part of abortionists (thus preventing injuries), decreasing the likelihood that criminals would profit from their crimes and increasing the likelihood that criminal conduct would be revealed to the authorities and prosecuted. In addition, it would permit injured people and their innocent families to receive compensation for injuries that had been tortuously inflicted by a criminal. All of these results benefit public welfare. Thus, these cases appear to be governed by the not *in pari delicto* exception to the rule prohibiting suit. Nevertheless, that possibility was seldom mentioned and never discussed in any case that applied the rule.

A second exception allows suit where the plaintiff was intended to be protected by the criminal statute and the defendant was the person "toward whom the prohibition or penalty was directed."[50] One of the purposes of a statute making abortions illegal, especially a statute enacted during a period when abortions were considered "one of the most dangerous [operations] in obstetrics,"[51] was the protection of the health of women who might have abortions.[52] Furthermore, the specific provisions of many of the abortion statutes indicate that one of the purposes of these statutes was the protection of women. For example, many statutes permitted an abortion that was necessary to protect the woman's life.[53] If the legislature were concerned only with the life of the fetus, such a provision

49. *See* 6A ARTHUR LINTON CORBIN, CORBIN ON CONTRACTS § 1378, at 27 (1962). Some authorities state that, in contract cases, this exception applies only where plaintiff's crime was not only less reprehensible than defendant's but also did not involve serious moral turpitude. *See* CALAMARI & PERILLO, *supra* note 28, §22.7 at 831; 3 SAMUEL WILLISTON, TREATISE ON THE LAW OF CONTRACTS § 1789 (1920).

50. 6A CORBIN, *supra* note 49, §1540, at 834. *Accord* CALAMARI & PERILLO, *supra* note 28, §22.2, at 824; II FARNSWORTH, *supra* note 28, §5.5, at 56.

51. DELEE, *supra* note 37, at 1019. Courts were well aware that abortions placed "in jeopardy the life of a human being—the pregnant woman." State v. Alcorn, 64 P. 1014, 1019 (Idaho 1901).

52. *See, e.g.*, J. Mohr, Abortion in America 30 (1978); GLANVILLE WILLIAMS, THE SANCTITY OF LIFE AND THE CRIMINAL LAW 154 (1957); Michael S. Sands, *The Therapeutic Abortion Act*, 13 UCLA L. REV. 285, 295 (1966); Note, *Changing Abortion Laws in the United States*, 7 J. FAM. L. 496, 506 (1967). Some courts disagreed, finding that those who enacted these statutes were completely unconcerned with the deaths and injuries caused by these operations. For further discussion of these holdings, see *infra* notes 172-83, 207-09 and accompanying text.

53. *See, e.g., Hunter*, 289 F. at 605 (discussing section 809 of District of Columbia Code); *see also* CAL. PENAL CODE §§ 274, 275 (Deering 1949) (amended 1967, 1976); IDAHO CODE ANN. tit. 17 § 1810 (1932); REV. LAWS OKLA. §2436 (1910); VA.

would not have been included in the statute. Similarly, a statute that prohibits any abortion not "under the direction of a competent licensed practitioner of medicine"[54] demonstrates the legislature's concern for the woman's health, as do statutes that criminalize the abortionist's conduct regardless of whether the woman was pregnant[55] and those that impose increased punishment if the woman died.[56] No one doubts that the second requirement for this exception exists in the abortion context: the abortionist was a person "toward whom the prohibition or penalty was directed."[57] Nevertheless, most of the cases that follow the majority and bar these women from recovering either fail to consider the possibility that the plaintiff might be covered by this exception to the prohibition,[58] or simply hold, without discussion, that the statutes were not designed to protect women.[59]

The final exception permits an illegal contract to be enforced when refusing to do so "causes great and disproportionate hardship."[60] If it is proper to enforce an illegal contract under such circumstances, it also must be right for a court to take the much smaller step of permitting an injured party to recover for injuries tortuously inflicted. There is no doubt that preventing a grievously injured person or her survivors from recovering for injuries tortuously inflicted by a criminal who sustained no harm, and who, in fact profited from his crime, imposes great and disproportionate hardship. Nevertheless, the cases that prohibit recovery ignore this exception to the rule prohibiting suit.

* * *

In using the illegality rule to bar plaintiffs from recovering for injuries inflicted during illegal abortions, courts applied a rule to a new situation

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CODE ANN. § 4401 (Michie 1942); WILLIAMS' TENN. CODE ANN. §10791 (1934); WASH. COMP. STAT. § 2448 (Remington 1922).

54. *Hunter,* 289 F. at 605. *Accord* N.Y. PENAL LAW § 125.05(3) (McKinney 1987).

55. *See* People v. Gallardo, 257 P.2d 29, 30-31 (Cal. 1953); Commonwealth v. Surles, 42 N.E. 502, 502 (Mass. 1895); Commonwealth v. Tibbetts, 32 N.E. 910, 910 (Mass. 1893); Commonwealth v. Follansbee, 29 N.E. 471, 471 (Mass. 1892); State v. Russell, 156 P. 565, 566 (Wash. 1916).

56. *See, e.g.,* ILL. STAT. ANN. § 37.015 (Jones 1936); MASS. GEN. L. ch. 272 § 19 (1921).

57. 6A CORBIN, *supra* note 49, §1540, at 834.

58. *See, e.g., Hunter,* 289 F. at 605; Castronovo v. Murawsky, 120 N.E.2d 871, 872 (Ill. App. Ct. 1954); Szadiwicz v. Cantor, 154 N.E. 251, 252 (Mass. 1926); Reno v. D'Javid, 390 N.Y.S.2d 421, 421-22 (N.Y. App. Div.), *aff'd,* 369 N.E.2d 766 (N.Y. 1977); Martin v. Morris, 42 S.W.2d 207, 207 (Tenn. 1931); Androws v. Coulter, 1 P.2d 320, 321 (Wash. 1931).

59. *See* Nash v. Meyer, 31 P.2d 273, 280 (Idaho 1934). *Cf.* Bowlan v. Lunsford, 54 P.2d 666, 668 (Okla. 1936); Miller v. Bennett, 56 S.E.2d 217, 218-19 (Va. 1949). Both *Nash* and *Miller* concluded that their abortion statutes were not intended to protect women, but neither opinion indicated whether that statement was relevant to the court's conclusion that the woman's consent barred her intentional tort suit or to some unstated conclusion.

60. 6A CORBIN, *supra* note 49, § 1512, at 714.

without considering that the reasons which tenuously supported it in the original realm (contract) demanded the opposite result in the new area (abortion). They compounded this error by overlooking the exceptions to that rule which had developed in contract, all of which appeared to apply to the abortion cases. The courts thus not only inappropriately applied a bar to an area of law where it properly had no application, they ignored the existing limitations on that bar.

Although an uncritical application of any rule is troubling, this thoughtless application and expansion of the illegality bar is particularly hard to fathom because of the suspicion with which that bar usually is viewed. As Lord Mansfield of the King's Bench in England said, "The objection that a contract is immoral or illegal as between plaintiff and defendant sounds at all times very ill in the mouth of the defendant."[61] The words sound particularly ill in the mouth of defendants who use this defense to retain profits they made from their criminal conduct, conduct that was also negligently performed and resulted in physical injury or death to someone else. Nevertheless, in abortion cases most courts embrace this unappealing ban, apply it to produce results antithetical to the justifications for the ban, and ignore its applicable exceptions.

3. *The Courts' Inconsistent Use of the Bar*

In stark contrast to the abortion opinions, most cases in which plaintiffs sought recovery for injuries inflicted during their participation in crimes other than abortion do not even discuss the possibility that plaintiffs' criminal conduct should preclude them from recovering.

The largest group of these cases involve plaintiffs injured during their participation in illegal fights. The reasons for permitting these plaintiffs to prevail are substantially weaker than those for permitting recovery by plaintiffs in most abortion suits. First, the fighters clearly consented to the defendant's conduct, and so normally would be bound by their consent; women who had illegal abortions did not consent to having the abortion negligently performed, so when they sued for negligence, they were not barred by consent.[62] Second, the fighters committed a crime by fighting; the women, in many jurisdictions, committed no crime by having an abortion. Nevertheless, most courts permitted illegal fighters to recover,[63] and

61. Holman v. Johnson, 98 Eng. Rep. 1120, 1121-22 (K.B. 1775).

62. For a discussion of consent, see *infra* notes 80-91 and accompanying text.

63. *See* Thomas v. Riley, 114 Ill. App. 520, 520 (1904) (permitting illegal fighters to recover); Adams v. Waggoner, 33 Ind. 531, 533-34 (1870); Schwaller v. McFarland, 291 N.W. 852, 853 (Iowa 1940); Lund v. Tyler, 88 N.W. 333, 333 (Iowa 1901); McCulloch v. Goodrich, 181 P. 556, 557 (Kan. 1919); McNeil v. Mullins, 79 P. 168, 170 (Kan. 1905); Grotton v. Glidden, 24 A. 1008, 1009 (Me. 1909); Morris v. Miller, 119 N.W. 458, 459 (Neb. 1909); Dole v. Erskine & Chase, 35 N.H. 503, 503 (1857); Bell v. Hansley, 48 N.C. 131, 132 (1855); Stout v. Wren, 8 N.C. 420, 420 (1821); Lewis v. Fountain, 84 S.E. 278, 279 (N.C. 1915); Barholt v. Wright, 12 N.E. 185, 186-87 (Ohio 1887); Teeters v. Frost, 292 P. 356, 356 (Okla. 1930); Colby v. McClendon, 206 P. 207, 209 (Okla. 1922); Teolis v. Moscatelli, 119 A. 161, 162

all but one[64] did so without even mentioning the possibility that they should be barred by their criminal conduct. The one fight case that did mention the rule which prohibited recovery by criminals merely stated that it "[m]anifestly is not pertinent inasmuch as one of the main purposes of the statutes [criminalizing fights] is to protect a class [combatants] of which plaintiff is a member."[65] This court offered no reason why this statutory purpose should enable plaintiff to sue despite his criminal conduct.[66]

Criminals other than fighters have also been permitted to recover in tort for injuries directly resulting from their crimes. In *Katko v. Briney*,[67] a person who was shot while burglarizing a building was permitted to sue and recover both compensatory and punitive damages.[68] There was no mention of barring the plaintiff from suit because his injury directly resulted from his criminal conduct.[69] Similarly, in *Starkey v. Dameron*,[70] the Supreme Court of Colorado permitted recovery of both punitive and compensatory damages, regardless of whether the plaintiff's criminal conduct had caused his injury.[71] Again, the court did not consider whether plaintiff should be prevented from suing if the plaintiff's injury directly resulted from his crime. In *Allison v. Fiscus*,[72] an Ohio case, the defendant argued that plaintiff should be barred from suing because he was injured when he broke into defendant's warehouse, with the intent to steal.[73] The Ohio Supreme Court did not discuss that contention, but held that plaintiff could recover if the force that defendant used was unreasonable, thereby clearly rejecting the defendant's argument. In an Oklahoma case, *Hulles v. Williams*,[74] and in two New York cases, *McCummings*[75] and *Fernandez v. City of New York*,[76] plaintiffs who asserted that defendants negligently used

(R.I. 1923); Strawn v. Ingram, 191 S.E. 401, 402 (Va. 1937); Milam v. Milam, 90 P. 595, 596 (Wash. 1907); Shay v. Thompson, 18 N.W. 473, 474 (Wis. 1884); Condict v. Hewitt, 369 P.2d 278, 281 (Wyo. 1962); *see also* PROSSER, *supra* note 19, § 18, at 122 (noting fighters can recover despite their conduct being illegal).

64. *See* Hudson v. Craft, 204 P.2d 1, 5 (Cal. 1949) (prohibiting illegal fighter from recovering).

65. *Id.* at 4.

66. Presumably the court felt this plaintiff was covered by the second exception to the prohibition: the criminal statute was intended to protect him from the defendant.

67. 183 N.W.2d 657 (Iowa 1971).

68. *See id.* at 658.

69. The case did discuss the appropriateness of awarding punitive damages to a criminal and the dissent concluded that such an award should not be given to a person injured while committing a serious crime. *See id.* at 661.

70. 21 P.2d 1112 (Colo. 1933).

71. *See id.* at 1113.

72. 100 N.E.2d 237 (Ohio 1951).

73. *See id.* at 238.

74. 29 P.2d 582 (Okla. 1934).

75. 613 N.E.2d 559 (N.Y. 1993).

76. 645 N.Y.S.2d 1004 (Sup. Ct. 1996), *aff'd*, 247 A.D.2d 212 (1998).

excessive force in arresting them for felonies were permitted to proceed even though their injuries arose from their criminal conduct. None of these courts considered whether these plaintiffs' criminal conduct should bar their suits. The New York courts also permitted recovery by the estate of a person killed while driving while intoxicated and exceeding the speed limit by at least thirty-five miles an hour, and they did so without considering whether it was appropriate to bar plaintiff because the injury resulted directly from decedent's serious criminal conduct.[77] Another New York plaintiff who was injured when he attacked defendant also was permitted to recover with no mention of the rule barring criminals from recovery.[78]

What is most startling about these cases, compared to the abortion cases, is that, except in *Hudson,* the prohibition on suits brought by criminals for injuries suffered because of their crimes is not even mentioned.[79] All of these plaintiffs were injured as a direct result of their crim-

77. *See* Humphrey v. New York, 457 N.E.2d 767, 768 (N.Y. 1983). New York recently adopted the position that criminal plaintiffs are barred if their crime is serious and directly causes their injuries. *See* Barker v. Kallash, 468 N.E.2d 39, 42 (N.Y. 1984). For a discussion of New York cases prohibiting recovery, see *infra* notes 287-344 and accompanying text.

For the few modern non-New York tort cases involving criminal conduct other than abortion in which courts prohibited criminals from suing because their injuries directly resulted from their criminal conduct, see Amato v. United States, 549 F. Supp. 863, 865 (D.N.J. 1982), *aff'd,* 729 F.2d 1445 (3d Cir. 1984) (finding that bank robber injured during bank robbery could not recover on theory that FBI negligently caused those injuries by failing to arrest him before robbery); Oden v. Pepsi Cola, 621 So. 2d 953, 957-58 (Ala. 1993) (forbidding recovery where decedent was killed when soda machine from which he was stealing, fell on him); Lord v. Fogcutter Bar, 813 P.2d 660, 662 (Alaska 1991) (finding that drunken man who raped woman could not recover from bartender who allegedly negligently continued to serve him after he became intoxicated); Atkinson v. Rossi Arms Co., 659 P.2d 1236, 1240 (Alaska 1983) (finding that man convicted of intentionally shooting another could not recover from manufacturer of gun on theory that gun was defectively designed); Newton v. Illinois Oil Co., 147 N.E. 465, 467 (Ill. 1925) (barring parents of child killed by employer's negligence from recovering when they illegally permitted decedent to work for employer); Gilmore v. Fuller, 65 N.E. 84, 87-88 (Ill. 1902) (prohibiting recovery by plaintiff injured during illegal charivari); Cole v. Taylor, 301 N.W.2d 766, 768 (Iowa 1981) (holding that murderer cannot recover from his psychiatrist on theory that psychiatrist negligently failed to prevent him from committing murder); Ryan v. Poole, 47 P.2d 981, 983 (Wash. 1935) (holding that estate of criminal who was killed in self-defense by his intended victim cannot recover from defendant who hired decedent to commit crime). Most of these cases involved claims that defendants had failed to prevent the criminal from committing the crime, or that defendant's negligence had increased the likelihood that the criminal would commit the crime. In all such cases it is highly unlikely that defendant's conduct could be a proximate cause of the injuries for which plaintiffs sought compensation. In addition, many of these plaintiffs sought compensation for injuries they inflicted on themselves. Only *Newton* and *Gilmore* involve facts remotely similar to those in abortion cases. For a discussion of *Newton* and *Gilmore,* see *infra* notes 269-86 and accompanying text.

78. *See* Lomonte v. A & P Food Stores, 438 N.Y.S.2d 54, 56 (Sup. Ct. 1981).

79. Permitting these plaintiffs to sue, but not the lack of discussion, can be justified in some of these cases. As previously noted, the fight cases might come under the second exception to the bar discussed above—the statutes that criminal-

inal conduct. All were permitted to sue and recover. But in only one of twenty-eight cases did a court even mention the rule on which courts routinely rely to prevent women from suing in abortion cases: that criminals can not be permitted to recover in tort for injuries sustained as a result of their criminal activity. Apparently it did not occur to any of these courts that the rule which barred suits by women injured during illegal abortions might apply to plaintiffs injured by their criminal participation in other crimes. Similarly, in abortion cases, courts that barred women from suing usually failed to consider that men injured as a result of their criminal conduct routinely were allowed to recover for their injuries. This remarkably consistent inconsistency is unlikely to be accidental.

B. *Plaintiff's Consent as a Reason for Prohibiting Recovery*

Courts occasionally rely on the doctrine of consent to explain why women injured by illegal abortions may not recover. To evaluate this explanation, it is important to focus on what cause of action the plaintiff asserted: negligence or an intentional tort.

Where an abortion plaintiff sued for negligence and claimed that the abortion or the aftercare was substandard,[80] the plaintiff's consent to the abortion was irrelevant to her cause of action—plaintiff had consented to an abortion, not a negligently performed abortion. Plaintiff's consent

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ized fighting probably were intended to protect both fighters from each other, and so the situation might be covered by an expansive reading of the second exception. If that is the reason the illegal fighters could sue despite the usual prohibition, the courts considering their claims ought to have explained the situation. Only *Hudson* made any attempt to do so.

Cases like *McCummings* and *Katko* are harder to fit into any of the exceptions. The intentional criminal's fault normally exceeds that of the defendant who unreasonably decided to use too much force either to protect himself or his property, or to arrest the criminal; at a minimum the parties are *in pari delicto*, so the first exception would not apply. Furthermore, the laws against crimes such as breaking and entering, and assault were not intended to protect the criminal from the victims of his crime, and the criminal prohibitions were directed at the criminal—not at the defendant/victim of the crime. Consequently, the second exception is inapplicable. As to the third exception to the bar, although it is possible that the failure to permit the criminal to recover could cause great hardship, that hardship might not be disproportionate. Moreover, it would not be possible to conclude that any case fell within this exception to the bar without discussing the relative hardships involved in the particular fact pattern, and none of these cases indicates that any thought was given to whether the hardships were either great or disproportionate.

Perhaps it should be noted that these cases are being discussed to compare them to the abortion cases, not to criticize their results. There are significant dangers to prohibiting such suits. For example, if these plaintiffs could not sue to recover for their injuries, they would become "fair game" who could be tortuously injured with impunity. The same is true, however, of women undergoing illegal abortions.

80. *See, e.g.*, Nash v. Meyer, 31 P.2d 273, 283 (Idaho 1934); Courtney v. Clinton, 48 N.E. 799, 802 (Ind. App. 1897); Miller v. Bennett, 56 S.E.2d 217, 221 (Va. 1949).

might have prevented her from proving that the surgery was a battery; however, because the consent did not extend to negligent performance of the surgery, it had no bearing on plaintiff's claim that the surgery had been negligently performed. To the extent that courts relied on the women's consent as a reason for denying claims for the negligent performance of illegal abortions, their reliance is woefully misplaced.

Where abortion plaintiffs sued for an intentional tort, usually assault or battery, the courts' reliance on plaintiffs' consent to bar recovery is more understandable. In most cases there is no cause of action for injuries caused by conduct to which plaintiff consented because, having obtained the plaintiff's consent, defendant committed no wrong to plaintiff. Thus, a woman who consented to an illegal abortion and later claimed that the abortion was a battery might be barred by her consent.

There are, however, exceptions to that general rule. In most states, plaintiff's consent is ignored when the conduct to which he consented was an illegal breach of the peace.[81] This exception is frequently invoked to permit those who engage in illegal fights to recover in battery despite their consent to the fights. The justification given for this is that a person lacks the power to consent to illegal conduct, and thus the purported consent is a nullity.[82] This analysis also would permit women who consented to illegal abortions to sue for intentional torts despite their consent to the abortions; illegal abortions clearly are breaches of the peace to which the woman could not effectively consent. Moreover, there are additional reasons to permit plaintiffs to sue in the abortion context: the needs to encourage the reporting of illegal conduct that otherwise would remain undetected, and discourage negligence in the performance of abortions.[83]

If, despite the obvious relevance of the "illegality exception" and the additional reasons to apply that exception in abortion cases, a court concluded that plaintiff's consent was effective, that court had an obligation to explain why. Some courts completely ignored the issue.[84] Others tried to explain the different results in the fight and abortion cases by concluding that, although the statutes prohibiting fights were enacted to protect those men who might engage in illegal fistcuffs, the abortion statutes were not intended to protect women who might have this dangerous illegal sur-

81. *See* PROSSER, *supra* note 19, § 18, at 122. The term "breach of the peace" in this context means conduct that tends "to create a disturbance of the public order, or threaten injury so severe as to affect the State's interest in the . . . productivity of the participants." Bohlen, *supra* note 26, at 819. Illegal abortions, which until recently maimed and killed thousands of American women every year, clearly affected the productivity of the women who had them. Hence, they are breaches of the peace.

82. *See* HARPER, *supra* note 19, § 3.10, at 236 & n.31.

83. *See* Bohlen, *supra* note 26, at 832 (noting goals and concurs in promulgating such rule).

84. *See, e.g.*, Sayadoff v. Warda, 271 P.2d 140 (Cal. Dist. Ct. App. 1954); Herko v. Uviller, 114 N.Y.S.2d 618 (Sup. Ct. 1952).

gery performed on them.[85] This purported distinction between abortion and other illegal conduct appears to be both factually incorrect and, in most jurisdictions, legally irrelevant. At the time of these decisions it was well known that abortions were dangerous.[86] Why would the legislators who passed these statutes be totally unconcerned about the lives and health of women who might have illegal abortions? The fact that according to the mores of the times, these women had acted immorally, and in some places illegally, hardly justified consigning them to be maimed or killed, yet these courts concluded that the legislators who passed the statutes criminalizing abortions had no interest in preventing such a result. Furthermore, anyone tempted to reach that improbable conclusion, should have been deterred by the specific provisions of these statutes that evince a concern for the health of women who might have abortions.[87] Given the available evidence, it is not surprising that scholars have concluded that the desire to protect women was a major reason for abortion legislation.[88] The courts' contrary conclusion—that legislatures were unconcerned with the health of women who had abortions—defied both reason and the wording the relevant statutes.

Moreover, in most jurisdictions legislative intent is irrelevant to the issue of whether the plaintiff's consent to the crime should bar her suit. The reason plaintiff's consent to a criminal breach of the peace usually is not effective is that people cannot consent to a crime involving a breach of the peace. Even assuming that plaintiff was not intended to be protected

85. *See, e.g., Nash*, 31 P.2d at 280-81; Bowlan v. Lunsford, 54 P.2d 666 (Okla. 1936); Miller v. Bennett, 56 S.E.2d 217 (Va. 1949). These courts made no attempt to explain non-fight cases in which criminals were allowed to recover.

86. *See, e.g.*, State v. Alcorn, 64 P. 1014, 1019 (Idaho 1901) (finding that abortion "places in jeopardy the life of a human being—the pregnant woman"); State v. Loomis, 97 A. 896, 897 (N.J. 1916) (noting that use of drugs to terminate pregnancy created serious risk for women), *aff'd*, 100 A. 160 (1917); State v. Tippie, 105 N.E. 75, 77 (Ohio 1913) (noting that purpose of criminal statute was to protect women and unborn children); DELEE, *supra* note 37, at 1019 (stating that "induced abortions [are] one of the most dangerous [operations] in obstetrics"); WILLIAMS, *supra* note 52, at 160 (describing knowledge of abortion risks); TE LINDE, *supra* note 37, at 475 (noting occurrence of 9,480 deaths per year from abortions in United States, and "very many times that number" of serious injuries from abortions); Bohlen, *supra* note 26, at 832 (noting that malpractice during abortions is "known to be widely prevalent"); *Functional Study*, *supra* note 37, at 93 (estimating that one woman out of 87 who had abortion in United States, died as result). *See generally* Roe v. Wade, 410 U.S. 113, 129-51 (1973) (noting policy of legalizing abortion to promote safety of pregnant women); Commonwealth v. Brunelle, 277 N.E.2d 826, 830 (Mass. 1972) (noting that abortion was dangerous to pregnant woman as well as child).

87. For a further discussion of public health and abortions, see *infra* notes 106, 139-40, 148, 181, 256 and accompanying text.

88. *See, e.g.*, Cyril C. Means Jr., *The Law of New York Concerning Abortion and the Status of the Fetus, 1664-1968: A Case of (Cessation) of Constitutionality*, 14 N.Y.L.F. 411, 430 (1968); J. MOHR, *supra* note 52, at 30; WILLIAMS, *supra* note 52, at 154; *see also Roe*, 410 U.S. at 129-151; People v. Belous, 458 P.2d 194, 204 (Cal. 1969); *Alcorn*, 64 P. at 1019; *Brunelle*, 277 N.E.2d at 830 & n.9; *Tippie*, 105 N.E. at 77.

by the criminal statute, that would not empower her to consent effectively to that criminal conduct. Thus, in jurisdictions that follow the majority rule (that no one can consent to criminal conduct that is a breach of the peace), the intention of the legislature is irrelevant to the question of the effect of plaintiff's consent, and plaintiffs should have been allowed to sue in intentional tort.

In jurisdictions that reject the majority rule, however, legislative intent to protect can be relevant to the effect of consent. In these jurisdictions, a person's consent to a crime is effective unless the "conduct is made criminal in order to protect a certain class of persons irrespective of their consent."[89] Thus, in those states, the woman's consent should have prevented her from suing for an intentional tort unless the criminal statute was intended to protect women in her position regardless of their consent. The abortion statutes may meet that test, in which case abortion plaintiffs should have been allowed to prevail in their intentional tort suits even in those jurisdictions that follow the minority approach.[90] Before dismissing such suits on the basis of consent, the courts should have explained that they were adopting the minority position (that consent to a breach of the peace usually was effective), and then discussed why this case did not come under the exception that invalidated consent given by a person whom the statute was intended to protect.

The courts' reliance on plaintiff's consent to justify their rejection of tort suits based on illegal abortions is ill-founded whenever the suit is for negligence. In most jurisdictions, abortion plaintiffs also should be able to recover in intentional tort despite their consent. Even in the minority of jurisdictions that hold that plaintiff's consent to a crime normally bars recovery, the abortion plaintiff's intentional tort suit would not be so barred unless the court reached the dubious conclusion that that state's abortion statute was not intended to protect women irrespective of their consent.

Thus, all the reasons offered for depriving abortion plaintiffs of their basic right to seek compensation for injuries tortuously inflicted on them are questionable at best.[91]

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89. RESTATEMENT (SECOND) OF TORTS § 892C (1977).

90. For a discussion of abortion statutes attempts to protect women, see *supra* notes 50-59 and accompanying text.

91. Although the courts do not mention it, it is possible that the doctrine of contributory negligence per se might explain why abortion plaintiffs' suits failed: if plaintiff was injured as a proximate cause of her commission of a crime, she was contributorily negligent as a matter of law and should be barred if the facts meet the requirements set out in section 286 of the *Second Restatement of Torts.*

Contributory negligence per se might explain the results of some of these causes of action, but it could not account for most of them. For example, because contributory negligence does not bar an intentional tort suit, this doctrine can not explain why the intentional tort causes of action in *Sayadoff v. Warda,* 271 P.2d 140 (Cal. Dist. Ct. App. 1954); *Goldnamer v. O'Brien,* 33 S.W. 831 (Ky. 1896); *Szadiwicz v. Cantor,* 154 N.E. 251 (Mass. 1926); *Reno v. D'Javid,* 390 N.Y.S.2d 421 (N.Y. 1977); and *Bowlan v. Lunsford,* 54 P.2d 666 (Okla. 1936) were rejected. In addition, contributory negligence per se would not apply in cases where defendants' conduct

III. STATE-BY-STATE ANALYSIS

A. *Kentucky (1896)*

The first reported decision in which a woman was prohibited from recovering in tort for injuries allegedly suffered as a result of an attempted abortion was *Goldnamer v. O'Brien*.[92] The holding in *Goldnamer* is quite narrow, and it withstands analysis better than cases that adopted a broader prohibition.

Plaintiff in *Goldnamer* sued for an intentional tort, claiming that defendants had induced her to submit to an illegal abortion and had procured and paid a doctor to perform that operation.[93] There was no allegation that defendants had carelessly selected the doctor or that any negligence had taken place in connection with the performance of the attempted abortion.[94] The jury found for plaintiff, but on appeal the court held that if the plaintiff had willingly submitted to the illegal abortion, her consent barred her claim.[95] Thus, this court adopted the minority view of the effect of consent to a crime, a view that Kentucky courts have followed in other cases.[96] This conclusion that a person's consent usually should bar her from suing for an intentional tort while defensible, is debatable in the case of illegal abortions.[97]

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was reckless (a distinct possibility in many of these fact patterns) or in those many states where plaintiffs had not committed a crime. Moreover, this doctrine applies only where the statute was designed to protect "a class of persons which includes the one whose interest was invaded" (RESTATEMENT (SECOND) TORTS § 286 (1965)), so those courts which held that the statute was not intended to protect women who had abortions thereby made the contributory negligence per se doctrine inapplicable to these cases.

As to relatively recent cases, such as *Reno v. D'Javid*, 390 N.Y.S.2d 421 (1977) and *Symone T. v. Lieber*, 613 N.Y.S.2d 404 (App. Div. 1994), there are other problems. First, the contributory negligence bar has been replaced by comparative fault, so the doctrine could not justify barring plaintiff. Second, as society's view of abortion has changed, the argument that the statutory violation might be excused has become stronger. For example, requiring a child rape victim to endanger her own life and mental health by carrying a baby to term might well "involve a greater risk of harm to the actor or to others" (RESTATEMENT (SECOND) TORTS § 288A (1965)) than would permitting an abortion that was a few days later than the statute allowed.

Finally, even if the contributory negligence per se doctrine could explain the abortion cases, the courts' failure to mention it shows that the courts either failed to give the cases sufficient consideration to realize that contributory negligence per se might be relevant, or they did so but decided the cases were so undeserving that it was not worth mentioning the reason for depriving these seriously injured people of redress.

92. 33 S.W. 831 (Ky. 1896).

93. *See id.*

94. *See id.*

95. *See id.* at 832.

96. *See* McNeil v. Choate, 247 S.W. 955, 955 (Ky. 1923); Lykins v. Hamrick, 137 S.W. 852, 854 (Ky. 1911).

97. The application of the bar to abortion cases is debatable because the deterrence of criminal conduct, and other desirable objectives, are thereby lost. *See*

Assuming that the consent bar applies to abortion cases, the *Goldnamer* plaintiff may have come under an exception to that bar, the exception that permitted plaintiffs to recover despite their consent when the purpose of the criminal statute was to protect people like plaintiff.[98] There is some evidence that women were intended to be protected by the Kentucky abortion law. A few years prior to *Goldnamer,* the Supreme Court of Kentucky had held that a woman who underwent an illegal abortion was the victim,[99] and one purpose of criminal statutes is to protect victims. A few years later, the court noted that to perform "an abortion upon a woman is necessarily to endanger her life."[100] It is probable that a statute which makes conduct criminal is, at least in part, intended to protect the person whose life is endangered by that conduct. Therefore, even though Kentucky usually held that plaintiff's consent to a crime barred her suit for intentional torts arising out of that crime, there was reason to conclude that this plaintiff came within an exception to that general rule and so should have been allowed to recover. *Goldnamer* did not consider such a possibility.

B. *District of Columbia (1923)*

In *Hunter v. Wheate,*[101] the plaintiff sued for injuries that the defendant negligently inflicted on her during and after the performance of an illegal abortion.[102] The appellate court, reversing a jury verdict in the plaintiff's favor, held that plaintiff could not recover for the injuries because "[i]f the act out of which the cause of action arises is immoral or

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supra notes 35-38 and accompanying text. The loss from forbidding these suits would be somewhat less where defendant was not the abortionist. Even then, however, permitting suits might cause paramours not to pressure women to have abortions, thus decreasing illegal abortions. In addition, even if the woman sued the paramour and not the abortionist, it is likely that the abortionist's identity would be revealed, thus opening the possibility that he would be prosecuted. This increased likelihood of uncovering abortionists caused Professor Bohlen to note that "there appear to be more cogent reasons of public policy" to permit intentional tort suits by women injured by illegal abortions than in cases of other types of criminal conduct. Bohlen, *supra* note 26, at 832. Finally, if a paramour who knew he could be sued nevertheless decided to pressure the woman to have an illegal abortion, the possibility of being sued would encourage him to locate a competent abortionist, thus decreasing the likelihood that the woman would be injured.

98. *See* RESTATEMENT (SECOND) OF TORTS § 892 (1974). *Goldnamer's* failure to discuss this exception is somewhat less objectionable because the case was decided in 1896, before much consideration had been given to the conditions under which consent to criminal conduct should be effective. Nevertheless, it would not have required a very sophisticated analysis to conclude that a plaintiff's consent to criminal conduct probably should not prevent her from suing for injuries caused by that conduct when one of the purposes of criminalizing the conduct was to protect plaintiff.

99. *See* Peoples v. Commonwealth, 9 S.W. 509, 510 (Ky. 1888).

100. Wilson v. Commonwealth, 60 S.W. 400, 401 (Ky. 1901).

101. 289 F. 604 (D.C. Cir. 1923).

102. *See id.* at 605.

illegal, the courts will not grant relief."[103] Thus, in the name of refusing aid to a moral transgressor, *Hunter* absolved the abortionist, who had committed a felony,[104] of all liability to the victim who had committed no crime[105]—a peculiar result that required some explanation.

Hunter, however, did not deal with that anomaly. Instead, the court sought to explain its treatment of the plaintiff by citing three cases in which courts refused to enforce illegal contracts.[106] Not surprisingly, none of the cited contract cases offered any reason why a tort plaintiff who had committed no crime should be barred from recovering. *Hunter* attempted to fill this gap in logic by stating that the prohibition "applies to transactions as well as to contracts" citing, without discussing, three more cases.[107] In none of those cases was a plaintiff prevented from recovering tort damages because of immoral or illegal conduct.[108] Thus, none of the cases relied on by *Hunter* supported Hunter's extension of the contract rule to tort suits for damages.

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103. *Id.* at 606.

104. *See* Law of March 3, 1901, ch. 854, § 809, 31 Stat. 1322 (codified as amended at D.C. CODE ANN. § 22-201 (1981 & Supp. 1999)) (providing that abortionist could be imprisoned for up to 20 years).

105. *See Hunter*, 289 F. at 605.

106. *See id.* at 606 (citing *Continental Wall Paper Co. v. Voight & Sons*, 212 U.S. 227 (1909); *McMullen v. Hoffman*, 174 U.S. 639 (1899); *Higgins v. McCrea*, 116 U.S. 671 (1886)).

107. *See Hunter*, 289 F. at 606 (citing *The Florida*, 101 U.S. 37 (1879); *Levy v. Kansas City*, 168 F. 524 (8th Cir. 1909); *Riggs v. Palmer*, 115 N.Y. 506 (1889)).

108. *See* The Florida, 101 U.S. at 38. In that case, a United States steamer seized the "Florida," a steamer anchored "under cover of a Brazilian vessel of war" in a Brazilian port. *Id.* The Florida was towed to the United States and sank. *See id.* Brazil demanded reparations and the United States settled, disavowing the capture as an illegal act. *See id.* The commander then sued, asking that title to the Florida vest in him. *See id.* The Supreme Court of the United States held that the "judicial [branch] is bound to follow the action of the political department of the government," and dismissed the claim. *Id.* at 42. The Court also stated that "[n]o court will lend its aid to a party who founds his claim for redress upon an illegal act," *id.* at 43, but that was not the holding. Nor is there any analogy between a claim by a criminal for the fruits of his crime and a claim by a non criminal for compensation for the injuries tortuously inflicted on her by a criminal.

The second case cited, *Riggs v. Palmer*, 22 N.E. 188 (N.Y. 1889), held that plaintiff, who poisoned his grandfather so that the grandfather could not disinherit him, could not take under the grandfather's will because the legislature could not have intended that the "[d]onee who murdered the testator to make the will operative . . . [should] enjoy the fruits of his crime." *Id.* at 189-90. Not permitting a murderer to inherit from his victim and so profit from his crime is a far cry from prohibiting a person who committed no crime from obtaining compensation from the criminal who tortuously injured her.

The final case relied on by *Hunter* was *Levy v. Kansas City*, 168 F. 524 (8th Cir. 1909). The plaintiff in *Levy* was seeking the return of money paid to obtain a license to run an illegal business. *See id.* at 525. The court refused to aid him because his claim was based on a transaction in which the plaintiff was guilty of "moral turpitude." *See id.* at 526. In passing, the court stated that the same rule would apply in a suit for damages, but this statement was gratuitous and completely unsupported.

Not only did *Hunter* extend the bar without analysis and without citing any applicable authority for doing so, it ignored the three existing cases that were directly on point, all of which permitted recovery by a plaintiff injured during an illegal abortion.[109] *Hunter* similarly disregarded the well-recognized rule permitting recovery by those injured as a result of their criminal participation in illegal fights,[110] a rule that demonstrated that the contract bar need not apply in tort cases.

Having so broadened the rule prohibiting suit, the court proceeded to apply that rule without considering its recognized exceptions. For example, *Corpus Juris*, a source relied on by *Hunter*, stated that where the plaintiff was less culpable than a defendant, the parties might not be *in pari delicto*, in which case the plaintiff could prevail.[111] There was little doubt that this plaintiff's culpability was less than the defendant's. Under the District of Columbia's abortion statute, a person seeking an abortion committed no crime but an abortion provider committed a crime punishable by imprisonment for up to twenty years.[112] This disparity in treatment makes clear the legislature's conclusion that abortionists and the women they harmed were not in equal fault, yet the court rejected plaintiff's claim without considering this exception.

Second, the *Hunter* plaintiff also came under the exception that allowed a person injured while engaged in illegal conduct to recover "where the law which creates the illegality in the transaction is intended to restrain one of the parties thereto and to protect the other."[113] The District of Columbia's abortion statute obviously intended to restrain abortionists: it made their conduct a felony. The statutory text also was designed, at least in part, to protect persons such as the plaintiff in *Hunter*. First of all, the person who had the abortion committed no crime. Second, all abortions were prohibited unless "under the direction of a competent licensed practitioner of medicine."[114] Only a concern for women's health could

109. *See* Courney v. Clinton, 48 N.E. 799, 800 (Ind. App. 1897); Lembo v. Donnell, 103 A. 11, 12 (Me. 1918); Miller v. Bayer, 68 N.W. 869, 871 (Wis. 1896). *Goldnamer*, which dealt only with the effect of consent on a plaintiff's intentional tort suit, was irrelevant to the *Hunter* plaintiff's negligence claim.

110. *See* 5 C.J. *Assault and Battery* § 24, at 630 (1914).

111. *See* 1 C.J. *Actions* § 53, at 960 (1914) (stating that law recognizes different degrees of culpability and plaintiff may recover if less culpable). Some authorities state that this *"not in pari delicto"* exception applies (in contract cases) only where plaintiff meets two requirements: (i) the plaintiff's fault is less than the defendant's, and (ii) plaintiff was not guilty of serious moral turpitude. *See* CALAMARI & PERILLO, *supra* note 28, at § 22.7; 3 SAMUEL WILLISTON, A TREATISE ON THE LAW OF CONTRACTS § 1789 (3d ed. 1920). A court that accepted this description of the exception could have concluded that the plaintiff in *Hunter* did not qualify, although the legislature's determination that the plaintiff's conduct was not criminal would make such a conclusion dubious.

112. *See* Law of March 3, 1901, ch. 854 § 809, 31 Stat. 1322 (codified as amended at D.C. CODE ANN. § 22-201 (1981 & Supp. 1999)).

113. 1 C.J. *Actions* § 53, at 961.

114. Hunter v. Wheate, 289 F. 604, 605 (D.C. Cir. 1923).

explain these competency and licensing requirements. Similarly, the statute permitted abortions "necessary to preserve (the woman's) life or health," a provision that would have been anathema to a legislature whose only concern in this area was the fetus. This statute provides strong evidence that it was passed, in part, to protect a person in plaintiff's position from abortionists. Thus, the case appears to fall into the second exception to the rule prohibiting suits. The *Hunter* court, nevertheless, ignored this exception to the rule it applied.

The facts of *Hunter* also bring the case within the third exception to the illegality bar: that recovery may be permitted when the refusal to do so would otherwise lead to great and disproportionate hardship or, more generally, when public policy would be advanced by permitting suit.[115] The court did not say what injuries were inflicted on the plaintiff by the defendant's negligence, but the injured woman and her family must have suffered great hardship, otherwise she would not have assumed the expense of bringing suit, nor would she have published her disgrace. Undoubtedly the plaintiff's injuries were disproportionate to the defendant's, for the defendant had no injury, only profit. And, as already explained, public policy would have been advanced by allowing these suits because they would deter illegal abortions, decrease the profit made by criminals, unmask more criminals, and increase the care with which these operations were performed.[116] Yet the court failed to consider whether the case was governed by this exception.

Thus, even assuming that the bar to suits should be applied in tort cases, the plaintiff in *Hunter* should have been permitted to recover because she came under existing exceptions to the bar, exceptions that the court did not consider.

The court's only explanation of its use of the bar, other than the incorrect implication that prior cases required it, came in the penultimate paragraph. There the court stated that one important question to be answered in deciding if plaintiff could sue was "whether, if the defendant were the plaintiff, a recovery would be allowed."[117] It is difficult to believe that anyone could hold that because the criminal abortionist could not sue his victim for his unpaid fee, the victim could not be allowed to sue the criminal for the injuries he negligently inflicted on her. Such a bizarre, unsupported statement, coupled with the other glaring omissions and unsupported conclusions contained in the opinion, show that the *Hunter* court dismissed plaintiff's claim without giving it anything approaching fair consideration.

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115. 6A CORBIN, *supra* note 49, § 1512, at 714 (1962) (permitting recovery where that would advance public policy); 5 C.J. *Assault and Battery* § 24, at 630 (stating that recovery permitted when refusal would lead to hardship).

116. For a discussion of the advantages of permitting suits by people injured during the performance of illegal abortions, see *supra* notes 35-46 and accompanying text.

117. *Hunter*, 289 F. at 607.

One further indication of the lack of thought that the *Hunter* court gave to its decision is that the plaintiff was denied recovery even though "the evidence tended to show, as the jury evidently found, that in [defendant's] subsequent professional treatment of [plaintiff, defendant] was negligent."[118] The court offered no reason why the plaintiff's agreement to submit to a crime should prevent her from suing for injuries caused by negligent treatment after the crime. A doctor has no right to malpractice on a patient whenever the patient's need for medical attention arose out of his or her immoral activity. Neither does a criminal abortionist.

C. *Kansas (1925)*

In *Herman v. Turner,*[119] the Supreme Court of Kansas opined that the Kansas "abortion statute is designed for the protection of the general public interest, and not for the special protection of a class . . . . The reason for civil liability for statutory rape, consented to, does not obtain, and there is authority that consent to an illegal operation bars recovery."[120] This statement, however, was dictum.[121] Neither *Herman* nor any other reported Kansas case deprived women injured by illegal abortions of the ability to sue for their injuries. In fact, *Herman* permitted the plaintiff's suit to proceed.[122] Unfortunately, courts in other states would later ignore the result in *Herman* and rely on the dictum quoted above to prevent abortion plaintiffs from recovering.

D. *Massachusetts (1926)*

In *Szadiwicz v. Cantor,*[123] the Supreme Judicial Court of Massachusetts reversed a jury verdict for the plaintiff, holding that the administrator of the estate of a woman who died as a result of an abortionist's "very dangerous and surgically unsound" treatment had no cause of action in either negligence or intentional tort.[124] The court recognized that, at the time of the decision, most courts which had addressed the issue allowed such a cause of action.[125] The court, nevertheless, rejected those holdings, quoting a case in which a court refused to enforce an illegal contract.[126]

118. *Id.* at 605.

119. 232 P. 864 (Kan. 1925).

120. *Id.*

121. *See* Joy v. Brown, 252 P.2d 889, 890 (Kan. 1953).

122. *See Herman,* 232 P. at 865 (holding that lower court did not err in overruling demurrer).

123. 154 N.E. 251 (Mass. 1926).

124. *Id.*

125. *See id.* at 252. The court cited *Courtney v. Clinton,* 48 N.E. 799, 800 (Ind. App. 1897); *Lembo v. Donnell,* 103 A. 11, 12 (Me. 1918); *Milliken v. Heddesheimer,* 144 N.E. 264, 267 (Ohio 1924); and *Miller v. Bayer,* 68 N.W. 869, 871 (Wis. 1896) for the rule supporting recovery in abortion cases, as well as *Adams v. Waggoner,* 33 Ind. 531, 533 (1870), which permitted recovery in a tort case involving a crime other than abortion.

126. *See Szadiwicz,* 154 N.E. at 251.

Szadewicz did not explain why the contract rule should be used in a tort case, but stated that *Hunter v. Wheate*—a decision notably short on authority, logic and analysis—and *Levy v. Kansas City*[127]—which was not a tort suit—had reached that conclusion. The court then cited three additional cases in support of its application of the bar to tort cases. None of the three cases, however, barred a tort plaintiff from suing.[128] Thus, without discussion, *Szadiwicz* rejected five cases that were directly on point and permitted recovery, apparently finding five cases that involved different issues, and the ill-reasoned *Hunter* case, more convincing. Certainly, the conclusion that the court should follow *Hunter* (even if the holding in *Hunter* somehow was bolstered by *Szadwicz's* reliance on the five inapplicable cases) rather than the five tort cases that were directly on point, demanded some explanation. *Szadiwicz*, however, made no attempt to explain its preference for *Hunter*.

Earlier Massachusetts decisions may provide some insight. During the previous century, Massachusetts stood alone[129] in frequently barring tort plaintiffs from recovering for injuries suffered during plaintiffs' commissions of crimes,[130] although even in Massachusetts that bar was not always used.[131] *Szadiwicz* may reflect that history; however, by the time it was decided, Massachusetts had retreated from its aggressive stance against those

127. 168 F. 524 (8th Cir. 1909).

128. *See* Foster v. Thurston, 65 Mass. 322, 323 (1853) (involving refusal to enforce illegal contract); Jackson v. Babcock, 16 N.Y. 246, 248 (1857) (involving controversy over meaning of lease); Roll v. Raquet, 4 Ohio 400, 420 (1831) (involving refusal to enforce illegal contract).

129. *See* Philadelphia R.R. v. Philadelphia Towboat Co., 64 U.S. 209, 218 (1859) (concluding that Massachusetts law in this area "depend[ed] on the peculiar legislation and customs of that state").

130. *See, e.g.*, Dudley v. Northampton Street Ry. Co., 89 N.E. 25, 28 (Mass. 1909) (finding that plaintiff injured while driving without Massachusetts license could not recover); Smith v. Boston & Maine R.R., 120 Mass. 490, 491-93 (1876) (finding that plaintiff injured while traveling on Sunday in violation of statute could not recover); Gregg v. Wyman, 58 Mass. 322, 324-25 (1849) (finding that plaintiff could not recover for injury to horse rented in violation of statute prohibiting that type of conduct on Sunday), *overruled by* Hall v. Corcoran, 107 Mass. 251 (1871).

131. *Dudley* stated that the bar would not apply if defendant's conduct was wanton or reckless. *See Dudley*, 89 N.E. at 28. In another case, *Harrington v. King*, the plaintiff had obtained possession of goods under a contract which required him to make monthly payments to the owner and which also stipulated that the goods could not be moved. *See* 121 Mass. 269, 270 (1876). The plaintiff made no payments and repeatedly moved the goods. *See id.* The plaintiff then left the goods in Massachusetts while he searched for a residence in another state. *See id.* Upon returning to Massachusetts, with the intent of moving the goods to Rhode Island without notifying the owner, the plaintiff found that the goods had been sold to the defendant. *See id.* The plaintiff then demanded that the defendant return the goods to him. *See id.* When the defendant refused, the plaintiff sued and won. *See id.* at 271. Clearly this plaintiff's conduct was immoral, almost certainly it was illegal, yet he recovered.

injured as a result of their criminal conduct.[132] One particularly germane case indicated that the bar would not apply if a plaintiff had been injured by "wantonness or recklessness."[133] Performing an operation with "non-sterile instruments," as was done in *Szadiwicz,* is reckless—the court itself said it was "very dangerous and . . . unsound"—yet *Szadiwicz* considered neither the reckless exception to the bar nor any of the indications that prohibition against recovery was no longer unassailable.

Assuming that in 1926 Massachusetts still barred tort suits by plaintiffs injured as a result of their criminal conduct, before barring a plaintiff on that ground the Massachusetts court should have considered whether that plaintiff was covered by an exception to the bar. Although such exceptions were recognized, and the *Szadiwicz* plaintiff appeared to come within more than one, *Szadiwicz,* like *Hunter,* failed to consider any of them.

As *Szadiwicz* acknowledged, the woman who submitted to an abortion committed no crime, although the abortionist did.[134] Thus, the parties seem not to have been *in pari delicto,* so the plaintiff may have come under the first exception to the bar, an exception that Massachusetts endorsed.[135]

The second exception may also have been applicable. Provisions of the Massachusetts abortion statute show that the statute was intended, in part, to protect women from being injured by abortionists. First, an abortionist's punishment was significantly more severe if the victim died.[136] Second, an abortionist was guilty of a crime regardless of whether the abortionist's victim was pregnant, even if the abortionist believed the woman was not pregnant.[137] Third, a doctor committed no crime if the doctor performed an abortion because he or she believed it necessary to save the woman's life and this conclusion was supported by another competent doctor.[138] All these provisions show the legislature's concern was not only for the fetus, but for the pregnant woman as well. Finally, the statute had

132. *See, e.g.,* Bourne v. Whitman, 209 Mass. 155, 169 (1911) (recognizing that courts had begun to enforce this bar less stringently); Hall v. Corcoran, 107 Mass. 251 (1871) (permitting owner of property who has acted unlawfully with regard to it to recover from wrongdoer), *overruling* Gregg v. Wyman, 58 Mass. (4 Cush.) 322 (1849).

133. *See Dudley,* 89 N.E. at 28.

134. *See id.*; *see also* Commonwealth v. Boynton, 116 Mass. 343, 345 (1874).

135. Massachusetts had recognized that the bar would not prevent plaintiff from suing "where there are elements of public policy more outraged by the conduct of one than of the other." Berman v. Coakley, 137 N.E. 667, 669 (Mass. 1923); *see also* White v. Franklin Bank, 39 Mass. (22 Pick.) 181 (1839). In addition, the Massachusetts statutes reflect the legislature's conclusion that the abortionist's conduct more outraged public policy than the woman's conduct did.

136. *See* MASS. GEN. L. ch. 292, § 19 (1926).

137. *See* Commonwealth v. Surles, 42 N.E. 502, 502 (Mass. 1895) ("The averment of pregnancy was unnecessary."); Commonwealth v. Tibbetts, 32 N.E. 910, 911 (Mass. 1893) (noting that allegation of pregnancy was not necessary); Commonwealth v. Follansbee, 29 N.E. 471, 471 (Mass. 1892) (same).

138. *See* Commonwealth v. Nason, 148 N.E. 110, 112 (Mass. 1925).

been enacted in 1845, a time when legislatures that passed abortion statutes were motivated primarily by their desire to protect women.[139] All this is strong evidence that one of the purposes of the Massachusetts abortion statute was to protect women seeking abortions from harm at the hands of abortion providers, the type of situation that comes under the second exception to the rule prohibiting recovery.

The third exception also appears to apply to the *Szadiwicz* facts: a woman who committed no crime died as a result of a defendant's criminal conduct that was "very dangerous and surgically unsound."[140] The woman thus sustained an injury that was disproportionate to the "suffering" of the defendant, who suffered no injury and indeed made a profit, and, as already noted, public policy would have been promoted by permitting this suit.[141]

The *Szadiwicz* plaintiff apparently came within all three exceptions to the bar against suit. Nevertheless, recovery was denied without discussing any of the exceptions.

Massachusetts' odd history of harshly treating tort plaintiffs who had committed crimes makes *Szadiwicz's* reflexive use of the bar more comprehensible than it would be in another jurisdiction. Massachusetts' law, however, provided many reasons why the bar should not have been used in *Szadiwicz.* In its certainty that the non criminal decedent's immoral conduct justified depriving her survivors of compensation for their loss, the *Szadiwicz* court saw no need to explore either the Massachusetts cases that acknowledged that injured criminals could recover, the cases from other jurisdictions which permitted recovery in the abortion context or the recognized exceptions to the bar it was imposing.

E. *Washington (1931)*

The Supreme Court of Washington held that there was no cause of action for the death of a woman caused by a negligently performed illegal abortion because "no court will lend its aid to a person who founds their cause of action upon an immoral or illegal act."[142] The court noted that there was a conflict of opinion as to whether that rule should apply in abortion cases, but concluded, without discussion, that it should, citing *Szadiwicz* and two contracts cases.[143] As just discussed, the *Szadiwicz* opinion provided no explanation for its conclusion and so is poor authority for

139. *See, e.g.,* Samuel W. Buell, Note, *Criminal Abortion Revisited,* 66 N.Y.U. L. REV. 1774, 1783-87 (1991) (discussing history of abortion statutes).

140. Szadiwicz v. Cantor, 154 N.E. 251, 251 (Mass. 1926).

141. For a discussion of public policy advantages secured by permitting these suits, see *supra* notes 25-46 and accompanying text.

142. Androws v. Coulter, 1 P.2d 320, 321 (Wash. 1931) (quoting *Holman v. Johnson,* 98 Eng. Rep. 1120, 1120 (K.B. 1775)).

143. *See id.* (citing *Higgins v. McCrea,* 116 U.S. 671, 677 (1886); *Szadiwicz,* 154 N.E. at 252; and *Holman,* 98. Eng. Rep. at 1120)).

extending the prohibition to include abortion cases.[144] Neither *Androws* nor *Szadiwicz* (nor *Hunter,* the only other then-existing abortion case barring recovery because of plaintiff's criminal conduct) explored the reasons for the prohibition on contract suits, or discussed why those reasons would support an extension of the prohibition to tort suits in general or abortion suits in particular, or considered whether the abortion cases were covered by any of the exceptions to the prohibition.

This uncritical acceptance of *Szadiwicz* is particularly peculiar in that Washington had long permitted criminals injured in illegal fights to recover for their injuries, at least where the injuries resulted from the use of excessive force.[145] Thus, in *Milam v. Milam,*[146] a case involving an illegal fight, the Supreme Court of Washington had lent its aid to a plaintiff who "'found[ed] his cause of action upon an . . . illegal act.'"[147] The *Androws* court must have been aware of *Milam*[148] yet, the court reached a result that directly conflicted with that case, and it did so without overruling the case, distinguishing it, or even mentioning it. *Androws* not only offers no explanation of why the contract bar should apply to prevent tort recoveries, it fails to recognize that the court had previously permitted such recoveries.

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144. For a discussion of *Szadiwicz,* see *supra* notes 123-40 and accompanying text.

145. *See* Milam v. Milam, 90 P. 595, 596 (Wash. 1907). Although *Androws* made no attempt to reconcile its conclusion with that reached in *Milam,* it might be argued that the cases are distinguishable because the *Milam* defendant used excessive force, conduct which courts are especially anxious to deter and to which the plaintiff had not consented. *See id.* Assuming that to be a valid explanation of *Milam,* it does not distinguish *Milam* from *Androws.* Clearly, society is as interested in deterring abortionists from negligently killing their patients as it is in deterring the use of excessive force in illegal fights.

See Androws, 1 P.2d at 321 (citing *Holman,* 98 Eng. Rep. at 1120).

146. 90 P. 595 (Wash. 1907).

147. *Androws,* 1 P.2d at 320 (quoting *Holman,* 98 Eng. Rep. at 1120).

148. A few months before deciding *Androws,* the Supreme Court of Washington decided *Hart v. Geysel,* 294 P. 570 (Wash. 1930). In *Hart,* the administratrix of the estate of a fighter who died of injuries suffered during an illegal fight lost her suit for damages because the fighter had consented to the blows that injured him. The *Hart* court distinguished *Milam* on the grounds that the *Hart* defendant had not done anything to which the plaintiff had not consented, whereas the *Milam* defendant, by using excessive force, had exceeded the plaintiff's consent. *See id.* Neither *Hart* nor *Milam* discussed the propriety of preventing a plaintiff from suing because of the fighter's illegal conduct, the only ground relied on in *Androws.* The *Hart* plaintiff lost for reasons having nothing to do with the illegality of the fighter's conduct, so the decision is irrelevant to *Androws.* The *Milam* plaintiff won despite the fighter's illegal conduct. Hence, it is clear that *Milam* and *Androws* directly conflict.

Furthermore, two judges dissented in *Hart,* concluding that a plaintiff injured during an illegal fight could recover even though he or she had consented, and despite the fact that the injury directly flowed from criminal activity. *See id.* at 572-73 (Holcomb, J., and Fullerton J., dissenting). A few months later, in *Androws,* these judges voted to bar a plaintiff without offering any explanation for this contradictory conclusion.

Assuming *arguendo* that the prohibition should apply in tort and that *Androws* reached that conclusion for all tort suits, overruling *Milam sub silentio,*[149] *Androws* is still deficient because it, like *Szadiwicz* and *Hunter,* failed to consider the established exceptions to the prohibition on recovery, at least two of which applied.

The exception that permitted suit where the criminal statute was intended to protect people in plaintiff's position from those in defendant's position, applied because the Washington statute showed that one of its purposes was to accord such protection.[150] Similarly, *Androws* came within the exception that permitted recovery when doing so would advance public policy objectives[151] and partially remedy the disproportionate hardship that had been inflicted.[152] Neither of these exceptions to the bar was considered.[153]

Thus, in concluding that there was usually no recovery for a death caused by a negligently performed illegal abortion, the *Androws* court ignored its own earlier decision that permitted criminals to sue for their injuries, rejected cases from other jurisdictions that permitted such suits, inappropriately applied a contract rule to a tort case without considering whether the reasons for the contract rule justified such an extension, and ignored established exceptions to that contract rule.

Some wording in *Androws* hints at the depth of the court's subconscious hostility toward women who seek abortions. Having concluded that the decedent's conduct prevented recovery for injuries caused by the tortuous performance of the abortion, the court stated that recovery could be permitted if the decedent had died as a result of improper care after the illegal operation because the "surgeon has no more right to abandon his patient under such circumstances than he would had she become his pa-

149. There is reason to believe that the *Milam* rule survived the *Androws* decision. Washington later permitted a murderer to inherit from his victim (*see Duncan,* 246 P.2d 445), a result that comports with *Milam* and conflicts with *Androws.*

150. *See* WASH. COMP. STAT. § 2448 (Remington 1922) (stating that abortion was legal if necessary to preserve woman's life, thus suggesting that one purpose of statute was to protect women). Similarly, the Washington Supreme Court's conclusion in an earlier case that an abortion would be criminal even though the woman was not pregnant indicates the court's conclusion that the legislature was interested not only in protecting the fetus, but also in protecting the woman. *See* State v. Russell, 156 P. 565, 566 (Wash. 1916).

151. For a discussion of public policy objectives which would be advanced by permitting these suits, see *supra* notes 25-46 and accompanying text.

152. Defendant negligently performed an illegal abortion, undoubtedly to make a profit, and thereby killed the patient. A stronger case of great and disproportionate hardship is hard to imagine.

153. Plaintiff may not have qualified for the "not *in pari delicto*" exception because the Washington abortion statute criminalized the conduct of the woman who had the abortion as well as the conduct of the abortionist. Nevertheless, even though the woman and the abortionist committed the same crime, given that the abortionist acted so negligently that the woman died, the *Androws* parties may not have been *in pari delicto;* that possibility should have been discussed.

tient under ordinary circumstances."[154] The implication—that surgeons have a "right" to treat these abortion patients negligently during illegal operations—appears to reflect the court's opinion of the value of the health of these patients. Such an opinion could help explain the court's failure to consider the many reasons why its decision denying recovery for a negligently performed abortion was at best extremely debatable.

F. *Tennessee (1931)*

In *Martin v. Morris,*[155] the Supreme Court of Tennessee concluded that a woman injured during an illegal abortion could not recover because her injuries were incurred during her participation in an immoral act.[156] Thus, like the courts in Massachusetts and the District of Columbia, the *Martin* court protected a criminal's profit so that the law would not be "sullied" by permitting a non criminal who had engaged in immoral conduct to recover for the injuries tortuously inflicted by the criminal.[157] The justification for this harsh conclusion was so obvious to this court that its entire opinion fills less than two-thirds of a page.[158]

The court's only explanation for the decision was that numerous courts barred abortion plaintiffs from suing, citing *Szadiwicz* "and other authorities referred to therein."[159] Although the court noted that there were "respectable authorities to the contrary," there was no mention that these respectable authorities outnumbered those on which the court relied.[160]

The *Martin* court also failed to consider whether any of the recognized exceptions to the bar applied. Each exception appeared to have been applicable. Most clearly on point, the Supreme Court of Tennessee had held that "[t]he general rule [prohibiting recovery] operates only in cases where the refusal of the courts to aid either party frustrates the object of the transaction, and takes away the temptation to engage in con-

154. Androws v. Coulter, 1 P.2d 320, 321 (Wash. 1931).

155. 42 S.W.2d 207 (Tenn. 1931).

156. *See id.*

157. *See id.* (noting that under Tennessee law, women who had abortions committed no crime).

158. For a discussion of the length of this and other abortion opinions, and the commensurate depth of consideration given to the issues, see *infra* notes 345-69 and accompanying text.

159. *Martin,* 42 S.W.2d at 207. As of the date of *Martin,* three jurisdictions had such a bar: the District of Columbia, Massachusetts and Washington, although the *Martin* court apparently was unaware of the recent Washington decision. Four other jurisdictions permitted such suits. *See* Martin v. Hardesty, 91 Ind. App. 239 (App. 1928); Lembo v. Donnell, 103 A. 11 (Me. 1918); Milliken v. Heddescheimer, 144 N.E. 264 (Ohio 1924); Miller v. Bayer, 68 N.W. 869 (Wis. 1896). Kentucky had held that a woman's consent to an illegal abortion prevented her from recovering for the intentional conduct to which she had consented, but it had not barred women from suing for negligently inflicted injuries. *See* Goldnamer v. O'Brien, 33 S.W. 831, 831-32 (Ky. 1896).

160. *Martin,* 42 S.W.2d at 207.

tracts *contra bonos mores*."[161] Prohibiting recovery in abortion cases would not "frustrate the object of the (illegal) transaction[s]" nor would the prohibition reduce the temptation to engage in those transactions. In fact, prohibiting recovery in these cases greatly increases the abortionists' temptation to engage in these transactions. Thus, under Tennessee law, the prohibition on recovery was not operative.

Tennessee law also recognized a "well-grounded exception" that permitted recovery in those cases "wherein the public good is to be promoted by permitting disaffirmance of the contract although in doing so a party to its illegality may be benefited."[162] Permitting recovery would deter illegal abortions, deter negligence in the performance of those abortions, uncover more abortionists and, prevent some criminals from profiting from their crimes, thereby promoting the public good. Thus, the *Martin* plaintiff also came within this exception and so she should have been able to recover.

Other exceptions also may have been applied. The plaintiff seems not to have been *in pari delicto* with the abortionist because her conduct was not criminal, whereas that of the abortionist was.[163] Furthermore, the Tennessee Supreme Court had concluded that a woman injured during an illegal abortion was a victim,[164] another indication that she and her victimizer were not *in pari delicto.*

The court's characterization of the plaintiff as a victim also is evidence that the statute was intended to protect her from the dangers posed by the abortionist, as is the statutory provision that permitted abortions done to preserve the life of the mother.[165] Where the criminal statute was designed to protect the plaintiff, she might well be covered by the second exception to the bar.

Thus, even if the bar did apply in tort suits, this plaintiff fits under numerous exceptions to it and should have been permitted to recover.

G. *Idaho (1934)*

Plaintiff in *Nash v. Meyer*[166] was injured during an abortion that defendant had supposedly told her was necessary to save her life.[167] Plaintiff

161. Darnell-Love Lumber Co. v. Wiggs, 230 S.W. 391, 394 (Tenn. 1921) (quoting 6 RULING CASE LAW § 220, at 829 (1915)).

162. *Id.*

163. *See Martin*, 42 S.W.2d at 207.

164. *See* Smartt v. State, 80 S.W. 586, 589 (Tenn. 1904). The fact that plaintiff was viewed as victim increased the likelihood that she was not guilty of serious moral turpitude, in which case she would satisfy both prongs of the more rigorous version of the "not *in pari delicto*" exception.

165. *See* TENN. CODE ANN. § 10791 (Williams 1934).

166. 31 P.2d 273 (Idaho 1934). There were two plaintiffs in *Nash*, the woman who was injured and her husband. For simplicity, I will refer to the wife as plaintiff.

167. *See id.*

alleged that defendant either knew the abortion was not necessary to save plaintiff's life or was negligent in concluding that it was necessary.[168] Plaintiff also asserted that defendant had negligently performed the abortion and failed to provide necessary care after the abortion, causing her to undergo an operation and a long period of convalescence, and probably leaving her sterile.[169] The jury found for the plaintiff.[170] The defendant appealed, challenging the trial court's refusal to charge that if plaintiff went to defendant for an illegal operation which defendant performed, plaintiff could not recover.[171]

In deciding this case, the Idaho Supreme Court failed to distinguish between the two arguments that might have protected defendant: (i) plaintiff was barred by her consent to defendant's conduct, and (ii) as to conduct to which plaintiff obviously had not consented (*i.e.*, negligence), she was barred because her injury was sustained as a result of her criminal conduct. One result of this confusion was a rather opaque opinion in which the court incorrectly relied on *Goldnamer v. O'Brien*[172] for the conclusion that a plaintiff who sued for negligence should be barred because she was injured as a result of her crime.[173]

This confusion makes the opinion difficult to parse. Nevertheless, it is clear that the court concluded that consent to illegal conduct normally barred recovery for injuries caused by the consented-to conduct[174] unless the state's "regard for the life, health and safety of its citizens" indicated that recovery should be allowed. According to *Nash*, this concern for citizens' health explained why those injured through their voluntary participation in illegal fights were allowed to recover despite their consent. *Nash* sought to distinguish the fight cases from the abortion situation by citing *Herman v. Turner*[175] for the proposition that "the abortion statute is not designed for the protection of the woman, only of the unborn child and through it society, while the assault and battering, dueling, etc. statutes are designed for the direct protection the individuals concerned."[176] The

168. *See id.*

169. *See id.* at 274.

170. *See id.* at 273.

171. *See id.* at 274.

172. 33 S.W. 831 (Ky. 1896).

173. *See Nash*, 31 P.2d at 277 (citing *Goldnamer*, 33 S.W. at 832). *Goldnamer* held only that, if the plaintiff had consented to conduct which injured her, that consent barred her from recovering for an intentional tort.

174. In reaching this conclusion, the court quoted professor Bohlen's article extensively. *See Nash*, 31 P.2d at 278. Consequently, it is difficult to see how *Nash* could have ignored Professor Bohlen's determination that women injured by negligently performed illegal abortions (such as Mrs. Nash) should be allowed to recover. *See* Bohlen, *supra* note 26, at 821 n.8. Additionally, the court ignored Professor Bohlen's statement that there were grounds for permitting an intentional tort suit by a woman who had been injured by an illegal abortion to which she had consented. *See id.* at 832.

175. 232 P. 864 (Kan. 1925).

176. *Id.* at 864.

court concluded that the Idaho legislature, although intent on preventing injuries to those who might engage in illegal duels and fights, had no similar interest in preventing injuries and death to women who submit themselves to illegal abortions.[177] This remarkable conclusion is supported only by a citation to dictum in a Kansas case, which interpreted a Kansas abortion statute that differed from the Idaho abortion statute.[178] The fact that the Kansas case allowed plaintiff to sue is ignored. *Herman* offers little support for the court's startling conclusion about legislative intent. That conclusion is further discredited by the fact that the Idaho statute permitted abortions that were necessary to save women's lives, a provision which would not have existed if the Idaho Legislature had been concerned only with the unborn child.

Having concluded that the legislature had no interest in protecting women from being injured during illegal abortions, the court stated that the injured women might nevertheless be allowed to recover despite their consent if the illegal act was "inherently fraught with danger to the life, health and safety of the individual."[179] The court, however, dismissed that possibility because it found no evidence "that there is more danger in the case of an illegal than a legal abortion."[180] Not only was this statement a non-sequitur—the question of whether an illegal abortion is more dangerous than a legal abortion has no bearing on the amount of danger inherent in an illegal abortion—it was patently false. Illegal abortions, unlike legal abortions, had to be clandestinely performed, often were performed by untrained persons, usually were not done under aseptic conditions, and frequently offered little chance for follow-up treatment.[181] To these dangers, add the fact that those who performed illegal abortions had less incentive to use due care because they could not be sued by the victims of their negligence,[182] and the conclusion that illegal abortions were much more dangerous than legal abortions becomes inescapable.[183]

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177. *See Nash,* 31 P.2d at 276-77.

178. *Compare* IDAHO CODE §§ 17-1810, 17-1811 (1932), *with* REV. STAT. KAN. § 21-437 (1923).

179. *Nash,* 31 P. 2d at 277.

180. *Id.*

181. *See id.* at 273 (noting lack of follow-up treatment was one reason for Mrs. Nash's injuries).

182. *See id.* at 277. The court raised the possibility that abortionists' knowledge that they could not be sued if they operated negligently would increase the danger involved in this operation. Inexplicably, the court concluded that that possibility "defeats [the argument] . . ., since, if damages be allowed, such source of added danger, i.e. freedom from liability for negligence, is thereby removed." *Id.* How does the fact that danger can be removed by permitting lawsuits explain why those lawsuits should be prohibited?

183. Although it takes little thought to realize that an operation done illegally will be considerably more dangerous than the same operation done legally, the extent of the increased danger may not be so apparent. A comparison of legal and illegal abortions, reported only a year after *Nash,* showed that in Russia, where abortions generally were legal, the death rate from abortions was 1 in 20,000; in

Nor was there support for *Nash's* implication that abortions were not dangerous. In fact, the Idaho Supreme Court itself had found that an abortion "places in jeopardy the life of a human being—the pregnant woman."[184] Other authorities had confirmed this danger.[185]

Thus Nash fails to provide credible reasons for distinguishing the fight cases from the abortion cases.

Nash sought to bolster its decision to reject plaintiff's claims by quoting from *Holman v. Johnson,*[186] a contract case in which the court stated "[n]o Court will lend its aid to a man who founds his cause of action upon an immoral or illegal act."[187] *Nash* also cited three Idaho cases that followed *Holman.* On the basis of these cases, *Nash* concluded, without discussion, that *Holman's* prohibition should apply to tort suits like *Nash.* Two of the three Idaho cases cited involved claims arising out of illegal contracts.[188] The third, *Clark v. Utah Construction Co,*[189] was a suit for trespass brought by a person whose only claim to ownership of the property was a purported deed that had been criminally obtained. The *Clark* court reasoned that the trespass claim could not be allowed because that would permit a criminal to profit from her crime.[190] *Clark* did bar a plaintiff from bringing a suit in tort, but the reason for doing so did not exist in *Nash,* where plaintiff was seeking not to profit from her crime but merely to be compensated for the injuries tortuously inflicted on her.

Nash also failed to consider the exceptions to the prohibition that probably would have permitted Nash to sue even if the prohibition did apply in tort suits. First, there is a strong argument that the loss imposed on Nash was great and disproportionate, and that public policy would have been advanced by permitting her suit because such suits would deter illegal abortions, deter the negligent performance of abortions, lead to the prosecution of additional criminals, and prevent some criminals from profiting from their crimes.[191] Second, Nash and the abortionist might not have been *in pari delicto.* Although both committed crimes under Idaho law, the statute provided greater penalties for the abortionist, indicating that, as a general proposition, the legislature believed the abortion-

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the United States, where abortions generally were illegal, the death rate was 1 in 87. *See Functional Study, supra* note 37, at 93 (noting statistics).

184. State v. Alcorn, 64 P. 1014, 1019 (Idaho 1901).

185. *See, e.g.,* DELEE, *supra* note 37, at 107.

186. 98 Eng. Rep. 1120 (K.B. 1775).

187. 31 P.2d at 280 (quoting *Holman,* 98 Eng. Rep. at 1120).

188. *See* McFall v. Arkoosh, 215 P. 978 (Idaho 1923); Libby v. Pelham, 155 P.575 (Idaho 1917).

189. 8 P.2d 454 (Idaho 1932).

190. *See id.* at 459.

191. Idaho had embraced this exception to bar on suits to enforce illegal contracts. *See McFall,* 215 P. at 979. ("[E]ven between parties in pari delicto, relief will sometimes be granted if public policy demands it" (quoting 6 RULING CASE LAW § 220, p. 829 (1915))).

ist's crime was greater.[192] Finally, one purpose of the statute appeared to be to protect women,[193] so Nash might well have come under that exception to the prohibition on suits. Nevertheless, Nash's claim was barred without any discussion of the first two exceptions, and minimal consideration of the third.

Like the earlier cases that barred plaintiffs, *Nash* unquestioningly and inappropriately applied a contract rule to a tort case. Unlike the earlier cases, *Nash* attempted to explain why recovery was permitted in illegal fight cases but denied in illegal abortion cases. That explanation failed, however, not only because the asserted distinction is spurious,[194] but because that distinction did not explain the result. Assuming, as *Nash* did, that the purpose of the statute making fights criminal was to protect fighters from each other, that could explain why fighters' tort claims were not barred by their criminal conduct: the fighters came within one of the exceptions to the bar and could recover.[195] Assuming that the abortion statute was not intended to offer women any protection from the ravages of negligently performed illegal abortions, that could explain why these women's claims did not come within the exception to the bar that covered illegal fighters. Nevertheless, their claims came under one or more of the other exceptions to the bar, exceptions which *Nash* never considered.

H. *Oklahoma (1936)*

In *Bowlan v. Lunsford*,[196] the Oklahoma Supreme Court prohibited suit by a woman who, as a result of an illegal abortion, "lay for weeks near the point of death."[197] The reason given was that the courts "should not give dignity to a cause of action based upon an immoral or illegal act whether the same is based upon a contract or on a tort."[198] *Bowlan's* support for its decision to deny plaintiff compensation for her serious injuries were: (1) references to the part of *Hunter* that quoted the contract rule and then stated, without authority or explanation, that the rule applied in tort and (2) a quotation from the dissent in *Olmstead v. United States*, a case in which the Supreme Court permitted those who had illegally obtained

192. *Compare* IDAHO CODE § 17-1810 (1932) (mandating two to five year prison terms for the abortionist), *with id.* § 17-1811 (mandating one to five year prison term for the woman).

193. *See* IDAHO COMP. STAT. § 8281 (1919) (permitting abortions that were necessary to save women's lives). The provision demonstrates that the legislature intended to protect women, not only fetuses.

194. For further discussion of how this explanation failed, see *supra* notes 162-92 and accompanying text.

195. Tellingly, only one fight case even raised the possibility that plaintiff's criminal conduct should bar him from recovering; all others ignored the issue. *Nash* bars plaintiff by relying on a "rule" that the vast majority of fight cases never even considered.

196. 54 P.2d 666 (Okla. 1936).

197. *Id.* at 667.

198. *Id.*

evidence to use that evidence against the victims of their improper conduct. *Bowlan* provided no analysis of why the contract bar should be extended to tort or why the *Olmstead* dissent was either persuasive or applicable. As previously discussed, neither the contract cases nor *Olmstead* show that the bar should be used in tort suits based on abortions.[199] Thus, *Bowlan*, like its predecessors, lacks a strong foundation.

Equally disturbing, *Bowlan* reached its conclusion even though it contradicted three of the *Bowlan* court's recent decisions permitting tort suits based upon "an immoral or illegal act." Some six years before *Bowlan*, the Supreme Court of Oklahoma had permitted recovery for the death of a participant in an illegal fight, and it had done so without even considering the possibility that recovery should be barred because the death was a result of decedent's criminal conduct.[200] Four years later, in *Hulls v. Williams*,[201] a thief was allowed to sue for injuries sustained during his apprehension and arrest.[202] Again, the court did not discuss whether the relation between these injuries and plaintiff's criminal conduct should prevent his recovery. In *Bowlan*, however, the relation between the plaintiff's crime and her injury, which was not even worthy of discussion in *Teeters* and *Hulls*, was sufficient to bar the lawsuit, and to do so without any mention of *Teeters* or *Hulls*.

Bolwan did refer to the third Oklahoma case in which a criminal had been permitted to recover for injuries inflicted as a result of his crime, *Colby v. McClendon*.[203] In *Colby*, the court held that a person injured during an illegal shootout could recover despite his criminal conduct in participating in the shooting.[204] *Colby* noted that some states held that "[w]here parties engage in a mutual combat in anger, the act of each is unlawful, and relief will be denied them in a civil action."[205] *Colby*, however, concluded that it would be against public policy to deny relief in cases of mutual combat with deadly weapons, and so rejected the rule that denied recovery.[206] *Bowlan* approved of *Colby*.[207] The court apparently concluded that, although public policy permitted recovery by those in-

199. For a discussion of *Olmstead* and the contract cases, see *supra* notes 39-45 and accompanying text.

200. *See* Teeters v. Frost, 292 P. 356, 356 (Okla. 1930). *Teeters* did consider whether the suit should be barred because decedent had consented to defendant's conduct. The court concluded that decedent's consent should not prevent the suit because "[t]he rule of law is therefore clear and unquestionable that consent to an assault is not justification. The exception to this general rule embraces only those cases in which that to which assent is given is a matter of indifference to public order." *Id.*

201. 29 P.2d 582 (Okla. 1934).

202. *See id.* at 584.

203. 206 P. 207 (Okla. 1922).

204. *See id.* at 208.

205. *Id.* at 209.

206. *See id.*

207. *See* Bowlan v. Lunsford, 54 P.2d 666, 668 (Okla. 1936).

jured while trying to illegally shoot someone else, public policy demanded that no compensation be given to a woman who hovered near death for weeks as a result of illegally entrusting her life to an abortionist.

According to *Bowlan*, these results were required because Oklahoma's abortion statutes "were enacted and designed for the protection of the unborn child" and not the woman, whereas Oklahoma's shooting statutes presumably were designed to protect shooters.[208] The court offered no reason why the legislature would want to protect a person who tried to shoot someone but not a woman who had an abortion. The only authority cited for this conclusion was *Nash*, which had reached a similar conclusion about Idaho abortion statutes based on dictum from a case interpreting Kansas abortion statutes.[209] Quite obviously, neither the Idaho court interpreting Idaho statutes nor the Kansas court interpreting Kansas statutes had anything to say about the purposes of the Oklahoma abortion statutes. Furthermore, the Oklahoma statutes provided that abortions were legal when necessary to preserve the woman's life,[210] evidence that the legislature had enacted and designed the statute, in part, to protect women. *Bowlan's* conclusion that the Oklahoma legislature wanted to protect those who participated in shoot outs and fights but not women who had abortions is illogical and contradicted by the terms of the statutes.

The court's failure to discuss two of its own cases that were directly on point and that permitted recovery by criminals injured during their criminal activities, and its strained distinction of *Colby* compound its more fundamental error—the failure to consider whether an extension of the contract bar to tort suits was desirable.

Bowlan is subject to criticism on yet another ground. The court noted that the rule prohibiting suit was subject to limitations and exceptions, but concluded, without explanation, that all exceptions actually were part of the not *in pari delicto* exception.[211] This conclusion is incorrect as to the

208. *Bowlan*, 54 P.2d at 668. *Bowlan* does not say why the legislature's intent was important. Presumably though, legislative intent was important because the court accepted the following two rules: (i) where the criminal law was intended to protect plaintiff from defendant, plaintiff's intentional tort suit was not barred by his consent, and (ii) a plaintiff who was to be protected by the criminal law came within an exception to the bar on suit for damages incurred by a criminal plaintiff.

209. *See* Nash v. Meyer, 31 P.2d 273, 276-77 (Idaho 1934).

210. *See* OKLA. STAT. § 1834-1835 (1931).

211. *See Bowlan*, 54 P.2d at 669. The *Bowlan* Court concluded that plaintiff did not come within the not *in pari delicto* exception, and found that "plaintiff is not innocent because she submitted to the operation for abortion." But the issue is not whether plaintiff was innocent, but whether she and defendant were in equal fault. The legislature had concluded that a person, like the *Bowlan* defendant, who advised a woman to have an abortion should be subject to imprisonment for a period three times as long as the maximum that could have been imposed on the woman who had an abortion. *Compare* OKLA. STAT. § 1835 (1931) (punishing women who participated in abortion), *with id.* § 1834 (punishing person who advised abortion). Even if plaintiff was not innocent, she and defendant do not appear to have been *in pari delicto*.

exception that permits plaintiff to sue if doing so would further public policy; it is debatable as to the exception that permits suit where plaintiff was intended to be protected. *Bowlan* appears to fit under both of these exceptions.[212] Nevertheless, they were totally ignored.

In 1964, *Henrie v. Griffith*[213] gave the Supreme Court of Oklahoma an opportunity to reconsider *Bowlan*.[214] Despite the numerous flaws in the *Bowlan* opinion, *Henrie* not only approved of the decision, but expanded it by holding that the estate of a woman who died because of the negligence of an abortionist could not recover for the injuries negligently inflicted during the illegal abortion, although the estate could recover for decedent's injuries that were caused by the abortionist's negligent post-operative care.[215] Adding insult to injury, the court stated that this recovery was permitted because the doctor had no "right to abandon his patient,"[216] implying that doctors (and others) had a "right" to negligently perform illegal operations. Thus, in 1964 the Supreme Court of Oklahoma remained convinced that public policy required that the families of women killed by negligently performed illegal abortions be denied recovery for their injuries, even though public policy permitted recovery by men injured as a result of their participation in criminal shootouts, illegal fights and thefts.

I. *Virginia (1949)*

In *Miller v. Bennett*[217] the Supreme Court of Appeals of Virginia, reversing a jury verdict for plaintiff, concluded that the death of a woman from an illegal abortion to which she consented could not give rise to a cause of action, even though the abortion had been negligently performed.[218] The *Miller* opinion revealed some confusion between the rule barring recovery by criminals and the rule barring recovery in intentional tort for injuries caused by conduct to which plaintiff had consented.[219] The court held that the general rule prohibiting recovery by a party who willingly participated in an immoral or illegal act, applied in tort cases because of the maxim *volenti non fit injuria*.[220] The fact that a plaintiff has

212. Public policy clearly would be advanced by permitting suits like *Bowlan* because they would deter illegal abortions, deter negligence in the performance of abortions, lead to additional prosecutions, and prevent some criminals from profiting from their crimes. As to the exception for cases where the statute was intended to restrain and protect, there can be no doubt that the statute was intended to restrain abortionists, and the fact that abortions necessary to save women's lives were permitted is evidence that women's health was of concern to the legislature.

213. 395 P.2d 809 (Okla. 1964).

214. *See id.* at 810-11.

215. *See id.* at 811.

216. *See id.* (quoting *Androws v. Coulter*, 1 P.2d 320, 321 (Wash. 1931)).

217. 56 S.E.2d 217 (Va. 1949).

218. *See id.*

219. *See id.* at 218-19.

220. *See id.* at 219.

no right to complain about conduct to which she consented, however, has no relevance to whether a plaintiff should be permitted to sue for injuries tortuously inflicted on her while she was committing a crime. Plaintiff's consent, if valid, means that the consented-to conduct was not tortuous, a totally distinct issue from whether plaintiff's participation in a crime should bar her from suing for injuries that were undeniably tortuously inflicted. The two possible defenses—consent and illegality—are not related. Nevertheless, the *Miller* opinion treated them as one, exposing the court's confusion.

As to the possibility that the plaintiff's consent barred her intentional tort claim, plaintiff asked the court to apply the prevailing rule, that consent to criminal conduct involving a breach of the peace did not bar plaintiff's intentional tort suit for injuries resulting from the consented-to conduct.[221] *Miller* rejected that argument, relying heavily on an article by Professor Francis H. Bohlen in which he argued that consent to illegal conduct usually should bar plaintiffs from suing for intentional torts.[222] The *Miller* court, however, failed to note Professor Bohlen's conclusion that "there appear to be more cogent reasons of public policy" to permit intentional tort suits arising from abortions.[223] Hence, *Miller's* implication that the article supported its conclusion is dubious.

Moreover, decedent's consent to the abortion should not affect the plaintiff's negligence claim because decedent had not consented to a negligently performed abortion. The only possible basis for barring plaintiff's negligence claim was the conclusion that courts should not aid those who were injured during the course of their illegal or immoral acts. It is interesting that Professor Bohlen's article, heavily relied on by *Miller*, stated that such a bar probably would be improper.[224] As Professor Bohlen stated:

> It is one thing to hold that one who engages in an illegal transaction cannot ask a court of the state whose laws he has broken to relieve him from the intended or necessary consequences of his misconduct; but it is quite another thing to add to the punishment prescribed for his offense, the enormous additional penalty of outlawry, by denying him the right to recover for any injury which he receives while engaged in the prohibited act, though . . . it is not a necessary and contemplated incident of the crime in which they were engaged.[225]

In accordance with that statement, Professor Bohlen concluded that *Hunter v. Wheate*[226] (also relied on by *Miller*) "probably went too far [in

221. *See* Bohlen, *supra* note 26, at 821.
222. *See id.* at 819-20.
223. *Id.* at 832.
224. *See id.* at 821 n.8.
225. *Id.*
226. 289 F. 604 (D.C. Cir. 1923).

prohibiting recovery for injuries negligently inflicted because] the illegal operation in which the plaintiff . . . participated merely provided the opportunity for the infliction of the injury for which she asked redress."[227] Despite its reliance on the Bohlen article, *Miller* ignored this conclusion.

Furthermore, the reasons Professor Bohlen gave (and *Miller* accepted) for prohibiting most intentional tort recoveries for injuries caused by conduct to which plaintiffs had consented, support permitting recovery in negligence. Professor Bohlen concluded that plaintiffs' consent to illegal conduct usually should bar their intentional tort suits because consent to legal conduct would have that result.[228] Thus, any other result would "pervert what is today a purely private remedy into a device to punish and so prevent crime," improperly using the civil law as "a prop to the inefficient administration of the criminal law."[229] If altering the outcome of an intentional tort suit to support the criminal law improperly perverts the civil law, altering the outcome of a negligence case to support the criminal law must be a similar improper perversion. Yet *Miller*, with no explanation, concluded that in an abortion case the civil law of negligence had to be changed, therefore, making the civil law serve as a "prop to the inefficient administration of the criminal law."[230] *Miller's* conclusion that plaintiff's negligence claim should be barred contravenes both Professor Bohlen's statement about *Hunter* and his rationale.

The only other support cited by *Miller* for its conclusion are four Virginia cases, none of which was based in tort.[231] *Miller* offered no explanation of why these cases should be expanded to apply in tort. As previously noted, the reasons offered to support the bar in other contexts do not support the bar's use in tort cases.[232]

Furthermore, the *Miller* plaintiff argued that Virginia had already recognized that those injured as a result of their criminal conduct could recover, citing *Matthews v. Warner*.[233] *Matthews* involved a wrongful death claim.[234] Part of the defense raised in *Matthews* was that recovery should be denied because the decedent had willingly engaged in the affray that led to the death.[235] In keeping with that theory, defendant asked the court to instruct the jury that, if decedent's death "was the result of his own misconduct or neglect, then the jury must find for the defendant."[236]

227. Bohlen, *supra* note 26, at 823 n.10.

228. *See id.* at 830.

229. Miller v. Bennett, 56 S.E.2d 217, 220 (Va. 1949) (quoting Bohlen, *supra* note 26, at 830).

230. *Id.* at 221.

231. *See id.* at 219 (citing cases).

232. For a discussion of the reasons why the bar does not apply in tort, see *supra* notes 25-46 and accompanying text.

233. 70 Va. 570 (1877).

234. *See id.* at 571.

235. *See id.* at 578.

236. *Id.*

The *Matthews* court refused to give that instruction, stating that "if the death was caused by a wrongful act, . . . it is still a wrongful act[ ] which is actionable."[237] That language, which indicated that a wrongdoer could recover, was ignored in *Miller.*

Having ignored the pertinent language in *Matthews, Miller* sought to explain that case by stating that if the *Matthews* decedent had consented to "engage in the affray, . . . that consent was no justification for Matthews' use of a deadly weapon."[238] Although that is a true statement, the only way that would distinguish *Matthews* from *Miller* would be if the *Miller* decedent's submission to an illegal abortion was justification for defendant to kill her by negligently performing that abortion. Presumably the *Miller* court would have found that proposition difficult to accept, but the court failed to consider the obvious implications of its conclusions.

Another flaw in *Miller* is the failure to consider whether the recognized exceptions to the bar applied. Decedent and defendant probably were not *in pari delicto*[239] because, under Virginia law, decedent had not committed a crime and was not even an accomplice.[240] Further, decedent appears to have been a person who the abortion statute was intended to protect.[241] Finally, the *Miller* defendant's criminal and tortuous conduct caused great, disproportionate hardship to the decedent, her child and her husband, and numerous public policy objectives would have been achieved by permitting recovery.[242] The case appears to come under all three exceptions to the bar, but *Miller* considered none of them.

Thus, to bar plaintiff from recovering for negligence, *Miller.* (i) ignored the rationale and conclusions of the Bohlen article on which it relied; (ii) inappropriately applied, without explanation, a rule which in other situations had prevented recovery; (iii) mischaracterized one of the court's own earlier decisions; and (iv) failed to consider whether recog-

237. *Id.*

238. Miller v. Bennett, 56 S.E.2d 217, 220 (Va. 1949).

239. Virginia case law recognized the "not *in pari delicto*" exception, at least in equity cases. *See* Waller v. Eanes, 157 S.E. 721, 724 (Va. 1931).

240. *See Miller,* 56 S.E.2d at 221 (stating that "[t]he Virginia anti-abortion statute . . . does not make the woman who consents to the treatment an accomplice"); *see also* VA. CODE ANN. §4401 (Michie 1942) (repealed 1950) (failing to specify in statute that woman's conduct was criminal which usually was interpreted to mean that woman had not committed crime); Note, *Recent Decisions Criminal Law—Abortion—No Crime Committed By Woman,* 26 COLUM. L. REV. 101, 101 (1926).

241. *See* VA. CODE ANN. § 4401. This statute provided that abortions were not illegal if "done in good faith, with the intention of saving the life of such woman," persuasive evidence that the legislature wanted to protect women, not just fetuses. *Id.*

242. Virginia had recognized that relief could be granted to a party injured through his or her own immoral conduct if doing so would promote public policy. *See Eanes,* 157 S.E. at 723; Clay v. Butler, 112 S.E. 697 (Va. 1922). Permitting suits like *Miller* would deter illegal abortions, deter the negligent performance of those abortions, prevent some criminals from profiting from their crimes, and increase the number of crimes revealed to the authorities.

nized exceptions to the bar applied. The court's implication that defendant was justified in performing the abortion negligently lends additional credence to the suspicion that this remarkably pro-defendant opinion was fueled by the court's lack of empathy for women who had abortions.

J. *California* (1954)

Plaintiff in *Sayadoff v. Warda*[243] consented to an illegal abortion that necessitated two additional operations and treatment with drugs, rendering her sterile and in ill health for the rest of her life.[244] She sued her paramour for her injuries, claiming that he had importuned her to have the abortion, made all the arrangements, and paid for the abortion, thereby conspiring with the abortionist to commit assault and battery on her.[245] After plaintiff's opening statement to the jury, the trial court dismissed her suit.[246] On appeal, the court stated that "[i]f an abortion is an actionable tort, the opening statement is sufficient to show a conspiracy."[247] The court also noted that, in a conspiracy, each conspirator, as a joint tortfeaser, is liable "'for all damages ensuing from the wrong, irrespective of whether or not he was a direct actor and regardless of the degree of his activity.'"[248] Thus, the court established that the defendant, as a conspirator, would be liable for the abortionist's actions if abortion were a tort.[249] The court, however, affirmed the nonsuit on the ground that plaintiff had consented to the abortion and thus could not sue for her injuries.[250]

In one way, *Sayadoff* was a stronger case for defendant than were most of those previously discussed: there was no allegation of negligence on the part of the abortionist.[251] Thus, the plaintiff was suing for damages sustained as a result of illegal conduct to which, as far as the case reveals, she had consented. The court's conclusion that a plaintiff should be barred by her consent to the criminal conduct, although debatable, was not unreasonable and was followed in a minority of jurisdictions.

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243. 271 P.2d 140 (Cal. Ct. App. 1954).

244. *See id.* at 141-42. Plaintiff's opening statement shows that, as a result of the "manner in which this abortionist . . . did do that abortion" plaintiff had to be treated with drugs and have two operations. *See* Transcript at 8-9, Sayadoff v. Warda, 271 P.2d 140 (Cal. Ct. App. 1954) (No. 15832).

245. *See Sayadoff,* 271 P.2d at 141-42.

246. *See id.* at 142.

247. *Id.*

248. *Id.* (quoting *Biggs v. Tourtas,* 206 P.2d 871, 876 (Cal. Dist. Ct. App. 1949)).

249. *See id.* (noting abortionist was co-conspirator).

250. *See id.* at 143.

251. Although it seems likely that an abortion that was performed in such a manner that the woman had to undergo treatment with drugs and have two additional operations including one to remove "female organs," and which, nevertheless rendered the woman "able to do little work," and assured that her "health will remain bad for the rest of her life" probably was negligently performed (*see id.* at 141-42), the opinion does not say that plaintiff alleged negligence.

California, however, was not one of those jurisdictions. Only five years earlier, in *Hudson v. Craft*,[252] the Supreme Court of California had reached the opposite conclusion, permitting a fighter to recover for injuries he had sustained during an illegal fight even though he had consented to the fight.[253] *Sayadoff* ignored *Hudson*, making no attempt to explain why a person's consent to an illegal abortion should bar her from recovering for injuries inflicted by that abortion, although a person's consent to an illegal fight did not bar that person from recovering for injuries inflicted by that fight.

The court's failure to discuss *Hudson* is especially striking because the plaintiff had argued that *Hudson* applied and the positions of the parties in the two cases were remarkably similar. The *Sayadoff* defendant, who arranged the illegal abortion, like the *Hudson* defendant, who arranged the illegal fight, was "the activating force in procuring the occurrence."[254] Similarly, the *Sayadoff* plaintiff resembled the *Hudson* plaintiff in that they both knowingly agreed to participate in an illegal activity that resulted in their injuries. Furthermore, the abortion statute in *Sayadoff* is similar to the fight statutes in *Hudson*[255] because there is substantial evidence that it was enacted, at least in part, to protect persons like the plaintiff. First, there was an obvious need to protect women from being injured by illegal abortions. At about the time the California statute was amended in 1935, more than 8,000 women a year died in this country as a result of illegal abortions and many more were seriously injured.[256] Second, the statute permitted abortions necessary to save the woman's life while it criminalized abortions even if the woman were not pregnant, provisions which show that the legislature wanted to protect women, not just fetuses. Finally, several later California cases stated that a woman who had an illegal abortion was the victim of a crime, and one likely motivation for criminalizing conduct is to protect future victims.[257]

252. 204 P.2d 1 (Cal. 1949).

253. *See id.* at 4.

254. Reply Brief for Appellant at 4, Sayadoff v. Warda, 271 P.2d 140 (Cal. Ct. App. 1954 (No. 15832). In fact, the *Sayadoff* defendant was much more closely associated with the crime because his conduct in impregnating plaintiff was the reason the crime was committed. *See id.* Furthermore, he "importuned" her to have the abortion. Given the relationship, this importuning was greater pressure to commit the crime than any exerted by the fight promoter in *Hudson*.

255. *See Hudson*, 204 P.2d at 4 (finding that one purpose of boxing statutes was to protect fighters from "uncontrolled conduct" of fight promoters).

256. *See* FREDERICK J. TAUSSIG, ABORTION—SPONTANEOUS AND INDUCED—MEDICAL AND SOCIAL ASPECTS 28 (1936) (noting that 8,000 to 10,000 women died each year in 1930s because of illegal abortions); Don Harper Mills, *A Medicolegal Analysis of Abortion Statutes*, 31 S. CAL. L. REV. 181, 182 (1957-58) (concluding that illegal abortions result in appalling numbers of deaths and injuries) (citing NICHOLSON J. EASTMAN, WILLIAMS OBSTETRICS 495 (10th ed. 1950)).

257. *See, e.g.*, People v. Davis, 276 P.2d 801, 807 (Cal. 1954); People v. Tatge, 219 Cal. App. 2d 430, 432 (Ct. App. 1963); Marlo v. State Bd. of Med. Examiners, 246 P.2d 69, 70 (Cal. Ct. App. 1952); People v. Emery, 221 P.2d 223, 223-24 (Cal. Ct. App. 1950).

The evidence that one of the purposes of the California abortion statute was to protect women is compelling. In fact, the California Supreme Court later stated that the abortion statute was "designed in 1850 to protect women from serious risks to life and health,"[258] a statement with which numerous commentators agree.[259] The parallels between *Hudson* and *Sayadoff* are clear. Yet the *Sayadoff* court, an intermediate appellate court bound by *Hudson,* ignored plaintiff's reliance on *Hudson,* never considering the possibility that *Hudson* applied.

Why would the court fail to see the relevance of *Hudson?* Some language in *Sayadoff* may provide a clue. For example, *Sayadoff* noted:

> It is . . . highly doubtful that any deterrent would be afforded by allowing damages in such a case as this. Such holding might well encourage a line of conduct such as we have before us,—the submission to abortions with no complaint if they are successful, but with the assurance of financial reward if the woman participant is injured.[260]

Receiving compensation for having to undergo and pay for two operations, for losing all "female organs," for being deprived of health for the rest of your life, and for being rendered unable to work, could be described as a "financial reward" only by those who attached little, if any, value to the health and welfare of the person who sustained such injuries. Further indication of this court's negative view of women is its suggestion that women were so devoid of common sense that the possibility that they might be compensated for injuries inflicted on them by the abortionist would cause women to have illegal abortions, even though in doing so they would court injury and death, as well as the disgrace and possible prosecution that accompanied any suit seeking compensation.[261]

Similarly revealing is the court's conclusion that an abortion plaintiff's consent should prevent her from suing even for injuries caused by the abortionist's negligence (to which she had not consented), because "[i]t would seem unwise to attempt to set up standards of skill in [abortion] cases."[262] *Sayadoff* did not explain why it was "unwise" for courts which routinely set up just standards of skill in other malpractice cases, to do so in abortion cases. The only explanation appears to lie in the mini-

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258. People v. Belous, 458 P.2d 194, 201 (1969).

259. *See, e.g.,* Zad Leavy & Jerome M. Kummer, Criminal Abortion: Human Hardship and Unyielding Laws, 35 S. CAL. L. REV. 123, 134-35 (1962); Mills, *supra* note 256, at 183; Vernon G. Foster, Comment, *Criminal Law—Abortion—Legal or Illegal- Burden of Proof,* 23 S. CAL. L. REV. 523, 528-29 (1950); Kathryn G. Milman, Note, *Abortion Reform: History, Status and Prognosis,* 21 CASE W. RES. L. REV. 521, 529 (1970); James Voyles, Note, *Changing Abortion Laws in the United States,* 7 J. FAM. L. 496, 506 (1967).

260. Sayadoff v. Warda, 271 P.2d 140, 143 (Cal. Ct. App. 1954).

261. For a discussion of the reasons why permitting these suits will not encourage illegal abortions, see *supra* notes 35-38 and accompanying text.

262. *Sayadoff,* 271 P.2d at 143.

mal value the court accorded to the lives and health of these women, a valuation that the court confirmed by concluding "the interest of the state in the individual [woman's] health would seem somewhat remote."[263]

How could a court conclude that the state's interest in protecting some women's lives was "somewhat remote," and that courts should not have to set up "standards of skill" in cases involving serious injury and death suffered by those women? How could a court state that compensating a woman for horrendous injuries and medical expenses would be giving her a "financial reward?" How could a court ignore binding precedent which had been pointed out to it by the parties? Perhaps this court's certainty that women are so irrational that they will be enticed to undergo illegal, dangerous operations by the possibility that they (or their estates) might recover for some of the injuries they sustain from those operations suggests an answer: the court was unable to understand, much less sympathize with, these women and the wrenching predicament they faced. How much easier it was for these judges to understand and sympathize with the fighter in *Hudson*, who engaged in illegal conduct to obtain five dollars.

K. *Illinois* (1954)

In *Castronovo v. Murawsky*,[264] plaintiff's wrongful death suit was dismissed.[265] Plaintiff had sued contending that defendant, who was not a doctor, had negligently performed an illegal abortion in defendant's home, resulting in the death of the woman on whom the abortion had been performed.[266] The court referred to a number of cases, and concluded, without discussing the persuasiveness of any of them, that "[t]he majority of jurisdictions deny a recovery, and, in our opinion, they are more in harmony with analogous decisions in our own jurisdiction."[267]

Unlike the other abortion cases denying recovery, *Castronovo* relied on the few non-abortion cases in which a plaintiff had been barred from suing in tort for injuries received as a result of plaintiff's criminal conduct.[268] These cases, however, were distinguishable from *Castronovo*. The

263. *Id.* at 143-44. The court asserted there was no reason to fear that these women would directly inconvenience the state because "it is highly speculative to assume that [in abortion cases] the injured person will become a public charge." *Id.* at 144. Plaintiff in *Sayadoff* was divorced and had custody of three children. *See id.* at 141. As a result of the abortion, she was able to do little work and the court agreed that she would remain in bad health for the rest of her life. *See id.* The possibility that plaintiff, an immigrant who had supported himself by working in a candy store, and her three children would become public charges was not at all speculative.

264. 120 N.E.2d 871 (Ill. App. Ct. 1954).

265. *See id.* at 875.

266. *See id.* at 871.

267. *Id.* at 874.

268. *See* Newton v. Illinois Oil Co., 147 N.E. 465, 468 (Ill. 1925); Gilmore v. Fuller, 65 N.E. 84, 87 (Ill. 1902); Kessinger v. Standard Oil Co., 245 Ill. App. 376, 380 (App. Ct. 1925); Fristoe v. Boedeker, 194 Ill. App. 52, 57 (App. Ct. 1915).

case most similar to *Castronovo* is *Newton v. Illinois Oil Co.*,[269] a wrongful death claim based on the death of a child while employed in violation of the child labor statues.[270] The child, like the decedent in *Castronovo,* had committed no crime; however, the suit was rejected because the beneficiaries of the wrongful death suit had committed a crime by permitting the child to work and were equally guilty with the defendant of causing the child's death.[271] The *Newton* court's refusal to compensate criminals for their injuries had little relevance to *Castronovo,* where the beneficiary of the wrongful death suit was not a criminal, but decedent's totally innocent child. Thus, *Newton* does not inexorably lead to the *Castronovo* decision. Nor do the other three cases cited by *Castronovo*: *Gilmore v. Fuller*,[272] *Kessinger v. Standard Oil Co.*,[273] and *Fristoe v. Boedeker*.[274] In all of those cases the injured person had committed a crime; the *Castronovo* decedent apparently had not.[275] Thus, *Castronovo* extended the holdings of those cases to prevent recovery by the estate of a person who was killed while engaging in immoral, but not illegal, conduct. Furthermore, none of the cases cited involved a situation that came within any of the acknowledged exceptions to the bar on recovery.[276] *Castronovo*, on the other hand, came within at least two of those exceptions.[277]

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269. 147 N.E. 465 (Ill. 1925).

270. *See id.* at 465-66.

271. *See id.* at 468.

272. 65 N.E. 84 (Ill. 1925).

273. 245 Ill. App. 376 (App. Ct. 1925).

274. 194 Ill. App. 52 (App. Ct. 1915).

275. The Illinois abortion statute did not state that it was a crime to have an abortion. Such an omission is normally interpreted to mean that having an abortion is not a crime. *See Recent Decisions—Criminal Law-Abortion No Crime Committed By Woman,* 26 COLUM. L. REV. 101, 101-02 (1926).

276. *See Gilmore*, 65 N.E. at 85 (involving claim by one participant in illegal charivari against another); *Kessinger*, 245 Ill. App. at 377-78 (seeking recovery from defendant because defendant interfered with plaintiff's ability to criminally take sand from Mississippi River); *Fristoe*, 194 Ill. App. at 53-54 (involving claim by one illegal hunter against another). In all these cases, plaintiffs and defendants were *in pari delicto.* In none of them was the protection of the plaintiff a purpose of the criminal statute. In none of these cases would public policy be furthered by permitting the suit. Thus, these cases did not come within any of the exceptions to the rule that prevented recovery by those injured as a result of their criminal conduct.

277. There is also a strong argument that this case came under the first exception: that plaintiff is not barred if plaintiff and defendant were not *in pari delicto.* Decedent's fault clearly was less than defendant's. Defendant not only had committed the crime of abortion, she also had performed the abortion negligently and thereby caused the woman's death. Under Illinois law, such a person was guilty of murder (*see Castronovo*, 120 N.E.2d at 871 (discussing ILL. REV. STAT. ch. 38 § 3 (1953)), a considerably more serious crime than abortion. *Compare* ILL. STAT. ANN. ch. 37 § 281 (Jones 1936) (stating that penalty for murder in Illinois was death or incarceration for minimum of 14 years and maximum of life), *with* ILL. STAT. ANN. ch. 37 § 015 (Jones 1936) (stating that penalty for abortion was imprisonment for one to ten years). Furthermore, the Illinois abortion statute did not state that it was a crime to have an abortion, making it doubtful that the decedent committed

The first clearly applicable exception, which had already been accepted by Illinois, permitted recovery when the statute was intended to protect people in plaintiff's position from harm caused by the defendant.[278] The abortion statute specifically provided that the abortionist's crime was increased to murder if the woman died,[279] and that abortions were not illegal if they were needed to protect women's lives.[280] Thus, *Castronovo* came within this exception. Another exception to the prohibition applied because losses suffered by both decedent and her surviving family were great and disproportionate, and because the public policies of deterring illegal abortions, uncovering additional illegal abortions, preventing criminals from profiting from their crimes and encouraging the use of reasonable care in those illegal abortions that were performed, all would have been furthered by permitting this suit. Furthermore, it appears that decedent's surviving child would have been less likely to become a public charge if the estate had been permitted to recover from defendant for the injuries the child had sustained by being deprived of her mother's support. Public policy clearly would have been advanced by permitting this plaintiff to recover. Thus, *Castronovo's* conclusion that the decision was "more in harmony with" prior Illinois cases is questionable.

The court did offer some additional explanation for its conclusion, stating "[t]he entire problem represents a conflict between the doctrine that every person should be entitled to a remedy to compensate for injuries suffered and the theory that the courts should not lend their aid to a wrongdoer."[281] No such conflict existed in *Castronovo,* however, because no wrongdoer was seeking aid. The court's decision to deny compensa-

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any crime. *See Recent Decisions, supra* note 275, at 101. Thus, the statute makes it clear that the legislature believed that the woman and the abortionist were not equally at fault, a conclusion that is borne out by the facts of *Castronovo.* This decedent, who was the sole means of support for her family, was driven to seek the abortion by her inability to support another child. *See Castronovo,* 120 N.E.2d at 871. Quite clearly, this desperate woman who risked—and paid—so much to have an abortion, was not in equal fault with the unlicensed medical practitioner who negligently performed illegal operations for profit, thereby killing at least one patient. Nevertheless, the court could have determined that decedent acted with serious moral turpitude, and so concluded that she did not come under the more exacting version of the "not in *pari delicto*" exception to the bar. It is at least questionable, however, that the decedent's moral turpitude should have prevented recovery on behalf of her innocent child, the person who would have benefited from this wrongful death suit.

278. *See* Thomas v. Riley, 114 Ill. App. 520, 521 (App. Ct. 1904) (permitting participant in illegal fight to recover for injuries despite criminal conduct). *Thomas,* like almost all illegal fight cases, discussed only whether plaintiff's consent should bar plaintiff's recovery in intentional tort, ignoring the Illinois prohibition on recovery by those injured as a result of their illegal conduct. *See id.* at 522. Had the court considered the issue, *Thomas* could have explained the result by concluding that the fight statutes were intended, in part, to protect fighters.

279. *See* ILL. STAT. ANN., ch. 37 § 015.

280. *See id.*

281. *Castronovo,* 120 N.E.2d at 874-75 (Ill. App. Ct. 1954) (quoting *Consent and Civil Liability for Illegal Abortions,* 45 ILL. L. REV. 395, 395 (1950)).

tion to an innocent child who had been deprived of its mother's care and support by defendant's tort cannot possibly be explained by the court's desire not to aid wrongdoers.

Nevertheless, the court assumed the existence of such a conflict and decided to resolve it by considering public policy.[282] The only public policy that *Castronovo* considered was deterring illegal abortions.[283] The court stated that unless there was "a substantial showing that allowing . . . recovery will result in fewer illegal abortions," the policy against aiding wrongdoers should prevail.[284] The court neither offered a reason why the policy against aiding wrongdoers was more important than the policy of compensating the injured, nor explained why the preference for that policy was so strong that it could be overcome only by a substantial showing of increased deterrence, rather than by, for example, some evidence of additional deterrence. This high standard of proof is particularly untoward here where the beneficiary of this lawsuit was totally innocent, the decedent had committed no crime, and one result of denying plaintiff's claim was to aid the only criminal involved by protecting the profits she made from her crime. Moreover, thoughtful consideration would have shown that "allowing . . . recovery would result in fewer illegal abortions,"[285] thus satisfying the court's "substantial showing" requirement. Finally, there is no reason why the only relevant public policy objective was deterring illegal abortions. Permitting these suits would deter negligence, unmask more criminals and deprive some criminals of the profits they otherwise made from their crimes, all important public policy objectives. The gains achieved by permitting these suits far outweigh any possible loss.

L. *New York* (1977)[286]

On June 6, 1970 Ismael D'Javid performed an illegal abortion on Mar-

282. *See id.* at 875.

283. *See id.*

284. *Id.*

285. *Id.*

286. This section begins with a discussion of Reno v. D'Javid, 379 N.Y.S.2d 290 (Sup. Ct. 1976), *rev'd*, 390 N.Y.S.2d 421 (App. Div.), *aff'd*, 369 N.E.2d 766 (N.Y. 1977). Although *Reno* is the first appellate case to decide the specific issue, two trial courts had earlier held that there could be no suit for injuries sustained in an illegal abortion to which the woman had consented. *See* Herko v. Uviller, 114 N.Y.S.2d 618, 619 (Sup. Ct. 1952); Larocque v. Conheim, 87 N.Y.S. 625, 625 (Sup. Ct. 1904). The importance of the earlier cases is perhaps best shown by the fact that in *Reno* neither the Appellate Division, the Court of Appeals, nor the dissent at the Court of Appeals referred to either case.

Nor does either of the earlier cases provide a convincing explanation as to why these suits should be barred. *Herko* merely cited *Larocque*. *See Herko*, 144 N.Y.S.2d at 619. *Larocque*, a case brought by the administrator of the estate of a teenager who died as the result of an illegal abortion, relied on three authorities for the conclusion that a person may not recover for injuries received in a transaction in which he was an unlawful participant: (i) *Thomas M. Cooley, Law of Torts* (1880); (ii) *Joel Prentiss Bishop, Commentaries on the Non-Contract Law* § 54

garet Reno, perforating Ms. Reno's uterus.[287] Ms. Reno alleged that defendant had negligently performed the abortion and exacerbated those injuries by negligent post-operative care.[288] As a result, Ms. Reno was brought "to the threshold of death" and had to have her reproductive organs removed.[289] Ms. Reno sued, charging malpractice, assault, breach of warranty and sodomy.[290] Defendant moved to dismiss because the abortion had been illegal.[291] The trial court denied the motion, but the Appellate Division reversed and dismissed all causes of action except the one for sodomy.[292] The Court of Appeals affirmed.[293]

(1889); and (iii) *Gregg v. Wyman*, 58 Mass. (1 Cush.) 322 (1849). *See Larocque*, 87 N.Y.S. at 627.

Larocque's reference to Cooley is to a section dealing with contribution among tortfeasors, and thus has no application to the facts of *Larocque*. *See* THOMAS M. COOLEY, LAW OF TORTS 149 (1880). Cooley, however, in another section did indicate that wrongdoers should not be permitted to sue for their injuries, but went on to contradict that statement by permitting criminals to recover for injuries received during illegal fights. *See id.* at 159. Thus, Cooley provided minimal support for *Larocque's* conclusion.

Bishop stated that those injured as a result of their participation in a crime could not recover because the courts "cannot lawfully assist a suitor in any effort to break" the law. JOEL PRENTISS BISHOP, COMMENTARIES ON THE NON-CONTRACT LAW § 54, at 22. Plaintiff in *Larocque* had not participated in any crime; and, permitting a suit by the administrator of the estate of a person killed as a result of an illegal abortion would not assist anyone to break the law. To the contrary, permitting such a suit would compensate innocent survivors at the expense of a criminal, thereby depriving the criminal of the law's assistance in protecting his profit. Bishop's reasoning supports recovery in *Larocque*. Furthermore, even if permitting suit in *Larocque* would assist someone in breaking the law, it is not clear that Bishop would have required that this plaintiff be barred because Bishop acknowledged that there were limitations on the prohibition on suits, stating that those limitations were "a little shadowy." *Id.* § 59, at 23. Bishop, like Cooley supplies little support for *Larocque*.

Larocque's last authority for its conclusion that plaintiff was barred by decedent's participation in a crime was a Massachusetts case, *Gregg v. Wyman*, 58 Mass. (1 Cush.) 322 (1849). Not only had the pertinent part of *Gregg* been overruled long before *Larocque* (*see Hall v. Corcoran*, 107 Mass. 251 (1871)), *Gregg*'s prohibition on suit did not appear to apply because, according to *Gregg*, an exception might exist "where the parties to an unlawful transaction are not regarded as *in pari delicto*." *Gregg*, 58 Mass. (1 Cush.) at 327. Certainly the parties in *Larocque*—the innocent administrator of decedent's estate and the older man who, through a fraudulent promise of marriage, seduced the teenage decedent and then caused her to submit to the illegal abortion that ultimately killed her—were not *in pari delicto*. *See Larocque*, 87 N.Y.S. at 625-26. Even, the decedent and the defendant were not equally at fault. Thus, *Gregg* itself did not support *Larocque*. Even if it had, it had been overruled.

287. *See* Reno v. D'Javid, 369 N.E.2d 766, 767 (N.Y. 1977) (Fuchsberg, J., dissenting) (stating plaintiff's injuries).

288. *See Reno*, 379 N.Y.S.2d at 292.

289. *Reno*, 369 N.E.2d at 767 (Fuchsberg, J., dissenting).

290. *See Reno*, 379 N.Y.S.2d at 291.

291. *See id.* at 291-92.

292. *See* Reno v. D'Javid, 390 N.Y.S.2d 421, 422 (App. Div. 1977), *reversing*, 379 N.Y.S.2d 290, *aff'd*, 369 N.E.2d 766 (N.Y. 1977).

293. *See Reno*, 369 N.E.2d at 677.

Reno v. D'Javid[294] raised two issues not relevant in earlier cases. First, the criminal statute violated by Ms. Reno and the defendant was almost certainly unconstitutional. Second, that statute had been repealed before plaintiff had the abortion, although the repeal did not go into effect until twenty-five days after the abortion.[295]

Reno was the first abortion injury tort case to be decided after *Roe v. Wade*.[296] *Roe*, which indicated that many state abortion laws were unconstitutional, raised a serious question as to the constitutionality of the New York abortion statute which criminalized all abortions save some done to preserve the woman's life. Nevertheless, the appellate courts relied on Ms. Reno's violation of that statute to deny her recovery, and they did so without considering whether that statute's almost certain unconstitutionality had any bearing. Assuming that criminals injured as a result of their crimes generally should be barred from suing in tort, that does not mean that a person injured as a result of "violating" an unconstitutional statute should be barred. Such a plaintiff did not participate in an illegal act, nor would the "paramount public policy imperative that the law . . . be obeyed" give any reason to bar such a plaintiff because there is no paramount public policy imperative that an unconstitutional law be obeyed.[297] The sole reason specifically mentioned by the Court of Appeals for rejecting Ms. Reno's claim offers no support for the court's conclusion if, as is probable, the statute she violated was unconstitutional.

In arguing that Ms. Reno should be barred, defendant faced an additional unique burden: the legislature had repealed the abortion statute before plaintiff's abortion, although the repeal did not go into effect until twenty-five days after that abortion. Thus, although Ms. Reno may have committed a crime, her criminal conduct arguably did not violate an important public policy, in which case the bar might not apply. The trial court found this argument persuasive and denied defendant's motion to dismiss, stating that "legislative action throughout the United States liberalizing [abortion] laws, and the amendment of New York Penal Law 125.05 and 125.50 legalizing certain abortions indicated a change in public policy which this Court cannot ignore."[298]

In reversing, the Appellate Division noted that both plaintiff and defendant had violated a criminal statute that was effective at the time of their conduct.[299] The court's entire consideration of the issues is as follows:

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294. 379 N.Y.S.2d 290 (Sup. Ct. 1976), *rev'd*, 390 N.Y.S.2d 421 (App. Div. 1077), *aff'd*, 369 N.E.2d 766 (N.Y. 1977).

295. *See id.* at 292.

296. 410 U.S. 113 (1973).

297. *Reno*, 369 N.E.2d at 766.

298. *Reno*, 379 N.Y.S.2d at 294.

299. *See* Reno v. D'Javid, 390 N.Y.S.2d 421, 422 (App. Div. 1977), *reversing*, 379 N.Y.S.2d 290 (Sup. Ct. 1976), aff'd, 367 N.E.2d 766 (N.Y. 1977).

> Plaintiff, having participated in an illegal act, may not profit therefrom. As was stated in *Riggs v. Palmer* (citation omitted) "No one shall be permitted to profit by his own fraud, or take advantage of his own wrong, or to found any claim upon his own iniquity, or to acquire property by his own crime. These maxims are dictated by public policy, have their foundation in universal law administered in all civilized countries, and have nowhere been superseded by statutes."[300]

Thus the court assumed the legislature's repeal of the statute was irrelevant to the bar, a conclusion that the trial court's opinion shows is questionable. The Court of Appeals agreed, affirming "on the memorandum at the Appellate Division," and adding only that the result was required by the "paramount public policy imperative that the law, whatever its content at a given time or for however limited a period, be obeyed."[301] The court did not say where it found this public policy imperative; it did not consider why the objective of obtaining compliance with the law—especially an unconstitutional law that had been repealed—was so important that it justified depriving tortuously injured people of compensation,[302] even when doing so protected the profits of more serious criminals; it did not explain why denying compensation would encourage obedience to the law. As discussed previously, there was every reason to expect that prohibiting these torts suits would lead to more illegal abortions, thus undermining the "paramount public policy imperative" and ensuring that more criminals would profit from their crimes.[303]

Putting aside the issues raised by the statute's repeal and its probable unconstitutionality, the *Reno* opinions are still problematic. The Appellate Division's only stated reason for refusing compensation to plaintiff was that she could not be permitted to profit from her crime, as explained in *Riggs v. Palmer*.[304] It is somewhat surprising that the court would take the

300. *Id.*

301. *Reno*, 369 N.E.2d at 766.

302. Six years after *Reno*, the Court of Appeals appeared to change its mind on this point. *See* Barker v. Kallash, 479 N.Y.S.2d 201, 203 (1984). In *Barker*, the court held that plaintiffs' criminal conduct would bar his recovery only if it was "serious criminal conduct." Thus, the court no longer was persuaded that obtaining compliance with the criminal law was such a "paramount public policy imperative" that it always justified depriving injured people of compensation. *See id.* Compensation was to be denied only if the crime was serious. *See id.* Conduct which the legislature and the governor had already determined would not be criminal could not possibly be "serious criminal conduct" simply because it occurred a few days before the effective date of the repeal. Thus *Reno* would have been decided differently under the *Barker* analysis.

303. For a further discussion of why prohibiting these suits increases the number of illegal abortions, see *supra* notes 30-34 and accompanying text.

304. 22 N.E. 188 (N.Y. 1889). The Court of Appeals, which "affirmed [Reno] . . . on the memorandum at the Appellate Division" apparently accepted the rule largely on the basis that criminals should not profit from their crimes. Reno v. J'David, 369 N.E.2d 766, 767 (N.Y. 1977). The New York courts' determination to

drastic action of summarily denying recovery to a seriously injured person on the basis of a case that, in over eighty years, had never been relied on to bar a plaintiff in a tort case.[305] More disturbing, the court failed to consider whether *Riggs* applied to the *Reno* situation. *Riggs*, which involved an attempt by a murderer to inherit from his victim, is easily distinguishable from *Reno*. While the *Riggs* plaintiff sought to profit from his crime, Ms. Reno sought only compensation for injuries sustained. Furthermore, the decision in *Reno* permitted the abortionist, who had committed a more serious crime than had the plaintiff, to retain the profit derived from the crime. Thus the result in *Reno* is antithetical to the objectives of *Riggs*.

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deprive criminals of their profits has not been so strong in other cases. For example, New York permits injured illegal aliens to recover for their lost future illegal earnings. *See* Collins v. New York Health & Hosp. Corp., 607 N.Y.S. 2d 387, 388 (App. Div. 1994); Public Adm'r v. Equitable Life Assurance Soc'y, 595 N.Y.S.2d 478, 479 (App. Div. 1993). One case involving an illegal alien's claims for future lost earnings prohibited the defendant from introducing evidence that the plaintiff could not have earned this money legally, thus ensuring that the jury could not consider that the plaintiff could not legally have made the money he was seeking. *See* Klapa v. O & Y Liberty Plaza Co., 645 N.Y.S.2d 281, 283 (Sup. Ct. 1996). In all three cases, criminals were allowed to use the courts to obtain the maximum profit that they could have expected to make from their crimes. *Klapa* went so far as to deprive the jury of any knowledge that the plaintiff was asking the court to award money which plaintiff could have earned only by breaking the law. *See id.* at 282. Obviously the policy of preventing criminals from profiting from their crimes, a factor that motivated the *Reno* court, was not viewed as terribly important in these cases.

305. *See Barker*, 479 N.Y.S.2d at 209 (Simons, J., dissenting). Although Judge Simons' statement that *Riggs* had never been relied on to prevent criminal plaintiffs from bringing tort suits was correct, such suits had been prohibited in two instances. In *Carr v. Hoy*, 2 N.Y.2d 185 (1957), the New York Court of Appeals barred a tort plaintiff from recovering the proceeds of his crime that had been confiscated by the authorities. *See id.* *Carr* is similar to *Riggs* in that, had the courts permitted these suits, plaintiffs would have profited from their crimes. They, therefore, are unlike *Reno* where plaintiff sought no profit, but merely asked to be compensated for an injury tortuously inflicted. *See Reno*, 369 N.E.2d at 767-68. Furthermore, one result of barring suit by Ms. Reno was that a more serious criminal did profit from his crime, the very result sought to be avoided by *Riggs* and *Carr*.

The second suit in which a plaintiff was prevented from suing in tort because there had been criminal conduct was *Flegenheimer v. Brogan*, 284 N.Y. 268 (1940). That suit was "brought by an alleged secret owner to vindicate his assertion of beneficial title to property he had parted with in order to perpetrate a fraud upon the statute which regulates and controls traffic in alcoholic beverages." *Id.* at 272. The court, with three judges dissenting, held that public policy would be violated if the court assisted such a plaintiff. *See id.* at 273. *Flegenheimer*, although more similar to *Reno* than was either *Carr* or *Riggs*, is nevertheless distinguishable. In *Flegenheimer*, plaintiff sought compensation for property whose value had been illegally increased by the fraud of plaintiff's intestate. *See id.* at 272. The purpose of the criminal conduct was to enhance the value of the item that was later converted. *See id.* Had the court permitted the suit, it would have helped the criminal's estate to recover that increased value and thus to profit from the crime. *See id.* at 273. The *Reno* court faced no similar problem: profit was not what Ms. Reno sought. *See* Reno v. D'Javid, 379 N.Y.S.2d 290, 191 (1976).

In addition, the appellate courts failed to discuss the recognized exceptions to the bar, some if not all of which appear to have been applicable.[306] First, Ms. Reno and the abortionist were not *in pari delicto.* Although Ms. Reno's conduct was criminal in New York, her crime was a class B misdemeanor, whereas the abortionist committed a class E felony.[307] Under the New York statutes, the maximum term of imprisonment to which the abortionist could have been sentenced was sixteen times the maximum to which Ms. Reno could have been sentenced.[308] Clearly the New York legislature had concluded that the woman who submitted herself to a dangerous illegal abortion was not in equal fault with the abortionist whose conduct was part of a profit-making criminal enterprise. When that criminal enterprise was negligently conducted, causing injury to plaintiff, the imbalance of fault is even greater. Add to that the fact that when *Reno* was decided it was known that plaintiff's right to have an abortion was constitutionally protected, and there can be no doubt that this plaintiff and defendant were not *in pari delicto.* Second, the New York abortion statute contained strong evidence that one of its purposes was to protect women who might have abortions.[309] Consequently, the second recognized exception to the prohibition might also apply. As to the third exception, the injuries suffered by plaintiff were great and disproportionate, and the public policies of uncovering crimes, decreasing the criminal abortionist's profits and increasing deterrence of both illegal abortions and the negligence that accompanies them, would have been advanced by permitting these suits. Thus, even if plaintiffs usually were barred from suing for injuries incurred as a result of their criminal conduct, Ms. Reno should not have been barred.

Remarkably, there is yet another reason why Ms. Reno's complaint should not have been dismissed. The complaint alleged that plaintiff's injuries had been increased by defendant's negligent treatment after the abortion.[310] Because this alleged malpractice occurred after the plaintiff's crime, she should not have been prevented from recovering for the injuries it caused, even if her criminal conduct meant she was barred from

306. The exceptions had been recognized in New York. *See, e.g.*, Watts v. Malatesta, 262 N.Y. 80, 83 (1933); Duval v. Wellman, 124 N.Y. 156, 162 (1891); Steinlauf v. Delano Arms, Inc., 226 N.Y.S.2d 862, 864 (App. Div. 1962); 10 N.Y. JUR. CONTRACTS § 180, at 82 (1960) ("Unless, therefore, the parties are in pari delicto as well as participes criminis, the courts, although the agreement is illegal, will afford relief, where equity requires it, to the more innocent party.").

307. *See Reno*, 379 N.Y.S.2d at 292 (quoting the New York abortion statutes).

308. *Compare* N.Y. PENAL LAW § 70.15 (Consol. 1976) (providing that imprisonment for class B misdemeanor not exceed three months), *with id.* § 70.00 (providing that imprisonment for class E felony not exceed four years).

309. *See* 1965 N.Y. LAWS ch. 1030 (providing that abortion was criminal even if woman was not pregnant); *id.* § 125.05 (providing that abortion could be justifiable if it was performed with reasonable belief that it was necessary to preserve woman's life, and it was justifiable only if performed by duly licensed physician).

310. *See Reno*, 379 N.Y.S.2d at 292.

recovering for injuries inflicted during the abortion itself.[311] Certainly no one would contend that a person who was, for example, shot while robbing a bank would have no recourse against a doctor who negligently treated his gunshot wound. Such a plaintiff's criminal conduct would not disqualify him because it is too remote. Why then should a woman injured during an illegal abortion be disqualified from recovering for injuries negligently inflicted later, when defendant negligently treated her initial injury? Her crime and the injuries for which she sued are just as remote as are the bank robber's.[312] The Appellate Division ignored this, as did all but the dissenting judge in the Court of Appeals.[313]

The numerous reasons why Ms. Reno should not have been barred were not particularly abstruse. Yet the Appellate Division and the Court of Appeals barred her without even considering: (i) whether the bar should be extended to a new type of case, (ii) whether the bar would produce the desired result, (iii) whether the plaintiff was covered by any of three probably-applicable exceptions to the bar, (iv) whether plaintiff should be barred from recovering for injuries inflicted after the crime, or (v) whether the bar should apply when the criminal statute involved was unconstitutional, and had been repealed.

The post-*Reno* cases in New York may also shed some light on the *Reno* bar. New York is unique in that seven years after *Reno* the Court of Appeals expanded the *Reno* bar to apply to anyone injured as a direct result of his or her serious, unjustified, hazardous criminal conduct.[314] As a result, the prohibition has been considered in several New York tort cases other than those involving illegal abortions. At least equally revealing are the cases where it was not considered even though it arguably should have applied.

There are six such cases where the bar was not mentioned. The first, *Lomonte v. A & P Food Stores*,[315] permitted recovery by a plaintiff injured during a fight he apparently initiated.[316] Although the opinion does not explain exactly what happened, it appears that plaintiff probably commit-

311. *See, e.g.*, Henrie v. Griffith, 395 P.2d 809, 809 (Okla. 1964); Androws v. Coulter, 1 P.2d 320, 321 (Wash. 1931).

312. The fact that the person who negligently treated plaintiff is the same person who inflicted the initial injury does not make the situation less remote. How ironic if plaintiff could recover for negligent post-abortion care if that care had been provided by a doctor who did not perform the illegal abortion, but not if the defendant was the criminal who also had inflicted the initial injuries. Further, in these cases plaintiff is being barred because her crime supposedly makes her unworthy of the court's help. The identity of the defendant is irrelevant to that issue.

313. *See* Reno v. J'David, 369 N.E. 766, 766 (N.Y. 1977).

314. *See* Barker v. Kallash, 479 N.Y.S.2d 201, 203 (1984).

315. 438 N.Y.S.2d 54 (Sup. Ct. 1981).

316. *See id.* at 55.

ted assault in the third degree, a misdemeanor.[317] The court did not consider the possibility that the plaintiff's criminal conduct should prevent him from recovering.

The directly injured parties in *Humphrey v. State*[318] and *Clark v. New York*[319] were involved in accidents caused, in part, by their drunk driving.[320] Decedent in *Humphrey* was killed when he drove his car at speeds in excess of fifty miles per hour past two fifteen mile per hour signs and past two "dead end" signs.[321] Plaintiff in *Clark* drove at a speed "sufficient to carry her car 200 feet along the shoulder and an additional 150 feet after impact with the guardrail."[322] Driving while intoxicated, as both these people were, was punishable by a term of imprisonment whose maximum was four times greater than the maximum that could have been imposed on Ms. Reno,[323] a strong indication that the legislature considered drunk driving a more serious crime than Ms. Reno's. No one would doubt that drunk driving is unjustified and hazardous, nor was there any question that it was the direct cause of the drivers' injuries. Yet the Court of Appeals and both Appellate Division courts permitted recovery without considering the possibility that the drivers' criminal conduct should bar recovery.[324]

Furthermore, there were several reasons why it was more appropriate to use the bar in the drunk driving cases than in *Reno*. The drivers in *Humphrey* and *Clark* were directly injured by their own criminal conduct: they drove off the road because they were drunk. Plaintiff in *Reno* did not injure herself, her crime merely gave the defendant the opportunity to tortuously injure her. The connection between the criminal conduct and

317. *See* N.Y. PENAL LAW § 120.00 (Consol. 1998) (mandating that person commits third degree assault if he intentionally causes physical injury, recklessly causes physical harm or with criminal negligence causes physical injury).

318. 469 N.Y.S.2d 661 (1983).

319. 508 N.Y.S.2d 648 (App. Div. 1986).

320. *See Humphrey*, 469 N.Y.S. 2d at 662; *Clark*, 508 N.Y.S.2d at 649.

321. *See* Humphrey v. State, 456 N.Y.S.2d 861, 861-62 (App. Div. 1982).

322. *Clark*, 508 N.Y.S.2d at 649.

323. *Compare* N.Y. VEH. & TRAF. LAW § 1192 (McKinney 1983) (mandating that driving while intoxicated constitutes misdemeanor punishable by fine and up to one year jail sentence), *with* N.Y. PENAL LAW § 70.15 (noting that illegal abortions are class B misdemeanors punishable by no more than 3 months imprisonment).

324. In *Barker v. Kallash*, 479 N.Y.S.2d 201, 203 (1984), the court implied that there were two reasons for not barring plaintiff in *Humphrey*: (i) "a violation of a statute governing the manner in which activities should be conducted" does not bar recovery, and (ii) "a complaint should not be dismissed merely because the plaintiff's injuries were occasioned by a criminal act." It is difficult to see how either reason could explain *Humphrey*. Drunk driving is prohibited, not merely regulated. Although it is not totally clear what is meant by injuries that were "occasioned by a criminal act" as opposed to those that were "a direct result of [a] . . . criminal act," the death of a drunk driver caused by the fact that he was traveling at more than three times the speed limit past two "dead end" signs had to be a direct result of his criminal conduct, however that term is construed.

the injury is much more direct in the drunk driving cases, making it more reasonable to bar those plaintiffs. In addition, defendants in *Humphrey* and *Clark* had committed no crime, whereas the defendant in *Reno* had, and had made a profit from doing so. Thus, the use of the bar in *Reno* protected the profit of the criminal abortionist, an undesirable result that would not have occurred had the bar been applied in either *Humphrey* or *Clark*. And, as noted, the crime that plaintiff committed was much more serious in *Humphrey* and *Clark* than in *Reno*.[325]

In *Bikowicz v. Sterling Drug*,[326] the court allowed a person who apparently had illegally procured prescription drugs to sue the drug manufacturer for damages she incurred as a result of becoming addicted to the drug. The court did not consider whether plaintiff's conduct deprived her of the right to collect damages for the injuries she caused to herself, although her conduct appeared to meet the *Reno/Barker* test.

Two other post-*Reno* cases in which the New York courts ignored the *Reno* bar involved plaintiffs' claims that those arresting them had negligently used excessive force.[327] The crimes for which those plaintiff were being arrested—resisting arrest in both cases, coupled with beating and attempting to rob a seventy-two year old man in one case, and perpetrating a violent crime with a sawed off shot gun in the other—were, without question, serious, unjustified, and hazardous, and so met that part of the *Reno/Barker* test. The injuries sustained by plaintiffs also directly resulted from their criminal conduct,[328] satisfying the other requirement of *Barker*.[329] Nonetheless, the courts did not consider the possibility that plaintiffs' criminal conduct prohibited them from recovering. *Reno* appears to require that all of these plaintiffs be barred, yet *Reno* was never discussed.

It also is informative to compare the instances when New York courts have prevented plaintiffs from recovering under the *Reno* rule with those

325. *Compare* N.Y. VEH. & TRAF. Law § 1193(1)(b) (McKinney 1983), *with* N.Y. PENAL LAW §70.15. The facts that the statute in *Reno* had been repealed and probably was unconstitutional further undermines the severity of the "crime" that Ms. Reno committed.

326. 557 N.Y.S.2d 551 (App. Div. 1990).

327. *See* McCummings v. New York City Transit Auth., 613 N.E.2d 559, 656 (N.Y. 1993), *cert. denied*, 510 U.S. 991 (1993); Fernandez v. City of New York, 645 N.Y.S.2d 1004, 1005 (Sup. Ct. 1996), *aff'd.*, 247 A.D.2d 212 (1998).

328. For a discussion of such reasoning in *McCummings*, see *supra* note 14 and accompanying text. The same analysis applies to *Fernandez*.

329. *See* Barker v. Kallash, 479 N.Y.S.2d 201, 203 (1984). One cogent argument against using the *Reno* bar in these arrest cases is that, if it applied, it would render arrestees "fair game" for the negligent use of excessive force because most police officers would know that their arrestees could not recover for injuries negligently inflicted during an arrest. This argument has significant appeal. Such reasoning applies equally, however, to cases like *Reno* and *Symone T.* because most abortionists would know that their patients could not recover for injuries negligently inflicted during an illegal abortion. In both instances, the prohibition on suit eliminates the deterrence of negligence which normally is provided by the tort system.

in which the courts have considered the rule and decided that it did not apply. The following six plaintiffs were denied recovery under *Reno*:[330] (i) a 14-year-old child injured in the explosion of a pipe bomb he was making;[331] (ii) the estate of a drunk driver who was killed when he lost control of his car while engaged in a race in which he had driven at over 100 miles per hour;[332] (iii) a plaintiff who sued the state claiming that the state had injured him by negligently not having had him involuntarily committed before he began the crime spree which led to his injuries;[333] (iv) a child rape victim injured during the negligent performance of an illegal abortion, if she knew the abortion was illegal;[334] (v) a teenager injured while joyriding in a car driven by a friend who did not have a driver's license, where the injuries were sustained when the driver, at plaintiff's suggestion, tried to change the radio station, and, in so doing, took her eyes off the road, causing a crash;[335] (vi) a plaintiff who was injured by his use of a dental product while he was practicing dentistry without a license, if the product was to be used only by dentists.[336]

The two abortion cases (*Reno* and *Symone T.*) raise very different issues from the other cases in which New York barred plaintiffs' tort suits. First, in none of the other cases did the prohibition on suit immunize a criminal from liability for injuries inflicted by the crime, much less protect the criminal's profit.[337] Second, in all the non abortion cases save *Manning*, plaintiffs sought to recover for injuries they directly inflicted upon themselves. These plaintiffs claimed that defendants' negligence enabled plaintiffs to injure themselves. Such claims are a far cry from those of Margaret

330. There are other cases in which the *Reno* bar was cited as an alternative reason for denying recovery. *See, e.g.*, Johnson v. State, 663 N.Y.S.2d 790, 796 (Ct. Cl. 1997), *aff'd*, No. 82 639, 1999 N.Y. App. Div. LEXIS 3678 (App. Div. April 8, 1999); Phifer v. New York, 612 N.Y.S.2d 225, 226 (App. Div. 1994).

331. *See Barker*, 479 N.Y.S.2d at 202.

332. *See* LaPage v. Smith, 563 N.Y.S.2d 174, 174 (App. Div. 1990).

333. *See* Preston v. New York, 543 N.Y.S.2d 823, 824 (App. Div. 1989).

334. *See* Symone T. v. Lieber, 613 N.Y.S.2d 404, 406 (App. Div. 1994).

335. *See* Manning v. Brown, 689 N.E.2d 1382, 1388 (N.Y. 1997).

336. *See* A. Guadamud v. Dentsply Int'l, Inc., 20 F. Supp. 2d 433, 434-45 (E.D.N.Y. 1998).

337. The cases that come the closest to doing so are *Manning* and *Barker*. *See Manning*, 689 N.E.2d at 1383; Barker v. Kallash, 479 N.Y.S.2d 201, 206 (Ct. App. 1984). Those cases are distinguishable, however. Unlike abortionists, the child defendants in *Manning* and *Barker* made no profit from their participation in plaintiff's joy riding and pipe-bomb-making endeavors, so protecting them from suit would not insure that a criminal retained the profits of his crime. In addition, at the time of their conduct, the defendants in *Barker* were 9, 14 and 15 years old, and they could not have been held criminally responsible. *See Barker*, 479 N.Y.S.2d at 202. Nor did those defendants directly injure the plaintiff. *See id.* Moreover, defendants in cases like *Manning* and *Barker* would not be immunized if they were not held liable to plaintiffs, because their conduct might well have injured non criminals who, of course, could sue for damages. In the abortion context, the only person the defendant could directly injure was the plaintiff, so if she and her estate could not recover, the defendant was immune.

Reno and Symone T., who sought compensation for injuries directly inflicted on them by the negligent criminal. Third, the abortion plaintiffs apparently came under several exceptions to the bar; exceptions that did not cover the other plaintiffs. Ms. Reno and Symone T. were not *in pari delicto* with their defendants, while the plaintiffs in *Manning, Barker, LaPage, Preston* and *Guadamud* were at least equally at fault with those defendants. In addition, Ms. Reno, Symone T. and possibly Barker (but none of the other plaintiffs) were individuals intended to be protected by the criminal statutes they violated, a fact that would have prevented the bar from being used against them if the defendant was a person against whom the plaintiffs were to be protected. In *Reno* and *Symone T.*, but not in *Barker* (at least as to the child defendants who supplied the firecrackers used by plaintiffs to make the bomb), defendant was such a person. Finally, permitting Ms. Reno and Symone T. to recover would have advanced public policy; that was not true in *Barker, LaPage, Preston* or *Guadmud.*

One particularly relevant New York case is *Hernandez v. Sei-Oung Yoon.*[338] Mr. Hernandez, a married man, sued the doctor who performed a vasectomy on him, claiming that the operation was negligently performed and that as a result, plaintiff's girlfriend became pregnant and underwent an abortion, causing the plaintiff mental distress.[339] The defendant argued that Mr. Hernandez's adultery (a class B misdemeanor)[340] was a direct cause of his injury and should bar his recovery. The court rejected that argument and permitted plaintiff's suit, noting that a temporary commission had recommended that the adultery statute be repealed, and stating that adultery was not a serious crime.[341]

The conflict with *Reno* is glaring.[342] The criminal statute in *Reno* had been repealed;[343] in *Hernandez,* a temporary commission had recommended that it be repealed, but that recommendation was not accepted, and the statute is still in effect nine years after Mr. Hernandez committed the crime. The criminal statute in *Reno* almost certainly was unconstitutional; in *Hernandez* there was no constitutional infirmity. In *Reno,* the defendant's negligence directly injured the plaintiff; in *Hernandez,* the defendant's negligence permitted the plaintiff to injure himself. In *Reno,* the defendant committed a serious crime; in *Hernandez* the defendant committed no crime. Ms. Reno suffered serious physical injuries; Mr. Hernandez suffered only mental distress resulting from the problems he had caused his girlfriend.[344] Yet Mr. Hernandez could recover. Ms. Reno could not.

338. 661 N.Y.S.2d 753 (Sup. Ct. 1997).
339. *See id.* at 754.
340. *See id.*; *see also* N.Y. PENAL LAW § 255.17 (McKinney 1989).
341. *See Hernandez,* 661 N.Y.S.2d at 754.
342. *See id.*; *see* Reno v. D'Javid, 379 N.Y.S.2d 290, 292 (App. Div. 1976).
343. *See Reno,* 379 N.Y.S.2d at 292.
344. *See Reno,* 379 N.Y.S.2d at 291; *see Hernandez,* 661 N.Y.S.2d at 754.

The *Reno* decision is remarkable for avoiding a plethora of issues, each one of which should have caused the court to permit Ms. Reno to recover. Having created the bar in *Reno*, the New York courts are disturbingly inconsistent in applying it, frequently failing to see its relevance when the plaintiff's criminal conduct was not an abortion, and inconsistently imposing the bar in those non abortion cases where they do realize its possible relevance.

IV. ABORTION CASES: GENDER-BIASED COURT-MADE LAW

The rule barring recovery by those injured by illegal abortions appears to foster two of the evils it is supposed to prevent: it ensures that criminals will retain the profits they made from their crimes and it leads to more illegal abortions. In addition, it removes an incentive to use care in performing illegal abortions, which therefore kill and maim more women. Injured people, even completely blameless injured children, are not compensated for their injuries. Given these appalling results, the only arguably valid reason offered for prohibiting recovery—the fear that allowing these claims might undermine respect for the courts—cannot support the rule, for no court in the name of maintaining respect for the law, could impose a rule that has such dreadful consequences.

Furthermore, there is little reason to conclude that allowing these plaintiffs to recover would decrease society's respect for the courts. For example, juries uniformly found these plaintiffs deserving, as evidenced by the fact that plaintiffs won every abortion case that reached a jury.[345] Further, there is no reported case in which a woman was convicted of having an illegal abortion.[346] Juries thus found that women who were negligently injured by abortions were victims, and that neither they nor their sisters who escaped injury were criminals. Permitting such victims to recover from the criminals who tortuously injured them would not bring disrespect to the law. Where the woman died as a result of the abortion, it is even more certain that the beneficiaries of the tort suit (frequently the decedent's children) would be seen as victims.

Nevertheless, the bar exists, and the opinions that adopted it were, for the most part, almost off-hand. One rather mechanical, but nonetheless revealing, measure of the paucity of thought given to the issues is the length of the opinions. Courts denied women one of their fundamental

345. *See* Hunter v. Wheate, 289 F. 604, 605 (D.C. Cir. 1923) (noting judgment of district court in favor of plaintiff); Nash v. Meyer, 31 P.2d 273, 283 (Idaho 1934) (reversing jury verdict for plaintiff); Martin v. Hardesty, 91 Ind. App. 239, 239 (App. Ct. 1929) (noting jury finding for plaintiff); Goldnamer v. O'Brien, 33 S.W. 831, 832 (Ky. 1896) (reversing jury verdict for plaintiff); Lembo v. Donnell, 101 A. 469, 469 (Me. 1917) (same); Szadiwicz v. Cantor, 154 N.E. 251, 252 (Mass. 1926) (same); Miller v. Bennett, 56 S.E.2d 217, 218 (Va. 1949) (noting jury verdict for plaintiff).

346. *See* Samuel W. Buell, *Criminal Abortion Revisited*, 66 N.Y.U. L. REV. 1774, 1790 (1991).

rights in startlingly brief opinions. Only one opinion, *Nash*, was more than four pages.[347] Among the rest of the cases, four opinions were one page or less,[348] three more were under one and a half pages,[349] four were between one and a half and three pages,[350] and two were between three and four pages.[351]

Other indicia of the lack of thought given to the decision to prevent these seriously injured women and their estates from recovering from the criminals who had tortuously injured them are:

- None of these opinions made any attempt to explain why a rule that prevented people from suing to enforce illegal contracts should be used to prevent tort suits.[352] This failure to consider whether the reasons for the contract rule applied in tort cases is critical, because it is clear that they did not. Thus:
  - No court noticed that preventing suits by those injured encouraged illegal abortions.[353] Because one of the reasons for the bar was to discourage illegal conduct, applying the rule in abortion cases was counter-productive.
  - No court noticed that denying recovery would cause more injuries because it immunized abortionists, who thus could negligently practice without fear of liability. A rule that, by encouraging carelessness, causes death and physical injury is clearly against public policy.
  - No court noticed that the decision to deny recovery ensured that criminal abortionists would retain the profits of their crimes, one of the results the bar was intended to prevent.

347. *See Nash*, 31 P.2d 273. Although *Nash* was a relatively long opinion, most of the opinion was a recitation of the facts and a restatement of the facts and holdings of the cases *Nash* cited. *See id.* at 273-80. Little space in the opinion was devoted to analysis. *See id.* at 280-83.

348. *See Szadiwicz*, 154 N.E. 251; Reno v. D'Javid, 390 N.Y.S.2d 421 (App. Div. 1977); Reno v. D'Javid, 369 N.E.2d 766 (N.Y. 1977); Martin v. Morris, 42 S.W.2d 207 (Tenn. 1931).

349. *See* Goldnamer v. O'Brien, 33 S.W. 831 (Ky. 1896); Symone T. v. Lieber, 613 N.Y.S.2d 404 (App. Div. 1994); Androws v. Coulter, 1 P.2d 320 (Wash. 1931).

350. *See* Hunter v. Wheate, 289 F. 604 (D.C. Cir. 1923); Sayadoff v. Warda, 271 P.2d 140 (Cal. Dist. Ct. App. 1954); Henrie v. Griffith, 395 P.2d 809 (Okla. 1964); Bowlan v. Lunsford, 54 P.2d 666 (Okla. 1936).

351. *See* Castronovo v. Murawsky, 120 N.E.2d 871 (Ill. App. Ct. 1954); Miller v. Bennett, 56 S.E.2d 217 (Va. 1949).

352. *See Hunter*, 289 F. 604; *Nash*, 31 P.2d 273; *Castronovo*, 120 N.E.2d 871; *Szadiwicz*, 154 N.E. 251; *Reno*, 390 N.Y.S.2d 421 (App. Div. 1977); *Reno*, 369 N.E.2d 766 (N.Y. 1977); *Symone T.*, 613 N.Y.S.2d 404; *Henrie*, 395 P.2d 809; *Bowlan*, 54 P.2d 666; *Martin*, 42 S.W.2d 207; *Miller*, 56 S.E.2d 217; *Androws*, 1 P.2d 320, 321 (Wash. 1931).

Two of these abortion cases were decided solely on the grounds of consent, and therefore did not discuss the illegality bar. *See Sayadoff*, 271 P.2d at 143; *Goldnamer*, 33 S.W. at 832.

353. For a discussion of the effects of preventing suits by those injured in illegal abortions, see *supra* notes 40-46 and accompanying text.

- No court noticed that prohibiting recovery would deter plaintiffs from bringing these suits, thereby shielding criminal abortionists from prosecution.

- None of these opinions, having applied the contract bar to a tort case, discussed the accepted exceptions to that contract bar. Thus:
  - No court fully considered whether the woman and the abortionist were *in pari delicto*.[354] If they were not, the bar would not apply. In most places the abortion statutes themselves show that the woman and the abortionist were not *in pari delicto*. Statutes aside, few people would find a woman who risked her life to avoid bringing into the world a child whom she could not feed or care for,[355] to be in equal fault with the abortionist who, to make a profit, performed the abortion, and performed it at least negligently and usually recklessly. This basic fact went unnoticed, even by courts that explained the bar by noting that "where both are equally in fault, *potior est conditio defendentis*."[356]
  - No court discussed whether the abortion cases came within the exception that permitted suit when the criminal statute was intended to protect the plaintiff from people like the defendant, although a few cases stated that there was no such statutory intent. The terms of the statutes, as well as common sense, show that the legislatures did intend women to be so protected.[357]
  - Only one court made any attempt to discuss whether the public good would be furthered by permitting these suits, another instance when the contract bar did not apply.[358] Public good would have been advanced by permitting these suits.[359]
- Most of these cases that were from jurisdictions which had permitted other criminals to recover for injuries suffered as a result of their crimes, ignored those contradictory decisions.[360] The few

354. The statement in *Bowlan* that defendant's criminal conduct would not lead to liability because "plaintiff is not innocent," is the most extensive treatment given to this issue. *See, e.g., Bowlan*, 54 P.2d at 669

355. *See* Kenneth A. Miller, Note, *Criminal Law: Abortion*, 20 NEB. L. REV. 41, 46 (1941) (noting that in 1941 it was estimated that 80% of women who had illegal abortions were married and predominantly motivated by difficulty or impossibility of providing food for extra child).

356. *Nash*, 31 P.2d at 280 (emphasis added). *Accord Castronovo*, 120 N.E.2d at 873; *Miller*, 56 S.E.2d at 219.

357. For a discussion of the legislative intent to protect women, see *supra* notes 113-14, 136-39, 148, 175, 192, 207, 241, 258-59 and 295 and accompanying text.

358. *See Castronovo*, 120 N.E.2d 871, 874 (noting that public policy consideration should be factor in determining which doctrine should prevail). *Castronovo*'s discussion of this point was superficial. For a discussion of *Castronovo*, see *supra* notes 264-85 and accompanying text.

359. For a discussion of the public good advanced by permitting tort suits for illegal abortions, see *supra* notes 25-46 and accompanying text.

360. *See generally* Sayadoff v. Warda, 271 P.2d 140 (Cal. Dist. Ct. App. 1954); *Castronovo*, 120 N.E.2d 871; Szadiwicz v. Cantor, 154 N.E. 251 (Mass. 1926); Henrie

that mentioned their own contrary decisions tried to distinguish them by announcing, without discussion, that the abortion statutes were not intended to protect women, but the statutes criminalizing fights were intended to protect fighters.[361] No court suggested any reason why legislatures would want to protect those who tried to injure each other in fights and shootouts, but not the desperate women who submitted themselves to illegal abortions. These courts also ignored the provisions in the abortion statutes which show that the legislatures did want to protect women from the dangers inherent in illegal abortions. The courts also failed to see the possibility that these women, the vast majority of whom had illegal abortions because an addition to the family would cause serious harm to the other children in the family,[362] and often at the insistence of others,[363] were more in need of protection than men who, for example, lost their tempers and engaged in illegal fights.

- Most courts either ignored the fact that the majority of states permitted recovery by plaintiffs who were hurt by their participation in crimes other than abortions,[364] or they summarily noted that there were cases that permitted recovery by such plaintiffs, and then either rejected those cases without discussion, or relied on the unsupported and incorrect assertion that they were distinguishable because the abortion statutes were not intended to protect women.[365]
- Two courts ignored the rather basic point that the criminal statute which they relied on to prevent the injured woman from recovering, was almost certainly unconstitutional.[366]

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v. Griffith, 395 P.2d 809 (Okla. 1964); Bowlan v. Lunsford, 54 P.2d 666 (Okla. 1936); Androws v. Coulter, 1 P.2d 320 (Wash. 1931).

361. *See Miller*, 56 S.E.2d at 219. *Bowlan*, which ignored the court's conflicting holdings in *Teeters v. Frost*, 292 P.2d 356 (Okla. 1930), and *Hulls v. Williams*, 29 P.2d 582 (Okla. 1934), unsuccessfully attempted to distinguish its earlier decision in *Colby v. McClendon*, 26 P. 207 (Okla. 1922). See *Bowlan*, 54 P.2d at 668.

These cases also ignored similar contradictory decisions from other states. *See, e.g.*, Starkey v. Dameron, 21 P.2d 1112 (Colo. 1933) (noting theft); Allison v. Fiscus, 100 N.E.2d 237 (Ohio 1951) (noting burglary); *see also supra* note 20.

362. *See* Miller, *supra* note 361 at 46 (1941);

363. *See, e.g., Sayadoff*, 271 P.2d at 143; Herman v. Julian, 232 P. 864, 867 (Kan. 1925); Goldnamer v. O'Brien, 33 S.W. 831, 833 (Ky. 1896); True v. Older, 34 N.W.2d 700, 704 (Minn. 1948); Symone T. v. Lieber, 613 N.Y.S.2d 404, 406 (App. Div. 1994); Larocque v. Conheim, 87 N.Y.S. 625, 627 (Sup. Ct. 1904); *Bowlan*, 54 P.2d at 667; Miller v. Bayer, 68 N.W. 869, 869 (Wis. 1896).

364. *See, e.g.*, Hunter v. Wheate, 289 F. 604, 606-07 (D.C. Cir. 1923); Reno v. D'Javid, 390 N.Y.S.2d 421, 421-22 (App. Div. 1977), *aff'd*, 369 N.E.2d 766 (N.Y. 1977).

365. *See* Nash v. Meyer, 31 P.2d 273, 276-77 (Idaho 1934); *Szadiwicz*, 154 N.E. at 251-52; Martin v. Morris, 42 S.W.2d 207, 207 (Tenn. 1931); *Androws*, 1 P.2d at 321.

366. *See* Reno v. D'Javid, 369 N.E.2d 766 (N.Y. 1977); *Reno*, 390 N.Y.S.2d at 422 (App. Div.)

- One court opined that, because the abortionist could not successfully sue to recover a fee for performing the illegal abortion, the woman he had negligently injured (who had not committed any crime) should be prevented from recovering for those injuries.[367] Two courts indicated their agreement with this incredibly confused version of mutuality.[368]
- Three courts, without discussion, declared that plaintiff's participation in an immoral or illegal act disabled her from recovering for injuries tortuously inflicted on her after that act.[369]

This curious concatenation of basic errors is rendered even more remarkable by the fact that, with few exceptions, when the same issue arose in non abortion cases, the courts' entire approach was different: plaintiffs recovered without any discussion of the possibility that their criminal conduct might render them ineligible to receive compensation.[370] The reasons used to deny compensation to injured women were totally ignored in these analogous cases.

In searching for an explanation of the oddly error-filled abortion opinions, the dismissive nature of those opinions, and the fact that the conduct that disabled abortion plaintiffs was routinely treated as irrelevant in cases involving other crimes, one obvious distinguishing characteristic is the gender of the victims. The individuals directly injured by illegal abortions invariably were women who suffered injury because of a uniquely female dilemma, whereas the injured criminals who were allowed to recover almost always were men involved in stereotypically male behavior. The judges who dismissed the abortion plaintiffs' claims were men.[371]

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367. *See Hunter*, 289 F. at 607.

368. *See Nash*, 31 P.2d at 280; *Szadiwicz*, 154 N.E. at 251-52.

369. *See Hunter*, 289 F. at 605, 607; *Reno*, 390 N.Y.S.2d 421 (App. Div. 1977), *aff'd*, 369 N.E.2d 766 (N.Y. 1977).

370. *See* cases in note 20 *supra*.

371. *See* DIGEST OF WOMEN LAWYERS AND JUDGES 5 (Laura Miller Derry ed., 1949) (The first woman to sit on highest court in any state or the District of Columbia was Florence E. Allen, who was elected to the Supreme Court of Ohio in 1922). It was 1959 before another woman took a seat on any state's highest court. *See* Beverly Blair Cook, *Women Judges in the Opportunity Structure, in* WOMEN, THE COURTS, AND EQUALITY 143, 146-49 (Laura L. Crites & Winifred L. Hepperle eds., 1987). During that period, all of the illegal abortion cases, except those from Oklahoma and New York, were decided. Women first sat on the highest courts in Oklahoma and New York in 1982 and 1983, respectively. *See id.* at 147-48. Thus, none of these abortion cases from the highest court in any jurisdiction was decided by a bench that included a woman. As to the decisions from intermediate courts of appeal, the first names of the judges who took part in those decisions are masculine.

Some understanding of women's lack of presence in the courts when these abortion decisions were reached can be gained by realizing that at the end of 1977 (the year in which the last of these cases to reach the highest court of a state was decided), a total of 14 women had ever been on the highest court of any of the 50 states, only 13 women were serving on any intermediate court of appeals in the 50 states, and a total of twelve women had ever been on the federal bench. *See* ALBIE

The lack of other distinguishing characteristics between these cases suggests that the remarkably different analysis they contain reflects the judicial system's bias against women, especially those whose claims arise in a uniquely female context.

The extent of some judges' disdain for women surfaced in one court's conclusion that permitting women to be compensated for the injuries they suffered as a result of abortions "might well encourage . . . [them to submit] to abortions . . . with the assurance of financial reward if [the women participant were] injured."[372] No rational person would undergo an illegal abortion fraught with danger of serious physical injury or death because there was a possibility that, if injuries were tortuously inflicted, a jury might partially compensate her or her estate.[373] This is especially true when her suit for damages would publicize the abortion, bringing disgrace and the possibility of criminal prosecution. The court's assumption that women act so irrationally is a telling indication of its bias.

A similar anti-woman sentiment is reflected in the statement that the state has only a "somewhat remote" interest in the health of women who have abortions.[374] In the court's view, that interest was so remote that it "would seem unwise [for a court] to attempt to set up standards of skill in . . . cases" of women injured by the negligent performance of illegal abortions.[375] Thus, although courts routinely set up just such standards of skill, this court concluded that society's interest in compensating these particular victims of negligence, preventing similar injuries, keeping the victims and their dependents off the welfare roles, etc. was so minimal that it did not justify expending this routine judicial effort.

But this type of overt bias is unlikely to be the primary explanation for all these cases. A more subtle type of gender bias may underlie these decisions: the subconscious bias that flows from male judges' identification with males and their actions, and these judges' concomitant inability to understand or identify with women who were injured because they made the uniquely female decision to resort to dangerous illegal abortions.[376]

It long has been recognized that judges' backgrounds affect their decisions:

SACHS & JOAN HOFF WILSON, SEXISM AND THE LAW 232 (1979); Cook, *supra* note 371, at 146-49 (listing female judges who sat on state courts of last resort).

372. Sayadoff v. Warda, 271 P.2d 140, 143 (Cal. Dist. Ct. App. 1954).

373. After paying legal expenses or a contingency fee, plaintiff's compensation is seldom, if ever, full.

374. *See id.* at 143-44.

375. *Id.* at 143. Even though *Sayadoff* acknowledged that its position disagreed with the Restatement, the court saw no need to offer any support for its conclusion. *See id.*

376. *See* Norma J. Wilker, *Educating Judges About Gender Bias*, *in* WOMEN, THE COURTS, AND EQUALITY, *supra* note 376, at 227, 237 (noting that although gender bias occurs in judicial arena, judges may not realize their biases, considering themselves "free of the kinds of bias documented in the social science reports, which they believe reflect only what happens 'elsewhere'").

> All their lives, forces which [judges] do not recognize and cannot name, have been tugging at them—inherited instincts, traditional beliefs, acquired convictions . . . . In this mental background every problem finds its setting. We may try to see things as objectively as we please. Nonetheless, we can never see them with any eyes except our own.[377]

Others agree. Charles Warren stated that Supreme Court Justices' "views are necessarily, though by no conscious intent, affected by inheritance, education and environment and by the impact of history."[378] Another commentator noted that "[w]e cannot, if we would, get rid of emotions in the field of justice. The best we can hope for is that the emotions of the judge will become more sensitive, more nicely balanced, more subject to his own scrutiny, more capable of detailed articulation."[379] Today few would question that a judge's background, experiences, and emotions sometimes affect his or her decisions.[380]

Recently, social science research has provided evidence of the subconscious effect that people's perceptions of others have on their decisions. People tend to judge others who are like them more leniently than they do those who are unlike them, and that tendency turns out to surface more often and to be greater than one might expect. For example, one experiment showed that people prefer members of their own group, even when membership in that group was randomly assigned by the person doing the research.[381] These randomly-selected group members perceived other members of their arbitrary group as being more similar to themselves than were members of other groups.[382] They evaluated members of their group more favorably than nongroup members, they remembered the undesirable behavior of nongroup members more than that of in-group members, and they "disproportionately attribute[d] in-group members' failures to . . . factors [that were beyond the in-group members' control] and [nongroup] members' failures" to the nongroup members' inadequacies.[383] Perhaps most relevant, they tried to reward members of

377. BENJAMIN N. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 12-13 (1921).

378. CHARLES WARREN, THE SUPREME COURT IN UNITED STATES HISTORY 2 (1932).

379. JEROME FRANK, LAW AND THE MODERN MIND 153 (1963).

380. *See* Gregory C. Sisk et al., *Charting the Influences on the Judicial Mind: An Empirical Study of Judicial Reasoning,* 73 N.Y.U. L. REV. 1377, 1383-92 (1998) (finding that decisions of judges and reasoning used to arrive at decisions are sometimes influenced by extralegal variables).

381. *See* Linda Hamilton Krieger, *The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity,* 47 STAN. L. REV. 1161, 1190-93 (1995) (summarizing experiments showing that when people are divided into groups, whether on basis of personal characteristics or randomly, people develop biases against members of other groups).

382. *See id.* at 1191-92.

383. *Id.* at 1192.

their own arbitrarily-determined group, even when doing so required them to treat nongroup members unfairly.[384] The benefits of being judged by a member of your own group, even if membership in that group is based on chance, are substantial.

One explanation for this preference for members of one's own group is sympathy. Sympathy arises out of "the ability to imagine oneself in the sufferer's predicament and, in some sense, to feel the other's pain."[385] Naturally, people are better able to imagine the predicament faced by others if those others are similar to them. The greater the similarity between the judge and the sufferer, the more readily sympathy is inspired.[386] Sympathy exerts several influences on the judge, all of them helpful to the object of that sympathy. It causes the judge to want to help the person with whom he sympathizes, to view evidence favorably to that person, and to cast less blame on that person.[387] Thus, when the judge is sympathetic to the injurer, which will tend to occur when they share characteristics, the judge is likely to attribute less responsibility to the injurer.[388] Furthermore, he will tend to attribute favorable traits to that person, even if he has information indicating that the person does not have those traits.[389] And once sympathy for one party is established, sympathy for that party's opponent decreases.[390]

The significance of these findings to the abortion decisions is clear. It is difficult to imagine a person who was more dissimilar from these male judges (who typically were well educated and well-to-do) than the impecunious women who were injured by illegal abortions.[391] Because these wo-

384. *See id.* at 1192-93.

385. Neal R. Feigenson, *Sympathy and Legal Judgment: A Psychological Analysis,* 65 TENN. L. REV. 1, 7 (1997).

386. *See id.* at 53.

387. *See id.* at 58, 59, 64.

388. See Kelly G. Shaver, Defensive Attribution: Effects of Severity and Relevance on the Responsibility Assigned For an Accident, 14 J. PERSONALITY & SOC. PSYCHOL. 101, 112 (1970).

389. *See* Richard E. Nisbett & Timothy DeCamp Wilson, *The Halo Effect: Evidence for Unconscious Alteration of Judgments,* 35 J. PERSONALITY & SOC. PSYCHOL. 250, 255 (1977).

390. *See* Feigenson, *supra* note 385, at 59-60.

391. Those well-to-do women who had abortions often had them where abortions were legal, and therefore considerably less dangerous, or were able to have their abortions characterized as therapeutic, and therefore legal. *See* Reva Siegel, *Reasoning from the Body: A Historical Perspective on Abortion Regulation and Questions of Equal Protection,* 44 STAN. L. REV. 261, 296 (1992). Those among the well-to-do who risked injury and prosecution by undergoing illegal abortions undoubtedly found doctors who adhered to well-known safety procedures, such as the use of sanitized instruments, and who gave appropriate after care. *See* Richard A. Posner, *Legal Reasoning from the Top Down and from the Bottom Up: The Question of Unenumerated Constitutional Rights,* 59 U. CHI. L. REV. 433, 448 (1992) (noting that middle-class women had option of safe illegal abortions if contraception failed). As a result of all these factors, those injured by illegal abortions were primarily poor women. *See* Vincent Blasi, *The Rootless Activism of the Burger Court, in* THE BURGER COURT: THE COUNTER-REVOLUTION THAT WASN'T 213 (Vincent Blasi ed., 1983).

men were not members of any group to which the judge conceivably belonged, the judges were not likely to sympathize with them. As a result, these women did not benefit from the leniency typically shown to in-group members, their failings were more likely to be remembered and attributed to factors that they should have controlled, and their judges may have been subconsciously willing to treat them unfairly if doing so would reward a member of the judges' own group. On the other hand, defendants in most of these cases were doctors—professionals with whom the judges had much in common.[392] They were likely to be viewed as members of the judges' "group," whose failings might be overlooked or attributed to factors beyond their control, and whom the judges subconsciously might want to protect.[393] In two cases where the defendants were not doctors, they were instead the woman's paramour,[394] another person who belonged to at least one group to which these male judges belonged, and whose position might well have been understood by the judge. Only three cases were against unlicensed practitioners of medicine, a group more remote from judges, although not as alien as women who had illegal abortions.[395]

Invariably, the woman whose conduct was ultimately being judged in the abortion cases was in no way similar to the judge, while her adversary and the judge usually shared many characteristics. The psychological literature indicates that the judge in such a case might well have a subconscious bias against the person who is so dissimilar from him—the plaintiff. The bias in these cases would tend to be particularly strong because gender-group identification is strong. At an early age children learn not to

392. *See, e.g.*, Hunter v. Wheate, 289 F. 604, 604 (D.C. Cir. 1923); Nash v. Meyer, 31 P.2d 273, 273 (Idaho 1934); Reno v. D'Javid, 379 N.Y.S.2d 290, 290 (Sup. Ct. 1976), *rev'd*, 390 N.Y.S.2d 421 (App. Div. 1977), *aff'd*, 369 N.E.2d 766 (N.Y. 1977); Symone T. v. Lieber, 613 N.Y.S.2d 404, 405 (App. Div. 1994); Henrie v. Griffith, 395 P.2d 809, 810 (Okla. 1964); Martin v. Morris, 42 S.W.2d 207, 207 (Tenn. 1931); Androws v. Coulter, 1 P.2d 320, 320 (Wash. 1931).

393. *Roe v. Wade*, 410 U.S. 113 (1973) provides some evidence that male justices more readily sympathize with dilemmas faced by doctors who might provide abortions than those of women who have abortions. When the justices first met to discuss the case, "the discussion focused on the professional rights of a doctor seeking to perform an abortion, rather than on the rights of a woman trying to obtain one." BOB WOODWARD & SCOTT ARMSTRONG, THE BRETHREN 169 (1979). The *Roe* opinion likewise focused "less on women, and more on fetuses, fetal life, and the responsibility of physicians and their 'right' to administer treatment." Lynne N. Henderson, *Legality and Empathy*, 85 MICH. L. REV. 1574, 1626 (1987). The justices' desire to relieve doctors of a burden on their practice of medicine seems to have supplied greater motivation to overturn the abortion statutes than did any concern for the "intrinsic horror" faced by women with unwanted pregnancies. Donald Regan, *Rewriting* Roe v. Wade, 77 MICH. L. REV. 1569, 1617 (1979).

394. *See* Sayadoff v. Warda, 271 P.2d 140, 141 (Cal. Dist. Ct. App. 1954); Bowlan v. Lunsford, 54 P.2d 666, 666-67 (Okla. 1936).

395. *See* Castronovo v. Murawsky, 120 N.E.2d 871, 871 (Ill. App. Ct. 1954); Szadwicz v. Cantor, 154 N.E. 251 (Mass. 1926); Miller v. Bennett, 56 S.E.2d 217 (Va. 1949).

behave as members of the other sex,[396] and that lesson is particularly strong for boys. For example, a girl who acts as a tomboy may not be ostracized, but a boy who adopts feminine traits will be relentlessly harassed. Indeed, some authorities have concluded that this bias is so strong that "it may be easier [for a male judge] to assume the imagined mental state of a black male, of whatever station in life, than it is successfully to imagine that [he] is a *female* (even a white, middle-class one)."[397]

In the abortion cases this bias would be strengthened by a number of factors. First, the woman was injured as a result of a decision that was uniquely female. Thus, the judge's inability to relate to her is at its zenith, for she is a person whom he has been taught to regard as different from him and she was injured making a decision that he will never face. Second, "females who violate sex role expectations are . . . negatively judged," and women who have abortions violate several sex role expectations.[398] Finally, in most abortion cases this bias against those who are dissimilar to the judge is augmented by the judges' tendency to relate to and so favor their fellow professionals, the defendant doctors.

None of these biases are present in the case of illegal fights, where plaintiffs typically are allowed to recover. In those cases, both parties are equally similar to the judge and do not violate sex role expectations, so no sympathy or in-group/out-group bias would automatically come into play. In cases such as *McCummings*, some such bias might be present, for the judge is more likely to see similarities between himself and the police officer than between himself and the fleeing felon. The judge's sympathy and its effect, however, would be less than in the abortion cases. Not only can the male judge more easily relate to the fleeing criminal than to a woman who had an abortion, but he will find it harder to understand the position of the cop on the beat who, for example, carelessly fired his gun, than that of a defendant doctor, a well-educated professional like himself who "merely made a mistake." Finally, the judge in a case like *McCummings* is aware of his possible bias, and so can guard against it, but judges in abortion cases are often oblivious to their possible prejudice. As one judge put it, "Until I was on this Gender Bias Task Force, there never was any gender bias in my court."[399] Judge Rothman did not stand alone. As one commentator stated, "[w]hile two-thirds to three-quarters of the wo-

396. *See* John D. Johnston, Jr. & Charles L. Knapp, *Sex Discrimination By Law: A Study in Judicial Perspective*, 46 N.Y.U. L. REV. 675, 744 (1971) (observing that children are taught not to "express a desire to be—or to behave as though he [or she] were—a member of the other sex").

397. *Id.*

398. REPORT OF THE NEW YORK TASK FORCE ON WOMEN IN THE COURTS, 15 FORDHAM URB. L.J. 11, 143 (1986-87) [hereinafter NEW YORK REPORT] (quoting NEW YORK TASK FORCE ON WOMEN IN THE COURTS PUBLIC HEARING 229-31 (1985) (Rochester) (testimony of Judy Long)).

399. THE EFFECTS OF GENDER BIAS IN THE FEDERAL COURTS: THE FINAL REPORT OF THE NINTH CIRCUIT GENDER BIAS TASK FORCE, 67 S. CAL. L. REV. 745, 949 (1994) (quoting Hon. David Rothman, Co-Chair, California Gender Bias Task Force).

men in nearly every survey indicate that they experience various forms of discriminatory practices . . . only one-fourth to one-third of the men report observing such behavior."[400]

Anecdotal evidence from the courts supports the conclusion that some male judges' identification with, and sympathy for, their fellow men affects their view of the cases that come before them. For example, when sentencing a man who had murdered and beaten his wife after finding her with another man, one Maryland judge commented, "I seriously wonder how many married men . . . would have the strength to walk away, but without inflicting some corporal punishment . . . I shudder to think what I would do."[401] In a similar situation, an Ohio judge stated, "It's enough to blow any guy's cool if he's any kind of man."[402] When imposing a minimal sentence on a defendant who had assaulted his estranged wife, upon finding her with another man, a New Hampshire judge stated, "I think that would provoke the average man."[403] Another judge concluded that, when a wife left her abusive husband and obtained a restraining order, she had committed "highly provoking acts . . . [that aroused] an irresistible passion [to kill her] *as it would in any reasonable person under the circumstances.*"[404] Judicial identification with, and sympathy for, the position of these men could hardly be more clear.

Subconscious judicial gender bias also surfaces in some courts' glib attitude toward injured women. Consider the judge who, upon hearing that a husband had poured lighter fluid on his wife and set her on fire, sang, in open court, "You light up my wife" to the tune of "You Light Up My Life."[405] Another judge, when informed that the defendant in a first-degree murder case had tried to kill his wife, commented, in open court, "Is that a crime here in Dade County?"[406]

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400. Ann J. Gellis, *Great Expectations: Women in the Legal Profession, A Commentary on State Studies*, 66 IND. L.J. 941, 971 (1991). Several state studies indicate that although most men thought biased behavior never occurred, the fact was that they were oblivious to the biased behavior that took place in their presence. *See* REPORT OF THE FLORIDA SUPERME COURT GENDER BIAS STUDY COMMISSION, 42 FLA. L. REV. 803, xv (1990) [hereinafter FLORIDA STUDY]; NEW YORK REPORT, *supra* note 400, at 17 (noting that gender bias is "pervasive problem with grave consequences"); Judith Resnick, *"Naturally" Without Gender: Women, Jurisdiction, and the Federal Courts*, 66 N.Y.U. L. REV. 1682, 1691 n.41 (1991) (quoting FINAL REPORT OF THE RHODE ISLAND COMMITTEE ON WOMEN IN THE COURTS 22 (June 1987)).

401. Lynn Hecht Schafran, *Symposium on Reconceptualizing Violence Against Women By Intimate Partners: Critical Issues; There's No Accounting For Judges*, 58 ALB. L. REV. 1063, 1063 (1995) (quoting Record at 4-5, *State v. Peacock* (Md. Cir. Ct. Oct. 17, 1994) (No. 94-Cr-0943)).

402. *Id.* at 1066 (quoting Sheila Weller, *More of America's Most Sexist Judges*, REDBOOK, Dec. 1994, at 88, 91).

403. *Id.* (quoting Sheila Weller, *America's Most Sexist Judges*, REDBOOK, Feb. 1994, at 83, 85).

404. Laura L. Crites, *Wife Abuse: The Judicial Record*, *in* WOMEN, THE COURTS, AND EQUALITY, *supra* note 376, at 38, 45 (alteration in original).

405. FLORIDA STUDY, *supra* note 400, at 863.

406. *Id.*

Evidence of the courts' biased treatment of women is not just anecdotal. As might be expected, the best-documented examples of consistent judicial gender bias involve the inequitable application of the law. In the area of criminal law, women who engage in sexual crimes "are penalized more harshly than their male counterparts."[407] Not only are these women punished more severely than men, they are considerably more likely to be prosecuted. Florida found that "prosecutions for male clients [of prostitutes] and pimps are nearly nonexistent" probably because attorneys, judges, and prosecutors did not regard the men who patronized prostitutes as criminals.[408] Instead, these individuals were viewed as "frequently respectable men who had much to lose by public exposure."[409]

When women are the victims of sexual batteries, judges often discount the seriousness of the crime. For example, Florida judges imposed sentences below those recommended by the sentencing guidelines "in sexual battery cases at a rate three times that of other violent personal crimes, four times that of burglary or theft, five times that of drug offenses, and seven times that of weapons offenses."[410] Judges' tendency to sympathize with men who abuse women appears in wife abuse prosecutions as well, where they "seldom impose sanctions commensurate with the seriousness of the offenses or comparable with sanctions for similar violence against strangers."[411] Similarly, judges repeatedly refuse to remove wife-batterers from the family home.[412] This reluctance to evict men is remarkably at odds with the attitude of many judges toward battered women: "I don't feel sorry for them. Why don't they just get up and leave?"[413]

Biased results are even more abundant in the area of family law, particularly in cases of divorce. This bias begins at the start of the case when the laws that "require a judge to order the more financially secure spouse (almost invariably the man) to pay the other spouse's ongoing legal fees and support if the request is well founded . . . generally are not observed

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407. Norma J. Wikler, *On the Judical Agenda for the 80's: Equal Treatment for Men and Women in the Courts,* 64 JUDICATURE 202, 206 (1980).

408. FLORIDA STUDY, *supra* note 400, at 906.

409. *Id.* at 899. Although the idea that criminals should not be prosecuted if they are otherwise respectable and have much to lose by public exposure should appeal to white collar criminals, it seems a rather peculiar position for prosecutors and judges to espouse. It also is noteworthy that the male clients of prostitutes, who committed crimes for fun, are favored over the women, who became prostitutes out of economic necessity. The sympathy these judges and prosecutors felt for their fellow men was indeed great. *See id.* at 900.

410. *Id.* at 890.

411. U.S. COMM'N ON CIVIL RIGHTS, UNDER THE RULE OF THUMB: BATTERED WOMEN AND THE ADMINISTRATION OF JUSTICE 59 (1982).

412. *See* FLORIDA STUDY, *supra* note 400, at xxvii-xxviii.

413. NEW YORK REPORT, *supra* note 400, at 32. Ironically, although this judge did not understand why battered women did not leave, he and his colleagues provide an unusual reason for the women to stay. *See id.* at 112.

or are observed in a manner biased against women."[414] Having established the unequal ground on which many cases will be held, the courts continue to favor men as the cases develop. They hold "mothers . . . to a different and higher standard of parenting and personal behavior than fathers,"[415] whereby, for example, "the divorced man with a girlfriend is a stable fellow starting a new life, but the divorced woman with a boyfriend is a promiscuous and unfit custodial mother."[416] The law as to division of property after a marriage breaks up is also construed "in a manner that greatly disadvantages women and predetermines inequitable results."[417] For example, one New York study shows that, in "equitably" distributing marital business property, courts gave the man a median of eighty-two percent of the assets while the woman received eighteen percent.[418] Florida also found that "[m]en customarily retain more than half of the assets of the marriage and leave with an enhanced earning capacity. The remaining family members are left with less than half of the marital assets and a severely diminished and declining earning capacity."[419] One study showed that under divorce as administered by the courts, women and children "suffer a seventy-three percent drop in their standard of living in the first year after divorce, in contrast to the forty-two percent rise in the standard of living of divorced men."[420] Child support awards "frequently are inadequate and appear to be based on what the father can comfortably afford rather than the standard of living of the children and their special needs."[421] When women try to enforce these inadequate awards they frequently are viewed by judges as vindictive, and they usually lose.[422] The possibility that these pro-male decisions result from the male judges' sub-

414. FLORIDA STUDY, *supra* note 400, at xviii; *see also* NEW YORK REPORT, *supra* note 400, at 69, 80.

415. Lynn Hecht Schafran, *Gender and Justice: Florida and the Nation*, 42 FLA. L. REV. 181, 192 (1990) (citing REPORT OF THE GENDER BIAS STUDY OF THE MASSACHUSETTS SUPREME JUDICIAL COURT (1989)). The *New York Report* also discussed the double standard in assessing fitness to parent, where women, but not men, need to be blameless. *See* NEW YORK REPORT, *supra* note 400, at 105-07.

416. Schafran, *supra* note 415, at 194.

417. NEW YORK REPORT, *supra* note 400, at 69.

418. *See id.* at 71.

419. FLORIDA STUDY, *supra* note 400, at 830-31. The average percentage of the marital assets that the woman received was between 25% and 40% in Florida and New Jersey. *See* Schafran, *supra* note 415, at 189. One result of giving much less than half of the marital assets to the spouse who has lower earning capacity, and who probably has custody of the couple's children, is that divorced women and their families are "the fastest growing segment of those living in poverty." FLORIDA STUDY, *supra* note 400, at 831.

420. FLORIDA STUDY, *supra* note 400, at 806.

421. *See* NEW YORK REPORT, *supra* note 400, at 99.

422. *See* FLORIDA STUDY, *supra* note 400, at 824. Many judges seem "to be more concerned about preserving the father's credit rating than effectively enforcing awards." NEW YORK REPORT, *supra* note 400, at 99. Others focus on the father's ability to pay, not the mother's need for money with which to raise the children. *See* FLORIDA STUDY, *supra* note 400, at 825.

conscious identification with men is supported by the fact that, when a woman is among the decision makers, the proportion of alimony/property decisions favoring men decreases.[423]

Court decisions in custody disputes also show the effect of the bias that can arise from judges' natural tendency to relate to those whose position is similar to theirs. As in the criminal cases mentioned earlier, the father's violence toward the mother often is excused in custody cases.[424] For example, it appears that judges in the District of Columbia have regularly awarded custody without giving any consideration to the violence which the father had visited upon the mother.[425] Perhaps even more telling is the fact that more than half of "abusive men . . . who use violence to gain custody are successful in court."[426] In fact, whenever men actually seek custody, they are quite successful. In one particularly blatant case, a judge denied a mother custody of two daughters, saying the father's "sexual abuse of the girls was less significant than the mother's decision to report him, because her reporting 'showed [that] her hatred for the father took precedence over the children's need to hold a high image of their father.'"[427] The Massachusetts Gender Bias Study showed that fathers were successful over ninety percent of the time when they sought custody.[428] Other studies showed fathers winning custody in contested

423. *See* David W. Allen & Diane E. Wall, *Role Orientations and Women State Supreme Court Justices*, 77 JUDICATURE 156, 165 (1993). A similar phenomenon occurs in sex discrimination cases, where the likelihood that a woman's sex discrimination claim will be successful increases if a female judge hears the case. *See id.*

424. *See* Martha R. Mahoney, *Legal Images of Battered Women: Redefining the Issue of Separation*, 90 MICH. L. REV. 1, 45 (1991) (noting that violent men frequently win custody suits and providing results from studies that reveal this is the case); Lynn Hecht Schafran, *Gender Bias in Family Courts: Why Prejudice Permeates the Process*, FAM. ADVOC., Summer 1994, at 22, 27 ("Many judges believe that if a man beats his wife but not his children, his violence should not have an affect [sic] on custody and visitation."); *see also Family Law in the Fifty States 1997-98: Case Digests*, 32 FAM. L.Q. 719, 777-79 (1999) (noting emergence of state statutes and decisions calling for increased consideration of domestic violence in determining custody).

425. *See* TASK FORCE ON RACIAL AND ETHNIC BIAS AND TASK FORCE ON GENDER BIAS IN THE COURTS, DISTRICT OF COLUMBIA COURTS, FINAL REPORT 183 (May 1992). Fewer that one-third of those questioned by the District of Columbia Task Force reported that, in making custody decisions, judges often or always considered violence by the father against the mother. Another 27.2% stated that judges sometimes (but not often) considered such violence in determining custody, and 18.5% said that judges rarely or never considered such violence in deciding who should get custody of children. Similarly, judges in other jurisdictions "routinely ignore . . . [domestic violence] or dismiss as insubstantial the impact of parental violence on children . . . ." Karen Czapanskiy, *Domestic Violence, the Family, and the Lawyering Process: Lessons from Studies on Gender Bias in the Court*, 27 FAM. L.Q. 247, 255 (1993).

426. Catherine F. Klein & Leslye E. Orloff, *Providing Legal Protection for Battered Women: An Analysis of State Statutes and Case Law*, 21 HOFSTRA L. REV. 801, 958 (1993).

427. Czapanskiy, *supra* note 425, at 256.

428. *See* FLORIDA STUDY, *supra* note 400, at 821 (noting high success rate of fathers seeking custody).

cases sixty-three percent, forty-five percent and "almost 50%" of the time, despite the fact that mothers "continue to be the primary caregivers."[429]

The cases show that some judges' application of the law very strongly favors those who are similar to them over those whose position they have difficulty understanding. Many male judges automatically understand that the husband worked hard to develop a business, but do not see that the wife worked equally hard in raising the family's children, running the home and providing social and emotional support for the entire family. These judges also fail to realize "the irretrievable economic losses women incur when they forego developing income-generating careers and vested retirement rights to become homemakers for the benefit of their families."[430] Consequently, these judges believe they are equitably distributing assets when they award eighty-two percent of the value of the business to the husband, leaving the wife, who has less ability to support herself, with eighteen percent. Similarly, the male judge relates to the father's desire for custody and finds it laudable. He may well believe that the children will be better off in the custody of a man who exhibits such unusual interest in them, and the fact that this father abused his wife may seem of little moment. These are cases in which the judge's "gender and resulting life experience [are] relevant to his or her view of the case."[431]

This abbreviated discussion of courts' inequitable application of the law gives some indication of the ways that judicial gender bias has affected the way courts apply the law. The abortion cases go much further, showing that gender bias not only has influenced the application of gender-neutral law, but has caused the creation of at least one biased common law rule, the rule that permits tortuously injured male criminals, but not similarly situated women, to recover. The facts that the courts reached such inequitable results without noticing the inequity, and that they deprived these women of their basic right to be compensated without considering whether that denial of compensation would achieve any desired objective, shows how ingrained and pervasive gender bias is, and its enormous pernicious influence on the judicial system.

429. *Id.* at 821 n.101; *id.* at 821.

430. NEW YORK REPORT, *supra* note 400, at 67.

431. J.E.B. v. Alabama *ex rel.* T.B., 511 U.S. 127, 149 (1994) (O'Connor, J., concurring).