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Fellow-Feeling and Gender in the Law of Personal Injury

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FELLOW-FEELING AND GENDER IN THE LAW OF PERSONAL INJURY

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Whenever authorities instruct audiences about the law that American courts apply—in civics lessons, in speeches to the public, and to students in law schools, as well as in the scripted instructions written for a jury—they typically emphasize the tenet of impartiality. Impartiality underlies fairness, justice, and intelligibility in any legal system. Law in the United States holds this value in writing, at the core of the nation's foundational documents.[1]

The obligation of impartiality gives direction to partisans as well as neutrals. Judges famously must eschew "bias or prejudice" and maintain an open mind in considering issues that may come before them, and they instruct jurors accordingly.[2] Participants who take the role of an advocate—attorneys for clients, legal scholars with agendas, law students ordered to argue for one side—succeed or fail based on how well they can

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[1] *See* U.S. CONST. amend. VI (stating a right to "an impartial jury"); THE DECLARATION OF INDEPENDENCE (U.S. 1776) (including, in a roster of complaints, a protest that the King of Great Britain had attacked judicial independence, established disingenuous trials, deprived Americans of trial by jury, and responded unfairly to petitions for redress).

[2] MODEL CODE OF JUDICIAL CONDUCT R. 2.3 (2007).

persuade neutral auditors. Advocates strive to move the impartial. Persuasion occurs when an auditor shifts from neutrality to the belief that one and only one of the two sides should win.[3]

Impartiality takes on a pointed aspect in private litigation, where each winner is matched with at least one loser. A failure of impartiality in an adjudicated civil case means that one side has enjoyed undue favor, while the other side suffered from undue disfavor. Impartial decisionmakers, for their part, should be moved to support one adversary over the other by facts or argument, rather than what standard instructions tell jurors to put aside: their "personal likes or dislikes, opinions, prejudices, or sympathy."[4]

Personal injury litigation has provoked particular suspicion about partiality rooted in sympathy. Critics of American tort law have argued that sympathy causes juries and judges to veer from the neutrality that should be their signature characteristic, and that this veering brings havoc to the rule of law.[5] Sympathy, in this view, leads to baseless determinations of responsibility, and damage awards that are excessively large. It also fosters nuisance value for cases that do not deserve to go to trial. Civil litigants in the United States have a right to jury adjudication that is not recognized in most other countries, where judges

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[3] On the presence of justice in this construct, see D.D. RAPHAEL, THE IMPARTIAL SPECTATOR: ADAM SMITH'S MORAL PHILOSOPHY 134-45 (2007), explaining moral philosophy with reference to conscience, which in turn responds to "feelings of approval and disapproval by disinterested spectators."

[4] United States v. Grace, 408 F. Supp. 2d 998, 1000 (D. Mont. 2006), *rev'd on other grounds*, 493 F.3d 1119 (9th Cir. 2007); *accord* State v. Kelly, 942 A.2d 440, 454 (Conn. App. 2008).

[5] JOHN C.P. GOLDBERG ET AL., TORT LAW: RESPONSIBILITIES AND REDRESS 25 (2d ed. 2008) (summarizing criticisms). A leading scholar of sympathy and emotion in the law offers a moderate version of the criticism, arguing that it would be imprudent for policymakers to increase the presence of sympathy currently manifest in American adjudication. Neal R. Feigenson, *Sympathy and Legal Judgment: A Psychological Analysis*, 65 TENN. L. REV. 1 (1997) [hereinafter Feigenson, *Sympathy*].

decide personal-injury cases,[6] and so to these critics, the problem of the lay factfinder who undermines law through sympathy removes American litigation from the rule of law as legal systems around the world understand it.

The classic sympathy-trope associated with American personal injury law features what looks like an innocent victim. Consider, for example, a hypothetical young plaintiff who accuses an obstetrician of negligence during his delivery, three years earlier. The plaintiff suffers from physical and mental disabilities that his lawyers attribute to misfeasance by the obstetrician. A trial commences. Expert witnesses testifying for the defendant find no breach of the pertinent standard of care. Opposing experts disagree. The judge decides to deny defense motions for judgment as a matter of law, and sends the case to a jury; she thinks the question of negligence is close. The three-year-old is adorable, let us say, and his plight heart-rending. To tort critics this plaintiff holds an unfair advantage: he will draw on sympathy.[7]

From another corner of legal commentary about American personal injury law, writers have decried a very different sympathy problem. They perceive a disregard for emotion, noting that tort law applies its remedial energies much less to psychological injury than to physical harm.[8] Tort doctrine privileges injury that can be expressed in quantified dollar terms over what it calls non-economic loss, and often will, by statute,

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[6] Geoffrey Palmer, *Accident Compensation in New Zealand: Looking Back and Looking Forward*, 2008 N.Z. L. REV. 81, 87 (2008) (noting this American anomaly).

[7] *See* James Phelan, Note, Hyundai Motor Co. v. Vasquez*: The Texas Supreme Court Broadens the Class of Impermissible Commitment Questions in Civil Voir Dire*, 59 BAYLOR L. REV. 541, 544 (2007) (discussing a similar hypothetical). On the sympathy-trope for this type of injury, see Anita Bernstein, *Enhancing Drug Effectiveness and Efficacy Through Personal Injury Litigation*, 15 J.L. & POL'Y 1051, 1098 (2007).

[8] Martha Chamallas, *The Architecture of Bias: Deep Structures in Tort Law*, 146 U. PA. L. REV. 463, 491–500 (1998); Mark Geistfield, *Negligence, Compensation, and the Coherence of Tort Law*, 91 GEO. L.J. 585, 608–10 (2003).

cap the latter category of damages.[9] By contrast, almost every United States jurisdiction puts no upper limit on what plaintiffs can recover for pecuniary losses.[10] Identifying themselves overtly with feminism, some writers have suggested that this disregard for distress and pain amounts to disparagement for what looks female, a nonpecuniary realm of women.[11] For them, tort law does indeed have a problem with emotion: the problem is not an excess of unruly sympathy, as the tort reformers have charged, but a refusal to honor the reality of feeling.[12]

Although the criticisms of American personal injury law appear opposed, they hold ground in common. This Article, finding validity in both the concern about too much sympathy from the first group of critics and the protests of the second group, replaces "sympathy" with a wider Enlightenment construct from 1754. Adam Smith, starting his *Theory of Moral Sentiments* with this word,[13] went on to describe a more complex phenomenon and gave it its own term. His coinage, "fellow-feeling," includes what an exegesis on Smith today would call sympathy and also empathy, interconnectedness of feeling, and identification with another person.

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[9] Joseph Sanders, *Reforming General Damages: A Good Tort Reform*, 13 ROGER WILLIAMS U. L. REV. 115, 129–40 (2008) (reviewing state provisions to cap damages and empirical findings about their effects).

[10] One exception is Virginia. VA. CODE ANN. § 8.01-581.15 (2006) (capping pecuniary as well as non-pecuniary damages).

[11] Chamallas, *supra* note 8 at 498; F. Patrick Hubbard, *The Nature and Impact of the "Tort Reform" Movement*, 35 HOFSTRA L. REV. 437, 452 (2006) (summarizing this literature).

[12] Although academic feminists have been a dominant cohort among those who favor more regard for emotion in personal injury law, they are not the only such advocates. In his student days, for example, one Torts scholar recommended that sympathy play a stronger role in tort adjudication. Benjamin Zipursky, DeShaney *and the Jurisprudence of Compassion*, 65 N.Y.U. L. REV. 1101 (1990). On empathy as a volatile subject within American law and politics, see James Carroll, *In Search of Empathy*, BOSTON GLOBE, Aug. 17, 2009, at Editorial, p. 11 (discussing the concept with relation to decisions of the Obama administration, particularly the appointment of Sonia Sotomayor to the Supreme Court).

[13] ADAM SMITH, THE THEORY OF MORAL SENTIMENTS 10 (D.D. Raphael & A.L. MacFie eds., Clarendon Press 1976) (1759).

If fellow-feeling is present in personal injury law, for whom does it feel? Many hypotheses deserve investigation. This Article, asking "the woman question,"[14] chooses only one. It starts with the uncontroversial premise that when tort law took form in the United States, it privileged men and imposed adversity on women. A quick summary: Until the late nineteenth century, American women could not hold personal property in their own name; this legal disability prevented them from suing and being sued. Women could not represent personal-injury litigants as advocates in court. They could not serve as judges; they were barred from juries. As far as we know, a woman in the United States or Britain never tried to emulate Thomas Cooley, Frederick Pollock, Francis Hilliard, or Charles Greenstreet Addison by publishing a nineteenth-century monograph on torts;[15] it is hard to suppose that she could have found a publisher. In short, women had almost no voice and no power in the early formation of American tort law. Today, though no longer barred from participation, women remain significantly underrepresented among the groups and individuals empowered to form tort doctrine.[16] If fellow-feeling is a force in American personal injury law, then one might expect it to function as do other forces in this field: to the exclusion or

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[14] Katharine T. Bartlett, *Feminist Legal Methods*, 103 HARV. L. REV. 829, 837–49 (1990).

[15] CHARLES G. ADDISON, WRONGS AND THEIR REMEDIES: A TREATISE ON THE LAW OF TORTS (BANKS AND BROS.) (1860); THOMAS M. COOLEY, A TREATISE ON THE LAW OF TORTS OR THE WRONGS WHICH ARISE INDEPENDENT OF CONTRACT (CALLAGHAN & CO. 1880); FRANCIS HILLIARD, THE LAW OF TORTS OR PRIVATE WRONGS (LITTLE, BROWN, & CO.) (1859); FREDERICK POLLOCK, THE LAW OF TORTS: A TREATISE ON THE PRINCIPLES OF OBLIGATIONS ARISING FROM CIVIL WRONGS IN THE COMMON LAW (BANKS & BROS.) (1898).

[16] On the underrepresentation of women within these groups—judges, personal-injury litigators, legislators, and scholars—see KATHARINE T. BARTLETT & DEBORAH L. RHODE, GENDER AND LAW: THEORY, DOCTRINE, COMMENTARY 682–90 (4th ed. 2006) (summarizing statistical data about disparities); for another statistic, see Susan Faludi, *Second Place Citizens*, N.Y. TIMES, Aug. 26, 2008 at A19 (observing that the percentage of women in state legislatures has stagnated in the low 20s for the last fifteen years).

detriment of women and to the benefit of men.

This favoritism reveals a distinction between sympathy, as tort reformers have used the term, and fellow-feeling. Sympathy and pity defeat impartiality and the rule of law when a pathetic plaintiff vanquishes a strong defendant.[17] Yet feelings of connection and identification surely extend beyond the tiny number of lucky, well-counseled, winsomely injured people who win big and inspire tort reform campaigns. Other people can attain them too. Witnesses, defendants, co-defendants, lawyers, and even (or so I will argue) business entities and their managers are all potential recipients of this feeling. Enlarge sympathy to include the breadth of fellow-feeling, and these others stand to receive much from the civil justice system. If personal injury law has been shaped—or, to put the point more tendentiously, if the objective content of tort law has been undone—by fellow-feeling, then the effects of this influence probably go beyond inflated verdicts. The powerful too are eligible to enjoy its emollients.

Our earlier hypothetical case, *Disabled Child v. Obstetrician*, might cause an observer to worry that unruly emotion would cause a jury to deem the defendant at fault when he was not, and if the defendant was indeed at fault, to overcompensate the plaintiff.[18] Good malpractice-defense lawyers, however, once they and their clients have chosen to go to trial rather than settle, refuse to be daunted by this worry. They do not cede fellow-feeling to their adversaries. To the extent they can, they will not only call their neutral-sounding emotion-free experts to talk about the standard of care, but also portray their client

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[17] For a survey of emotion as a force that sways juries in favor of plaintiffs and against defendants—the standard conception of emotion in personal injury law that this Article seeks to supplement—see NEIL FEIGENSON, LEGAL BLAME: HOW JURORS THINK AND TALK ABOUT ACCIDENTS 69–86 (2000).

[18] Adam Smith was aware of the unique claim that a child makes on sympathetic engagement. *See* SMITH, *supra* note 13, at 219 (observing that a child "excites a much more lively as well as a much more universal sympathy" than an old man: "Every thing may be expected, or at least hoped, from the child. In ordinary cases, very little can be either expected or hoped from the old man.").

sympathetically, as a valiant Everyman who fought long odds to help the unborn, now ungrateful, plaintiff and his laboring mother.[19]

That could be me, fellow-feeling concludes, and often to the detriment of weaker parties. Juries side with physicians much more than patients.[20] Judge-made shifts in doctrine have gone in the same direction: a plaintiff prosecuting a medical malpractice claim typically has to demonstrate its merit before it will go to a jury, and clear other hurdles.[21] Medical-malpractice statutory reforms favoring defendants originated more in manipulation than data.[22] Emotion-based and non-analytical affinities, in short, have aided not only vulnerable accusers but the individuals and entities they accuse.

In considering whether fellow-feeling helps men in the realm of personal injury, this Article regards products liability as a rich venue for investigation, because gender in the United States has been especially central to the phenomenon of claiming and receiving compensation for injuries ascribed to defective products.[23] Women have reported to the courts that numerous

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[19] Berkeley Rich, *Malpractice: How to Neutralize the Sympathy Factor*, MEDICAL ECONOMICS, Feb. 20, 2004, at 81 (offering a more detailed version of this strategy).

[20] Numerous studies report the same conclusion; the divergences are limited to how much the defense win rate exceeds 50%. Ralph Peeples & Catherine T. Harris, *Learning to Crawl: The Use of Voluntary Caps on Damages in Medical Malpractice Litigation*, 54 CATH. U. L. REV. 703, 708 n.33 (2005) (citing an array of surveys that showed physicians prevailing in 58%, 67%, 75%, 78%, and 87% of jury trials).

[21] *See, e.g.*, N.J. STAT. ANN. § 2A: 53A-27 (West 2004) (requiring plaintiffs to file an expert affidavit that a malpractice claim has merit); MASS. GEN. LAWS ch. 231, § 60B (2006) (requiring malpractice claims to go through expert panels before trial).

[22] STEPHANIE MENCIMER, BLOCKING THE COURTHOUSE DOOR 182-95 (2006) (recounting staged protests by doctors, industry lobbying, and distorted data); Kenneth E. Thorpe, *The Medical Malpractice 'Crisis': Recent Trends and the Impact of State of Tort Reforms*, HEALTH AFF., Jan. 21, 2004, *available at* http://content.healthaffairs.org.

[23] Hoping to sidestep controversies in this area—on whether gender is binary, for example, or the functions of this category, see Jennifer M. Protas, Comment, *Divesting from "The Apartheid of the Closet": Toward an*

manufactured objects caused them injury in gender-specific manifestations.[24] In a separate cluster of actions, plaintiffs have accused manufacturers of in effect using the placenta as a conduit to poison embryos and fetuses.[25] Other female plaintiffs fall in a disparate impact category: women happened to encounter a particular dangerous product much more than men.[26]

One injurious item that inflicted most of its damage on workers who encountered it in places and times that excluded women—shipyards, railroads, construction sites, mines, and insulation factories during the middle of the twentieth century—becomes, against this backdrop, an anomaly in products liability. The anomaly is not that men filed products liability actions attacking the toxic substance that will occupy this Article. Their gender has dominated case law assailing many things as defective: ladders, power tools, punch presses, tractors, automobiles. What makes asbestos litigation unusual is that it located toxicity, rather than the collateral damage that an industrial economy always wreaks,[27] in something that was "made for men" (as holders of the pertinent near-monopolies in employment) "to use or take."[28] Of all the products that have

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Enriched Legal Discourse of Sexual and Gender Identity, 38 MCGEORGE L. REV. 571, 577–80 (2007)—I refer here to gender as onlookers perceive it.

[24] The gynecological injury category includes (and is not limited to) DES, breast implants, tampons, the Dalkon Shield, and other contraceptives. In another set of cases, women allege other types of injuries as a result of their encounters with women-only products: for example, strokes from anti-lactation drugs. *See infra* notes 153–55 and accompanying text.

[25] *See generally* Anita Bernstein, *Formed by Thalidomide: Mass Torts as a False Cure for Toxic Exposure*, 97 COLUM. L. REV. 2153, 2156 (1997) (summarizing litigation over thalidomide and Bendectin, which alleged that these drugs were teratogenic).

[26] *See infra* notes 262–64, 297–304 and accompanying text (describing fen-phen litigation).

[27] *See generally* John Fabian Witt, *Speedy Fred Taylor and the Ironies of Enterprise Liability*, 103 COLUM. L. REV. 1, 14–21 (2003) (exploring the rise of "industrial accident" as a concept in the late nineteenth century).

[28] Joan E. Steinman, *A Legal Sampler: Women, Medical Care, and Mass Tort Litigation*, 68 CHI. KENT L. REV. 409, 411 (1992). Steinman's 1992 article found no product that fit this bill. Some years later, the Sixth Circuit issued *In re* American Medical Systems, Inc., 75 F.3d 1069 (6th Cir. 1996),

achieved notoriety in the annals of American liability only one, Agent Orange, is as strongly associated as asbestos with harm to men's bodies. Asbestos litigation exemplifies male-gendered products liability.

It has been easy to lose sight of both gender and fellow-feeling in asbestos liability, however, because of the stupefying amount of money already transferred—with billions more dollars certain to be spent. In monetary-liability terms, all the products adjudicated as toxic to women, aggregated together, are less significant than asbestos.[29] Asbestos liability looks like the opposite of emotion. Move along: nothing to see here but money, actuarial projection, and business insolvency.

The contrary possibility explored in this Article is that the biggest injurer of men known to American products liability law marked a triumph of fellow-feeling, rooted in identification with and sympathy for men *qua* men, over cold hard doctrine. The doctrinal severities that all plaintiffs in principle must overcome are summarized in Part I, to set the baseline. Gaps between asbestos victories on one hand, and the harsher applications that govern most products liability actions on the other, look like what tort reform critics (who have been remarkably gentle in their comments on asbestos liability)[30] denounce when they

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decertifying a class of plaintiffs who alleged injury from a penile implant. The court accepted the named plaintiff's estimate that the class numbered between 15,000 to 120,000 persons. *Id.* at 1079–80.

[29] Researchers have estimated that by 2002 asbestos liability had amounted to more than $70 billion and had driven more than 75 corporations into bankruptcy; they anticipate that between 2002 and the end of liability, perhaps fifty years hence, another sum between $130 billion and $195 billion would join the current $70 billion expended. This liability has spread its effects far beyond the dozens of bankrupted businesses, causing secondary losses to the economy amounting to hundreds of billions of dollars. STEPHEN J. CARROLL ET AL., ASBESTOS LITIGATION 92–97, 121–23 (2005) [hereinafter RAND REPORT].

[30] David E. Bernstein, *Keeping Junk Science Out of Asbestos Litigation*, 31 PEPP. L. REV. 11 (2003) (hereinafter Bernstein, *Junk Science*) (focusing on only two narrow, discrete "junk science" dangers); Steven B. Hantler et al., *Is the "Crisis" in the Civil Justice System Real or Imagined?*, 38 LOY. L.A. L. REV. 1121, 1151–52 (2005) (confining criticisms of asbestos liability to the inclusion of peripheral defendants). In his polemic against "junk

denounce sympathy. Part II explores fellow-feeling as a source of compassionate identification.

The sympathizers under study in this Article are not the lay factfinders that have worried tort-reform critics, but men empowered to interpret and apply the law. Judges released asbestos plaintiffs from many demands of personal injury doctrine. Parts III and IV contrast what groups of claimants received when they made allegations about their encounters with dangerous products. When judging asbestos claims, courts waved away rules that hobbled complainants, wrote spontaneous pro-plaintiff revisions to existing doctrine, interpreted statutory law to maximize opportunities to bring actions, and gave plaintiffs the benefit of considerable factual doubt. Part IV, reviewing contrary outcomes in personal injury actions that women brought, finds evidence that judges greeted male litigants with an unusually warm welcome.

The record is not one of simple unequal treatment in court, where men fare well and women poorly. This Article, focused on feeling, seeks the emotional constituents of American personal injury law. Part IV examines two emotions that human beings (and perhaps other primates)[31] feel in reaction to the manifestations of hurt that they perceive. One such response is the desire to comfort. Personal injury law sometimes honors plaintiffs as human beings who crave and deserve emotional succor. Defying a larger doctrinal stance against recognition of emotional injury (which has long kept female-dominated groups of plaintiffs uncompensated), courts permit asbestos plaintiffs to recover for their emotional distress. Courts also have ordered asbestos defendants to pay for medical monitoring, a remedy that gives plaintiffs non-pecuniary support and care, which tort law typically withholds. The second emotional reaction observed is outrage, which emerges in the form of blame. Courts have

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science," which he sees as having warped American liability in a plaintiff-favoring direction, Peter Huber has kind words for asbestos liability, saying that "good science" underlies claims for the "great harm" it caused. PETER W. HUBER, GALILEO'S REVENGE: JUNK SCIENCE IN THE COURTROOM 152 (1991).

[31] *See infra* note 107 and accompanying text.

sheltered asbestos plaintiffs from blame and responsibility for their own harm. This protection contrasts with the way they have blamed women—especially sexually active women and mothers of children harmed by defective products—who had the temerity to assert claims for redress.

Readers who accept this descriptive thesis—that gendered fellow-feeling influences outcomes in American personal injury law—might well conclude that this condition does not call for any reform or other normative response. The only shift I explicitly recommend here comes from Adam Smith himself, the first thinker to contemplate the moral demands of fellow-feeling. Smith urged readers of *The Theory of Moral Sentiments* to "feel much for others and little for ourselves," and "to restrain our selfish, and to indulge our benevolent, affections."[32] An increase in both benevolent affections and regard for the welfare of others would enhance personal injury law too.

I. DOCTRINES THAT BURDEN PERSONAL-INJURY PLAINTIFFS CATEGORICALLY

Rules of evidence and civil procedure decree that plaintiffs always must lose—even if a jury or other factfinder would find what happened to them worthy of redress—unless they can overcome a set of hurdles. It is these constraints on plaintiffs' opportunities that give personal injury litigation, a notoriously statute and rule-free area of the law,[33] much of the scant doctrinal content it holds. While tort law will sometimes recognize specific common-law doctrines that give plaintiffs a boost,[34] its broadest and most universally applicable precepts

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[32] SMITH, *supra* note 13, at 25.

[33] OLIVER WENDELL HOLMES, THE COMMON LAW 88-89 (Mark DeWolfe Howe ed., Harvard Univ. Press 1963) (1881) (observing that "a vague test" governs the analysis of negligence); Caroline Forell, *Statutes and Torts: Comparing the United States to Australia, Canada, and England*, 36 WILLAMETTE L. REV. 865 (2000) (describing the dominance of judge-made law in tort adjudication).

[34] Among the pro-plaintiff boosts are res ipsa loquitur, alternative liability, and the collateral source rule.

amount to limits on the prerogative of an injured party to haul a putative wrongdoer before lay strangers and plead for recompense.

A. The Preponderance of the Evidence Standard

Tort law holds personal-injury claimants to a "more probable than not," or preponderance, standard of proof whereby they must establish that the existence of contested facts is more probable than its nonexistence.[35] This preponderance standard is conventionally regarded as low and easy to meet when compared to the other two standards of proof commonly used in American adjudication.[36] Judicial opinions that advert to the preponderance standard frequently modify it with the adjective "mere."[37]

This lowest of the three standards of proof will indeed be "mere" much of the time—but not when disputed facts approach equipoise, or very close parity. Whenever the plaintiff's and defendant's stances are in equipoise, the preponderance standard calls for absolute and permanent rejection of a claim: "the plaintiff loses and cannot relitigate the case."[38] This rigid, categorical interpretation looks like a quasi-scientific rule but in fact diverges from scientific practice: whenever an experiment yields an outcome that is not consistent with a null hypothesis, but also does not meet conventional standards for significance, the protocol for a researcher is to continue investigating, not to

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[35] JOHN WILLIAM STRONG, MCCORMICK ON EVIDENCE § 339 (5th ed. 1999).

[36] The other standards are "beyond a reasonable doubt," to sustain a conviction where a defendant has pleaded not guilty, and "clear and convincing evidence," applied in a range of miscellaneous proceedings where "the interests at stake . . . are deemed to be more substantial than mere loss of money." Addington v. Texas, 441 U.S. 418, 424 (1979).

[37] Nat'l Org. of Women v. Operation Rescue, 37 F.3d 646, 662-63 (D.C. Cir. 1994); Marshak v. Treadwell, 58 F. Supp. 2d 551, 566 (D. N.J. 1999); *In re* Estate of Walker, 890 A.2d 216, 228 n.11 (D.C. App. 2006).

[38] Neil B. Cohen, *The Gatekeeping Role in Civil Litigation and the Abdication of Legal Values in Favor of Scientific Values*, 33 SETON HALL L. REV. 943, 955 (2003).

dismiss the hypothesis.[39] Cases in equipoise fall into a similar middle ground. Liability law dispatches them in a way that sensible, open-minded inquiry would not.

B. Proof of Causation

Personal injury doctrine compels plaintiffs to prove that the conduct they identify as tortious caused the harm they experienced. In some of the costlier corners of this field—products liability, medical malpractice, toxic torts—their effort needs expert evidence, often of a scientific or specialized nature. Courts enforce the evidentiary burden with rules like the almost-universal requirement that medical malpractice claims cannot reach a jury without expert testimony on the standard of care[40] and the obligation of plaintiffs to produce a reasonable alternative to the design of any product they challenge as defective.[41] Even when doctrine does not categorically force plaintiffs to come up with arcane evidence of causation, in practice summary judgment functions to defeat contentions that cannot thus be supported.[42]

State and federal rules of evidence long maintained a formal hurdle for plaintiffs by holding them to a general-acceptance standard of admissibility for the testimony they sought to introduce. Articulated without much exposition in a 1923 federal case, *Frye v. United States*,[43] the general-acceptance standard forced judges to reject any proffered expert testimony around which the relevant scientific community had not united. This criterion amounted to another hurdle for personal-injury plaintiffs, who had to deal regularly with uncertainty on the causal connection between acts or choices of defendants and the

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[39] *Id.* at 995.

[40] DAN B. DOBBS, THE LAW OF TORTS 642 (2000).

[41] RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 2 (1998).

[42] Lucinda M. Finley, *Guarding the Gate to the Courthouse: How Trial Judges Are Using Their Evidentiary Screening Role to Remake Tort Causation Rules*, 49 DEPAUL L. REV. 335, 339 (1999).

[43] Frye v. United States, 293 F. 1013, 1014 (D.C. Cir. 1923) (keeping a precursor of polygraph technology from the jury in a criminal trial).

harms they suffered. *Frye*'s conservative, static approach to expert knowledge provoked grumbling and occasional resistance from judges and critics who thought that it set "an artificially high threshold."[44] General acceptance nevertheless remained the rule in most states and the federal courts, and *Frye* perseveres in a few states today.[45]

In 1993, the Supreme Court reinterpreted Rule 702 of the Federal Rules of Evidence to repudiate the *Frye* rule of general acceptance while also holding that trial judges must keep expert scientific evidence from juries unless they deem that evidence valid.[46] Commentary on *Daubert v. Merrell Dow Pharmaceuticals* has agreed that despite the permissive tenor of the holding (i.e. many criteria for admissibility with no relative weight attached to each, rather than the unitary criterion of *Frye* and the liberal pedigree of Justice Blackmun himself), *Daubert* continues to restrict plaintiffs' personal injury claims.[47] Especially after *General Electric Co. v. Joiner*,[48] holding that trial courts enjoy latitude to apply the *Daubert* criteria to litigants as they see fit, judges gained a prerogative to look with deep skepticism at any new assertion that some antecedent caused an effect. Personal-injury claims involving prescription drugs post-*Daubert* have had to reckon with this judicial skepticism: A plaintiff might possess good evidence about the dangerousness of a drug and some evidence about the causal

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[44] Stan Kitzinger, Note, *The Supreme Court Waves Good-bye to Frye:* Daubert v. Merrell Dow Pharmaceuticals, Inc., 58 ALB. L. REV. 575, 581 (1994).

[45] Archie Alexander, *Functional Magnetic Resonance Imaging Lie Detection: Is a "Brainstorm" Heading Toward the "Gatekeeper"?*, 7 HOUS. J. HEALTH POL'Y & L. 1, 25-26 (2006).

[46] Daubert v. Merrell Dow Pharm., Inc., 509 U.S. 579, 588-89, 592-93 (1993).

[47] Anita Bernstein, *Products Liability in the United States Supreme Court: A Venture in Memory of Gary Schwartz*, 53 S.C. L. REV. 1193, 1216-17 (2002) (reviewing cases and commentary); Edward K. Cheng & Albert H. Yoon, *Does* Frye *or* Daubert *Matter? A Study of Scientific Admissibility Standards*, 91 VA. L. REV. 471, 472-73 (2005); Lisa Heinzerling, *Doubting* Daubert, 14 J.L. & POL'Y 65, 68 (2006).

[48] Gen. Elec. Co. v. Joiner, 522 U.S. 136, 143, 146 (1997).

mechanism that hurt her—and, of course, an injury—yet not reach a jury because of the trial judge's doubts regarding causation.

The *Daubert* test determines admissible evidence, not what would constitute sufficient evidence to support a judgment. Lower courts, however, have read its admissibility rule to hold plaintiffs' experts to a sufficiency standard.[49] In other words, a plaintiff loses before trial not because his proffered evidence is bad, but because a trial judge thinks it is not enough. Many judges will privilege epidemiology whenever epidemiology suggests doubts about causation, for example, even when other fields of scientific inquiry could support a causal hypothesis, and thus exclude as irrelevant "other types of scientific evidence, such as animal studies, toxicology reports, chemical structure analysis, and clinical differential diagnosis."[50]

In sum, *Daubert* installed new barriers to recovery.[51] The older *Frye* barriers, still present in United States jurisdictions, were equally formidable. Under either approach to expert evidence, plaintiffs rather than defendants bear the costs of uncertainty.

C. Narrow Conceptions of Injury

The most fundamental element of a tort cause of action is harm of a kind that courts choose to recognize.[52] Plaintiffs need invasion of a protected interest in order to prosecute their claim. Notwithstanding folklore to the effect that in the United States

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[49] Finley, *supra* note 42, at 348; Brief of Margaret A. Berger & Jerome P. Kassirer as *Amici Curiae* in Support of Plaintiff-Appellant at 21–29, Rider v. Sandoz Pharms. Corp., 295 F.3d 1194 (11th Cir. 2002) (No. 61-11965 BB and 01-CC).

[50] Finley, *supra* note 42, at 350.

[51] Bernstein, *supra* note 47, at 1216–17 (describing the transition of *Daubert* from permissive to restrictive).

[52] *See* John C.P. Goldberg, *The Constitutional Status of Tort Law: Due Process and the Right to a Law for the Redress of Wrongs*, 115 YALE L.J. 524, 600–01 (2005).

any person can sue anyone for anything,[53] attempts to seek redress for harm are routinely flushed from the docket for lack of a cognizable injury. Both Rule 12(b) of the Federal Rules of Civil Procedure and state-level laws pertaining to demurrer require judges to dismiss any complaint that fails to state a cause of action.[54]

The 12(b) or demurrer hurdle usually functions to defeat actions that depend on conceptions of duty that courts find too expansive, but it does not require a judge to reach any particular conclusion on the question of duty. In both form and effect, it just tells plaintiffs that a judge does not favor their claim. An illustrative example comes from the walk that a Boston laborer took in 1872 to visit his boss, planning to ask whether he might change his work time from night to day. After becoming injured on the highway and suing the city, the laborer had his claim dismissed for failure to state a cause of action because he had been traveling on Sunday, "and not for any work of necessity or charity."[55] *Connolly v. City of Boston* did not rest on an affirmative defense or any other showing by the defendant. The plaintiff started to tell the story of his injury and the trial judge simply interrupted him, saying it was no injury at all as far as the Commonwealth was concerned, and the Supreme Judicial Court agreed.[56]

Today, although those who travel on any day without regard to "any work of necessity or charity" may bring actions when

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[53] *See* Marshall B. Kapp, *The Lost Art of Drawing the Line*, FLA. BAR J., Oct. 2001, at 64 ("In the name of promoting our right to sue anybody for anything at any time, we have been transformed into a nation of potential defendants constantly looking nervously over our shoulders. This is hardly freedom."); *Hold Down Awards to Ease the Crisis*, USA TODAY, Jun. 6, 1986, at 12A. For a contention that just the opposite is true—that American cultural norms suppress some of the personal-injury claims that would otherwise be filed—see Shawn J. Bayern, Comment, *Explaining the American Norm Against Litigation*, 93 CAL. L. REV. 1697, 1697-1704 (2005).

[54] *See Failure to State a Claim*, *in* 4 WEST'S ENCYC. OF AM. LAW 300 (2d ed. 2004), *available at* http://www.answers.com/topic/failure-to-state-a-claim (last visited July 29, 2009).

[55] Connolly v. City of Boston, 117 Mass. 64, 64 (1875).

[56] *Id.* at 64-65.

they get hurt during their trip, all personal-injury plaintiffs still must meet judicial criteria for cognizable harm. Recurring categories of injury collide with this barrier. To be taken seriously in tort courts, the harms that plaintiffs allege must typically be "physical, visible, or discernible."[57] Courts tend to classify "psychic injuries, injuries to mental or emotional equilibrium, and probabilistic injuries, lost chances, or increased risks" as less worthy of serious attention.[58] For the less favored "ethereal torts," redress for injury depends on a sometimes withheld recognition that what the plaintiff suffered was both genuine and actionable.[59]

D. Limitation Periods

Invoked as an affirmative defense, a state statute of limitation will destroy an otherwise unassailable claim for personal injury—on the ground that the plaintiff has filed the action too late. Statutes of limitation have coexisted with common-law claims for more than five hundred years.[60] They protect defendants from baleful accompaniments to personal injury litigation: dilatory tactics, aging memories, deteriorating physical evidence. In function, they privilege one entitlement over another: As the United States Supreme Court has declared, "the right to be free of stale claims" will, after a legislatively established period of time has lapsed, come "to prevail over the right to prosecute them."[61]

This venerable "right to be free of stale claims" rested on sounder ground during its early sixteenth-century origins than it does today.[62] Modern factfinding has reduced its dependency on

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[57] Nancy Levit, *Ethereal Torts*, 61 GEO. WASH. L. REV. 136, 174 (1992).

[58] *Id.*

[59] *Id.*

[60] HENRY THOMAS BANNING & ARCHIBALD BROWN, THE LAW OF THE LIMITATION OF ACTIONS 1-2 (3d ed. 1906).

[61] Order of R.R. Telegraphers v. Ry. Express Agency, 321 U.S. 342, 349 (1944).

[62] *See* Michael D. Green, *The Paradox of Statutes of Limitation in Toxic*

the frail mind or body of an individual human being. A large proportion of personal-injury defendants are now entities that enjoy perpetual existence and can retain their business records indefinitely. Technologies for preservation and storage keep alive contentions that depend on witness testimony (recordings of which can be stored redundantly and cheaply) or the physical identification of anything individual, such as human DNA. Even more dramatic than these shifts has been the rise of latent injury, unknown when limitation periods arose in early modern England and today extraordinarily costly in the United States. If exposure to a substance causes physical injury only after several years have elapsed, statutes of limitation impose a perverse roadblock: The quality of evidence needed to decide claims has improved rather than deteriorated.[63]

The right to be free of stale claims has come to outweigh the right to prosecute them. One innovation present in both state statutes and decisional law, "the discovery rule," does occasionally give plaintiffs the benefit of a longer limitation period: claims that would otherwise accrue at a particular time of impact can accrue instead at a later point, the time that plaintiffs reasonably should have known of the relevant facts.[64] But technologies that commend the extension (if not the abandonment) of limitation deadlines have not generally had this liberal effect for plaintiffs. Instead, the tort-reform era, a technologically fecund time, saw the enactment of statutes of repose, which gave defendants immunity from responsibility for the harms of certain manufactured products;[65] and many states chose to shorten rather than lengthen or eliminate their personal-injury limitation periods.[66]

Substances Litigation, 76 CAL. L. REV. 965, 971, 1012–14 (1988) (recommending a partial abolition).

[63] An asbestos action brought forth this judicial insight. Wilson v. Johns-Manville Sales Corp., 684 F.2d 111, 119 (D.C. Cir. 1982). *See also* Green, *supra* note 62 at 969 (noting "the paradox").

[64] DOBBS, *supra* note 40, at 556. *See also infra* Part II.B.2.

[65] DOBBS, *supra* note 40, at 557–58.

[66] PATRICIA M. DANZON, NEW EVIDENCE ON THE FREQUENCY AND SEVERITY OF MEDICAL MALPRACTICE CLAIMS vii (1986) (finding that these

E. Summary: A Message to Plaintiffs about the Likely Merits of Their Personal Injury Claims

These doctrines, among others, convey and enforce skepticism toward what plaintiffs allege. The law says to plaintiffs:

> *Unless you can prove that your version of the story is more likely than the defendant's version, you—and not your adversary, who might be just as unable to meet that burden—will lose. Unless what you regard as an injury comports with judges' conceptions of what an injury is, you will lose.*
>
> *You must prove not only tortious conduct (or the existence of a product defect) and harm to yourself, but a causal connection between the two, and if scientific or other complex evidence is necessary to show the connection, you must obtain this evidence—even if finding it is extremely costly, or if the current state of knowledge contains no answers to critical questions—or you will lose. Should you obtain valid evidence on the causation of a toxic or pharmaceutical injury, you may nevertheless lose if you do not meet a judge's beliefs about what epidemiology demands.*
>
> *And if you do not wish to lose, even if your claim is flawless, you had better file before your statutory deadline passes. Courts will not accept an excuse for your lateness.*

Postures like these, especially when taken together, send a message of presumptive disapproval. In order to recover for the harm they have identified, personal-injury plaintiffs have to push through a hard surface. The remainder of this Article explores fissures and soft spots in this surface of judicial rejection. While categorical rules discourage individuals from bringing tort

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shortenings reduced the number of claims filed); Katharine F. Nelson, *The 1990 Federal "Fallback" Statute of Limitations: Limitations by Default*, 72 NEB. L. REV. 454, 508 (1993) (identifying a national trend toward shorter statutes of limitations for personal injury).

actions, episodes of gentleness make some of these persons welcome in court, and extend them relief. The next Parts offer examples of warmth in the otherwise cold climate of personal injury law. Women have occasionally benefited from this warmth, but strikingly it has favored men.

II. FELLOW-FEELING AS A CONSTITUENT OF PERSONAL INJURY LIABILITY

A. What is Fellow-Feeling?

The philosopher and economist Adam Smith began his *Theory of Moral Sentiments* by observing that every man, no matter how "selfish" he may be, has "some principles in his nature" that "interest him in the fortune of others, and render their happiness necessary to him."[67] Expounding on this thesis, Smith offered an illustration. Imagine a man before our own eyes. He is being tortured. We are not. We respond, even though "as long as we ourselves are at our ease, our senses will never inform us of what he suffers."[68] While "our brother is upon the rack,"[69] we share in his experience, even though we stand at a distance from it:

> By the imagination we place ourselves in his situation, we conceive ourselves enduring all the same torments, we enter as it were into his body, and become in some measure the same person with him, and thence form some idea of his sensations, and even feel something which, though weaker in degree, is not altogether unlike them. His agonies, when they are thus brought home to ourselves, when we have thus adopted and made them our own, begin at last to affect us, and we then tremble and shudder at the thought of what he feels.[70]

A modern speaker of English would call this inclination

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[67] SMITH, *supra* note 13, at 9.

[68] *Id.*

[69] *Id.*

[70] *Id.*

sympathy, as Smith did,[71] or perhaps empathy. Yet because sympathy and empathy are not exact synonyms, neither term conveys the full emotional content of Smith's illustration.[72] Sympathy connotes caring, loyalty, affection, or an inclination to support somebody or something. Empathy, which refers to the understanding of another person's inclinations or feelings, can exist even if the person bearing empathy has no desire to benefit the object of this understanding.

Smith offers a second illustration in this chapter, "On Sympathy," that comports more with empathy:

> When we see a stroke aimed and just ready to fall upon the leg or arm of another person, we naturally shrink and draw back our own leg or our own arm; and when it does fall, we feel it in some measure, and are hurt by it as well as the sufferer.[73]

Because neither sympathy nor empathy conveys what an onlooker would in all cases feel when watching a "brother on the rack," or the blow about to land on another person's leg or arm, the phenomenon that includes "interdependencies of feeling" needs its own descriptive label.[74] "Empathy" includes the identification with ourselves—"our own leg"—but omits the emotion often simultaneously present.[75] "Sympathy" recognizes that the pain conveyed by imagination resembles pain conveyed by a truncheon, but it also implies an affective state inside the onlooker that may not be there. When we watch a man being

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[71] *See, e.g., id.* (Chapter 1, "On Sympathy").

[72] On overlaps between the two, discussed with reference to Smith, see Feigenson, *Sympathy*, *supra* note 5, at 11–12.

[73] SMITH, *supra* note 13, at 10.

[74] Robert Sugden, *Beyond Sympathy and Empathy: Adam Smith's Concept of Fellow-Feeling*, 18 ECON. & PHIL. 63, 71 (2002).

[75] For examples of how empathy can be present without sympathy, see Zack Berman, *Thorns Learns, and Blossoms*, WASH. POST, Jan. 29, 2009, at E4 (reporting that a college athlete received empathy but not sympathy from his father and uncle); Dimitri K. Simes & Paul J. Saunders, *Putin's Russia: Dangers Increase for Democracy*, SAN DIEGO UNION-TRIB., Jan. 9, 2000, at G1 (advocating empathy but not sympathy for Russia with respect to Chechnya).

tortured, and feel what Adam Smith says we feel—when we "enter as it were into his body"—we also, for our own reasons, might conclude that the torture should continue. To locate the partial overlap of sympathy and empathy necessary for this descriptive purpose, and to supply what each word lacks, Smith coined the term "fellow-feeling."[76]

Fellow-feeling has defining attributes. At least four of them pertain to personal-injury law as enforced and applied in the United States. First, at the individual level, the attentions of fellow-feeling are unitary. Individuals experience fellow feeling for only one object—typically, for only one person—at a time. In Smith's illustrations, a torturer is present, inflicting pain intentionally on "our brother on the rack," and when "we see a stroke aimed as just ready to fall" on someone's arm or leg, we also see the person who aims the stroke. But these other people do not qualify for our fellow-feeling. Indeed, Smith uses the passive voice to eliminate the stroke-aimer from our consideration.

Second, for the most part fellow-feeling (its presence in the first pages of a book called *The Theory of Moral Sentiments* notwithstanding) is a psychological state rather than a moral conclusion.[77] Watching a rack twist our brother's body, or blows rain down on another person, we might respond at a moral level: on how we ought to feel, whom we should condemn, what reactive measures we ought to take. But that reflection is not necessarily present when we experience fellow-feeling. The sensation of fellow-feeling comes upon a human being almost involuntarily.[78] This distance from a sense of duty, loyalty, or affection is part of the difference between fellow-feeling and sympathy.

Third, fellow-feeling as an experience feels good. Its existence reminds us that not everything we enjoy derives from strategy or a conscious pursuit. Though unplanned and not

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[76] Sugden, *supra* note 74, at 71 (attributing this purpose to Smith).

[77] *See* RAPHAEL, *supra* note 3, at 134 (observing that "the grounding [of Adam Smith's moral philosophy] is psychological, not logical").

[78] *See id.* at 71–72.

entirely under our control, fellow-feeling gives us satisfactions as deep as the pleasure of going after an object of desire and winning it. The connection feels good even when people so united are experiencing distress. Adam Smith, describing "the pleasure of mutual sympathy,"[79] noted that this sentiment both "enlivens joy and alleviates grief."[80]

This third point may call for an illustration. Suppose that two individuals, Steve and Eydie, are connected by what we are here calling fellow-feeling. Something good has happened to Eydie or, alternatively, something bad has happened to Steve. Start with the good hypothetical event. Steve will be pleased by the story of Eydie's recent triumph as soon as she tells him about it. Speakers of idiomatic contemporary English say they would "like to share the news" with a group of listeners only when the news is good: with this phrase, they pass along not only factual information but the chance of mutually held positive emotion. When telling Steve, her partner in fellow-feeling, about her own happiness, Eydie conveys some of that happiness to him while losing none for herself. Should Steve tell Eydie his own bad news, he retains the pain he started with, but he suffers less. The emotional connection in their fellow-feeling—the way her reactive state corresponds with his condition—gives him comfort. Mutual sympathy, wrote Smith, "alleviates grief by insinuating into the heart almost the only agreeable sensation which it is at that time capable of receiving."[81]

The fourth and final attribute of fellow-feeling pertinent to personal injury law is that although fellow-feeling is primarily psychological rather than moral, "the psychology of fellow-feeling and the correspondence of sentiments is tightly linked with that of approval and disapproval; and approval and disapproval form the basis of our sense of morality."[82] Human groups teach morality and enforce it. Approval and disapproval can exist only in aggregations of persons.

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[79] SMITH, *supra* note 13, at 13.

[80] *Id.* at 14.

[81] *Id.*

[82] Sugden, *supra* note 74, at 13.

This attribute distinguishes fellow-feeling from "sympathy" and "empathy" by making reference to the social—and, I argue, from there the political and jurisprudential[83]—facets of this connection. Return to Eydie as she relates her good news to Steve. Eydie will manifest some emotional affect (even if it is only a blankness or lack of joy that looks odd to Steve, who supposes that he would have been more exultant if the good news had happened to him). Steve might react to Eydie's affect with one or more of many conclusory adjectives: he might deem her unaware, gleeful, distracted, ungrateful, too modest, and so on. Fellow-feeling makes us judgmental even when almost nothing is at stake. "We are even put out of humour if a companion laughs louder or longer at a joke than we think it deserves," Smith observed.[84]

Reactions rooted in individuals' judgment go on to form social categories, and fellow-feeling comes to generate entire social conceptions of propriety and civic rightness. Individuals scrutinize and judge their own emotions in reaction to a social stimulus. They also punish others when their responses to stimuli appear out of line. We preen to think that we are popular; we feel pain whenever we appear in our own eyes to offend or repulse the people we encounter.[85] Although this eighteenth-century term does not appear in the *Diagnostic and Statistical Manual of Mental Disorders*, an individual lacking in manifested fellow-feeling will qualify for a diagnosis of mental disability.[86]

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[83] *See infra* Part II.B.4. On the jurisprudential lessons of the *Theory of Moral Sentiments*, see RAPHAEL, *supra* note 3, at 105–14.

[84] SMITH, *supra* note 13, at 16.

[85] *Id.*

[86] The mental disability of autism is associated with "less complex emotions, less regulation of emotions and less ability to reflect on one's own emotion," which deficiencies in turn lead to "difficulties in integrating the cognitive and affective facets of . . . [another] person's mental states." Frédérique de Vignemont & Uta Frith, *Autism, Morality and Empathy*, *in* MORAL PSYCHOLOGY, VOLUME 3: THE NEUROSCIENCE OF MORALITY: EMOTION, BRAIN DISORDERS, AND DEVELOPMENT 273, 274 (Walter Sinnot-Armstrong ed., 2007). The DSM-IV recognizes "asocial personality disorder," a condition that it occasionally uses interchangeably with

B. Aspects of Fellow-Feeling that Pertain to Personal Injury Doctrine

1. For One Side Only (And Businesses Are Eligible)

Every time a court attributes responsibility for a personal injury, it expresses its conclusion about at least one experience of reported pain. Injury hurts. American law, taking a capacious view of these hurts, offers redress for many categories. Its practitioners use the term "pain and suffering" to describe the subsets of personal injury that have no precise economic value: Plaintiffs can receive this recompense for their traumatic scarring, mental distress, loss of motor function, amputation of limbs or digits, or discomforts of the type that opiate drugs can alleviate.[87] Defendants found liable in court or who accept responsibility for an injury through settlement typically add these payments to more determinate sums like lost wages and medical expenses. The less-than-pellucid division between "special damages" (i.e. the fixed or determinate amounts) and "general damages" (whose value is more subjective) shares this view of pain and suffering as a distinct portion of what defendants pay to plaintiffs.

When we move beyond literal nerve endings and post-traumatic distress, however, pain and suffering becomes more pervasive, and less distinctly a form of anguish that only plaintiffs feel. A tort action requires those who participate in adjudication to price the plaintiff's suffering and, if the plaintiff succeeds, to compel the defendant to pay this price. Once the law declares this commensurability of an injury with damages (or a sum paid in settlement), it becomes axiomatic—or at least not crazy—to say that whenever a plaintiff prevails, a defendant experiences pain and suffering. The extended phrase thus could also describe two types of anguish that do not include trauma or

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"psychopathy." *See* Robert D. Howe, *Psychopathy and Antisocial Personality Disorder: A Case of Diagnostic Confusion*, PSYCHIATRIC TIMES, (Feb. 1, 1996), *available at* http://www.psychiatrictimes.com/display/article/10168/54831?verify=0.

[87] DOBBS, *supra* note 40, at 1050–53.

nerve endings: the quantifiable part of a plaintiff's damages, such as medical expenses, and the plight of a defendant who loses. Personal injury litigation forces factfinders to choose between inflicting the pain and suffering of rejecting petitions for redress and the correlative pain and suffering of forcing defendants to pay. Literal suffering—the hurt that the plaintiff felt—would appear more compelling than these alternative constructions of pain. One would expect fellow-feeling to side with the pitiable.

And yet in practice emotional affinity is not a fatal obstacle to defense interests, even when defendants are business entities. Judges and jurors routinely say no to personal-injury plaintiffs.[88] Personal-injury lawyers say no to them too, turning away the majority of prospective clients who approach them.[89] Injured people themselves say no to their own claims.[90] Medical malpractice, a source of personal injury for which businesses pay a large share of damages and settlements, yields far less than a count of actionable medical errors would predict,[91]

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[88] *See* Kevin Clermont & Theodore Eisenberg, *Trial by Jury or Judge: Transcending Empiricism*, 77 CORNELL L. REV. 1124 (1992); Valerie P. Hans, *The Illusions and Realities of Jurors' Treatment of Corporate Defendants*, 48 DEPAUL L. REV. 327 (1998).

[89] Julee C. Fischer, Note, *Policing the Self-Help Legal Market: Consumer Protection or Protection of the Legal Cartel?*, 34 IND. L. REV. 121, 146 (2000) (reporting that most people who seek counsel following personal injury are turned down by both private lawyers and legal assistance programs); *Views Given on Health Costs*, MORNING CALL, Jul. 19, 2005, at B1 (reporting an estimate of 80 to 90 percent for medical malpractice lawyers).

[90] A famous law review article lists "naming," or consciousness of one's own injury as a wrong, as necessary before a prospective plaintiff can move on to "blaming" and "claiming." William L.F. Felstiner et al., *The Emergence and Transformation of Disputes: Naming, Blaming, Claiming . . .*, 15 LAW & SOC'Y REV. 631, 636 (1980) ("[O]nly a small fraction of injurious experiences ever mature into disputes.").

[91] The best-known study is PATIENTS, DOCTORS, AND LAWYERS: MEDICAL INJURY, MALPRACTICE LITIGATION AND PATIENT COMPENSATION IN NEW YORK, THE REPORT OF THE HARVARD MEDICAL PRACTICE STUDY TO THE STATE OF NEW YORK at 7-1 (1990) (estimating that only one in eight patients who suffered actionable negligence sought legal redress). In the mid-

suggesting that victims might prefer not to embrace the tortious origin of their harm even if this embrace would hold monetary value for them.

Rejections, suppressions, and non-assertions of so many personal-injury claims may seem puzzling. With only warm-blooded decisionmakers empowered to form and adjudicate a complaint, how can corporations and other non-human entities commonly triumph—at every stage of claiming, including the victim's own consciousness of injury—over hurt human beings? The belief of lawyers, judges, jurors, and even injured people themselves that personal-injury plaintiffs frequently should lose, even when their adversary is not human, bespeaks a consensus that the defendant in a personal-injury case holds an identity that includes a moral valence.[92]

Even persons who state instrumental reasons for favoring a defendant rather than a plaintiff ("We don't want to drive it out of business," "Liability's what makes insurance premiums go up") necessarily regard this defendant as a distinct entity. Not all onlookers would agree that the entity holds rights and entitlements, but these persons do see it as bearing a shape, existence, and standing. Apparently they believe one should not hurt even a nexus-of-contracts legal fiction unless one has a reason for doing so.

This modicum of respect is illustrated by studies about the way changes in the law seeking to reduce personal-injury liability have resonated with ordinary individuals who lack

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1970s, the California Medical Association undertook a similar investigation hoping to uncover a high rate of unfounded claiming. Instead, the reviewers found "levels of injury that stunned the sponsors," and the medical association "quietly killed the study." Michelle M. Mello & Troyen A. Brennan, *Deterrence of Medical Errors: Theory and Evidence for Malpractice Reform*, 80 TEX. L. REV. 1595, 1599 (2002). For a return to these findings, noting that juries continue to favor defendants in medical malpractice actions, see Philip G. Peters, Jr., *Health Courts?*, 88 B.U. L. REV. 227, 238–39 (2008).

[92] Another possibility, not inconsistent with this attribution of identity to defendants, is that spectators regard certain plaintiffs as especially unworthy or distasteful. I take up this possibility below. *See supra* note 82 and accompanying text; *see also* Part IV.B.

wealth and power.[93] The investigations document the successes of tort reform initiatives, a victory manifested not only in new legislation but also through shifts in lay attitudes that have made personal-injury stories harder to sell to the public.[94] The tort reform endeavor overcame the notion of businesses as dangerous and rapacious accretions of wealth by associating their well-being with core political values: equity, efficiency, security, and liberty.[95]

Disinterested persons would acknowledge the association between business interests and these "motherhood" values.[96] Consider the values in turn. Equity: Like any other litigant, a defendant should be treated fairly in court. Efficiency: Wasting money in adjudication is deplorable. Security and liberty would be threatened by plaintiffs' verdicts at an aggregate level: a high enough quantity of liability might make life less safe, if products and services really do become less available. Also in the liberty camp: a withdrawal of desired things from markets would reduce consumer choice. These arguments bring the business corporation closer to the daily life of a human being by making it concrete rather than abstract or remote. *My options, my health, my doctors, my kids' playgrounds.*

At this point, fellow-feeling moves the Smithian "impartial spectator"[97] toward siding with the less pathetic litigant. References to equity, efficiency, security, and liberty link the

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[93] *See* Stephen Daniels & Joanne Martin, *The Impact That It Has Had Is Between People's Ears: Tort Reform, Mass Culture, and Plaintiffs' Lawyers*, 50 DEPAUL L. REV. 453 (2000); Shari Seidman Diamond et al., *Juror Judgments About Liability and Damages: Sources of Variability and Ways to Increase Consistency*, 48 DEPAUL L. REV. 301, 309 (1998) (reporting data on jurors' opinions about tort policy).

[94] *See generally* David M. Engel & Michael McCann, *Introduction*, *in* FAULT LINES: TORT LAW AS CULTURAL PRACTICE 1, 12 (David M. Engel & Michael McCann eds., 2009) ("[N]ews coverage has privileged cultural norms of 'individual responsibility' while ridiculing plaintiffs and, especially, their attorneys, thus skewing moral and political debate in favor of corporate producers and to the detriment of consumers.").

[95] Daniels & Martin, *supra* note 93, at 454–55.

[96] *Id.* at 455 (citing philosopher Deborah Stone).

[97] SMITH, *supra* note 13.

interests of businesses with the interests of everyone else. The next step for defendants, more directly rooted in the emotional content of fellow-feeling, is to alienate the spectator from those who file personal injury actions.[98]

2. The Almost Involuntary Psychological State

Personal injury doctrine makes room for the psychology of fellow-feeling at several points. Under conventional understandings of how to adjudicate a negligence claim, each trial judge divides prerogatives with a jury, in a territorial power-sharing design.[99] Juries are assigned the question of breach for both negligence and comparative negligence; it is for them to say whether challenged conduct was "reasonable" or not. They also align behaviors with outcomes whenever they decide proximate cause. Judges determine whether the defendant owed a duty of care to the plaintiff. When the facts appear sufficiently clear to them either before or after trial, they are empowered to act unilaterally. We have noted their power to dismiss an action for failure to state a claim:[100] judges also may rule for one party or another on summary judgment, and enter judgment for one party notwithstanding a jury verdict.

Fellow-feeling influences all of these domains. When judges purport to identify their own territory of "law" in contrast to "facts" for the jury to find, they make claims about fellow-feeling: they push to the jury the tasks of emotion-sorting they

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[98] Studies of the personal-injury bar in Texas showed the high profit of campaigns that portrayed plaintiffs as "golddigging," malingering, and untrustworthy on the subject of their own pain and suffering. The results are modest on the surface, having an impact mainly on the humble docket of automobile-injury cases: jury verdicts come in lower; settlement values drop; polled jurors decry pain and suffering and applaud personal responsibility. Not momentous for the bar, except that nonfatal automobile accidents finance entire practices, paying the bills when bigger cases are either absent or unremunerative. Several informants told Daniels and Martin that they felt unable to continue doing personal-injury work. Daniels & Martin, *supra* note 93, at 472–84.

[99] DOBBS, *supra* note 40, at 33–36.

[100] *See supra* Part I.C.

wish to reject for themselves, and when they write and apply categorical rules, they set up buffers against emotion.[101] But their rules bear the imprint of fellow-feeling too. Even the relatively rigid doctrines of personal injury law—among them immunities, negligence per se, and the tiered classifications of land visitors—have developed with regard to fellow-feeling for one category of person or another.[102]

Jury-territory is more evidently a place for fellow-feeling to generate results that originate in psychology rather than an analytic application of major-premise principles. The reasonableness lens through which juries review claims of negligence and contributory negligence can generate an ideal-type competition between the defendant and the plaintiff: the jury will side with the party holding a better claim to the title. Folksy descriptions of the reasonable man—the man in the Clapham omnibus, or the man who takes the magazines at home, and in his shirtsleeves pushes a mower over his lawn[103]—

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[101] *See generally* PETER KARSTEN, HEART VERSUS HEAD: JUDGE-MADE LAW IN NINETEENTH-CENTURY AMERICA (1997) (arguing that judges favored an image of themselves as inclined toward thinking and reasoning rather than feeling); Stephan Landsman, *The Civil Jury in America: Scenes from an Unappreciated History*, 44 HASTINGS L.J. 579, 606–07 (1993) (describing judges' views of emotional jurors in the nineteenth century).

[102] A chronological summary captioned "Progressive Tort Law: 1945–1980" lists numerous judicial landmarks that extended redress to plaintiffs who once were kept categorically from American courts. Michael H. Rustad & Thomas L. Koenig, *Taming the Tort Monster: The American Civil Justice System as a Battleground of Social Theory*, 68 BROOK. L. REV. 1, 111–15 (2002). Some of these judge-made changes implicitly evoked sympathy or empathy. *See, e.g.*, Rowland v. Christian, 443 P.2d 561, 568 (Cal. 1968) ("A man's life or limb does not become less worthy of protection under the law because he has come upon the land of another without permission . . . ."); Canterbury v. Spence, 464 F.2d 772, 782–83 (D.C. Cir. 1972) (announcing a doctrinal shift in focus from the physician to the patient); *see also* KARSTEN, *supra* note 101, at 294 (arguing that surges of emotion impelled judges to abandon precedents that had disadvantaged hurt individuals).

[103] GUIDO CALABRESI, IDEALS, BELIEFS, ATTITUDES AND THE LAW 23 (1985) (citing Hall v. Brooklands Auto Racing Club, [1933] 1 K.B. 205, 224).

approve of a juror who will measure a personal-injury litigant with reference to affinity.[104] Questions of proximate cause invite jurors to dismiss consequences as freakish, or beyond their own ken, without having to articulate why the alignment that the plaintiff has alleged feels wrong to them.

The ascendancy of fellow-feeling over rigid doctrine is not absolute, and an illustration of the balance between them emerges in the awarding of damages. Here tort law accepts the emotion of fellow-feeling while keeping it reined in. Doctrines like remittitur and additur assert that reason and consistency must triumph over sympathy. Caps on noneconomic damages implicitly condemn soft-hearted juries for being inclined to give away too much money. Trial and appellate judges routinely trim large compensatory awards as excessive. The Supreme Court decisions that have given constitutional status to punitive damages emphasize the evil of unbounded overpunishment.[105] These outcomes are stated in procedural terms, as befits any discussion of the Fourteenth Amendment; but whenever punishment is too much, the origins of this excess typically contain emotion.[106] Mediating between emotional connection to one party over another on one hand and the impulse to impose order on the other, personal injury damages manifest both the psychological inclinations of fellow-feeling and an inclination to rein these tendencies in.

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[104] *See generally* Michael Wells, *Scientific Policymaking and the Torts Revolution: The Revenge of the Ordinary Observer*, 26 GA. L. REV. 725, 732–33 (1992) (arguing that this homespun imagery makes negligence law out of the "dominant social expectations of well-socialized persons").

[105] *See* Philip Morris USA v. Williams, 549 U.S. 346, 352–53 (2007); State Farm Mut. Auto Ins. Co. v. Campbell, 538 U.S. 408, 416 (2003).

[106] *See* Gardner v. Florida, 430 U.S. 349, 358 (1977) (insisting that the Constitution requires a death sentence to be "based on reason rather than caprice or emotion"); Olmstead v. First Interstate Bank of Fargo, N.A., 449 N.W.2d 804, 809 (N.D. 1989) (holding that only "passion or prejudice" can justify overturning a punitive damages award, and determining that passion "means the jury was motivated by feelings or emotions rather than the evidence").

3. Feeling Good

Fellow-feeling builds a sense of satisfaction for the auditor or spectator. One economist, reviewing psychological studies that found tendencies among human infants, family dogs, and chimpanzees to express sympathy and assuage distress through gestures, concluded "that for human beings, and at least for some other social mammals, there is a deep-rooted desire to receive comfort when distressed and an equally deep-rooted motivation to engage in comforting behavior in response to other individuals' distress."[107] Because a personal injury claim necessarily contains distress on two sides—the plaintiff regards herself as hurt by wrongful conduct; the defendant resents having to refute serious accusations at her own expense—both litigants will crave a comforting, empathetic response from the factfinder. The factfinder in turn will enjoy the satisfaction of applying the poultice of favorable disposition.

The factfinder/auditor/spectator can extract comfort and satisfaction from either of the binary alternatives that it faces. Affirming the plaintiff's grievance yields the satisfaction of having meted out corrective justice.[108] The terminology that commentators use to describe corrective justice through tort law—repair, rectification, righting a balance[109]—conveys the easing of distress that extends beyond individually aggrieved complainants. When the auditor reaches a contrary conclusion, and sides with a defendant, it hushes the cacophony of a false

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[107] Robert Sugden, *Fellow-Feeling*, *in* ECONOMICS AND SOCIAL INTERACTION: ACCOUNTING FOR INTERPERSONAL RELATIONS 52, 61 (Benedetto Gui and Robert Sugden eds., 2005).

[108] The literature on corrective justice as applied to tort doctrine generally associates this type of justice with accepting what a plaintiff contends and decreeing a just remedy for this person, rather than siding with the defendant. Outcomes favoring defendants are cast in negative terms: a claim for corrective justice has proved unavailing.

[109] *See generally* Rebecca Korzec, *Maryland Tort Damages: A Form of Sex-Based Discrimination*, 37 U. BALT. L.F. 97, 110 (2007) ("Corrective justice seeks to right wrongs by restoring the balance of rights [disrupted by a wrongdoer]."); Ernest J. Weinrib, *Corrective Justice*, 77 IOWA L. REV. 403, 410–11 (1992) (describing rectification).

alarm, stirred-up trouble, and the instability that accompanies an unfounded accusation.

Rituals of jury adjudication encourage participants to find reassurance in a binary result that Adam Smith, writer of a vivid binary hypothetical about torture,[110] would have recognized. A judge will thank jurors for their verdict even if it looks shaky, and praise them. The notion that jury deliberations take place in a box that no outsider may open or investigate tells these auditors to settle on affirming one side and disaffirming the other without equivocation.[111]

Researchers consistently report that American jurors find their service gratifying.[112] In 1835, Alexis de Tocqueville observed that the civil jury trial presented a unique chance for a citizen to experience justice intimately, in personal terms:

> It teaches men to practice equity; every man learns to judge his neighbor as he would himself be judged. . . . And this is especially true of the jury in civil cases, for while the number of persons who have reason to apprehend a criminal prosecution is small, everyone is liable to have a lawsuit.[113]

The satisfactions that citizens feel when they go through civil jury service, from summons to verdict, include the pleasure of fellow-feeling.[114]

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[110] *See* SMITH, *supra* note 13 and text accompanying notes 68–69.

[111] *See generally* Julie A. Seaman, *Black Boxes*, 58 EMORY L.J. 427, 432–38 (2008) (exploring this metaphor about unseen and unknowable processes and behavior in the jury room).

[112] Shari Seidman Diamond, *What Jurors Think: Expectations and Reactions of Citizens Who Serve as Jurors*, *in* VERDICT: ASSESSING THE CIVIL JURY SYSTEM 282, 285–86 (Robert E. Litan ed., 1993) (summarizing social science findings); Lassen County Superior Court, Jury Information: A Guide to Jury Service, http://www.lassencourt.ca.gov/Jury_Info.htm (last visited Sept. 12, 2009) ("Over and over, jurors who have served tell us they enjoy being involved in making an important civic decision.").

[113] ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 274 (J.P. Mayer ed., 1969).

[114] Fellow-feeling is present in the criminal jury trial as well. Kevin Jon Heller, The Cognitive Psychology of Mens Rea 17 (2008) (unpublished manuscript, on file with author) (citations omitted) (reporting that empathy

4. Social and Jurisprudential Effects

In both *The Theory of Moral Sentiments* and his *Lectures on Jurisprudence*,[115] Adam Smith identified social and jurisprudential consequences of fellow-feeling. One might have supposed that anything called "feeling" would arise episodically in an individual and go no further. Instead, fellow-feeling underlies all the bases of communal life, especially what Smith described as propriety or the assignment of "approbation."[116] Fellow-feeling instructs human beings about even the quirkiest or most trivial-sounding options before them, as Smith wrote, including whether to deem a joke funny and how funny to deem it.[117] Societies impose meticulous judgments and boundaries about the domain of empathy and the rightness of an emotional response.[118]

Although much of this enforcement lies outside the formal reach of law, Smith took a particular interest in the enforcement of fellow-feeling rules through legal doctrine. Torts being still inchoate in the eighteenth century, the illustrations that Smith devised necessarily referred to older fields of private law. He found fellow-feeling in two property-law doctrines, occupation

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affects jury decisionmaking in rape trials). *See also* Feigenson, *Sympathy*, *supra* note 5, at 20–22 (noting the gap between extensive data about sympathy in criminal adjudication on one hand, and scant data about sympathy in civil adjudication on the other).

[115] SMITH, *supra* note 13; ADAM SMITH, LECTURES ON JURISPRUDENCE (R.L. Meek et al. eds., 1978).

[116] SMITH, *supra* note 13, at 116.

[117] *See* RAPHAEL, *supra* note 3 and text accompanying note 83.

[118] *See* K. Papadopoulou, *The Development of Children's Understanding of Negative Reflexive Social Emotions*, *in* EVERYDAY CONCEPTIONS OF EMOTION 333, 337 (James A. Russell et al. eds., 1995) (arguing that cultures teach children how to manifest their emotions); Thorsten Gieser, *Embodiment, Emotion and Apathy*, 8 ANTHROPOLOGICAL THEORY 229 (2008) (providing a summary of empathy in anthropological terms); Catherine Lutz & Geoffrey White, *The Anthropology of Emotions*, 15 ANNUAL REV. ANTHROPOLOGY 405, 428 (1986) (noting that the Ifaluk language, unlike English, has a word meaning "justified anger").

and prescription.[119]

III. FELLOW-FEELING IN ACTION: INSTANCES FROM PRODUCTS LIABILITY CASE LAW

We move to a synthesis of the two oppositional conditions described in the last Part. Tort doctrines—including the preponderance of the evidence rule; admissibility of evidence criteria; legal categories of injury; and rigid deadlines to file claims—function together to limit the power of fellow-feeling, a construct that encompasses mutual sympathy, interdependencies of feeling, and empathy.

All of these aspects of fellow-feeling clash with the rigid personal-injury rules noted in Part I. Fellow-feeling is directed toward one side in a dispute; any feeling directed toward only one person or party in an interpersonal conflict will result in partiality, rather than the impartiality that the law purports to uphold in adjudication. Fellow-feeling is more psychological than moral; case outcomes are supposed to derive from the application of principles rather than unplanned, unmanageable reactions rooted in individual psychology. Fellow-feeling's warmth feels good; but warmth is problematic too: when a personal injury claim goes to a jury, the judge gives instructions on the law that condemn, or at least try to constrain, the force of emotion.[120] Instances of fellow-feeling, when they generate

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[119] Occupation, "the first instances of taking possession of something that was not previously the private property of anyone," RAPHAEL, *supra* note 3, at 106, made sense to Smith, who saw "sympathy or concurrence betwixt the spectator and the possessor," *id.* at 108 (quoting *Lectures on Jurisprudence*), when a possessor had pulled an apple from a tree in the wild and claimed it as his own. As for prescription, which refers to exclusive usage over long periods of time, Smith contended that a holder of property will expect "that he will have the use of the thing occupied, and think he is injured by those who would wrest it from him." *Id.* (quoting *Lectures on Jurisprudence*).

[120] *See* United States v. Grace, 408 F. Supp. 2d 998, 1000 (D. Mont. 2006) (noting media coverage and overall bias of the jurors); State v. Kelly, 942 A.2d 440, 454 (Conn. App. 2008) ("We do not discern any conduct by the defendant as having invited these improper appeals to the emotions of the jurors."); MODEL CODE OF JUDICIAL CONDUCT, R. 2.3 (2007); *see*

social and jurisprudential effects, undermine the rigidity of doctrine and are thus sources of instability rather than order.

These oppositional conditions coexist in a dialectical relation. An episode of fellow-feeling can bring to light the unfairness of a rigid rule; doctrines can arise or be changed to curb the power of unchecked discretion, sympathy, or bias. The examples gathered in this Part suggest a gendered pattern in the dialectic.

A. Fellow-Feeling Closes a Preponderance-of-Evidence Gap on Causation

Some plaintiffs come to court with ambiguous, inexact evidence—about how a defendant's defective product or negligent conduct caused them an injury. Their experts disagree with the defendant's experts. Alternative hypotheses remain plausible; the dispute approaches equipoise.[121] The defendant moves for summary judgment, or brings a motion *in limine* to the same effect: Plaintiffs cannot meet their burden on causation, says the defendant, because the weight of expertise does not accept their contention.

Our divide between doctrine and fellow-feeling contrasts two strategies for adjudication. Apply rules and principles syllogistically, says the first strategy. Start with the major premise: *Daubert*, or *Frye* if "general acceptance" is the rule; Federal Rule of Evidence 702, or its state counterpart. Next consider, as the minor premise, the particulars of the evidence proffered, and determine whether it is sufficiently valid and relevant for a jury to hear it.

Fellow-feeling recommends a different route. To break the equipoise tie, fellow-feeling proposes, look at the plaintiff and defendant. Which of the two is more compelling—more like oneself, the decisionmaker—and which more alien and remote, like the torturer in Adam Smith's tableau?

Now consider, for purposes of illustration, a plaintiff stricken with mesothelioma who in the past had been exposed to

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RAPHAEL, *supra* note 3 and accompanying text.

[121] *See* COHEN, *supra* notes 38–39 and accompanying text.

asbestos at a worksite.[122] Part of his case on causation is straightforward, and unlikely to provoke resistance from the defendant. Nobody doubts the connection between exposure to this substance and mesothelioma: it is almost impossible for anyone to contract the disease without having inhaled asbestos.[123] Evidence for this association would pass easily through any judicial filter for admissibility.

The problem for a court, as the products liability scholar Jane Stapleton has explained, concerns the attribution of responsibility for the plaintiff's mesothelioma to a particular supplier.[124] Most asbestos plaintiffs cannot recall, or never knew, whose product they inhaled. Their lawyers have tended to name as defendants all the entities that they have reason to think provided that worksite with asbestos.[125] At first blush, allowing them to prevail appears fair. The plaintiff's worksite was a stew of poison; each named defendant contributed to the stew. Permissive results look like alternative liability, the longstanding doctrine giving relief to plaintiffs who can establish tortious conduct and their own injury but cannot pinpoint the malefactor who hurt them.[126]

Yet courts that allow a mesothelioma victim to recover from any named supplier among many give this plaintiff a judicial gift, Stapleton observes. The uncertainty here is on etiology: A court can be confident that asbestos causes mesothelioma, but it cannot know *how*. Judges do know that mesothelioma, differing

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[122] Anita Bernstein, *Asbestos Achievements*, 37 SW. U. L. REV. 691, 702–06 (2008) (discussing this example as a causation problem).

[123] For data on the thousands of such mesothelioma claims, see RAND REPORT, *supra* note 29, at 71, 74.

[124] Jane Stapleton, *Two Causal Fictions at the Heart of U.S. Asbestos Doctrine*, 122 L.Q. REV. 189, 189–90 (2006).

[125] *See, e.g.*, Celotex Corp. v. Copeland, 471 So. 2d 533, 535 (Fla. 1985) (noting that the plaintiff had named eleven supplying defendants). *Cf.* Envtl. Protection Agency, Consumer Guides: Asbestos Mesothelioma Poisoning, http://www.consumer-guides.info/Asbestos/legislation/epa.html (last visited Sept. 12, 2009) (noting that when bringing abatement claims, plaintiffs frequently name all the manufacturers they know of, even ones that had not produced the asbestos product in question).

[126] DOBBS, *supra* note 40, at 426–29.

in this respect from asbestosis, is not dose-related. Mesothelioma victims report divergent levels of past exposure to asbestos.[127] Mesothelioma (again unlike asbestosis, a disease that takes forms that range from slight to unbearable) is an on-off binary, which an individual either has or does not have.[128]

Asbestos-linked mesothelioma in an individual necessarily originated in one of two types of exposure, which Stapleton calls the "single-insult" and "threshold" hypotheses.[129] The two etiologies are mutually inconsistent; only one can be correct. If the single-insult hypothesis is the correct one, each plaintiff inhaled one deadly unit of asbestos and was stricken. Other asbestos particles in his lungs might have injured him in other ways, but they had nothing to do with his mesothelioma. The threshold explanation, by contrast, proposes that the plaintiff needed a certain minimum quantity of exposure to become vulnerable. He experienced that minimum, and then inhaled another increment of asbestos that pushed him over the mesothelioma line. These explanations are the only ways to attribute an indivisible, non-dose-related injury to toxic exposure.

In allowing numerous plaintiffs to recover (often in full) from defendants who were not the only suppliers to the relevant workplace, courts implicitly make a choice between the two hypotheses. They reject the single-insult etiology—because whenever multiple suppliers sent asbestos to the workplace, it is *not* more probable than not that a blamed defendant delivered the deadly unit—and accept the threshold etiology. This conclusion is baseless. The single-insult hypothesis is simpler, more parsimonious, and at least equally plausible. As a theory of how mesothelioma comes to afflict some but not all asbestos-exposed persons, the threshold mechanism has no support of the kind that establishes "validity" under the *Daubert* test or

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[127] Laura S. Welch et al., *Asbestos Exposure Causes Mesothelioma, but Not* This *Asbestos Exposure*, 13 J. INT'L OCCUP'L ENVTL. HEALTH 318, 322 (2007).

[128] Stapleton, *supra* note 124, at 191-92.

[129] *Id.*

"general acceptance" under *Frye*.[130]

Courts did not declare that they were disdaining the law of evidence for these mesothelioma claims, or making an exception in recognition of the extraordinary nature of asbestos. Defense lawyers did not raise a single-insult versus threshold argument, even though it might have defeated claims against their clients. Consistent with fellow-felling as a psychological reaction rather than the product of inquiry into moral rightness, plaintiffs' lawyers did not appear conscious of the causation problem. No one even seemed aware of it until Jane Stapleton published her short article in 2006, well after developments in asbestos liability doctrine had matured. In that article, Stapleton called the end run around causation law one of "two causal fictions in U.S. asbestos doctrine."[131] But the judicial acceptance of an unadumbrated "threshold" hypothesis did not quite amount to a fiction. Judges contrive and apply fictions consciously, toward an end.[132] Here, a crucial barrier melted away from mesothelioma claims without judicial analysis. If it caused this outcome in asbestos litigation—and even if it did only that—then fellow-feeling is a force of large economic consequence.

When one moves away from the exceptional setting of asbestos liability, this sort of indulgent, pro-plaintiff leaping over a causal mystery gets called a harsh name. The gender subtext beneath attacks on "junk science"[133] can emerge if one asks an attacker to give an example of the phenomenon he condemns from the civil liability record. Chances are he will

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[130] Daubert v. Merrell Dow Pharm. Inc., 509 U.S. 579, 594–95 (1993). United States v. Frye, 293 F. 1013, 1014 (D.C. Cir. 1923).

[131] This phrase formed her title. Stapleton, *supra* note 124.

[132] *See generally* BLACK'S LAW DICTIONARY 894 (6th ed. 1991) (defining "legal fiction"). The Latin ancestor of the word is *fingere*, "to shape," implying consciousness.

[133] My own thoughts on this phrase, including but not limited to reflections on gender in it, appear in Bernstein, *supra* note 47, at 1217–18; Anita Bernstein, *Engendered by Technologies*, 80 N.C. L. REV. 1, 80 n.390 (2003); Anita Bernstein, *The Zeal Shortage*, 34 HOFSTRA L. REV. 1165, 1180 (2006).

forgo a range of alternatives—evolutionary psychology, say[134]—to focus on a woman's claim. The notion that silicone leakage from a breast implant compromises the immune system has been a favored illustration.[135] A former Attorney General of the United States has spied junk science in arguments that pesticides, plastics, and electromagnetic fields cause breast cancer, and in claims brought against the manufacturers of Bendectin and Norplant, drugs prescribed only to women.[136] In *Galileo's Revenge*, a book-length study of junk science, Peter Huber devoted time to only one gender-neutral instance, the false claim that Audi automobiles were prone to spontaneous acceleration,[137] while denouncing as "junk" many accusations that women tried to make in court, usually to no avail: a medical scan took away psychic powers;[138] a contraceptive spermicide caused a baby to be born with defects;[139] fetal monitoring harms babies;[140] intrauterine devices cause pelvic infections.[141]

A female anatomical structure delivered to plaintiffs Bendectin—a substance of interest to this Article because it was

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[134] On evolutionary psychology as more political ideology than science, see SUSAN MCKINNON, NEO-LIBERAL GENETICS: THE MYTHS AND MORAL TALES OF EVOLUTIONARY PSYCHOLOGY (2006); on the desire to introduce evidence pertaining to evolutionary psychology, see, e.g., Cunnings v. Sirmons, 506 F.3d 1211, 1233 (10th Cir. 2007) (reviewing a contention that the petitioner had received ineffective assistance of counsel because his lawyer had failed to consult "an anthropologist, evolutionary psychologist, historian, or sociologist" to explain his "socio-economic 'White trash' subculture"). Mr. Cunnings' contention failed, but denouncers of junk science do not insist on success in court before they become alarmed.

[135] *See, e.g.*, MARCIA ANGELL, SCIENCE ON TRIAL 69–89 (1996); David E. Bernstein, *The Breast Implant Fiasco*, 87 CAL. L. REV. 457, 459–64 (1999).

[136] *See* Dick Thornburgh, *Junk Science—The Lawyer's Ethical Responsibilities*, 25 FORDHAM URB. L.J. 449, 449–52 (1998).

[137] HUBER, *supra* note 30. Much of the Audi discussion in this book has in mind incompetent women drivers.

[138] *Id.* at 4.

[139] *Id.* at 174.

[140] *Id.* at 201–02.

[141] *Id.*

prescribed only to pregnant women;[142] it was also the toxic substance adjudicated in *Daubert*.[143] As a standard for proffered evidence *Daubert* can, as we have noted, function constrictively,[144] but it makes constriction a choice, not a mandate. Gendered fellow-feeling is free to influence this choice. Any trial judge who presumes that men are sober and dignified citizens who deserve a hearing when they accuse someone of having wronged them, and that women's accusations of wrongdoing originate in their own craziness or dishonesty—or the contrary bias, one must hasten to say: that men are nutty liars while women are sober and dignified—may, under the *Daubert-Joiner* standard of review,[145] take his inclination into account when considering a motion for summary judgment.

As our study of fellow-feeling has already indicated, this judge might well be unaware that he holds any inclination.[146] Skepticism can look to him like high standards: that is, a rigorous sense of what injured persons have to prove under the preponderance standard, or a belief that reason rather than emotion (pity toward a plaintiff, outrage toward a negligent defendant) must guide the adjudication of a personal injury claim. The contrary stance can look like faith in the wisdom of juries. Neither premise leads to reversible error, as long as he refrains from abusing his discretion.[147]

Because judges do not make overt references to gendered fellow-feeling when they apply *Daubert*, observers looking for it can only try to compare analogous cases. The feminist tort scholar Lucinda Finley offers a complement to fellow-feeling in asbestos liability by recounting a contrary outcome in breast-implant liability.[148] Women who alleged that their breast implants gave them autoimmune diseases came to court with evidence on

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[142] *Id.* at 111–29.

[143] *See* Daubert v. Merrell Dow Pharm. Inc., 509 U.S. 579 (1993).

[144] *See supra* notes 4–50 and accompanying text.

[145] *See* Gen. Elec. Co. v. Joiner, 522 U.S. 136 (1997).

[146] *See supra* notes 76–77 and accompanying text.

[147] *See* Bernstein, *supra* note 47, at 1218 (noting the abuse of discretion standard as announced by Gen. Elec. Co. v. Joiner, 522 U.S. at 142–43).

[148] Finley, *supra* note 42, at 350.

causation, as did their adversaries.[149] The presiding judge, Robert Jones, assembled a panel of scientific experts in a range of disciplines, including epidemiology, to advise him on questions of science. A neutral expert reviewed the partisan reports from each field. Unsurprisingly, the plaintiffs' epidemiologist found an association between breast implants and autoimmune disease while the defendants' found none. The court-appointed epidemiologist judged both of the dueling reports well founded and recommended that both be admitted.[150]

Judge Jones rejected this recommendation, hewing to a relative-risk criterion for admissibility.[151] His expert (who was present because he knew more than the judge about what would meet epidemiological standards) had not deemed it necessary for claimants to get over that particular hurdle. After excluding the plaintiffs' expert testimony for not clearing the relative-risk bar, the judge also excluded the rest of their expert testimony, on the ground that none of it could meet the epidemiological criterion he had set.[152] He felt free to insist on a stringent application of the preponderance criterion, just as asbestos judges had felt free to leap over the same doctrinal barrier.

Another example of the disbelief that female litigants faced when they made causal claims—a less famous instance than breast implants, but equally suggestive of what fellow-feeling could have done for their plight—appears in the litigation about Parlodel, a drug marketed to suppress lactation.[153] Women who had been prescribed this drug sued its manufacturer for failure

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[149] Hall v. Baxter Healthcare Corp., 947 F. Supp. 1387 (D. Or. 1996).

[150] Finley, *supra* note 42, at 353 (quoting *Hall*, 947 F. Supp. at 1448).

[151] In other words, Judge Jones held that unless the plaintiffs could show that the autoimmune disease in question develops at least twice as often in women with breast implants as it develops among all women, they could not meet the preponderance criterion: they could not prove that exposure to the harmful substance more probably than not caused their injury. *Hall*, 947 F. Supp. at 1403.

[152] Finley, *supra* note 42, at 353-55.

[153] Margaret A. Berger & Aaron D. Twerski, *Uncertainty and Informed Choice: Unmasking* Daubert, 104 MICH. L. REV. 257, 268-70 (2005) (discussing Parlodel). I am grateful to Professor Twerski for sharing his thoughts about this litigation.

to warn of the danger of stroke. A majority of these litigants lost on *Daubert*-based summary judgment, even though the plaintiffs had reliable evidence, including adverse reaction reports and epidemiological studies, to support their contention that Parlodel had caused them to suffer their injury. They also had human studies that showed that patients who were given Parlodel would experience vascular constriction, a condition that typically precedes or accompanies strokes—an experience that stopped when the drug was withdrawn.[154] None of their data sufficed to lift them over the wall of skepticism to reach a jury:

> Adverse Reaction Reports were deemed too idiosyncratic and unreliable. Animal studies were given short shrift because one cannot accurately liken animal reactions to those of humans. Evidence that Parlodel, when administered to a patient, caused vascular constriction that receded when the drug was withdrawn and then reappeared when the drug was introduced to the patient (dechallenge/rechallenge), was not sufficient because the patient did not actually suffer a stroke from the use of the drug. And finally, the epidemiological studies were deemed inconclusive. As Adverse Reaction Reports began coming in from the use of Parlodel, the FDA sought to get Sandoz [the manufacturer] to issue warnings about the possible relationship of the drug and strokes. Parlodel was, however, a very lucrative drug and the company resisted for fear that it would cause a sharp decrease in its profits.[155]

B. Fellow-Feeling Gives Some Victims the Time They Need to Bring Claims

1. . . . Some Claim Early . . .

In the landmark *Borel v. Fibreboard Paper Products Corp.*[156]

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[154] *Id.* at 269 & n.69 (citing cases).

[155] *Id.*

[156] 493 F.2d 1076 (5th Cir. 1974).

the plaintiff, who suffered from asbestosis and then died of mesothelioma, differed from most asbestos plaintiffs in that he had experienced harm attributed to the toxic product to which he was exposed.[157] This decision delivered the first cohort of asbestos workers to American liability doctrine. Most had injuries when they came to court. At present, the majority of Clarence Borel's successor-plaintiffs still alive are, in the peculiar jargon of asbestos liability, "unimpaired."[158] An adjective that means "having no injury" is used to modify a noun meaning "person entitled to claim that he has an injury."

Offering another neologism by way of oxymoron, asbestos liability has introduced the "inactive docket."[159] A docket is supposed to mean a list of "causes for trial"[160]—causes that are active in that they are pending.[161] The inactive docket, however, consists of cases that are *not* under consideration. Also known as a deferred docket or a pleural registry, this innovation allows uninjured plaintiffs to obtain an index number and preserve their asbestos claims from dismissal on statute of limitations grounds.[162]

The deferred docket, manifesting sympathy and empathy for exposed plaintiffs,[163] rescues claims from the oblivion of demurrer and Rule 12(b). Non-asbestos plaintiffs who try to sue without having been harmed present a contrast: they lose and

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[157] The point is controversial, *see* RAND REPORT, *supra* note 29, at 76, and rests in part on how one defines an injury. Here I follow the RAND convention and focus on impairment, in the sense of an impediment to daily living. *Id.* at 7.

[158] *See id.* The first case to recognize an unimpaired plaintiff was Bernier v. Raymark Industries, Inc., 516 A.2d 534 (Me. 1986).

[159] *See* Green, *supra* note 62, at 986 n.99 (explaining the term).

[160] IV OXFORD ENGLISH DICTIONARY 912.

[161] "On the docket," according to the *Oxford English Dictionary* means "in hand; under consideration." *Id.*

[162] Mark A. Behrens & Monica G. Parham, *Stewardship for the Sick: Preserving Assets for Asbestos Victims Through Inactive Docket Programs*, 33 TEX. TECH L. REV. 1, 8–11 (2001).

[163] *See supra* Part III.C, at 51 and Part IV.A.2 (reviewing judicial conclusions that exposed-yet-unimpaired plaintiffs had suffered an injury that courts would recognize).

disappear. Today, in Jerome Frank's memorably phrased "topsy-turvy land,"[164] advocates appear perverse in their reactions to this innovation. Defense interests give thanks for what is a boon to their adversaries,[165] while plaintiffs' lawyers oppose the inactive docket because it includes no mechanism to pay them for their personal-injury advocacy on behalf of people who have no injury.[166]

Another judicial reprieve from doctrine permitted plaintiffs to sue for their increased risk of cancer in the future. Like the causation maneuvers described above, this device excused plaintiffs from the preponderance rule: They recovered for this increased risk even when they could not prove that they would more probably than not develop cancer. Courts today seldom deploy the increased-risk device because another judicial creation, an ad hoc repeal of the "single action rule" that had forced plaintiffs to complain about everything that had happened to them in one pleading,[167] has made it unnecessary. The modern plaintiff can split his claim.

2. . . . Some Claim Late . . .

Statutes of limitation, as was noted,[168] purport to bar the filing of claims irrespective of their merits. Implicitly they concede that the plaintiffs' contentions might be perfectly sound but for their staleness. In contrast to this cool deployment of a calendar to toss out a complaint, an approach to personal-injury

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[164] Dincher v. Marlin Firearms Co., 198 F.2d 821, 823 (2d Cir. 1952) (Frank, J., dissenting).

[165] *See* Mark A. Behrens & Manuel Lopez, *Unimpaired Asbestos Dockets: They Are Constitutional*, 24 REV. LITIG. 253 (2006); Behrens & Parham, *supra* note 162; Victor E. Schwartz et al., *Consolidation Versus Inactive Dockets (Pleural Registries) and Case Management Plans That Defer Claims Filed by the Non-Sick*, 31 PEPP. L. REV. 271, 276 (2003).

[166] RAND REPORT, *supra* note 29, at 26.

[167] James A. Henderson, Jr. & Aaron D. Twerski, *Asbestos Litigation Gone Mad: Exposure-Based Recovery for Increased Risk, Mental Distress, and Medical Monitoring*, 53 S.C. L. REV. 815, 819 (2002) (citations omitted).

[168] *See supra* Part I.D.

adjudication rooted in fellow-feeling would respond to the degree of emotion triggered by the claimants' plight. A plight that inspired little sympathy would win little or no relief from the rigidity of a statutory deadline; a compelling plight that stirred fellow-feeling would permit lenient exceptions.

Numerous exceptions fill the asbestos annals: judges rescued asbestos claims that would otherwise have run aground on statutes of limitation. Late filings became suddenly timely enough with the help of a discovery rule, first recognized by the Supreme Court in *Urie v. Thompson*,[169] a 1949 FELA case similar on its facts to the asbestos actions that would later commence.[170] The discovery rule extends a statute of limitation by starting accrual not when the plaintiff experienced injurious contact but at some later date relating to discovery of that injury. *Urie* suggested that an exposure claim accrues when a reasonable person would have received a diagnosis of injury. Given long latency periods for toxic exposure, the discovery rule can extend statutory limitation periods by decades.

Courts and legislatures give further aid to plaintiffs on their timing problem by turning on the limitation clock much later than normal. For most personal-injury plaintiffs, causes of action accrue at the time that bodies are harmfully touched. For asbestos, accrual does not commence until much later—when victims discover their harm, with discovery leniently construed.[171] This judicial generosity is not unique to asbestos, but asbestos cases are prominent in the annals of reprieve. For instance, courts have held that knowledge about asbestos

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[169] Urie v. Thompson, 337 U.S. 163 (1949).

[170] Tom Urie, who had worked on the Missouri Pacific Railroad for about thirty years, suffered from a pulmonary disease diagnosed as silicosis. *Id.* at 165–66.

[171] *See, e.g.*, Rose v. A., C., & S., Inc., 796 F.2d 294, 297 (9th Cir. 1986) (holding that the cause of action did not accrue until the plaintiff knew not only about the illness but the identity of the manufacturer); Karjala v. Johns-Manville Products Corp., 523 F.2d 155, 159–60 (8th Cir. 1975) (approving a jury instruction telling jurors they were free to determine the time at which plaintiff should have realized he had a claim for his longstanding asbestosis).

exposure did not constitute discovery for purposes of a mesothelioma claim,[172] and that the judicially recognized extension of a limitation period based on time of discovery must benefit only asbestos plaintiffs.[173]

Judicially improvised doctrines that reconceive late filing as timely complement the creation of the deferred docket. Taken together, these judicial innovations assure litigants who were exposed to asbestos that any time is a good time to bring a claim. Sue then, or sue now, or sue later. Plaintiffs who are not yet injured will nevertheless receive an attentive welcome in court, and if they were exposed long ago, too far beyond the limitation period, then the timing of their injury is boosted by a push forward.

3. . . . And Some Claim Female[174]

Like other pro-plaintiff shifts in asbestos liability, the time-of-discovery approach to accrual looks like an instance of common sense mixed with sympathy for an injured person. Only in Jerome Frank's topsy-turvy land mentioned above can you "die before you are conceived, or be divorced before ever you marry, or harvest a crop never planted, or burn down a house never built, or miss a train running on a non-existent railroad."[175] Of course, courts should not expect a plaintiff to sue

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[172] Wilson v. Johns-Manville Sales Corp., 684 F.2d 111 (D.C. Cir. 1982) (R.B. Ginsburg, J.); Sopha v. Owens-Corning Fiberglas Corp., 601 N.W.2d 627, 634–35 (Wis. 1999).

[173] Pustejovsky v. Rapid-American Corp., 35 S.W. 3d 643, 653 (Tex. 2000); *see also* Bruce J. McKee, *Alabama: A Jurisdiction Out of Control?*, 41 N.Y.L. SCH. L. REV. 637, 641 (1997) (noting that Alabama statutory law refuses to recognize the discovery rule except for two types of claims, fraud and asbestos).

[174] *Cf.* David A. Harris, *The Stories, the Statistics, and the Law: Why "Driving While Black" Matters*, 84 MINN. L. REV. 265 (1999) (adverting to another immutable characteristic that receives detrimental treatment backed by law).

[175] Dincher v. Marlin Firearms Co., 198 F.2d 821, 823 (2d Cir. 1952) (Frank, J., dissenting). Frank was objecting to the application of a Connecticut statute of limitation.

before he could know he was injured. It should come as no surprise that as early in 1949, well before the phrase "toxic torts" took form, *Urie v. Thompson* recognized time of discovery as the correct trigger for a railroad worker's exposure claim.[176] Any triumph of good sense over a perverse, rigid, formalistic obstacle looks like justice.

Compared to the experience of women with dormant claims, however, the reprieve for asbestos plaintiffs is problematic. Young women who learned that their reproductive organs were damaged by DES, a toxin that their mothers had ingested during pregnancy, illustrated the discovery problem in classic terms. Many of them sought legal counsel as soon as they knew they were injured and, like Tom Urie of FELA fame, tried to file suit promptly. They did not delay in learning about the link between maternal DES and their physical anomalies, either. Lawyers turned them away.[177] Spurred into activism in New York, a redoubt of early "time of injury" deadlines, some DES claimants joined with other reformers to lobby the state legislature for help.[178] They did not win the discovery rule that their counterparts had achieved so easily in asbestos litigation, but did get the lesser measure of a revival statute—a special new law that gave them a year to file what otherwise would have been stale claims.[179] Courts have held plaintiffs tightly to the terms of this reprieve.[180]

In one of the many decisions that freed asbestos plaintiffs

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[176] Urie v. Thompson, 337 U.S. 163 (1949). One scholar reports that the first use of the term "toxic tort" in a judicial opinion occurred in 1979. Gerald W. Boston, *Toxic Apportionment: A Causation and Risk Contribution Model*, 25 ENVTL. L.J. 549, 551 n.1 (1995).

[177] *See* Anita Bernstein, *Markets of Mothers: Hymowitz v. Eli Lilly & Co.*, *in* TORTS STORIES 151, 163 (Robert L. Rabin & Stephen D. Sugarman eds., 2003).

[178] *Id.* at 164–65.

[179] *Id.* at 163.

[180] For example, the revival statute was a condition precedent, rather than an adjustment to the statute of limitations, as one New York appellate court admonished a plaintiff who tried to sue after attaining majority, and so was not subject to tolling. Singer v. Eli Lilly & Co., 549 N.Y.S.2d 654, 655–56 (N.Y. App. Div. 1990).

from the "single action" characterization of a limitation period,[181] the Wisconsin Supreme Court reviewed earlier holdings on this issue.[182] Its discussion nicely juxtaposes two contrasts: compassionate relief for asbestos plaintiffs versus by-the-book severity for other claimants. Although the first plaintiff in Wisconsin to win the favor of a discovery rule had been a woman injured by the Dalkon Shield contraceptive, numerous other women surveyed in *Sopha v. Owens-Corning Fibreglas Corp.* fared less well. One Wisconsin litigant learned that her cause of action accrued when she received a blood transfusion that impaired her fertility, not when her infertility manifested itself.[183] Another plaintiff saw her claim rejected because she needed years to connect her disabling emotional distress to her having been molested by a priest, coupled with negligence by the Archdiocese of Milwaukee.[184]

The sexual abuse of children offers a pertinent contrast to asbestos.[185] Researchers estimate that one in three women and one in five men before the age of 18 experience sexual abuse in the United States.[186] There is no reason to suppose that this abuse was much rarer in past decades, when a taboo tended to

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[181] Sopha v. Owens-Corning Fiberglas Corp., 601 N.W.2d 627, 642 (Wis. 1999).

[182] *Id.* at 636.

[183] Olson v. St. Croix Valley Memorial Hosp., 201 N.W.2d 63, 65 (Wis. 1972).

[184] Pritzlaff v. Archdiocese of Milwaukee, 533 N.W.2d 780 (Wis. 1995).

[185] I mention sexual abuse that occurs in childhood rather than child abuse more generally because it has an especially extensive literature. *See generally* Elizabeth A. Wilson, *Suing for Lost Childhood: Child Sexual Abuse, the Delayed Discovery Rule, and the Problem of Finding Justice for Adult-Survivors of Child Abuse*, 12 U.C.L.A. WOMEN'S L.J. 145, 249 (2003) (arguing that other types of "child maltreatment" should be of at least equal interest to the law).

[186] *See* Leslie Miller, *Sexual Abuse Survivors Find Strength to Speak in Numbers*, USA TODAY, Aug. 27, 1992, at D6 (reviewing studies of childhood sexual abuse); *see also* Rosemarie Ferrante, Note, *The Discovery Rule: Allowing Adult Survivors of Childhood Sexual Abuse the Opportunity for Redress*, 61 BROOK. L. REV. 199, 205 (1995) (reporting a slightly higher estimate).

suppress mention of the subject.[187] How many victims would possess what they need to recover in tort (access to counsel, willingness to sue, proof that their harm occurred, a defendant holding assets, damages amenable to monetary expression) is anyone's guess, but as a starting point, one-third or one-fifth, or for that matter one thirty-fifth, of a very large population yields many prospective clients for the personal-injury bar. The collapse of family and charitable immunities in the middle of the twentieth century, around when the Supreme Court first granted its discovery-liberality to a railroad worker, could have enabled claims for battery or negligence against millions of parents, stepfathers, other relatives, churches, and parochial schools.

It never did. Nancy Tyson, who in 1983 alleged that her father had sexually abused her in the 1960s, appears in the law review literature as a pioneer. Before then, few other adult victims had shared Tyson's willingness to challenge the statute of limitations and assert entitlement to a discovery rule.[188] The Washington Supreme Court dismissed her complaint as time-barred.[189] In ensuing years, a majority of states, including Washington, rejected *Tyson v. Tyson* and adopted a discovery rule for claims of childhood sexual abuse.[190] But these discovery-rule reforms are stingy when compared to the generosity that asbestos claimants receive.[191] The extensions are arbitrarily

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[187] *See generally* JOHN CREWDSON, BY SILENCE BETRAYED: SEXUAL ABUSE OF CHILDREN IN AMERICA (1988) (reporting shifting assessments of the phenomenon by Freud in the late nineteenth century); MARK PENDERGRAST, VICTIMS OF MEMORY: SEX ABUSE ACCUSATIONS AND SHATTERED LIVES 30 (2d ed. 1996) (noting that Kinsey data from the 1940s reported that 24 percent of female respondents said that an adult had approached them for sexual contact when they were 13 or younger).

[188] Tyson v. Tyson, 727 P.2d 226 (Wash. 1986). Although Tyson claimed that her memories of the abuse had been repressed, *id.* at 227, discovery of one's own sexual past abuse can be delayed by circumstances other than repressed memory. For example, a victim could have forgotten the assault that caused her a real injury, and then been told about it years later by a reliable eyewitness.

[189] *Id.* at 229–30.

[190] Ferrante, *supra* note 186, at 214–15.

[191] In Clay v. Kuhl, 727 N.E.2d 217, 222 (Ill. 2000), a plaintiff alleging

short, unaligned with the amount of time plaintiffs need to frame and prosecute a claim.[192] In some states plaintiffs cannot receive the extension unless they have corroborating evidence about the contact and its effects—a burden never imposed on plaintiffs who discover asbestos-originated impairments belatedly and one that reminds observers of the old misogynous corroboration requirement for rape claims.[193] Other states, like New York, home of the skimpy DES revival statute, have not budged to recognize the problem of delayed discovery, and hold sexual-abuse plaintiffs to the short limitation period.[194] No child-abuse plaintiff who brings a belated complaint, in sum, can count on judicial indulgence with respect to timing, the boon that asbestos plaintiffs routinely obtain.

If she can get past her statute of limitations problem, this plaintiff will not enjoy the presumption of dignity and mental clarity that asbestos-exposed workers appear to share.[195] The small fraction of women who seek redress for the sexual abuse that took place during their childhoods, especially those who sue their fathers, are portrayed and perceived as crazy: Either the molestation they allege really happened and made them mentally ill, or their belief of having been abused is a delusion, formed in a sick mind.[196]

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sexual abuse argued that she was situated similarly to an asbestos plaintiff and should receive the same leniency for her delay in filing. The court rejected her contention. *Id.* at 222.

[192] Marci Hamilton, *Why Ensuring Accountability for Clergy Sexual Abuse of Children Has Proved So Difficult, Even Though It Remains So Crucial*, FINDLAW'S WRIT, May 6, 2004, http://writ.news.findlaw.com/hamilton/20040506.html.

[193] *See* Wilson, *supra* note 185, at 154–55. This requirement, long abolished in the United States, endures in some applications of Islamic law. *See* Manar Waheed, Note, *Domestic Violence in Pakistan: The Tension Between Intervention and Sovereign Autonomy in Human Rights Law*, 29 BROOK. J. INT'L L. 937, 965 (2004) (noting that under *zina* in Pakistan, the crime of rape can be established only by the rapist's confession or eyewitness testimony from four Muslim males).

[194] *See* Ferrante, *supra* note 186, at 202–03.

[195] *See supra* Part II.B.

[196] *See* Wilson, *supra* note 185, at 155 (observing that the "putative

Understood in the context of fellow-feeling, a lapse of years will cause deteriorations in memory that vary by the category of claimant. Asbestos plaintiffs might forget a little: Like the spectator himself, they are only human.[197] Sexual-abuse plaintiffs, by contrast, have become warped by the retelling of dubious stories inside their heads.[198]

C. Fellow-Feeling Answers the Question of Whether a Plaintiff Suffered an Injury

Fellow-feeling fills a void whenever sympathy and empathy impel an observer to deem another person harmed by exposure to poison. The welcome that courts gave to inchoate asbestos claims, where a plaintiff could show tortious exposure but not injury, illustrates this phenomenon.[199] Missing factual detail central to each claim that this person, who brought an action for a physical injury, has no marker of harm on his own body—does not defeat the assertion when the decisionmaker-spectator (slightly changing the subject) can ask himself, "How would I feel if I had inhaled asbestos that was put into my work environment by a heedless supplier? I'd feel injured, that's how

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mental illness" of claimants is linked to the discovery rule).

[197] For trenchant commentary on how lawyers enhanced their recall, see Walter Olson, *Thanks for the Memories*, REASON, June 1998, http://www.overlawyered.com/articles/olson/memories.html; *see also* W. William Hodes, *The Professional Duty to Horseshed Witnesses-Zealously, Within the Bounds of the Law*, 30 TEX. TECH. L. REV. 1343, 1354 (1999) (arguing that helping a client remember brand names on asbestos packages that he last saw decades ago does not necessarily create false testimony).

[198] ELIZABETH LOFTUS & KATHERINE KETCHAM, THE MYTH OF REPRESSED MEMORY: FALSE MEMORIES AND ALLEGATIONS OF SEXUAL ABUSE 24 (1994) (contending that some therapists tell patients that "[t]he existence of doubt and skepticism is an indication that the memories do, in fact, exist. Ignore your doubts. Trust your feelings . . . . Don't seek external proof . . . ."); PENDERGRAST, *supra* note 187, at 44 (attributing to therapists a litany of "[r]ehearse your memories, repeating them, writing them down, making them more real. Cherish those people who support your new belief system, but jettison those who express even the slightest doubt").

[199] *See supra* Part III.B.

I'd feel. Don't tell me nothing has happened to me when I have poison fibers in my lungs." Such an observer will honor the grievance now and assume it will be priced later. This conclusion demands an overt rewrite to existing doctrine,[200] but the swift psychological reaction of fellow-feeling obscures the revision.

Asbestos liability is noteworthy for other instances of spontaneous manifestation that so many observers find in it—especially the belief that this liability just happened, like a force of nature. When assessing the phenomenon, commentators see a tsunami.[201] Entrepreneurial lawyers brought thousands of actions, overwhelming the dockets; naturally, judges had to consolidate the filings and administer a settlement apparatus. One state supreme court judge testified before Congress about judicial haplessness. *What could we do?* Under the circumstances, he said, "fairness and truth" had to give way:

> Think about a county circuit judge who has dropped on her 5,000 cases all at the same time . . . . [I]f she scheduled all 5,000 cases for one week trials, she would not complete her task until the year 2095. The judge's first thought then is, "How do I handle these cases quickly and efficiently?" The judge does not purposely ignore fairness and truth, but the demands of the system require speed and dictate case consolidation even where the rules may not allow joinder.[202]

Nice touch there, the feminine generic for a group of mostly male decisionmakers: it so happens that women who observed or adjudicated asbestos complaints have been less inclined than men to passive acquiescence vis-à-vis plaintiffs' initiatives and "the demands of the system."[203] Let us stray a step further from

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[200] *See supra* Part I.C (noting the tenet that a personal injury plaintiff must have an injury).

[201] *See* Bernstein, *supra* note 122, at 714–15, on the uses of "tsunami" and other outsized metaphors to describe asbestos litigation.

[202] Conrad L. Mallett, Jr., former chief justice of the Michigan Supreme Court, *quoted in* Mark A. Behrens & Phil Goldberg, *The Asbestos Litigation Crisis: The Tide Appears to Be Turning*, 12 CONN. INS. L.J. 477, 485 (2005).

[203] On the short list of farsighted politicians, there was Millicent

gendered reality and imagine, in place of a female county circuit judge, a female complaint of large magnitude. Next we may consider whether courts would regard this complaint as describing a real injury.

Because things that injure women in their reproductive capacity may seem fundamentally different from a toxin in the air like asbestos, the thought-experiment I propose relates to a dangerous product that, like asbestos, does its harm away from the pelvis: lead-contaminated housing and consumer goods. Imagine a coalition of parents and lawyers inspired to bring products liability actions against a host of defendants—they might start with offshore toy manufacturers and U.S.-based sellers—for exposing children to this poison.[204] When nearly 30 million toys were recalled in 2007, most of them because of lead contamination,[205] a large volume of litigation did not ensue; imagine that it did. Millions of toys, millions of children. The

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Fenwick, who, advocating for her constituents (both workers and businesses) in asbestos-scarred New Jersey, led congressional efforts to introduce a compensation scheme soon after the fateful *Borel* decision; on the bench, Janis Jack, who made short work of the related silicosis litigation, and Helen Freedman, famed for her case management skills; and in the academy, Jane Stapleton.

[204] Hypothetical children as a contrast to the men who bring personal injury claims does not deviate from the male/female binary explored in this Article. Women and children line up together in numerous respects. Western intellectual traditions ascribe similar characteristics—among them weakness, blankness, impulsiveness, and a reduced capacity for ratiocination—to them both. *Compare* Anita Bernstein, *Treating Sexual Harassment with Respect*, 111 HARV. L. REV. 445, 456-67 (1997) (recounting views about women), *with* Jessica Kulynych, *No Playing in the Public Sphere: Democratic Theory and the Exclusion of Children*, 27 SOC. THEORY & PRAC. 231 (2001) (recounting views about children). The patriarchal household contains a male head resting above that which belongs to him: woman, children, servants, possessions. Inside both households and public policy, laboring for the well-being of children is women's terrain. NANCY FOLBRE, WHO PAYS FOR THE KIDS? GENDER AND THE STRUCTURES OF CONSTRAINT (1994). Lest this summary register as obsolete, I invite readers to search online for recent materials on "children and the law," or "children and policy," and see which gender's names come up.

[205] *The President and Product Safety*, N.Y. TIMES, Aug. 5, 2008, at A18.

litigation could spread beyond children injured by toys and encompass other lead-contaminated products found in a typical American household.[206]

Borrow from the asbestos experience to make the story lurid: plaintiffs' lawyers setting up recruitment stations in kindergartens and day-care centers; forum-shopping travels to distant plaintiff-friendly state courts; pediatricians on the payroll as partisan expert witnesses; demands for decades of elaborate medical monitoring; large-scale distribution (maybe at public elementary schools) of testing kits for low-income people to take home; *cris de coeur* from mother-plaintiffs about their severe emotional distress. Toy specialist lawyers would join forces with more experienced residential-building lawyers, revitalizing a litigation history that has so far given little relief to lead-exposed plaintiffs. As for magnitude, imagine that these lawyers could recruit as clients the same fraction of exposed persons as did the asbestos lawyers. While we're writing our parable, we could make our lead-paint lawyers mostly mothers—perfectly possible, with thousands of women in the United States combining childrearing with successful law practices.[207]

This litigation would appear to lack merit. Few children or other individuals in the cohort would have suffered an

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[206] Making random tests, Consumers Union found dangerous levels of lead in "samples of dishware, jewelry, glue stick caps, vinyl backpacks, children's ceramic tea sets, and other toys and items." It claims that children suffer developmental harm at lead-levels that are lower than what the federal government deems dangerous, and adverts to studies suggesting that lifetime lead exposure could be the cause of neurocognitive decline in elderly adults. *Consumer Reports: Tests Find Lead in More Products*, Oct. 29, 2007, *available at* http://www.consumersunion.org/pub/core_product_safety/005071.html. On these studies, see *Early Lead Exposure May Hasten Old-Age Mental Decline*, ASSOCIATED PRESS, Jan. 28, 2008, *available at* http://www.msnbc.msn.com/id/22787587/page/2/.

[207] More than half the female lawyers in the U.S. who earn more than $100,000 a year are mothers. SYLVIA ANN HEWLETT, CHOOSING A LIFE: PROFESSIONAL WOMEN AND THE QUEST FOR CHILDREN 97 (2002) (estimating the proportion as between 51% and 78%). *See also* CYNTHIA FUCHS EPSTEIN, WOMEN IN LAW 361-62 (1993) ("Perhaps one answer to the question of why successful women lawyers are usually married and often have children is that good lawyers are problem solvers.").

impairment. For those really hurt, an insurmountable defendant-identification problem would imperil recovery. Doctrine says that mothers may not recover for the emotional distress that follows impacts to their children unless they meet a host of requirements absent here.[208] American courts would lack jurisdiction over at least some foreign defendants. Courts would find it odd to unite defendants as disparate as, say, a factory in China rushing to fill an order for an American toy brand with an investor who had bought an old residential apartment building in decades past.

In sum, if American lawyers would do with lead exposure what they did with asbestos—recruit and retain plaintiffs without first confirming that they were really hurt, file lawsuits at a level pitched to overwhelm the docket ("5,000 cases all at the same time"), throw together a mélange of defendants in the same action despite the lack of connection among them, try to bolster flawed claims by aggregating them with less flawed ones (for asbestos, bringing in attenuated entity defendants after the original suppliers vanished into the mists of bankruptcy; for my hypothetical, including mothers as plaintiffs), and along the way refuse to be governed by elementary doctrine about injury, causation, and procedure—then I daresay a "judge's first thought" would not be, "How do I handle these cases quickly and efficiently?" No judge would see his choices as limited to (a) capitulation-consolidation-settlement and (b) booking his calendar through a distant year like 2095. The judge would view "these cases" as the fruit of derangement and chaos: crazy mothers, money-mad lawyers. He would think of his court as under siege.

Instead of consolidating cases so that the meritorious minority would prop up the injury-free majority and thereby create settlement value for otherwise unavailing claims, our judge would react in Rule 11 terms, and try to protect his court from what he would deem at best a frivolous onslaught. A hardliner would dismiss the pleadings and sanction the lawyers.

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[208] DOBBS, *supra* note 40, at 840–41 (describing limited judicial liberality regarding zone-of-danger requirements).

A more tolerant judge might take a leaf from the *Solerwitz* case,[209] which responded politely but firmly to 4600 ill-founded petitions that an attorney brought on behalf of air traffic controllers that President Reagan had fired in 1982.

The extravagance of an inactive docket for unimpaired asbestos claimants is demonstrated by imagining a similar structure to favor our hypothetical plaintiffs. Shall we wait to see whether children exposed to lead develop brain injuries, meanwhile keeping the entities that they might choose to sue (paint makers, other manufacturers, builders, landlords, schools, government housing programs) on the liability hook? After all, the *New England Journal of Medicine* has said that sixteen percent of American children "have been mentally and neurologically damaged because of exposure" to this toxic substance.[210] No, we shall not. Threats to the welfare of children matter only when they can, "accurately or fancifully, be laid at the women's doorstep," wrote Katha Pollitt when the medically spurious cliché of "crack babies" had started to pull mothers into criminal courts while other sources of harm to their children—racism, poverty, male violence—drew little attention. "If the mother isn't to blame, then no one is to blame."[211] Lead-poisoned children and their mothers have not received the nurture of fellow-feeling.

IV. EMOTION (OCCASIONALLY) HONORED IN PERSONAL-INJURY ADJUDICATION

Fellow-feeling starts out as an emotional concordance and then moves to judgment. As Adam Smith explained, a spectator looks judgmentally at the emotions or "passions" of another

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[209] The Federal Circuit designated twelve of Solerwitz's filings as representative, ordered him to be bound by how they came out—unfavorably to his clients, of course—and held off suspending him from practice before the court until he defied its order with more petitions. *In re* Solerwitz, 848 F.2d 1573 (Fed. Cir. 1988).

[210] Katha Pollitt, *Fetal Rights, Women's Wrongs*, *in* REASONABLE CREATURES: ESSAYS ON WOMEN AND FEMINISM 169, 184 (1995).

[211] *Id.* at 186.

person, asking himself whether these responses appear "just and proper, and suitable to their objects."[212] We have considered Smith's interpretation of the English common law with reference to fellow-feeling.[213] From this base, one may infer that the law treats emotion judgmentally too, withholding or bestowing approval for various categories of feelings.

In the context of personal injury law, doctrine can withhold or bestow approval for feeling with the general rule that negligently inflicted emotional injury is not compensable.[214] If, as this Article contends, fellow-feeling leads courts to deviate from rules of general application, it becomes possible for limited categories of emotional damage to win approval. Judicial sympathy welcomes a small fraction of plaintiffs who seek redress for emotional harm, and spectators react to allegations of injury with emotions of their own.

A. Fellow-Feeling Offers Comfort to Some Plaintiffs

1. Validating Plaintiffs' Fears

Culpable infliction of fear, an injury that affects "mental or emotional equilibrium," is among the "ethereal torts" that courts find problematic.[215] Judges have long regarded claims of emotional distress as difficult to administer and repair. Before the late twentieth century, they usually insisted that any plaintiff who sought redress for negligently inflicted emotional distress, of which fear is one type, come to court with evidence of physical consequences: either a traumatic impact on their bodies or an observable manifestation of the harm alleged.[216]

Like other gatekeeping devices surveyed earlier in this

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[212] SMITH, *supra* note 13, at 16.

[213] *See supra* notes 115–19 and accompanying text.

[214] GOLDBERG ET AL., *supra* note 5, at 700 (explaining the traditional stance).

[215] *See supra* notes 57–59 and accompanying text.

[216] James F. d'Entremont, *Fear Factor: The Future of Cancerphobia and Fear of Future Disease Claims in the Toxicogenomic Age*, 52 LOY. L. REV. 807, 809 (2006).

Article, the physical-consequences requirement greeted plaintiffs with a presumption of skepticism.[217] Courts worried that absent such a criterion to work as a filter, "spurious" claims of emotional injury would prevail.[218] The combination of recognizing the cause of action, on one hand, while burdening it with a physical-consequences element, on the other, suggests concern about two dangers: first, that wrongfully inflicted, unfaked emotional distress would not be remedied and, second, that nonexistent or exaggerated emotional distress would tug at heartstrings and generate a (wrongful) award of damages. The gendered version of fellow-feeling explored in this Article predicts that courts would divide their remedial attentions along a gendered line. Facing male plaintiffs, they would worry about undercompensation and be lenient; facing female plaintiffs, they would worry about spurious or otherwise unsound claims for redress, and be severe.

Fear-of-future-illness decisions supports this prediction—but only in part. Cases reach divergent results. Some male plaintiffs lose; some groups that include female plaintiffs win.[219]

Nevertheless, the sieve that judges use to filter asbestos claims is noteworthy for its generous wide mesh. From the Supreme Court down to a host of lower forums, judges have agreed that asbestosis, for example, will suffice to support a fear-of-cancer claim.[220] Asbestosis being neither necessary nor sufficient to cause cancer,[221] this association does not rest on

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[217] *See supra* Part I.E.

[218] d'Entremont, *supra* note 216, at 809 (quoting *Prosser & Keeton on the Law of Torts*).

[219] *See generally In re* Methyl Teriary Butyl Ether (MTBE) Products Liab. Litig., 528 F. Supp. 2d 303, 315 (S.D.N.Y. 2007) (surveying divergent approaches to the physical-consequences requirement for fear-of-cancer claims).

[220] *See* Norfolk & W. Rwy v. Ayers, 538 U.S. 135 (2003); Jones v. CSX Transp., 337 F.3d 1316, 1317 (11th Cir. 2003); *see also* Jackson v. Johns-Manville Sales Corp., 781 F.2d 394, 415 (5th Cir. 1986); Owens v. Lac D'Amiante du Quebec, Ltee, 1987 US Dist LEXIS 5961, *4 (E.D. Pa. 1987); *see also* Williams v. Am. Optical Corp., 985 So. 2d 23, 29–30 (Fla. App. 2008).

[221] Welch et al., *supra* note 127, at 322 (noting that mesothelioma

principle. Judges have offered scant explanation for their beneficence.

Courts respond to women's attempts to receive compensation for fear with a very different analytical rigor. In a rare departure from the judicial consensus that DES plaintiffs cannot recover for emotional distress, one trial court distinguished the no-recovery precedents by observing that a DES plaintiff's particular physical manifestation was "premalignant,"[222] implying that for DES litigants, only a premalignant condition could support a claim for emotional distress.[223] Asbestosis is not a premalignant condition.[224] Case law does report a pro-plaintiff departure in a DES case,[225] and courts have rejected many fear-of-cancer claims that asbestos-exposed plaintiffs have tried to bring.[226] Victory for these male plaintiffs is far from assured. But given the difficulty of recovering for negligent infliction of emotional distress—the claim has never been a judicial favorite[227]—asbestos-exposed plaintiffs have an unusually strong

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requires much less exposure to asbestos than asbestosis requires).

[222] McAdams v. Eli Lilly & Co., 638 F. Supp. 1173, 1174 (N.D. Ill. 1986).

[223] *Id.*

[224] "The DES stories were as heart-wrenching as the stories told by families who suffered from the effects of asbestos or Agent Orange," one judge has remarked, from the vantage point of knowing all three sets of "stories" well. Bilello v. Abbott Laboratories, 825 F. Supp. 475, 481 (E.D.N.Y. 1993) (Weinstein, J.) (denying a recusal motion that accused the judge of, *inter alia*, being too sympathetic to DES plaintiffs). Decisional law does not align with this informed opinion about parity between the two genders.

[225] *See* Wetherill v. Univ. of Chicago, 565 F. Supp. 1553, 1559 (N.D. Ill. 1983).

[226] *See, e.g.*, Dragon v. Cooper/T Smith Stevedoring Co., Inc., 726 So. 2d 1006, 1010 (La. App. 1999) (rejecting claim brought under the Jones Act because plaintiffs could not show physical manifestations of their distress); Henderson & Twerski, *supra* note 167, at 828–31 (reviewing rejections of the claim).

[227] Brian L. Church, Note, *Balancing Corrective Justice and Deterrence: Injury Requirements and the Negligent Infliction of Emotional Distress*, 60 ALA. L. REV. 697 (2007) (arguing that courts have focused closely on the injuries that emotional-distress plaintiffs allege in part as a gate-keeping

chance of being compensated for their anxiety.

Emotional-distress asbestos litigants have prevailed only when they have litigated from the workplace, a male-dominated venue. One legal encyclopedia entry about emotional distress and toxic exposure has a heading called "Home—Asbestos," under which all ten decisions assessed home-based emotional distress claims, many of them brought by women; not one accepted the claim.[228] Women married to asbestos workers lose when they try to blame asbestos suppliers for their emotional plights.[229] In another contrast between male and female emotional states, the relative-risk hurdle that has defeated female claimants in the post-*Daubert* era does not seem to burden asbestos workers who bring emotional-distress claims. Judges could ask a plaintiff the blunt question how likely it is that what he dreads will actually happen—and make 'more probable than not' a real criterion for recovery—but generally have not done so.[230]

The asbestos anomaly is amplified when one considers how seldom plaintiffs can recover for emotional harm that comes from a recurring or ongoing point of origin. For women,

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device).

[228] Gregory G. Sarno, *Infliction of Emotional Distress: Toxic Exposure*, 6 A.L.R. 5th 162 (1992). Not all the plaintiffs were women. *See, e.g.*, Burns v. Jaquays Mining Corp., 752 P.2d 28, 29 (Ariz. App. 1987) (ruling against residents of a trailer park, gender unspecified). Most of the cases in this entry involve wives who were exposed to asbestos by doing their husbands' laundry.

[229] *See* Amader v. Johns-Manville Corp., 514 F. Supp. 1031, 1033 (E.D. Pa. 1981) (rejecting a claim by a wife who feared that her asbestos-exposed husband would develop cancer); Cathcart v. Keene Industrial Insulation, 471 A.2d 493, 509 (Pa. Super. 1984) (rejecting a claim by a wife that she feared cancer from having inhaled asbestos while doing her husband's laundry).

[230] For example, one study found that out of a million workers exposed to asbestos in the Pearl Harbor shipyard, sixty-seven would be diagnosed with lung cancer each year. *In re* Hawaii Fed. Asbestos Cases, 734 F. Supp. 1563, 1570 n.10 (D. Haw. 1990). This figure excludes other cancers, of course, and a per-year count is much lower than a lifetime risk, but it is still quite low. The same study found "a risk ratio [or relative risk] of cancer mortality" of between 1.4 and 1.7 for these workers, *id.*—a number significantly lower than the 2.0 minimum to which Bendectin and breast-implant claimants were held.

actionable emotional distress has been exemplified by the pietà of a mother cradling her mangled or dying son[231]—a trauma-tableau that extends no recognition to emotional distress inflicted steadily over time.[232] Negligence law, which regards the fear of cancer that male workers experience steadily over time as well-founded and often compensable, does not recognize as actionable in itself the fear derived from past tortious conduct that pervades many women's lives.[233]

Gender-divergent outcomes for claims involving the negligent infliction of fear bespeak fellow-feeling. Approved, condoned, understandable, containable fear—the fear that comes wrapped in Smithian propriety[234]—wins redress. Unlike the majority of claims for infliction of continuing emotional distress, these occasions of vulnerability appear to judges well cabined. The sympathetic spectator sees little need to worry about unbounded excess in compensation, because he can grasp the scope of the injury. Less familiar allegations of distress attributed to tortious conduct, in contrast, open a nearly infinite void. Our spectator thinks that no one can know where these alien emotions begin and end. Committed to keeping doctrine under control, he writes no-duty rules to ward off an abyss.

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[231] *See* Thing v. La Chusa, 771 P.2d 814, 815 (Cal. 1989); *see generally* Portee v. Jaffee, 417 A.2d 520, 522-23 (N.J. 1980). Another leading case, Dillon v. Legg, 441 P.2d 912, 914 (Cal. 1968), featured a dying daughter.

[232] *See Thing*, 771 P.2d at 829 (emphasizing the need to keep a tight rein on this cause of action). I say "exemplified" based on conversations with Torts colleagues over the years. Ask a specialist teacher or scholar about actions for negligent infliction of emotional distress with women as plaintiffs and he or she will likely mention the *Dillon-Portee-Thing* bystander question.

[233] As far as I know, no plaintiff has ever used negligence doctrine to recover, or even try to recover, damages for her fear of rape or other violence from an intimate partner—a fear that in some cases will be much better grounded in fact than fears of cancer for which asbestos plaintiffs have won recompense—unless she had already experienced an episode of this violence. Judges recognize her fear of assault in the future as part of damages for the historical assault. Were asbestos claims adjudicated with the same presumed skepticism, emotional distress (including its fear of cancer subset) would be actionable only insofar as it came after a vivid, indisputable physical injury linked to asbestos exposure.

[234] SMITH, *supra* note 13, at 16.

2. Hands-On Caregiving as a Remedy

Despite years of advocacy by academic reformers who favor expansions, American tort law has kept its commitment to pecuniary-only remedies for personal injury. A successful plaintiff typically receives money and nothing more.[235] Alternative or supplementary relief following injurious conduct—an injunction, a court-fostered apology, even a declaratory judgment—remains rare.

Making one of the bolder proposals to break up this money-monopoly, the feminist scholar Leslie Bender published two articles to claim that personal-injury victims need care as well as money in order to be made whole.[236] Payment from a corporation's treasury or insurer, Bender wrote, is inadequate because it does not deliver to victims the "direct, personal services of caregiving."[237] As examples of these services that are omitted from the current remedial menu, Bender mentioned "shopping, transportation, and arranging for medical treatments," "feeding and aiding in personal hygiene care," and "spending time with the injured person and treating her with dignity and importance."[238] Corporate officers, she proposed, should have "*nondelegable* duties to provide direct interpersonal services—time and energy—for the care of their victims or of persons similarly situated."[239]

Scorn from the academy ensued,[240] and courts manifested no interest in this proposal. Both Bender and her opponents

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[235] *Cf.* Anita Bernstein, *Restatement (Third) of Torts: General Principles and the Prescription of Masculine Order*, 54 VAND. L. REV. 1367, 1376 (2001).

[236] Leslie Bender, *Changing the Values in Tort Law*, 25 TULSA L.J. 759 (1990) [hereinafter Bender, *Changing*]; Leslie Bender, *Feminist (Re)torts: Thoughts on the Liability Crisis, Mass Torts, Power and Responsibilities*, 1990 DUKE L.J. 848 [hereinafter Bender, *Feminist (Re)torts*].

[237] Bender, *Changing*, *supra* note 236, at 769.

[238] *Id.* at 769.

[239] *Id.* at 771 (emphasis in original).

[240] *Id.* at 769–70 n.23; *see also* Bender, *Feminist Re(torts)*, *supra* note 236, at 905–07. I speak from observation, having been present at one academic gathering where Bender presented her thesis.

appeared certain that she had argued for something peculiar.[241] Understood in a fellow-feeling perspective, however, the Bender approach to personal-injury responsibility is far from novel or strange.

The compulsory-caregiving proposal was described as antithetical to economic analysis: Bender advised her audience to suppress any misgivings about costs.[242] In rejecting dollar tradeoffs, Bender harkened to a remedy available (especially back in 1990, when she offered her reform proposal) to asbestos claimants: medical monitoring, a measure that courts occasionally grant in defiance of microeconomic basics.

As an option for negotiators trying to resolve mass-exposure claims, medical monitoring lacks the partisan payoffs that support other outcomes: It imposes heavy costs on defendants without necessarily enriching plaintiffs' lawyers the way monetary settlements do; and presumably many, if not most, people who have been exposed to a toxin would rather receive cash than prepaid physical examinations. This aversion continues when mass-tort pleadings reach the courts. Attempts to receive class certification for medical monitoring typically fail.[243] Judges have written cumbersome tests (in some versions, with seven conjunctive elements for plaintiffs to meet[244]) that eliminate most

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[241] "I realize that I am asking a lot of openness of you as a listener," Bender wrote, "because my proposal imagines a major change in how we think about what law is and can do in the name of tort, about how law understands human relationships, and about how it reflects and implements our values." Bender, *Changing*, *supra* note 236, at 767. In both of its published incarnations, the proposal appeared without footnotes, except for a few references to feminist theory, just as one would expect for a novel "paradigm shift in how lawyers understand responsibility in tort law."

[242] If a reader was "prompted to ask 'how much will this cost?' or 'wouldn't it be more efficient or cost-effective to . . . ?' or 'how can we pay for this?,'" Bender wrote, "please suspend these questions about the economics of accidents for the time being." *Id.* at 769.

[243] Rory Ryan, Comment, *Uncertifiable? The Current States of Nationwide State Law Class Actions*, 54 BAYLOR L. REV. 467, 501-02 (2002) (reviewing medical monitoring case law).

[244] *See, e.g.*, Redland Soccer Club v. Dep't of the Army, 696 A.2d 137, 145-46 (Pa. 1997) (seven elements, with expert testimony required); Hansen

medical monitoring claims altogether.

With all due sympathy for anyone exposed to asbestos, no judicial test for this relief can support giving medical monitoring to these plaintiffs.[245] The horror of mesothelioma and lung cancer is undeniable.[246] Asbestosis produces severe shortness of breath and can demand supplemental oxygen, an unpleasant set of effects.[247] Even pleural thickening, a lesser development, suggests ill health ahead. Yet what entitles plaintiffs to medical monitoring is not the gravity of their sickness but the benefit that early detection of a new development can give them.[248]

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v. Mountain Fuel Supply Co., 858 P.2d 970, 979 (Utah 1993) (eight elements). Crucial for this discussion are two elements that justify this remedy: early detection must be beneficial, and the regime must be reasonably necessary according to contemporary scientific principles. Abuan v. Gen. Elec. Co., 3 F.3d 329, 334 (9th Cir. 1993); Wyeth, Inc. v. Gottlieb, 930 So. 2d 635 (Fla. App. 2006).

[245] Paul F. Rothstein, *What Courts Can Do in the Face of the Never-Ending Asbestos Crisis*, 71 MISS. L.J. 1, 20 (2001) ("Medical monitoring, like recovery for expected future impairment or fear thereof, may have its place in tort law, but in the asbestos litigation, this device has become a caricature.").

[246] *See* Norfolk & W. Rwy. v. Ayers, 538 U.S. 135, 155 (2003) (mentioning that mesothelioma "inflicts 'agonizing, unremitting pain', relieved only by death") (citation omitted).

[247] My father, who had been a plumber's assistant in his youth and then worked during World War II as an engineer at an infamous asbestos-locus, the Brooklyn Navy Yard, spent his last decade with oxygen tubes in his nostrils. His pulmonologist told him he had emphysema. It is extraordinarily unlikely, however, that a lifelong nonsmoker with no other risk factors would develop that disease. *See Most Emphysema Cases Stem from Smoking*, Grand Rapids Press, Apr. 1, 2009, at B2. I feel certain that it was asbestosis that brought on the heart attack mentioned on his death certificate. He died a ghastly death. His inability to breathe had wrecked his ability to eat, and on his deathbed he, a man of medium height with a big frame, weighed less than 125 pounds.

[248] So held the first judicial approval of medical monitoring, a case brought on behalf of orphans on an airplane at risk of developing treatable brain damage. Friends For All Children, Inc. v. Lockheed Aircraft Corp., 746 F.2d 816 (D.C. Cir. 1984); *see also* Meyer ex rel. Coplin v. Fluor Corp., 220 S.W.3d 712, 718 (Mo. 2007) ("[T]he purpose of medical monitoring is to facilitate the early diagnosis and treatment of latent injuries

Throughout the decades of asbestos litigation, no such showing has emerged. Once exposed to asbestos, a person cannot unbreathe the fibers that entered his lungs, nor undo through monitoring whatever damage lies in store for him.[249]

In *Hansen v. Mountain Fuel Supply Co.*,[250] a leading precedent on medical monitoring for asbestos-exposed plaintiffs, the plaintiffs had no theory about what prepaid intervention could do for them, and nothing to support their claim except a letter from an examining physician calling their exposure "limited and perhaps inconsequential" and suggesting that they "*may*" (not "must" or "had better") come back for new chest x-rays in a few years.[251] The Utah Supreme Court declared that not only was this letter inadequate to get the plaintiffs past summary judgment, but that it might also "imply that medical monitoring is, in fact, unnecessary."[252] Reject the medical-monitoring claim, then? No. The court remanded to give the plaintiffs more opportunity to develop their contention.[253] Later decisions that approve asbestos-related claims for medical monitoring cite *Hansen* in support of their stance.[254]

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caused by exposure to toxins.") (citation omitted).

[249] In the words of the Ninth Circuit:

> Here, the plaintiffs have not shown that a treatment exists for asbestos-related diseases, or that there is clinical value to administering any such treatment before the onset of symptoms of these diseases. Plaintiffs maintain that all they seek is a single baseline medical examination. Yet they have submitted no evidence that a single examination would yield any clinical benefit.

In re Marine Asbestos Cases, 265 F.3d 861, 867 (9th Cir. 2001); *see also* Metro-North Commuter R.R. Co. v. Buckley, 79 F.3d 1337, 1347 (2d Cir. 1996) (holding "that Buckley should receive medical monitoring in order to ensure early detection and cure of any asbestos-related disease he develops" without pausing to wonder what such a "cure" might be), *rev'd*, 521 U.S. 424 (1997).

[250] 858 P.2d 970 (Utah 1993).

[251] *Id.* at 981 (emphasis supplied).

[252] *Id.* at 981–82.

[253] *Id.* at 982.

[254] *E.g.*, Patton v. Gen. Signal Corp., 984 F. Supp. 666, 674 (W.D.N.Y. 1997); Bourgeois v. A.P. Green Indus., Inc., 716 So. 2d 355,

Rejections of medical monitoring for persons exposed to asbestos are noteworthy for their lack of scoffing. In *Metro-North Commuter R.R. Co. v. Buckley*, the Supreme Court expressed sympathy for the asbestos-exposed plaintiff's desire to seek ongoing medical attention but found no warrant in the governing statute, the Federal Employers Liability Act, to give this relief in a lump sum. Instead, the Court kept open the possibility of "medical cost recovery rules more finely tailored" than the "full-blown, traditional, tort law cause of action" to pay for medical monitoring that the plaintiff had sought.[255] One incisive critic of asbestos litigation as it has expanded over the last two decades tells us, with no disapproval, that Congress's failed fix of this liability crisis would have given medical monitoring to all victims of exposure, from the barely pleural Level I through Level IX, the mesothelioma class.[256] Gentle responses indeed to a demand that plainly lacks support in the law.

Women plaintiffs who want medical monitoring fare differently, as a leading monitoring-for-men case, *In re Paoli R.R. Yard PCB Litigation*,[257] pointed out: "Our research has yielded only two cases in which courts have purported to disallow recovery based on a medical monitoring theory," wrote the court. "Both cases are distinguishable."[258] They are, by gender: both involved women exposed to DES.[259] Another group

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358 (La. 1998).

[255] Metro-North Commuter R.R. v. Buckley, 521 U.S. 424, 444 (1994).

[256] Lester Brickman, *An Analysis of the Financial Impact of S. 852: The Fairness in Asbestos Injury Resolution Act of 2005*, 27 CARDOZO L. REV. 991, 1006–07 (2005).

[257] *In re* Paoli R.R. Yard PCB Litig., 916 F.2d 829 (3d Cir. 1990).

[258] *Id.* at 851 n.25.

[259] *Id.* In the years following *Paoli R.R. Yard*, more case law disallowing medical monitoring emerged, male plaintiffs not excluded. Henderson & Twerski, *supra* note 167, at 838 (identifying, in 2002, "recent signs of stiffening resistance" to medical monitoring in asbestos claims). Assessments of medical monitoring in law reviews post-*Paoli* are mostly negative. *See, e.g.*, Andrew R. Klein, *Rethinking Medical Monitoring*, 64 BROOK. L. REV. 1 (1998); George W.C. McCarter, *Medical Sue-Veillance: A History and Critique of the Medical Monitoring Remedy in Toxic Tort Litigation*, 45

of women plaintiffs in a multidistrict litigation fell out of luck when they sought medical monitoring after exposure to the defendant's harmful hormones: the court said that state decisional law on medical monitoring contained too much variety to permit certifying a class for this relief,[260] an overstatement.[261]

The solitary mass-tort success story for women on this front has been fen-phen. Plaintiffs who took this toxic diet drug—an overwhelmingly female cohort[262]—filed products liability actions around the country. These claims were consolidated into a multi-district litigation in Philadelphia, which ended in a settlement that included medical monitoring.[263]

RUTGERS L. REV. 227 (1993).

[260] *In re* Prempro Products Liability Litigation, 230 F.R.D. 555, 569 (E.D.Ark. 2005).

[261] The variations are trivial: some states regard medical monitoring as a cause of action in itself and others see it as part of a damages claim; some state supreme courts have approved it and some have not done so. No state purports categorically to disallow this remedy. The strongest state-level stance against it, Hinton v. Monsanto Co., 813 So. 2d 827 (Ala. 2001) (responding to certified question), demands some kind of present injury first, a criterion that might be fulfilled with reference to some counterpart to pleural thickening. Even if the variations were not trivial, choice of law rules permit a resolution. *See* Ryan, *supra* note 243, at 501-02 (concluding that these class certifications are typically possible, though difficult to get).

[262] Upon publication of a fen-phen exposé, one writer reflected on the gendered nature of this toxin:

> It's very distressing to tell other members of the media about this and watch them glaze over. Particularly men. They think: "Diet drugs, women's problems, who cares?" Then they get all excited about 200 deaths on the faulty Firestone tires. You look at this figure: Between the heart valve disease and lung disease, you're talking several hundred deaths so far. And 45,000 cases of illness. These are pretty big numbers. At one point, I turned to a reporter and said, "If one of the side effects of this had caused your dick to turn black and fall off, it would be a major national story. There's a money trail, a paper trail, a federal whistleblower. You'd say: 'We've got to jump on this.'"

Janelle Brown, *The Poison Pill*, SALON, May 16, 2001, http://dir.salon.com/tech/feature/2001/05/16/mundy_q_a.

[263] *See In re* Diet Drugs Products Liability Litigation, 282 F.3d 220,

For medical-monitoring purposes, fen-phen could not be more different from asbestos. The screening device used to monitor patients, a relatively low-cost technology, reveals fen-phen's asymptomatic damage to heart valves in time for effective treatment. Assuming that plaintiffs would get the same time-of-discovery reprieves on statutes of limitation that asbestos plaintiffs have long enjoyed, such monitoring saves defendants money by forestalling severe harm and thereby making the claims cheaper. Heart screening via echocardiogram is not part of a routine office visit, and so fen-phen plaintiffs cannot forfeit their medical monitoring claim on that ground, as did women who sought medical monitoring for breast cancer after having ingested the dangerous synthetic hormones that their doctors prescribed.[264] Like DES plaintiffs, hormone-replacement plaintiffs were rebuffed with the statement that ordinary gynecological checkups would give them all the monitoring they need.

We begin to see a possible explanation here for the gender gap with respect to medical monitoring. Decisionmakers may assume, consciously or not, that women should be denied this relief because they already monitor themselves. Men need indulgence and support to coax them toward more medical care.[265] If fellow-feeling must stretch and rewrite doctrine to achieve that result, so be it.

The stereotype that men don't go to the doctor—or that they are especially inclined to avoid the postponable, non-crisis office

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225–27 (3d Cir. 2002) (describing the litigation history).

[264] *See* Wyeth, Inc., v. Gottlieb, 930 So. 2d 635 (Fla. Dist. Ct. App. 2006); Albertson v. Wyeth, Inc., 2005 LEXIS Phil. Ct. Common Pleas 604 (May 3, 2005); *see also supra* note 260 and accompanying text (referencing the Arkansas MDL, *In re* Prempro Products Liability Litigation).

[265] The racially and economically diverse county in which I live maintains a public-relations initiative called "Take Your Man to the Doctor—He'll Live to Love You Longer." Press release, Office of the President of the Borough of Brooklyn, Sept. 20, 2005, http://www.brooklyn-usa.org/Press/2005/sep20b.htm; *see also* Sari Harrar, *A Healthier Husband*, GOOD HOUSEKEEPING, http://www.goodhousekeeping.com/health/healthy-husband-diet-exercise-lifestyle (subtitled "How to get him to shape up–without nagging or driving yourself crazy").

visits that are a kind of patient-initiated and -financed medical monitoring—has statistical support. Studies show that women go to physicians for prevention at more than twice the rate of men.[266] "Men make 150 million fewer trips to doctors than women each year," says the University of Iowa hospital, adding parenthetically that "this doesn't even include women's pregnancy-related visits."[267] More vulnerable than women to stress-related illnesses, men comprise only a fifth of the registry in stress-management programs.[268] They lag behind women on a host of self-monitoring behaviors: sunscreen use, blood pressure checks, compliance with prescription-medicine regimens, flu vaccination, commitment to safe-sex practices, avoidance of cigarettes and alcohol, and modifications to unhealthful diets.[269] The percentage of women who say they regularly examine their breasts exceeds the percentage of men who "even know how to perform a testicular self-exam."[270] Although men use the Internet more than women for most categories of queries and needs, health is an exception: women predominate among "online health seekers," on their own behalf and others'.[271] Demographers credit wifely "nagging" about health care as one

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[266] Karen Goldberg Goff, *Male Fear of Physicians-American Academy of Family Physicians Survey*, INSIGHT ON THE NEWS, Apr. 24, 2004, *available at* http://findarticles.com/p/articles/mi_m1571/is_15_16/ai_62024138.

[267] University of Iowa Hospitals and Clinics, *Why Men Don't Go to the Doctor*, http://www.uihealthcare.com/reports/urology/030609menshealth.remove.html [hereinafter *Iowa Report*].

[268] *Id.*

[269] *Id.*

[270] *Compare The Breast Self-Examination Pad*, http://www.bse-pad.com/ ("only twenty-nine percent perform self-exams on a regular basis") *with Iowa Report*, *supra* note 267 ("3/4 of men don't even know how to perform a testicular self-exam"). Because testicular cancer, with its lifetime risk of 1 in 150, is so much rarer than breast cancer, the choice not to examine oneself for symptoms may seem reasonable—except that the condition is relatively easy to cure if someone finds it, harder to cure in its late stages; younger men, who are most vulnerable to this cancer, generally eschew doctors' offices, and so they need an alternative to examination by a physician.

[271] *Women Top Men in Seeking Health Care Info*, REUTERS, Aug. 28, 2007. True to another stereotype, women use the Internet more than men to obtain travel directions. *Id.*

reason for the big gap in life expectancy between married men and single men.[272]

Courts that award medical monitoring with exceptional generosity to asbestos plaintiffs extend the tradition of affectionate nagging as a route to health for the male bourgeoisie—time to go for your chest x-ray, dear; it's free—by shifting costs away from the men who benefit from this intervention. It is a truism that customers of defendant businesses and the taxpaying public underwrite tort liability; women are not exempted from contributing.[273] A wife who makes appointments for her husband to see the doctor, focuses on his worrisome symptoms when he doesn't, shops for and cooks the type of food that promotes his health, and refills or picks up his prescriptions presumably receives something in return for her labors, even if she never gets any medical monitoring of her own from the marriage. We infer as much because she can opt out of the household, at least in theory. She cannot opt out of paying into the nearly bottomless asbestos pit. Nobody can.[274] Judges who award male plaintiffs a type of costly relief that they generally deny to women thus impose an injustice in a way that traditional marital arrangements do not. If

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[272] LINDA J. WAITE & MAGGIE GALLAGHER, THE CASE FOR MARRIAGE: WHY MARRIED PEOPLE ARE HAPPIER, HEALTHIER, AND BETTER OFF FINANCIALLY 55 (2000).

[273] African-American personal-injury litigants receive lower compensatory damage awards than their white counterparts. Frank M. McClellan, *The Dark Side of Tort Reform: Searching for Racial Justice*, 48 RUTGERS L. REV. 761, 786 (1996). Even if their lower wage income (and not bigotry against them in the civil justice system) explains this gap, black customers are still not receiving the price discount on consumer goods that they should receive in exchange for less compensation after the products injure them. *See also* David Rosenberg, *Individual Justice and Collectivizing Risk-Based Claims in Mass-Exposure Cases*, 71 N.Y.U. L. REV. 210, 230 (1996) (noting that enterprise liability necessarily prices "many consumers . . . out of the market for the good or service in question" and denies work to "prospective employees;" moreover, "[t]hose willing to pay the higher prices and accept the lower wages because they lack better alternatives still suffer a decrease in net benefits from the transaction").

[274] *See supra* note 29 and accompanying text (summarizing severe social costs).

women who are already going to the doctor make a claim for medical monitoring that would succeed when made by male claimants, then distributive justice calls for these women to receive what they seek, without getting docked for their salutary habits of self-care.

Not being free to rule against women and in favor of men overtly because they think women already monitor themselves (and pay the price of this monitoring, at least in self-discipline and often in cash) while men need nurture in the form of paid-for scheduled office visits, judges can get tangled trying to assert a gender-neutral justification for what they have decided. *Vitanza v. Wyeth, Inc.*, another hormone-replacement decision that came out against women who had sought medical monitoring, illustrates the tangle.[275] The trial court explained to plaintiffs that the governing law comes from New Jersey, where products liability law is statutory, and under the state's Product Liability Act, one needs "harm" to recover anything, including paid-for surveillance. So far, you have no harm, the court said. Come back when you're hurt.

But what about decisional law of the state's highest court, which approved medical monitoring following toxic exposures?, the plaintiffs wanted to know. One case, *Ayers*, had involved contamination of an aquifer;[276] the other, *Mauro*, followed workplace asbestos exposure.[277] The court admitted that the *Vitanza* hormone-replacement plaintiffs had met "every element" of the *Ayers* criteria and would have been entitled to their medical-monitoring claim had that precedent governed. It was thus forced to distinguish the earlier medical-monitoring decisions. Asbestos workers and contaminated-water consumers could receive medical monitoring because they had brought an environmental tort claim, said the court. The *Vitanza* plaintiffs had only a products liability claim.

What's the difference between the two? The court fumbled.

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[275] Vitanza v. Wyeth, Inc., No. 2093-04, 2006 WL 462470 (N.J. Super. Ct. Law Div. Jan. 24, 2006).

[276] Ayers v. Twp. of Jackson, 525 A.2d 287 (N.J. 1987).

[277] Mauro v. Raymark Indus., Inc., 561 A.2d 257, 258–63 (N.J. 1989).

"The main reasons that prompted the New Jersey Supreme Court to allow medical monitoring in *Ayers*," it answered, "was that the nature of environmental tort actions made proving and establishing causation extremely difficult for plaintiffs and also, the lack of a governmental response to providing compensation for victims of toxic exposure forced a need for a judicial remedy."[278] Neither reason applies to a hormone-replacement claim, the court said.[279] And neither reason makes a lot of sense, either. Difficulty in proving causation does not support giving plaintiffs medical monitoring, and it does not rule out medical monitoring for hormone-replacement claims, which pose difficult questions of causation after patients suffer harm. As for the lack of government-paid compensation, that too does not distinguish the two cases.

The *Vitanza* court wrote an equally telling review of the New Jersey Supreme Court's two decisions on medical monitoring for asbestos plaintiffs.[280] In one, the court granted this relief; in the other, decided four years later, the court refused it. Neither plaintiff was yet ill; both had evidence to show that their lungs had been hurt. The winning plaintiff, Roger Mauro, had been exposed while working as a repairman, plumber, and steamfitter in a psychiatric hospital. The losing plaintiff, Rosa Marie Theer, had been exposed while washing her husband's clothes. She would have been a fine candidate for medical monitoring if the court had applied the *Ayers* rationale: (1) she could expect to have difficulty, even more than would Mr. Mauro, in "proving and establishing causation," and (2) she apparently had received no government compensation for her injury. But over the four years between the two cases, the New Jersey Supreme Court somehow had learned that medical monitoring is a remedy "not easily invoked."[281] Roger Mauro might have needed a fellow-feeling boost in order to invoke it so easily.

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[278] *Vitanza*, 2006 WL 462470, at *8 (citing *Ayers*, 106 N.J. at 581–86).

[279] *Id.*

[280] *Vitanza*, 2006 WL 462470, at *5–6.

[281] Theer v. Philip Carey Co., 628 A.2d 724, 724–33 (N.J. 1993).

B. Fellow-Feeling Casts Blame Beyond Defendants

Personal injury law will occasionally purport to be indifferent to blame. Strict liability, for example, is imposed without a showing of fault by the defendant. Some affirmative defenses defeat a claim even when the plaintiff can prove the defendant is blameworthy.[282] These exceptions noted, blame pervades personal injury law, particularly when advocates and factfinders try to identify which of two conflicting outcomes would be the fair one.

Any effects of fellow-feeling on personal injury law will be manifest in the ascribing and withholding of blame. We may again observe that Adam Smith, who published *The Theory of Moral Sentiments* before modern tort law took form a century later, did not discuss civil responsibility for personal injury;[283] but on a related subject, responsibility for crimes, he made the non-utilitarian argument that punishment should align with social feelings and attitudes about the crime in question rather than with gains to the public good.[284] Fellow-feeling, he wrote by way of example, makes an ordinary person shudder to hear that a sentinel was put to death following military law for the crime of falling asleep at his post, whereas the death penalty for "a cruel murtherer or atrocious criminall" would seem all right to this spectator.[285] Either blame or an overt refusal to blame accompanies fellow-feeling in response to adversity.

In personal injury adjudication, a determination that there is no liability does not equate to a determination of no blame. Instead, what it can mean is that the factfinder has assigned blame—informally, making no record—for the injury to someone other than the defendant. The ascription of informal, unofficial, and yet implacable blame is a familiar topic in feminist legal writing, which has identified numerous contexts where women

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[282] These affirmative defenses include statutes of limitation, *see supra* Part I.D., and preemption, *see* DAVID G. OWEN, PRODUCTS LIABILITY 940 (2d ed. Thomson/West 2008).

[283] *See supra* notes 115–19 and accompanying text.

[284] RAPHAEL, *supra* note 3, at 111.

[285] *Id.*

receive blame for their own misfortune.[286]

For example, the attorney for the manufacturer of an intrauterine device asked a litigant at her deposition whether she wore pantyhose and "what fabric was used in the crotch."[287] "I'll answer that," said the plaintiff to the opposing lawyer, "but this sounds more like an obscene phone call than anything else."[288] The question was irrelevant because pantyhose "can't cause PID [pelvic inflammatory disease, the condition that the plaintiff attributed to the defendant's product]; not even defense experts suggested they could."[289] Defense lawyers in the Dalkon Shield litigation were on somewhat more relevant ground when they asked plaintiffs how many sexual partners they had had, because of the positive relation between the number of partners and the incidence of PID. But not much more: the connection is a bare correlation only, and Robins, manufacturer of the Dalkon Shield, never had to explain how more partners necessarily equals more infectious bacteria. The Ninth Circuit agreed with two plaintiffs that such testimony was probably irrelevant and prejudicial, but did not disturb the trial judge's decision because of the lenity of its abuse of discretion standard.[290]

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[286] *See, e.g.*, "Failure to Protect" Working Group, *Charging Battered Mothers with Failure to Protect: Still Blaming the Victim*, 27 FORDHAM URB. L.J. 849 (2000); Louise F. Fitzgerald et al., *Why Didn't She Just Report Him?*, 51 J. SOCIAL ISSUES 117, 119–21 (1995) (summarizing reasons, including self-blame, for the decision of harassed workers not to denounce their harassers); Kimari Paul-Emile, *The Charleston Policy: Substance or Abuse?*, 4 MICH. J. RACE & L. 325, 326 (1999) (analyzing a practice of prosecuting "substance-dependant pregnant women under the state's child endangerment laws"), Cynthia Lee Starnes, *Mothers, Myths, and the Law of Divorce: One More Feminist Case for Partnership*, 13 WM. & MARY J. WOMEN & L. 203, 218 n.80 (2006) (objecting to the use of "rehabilitation" as applied to alimony, as if ex-wives were "criminals in need of rescue from their lives of vice").

[287] *Id.*

[288] MORTON MINTZ, AT ANY COST: CORPORATE GREED, WOMEN, AND THE DALKON SHIELD 195 (1985).

[289] *Id.*

[290] Coursen v. A.H. Robins Co., 764 F.2d 1329, 1339–40 (9th Cir. 1985).

Arriving at the heyday of a sexual revolution, the Dalkon Shield bequeathed on American products liability litigation a practice of portraying plaintiffs as befouled from having put their reproductive anatomy to uses of pleasure, rather than accepting pregnancy as the wages of coitus.[291] The long-held popular association between unchastity and every means of birth control, not just this intrauterine device,[292] coupled with liberal discovery rules enabled lawyers defending Dalkon Shield to presume each woman soiled and ask her whatever "obscene phone call"-like questions they wished. This defamation slurs women outside products liability litigation as well. The memorable phrase that journalist David Brock coined to attack one famed female accuser, "a bit nutty, and a bit slutty,"[293]

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[291] Or befouled even from their poor hygiene, as Robins lawyers implied by asking about pantyhose and, at the deposition of another Dalkon Shield plaintiff, "which way she wiped." MINTZ, *supra* note 288, at 195. Lawyers directed the plaintiff not to answer this question and others about "whether, and how often, she engaged in oral and anal intercourse and used so-called marital aids. Five months later, however, a judge compelled her to return to the Twin Cities to answer the questions." *Id.*

[292] *See* People v. Sanger, 118 N.E. 637, 637 (N.Y. 1918) (upholding, "for the benefit of the health and morals of the community," the conviction of activist Margaret Sanger for distributing contraceptive devices and information about pregnancy prevention); Lorraine Schmall, *Birth Control as a Labor Law Issue*, 13 DUKE J. GENDER L. & POL'Y 139, 142-43 (2006) (recounting the crusade against contraception begun by Anthony Comstock and continuing in the practices of contemporary pharmacists). On the indecency of these technologies as seen even by a sophisticated jurist, *see id.* at 143 (*citing* United States v. One Package, 86 F.2d 737, 737-40 (2d Cir. 1936) (Hand, J.) ("There seems to me substantial reason for saying that contraceptives were meant to be forbidden, whether or not prescribed by physicians, and that no lawful use of them was contemplated.")).

[293] *See* David Brock, *The Real Anita Hill*, THE AMERICAN SPECTATOR, Mar. 1992, at 18; *see also infra* note 331 (referring to the "nutty, slutty defense" as used in a media report about a rape charge). Ten years later, too late to undo the damage, Brock recanted his words. *See* DAVID BROCK, BLINDED BY THE RIGHT: THE CONSCIENCE OF AN EX-CONSERVATIVE 98 (2002) ("Not even the Spectator had ever seen the likes of the sexist imagery and sexual innuendo I confected to discredit Anita Hill. These were but two ingredients in a witches' brew of fact, allegation, hearsay, speculation, opinion, and invective labeled by my editors as 'investigative journalism.'").

exploited a belief that extensive sexual experience, often a source of pride for men, causes or evinces untrustworthiness in a female complainant or witness.[294] When a physician brought an action against the New York Health and Hospitals Corporation for the HIV infection she attributed to a carelessly discarded needle, the lawyer for the city asked her on cross-examination about her abortion history, even though an abortion cannot transmit a virus or make a woman more likely to become infected.[295] The lawyer also asked about her sexual past, even though the two men she had named as her only partners had both tested negative for HIV.[296]

The notion that female plaintiffs are worth less because of their past sexual activity can lower the value of their claims—even if defendants do not broach the subject—emerged in a noted fen-phen lawsuit.[297] "We were so disappointed the trial settled," one juror told a lawyer for the deceased plaintiff, Mary Linnen. "We really were going to give the Linnens a billion dollars."[298] Mary Linnen's father was motivated to settle for much less—in part because his daughter had died before marrying her fiancé (she had taken fen-phen in hopes of losing twenty-five pounds before her wedding), and he knew that a trial would expose the fact of her premarital cohabitation.[299]

Defendants unwilling or unable to slut-shame their female

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[294] *See, e.g.*, JESSICA VALENTI, HE'S A STUD, SHE'S A SLUT, AND 49 OTHER DOUBLE STANDARDS EVERY WOMAN SHOULD KNOW (2008).

[295] Carol Agus, *Prego Gets $1.5M in AIDS-Suit Settlement; 'Now, My Only Dream Is a Cure'*, NEWSDAY, Mar. 9, 1990, at 3. "It was totally irrelevant to the whole case," the plaintiff, Dr. Veronica Prego, later told a reporter. "The only way you could get AIDS in an abortion was with transfusions. So he could have asked about transfusions without asking about abortions. But he asked about abortions and never asked about transfusions. It was done in an attempt to embarrass me." *Id.*

[296] *Id.*

[297] *See generally* ALICIA MUNDY, DISPENSING WITH THE TRUTH (2001).

[298] *Id.* at 367.

[299] *Id.* at 324–25. The Linnens had also been put through a wrenching subpoena that demanded the funeral home condolence book, all sympathy notes and cards that they had received following Mary's death, and a list of all who had attended the graveside service. *Id.* at 185.

adversaries have other victim-blaming devices at hand. The fen-phen record shows several of them. Not every plaintiff in this litigation had committed a sexual act worth mentioning, but all had taken the drug to lose weight. The Linnen trial featured an opening statement by a defense lawyer who claimed Mary Linnen had been 5'3" and weighed 193 pounds at the time of her death; she was actually 5'7," and had started using fen-phen when her weight reached 170.[300] Fat women—or, as one e-mail message typed by a physician who worked for the defendant had shouted in his attack on them, FAT WOMEN[301]—made a ready target for shame and blame.[302] Another fen-phen plaintiff was attacked for having smoked, even though smoking has no connection to the injuries for which these women filed claims.[303]

It can also appear natural for mothers to receive blame for the adversities that their children experience. Before fen-phen was identified as a culprit in heart valve diagnoses, physicians struggled to find the cause of heart valve disease in young women. Asthma and bronchitis, both common conditions, were frequently available; when the patient had never experienced either one, physicians reached for childhood rheumatic fever, a condition "all but eradicated in the 1950s and 1960s."[304] The mother of one plaintiff, Julee Montgomery, had "insisted to doctors that Julee had never had rheumatic fever. But the

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[300] "She had just painted Mary Linnen as a troll." *Id.* at 324. The statement was not a careless mistake; the lawyer went out of her way to say "five three . . . my height." *Id.*

[301] "Now everything is clear. The coordinated attack on REDUX [part of the fen-phen combination] during the past few weeks is part of a conspiracy-led by FAT WOMEN . . . to make EVERYONE fat, by keeping away the only effective medications to keep people from becoming so . . . ." *Id.* at 108 (quoting the physician's e-mail message).

[302] Jane Byeff Korn, *Fat*, 77 B.U. L. REV. 25, 29–37 (1997) (describing the intersection of weight and gender as a locus of discrimination); Elizabeth E. Theran, *"Free to Be Arbitrary and. . .Capricious:" Weight-Based Discrimination and the Logic of American Antidiscrimination Law*, 11 CORNELL J.L. & PUB. POL'Y 113, 144 (2001) (arguing that weight-related oppression functions to hold back the advances of feminism).

[303] MUNDY, *supra* note 297, at 210.

[304] *Id.* at 217–18.

doctors were convinced that Julee's mother was wrong. Perhaps she had been inattentive, even negligent. A bad mother. She must have missed it when Julee was a child."[305] Rheumatic fever is hard to miss.[306]

The asbestos contrast emerges with particular force when one reviews the judicial response to plaintiffs' coming to court as current or former smokers. In his study of developments in apportionment, Michael Green finds three judicial approaches to cancer claims that combine asbestos exposure with exposure to cigarette smoke. Courts in the first group assess the relative contribution of each input (asbestos and smoking) to the risk of cancer. Courts in the second group simply refuse to take the smoking into account. The third approach looks at smoking as a plaintiff's-conduct defense, requiring the defendant to prove that the plaintiff's smoking was negligent.[307]

Because cigarette smoke is a significantly more potent carcinogen than asbestos, this balance appears awry, not consistent with the apportionment rules that plaintiffs face in other products liability actions. The first approach is sound (with Green's important reminder-caveat that only tortious inputs should be subject to apportionment: in order to count, the cigarette smoking, whether done by the plaintiff or third parties, must have been wrongful).[308] But it is not a majority rule. The second approach, which ignores a pertinent history, blatantly denies reality to favor plaintiffs. The third, shifting the burden of production to defendants, has been occasionally unfair to defendants in application, as has the first.[309]

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[305] *Id.*

[306] Gene H. Stollerman, *Rheumatic Fever*, 349 LANCET 935 (1997) (describing symptoms, which include severe pain, and noting that "[t]he diagnostic criteria have not changed since their definitive description by William Cheadle, in 1889 . . . .").

[307] Michael D. Green, *A Future for Asbestos Apportionment?*, 12 CONN. INS. L.J. 315, 333 (2006).

[308] *Id.* at 341.

[309] *Id.* at 324 n.40 (putting in the third category Rutherford v. Owens-Illinois, Inc., 941 P.2d 1203 (Cal. 1997), which affirmed an improbable jury determination that the decedent's fault in maintaining a pack-a-day smoking

That the smoker/cancer/worker subset of asbestos plaintiffs could ever succeed in showing that asbestos exposure more probably than not caused their lung cancer is difficult to explain without reference to the plaintiffs' gender. All of their claims—in substance, "I have cancer because I was exposed to asbestos"—were almost always not true enough to meet the preponderance standard. If the claims were ever true in particular instances, the truth was fortuitous and unknowable.

Against these cold facts, however, stood laboring men, breadwinners of the working class. These cancer plaintiffs had smoked, but because their friends and families smoked or to ease the stress of earning their living in a factory or railroad yard, not because they lacked regard for their own wellbeing or sought to encounter a risk. At work, each man was wrongfully exposed to asbestos, a hazardous substance, and later he was stricken with a deadly disease.

Each lung-cancer plaintiff can win against an asbestos defendant only with the help of empathy. Tort doctrine, coldly demanding that he eliminate the more likely source of his injury, is not on his side. And so I speculate that looking at this litigant, judges and defense lawyers experience fellow-feeling amounting almost to brotherhood. These adversaries and neutrals feel no such connection in the presence of litigants who say they were sickened or maimed by synthetic estrogen, diet drugs, morning-sickness drugs, intrauterine devices, lactation suppressants, miscarriage preventatives, hormonal birth-control implants, tampons, or slabs of silicone inserted surgically into breasts to make them bigger. When they face women in an adverse medical state attributable to a product defect, especially a gynecological state—miscarrying, mourning their inability to become pregnant, giving birth to deformed children—they do not see themselves. Their fellow-feeling appears more readily stirred by business managers who tried to meet demand by supplying

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habit for 30 years contributed only 2.5% to his lung cancer); Altiere v. Fibreboard Corp., 617 A.2d 1302, 1303 (Pa. Super. 1992) (fear-of-cancer case with present asbestosis featuring a plaintiff who "was a heavy smoker;" the court refused an apportionment instruction because the statistical evidence on what inputs cause which cancers was too imprecise).

goods to a market of consumers, only to be ambushed by a problem that few could foresee.

CONCLUSION

Doctrine in the United States is stringent when litigants try to hold defendants responsible for injuring them. Barriers keep plaintiffs from jurors who might be moved to compensate them out of what critics have called sympathy.[310] Agreeing that sympathy flourishes in personal injury liability, this Article has found this force in new places. Observers, including jurors and judges, feel connected to litigants who put them in mind of themselves. Their feeling of sympathetic connection to these persons impels them to relax the stringent requirements of hornbook tort law. Four key aspects of this fellow-feeling—its inclination to focus on one person or side at a time; its involuntary origins; its tendency to make people feel good; and its social effects—manifest in personal injury liability. Fellow-feeling explains some recurrent favoritisms.

The favoritism that this Article has addressed extends unacknowledged (and perhaps unconscious) kindnesses to some male participants in personal injury liability, while withholding the same kindnesses from female plaintiffs. I acknowledge the strong null hypothesis that opposes my contention. Any charge of gender bias made in the twenty-first century United States, when persons who feel challenged by the accusation seldom are willing to agree that they treated one gender better and the other worse for no good reason, has a row of persuasion to hoe. What is to one observer a record of undefended and undertheorized preference will not look the same to all others. Throughout the Article, accordingly, I have tried to support my contention about fellow-feeling in one particular male-gendered category of claims by making side-by-side references to women's personal-injury claims, arguing that these like cases have not been treated alike.[311]

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[310] *See generally* Feigenson, *Sympathy*, *supra* note 5.

[311] *Cf.* ARISTOTLE, NICOMACHEAN ETHICS 118–19 (Martin Ostwald

Readers who doubt this thesis might deem the differences among my examples more salient than the similarities, or maintain that the defective product I have associated with male plaintiffs is so different from every other source of personal injury that it cannot stand in for a separate category like gender.[312] In response, I can only commend renewed attention to asbestos case law. The liberalities and dispensations bestowed on this group of plaintiffs, catalogued only in part in this Article,[313] are extraordinary. They amount to the very antithesis of rigor. Anyone looking for the strict criteria, bright lines, categorical rules, and outcome-determinative syllogisms found in American personal injury law must go where the women are.

Having discussed litigants, jurors, and judges, this Article closes with a few words about the occupational group whose role in personal injury law has received only passing attention so far.[314] Asbestos lawyers have received considerable attention away from this Article.[315] Most of this commentary has been scathing; almost all of it has focused on lawyers who represented plaintiffs. To even the imbalance in the discourse, I start with attorneys for defendants.

A key problem with fellow-feeling in an adversarial context is that it undermines assigned-role duties to suppress its impulses. Observers affronted by the lapses of asbestos plaintiffs' lawyers—witness coaching,[316] stirring up litigation of

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trans., 1962) (stating a principle that things that are alike ought to be treated alike).

[312] *See, e.g.*, Eagle-Picher Inds. v. Balbos, 578 A.2d 228, 231 (Md. Ct. Spec. App. 1990) (calling asbestos liability "the Apocalyptic Beast," a sobriquet connoting uniqueness).

[313] *See supra* Parts III and IV. "Only in part," because after a point I just stopped looking for these instances; because the Article says little about indulgences from defendants and their lawyers; and because I took time for only a quick exploration of how the social phenomenon of women-blaming, *see supra* Part VI.B, affects personal-injury liability.

[314] I try to fill in some of this gap in Bernstein, *supra* note 122 (describing the "Asbestos Achievements" of plaintiffs' lawyers).

[315] *See infra* notes 316-21 and accompanying text.

[316] Brickman, *supra* note 256, at 999; Griffin B. Bell, *Asbestos and the Sleeping Constitution*, 33 PEPP. L. REV. 1, 7 (2003).

dubious merit,[317] recruiting medical experts to testify without due regard for the truth,[318] collecting extremely high fees,[319] and other misdeeds[320]—were curiously untroubled by the disloyalty to clients, in crucial ways a worse wrong,[321] exhibited on the other side of the caption. If fellow-feeling affected asbestos jurors and judges in the way this Article has claimed, it also caused defense lawyers to pull their punches. If lawyers had defended asbestos claims by going after their adversaries at anywhere near the pitch that defense lawyers routinely use against women plaintiffs, their clients (and the American public) would have paid a much lower liability bill.[322]

Asbestos plaintiffs' lawyers, a cohort dominated by men, placed themselves in an interesting position by choosing to represent both this group of injured workers and products-

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[317] Brickman, *supra* note 256, at 997; Milo Geyelin & Michael J. McCarthy, *Judge Chides Lawyers in Asbestos Claims,* WALL ST. J., Jun. 7, 1990, at B10 (describing two Texas lawyers who, rolling through Texas in a van and visiting asbestos plants offering x-rays to workers, signed up 6000 litigants).

[318] Behrens & Goldberg, *supra* note 202, at 482; Bernstein, *Junk Science*, *supra* note 30, at 13.

[319] Brickman, *supra* note 256, at 995.

[320] In his article about the ethics of asbestos lawyers, Lester Brickman adds other charges. Lester Brickman, *Ethical Issues in Asbestos Litigation*, 33 HOFSTRA L. REV. 833 (2005) (mentioning solicitation, conflicts of interest, and violations of statutes). He accuses defense lawyers of misbehavior too. *See, e.g.*, *id.* at 890–91 (mentioning defense conflicts of interest).

[321] Disloyalty is not only more a fundamental ill than hyperpartisan excess; it is also much harder to locate and resist. An adversary can be counted on to care about and protest a breach of ethics that threatens the adversary's client. No such safeguard exists to protect a client from a lawyer too devoted to fraternal norms about not treating a fellow like a girl to assert, for example, that a *Daubert* precedent disadvantaging female plaintiffs should be applied to his adversary's asbestos claim.

[322] *See supra* note 29 and accompanying text (referring to the high social costs of this liability). For their part, judges—state actors—apparently did not believe that the law of equal protection obliged them to treat male complainants no less harshly and skeptically than they treat female complainants.

liability claimants generally. On one hand, they advocated for victims inside the empathy circle, the men who supported their families and did nothing worse at their dangerous jobs than smoke. On the other hand, these lawyers also advocated against synthetic estrogen, diet drugs, morning-sickness drugs, intrauterine devices, lactation suppressants and so on. They have been winners at the asbestos game, but when away from asbestos cases this cohort of lawyers more often loses, in part because of victim-blaming.[323] Lead paint, *Daubert* as applied to female litigants, statutes of limitation for sexual-abuse actions, offensive collateral estoppels, emotional distress, medical monitoring, attempts to aggregate claims, and other battles surveyed in this Article yield a bad win-loss tally for plaintiffs, along with their lawyers. Yet these advocates made asbestos-liability critics tremble.

When they sided with women against men in long-odds drug products liability actions, these lawyers, unlike their asbestos-exposed clients, strayed from the brotherhood version of fellow-feeling that would have connected them to their adversaries and the other men who managed this litigation. Anyone looking at their client roster would see that even though plaintiffs' lawyers stuck up for salt-of-the-earth laborers, these men must not be committed only to a brotherhood, because they also stuck up for women, advocating for them as if these complainants were not lying or crazy or both.[324] In this light, a man who would champion women in a products liability action appears money-motivated at best; he might even believe that women are entitled to use the law for their own ends and against entities dominated by the other gender. These male advocates were suspect, in short.[325] Plaintiffs' lawyers (their clients emphatically put aside

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[323] *See supra* Part IV.B.

[324] *See infra* note 325.

[325] When John Edwards, who had earned a fortune bringing neonatal-injury lawsuits against hospitals and obstetricians, ran for president in 2007 as the only plaintiffs' lawyer in the race, he (alone among the dozen or so men whose campaigns drew national attention) had to deal with repeated sneering on the subject of his manhood. *See* Howard Kurtz, *Bad Hair Day?*, WASHINGTONPOST.COM, Apr. 24, 2007 (referring to several gendered

for this purpose) went on to receive virtually all the blame for asbestos liability run amok, in terms that go beyond disagreement into white-hot revulsion and fury.[326]

So deplored by these angry critics, the gargantuan scale of asbestos liability nevertheless suggests that kindness rooted in fellow-feeling has its social uses. Any Article about the effects of asbestos liability should note what it achieved.[327] Suppliers who knew that exposure to their product was dangerous yet failed to warn workers had their "outrageous misconduct" brought to light.[328] Injured persons received compensation. Other positive effects included enhancements for "the fund of social knowledge, and, ultimately, for consumer welfare."[329] More to the point of this Article, although not an especially positive consequence: Women received wealth transfers from asbestos liability, because exposed men who win compensation for asbestosis, mesothelioma, or lung cancer typically do not live to enjoy the money, which passes to their widows. Gender-fairness also obliges me to note that women were disproportionately spared—that is, excluded from—employment in lung-poisoning workplaces.[330]

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epithets, including "Breck Girl," "Material Boy," and "metrosexual"); Charles P. Pierce, *The Beauty Contest*, ESQUIRE, Aug. 1, 2007, *available at* http://www.esquire.com/features/edwardscontest0807 (recalling that one commentator had called Edwards, at the time married for decades to the mother of his children, "a faggot").

[326] *See, e.g.*, Thomas Grillo, *After 8 Years, a Milestone in Battle over Mold*, BOSTON GLOBE, Nov. 25, 2003, at A1 ("[G]reedy lawyers looking for the next cash cow as asbestos lawsuits diminish"); Stuart Taylor, Jr., *The Greedy vs. the Sick: Lawyers Are Using Asbestos Claims to Cheat the Rest of Us*, LEGAL TIMES, Sept. 30, 2002, at 60.

[327] For elaboration, see Bernstein, *supra* note 122.

[328] I borrow the title of a book about asbestos liability before and after a landmark federal decision. PAUL BRODEUR, OUTRAGEOUS MISCONDUCT: THE ASBESTOS INDUSTRY ON TRIAL 42 (1985) (linking Borel v. Fibreboard Paper Products Corp., 493 F.2d 1076 (5th Cir. 1974) to revelations about industry knowledge)).

[329] Marshall S. Shapo, *Millennial Torts*, 33 GA. L. REV. 1021, 1031 (1999) (summarizing some consequences of asbestos litigation).

[330] Deborah R. Hensler, *Asbestos Litigation in the United States: Triumph and Failure of the Civil Justice System*, 12 CONN. INS. L.J. 255, 260 n.9

Injustices surveyed here thus invoke recognition respect and equal treatment before the law, more than a material shortfall. Male-dominated cohorts of litigants who made accusations about one defective product received attention, empathy, and support in the courts that female-dominated cohorts making accusations about product defects did not and do not receive. This difference, which comports with a larger pattern prevailing when women publicly impugn men or male-governed entities, pertains to law and policy beyond personal injury liability.[331] Observers

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(2006) ("Most asbestos workers are male."). The most dangerous jobs in the United States—fishing, logging, and flying airplanes—are male-dominated. Les Christie, *America's Most Dangerous Jobs*, CNNMONEY.COM, Aug. 17, 2006, http://money.cnn.com/2007/08/07pf/2006_most_dangerous_jobs/index.htm. Yet "it is worth noting that working in a hospital is more dangerous than mining coal. Nursing homes report more on-the-job injuries than steel mills. Grocery workers are injured more frequently than lumberjacks." Fay Hansen, *It's Safe Behind the Desk*, WORKFORCE MGMT., Nov. 19, 2007, at 14. An ethnographic study of street prostitutes in Britain found an array of dangers for these women workers, not limited to client violence. Teela Sanders, *The Risks of Street Prostitution: Punters, Police, and Protesters*, 41 URBAN STUDIES 1703, 1704 (2004). One might also wonder about the safety of long work shifts in hair, nail, and tanning storefronts. *See* Tonya Turner, *Poisonous Perfection*, COURIER MAIL, Mar. 15, 2007, at 42 (reporting on methyl methacrylate, a toxic chemical used in Australian nail salons).

[331] *See supra* notes 293–94 and accompanying text (noting the Clarence Thomas-Anita Hill controversy). Reactions to rape complaints provide another illustration of gendered fellow-feeling as a social phenomenon. Morrison Torrey, *When Will We Be Believed? Rape Myths and the Idea of a Fair Trial in Rape Prosecutions*, 24 U.C. DAVIS L. REV. 1013 (1991) (detailing the tendency to disbelieve rape complainants). As Torrey shows, the gender pattern in fellow-feeling is one of disbelief toward female accusers, not spectators' favoring their own gender; those who respond skeptically to rape claims include women as well as men. *Id.* at 1039–40 (reviewing social science evidence); *see also* BERNARD LEFKOWITZ, OUR GUYS: THE GLEN RIDGE RAPE AND THE SECRET LIFE OF THE PERFECT SUBURB (1997) (recounting how a community united to support and defend high-school athletes who raped a mentally retarded girl); Katheryn Russell-Brown, *Black Protectionism as a Civil Rights Strategy*, 53 BUFF. L. REV. 1, 42–43 (2005) (noting that "the Black community roundly denounced" the young African-American woman who reported being raped by the boxer Mike Tyson, accusing her somewhat contradictorily of extreme näivété, for

concerned about the inequalities, partialities, and asymmetrical sympathies that still blight American personal injury law ought to reflect on fellow-feeling.

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not knowing what to expect when she visited a man in his hotel room, and also being "a scheming gold-digger"); *Bryant Attorneys Will Use 'Nutty, Slutty' Defense*, MSNBCNEWS.COM, Aug. 23, 2004, *available at* http://www.msnbc.msn.com/id/5789268 (referring to a charge of sexual assault brought against a star NBA player).