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Gender in Asbestos Law: Cui Bono: Cui Pacat

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Gender in Asbestos Law: *Cui Bono? Cui Pacat?*

Anita Bernstein*

The large literature about liability for asbestos exposure has, for the most part, omitted gender. This omission matters. Men and women who sought redress in court fared very differently, and the two genders have shared unequally in the spoils of asbestos litigation and regulation. Here I ask: Cui bono? Cui pacat? In other words—English words—this Article investigates who has gained from and who has paid for the transfer of wealth put in motion by asbestos law.

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I. INTRODUCTION

Put gender at one end of a spectrum and asbestos law at the other, and one may wonder whether the twain can meet.

At the asbestos law side appear signature diseases, bankruptcy trusts, environmental and workplace regulation, multidistrict litigation, and billions of dollars. And men. Claimants, claimants' lawyers, claimants' lawyers' adversaries, pleural registrants; insulators, miners, plumbers, pipe fitters, stevedores, assemblers, railroad workers.¹ At the other end of our spectrum—gender, or in this context, feminist legal theory—we find relatively few men, little cash, and ample abstract ideas. Formal equality, postmodernism, epistemology, positionality, standpoint theory, sameness and difference, intersectionality, and more.² The capacious category of gender within legal theory embraces much, but what does asbestos have to do with it? Focusing more on dollars than abstractions, this Article ventures an answer.

The answer takes the form of questions. “*Cui bono? Cui pacat?*,” a variation on “follow the money” rendered in Latin, follows the suggestion of feminist legal theorist Katharine Bartlett by asking a “woman question.”³ With respect to asbestos law in the United States, I ask: *Who benefits and who pays?* Litigation about this substance has caused billions of dollars to move.⁴ Here I consider the gender of this movement, a large wealth transfer.

My contention is that the asbestos record reveals detriments for women. Elsewhere I have used illustrations from asbestos precedents to argue that empathy and sympathy—most of it from judges, but some from adversaries' lawyers—helped enable a cohort of men to achieve gains that had been regarded as unavailable to plaintiffs under the rules and doctrine of civil procedure and torts.⁵ This Article

1. See Malcolm Ross, *A Survey of Asbestos-Related Disease in Trades and Mining Occupations and in Factory and Mining Communities as a Means of Predicting Health Risks of Nonoccupational Exposures to Fibrous Minerals*, in DEFINITIONS FOR ASBESTOS AND OTHER HEALTH-RELATED SILICATES 51, 58-60 (Benjamin Levadie ed., 1984).

2. For surveys, see MARTHA CHAMALLAS, INTRODUCTION TO FEMINIST LEGAL THEORY (2d ed. 2003); and FEMINIST LEGAL THEORY: FOUNDATIONS (D. Kelly Weisberg ed., 1993).

3. Katharine T. Bartlett, *Feminist Legal Methods*, 103 HARV. L. REV. 829, 831 (1990). Bartlett joins the woman question with two other tasks—consciousness raising and practical reasoning—that are also underway in this Article. *Id.*

4. Anita Bernstein, *Fellow-Feeling and Gender in the Law of Personal Injury*, 18 J.L. & POL'Y 295, 303 (2009).

5. *Id.* In a companion article, Anita Bernstein, *Asbestos Achievements*, 37 SW. U.L. REV. 691 (2008), I detail these extraordinary gains and give credit to plaintiffs' lawyers.

connects my earlier attention to gender in personal injury law with the Symposium's inquiry into legal developments relating to asbestos. One answer to *cui bono* from asbestos law is men, I shall argue, while women *pacat* in the form of exclusion from gender-based favors. Along with men, women also pay an undiminished share of the social costs that asbestos law has imposed on us all.

Let me state up front the clearest sense in which men have paid for asbestos and women have gained. Because women in the United States lacked, and still lack, access to the higher-wage unskilled and semiskilled jobs where workers had to touch and breathe asbestos, far more men than women are known to have been exposed to this toxin.⁶ Many men who recovered sizeable settlements or judgments and then died of asbestosis, mesothelioma, or cancer must have suffered a great deal before they could enjoy the settlements that their unimpaired wives stood ready to inherit.⁷ Payments also have gone to men who were exposed at work but not impaired;⁸ I am inclined to put these individuals in the "*pacat*" category, because the harm of anticipating a diagnosis of lung disease is genuine and not adequately repaired by money, a wealth transfer in which wives share. The gendered distribution of gain and pain examined in this Article acknowledges the uncontroversial and severe detriment of workplace exposure that has harmed male victims and, with the help of asbestos law, indirectly enriched their female spouses. Further review of the record yields a host of other gender disparities, however, all contrary to the material interests of women.

As used in this Article, "asbestos law" means the responses that legal institutions in the United States have made to the problem of asbestos as a toxin that sickens and kills human beings. Regulation preceded the rise of tort liability: the Occupational Safety and Health Administration (OSHA) issued the first national-level legal response in 1971 when it decreed maximum asbestos levels for workplace

6. The leading study of asbestos law notes that most claimants in the United States alleged exposure at their workplaces, which featured "asbestos mining, manufacture, or installation; shipyards; railroad and automobile maintenance; construction; chemicals; and utilities." Stephen J. Carroll et al., *Asbestos Litigation*, INST. FOR CIVIL JUSTICE, RAND 76-77 (2005), http://www.rand.org/content/dam/rand/pubs/monographs/2005/RAND_MG162.pdf. The RAND report and other sources say little about the gender of participants; this Article, like writings about asbestos law generally, assumes that most plaintiffs who claim exposure to asbestos are men.

7. I thank Aaron Twerski for his discussion of this point with me.

8. Michelle J. White, *Asbestos and the Future of Mass Torts*, 18 J. ECON. PERSP. 183, 193 (2004).

exposure.⁹ A Texas workers' compensation lawyer named Ward Stephenson had set out ten years before then for recompense, filing the first known tort claim for an asbestos injury.¹⁰ This plaintiff was awarded only a disappointing \$7,500, but Stephenson won a big victory when he represented a coworker of this client, an asbestos-exposed insulator named Clarence Borel who had toiled for decades in shipyards and oil refineries.¹¹ *Borel v. Fibreboard Paper Products Corp.* featured the first jury trial of a claim that a manufacturer had failed to warn of the dangers of asbestos.¹²

Understood to have launched large-scale tort liability for the harms of exposure, *Borel* was one of several judicial decisions that treated asbestos workers with unprecedented generosity. One famed example of this bounty, *Beshada v. Johns-Manville Products Corp.*, held that an asbestos defendant could be liable for the failure to warn about dangers "undiscoverable,"¹³ in the Supreme Court of New Jersey's phrase, at the time of marketing. All but retracted two years after its issuance,¹⁴ *Beshada* nevertheless remains the only decision by a state high court that exposes a manufacturer to liability for not warning about more of a product's dangers than it could have known. Other plaintiff-favoring departures pervade asbestos case law. Elsewhere I have gathered numerous other illustrations of these "asbestos achievements," a rewriting of doctrine the likes of which accident law has never seen.¹⁵

Extraordinary favoritism in asbestos law spreads beyond judicial decisions, and thus this Article looks at primary sources other than cases. I apply *Cui bono? Cui pacat?* to statutes—including statutes of limitation, a source of asbestos law made by legislatures and judges—along with regulatory mandates and a legal form prominent in this

9. See *id.* at 185; Occupational Exposure to Asbestos, Tremolite, Anthophyllite and Actinolite, 57 Fed. Reg. 24,310, 24,314 (June 8, 1992) (codified at 29 C.F.R. pts. 1910, 1926).

10. Stephenson started this claim with a workers' compensation filing in 1961; a complaint in court followed in 1966. TOXIC TORT LITIGATION 352-53 (D. Alan Rudlin ed., 2007).

11. *Beyond the Rhetoric: The Impact of Asbestos Litigation*, SOUTHEAST TEX. REC. (Nov. 17, 2008, 8:49 AM), <http://setexasrecord.com/news/215936-beyond-the-rhetoric-the-impact-of-asbestos-litigation>.

12. White, *supra* note 8, at 186-87.

13. 447 A.2d 539, 547 (N.J. 1982).

14. *Feldman v. Lederle Labs.*, 479 A.2d 374, 388 (N.J. 1984) (determining that *Beshada* must be limited "to the circumstances giving rise to its holding").

15. See Bernstein, *supra* note 5.

Symposium, asbestos trusts.¹⁶ My tally starts in Part II, “Inhaling Asbestos at Home Rather than at Work.”

A familiar locus of feminist legal theory,¹⁷ home has proved an important venue in asbestos liability as well. Part II names female plaintiffs who died, typically of mesothelioma, after years of shaking out and washing asbestos-contaminated work clothes they had not worn. Individual litigants in this category tend to lose in court. No personal injury lawyer, as far as I can tell, has ever even tried to recruit them into clusters to enhance their chances of redress: among groups of asbestos plaintiffs, only male-dominated groups have reaped the gains of aggregation.¹⁸ I compare these women to similarly situated child plaintiffs, who also tend to lose but have fared distinctly better than their mothers.

Making frequent references to the asbestos liability record, Part III fills out this picture by examining how groups of women who alleged approximately comparable sources of injury did worse in court than their male asbestos peers. Thus Parts II and III of this Article depict physically injured women as *cui pacat*, or among the losers of asbestos law. Whether they brought asbestos-related disease claims of their own or made claims about other harms, they paid in comparison to men.

From this base, Parts IV and V of the Article move to consider a set of gendered consequences that extend past injured plaintiffs. Part IV, “Pecuniary Gains Beyond Judgments and Settlements,” follows the *cui bono* money by observing how men became, and remain, more enriched than women by the institutional machinery that occupies and implements contemporary asbestos law. In Part V, my survey of *cui pacat* expounds on who is paying the asbestos law bill. Detriments to groups—commercial creditors of insolvent businesses, insurers and their customers, and taxpayers and the larger population base—fall on every gender. Foreclosed from sharing equally in the gains of asbestos law, women enjoy no shelter from its losses.

16. See *infra* Parts III.D, IV.

17. See CATARINE A. MACKINNON, TOWARD A FEMINIST THEORY OF THE STATE 35-36 (1989); JEANNIE SUK, AT HOME IN THE LAW: HOW THE DOMESTIC VIOLENCE REVOLUTION IS TRANSFORMING PRIVACY (2009); Lorna Fox, *Re-Possessing “Home”: A Re-Analysis of Gender, Homeownership and Debtor Default for Feminist Legal Theory*, 14 WM. & MARY J. WOMEN & L. 423 (2008); Laura A. Rosenbury, *Work Wives*, 36 HARV. J.L. & GENDER 345 (2013).

18. See *infra* Part III.E.3.

II. INHALING ASBESTOS AT HOME RATHER THAN AT WORK

The paradigm here starts with a married woman who inhales fibers that her husband, an asbestos worker, brought home from his job. Typically she did not encounter asbestos from any other source. She develops mesothelioma or asbestosis—both diseases bespeak asbestos exposure¹⁹—and seeks redress in court. Not all courts have said no to this plaintiff; some of the decisional law that comes out against wives treats them fairly. But the pattern of hostility is striking, especially in light of how comparatively well men injured by asbestos have fared in court.

I discuss judicial rejection in the next two Subparts. The first reviews how courts defeat wives' claims.²⁰ Sometimes judges face clear statutory authority that gives them little choice,²¹ but the common law doctrines they also use—mostly variations on no duty—are manipulable. For no good reason, or so I contend in the second Subpart, asbestos children have done better in court than asbestos wives.²²

A. *The Wife-Lauderer*

Our paradigmatic wife-plaintiff lived with someone who unwittingly brought home a substance that courts have identified as a poison²³—a source of danger attributed to unreasonable conduct if we use negligence diction, a defective product in the vocabulary of products liability. In a recurring scenario, the way this wife came to inhale asbestos was via laundry. This individual and her lawyer would plead negligence, whether labeled as such in a complaint or relocated into the failure-to-warn subset of products liability.

19. Mesothelioma is close to a signature disease, that is, a condition that rarely develops unless an individual was exposed to a particular antecedent. It is possible to develop mesothelioma without exposure to asbestos, see Lester Brickman, *The Asbestos Litigation Crisis: Is There a Need for an Administrative Alternative?*, 13 CARDOZO L. REV. 1819, 1842-43 (1992), but the association is very strong. Carroll et al., *supra* note 6, at xxiv (stating that "asbestos exposure is the only known cause" of mesothelioma). As for asbestosis, by its definition, it cannot exist absent asbestos exposure. Am. Thoracic Soc'y, *The Diagnosis of Nonmalignant Diseases Related to Asbestos*, 134 AM. REV. RESPIRATORY DISEASE 363, 367 (1986) (listing exposure as the first of six necessary criteria).

20. And the courts deny these claims with more vigor: although neither products liability/negligence nor premises liability has been a winner for wives, these plaintiffs do better with the former than the latter.

21. See *infra* notes 50-51 and accompanying text.

22. DAVID G. OWEN, PRODUCTS LIABILITY LAW 815 (2d ed. 2008) (observing that in considering proximate cause, "courts are fickle when it comes to injured children").

23. *Borel v. Fibreboard Paper Prods. Corp.*, 493 F.2d 1076, 1084 n.13 (5th Cir. 1973).

These grounds for redress worked for Clarence Borel, the patriarch of American asbestos plaintiffs. Seeking compensation, Borel chose a diversity action in Texas federal court against the manufacturers of asbestos materials that he had spent years installing.²⁴ Negligence reasoning allowed courts to hold suppliers responsible for asbestosis and mesothelioma—not just Clarence Borel’s, of course, but those of thousands of other workers whose claims followed.

In principle, negligence law gives a wife-laundrer an advantage that the husband-worker will usually lack: she may bring an action against her husband’s employer—not just the remote suppliers that fill products liability case law involving male worker-plaintiffs—because she is not barred by workers’ compensation as an exclusive remedy for unintentional injury suffered at a work site.²⁵ Decisional law reports numerous behaviors by employers that could fulfill the breach element of a negligence claim, among them failure to warn workers; failure to provide showers, uniforms, or masks to reduce the quantity of asbestos dust that landed on and inside workers’ bodies; and noncompliance with OSHA regulations governing asbestos in the workplace.²⁶ Courts nevertheless have invoked duty to conclude that both suppliers and employers had no obligation to avoid exposing employees’ wives to the risks of asbestos.

The duty rationale for ruling against wives has taken differing forms. The high court of New York reminded one wife-laundrer that the state has never equated foreseeability with duty and insisted that her husband’s employer, the Port Authority of New York and New Jersey, had no relationship with her. Hence no duty, the New York State Court of Appeals concluded.²⁷ The Supreme Court of Georgia focused on “policy” when it denied a duty to wife-launders, worrying about “an almost infinite universe of potential plaintiffs.”²⁸

Such framing appears to concede that harm to a wife-laundrer is foreseeable: yet in other states more open to foreseeability as a source of duty, wife-launders fare little better. The wife-laundrer cohort has one big victory, a decision by the foreseeability-focused Supreme

24. *Id.* at 1086.

25. Rebecca Leah Levine, Note, *Clearing the Air: Ordinary Negligence in Take-Home Asbestos Exposure Litigation*, 86 WASH. L. REV. 359, 368–69 (2011).

26. *Id.* at 390–91.

27. *In re* N.Y.C. Asbestos Litig., 840 N.E.2d 115, 120 (N.Y. 2005).

28. *CSX Transp., Inc. v. Williams*, 608 S.E.2d 208, 209 (Ga. 2005) (quoting *Widera v. ETTCO Wire & Cable Corp.*, 611 N.Y.S.2d 569, 570–72 (App. Div. 1994)).

Court of New Jersey,²⁹ and a handful of wins in intermediate appellate courts.³⁰ More typically, these plaintiffs lose, and again the rationales vary. A Texas appellate court concluded that an employer in the 1950s could not have been expected to understand that asbestos exposure away from the workplace was dangerous and so another wife-laundrer had to lose on duty, even though she produced a 1948 internal memorandum by the corporate defendant informing workers that “a health hazard existed if employees wore their clothes home from work.”³¹ Moreover, the Walsh-Healey Act, codified by Congress in 1936, required government-contract employers to provide asbestos workers with a change of clothing.³²

Upholding summary judgment against a laundering family member, the Iowa Supreme Court suggested that this plaintiff might have fared better if her husband had been an employee of the defendant. He was an independent contractor, however, and “[o]ne who employs an independent contractor owes no general duty of reasonable care to a member of the household of an employee of the independent contractor.”³³ In a decision that consolidated nine asbestos actions against various defendants, one wife-laundrer asked the trial judge to instruct the jury that her husband’s employer owed its employees a safe workplace, an obligation that included a duty to warn its employees of nonobvious dangers.³⁴ The Court of Special Appeals of Maryland approved the judge’s denial of this proposed instruction,

29. *Olivo v. Owens-Illinois, Inc.*, 895 A.2d 1143 (N.J. 2006). *Olivo* was remanded for a determination of whether the defendant owed a duty to the plaintiff’s husband, noting that a negative answer to that question would vitiate the wife’s derivative claim. *Id.* at 1151.

30. The authoritative appellate-level wins against employers are *Simpkins v. CSX Corp.*, 929 N.E.2d 1257 (Ill. App. Ct. 2010), and *Chaisson v. Avondale Industries, Inc.*, 2005-1511 (La. App. 4 Cir. 12/20/06); 947 So. 2d 171. *Zimko v. American Cyanamid*, 2003-0658 (La. App. 4 Cir. 6/8/05); 905 So. 2d 465, relied on an out-of-state decision that was later reversed; the unpublished *Honer v. Ford Motor Co.*, No. B189160, 2007 WL 2985271 (Cal. Ct. App. Oct. 15, 2007), reversed summary judgment against a plaintiff without saying why. *Dixon v. Ford Motor Co.*, 70 A.3d 328 (Md. 2013), upheld a judgment in favor of a wife-laundrer, but in *Dixon*, the defendant-employer seemed to concede its duty and breach, focusing in its appeal on the admission of expert testimony and caps on noneconomic damages. See *id.* at 330 n.1 (noting that the court would not consider issues that Ford had not raised on appeal).

31. *Alcoa, Inc. v. Behringer*, 235 S.W.3d 456, 460-61 (Tex. App. 2007). In fairness to the defendant, the substance at issue in this memorandum was not asbestos. Nevertheless, as the plaintiff put the point, “this memorandum evidences Alcoa’s general knowledge that ‘contaminants could be taken home.’” *Id.* at 462.

32. Levine, *supra* note 25, at 379; see also MICHAEL BOWKER, FATAL DECEPTION: THE TERRIFYING TRUE STORY OF HOW ASBESTOS IS KILLING AMERICA 91-92 (2003) (reporting corporate cover-ups of the known dangers during the 1940s).

33. *Van Fossen v. MidAmerican Energy Co.*, 777 N.W.2d 689, 696 (Iowa 2009).

34. *Adams v. Owens-Illinois, Inc.*, 705 A.2d 58, 66 (Md. Ct. Spec. App. 1998).

holding that the employer “owed no duty to strangers based upon providing a safe workplace for employees.”³⁵ Wives, then, were strangers. No duty to a wifelike launderer, agreed the Michigan Supreme Court,³⁶ using a certified question to dispatch a claim filed in Texas and accepting the Texas court’s articulation of the duty question in terms of premises liability.³⁷

Courts disinclined to find a duty to wife-launderers have often cast the cause of action as premises liability, even though these claimants tend to plead their claims simply as negligence. Premises liability and the rule of no affirmative duty to rescue are more or less the only duty-based shelters for defendants against plaintiffs who link their physical injury to the defendants’ carelessness.³⁸ Like the rescue category, premises liability casts the defendant as passive—a person or entity that did not do anything affirmatively wrong even if more prudent conduct on its part would have lessened risks.³⁹

It is anomalous that courts attribute the passivity of premises liability—that is, nonfeasance rather than misfeasance—to an asbestos employer when a wife has complained about heedless neglect for her well-being. For starters, premises liability traditionally has functioned to limit claims of visitors who entered a possessor’s land.⁴⁰ Most wife-launderers stayed away from their husbands’ workplaces.⁴¹

Related to this point, part of the rationale for limited duties to land visitors is that a possessor should not be expected to modify the place he occupies to comply with external judgments about safety for third parties or the public.⁴² Premises liability, when it took form as a

35. *Id.*

36. *In re Certified Question from the Fourteenth Dist. Court of Appeals of Tex.*, 740 N.W.2d 206, 222 (Mich. 2007). On the “wifelike” category of plaintiffs, see *infra* notes 69–75 and accompanying text.

37. *In re Certified Question from the Fourteenth Dist. Court of Appeals of Tex.*, 740 N.W.2d at 223 (Cavanagh, J., dissenting) (protesting that the Michigan Supreme Court had in effect decided a case filed in another state without guidance from any appellate standard of review).

38. One might mention the famous *Palsgraf* case, but the opinion for the court by Judge Cardozo might be understood as finding no breach of duty as a matter of law, rather than no duty. See JOHN C.P. GOLDBERG, ANTHONY J. SEBOK & BENJAMIN C. ZIPURSKY, *TORT LAW: RESPONSIBILITIES AND REDRESS* 320–21 (3d ed. 2012).

39. See DAN B. DOBBS, *THE LAW OF TORTS* 600 (2000) (explaining the focus on the underlying principle of invitee status rather than the invitation).

40. See *id.* at 591 (describing the category as posing duties owed to persons on the defendant’s premises).

41. But see, e.g., *Anderson v. A.J. Friedman Supply Co.*, 3 A.3d 545 (N.J. Super. Ct. App. Div. 2010) (featuring a wife who had been an asbestos worker herself as well as a launderer).

42. DOBBS, *supra* note 39, at 600.

common law rule, declared that land conditions good enough for the laird must be good enough for his visitors, who take his premises as they find them.⁴³ Trespassers and licensees of the old tripartite scheme receive little more from courts beyond condemnation of a wanton breach of their safety.⁴⁴ This agrarian hierarchy of yore can fit modern household spaces well enough, but limiting the duty of care to invitees makes little sense for twentieth-century workplaces from which workers carried particulate matter home on their clothing. Asbestos enterprises did not live around the shop floors and shipyards and engine rooms that endangered employees and their families. This rationale for favoring a landed defendant cannot justify limiting the claims of asbestos workers' wives.

Last, and most fundamentally, wife-launders did not ascribe their injuries to the omissions that characterize premises liability. Instead these plaintiffs described purposeful, gain-seeking economic activity that imposed risks on them.⁴⁵ They complained foremost about a failure to warn employees about dangers that these active business behaviors imposed on families who reunited at the end of each day at home. Wife-launders accused defendants not of failing to act affirmatively to protect them but of operating work sites in a dangerous manner, with foreseeable consequences to those persons who lived with their employees.

Rochon v. Saberhagen Holdings, Inc.,⁴⁶ an unreported decision of the Washington Court of Appeals, grasps this basic distinction. The court agreed with defendant-employer Kimberly-Clark that it owed a wife-launderer no duty to protect her from dangers that arose away from its operations and also owed her no duty of care under premises liability. Kimberly-Clark did, however, have a duty "to prevent injury from an unreasonable risk of harm it had itself created."⁴⁷ Stricken with mesothelioma, Adeline Rochon was by no means home free at that point. On remand, she would have to show "that, as a factual matter, a family member who launders clothes could be a foreseeable

43. "The English common law from which our American law is derived was part and parcel of a social system of which the landholders were the backbone. The judges were drawn from the landowning classes or hoped to found a landowning family." Francis H. Bohlen, *Fifty Years of Torts*, 50 HARV. L. REV. 725, 735 (1937).

44. *Id.* at 736.

45. *See, e.g.*, *Riedel v. ICI Ams. Inc.*, 968 A.2d 17, 18-19 (Del. 2009) (rejecting the claim of a wife who had said the defendant had released toxins "actively").

46. No. 58579-7-I, 2007 WL 2325214 (Wash. Ct. App. Aug. 13, 2007).

47. *Id.* at *3.

victim of asbestos exposure.”⁴⁸ In siding partially with both the plaintiff and defendant, the *Rochon* court understood, and clearly stated, that premises liability does not insulate wrongdoers from responsibility just because their misconduct took place in a geographic space that they possessed.⁴⁹

Using premises liability to reject the claims of wife-launders is reliably correct under one condition: a state legislative mandate. Ohio, for example, has chosen to immunize employer-possessors from responsibility for take-home asbestos exposure of the kind that injures wife-launders: “A premises owner is not liable for any injury to any individual resulting from asbestos exposure unless that individual’s alleged exposure occurred while the individual was at the premises owner’s property.”⁵⁰ Kansas has made a similar decision covering asbestos and silica: “No premises owner shall be liable” for exposure to these substances, its legislature has decreed, unless the exposure occurred on-site.⁵¹ Statutes like these exemplify what makes premises-based rejection lawful.

The failure-to-warn subdivision of products liability remains an alternative to the negligence contention that a court is likely to call premises liability and dismiss, but case law is equally bleak for wives⁵²—courts have mostly eschewed this claim. One wife whose children tried it, Dorothy Palmer, died of mesothelioma after years of washing the clothes of her husband, an insulation worker.⁵³ A jury awarded her daughters \$450,000. Reversing the judgment that resulted, the United States Court of Appeals for the Tenth Circuit held that the defendant, Owens-Corning Fiberglas Corporation, had owed Palmer no duty to warn. “Appellants could not have foreseen that Mrs. Palmer would be exposed to their products in the manner in which she was,” wrote the court.⁵⁴ Working men tend to be married; wives wash their husbands’ clothes; who knew?⁵⁵

48. *Id.* at *4.

49. *Cf.* Mae Kuykendall, *Restatement of Place*, 79 BROOK. L. REV. 757 (2014) (noting the salience of place in the law).

50. OHIO REV. CODE § 2307.941(A)(1) (2014).

51. KAN. STAT. § 60-4905(a) (2013).

52. Like negligence, products liability has a single published victory for a wife-launders in a state supreme court. *Stegemoller v. ACandS, Inc.*, 767 N.E.2d 974 (Ind. 2002).

53. *Rohrbaugh v. Owens-Corning Fiberglas Corp.*, 965 F.2d 844, 845 (10th Cir. 1992).

54. *Id.* at 846.

55. At least by the time of the first Bush Administration, Congress and the President knew. See U.S. Dep’t of Health & Human Servs, *Report to Congress on Workers’ Home*

In a revealing footnote, the tort reform scholar Victor Schwartz explored the depth of fear of laundry liability.⁵⁶ Schwartz string-cited five decisions to sound the slippery slope alarm. *Allow recovery for asbestos exposure at home, and where does it end?*⁵⁷ Courts have almost unanimously denied the claims of wife-laundressers, yet Schwartz listed "Premises Owner Liability for 'Take Home' Asbestos Exposures" as second of five areas where prodefendant doctrinal "[i]mprovements are needed."⁵⁸ Hard to imagine what these improvements might be: almost no other claim in the annals of asbestos liability has worked out more poorly for plaintiffs.⁵⁹ Schwartz expressed worry about the future. Going forward, he said, judges who infer duty from foreseeability might be willing to side with wife-laundressers for claims based on "post-1972 nonoccupational exposures,"⁶⁰ because the threat became more foreseeable to premises owners after knowledge about danger progressed. He found only one fix for the problem he identified: courts had better declare that "public policy reasons . . . limit the economic pursuit of potential defendants, even in situations where the harm is arguably foreseeable."⁶¹ Schwartz did not supply these public-policy reasons. Instead he told judges, who according to him have been wrongly enriching male claimants for decades, not to enrich female ones who might in the future give the foreseeability wheel a spin.⁶² Enough is enough.

B. *Exposure of Children Contrasted*

If claims by wife-laundressers against employers or manufacturers are bad, then the claims of children also exposed to asbestos at home via workers' clothes must be bad too. The conclusion follows a fortiori. As plaintiffs, children are at least as unforeseeable as wives.

Contamination Study Conducted Under the Workers' Family Protection Act (29 U.S.C. 617a), CTDS. FOR DISEASE CONTROL (Sept. 1995), <http://www.cdc.gov/niosh/pdfs/95-123.pdf>.

56. Victor E. Schwartz, *A Letter to the Nation's Trial Judges: Asbestos Litigation, Major Progress Made over the Past Decade and Hurdles You Can Vault in the Next*, 36 AM. J. TRIAL ADVOC. 1, 22 n.109 (2012).

57. *Id.*

58. *Id.* at 15, 20.

59. The extraordinary notion that asbestos defendants have a duty to warn of a danger not knowable to them has enjoyed about as much success: one isolated holding by the Supreme Court of New Jersey. See *supra* notes 13-14 and accompanying text.

60. Schwartz, *supra* note 56, at 23-24.

61. *Id.* at 21.

62. Victor E. Schwartz & Leah Lorber, *A Letter to the Nation's Trial Judges: How the Focus on Efficiency Is Hurting You and Innocent Victims in Asbestos Liability Cases*, 24 AM. J. TRIAL ADVOC. 247, 258-60 (2000).

They suffered exposure equally far from a work site. To the extent they differ from wife-laundrerers, they are worse plaintiffs, not better. For example, because a worker can have more children than wives and interact with them in ways that can be almost infinitely varied and irregular, the likelihood of their being injured by employer carelessness or a defective product is less. They are also harder than wives to warn.

Yet children have fared better than wives in the take-home subset of liability for workplace exposure. They simply win more often, without a judicial rationale for the disparity. In *Lunsford v. Saberhagen Holdings, Inc.*, for example, one son won big: the Washington Supreme Court concluded that even though exposure to asbestos at the defendant's workplace had occurred in 1958, at least eleven years before Washington adopted strict products liability, the plaintiff could benefit from retroactive application of this doctrine.⁶³

One child-plaintiff decision by the Tennessee Supreme Court,⁶⁴ praised by a commenter as "[p]erhaps the most comprehensive analysis of the duty issue in a take-home asbestos case,"⁶⁵ stands as the most generous piece of decisional law for plaintiffs who were exposed to asbestos carried away from a workplace. Take-home claims allege misfeasance, not nonfeasance, said the court, and so no special relationship need exist between the defendant and plaintiff.⁶⁶ Replete with citations to learned works, *Satterfield v. Breeding Insulation Co.* goes further than any other state high court in recognizing a duty owed "to those who regularly and repeatedly come into close contact with an employee's contaminated work clothes over an extended period of time, regardless of whether they live in the employee's home or are a family member."⁶⁷

The Satterfields of *Satterfield* presented poignant circumstances to the Tennessee courts. Doug Satterfield was exposed to asbestos when he worked for Alcoa in the 1970s. He and his wife had a child, Amanda, who was born prematurely in 1979 and needed to stay in the University of Tennessee hospital for her first three months. Doug would go there to visit her as soon as his Alcoa shift ended, dressed in his contaminated work clothes. Amanda was diagnosed with mesothelioma in 2003. Exposed to poison in a neonatal unit, dying

63. 208 P.3d 1092, 1102-03 (Wash. 2009).

64. *Satterfield v. Breeding Insulation Co.*, 266 S.W.3d 347 (Tenn. 2008).

65. Christopher W. Jackson, Comment, *Taking Duty Home: Why Asbestos Litigation Reform Should Give Courts the Confidence To Recognize a Duty to Second-Hand Exposure Victims*, 45 WAKE FOREST L. REV. 1157, 1173 (2010).

66. *Satterfield*, 266 S.W.3d at 355-56.

67. *Id.* at 374.

from her exposure at twenty-five, Amanda, the nonlaunderer, could not have appeared more innocent.⁶⁸

Laundry correlates with courtroom defeat: female relatives younger than the worker who brought home asbestos, situated similarly to Amanda Satterfield in this respect, fared differently when they had washed his clothes. Judges apparently equate launderer-plaintiffs with wives.⁶⁹ Thus when Carolyn Miller filed suit attributing her mesothelioma to work her stepfather had done relining the interiors of iron-ore furnaces with asbestos at a Ford plant in Dearborn, the Michigan Supreme Court answered "no duty" to the Texas court that certified this question.⁷⁰ To support its assertion that "the relationship between Miller and defendant was highly tenuous," or not good enough to win, the court noted that this plaintiff "sometimes washed" the stepfather's clothes.⁷¹ The court did not question causation, just the laundering relationship.

Another Texas stepdaughter-launderer, Kay Bilder, sought redress for mesothelioma from a subcontractor that had employed her stepfather. Bilder won a judgment, but a Texas court of appeals set it aside.⁷² Another stepdaughter-launderer lost in the Iowa Supreme Court.⁷³ Yet another plaintiff developed mesothelioma after laundering her father's and brother's clothes; like Kay Bilder, she prevailed in an early round,⁷⁴ and then a California appellate court used premises liability to hold that the defendant owed her no duty.⁷⁵ More recently, in 2013, the highest court of Maryland concluded that an asbestos

68. Cf. Anita Bernstein, *Formed by Thalidomide: Mass Torts as a False Cure for Toxic Exposure*, 97 COLUM. L. REV. 2153, 2164 (1997) ("Babies and children injured by thalidomide set a standard of innocence to which few subsequent toxic-substance victims could compare.").

69. In addition to Amanda Satterfield, daughters who stayed away from laundry and prevailed in court include Joan Dube, who won a mesothelioma claim against the U.S. government related to her father's exposure as a civilian employee of the Navy, see *Dube v. Pittsburgh Corning*, 870 F.2d 790 (1st Cir. 1989), and Jeanette Franklin, who won a multimillion dollar jury verdict, see Henry K. Lee, *\$6.5 Million Awarded to Woman in Secondhand Asbestos Case/Exposure Traced to Shipyard in '40s*, SFGATE (Mar. 23, 2000, 4:00 AM), <http://www.sfgate.com/bayarea/article/6-5-Million-Awarded-to-Woman-in-Second-hand-2767631.php>.

70. *In re* Certified Question from the Fourteenth Dist. Court of Appeals of Tex., 740 N.W.2d 206, 216 (Mich. 2007).

71. *Id.*

72. *Fuller-Austin Insulation Co. v. Bilder*, 960 S.W.2d 914 (Tex. App. 1998), judgment set aside Sept. 16, 1999.

73. See *Van Fossen v. MidAmerican Energy Co.*, 777 N.W.2d 689 (Iowa 2009).

74. *Honer v. Ford Motor Co.*, No. B189160, 2007 WL 2985271 (Cal. Ct. App. Oct. 15, 2007).

75. *Campbell v. Ford Motor Co.*, 141 Cal. Rptr. 3d 390, 404-05 (Ct. App. 2012).

supplier owed no duty to warn a teen granddaughter-laundrer,⁷⁶ and a federal trial court in Seattle, considering a claim brought by a woman exposed to asbestos via laundry of both her father and her husband, granted summary judgment to the defendant-employer, even though the law of Washington, home of plaintiff-favoring case law for family members, governed her action.⁷⁷

Being associated with a wife-laundrer seems to harm the claims of child plaintiffs in take-home exposure cases, at least in Georgia. One loss for children, *CSX Transportation, Inc. v. Williams*, combined the claim of a wife-laundrer with those of three nonlaundrer children; the Supreme Court of Georgia found no duty.⁷⁸ An unreported case duly cited this one in ruling against a plaintiff son.⁷⁹ Another Georgia decision, *Hoffman v. AC&S, Inc.*, stayed clear of laundry.⁸⁰ The plaintiff lost, but only because of her problem with identification: her brother, the laborer, could not recall having seen any manufacturers' names at his job site.⁸¹ Litigating as a nonlaundrer put Elaine Hoffman in just as good a position as a worker himself.

III. HOW ASBESTOS-HARMED MEN HAVE FARED BETTER IN COURT THAN COMPARABLY HARMED WOMEN

A. *Reprieves in the Prima Facie Case*

In contrast to the severity that wife-laundrers have experienced in court on the question of duty, male plaintiffs in asbestos law have received lenient treatment on two other fundamentals present in any tort claim: injury and causation. Normally a plaintiff who lacks evidence of either of these two elements can expect dismissal or a loss on summary judgment. The reprieves from the rigors of the prima facie case enjoyed by male asbestos plaintiffs remain undertheorized and unexplained. In *Fellow-Feeling and Gender in Personal Injury Law*, I attributed them to empathy and sympathy by men for men.⁸² This attribution could be wrong, but the extraordinary success of American male asbestos plaintiffs has never been questioned.

76. *Georgia Pacific, LLC v. Farrar*, 69 A.3d 1028, 1030-31 (Md. 2013).

77. *Hoyt v. Lockheed Shipbuilding Co.*, No. C12-1648 TSZ, 2013 WL 3270371, at *8 (W.D. Wash. June 26, 2013). On Washington's proplaintiff stance, see *supra* notes 46-49, 63 and accompanying text.

78. 608 S.E.2d 208, 208 (Ga. 2005).

79. *Wood v. CSX Transp., Inc.*, No. CV 294-008, 2005 WL 2100991 (S.D. Ga. Aug. 26, 2005).

80. 548 S.E.2d 379 (Ga. Ct. App. 2001).

81. See *id.* at 381-84. On identification, see *infra* note 91 and accompanying text.

82. Bernstein, *supra* note 4, at 377-78.

Regarding injury: rather than get booted for not having any, unimpaired workplace-exposed plaintiffs had their names put on the “inactive docket,” an innovation designed to save them from losing on statute of limitation grounds should injuries manifest later.⁸³ Some men have collected twice, once for exposure and the second time for a disabling injury that manifested later.⁸⁴ Courts have also stretched the definition of injury. They rewarded male plaintiffs who reported only exposure followed by pathology that appeared only on examination of the lungs and that produced no impairment: damages for noninjurious pleural plaque have reached \$5 million, and settlements have run high.⁸⁵ Judges have also deemed what happened to unimpaired men an actionable emotional injury, even though plaintiffs who claim accidental harm to their feelings usually encounter judicial skepticism.⁸⁶ Unimpaired women, by contrast, simply do not collect for the wrong of exposure.⁸⁷

Like the injury element, causation also contains multiple instances of judicial generosity. The products liability scholar Jane Stapleton has documented the judicial leap needed to resolve mesothelioma claims in favor of exposed plaintiffs. Litigants, lacking scientific knowledge of how asbestos exposure causes mesothelioma, could not show which of several sources of exposure caused this disease.⁸⁸ Yet plaintiffs prevailed. Standard causation doctrine ought to favor an asbestos supplier when the injury is lung cancer and the plaintiff smoked; plaintiffs nevertheless regularly prevail.⁸⁹ Asbestosis is less vulnerable than mesothelioma and lung cancer to this criticism about shaky evidence, but the identification subset of causation—that

83. See *id.* at 338 nn.160-61 (quoting the *Oxford English Dictionary* position that to be “on a docket,” a case must be active, in hand, or under consideration).

84. White, *supra* note 8, at 193.

85. *Id.*

86. See *infra* Part III.B (noting that after recognizing emotional harm as an injury, courts favored plaintiffs with other reprieves).

87. See *infra* notes 107-108 and accompanying text (noting the failure of women to prevail using emotional distress, the only route to court for an unimpaired plaintiff not aggregated among fellow workers); see also Lester Brickman, *Lawyers' Ethics and Fiduciary Obligation in the Brave New World of Aggregative Litigation*, 26 WM. & MARY ENVTL. L. & POL'Y REV. 243, 273 (2001) (stating that if the courts had insisted on impairment as a criterion for recovery, there would have been no asbestos litigation crisis).

88. Jane Stapleton, *Two Causal Fictions at the Heart of U.S. Asbestos Doctrine*, 122 LAW Q. REV. 189, 189-90 (2006). Several years after the publication of this article, the highest court of Maryland condoned the admission of testimony by an expert for a wife-laundress plaintiff, stating that “every exposure to asbestos is a substantial contributing cause” of mesothelioma. *Dixon v. Ford Motor Co.*, 70 A.3d 328, 335 (Md. 2013) (internal quotation marks omitted).

89. Bernstein, *supra* note 5, at 710-11.

is, an answer to the question of which asbestos business supplied the injurious product—has been another locus of generosity. Courts have allowed workers to testify that in past years they saw, and right now they recall, brand names on asbestos products even when such testimony includes hearsay or is unreliable under the circumstances.⁹⁰ Well-drilled asbestos plaintiffs have delivered such confident recollections of defendants' brand names decades after they last saw them that the tort reformer Walter Olson was moved to sarcasm in an article title. "Thanks for the Memories," he wrote.⁹¹

B. *Emotional Distress Honored*

Claims for emotional distress have never been a judicial favorite;⁹² toxic exposure is a particularly disfavored source of this harm.⁹³ The United States Supreme Court, which has had relatively little to say about products liability,⁹⁴ has opined a couple of times on the subject in asbestos decisions. It concluded that exposure without symptoms of disease did not suffice to support a claim for emotional distress under the Federal Employers' Liability Act (FELA).⁹⁵ One Florida court went further, rejecting a claim from a man who suffered

90. See Brickman, *supra* note 19, at 1844.

91. Walter Olson, *Thanks for the Memories*, REASON.COM (June 1, 1998), <http://reason.com/archives/1998/06/01/thanks-for-the-memories>. For a tart rejoinder, see W. William Hodes, *The Professional Duty To Horseshed Witnesses—Zealously, Within the Bounds of the Law*, 30 TEX. TECH L. REV. 1343, 1354 (1999).

92. To some writers, this stance raises concerns about gender. See Martha Chamallas, *Removing Emotional Harm from the Core of Tort Law*, 54 VAND. L. REV. 751, 752 (2001); Jean Thomas, *Which Interests Should Tort Protect?*, 61 BUFF. L. REV. 1, 19-21 (2013). I do not in this Article argue for more judicial acceptance of emotional distress actions and focus only on parity between men's and women's claims.

93. 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, 827 (2002) (noting that the cause of action "allows recovery for serious and immediate emotional distress arising from conduct that was either violent or traumatic in nature").

94. See Anita Bernstein, *Products Liability in the United States Supreme Court: A Venture in Memory of Gary Schwartz*, 53 S.C. L. REV. 1193 app. at 1222-23 (2002) (offering a list of only twenty-five decisions through 2001).

95. See, e.g., *CSX Transp., Inc. v. Hensley*, 556 U.S. 838, 839-40 (2009) (per curiam) (offering guidance for jury instructions when a plaintiff with asbestosis seeks damages for fear of cancer); *Norfolk & W. Ry. Co. v. Ayers*, 538 U.S. 135, 157 (2003) (requiring a plaintiff to show, inter alia, a diagnosis of asbestosis to recover for fear of cancer); *Metro-N. Commuter R.R. Co. v. Buckley*, 521 U.S. 424, 427 (1997) (rejecting the claim because the plaintiffs had not been diagnosed with an illness).

from asbestosis and then complained of emotional distress in the form of fear of cancer.⁹⁶

More often, however, asbestos-exposed men have fared well when they sought recovery for emotional distress linked to fear of cancer, especially when they had been diagnosed with a lung disease. Judicial liberality has taken several manifestations. First, courts permit recovery even when the plaintiff cannot show that he is likely to get cancer: what he fears need not be more probable than not.⁹⁷ Second, courts take a diagnosis of asbestosis as supportive of the plaintiff's fear of cancer, even though asbestosis does not cause cancer and is likely just another consequence of the same asbestos exposure that sometimes does, and sometimes does not, cause cancer and other diseases.⁹⁸ Pleural thickening alone, one of the benign disorders linked to asbestos exposure, has also sufficed to support fear-of-cancer emotional distress claims,⁹⁹ even though, as with asbestosis, "there is no evidence that pleural plaque confers an increased risk of lung cancer or pleural mesothelioma within a population of individuals having the same cumulative asbestos exposure."¹⁰⁰

The most striking liberality has been judicial relief from the venerable demand that plaintiffs seeking redress for the negligent infliction of emotional distress prove some kind of manifestation of this distress in their bodies. Physical manifestation has traditionally meant trauma or pathology. Although courts regularly reject emotional

96. *Eagle-Picher Indus., Inc. v. Cox*, 481 So. 2d 517, 527-29 (Fla. Dist. Ct. App. 1985). Courts occasionally say there is an association between asbestosis and an increased risk of lung cancer and mesothelioma, but back up this assertion with little if any evidence. *See, e.g., Pierce v. Johns-Manville Sales Corp.*, 464 A.2d 1020, 1022 (Md. 1983) (quoting from a conclusory affidavit and citing medical literature that did not report an increased risk).

97. In *Watkins v. Fibreboard Corp.*, 994 F.2d 253 (5th Cir. 1993), for example, the court allowed the plaintiff to recover for fear of cancer (he had asbestosis) that was "proximately caused by his asbestos exposure, even if such distress arises from fear of diseases that are a substantial concern but not medically probable." *Id.* at 259; *see also Henderson & Twerski, supra* note 93, at 823-24 (reviewing other decisions).

98. *See Lavelle v. Owens-Corning Fiberglas Corp.*, 507 N.E.2d 476, 480-87 (Ct. Com. Pl. Cuyahoga Cnty., Ohio, 1987) (holding that asbestosis was good enough to support fear of cancer); *infra* note 100 and accompanying text.

99. *See, e.g., Herber v. Johns-Manville Corp.*, 785 F.2d 79, 85 (3d Cir. 1986) (allowing a plaintiff who had only pleural thickening to recover for fear of cancer); *Hoerner v. ANCO Insulations, Inc.*, 2000-2333, pp. 42-43 (La. App. 4 Cir. 1/23/02); 812 So. 2d 45, 74 (same); *Mauro v. Owens-Corning Fiberglas Corp.*, 542 A.2d 16, 24 (N.J. Super. Ct. App. Div. 1988) (same), *aff'd sub nom. Mauro v. Raymark Indus., Inc.*, 561 A.2d 257 (N.J. 1989).

100. J. Ameille et al., *Asbestos-Related Cancer Risk in Patients with Asbestosis or Pleural Plaques*, 28 REVUE DES MALADIES RESPIRATOIRES e11, e11 (2011) (Fr.).

distress claims on this ground,¹⁰¹ they have approved fear-of-cancer emotional distress claims when plaintiffs suffer no disease at all.¹⁰²

Some of these instances of generosity from judges spare plaintiffs even the task of assembling evidence about their distress. The United States Court of Appeals for the Fifth Circuit found it sufficient that one plaintiff had heard from his doctor that asbestos inhalation increased his risk of serious illness: "People today are sensitive to the dangers of cancer," wrote the court.¹⁰³ "Mental anguish would reasonably follow after [the plaintiff] was informed by a reliable source—his physician—that his exposure to defendants' products had heightened his risk of developing these deadly diseases."¹⁰⁴ Citing very little authority, one New Jersey trial court coined an indulgent, easy-to-meet four-part test for fear-of-cancer claims.¹⁰⁵ In another illustration of judicial generosity, a group of firefighters succeeded in a fear-of-cancer emotional distress claim against Louisiana State University following an ill-conceived training program in a building that contained asbestos. Some of these distressed persons had been exposed only on part of one day as they fought a fire.¹⁰⁶

Women, by contrast, reliably lose when they try to file a freestanding emotional distress claim based on exposure to asbestos with no physical illness. Mere inhalation with or without pleural thickening has not supported recovery for any female emotional-distress claimant, as it has for men, in any reported decision. Courts report a host of emotional-distress rejections when the distressed asbestos-exposed litigant was female. Most of these plaintiffs lost on

101. Courts ruled against male plaintiffs in several emotional-distress decisions on the ground that these plaintiffs lacked physical symptoms of disease. See, e.g., *Metro-N. Commuter R.R. Co. v. Buckley*, 521 U.S. 424, 428-29 (1997); *Contreras v. Thor Norfolk Hotel, L.L.C.*, 292 F. Supp. 2d 798, 804 (E.D. Va. 2003); *Simmons v. Pacor, Inc.*, 674 A.2d 232, 238 (Pa. 1996); *Temple-Inland Forest Prods. Corp. v. Carter*, 993 S.W.2d 88, 93 (Tex. 1999).

102. See, e.g., *Dartez v. Fibreboard Corp.*, 765 F.2d 456, 468 (5th Cir. 1985); *Devlin v. Johns-Manville Corp.*, 495 A.2d 495, 500 (N.J. Super. Ct. Law Div. 1985).

103. *Dartez*, 765 F.2d at 468.

104. *Id.*

105. A plaintiff would have to prove that he is suffering from "serious fear or emotional distress or a clinically diagnosed phobia of cancer," that this fear was caused by exposure to asbestos, that his "fear of getting cancer . . . is reasonable," and that the defendant is "legally responsible" for the plaintiff's exposure. *Devlin*, 495 A.2d at 499. Absent from this recitation is any mention of duty, a judicial demand regarding physical manifestations, or how to add content to the "reasonable" criterion in the third element. *Id.*

106. The university argued to no avail that the plaintiffs did not even establish that the asbestos in the building was friable, or unstable, enough to be dangerous. *Lilley v. Bd. of Supervisors of La. State Univ.*, 98-1277, pp. 9-10 (La. App. 3 Cir. 3/24/99); 735 So. 2d 696, 701.

the ground of not having alleged any physical manifestation,¹⁰⁷ but other routes to their defeat turn up in decisional law.¹⁰⁸

Judicial skepticism toward women who alleged emotional distress from toxic exposure dates back to the 1980s. Courts agreed with plaintiffs that DES, a synthetic hormone, caused a variety of reproductive-organ diseases in persons exposed to the substance in utero, ranging from cancer to more benign anomalies like adenosis.¹⁰⁹ They have been reluctant, however, to compensate these women for emotional distress.

In an influential decision, the Massachusetts Supreme Judicial Court demanded that a plaintiff show not only physical harm from her DES exposure but also "objective symptomatology . . . substantiated by expert medical testimony."¹¹⁰ The court worried about the unreliable female narrator: "A plaintiff may be genuinely, though wrongly, convinced that a defendant's negligence has caused her to suffer emotional distress. If such a plaintiff's testimony is believed, and there is no requirement of objective corroboration of the emotional distress alleged, a defendant would be held liable unjustifiably."¹¹¹ One court was willing to accept a DES claim for emotional distress because the plaintiff's physical manifestation of her distress was "a pre-cancerous condition."¹¹² Asbestosis cannot, and apparently need not, get over a hurdle that demands premalignancy.¹¹³

107. See *Deleski v. Raymark Indus., Inc.*, 819 F.2d 377, 380 (3d Cir. 1987); *Mergenthaler v. Asbestos Corp. of Am.*, 480 A.2d 647 (Del. 1984). In *Hughes v. Johns-Manville Corp.*, 7 Phila. Cnty. Rptr. 620, 638 (Pa. Ct. Com. Pl. 1982), the court acknowledged that inhalation might satisfy an impact criterion, but granted summary judgment to the defendant because the plaintiff could not show "that physical impact or injury accompanies her claimed emotional [distress]."

108. See, e.g., *Cathcart v. Keene Indus. Insulation*, 471 A.2d 493, 507 (Pa. Super. Ct. 1984) (holding that a wife could not recover for fear for herself nor for distress from watching her husband suffer from asbestosis, because she had no physical injury); *Walston v. Boeing Co.*, 294 P.3d 759, 763 n.7 (Wash. Ct. App. 2013) (noting that plaintiff's wife's laundry-based fear-of-cancer claim was dismissed by stipulation).

109. Anita Bernstein, Hymowitz v. Eli Lilly and Co.: *Markets of Mothers*, in *TORTS STORIES* 151, 152 (Robert L. Rabin & Stephen D. Sugarman eds., 2003).

110. *Payton v. Abbott Labs*, 437 N.E.2d 171, 172 (Mass. 1982).

111. *Id.* at 175; see also *Plummer v. Abbott Labs*, 568 F. Supp. 920, 927 (D.R.I. 1983) (holding that ingestion of DES was neither an impact nor physical manifestation and hence the plaintiff could not recover for her emotional distress).

112. *Wetherill v. Univ. of Chi.*, 565 F. Supp. 1553, 1559 (N.D. Ill. 1983).

113. See Bernstein, *supra* note 4, at 354. Shepardizing *Payton* yields a host of decisions that cite this precedent but relieve men from the rigors of its standard when they claim emotional distress occasioned by toxic exposure.

C. *More Medical Monitoring*

Entities responsible for toxic exposure that has not yet caused physical injury could in principle be ordered to pay for medical surveillance, or monitoring, of the persons they wrongly exposed. The idea behind medical monitoring as a court-ordered remedy is to catch the onset of disease at a point when treatment interventions are at their most promising, rather than force exposed persons to wait for a diagnosis before they can recover.¹¹⁴ Yet while “early detection saves lives” continues to be popular as a slogan,¹¹⁵ neither defendants, plaintiffs, nor judges have ever shown enthusiasm for medical monitoring as a response to toxic exposure. For defendants, the expense of this monitoring is costly and ongoing—hard to quantify or plan for. Plaintiffs might want it, but they have to speak through lawyers retained on contingency; unless the cost of medical monitoring is awarded in a lump sum, it will seldom provide a lucrative denominator to facilitate the payment of attorneys’ fees.¹¹⁶

Judicial aversion to medical monitoring lacks a pecuniary explanation of this kind, but case law makes it plain. Whereas judge-authored multifactor criteria for most causes of action contain fewer than six elements, the factors that plaintiffs must establish for medical monitoring can number seven or eight and are phrased conjunctively rather than as alternatives or in a balancing test.¹¹⁷ Litigants find it almost impossible to win class certification for this claim.¹¹⁸

This judicial aversion is equally plain in its results for individuals. Like most claimants of any gender who seek medical monitoring, asbestos-exposed plaintiffs tend to lose. And so medical monitoring

114. So stated the first decision to approve medical monitoring. *Friends for All Children, Inc. v. Lockheed Aircraft Corp.*, 746 F.2d 816, 825-26 (D.C. Cir. 1984). *But see infra* notes 142, 164 and accompanying text (discussing other possible uses of this remedy).

115. A business called Longevity owns the “earlydetectionsaveslives” domain name. LONGEVITY—EARLY DETECTION SAVES LIVES, <http://earlydetectionsaveslives.com> (last visited May 5, 2014); see *Breast Cancer: Early Detection*, AM. CANCER SOC’Y, <http://www.cancer.org/acs/groups/cid/documents/webcontent/003165-pdf.pdf> (last revised Jan. 28, 2014).

116. That said, class certification can enrich plaintiffs’ lawyers. See LESTER BRICKMAN, *LAWYER BARONS: WHAT THEIR CONTINGENCY FEES REALLY COST AMERICA* 193 (2011) (“In jurisdictions that allow medical-monitoring class actions, lawyers can, in theory, aggregate hundreds of thousands and even millions of consumers into class actions based solely on exposure to alleged toxic substances and seek a lump sum of billions of dollars for medical testing.”).

117. See Joseph K. Hetrick & Allison M. Brown, *Cause of Action for Medical Monitoring Relating to the Use of Medical Devices and Prescription Drugs*, in 34 CAUSES OF ACTION 2d 249, § 9 (2007) (gathering eight states’ versions of a multifactor test).

118. Debra M. Perry & Zane C. Riester, *Turning the Tide: The Viability of Medical Monitoring Class Actions*, FOR THE DEF., July 2009, at 26, 27.

differs from the male-winner doctrines discussed earlier in this Part.¹¹⁹ Accordingly, my claim about gender unfairness takes a different form. I work from a central tenet of fairness: treat like cases alike.¹²⁰

Consider the shortest set of criteria for medical monitoring, a sensible four-factor test used in the District of Columbia:

- (1) [P]laintiff was significantly exposed to a proven hazardous substance through the negligent acts of the defendant; (2) as a proximate result of that exposure, plaintiff suffers a significantly increased risk of contracting a serious latent disease; (3) that increased risk makes periodic medical examinations reasonably necessary; and (4) monitoring and testing procedures exist which make the early detection and treatment of the disease possible and beneficial.¹²¹

The third and fourth elements of this test are ones most central to medical monitoring. The first and second address injury and proximate cause, present in all claims for accidental harm, rather than what is unique about medical monitoring: a premise that forward-looking surveillance helps to repair the damage of exposure.

In relation to these last elements—that ongoing medical attention must be reasonably necessary in response to the risk and that it must be useful enough to benefit the person who is monitored—consider three substances that have given rise to medical monitoring claims in recent decades: asbestos, as encountered in workplaces; fen-phen, the diet drug; and Prempro, a drug that combines estrogen and progestin to treat symptoms of menopause. The theme of gender division continues. Most persons claiming asbestos exposure at work were male; all persons who sought to blame Prempro for injury to their own bodies were female; fen-phen plaintiffs have been overwhelmingly female.¹²²

Of the three substances, fen-phen has gained medical monitoring for plaintiffs most consistently. A consolidated federal action, centered in Philadelphia, certified a class of six million members and approved a settlement that included this remedy.¹²³ Before this national-level

119. See *supra* Part III.A-B.

120. See JUDITH N. SHKLAR, *LEGALISM: LAW, MORALS, AND POLITICAL TRIALS* 119 (1964) (linking this principle with the rule of law).

121. *Arias v. DynCorp*, 928 F. Supp. 2d 10, 16 n.2 (D.D.C. 2013) (quoting *Reed v. Philip Morris Inc.*, No. 96-5070, 1997 WL 538921, at *16 n.10 (D.C. Super. Ct. Aug. 18, 1997)).

122. Bernstein, *supra* note 4, at 361-62 (reporting the gender pattern of asbestos and fen-phen claims).

123. *In re Diet Drugs*, 282 F.3d 220, 225-29 (3d Cir. 2002) (summarizing the litigation); *In re Diet Drugs*, Nos. 1203, 99-20593, 2000 WL 1222042, at *4-5 (E.D. Pa. Aug. 28, 2000) (describing the settlement).

class certification in 1999, medical monitoring classes were certified by state courts in Illinois, New Jersey, Pennsylvania, Texas, Washington, and West Virginia;¹²⁴ after the federal certification, Florida followed.¹²⁵ Not all plaintiffs' efforts succeeded,¹²⁶ but fen-phen litigation remains on the whole a rare exception in the annals of medical monitoring.¹²⁷

Working from the apparent premise among judges that medical monitoring ought to be awarded sparingly, here I contend that fen-phen earned its success for plaintiffs, while exposure to neither asbestos nor Prempro warranted it. If courts had treated the two genders alike—giving both equal presumptive access to this remedy *ex ante*—then fen-phen exposure would have stood out to them as extraordinarily worthy of paid-for surveillance. Asbestos would have appeared considerably less deserving than Prempro: although the commonality criterion of Rule 23 of the Federal Rules of Civil Procedure likely means that neither of the two claims is suited to aggregation in a class action,¹²⁸ at least Prempro's risks are within the therapeutic reach of early diagnosis. Yet Prempro-exposure claims for medical monitoring encountered almost total failure in court.¹²⁹ Like cases have not been treated alike.

On the winner of medical monitoring, fen-phen, a diet drug that was taken mostly by women before it left the market, caused two cardiovascular effects: heart valve defects, also known as valvular disease, and primary pulmonary hypertension (PPH), a pathology of

124. *In re Diet Drugs*, No. CIV. A. 98-20626, 1999 WL 673066, at *3 (E.D. Pa. Aug. 26, 1999).

125. *Petito v. A.H. Robins Co.*, 750 So. 2d 103, 104-06 (Fla. Dist. Ct. App. 1999).

126. *See, e.g., Baker v. Wyeth-Ayerst Labs. Div.*, 992 S.W.2d 797, 799 (Ark. 1999) (refusing to certify a fen-phen class that sought medical monitoring, *inter alia*); *Wood v. Wyeth-Ayerst Labs., Div. of Am. Home Prods.*, 82 S.W.3d 849, 852 (Ky. 2002) (affirming the dismissal of a complaint).

127. *See Perry & Riester, supra* note 118, at 29.

128. *But see* A. Benjamin Spencer, *Class Actions, Heightened Commonality, and Declining Access to Justice*, 93 B.U. L. REV. 441, 449 (2013) (arguing that the commonality criterion, properly understood, permits more aggregation than Supreme Court decisional law has tolerated).

129. The attempt to certify a national-level class for medical monitoring failed in 2005. *See In re Prempro Prods. Liab. Litig.*, 230 F.R.D. 555 (E.D. Ark. 2005). State-level failures to obtain class certification for medical monitoring following Prempro exposure include *Wyeth, Inc. v. Gottlieb*, 930 So. 2d 635 (Fla. Dist. Ct. App. 2006), *Vitanza v. Wyeth, Inc.*, 2006 WL 462470 (N.J. Super. Ct. Law Div. Jan. 24, 2006), and *Albertson v. Wyeth*, No. 2944, 2005 WL 3782970 (Pa. Ct. Com. Pl. Phila. Cnty. May 3, 2005). An earlier decision in *Albertson* had permitted a claim for medical monitoring, but the subsequent rejection of class certification limited this success for plaintiffs. *See Albertson v. Wyeth Inc.*, No. 2944, 2003 WL 21544488 (Pa. Ct. Com. Pl. Phila. Cnty. July 8, 2003).

the heart and lungs.¹³⁰ Mayo Clinic scientists who broke the news focused on valvular disease, the much more common condition of the two.¹³¹

Fen-phen exposure calls for echocardiogram surveillance, a technology that fits the central elements of a medical-monitoring claim noted above. The increased risk of cardiac disease associated with fen-phen exposure is well supported.¹³² Both valvular disease and PPH respond to treatment; cures tend to elude both conditions, but early intervention is better.¹³³ As for the intervention itself, the United States Department of Health and Human Services has recommended echocardiogram surveillance for persons exposed to fen-phen (or fenfluramine alone) even if a clinical examination finds no symptoms of heart or lung disease.¹³⁴ The American Heart Association and American College of Cardiology have issued policy guidelines concerning valvular disease that comport with this recommendation.¹³⁵ Some jurisdictions impose on claims for medical monitoring another requirement that fen-phen meets easily: the intervention must be something not normally recommended absent exposure.¹³⁶ Fen-phen is

130. Heidi M. Connolly et al., *Valvular Heart Disease Associated with Fenfluramine-Phentermine*, 337 NEW ENG. J. MED. 581, 581 (1997); see Bryan L. Roth, *Drugs and Valvular Heart Disease*, 356 NEW ENG. J. MED. 6, 6 (2007); Tatsuo Tomito & Qiong Zhao, *Autopsy Findings of Heart and Lungs in a Patient with Primary Pulmonary Hypertension Associated with Use of Fenfluramine and Phentermine*, 121 CHEST 649, 649 (2002). Although the National Institutes of Health reports that “idiopathic pulmonary arterial hypertension” has replaced primary pulmonary hypertension, I stay with PPH in this Article because this term was used in the fen-phen case law I discuss. *Pulmonary Hypertension*, MEDLINEPLUS, <http://www.nlm.nih.gov/medlineplus/ency/article/000112.htm> (last updated Feb. 26, 2014).

131. See Camille N. Tragos, *Fen-Phen Litigation Against American Home Products Corporation: The Widespread Use of Fenfluramine (Pondimin) and Dexfenfluramine (Redux) for Weight Loss, The Health Problems Associated with Those Drugs, the Resulting Litigation Against American Home Prod.*, DIGITAL ACCESS TO SCHOLARSHIP AT HARV. 21-22 (2000), <http://dash.harvard.edu/handle/1/8965626/>.

132. See, e.g., Connolly et al., *supra* note 130.

133. William Hopkins & Lewis J. Rubin, *Treatment of Pulmonary Hypertension in Adults*, UPtODATE, <http://www.uptodate.com/contents/treatment-of-pulmonary-hypertension-in-adults> (last updated Feb. 23, 2014) (discussing therapies for pulmonary hypertension); *What Is Heart Valve Disease?*, NAT’L HEART, LUNG, & BLOOD INST., NIH (Nov. 16, 2011), <http://www.nhlbi.nih.gov/health/health-topics/topics/hvd/> (“Currently, no medicines can cure heart valve disease. However, lifestyle changes and medicines often can successfully treat symptoms and delay problems for many years. Eventually, though, you may need surgery.”).

134. Tragos, *supra* note 131, at 31-32.

135. *Id.* at 31.

136. These jurisdictions include Utah, see *Hansen v. Mountain Fuel Supply Co.*, 858 P.2d 970, 982 (Utah 1993); Pennsylvania, see *Redland Soccer Club, Inc. v. Dep’t of the Army & Dep’t of Def. of the U.S.*, 696 A.2d 137, 145-46 (Pa. 1997); and Florida, see *Petito v. A.H. Robins Co.*, 750 So. 2d 103, 106-07 (Fla. Dist. Ct. App. 1999). Routine medical care, especially for the demographic harmed by fen-phen, generally does not include screening by

not a perfect candidate for medical monitoring,¹³⁷ but it fulfills the judicial criteria for it better than almost any other toxin.

Fen-phen compares especially well to asbestos.¹³⁸ When the Supreme Court rejected medical monitoring for an asbestos-exposed person who had sought relief under FELA, the Court was careful to call the plaintiff “sympathetic” and to express, in dicta, endorsement for medical monitoring in some form other than the “lump-sum damages recovery” that he had demanded.¹³⁹ Other asbestos-exposed plaintiffs who sought medical monitoring, free from the chafing text of FELA, have prevailed under state common law.¹⁴⁰

No matter that, if I may quote myself, “[o]nce exposed to asbestos, a person cannot unbreathe the fibers that entered his lungs, nor undo through monitoring whatever damage lies in store for him.”¹⁴¹ Many courts have taken the same view and rejected medical-monitoring claims following asbestos exposure.¹⁴² The chief justice of the Louisiana Supreme Court, however, deemed medical monitoring perfectly consistent with the inability of contemporary medicine to do anything curative for a person exposed to asbestos. It would make him feel better:

If a plaintiff has been placed at an increased risk for a latent disease through exposure to a hazardous substance, absent medical monitoring,

an echocardiogram. Bernstein, *supra* note 4, at 363. Medical monitoring therefore renders to fen-phen plaintiffs something that they do not already receive and that fits closely with the exposure they suffered.

137. Lester Brickman has reported some infirmities of fen-phen medical monitoring. See BRICKMAN, *supra* note 116, at 193 (observing that mere “cessation” of taking fen-phen, without more, has a good effect on patients’ health); Lester Brickman, *The Use of Litigation Screenings in Mass Torts: A Formula for Fraud?*, 61 SMU L. REV. 1221, 1243-61 (2008) (locating instances of misreading and exaggerated diagnoses following fen-phen screenings by echocardiogram). Fair enough, but it is at least possible to find some treatable disease that would otherwise elude detection.

138. Few scholars put the two products together. For a noteworthy exception, see S. Todd Brown, *How Long Is Forever This Time? The Broken Promise of Bankruptcy Trusts*, 61 BUFF. L. REV. 537, 571-72 (2013), observing that whereas the fen-phen global settlement provided for mandatory audits of 15% of claims and imposed severe penalties for fraud, asbestos trusts are rarely obliged to audit claims and take little advantage of the auditing opportunities given them in trust instruments.

139. *Metro-N. Commuter R.R. Co. v. Buckley*, 521 U.S. 424, 443-44 (1997).

140. See Bernstein, *supra* note 4, at 360-61 (citing four decisions from both state and federal courts); *id.* at 367 (contrasting two New Jersey claims for medical monitoring, alike in all pertinent respects except that the winning plaintiff was male and the losing one female); see also *Simmons v. Pacor, Inc.*, 674 A.2d 232, 239-40 (Pa. 1996) (approving medical monitoring for men with asymptomatic pleural thickening).

141. Bernstein, *supra* note 4, at 360.

142. See cases cited *supra* note 101; see also Henderson & Twerski, *supra* note 93, at 838 (identifying a rejectionist trend).

he must live each day with the uncertainty of whether the disease is present in his body. If, however, he is able to take advantage of medical monitoring and the monitoring detects no evidence of the disease, then, at least for the time being, the plaintiff can receive the comfort of peace of mind. Moreover, even if medical monitoring did detect evidence of an irreversible and untreatable disease, the plaintiff might still achieve some peace of mind through this knowledge by getting his financial affairs in order, making lifestyle changes, and, even perhaps, making peace with estranged loved ones or with his religion.¹⁴³

Quite a pricey dose of emotional succor when the toxic substance at issue is so notorious for the costly aggregation it generates. As Justice Breyer observed in *Metro-North Commuter Railroad Co. v. Buckley*, costs to defendants do not stop with the modest demand of Buckley to receive only “\$950 annually for 36 years,” because paying him would require consideration of the “tens of millions of individuals [who] may have suffered exposure to substances that might justify some form of substance-exposure-related medical monitoring.”¹⁴⁴ Because of scarcity, moreover, lump-sum medical-monitoring damages for an uninjured person jeopardize the opportunity for a person stricken with mesothelioma or asbestosis (like the wife-laundress with whom we began)¹⁴⁵ to recover a compensatory award in full.¹⁴⁶

D. Generous Statutes of Limitation

Physical harms caused by asbestos exposure take at least years, if not decades, to manifest; statutes of limitation for negligence (and products liability) actions run short. Thus one might have thought most persons exposed to asbestos at work would be out of luck in court. Not so. As the products liability scholars James Henderson, Jr., and Aaron Twerski have documented, courts granted these (mostly male) plaintiffs’ numerous exemptions from statutory deadlines—not only more time to file, but reprieve from procedural rules that would

143. *Bourgeois v. A.P. Green Indus., Inc.*, 97-3188, pp. 1-2 (La. 7/8/98); 716 So. 2d 355, 363 (Calogero, C.J., concurring).

144. 521 U.S. at 442.

145. See *supra* Part II.A.

146. Victor E. Schwartz, Leah Lorber & Emily J. Laird, *Medical Monitoring: The Right Way and the Wrong Way*, 70 MO. L. REV. 349, 376 n.166 (2005) (“[T]he filing of mass screening cases is tantamount to a race to the courthouse and has the effect of depleting funds, some already stretched to the limit, which would otherwise be available for compensation to deserving plaintiffs” (quoting *In re Asbestos Prods. Liab. Litig.* (No. VI), No. MDL 875, 2002 WL 32151574, at *1 (E.D. Pa. Jan. 16, 2002))).

have forced them to recite in one pleading all the injuries they ascribed to the defendants' conduct or products.¹⁴⁷

For observers of this judicial largesse, a useful comparator to asbestos exposure is childhood sexual abuse, because gender pervades both examples. The majority of persons who report child sexual abuse are female; the large majority of offenders are male.¹⁴⁸ Gender is also present in unclaimed injuries: experts believe that young male victims are relatively unlikely to report sexual abuse.¹⁴⁹

Child sexual abuse victims who file tort claims years after being assaulted face a host of difficulties in court.¹⁵⁰ Although these burdens have been eased in recent years, legislatures, rather than judges, did the law-reform work related to limitation periods.¹⁵¹ One can scarcely imagine a category of tort claims more deserving of extra time to file. Victims often do not understand what they experienced; at the time of harm, they cannot grasp the long-term consequences of an assault, and they face an aggressor who at a minimum has power over them—if not devastating power, as is the case when parents or guardians commit the abuse—sufficient to delay both discovery of the injury and the sense of grievance needed to protest in court.¹⁵²

Nevertheless, most judges have held claimants to the narrow terms of the statute. Tolling runs only until these persons reach majority, whereupon the limitation period ensues. Typically this period runs two or three years, after which the law extinguishes the claim.¹⁵³

147. Henderson & Twerski, *supra* note 93, at 848–49.

148. See *Child Sexual Abuse: What Parents Should Know*, AM. PSYCHOLOGICAL ASS'N, <https://www.apa.org/pi/families/resources/child-sexual-abuse.aspx> (last visited May 6, 2014).

149. As one psychologist put the point, “Big boys still don’t cry.” Karyl McBride, *Why Boys Do Not Tell About Sexual Abuse*, PSYCHOLOGY TODAY (Nov. 12, 2011), <http://www.psychologytoday.com/blog/the-legacy-distorted-love/201111/why-boys-do-not-tell-about-sexual-abuse>.

150. See *Doe 76C v. Archdiocese of Saint Paul & Minneapolis*, 817 N.W.2d 150, 170–72 (Minn. 2012) (surveying decisional law to conclude that the plaintiff’s hypothesis about repressed memory lacked scientific validity); Myrna S. Raeder, *Distrusting Young Children Who Allege Sexual Abuse: Why Stereotypes Don’t Die and Ways To Facilitate Child Testimony*, 16 WIDENER L. REV. 239, 239 (2010) (exposing the difficulties of bringing claims as a child as well). Elsewhere I argue that stereotypes about women—including “crazy,” “predatory,” “vengeful,” and otherwise unreliable—worsen this phenomenon for female complainants. Anita Bernstein, *What’s Wrong with Stereotyping?*, 55 ARIZ. L. REV. 655, 698–99 (2013) (reporting evidence that accusations of sexual abuse are met with disproportionate skepticism).

151. Bernstein, *supra* note 150, at 717.

152. Marci A. Hamilton, *The Time Has Come for a Restatement of Child Sex Abuse*, 79 BROOK. L. REV. 397, 399–407 (2014).

153. *Id.*

Several state legislatures have liberalized this judicial severity by lengthening the limitation period, codifying a window of time in which stale claims revive and can be prosecuted or turning on the limitation clock later with the help of a discovery rule for accrual.¹⁵⁴

Yet even though the harm of child sexual abuse has been going on far longer than the harm of workplace asbestos exposure, statutory reforms to benefit child plaintiffs were followers rather than leaders. Legislatures installed these liberalizations for mass tort claims, including asbestos claims, before they considered applying the same innovation to child sexual abuse.¹⁵⁵ Furthermore, most states have enacted no such reprieves for sexual-abuse plaintiffs.¹⁵⁶ Because men are grossly overrepresented among offenders and underrepresented among persons who become sexual-abuse plaintiffs (even though men, as was just mentioned, are harmed by child sexual abuse to a greater extent than tort liability can know), the *cui bono?/cui pacat?* question has a clear answer where gender meets short and stringently applied statutes of limitation that inhibit tort claiming for child sexual abuse in most states. Men, in the aggregate, benefit; women, in the aggregate, pay.

E. Access to Counsel

Asbestos plaintiffs' lawyers have received attention for their avid pursuit of new clients. Their recruitment efforts built a big roster of what a federal court once called "inventory"¹⁵⁷—some fraction of whom (one might say "of which") had been exposed only slightly to asbestos or not at all, or exposed but not harmed, or harmed but not so severely as their attorneys went on to allege.¹⁵⁸ For decades judges,

154. Marci Hamilton collects updates on these fronts at a Web site called www.sol-reform.com.

155. Hamilton, *supra* note 152, at 402 & n.20 (citing *Indep. Sch. Dist. No. 197 v. W.R. Grace & Co.*, 752 F. Supp. 286 (D. Minn. 1990); *20th Century Ins. Co. v. Superior Court*, 109 Cal. Rptr. 2d 611, 633 (Ct. App. 2001); *In re "Agent Orange" Prod. Liab. Litig.*, 597 F. Supp. 740, 811-12 (E.D.N.Y. 1984); *Mergenthaler v. Asbestos Corp. of Am., Inc.*, 534 A.2d 272, 276-77 (Del. Super. Ct. 1987); *Hymowitz v. Eli Lilly & Co.*, 539 N.E.2d 1069, 1079-80 (N.Y. 1989)) ("[This response] was not invented for child sex abuse cases. The idea was initially tested to address mass torts, for example, chemical or asbestos, in Delaware, New York, Minnesota, and California.").

156. *Id.*

157. Huber v. Taylor, 469 F.3d 67, 70 (3d Cir. 2006).

158. Lester Brickman has developed this point at length. See, e.g., Brickman, *supra* note 19, at 1833-34; see also Lester Brickman, *On the Theory Class's Theories of Asbestos Litigation: The Disconnect Between Scholarship and Reality*, 31 PEPP. L. REV. 33, 59-63 (2004) (identifying "The Phenomenon of the Unimpaired Claimant").

academics, and journalists have been condemning the energetic entrepreneurship of the asbestos plaintiffs' bar.¹⁵⁹

Here I propose a different look at this pursuit, a client's perspective. Deserving or not, a group of persons who believed they were wrongly injured received the legal help they needed to gain relief. The rhetoric around asbestos law seems to think of male asbestos workers as duped, manipulated simpletons,¹⁶⁰ but there is no reason to doubt they valued the assistance and support they enjoyed. Lawyers helped them get money. Injured persons who are female lack comparable—or even adequate—access to counsel.¹⁶¹

1. Mass Screenings

In the mid-1980s, plaintiffs' lawyers pioneered the practice of equipping a van with radiographic machines and driving it to a factory. This vehicle, sometimes dubbed an "examobile," allowed them to offer a free X-ray to any worker over the age they set.¹⁶² Accepting X-rays required the workers to sign retainers agreeing to be represented should the screening reveal an asbestos-related disease.¹⁶³ A radiologist hired by the recruiting lawyer would peer at the images collected, looking for evidence of pathologies associated with asbestos. In this way, mass screenings of asymptomatic individuals, aided by medical personnel, facilitated the recruitment of clients.

159. Bernstein, *supra* note 5, at 692-94; Anita Bernstein, Lecture, *The Enterprise of Liability*, 39 VAL. U.L. REV. 27, 32-34 (2004).

160. See, e.g., Huber, 469 F.3d at 82 (noting the labeling of asbestos plaintiffs as "inventory" that lawyers hold); Olson, *supra* note 91 (suggesting that the testimony of coached asbestos plaintiffs resembles "identically worded essays" turned in by an entire class of schoolchildren).

161. Many conditions contribute to this disparity. See Bernstein, *supra* note 109, at 171-72 (reporting the opinion of plaintiffs' lawyer Sybil Shainwald that women's injuries have been priced too cheaply); Stephen Daniels & Joanne Martin, *The Texas Two-Step: Evidence on the Link Between Damage Caps and Access to the Civil Justice System*, 55 DEPAUL L. REV. 635, 661 (2006) (blaming tort reform, especially caps on noneconomic damages); Sara Parikh, *How the Spider Catches the Fly: Referral Networks in the Plaintiffs' Personal Injury Bar*, 51 N.Y.L. SCH. L. REV. 243, 260 (2006/07) (reporting that female personal injury lawyers have trouble navigating referral networks in "the male bastion of the personal injury bar"); Joanna M. Shepherd, *Ideal Versus Reality in Third-Party Litigation Financing*, 8 J.L. ECON. & POL'Y 593, 598 (2012) ("Oftentimes, the expected compensatory awards for low-wealth plaintiffs are low due to the low economic damages arising from their modest incomes. As a result, the expected contingency fees will be too low to induce attorneys to take such cases on contingency.").

162. Roger Parloff, *The \$200 Billion Miscarriage of Justice*, CNNMONEY (Mar. 4, 2002), http://money.cnn.com/magazines/fortune/fortune_archive/2002/03/04/319093.

163. *Id.*

Screenings did more than build “inventory”; they provided workers with a valuable service. One business-magazine story scoffed at the statement made by a well-known member of the asbestos plaintiffs’ bar about their value: “If I have a disease, I want to know about it,” the Dallas lawyer Fred Baron said, “and I want to be able to seek treatment for it.”¹⁶⁴ Not really, retorted *Fortune* in 2002.¹⁶⁵ Of the three major diseases that screening by “examobile” can catch, mesothelioma and asbestosis are incurable and X-rays identify lung cancer too late to improve survival rates.¹⁶⁶ This client-recruitment device persisted for a couple of years after the *Fortune* story, but received a knockout punch in 2005. Janis Jack, a judge who managed silica-exposure claims in Houston, concluded that her court lacked subject matter jurisdiction—and also said she thought plaintiffs’ lawyers deserved to be sanctioned—after determining that numerous claims for silicosis aggregated in her court rested on egregious misdiagnoses that had followed lawyer-sponsored screenings.¹⁶⁷ The toxin in question was different, but the reasoning of *In re Silica Products Liability Litigation* pertained to asbestos-exposure mass screening. Plaintiffs’ lawyers abandoned the practice.¹⁶⁸

Yet the intervention was not idle for workers screened by enterprising lawyers. These persons received not just medical attention (of dubious benefit, we may agree) but also counsel. The more workers’ X-ray results enriched lawyers, the more attorney time got steered into this effort, and by the time mass screening ended, the enterprise of asbestos liability had matured. The undertaking—and from there, access to counsel—kept moving forward after skepticism turned off the mass-screenings engine.

2. Help from Labor Unions

When researchers examined Securities and Exchange Commission filings, they found “particularly high unionization rates”

164. *Id.* (internal quotation marks omitted). *But see* Griffin B. Bell, *Asbestos & the Sleeping Constitution*, 31 PEPP. L. REV. 1, 5 (2004) (“There often is no medical purpose for these screenings and claimants receive no medical follow-up.”).

165. Parloff, *supra* note 162.

166. *Id.*

167. *In re Silica Prods. Liab. Litig.*, 398 F. Supp. 2d 563, 673-79 (S.D. Tex. 2005). Of the many plaintiffs’ lawyers whose silica misconduct was known to her, Judge Jack imposed sanctions on the one firm where her court had jurisdiction. *Id.*

168. Elise Gelinas, Comment, *Asbestos Fraud Should Lead to Fairness: Why Congress Should Enact the Fairness in Asbestos Injury Resolution Act*, 69 MD. L. REV. 162, 188 (2009).

among firms that chose bankruptcy in the wake of asbestos liability.¹⁶⁹ Unsurprising, because many of these defendant businesses had engaged in manufacturing, and manufacturing has long been a locus of relatively successful labor organization efforts.¹⁷⁰ More than mere correlation is present, however.

Labor unions worked alongside plaintiffs' lawyers in the recruitment of clients. As two railroad lawyers reported with some dismay in 1985, labor unions had then become "active in instituting a great deal of asbestos litigation brought in behalf of retired and presently working employees of the railroad industry."¹⁷¹ Machinists, electricians, and other unionized groups would put out the word through newsletters that a mobile X-ray unit was coming to town.¹⁷²

Plaintiffs' lawyers could have done some of their recruiting alone, but unions gave the effort valuable support.¹⁷³ Communication with prospective clients had posed challenges in the pre-Internet era during which worker screening flourished.¹⁷⁴ Union leaders bridged a gap for entrepreneurship in the plaintiffs' bar. They knew which workers could profitably be screened; they could inform these workers where and when mobile units would appear; and their role helped insulate lawyers from complaints about solicitation in violation of professional responsibility rules.¹⁷⁵

169. Joseph E. Stiglitz, Jonathan M. Orszag & Peter R. Orszag, *The Impact of Asbestos Liabilities on Workers in Bankrupt Firms*, HEARTLAND INST. 22 (Dec. 2002), http://heartland.org/sites/all/modules/custom/heartland_migration/files/pdfs/11543.pdf.

170. *Id.*

171. John C. Corrigan & Craig J. Whitney, *Asbestos Litigation Under the F.E.L.A.*, 20 FORUM 580, 580 (1984-1985). Sounding irked, the authors go on to suggest that unions "may have had an independent duty to warn their members of the dangers of asbestos" and perhaps "should be joined by third-party action," *id.*, but their article never returns to this idea.

172. *Id.*

173. Some judicial condemnations of mass screenings of asymptomatic workers list unions rather than lawyers first on their roster of culpable actors. See, e.g., *Owens Corning v. Credit Suisse First Bos.*, 322 B.R. 719, 723 (D. Del. 2005) ("Labor unions, attorneys, and other persons with suspect motives caused large numbers of people to undergo X-ray examinations . . . thus triggering thousands of claims by persons who had never experienced adverse symptoms."); *Eagle-Picher Indus., Inc. v. Am. Emp'ts Ins. Co.*, 718 F. Supp. 1053, 1057 (D. Mass. 1989) (referring to "mass X-ray screenings at occupational locations conducted by unions and/or plaintiffs' attorneys"). See generally Brickman, *supra* note 158, at 73-78 (contrasting client-recruitment efforts that included and excluded union participation).

174. The Internet must be pretty good for client recruitment, if search-engine pricing is any guide. See Barry Schwartz, *Mesothelioma, Asbestos, Annuity: Google's Most Expensive Keywords*, SEARCH ENGINE LAND (Nov. 9, 2012, 12:49 PM), <http://searchengine.land.com/mesothelioma-asbestos-annuity-googles-most-expensive-keywords-139295>.

175. See Roger C. Cramton, *Lawyer Ethics on the Lunar Landscape of Asbestos Litigation*, 31 PEPP. L. REV. 175, 182 (2004) (arguing that union participation made what

Like screenings themselves, union participation helped asbestos-exposed workers who wanted counsel. When recruiting lawyers arrived on-site for a screening, union leaders answered workers' questions about what was going on.¹⁷⁶ An individual decision about whether to go ahead with an X-ray and the retainer agreement that followed must have been easier to make—more comforting, better supported—when the worker knew that he, just like his employer and other corporate adversaries of his, now had the benefit of solidarity and repeat-player experience. Hard to say how much the so-called brotherhood of a labor union meant back in the screening era for an asbestos-exposed person when his local told him that he might pursue redress; but contemporary recruiters stick with the theme of “you’re not alone,” suggesting that union membership can hold psychological value for workers who feel vulnerable.¹⁷⁷

3. Ready Aggregation

In the years after the Supreme Court undid two efforts to certify classes of asbestos claimants for the purpose of settlement,¹⁷⁸ other routes to aggregation have flourished. The most prominent among these routes in federal court is multidistrict litigation (MDL), which centralizes civil actions filed around the country in a single district court authorized to manage pretrial proceedings.¹⁷⁹ For state court judges, the favored aggregator has been the consolidation of separately filed actions.¹⁸⁰

could have been deemed improper solicitation protected conduct under freedom of association). *But see* Lester Brickman, *Ethical Issues in Asbestos Litigation*, 33 HOFSTRA L. REV. 833, 843 (2005) (“[T]his form of solicitation violates Model Rule 7.2(b).”). The point is almost moot because asbestos defense lawyers “do not complain about these ethical violations,” Cramton, *supra*, at 178, and discipline for solicitation is rare. *See* Anita Bernstein, *Sanctioning the Ambulance Chaser*, 41 LOY. L.A. L. REV. 1545 app. at 1576-83 (2008) (reporting empirical data about the offense).

176. Parloff, *supra* note 162.

177. In 2013, the labor union representing grocery store workers reached out to young workers, proposing to ease their isolation and financial stress with “solidarity and being there for each other, especially in times of need.” *With a Union, You’re Not Alone*, UFCW (June 24, 2013), <http://www.ufcw.org/2013/06/24/with-a-union-youre-not-alone>; *see also* Kendra Coulter, *Raising Retail: Organizing Retail Workers in Canada and the United States*, 38 LAB. STUD. J. 47, 58 (2013) (reporting organizers’ embrace of this message).

178. *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 859 (1999); *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 629 (1997).

179. *See* 28 U.S.C. § 1407 (2012).

180. Jeffrey M. Davidson, *Theories of Asbestos Litigation Costs—Why Two Decades of Procedural Reform Have Failed To Reduce Claimants’ Expenses*, 7 NEV. L.J. 73, 77 (2006).

Like the class action, MDL and consolidation were created in the name of efficiency. Judges could, in principle, clear their dockets from the clutter of multiple related claims and move on. “At one point,” the civil procedure scholar Arthur Miller recently recalled, “I expressed the hope that aggregation . . . would be an effective way to deal with the enormous backlog of asbestos cases in the federal courts.”¹⁸¹ Wrong, Miller observed,¹⁸² and wrong with respect to state-court filings as well.

In hindsight, the perversity of aggregating asbestos claims in an attempt to make them go away should have been foreseen. “Increased efficiency may encourage additional filings,” mused Helen Freedman, a New York judge with deep experience in the asbestos trenches.¹⁸³ Consolidating cases for trial “simply attract[s] even more claims,”¹⁸⁴ because using this technique “to force defendants to settle is a bit like using a lawn mower to cut down weeds in a garden . . . ultimately the approach is likely to fuel the filing of more claims.”¹⁸⁵ One mass torts scholar put the point concisely: “If you build a superhighway, there will be a traffic jam.”¹⁸⁶

Like mass screenings and alliances between labor unions and enterprising lawyers, the excesses of aggregation can be understood not only as yet another development that helped form the infamous “elephantine mass”¹⁸⁷ of asbestos law, but also as a source of legal counsel for individuals. The ready aggregation of asbestos claims has functioned as both cause and effect. Plaintiffs’ lawyers recruited clients, tried to aggregate the ones they had, received enough encouragement from judges to keep litigating,¹⁸⁸ built a big roster that posed a bet-the-company threat to their risk-averse adversaries, won favorable settlements, won more clients drawn to their winning track record, made scarier bet-the-company demands, won bigger settlements. Rinse and repeat.

181. Arthur R. Miller, *Simplified Pleading, Meaningful Days in Court, and Trials on the Merits: Reflections on the Deformation of Federal Procedure*, 88 N.Y.U. L. REV. 286, 293 n.23 (2013).

182. *See id.*

183. Helen E. Freedman, *Product Liability Issues in Mass Torts—View from the Bench*, 15 TOURO L. REV. 685, 688 (1999) (recalling asbestos cases).

184. Jackson, *supra* note 65, at 1165.

185. Mark A. Behrens, *What’s New in Asbestos Litigation?*, 28 REV. LITIG. 501, 509-10 (2009).

186. Francis E. McGovern, *The Defensive Use of Federal Class Actions in Mass Torts*, 39 ARIZ. L. REV. 595, 606 (1997).

187. *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 821 (1999).

188. *See supra* Part III.A-C (reviewing doctrinal gains for asbestos plaintiffs).

For an asbestos-exposed person who wanted a lawyer, this cycle of escalation and profit for others meant opportunity. He had no control over litigation strategy or outcomes, but he—in this respect different from the large majority of individuals in the United States with plausible legal claims—could assert his interests. If he did wish to litigate, he could say no to the great entrepreneurial apparatus not eager to offer him help.

Contrast injuries to women, which get aggregated now and then but to far less profit for claimants and lawyers.¹⁸⁹ This absence is not explained by any lack of injury to groups of victims. Female workers, for example, are entitled by law to equal pay and opportunity;¹⁹⁰ the Supreme Court has construed the law of employment discrimination and federal civil procedure to deny them aggregation.¹⁹¹ Institutional entities are continually accused of responsibility for large numbers of sexual assaults,¹⁹² which more women than men experience;¹⁹³ were it available, aggregation would transfer wealth from mostly male offenders and male-governed institutions to mostly female victims. Although lead paint has poisoned girls and boys alike, I have argued that lawyers and courts tacitly classified it as female.¹⁹⁴ This substance would have been a perfect candidate not only for aggregation but the inactive docket that courts created to save unripened asbestos claims.¹⁹⁵ It has received no asbestoslike judicial favor on either front.¹⁹⁶

Injuries gendered female are priced cheaply.¹⁹⁷ Cheap injuries need aggregation for injured persons to gain counsel: low-dollar

189. See White, *supra* note 8, at 192 tbl.2 (presenting quantitative data about nine mass torts, most of which included plaintiffs of mostly or only one gender).

190. See *Equal = Pay: A Guide to Women's Equal Pay Rights*, WOMEN'S BUREAU, U.S. DEP'T OF LABOR (Apr. 2012), <http://www.dol.gov/equalpay/equalpay-employee.pdf> (summarizing the federal law of equal employment opportunity for women). The U.S. Census Bureau reported that in the latest year studied, 2009, full-time workers in the United States who were male earned a median income of \$56,053, while full-time workers who were female earned about three-quarters of that sum, \$43,217. Carmen DeNavas-Walt, Bernadette D. Proctor & Jessica C. Smith, *Income, Poverty, and Health Insurance Coverage in the United States: 2010*, U.S. CENSUS BUREAU 7 (Sept. 2011), <http://www.census.gov/prod/2011pubs/p60-239.pdf>.

191. See *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2561 (2011).

192. See Hamilton, *supra* note 152, at 415-18.

193. See Bernstein, *supra* note 150, at 699 (reporting data).

194. Bernstein, *supra* note 4, at 350-51 (noting a focus on mothers as responsible for this harm).

195. See *supra* note 83 and accompanying text.

196. Bernstein, *supra* note 4, at 348-50.

197. See *supra* note 161 and accompanying text.

claims are likely to die without it.¹⁹⁸ Aggregation thus gave unimpaired asbestos-exposed men a gain in which women did not share.

IV. *CUI BONO*: PECUNIARY GAINS BEYOND JUDGMENTS AND SETTLEMENTS

We now turn from litigants who sought redress for personal injury in court and move to asbestos law as a source of wealth in forms other than compensation. Here “asbestos law” covers advocacy for clients, bankruptcy law, regulatory law, and the furnishing of legal advice to businesses. Like plaintiffs who claimed personal injury from asbestos exposure, the persons who have profited from these other kinds of asbestos law have been predominantly men.

A. *Multiple Helpings for Mostly Male Attorneys*

The most (in)famous way to make money as an asbestos lawyer is to represent plaintiffs. Even the well-compensated lawyers of the 1998 federal tobacco settlement received less than what their asbestos peers collected.¹⁹⁹ Researchers at the RAND Corporation estimated that plaintiffs’ lawyers reap 34% of recoveries in the form of fees and spend another 7% on expenses like screenings and expert witnesses; an informed observer believes both percentages are a bit higher.²⁰⁰

Client advocacy occurs on the other side too. RAND found that defense transaction costs—lawyers’ fees and litigation expenses—consumed about 31% of total spending on asbestos liability in the years 1983 to 2001—more than \$21 billion, about a billion dollars more than plaintiffs’ lawyers made.²⁰¹ Informants told RAND that they expected these defense-side figures, which have fluctuated over the years, to go up in the twenty-first century, at least in the short term.²⁰² Men reap much more than women of the defense lawyers’ profits.²⁰³

In addition to prosecuting and defending personal injury claims, asbestos law offers a third category of lucrative employment for lawyers, overlapping in large measure with plaintiff advocacy: trustee

198. See STEPHEN N. SUBRIN & MARGARET Y.K. WOO, *LITIGATING IN AMERICA: CIVIL PROCEDURE IN CONTEXT* 200-01 (2006) (making this point in defense of class actions).

199. White, *supra* note 8, at 195.

200. Brickman, *supra* note 175, at 841-42.

201. Carroll et al., *supra* note 6, at 95-96.

202. *Id.* at 96-97.

203. The National Association for Law Placement, which has been monitoring the demographics of law firm partners since 1993, reports that equity partners in large law firms are about 85% male, consistent with a long-standing pattern. *The Demographics of Equity—An Update*, NALP (Feb. 2013), http://www.nalp.org/demographics_of_equity_update.

work inside entities put into bankruptcy by asbestos liability. Numerous entities, made insolvent by judgments and claims against them, have taken shelter in federal bankruptcy law, typically Chapter 11. In the summer of 2004, RAND researchers counted seventy-three asbestos-entity defendants that had either dissolved or filed for reorganization.²⁰⁴ Other businesses have joined this roster in the last decade.²⁰⁵ These data provide a picture of *cui bono* with respect to business insolvency occasioned by asbestos law.

Section 524(g) of the United States Bankruptcy Code permits a debtor-entity to establish a trust to control and pay for personal injury and property damage claims related to asbestos exposure.²⁰⁶ Because protection of creditors' interests is central to bankruptcy reorganization and asbestos plaintiffs are creditors, plaintiffs' lawyers have a strong voice in corporate governance when a debtor enters Chapter 11;²⁰⁷ they are especially prominent in § 524(g) trusts. A RAND study of the twenty-six most active asbestos trusts identified the nine law firms most often represented in trust administration.²⁰⁸ Ranks one through seven of these top nine were held by plaintiffs' firms.

Inside trusts, plaintiffs' lawyers are active. They serve as trustees who manage the trust investments and stand in the debtor's place during litigation²⁰⁹ and as members of trust advisory committees, which advocate for claimants' interests under conditions of scarcity.²¹⁰

204. Carroll et al., *supra* note 6, at 109.

205. U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-11-819, ASBESTOS INJURY COMPENSATION: THE ROLE AND ADMINISTRATION OF ASBESTOS TRUSTS 2 (2011) (counting approximately 100 corporate bankruptcies attributable to asbestos liability); Mark D. Plevin, Leslie A. Davis & Tacie H. Yoon, *Where Are They Now, Part Six: An Update on Developments in Asbestos-Related Bankruptcy Cases*, 11 MEALEY'S ASBESTOS BANKR. REP., no. 1, 2012, at 1, 17-18 chart 1 (adding twenty-two bankruptcy filings made after 2005 to the U.S. corporate bankruptcy roster).

206. 11 U.S.C. § 524(g)(2)(B)(i)(I) (2012).

207. The statute requires approval of the bankruptcy reorganization plan from 75% of current asbestos plaintiffs before the debtor can receive a "channeling injunction" from the bankruptcy court, directing all claims for exposure to the trust rather than the courts. *Id.* § 524(g)(2)(B); see also Roger Parloff, *Welcome to the New Asbestos Scandal*, CNNMONEY (Sept. 6, 2004), http://money.cnn.com/magazines/fortune/fortune_archive/2004/09/06/380311 ("Since bankruptcy is worthless to an asbestos defendant if the company can't get a channeling injunction, the asbestos claimants—or to be more precise, the plaintiffs lawyers who control 75% of them—effectively have more power than the bankruptcy judge!").

208. Lloyd Dixon, Geoffrey McGovern & Amy Coombe, *Asbestos Bankruptcy Trusts: An Overview of Trust Structure and Activity with Detailed Reports on the Largest Trusts*, INST. FOR CIVIL JUSTICE, RAND, at xvi tbl.5.2 (2010), http://www.rand.org/content/dam/rand/pubs/technical_reports/2010/RAND_TR872.pdf.

209. *Id.* at 12-13.

210. *Id.* at 13-14.

Fees for this work can be high,²¹¹ but more significant inside the trusts is power. Plaintiffs' lawyers write generous criteria for compensation in trust instruments,²¹² for example, and to some observers, they have manifested inadequate concern for curbing fraudulent claims and double-collecting by the same plaintiffs from different trusts—an indifference that, if it exists, enriches these individuals.²¹³ Few women sit at this bounteous table.

B. Gains from Regulatory Compliance

OSHA, as was noted, responded relatively quickly to the problem of asbestos exposure: one of the first actions the agency took was to set maximum particle levels in the workplace.²¹⁴ The Environmental Protection Agency (EPA) and the Consumer Product Safety Commission also regulate asbestos,²¹⁵ as do laws enacted in every state.²¹⁶ While enhancing safety and ameliorating environmental harm, statutes and regulations also expand employment opportunities in a gendered pattern.

One description of “asbestos abatement worker,” for example, states a median income of \$17 an hour²¹⁷—right in the middle for men

211. *Id.* at 13 (giving, as examples from trust instruments, \$500 an hour or annual compensation, typically between \$60,000 and \$75,000 a year, plus hourly compensation for travel).

212. Exposure standards for some asbestos trusts permit compensation for individuals “who did not work directly with or even in the same building as an asbestos-containing product.” Brown, *supra* note 138, at 562.

213. Introduced in the United States House of Representatives in 2013, the Furthering Asbestos Claim Transparency Act seeks to mandate more public disclosure from asbestos trusts. H.R. 982, 113th Cong. (2013). See generally U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 205, at 31-33 (reporting the debate in neutral terms).

214. See *supra* note 9 and accompanying text.

215. See JACK B. WEINSTEIN, *INDIVIDUAL JUSTICE IN MASS TORT LITIGATION: THE EFFECT OF CLASS ACTIONS, CONSOLIDATIONS, AND OTHER MULTIPARTY DEVICES* 6 (1995). See generally Jennifer L. Leonardi, *It's Still Here! The Continuing Battle over Asbestos in America*, 16 VILL. ENVTL. L.J. 129, 144-45 (2005) (summarizing federal regulation).

216. Robert D. Brownson, Kristi K. Warner & Jessie E. Rosenthal, *Current and Historical American Asbestos Regulations*, BROWNSON & BALLOU 2 (2012), <http://www.brownsonballou.com/wp-content/uploads/2013/06/Historical-Asbestos-Regulations-2012.pdf>.

217. *Asbestos Abatement Worker/Asbestos Abatement Technicians Job Description, Career as a[n] Asbestos Abatement Worker/Asbestos Abatement Technicians, Salary, Employment—Definition and Nature of the Work, Education and Training Requirements, Getting the Job*, STATEUNIVERSITY.COM, <http://careers.stateuniversity.com/pages/7769/Asbestos-Abatement-Worker-Asbestos-Abatement-Technicians.html> (last visited May 6, 2014) [hereinafter *Asbestos Abatement Worker*].

who hold the high school diploma demanded,²¹⁸ but about a third more than the median hourly wage for a female high school graduate.²¹⁹ The job reads masculine. Technicians “use different types of hand and power tools” and “handle myriad varieties of heavy machineries.”²²⁰ “Fundamental knowledge of mathematics is required while performing conversions and calculations to neutralize contaminants,” the description adds.²²¹ “Since the work area concerns buildings, a background in construction can often be helpful.”²²²

Higher up the educational ladder, asbestos regulation has generated more varied occupational opportunities. OSHA standard setting enlists scientific expertise in establishing airborne asbestos maximums and technologies for measuring compliance.²²³ The Asbestos Hazard Emergency Response Act of 1986 mandated inspection of all U.S. school buildings for this substance;²²⁴ a reauthorization act added the demand of accreditation of individuals who inspect for and remove asbestos in a variety of buildings.²²⁵ For ideas about workplace maximum levels, state governments frequently defer to a trade group, the American Conference of Governmental Industrial Hygienists, which has been promulgating what it calls “threshold limit values” for asbestos since 1946.²²⁶ One state, California, empowers several agencies—the state counterpart to OSHA, a department of toxic substances control, a contractors’ license board, and local air pollution control districts—to set and enforce standards.²²⁷ State regulation is permitted, if not encouraged, by federal law: unlike some other federal agencies, OSHA takes an antipre-emption stance,²²⁸ and the Asbestos Hazard Emergency Response Act

218. *Table 4.15: Hourly Wages of Men, by Education, 1973-2011 (2011 Dollars)*, ECON. POLICY INST., <http://stateofworkingamerica.org/chart/swa-wages-table-4-15-hourly-wages-men-education> (last updated May 14, 2012) (listing the median real hourly wage for male high school graduates as \$17.53 in 2011).

219. *Table 4.16: Hourly Wages of Women, by Education, 1973-2011 (2011 Dollars)*, ECON. POLICY INST., <http://stateofworkingamerica.org/chart/swa-wages-table-4-16-hourly-wages-women/> (last updated May 14, 2012) (listing the median real hourly wage for female high school graduates at \$13.83 in 2011).

220. *Asbestos Abatement Worker*, *supra* note 217.

221. *Id.*

222. *Id.*

223. Brownson, Warner & Rosenthal, *supra* note 216, at 7-8.

224. 15 U.S.C. § 2643 (2012).

225. Asbestos School Hazard Abatement Reauthorization Act of 1990, Pub. L. No. 101-637, § 15, 104 Stat. 4589, 4596-97.

226. Brownson, Warner & Rosenthal, *supra* note 216, at 14.

227. *Id.* at 18-20.

228. See, e.g., Ronald J. Krotoszynski, Jr., *Cooperative Federalism, The New Formalism, and the Separation of Powers Revisited: Free Enterprise Fund and the Problem of*

expressly invites states to promulgate stricter standards regulating asbestos in schools.²²⁹ Asbestos law functions as a white-collar job creator for an array of compliance tasks.

More job creation emerges from the partial and incomplete nature of asbestos prohibitions. In contrast to more than thirty other countries, the United States has not codified a comprehensive ban of this substance.²³⁰ Instead, statutes like the Clean Air Act, the Consumer Product Safety Act, and the Toxic Substances Control Act declare asbestos an unlawful ingredient or constituent in particular products.²³¹ A patchy, rather than a total, ban necessarily generates work for individuals charged with observing or policing the line between permitted and prohibited uses of this substance.

Underrepresented in upper management, engineering at all levels, and jobs that reward knowledge of chemistry, geology, hydraulics, and materials science,²³² women are absent from this white-collar work in a pattern similar to their exclusion from the unskilled and semiskilled asbestos-exposing occupations of past decades.²³³ The deadliness of asbestos jobs has (to the great credit of asbestos law) lessened dramatically. The gender exclusion, not so much.

V. *CUI PACAT*: PECUNIARY LOSSES

The enrichments of asbestos law described in the last Part came at a cost. *Cui pacat* at the collective level for asbestos liability, and how much, is an empirical question that has received little study from researchers—curiously little in relation to the vast consensus that

Presidential Oversight of State-Government Officers Enforcing Federal Law, 61 DUKE L.J. 1599, 1630 (2012) (noting that OSHA has always been willing to defer to well-enforced state occupational safety standards); Letter from Deborah Greenfield, Acting Deputy Solicitor, to Les Weisbrod, President of the Am. Ass'n for Justice, U.S. DEP'T OF LABOR (Feb. 3, 2010), https://www.osha.gov/pls/oshaweb/owadisp.show_document?p_table=INTERPRETATIONS&p_id=28049 (declaring an OSHA position against preemption).

229. See 15 U.S.C. § 2649(c) ("Nothing in this subchapter shall be construed or interpreted as preempting a State from establishing any additional liability or more stringent requirements with respect to asbestos in school buildings within such State.").

230. Leonardi, *supra* note 215, at 130.

231. *U.S. Federal Bans on Asbestos*, EPA, <http://www2.epa.gov/asbestos/us-federal-bans-asbestos> (last updated Mar. 16, 2014).

232. See David Beede et al., Econ. & Statistics Admin., *Women in STEM: A Gender Gap to Innovation*, U.S. DEP'T OF COMMERCE (Aug. 2011), <http://www.esa.doc.gov/sites/default/files/reports/documents/womeninstemagaptoinnovation8311.pdf>.

233. See Kingsley R. Browne, *Biological Sex Differences in the Workplace: Reports of the "End of Men" Are Greatly Exaggerated (As Are Claims of Women's Continued Inequality)*, 93 B.U. L. REV. 769, 790-94 (2013) (reporting low levels of female employment in both white-collar science and technology jobs and blue-collar, historically male ones).

asbestos has done great harm to the American economy. Seeking facts, this Part starts with the asbestos bankruptcy record noted in Part IV. Corporate bankruptcies do not account for all the pecuniary losses that asbestos law installed;²³⁴ they also are not coterminous with financial distress. Nevertheless, this category features distinct and illustrative detriments that women must *pacat* alongside men, the gender *cui bono* from asbestos law.

A. *Creditors of Insolvent Defendants*

As soon as an asbestos defendant files its bankruptcy petition, the *cui pacat*, or suffering, cohort includes all creditors that lack a security (or otherwise legally privileged) interest in it. Secured credit, as one bankruptcy scholar wryly noted, amounts to “an agreement between A and B that C take nothing.”²³⁵ Individuals and entities that never set out to establish a credit relationship with a corporate debtor *pacat* for asbestos law in the form of lowered priority for repayment of what the debtor owes them.

The losses are diffuse.²³⁶ Examples of reluctant creditors of debtors in bankruptcy include utility companies, victims of business torts, victims of antitrust violations and intellectual-property infringement, environmental agencies performing cleanups, and other governmental agencies such as taxing authorities and pensions-benefit guarantors.²³⁷ Asbestos debtors always owe money to more than current and future personal injury claimants;²³⁸ some creditors are the reluctant kind.²³⁹ Moreover, because a § 524(g) trust must contain

234. For example, mergers and acquisitions likely failed to occur because prospective acquirers were turned off by the risk of future claims posed by their targets' past operations. See Stiglitz, Orszag & Orszag, *supra* note 169, at 42. Some of these changes in corporate form by hypothesis would have generated value. See Brickman, *supra* note 158, at 37 n.10 (“[T]he large uncertainty surrounding asbestos liabilities has impeded transactions that, if completed, would have benefited companies, their stockholders and employees, and the economy as a whole.” (quoting the United States Senate testimony, S. REP. NO. 108-118, at 25 (2003), of a managing director of Goldman Sachs (internal quotation marks omitted))).

235. Lynn M. LoPucki, *The Unsecured Creditor's Bargain*, 80 VA. L. REV. 1887, 1899 (1994).

236. I thank Lester Brickman and Ted Janger for their stimulating thoughts on this point.

237. LoPucki, *supra* note 235, at 1896-97.

238. See, e.g., Gary T. Pakulski, *Missteps and Dissensions—OC Bankruptcy Documents Reveal Rifts Inside Firm, Among Creditors*, TOLEDO BLADE (Dec. 8, 2002), <http://www.toledoblade.com/local/2002/12/08/OC-bankruptcy-documents-reveal-rifts-inside-firm-among-creditors.html> (noting an assertion by rival creditors that the Owens Corning bankruptcy reorganization unduly favored asbestos claimants).

239. Reluctant creditors are often heard from in the context of prepackaged bankruptcies, wherein dominant creditors approve a reorganization plan before the plan is

more than half the debtor's assets,²⁴⁰ under the scarcity that is always present in a bankruptcy reorganization, reluctant creditors become worse off whenever such a trust forms.²⁴¹ By transferring wealth in favor of (mostly male) exposed persons and their (mostly male) lawyers, asbestos law takes money from groups likely to include or impact women.

B. Insurers and Their Customers

Although insurers profited from having sold defense and indemnity policies to businesses that went on to become defendants,²⁴² asbestos law has imposed burdens on them. With respect to personal injury claims, courts have interpreted occurrence-based comprehensive general liability policies favorably to asbestos plaintiffs and unfavorably to insurers. Exposure in year 1 with a diagnosis of a disease like asbestosis in year 30 typically permits an exposed person to collect on a liability policy that covered the firm for liability-generating occurrences in year 1, year 30, or any year in between.²⁴³ This opportunity to reach multiple sources of coverage comes from the judicial conclusion that asbestos fibers, once inhaled, continuously injure the lungs.²⁴⁴ Insurers also have been unable to enforce the aggregate limits they thought they had imposed on coverage through their contracts.²⁴⁵

With respect to corporate reorganization in bankruptcy, asbestos law developments have made insurers *pacat* in additional ways. Recall that a § 524(g) trust permits a debtor to obtain from the bankruptcy court a channeling injunction that sends all asbestos personal injury

presented to the bankruptcy court. See EUGENE F. BRIGHAM & PHILLIP R. DAVES, INTERMEDIATE FINANCIAL MANAGEMENT 955 (11th ed. 2013) (describing the "cramdown" phenomenon). On prepackaged asbestos bankruptcies, see *infra* notes 247-248 and accompanying text.

240. 11 U.S.C. § 524(g)(2)(B)(i)(III) (2012).

241. Queena Sook Kim, *Firms Hit by Asbestos Litigation Take Bankruptcy Route*, WALL ST. J., Dec. 21, 2000, at B4 (observing that typically an asbestos trust will hold much more than the statutory minimum of 51% of a debtor's assets).

242. See Jeffrey W. Stempel, *Assessing the Coverage Carnage: Asbestos Liability and Insurance After Three Decades of Dispute*, 12 CONN. INS. L.J. 349, 350-51 (2006) (arguing that insurers' experiences of asbestos liability have been mixed rather than ruinous); *id.* at 417 (stating that even for insurers that have paid out the highest sums, asbestos claims present no more than a 6% "drag on earnings").

243. White, *supra* note 8, at 193-94.

244. *Id.*

245. Stempel, *supra* note 242, at 381-406; White, *supra* note 8, at 194 (observing that when courts characterized policies as applying to premises rather than products, they declared that "insurers effectively have unlimited liability").

claims, present and future, to the trust rather than the courts for resolution.²⁴⁶ The trust-and-channeling-injunction option for a debtor disadvantages insurers. They hold less power to fight claims channeled to a trust than they would if they could litigate in court; moreover, being compelled to fund a trust increases at least the speed at which they have to pay on their liability policies and probably the total of these payouts as well.²⁴⁷

Disadvantages to insurers grow more acute with prepackaged Chapter 11 reorganization.²⁴⁸ Personal injury creditors who can figure out workable terms of a bankruptcy before the filing of a petition can enlist the debtor-defendant in an alliance against the interests of insurers.²⁴⁹ Consistent with the rest of asbestos liability, the “prepack” wars, between reluctant creditors—mostly insurers—on one side and lawyers representing plaintiff-creditors on the other, came out favorably to the plaintiffs’ bar, at least at first.²⁵⁰ Courts concluded that an asbestos reorganization plan is “insurance neutral” if it does not worsen the position of an insurer compared to where it stood prepetition,²⁵¹ and deeming a plan insurance-neutral means that insurers lack standing to object to it in bankruptcy court.²⁵² A couple of hard-fought cases did lessen this gain for plaintiffs’ lawyers in 2011 and 2012. Insurers persuaded two federal appellate courts that the particulars of two reorganization plans lacked the neutrality needed to defeat standing.²⁵³ The prepack tide may have turned in favor of insurers.

246. See *supra* note 210 and accompanying text.

247. Stempel, *supra* note 242, at 420-21.

248. See BRIGHAM & DAVES, *supra* note 239, at 955 (describing prepackaged bankruptcy).

249. Parloff, *supra* note 207 (“Instead of working together to resist and defend claims, in a prepack the insured and the plaintiffs['] attorney work together to force the insurer to pay as much as possible.” (quoting an unnamed general counsel of an insurance company (internal quotation marks omitted))).

250. S. Todd Brown, *Section 524(g) Without Compromise: Voting Rights and the Asbestos Bankruptcy Paradox*, 2008 COLUM. BUS. L. REV. 841, 868-69.

251. Jennifer Kent, Comment, *Quality, Not Quantity: The Implications of Redefining Insurance Neutrality in In re Global Industrial Technologies, Inc.*, 53 B.C. L. REV. 345, 349 (2012).

252. See *In re Combustion Eng'g, Inc.*, 391 F.3d 190, 214-15 (3d Cir. 2004); *Fuller-Austin Insulation Co. v. Highlands Ins. Co.*, 38 Cal. Rptr. 3d 716, 725 (Ct. App. 2006).

253. *In re Thorpe Insulation Co.*, 677 F.3d 869, 885-86 (9th Cir. 2012); *In re Global Indus. Techs., Inc.*, 645 F.3d 201, 215 (3d Cir. 2011) (en banc). *In re Global Industrial Technologies*, a five-to-four en banc decision with a strong dissent, was especially hard-fought. For a close reading of this decision and the case law that preceded it, see Peter I. Tsoflias, *Insurance Neutrality: Affecting an Insurer's Right to Bankruptcy Standing*, 37 DEL. J. CORP. L. 569 (2012).

And yet insurance neutrality as a standing suppressant, even when applied carefully, effects a shift in pecuniary advantage reminiscent of the moves explored in Parts II through IV of this Article. Any asbestos bankruptcy trust establishes gains for claimants and their lawyers at the expense of entities that wrote and sold liability insurance policies. Harm to insurers may be a good thing, but it is not insurance-neutral. Denying *cui pacat* on this point not only conceals a shift of wealth but undermines the bankruptcy norm of mutual sacrifice and parity among creditors at the same tier.²⁵⁴

Because the insurance business runs on spreading detriments to customers, the burdens that asbestos law has imposed on insurers generate higher prices for premiums. Judicial determinations that an insurer lacks standing to challenge a bankruptcy plan, as noted above,²⁵⁵ can be counted on to drive up this cost.²⁵⁶ Tort reformers have been stating variations on this association between liability and the cost of insurance for decades. Their effort reaped especially dramatic results in the statehouses with respect to medical care: too much tort liability, they told receptive audiences, makes malpractice coverage unavailable for physicians.²⁵⁷ Observers who disagree about the relation between insurance and the supply of medical services do not quarrel with the truism that more liability exposure for an insurer raises prices for policyholders. And so anyone who buys insurance of any kind sold by insuring entities that faced asbestos liability exposure or who pays for the goods and services that corporate policyholders sell is among those *cui pacat*.²⁵⁸

254. Brown, *supra* note 250, at 860-61.

255. See *supra* notes 250-252 and accompanying text.

256. Tsouflas, *supra* note 253, at 589.

257. See generally Jessica Wolpaw Reyes & René Reyes, *The Effects of Malpractice Liability on Obstetrics and Gynecology: Taking the Measure of a Crisis*, 47 NEW ENG. L. REV. 315 (2012) (studying the issue from the perspective of physician behavior); Joseph Sanders & Craig Joyce, "Off to the Races": *The 1980s Tort Crisis and the Law Reform Process*, 27 HOUS. L. REV. 207, 218-19 (1990) (surveying tort reform legislation enacted between 1985 and 1988 in almost every state in response to an identified insurance crisis).

258. While this Article was going to press, affronted policyholders showed how an insurance payout can feel like an injury to the premium buyer *cui pacat*. Individuals and entities protested the compulsory coverage of particular health care interventions. See, e.g., Hobby Lobby Stores, Inc. v. Sebelius, 723 F.3d 1114, 1144-45 (10th Cir. 2013) (holding that the Religious Freedom Restoration Act of 1993 permits corporate employers to object to insurance mandates), cert. granted, 134 S. Ct. 678 (Nov. 26, 2013) (No. 13-354); Kirk Johnson, *In Washington, Abortion Debate Counters Trend*, N.Y. TIMES (Apr. 1, 2013), <http://www.nytimes.com/2013/04/02/us/washington-state-abortion-debate-counters-the-trend.html> (reporting on the controversy over the inclusion of abortion in health insurance coverage). Premium buyers seldom focus this way on who receives payouts distributed by their insurers, but they are always free to do so. Corporate policyholders and their customers can think of

C. *The Larger Population*

Recall that the gains of asbestos law include access to counsel.²⁵⁹ Once lawyers managed to aggregate them into big cohorts of plaintiffs, unimpaired workers became numerous enough to overwhelm judicial dockets and threaten the solvency of the businesses their lawyers named as defendants. Successes begat more successes for persons exposed to asbestos at work and the lawyers who shaped and shared in their gains. The counsel that located these persons through recruitment and aggregation had no time to give these clients advice or meet their individual needs,²⁶⁰ but even the most remote, inventory-minded lawyer, when he succeeded—a frequent result²⁶¹—won clients money and vindication for the wrong of exposure.

The *pacat* trade-off for this *bono* included, for openers, a diverting of representation. Lawyers who took on asbestos defendants may have been known for their energy,²⁶² but their day contained only the quotidian twenty-four hours. Asbestos work made them less accessible to other prospective clients. Researchers continue to demonstrate that plaintiffs' lawyers respond to financial incentives;²⁶³ *ceteris paribus*, they prefer clients and matters that pay well. Whenever asbestos work maximizes the value of a plaintiffs' lawyer's time, this lawyer is likely to take up that work and decline to represent other prospective clients. Turned-away clients might find another lawyer, but by hypothesis, their second-choice counsel benefit these

themselves as enriching or supporting asbestos plaintiffs and their lawyers, assuming their insurers are among those that have paid into asbestos trusts.

259. See *supra* Part III.E.

260. WEINSTEIN, *supra* note 215, at 1.

261. See *supra* notes 56, 62 and accompanying text (noting studies of the patterns in asbestos litigation).

262. Obituaries for the plaintiffs' lawyers Ron Motley and Fred Baron, for example, reported a host of diverse activities and long workdays, along with millions of dollars earned. John Schwartz, *Ron Motley, Who Tackled Big Tobacco, Dies at 68*, N.Y. TIMES (Aug. 22, 2013), <http://www.nytimes.com/2013/08/23/business/ron-motley-who-tackled-big-tobacco-dies-at-68.html>; *'King of Torts' Fred Baron Dies of Cancer*, DALL. BUS. J., <http://www.bizjournals.com/dallas/stories/2008/10/27/daily60.html?page=all> (last updated Oct. 31, 2008).

263. Two scholars published a series of papers reporting findings they drew from a Texas data set containing reports of personal injury liability claims. See Charles Silver & David A. Hyman, *Access to Justice in a World Without Lawyers: Evidence from Texas Bodily Injury Claims*, 37 FORDHAM URB. L.J. 357, 360 n.17 (2010) (providing a bibliography). Silver, Hyman, and their occasional coauthors focus on issues pertinent to asbestos liability, including aggregation, insurance, medical evidence of harm, and attorney compensation. *Id.* They find that curbing the percentage that lawyers can collect through contingent-fee work reduces access to the courts for injured persons. *Id.* at 374; see also Daniels & Martin, *supra* note 161, at 637-38 (reporting the same effect from statutory caps on damages).

individuals less.²⁶⁴ Entire domains of personal injury law necessarily shrink in response to this diversion.²⁶⁵

We could speculate about the great mass tort actions pushed aside by asbestos law—against sellers of lead paint, for instance, or institutions that could with reasonable care have prevented the sexual abuse of children. Yet we have little idea of which wrongs and wrongdoers would have been identified. Slam-dunk hypothetical negligence claims with plenty of evidence, good economic value for a lawyer, and good social effects could have existed yet never come to court because when these claims ripened, the leaders who would otherwise have had time to consider retaining injured clients and protesting were too busy with asbestos.

Even if nothing is out there—even if asbestos lawyers had no other wrongs of any interest to right—the *pacat* constituency remains. It is us. Dial back the contention that asbestos liability in the United States has been an almost unmitigated blight, reminiscent of “Credit Mobilier, Teapot Dome, Billy Sol Estes, the salad oil scandals, the Savings & Loan scandals, WorldCom, and Enron,”²⁶⁶ and start from a more anodyne premise: tort liability in the United States is expensive; asbestos law has been central to the costliness of this apparatus. How expensive? One insurance consulting business has been estimating the cost of the apparatus regularly since 1985, issuing multibillion dollar bottom-line numbers every couple of years. Its most recent tally: for 2010, \$264 billion.²⁶⁷ Critics raise objections to the politics and methodologies behind these published totals and deem the numbers too big,²⁶⁸ but the high cost of tort as a mechanism of compensation for individuals is acknowledged across the American political spectrum.

264. Silver & Hyman, *supra* note 263, at 374 (“[Q]uality of lawyering matters as well.”).

265. Cf. Ellen S. Pryor, *The Stories We Tell: Intentional Harm and the Quest for Insurance Funding*, 75 TEX. L. REV. 1721, 1724-25 (1997) (identifying the phenomenon of “underlitigating,” or describing intentional harms as accidental to enhance the plaintiff’s access to the defendant’s liability insurance).

266. Brickman, *supra* note 158, at 35. If we put the contention aside, we behave predictably to Brickman, who has protested the absence of a consensus in the asbestos law literature supporting his judgments. *Id.* at 168-69; cf. Charles Silver, *A Rejoinder to Lester Brickman: On the Theory Class’s Theories of Asbestos Litigation*, 32 PEPP. L. REV. 765, 767-68 (2005) (noting that falsity also came from the defense side in asbestos litigation).

267. *U.S. Tort Costs Trends: 2011 Update*, TOWERS WATSON 3 (Jan. 2012), <http://www.towerswatson.com/en/Insights/IC-Types/Survey-Research-Results/2012/01/2011-Update-on-US-Tort-Cost-Trends> (select “download PDF”).

268. See, e.g., J. Robert Hunter & Joanne Doroshov, *Towers Perrin: “Grade F” for Fantastically Inflated “Tort Cost” Report*, AMS. FOR INS. REFORM (Jan. 28, 2010), <http://www.amsforinsreform.org>.

As for the portion of American tort liability that occupies this Article, the acclaimed economist Joseph Stiglitz examined in a coauthored paper one subcategory of *cui pacat*: costs attributable to asbestos bankruptcies.²⁶⁹ *The Impact of Asbestos Liabilities on Workers in Bankrupt Firms* started with workers but moved to other persons and entities *cui pacat*.²⁷⁰ It observed that asbestos businesses in bankruptcy laid off large numbers of their employees, who in turn had trouble finding new jobs and had to accept lower wages.²⁷¹ It priced this detriment of wage loss at “between \$1.4 billion and \$3.0 billion.”²⁷² Predictably enough, Stiglitz and his coauthors also found an association between bankruptcy and a drop in the value of employees’ retirement portfolios, which were likely to contain asbestos-contaminated company stock.²⁷³

Asbestos-related financial distress also tends to reduce investment by the business in itself. As RAND researchers noted a couple of years after the Stiglitz report was published, although “some of the funds removed from capital markets when retained earnings are used to compensate asbestos claimants return to those markets,”²⁷⁴ the bottom-line effect of asbestos litigation on “investments and job creation” is adverse. Though not amenable to precise quantification, this detriment has an impact on the national economy.²⁷⁵

The Stiglitz report goes on to identify others *cui pacat* from asbestos bankruptcies. Governments, for example, lose revenue they would have collected in payroll taxes and corporate income tax; reductions in these revenues are felt in both state and federal coffers.²⁷⁶ Governments, again both state and federal, also have to pay out more in means-tested social insurance when individuals become impoverished by unemployment.²⁷⁷

insurance-reform.org/studies/TowersPerrin2010F2.pdf (responding to the 2009 edition of this study).

269. Stiglitz, Orszag & Orszag, *supra* note 169, at 3.

270. *Id.* at 12-13.

271. *Id.* at 28-29.

272. *Id.* at 29.

273. *Id.* at 30-39; see also Parloff, *supra* note 162 (noting that employees had held 16% and 14% of their stock in Federal-Mogul Corporation and Owens Corning, respectively, when the companies filed their bankruptcy petitions; these stocks had lost 99% and 97%, respectively, of their value in the two years before filing).

274. Carroll et al., *supra* note 6, at 123.

275. *Id.*; see also *id.* at 123 n.33 (expressing concern that the RAND estimates about the effects of asbestos liability published in 2002 were cited too tendentiously, with insufficient recognition that workers displaced by this liability get hired by other firms).

276. See Stiglitz, Orszag & Orszag, *supra* note 169, at 40-41.

277. Carroll et al., *supra* note 6, at 123.

VI. CONCLUSION

Following the money of asbestos law in the United States reveals a gendered pattern of distribution. At four distinct levels, women paid for the asbestos law we now have. First, they fared worse than men in court when they sought redress for the asbestosis or mesothelioma that they attributed to asbestos exposure.²⁷⁸ Second, they have not enjoyed the reprieves from doctrinal harshness that male asbestos plaintiffs have enjoyed.²⁷⁹ Third, they do not hold an equal share of the occupational benefits that asbestos law created.²⁸⁰ The fourth level of payment for women is one that men share. Asbestos law continues to burden the national economy, to the detriment of all genders.²⁸¹

Talented policy makers have been addressing American asbestos law for four decades.²⁸² Their reform energies remain vitally necessary. *Cui bono, cui pacat* ought to inform the repairs they produce.

278. See *supra* Part II.

279. See *supra* Part III.

280. See *supra* Part IV.

281. See *supra* Part V.

282. See *supra* notes 9-12 and accompanying text.

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