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Women, Medical Care, and Mass Tort Litigation

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WOMEN, MEDICAL CARE, AND MASS TORT LITIGATION

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Dow Corning whitecoat to a group of women: "We're testing breast implants on you, to see if they're safe for guinea pigs . . . ."[1]

Everywhere I look in the popular press I see women expressing anger at their treatment in this society. One set of issues revolves around lack of equal opportunity in the workplace: unequal pay, sexual harassment on the job, exclusion from informal but important social/business networks, disadvantageous pension policies, and the like. Another set of issues revolves around women's health care. It encompasses myriad matters. A sample from recent newspapers and magazines would include:

— the low level of funding by the National Institutes of Health of scientific research involving women subjects and on health issues of special concern to women (such as research on the causes of breast cancer);

— the failure of the scientific community to aggressively pursue development of male contraceptives;

— the assault on women's health and autonomy pervading the judicial, legislative, executive and private spheres in their efforts to limit women's ability to curtail unwanted pregnancies;

— the less aggressive treatment given to women heart attack victims;

— the failure of the federal Food and Drug Administration to ensure that adequate testing has been done of the safety and efficacy of drugs and medical devices designed for women and to ensure that adequate information concerning the risks entailed by the use of such products is made available both to doctors and to the consuming public; and

— the unacceptable risks that corporate producers of drugs and medical devices have imposed on women, while assuring us of the safety of their products.

In this Essay, I would like to focus my attention on and raise some questions about the treatment of women by three power centers: the cor-

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1. Cartoon, 1992 Mike Luckovich—ATLANTA CONST.

porate businesses that provide medical products to us, the regulatory governmental structures that exist to protect consumers from hazardous drugs and medical devices, and the adjudicatory legal system that exists to apply legislative and common law norms to redress the grievances of people injured by drugs and medical devices.

I. THE STRIKING AMOUNT OF HARM DONE TO WOMEN

As a teacher of a course in "complex litigation" (which, broadly speaking, focuses on procedural and substantive law issues that arise in multi-party and multi-forum litigation), it has been my impression that an awful lot of products liability personal injury litigation arises out of injuries caused by products designed for women. If one looks at the most widely used casebook, Richard Marcus' and Edward Sherman's "Complex Litigation, Cases and Materials on Advanced Civil Procedure,"[2] one finds in it a number of judicial opinions deriving from the cases generated by the Dalkon Shield intrauterine contraceptive device, by DES, a synthetic estrogen which had been promoted by its manufacturers for use by pregnant women to prevent spontaneous abortion, and by Bendectin, an anti-nausea drug also created for pregnant women in particular, which has been alleged to cause a variety of birth defects. In addition to my exposure to these cases from teaching, I recall the harm caused by Thalidomide (arm and leg deformities due to effects on the fetus in utero), which also had been prescribed as an anti-nausea drug and, as I am writing this Essay in March, 1992, I read in the newspapers almost every day about the injuries that many women and their doctors believe to have been caused by silicone gel breast implants. These include scleroderma (a disorder of the skin and connective tissue), Lou Gehrig's disease (amyotrophic lateral sclerosis, a degenerative neurological condition) and auto-immune system problems such as arthritis and lupus.[3]

To verify my impression that women seem to be disproportionately affected by harmful drugs and medical devices, I scanned the annotations of the cases described in the United States Code Annotated, in the sec-

2. RICHARD L. MARCUS & EDWARD F. SHERMAN, COMPLEX LITIGATION, CASES AND MATERIALS ON ADVANCED CIVIL PROCEDURE (1992).

3. I also have just read of a case in which there was medical testimony of a study indicating that if a diaphragm is kept in place for the eight hours recommended for contraceptive purposes, an overgrowth of bacteria is present that presents a risk of toxic shock syndrome. The enclosure packaged with the diaphragm reports that an association between the device and TSS has *not* been scientifically established but that it is safest not to leave the diaphragm in place for more than *24* hours. *See* Gail D. Cox, *Diaphragm TSS Leads to Award*, NAT'L L.J., Mar. 9, 1992, at 3, 36.

tion concerning multidistrict litigation.[4] Section 1407 provides for the temporary transfer to a single federal judicial district of civil actions that share one or more common questions of fact, to facilitate coordinated or consolidated pretrial proceedings.[5] It is likely that if many individuals believe themselves to have been injured by a product, they will sue individually, in small groups, and in some instances in proposed class actions, and that one or more of the litigants will seek to have the cases consolidated pursuant to § 1407. Consequently, the annotations to § 1407 should provide a fairly accurate portrait of the nature of product liability actions for personal injury, affecting large numbers of people, that have been filed over the last twenty-five years or so. My examination of the annotations bore out my suspicion. I found cases about Bendectin, cases about contraceptives for women including the Dalkon Shield and other intrauterine devices such as the Lippes Loop, and cases about tampons. There were some cases that related to products for both sexes, such as intraocular lenses, aortic heart valves, swine flu vaccine, the antibiotic "Cleocin" and other drugs. There also were cases about cigarettes, which are advertised to and used by both sexes but are not prescribed as healthful, and some cases that related to products that predominantly harmed men: agent orange and asbestos, in particular. It is noteworthy, however, that the latter products were not made for men to take or use for personal purposes; they were products that men were exposed to "accidentally," as an incident of their employment in the military or in the industrial production and use of products containing asbestos.[6] Ironically, when exposing women to hazardous substances would transfer relatively well-paying jobs to women from men, employers have been loathe to allow equal "opportunity,"[7] but when such employment

4. 28 U.S.C. § 1407 (1988).

5. *Id.*

6. My notion was further supported by impressionistic research that my research assistant did. He reviewed the compilation, RICHARD M. PATTERSON ET AL., DRUGS IN LITIGATION: DAMAGE AWARDS INVOLVING PRESCRIPTION AND NONPRESCRIPTION DRUGS (1991). Of the drugs that generated litigation which required 5 or more pages of text in the book, several of the drugs were apparently gender neutral: chloramphenicol (an antibiotic), chloroquine (an anti-infective), chlorpromazine [thorazine] (an antiemetic and sedative), DPT [diphtheria, tetanus, pertussis] vaccine, Haloperidol (a tranquilizer), Isoniazid (for treatment of tuberculosis), Isotretinoin [accutane] (for acne), medroxyprogesterone acetate (for cancer), phenytoin sodium [dilantin] (for epilepsy), and sodium warfarin (anticoagulant). The others were primarily for women, and were alleged to have caused injury primarily to women: DES, doxylamine succinate [Bendectin], and oral contraceptives including Ovulen, Norinyl, Ortho-novum, Enovid and Enovid-E, and Oxytocin (to facilitate childbirth). None of the drugs that generated litigation which required 5 or more pages of text was designed for men.

Although our litigation system has a great many faults, one incidental value that it serves is that it helps us to identify dangerous products.

7. *See, e.g.*, International Union, UAW v. Johnson Controls, Inc., 111 S. Ct. 1196, 1203 (1991) (employer's policy was to bar all women, and only women, whose infertility was not medically docu-

effects are not obviously entailed, women's well-being seems to be of lesser concern. I do not know of a single mass tort in which men were injured by a product made for men to use or take, ostensibly to enhance their well-being. It appears that women, far more than men, take it on the chin from products made ostensibly for our good.[8]

One has to wonder what is going on here. Are there no medical products peculiarly for men? If there are, is it mere coincidence that they have not proven to be seriously harmful? I assume that if such products had caused widespread and serious harm, the injured would have sued; evidence of the problem would appear in the case reports. But it is not there.

Although mine is not the only inference one could draw, I strongly suspect that a disparity exists between the care invested in products for men and that invested in drugs and medical devices for women. One might say that I am overstating the problem because the troublesome products have been limited to a narrow category, to items that relate to women's reproductive and sexual functions and structures. But that is not a narrow category of products; such products are used by all of us, and millions of us use any given variety. Moreover, one has to wonder why the scientific community has placed so much emphasis on developing and marketing contraceptive drugs and devices for women, and so little emphasis on developing them for men. My own speculation is that it is because men (both the general population and the men who decide what scientific research should be conducted, in particular) don't want to mess with their own body chemistry or genitalia, or those of people like them, *i.e.* men. They would much prefer to let the women take the pills and the injections or have the foreign objects installed in them. After all, conception is primarily the woman's problem: fatherhood can be a five minute proposition unless a man chooses to commit himself to it or the courts order the very limited form of responsibility that entails the pay-

mented from jobs involving lead exposure exceeding OSHA standards, despite evidence that lead exposure also had a debilitating effect on the male reproductive system).

8. Of course, I recognize that male fetuses may be injured by drugs and medical devices used by pregnant women, just as much as female fetuses may be so injured. However, historically, I don't believe that manufacturers thought beyond the dangers to the person taking a drug or using a medical device, so potential injury to the fetus (and concern about possibly injuring fetal males) was too remote to affect the corporate psyche. By way of anecdotal support: the FDA's primary concern about thalidomide was that it might cause peripheral neuropathy in adults, not birth defects in infants, despite reports of an increased number of deformed babies having been born in Germany to mothers who had taken the drug. Joseph Sanders, *The Bendectin Litigation: A Case Study in the Life Cycle of Mass Torts*, 43 HASTINGS L.J. 301, 313-14 & n.57 (1992). At that time, the FDA did not require testing for teratogenicity [that is, tendency to produce abnormalities in the embryo or fetus by disturbing maternal homeostasis or by acting directly on the fetus in utero, *id.* at 313 n.53 (citing A DICTIONARY OF EPIDEMIOLOGY (John M. Last ed., 2d ed. 1988))]. *Id.* at 318, 321.

ment of money, but motherhood is a long term condition, particularly if abortion is difficult to obtain.

I cannot help wondering if the corporations which produce drugs and medical devices for women, and the people who run them, are particularly indifferent to the health and well-being of women. Perhaps the profit motive is such that these entities and individuals are nondiscriminatorily indifferent to consumers' health and well-being. Perhaps no matter what the consumer's gender, corporate decision makers care about causing injury and pain only when the economic consequences are sufficiently drastic that the corporation's financial condition will suffer materially adverse effects unless a change is made in a product. It would be interesting to know, through rigorous empirical study, whether there in fact has been a "disparate impact" on women from medical products ostensibly made for our benefit; whether corporate and scientific practices have unintentionally but disproportionately resulted in the marketing of products "for" women that injure women; whether there is even evidence of "disparate treatment," intentional, or more likely reckless, production and marketing of such products; whether and to what extent any disparate impacts upon or treatments of women derive from economic forces, from "bean counting" that predicts that the profits to be derived from the sale of a risk-bearing product will exceed the probable liabilities; and whether and to what extent any disparate impacts upon or treatments of women derive from other factors such as attitudes toward women that denigrate the importance of the injury, impairment or pain we would suffer.[9]

I am not in a position to do the research that would answer these queries. However, I would like, for purposes of this paper, to assume affirmative answers to all of them, to assume that there are disparate injurious impacts and treatments, and that at least some of the injuries that corporate decision makers inflict on women are inflicted out of a combination of economic incentives and attitudinal indifference that is greater when women are the consumer population than when men are the consumer population.[10]

9. The obnoxious sexist behaviors to which women doctors and doctors in training are subjected, while not of Tailhook dimensions, certainly suggest that the medical and research establishments have their share of attitudes and practices that denigrate women.

10. A glaring example of reckless disregard for women's well-being is the marketing of the Dalkon Shield, which was rushed to market without adequate study and despite known risks. *See, e.g.*, SHELDON ENGELMAYER & ROBERT WAGMAN, LORD'S JUSTICE (1985). The A.H. Robins Company entered the birth control market in a matter of months by falsely representing the Dalkon Shield to be a medical device, devoid of copper, rather than a drug; it thereby avoided preclearance by the FDA. It deleted its advice to doctors to use an anesthesia for difficult insertions and to replace the Shield after two years, because it believed that both were hurting sales. It overstated the

Having made this assumption, there are two broad questions I would like to consider. First, how might conditions be changed to prevent or deter these wrongs and to better redress the injuries that occur nonetheless? Second, is the legal system (including the regulatory system), which is among the forces that are intended to prevent and deter such harms and which is the primary mechanism for redressing them, significantly different than the corporate culture that permits the harms to be done, or it is similarly constrained by economic and institutional limitations and similarly infected by cultural influences that render unequal the protection that injured women are afforded by regulatory agencies and the redress that we receive when we resort to the courts?

II. WHAT CAN BE DONE?

Focusing first upon the corporate and scientific communities, the remedies for the problem (that I am assuming exists) would have to be both legal and extra legal. Some of the "fault" may lie in an economic system that makes profit-making the primary, if not the only, value. To the extent that money is the game, the answer would seem to lie in making it unprofitable to inflict serious injury on consumers. There is evidence that the traditional tort system does not contribute much to deterrence.[11] On the other hand, we constantly hear the business and insurance industries complain about "the liability crisis," and we are told that fear of liability deters companies from bringing some products to (or keeping some products on) the market. (Most recently, a number of manufacturers have withdrawn from the silicone gel breast implant business.) In light of the uncertainty that characterizes this matter, I would err on the side of increasing the financial costs of causing injury and of

Shield's success rate in preventing pregnancies. It disregarded scientific information that the Shield's tail-string permitted wicking which caused pelvic inflammatory disease. *See* RONALD J. BACIGAL, THE LIMITS OF LITIGATION, THE DALKON SHIELD CONTROVERSY 6-13 (1990). The question is whether the Dalkon Shield debacle is an extreme example of a common phenomenon.

11. Deborah R. Hensler [Research Director, Institute for Civil Justice, RAND Corporation], *Resolving Mass Toxic Torts: Myths and Realities*, 1989 U. ILL. L. REV. 89, 103. She writes,

> According to modern economic theory, as long as the total payment equals full economic loss, sometimes termed "societal loss," potential defendants should be deterred from negligent behavior. . . . [C]ritics of aggregate procedures question whether their outcomes will fully satisfy the tort system's deterrence objective. Available data suggest that the traditional tort approach, by itself, does not come close to this standard. . . . [V]ery little about the impact of the liability system on the behavior of producers is known. . . . [I]n many areas of productive behavior, the tort system interacts with market and regulatory forces. Moreover, economic theory assumes that producers are fully informed and rationally weigh potential losses against potential benefits of supplying products. Empirical evidence on economic behavior suggests this model is far from reality. With regard to deterrence, not enough is known about the impact of the traditional tort approach to judge the consequences of alternatives.

Id. (footnotes omitted).

causing it in a manner that disproportionately harms women. This might be accomplished in a number of ways.

Remedies could be legislated that would impose liability, punitive damages, or fines for engaging in a pattern or practice of producing and/or marketing medical products for women that prove to be injurious to them (analogous to a disparate impact claim), perhaps even if the defendant were guilty of being "merely" negligent in creating this pattern or practice, and for intentionally, recklessly, or perhaps even negligently producing and/or marketing such products (analogous to a disparate treatment claim). (If this proposal seems ludicrous at first blush to you, consider whether you would react the same way if you substitute "blacks" for "women" in the proposal.) In addition to imposing liability for the usual compensable injuries, under this scheme additional monetary extractions would be imposed to deter or punish socially unacceptable behavior vis-a-vis an historically abused, because undervalued and underrespected, segment of the population.

Another approach would be to facilitate recovery by injured women against the producers and distributors of the medical products "for" us that cause injury. In an article concerning failings of the tort system and ways in which it could be strengthened for injured parties generally, Professor Leslie Bender has argued that, in order to do justice in mass tort cases, it is essential to readjust the balance of power between the parties. She urges in particular that,

> If a plaintiff is injured or subjected to risk of injury by a mass-produced product . . . , after a limited showing has been made about the corporation's creation of risk to the plaintiff, a corporate actor should be required to bear the initial economic loss (medical expenses, lost wages, or income maintenance and special out-of-pocket damages). This . . . would be a rebuttable presumption. . . . [However] the burden of [production and] proof would be shifted for purposes of the entire litigation and for all elements of the cause of action after the plaintiff has made a limited "risk" showing that the corporate actor may have created a risk of harm to which the plaintiff was exposed [based upon the corporate actor being found to be the party most capable of bearing those burdens, by virtue of its wealth, power, knowledge, and access to information].[12]

12. Leslie Bender, *Feminist (re)Torts: Thoughts on the Liability Crisis, Mass Torts, Power, and Responsibilities*, 1990 DUKE L.J. 848, 886-87, 892. As an aside, noteworthy particularly for those who scoff at the notion that a corporate actor should be required to bear the initial economic loss, including medical expenses necessitated by its allegedly injurious product, it is interesting that Dow Corning—"ahead" of the courts—has suggested that it might provide financial help for women who want to remove their silicone gel implants. A.H. Robins Company also "voluntarily," which is to say acting without the compulsion of a court order, eventually urged the removal of Dalkon Shields and, in letters to doctors, print media and on television, offered to pay the costs involved. (I do not

Such a scheme could be adopted, if not for all mass tort litigation, then for cases involving women who are alleged to have been victimized by corporate irresponsibility and indifference with respect to women in particular. Although such a selective power readjustment might provoke an equal protection challenge by male injured parties or even by corporate defendants, the adverse treatment accorded to women by the defendant could justify the favorable treatment that would be accorded them in the courts under this proposal. Under current jurisprudence, the provision of more favorable treatment to women litigants than to their male counterparts would not need to survive strict scrutiny to survive a constitutional challenge.

Since the corporate/scientific production of injurious medical products for women is not entirely traceable to economic forces, and since even the consequences of economic forces may not be susceptible to eradication through economic responses such as increased liability, additional responses are essential. To the extent that unduly dangerous medical products are marketed for women out of a lack of real concern for our well-being, the problem will have to be addressed through a change in basic attitudes. It would help, of course, if the obstacles to women becoming corporate and scientific decision makers were eliminated. Having substantial numbers of women securely in positions of power, unafraid to take stands protective of women's health, would go some distance toward reducing the problem. But even women are affected by the culture's devaluation of women, so having women in influential positions would not entirely solve the problem. Again, education, a change in the society's view of the value and importance of women, seems to me critical. How we accomplish that is a big question. It may require us to continue to increase the number and visibility of highly achieving women, but the necessary regard is not altogether (and probably is not even primarily) a matter of respect for proven capability. To enhance the caring about women that we need, men somehow need to surrender some of their need to feel superior and their view of women as frighteningly "other." That need seems to be a very strong one, and I don't know how we moderate it.

(We see something analogous in the context of race relations. We had legal rules that kept minorities away from whites, out of "our" restaurants, schools, bathrooms, neighborhoods, etc., but the elimination of

mean to suggest that this corporate conduct was purely altruistic. The corporations involved may well have been acting to mitigate their damages and to lay the groundwork for arguing that women who did not have their implants or IUDs removed thereby failed to mitigate their damages.)

those rules and their replacement by antidiscrimination statutes has not eradicated racism, the need of each to feel superior to the other, the fear and resentment of one another. Blatant de jure discrimination may be largely a thing of the past, but de facto discrimination is alive and well, living everywhere in the United States. Women were not subject to quite the same legal restrictions, although we had, and have, our share of legal disabilities; among other things, the equal rights amendment had not become the law of the land the last time I checked. But while the instances of de jure discrimination against women have been perhaps fewer and less obvious than those against people of color (and the law now prohibits some forms of sex discrimination—with a cap on the amount of damages a woman can collect!), like racist feelings, the subtler, attitudinal de facto disadvantages that women have to contend with continue to be pervasive, and are more difficult to extirpate. Just one of many manifestations of these barriers is the perpetual lag in women's real earning power, which has not lessened substantially in decades, despite the entry of significant numbers of women into traditionally male professions.[13])

III. How Much Better is the Legal System, Upon Which We Rely for Protection and Redress of our Grievances?

A. Regulation

Regulatory agencies like the Food and Drug Administration often are manned and advised by people who have been and will again be corporate/scientific decision makers, whose long-term professional success may depend upon those whom they are supposed to regulate, and whose sympathies may lie at least as much with those whom they are supposed to regulate as with those whom they are supposed to protect. Even if this were not so and the regulators were all as knowledgeable and dedicated consumer advocates as we could imagine and as free of cultural attitudes devaluing women as we could imagine, the deficient funding and staffing of these agencies is such that they are incapable of providing adequate protection to the public. According to an article in the Chicago Tribune

13. A recent study of California lawyers, for example, found that women lawyers tend to earn less than white male lawyers:

> among white male lawyers in practice from 10-19 years and working 35 hours or more a week, just 8 percent earn less than $50,000 a year and 20 percent earn more than $200,000. Fourteen percent of comparable white women and 15 percent of minority lawyers earn less than $50,000 annually, while 9 percent of the women and 8 percent of the minorities earn more than $200,000.

Don J. DeBenedictis, *Survey: New Grads Changing Bar: Minority, Female Lawyers Increasing, but Their Pay is Below That of White Males*, A.B.A. J. Nov. 1991, at 34.

in early 1992, "[a] blue-ribbon government panel concluded last year that the FDA was short of money, manpower and legal clout. Although steps have been taken to strengthen the agency—which oversees about one-quarter of all products sold in the U.S.—critics say the FDA is still too weak."[14] The result was, for example, that public hearings on silicone breast implants were not held until 1991. Although everyone now seems to concede that the studies that have been done are insufficient, back in 1978 the FDA chose to rely on the assurances of (financially interested) plastic surgeons that the implants were safe, rather than asking implant recipients their experience or doing its own examination of the implants' safety. Until Congress and the President make the work of the FDA a much higher priority, neither women nor men will be able to rely on it for much protection.

Before leaving the subject of the legal system as potential preventor of harm, something should be said about the role of the FDA as a facilitator of informed consent. While the FDA never will have the resources to assure the safety of every drug and medical device, it needs to do a much better job of assuring that whatever information exists at a given time on the safety and efficacy of products is easily accessible to both the medical community and interested consumers. Any paternalism that denies material information to the consuming public is unacceptable. It also needs to insist that information on the safety and efficacy of products that is adequate to allow doctors and consumers to make well-informed judgments is developed as quickly as possible. It is (or should be) the obligation of the FDA to "ride" industry to assure that all health risks are examined and quantified as expeditiously as possible, and to assure that the determinations are promptly and clearly communicated to physicians and surgeons and made easily available to the public. In the case of silicone gel implants, for example, it seems to me that, as an initial matter and in view of the benefits of the product, particularly to women who desired reconstructive surgery after mastectomy, it was not necessarily wrong to allow use of the implants before scientific evidence established their safety; but women were entitled to know that the implants' safety had not been established and what the known risks were. The FDA has now made strides in obtaining and seeing to the communi-

14. Michael L. Millenson, *Consumer Concerns Put Focus on FDA Safety Reviews*, CHI. TRIB., Jan 26, 1992, § 1, at 8. Although in 1976 Congress required the FDA to raise its standards for approval of new devices and to review medical devices already on the market, very little money came with the law. In addition, "in 1976, the FDA's device bureau employed [only] 132 people, including secretaries and file clerks, to review more than 1,700 types of devices. . . . By comparison, 1,013 employees were working on ongoing drug review. . . . In 1990, the combined device and radiological health center had 860 employees, while the drug center had 1,223 employees." *Id.*

cation of information, the General and Plastic Surgical Devices Advisory Panel having recommended, *inter alia*, the establishment of an FDA-monitored registry for women with implants, the use of a very inclusive informed consent form, and the establishment of a clear schedule for manufacturers, which outlines data required and deadlines for submission. As of April 1992, the FDA had begun working with current and former manufacturers to set up the registry, and had established a toll-free telephone line to provide information on implants to consumers. But we need aggressive regulatory action before the horse is out of the barn, not afterwards. We need the process to be rigorous from the beginning.

B. Redress

When injuries have not been prevented and the legal system has been looked to to provide "remedies" for injuries done, how good a job has the judicial system done?

At one level, all the problems that plague the legal system generally and limit its ability to justly and efficiently handle mass tort litigation in particular come into play in this context. The costliness and slowness of the process are well known. Similarly, the pros and cons of class action treatment versus consolidation of actions (to minimize duplication of effort and inconsistency of results in pretrial discovery and in the trial of identical issues) versus separate prosecution of individual cases have been written about extensively. Critiques of substantive tort law and of the judicial process in mass tort cases—such as Professor Bender's critique of the traditional allocation of burdens of production and proof, noted above—also pertain.

I would like to focus therefore on a different set of empirical and legal questions. First, it would be worthwhile to investigate whether economic and attitudinal factors of the kind that (I have argued) disadvantage women in the corporate/scientific sphere also operate to perpetuate and exacerbate the disadvantage to women when we are forced to resort to the courts for a redress of our grievances. Courts are not profit-motivated institutions, so economic factors will not operate on them the way they do on corporate America . . . though economic factors certainly operate; depending on their ability to pay, litigants can "buy" representation that varies significantly in quality. The courts' problem is much more like that of the regulatory agencies: judicial resources are limited and arguably insufficient to consistently administer good quality justice. As a result, courts have been driven to employ methods that increase

their "efficiency," including their case disposition rates. Among the consequences are more "managerial judging," tighter control of discovery, and more judicially applied pressure to settle. While many questions are posed by these phenomena, one is whether these changes tend to benefit corporate defendants or mass tort plaintiffs, particularly the women who constitute so large a proportion of the personal injury product liability plaintiffs in mass tort cases. The answer is not intuitively obvious. Rather, these changes could either help or impede mass tort plaintiffs, depending upon how the courts, individually and collectively, utilize their powers. As Professor Judith Resnik has written,

> Transforming the judge from adjudicator to manager substantially expands the opportunities for judges to use — or abuse — their power. . . . [M]anagement [also] tends to undermine traditional constraints on the use of that power. . . . Further, no explicit norms or standards guide judges in their decisions about what to demand of litigants. . . . Further, judges with supervisory obligations may gain stakes in the cases they manage. Their prestige may ride on "efficient" management, as calculated by the speed and number of dispositions. Competition and peer pressure may tempt judges to rush litigants because of reasons unrelated to the merits of disputes. . . . [A]s pretrial case managers, judges operate in the freewheeling arena of informal dispute resolution. . . . Unreviewable power, casual contact, and interest in outcome (or in aggregate outcomes) have not traditionally been associated with the "due process" decision-making model.[15]

Judges could use their powers to tightly rein in defendants' efforts to delay, stonewall and keep damaging testimony and documents out of the hands of injured parties, and to urge the propriety of large settlements, OR they could use their powers to impede plaintiffs by, for example, limiting their discovery, limiting their ability to unite or to share information, liberally allowing discovery to be taken of plaintiffs that would chill their vigorous prosecution of the litigation—such as discovery of intimate sexual matters which defendants may claim is relevant to whether defendant's product caused plaintiff's injury—and by urging plaintiffs to accept small settlements. I don't know whether an empirical study of past cases would show that one or the other of these patterns predominates. In view of the high percentage of cases that settle, however,[16] the answer to the question whether managerial judging has been used to assist or impede mass tort plaintiffs and, in particular, which side has been favored in the settlement context may be very significant.

15. Judith Resnik, *Managerial Judges*, 96 HARV. L. REV. 374, 425-30 (1982).

16. *See, e.g.*, W. Kip Viscusi, *The Determinants of the Disposition of Product Liability Claims and Compensation for Bodily Injury*, 15 J. LEGAL STUD. 321, 345 (1986) (the great majority of product liability claims (98% of all claims receiving payment) are settled out of court).

Given the high probability of settlement, the attitude toward women of the presiding judge, of the controlling lawyers, and of the very defendant whose product is alleged to have caused women enormous harm, would seem likely to be of great importance.[17]

In pursuing the inquiry into whether attitudinal factors disadvantage women who are forced to resort to the courts for a redress of their grievances, a number of additional tacks might be taken. It might be instructive to try to compare mass tort cases concerning drugs and medical devices designed for or marketed primarily to women with mass tort cases concerning drugs and medical devices designed for or marketed primarily to men or, in the absence of such cases, mass tort cases concerning chemicals and other products (such as Agent Orange and certain forms of asbestos) that were largely used by and caused injury to men. An investigator could try to ascertain such things as:

— relative outcomes; who recovered more, and how did the injuries and the difficulties of proving plaintiffs' cases compare, as a matter of the factual and legal challenges? (As one lawyer put it to me, "Do we pay more to men or to women who cannot prove their claims?");

— how quickly were the respective cases resolved?;

— how substantially, if at all, was substantive law modified so as to facilitate recovery?;

— to what extent were procedural devices that presumably would strengthen the plaintiffs' position vis-a-vis the defendants' (or defendants' position vis-a-vis plaintiffs') adopted by the court? Within this question one would consider such matters as the grant or denial of class certification, the grant or denial of consolidation for pretrial, or all, purposes (I do not intend to imply that plaintiffs or their lawyers always believe class certification or consolidation to be in their interests; many believe otherwise), the grant or denial of motions to bifurcate or trifurcate trial—to separate testimony and jury functions concerning liability from those concerning damages—and whether the court was willing to seal documents and order the non-disclosure of information, with the effect of concealing a public hazard;

— what role did the court play in pushing the cases toward settle-

17. Intuitively, managerial judging, with its emphasis on efficiency and case disposition, also seems to conflict with the goal (of many feminists and others) of having women's "stories" taken more seriously in litigation. A colleague of mine, Anna-Maria Marshall, who has experience representing abortion clinics that sought contempt sanctions against Operation Rescue and others for violating injunctions against blockades, related to me as a relevant anecdote that one of the judges she appeared before was an elderly man who did not want to hear about "girls" getting harassed on their way into clinics; he was not interested in how hard this had been on them. All that mattered was how many people were in front of the doors and whether someone who tried could get through.

ment, and whose view of the case, as to liability and amount of damages or extensiveness of other remedies, did the court advocate more forcefully?; and

— how important were the cases or the legal and factual issues that they raised regarded to be, by the judges, the attorneys, the media?

While I don't have the answer to any of these questions, one can hazard a guess as to whether attitudinal factors operate against women mass tort plaintiffs, based upon the treatment of women as litigants, judges, lawyers, and witnesses, generally. The evidence is not encouraging. Studies of gender bias in the courts have been done around the country over the last decade. One of the most recent, and typical, is that by the Illinois Gender Bias Task Force, published in 1990. Among its conclusions were the following:

Women judges still are a small minority of the judges; outright discrimination against women applicants for judicial positions has not been eradicated, and gender discrimination may enter into judicial assignments, as well. [Problems persist in the federal judiciary, as well. Only 14 percent of President Bush's judicial appointments have been women.[18] Moreover, "[a]s of June of 1991, the ninety-four federal trial courts had 758 sitting, life-tenured judges—of whom 705 were men and fifty-three were women. . . . [S]ixty of those courts had no life-tenured women judges. . . . [F]our of the thirteen courts had no women appellate judges."[19]]

Women attorneys have to be wary of appearing "too aggressive" before juries, and both they and women witnesses have to be careful not to appear "too attractive" for fear of generating resentment among jurors. (As one of my colleagues suggested to me, if you're "too attractive," you risk not being taken seriously, being seen as presumptively a bimbo or promiscuous. Women don't look like lawyers because lawyers look like men, and we're far away from changing that.) We also have to overcome an ancient history of disapproval of women advocates, which condemns their activity as unchaste and as an intrusion upon the proper sphere of men.[20]

18. George Kassouf, *Bush Judges Out of Touch*, PIPELINE (Alliance for Justice, Washington, D.C.), Winter 1992, at 3.

19. Judith Resnik, *Hearing Women*, 65 S. CAL. L. REV. 1333, 1341 (1992) (citations omitted; the data was reported in *Judges of the Federal Courts*, 923 F.2d at vii-xxx (1991)).

20. *See* Amy Richlin, *Roman Oratory, Pornography, and the Silencing of Anita Hill*, 65 S. CAL. L. REV. 1321 (1992). She quotes, DIG. 3.1.1.5, *On Pleading* [6th c. A.D.]:

> It is prohibited to women to plead on behalf of others. And indeed there is reason for the prohibition: lest women mix themselves up in other people's cases, going against the chastity that befits their gender, and lest women perform the duties proper to men. The origin

Women's existence is not recognized by the Illinois' Pattern Jury Instructions, which consistently use male pronouns to describe everyone.

One-third of the women attorneys who responded to a recent American Bar Foundation survey reported having experienced judicial bias in the form of comments made to them by judges or exclusion from socializing between (male) judges and male attorneys. These women reported that they refrained from complaining to the judge for fear that they would provoke a less favorable outcome for their clients. Fifty-seven percent of the women attorneys who responded reported disrespectful treatment by male adversaries in remarks, interruption of their presentations, conduct by which they were "dismissed" or ignored and by which male attorneys sought to physically monopolize the judge's visual and auditory attention, none of which behavior (the women believe) would have been directed at a male counterpart.

Women litigants and witnesses were reported to have been addressed informally when male litigants had been addressed by surname or title, to have elicited less interest and attentiveness when they spoke, and to have had comments made about their physical appearance and appropriate social role.[21] Finally, many of the mass tort cases over medical devices and drugs for women involve devices and prescription drugs that have to do with sex (particularly with contraception) and with highly sex related portions of our anatomies (tampons are inserted into the vagina, silicone gel implants shape and augment breasts). As a result, the women litigants in these cases are first injured by their use of these products and then, in our culture, are tainted by having to detail their use of the products, and often their sexual activities, if they wish to recover for their injuries. Their very discussion of sexual matters has the tendency to discredit and devalue them in the eyes of the often male triers of fact and law.

> comes from Carfania, a most shameless woman, who by immodestly bringing cases and bothering the magistrate provided the cause for the edict.

Id. at 1323.

21. THE 1990 REPORT OF THE ILLINOIS TASK FORCE ON GENDER BIAS IN THE COURTS 197, 201, 219-33 [hereinafter 1990 GENDER BIAS TASK FORCE REPORT]. The newer 1992 Ninth Circuit Gender Bias Task Force similarly found subtle but pervasive sexism in the Ninth Circuit, including perceived discrimination in assignments and in the opportunity to become law firm partners, patronizing and trivializing conduct, sexual harassment of women attorneys and adversely disparate evaluation of women litigants' injuries. NINTH CIRCUIT GENDER BIAS TASK FORCE, THE PRELIMINARY REPORT OF THE NINTH CIRCUIT GENDER BIAS TASK FORCE, EXECUTIVE SUMMARY 6-8, 17 (1992) [hereinafter 1992 NINTH CIRCUIT GENDER BIAS TASK FORCE REPORT]. Women litigants and witnesses, and probably counsel as well, also may have to overcome a stereotype of being self-interested liars, which goes back at least as far as the story of the Judgment of Solomon. *See* Ann Althouse, *Beyond King Solomon's Harlots: Women in Evidence*, 65 S. CAL. L. REV. 1265, 1274 (1992).

In light of the pervasive evidence of disrespect for and callous treatment of women participants in the judicial process, it is impossible to feel sanguine about how satisfactorily women's mass tort claims are settled, or tried.

One of the contexts in which women litigants are most commonly disadvantaged in the courts by the realities of the culture and circumstances in which we live is the calculation of money damages. As Professor Lucinda Finley has observed, basing damages on lost future income can disadvantage women in an economy in which we are, on the whole, paid significantly less than men; and even where a woman earns a substantial income, sexual stereotyping can adversely affect projections of future income. Moreover,

> unpaid but crucially productive and important services such as household management and childrearing are consistently undervalued or overlooked in a system which gauges damages to the market economy. . . . [L]ow damages judgments reflect the tort system's primary valuation of wage-earning capacity. This legal measure automatically devalues women, whose earning capacity has been depressed by society's denial of financial reward for household services rendered within one's own family.[22]

Professor Finley also found that, beyond efforts to recover for economic harms, gender bias also influences evaluations of other injuries.

> For example, historically, women's complaints of pain or injury have often been dismissed as emotional or hysterical complaints, while men's complaints about the same ailment were more likely to be treated as serious physical harm. Thus, more women's injuries may be cast into the "emotional distress" pile; and it has always been harder to recover for emotional injuries.[23]

On the other hand, sexual stereotypes have facilitated women's recovery for such wrongs as the intentional infliction of emotional distress.[24]

The findings of the Illinois Task Force on Gender Bias in the Courts are consistent with Professor Finley's observations. Its 1990 Report indicates that nationwide women generally receive *significantly* lower compensatory damage awards than do men, in part as a result of both "the different roles men and women have traditionally played . . . and . . . societal perceptions and opinions about the role and 'worth' of women."[25] The Report concludes that these factors influence damages in

22. Lucinda M. Finley, *A Break in the Silence: Including Women's Issues in a Torts Course*, 1 YALE J.L. & FEMINISM 41, 51-52 (1989).

23. *Id.* at 65 (footnote omitted).

24. *Id.*

25. 1990 GENDER BIAS TASK FORCE REPORT, *supra* note 21, at 177, 181; *see also* 1992 NINTH CIRCUIT GENDER BIAS TASK FORCE REPORT, *supra* note 21, at 17-18.

personal injury lawsuits, and awards for lost income, pain and suffering, and loss of consortium. It found evidence that both jurors and judges award women less for future income in part because they believe that women will go in and out of the work force to raise a family, an assumption which is not accurate in many cases. As the Report concludes, "[i]f such assumptions about the relative wages of men and women are so deeply ingrained in juror's [sic] minds that even statistical evidence may not overcome them, an individual female plaintiff is unlikely to receive a hearing on the facts of her particular case, unfiltered through historical or societal biases."[26]

The pervasiveness and potential for harm from sexual stereotypes is frighteningly illustrated in a critical evaluation of the American Medical Association's *Guides to the Evaluation of Permanent Impairment*, by Professor Ellen Smith Pryor.[27] Professor Pryor found that, although the *Guides* purport to be an objective medical evaluation system, "it is laden with hidden or poorly explained value judgments that frequently are gender-biased."[28] I will give two examples from her book review. First,

> in the reproductive system chapter, an impairment of the penis results in 5-10% whole-person impairment when "sexual function is possible, but there are varying degrees of difficulty of erection, ejaculation, and/or sensation" (p.196). By contrast, the criteria for evaluating impairment of the vulva-vagina make it clear that a 0% whole-person impairment rating can result if "symptoms . . . do not require continuous treatment," "the vagina is adequate for childbirth". . . and "sexual intercourse *is possible*" (p.199, emphasis added).[29]

More generally, the "whole-person" ratings are based on scales that evaluate a person's ability to carry out "activities of daily living (ADL)," so impairment evaluations require decisions as to what activities are relevant, as well as of what levels of activity should serve as the norm. The examples in the *Guide* are blatantly stereotypical, focusing on household tasks (mopping, shopping, cooking, and the like) and childrearing for women, and sports for men.[30] When physicians have to make ADL assessments, they are free to be similarly sexist. With this sort of "guidance" to the courts from the American Medical Association, how can an informed woman be other than demoralized at the thought that courts

26. 1990 GENDER BIAS TASK FORCE REPORT, *supra* note 21, at 189-90; as to the preceding material generally, *see id.* at 186-90.

27. Ellen S. Pryor, *Flawed Promises: A Critical Evaluation of the American Medical Association's Guides to the Evaluation of Permanent Impairment*, 103 HARV. L. REV. 964 (1990) (book review).

28. *Id.* at 965.

29. *Id.* at 970 (footnote omitted. The footnote does mention, however, that later examples do mention a woman's sexual sensation (p.199).)

30. *See id.* at 970-71.

will determine the compensation she will receive for her reproductive, work diminishing, and other injuries?

One interesting question is what the remedies might be for sex discrimination against women litigants by courts? Of course, preventive education (both in the world at large and through the admission of evidence that would reveal biases) is vital and prospective injunctive relief might help or at least have some symbolic value, but what happens until the discrimination is eradicated? I suppose a cause of action for money damages could be created that would measure damages by the difference between what plaintiffs recovered (or defendants were held liable for) and what they would have recovered (or been held liable for) in the absence of such discrimination. (It seems rather fanciful, but essays like this are supposed to expand the envelope.) But who would the defendant be? As a matter of policy, it seems a bit much to think of making jurors potentially liable. In order to make the remedy most effective, it would make most sense to impose the liability on the government itself. Of course, the government would have to waive sovereign immunity, but so long as the state is picking up the tab, the policies that support judicial immunity might well not defeat such a cause of action.[31] (Although the amount of the liability really represents a windfall to the original, usually corporate, defendant, res judicata might protect it from being a potential indemnitor.) If one could establish sex discrimination by the FDA, in

31. Judges are immune from liability for damages for acts committed within their judicial jurisdiction, even when they have been accused of acting maliciously and corruptly. Pierson v. Ray, 386 U.S. 547, 554 (1867); Bradley v. Fisher, 80 U.S. (13 Wall.) 335 (1872). In theory, the immunity has been conferred "for the benefit of the public, whose interest it is that the judges should be at liberty to exercise their functions with independence and without fear of consequences." Scott v. Stansfield, 3 L.R.-Ex. 220, 223 (1868), quoted in both *Bradley*, 80 U.S. at 349, 350 n.16, and *Pierson*, 386 U.S. at 554. A judge "should not have to fear that unsatisfied litigants may hound him with litigation charging malice or corruption. Imposing such a burden on judges would contribute not to principled and fearless decision-making but to intimidation." *Pierson*, 386 U.S. at 554. The Court also has held, however, that judicial immunity does not insulate from liability for damages private persons who corruptly conspired with a judge. Dennis v. Sparks, 449 U.S. 24, 29 (1980). The Court concluded that there is no constitutionally based privilege immunizing judges from being required to testify about their judicial conduct in third-party litigation, nor any historical basis for excusing judges from responding as witnesses when their co-conspirators are sued. *Id.* at 30. It added,

> [o]f course, testifying takes time and energy that otherwise might be devoted to judicial duties; and . . . the judge's integrity and that of the judicial process may be at stake in such cases. But judicial immunity was not designed to insulate the judiciary from all aspects of public accountability. . . . In terms of undermining a judge's independence and his judicial performance, the concern that his conduct will be examined in a collateral proceeding against those with whom he allegedly conspired, a proceeding in which he cannot be held liable for damages and which he need not defend, is not of the same order of magnitude as the prospects of being a defendant in a damages action . . . with the attendant possibility of being held liable for damages if the factfinder mistakenly upholds the charge of malice or of a corrupt conspiracy with others.

Id. at 30-31. These concepts would apply by analogy to the situation envisioned in the text, of a suit against the government itself, in which the judge's conduct would be called into question.

less rigorous regulation of products for women than for men, a cause of action based on equal protection notions again would seem appropriate, but the measurement of damages would be even more difficult.

In addition to having to contend with bias in damage measurements, women litigants are of course also subject to the "rules" that govern product liability generally. In this connection, I want to comment just briefly on the latest effort in Congress to pass federal product liability legislation. As noted in the March 1992 ABA Journal, this effort "comes amid growing concerns about the nation's economy and a growing emphasis by the Bush administration on the issue of competitiveness."[32] Under S. 640,

> Punitive damages could be awarded only if a plaintiff established by clear and convincing evidence that injury resulted from a product manufacturer's or seller's "conscious or flagrant indifference to safety of those persons who might be harmed by the product." *A defense against punitive damages would exist in cases involving pharmaceutical drugs, medical devices and aircraft that have governmental approval as long as there was no fraud or bribery of government officials in obtaining that approval.*
>
> An expedited settlement plan would penalize plaintiffs and defendants who reject settlement offers and then go on to lose in litigation. . . . [I]f a plaintiff rejected a defendant's settlement offer and the judgment in the subsequent litigation was for an amount less than the settlement offer, the plaintiff would be liable for the defendant's attorney fees.
>
> . . . [E]ach defendant would be liable only for a non-economic damage amount in direct proportion to its percentage of total responsibility. . . .
>
> Product liability actions would be subject to a two-year statute of limitations, beginning at the time a plaintiff discovered or reasonably should have discovered the harm and its cause.[33]

Although this short Essay is not the place for a lengthy discussion of the vices of this proposed legislation, I do find horrifying the lengths to which it goes in impeding and deterring innocent victims of tortious conduct from recovering full compensation for their injuries (via the short statute of limitation, the partial abolition of joint and several liability, and the unaffordable penalty for rejecting what the plaintiff in good faith believes is an inadequate settlement offer) and in protecting manufacturers from punitive damages. In view of the impossibility that the FDA can be relied upon to warrant the safety of drugs and devices within its bailiwick, and the history of enormous harms being done by these prod-

32. Rhonda McMillion, *New Product Liability Bills*, A.B.A. J., Mar. 1992, at 89.
33. *Id.* (emphasis added).

ucts while their manufacturers hid evidence and refrained from developing evidence of their hazardousness, it is incredible to me that we would afford a defense against punitive damages so long as government approval had not been elicited through fraud or bribery. (Incidentally, if women are disproportionately represented among product liability victims, this legislation would disproportionately disadvantage women.)

In addition to radically improving the ways that compensatory monetary equivalents are determined for injured female mass tort plaintiffs, our tort system, or some other system, needs to provide additional relief to injured parties. Professor Bender has written,

> To compel people imbued with this power [to choose to impose risks on the health and safety of others] to take responsibility for the consequences of their actions and decisions, mass tort law as well as criminal law must be constructed in a manner that imposes personal liability on the individuals with the power . . . [as well as on corporations]. . . . Post-event responsibility ought to mean more than making [monetary] reparations. . . . [The parties responsible for a harm have] an obligation to remedy the harm and to take care of the people harmed . . . [*inter alia*, by personally providing] physical and emotional care . . . for as long as the innocent victims suffer.[34]

While I might not go as far as this last specific remedial proposal, I do certainly agree that the judicial system, or some system, should do more for victims and should impose more than financial responsibility upon those who, through callous indifference to the well being of consumers or substantial negligence, impose serious injuries upon others. Among other things, it is important that the victims who want to communicate their nightmarish experiences to responsible executives be afforded the opportunity to do so; the latter should have to listen. Perhaps the responsible parties should have to author and utter appropriate apologies. And it is not a bad idea at all to have them witness a sample of the pain and impairments that their drugs or other medical devices caused. In addition, executives who have egregiously abused the public trust should be prohibited from exercising important decision-making responsibilities. (Not often enough, but we disbar lawyers and revoke the licenses of physicians; why not similarly disqualify people who have proven themselves ethically or otherwise incompetent and untrustworthy to make decisions that will affect the health and welfare of the public?)

By taking their respective responsibilities seriously, businesses, regulatory agencies and courts could do a lot to make this a safer, more humane and more just society. Until they do a better job, all of us—with

34. Bender, *supra* note 12, at 898-906.

women in the vanguard—will continue to suffer the consequences. But if we suffer, it is inevitable that our children, spouses, lovers, and other family members, to say nothing of our employers and the economy generally, will pay a high price as well, . . . and if women remain as angry at and mistrustful of the system as we now are, who knows what changes will follow?