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CHANGING THE VALUES IN TORT LAW*

Leslie Bender† ‡

I would like to discuss some ways that feminist theory might transform the practice and thinking in tort law, particularly in mass tort law.¹ I have two proposals I would like to share. One is about shifting the burden of proof and persuasion and the initial allocation of economic loss in cases of mass tort injury. This suggestion arises out of an open recognition of the power dynamics in mass tort litigation. In the second proposal, I suggest that we change the values and the moral vocabulary of tort

* Copyright © 1990 by Leslie Bender. All rights reserved. This Essay is an annotated version of a talk I gave at the 12th Annual Critical Legal Studies Conference on The New Public Interest Law, San Francisco, California, on January 7, 1990. It is a synthesis of some of the arguments I made more fully in an article in 1990 *DUKE L. J.* (forthcoming). I would like to thank the *Tulsa Law Journal* editors for their willingness to deviate from Bluebook style.

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‡ At the author's request, citations in the footnotes to this Essay deviate from the style specified by *A UNIFORM SYSTEM OF CITATION* (14th ed. 1987): citations contain authors' first names and the names of publishing companies.

Professor Bender explained that her reasons for requesting the addition of authors' first names are similar to those espoused by Katharine T. Bartlett in a footnote to her article, *Feminist Legal Methods*, in the *Harvard Law Review*. Professor Bartlett wrote:

I had wanted to humanize and particularize the authors whose ideas I used in this Article by giving their first as well as last names. Unfortunately, the editors of the *Harvard Law Review*, who otherwise have been most cooperative, insisted upon adhering to the "time-honored" Bluebook convention of using last names only, see *A UNIFORM SYSTEM OF CITATION* 91 (14th ed. 1986), except when the writing is a "book," in which case the first initial is given, *id.* at 83, and except when the writing is by a student, in which case no name whatsoever is given (unless the student has a name like "Bruce Ackerman," in which case "it may be indicated parenthetically," *id.* at 91), see *id.* In these rules, I see hierarchy, rigidity, and depersonalization, of the not altogether neutral variety. First names have been one dignified way in which women could distinguish themselves from their fathers and their husbands. I apologize to the authors whose identities have been obscured in the apparently higher goals of Bluebook orthodoxy.

Katharine Bartlett, *Feminist Legal Methods*, 103 *HARV. L. REV.* 829, 829 note (1990).

Professor Bender explained that she also wanted the names of publishing companies included in order to enable readers to more easily locate the cited books.—Ed.

1. I am using "mass tort" as a catch-all phrase for products liability, mass torts, and toxic torts that injure large numbers of people (or subject them to the risk of personal injury) and are caused by the products or activities of large, complex corporate enterprises in the pursuit of commercial self-interest.

law. I argue that we must reject the language of economics—costs, dollars, and efficiency—as the dominant discourse for tort law’s understanding of injuries, remedies, and the requirements of justice. A feminist ethic of care can be used to redefine the meaning of responsibility and the kinds of remedies available in tort. These proposals seek significant shifts in how we think about and talk about tort law. I ask you to listen to them with an openness that is not usually required in legal thinking. I know that they are a bit difficult to imagine within the current constraints of our torts models, but I am asking us to go beyond those models and transform tort law in a way that can improve the quality of our lives and our communities.

I. POWER BALANCING

One necessary prerequisite to justice is the equalization of power between disputing or conflicting parties when they present their stories or claims to a court. If one party can overpower the other in our judicial system, then problems are solved by brute strength, wealth, or privilege, rather than by justice, which would instead attend to the particular facts and circumstances of the dispute. Despite our repeatedly articulated value of equality-before-the-law, parties in mass tort litigation come to the courthouse significantly differently empowered, and that power difference affects the possibility of achieving just resolutions.² Corporate defendants are usually highly organized, well-integrated, and wealthy, as opposed to injured plaintiffs, who are more often poorer and are single people, families, or a random conglomeration of people who have temporarily combined in a class action lawsuit.³ Knowledge, social, economic,

2. For the moment, in discussing differential empowerment, I am not discussing the cultural factors that disempower people in our society. Such factors include race, gender, class, education level, religious or ethnic background, sexual preference, age, or different physical capabilities. They are critical aspects of empowerment, and they are deserving of our constant and full attention. Nonetheless, for purposes of this Essay, I am primarily writing about differences of wealth, knowledge, access, and political power. These differences between mass tort victims and corporate defendants in mass tort cases parallel (and often even accompany) differential empowerment in society based on cultural identities and factors.

3. In major mass tort litigation, the defendants have included corporations such as Johns-Manville Corporation (asbestos), Eli Lilly and Abbott Laboratories (DES), A.H. Robins (Dalkon Shield), Dow Chemical (Agent Orange), Beatrice Foods and W.R. Grace (Woburn, Mass., groundwater contamination), Richardson-Merrell (Bendectin), Hooker Chemical (Love Canal), Union Carbide (Bhopal), and Exxon (Valdez oil spill), not to mention the major cigarette producing corporations involved in the tobacco litigation. See also *infra* note 5. Conversely, evidence has shown that plaintiffs or injured persons often had fewer resources. AUDREY CHIN & MARK PETERSON, DEEP POCKETS, EMPTY POCKETS: WHO WINS IN COOK COUNTY JURY TRIALS 10-12 (The Rand Corp., 1985).

and political power advantages or privileges corporate enterprises in lawsuits by injured individuals. Much of what happens in the mass tort litigation process and courtroom is dependent upon the work, knowledge, and power of lawyers, technical and scientific experts, and investigators, all of whom are very expensive. Big corporations often have these lawyers and experts on their payrolls and have the information they need within their corporate network. Unlike the injured plaintiffs who do not know they will be injured until after tragedy strikes, corporate defendants have planned for the contingency of conflict and potential litigation.⁴ The way the system is now, injured plaintiffs often have to engage in years of investigation and research just to locate the factual information they need from a corporate defendant. They cannot know there is a "smoking gun" until they find it, and they have to find it before the corporation destroys it.⁵ This process is very long, expensive, and alienating

4. PETER REUTER, *THE ECONOMIC CONSEQUENCES OF EXPANDED CORPORATE LIABILITY: AN EXPLORATORY STUDY* (The Rand Corp., Nov. 1988) (empirical study showing that corporations alter their behaviors in response to potential tort liability); David Rosenberg, *The Causal Connection in Mass Exposure Cases: A "Public Law" Vision of the Tort System*, 97 HARV. L. REV. 851, 902-05 (1987).

5. The destruction or concealment of important corporate documents by defense counsel and defendants has characterized some mass tort litigation. Evidence of concealed information and dilatory and/or deceptive discovery practices by corporate defendants occurred in asbestos cases where toxic exposures leading to asbestosis, mesothelioma, and lung cancers were concealed. RUSSELL MOKHIBER, *CORPORATE CRIME AND VIOLENCE: BIG BUSINESS POWER AND ABUSE OF THE PUBLIC TRUST* 277, 283-84 (Sierra Club Books, 1988). A medical director of Manville, the nation's largest asbestos manufacturer, admitted to a policy of refusing to advise workers of asbestosis because

as long as the man is not disabled, it is felt that he should not be told of his condition so that he can live and work in peace and the Company can benefit by his many years of experience. Should the man be told of his condition today, there is a very definite possibility that he would become mentally and physically ill, simply through the knowledge that he has asbestosis.

Id. at 283-84 (quoting SAMUEL EPSTEIN, M.D., *THE POLITICS OF CANCER* 93 (Anchor Press/Doubleday, 1978)). See also *Borel v. Fibreboard Paper Prod. Corp.*, 493 F.2d 1076 (5th Cir. 1973), *cert. denied*, 419 U.S. 869 (1974); *Johns-Manville Prod. Corp. v. Contra Costa Super. Ct.*, 27 Cal. 3d 465, 165 Cal. Rptr. 858, 612 P.2d 948 (1980) (asbestos corporations fraudulently withheld information about plaintiffs' illnesses); PAUL BRODEUR, *OUTRAGEOUS MISCONDUCT: THE ASBESTOS INDUSTRY ON TRIAL* (Pantheon Books, 1985).

Corporate defendant discovery abuse was also found in the Woburn litigation. See *Anderson v. Beatrice Foods Co.*, 3 Toxics L. Rep. (BNA) 875 (Dec. 14, 1988) (groundwater contamination case in which the U.S. Court of Appeals for the First Circuit found that there was "overwhelming evidence" of discovery misconduct during the *Anderson v. W.R. Grace* litigation).

Questionable corporate practices also occurred in the Dalkon Shield cases in which an IUD with a defectively designed tail-string caused deaths, abortions, infertility, pelvic inflammatory disease, and other injuries to women and their fetuses. See Miles Lord, *The Dalkon Shield Litigation: Revised Annotated Reprimand by Chief Judge Miles W. Lord*, 9 HAMLINE L. REV. 7 (1986); SHELTON ENGELMAYER & ROBERT WAGMAN, *LORD'S JUSTICE* (Anchor Press/Doubleday, 1985); MORTON MINTZ, *AT ANY COST: CORPORATE GREED, WOMEN, AND THE DALCON SHIELD* (Pantheon Books, 1985). For examples of corporate misconduct in other areas, see Matt Tallmer, *Chemical Dumping as a Corporate Way of Life*, in *CORPORATE VIOLENCE: INJURY AND DEATH FOR PROFIT*

to plaintiffs who are simultaneously coping with the burdens of their injured bodies and their unequal wealth and power. In addition, plaintiffs are forced by the system to bear all the initial economic costs—such as medical expenses and lost income—until they win their lawsuits and appeals.⁶ How can courts and tort law work to alleviate the disadvantages of this inequality of power within the judicial process?

Courts have taken one of two approaches to deal with inequalities of power between parties. One is to ignore it.⁷ This is the dominant legal approach. It is noninterventionist—a free market approach of letting the chips fall where they may, even if that gives one party a license to overpower the other. A court will blindfold its eyes to the power imbalances. The other approach is an interventionist approach, based on paternalism, to protect the vulnerable, less powerful, wounded, or alien.⁸ Legal paternalism by courts is usually an act of *noblesse oblige*, an isolated gesture of mercy, a gift from the empowered. A court substitutes its power for that of the weaker party and momentarily overpowers the mightier one.

A feminist analysis leads to a third approach for dealing with inequality of power between parties before the court. This approach entails empowering others, or what I call power-balancing. Professor Robin West, in her influential article, *Jurisprudence and Gender*, distinguishes between dominant male and alternative female experiences of power and

111 (S. Hills, ed., Rowman & Littlefield, 1987) (Hooker Chemical Co. cases involving Love Canal, Bloody Run Creek, Bethpage, and Hicksville, N.Y., Taft, La., and Occidental Chemical Co. at Lathrop, Cal.); *Elam v. Alcolac, Inc.*, 765 S.W.2d 42 (Mo. Ct. App. 1988), *cert. denied*, ___ U.S. ___, 110 S. Ct. 69 (1989) (“state of the art” chemical plant with environmental controls managed by uneducated janitor who “squeegied” toxic chemicals into the sewer system and clear management cost-based rejections of necessary environmental improvements that caused physical injuries and chemically-induced immune deficiencies in neighbors).

6. Of course, some of plaintiffs’ expenses may be paid by first-party insurance, health care insurance provided through their workplaces, workers’ compensation, and/or government benefit programs.

7. Power differences are ignored in the sense that they are not spoken of, but not in the sense that the differences do not make a difference. To truly ignore these power differences and their effects, courts would have to alter the process dynamics to eliminate power advantages or disadvantages.

8. Duncan Kennedy, *Distributive and Paternalist Motives in Contract and Tort Law, with Special Reference to Compulsory Terms and Unequal Bargaining Power*, 41 MD. L. REV. 563 (1982) (arguing that decisionmakers use paternalist motives under the rhetoric of unequal bargaining power, although they disguise them as distributive or efficient); Frances Olsen, *From False Paternalism to False Equality: Judicial Assaults on Feminist Community, Illinois 1869-1895*, 84 MICH. L. REV. 1518 (1986). For slightly different uses of the idea of paternalism in law and philosophy, see Gerald Dworkin, *Paternalism*, in PHILOSOPHY, POLITICS AND SOCIETY, 78 (Yale Univ. Press, 5th ser., 1979), reprinted in abridged form from 56 *The Monist* 1 (Jan. 1972) (“By paternalism I shall understand roughly the interference with a person’s liberty of action justified by reasons referring exclusively to the welfare, good, happiness, needs, interests or values of the person being coerced.”); David Luban, *Paternalism and the Legal Profession*, 1981 WIS. L. REV. 454.

notes how those different understandings of power affect its uses and responsibilities.⁹ While debates rage about whether these differences are biologically tethered, socially constructed as part of gender, or politically constructed through subordination and oppression, the resolution of those debates does not affect the depth of West's insight about different kinds and uses of power. West suggests that women's experiences of having power often arise in situations of grave inequality, as in parenting, where a woman usually uses her power to protect and guide, rather than overbear or control. She explains that parental (in particular maternal) power, derived from the physical power and knowledge differential between parent and child, is interpreted by the power-holder as a responsibility to care for and empower the less powerful child.¹⁰ Sara Ruddick makes a similar observation about maternal power and practice in her writings.¹¹ It is the very awareness of the inequality of power that prompts or produces the responsibility to protect, to enable, and to give care.

These two modalities of power can be differentiated as "overpowering or controlling/protecting" (a masculinist model) and "empowering or power-balancing" (a feminist model). In general, our legal system claims to remain neutral or blind to the power of the parties before it, but occasionally in the face of evidence of unconscionable abuses of unequal power, a court will exercise its paternalistic power to "overpower" the bully, "control" the parties, and "protect" the vulnerable in the masculinist model sense. This paternalistic intervention is not bad or wrong for a court to do, but it is not the same as empowering a disadvantaged party. The general power imbalance of the parties as litigants in the court is neither addressed nor altered by a court's paternalistic intervention. The court and the rules of law do not respond to a disadvantaged party's need for empowerment, nor do they balance power in the courthouse so that she or he can have equal access to, or opportunities for,

9. Robin West, *Jurisprudence and Gender*, 55 U. CHI. L. REV. 1 (1988). She elaborates further on this analysis in Robin West, *Feminism, Critical Social Theory and Law*, 1989 U. CHI. LEGAL F. 59, 80-81.

10. Let me not be misunderstood. Although I believe that our understandings and experiences of this kind of exercise of power arise out of women's experiences in caregiving to persons less enabled than they are (e.g., children, elderly, sick, or injured), I am not representing that this concept of power is unique to women or that all women understand power in this manner.

11. SARA RUDDICK, *MATERNAL THINKING: TOWARD A POLITICS OF PEACE* (Beacon Press, 1989) (Maternal practice, in societies where children demand protection, nurturance, and training, involves the exercise of power to achieve the goals of preservation, growth, and social acceptability for one's children.).

justice. Legal paternalism does not challenge the distribution of power or how it impacts on the judicial process itself.

To empower a mass tort plaintiff, a court must alleviate some of the initial impediments to equal justice. This can be done by shifting some burdens from the less powerful, injured plaintiff to the disproportionately empowered corporate defendant. Because injured victims of mass harm do not usually have lawyers, ready access to necessary evidence or information to support their claims,¹² or adequate resources to spend, it makes sense to shift the burden of initiating a lawsuit and burdens of proof and persuasion to the more-empowered party who putatively caused the harm or created the risk and who can better bear this burden.

Tort law doctrine and common law judges can alter burden-shifting rules by placing the risks of nonproduction and nonpersuasion¹³ on the more-empowered party to the litigation, which in mass tort would probably be a corporate defendant. Once plaintiff has filed an injury claim accompanied by a simple probable-cause-like showing that a corporate defendant created a risk of harm to which the plaintiff was exposed, the law can immediately require the corporate defendant to pay all of plaintiff's economic losses (medical expenses, wage loss, specials).¹⁴ Tort doctrine could raise a rebuttable presumption that a corporate defendant was liable for all such expenses.¹⁵ If defendant believes it is unjust that it should be required to pay economic losses, then defendant has the burden of initiating legal action to persuade a court that it is not responsible

12. For example, the evidence discovery task would be easier for a corporate producer or actor putatively responsible for the harm because of its easier access to the information and its greater resources. A defendant's greater access to necessary information has been recognized by courts as grounds for shifting burdens. See *Barker v. Lull Eng'g Co.*, 20 Cal. 3d 413, 143 Cal. Rptr. 225, 573 P.2d 443 (1978).

13. For purposes of this Essay, I use "burden of proof" to mean the obligation to produce evidence and convince or persuade a court or jury about the correctness of your position in order to prevail. Wigmore referred to this as the "risk of nonpersuasion" and "the risk of nonproduction." 9 WIGMORE, EVIDENCE §§ 2485, 2487-2488 (1981), cited in FLEMING JAMES, JR., & GEOFFREY HAZARD, JR., CIVIL PROCEDURE §§ 7.6 n.1, 7.7 n.2 (3d ed. Little, Brown & Co., 1985).

14. It is imaginable that with a change to a corporate defendant's burden of proof and a plaintiff's presumption of nonliability in mass tort cases, a court might require a defendant immediately to escrow funds for the plaintiff's benefit and may entitle plaintiff access to some of those funds for health, maintenance, and even litigation expenses as needed. Alternatively, the law could require that defendant's employee compensation and health plan cover the victims after an initial probable cause showing has been made. Failure to act immediately, as required by law, could subject the recalcitrant or dilatory defendant to sanctions.

15. An Indian lower court made a similar move in response to the Bhopal tragedy when it ordered that Union Carbide pay \$192 million into a fund for the victims prior to any trial or finding of liability. Stephen Adler, *Bhopal Ruling Tests Novel Legal Theory*, WALL ST. J., May 15, 1988, at 33, col. 3.

for plaintiff's harms.¹⁶ If defendant prevails, defendant would be entitled to repayment of the moneys it fronted. Likewise, if plaintiff believed she was entitled to more than economic losses, she could counterclaim or initiate an action for noneconomic damages.

The tort system works in the opposite fashion today. Plaintiffs must bear the economic loss and expenses of their own injuries, even if they were faultless and defendants clearly caused their harm. But if they file a lawsuit and win, the defendant must repay them. In our current construction of tort law, defendants come to court with a rebuttable presumption of nonliability. I am arguing that the presumption could just as readily attach to the less-empowered plaintiffs. The law already uses a presumption of nonliability. The issue here is where it should best be placed to foster justice and fairness.

Burden-shifting presumptions like the one I propose here are not uncommon in law. They are used, for example, with *res ipsa loquitur*,¹⁷ market share and enterprise liability,¹⁸ or alternative joint liability.¹⁹ However, the presumptions usually shift the burden of just one element of the cause of action—causation or negligence. This proposal, designed to balance the power of the parties, would shift the initial presumption of

16. This power-balancing approach would work just as well in a case where the plaintiff is a large corporate organization and the defendant is a less-empowered individual. The burden of proof and production would always be placed on the more-empowered party and the presumption of nonliability would always be on the less-empowered party, regardless of which one is the plaintiff or defendant.

17. See *Ybarra v. Spangard*, 25 Cal. 2d 486, 154 P.2d 687 (1944); *Escola v. Coca Cola Bottling Co.*, 24 Cal. 2d 453, 150 P.2d 436 (1944); *Byrne v. Boadle*, 159 Eng. Rep. 299 (Ex. Ch. 1863). *Res ipsa loquitur* either raises an inference of negligence that permits a plaintiff to get to a jury or raises a presumption of negligence that shifts the burden to a defendant to rebut, depending upon the particular jurisdiction. DAN DOBBS, *TORTS AND COMPENSATION: PERSONAL ACCOUNTABILITY AND SOCIAL RESPONSIBILITY FOR INJURY* 173 (West Pub. Co., 1985); PROSSER & KEETON, *TORTS* §§ 39-40 (5th ed. West Pub. Co., 1984).

18. See *Sindell v. Abbott Laboratories*, 26 Cal. 3d 588, 163 Cal. Rptr. 132, 607 P.2d 924, *cert. denied*, 449 U.S. 912 (1980); *Hall v. E.I. Du Pont De Nemours & Co.*, 345 F. Supp. 353 (E.D.N.Y. 1972); *Collins v. Eli Lilly Co.*, 116 Wis. 2d 166, 342 N.W.2d 37, *cert. denied*, 469 U.S. 826 (1984); *Martin v. Abbott Laboratories*, 102 Wash. 2d 581, 689 P.2d 368 (1984). These relatively new enterprise or alternative liability theories were developed in the context of DES litigation. In circumstances where negligence or strict liability has been proven but proof of identity of a specific defendant has been made impossible through no fault of the plaintiff, the burden of proof is shifted to the multiple defendants to prove the identity of the single defendant who caused the harm.

19. See *Summers v. Tice*, 33 Cal. 2d 80, 199 P.2d 1 (1948). Alternative joint liability will shift the burden of causation to defendants when all possible defendants are before the court and have been proven to have been negligent towards the plaintiff, but identification of which one of the several defendants caused the harm is impossible. See also *RESTATEMENT (SECOND) OF TORTS* § 433B (1965).

nonliability for economic losses from the corporate defendant to the injured plaintiff and simultaneously shift the entire burden of proving liability and producing persuasive evidence from the injured plaintiff to the corporate defendant.

In addition to power-balancing, this proposal will have two other beneficial side effects. First, if defendants are required to pay first and sue to recoup their losses, they will no longer be motivated to use their resources to delay and obfuscate resolution of cases. Secondly, if the law holds corporate defendants liable for the initial economic losses due to injuries, defendant corporations might use their greater political clout to lobby for kinds of socialized medical care and income maintenance for injured plaintiffs. Defendants have no incentives to lobby actively for these statutory, tax-funded compensation schemes when they have no responsibility for the initial economic losses. Upon a change in the burden of proof and persuasion and the presumption of nonliability, it is likely that defendant corporations would immediately seek political relief in the form of compensation plans, or, if nothing else, they would insure accordingly.

By power-balancing or empowering a party, the court is not interfering in the merits or substance of the controversy. This feminist approach does not "decide" the case, but gives the parties more equal opportunities to present their claims. If we continue with only the masculinist approach to power taken by courts, wherein they intervene "ad hoc" paternalistically in deciding particular cases based on a vulnerability of one party or an abuse of power by another, we ignore the role that unequal power and resources currently play in the legal conflict-resolution process itself. We also contravene our ideal of equal-justice-before-the-law which includes the belief that justice is not "for sale" to the highest bidder. If the burden remains with unempowered injured plaintiffs, plaintiffs' capacities to underwrite (or plaintiffs' abilities to locate experienced, wealthy lawyers to underwrite) these costs will determine plaintiffs' access to discovery, experts, trial, settlement, and ultimately justice. Even with this alteration in the burden of proof and the presumption of nonliability for the plaintiff, defendant corporations in mass tort cases would be as capable of prevailing in the litigation on the merits as they are today, but they will not be as advantaged in the process by their greater resources, power, or knowledge.

Because my time is limited, I must move on to my second proposal, but I hope you have at least an idea about these possibilities.

II. LEGAL RESPONSIBILITY AS "TAKING CARE OF"

I realize that I am asking a lot of openness of you as a listener, because my next proposal imagines a major change in how we think about what law is and can do in the area of tort, about how law understands human relationships, and about how it reflects and implements our values. I am asking you to rethink seriously how law remedies personal injuries. I am seeking a paradigm shift in how lawyers understand responsibility in tort law. There is a conservative human tendency to dismiss major changes as unworkable and to prefer the status quo. I hope you will fight that impulse and listen openly. This will require you to start thinking from different premises and assumptions than currently underlie tort law when it considers just resolutions of personal injury problems.

Tort law has been weighted down by a language and value system that privileges economics and costs. Every time there is an injury, we determine legal responsibility by asking about the dollar and efficiency costs of paying for the harms and/or of avoiding them. Questions of cost that have consistently been our first or second inquiry ought to come much later in the analysis. So as you listen to this, if you are prompted to ask "how much will this cost?", or "wouldn't it be more efficient or cost-effective to . . . ?", or "how can we pay for this?", please suspend these questions about the economics of accidents for the time being.

As harms from mass tort have become more widespread, legal analysis in tort law has become desensitized to the individuals and groups of people harmed. The more people who are injured or subjected to the risk of injury, the more tort law dehumanizes people generally, sees them as statistics, or sees their injuries as costs of economic growth and progress. If this kind of legal thinking is inconsistent with our core values, we ought to reject it outright as violative of human dignity and equality and reorient legal values to appreciate every individual's special humanity. Strangers are no less human because we do not know them. Legal doctrines must be reconstructed to treat each person with the same care and concern that we would want given to our friends and family, to the people we do know.

Feminist theory and method, particularly insights from the work of Carol Gilligan, can help us alter the values and moral vocabulary of tort

law.²⁰ My suggestion is that we use feminist theory to change the meaning of responsibility in tort—which now means primarily an obligation to make monetary reparations for harms caused—to a meaning rooted in a concept of care. This enriched meaning of responsibility arises out of our recognition of our interconnectedness as human beings and has to do with responding through interpersonal caregiving to the needs of someone who has been injured. It means taking care of. Responsibility as taking care of, rather than solely as paying for, seems completely absent from the law, although it is part of our social understanding of the meaning of responsibility that arises out of our experiences as parents, siblings, lovers, friends, and neighbors.²¹ It is time for legal responsibility to include this meaning.

20. CAROL GILLIGAN, IN A DIFFERENT VOICE: PSYCHOLOGICAL THEORY AND WOMEN'S DEVELOPMENT (Harvard Univ. Press, 1982) [hereinafter GILLIGAN, IN A DIFFERENT VOICE]; Carol Gilligan, *Remapping the Moral Domain: New Images of Self in Relationship*, in MAPPING THE MORAL DOMAIN: A CONTRIBUTION OF WOMEN'S THINKING TO PSYCHOLOGICAL THEORY AND EDUCATION 3 (C. Gilligan, J. Ward, J. Taylor, and B. Bardige, eds., Harvard Univ. Press, 1988).

21. Carol Gilligan and her associates have denominated this approach an ethic of care. Professor Gilligan noted that standard evaluations of moral development based on open-ended answers to hypothetical moral problems failed to listen carefully to the multiple perspectives being expressed by subjects. GILLIGAN, IN A DIFFERENT VOICE, *supra* note 20. In particular, she focused her criticism on Lawrence Kohlberg's multi-stage model. Kohlberg's popularly used and respected psychological measuring tools valued answers from the perspective Gilligan called an ethic of rights or ethic of justice. These tests concluded that moral reasoning was more advanced if it was based on (1) abstract principles (like equality, justice, fairness), (2) objective and universal rules, (3) fair formal procedures, and (4) the balancing of hierarchical rights (property, contract, duty). See GILLIGAN, IN A DIFFERENT VOICE, *supra* note 20. Gilligan contrasted the ethic of rights/justice with another ethic that had been excluded, submerged, or undervalued by contemporary psychological measures. This different approach or different voice was founded on an ethic of responsibility and care. Gilligan claimed that these different "voices" (of rights/justice and responsibility/care) depended greatly on different perceptions of human relationships and manners of seeing others. See GILLIGAN, IN A DIFFERENT VOICE, *supra* note 20.

Nona Lyons pursued Gilligan's research and found two distinct perspectives of self, relationships, and morality—the separate/objective self and the connected self. Nona Lyons, *Two Perspectives: On Self, Relationships, and Morality*, in MAPPING THE MORAL DOMAIN, *supra* note 20, at 21. The separate/objective self ("autonomous in relation to others") has a perspective of relationships based on reciprocity (considering others as one would like to be considered, with objectivity and fairness, and assuming that others are the same as self) mediated through rules (primarily of equality) and grounded in roles (that are derived from obligations and duties). Lyons, *supra*, at 33. The connected self ("interdependent in relation to others") experiences its relationships through responses to others *in their terms* ("alleviation of their burdens, hurt, or suffering") mediated through the activity of care (focused on maintaining connection and caring in relationships) and grounded in interdependence and interconnectedness. Lyons, *supra*, at 33-35. The response and care perspective requires seeing others in their own terms, contextually, and assumes that others are different from oneself. Lyons, *supra*, at 34.

Carol Gilligan and Jane Attanucci distinguished between these foci as follows:

A justice perspective draws attention to problems of inequality and oppression and holds up an ideal of reciprocity and equal respect. A care perspective draws attention to problems of detachment or abandonment and holds up an ideal of attention and response to need. Two more injunctions—not to treat others unfairly and not to turn away from

A responsibility to give care (or care for) has always existed in the lived experiences of tort victims and their friends and families. Injured people need direct, personal services of caregiving to survive and recover. Interpersonal caregiving always involves planning, organizing, managing, being available as needed, and keeping another's needs in the forefront of one's mind. Personal caregiving consists of both physical and emotional work in response to the needs of the person being cared for.²² It runs the gamut from providing services such as shopping, transportation, and arranging for medical treatments, to retraining or educating, to feeding and aiding in personal hygiene care, to rebuilding self-confidence, and even to spending time with the injured person and treating her with dignity and importance.²³ It requires personal time, energy, and attention from the caregiver in a manner completely ignored by the tort system.

someone in need—capture these different concerns Since everyone has been vulnerable both to oppression and to abandonment, two moral visions—one of justice and one of care—recur in human experience.

Carol Gilligan & Jane Attanucci, *Two Moral Orientations*, in *MAPPING THE MORAL DOMAIN*, *supra* note 20, at 73-74. Both Gilligan and Lyons hinted that these different perspectives were associated with gender—that is, women more dominantly expressed the care/response focus and men expressed themselves more often in terms of justice or equality/rights. GILLIGAN, *IN A DIFFERENT VOICE*, *supra* note 20; Lyons, *supra*. Gilligan and Attanucci did a later study to explore gender associations with these moral orientations. Gilligan & Attanucci, *supra*, at 73. Their preliminary results indicated that both men and women express concerns about justice and care, “but [that] people tend to focus on one set of concerns and minimally represent the other.” Gilligan & Attanucci, *supra*, at 82. The problem with the simultaneous co-existence of each perspective is that they seem to contradict one another.

The tension between these perspectives is suggested by the fact that detachment, which is the mark of mature moral judgment in the justice perspective, becomes *the* moral problem in the care perspective—the failure to attend to need. Conversely, attention to the particular needs and circumstances of individuals, the mark of mature moral judgment in the care perspective, becomes *the* moral problem in the justice perspective—failure to treat others fairly, as equals.

Carol Gilligan & Jane Attanucci, *supra*, at 82 (emphasis in original). Both perspectives are important to resolving torts disputes, but the different voice that is more common in women is practically nonexistent in tort law.

22. See ARLIE HOCHSCHILD, *THE MANAGED HEART: COMMERCIALIZATION OF HUMAN FEELING* (Univ. of Cal. Press, 1983).

23. It is inevitable at this point in my argument that someone finds a particularly exaggerated and distorted example of caregiving so that he can reject this model outright. For example, a professor at Duke Law School rejected this idea based on a hypothetical he devised. The professor assumed that this theory would require him to be bathed and fed by a large, hostile, and burly Hell's Angel biker from the late 1960s after that person had scratched the professor's classic, cherry red motorcycle when no one was on or near it. Panel discussion on Tort Remedies, *Frontiers of Legal Thought Conference*, Duke Law School, January 25, 1990.

When I presented this idea at the Association of American Law Schools annual meeting Torts Section panel, January 5, 1990, some audience members dismissed the model with sarcastic chortles about Lee Iacocca chauffeuring victims of Pinto accidents or corporate executives “wasting” their time bathing and feeding victims. Others were prompted immediately to ask about the economic efficiency and costs of the plans. I understand that our legal training leads us to these “reflex”

The burden of caregiving has traditionally fallen on the friends and family of the injured and on people hired to do these tasks—usually lower class women who are paid too little and are given no prestige for their vital work. Tort law has never deemed interpersonal caregiving to be the responsibility of the tortfeasor, except perhaps to pay for a small portion of it. If interpersonal caregiving is a necessary and essential part of the social and moral responsibility involved in taking care of any injured person, why doesn't legal responsibility include it? Someone must always do this work when there is injury. If the law doesn't hold a tort defendant liable or responsible for this caregiving, who ends up being "held responsible" by default? The law's ignoring these responsibilities does not make them go away. And if all the law does is ask a harm-causing defendant to pay the costs of others' caregiving, it is passing on or transferring the interpersonal caregiving responsibility to a third party instead of requiring a defendant to assume it.²⁴

It is arguable that the law's meaning of responsibility does not include interpersonal caregiving because that kind of work has traditionally been done by women, not by the men who created and developed

responses and argumentative techniques. I would like humbly to suggest that many of these responses miss the point I am trying to make. Perhaps it is too difficult for well-trained legal scholars to listen with the openness I asked for. Law is a very conservative discipline.

It would be valuable at least to reiterate here that the caregiving responsibilities that I argue the law ought to impose would be particularized to the needs and desires of the injured party and would be responsive to the personal injuries suffered from defendants' conduct or decisionmaking. For example, in the Duke professor's hypothetical which I described above, he suffered no personal injuries in the accident, so he would not need the defendant to "bathe or feed" him. Secondly, if the theory was to apply in a circumstance without personal injuries, it might be the responsibility of a harm-causer to arrange for alternative transportation and the repair of the damaged property, in addition to paying for those damages.

24. If defendants can buy insurance or pay their debt and terminate their liability, they will not fully own up to their interpersonal responsibility. Victims cannot buy insurance that will prevent them from having to live with their suffering and cope with their disabilities. Insurance might provide money for out-of-pocket expenses (and even for intangible harms), but it does not begin to address the other human aspects of injury.

One argument for change would be to place a dollar value on this caregiving work, enumerate all the possible ways in which it might be needed, and then make defendant corporations responsible by requiring them to internalize these costs as well. Caregiving costs are a necessary part of our economy that has been silently and "freely" borne by families (and primarily women). Now that we realize this and have learned about the labor value of these caregiving responsibilities on the market, we are able to calculate their approximate economic value for inclusion in a corporate defendant's damages liability. Tort law could be amended so that financial responsibility for harm includes the market value of caregiving costs. While this is an optional argument, it compounds the problem of translating everything into dollar values which, I have argued elsewhere, led to the "liability crisis" in the first place. It also permits defendants to transfer their "responsibility" by purchasing more insurance. The price of insurance can be calculated into the price of the product or the cost of the activity. This spreads the loss in an efficient fashion, but fails to encourage corporate officers, employees, and shareholders to take individual or personal responsibility for the consequences of their decisions or actions.

tort law, nor by the men who ran the business world that created all these mass torts and personal injuries. Those men may have inadvertently universalized the meaning of responsibility from their own experiences without recognizing its partiality and underinclusiveness. To them, being responsible for family usually meant providing financial support. Therefore, it is not surprising that when they wrote the law, “paying for” or “financial responsibility” became the definition of responsibility. But now, in the 1990s, we can see how flawed and incomplete that reasoning is.

Women have always known that responsibility means taking care of and that taking care of involves interpersonal caregiving, time, and energy. If women had designed tort remedies, we probably would have done it very differently. By using only part of human experience to construct law, we get laws that only partially respond to human needs. There is nothing natural or necessary about the way law is ordered now. We can construct tort law to recognize the human and social character of injured people rather than just their commodity or exchange value. We can change the meaning of responsibility in tort law to blend obligations to pay and obligations to give care. Neither one alone would be adequate—at least not until we get a system of guaranteed health care and income maintenance. If that came to pass, then we could cut back the meaning of responsibility to include only obligations of caregiving.

How can the law hold corporate defendants, corporate officers, and corporate decisionmakers personally responsible in an interpersonal caregiving way for the mass harms they cause in their relentless pursuit of materialism and convenience? This is where we all need to brainstorm. We need to develop new kinds of remedies where corporate officers have *nondelegable* duties to provide direct interpersonal services—time and energy—for the care of their victims or of persons similarly situated.²⁵ Each situation would be different. The specific kinds of care

25. It is certainly possible that a particular victim would not want to see or be with the person who caused the harm she suffers. In that case, defendants may be required to take interpersonal caregiving responsibility for a different, but similarly situated person, and other defendants might take some interpersonal caregiving responsibility for the first victim.

Defendants who are inexperienced in caregiving may need to be trained to do physical caretaking (from changing bedding or dressings, to feeding, exercising, providing transportation, or whatever is needed), to provide emotional care and support, and to focus on another's needs and respond to them.

How can you teach someone to give care? This may be a difficult task, but we do it every day in training children and in training students or apprentices in caregiving professions. The more complicated question is: Would care by someone forced by law to give it be worse than no care at all?

needed would depend on the particularized needs of the victim.²⁶ If tortfeasors have to take direct personal caregiving responsibilities for the harms they cause, then families and friends of victims will be relieved of a portion of the increased responsibility the injuries have imposed upon them. The responsibilities will not be lifted completely from loved ones, but the help with them will be appreciated.

A salutary effect of this change might be that corporate officers would be goaded into reprioritizing health, welfare, and human dignity in their decisionmaking because they would know they would have to give personal caregiving services to persons injured by their actions or decisions. Because they would not want to spend their time, effort, and emotional energy on strangers they happened to injure while doing their jobs, they would take much greater care to avoid that potentiality.

It is hard to imagine how this could work, because we have been so inculcated in the language of dollars and costs—paying for injuries, not giving care. But I ask you to be open. A legal definition of responsibility in tort that includes notions of interpersonal caregiving, of taking care of, makes sense if we can agree on certain assumptions or premises. If we can agree that part of being human is being connected, interrelated, and mutually dependent; if we can agree that personal injuries always give rise to needs for interpersonal caregiving, in addition to needs for money; if we can agree that a language of torts that singularly translates injuries and responsibility into dollars is partial, inadequate, and disrespectful of the fullness of our human dignity; and if we can agree that we prefer values in tort law that go beyond economics and a language of dollars to

Would it feel demeaning and awful to the recipient? It is hard enough to accept ideas like Rousseau's about forcing people to be free; what about forcing people to give care? We need to think seriously about what this really means, how it could be accomplished, and the effects it would have on the victims or recipients of this kind of care.

Maybe it is not giving care that we ought to require of tortfeasors, but performing some of the traditional caregiving functions to alleviate the burden on family and friends. The point I want to emphasize here is that, as difficult as it might be to conceptualize requiring care or caregiving behavior from mass tortfeasors, by not requiring this kind of interpersonal responsibility from defendants, we are requiring it from family members or loving friends. It has to be done. It does not go away because we do not require defendants to do it. It is just silenced and unvalued.

26. For example, in the Dalkon Shield cases, corporate defendants might be ordered by law to fulfill their caregiving responsibilities by finding openings in infertility clinics for victims, arranging their appointments and transportation for the necessary visits, organizing necessary clinics if what already exists is inadequate, locating competent marriage and psychological counseling, developing private adoption alternatives for those women who want children but cannot conceive, and the like. For cases like the Exxon oil spill, corporate officers and executives might be required to do the physical labor of cleaning oil from the birds and shorelines. In the Pinto cases, it might be perfectly appropriate to have Lee Iacocca and his top corporate officers transport burn victims to medical facilities, arrange for appropriate living spaces and available nursing care, and work in burn centers giving their support (emotional, physical, companionship) to victims or those similarly situated.

include an ethic of care, I know that together we can develop concrete and practical remedies.²⁷ I invite your suggestions and critiques. I would like these ideas to begin a new conversation—a dialogue about the possibilities of reconstructing the underlying values of tort law and of eliminating our often callous indifference to risk-imposition.

27. I imagine that the people who first suggested community service obligations as criminal penalties were pooh-poohed as impractical. Yet community service is now an accepted part of our criminal jurisprudence.

