

Feminist Approaches to Tort Law

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This article observes that one of the most interesting developments in tort scholarship during recent years has been the emergence of a literature analyzing tort problems from feminist perspectives. The article looks at three of the areas that feminist writers have explored: the possibility of a "reasonable woman" standard as an alternative to the "reasonable man"; the possible recognition of a duty to rescue, which allegedly would be in harmony with feminist ethics; and the issue of how the tort system should respond to types of harms that are disproportionately suffered by women. The article concludes that the feminist discussions of these topics have enriched the discourse of tort. Still, those discussions have been, in significant respects, inadequate. They have failed, for example, to take advantage of the relevant empirical information; and certain key issues relating to legal history and legal theory have remained underdeveloped.

INTRODUCTION

In an article published a few years ago,¹ I pointed out that there are two major camps of tort scholars. One camp approaches tort law from an *ex ante* perspective of deterrence and the furnishing of appropriate incentives to potential injurers. The other looks at tort law as an after-the-fact effort to achieve corrective justice as between injurer and victim. As my article indicated, under general trends, each scholarly school either ignores or disparages the other school. The article, disapproving of these trends, indicated how bridges can easily be built between the two. In particular, the article suggested that tort law's deterrence goal has a humane and humanitarian quality about it, which enables it to extend beyond the

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¹ Gary T. Schwartz, *Mixed Theories of Tort Law: Affirming Both Deterrence and Corrective Justice*, 75 Tex. L. Rev. 1801 (1997).

often narrow confines of an economic analysis.² For example, if one party's negligence that injures another is understood as violating that other's moral rights, then tort law's deterrence effects can be understood as serving a justice protecting function.

A few years later, there is little in this analysis that I would want to *revise*, yet I can at least *supplement* that analysis by pointing out that in recent years, both deterrence scholarship and corrective justice scholarship have been in steady state: there has been an absence of important new developments. In fact, the economic analysis of tort law largely reached stability in the 1980s. In 1987, both Shavell and the Landes-Posner team published books on the economic analysis of tort law.³ These books marked the culmination of scholarship that Posner had been engaged in since 1972⁴ and Shavell since 1980.⁵ Since 1987, most of their attention has been focused on other fields of law.⁶ In 1985 and 1987, respectively, George Priest wrote two important articles analyzing (and criticizing) tort law from an economic perspective;⁷ but in the 1990s, Priest largely directed his energies elsewhere. Alan Schwartz burst forth into tort scholarship with an important article on products liability in 1989;⁸ since then, however, he has turned away from torts as a scholarly field. In the 1980s, Mark Grady published several articles advancing interesting and original economic ideas;⁹ but in the 1990s, Grady (even before becoming a dean) was largely content merely to work out new applications of those ideas he had previously developed.¹⁰ It has now been

2 *Id.* at 1828-34.

3 William M. Landes & Richard A. Posner, *The Economic Structure of Tort Law* (1987); Steven Shavell, *Economic Analysis of Accident Law* (1987).

4 Richard A. Posner, *A Theory of Negligence*, 1 J. Legal Stud. 29 (1972).

5 Steven Shavell, *Strict Liability versus Negligence*, 9 J. Legal Stud. 1 (1980).

6 Shavell has recently co-authored a long article on punitive damages. A. Mitchell Polinsky & Steven Shavell, *Punitive Damages: An Economic Analysis*, 111 Harv. L. Rev. 869 (1998). But the basic idea on which that article relies was developed by Dan Ellis back in 1982. Dorsey D. Ellis, Jr., *Fairness and Efficiency in the Law of Punitive Damages*, 56 S. Cal. L. Rev. 1 (1982).

7 George L. Priest, *The Current Insurance Crisis in Modern Tort Law*, 96 Yale L.J. 1521 (1987); George L. Priest, *The Invention of Enterprise Liability: A Critical History of the Intellectual Foundations of Modern Tort Law*, 14 J. Legal Stud. 461 (1985).

8 Alan Schwartz, *Proposals for Products Liability Reform: A Theoretical Synthesis*, 97 Yale L.J. 353 (1988).

9 E.g., Mark F. Grady, *Why Are People Negligent? Technology, Nondurable Precautions, and the Medical Malpractice Explosion*, 82 Nw. U.L. Rev. 293 (1988).

10 E.g., Mark F. Grady, *Res Ipsa Loquitur and Compliance Error*, 142 U. Pa. L. Rev. 887 (1994).

thirteen years since the first editions of the Shavell and Landes-Posner books came out — and there seems to be little need for any second editions. Whether the topic is negligence, strict liability, vicarious liability,¹¹ actual causation, proximate causation, the duty to rescue, intentional torts, punitive damages, pain-and-suffering damages, or whatever, most of the basic work had been done before the decade of the 1990s began. What has been published since then is work that offers refinements of and introduces qualifications into the earlier models.¹²

As far as corrective justice writings are concerned, the basic observation is about the same — though the relevant date at which stability was reached may be somewhat later. The modern corrective justice literature began with important articles by George Fletcher in 1972¹³ and Richard Epstein in 1973.¹⁴ By 1980, however, Fletcher was focusing his attentions on the criminal law,¹⁵ while Epstein had moved away from ethics in the direction of efficiency as his preferred foundation for tort liability rules.¹⁶ In the early 1980s, Jules Coleman and Ernest Weinrib emerged as new leading figures in the corrective justice movement. During the following decade, they published extensively and were joined by a number of other scholars, including Ken Kress, Stephen Perry, and Richard Wright. All of this culminated in an *Iowa Law Review*

11 Thanks in part to the leadership displayed by Jennifer Arlen, the 1990s have witnessed a surge of scholarly interest in questions of vicarious liability. See, e.g., *Corporate Tort Liability Symposium*, 69 S. Cal. L. Rev. 1679 (1996) (Arlen organized this symposium).

Still, what remains as the primary economic rationale for vicarious liability was set forth in various articles in the 1980s. See, e.g., Alan O. Sykes, *The Boundaries of Vicarious Liability: An Economic Analysis of the Scope of Employment Rule and Related Legal Doctrines*, 101 Harv. L. Rev. 563 (1988).

12 A possible exception is Steven P. Croley & John D. Hanson, *The Nonpecuniary Costs of Accidents: Pain and Suffering Damages in Tort Law*, 108 Harv. L. Rev. 785 (1995), which critiques the pre-1990 view that tort awards (if geared to the goal of efficient insurance) should not include damages for pain-and-suffering. The article is effective in showing significant elements of overstatement in the pre-1990 arguments. However, the article is much less persuasive in proving that the earlier scholars in fact reached the wrong result.

13 George P. Fletcher, *Fairness and Utility in Tort Theory*, 85 Harv. L. Rev. 357 (1972).

14 Richard A. Epstein, *A Theory of Strict Liability*, 2 J. Legal Stud. 151 (1973).

15 George P. Fletcher, *Rethinking Criminal Law* (1978).

16 Epstein charts his progression in Richard A. Epstein, *The Tort/Crime Distinction: A Generation Later*, 76 B.U.L. Rev. 1 (1996).

symposium in 1992;¹⁷ in Jules Coleman's book later in the same year;¹⁸ and in Ernest Weinrib's book in 1995.¹⁹ Since then, however, while there have been a number of corrective justice contributions, they have not really altered the scholarly landscape.²⁰ Weinrib, in particular, has written nothing on tort law as such since the 1995 publication of his book.²¹

To be sure, in both the teaching and the scholarship of torts, the ideas of deterrence and corrective justice remain highly influential; deterrence and corrective justice arguments are taken just as seriously now by torts teachers (and torts scholars) as they were in 1990, or 1995. Still, the observation remains valid that there is not much that is new in the deterrence and corrective justice scholarship that merits discussion. I came to this observation when the Cegla Institute conference's organizers invited me to think about directions in contemporary tort scholarship. Yet when given that invitation, what I also realized was this: Beginning in 1988, there has emerged a rather large body of writings analyzing tort rules and tort practices from feminist perspectives. These writings have been prepared primarily by American women law professors who are avowedly feminists; the one exception to this generalization concerns a pair of articles by a male scholar who embraces feminist ideas.²² At least so far, this body of writings has not been commented on or evaluated by anyone other than a feminist.

All of that gives me a scholarly opportunity. In this article, I will *not* make any effort to identify the core or essence of modern feminism and then explain what light that core might shed on tort issues: for a project of this sort, I do not have the necessary background. Rather, my goal here is to take advantage of my own background as a mainstream torts scholar in order to provide an initial evaluation of articles about torts prepared by writers

17 Symposium, *Corrective Justice and Formalism: The Care One Owes One's Neighbors*, 77 Iowa L. Rev. 403 (1992).

18 Jules L. Coleman, *Risks and Wrongs* (1992).

19 Ernest J. Weinrib, *The Idea of Private Law* (1995). See also *Philosophical Foundations of Tort Law* (David G. Owen ed., 1995) (another 1995 entry).

20 Gregory Keating draws heavily on Fletcher. Gregory C. Keating, *The Idea of Fairness in the Law of Enterprise Liability*, 95 Mich. L. Rev. 1266 (1997). So does Arthur Ripstein. Arthur Ripstein, *Equality, Responsibility, and the Law* (1999).

21 Weinrib's article in the first issue of *Theoretical Inquiries in Law*, which was published just after the Cegla conference, involves a mixture of the law of torts and the law of restitution. Ernest J. Weinrib, *Restitutionary Damages as Corrective Justice*, 1 *Theoretical Inquiries in Law* 1 (2000).

22 Carl Tobias, *Gender Issues and the Prosser, Wade, and Schwartz Torts Casebook*, 18 Golden Gate U.L. Rev. 495 (1988); Carl Tobias, *Interspousal Tort Immunity in America*, 23 Ga. L. Rev. 359 (1989).

who themselves avow a feminist perspective. In addition, I can anticipate that many torts analysts who encounter this article will be unaware of the feminist writings in question; accordingly, I will undertake to describe them as well as to evaluate them. Actually, feminist scholarship has addressed a wide variety of torts topics — not all of which I can consider in this paper. Instead, I will focus on three issues raised by that scholarship that impress me as being especially interesting. One is the "reasonable woman" standard as an alternative to the "reasonable man" standard as a yardstick for evaluating the negligence of parties. The second is a feminist understanding of the possibility of a tort duty of rescue. The third issue concerns the question of what the attitude of tort law should be when it encounters some category of injuries that are primarily, or at least disproportionately, suffered by women rather than men.²³

I. REASONABLE MEN AND REASONABLE WOMEN

In American legal scholarship generally, feminism became quite important as early as the start of the 1970s. Still, feminist evaluations of tort law did not really begin until 1988, when Professor Leslie Bender published an article in the *Journal of Legal Education*.²⁴ The Bender article began its consideration of tort law by addressing the "reasonable man" standard on which tort law has long relied. Bender regards this standard as an example of male naming, male norm-setting, and an overt sexism at the heart of the traditional law of torts.²⁵ Many later articles have embraced these points, to the extent that they have quickly become "a new received wisdom."²⁶ Often quoted has been an English court's suggestion that the "reasonable man" is

23 Another quite interesting — yet quite difficult — issue that I do not have the space to discuss here is the practice engaged in by some trial courts of relying on gender-based tables in predicting future income losses. See Martha Chamallas, *The Architecture of Bias: Deep Structures in Tort Law*, 146 U. Pa. L. Rev. 463, 480-89 (1998); Elaine Gibson, *The Gendered Wage Dilemma in Personal Injury Damages*, in *Tort Theory* 185 (Ken Cooper-Stephenson & Elaine Gibson eds., 1993).

24 Leslie Bender, *A Lawyer's Primer on Feminist Theory and Tort*, 38 J. Legal Educ. 3 (1988) [hereinafter Bender, *A Lawyer's Primer*]. See also Leslie Bender, *An Overview of Feminist Torts Scholarship*, 78 Cornell L. Rev. 575 (1993) [hereinafter Bender, *An Overview*].

25 Bender, *A Lawyer's Primer*, *supra* note 24, at 20-22.

26 Margo Schlanger, *Injured Women Before Common Law Courts, 1860-1930*, 21 Harv. Women's L.J. 79, 81 n.15 (1998).

"the man who takes the magazines at home in the evening and pushes the lawn mower in his shirtsleeves."²⁷

The new wisdom, then, is that the reasonable man standard in traditional tort law has effectively served to exclude or erase women. However, two quite interesting recent articles have shown that — at least in the context of legal history — this understanding is incorrect. Rather, those articles found that during the prime years of traditional American tort law, courts frequently gave consideration to the circumstances of women. The first of these articles was published in 1994 by Barbara Welke.²⁸ (At the time, Welke, armed with a law degree, was working on her Ph.D.; she is now on the history faculty at the University of Minnesota.) Having studied American tort cases between 1870 and 1920, Welke reported that during that period "injury was a gendered event."²⁹ "Courts ... held men and women to different standards of care."³⁰ Negligence was "an explicitly relative term indissolubly tied to the gender of the actors involved."³¹ Overall, "gender difference suffused the air, filled the senses. It was both backdrop and foreground [for tort law]."³² In particular, according to Welke, judicial rulings "evolved into a body of law that, in the case of women, imposed [liability] not on the victim but on the creator of the risk of injury."³³ All of this, Welke indicated, was obviously beneficial to the individual woman who sued and received compensation. But, in Welke's view, there was an offsetting factor. For while judicial opinions allowed women to recover by holding them to a lesser standard of care, in doing so those opinions presented "a narrow image of what constituted 'ladylike' conduct and ... a debilitating image of women's nature."³⁴ Judicial opinions hence "reified," "ratified," and "recreated" preexisting gender norms in a way that imposed long-run disadvantages on women.³⁵

Four years later, the second article, focusing on about the same time period, was published by Margo Schlanger.³⁶ (Schlanger, as a recent law

27 Hall v. Brooklands Auto Racing Club, 1 K.B. 205, 224 (1933) (professing to quote an unidentified "American author").

28 Barbara Y. Welke, *Unreasonable Women: Gender and the Law of Accidental Injury, 1870-1920*, 19 L. & Soc. Inquiries 369 (1994).

29 *Id.* at 369.

30 *Id.*

31 *Id.* at 370.

32 *Id.* at 371.

33 *Id.* at 372.

34 *Id.* at 372.

35 *Id.* Welke is not entirely clear as to the precise nature or character of these disadvantages.

36 Schlanger, *supra* note 26.

school graduate, was then practicing law; she is now on the law faculty at Harvard.) Schlanger, like Welke, described a pattern of cases that frequently took women's circumstances into account. Moreover, Schlanger, like Welke, found that the cases tended to reach pro-liability outcomes — judicial opinions produced results that were "frequently, though not uniformly, friendly to women and their needs."³⁷ Schlanger, however, differed from Welke in her assessment of the underlying judicial ideas. According to Schlanger, courts ruled in favor of women not because of biased images, but, rather, because of the courts' sensitive recognition of objective circumstances that distinguished women from men.

Welke and Schlanger looked at many of the same cases. Some of these were cases in which women were injured while boarding or exiting trains; some were cases in which women were injured while passengers in carriages being driven by men (often their husbands); others were cases in which women themselves were the drivers of the carriages. In the train cases, the issue generally was whether the apparent misstep by the woman passenger counted as contributory negligence. In the carriage passenger cases, the question was whether the woman-plaintiff was guilty of contributory negligence in not observing dangers on the road ahead and alerting the (male) driver of these dangers. In the other carriage cases, the question was whether the woman driver should be held to the same standard of care as a man in terms of the management of the carriage itself.

These are intriguing lines of cases, and I commend Welke and Schlanger for highlighting them.³⁸ What, then, does the case-law evidence show by way of the extent to which gender made a difference? Certainly there are particular cases that did impressively emphasize the relevance of gender. For example, in 1873, the Michigan Supreme Court, in *Daniels v. Clegg*,³⁹ ruled that a twenty-year-old woman, injured when the carriage she was driving collided with another carriage, might not have the knowledge and competence of men in managing carriages; accordingly, it would not "be just to hold her to the same high degree of care and skill."⁴⁰ In *Hickman v. Missouri Pacific Railway*

37 *Id.* at 85.

38 They should also be praised for their ingenuity and energy as researchers. The judicial rulings they have uncovered are rulings that were not coded into the key number system; nor had the cases in question been collected in any previous tort treatises or articles.

39 28 Mich. 32 (1873).

40 *Id.* at 42. The Court referred to the "incompetency indicated by her age or sex," though it appreciated that a twenty-year-old was at less of a disadvantage than a child. The carriage, owned by the woman's father, was damaged in the collision; and the primary suit was the property damage suit filed by the father. The Court assumed that

in 1886, a case involving a woman alighting from a train, the Missouri Supreme Court authorized the jury to consider not only the plaintiff's age and physical condition, but also the plaintiff's "sex" in determining whether she had behaved reasonably.⁴¹ In *Denver & Rio Grande Railroad v. Lorentzen*,⁴² the woman plaintiff was a passenger in a "public hack" that was struck by a train when it was crossing railroad tracks.⁴³ The federal district court judge considered the claim that the plaintiff was contributorily negligent for having failed to observe the approaching train and alert the driver. The judge indicated that were the plaintiff a man, he would probably direct a verdict on behalf of the defendant on the basis of the plaintiff's contributory negligence. But because the plaintiff was a woman, "a person who is not accustomed, or very much accustomed, to such places," a jury question was raised as to whether she "used the care and diligence which should be expected of a person in her situation."⁴⁴ The judge made clear that he was not announcing a standard of law, but merely raising a possibility for the jury to take into account. "I want you to consider whether there is less diligence to be exacted or expected from a woman than would be expected from a man."⁴⁵ In light of the flexibility in this instruction, the Eighth Circuit affirmed. The jury, in considering all the circumstances, had an "undoubted right" to take into account the "plaintiff's sex" in ruling on contributory negligence.⁴⁶

These are among the strongest instances of case-law evidence supporting the idea that gender was incorporated into the standard of care that American courts applied during tort law's traditional era. Schlanger goes on to describe identifiable differences between men and women that help explain the gender differential that courts seemingly supported. For example, in an era of high birth rates and short life expectancies, the percentage of women who at any one time had been pregnant was substantially higher than it is today.⁴⁷ Moreover, women were subject to social standards as to proper

any contributory negligence on the daughter's part would be imputed to the father. The Court found that the woman's age and gender had a double significance. First, it lowered the standard for purposes of assessing her own contributory negligence. Secondly, because the driver of the *other* carriage perceived that a young woman was in charge of the carriage approaching him, that driver was under a "higher degree of care." *Id.*

41 91 Mo. 433, 434-38 (1886).

42 79 F. 291 (8th Cir. 1897).

43 *Id.* at 292.

44 *Id.* at 292-93.

45 *Id.* at 293.

46 *Id.*

47 Schlanger, *supra* note 26, at 114-15.

dress — standards that included long skirts, corsets, and frequently high heels. In addition, railroad cars were, in fact, difficult to board and exit: steps were frequently three feet apart. There were, then, "very real restrictions on women's agility"⁴⁸ — and these restrictions courts did indeed deem relevant in considering whether the woman passenger was contributorily negligent.⁴⁹ This is a major reason why Schlanger regards the courts as displaying sensitivity to women's real needs and not as relying on disparaging stereotypes about women's supposed inabilities.⁵⁰

This, then, is the kind of evidence that is offered on behalf of the relevance of gender in traditional American tort law. What is its collective strength? It is fair to say that its strength should not be overstated. Much of the time, for example, American courts rejected the idea of an explicit differential in the standard of care. For example, in *Tucker v. Henniker*,⁵¹ the New Hampshire Supreme Court interpreted the "man" in "reasonable man" as generic and also expressed its view that women were well experienced in handling carriages on New Hampshire's roads; accordingly, the Court found that any "reasonable woman" instruction geared to a woman carriage driver would be error. An even more elaborate opinion was *Hassenyer v. Michigan Central Railroad*, authored by Judge Cooley for the Michigan Supreme Court in 1882.⁵² The case involved a woman struck by a train while walking across railroad tracks. Judge Cooley rejected as improper an instruction given by the trial judge to the effect that the law does not require the same degree of care from a woman as from a man. First of all, Judge Cooley reasoned, the generalization on which the instruction rests — that women exercise less care than men —

48 *Id.* at 139.

49 Note, however, that dress standards were a matter of custom, not biology. It is noteworthy that no court ever entertained the idea that a woman passenger was contributorily negligent for wearing high heels while attempting to board a train. The point is not discussed by Schlanger. *See also infra* note 50.

50 In one striking passage, Schlanger discusses the rhetoric in several judicial opinions suggesting it was especially reasonable for women (as passengers in cars) to trust the good judgment of the male driver (often the husband). Schlanger is aware that such judicial rhetoric seems to assign women a subordinate role. But she avoids criticizing the judges by suggesting that if courts had denied wives' recoveries because of their failure to challenge their husbands, courts would have been penalizing women for failing to rebel against society's gender customs — and such penalties would have been harsh and unfair. Schlanger, *supra* note 26, at 105. Schlanger is clever here. However, she offers no evidence to show that the judges were, in fact, reasoning along the lines she now suggests. Rather, the judicial opinions suggest that the judges were themselves taking for granted the gender customs of the day.

51 41 N.H. 317 (1860).

52 48 Mich. 205 (1882).

was inaccurate; women, he indicated, are often "more cautious" and "more prudent" than men, in part because of the way in which their "natural timidity" contrasts to the excessive rambunctiousness frequently exhibited by men.⁵³ Secondly, to accept the instruction would be to facilitate an unacceptable inequality in outcomes. Cooley hypothesized a man and a woman standing together, in a perilous way, on a platform of a moving railroad car, from which both are then accidentally knocked off by the railroad's negligence;⁵⁴ it would be wrong, Cooley thought, to apply the defense of contributory negligence in a way that would confer a tort recovery on the woman while withholding it from the man.

There was, then, an interesting collection of tort cases that considered gender issues. Yet the results ensuing from those cases were somewhat mixed — and hence do not justify Welke's strong "different standards of care" thesis. Moreover, the number of tort contexts in which gender differences were considered was evidently limited. In addition to the lines of cases discussed above, Schlanger does a fine job in discussing cases in which railroads, as common carriers, were found negligent for failing to anticipate or respond to the special needs of women passengers⁵⁵ and also cases dealing with whether the negligence of the husband driving a carriage might be imputed to the wife when she sues a third party whose negligence contributed to a carriage accident.⁵⁶ All of these cases are certainly interesting — but still, they are quite limited in both their number and their range. Accordingly, they do not come close to supporting Welke's strong assessments that "injury was a gendered event" and that "gender difference suffused the air" of tort law.⁵⁷ In neither the Welke nor Schlanger articles, for example, is there any treatment of cases in which farmers sued railroads, in which employees sued railroads and other employers, or in which invitees sued landowners (including commercial establishments). At the times in question, these were important lines of cases (indeed, at the turn-of-century, there evidently were more cases brought by workers than by any other category of injury victims). Welke is at pains to deny that her project results in merely "adding 'women' to the vocabulary of nineteenth-century accidental injury law."⁵⁸ In light of the evidence she provides, she can, indeed, take credit for bringing about such an addition

⁵³ *Id.* at 209-10.

⁵⁴ *Id.*

⁵⁵ Schlanger, *supra* note 26, at 118-32.

⁵⁶ *Id.* at 102-06.

⁵⁷ Welke, *supra* note 28, at 369, 371. *See also supra* text accompanying notes 30-32.

⁵⁸ Welke, *supra* note 28, at 371.

to the vocabulary. But her evidence does not sustain the broader claims she advances to the effect that gender dominated tort law.⁵⁹

A closely related point concerns the relationship of the cases Welke and Schlanger discuss to more general debates about the nature of American tort history. Over the decades, many leading scholars have claimed that traditional American tort doctrine was unremittingly harsh in its treatment of tort plaintiffs. In those scholars' views, courts' acceptance of a negligence liability standard severely limited victims' opportunities to recover,⁶⁰ and the defense of contributory negligence was stringently applied by courts so as to deny the claims of deserving plaintiffs.⁶¹ More recently, however, certain revisionist scholars have disagreed with this account.⁶² Instead, they have suggested that the negligence standard was broadly defined by traditional American courts and that the contributory negligence defense was applied in a sympathetic manner. Schlanger refers to the ensuing debate among historians only in a footnote⁶³ — a footnote that indicates that the debate is beyond the scope of her article. Welke, in turn, acknowledges the familiar view that traditional American tort law was favorable to industry and then declares that her findings "undermine" this view.⁶⁴ What she means by this is somewhat unclear; yet what she seems to mean is that courts did indeed in general harbor pro-industry preferences, but uniquely departed from these preferences in cases in which the victims were women. Welke suggests that the only effect of this pro-woman departure on tort law more generally is that holdings originally

59 While the lines of cases identified by Welke and Schlanger are rich and interesting, it is not clear that they are any *more* rich or *more* interesting than the lines of cases concerning injured children discussed by Professor Karsten. Peter Karsten, *Heart Versus Head: Judge-Made Law in Nineteenth-Century America* 201-54 (1997).

60 See Morton J. Horwitz, *The Transformation of American Law, 1780-1860* (1977); Charles O. Gregory, *Trespass to Negligence to Accident Liability*, 37 Va. L. Rev. 359 (1951).

61 See Lawrence M. Friedman, *The History of American Law* 470-72 (2d ed. 1985); Wex S. Malone, *The Formative Era of Contributory Negligence*, 41 Ill. L. Rev. 151 (1946).

62 See, e.g., Karsten, *supra* note 59; Nathan Honson, *Iowa Tort History, 1839-69: Subsidization of Enterprise or Equitable Allocation of Liability?*, 81 Iowa L. Rev. 811 (1996); Gary T. Schwartz, *The Character of Early-American Tort Law*, 36 UCLA L. Rev. 641 (1989) [hereinafter Schwartz, *The Character*]; Gary T. Schwartz, *Tort Law and the Economy in Nineteenth-Century America: A Reinterpretation*, 90 Yale L.J. 1717 (1981) [hereinafter Schwartz, *Tort Law and the Economy*].

63 Schlanger, *supra* note 26, at 95 n.39.

64 Welke, *supra* note 28, at 369.

applicable to women plaintiffs could later be extended to plaintiffs of both genders.⁶⁵

But this reasoning does not give enough attention to the position taken by the revisionists. Their position is that (with the significant exception of the worker cases) tort law in general reached results that were sympathetic to the claims of injury victims. As noted, Schlanger's finding is that tort law was frequently "friendly" to women.⁶⁶ But the position of the revisionists is that (apart from workers) tort law was "friendly" to victims of all sorts. If the revisionists are right, then there is nothing all that special or distinctive about the treatment of women that Schlanger and Welke describe; rather, that treatment was largely in line with tort law's treatment of victims overall. This general point can be restated at the more specific level. According to Schlanger, in cases brought by women passengers, the obligations of railroads as common carriers were expansively defined; yet according to the revisionists, in most railroad passenger cases, those obligations were broadly characterized.⁶⁷ Schlanger and Welke are effective in demonstrating how forgiving the defense of contributory negligence was in cases brought by injured women; yet if the revisionists are right, courts in a wide variety of cases were willing to read elements of leniency and excuse into the contributory negligence defense.⁶⁸

Maybe the revisionists are right and maybe they are wrong. But at the very least, feminist historians such as Welke and Schlanger need to make clear what their position is on all of this before the reader can figure out what kinds of claims they are making on behalf of the specific relevance of gender in traditional American tort law. It is true that the revisionists have largely failed to highlight cases involving women victims;⁶⁹ accordingly, the case-law evidence uncovered by Welke and Schlanger is certainly valuable. But it may turn out that its principal value is to provide support for the revisionists' position in the course of the ongoing debate.

At the very least, it is fair to observe that the claims made by feminist historians about a "reasonable woman" standard of care can receive helpful clarification by reviewing those claims in the context of the larger themes involved in the writing of tort history. However, in giving further attention to "reasonable woman" issues, let us now move from the past to the present.

65 *Id.* at 372.

66 *See supra* note 37 and accompanying text.

67 *See, e.g.,* Schwartz, *The Character*, *supra* note 62, at 654-65; Schwartz, *Tort Law and the Economy*, *supra* note 62, at 1750-51.

68 *See, e.g.,* Schwartz, *Tort Law and the Economy*, *supra* note 62, at 1759-63.

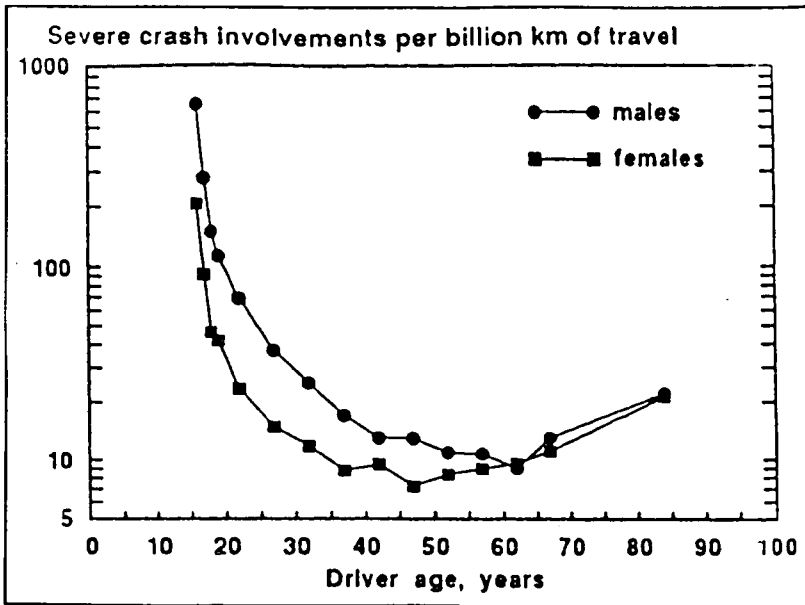
69 *But see id.* at 1744 n.207 (discussing three cases, but only briefly and only in a footnote).

Any consideration of the possibility of a reasonable woman standard of care for today's tort law can certainly be enriched by looking at whatever empirical evidence there may be about the "care" that women's behavior currently exhibits. Within the social sciences, there is an emerging literature on whether there are gender differences in behavior, and if so, what their magnitude is. For example, studies of financial decision-making have indicated that women are, on average, more risk averse than men: that they value security in financial decision-making more highly than they value the chance to earn a maximum return.⁷⁰ Professor Joni Hersch has focused on gendered decision-making that relates to the risk of physical injury; looking, for example, at the utilization rates of seat belts, she reports that women are (on average) more concerned with safety than are men.⁷¹ In addition, there is ample information on the record of motoring, analyzed in terms of gender. Here is a chart displaying the "severe crash involvements per billion kilometers of travel" by male drivers and by female drivers.⁷²

70 Nancy A. Jianakoplos & Alexandra Bernasek, *Are Women More Risk Averse?*, 36 Econ. Inquiry 620 (1988); Melanie Powell & David Ansic, *Gender Differences in Risk Behaviour in Financial Decision-Making: An Experimental Analysis*, 18 J. Econ. Psychol. 605 (1997).

71 Joni Hersch, *Smoking, Seat Belts, and Other Risky Consumer Decisions: Differences by Gender and Race*, 17 Managerial & Decision Econ. 471, 474 (1996). See also Joni Hersch, *Compensating Differentials for Gender-Specific Job Injury Risks*, 88 Am. Econ. Rev. 598 (1998).

72 Leonard Evans, *Traffic Safety and the Driver* 34 (1991).



As the chart shows, young women drivers are involved in a dramatically lower number of severe crashes than are young men; the latter seem to be aggressive or thrill-seeking drivers in a way that the former are not. Furthermore, the chart suggests that until age sixty, women drive more safely than do men.⁷³ What the components are of this safer driving may be unclear. A reasonable guess is that women care more about safety — and therefore make safer driving choices — driving, for example, at a lower rate of speed.⁷⁴ Furthermore, if there are gender differentials in how cars are driven, there can also be differentials in terms of which cars are purchased in the first place. As recently as twenty years ago, the understanding among auto manufacturers was that "safety doesn't sell" — that there was little consumer demand for safety features in cars. In more recent years, however, safety has turned out to be a significant sales item; for example, automakers have included airbags in cars in advance of federal regulations and then have advertised their inclusion. Recently I asked Jack Martin, for many years the General Counsel of Ford, what the explanation is for the increase in consumer interest in vehicle safety.

⁷³ The chart relies on data from the late 1980s. More recent data I have seen indicate that the gender difference for middle-age drivers has narrowed.

⁷⁴ An alternative explanation — which I deem unlikely — is that women exhibit greater skill than men in driving even at the same rate of speed.

His answer was straightforward: more women are buying cars, for themselves or on behalf of their families.

Of course, even if there are gender differences relating to safe behavior and safe choices, it is important to consider what their magnitude is. The data that Hersch reported about seat belt utilization are here instructive.⁷⁵ About 50% of all men wear available seat belts, while the utilization rate among women is close to 60%. This is a gender gap that is quite important; if one were a public official working on problems of highway safety, one would make every effort to raise the men's rate to the point that brings it equal to the women's rate. But as significant as a 10% gender differential is, it is, of course, no more than 10%. That is, for every five men out of ten who wear seat belts, there are also five women out of ten; for every four men out of ten who do not wear seat belts, there are also four women out of ten. It is only one person out of ten where gender makes a difference in explaining seat belt use. In short, women behave the same as men 90% of the time; what difference there is in behavior affects only 10% of all persons.

The significance of all of this for a possible "reasonable woman" standard of care in contemporary tort law — or at least for allowing contemporary juries to consider the party's gender in determining whether the party has been negligent — is certainly intriguing. Several articles do, indeed, seem to recommend that the law adopt a "reasonable woman" standard,⁷⁶ mainly in cases in which a woman's conduct is being evaluated. Yet none of these articles really endorses a differential standard for purposes of evaluating the negligence of a party's conduct in personal injury litigation. Rather, these articles typically focus on sexual harassment or hostile environment cases — in which identifying the *employer's* conduct as illegal may depend on how the reasonable person who is the target of that conduct would respond to it.⁷⁷ This, however, is a question that arises under federal statutory law,⁷⁸ not state tort law; under the latter, sexual harassment cases do not depend on any concept of the reasonable person.⁷⁹ In personal injury cases, a century

75 See *supra* note 71 and accompanying text.

76 See, e.g., Lucinda M. Findley, *A Break in the Silence: Including Women's Issues in a Torts Course*, Yale J.L. & Feminism 41, 57-58 (1989); Caroline Forell, *Essentialism, Empathy, and the Reasonable Woman*, 1994 U. Ill. L. Rev. 769.

77 See, e.g., Forell, *supra* note 76, at 786-804.

78 In Title VII hostile environment cases, the Supreme Court, at least so far, has not been willing to accept a "reasonable woman" standard. See *Harris v. Forklift Systems, Inc.*, 510 U.S. 17 (1993).

79 Rather, the state tort cases require that the defendant's conduct be "extreme and outrageous" and that the plaintiff's resulting emotional distress be "severe"; Restatement (Second) of Torts § 46 (1965). Professor Findley complains that in

ago a "reasonable woman" test was sometimes applied to women litigants. Given what were then perceived to be the relevant gender differentials, the utilization of that test made it easier for juries to find that women litigants were not negligent and easier for courts to affirm such findings. However, given the higher safety standards that are currently associated with women generally, the effect (if any) of employing such a test today would be to make it easier to conclude that particular women litigants have deviated from the relevant standard and, hence, are guilty of negligence.⁸⁰ Yet this would hardly be a socially attractive result.

Perhaps, however, the previous analysis has focused too much on appellate doctrine and the extent to which jury findings are controlled by the court's instructions. Assume that appellate judges, either a century ago or currently, authorized trial judges to instruct juries pursuant to a reasonable woman standard or to instruct juries that the party's gender is a factor to be taken into account. The relevant question to ask would then become this: What significance is attached to such an instruction by juries, then and now? In considering this question, one is led to recognize the *de facto* discretion of juries in ruling on claims of negligence. Certainly, in *any* personal injury case, the jury becomes aware of the gender of the parties and, in particular, of the injured plaintiff. *With* or *without* instructions from the judge, what significance did the plaintiff's gender play in the course of jury decision-making a century ago; and what significance does that gender play as juries decide tort cases today?

Whether the focus is on 1900 cases or instead 2000 cases, the question of juries' values relative to the victim's gender is probably much more important than the question of exactly what gender-related instructions the trial judge may give to the jury in the first place. The question concerning jury attitudes

tort cases concerning sexual harassment, the doctrine of "extreme and outrageous" has been applied in ways that are too conservative on liability. Findley, *supra* note 76, at 54-57. However, one point that Findley makes is that sexual harassment "is a pervasive social practice." *Id.* at 55. If she is right in this — and I believe she is — then courts are probably correct in usually rejecting claims of "extreme and outrageous." As I read the Restatement tort, it limits itself to instances of conduct that can be classified as "outliers"; it is not tort that is designed to transform existing practices.

For another consideration of the intentional infliction tort in its application to sexual harassment and other workplace problems, see Regina Austin, *Employer Abuse, Worker Resistance, and the Tort of Intentional Infliction of Emotional Distress*, 41 Stan. L. Rev. 1 (1998).

80 It is assumed here that the conduct of the "average woman" is at least relevant in considering what the conduct would be of the "reasonable woman."

in 1900 has not been addressed by the recent feminist historians. To be sure, the question, even if identified, may be impossible to answer; there may well be an absence of data that historians can consult. As for the juries of today, one recent study, involving a simulated trial, found that mock juries tend to grant larger wrongful death awards (even controlling for relevant variables) if the victim of the fatal accident was a man.⁸¹ But one can observe for gender purposes how nicely ambiguous this finding is: the differential may be due to the jury's devaluation of the earning capacity of women as victims; or alternatively, it may be due to the jury's sympathetic recognition of the greater financial need of women when they are the surviving spouse. Moreover, for purposes of assessing jury attitudes, simulated trials are quite simply not the same thing as actual trials. Furthermore, the study described above concerned only the size of damage awards once liability is found; it hence says nothing about any differential in the jury's willingness to affirm liability in the first place. And it is certainly possible that injured women are sympathetic victims in the eyes of juries in a way that encourages them to rule in favor of liability.

Once the importance of the jury in tort litigation is recognized, another set of gender-related questions can be identified. Many historians, including those in the revisionist camp⁸² but also some who adhere to the conventional view,⁸³ believe that traditional juries were generally sympathetic to the claims of accident victims. If this belief is correct, then recent feminist writings have added a worthy point. They have reminded us that during the traditional era, civil juries were entirely male (women did not frequently serve on juries until the 1940s).⁸⁴ This reminder enables us to refocus the question of jury attitudes in tort cases during the traditional era in terms of the attitudes of *male* jurors when victims sued industry. What has been perceived until now as the willingness of jurors in general to rule against industrial defendants can now be re-characterized as the willingness of *male* jurors to rule against such defendants; and certainly this is an interesting re-characterization.

As far as contemporary tort law is concerned, feminist scholars acknowledge that in judicial opinions, the allegedly sexist "reasonable

81 Jane Goodman et al., *Money, Sex, and Death: Gender Bias in Wrongful Death Damage Awards*, 25 L. & Soc'y Rev. 263 (1991). Smaller awards to female plaintiffs are reported in Chamallas, *supra* note 23, at 465-66. Chamallas acknowledges, however, that her data do not control for obviously relevant variables, *id.* at 465 n.10. As a result, the data have little value.

82 See Schwartz, *Tort Law and the Economy*, *supra* note 62, at 1763-65.

83 See Lawrence M. Friedman, *A History of American Law* 416-17 (1973). But see Friedman, *supra* note 61, at 475, 484-85.

84 Welke, *supra* note 28, at 395.

man" term has been replaced by "reasonable person"; yet they allege that the change is cosmetic and that even "reasonable person" carries a male bias.⁸⁵ Especially given the role played by the jury, I find this position quite unconvincing. First of all, in contemporary judicial opinions, the phrase "reasonable person" is used much less frequently than the more extended phrases "reasonably prudent person"⁸⁶ and "reasonably careful person."⁸⁷ I find it impossible to identify anything that is even implicitly sexist in terms of this sort. Secondly, when instructions are couched in these terms, they undeniably give a very substantial discretion to the jury. And in considering how the jury exercises this discretion, an obviously relevant point is that juries now consist of a mix of men and women. There is nothing in a phrase such as "reasonably prudent person" that would induce a jury consisting of a combination of men and women to exhibit a male bias in reaching its decision.

Even more generally, the interesting question — which feminist tort scholars have not yet addressed — concerns how the presence of women on juries is affecting the pattern of jury decision-making in tort cases. On this issue, I have consulted one recent manual on jury selection written by a practicing lawyer.⁸⁸ That manual indicates that suburban homemakers are unsympathetic to plaintiffs and conservative in measuring damages. The attitudes of working women, it is said, are, by contrast, largely shaped by their particular job experiences. In addition, older women jurors may feel protective of younger women who are injured plaintiffs; but if the plaintiff is a physically attractive or successful woman, women jurors may be envious of her.

To be sure, it is quite difficult to confirm the accuracy of the advice that such manuals provide;⁸⁹ and for all I know, the advice in this manual may be marred by unjustified gender stereotypes. In any event, research needs to

85 See, e.g., Bender, *A Lawyer's Primer*, *supra* note 24, at 31; Forrell, *supra* note 76, at 774.

86 See, e.g., *Bolkhir v. N.C. State Univ.*, 365 S.E.2d 898, 900 (N.C. 1988).

87 See, e.g., *White River Rural Water Dist. v. Moon*, 839 S.W.2d 211, 212 (Ark. 1992).

88 Ward Wagner, *Art of Advocacy: Jury Selection* 1-24, 1-25 (1989).

89 See Solomon M. Fulero & Steven D. Penrod, *The Myths and Realities of Attorney Jury Selection Folklore and Scientific Jury Selection: What Works?*, 17 Ohio N.U.L. Rev. 229 (1990).

One study published subsequent to the Cegla conference finds that male jurors assign higher monetary values than do women jurors to the plaintiff's pain and suffering. Roselle L. Wissler et al., *Decisionmaking about General Damages: A Comparison of Jurors, Judges, and Lawyers*, 98 Mich. L. Rev. 751, 783 (1999). It is quite unclear what the psychological basis is for this gender differential in assessing pain-and-suffering damages.

be undertaken on the attitudes of women jurors towards various categories of victims. Of course, if the attitudes of women jurors towards *plaintiffs* are a relevant factor, so are the attitudes of women jurors towards *defendants*. And here, recent empirical studies tend to converge on an interesting finding: "men tend to [assess] risks as smaller and less problematic than do women."⁹⁰ Moreover, such a differential in attitudes between men and women is likely to have an effect on their behavior as jurors. After all, if the defendant's conduct has created a risk, the magnitude and the reasonableness of that risk are factors that routinely bear on assessments of the defendant's possible negligence. Accordingly, if the recent studies are correct, women jurors may be *more* likely than men to rule in favor of negligence (and, hence, in favor of liability). The recent studies, however, are doubtless no more than tentative. Certainly, the entire question of women jurors' attitudes towards various kinds of defendant risk-taking is worthy of further inquiry.

II. THE DUTY TO RESCUE

Just as Professor Bender initiated the feminist treatment of the standard of care in negligence cases, she has also developed a feminist analysis of a related tort issue. The issue concerns the position that tort law takes relating to a person's obligation to rescue another party when that party is in a position of peril. As all know, the common law rule is that there is no general affirmative duty to rescue; this general rule, however, is subject to a number of important exceptions. For example, if there is a special relationship between the defendant and the plaintiff, an obligation to rescue can attach.

Bender advances a feminist critique of the common law rule that denies rescue obligations.⁹¹ Here, Bender draws on the work of Carol Gilligan: mainly, Gilligan's famous book *In a Different Voice*.⁹² What Gilligan indicated is that there is a sharp difference between women's moral development and the moral development of men. Men focus on abstract rules and the deductions that can be derived from them; women focus on the particular context. Men

90 James Flinn et al., *Gender, Race and Perception of Environmental Health Risks*, 14 *Risk Analysis* 1101, 1101 (1994).

91 Bender, *A Lawyer's Primer*, *supra* note 24, at 33-36. See also Bender, *An Overview*, *supra* note 24, at 580-81.

92 Carol Gilligan, *In a Different Voice* (1982). Of all non-law books, this is the one that has been most frequently cited in modern legal scholarship. Fred R. Shapiro, *The Most-Cited Legal Books Published Since 1978*, 29 *J. Legal Stud.* 397, 407 (2000).

understand the significance of hierarchy; women appreciate the significance of horizontal relationships. Men subscribe to an ethic of justice; women subscribe to an ethic of care and responsibility. Professor Bender — having restated and endorsed Gilligan's findings — then goes on to indicate that the no-duty general rule rests on the male ethic of justice and rights rather than on the female ethic of caring and responsibility.⁹³ Moreover, Bender suggests, the female ethic is clearly superior to the male ethic: caring, with all its beneficial consequences, is clearly more important than abstract principles of justice. In Bender's view, an understanding of the gender dimensions of the problem hence supports recommending the reversal of the common law's general rule and the recognition of an obligation to rescue.

Let me begin by praising Professor Bender's presentation. The entire issue of affirmative duties is one of the most intriguing issues philosophically in all of tort law. Yet since the early 1970s, the issue has been largely stagnant in tort scholarship. Corrective justice writers have not had that much to say about the issue since Richard Epstein's treatment of it in 1973;⁹⁴ and while economists discovered the issue in the 1980s, it turns out that an economic analysis is not especially profitable in promoting understanding of the duty-to-rescue issue.⁹⁵ If that issue involves a conflict between liberty interests and safety or security interests, little progress has been made in recent decades in resolving that conflict — or even in improving the understanding of the conflict. Bender's ability to find gender dimensions in the debate about rescues adds an interesting new element to the debate itself.

Yet having conferred praise, let me now raise several quite significant concerns. I can begin by accepting — for the sake of discussion — the gender evaluation of ethics that was developed by Gilligan and endorsed by Bender. If this assessment is right, then it might seem fair to say that the common law rule denying any rescue duty has a male orientation, while the reversal of the common law rule (recognizing a rescue obligation) would have a female orientation. Yet if such a characterization sheds light on the rescue debate by conferring a descriptive label to each side of the debate, it nevertheless fails to generate a normative resolution of that debate. Only if one takes the further step and concludes that women's

93 Other legal feminists have drawn on Gilligan in order to reach even more dramatic conclusions. According to Robin West, Gilligan's findings indicate that "all of modern legal theory" is "essentially and irretrievably masculine." Robin West, *Jurisprudence and Gender*, 55 U. Chi. L. Rev. 1, 2, 60 (1988).

94 Epstein, *supra* note 14, at 198-200.

95 See, for example, the ambivalent analysis in Richard A. Posner, *Economic Analysis of Law* 207-09 (5th ed. 1998).

ethics are right and men's ethics wrong would the description lead to a normative recommendation. In fact, Gilligan's book is, in part, a response to earlier work by the psychologist Lawrence Kohlberg,⁹⁶ whose studies accepted men's moral development as the model and, accordingly, disparaged the morality of women as immature. Gilligan is, indeed, effective in showing that Kohlberg's work is somewhat biased and his conclusions premature. Yet much of Gilligan's discussion implies the further point that the ethics of women are superior to those of men;⁹⁷ and this is a point that her book is not adequate in sustaining. What is implicit in Gilligan becomes explicit in Bender — who claims (in the context of the rescue issue) that caring is more important than liberty; yet her demonstration of this consists largely of simplifying statements.⁹⁸ Even if it might be correct, then, to say that the common law rule is male-oriented, this leaves entirely open the question of whether that rule is ethically desirable or not.

But let me now address the point that the previous paragraph has assumed — that women's ethics do, indeed, support a general duty to rescue. There are several problems with this assessment. First of all, Gilligan herself finds (as noted above) that men are more favorable to general rules, while women are more favorable to individualized and contextualized determinations. Yet the duty to rescue that Bender recommends would evidently take the form of a general rule; and to this extent, it is out of line with women's ethics. The generality of the rule to one side, at least some of the time, Gilligan's description of women's ethics focuses on caring as a matter of voluntary and cooperative behavior. (Thus, one of Gilligan's interviewees, faced with a situation in which her ailing spouse badly needs a medication he is unable to pay for, is confident that the pharmacist, given full information about the spouse's plight, will provide the medication without charge or at least defer the obligation to pay for it.⁹⁹) That is, the responsibilities that Gilligan affirms as a matter of women's ethics are responsibilities that are voluntarily assumed. In sharp contrast, the affirmative duties in tort that

⁹⁶ Lawrence Kohlberg, *The Philosophy of Moral Development* (1981).

⁹⁷ To be sure, in one passage, Gilligan talks about the desirability of the "development of a postconventional ethical understanding" that would somehow combine or synthesize the best parts of the ethical views of men and of women. Gilligan, *supra* note 92, at 100. In addition, at the end of her book, Gilligan discusses, somewhat ambivalently, whether there might be a tendency towards "convergence" in the attitudes of more mature men and women. *Compare id.* at 164, *with id.* at 167.

⁹⁸ See, e.g., Bender, *A Lawyer's Primer*, *supra* note 24, at 31. See also Bender, *An Overview*, *supra* note 24, at 580.

⁹⁹ Gilligan, *supra* note 92, at 27-32.

Bender recommends would be affirmative duties imposed by the coercive force of law. Nothing in the Gilligan book on which Bender attempts to rely supports the idea that women's ethics would favor such coercion.

A second problem with Bender's treatment of Gilligan is that most of the time, the examples of caring provided by Gilligan concern persons who are in a preexisting relationship: the women described by Gilligan feel a sense of responsibility towards their family and their friends.¹⁰⁰ However, when there is a meaningful preexisting relationship between the parties, tort law in its existing form tends already to recognize the existence of affirmative duties. To this extent, Gilligan's analysis *supports* the common law position rather than disputing it. Gilligan's account tells us nothing about women's attitudes of caring or responsibility towards persons who are strangers to the women themselves; and it is exactly one's legal obligations towards strangers that is the question addressed by the common law's general rule. Inasmuch as Bender declares that the woman's ethic of care and responsibility extends beyond preexisting relationships to complete strangers, Bender extends Gilligan in a way that Bender neither acknowledges nor justifies.

I am quite willing to believe that real-world evidence would support Gilligan's suggestion that women are more caring than men in terms of how they treat their friends and acquaintances.¹⁰¹ Still, what evidence is there concerning any gender differential between women and men with respect to rescuing or assisting strangers? It turns out that there is a substantial body of empirical studies concerning the comparative extent to which men and women are altruistic — are willing to engage in behavior that will assist persons who are in various kinds of physical or psychological distress. A "meta-analytic review" published in 1986 examined the "social psychological literature" concerning "gender and helping behavior."¹⁰² Almost one hundred empirical studies were considered, all of which concerned providing assistance to

100 See, e.g., *id.* at 35, 138 (focusing on "family relationships").

101 My perception, however, is that the gender differential is limited rather than categorical. In much of her text, Gilligan makes rather sweeping claims about women's ethics and men's ethics. However, there is a note of caution in her Introduction. Gilligan, *supra* note 92, at 2 ("The different voice I describe is characterized not by gender but theme. Its association with women is an empirical observation. ... But this association is not absolute [and does not] represent a generalization about either sex."). There are no similar notes of caution in Bender's writings, which rely on seemingly categorical generalizations.

By the way, Gilligan's Introduction also identifies — and leaves open — the question of whether the relevant differences in men and women's ethics are due to biology or instead culture. *Id.*

102 Alice H. Eagly & Maureen Crowley, *Gender and Helping Behavior: A Meta-Analytic Review of the Social Psychological Literature*, 100 Psychol. Bull. 283

persons who are essentially strangers. (These studies related to behaviors such as picking up a hitchhiker, helping a person who falls in the subway, helping a person who has dropped a bag of groceries, and so on.) As I approached this meta-review, I regarded it as likely that it would report gender differentials, of at least limited magnitude, showing that women help more frequently. In fact, however, the aggregate of findings is to the effect that men are *more* helpful or altruistic than are women.¹⁰³ For example, one of the studies concerns helping a choking female student at an experiment:¹⁰⁴ seventy-four percent of all men provided help, while only sixty-three percent of women did so.

To be sure, these studies tested for attitudes on the part of subjects that extend beyond altruism as such. In some of the experiments (for example, helping a stranger change a flat tire¹⁰⁵), the competence of the helper to intervene was a relevant factor; men might be more competent at certain tasks than women (or at least more confident in their competence) and, hence, more willing to help.¹⁰⁶ Some rescues involve an element of heroism on the part of the rescuer; and men may harbor more heroic impulses than do women.¹⁰⁷ Moreover, when the person in need is a woman, that may

(1986). Psychologists at UCLA tell me that this literature review remains largely valid, despite the years that have intervened between 1986 and now.

For a review of experiments concerning altruism by women in the course of purely economic activities, see Catherine C. Eckel & Philip J. Grossman, *Differences in the Economic Decisions of Men and Women: Experimental Evidence*, in *Handbook of Experimental Economics Results* (Charles Plott & Vernon L. Smith eds., forthcoming).

¹⁰³ Eagly & Crowley, *supra* note 102, at 286.

¹⁰⁴ This doctoral dissertation, discussed in *id.* at 291, is P.J. Senneker, *Altruism and Androgyny: The Effects of Sex Roles on Diffusion of Responsibility in Bystander Intervention*. A similar experiment involved helping a male student who evidently suffered a seizure during an experiment: sixty-nine percent of the men offered help, sixty-two percent of the women. John M. Darley & Bibb Latane, *Bystander Intervention in Emergencies: Diffusion of Responsibility*, 8 J. Personality & Soc. Psychol. 377 (1968).

¹⁰⁵ Richard J. Pomazal & Gerald L. Clore, *Helping on the Highway: The Effects of Dependency and Sex*, 3 J. Applied Soc. Psychol. 150 (1973). In this experiment, conducted alongside a public highway, forty percent of the motorists passing by were female. But of the fifty-three persons who stopped and helped, only two were women. *Id.* at 153.

¹⁰⁶ See Eagly & Crowley, *supra* note 102, at 284.

¹⁰⁷ See *id.* at 284-85. A related point is that certain rescues may expose the rescuer to some personal risk; and as has been noted above, women may be more risk averse than men. See *supra* notes 70-72 and accompanying text. For that matter, in certain "helping" situations, women may encounter an objectively higher level of risk than do men. Compare, for example, a male and a female motorist, each of whom picks up a hitchhiker at night.

activate attitudes of chivalry that uniquely operate on men.¹⁰⁸ But whatever combination of explanations there may be, the empirical studies (ignored by Bender) fail to support her claim that women's ethics make the rescue of strangers more normal and more likely. Given all the complicating factors bearing on rescuer motivation, the empirical evidence does not really refute Bender's position; but it certainly fails to provide that position with strong affirmative confirmation.

Yet despite all the problems with Bender's analysis that have been explored above, I *still* find it quite plausible to believe that women — on average — favor and support affirmative duties in tort more frequently than men do. To rely on what may be a relevant analogy: there has developed (though only in recent years) a gender gap in American voting, pursuant to which women voters, on average, seem more willing to vote in favor of the Democratic Party candidate and to favor undeniably coercive taxation in order to support such "helpful" social services as health and education. Once again, however, the differentials are limited: in the last four presidential elections, men have voted for the Democratic candidate 41% of the time, women 48.5%; in the last eight congressional elections, men have voted for the Democratic candidate for the House 48% of the time, women 53%.¹⁰⁹ This, then, is a differential that is not at all categorical: overall, men voters and women voters agree with each other well more than nine times out of ten. Nevertheless, the differential is significant rather than insignificant: it can play a major role as parties determine which candidates to nominate and what kind of political campaign to mount.

Once again, however, even if a gender difference exists in attitudes towards duties to rescue, this difference provides only a description of sorts of the duty-to-rescue problem and not a normative evaluation. Nonetheless, the description has a particular form of power. Until recently, all appellate court judges were men; and even now, the vast majority of those judges

¹⁰⁸ See *id.*

¹⁰⁹ These data are drawn from the document *The Gender Gap, Voting Choices, Party Identification, and Presidential Performance Ratings*, circulated on the Web by the Center for the American Woman and Politics, <http://www.rci.rutgers.edu/~cawp/pdf/ggap.pdf>.

Some believe that a gender gap in political preferences has opened up only in recent years. However, one recent study finds that women's suffrage — from its very beginnings — has resulted in an increase in government spending programs and, likewise, in government taxes. John R. Lott, Jr. & Lawrence W. Kenny, *Did Women's Suffrage Change the Size and Scope of Government?*, 107 J. Pol. Econ. 1163 (1999).

are men. In a "positive" vein, I would predict female judges would be somewhat more likely than male judges to rule in favor of rescue duties in tort. Moreover, the point behind such a prediction can also be relied on for a retrospective evaluation: had there been a larger number of women judges on courts during the common law's formative era, a larger number of courts would have recognized duties to rescue. (To be sure, such an evaluation is in a way sharply anti-historical. Given the gender patterns and social attitudes of a century ago — let alone the legal rules as to the practice of law — the notion of women then serving on state supreme courts makes little sense.)

III. TORT CLAIMS FOR WOMEN'S INJURIES

To explain a further set of issues raised by feminist scholars, let me begin by describing two situations that might give rise to tort liability. The first situation: a patient advises a therapist that the patient is planning on committing a crime of violence against a third party. Even though the therapist tries to dissuade the patient, the therapist is aware that a significant risk remains, yet makes no effort to warn the potential victim. The patient proceeds to attack and badly injure the third party — who then sues the therapist for the failure to give a warning. In such situations, the victims in question can be either male or female; yet the most common instance involves women who are attacked by men with whom they have been romantically involved.

The second situation: a child is run down and killed by a negligent motorist, and the fatal accident is observed by the child's parent, who, because of this, suffers severe emotional distress. A wrongful death action can obviously be brought on behalf of the child. Yet can the parent recover for the emotional distress? Any holding in favor of liability would support emotional distress claims by either fathers or mothers. However, for reasons relating to biology and/or social attitudes, mothers are far more likely than fathers to be the parent observing the fatal accidents. Moreover, for reasons relating to biology and/or social attitudes, it may well be that the emotional distress suffered by an observing mother is, at least on average, more intense and more painful than the emotional distress incurred by an observing father.

In each situation, women predominate among the plaintiffs bringing claims. The first situation refers to a 1976 California classic, *Tarasoff v. Board of Regents*,¹¹⁰ in which the California Supreme Court ruled in favor

110 551 P.2d 334 (Cal. 1976).

of liability. *Tarasoff* has been characterized as a case about violence to women by Stephanie Wildman¹¹¹ and by Professor Bender.¹¹² The second situation involves another California classic, *Dillon v. Legg*,¹¹³ from 1968, the first American case to rule in favor of liability in the context of one person witnessing an injury suffered by another. *Dillon v. Legg* has been treated as a case vindicating women's rights in an article written by Martha Chamallas with Linda Kerber.¹¹⁴ The interesting question is: In situations such as these, does the predominance of women among the category of victims provide a significant persuasive argument in favor of recognizing liability?

One related or preliminary issue concerns the extent to which the cases in question were *presented by plaintiffs* as women's cases and *considered by courts* in those terms. There is no evidence of this in *Tarasoff*; while the Court ruled in favor of liability, its opinion did not focus any attention on the social problem of violence to women. Accordingly, the Court's opinion is reproached by Stephanie Wildman for having improperly ignored or marginalized that social problem.¹¹⁵ In *Dillon*, by contrast, gender obviously played a significant role. In oral argument, plaintiff's counsel pressed the point that when children are on the street, one would "certainly anticipate ... that their mothers certainly would not be very far away."¹¹⁶ Moreover, the Court's opinion — while supporting claims brought by either fathers or mothers — clearly placed weight on the plaintiff's status as mother on the issue of foreseeability. A driver whose negligence imperils a young child "may reasonably expect that the mother will not be far distant."¹¹⁷ Also, the Court's opinion focused on the special intensity of the mother's emotional distress. According to the Court, among all emotional distress cases, this case was "the most egregious of them all: the mother's emotional trauma at the witnessed death of her child."¹¹⁸

In short, the gender of the victim (and of similar victims) seems to have

111 Stephanie W. Wildman, *Review Essay: The Power of Women*, 2 Yale J.L. & Feminism 435, 444 (1990).

112 Bender, *An Overview*, *supra* note 24, at 593-94.

113 441 P.2d 912 (Cal. 1968).

114 Martha Chamallas with Linda K. Kerber, *Women, Mothers, and the Law of Fear: A History*, 88 Mich. L. Rev. 814 (1990).

115 Wildman, *supra* note 111, at 443-44.

116 Counsel also referred to the "traditional classic concept of motherhood ... which we all admire and look up to." In both instances, the record is quoted in Chamallas with Kerber, *supra* note 114, at 857 n.195, 860.

117 441 P.2d at 921.

118 *Id.* at 925. While Chamallas approves of the Court's emphasis on women as the victims in *Dillon* situations, she complains that the Court's precise language in *Dillon* — to the effect that a child is certain to be accompanied by his or her

gone unnoted by the Court in *Tarasoff*, and for that reason, the opinion has been criticized. Yet the gender of the plaintiff (and of other victims) seems to have influenced the Court in *Dillon*, and for this reason, its holding has been commended. In considering whether to extend the scope of tort liability, should it make a difference that such an extension will disproportionately advantage victims who are women?

The premise that this *should* make a difference is accepted by much of the recent feminist scholarship. However, the reasons that might support such a premise have not always been made clear. One possible reason is stated frankly towards the end of the Chamallas article on *Dillon*. "A decision that has the concrete effect of putting money into the hands of women through the redistributive mechanism of tort liability may be understood to serve women's interests."¹¹⁹ Taken at face value, such an assessment is, in my view, clearly unfortunate. The assessment suggests that — whatever the circumstances concerning defendants and their conduct — transferring money from tort defendants to women plaintiffs is a progressive measure. Such a style of reasoning imputes to tort law an objective of pure redistribution that I find objectionable.

Other arguments, however, need to be taken more seriously. It can be claimed that courts in the past have underestimated the injuries that have been suffered by women victims. If so, that underestimation may have led courts to deny liability where in light of proper principle, it should have been affirmed;¹²⁰ a proper estimation of the extent of the injuries can, hence, lead to entirely justified expansions in liability. For example: In emotional distress cases, courts have long held to the understandable position that unless the distress is sufficiently serious, recognizing tort claims is, on balance, not desirable. Assume now that the parents who observe children being run down are more commonly mothers and that mothers who do so observe suffer more intensely, at least on average, than do observing "parents" in some generic sense. If so, then the *Dillon* court's focus on the situation of mothers may have been essentially appropriate in enabling it to reach the proper result.

It is not enough, however, for feminist tort scholars to make claims

mother — stereotypes and sentimentalizes motherhood. Chamallas with Kerber, *supra* note 114, at 861.

119 Chamallas with Kerber, *supra* note 114, at 861. This passage simply takes it for granted that a decision that serves women's interests is for that reason socially desirable.

120 On the theme of tort law's under-valuation of women's injuries, see Bender, *An Overview*, *supra* note 24, at 585-86; Chamallas, *supra* note 23, at 499; Findley, *supra* note 76, at 52.

that courts characteristically undervalue women's injuries. For such claims need to be justified.¹²¹ And it turns out that Professor Chamallas' 1990 article illustrates how the project of providing such justification may be more difficult than it seems at first.¹²² In the article, Chamallas points out that many plaintiffs who have brought "fright" claims have been pregnant women who have alleged that they suffered miscarriages because of the emotional trauma imposed on them by defendants.¹²³ A well-known article from 1944, prepared by Dr. Hubert Smith, noted the predominance of women plaintiffs in fright cases and further found that in most of these cases, the causal relationship

121 Given that until relatively recently, all judges were male, it might be deemed plausible to assume that the traditional judiciary under-appreciated harms to women. Yet consider the findings of Welke and Schlanger to the effect that traditional judges regarded women as sympathetic victims in personal injury cases. *Supra* notes 33, 37 and accompanying text.

122 In one passage, Chamallas praises the development by physicians (in the late nineteenth century) of the diagnosis of "neurasthenia." Chamallas with Kerber, *supra* note 114, at 825. The neurasthenia diagnosis served to "legitimize a category of disease that had previously been dismissed as hypochondria" and in a desirable way "medicalized" what previously had been seen as rather "diffuse disorder." *Id.* at 824-25. According to Chamallas, the neurasthenia diagnosis may have encouraged women to bring lawsuits on account of the "harms they experienced." *Id.* at 825. Neurasthenia was not junk science; the diagnosis was widely accepted among the medical community. Nevertheless, the diagnosis — with its identification of an organic cause for fatigue — seems to be medically false. The organic theory has been discredited, and the diagnosis has long since disappeared from the American medical vocabulary. Moreover, the diagnosis was deeply sexist. Women were disproportionately subjected to the diagnosis, because of beliefs about the innate weakness in women's nervous systems and the vulnerabilities entailed by women's reproduction systems. Women who were given the diagnosis were often subjected to long rest cures, requiring complete passivity (bed rest for a month, no books, no visitors, a spoon-fed milk diet). Men, by contrast, were often awarded exercise cures (including sports and camping out) so as to recharge their nervous systems. In certain cases, women diagnosed with neurasthenia were even willing to submit to clitoridectomies and oophorectomies.

The above is based on Simon C. Wessely, *Neurasthenia and Fatigue Syndromes*, in *A History of Clinical Psychiatry: The Origin and History of Psychiatric Disorders* 509 (German E. Berrios & Roy Porter eds., 1995); Robert L. Martensen, *Was Neurasthenia a "Legitimate Morbid Entity?"*, 271 JAMA 1243 (1994); John Stea & William Fried, *Remedies for a Society's Debilities: Medicines for Neurasthenia in Victorian America*, 93 N.Y. St. J. Med. 120 (1993). For an interesting comparison of then and now, see Simon Wessely, *Neurasthenia and Chronic Fatigue: Theory and Practice in Britain and America*, 31 Transcultural Psychiatric Res. Rev. 173 (1994).

123 Chamallas with Kerber, *supra* note 114, at 828, 830, 832, 833, 846-47.

between the defendant's conduct and the plaintiff's alleged harm had been too weak as to make liability appropriate.¹²⁴ In reaching this conclusion, Dr. Smith emphasized that the emotional distress incurred by many plaintiffs had been primarily due to their own "idiosyncrasy or susceptibility."¹²⁵ Here he regarded the pregnancy of a woman as a form of "idiosyncrasy."¹²⁶ Chamallas contends that Smith's analysis is defective — and I entirely agree. Pregnancy, far from being an idiosyncrasy for which the victim bears primary responsibility, is a normal human condition that may be essential to many women and that certainly is essential to families and the human race.

Yet for purposes of justifying tort recoveries, confirming the normality of pregnancy is only the first step. The much harder step lies in proving that the miscarriage suffered by the plaintiff was actually caused by the emotional distress incurred by the plaintiff on account of the defendant's conduct. Here there are issues of both "general causation" and "specific causation." As for the former, do episodes of emotional trauma sometimes cause miscarriages? As for the latter, can it be said with sufficient confidence that any particular miscarriage was caused by such an episode? Current medical studies are divided as to whether ongoing stress can be a cause of miscarriage;¹²⁷ there seems to be a lack of recent studies considering whether a single episode of emotional trauma can result in miscarriage. The issue of general causation, hence, is uncertain. Yet in part because of that uncertainty, any finding of specific causation would be quite questionable. Indeed, the Chair of the Department of OB-GYN at the UCLA Medical School has advised me that in light of all the relevant risk factors that can contribute to miscarriages, it would be "impossible" to prove that a particular miscarriage has been caused by an emotional trauma.¹²⁸ In short, in the past, courts with some

124 Hubert W. Smith, *Relation of Emotions to Injury and Disease: Legal Liability for Psychic Stimuli*, 30 Va. L. Rev. 193 (1944).

125 *Id.* at 225-26.

126 *Id.* at 296.

127 Compare Laura Fenster et al., *Psychologic Stress in the Workplace and Spontaneous Abortion*, 142 Am. J. Epidemiology 1176 (1995), with Lars P.A. Brandt & Claus V. Nielsen, *Job Stress and Adverse Outcome of Pregnancy — A Causal Link or Recall Bias*, 135 Am. J. Epidemiology 302 (1992).

128 Interview with Dr. Alan deCherney, Chair of the Department of OB-GYN at UCLA Medical School (Oct. 12, 1999). The problem of proving causation in miscarriage cases is acknowledged by Chamallas, but nevertheless relegated to the end of a long footnote. Chamallas with Kerber, *supra* note 114, at 832 n.61 (citing Jack A. Pritchard & Paul C. MacDonald, Williams' on Obstetrics 591 (16th ed. 1980)). I should add that I am not sure how effective I was in explaining to Dr. deCherney the law's standards for causation.

frequency have granted recoveries to women who have suffered miscarriages after frightening experiences. In doing so, courts may well have overestimated the extent to which defendants' conduct has caused harm to women and, hence, have imposed inappropriate liabilities.

But the traditional pregnancy cases are a minor matter compared to one episode of tort litigation in the 1990s. During this decade, women began suing for harms thought to be caused by breast implants. Most of these harms were said to be auto-immune diseases. In 1998, Dow Corning, a principal defendant, agreed to settle 177,000 claims for a total of \$3.2 billion; other companies have contributed an additional \$3 billion.¹²⁹ At the time of these settlements, the scientific basis for the plaintiffs' claims could perhaps be called unsettled. Since then, however, a National Science Panel commissioned by Judge Pointer has reported to the judge that there is no evidence to support the causal claim;¹³⁰ and a report prepared by the Institute of Medicine has reached the same conclusion.¹³¹ Both reports agree that breast implants can cause localized ruptures; but rupture claims form only a small fraction of all claims against the companies. To be sure, it is quite conceivable that further studies will detect *some* causal connection between breast implants and auto-immune diseases. Nevertheless, if the causal connection has eluded all the studies conducted until now, the *amount* of harm caused must be relatively small — only a tiny fraction of the harm envisioned by the settlements.

In all, then, one of the major instances of tort litigation in the 1990s turns out to be an instance in which the tort system evidently malfunctioned in a way that radically overestimated the extent of harms suffered by women on account of defendant negligence. To be sure, even if this is the case, there may be other situations in which tort law — even in its modern expansive form — is devaluing or underestimating the harms suffered by women and is, therefore, unwisely withholding liability. But proof of such situations needs to be forthcoming;¹³² and even if particular situations do turn

129 Charles Krauthammer, *Class-Action Extortion*, Wash. Post, June 25, 1999, at A29. Another source puts the total of settlements at \$7 billion. Mike France, *Class Actions: Fine-Tune the Law, Don't Trash It*, Bus. Wk., July 12, 1999, at 45.

130 Betty A. Diamond et al., Nat'l Science Panel, *Silicone Breast Implants in Relation to Connective Tissue Diseases and Immunologic Dysfunction* (1998) (unpublished report).

131 Inst. of Medicine, *Safety of Silicone Breast Implants* (1999).

132 Professor Chamallas complains about tort law's disinclination to recognize a general tort for the negligent infliction of emotional harm. Chamallas, *supra* note 23, at 491-500. Her hypothesis is that this disinclination is due to judges' association of emotional distress claims with female plaintiffs. *Id.* at 499. But she does not prove

out to exist, it does not follow that the underestimation of women's harms is a problem that characterizes the tort system as a whole.

In giving further consideration to the idea that the predominance of women victims justifies extensions of liability, I can observe that the recent feminist writings have curiously isolated themselves from the more basic stream of scholarship that has considered the objectives of tort law. As noted above, those basic objectives are commonly seen as deterrence, or corrective justice, or some combination of the two. But the feminist writings have paid curiously little attention to these objectives; for example, the writings have considered only in passing the extent to which imposing tort liability can serve as an incentive for more careful conduct. If one does consider tort law's deterrence goal in relation to cases such as *Tarasoff* and *Dillon*, one can identify a sharp difference between the two. Prior to *Tarasoff*, therapists rarely provided warnings to potential victims. However, their awareness of their *Tarasoff* obligation can be expected to lead to a significant increase in such warnings.¹³³ If it is assumed that the practice of giving warnings is socially worthwhile, then the incentive argument in favor of *Tarasoff* is quite strong. In the *Dillon* context, however, the negligent motorist already faces liability for the physical injury or death of the pedestrian on the street. The added liability for the emotional distress of the observing parent (if such a parent turns out to exist) is a rather small add-on to the liability that the motorist already faces. If the prospect of liability for physical injury is insufficient to dissuade the motorist from driving negligently, it is unlikely that the *Dillon* supplement to that basic liability will have a meaningful deterrent effect. From a deterrence perspective, then, the argument in favor of liability in *Tarasoff* may be strong, but the argument in *Dillon* is weak.

If one shifts from the criterion of deterrence to the criterion of corrective justice, one can appreciate that the issue in *Tarasoff* is rich but also puzzling: how does a moral therapist balance the interests of the patient (including the interest in the confidentiality of therapy) against the safety interests of

this hypothesis. Certainly, the hypothesis is in no way confirmed by *Consolidated Rail Corp. v. Gottshall*, 512 U.S. 532 (1994), discussed in Chamallas, *supra* note 23, at 494-95, 499. The plaintiff in *Gottshall* was a male — as are most plaintiffs in FELA cases that are governed by the *Gottshall* holding. See also *Metro North Commuter R.R. v. Buckley*, 117 S. Ct. 2113 (1997).

Note also that tort law, in placing a priority on personal injury, frequently denies recovery for the negligent infliction of emotional distress — but likewise rejects recovery for the negligent infliction of economic loss. And in economic loss cases, plaintiffs are most frequently corporations.

133 For one study, see Daniel J. Givelber et al., *Tarasoff, Myth and Reality: An Empirical Study of Private Law in Action*, 1984 Wis. L. Rev. 443.

a potential third-party victim? In *Dillon*, the corrective justice analysis is puzzling in a quite different way. It may be clear enough that corrective justice supports the claim brought by the injured child-pedestrian against the negligent motorist. Assume now that corrective justice also warrants a claim against that negligent motorist by the observing mother. Yet if one begins with that assumption, what can one say about the claim of the observing grandparent or next-door neighbor — or the claim of the mother or father who simply learns of the fatal accident by way of a telephone call? For corrective justice purposes, where does one draw the line — and why?

Cases such as *Tarasoff* and *Dillon* hence raise interesting questions concerning the criteria of deterrence and corrective justice; yet these are criteria that have received little attention in the recent feminist writings. Instead, those writings have often relied on what is referred to as the "expressive function of law."¹³⁴ Thus, according to Chamallas, *Dillon* is correctly decided because it serves "to recognize and value the interests of women."¹³⁵ Likewise, Chamallas praises the award of damages for pain and suffering because such awards "demonstrate the importance we place on ... legal rights."¹³⁶ Similarly, according to Shelley Ryan, the feminist reason to favor liability for parents of disabled children in so-called "wrongful birth" cases is to "signal that the emotional harm suffered in [those] cases is significant enough that the legal system will acknowledge and provide compensation for it."¹³⁷

I am somewhat puzzled by these "expressive" claims as to why liability should be more readily affirmed when the harms in question are disproportionately incurred by women. To recommend that the harm be affirmed as "significant" *might* be one way to offset the possibility that the harm is inappropriately devalued; if so, then the "expressive" claims are a restatement of the concern for under-valuation, which has been discussed above. But insofar as the "expressive" claims on behalf of liability seem to go beyond a concern for offsetting under-valuation, I am not sure what sense to make of them. There is a growing literature, in the context of public law regulations, on the expressive function of law.¹³⁸ But much of this literature goes beyond the simple statement that laws should be adopted

¹³⁴ Chamallas, *supra* note 23, at 507.

¹³⁵ Chamallas with Kerber, *supra* note 114, at 816.

¹³⁶ Chamallas, *supra* note 23, at 507.

¹³⁷ Shelley A. Ryan, *Wrongful Birth: False Representations of Women's Reproductive Lives*, 78 Minn. L. Rev. 857, 887 (1994).

¹³⁸ See, e.g., Cass R. Sunstein, *On the Expressive Function of Law*, 144 U. Pa. L. Rev. 2021 (1996).

for the sake of expression; rather, scholars go on to discuss such possibilities as that expressive laws will have beneficial consequences by way of affecting social norms.¹³⁹ In the feminist tort writings, elaboration of this sort has been lacking, at least so far.

Indeed, in the context of tort law, the only way one can express the significance of the plaintiff's harm is by imposing a costly liability on a defendant. If there is a corrective justice reason for this liability, then a pro-liability result is, of course, appropriate. That result is likewise fine if imposing liability will serve an important deterrence function. But if, for whatever reason, the corrective justice and deterrence rationales do not justify liability, it seems doubtful that the mere interest in expressing the significance of the harms suffered by women victims is a satisfactory reason for imposing liability. By way of illustration, assume that a medication provided to large numbers of pregnant women causes harm to those women — and to their daughters as well.¹⁴⁰ This is an awful result. Assume, however, that the company, in preparing and distributing the drug, did not know of these adverse side effects, even though the company had engaged in all reasonable research. The conclusion that most analysts have reached¹⁴¹ is that fairness and deterrence reasoning do not warrant liability in the event of "unknowable risks" (what the European Community calls "development risks").¹⁴² If this conclusion is correct, then in the case described, the denial of liability is the right result, despite the importance of the harms suffered by women. Another illustration — in a non-gendered context — might be helpful in considering the "expressive" relevance of tort law. Certainly, nothing is more valuable than life itself. Yet all the time, activities go on in society that place people at the risk of death. Assume that a death indeed occurs and the victim's family sues some defendant. In such suits, despite the importance of expressing the value of life, liability is routinely denied unless some existing liability rule — evidently justified by concerns for deterrence or corrective justice — makes liability appropriate.

139 See *id.* For one recent discussion of expressive law, see Matthew D. Adler, *Expressive Theories of Law: A Skeptical Overview*, 148 U. Pa. L. Rev. 1364 (2000).

140 See, e.g., *Brown v. Superior Ct.*, 751 P.2d 470 (Cal. 1988).

141 See, e.g., Restatement (Third) of Torts: Products Liability § 2 (1999) (limiting liability in design defect and warning defect cases to products with "foreseeable risks"). See also the scholarship reviewed in *id.* at 81-84 (Reporters' Note).

142 Geraint G. Howells & Mark Mildred, *Is European Products Liability More Protective than the Restatement (Third) of Torts: Products Liability?*, 65 Tenn. L. Rev. 985 (1998).

Moreover, it is appropriate to assess what the medium-run consequences can be when liability is extensively imposed. Consider *McDonald v. Ortho Pharmaceutical Corp.*¹⁴³ In this case, the plaintiff, having taken an oral contraceptive, suffered an incapacitating stroke and sued the manufacturer for its failure to adequately warn. The Court's opinion, by Justice Ruth Abrams, has been praised for its sensitivity to women's interests.¹⁴⁴ In *McDonald*, the company had warned that oral contraceptives can produce blood clots and that blood clots can lead to brain damage and can be fatal. The warning, however, did not specifically refer to the possibility of a disabling stroke. Because of this omission, the Court ruled in favor of the company's liability. Opinions like *McDonald* contribute to companies' belief that as a practical matter, there is little they can do to stave off expensive litigation and, indeed, ultimate liability.¹⁴⁵ Moreover, such a belief can, in turn, affect companies' willingness to develop new products and to distribute products widely. Indeed, there is considerable reason to believe that the threat of liability has, in fact, diminished the efforts of American companies in developing contraceptive devices and also has limited the availability within the American market of devices that have been developed in other countries.¹⁴⁶ Results such as these are evidently harmful to the interests and welfare of American women.

CONCLUSION

When I was in third grade, my teacher imposed a prohibition on our class: in writing book reviews, we were not allowed to use the word "interesting." In this article, I have departed from third-grade standards by frequently

¹⁴³ 475 N.E.2d 65 (Mass. 1985).

¹⁴⁴ Findley, *supra* note 76, at 69. To be sure, Professor Findley focuses on another of the holdings in *McDonald*: that the drug company's obligation to warn runs not only to physicians but also directly to patients. Given a prior FDA ruling that the manufacturers of oral contraceptives have a regulatory obligation to directly notify patients, I regard this holding in *McDonald* as acceptable.

¹⁴⁵ The Court affirmed in extremely broad terms the discretion of the jury in ruling on the adequacy of a product's warning. 475 N.E.2d at 71.

¹⁴⁶ This possibility was explored at a recent conference organized by a highly regarded feminist. The papers from this conference have been published in a law review symposium. The lead paper, by the conference organizer, is Sylvia A. Law, *Tort Liability and the Availability of Contraceptive Drugs and Devices in the United States*, 23 N.Y.U. Rev. L. & Soc. Change 339 (1997). See also Elof D.B. Johansson, *Comparison of the Availability of Contraceptive Methods in Selected European Countries and the United States*, 23 N.Y.U. Rev. L. & Soc. Change 471 (1997).

describing as "interesting" the feminist tort scholarship that has developed in the last twelve years. I stand by that description. The feminist writings I have encountered have thoroughly engaged my own interests. As well, the last several times I have taught my torts course, I have presented to my students many of the issues that have been considered in this article. This presentation has certainly enriched my course; the response by students has been quite gratifying.

Even so, it is fair to characterize these feminist writings as thin.¹⁴⁷ As for the feminist legal historians, they have failed to connect to the larger debates about American tort history. As for the advocates of a reasonable woman standard of care and a feminist perspective on rescue, they have failed to connect to what empirical information is available about women's behavior. As for feminist writers recommending an "expressive" rationale for liability, they have failed to give that rationale the elaboration it needs and to show how that rationale relates to the other rationales ordinarily associated with tort liability.

I can conclude by observing that the first decade (or more) of feminist writings on tort law has succeeded in opening up valuable lines of inquiry. One can hope, and perhaps predict, that in the next decade, those lines of inquiry will be more thoroughly explored and additional lines of inquiry identified.¹⁴⁸ On the other hand, perhaps nothing in the world of scholarship is predictable. From what I can tell, for example, in the 1960s no one anticipated the surge of economic analyses of tort issues that began in the 1970s. Moreover, as late as the mid-1980s, most tort scholars would have been baffled by any suggestion of feminist approaches to tort law. Yet here we are; those approaches have arrived and have made their mark.

147 Modern feminist writings have had a major impact on the criminal law, leading to reformulations of the law of rape and a new judicial willingness to accept evidence of battered-woman-syndrome. See Sanford H. Kadish, *Fifty Years of Criminal Law: An Opinionated Review*, 87 Cal. L. Rev. 943, 974-78 (1999). One can identify no comparable impact of feminism upon the law of torts.

148 There is, after all, a very significant diversity of views among contemporary feminists. In light of this, the Carol Gilligan book (for example) has been subjected to diverging interpretations; and evidently some feminists largely reject Gilligan, finding her methodology inadequate or her conclusions somewhat too simple. For acknowledgments of early criticisms of Gilligan, see Bender, *A Lawyer's Primer*, *supra* note 24, at 29 n.111.

