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# **TAKING THE MASS OUT OF MASS TORTS: REFLECTIONS OF A DALKON SHIELD ARBITRATOR ON ALTERNATIVE DISPUTE RESOLUTION, JUDGING, NEUTRALITY, GENDER, AND PROCESS**

*Carrie Menkel-Meadow\**

## **I. INTRODUCTION: THE FACTS AND ISSUES**

Life in the modern and post-modern world has changed our understanding of many traditional legal matters. Although many died from plagues, wars, and some shipping and agricultural accidents in the years which preceded the Industrial Revolution and modern breakthroughs in medicine, the twentieth century has given rise to “group” injury and death at unprecedented levels, all as we march toward growth, progress, and greater goods for greater numbers. Mass progress has resulted in mass injury, which in turn has transformed

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As an arbitrator in the Dalkon Shield Claimants Trust proceedings, I heard approximately one hundred cases over a several year period; both my empirical analysis of my own experience and the Private Adjudication Center’s analysis of the entire program await further treatment in the future. The views expressed in this essay are purely my own and I do not speak for other arbitrators in the program, the Private Adjudication Center, the Dalkon Shield Claimants Trust, or the claimants. Proceedings under the Alternative Dispute Resolution program of the Dalkon Shield Claimants Trust were confidential and final, perhaps more so than many other formal court proceedings. Therefore, talking and writing about them is risky, both because we promise confidentiality and because you, the reader, have no independent source of verification of what I say here. As an ethicist, practitioner, theorist, and sometime critic of Alternative Dispute Resolution processes, I both want to respect the process that I promised to be a part of and publicly analyze it so we can learn for future proceedings.

Thanks to Robin L. West, Robert Meadow, Herbert Kritcer, Neil Vidmar, and Elena Ro for comments, readings, and conversations about what follows.

individualized justice into mass justice.<sup>1</sup> Whether structured as large class actions or as thousands of individual cases dealing with the same accident, product, or chemical, lawsuits claiming compensation for the harms caused by the fruits of production of a mass industrialized society proliferate in our legal system and challenge many of the basic tenets of American, adversarial, common law adjudication.

Attempts to aggregate claims have led to multidistrict consolidations, class actions, federal-state coordination committees of lawyers and judges, organized claims facilities, and bankruptcy proceedings.<sup>2</sup> Whether before, during, or after the pendency of litigation, cases of mass injury increasingly use various forms of Alternative Dispute Resolution ("ADR") to help assess global costs and liabilities. Further, parties use ADR to provide some form of an individualized assessment of either the legal merits and liability, or the amount of compensation to be paid to particular claimants or victims, or in some cases all three.<sup>3</sup>

This essay is part of the story of the mass injury suits that turned to ADR as one way to individually process many cases. The story of the Dalkon Shield litigation has been told in several other places<sup>4</sup> and I will not repeat it here except as necessary to understand the issues I raise.

When the A.H. Robins Company chose bankruptcy as the way of dealing with its liability for the manufacture of the intrauterine

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1. See Carrie Menkel-Meadow, *Ethics and the Settlements of Mass Torts: When the Rules Meet the Road*, 80 CORNELL L. REV. 1159, 1161 (1995).

2. See *Amchem Prods., Inc. v. Windsor*, 117 S. Ct. 2231 (1997); LINDA S. MULLENIX, *MASS TORT LITIGATION* (1996); JACK B. WEINSTEIN, *INDIVIDUAL JUSTICE IN MASS TORT LITIGATION* (1995).

3. For a more in-depth review of the different kinds of mass tort cases and the uses of different forms of Alternative Dispute Resolution ("ADR"), see MARK A. PETERSON & MOLLY SELVIN, *RESOLUTION OF MASS TORTS: TOWARD A FRAMEWORK FOR EVALUATION OF AGGREGATIVE PROCEDURES* 39-48 (1988); Deborah R. Hensler, *A Glass Half Full, a Glass Half Empty: The Use of Alternative Dispute Resolution in Mass Personal Injury Litigation*, 73 TEX. L. REV. 1587 (1995); Deborah R. Hensler & Mark A. Peterson, *Understanding Mass Personal Injury Litigation: A Socio-Legal Analysis*, 59 BROOK. L. REV. 961 (1993); and Francis E. McGovern, *Rethinking Cooperation Among Judges in Mass Tort Litigation*, 44 UCLA L. REV. 1851 (1997).

4. See, e.g., RONALD J. BACIGAL, *THE LIMITS OF LITIGATION: THE DALKON SHIELD CONTROVERSY* (1990); RONALD J. BACIGAL, *MAY IT PLEASE THE COURT: A BIOGRAPHY OF JUDGE ROBERT R. MERHIGE* (1992); KAREN M. HICKS, *SURVIVING THE DALKON SHIELD IUD: WOMEN V. THE PHARMACEUTICAL INDUSTRY* (1994); MORTON MINTZ, *AT ANY COST* (1984); RICHARD B. SOBOL, *BENDING THE LAW: THE STORY OF THE DALKON SHIELD BANKRUPTCY* (1991).

device ("IUD"), known as the Dalkon Shield, it established a settlement fund of \$2.3 billion to compensate thousands of women and men who claimed injuries resulting from the use of the device.<sup>5</sup> Women's injuries included unwanted pregnancies, ectopic pregnancies, septic abortions, miscarriages, birth defects, excessive bleeding and cramping, pelvic inflammatory disease, infertility, and, in a few cases, death. Men's injuries included loss of consortium and related claims.<sup>6</sup>

Most of the physical injuries were due to the peculiar "wicking" action of the string<sup>7</sup> which extended from the crab-like device, allowing removal by the physician. The string of the Dalkon Shield was particularly susceptible to allowing bacteria to climb or to be wicked into the uterus, causing dangerous, but often silent, infections.<sup>8</sup> In addition, the distinctive prongs of the Dalkon Shield often became embedded in the uterus, causing pain and bleeding. Finally, as later became an issue in the litigation, inadequate testing of the device<sup>9</sup>—and then failure to disclose some of the findings of internal corporate tests—prevented accurate dissemination of the medical risks and the actual efficacy rate of pregnancy prevention.<sup>10</sup>

In addition to these physical injuries, the problems they caused led to several significant psychic harms for many, if not all, women. Some suffered troubled or broken marriages due to their infertility<sup>11</sup>

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5. For more complete descriptions of the process which led to the establishment of the Dalkon Shield Claimants Trust ("Trust") see Kenneth R. Feinberg, *The Dalkon Shield Claimants Trust*, 53 LAW & CONTEMP. PROBS. 79 (1990) and Georgene M. Vairo, *The Dalkon Shield Claimants Trust: Paradigm Lost (or Found)?*, 61 FORDHAM L. REV. 617 (1992).

6. See Vairo, *supra* note 5, at 625.

7. See SOBOL, *supra* note 4, at 10-11.

8. See *id.* at 2.

9. The Intrauterine Device ("IUD"), as a "device" and not a drug, was not subject to certain Federal Drug Administration premarketing testing requirements in 1970. See *id.* at 4.

10. This was a crucial factor in the mass use of the Dalkon Shield. Touted as a highly effective contraceptive, the Dalkon Shield became a birth control device of choice at the time when the first studies of dangerous side effects of the birth control pill were released. In the cases I heard as an arbitrator, a majority of Dalkon Shields had been inserted in university and college student health offices or in Planned Parenthood health clinics. The Dalkon Shield was a mass device, aggressively marketed to take advantage of the new sexual freedom of women in the late 1960s and early 1970s. By the time the product was withdrawn from the market, A.H. Robins Company had distributed approximately 2.8 million Dalkon Shields in the United States. See Vairo, *supra* note 5, at 625.

11. In one case I heard a woman aborted a pregnancy conceived while using the Dalkon Shield, due to fear of damage to the fetus. She never conceived

or due to their conception of an unwanted child; many developed fear of sexual intercourse due to pain from the Dalkon Shield or fear of unwanted pregnancy and its aftermath.<sup>12</sup> Even years after removal of the Dalkon Shield, some women were fearful of any public appearances, including going to work, after excessive bleeding had led to humiliating experiences.<sup>13</sup> For many women the use of the Dalkon Shield produced an anxiety or fear about sexuality, reproduction, relationships, and other significant harms.

At least one commentator has recognized these harms as "gendered harms"<sup>14</sup> that largely have been ignored or undercompensated in our gendered, pragmatic, instrumentalist, and male-identified tort system.<sup>15</sup> Furthermore, for many women the fear of

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again.

12. While abortion was legalized in the United States during the period of Dalkon Shield use, *see Roe v. Wade*, 410 U.S. 113 (1973), some women faced unwanted pregnancies before this period and had to grapple with the decision of whether to obtain illegal abortions, as well as whatever religious, moral, and personal guilt they felt about abortion generally. I heard cases of women who were not in the United States, but were in regimes where abortion was not legal. These women either had to obtain unlawful abortions, incur travel and other expenses to reach nations where abortion was legal, or bear children that were, for any number of complicated reasons, unwanted or unmanageable at the time of conception.

Consider how the vagaries of territorial legality differentially affects the victims of mass torts. In some places, women who conceived due to the failure of the falsely advertised protection of the Dalkon Shield could not legally abort their unwanted fetuses and also did not have a legal claim for "wrongful life." In other jurisdictions women could legally abort their pregnancies at some monetary expense and at varying degrees of psychic cost. Only in very few jurisdictions could a woman have collected the expenses of child bearing, but not of child rearing, for wrongful life claims. Many who have judged or commented on mass torts have decried the variation in legal compensation based on the differences in state law in what are national or even global torts. *See In re DES Cases*, 789 F. Supp. 552, 562, 576-77 (E.D.N.Y. 1992) (applying and broadening rules of personal jurisdiction to include the expectation that manufacturers of nationally marketed and distributed products should expect to be sued wherever the products are used, and commenting in dicta on the nature of global distribution of products and the liability that should flow therefrom).

13. In one case I heard that a bride's wedding dress was ruined with blood due to excessive bleeding.

14. *See* ROBIN L. WEST, *CARING FOR JUSTICE* 97 (1997).

15. *See id.*; Robin L. West, *The Difference in Women's Hedonic Lives: A Phenomenological Critique of Feminist Legal Theory*, 3 WIS. WOMEN'S L.J. 81, 82 (1987); *see also* Leslie Bender, *Feminist (Re)Torts: Thoughts on the Liability Crisis, Mass Torts, Power, and Responsibilities*, 1990 DUKE L.J. 848, 850-53 (1990) (discussing the implications of a feminist tort system); Leslie Bender, *A Lawyer's Primer on Feminist Theory and Tort*, 38 J. LEGAL EDUC. 3, 4-5 (1988) (discussing the components of feminist theory); Lucinda M. Finley, *A Break in the Silence: Including Women's Issues in a Torts Course*, 1 YALE J.L. &

cross-examination on past sexual history—like the cross-examination used by A.H. Robins Company's defense counsel to demonstrate an alternative theory of causation for pelvic inflammatory disease—the actual conduct of the cross-examination in depositions and trials was experienced as another layer of harm. The harm is like the claim of rape victims that the defendant's trial is often experienced as a second rape of the victim. Thus, for some women, the very structure of the legal process added to the harm and injury experienced in the use of the product.<sup>16</sup>

The Dalkon Shield story is also an interesting and poignant human story, as are all mass tort stories, with the characteristic tragedy of modern life. It is the story of medical design failure, fueled by the ironic joint hopes of the social and sexual revolutionaries of the 1960s, who were quite literally in bed with the corporate profit sought by those who desired capitalizing on social change.<sup>17</sup> Although it is

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FEMINISM 41, 41-42 (1989) (discussing the reasons for including feminist theory and women's injuries in a torts course).

It would be an interesting empirical study to compare whether the soldiers exposed to Agent Orange feel that they were treated any better than the would-be mothers who used the Dalkon Shield or were exposed to Diethylstilbestrol ("DES"). See CAROLE PATEMAN, *THE DISORDER OF WOMEN: DEMOCRACY, FEMINISM, AND POLITICAL THEORY* 10-12 (1989) (arguing that women's child bearing should be recognized as an act of citizenship commensurate with men's soldiering).

16. See HICKS, *supra* note 4, at 104 (discussing how lawyers promote victim-blaming ideologies and trivialize injuries). Not all women feared public legal hearings. In any mass tort case or large class action lawsuit for social change, there will be courageous individuals who are willing to take the stand and go public with their stories, even with often difficult and painful cross-examination experiences, so that the larger story may be known.

As I argue, the fact that women, like all human beings, have different preferences, desires, needs, and capacities for privacy or publicity, suggests that any one way to process mass torts may ill serve victims. Varieties of process, such as a fuller menu of ADR, may better serve the tort victims as well as meet their substantive and compensatory needs. As in medicine, there may be several choices of treatment. After a recent angioplasty—rather than a coronary bypass—noted mediator and litigator Michael Keating remarked that if surgery is like trial, then angioplasty is the ADR of cardiac care. There is less wear and tear, lower cost, lower risk, and less disability when it can be utilized. See Michael Keating, Remarks at the Spring Meeting of CPR-Institute for Dispute Resolution in Vancouver, British Columbia (June 24, 1997).

17. I cannot resist, in what I consider to be a mixture of personal essay and law review commentary, naming the irony of this "joint venture." In the middle of writing this piece I returned, for personal reasons, to Richmond, Virginia—the home of the Dalkon Shield and the A.H. Robins Company. How odd it seemed to me that this town and this company benefited so greatly from the birth control practices, which clearly much of this community must have abhorred, of young people all over the nation and the world. At the time the Dalkon Shield was

true that the Dalkon Shield was most easily used by women who had already borne children, it was widely prescribed and inserted by physicians working in university student health facilities. These university facilities were where the first pioneers of the sexual revolution began their work for a more free and more active sexual youth, unprecedented by any previous generation. With the typical American faith in medical and technical progress, millions of women were quick to avail themselves of all that the new market would offer. Although the total toll of all mass torts on the two genders is yet to be calculated,<sup>18</sup> it is clear that those mass torts resulting from reproductive medicine fall disproportionately on women.

When the potential liability from thousands of lawsuits became too great, the A.H. Robins Company filed for "reorganization relief" under Chapter 11 of the Bankruptcy Code in its hometown of Richmond, Virginia.<sup>19</sup> Federal District Judge Robert Merhige retained jurisdiction over the entire case.<sup>20</sup> The reorganization plan—which

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marketed, Richmond was a very conservative and religious Virginia city. Modern sexual practices and the prevention of pregnancies were not likely favored policies there. The vast majority of the Dalkon Shields that were the subject of the hearings I heard were provided through university student health facilities and urban Planned Parenthood clinics.

Today the city and University of Richmond are endowed with many large and gracious buildings provided by the Robins family, most of whose profits are due to the widely successful cough syrup Robitussin and Chapstick, and probably not to the Dalkon Shield. Indeed, the Robins family management probably wishes it had never purchased the Dalkon Shield from its Baltimore inventor. Nevertheless, it is somewhat ironic and interesting to note the magic that capitalism performs when it brings together suppliers and purchasers who may share little in their fundamental values but are willing to make a mutually beneficial commercial exchange.

18. Until the final number of tobacco injuries are known, it is difficult to know with any degree of accuracy whether either gender has been disproportionately injured in mass tort events. It is interesting to note that many of the mass torts have themselves been quite gendered. Asbestos, heart valve, and Agent Orange are primarily "men's" torts, while DES, Dalkon Shield, and breast implants are obviously "women's" torts. Many commentators on reproductive medicine note that the harms of birth control and birth clearly and disproportionately have been visited upon women. There is little development in male intrusive birth control measures, such as IUDs and the chemistry of the pill or Norplant, causing some to complain about the medical violence done to women. See HICKS, *supra* note 4, at 15.

19. See *In re A.H. Robins Co.*, 86 F.3d 364, 367 (4th Cir. 1996).

20. See *id.* at 368. I will not deal here with the controversial issues surrounding Judge Merhige's role, including his relationship to the Robins family, to the Richmond economy, and his control of the bankruptcy case, as these issues have been recounted by others. See sources cited *supra* note 4. For many, Judge Merhige had been considered a fair, innovative, and committed judge in the Virginia school desegregation cases. To the extent that this essay raises issues about

involved, among other things, the financing of the Dalkon Shield Claimants Trust ("Trust") primarily from the acquisition of A.H. Robins Company by American Home Products—provided for several options for claims to be filed and for payment by the Trust.<sup>21</sup> These options included: (1) small short form payments with a simple application process, (2) more complicated forms and processes where liability was less clear or desired compensation was higher, and (3) a process for attending a settlement conference with a Trust representative, followed by a choice of trial or binding arbitration if settlement offers were rejected.

Settlement offers were made on the basis of pre-bankruptcy petition historical settlement amounts, as calculated by a special master and experts during an estimation process supervised by the court. There was much acrimony, which I will not review here, as to selection of the trustees to administer the Trust and a variety of other legal issues. These issues are important in the larger consideration of whether justice was finally done, both in the process and in the outcome achieved through the Dalkon Shield claims process, but I will leave that assessment to another day.

As part of the Option (3) choice of settlement or trial, the Trust developed a fast-track arbitration process which it misnamed, in my view, ADR. As used in the Trust rules, ADR was simply a faster, even less formal, form of arbitration, allowing testimony of experts by affidavits and medical texts. There was no mediation, negotiation, or further attempt to engage in conversation with the Trust representatives. If a claimant rejected a settlement offer and proceeded to ADR, she was electing an adversarial trial-like hearing, albeit not in a court. The claims representatives had absolutely no authority to negotiate or "talk" to the claimants. When a case came to ADR, it came for decision and award.

The Trust contracted with the Private Adjudication Center ("PAC"), an affiliate of Duke University School of Law, to be the third party neutral under the reorganization plan and to administer the ADR and arbitration process.<sup>22</sup> In turn, PAC trained a cadre of arbitrators throughout the country to serve as hearing officers. These arbitrators included retired trial judges and some lawyers with at least ten years of significant trial experience. No one who had used

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neutrality, fairness, and personal involvement with the issues, Judge Merhige's concerns and commitments to his community are another example of the complexity of the judge's role.

21. See *In re A.H. Robins Co.*, 86 F.3d at 369.

22. See Feinberg, *supra* note 5, at 108 n.85.



or who had an immediate family member who had used the Dalkon Shield was eligible to serve as an arbitrator.<sup>23</sup> Further, no one who had been involved in the on-going litigation was eligible either.<sup>24</sup> Arbitrators were trained in the relevant law, in the rules of the Trust for conducting the hearing and for liability,<sup>25</sup> and by a gynecologist on

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23. There was a recent effort to recuse a federal district judge from a breast implant case in which he acknowledged that his wife had breast implants and therefore he was technically a member of the class of litigants. The judge failed to remove himself under 28 U.S.C. §§ 144 and 455. He stated that he could still judge the case impartially, despite familial and potential economic interests, as well as "extrajudicial knowledge" or views about the larger case. See Plaintiffs' Motion to Disqualify Judge Robert Jones, *McAleer v. Medical Eng'g Corp.*, No. CV-97-10158-2 (N.D. Ala. 1997) (denying the disqualification motion brought by plaintiff). This suggests that the disqualification rules for arbitrators were more stringent than the federal statute of judicial disqualification, under which at least some judges have ruled on their own potential interests and biases.

24. At the time of the selection of the initial arbitrators, there were concerns, relevant to this essay, about the gender composition of the arbitration panels. Under the traditional arbitration option, claimants and the Trust could strike arbitrators. I was trained in the initial group in southern California where there was only one other woman in my training cohort. Within the rules for arbitration, it would have been possible, had the Trust wanted to, to strike either or both of us so that there would have been no women on cases in this region. I believe there were similar issues in other regions.

The staff of the Private Adjudication Center ("PAC") was duly sensitive to this issue and over the years many women were added to the arbitrator lists. In fact, when the ADR "fast-track" arbitration process was created, the PAC chose the arbitrators and there were many women, as well as men, chosen. Therefore, the possibility of an all male corps of arbitrators never developed. I handled the first set of ADR proceedings in this country, which were monitored by the Trust and its Executive Director, Michael Sheppard.

25. There were relatively complex liability rules for the arbitration hearings about what the Trust admitted and what was still subject to contest. Proof of use was required, but causation was far more complicated. In the ADR proceedings, amounts of compensation were limited initially to \$10,000 per claimant and then raised to \$20,000. Subsequently, after all claims were paid, each claimant would receive pro rata additions. There have already been some pro rata additional payments to those who were compensated through this process. There were a variety of far more complicated legal issues, which I, as a law professor, saw in these proceedings which I will not deal with here, but which should be considered in future global settlements like these.

The instrument setting up the Trust and the rules promulgated by the bankruptcy court, approved by District Judge Merhige, provided that Virginia law was to govern legal claims. However, many of the lawyers representing claimants continued to insist that the proceedings were occurring in their jurisdictions and that under diversity jurisdiction their state substantive rules were to apply. In California, for example, certain forms of wrongful life claims were recognized as a matter of tort law, where they were not recognized in Virginia. Under the ADR rules, once chosen by the claimant as a process, all awards by arbitrators were final and binding and not subject to review. I used to say about my

the reproductive medicine necessary to understand the causation and injury issues.

There is much I could say as a law professor about the legal proceedings. Was the bankruptcy device appropriately used? Were the conflicts of law issues adequately dealt with? Was there adequate representation and negotiation for the settlement amounts? Were the liability and process issues properly handled? Finally, was justice done in the winding up of this mass tort, one of the few to come to final legal closure?

Many of these issues have been canvassed by others, with reference to this case or with respect to others like it, such as in the asbestos and breast implant litigations. I have views on these subjects,<sup>26</sup> but here I choose to focus on two different and more difficult aspects of the use of ADR in mass torts based on my own participant-observer experience.<sup>27</sup> Both of the issues I will address here are controversial and will no doubt inspire disagreement. However, I raise these issues because I think it is important to air them openly and in

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role as a Dalkon Shield arbitrator that I felt as powerful as a Supreme Court Justice. Virtually no one could review my rulings. There were several appeals filed both with Judge Merhige and with the Fourth Circuit on issues having to do with the ADR and arbitration process, all of which were unsuccessful. See, e.g., *In re A.H. Robins Co.*, 86 F.3d at 364 (4th Cir. 1996).

26. See *supra* note 1 and accompanying text.

27. Whether cast as sociological participant observation or more jurisprudential phenomenological accounts of judging processes, we have a growing literature which seeks to explore and understand the process of judging from inside. See generally BENJAMIN N. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* (1921); KARL N. LLEWELLYN, *THE COMMON LAW TRADITION: DECIDING APPEALS* (1960); Shirley S. Abrahamson et al., *Judges on Judging: A Bibliography*, 24 ST. MARY'S L.J. 995, 995-97 (1993); Shirley S. Abrahamson, *Judging in the Quiet of the Storm*, 24 ST. MARY'S L.J. 965, 965-93 (1993); Jerome Frank, *What Courts Do in Fact*, 26 U. ILL. L. REV. 645 (1932); Duncan Kennedy, *Freedom and Constraint in Adjudication: A Critical Phenomenology*, 36 J. LEGAL EDUC. 518 (1986); Max Radin, *The Theory of Judicial Decision: Or How Judges Think*, 11 A.B.A. J. 357 (1925); Charles Yablon, *Justifying the Judge's Hunch: An Essay on Discretion*, 41 HASTINGS L.J. 231 (1990).

This essay is at least a partial phenomenological account of an ADR process. This Article discusses a particularized form of ADR within the specific context of a mass tort with multiple layers of rules. Later in this Article, I suggest that our accounts of decision-making, judging, and in the case of ADR, facilitating might more rigorously explore the differences between fact-finding and lawmaking or the interpretation and application of rules and precedents. Now added to the analysis are the different third party neutral roles performed by mediators or other judicial-like officers. Much may turn on differences in: ethics and rules of disqualification; choice of the decision-maker, as in some forms of ADR; qualities and attributes necessary for the tasks; competencies; strategies and quality of the decision-making processes and the outcomes.

print and not just in the corridors of hearing rooms and conference halls.<sup>28</sup>

First, when properly used, ADR can take the "mass" out of mass torts and make big cases small again in a positive, more human way. ADR can provide an individualized treatment of cases, which is an important part of the judgment of disputants when they evaluate whether they were treated fairly. As we now know from the procedural justice literature, it is not just outcome that matters. How people perceive the fairness of the processes they endure is a major determinant of how they feel the legal system has treated them.<sup>29</sup> I

28. In this era of political correctness, on both ends of the political spectrum, and close scrutiny of the written word, it is difficult to talk about these issues in print. Those who would hold public office or perform other forms of public service—such as a government official, judge, private mediator, or arbitrator—must be careful about what they say in public. On the basis of their academic writings, Judge Bork was denied confirmation as a Supreme Court Justice and Lani Guinier's nomination as Assistant Attorney General for Civil Rights was withdrawn.

Some years ago I was privileged to participate in an important conference on the role of women in the judiciary at the University of Pennsylvania's Annenberg Public Policy Center, on March 14, 1995. Supreme Court Justices Sandra Day O'Connor and Ruth Bader Ginsberg, as well as several other important federal and state judges, spoke about whether the participation of women in the judiciary had "transformed the image of justice." Most, if not all, of the judges and justices were quite reluctant to discuss explicitly the influences of their gender on their decision-making. When one of the federal judges simply mentioned how her brethren had treated her when she first joined the bench, it made the news the next day. See Howard Goodman, *Female Judges Tell Audience at Penn of Balancing Acts*, PHILADELPHIA INQUIRER, Mar. 15, 1995, at 2.

Now that I am writing about the effect of my gender on my role as a private arbitrator in a very gendered mass tort, I have come to understand their reluctance. I want to talk about these important issues. I believe I am a fair, competent, good, and compassionate arbitrator, but I worry that what I say will lead some to question my neutrality or objectivity in the conventional, traditional, and sometimes misunderstood ways in which we define these terms for legal decision-makers.

Over the years only a very few women judges have bravely spoken out on some of these issues with honesty and great integrity. See generally Shirley S. Abrahamson, *The Woman Has Robes: Four Questions*, 14 GOLDEN GATE U. L. REV. 489 (1984); Gladys Kessler, *National Association of Women Judges*, 14 GOLDEN GATE U. L. REV. 473 (1984); Patricia M. Wald, *The Role of Morality in Judging: A Woman Judge's Perspective*, 4 LAW & INEQ. J. 3 (1986); Patricia M. Wald, *Some Real Life Observations About Judging*, 26 IND. L. REV. 173 (1992); Patricia M. Wald, *Women in the Law: Stage Two*, 52 UMKC L. REV. 45 (1983); Bertha Wilson, *Will Women Judges Really Make a Difference?*, 28 OSGOODE HALL L.J. 507 (1990). I will refer to some of their work in this Article. It is worth noting that the Honorable Bertha Wilson was the first of three women justices on the Supreme Court of Canada.

29. See E. ALLAN LIND & TOM R. TYLER, *THE SOCIAL PSYCHOLOGY OF*

join Judge Weinstein in my belief, based on experience, that catharsis—an ability to tell one's story, to know that someone will hear it, to know that what one has suffered is meaningful,<sup>30</sup> even though painful—is an important part of how we must deal with mass torts.<sup>31</sup> Settlements and even some forms of adjudication and ADR that do not take this basic human need into account will be found wanting, at least by some claimants. When well-constructed, ADR may be a useful way to provide justice and some meaning to those who suffer from injuries caused in our mass society. This is especially true when ADR allows for proper “voice,” “party control,” “hearing,” and other basic characteristics of processes that are valued by its participants.

Second, my recognition that catharsis and empathic hearings matter, if ADR is going to be fair and meaningful, exposes a far more controversial point. Who the third party neutral is may matter a lot and may make a difference whether the process used is arbitration or mediation. In short, I want to deconstruct the meaning of neutrality to interrogate its teachings in the particularity of this story, and for the more general story of neutrality or impartiality in particular forms of judging.<sup>32</sup> This particular story is one of gendered injury. Thus, here the deconstruction of neutrality or lack of bias is focused on the gendered nature of harm and hurt,<sup>33</sup> and what role gender—and similar demographic, identity, or experience based filters—may play in the judging.<sup>34</sup>

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PROCEDURAL JUSTICE 61-66 (1988); Tom R. Tyler, *A Psychological Perspective on the Settlement of Mass Tort Claims*, 53 LAW & CONTEMP. PROBS. 199, 203-04 (1990); see also JOHN THIBAUT & LAURENS WALKER, *PROCEDURAL JUSTICE: A PSYCHOLOGICAL ANALYSIS* 6-16 (1975) (reviewing the first laboratory-like studies of parties' procedural preferences).

30. For a fascinating, rich, and deeply textured exploration of how we categorize, socially construct, and use human suffering for a variety of purposes, see ELIZABETH V. SPELMAN, *FRUITS OF SORROW* 3-14 (1997).

31. See WEINSTEIN, *supra* note 2, at 9-11.

32. See DUNCAN KENNEDY, *A CRITIQUE OF ADJUDICATION (FIN DE SIECLE)* 180-212 (1997); Kennedy, *supra* note 27, at 518; John Leubsdorf, *Theories of Judging and Judge Disqualification*, 62 N.Y.U. L. REV. 237, 238-40 (1987).

33. See WEST, *supra* note 14, at 94-178; Bender, *A Lawyer's Primer on Feminist Theory and Tort*, *supra* note 15, at 15-27; Bender, *Feminist (Re)Torts: Thoughts on the Liability Crisis, Mass Torts, Power, and Responsibilities*, *supra* note 15, at 888-94.

34. See Patricia A. Cain, *Good and Bad Bias: A Comment on Feminist Theory and Judging*, 61 S. CAL. L. REV. 1945, 1946-48 (1988); Homer C. La Rue, *The Ethics of Disclosures by Arbitrators of Color: Have the Rules Changed?*, 42 LAB. L.J. 619, 623-26 (1991); Judith Resnik, *Feminism and the Language of Judging*, 22 ARIZ. ST. L.J. 31, 32 (1990); Judith Resnik, *On the Bias: Feminist Reconsiderations of the Aspirations for Our Judges*, 61 S. CAL. L. REV. 1877, 1883-86 (1988).

## II. THE USE OF ADR PROCESSES IN MASS TORTS

Much ink has been spilled on the difficult procedural, substantive, and policy questions implicated in how we are to compensate the victims of a growing variety of mass injuries. These injuries range from mass accidents, such as plane crashes, hotel fires, or building collapses in which many people are hurt simultaneously, to more gradual and individualistic injuries that come from the use of medical products or drugs, like the heart valve, Bendectin, the Dalkon Shield, or Diethylstilbestrol ("DES"). Injuries now include the more insidious and the very gradual injuries resulting from diseases like cancer. These injuries often come from prolonged exposure to substances whose dangers may not be known at the time of use, such as with asbestos, dioxin, and electromagnetic fields; or as we recently learned, known to some but not others, as with tobacco and Agent Orange.

The question of what was known by whom and at what stage of product or chemical use has become one of the most gripping human mystery stories of modern life. It is a story complicated by the fascinating journalistic reports of these tales and further entangled by the more complex story that legal liability, risk analysis, and causation rules require.<sup>35</sup> Will breast implant epidemiology turn the *Dow Corning* case into another Bendectin story or will it eventually become more like the stories of DES, asbestos, and tobacco?

In his important article on the temporal legal development of mass tort cases, Professor Francis E. McGovern argues for several methods of compensation for mass tort victims once a tort has "matured" in litigation.<sup>36</sup> A tort matures when there is enough expe-

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Judge Wald has commented that women judges will be particularly important in legal issues implicating gender, such as domestic disputes, family law, employment discrimination, some criminal matters, and some torts. However, she recognizes that women's experiences and insights will also be important for other, non-obviously gender-related cases and for the judiciary itself. See Wald, *Women in the Law: Stage Two*, *supra* note 28, at 49 (cautioning women lawyers not to suppress the instinctive reactions that they fear will be labeled "soft" or "overemotional"); see also Carrie Menkel-Meadow, *Mainstreaming Feminist Legal Theory*, 23 PAC. L.J. 1493, 1495 (1992); Carrie Menkel-Meadow, *Women's Ways of "Knowing" Law: Feminist Legal Epistemology, Pedagogy, and Jurisprudence*, in KNOWLEDGE, DIFFERENCE, AND POWER 57, 66-68 (Nancy Goldberger et al. eds., 1996) (illustrating examples of how feminist analysis has affected traditional legal doctrine and legal categories).

35. See generally Christopher H. Schroeder, *Corrective Justice and Liability for Increasing Risks*, 37 UCLA L. REV. 439 (1990); Christopher H. Schroeder, *Corrective Justice, Liability for Risks, and Tort Law*, 38 UCLA L. REV. 143 (1990).

36. See Francis E. McGovern, *Resolving Mature Mass Tort Litigation*, 69 B.U. L. REV. 659 (1989).

rience with the damage caused by injury and enough cases litigated or settled to establish an economic value for these types of cases. In cases involving mature torts, experts have been employed to help evaluate the cases and develop the appropriate valuations and grids for settlement.<sup>37</sup> Several mature torts were handled this way, including the Dalkon Shield case and claims involving asbestos, breast implants, and likely now tobacco. However, it is also true that we have begun to think about processing mass torts sooner.

Now, we are trying to develop the methods of process and the amounts for payments before a tort is legally mature. In some respects the settlement of the Agent Orange litigation was such a case.<sup>38</sup> Judge Weinstein clearly thought the plaintiffs' causation proof was weak, but he was determined to see that compensation would be paid to veterans who were suffering.<sup>39</sup> Some also think that the proposed breast implant settlement—until Dow Corning's bankruptcy filing radically altered the procedural landscape—was an "early" or "premature" tort. Some saw it as an effort by the manufacturers to avoid mass litigation by settling up even before all the liabilities were clear and putting the financial burdens behind them as companies. For those plaintiffs and plaintiffs' attorneys willing to agree, it was a way to avoid the time, expense, and, once again, the painful and embarrassing tales of women's injuries that would have to be exposed.<sup>40</sup>

At the other end of the temporal spectrum, one might consider

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37. See *id.* at 684-85.

38. See *In re Agent Orange Prod. Liab. Litig.*, 597 F. Supp. 740, 857-58 (E.D.N.Y. 1984), *aff'd* 818 F.2d 187 (2d Cir. 1987).

39. See WEINSTEIN, *supra* note 2, at 3-4, 62.

40. As in the Dalkon Shield cases, the breast implant cases require some women to testify to very personal and painful details about their lives and bodies. Many women who received breast implants had not told their families or loved ones that they had done so; and if they had known they would be required to testify in order to claim compensation for either already manifested injuries, or potential future injuries, they might not have chosen litigation.

I served briefly as a consultant to the settlement process, in which we attempted to design a counseling procedure to inform claimants about their settlement options. We had to take account of the fact that many women would not want to attend mass public meetings to learn about their rights if it meant appearing in a public forum, particularly in the community in which they lived. In other mass tort cases, public relations consultants have been brought in to design home videos, computer software, and telephone hot lines as other ways of informing claimants and privately communicating messages about legal rights and remedies that in non-mass settings might have been better performed by individual lawyers.

In many recent mass torts, the claimants have effectively formed their own support groups. In the case of asbestos, traditional union facilities have been utilized for such functions. See WEINSTEIN, *supra* note 2, at 57-61.

the tobacco cases in which injuries are clearly mature in the physical, if not legal, sense. If the current proposed settlement, or some variation on its themes, goes forward, it will in a sense also be an early mass tort. That is, compensation rates will be paid from agreed-upon regularized grids of benefits, rather than being based on years of litigation or settlement values.

One might say that mass torts have themselves matured *en masse*. Perhaps we have learned enough from the aggregation of claims in those cases, which have run the fuller gamut of litigation and settlement, that when a new one erupts on the scene<sup>41</sup> the masters of the mass torts<sup>42</sup> are prepared to spring into action. These masters stand ready to act, with tools for evaluating claims and formulas for computing market shares, compensation schemes, alternative processes, and attorney fee schedules.<sup>43</sup> Often even before litigation is

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41. Many of us who work in this field wonder what modern product, chemical, or new technology will emerge next with its human harms and potential for attorney fees. Mass torts have proven to be a growth industry, as specialists in one area have quickly moved to another. Having mastered the medicine of lungs in asbestos litigation, plaintiff lawyer Ron Motley, among others, has become a big player in the tobacco litigation. For others who learned about the toxicity of fibers, there may be a new world of litigation waiting in the asbestos substitutes, which, like fiberglass, may very well turn out to have some similar properties. Similarly, newly styled women's health experts jump from DES to Dalkon Shield to breast implants, despite the fact that the actual physiological damages in these cases are quite different. For a discussion of the newest mass torts, see Richard B. Schmitt, *Feeding Frenzy: Trial Lawyers Rush to Turn Diet-Pill Ills into Money in the Bank*, WALL ST. J., Oct. 24, 1997, at A1.

42. I cannot resist suggesting that this small band of mass tort experts sometimes thinks of themselves as "masters of the universe." Even Judge Weinstein, who has repeatedly appointed the same masters, wishes that there was a broader base of individuals to choose from. See WEINSTEIN, *supra* note 2, at 109-10 (arguing that the small number of special masters may lead to conflicts of interest and suggesting that a special code of ethics may be required where masters work in the interstices of judging and lawyering). Several commentators and Gender Bias Task Force Reports have remarked on the overwhelming use of a small cadre of individuals, virtually all men, who serve in such capacities. See *Report of the Special Committee on Gender, Race, and Ethnic Bias Task Force in the D.C. Circuit*, 84 GEO. L.J. 1657, 1680 (1996) (commenting specifically on the gender composition of court's special masters); Judith Resnik, *Gender Bias: From Classes to Courts*, 45 STAN. L. REV. 2195, 2196-201 (1993); *The Effects of Gender in the Federal Courts: The Final Report of the Ninth Circuit Gender Bias Task Force*, 67 S. CAL. L. REV. 745 (1994).

43. Outside of the mass tort area, but in the related area of mass consumer and securities class actions, it is interesting to note that when a formula for settlement is used successfully in one case, see Leslie Scism, *Prudential Restitution Could Top \$1.6 Billion*, WALL ST. J., May 30, 1997, at A3; *Settlement Approved in Prudential Case*, N.Y. TIMES, Mar. 11, 1997, at D4, it almost instantaneously is used in similar cases against other defendants, until a court rejects the particular

filed in some areas of specialized practice, such as construction defects, committees of interest are formed, mediators are hired, and a structured settlement process is underway.<sup>44</sup>

The definitive history of mass torts has yet to be written<sup>45</sup> and the policy and scholarly discussions of how mass torts should be managed continue in debates that range from case consolidation and multidistrict management,<sup>46</sup> to judicial settlement intervention,<sup>47</sup> to class actions, to bankruptcy, and to new administrative mechanisms<sup>48</sup> with an occa-

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mass settlement scheme, as occurred in the General Motors Trucking case. See *In re General Motors Corp. Pick-Up Truck Fuel Tank Prods. Liab. Litig.*, 55 F.3d 768, 822 (3d Cir. 1995).

44. Dispute resolution organizations like the PAC, JAMS-Endispute, the Center for Public Resources Industry-Specific Panels, and the American Arbitration Association now have all developed great expertise and sophistication in structuring mass tort and products liability settlement procedures, perhaps surpassing the abilities and capacities of courts to organize and manage such cases. See Symposium, *Claims Resolution Facilities and the Mass Settlement of Mass Torts*, 53 LAW & CONTEMP. PROBS. 1 (1990); *Task Force on Alternative Dispute Resolution, Recommendations by the American Arbitration Association* (March 1997).

45. We do have a series of excellent journalistic accounts of some of the major mass torts. However, almost all of them tend to be told by writers more informed by one side than the other and it is usually the plaintiffs' side. See, e.g., PAUL BRODEUR, *OUTRAGEOUS MISCONDUCT* (1985) (discussing asbestos); JONATHAN HARR, *A CIVIL ACTION* (1995) (discussing water pollution in Woburn, Massachusetts); RICHARD KLUGER, *ASHES TO ASHES* (1996) (discussing the role of the tobacco industry in the tobacco litigation); SOBOL, *supra* note 4 (discussing the bankruptcy reorganization of the company manufacturing the Dalkon Shield IUD); GERALD M. STERN, *THE BUFFALO CREEK DISASTER* (1976) (discussing a coal mine flood disaster); see also PHIL BROWN & EDWIN J. MIKKELSEN, *NO SAFE PLACE: TOXIC WASTE, LEUKEMIA, AND COMMUNITY ACTION 1-6* (1990) (discussing the sociological accounts of the community effects of some mass torts); KAI ERIKSON, *EVERYTHING IN ITS PATH: DESTRUCTION OF COMMUNITY IN THE BUFFALO CREEK FLOOD* (1976) (discussing the community effects of mass torts). There are a growing number of more scholarly accounts of the legal and social issues in mass torts, see e.g., MICHAEL D. GREEN, *BENEDICTIN AND BIRTH DEFECTS: THE CHALLENGES OF MASS TOXIC SUBSTANCES LITIGATION* 96-147 (1996); JOSEPH SANDERS, *FROM SCIENCE TO EVIDENCE: THE TESTIMONY ON CAUSATION IN THE BENEDICTIN CASE* (1992); PETER H. SCHUCK, *AGENT ORANGE ON TRIAL 1-15* (1987); WEINSTEIN, *supra* note 2, at xi-xvii (reflecting on the many mass tort cases he has handled).

46. See, e.g., Francis E. McGovern, *Toward a Functional Approach for Managing Complex Litigation*, 53 U. CHI. L. REV. 440, 449-56 (1986) (discussing new case management techniques).

47. See WEINSTEIN, *supra* note 2; SCHUCK, *supra* note 45. Cf. David Luban, *Heroic Judging in an Anti-heroic Age* 97 Colum. L. Rev 2064 (commenting on Judge Weinstein's settlement activities as a judge at many mass torts, in Symposium on Judge Weinstein's legacy as a judge).

48. Judge Weinstein, for example, has proposed a National Disaster Court,



sional mention of some ADR.

I would like to suggest that while we are looking for a single fix to the claimed litigation explosion and the particular problems that mass torts present, it is now clear that we will have to use a variety of techniques depending on several factors. These factors include: the nature of the injuries, whether death, long-term disability, latency, medical monitoring, loss of consortium, etc.; the science of causation; the relative numbers of defendants; the depth of the defendant's pockets; the numbers of claimants; and the fee structures of their lawyers.<sup>49</sup>

It is not clear that one size will fit all torts. Defendants who decide to contest liability may need to use different techniques to assess causation, rather than concede it or seek to pay anyway in order to avoid more extensive litigation costs and bad publicity. Different kinds of settlements will need to be structured depending on whether the injury is complete, as unfortunately with death or with time-limited injury, or is latent, requiring continuing care or medical monitoring; whether a single source will finance all payments, such as with a single defendant; or whether claims assessment will be based on market share or other principles, as with the Asbestos Claims Facility. Settlements will also depend on whether amounts of claims are finite or can be changed at different times, depending either on changed injuries or numbers of claimants, such as in the back-end opt-out provisions of the proposed breast implant settlement.<sup>50</sup>

What is clear to me from my involvement as an arbitrator in the Dalkon Shield cases is that in some of the mass tort cases, simple payouts from predetermined grids, no matter how fairly calculated, will not be enough. If the current litigation system is to survive—and I have elsewhere expressed my doubts about its basic operating procedures and underlying theory<sup>51</sup>—adversarial processes may need

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specializing in mass tort matters. Others would prefer a type of agency like the Federal Emergency Management Agency. See Lester Brickman, *The Asbestos Litigation Crisis: Is There a Need for an Administrative Alternative?*, 13 CARDOZO L. REV. 1819, 1823-24 (1992); Robert L. Rabin, *Tort System on Trial: The Burden of Mass Toxics Litigation*, 98 YALE L.J. 813, 827-28 (1989).

49. For a useful classification scheme of mass torts see McGovern, *supra* note 3, at 1853.

50. See *In re Silicone Gel Breast Implant Prods. Liab. Lit.*, No. CV92-P-10000, MDL No. 926, 1994 WL 114580 (N.D. Ala., Apr. 1, 1994) (approving a \$4.225 billion settlement after a fairness hearing); *In re Dow Corning Corp.*, No. 95-20512, 1997 WL 435029 (Bankr. E.D. Mich., July 29, 1997).

51. See Carrie Menkel-Meadow, *The Trouble with the Adversary System in a Postmodern, Multicultural World*, 38 WM. & MARY L. REV. 5, 12-24 (1996).

to take a page out of the learning of ADR processes.

At the macro or global level, judges who manage mass torts have already begun using a variety of methods: to determine liability and causation using expert science panels and special masters; to determine market share and claims allocation using statistical, economic, and medical experts; to estimate the number and value of claims that broaden the number of parties participating; and to change the structure and nature of legal proceedings. In such recent cases as the breast implant litigation, Judge Pointer utilized committees representing subclasses of litigants to develop settlement proposals that look more like coalitional negotiation processes<sup>52</sup> than conventional litigation.

With fuller participation by parties of various kinds, including manufacturers, insurers, and experts, the modern mass tort looks little like a contest between two litigants before a jury of peers. Rather, it is a complex social and economic problem and the numbers of players often defy court rules, not to mention courtroom architecture.<sup>53</sup> The liability and allocation issues often involve multiple parties and multiple issues. It seems likely that the courts will have much to learn from the multiparty facilitation and problem-solving processes of mediators and public policy planners.<sup>54</sup>

Already much has been learned and done in this area and a variety of new developments are pending, such as in breast implant science hearings. While there is even more innovation to be applied at the global level of problem-solving, I want to turn my attention to the more human element—the level of individual justice within the mass tort.

Too often in recent mass settlements—including consumer, insurance, banking, and product class actions, as well as mass torts—I have noticed and have been uncomfortable with the simple applica-

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52. See generally Gary Goodpaster, *Coalitions and Representative Bargaining*, 9 OHIO ST. J. ON DISP. RESOL. 243 (1994) (discussing coalitional negotiation processes).

53. In a recent mass tort case, I watched a contested argument on a motion involving hundreds of lawyers representing defendants, claimants, insurers, unions, intervenors, and public interest groups. Due to the numbers and confusing alignments, most of the lawyers did not know where to sit. The alignments on the motion crossed over the underlying alignments of the basic plaintiff-defendant lawsuit. See Menkel-Meadow, *supra* note 1, at 1162-64.

54. See e.g., ROGER SCHWARTZ, *THE SKILLED FACILITATOR: PRACTICAL WISDOM FOR DEVELOPING EFFECTIVE GROUPS* 3-41 (1994); LAWRENCE SUSSKIND & PATRICK FIELD, *DEALING WITH AN ANGRY PUBLIC: THE MUTUAL GAINS APPROACH TO RESOLVING DISPUTES* 222-38 (1996).

tion of monetary settlement grids. Such grids of cash payouts, depending on the proof presented by individuals and the degree of injury, may work well in cases that are only, at bottom, monetary. Examples of these grids can be found in the many class action securities cases at the individual, if not at the aggregate level,<sup>55</sup> and some consumer cases.<sup>56</sup> However, such grids will not satisfy those claimants who have suffered serious bodily harm or feel the need to confront the wrongdoer.<sup>57</sup>

In these cases we will need individualized hearings of some kind in a manner that will require more direct human contact than a simple payment application to a claims administrator. Not all cases will require such treatment and not all claimants within those categories of cases with personal injury will require such processes. Nevertheless, I urge those who are crafting the mass settlements in mass torts—as well as in some consumer, insurance fraud, and products liability cases—to pay heed to the teachings of the empirical work that has been done on procedural justice.<sup>58</sup> Through this empirical work

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55. In path-breaking empirical work, Janet Alexander has demonstrated that in securities litigation, settlements are often effectuated on the basis of nuisance or transaction costs that may compensate somewhat the injured plaintiffs and their lawyers, but may fall short of tracking enforcement and compliance requirements of the substantive law. See Janet Cooper Alexander, *Do the Merits Matter?: A Study of Settlements in Securities Class Actions*, 43 STAN. L. REV. 497, 524-58 (1991). John C. Coffee, Jr., has also demonstrated the effects of lawyer fee incentives on sub-optimal recoveries for both individual plaintiffs and larger law enforcement goals. See John C. Coffee, Jr., *Class Wars: The Dilemma of the Mass Tort Class Action*, 95 COLUM. L. REV. 1343, 1373-75 (1995).

56. I once happily accepted a class action settlement of a bar review price-fixing case, in which I was one of thousands of class members, that entitled me to pick free books from the defendant Harcourt, Brace, & Jovanovich at a specified and relatively small dollar amount, not unlike the recent settlement, by coupons, in the airline industry price-fixing class action.

57. At least some Dalkon Shield litigants were more interested in face to face apologies from A.H. Robins Company officials than monetary settlements. See BACIGAL, *THE LIMITS OF LITIGATION*, *supra* note 4, at 125.

58. See E. LIND & TYLER, *supra* note 29, at 30-34 (demonstrating that people are equally interested in process, as well as outcome); TOM R. TYLER, *WHY PEOPLE OBEY THE LAW*, 115-24 (1990); E. Allan Lind et al., *In the Eye of the Beholder: Tort Litigants' Evaluations of Their Experiences in the Civil Justice System*, 24 L. & SOC'Y REV. 953, 957-60 (1990) (reporting on a variety of studies demonstrating that non-instrumental, expressive functions and values of process are critical in litigants' assessments of the justice system and whether they have been treated fairly). "People value the opportunity to state their views to a decision-maker regardless of the influence of those views on decision . . ." TYLER, *supra*, at 116. See THIBAUT & WALKER, *supra* note 29, at 67-80 (reporting on laboratory studies of perceptions of fairness in procedural variations). This is known as the voice function of process. See Lucie E. White, *Subordination*,

we have learned that voice or the ability to express one's claims matters and it matters a great deal in the assessment of fairness of a judicial system.

I learned from my work in the Dalkon Shield cases what Judge Weinstein learned from his DES plaintiffs.<sup>59</sup> Even after settlements have been reached, claimants still have a need to tell their harrowing stories and to address the court with a reporter present in order to achieve some closure on or catharsis about their case.<sup>60</sup> Some claimants will not feel good about the justice system, no matter what the financial outcome, unless they have a chance to tell their story, report their pain, and in some cases, confront some representative of the company that wronged them.<sup>61</sup> Process matters to many and to some it matters more than outcome. For others, the experience of a loss, physical, emotional, psychic, or monetary, has deeply changed their lives. In the human search for meaning, "meaning making" is often a product of the claimant's narrative in a hearing.

It is obvious to all of us—lawyers, judges, and claimants—that in these mass cases that affect thousands—and if the tobacco cases settle, literally millions—of people, not everyone can be afforded a full dress due process hearing in a court of law with a judge and jury. In the kind of sensitive cases that comprise many of women's health issues, many individuals want to tell their story to some authoritative figure, but not necessarily in a very public forum. Thus, ADR, and an ADR of a very particular kind, may be an essential part of any real satisfaction with the American judicial process. For those who seek to establish claims facilities with simple grids and no opportunities for contest, appeal, or in-person confrontation with decision-makers, there is likely to be some dissatisfaction with the process.

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*Rhetorical Survival Skills, and Sunday Shoes: Notes on the Hearing of Mrs. G.*, 38 BUFF. L. REV. 1, 3-5 (1990) (describing a welfare recipient's desire to tell her own story in her own words at a welfare hearing).

59. See WEINSTEIN, *supra* note 2, at 13.

60. See *id.*

61. In the case which began the "procedural revolution," the Supreme Court recognized the differences between oral testimony and written evidentiary records, and the importance in civil, as well as criminal, contexts of being able to confront an adverse decision-maker. See *Goldberg v. Kelly*, 397 U.S. 254, 268-70 (1970). One of the lawyers who worked on *Goldberg* said:

[The case] was won on the facts. Plaintiffs told of dozens of stories about individuals devastated by erroneous terminations of subsistence aid. . . . The case was grounded in the real lives of ordinary poor people and the pervasive meanness and incompetency of an ordinary bureaucracy. The facts sang.

Sylvia A. Law, *Some Reflections on Goldberg v. Kelly at Twenty Years*, 56 BROOK. L. REV. 805, 807 (1990).

For those who craft mass settlements, it is important to consider what such a hearing process should look like. Many of the claimants I saw in the Dalkon Shield proceedings simply wanted to tell their story, while others wanted to renegotiate the settlement offers they had rejected from the Trust. The fast-track arbitration process was frustrating to these claimants and I protested early on, to no avail, that the Trust reconsider and develop a more participatory mediation process. A participatory process would have required different training for the Trust representatives, who, though not lawyers, came to arbitration hearings prepared to do adversarial battle with the claimants.<sup>62</sup> Procedural justice research tells us that litigants care about being treated fairly. Fairness matters so much that they will rate satisfaction levels high even when they have not won<sup>63</sup> as long as they perceive the process to be a good one, which thus far has meant being able to present a case before a neutral third party.

Especially in cases such as the Dalkon Shield litigation, where so many claimants were unrepresented, it may be particularly important for claimants to participate in some kind of process rather than simply to fill out a settlement application form.<sup>64</sup> Though I have not

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62. This did not work for long in my court. To their credit, repeat-player Trust representatives in my hearings quickly learned that haranguing or aggressively cross-examining a claimant—whether she was entitled to relief or not—did not help their case. A question I posed to the in-house counsel who trained the Trust hearing representatives was why non-lawyers—many of the Trust representatives were nurses, or insurance representatives, or people with other valuable expertise—had to be trained in such unnecessary practices for what was supposed to be an informal hearing. Most of the Trust representatives that appeared before me were women, generally much younger than the claimants, which caused some confusion and dissatisfaction on the part of claimants. How could a young(er) woman be the representative of the “evil” company who had done this to them? Ironically, of course, since IUDs have been off the market for so long, many of the Trust representatives could not have had any personal experiences with its use, further complicating the gender issues in these cases.

63. See LIND & TYLER, *supra* note 29, at 184-86.

64. For those claimants who were represented, mass tort hearings presented another kind of problem: that of the repeat-player lawyer. Of the many cases I heard in several cities, there were two or three lawyers who handled the bulk of the cases. In general the repeat-player lawyers were better prepared, knew how to develop their cases, and ironically seemed to have better relations with their clients. This was perhaps because offices specializing in such matters had developed a routine for client notification, counseling, and witness preparation. I especially would like to single out Daniel W. Dunbar, a 1981 graduate of Loyola of Los Angeles Law School, for consistently excellent advocacy and for demonstrating good relations with clients.

On the other hand, the repeat-player representative faces a prisoner's dilemma game of sorts. It is virtually impossible to advocate equally hard for all

systematically plumbed my records or memory for exact numbers, there were many unrepresented claimants who represented themselves at least as well as, if not better than, some of the lawyers.<sup>65</sup> Similarly, some of the trained lay advocates representing the Trust were as good as the lawyers. Others were unnecessarily and ineffectively adversarial.<sup>66</sup>

Claimants prepared their own exhibits and evidence. In the single best presentation I witnessed, an unrepresented claimant appeared with her recovered Dalkon Shield, saved from when it had been expelled from her body, a blown up and professionally prepared chart of the chronology of her injuries, illnesses, and operations, and a prepared notebook of her medical records with a typewritten brief and closing statement. At the conclusion of this hearing the claimant told me she had prepared for this hearing as a "closure ceremony" so

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claimants and maintain any credibility with the repeat-player decision-maker or arbitrator. So in some cases, the repeat-player representative, in subtle ways, begins to "defect." By reading the subtle cues from the questions asked or the arguments made, I could tell when counsel knew some aspect of the case was weak. One particularly caring counsel concluded all examinations of claimants by asking his clients if they had anything else to add following formal direct examination. This was often a time when claimants told of the effects that the Dalkon Shield had on their lives and for the things they knew they could not be compensated. This allowed claimants to at least tell their story when it was clear counsel had prepared them to know that such matters were either irrelevant or not recoverable. Such additional material did not take me much more time to listen to. However, a judge clearly would not have the time to allow all claimants to do this.

65. At an impressionistic level, this confirms some of the more rigorous data recently reported by Herbert M. Kritzer in his comparison studies of lawyers versus lay advocates in several administrative settings. See HERBERT M. KRITZER, *LEGAL ADVOCATES: LAWYERS AND NON-LAWYERS AT WORK* (forthcoming 1998) (reporting that in some settings lay advocates may do as well or better than lawyers).

66. Their ineffectiveness demonstrates the adage that a little knowledge is a dangerous thing! In my most difficult case, the Trust representative heartlessly pursued a totally ineffective cross-examination about irrelevant matters against an unrepresented claimant. The claimant had her records improperly returned to her by the Trust, which was dramatic evidence of very serious injuries. Her four grown children had to testify to their mother's incapacity when they were young as a result of her excessive pain and bleeding.

On the other hand, I vividly remember one hearing in which a Trust representative broke down in tears herself when she heard the full facts of a claimant's suffering and wisely refrained from unnecessary questioning.

Perhaps the strangest case involved a sophisticated former nurse and women's health advocate who had assisted other women with their claims. She appeared unrepresented and told a sad and convincing story of her own injuries, but described what clearly was a non-Dalkon Shield IUD manufactured by another company. Thus, she was not entitled to any compensation from the Trust.

that regardless of what she was awarded at the hearing, she would finally be able to put this behind her and get on with her life.

Consider that for most claimants the facts in dispute occurred over twenty years before the hearing, they had spent years trying to locate often destroyed medical records, they had to reconstruct detailed medical facts, and they had to relive incidents surrounding the most emotional points of a woman's life. There were also male claimants who testified about loss of consortium, loss of potential children, their helplessness in the face of their loved one's pain or bleeding, and their direct confrontation with and vicarious living of the most intimate of a woman's experiences.

I report these few stories to demonstrate the human side of mass torts and to urge those who craft mass tort processes to consider the importance of retaining some process which permits narration, confrontation, and most importantly, the catharsis that can leave an injured person feeling somewhat ready to get on with their life, even if not fully healed or empowered. Injured victims of our mass society may require ceremonies, rituals, or procedural due process just as much as the inhabitants of any foreign culture require the rituals documented by visiting anthropologists.<sup>67</sup>

Of course the one major difficulty with providing such a process in all mass torts is cost. Due to the relatively low recovery amounts awarded claimants in the Dalkon Shield fast-track arbitration program and the relatively efficient administration of the program,<sup>68</sup> the Dalkon Shield litigation will likely be one of the first mass torts to conclude by awarding proportional additional payments to claimants. Not all limited fund cases, nor all settled consumer or mass torts cases, will have the funds available to provide for formal ADR programs. Such programs are costly even if third party neutrals are paid token amounts.<sup>69</sup>

Yet it seems to me that where claimants are more organized, ei-

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67. See generally *THE DISPUTING PROCESS—LAW IN TEN SOCIETIES* (Laura Nader & Harry F. Todd eds., 1978).

68. See Vairo, *supra* note 5, at 630-31.

69. There are sizable expenses in administering such programs, in locating and paying for appropriate sites for hearings, in preparing and copying records, in taping or transcribing proceedings, and in processing the decisions of reported arbitration awards. Mediation might appear to be cheaper than arbitration due to the absence of formal evidentiary hearings with records and the absence of awards and prepared decisions. However, I have no doubt that mediations would have taken longer and might have required further communications with Trust principals and others to effectuate settlements.

ther through victim support committees or through effective class action representation, the question of whether to allocate some settlement funds to develop such individualized ADR or other hearings, is one for claimants to make. Such procedures offer the promise of making mass tort cases more human again and demonstrate that at least some form of access to justice may be available even if the full court "press" of trial is not.<sup>70</sup> As procedural justice research informs us, a fair process before a third party neutral, whether a judge, arbitrator, or mediator, is likely to be better evaluated than the negotiated settlements between lawyers and judges where the clients and parties feel totally excluded from the process.<sup>71</sup>

If ADR is going to be used to make mass cases individual again,

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70. I am not alone in arguing that ADR may be used in these larger cases to increase access to justice by providing at least some form of recognizable process through the formal justice system. See D. Brock Hornby, *Federal Court-Annexed ADR: After the Hoopla*, 7 FJC DIRECTIONS 26, 26-27 (1994). Examples of such systems are found in court-approved processes with a sanctioned settlement agreement or a supervised class settlement.

71. Much of the evaluation research on the use of different processes in tort cases suggests that parties prefer processes they have participated in, including court-mandated arbitration programs, over settlements effectuated by lawyers or settlement conferences with lawyers and judges only, which are not visible to the clients. See LIND ET AL., *supra* note 58, at 960-61; Deborah R. Hensler, *What We Know and Don't Know About Court-Administered Arbitration*, 69 JUDICATURE 270, 276 (1986). Recently, there has been a great deal of controversy surrounding the studies of ADR in the RAND Corporation's, see JAMES KAKALIK ET AL., AN EVALUATION OF MEDIATION AND EARLY NEUTRAL EVALUATION UNDER THE CIVIL JUSTICE REFORM ACT (1996), and the Federal Judicial Center's empirical assessments of ADR in the courts, see DONNA STIENSTRA ET AL., REPORT TO THE JUDICIAL CONFERENCE COMMITTEE ON COURT ADMINISTRATION AND CASE MANAGEMENT: A STUDY OF FIVE DEMONSTRATION PROGRAMS ESTABLISHED UNDER THE CIVIL JUSTICE REFORM ACT OF 1990 (1997). The controversy is whether or not ADR is actually a cost and delay savings device or whether ADR promotes other values, such as participation, fairness, and a right to be heard, which are much harder to study. It is clear that there are very high satisfaction rates with ADR processes used in the courts. I will not resolve these issues in this Article, but for my views see Carrie Menkel-Meadow, *When Dispute Resolution Begets Disputes of Its Own: Conflicts Among Dispute Professionals*, 44 UCLA L. REV. 1871, 1922-30 & nn.243-79 (1997). We know very little, in a rigorous empirical way, about the use of ADR outside of the court setting. What all of the researchers and critics agree on is that we have little rigorous research on what values the high satisfaction rates express. High satisfaction rates may go beyond cost and delay concerns, such as participation process values and perhaps, in some cases, to more responsive and particularized solutions. See Deborah R. Hensler, *Puzzling Over ADR: Drawing Meaning from the RAND Report*, DISP. RESOL. MAG., Summer 1997, at 8; Francis E. McGovern, *Beyond Efficiency: A Bevy of ADR Justifications*, DISP. RESOL. MAG., Summer 1997, at 12.



then the question of who will preside over these hearings becomes even more important. It is to that delicate question I now turn.

### III. WHAT DOES IT MEAN TO BE A THIRD PARTY NEUTRAL IN MASS TORTS?

A judge is either male or female and is of a particular race, class, and social position; the appearance of neutrality, of evenhandedness, of impartiality is false comfort.

—Judith Resnik<sup>72</sup>

[W]e treat the perspective of the person doing the seeing or judging as objective, rather than as subjective. Although a person's perspective does not collapse into his or her demographic characteristics, no one is free from perspective, and no one can see fully from another's point of view.

—Martha Minow<sup>73</sup>

[I]f background or sex or race of each judge were, by definition, sufficient grounds for removal, no judge on this court could hear this case, or many others, by virtue of the fact that all of them were attorneys, of a sex . . . .

—Judge Constance Baker Motley<sup>74</sup>

"What does my being a woman specially bring to the bench? It brings me and my special background. All my life experiences—including being a woman—affect me and influence me. . . ." My point is that nobody is just a woman or a man. Each of us is a person

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72. Judith Resnik, *On the Bias: Feminist Reconsiderations of the Aspirations for Our Judges*, *supra* note 34, at 1908.

73. Martha Minow, *Foreword: Justice Engendered*, 101 HARV. L. REV. 10, 32 (1987).

74. *Blank v. Sullivan & Cromwell*, 418 F. Supp. 1, 4 (S.D.N.Y. 1975) (rejecting a recusal motion in a law firm sex discrimination case that asserted bias because the judge was the same sex as the plaintiff); *see also* *Commonwealth v. Local Union 542, Int'l Union of Operating Eng'rs*, 388 F. Supp. 155, 157 (E.D. Pa. 1974) (rejecting a recusal motion in a race discrimination case asserting bias because the judge was the same race as the plaintiff).

with diverse experiences. Each of us brings to the bench experiences that affect our view of law and life and decision-making.

—Judge Shirley S. Abrahamson<sup>75</sup>

If, however, “bias” and “partiality” be defined to mean the total absence of preconceptions in the mind of the judge, then no one has ever had a fair trial and no one ever will. . . . Interests, points of view, preferences [ . . . ] are the essence of living.

—Judge Jerome Frank<sup>76</sup>

Any justice, judge, or magistrate of the United States shall disqualify *himself* in any proceeding in which his impartiality might reasonably be questioned. . . . He shall also disqualify himself . . . [w]here he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding;

—28 U.S.C. § 455.<sup>77</sup> Disqualification of  
justice, judge, or magistrate

I remember well when the first set of claimants entered my hearing room<sup>78</sup> and often commented on the fact that they were

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75. Abrahamson, *supra* note 28, at 492-94.

76. *In re J.P. Linahan, Inc.*, 138 F.2d 650, 651-52 (2d Cir. 1943). See generally JEROME FRANK, *LAW AND THE MODERN MIND* (1935) (discussing lay attitudes towards lawyers and the legal profession); Frank, *supra* note 27, at 652-55 (discussing a legal realist account of how judges actually decide cases and the importance of personality and background in shaping judges' views).

77. 28 U.S.C. § 455 (1994) (emphasis added). The statute itself is not expressed in gender neutral or at least gender inclusive terms. This section provides the rule for judicial disqualification by the judge. Another section of the United States Code permits the filing of a recusal motion by counsel who seek to challenge the impartiality of the judge. See 28 U.S.C. § 144 (1994). As commentators have pointed out, the relation of these statutes to each other is less than clear or uniformly applied. See John Leubsdorf, *supra* note 32, at 238. In most jurisdictions, recusal motions are decided by the same judge against whom they are filed. In some courts the chief judge or a motions judge may decide the recusal motions for all the judges in the relevant court.

78. I held my hearings either in a small hearing room at the UCLA Law School, designed for teaching students clinical advocacy courses and an interesting sort of alternative dispute resolution site, or in a small office-like room in participating federal courthouses, on both the west and east coasts. The significance of the relative formality of site is important in order to communicate to claimants that they are getting a serious, court-like setting for their individual hearings.

I recently completed an empirical study of the court-annexed arbitration program in the federal court of the Eastern District of Pennsylvania. Regarding

surprised and most often pleased to see a woman arbitrator. As the numbers of my hearings increased, I placed a box of tissues next to the tape recorder. This reflected the solemnity and the need for a record in a formal court hearing, together with a symbol of the psychologist's or counselor's office that tears are perfectly acceptable in this setting. As I have suggested in many settings,<sup>79</sup> our legal system needs to include, both symbolically and realistically, the formality of rules and fairness and the affective aspects of real human cases and suffering. From the first hearing, recounting events from over twenty years ago, when the claimant began to cry as she recounted the pain and anguish of her Dalkon Shield experience, until the last retelling of these tales, and for me some hundred cases later, I found myself deeply moved by what had happened to these women and yet also conscious of my role as an impartial and objective judge.

After years of advocacy before the Social Security Administration as a lawyer representing disability claimants, I knew of grids of disability and degrees of pain. I was curious to see how I would measure individual and comparative pain. Where, as in the Dalkon Shield ADR program, there was a finite amount of money to be awarded to claimants—a maximum of \$20,000 to each claimant was payable in this particular forum—almost inevitably I created a comparative grid of injury, harm, and damage to be sure I was doing horizontal equity across cases.<sup>80</sup> Although in social security disability

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arbitration hearings, respondents overwhelmingly preferred the use of a courthouse hearing or conference room over private law offices. We need to represent the formality of the fairness of law in our architecture, but we could consider different physical design layouts in both formal courtrooms and in other settings.

Some law schools have begun to develop more innovative hearing rooms. Hearing rooms need to provide the symbolism of fairness and seriousness, but they also need to make people feel comfortable while at the same time awed enough to tell their truthful stories. The balance of formality, to encourage truth telling and fairness, with informality, to minimize fear, is a difficult procedural and architectural problem.

79. See generally Carrie Menkel-Meadow, *Portia in a Different Voice: Speculations on a Woman's Lawyering Process*, 1 BERKELEY WOMEN'S L.J. 39 (1985) (suggesting that the increased presence of women in the legal profession might change some of the legal processes we use).

80. The best represented claimants had full documentation of their medical expenses and hospitalizations, to the extent it was possible to retrieve them after almost twenty years. Some had definitive proof of their Dalkon Shield use, either through medical records or by producing the long-saved, crab-like objects. Many claimants in the fast-track procedure, however, had little objective evidence of their economic or physical damages. Often they did not know that their own testimony was evidence and could be evaluated for credibility and for proof of their claims. For all of us serving as arbitrators, assessments of credibility on facts of injury, pain, and suffering had to be made in almost every case.

hearings, the conclusions to be reached by administrative law judges are in some sense easier—where there are binary findings of eligible disability or not—it may be possible to look only at the case at hand, even though the grid system intends to provide for horizontal equity there as well.<sup>81</sup>

I began occasionally to receive letters from claimants following their hearings. Claimants received a written decision and opinion with findings of fact, conclusions of law, and a statement of monetary award if one was ordered. Their letters thanked me for my understanding, compassion, or kindness in letting them tell their story, even in cases where claimants felt the money they received would never really compensate them for what had happened. I wondered whether my hearings were really any different from anyone else's.

During the first year of the program, the active arbitrators received a few redacted sample opinions written by a number of us, but it was not until some years into the program that we had several meetings of arbitrators at the annual meeting of the Society of Professionals in Dispute Resolution. These meetings were held to discuss common issues of procedure and judicial philosophy and to learn more about what else was happening in the program. Over the years, some of the repeat-player attorneys casually shared a perfectly legitimate comment of comparison about the repeat-player judges before whom they appeared.<sup>82</sup>

Over the years of conducting these hearings, I wondered what difference, if at all, my gender made, not only in potential outcomes—I assume the PAC can rigorously analyze this since it has all the aggregate data needed to study this question—but also in the process or conduct of the hearings. I am, after all, a feminist legal theorist. I have taught women's studies courses at UCLA. I have been a women's rights litigator. I have written and spoken widely on the question of whether women lawyers and women judges make a

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81. In fact, empirical studies have demonstrated a lack of consistency in social security disability findings in different regions. See Jerry L. Mashaw, *The Supreme Court's Due Process Calculus for Administrative Adjudication in Matthews v. Eldridge: Three Factors in Search of a Theory of Value*, 44 U. CHI. L. REV. 28, 44-45 (1976-1977).

82. I was shocked to learn, for example, that one judge wrote his opinions on his lap-top computer during the hearing. What that judge might defend as accurate and efficient record keeping and fact-finding, I found insensitive to the need for the judge to make eye contact with the witnesses and counsel, for both empathic and instrumental credibility-assessment reasons.

difference in the practice of law.<sup>83</sup> This set of issues is one which remains deeply controversial.

I was and am troubled by an essentialist notion that only a woman could truly understand these claims. This is, on its own terms, a biologically determinist notion, which I have always rejected as a totalizing explanation of gender subordination and difference.<sup>84</sup> Yet I was struck, even at our arbitrator training session, by how many questions my male colleagues asked me about female reproductive organs after our gynecological training, that were deeply familiar and known to me. How would these men evaluate pain, bleeding, and pelvic inflammatory disease claims? How comfortable would a claimant be telling these intimate details to a man who was not related to her?

I began each hearing by describing who I was and making sure I had no conflicts of interests or disqualifying relations to the parties. I was conscious of the fact that although I had never used an IUD, I was, at the very time of the hearings, experiencing many of the same medical procedures,<sup>85</sup> for unrelated reasons, as the claimants before

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83. See, e.g., Carrie Menkel-Meadow, *Feminization of the Legal Profession: The Comparative Sociology of Women Lawyers*, in *LAWYERS IN SOCIETY* 221 (Richard L. Abel & Philip S.C. Lewis eds., 1995); Menkel-Meadow, *supra* note 79; Carrie Menkel-Meadow, *What's Gender Got to Do with It?: The Politics and Morality of an Ethic of Care*, 22 N.Y.U. REV. L. & SOC. CHANGE 265 (1996).

84. I have most often written about social constructionist feminism within the label of "difference feminism," a label others apply to me, see, e.g., Joan C. Williams, *Deconstructing Gender*, 87 MICH. L. REV. 797, 803 & n.17 (1989). The harms of Dalkon Shield, DES, and breast implants are biologically and physically gendered and challenge those who would claim all gendered effects are socially constructed or politically structured. Indeed, like my colleague Robin L. West, I believe that some portion of women's consciousness and standpoint philosophies do turn on the biological reference points of women's bodies and their connections to others and to gender-specific harms. Menstruation, penetration, rape, pregnancy, childbirth, miscarriage, breast-feeding, breast cancer, menopause, pelvic inflammatory disease, ovarian and uterine cancers, and infertility are all linked to women's bodies. Some of these have easier analogies to men's bodies and male harms, and some are without commensurability. See Robin L. West, *Jurisprudence and Gender*, 55 U. CHI. L. REV. 1, 2-3, 28-35 (1988).

85. Of course, if personal experience with an injury or medical procedure is a source of extrajudicial knowledge or bias, then no judge who has broken a leg or had an operation could sit on even the most simple and common tort cases. Why does it feel like a gendered tort carries a different weight? Am I conscious of the sexist and racist claims for recusal made against female and black judges in sex and race discrimination claims, as if men and whites had no gender or race in deciding those cases? What is the measure of demographic/positional neutrality or objectivity in a case which necessarily implicates one's demographic position? Are neutrality and objectivity bad words to describe what we are trying to achieve here?

me had in the past.<sup>86</sup> Of course, I also had endured some perfectly

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86. I was undergoing fertility testing and had suffered a miscarriage at one point during the years while I was hearing cases. Are these disqualifying events? I do not think so. But they do dramatize the fact that all judges have either shared the experiences of the litigants before them or they have not. Both experiential perspectives may inform decision-making. I am sure, indeed certain, that some of the male arbitrators had spouses or loved ones who had suffered some of the same harms as the claimants. Were they any more or less neutral or biased from this one-step removed perspective? Note that the federal disqualification rules apply to financial, representative, fiduciary, or "any other interest that could be substantially affected by the outcome of the proceeding" of spouses and other family members of the judge. 28 U.S.C. § 455(b)(4).

In a case that is currently pending, Judge Robert Jones, in the federal court of Oregon, was asked to recuse himself in a breast implant litigation when he revealed that his wife had breast implants, even though she had no problems with them and was not complaining about them. See Plaintiffs' Motion to Disqualify Judge Robert Jones, *McAleer v. Medical Eng'g Corp.*, No. CV-97-10158-2 (N.D. Ala. 1997) (requesting disqualification for reasons set forth in brief which is filed under seal).

The filing attorneys believe that Judge Jones' statements indicate a personal interest and bias which affects his ability to be fair. The plaintiffs' attorneys believe that his statements about his wife's lack of complaints evidence a personal bias against those who, by definition, have complained—the plaintiffs. In that case the judge's wife is, by definition, a potential member of the class, unless and until she "opts out." This gives the judge a rather obvious financial interest in the larger litigation. He is the judge for all of the Oregon breast implant cases.

Judge Jones' comments about "unknown out-of-state attorneys" who raised the question may further evidence bias against the attorneys who made the motion. This raises questions about who should decide disqualification motions. See Leubsdorf, *supra* note 32, at 268-79; Resnik, *Feminist Reconsiderations of the Aspirations for Our Judges*, *supra* note 34, at 1887-90. Another federal judge, Judge Ancer Hagerty, denied the motion for recusal. The case was transferred to the multidistrict venue of Alabama, before Judge Pointer, where the non-Dow Corning breast implant cases remain.

If this case ever receives a full hearing on the merits, it will raise issues about the personal bias and interest of judges who have formed views based on their own or close family members' experiences. In this situation we have the actual comments made by a judge about his views on his wife's experience, the case before him, the recusal motion, and the attorneys who made the recusal motion. Note also that this case exposes the difficulty of policing boundaries of "personal knowledge of disputed evidentiary facts concerning the proceeding." 28 U.S.C. § 455(b)(1).

Before I heard the Dalkon Shield cases—as a law professor in my professional capacity—I had read many books and articles about the litigation so I had knowledge, not of particular disputed evidentiary facts in individual cases, but of the larger context in which these cases were situated. Compare this professional and neutral acquisition of knowledge to that of Judge Kelly in *In re School Asbestos Litig.*, 977 F.2d 764, 778-81 (3d Cir. 1992), who attended a conference on asbestos-caused injuries paid for by a plaintiffs' escrow fund and which utilized plaintiffs' experts as speakers. At the time of the conference, Judge Kelly did not know who had financed the event. He did not recuse himself upon learning this

normal and ordinary, amount of pain and bleeding associated with menstruation and reproductive functions. Was my position any better—because I was able to empathize with some of the situations or conditions the claimants suffered—or any worse—because I had experienced these things and knew how bad or trivial they really were—than male arbitrators or female arbitrators who had not experienced any of these harms?

I cannot help but conclude that gender did matter in these cases, but not necessarily in categorically pure ways. In the sample of opinions we received from each other, it was clear that some male arbitrators thought that even a little bit of excessive pain or bleeding was a terrible thing to endure and awarded relatively high amounts of damages, while others thought that some pain and bleeding was perfectly normal for any woman to endure. Some male arbitrators seemed particularly moved by testimony of claimants. Others relied more clinically on the evidence of medical texts presented by the Trust.

Though the samples of opinions written by women arbitrators were much smaller in the beginning, I noticed similar ranges. To the extent that these early opinions revealed any differences, they were clearly within and across genders and not between them.<sup>87</sup> I hope that it will be possible to do a more rigorous analysis of these issues from the data available.<sup>88</sup> The lawyers who often appeared in these hearings would also be a good source of information, though they themselves were predominantly male, as is the mass torts bar.<sup>89</sup> Thus, at least with respect to differences in outcomes, it would be possible

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information but was disqualified by the Third Circuit. See *id.* at 785. As commentators have noted, it is not entirely clear whether the applicable section prohibiting personal bias or prejudice concerning a party applies only to actual bias or to perceived or apparent bias. See STEPHEN GILLERS, REGULATION OF LAWYERS: PROBLEMS OF LAW AND ETHICS 580 (4th ed. 1995).

87. This is a point that equality feminist scholars in law, sociology, and psychology have been making for years: that average ranges within genders are greater than the differences between genders on most measures of achievements and most attributes. See CYNTHIA F. EPSTEIN, DECEPTIVE DISTINCTIONS 83-87 (1988); CAROL TAVRIS, THE MISMEASURE OF WOMAN 295 (1992).

88. Since all opinions and awards were confidential and sent only to the parties and the administering PAC, only the PAC will have access to the relevant data. Fortunately, the board of the PAC includes several very experienced sociolegal researchers from the Duke faculty, including Neil Vidmar, Tom Metzloff, and now E. Allan Lind.

89. The breast implant litigation is the first mass tort I have seen with significant female attorney representation. It will be interesting to track, in the future, whether women's health tort victims are more likely to seek female attorneys when they have more of an option to do so.

to determine if there were any gender differences by decision-makers.<sup>90</sup>

Since I cannot comment on the aggregate data of outcome differences and have not had the opportunity to view other arbitrators' hearings in a systematic way, my views about differences in process or outcome are just that—my own views. I cannot help but continue to suggest, as I have for many years, that the process provided by women arbitrators in this program was likely more sensitive to the needs of the claimants<sup>91</sup> and provided some of the advantages of an

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90. The rich literature on differences in male and female judging have produced very few empirically verified outcome differences. See generally David W. Allen & Diane E. Wall, *The Behavior of Women State Supreme Court Justices: Are They Tokens or Outsiders?*, 12 JUST. SYS. J. 232 (1987) (stating that women Supreme Court Justices adopt an outsider role); David W. Allen & Diane E. Wall, *Role Orientations and Women State Supreme Court Justices*, 77 JUDICATURE 156 (1993) (discussing the differences between female and male Supreme Court Justices); Elaine Martin, *The Representative Role of Women Judges*, 77 JUDICATURE 166 (1993) (discussing the representation of women's interests by women justices); see, e.g., Beverly B. Cook, *Sentencing Behavior of Federal Judges: Draft Cases-1972*, 42 U. CIN. L. REV. 597, 620-30 (1973); John Gruhl et al., *Women as Policymakers: The Case of Trial Judges*, 25 AM. J. POL. SCI. 308 (1981) (discussing the small differences in male and female sentencing); Herbert M. Kritzer & Thomas M. Uhlman, *Sisterhood in the Courtroom: Sex of Judge and Defendant in Criminal Case Disposition*, 14 SOC. SCI. J. 77, 83 (1977) (finding there are no differences in male and female judges); Thomas G. Walker & Deborah J. Barrow, *The Diversification of the Federal Bench: Policy and Process Ramifications*, 47 J. POL'Y 596, 598 (1985) (looking at female and black federal judges appointed by the Carter administration); see also Sue Davis, *Do Women Judges Speak "In a Different Voice?"*: Carol Gilligan, *Feminist Legal Theory and the Ninth Circuit*, 8 WIS. WOMEN'S L.J. 143 (1993) (analyzing the opinions of the Ninth Circuit on equal protection); Sue Davis et al., *Voting Behavior and Gender on the U.S. Courts of Appeals*, 77 JUDICATURE 129 (1993); Elaine Martin, *Gender and Judicial Selection: A Comparison of the Reagan and Carter Administrations*, 71 JUDICATURE 136, 138 (1987) (discussing Reagan's poor performance in appointing female federal judges); Peter McCormick, *Do Women Judges Make a Difference?: An Analysis by Appeal Court Data*, 8 CAN. J.L. & SOC'Y 135 (1993).

In male-only appeal panels, fathers seeking custody of their children fared better than when appeal panels were of mixed gender. One gender bias task force has found some gender related outcomes. See Lynn H. Schafran, Symposium, *Women and the Law: Goals for the 1990s*, 42 FLA. L. REV. 181, 191 (1990); see also KRITZER, *supra* note 65 (discussing gender differences in labor grievance arbitrations).

91. An often heard theme in the hearings was how many male gynecologists had been particularly uncaring about the physical symptoms associated with the Dalkon Shield. Claimant after claimant testified that when she complained about excessive pain or bleeding, doctors just told them it was normal and they would "get used to it." Though the principal blame for the Dalkon Shield debacle has been placed on the manufacturer and the incorrect and incomplete materials sent to treating physicians, there remains a separate concern about the role



ADR-like forum. This is ironic, because so many feminists decry the use of ADR in at least some settings.<sup>92</sup> The informality of these ADR processes allowed for a more informal, conversational, and narrative presentation of cases, without the embarrassment and glare of a public court room. Further, the process took place in a setting where the ultimate decision-makers were more reflective of the claimant population and demographics, and perhaps did have some greater empathic understanding of the injuries suffered.<sup>93</sup>

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of treating physicians and their continued use of a device that was clearly causing pain and injury. See SOBOL, *supra* note 4, at 8-22 (discussing how the physicians managed to remove themselves from most of the litigation).

92. See, e.g., Penelope E. Bryan, *Killing Us Softly: Divorce Mediation and the Politics of Power*, 40 BUFF. L. REV. 441, 445 (1992) (criticizing mediation as a retreat from the stiffer laws of the courtroom); Trina Grillo, *The Mediation Alternative: Process Dangers for Women*, 100 YALE L.J. 1545, 1549 (1991) (arguing that mandatory mediation is more damaging to women); Lisa G. Lerman, *Mediation of Wife Abuse Cases: The Adverse Impact of Informal Dispute Resolution on Women*, 7 HARV. WOMEN'S L.J. 57, 72 (1984) (discussing the weaknesses in mediation procedures).

93. The recent study of comparative procedures in small claims courts in New Mexico lends some support to the notion that participants find processes more satisfactory or fair when there is some demographic matching of decision-makers and parties. See MICHELLE HERMAN ET AL., METRO COURT STUDY (1995); Gary LaFree & Christine Rack, *The Effects of Participants' Ethnicity and Gender on Monetary Outcomes in Mediated and Adjudicated Civil Cases*, 30 L. & SOC'Y REV. 767, 784-88 (1996). To note the other side of the gender divide in the controversies about matching in ADR, I recently excluded myself from consideration as an arbitrator in a sports salary dispute because I felt that I did not have adequate extrajudicial knowledge of the sport. I know that many of my male colleagues, who care deeply about this sport, would have given their eyeteeth to arbitrate this case. This is not to say that I would disqualify myself from all male sports or that another woman arbitrator would not feel perfectly competent to decide such a case.

The issues of demographic or other forms of matching are far more complex in ADR than in adjudication. In arbitration, parties often choose partisan arbitrators who are supposed to have extrajudicial knowledge and contacts, such as in labor arbitration. In addition, parties choosing both arbitrators and mediators often seek those with expertise and knowledge of both the subject matter and sometimes even the parties. I know that in some cases I have been chosen as an arbitrator precisely because the parties or their lawyers wanted a woman, for whatever complicated reasons of empathy, perceived and accepted partiality, or acceptability to both sides. Query whether court-annexed programs allowing party choice of third party neutrals could, under the rubric of state action, accede to requests for female, black, or Hispanic neutrals? For some early studies describing the differences in male and female mediation styles see Charity B. Gourley, *Mediator Differences in Perception of Abuse: A Gender Problem?*, in CONFLICT AND GENDER 73, 81-82 (Anita Taylor & Judi Beinstein Miller eds., 1996), Shiela Heen, *Defining Gender Differences—Is the Proof in the Process?*, 12 NEGOTIATION J. 9, 14-16 (1996), and Helen Weingarten & Elizabeth Douvan, *Male and Female Visions of Mediation*, 1 NEGOTIATION J. 349 (1985).

It has always struck me as somewhat ironic that some of the critical race theorists, who argue most for the narrative method in legal studies, have also criticized ADR's informalism. It is those very informal processes that are most likely to permit narrative discourse and case presentation.<sup>94</sup>

Aside from gender, the use of the Dalkon Shield is also an interesting class story. The use of the Dalkon Shield crossed class lines. There were affluent middle-class women and university students, as well as working women and welfare mothers, who were all seeking to control their reproductive lives. Thus, there was a sense in these cases of a unified "women as a class" interest. At the same time, class often asserted itself in representational strategies. Poorer women were much more likely to proceed pro se, or to have never consulted a lawyer except at the beginning of their cases.<sup>95</sup>

Mediation would have been my ideal process in this kind of case, so that the claimants would have had an opportunity, ideally assisted by counsel, to act and participate in the assessment of their claim and its value. However, I understand that in limited fund cases, settling defendants fear that mediated solutions may be less predictable.<sup>96</sup> To the extent that mediators facilitate, rather than decide, cases and the parties exercise more control, some would say we need to worry less about the distance, objectivity, or neutrality of the third party

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94. See Richard Delgado et al., *Fairness and Formality: Minimizing the Risk of Prejudice in Alternative Dispute Resolution*, 1985 WIS. L. REV. 1359, 1387-89 (1985); Richard Delgado, *Storytelling for Oppositionists and Others: A Plea for Narrative*, 87 MICH. L. REV. 2411, 2437-41 (1988).

95. The Dalkon Shield case is significant for legal ethics and client solicitation reasons as well. This was one of the first mass torts to have been advertised by lawyers seeking clients who had been injured. See *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 629-31 (1985). The attorneys soliciting Dalkon Shield cases were instrumental in constitutional challenges to limits on lawyer advertising. After the A.H. Robins bankruptcy filing, there was national advertising, advising potential claimants to file with the bankruptcy court. Obviously, class played a large role in access to counsel, even given the contingent fee used by most plaintiffs' counsel.

96. I am not persuaded by this. Evaluation experts are employed to predict the value of future claims from samples of litigated or settled cases. Stratified samples of cases could just as easily have been subjected to mediated treatment with agreed-upon "caps." Also, predictive values could have been assessed from such samples, as have been used with respect to other claim valuation processes. It is, of course, somewhat ironic that some plaintiffs' advocates fear mediation because they presume there will be a compromise, while defendants fear mediation as being too unpredictable and perhaps more costly in time. There is virtually no empirical evaluation of differences among the variety of ADR processes to rigorously assess these claims.

neutral<sup>97</sup> in a mediation setting.

Ultimately the question of what is appropriate neutrality or impartiality in judging cases remains much more problematic for me than the current statutory requirements. As Duncan Kennedy<sup>98</sup> and Judge Patricia Wald<sup>99</sup> have both realized from analytical, jurisprudential, and practical bases, judging is constrained by our commitments to rules of law and fairness. Judging is further fettered by some aspiration for impartiality and neutrality, even if every individual has at least a demographic, if not a substantive or ideological positionality<sup>100</sup> with respect to any particular case.<sup>101</sup> As my colleague and talented mediator, Howard Gadlin, has said, we hold some notion of neutrality, objectivity, or impartiality over our head, like an unreachable halo to remind us of what we need to aspire to, as we work on cases situated before us, where we are grounded in who we are.<sup>102</sup> As both Judge Wald and Duncan Kennedy have noted, there

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97. For others the question of how neutral, distanced, or impartial the third party neutral is does not depend on the particular process, but on what control the parties have over the choice of the neutral. If the parties choose their arbitrator or mediator, the emphasis will be on disclosure and consent so that parties can, if they want, opt for someone who is not impartial at all. This issue is currently very important in ADR ethics, as parties often desire a third party neutral with great expertise in a subject but who may be quite enmeshed with all the parties. This is not unlike the choice of a village elder or "the big man" in choosing a third party, who is deeply enmeshed in the community in which the dispute occurs, to resolve a case. See MARTIN SHAPIRO, *COURTS: A COMPARATIVE AND POLITICAL ANALYSIS* 6 (1981). This kind of enmeshed third party neutral selection is quite common in intellectual property disputes where parties seek someone who understands the technology and the law. This third party may have some past or present relation, if not to the particular disputants then to the larger industry or practice in which the dispute is located. See Carrie Menkel-Meadow, *Ethics in Alternative Dispute Resolution: New Issues, No Answers from the Adversary Conception of Lawyers' Responsibilities*, 38 S. TEX. L. REV. 407, 443-44 (1997).

98. See generally Kennedy, *supra* note 32, at 558-62 (describing the relation of judges' demographic and political views to the decision-making process).

99. See generally Wald, *Women in the Law: Stage Two*, *supra* note 28, at 49 (recognizing the particularities of women's position as a judge and the objective constraints of the law).

100. In addition to Martha Minow, *supra* note 73, many legal scholars have noted our inevitable positions or commitments—demographic, ideological, or, as the statute says, personal interests—that color or filter how we view the world and interpret facts. See Katharine Bartlett, *Feminist Legal Methods*, 103 HARV. L. REV. 829, 835 (1990); Howard Lesnick, *The Wellsprings of Legal Responses to Inequality: A Perspective on Perspectives*, 1991 DUKE L.J. 413, 413-20 (1991).

101. See Lesnick, *supra* note 100, at 413-20.

102. See generally Howard Gadlin & Elizabeth W. Pino, *Neutrality: A Guide for the Organizational Ombudsperson*, 13 NEGOTIATION J. 17 (1997).

is really often only a small place within the constraints of the legal process and rules where discretion or creative interpretation allows a fuller expression of what one really values in lawmaking.<sup>103</sup> This may apply particularly in the context of adjudication, and most particularly in constitutional adjudication, where laws are interpreted and new meanings created.<sup>104</sup>

Yet in the context of arbitrating or mediating tort cases, it is more often fact-finding or fact-listening, rather than lawmaking that engages the capacities of third party neutrals. The law is settled in most cases in which ADR is used, either by settlement, judicial decree, or avoidance. Thus, I wonder whether the literature on judicial neutrality, disqualification, and decision-making has paid sufficient attention to the differences in the various kinds of judicial functions. Is neutrality or impartiality different for lawmaking or law interpretation than for fact-finding?<sup>105</sup> We may need to reconceptualize both the philosophical underpinnings and the statutory provisions for judicial standards of impartiality, lack of bias, neutrality, and disqualification. What makes for a good, distanced, and neutral judge in one context may not make a caring and empathic listener in a different sort of proceeding. Should standards for neutrality or impartiality be different in ADR than in formal adjudication?<sup>106</sup> Are different

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103. See *supra* notes 98-99 and accompanying text.

104. For example, would a Supreme Court comprised of more women have defined the "liberty interest" in *Lassiter v. Dep't of Soc. Servs.*, 452 U.S. 18 (1981), to include the termination of parental rights? See *id.* at 59 (Stevens, J., dissenting) (recognizing property rights derived from the parent-child relationship).

105. Both law interpretation and fact-finding are constitutive of judicial functions and expertise, but they may call on the different skills, capacities, and aspects of who we are. See Frank, *supra* note 27, at 655.

106. The CPR-Georgetown Commission on Ethics and Standards in ADR, which I chair, is currently drafting proposed rules and crafting position papers on these important issues. See Carrie Menkel-Meadow, *The Silences of the Restatement of the Law Governing Lawyers: Lawyering as Only Adversary Practice*, 10 GEO. J. LEGAL ETHICS (1997). Some suggest that arbitrators should be covered by the same rules as judges—both the relevant statutes and the Judicial Code of Conduct—because their roles as decision-makers over the case are so similar, while mediators should be governed by more disclosure and consent rules since they have less power over the parties. To the extent that mediators are now often very active in evaluating cases, as well as facilitating them, it is not clear to me that mediators should be held to a different standard. Indeed, mediators may often be privy to more confidential information in the form of sensitive settlement facts that are not typically revealed in hearing settings. Nevertheless, third party neutral disclosure and consent may be an adequate protection here and, it could provide for greater choice and disclosure than the current statutory and ethical schemes provide, with greater party acceptance of the neutrals they have

competencies required?

Where the constitutional adjudicator may need to be distanced from the parties in a particular dispute, and be wise at considering the larger policy and external effects on parties outside of a dispute in deciding a question of important constitutional or interpretative moment,<sup>107</sup> the mass tort arbitrator or mediator may need to have an ability to relate to claimants interpersonally, to listen well, and yes to empathize, as well as to find facts. To this extent, mass tort ADR provides the possibility for the kind of legal empathy that I<sup>108</sup> and many others have argued for, as seen in Lynne Henderson's "empathy,"<sup>109</sup> Robin L. West's "caring justice,"<sup>110</sup> and Martha Nussbaum's "love's knowledge" or "poetic justice."<sup>111</sup> By providing a closer, more intimate and interpersonal connection with a legal proceeding, an ADR proceeding—if conducted in a manner providing the opportunity to express the fullness of the harms and the need for catharsis described by Judge Weinstein and others<sup>112</sup>—offers the potential for allowing the expression of individual pain within the context of a mass tort.

I have been persuaded by Robin L. West<sup>113</sup> that if women's hedonic lives and injuries are currently underexpressed and undercompensated for<sup>114</sup> in the recognition that traditional tort law has allowed and the process that traditional adjudication has permitted them to be expressed in, then gender does matter. To the extent that I continue to feel that gender has something of a role to play here, the empathic processes with the greater potential for narrative in ADR are a powerful tool for their expression.<sup>115</sup>

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had a hand in choosing.

107. See BRUCE ACKERMAN, *WE THE PEOPLE* 131-62 (1991).

108. See Carrie Menkel-Meadow, *The Power of Narrative in Empathetic Learning: Post-Modernism and the Stories of Law*, 2 UCLA WOMEN'S L.J. 287, 304-07 (1992).

109. See Lynne N. Henderson, *The Dialogue of Heart and Head*, 10 CARDOZO L. REV. 123, 123 (1988); Lynne N. Henderson, *Legality and Empathy*, 85 MICH. L. REV. 1574, 1576 (1987).

110. See generally WEST, *supra* note 14.

111. See MARTHA C. NUSSBAUM, *LOVE'S KNOWLEDGE: ESSAYS ON PHILOSOPHY AND LITERATURE* 53-78 (1990); MARTHA C. NUSSBAUM, *POETIC JUSTICE: THE LITERARY IMAGINATION AND PUBLIC LIFE* (1995) (arguing for judicial decision-making that combines the knowledge of the heart, which is situated in cultural contexts and inspired by literature and narrative, with the legal rational knowledge of the head and rules).

112. See WEINSTEIN, *supra* note 2, at 13.

113. See West, *supra* note 15.

114. See WEST, *supra* note 14, at 82.

115. In my brief experience in the breast implant litigation, it became clear to

None of this, of course, speaks to the bigger questions implicated in any mass tort, and any mass tort with gender specific harms. What harms should substantively be recognized? What are fair compensatory amounts? What other remedies should be granted?<sup>116</sup> However, I do come away from the Dalkon Shield experience believing that if the larger justice questions can be dealt with, then ADR processes—with tissue boxes<sup>117</sup> as well as tape recorders, with heart as well as head—can provide an individualized hearing to those people who want it, and can take the mass out of mass torts.

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me just how important the process is. Those designing the process by which potential claimants would be counseled and apprised of their legal rights were sensitive enough to seek skilled female ADR professionals to assist them in designing the process. How this might play out in concerns about gender discrimination in formal court or court adjunct appointments is a separate question I am ducking at the moment. At the same time, I noted that insensitive male attorneys who had worked on this case for years described the settlement structure as a “top-down” grid, without even realizing how insensitive these words were in the context of the subject matter of the litigation.

116. The Dalkon Shield settlement program included an emergency fertility program for those women nearing the end of their active fertility periods. Breast implant settlement proposals, as well as some asbestos proposals, include programs for some medical monitoring.

117. With all the harms that befall injured people, and particularly women in our society, claimants may need to cry as well as narrate in their hearings. If crying about our pain illustrates just how bad our situations are, then some may prefer a private setting for the expression of their grief and pain.

