(In)Juries, (In)Justice, and (Il)Legal Blame: Tort Law as Melodrama—or Is It Farce?

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According to the National Academy of Sciences' Institute of Medicine (IOM), preventable medical errors are not so much caused by the carelessness of individual physicians, nurses, or other hospital personnel. Rather they are the result of cumulative opportunities for human error inevitable in today's complex medical system. The IOM report calls for shifting attention away from the faults of individual care providers to the overall system. The current tort system's "blame culture" is itself blamed by the IOM for impeding improvements to patient safety because, among other things, it deters physicians from reporting their errors in the first place. But the manner in which personal injury cases are prepared and litigated is totally at odds with the IOM report's emphasis on systemic causes of avoidable medical failures, according to law professor Neil Feigenson's book, Legal Blame. *Instead of uncovering the systemic origins of accidents, personal injury litigation not only distorts accidents as having a single cause but also paints them melodramatically by finding a histrionically reprehensible flaw on the part of some single individual. Thus, complex institutional factors are not just ignored, they're repressed. Exhaustive examination of scholarly literature and of actual trial transcripts reveals that judges and jurors are more likely to find liability (or to reject it) if they can be made to focus on a bad guy (either plaintiff or defendant) as opposed to intricate, interconnected processes or programs that may, in particular cases, have been amiss.*

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INTRODUCTION

The operation of tort law as applied to personal injury remains, as it did throughout Gary Schwartz's admirable career, the subject of intense controversy.[1] Two recent and important publications encapsulate polar views of personal injury tort law.

According to the National Academy of Science's Institute of Medicine (IOM), most medical errors are not caused so much by the clear carelessness of individual physicians, nurses, or other health care personnel; rather they are the multicausal result of cumulative opportunities for often small human lapses inevitable in today's complex medical system.

The 1999 IOM report, *To Err Is Human: Building a Safer Health Care System*,[2] calls for shifting attention away from the faults of individual care providers to the overall health care system. The current tort system's "blame culture" is itself blamed by the IOM for impeding improvements to patient safety because the culture deters physicians from acknowledging their errors in the first place.

Thus, according to the IOM, the law of medical malpractice is in irreconcilable tension with the realities of medicine. Indeed, going further, in some ways systemic medical errors often function to *benefit* society. Atul Gawande, an experienced surgeon, writes of his experiences as an intern learning difficult medical procedures in his new book, *Complications*.[3] He begins by recounting the tedious and tortuous process of learning how to master the tricky procedure of placing an intravenous line directly into a patient's heart. The learning process, which Gawande describes as "floundering followed by fragments followed by knowledge and, occasionally, a moment of elegance,"[4] is a necessary incident of surgical training. There is simply no alternative to tolerating the risk that goes along with allowing inexperienced young doctors to operate on patients. "In surgery," Gawande writes, "skill, judgment, and confidence are learned through experience, haltingly and humiliatingly."[5] Hands-on experience is the only effective method of learning how to perform medical procedures. This fact stands in tension, says Gawande, with "court rulings" holding that "a patient's right to

1. For a discussion of the pros and cons of personal injury law, see PETER A. BELL & JEFFREY O'CONNELL, ACCIDENTAL JUSTICE: THE DILEMMAS OF TORT LAW (1997).

2. COMMITTEE ON QUALITY HEALTH CARE IN AMERICA, INSTITUTE OF MEDICINE, TO ERR IS HUMAN: BUILDING A SAFER HEALTH CARE SYSTEM (Linda T. Kohn et al. eds., 2000) [hereinafter IOM REPORT], *available at* http://www.nap.edu/books/0309068371/html (lasted visited Oct. 28, 2002).

3. ATUL GAWANDE, COMPLICATIONS: A YOUNG SURGEON'S NOTES ON AN IMPERFECT SCIENCE 11 (2002); *see also* Atul Gawande, *The Learning Curve*, NEW YORKER, Jan. 28, 2002, at 52.

4. GAWANDE, *supra* note 3, at 22; Gawande, *supra* note 3, at 57.

5. GAWANDE, *supra* note 3, at 18; Gawande, *supra* note 3, at 55.

the best care possible must trump the objective of training novices."[6] As Gawande observes, "We want perfection without practice. Yet everyone is harmed if no one is trained for the future."[7]

Perhaps the most striking aspect of Gawande's book is his candid admission that the perils of the learning curve extend far beyond a physician's training period. "The process of learning," he writes, "goes on longer than most people know."[8] Because medicine is continuously in a state of technological improvement and progress, new procedures must be mastered by those who are responsible for administering them. Again, "the perils of the learning curve are inescapable."[9] Gawande cites a study in the *British Medical Journal* that examined administration of a new procedure between 1978 and 1998 to help children born with a severe heart defect known as transposition of the great arteries.[10] The long-term effect of the new procedure was to decrease the annual death rate in children with the defect by more than 75 percent, and to increase their life expectancy from forty-seven to sixty-three years.[11] The price of such progress, however, was significant: In the first seventy operations employing the new procedure, the surgical death rate was 25 percent, compared with just 6 percent with the then-standard procedure.[12] Another study cited by Gawande indicates that when surgeons try a new procedure, it is inevitable that they will first suffer a diminution in efficacy.[13]

A book published not long after the IOM report illustrates that such reality has little or no place in medical malpractice litigation. Neal Feigenson's volume, *Legal Blame: How Jurors Think and Talk About Accidents*,[14] published by the American Psychological Association, is a very curious book. The thrust of his book, in pointed contrast to the IOM report's emphasis on systemic failure, is that the purpose of personal injury litigation—especially, but by no means exclusively, as practiced by the plaintiffs' bar—is to portray accidental injuries not only monocausally but melodramatically.[15] The aim

6. GAWANDE, *supra* note 3, at 24; Gawande, *supra* note 3, at 58.

7. GAWANDE, *supra* note 3, at 24; Gawande, *supra* note 3, at 58.

8. GAWANDE, *supra* note 3, at 25; Gawande, *supra* note 3, at 58.

9. GAWANDE, *supra* note 3, at 26; Gawande, *supra* note 3, at 59.

10. GAWANDE, *supra* note 3, at 27 (citing A. Hasan et al., *New Surgical Procedures: Can We Minimise the Learning Curve?*, 320 BRIT. MED. J. 171, 171–73 (2000)); Gawande, *supra* note 3, at 59 (no citation).

11. Gawande, *supra* note 3, at 59.

12. *Id.*

13. GAWANDE, supra note 3, at 28–30 (citing Gary P. Pisano et al., *Organizational Differences in Rates of Learning: Evidence from the Adoption of Minimally Invasive Cardiac Surgery*, 47 MGMT. SCI. 752, 761–63 (2001)); Gawande, *supra* note 3, at 60.

14. NEAL FEIGENSON, LEGAL BLAME: HOW JURORS THINK AND TALK ABOUT ACCIDENTS (2000).

15. *Id.* at 88–95.

of counsel on both sides is to find a dramatically reprehensible causal flaw on the part of some single individual, even at the price of ignoring and indeed suppressing more complex multicausal factors.[16] Juries and even judges, as Feigenson richly demonstrates with instructive text and examples, are seen as much more likely to find (or deny) liability if they can focus on a "bad guy," not on complicated interconnected processes or programs that may (or may not) be amiss.[17]

Feigenson's opus is impressively researched, but rarely has a thoughtful—indeed, in many ways brilliant—book so inadvertently but completely condemned its own ultimate thesis. After 233 pages of carefully wrought and footnoted prose (plus thirty-five pages of densely packed and impressive bibliography), Feigenson proffers the hope that his opus will make the reader "more appreciative" of juries in personal injury cases.[18] But if ever a book turns on itself and leaves a reader disenchanted with what supposedly has been defended by its author, Feigenson's book is it. Obviously, to the extent that the IOM is right that accidents are multicausal and systemic, Feigenson's exposition, contrary to his conclusion, clearly condemns personal injury law.

It behooves us, then, to examine Feigenson's portrayal of induced melodrama in personal injury litigation, and his appraisal of the results of such a focus.

Science is refining the tools of the courtroom artist. New disciplines such as cognitive psychology hone the skills that expert trial lawyers formerly developed through years of keen observation and intuition. Lawyers are learning the scientific bases behind their rhetorical weapons and are presumably wielding them more effectively. In fact, the result is near nirvana for the accomplished rhetorician: the *Rhetoric*[19] of Aristotle modernized and certified by the scientific method.

In the legal marketplace, the masters of cognitive and social psychology promise to help advocates build a better argumentative mousetrap, for a fee.[20] Once limited to merely picking the perfect jury, jury consultants are now in for the long haul, continually analyzing a lawyer's impact on the

16. *Id.* at 51–52.

17. *Id.* at 92–95.

18. *Id.* at 232.

19. *See* ARISTOTLE, ON RHETORIC: A THEORY OF CIVIC DISCOURSE (George A. Kennedy trans. & ed., 1991).

20. In the mock jury industry, for instance, fees for jury consultants can run anywhere from $2500 for a jury selection to $200,000 and up for the full package of jury selection, monitoring, and persuasion consulting. Kate Rix, *Jury Consultants Play Meatier Role in Trial Prep*, NAT'L L.J., Aug. 7, 2000, at A13.

jury.[21] These consultants are not some version of the sinister, intuitive, or empathic genius portrayed in popular media,[22] but likely members of a respectable Bay area brain trust (marketing those psychology degrees their mothers had doubts about).[23] Consultants translate the teachings of social and cognitive psychology for lawyers so as to optimize signals sent to a jury. Lawyers in turn translate the law and the facts for the jury so as to optimize the verdict.

Not to be left out, legal scholarship also has given its fair share of attention to describing exactly what the findings of psychologists can tell us about that most cherished and beleaguered of legal institutions: the jury. This is where Feigenson's *Legal Blame* comes in—it is a thoroughly researched, carefully crafted work of scholarship that applies the theories of psychological science to the rich environment of courtrooms and jury deliberations. Feigenson strives to uncover the how's and the why's of liability findings in personal injury cases. The book is equal parts encomium to the American jury and primer for trial attorneys on the vocabulary of cognitive psychology. Feigenson translates the findings of the new science for the legal community at large. What Feigenson does not satisfactorily address is whether the tort system is being made more effective. Will knowledge of the multidimensional, textured decisional process of juries enhance the operation of personal injury law?

In addition to the IOM report, another recent piece of legal scholarship answers these questions in the negative. Professor Kenneth Abraham's seminal article, *The Trouble with Negligence*,[24] locates a major flaw in our judicial process in what he calls the "unbounded" norm presented to civil juries in accident trials.[25] In these cases, the jury's idiosyncratic understanding of

21. *See, e.g.*, Ronald J. Karpf, *Don't Try to Handpick Jurors, but Know How to Talk to Them During Trial*, LEGAL INTELLIGENCER, Oct. 16, 2000, at 7 (asserting that "trial consultation has moved from jury consultation to post-selection consultation" and making specific reference to knowledge structures and heuristics, discussed extensively below, as common tools of the modern jury consultant).

22. The protagonist waylaid by his own vanity in the recent film DEVIL'S ADVOCATE (Warner Bros. 1997) is a perfect example. Another is the jury consultant and bogeyman in JOHN GRISHAM, THE RUNAWAY JURY (1996).

23. Three of the major jury consulting companies are based in or near San Francisco, California. Rix, *supra* note 20.

24. Kenneth S. Abraham, *The Trouble with Negligence*, 54 VAND. L. REV. 1187 (2001).

25. Within the realm of physical injury torts, Professor Kenneth Abraham draws distinctions between bounded and unbounded negligence actions. Bounded negligence actions are those in which the norm applied by the finder of fact is supplied wholly or in part by an extrajudicial source. *Id.* at 1207–08. That source might be the custom of an industry or the recognized practices of a profession. Negligence per se would be the extreme of a bounded case. Unbounded cases are those arising from everyday situations for which there is no independent extrajudicial authority. *Id.* at 1204–07. Automobile, slip-and-fall, and other "accidents just happen" cases are the most recognizable in the unbounded category. For a criticism of the distinction between bounded and un-

what happened reigns untrammeled: "[T]he very idea of negligence is shaky; the finder of fact will in effect create a conception of negligent behavior to fit the case at hand."[26] As a result, no case has much, if any, precedential value for a later case. Juries just do their thing, case by case.

Paradoxically, this rough and ready justice is precisely what Feigenson sees as a strength of the jury.[27] Feigenson goes to great length to show that juries generally seek to craft decisions based on their understanding of "total justice"—quite apart from any technical legal considerations—and that these decisions appear correct in about 80 percent of cases.[28] Feigenson seems to be content that "total justice, like common sense in other domains . . . leads to results that are right by the relevant normative standards, albeit for the wrong reasons."[29]

In glorifying the jury's role, Feigenson turns his back on what even he admits are the inevitable systemic errors in an industrial society that stem from both the imperfection of any human endeavor and the laws of physics and probability.[30] Accidents are rife, as he tellingly illustrates, for which assigning blame is just plain misleading.[31] There simply is no *one* party to blame. These accidents, he suggests, certainly in gross and often in particular, cannot be accurately, nor even fairly, confronted through the current tort negligence system, regardless of the semantic richness and persuasive rhetoric of the trial process.[32]

Even so, Feigenson's analysis is certainly a boon to the studious trial lawyer. Law students will benefit as well from *Legal Blame*'s careful dissection of actual closing arguments.[33] Sadly enough, the tempting gains in these respects only emphasize the huge inadequacies and inefficiencies of tort law itself.

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bounded cases, maintaining that as a practical matter, almost all personal injury cases are unbounded, see Jeffrey O'Connell & Andrew S. Boutros, *Treating Medical Malpractice Claims Under a Variant of the Business Judgment Rule*, 77 NOTRE DAME L. REV. 373, 405–06 (2002).

26. Abraham, *supra* note 24, at 1223.

27. FEIGENSON, *supra* note 14, at 109.

28. *Id.* For further discussions pro and con on such agreements, see O'Connell & Boutros, *supra* note 25, at 434–35. *See generally, e.g.*, W. Kip Viscusi, *Do Judges Do Better?*, *in* CASS R. SUNSTEIN ET AL., PUNITIVE DAMAGES: HOW JURIES DECIDE 186 (2002) (concluding that, on the whole, judges are better able to make decisions more in line with standard law-and-economics prescriptions, such as risk-cost balancing).

29. FEIGENSON, *supra* note 14, at 109 (citation omitted).

30. "The melodramatic conception makes it harder for people to put in the foreground causes of accidental harm they might be better off recognizing." *Id.* at 216. For anecdotal support for the notion that accidents are a price of medical advancement, see GAWANDE, *supra* note 3, at 52.

31. FEIGENSON, *supra* note 14, at 218–23.

32. *Id.* at 229.

33. *See id.* at 138–39, 145–46, 154–55.

I. *LEGAL BLAME* AND DISCONCERTING PRAISE THEREOF

Professor Feigenson's insightful application of modern psychological science to the decisionmaking process of juries is at once highly illuminating and deeply disturbing. The illumination results from his scholarly exegesis of a familiar idea: the trial as a melodrama.

Whereas the IOM urges that a focus on individual fault in tort litigation is anachronistic in an advanced society of systemically technological creation of inevitable risk,[34] Feigenson conversely writes:

> If anything, people's urge to understand accidents as melodrama is becoming greater the more technologically advanced society becomes. As [Lawrence M.] Friedman wrote, advances in technology lead people to expect that the riskiness in their lives can be controlled—if not by themselves, then surely by someone (for example, most people have no personal control over airplane safety, but the manufacturers, airline maintenance crews, and pilots presumably do). People thus expect those others to exercise that control. The greater one's expectation of absolute security, the more a catastrophic accident stands out as senseless, shocking, something that *should not be*. The need to *make sense* of accidental harm becomes even greater, and melodrama is one of the primary ways people do this. In any event, there is good reason to believe that the absolute *amount* of drama of all sorts, including melodrama to which people in the last 40 years have been exposed (primarily through television) is very much greater than that to which people in previous generations were exposed. This suggests that the influence of melodramatic sensibility on people's judgments may very well be increasing as well.[35]

Furthermore,

> When one moves from the dramatic arts to the world of "facts," one continues to find evidence that American culture conceives of accidents as melodrama. For instance, many studies show that media reporting on hazards and accidents tends to adopt a melodramatic structure. The media tend to report harms, not risks; that is, they individualize danger. The media tend to prefer monocausal accounts of hazards and to identify individuals rather than physical or social forces as causes. Thus, "news of disaster tends to be portrayed as melodrama—a form of communication that relies heavily on plot predictability and stereotype." In all of this, media coverage of accidents and hazards is consistent with their coverage of news in general.[36]

34. IOM REPORT, *supra* note 2, at 49–68.

35. FEIGENSON, *supra* note 14, at 224–25 (citations omitted).

36. *Id.* at 215 (citations omitted) (quoting Lee Wilkins & Philip Patterson, *Risk Analysis and the Construction of News*, 37 J. COMM. 80, 81 (1987)). See Rob Walker, *Anchor Steam*, NEW

Nor is this just a matter of Feigenson's opinion. In a review of Jay Rosen's book *What Are Journalists For?*,[37] Jean Bethke Elshtain writes:

> [F]ree and open societies have always been characterized by media devoted in large measure to the . . . melodramatized [and] to bathos . . . . Around American television newsrooms, the rule of thumb is: "If it bleeds, it leads", and those who don't lead with the bleeding seem to fall off the evening sweepstakes for viewers.
>
> It seems safe to say that the excessive and growing commercialization of the media only deepens the tendency. . . . [T]here is no end in sight.[38]

Of course, the dramatic propensities of jury trials are among the oldest commonplaces of literature, and history is rife with trials as popular entertainment. A revelation emerges, however, in Feigenson's detailed analysis of how jurors are so naturally drawn to, and how lawyers so cleverly invoke, certain habits of thought that heighten trials as melodrama. In other words, it is not the melodrama as a paradigm that gives rise to certain habits of thought, but the habits of thought that lead to a melodramatic paradigm.[39] This paradigm is at odds with the orthodox model of a jury's rational decisionmaking process in finding fault,[40] an ideal quite distant from the counterproductivity of focusing on monocausal, individual fault in a multicausal, technological age.

The habits of thought outlined in *Legal Blame* serve as a grammar for understanding both an advocate's rhetorical skills and a juror's thought process. These habits come straight from scientific studies produced by the cognitive revolution of the past thirty years. Feigenson's citations and lengthy bibliography indicate both the care of his scholarship and the interpenetration of cognitive science with the law. Cognitive science is the quest to discover how the brain's architecture translates into ways of thinking. Modern scientists are working at the problem from both ends and many angles. Some are dedicated to tracing the wiring of the brain itself and figuring out how the wiring gives rise to what we know as "thought." Other scientists, among them psychologists, seek to identify empirically common patterns of thought that some day will be linked to the work of those looking at the

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REPUBLIC, May 20, 2002, at 18, for a similarly jaundiced portrayal of television's disappointing oversimplification of the news.

37. JAY ROSEN, WHAT ARE JOURNALISTS FOR? (1999).

38. Jean Bethke Elshtain, *Publics and Prints*, TIMES LITERARY SUPPLEMENT, Feb. 23, 2001, at 9 (book review); *see also infra* note 84.

39. FEIGENSON, *supra* note 14, at 97–98.

40. The orthodox model is an analysis of evidence to evaluate whether the elements of a claim have been satisfied based on a given standard of proof. *Id.* at 97. Neal Feigenson refers to this model as "*paradigmatic* reasoning, an element-by-legal-element account of why the plaintiff has [or has not] failed to satisfy the requirements of the prima facie case." *Id.*

brain's architecture. It is from the work of cognitive psychologists that Professor Feigenson draws.

Cognitive psychologists, led by Daniel Kahneman, a recent Nobel Prize winner in economics, and his coauthor, the late Amos Tversky, among others, have developed a new vocabulary to describe the habits of thought at the heart of practical reasoning.[41] For those unfamiliar with the terms "representativeness heuristic,"[42] "availability heuristic," "fundamental attribution error," "culpable causation," "monocausality," and "norm theory," or with schemas, scripts, and other knowledge structures, the following part summarizes Feigenson's rather dauntingly technical summary of the literature. (Those disinclined to bury themselves in such arcana are advised to skip to Part III.)

II. THE COGNITIVE LITERATURE

When jurors use mental tools to help infer conclusions from evidence presented at trial, they use two major categories of such tools. First are several subcategories of knowledge structures such as schemas, scripts, and cultural models. Perhaps a more familiar and generalized term for these structures is paradigm. Whatever the label, these structures (1) allow for the recognition of, (2) organize the expectations of, and (3) limit the boundaries of our experience, whether that experience is through the senses, emotions, or intellect.[43]

For instance, a schema contains certain features that allow us to organize and name what we see when we see it. Sensory impressions that indicate a domesticated, four-legged, hairy, barking creature with paws yield the schema of "dog."[44] Similarly, a script contains features in sequence that allow us to recognize and act in events or series of events. A script "guides how people infer missing information from what is explicitly provided."[45] The absence of a dog collar might yield the inference that a dog is not in fact domesticated, triggering the schema "wild dog" and activating an alternative range of scripts that call for speaking calmly, backing away, or at least proceeding cautiously. Finally, a cultural model is a complex combination of schemas and scripts. Feigenson illustrates this with the cultural model of

41. *E.g.*, Daniel Kahneman & Amos Tversky, *The Simulation Heuristic*, *in* JUDGMENT UNDER UNCERTAINTY: HEURISTICS AND BIASES 201 (Daniel Kahneman et al. eds., 1982).

42. "Heuristic" is a fancy word that academics and other self-proclaimed intellectuals are fond of. It refers to a problem-solving technique ingrained by early experience that does not give rigorously accurate results. It entails matters seemingly incapable of proof, needing further empirical research. *See* FEIGENSON, *supra* note 14, at 45–49.

43. *Id.*

44. *Id.* at 46.

45. *Id.* (citation omitted).

marriage, which "may combine schemas (for what constitutes a marriage) and scripts (for how marriages are supposed to proceed) into an implicit framework that allows people to make sense of marital successes, difficulties, and dissolutions."[46] The nesting of these structures creates that glorious and ubiquitous human creation: the story.

The second category of mental tools that the author employs is inferential heuristics, that is, inferential shortcuts people use "to go from what they know to what they need to learn in order to classify, predict, or attribute responsibility."[47] Twelve different habits of mind are described and used in the analysis.[48] For brevity's sake, only a few of these mental tools need be described here.

The two chief inferential heuristics, the availability heuristic and the representativeness heuristic, are "important . . . features of other cognitive habits relevant to jurors' evaluation of accident cases."[49] The availability heuristic describes the tendency of people estimating the frequency, or predicting the likelihood, of events "to be influenced by the ease with which instances of that class of events can be brought to mind."[50] The availability heuristic has been studied in a variety of contexts. Feigenson refers to many of the key experiments:

> Those who estimate that accidents cause as many deaths as does disease, when in fact 16 times as many people die from disease, are basing their estimate on the disproportionate availability of reports of fatal accidents in the media. When each spouse routinely overestimates his or her own contributions to joint household chores, it may be because each pays more attention to and spends more time thinking about his or her own efforts, making those efforts more available for later recall. Those who guess that more words begin with *r* than contain *r* as the third letter do so because it is easier to conduct a mental search of words by the first letter than by the third, so it is easier to think of instances of the former class of words, even though instances of the latter are far more numerous.[51]

Scientific findings such as these underscore the importance of those ideas that are given pride of place at the beginning and end of a lawyer's closing argument. The availability heuristic also suggests the importance of the physical courtroom space: The jury only has available to it the parties present or represented in the courtroom. The very staging of the courtroom

46. *Id.* (citation omitted).
47. *Id.*
48. *See id.* at 46–49.
49. *Id.* at 47.
50. *Id.* (citation omitted).
51. *Id.* (citations omitted).

drama, with opposing parties separated by an aisle, belies a world of inevitable multicausality.[52]

The representativeness heuristic underlies the associative power of common sense. It refers to "people's habit of reasoning by perceived resemblance."[53] When people attempt to associate a new object of consideration with a category of objects of which they are already aware, they are using the representativeness heuristic. As Feigenson notes:

> [The representative heuristic] often yields correct classifications, especially when a person's knowledge of important category features is accurate and complete and members of the category are more or less invariant with regard to those features, so that . . . to know one member of the category really is to know them all.
>
> Like other cognitive tools, however, representativeness can lead to error when used inappropriately. It can fail a person, as reasoning on the basis of ethnic stereotypes often does, when a person's supposed knowledge of category features is inaccurate or when members of the category vary considerably. Given substantial variation, one cannot reliably infer from the fact that a person who has one feature presumed to be characteristic of the category that the person also has other features presumed to be characteristic of the category.[54]

The representative heuristic is the name given by psychologists to common sense induction, certainly an indispensable logical tool.[55] On the other hand, representativeness also can be the cause of various logical fallacies. For instance, representativeness fallacies include reasoning that because something is generally true, it is true for a highly specialized class (fallacious division) or reasoning that because something is true for a highly specialized class, it is generally true (fallacious composition).[56]

Of course, the adversary system of trial can be expected to uncover and counter many of the more blatant fallacies based on representativeness. Feigenson, however, cites research that has found misconceptions based on representativeness that seem so systemic and subtle that they resist being uncovered. He refers to a famous experiment by Kahneman and Tversky showing that the representativeness heuristic encourages people to disregard basic principles of statistical inference:

Some participants were told that personality tests had been given to a group of 100 persons consisting of 70 engineers and 30 lawyers; others, that

52. *Id.* at 47–48.
53. *Id.* at 48.
54. *Id.* (citation omitted).
55. *Id.*
56. One standard reference work gives the following example of fallacious division: "To imprison a man is cruel; therefore, murderers should be allowed to run free." RICHARD A. LANHAM, A HANDLIST OF RHETORICAL TERMS 136 (2d ed. 1991).

the group consisted of 30 engineers and 70 lawyers. All participants were asked to estimate the likelihood that a person selected at random from the group of 100 was an engineer, on the basis of the following personality profile: "Dick is a 30-year-old-man. He is married with no children. A man of high ability and high motivation, he promises to be quite successful in his field. He is well liked by his colleagues." Participants judged the probability that Dick was an engineer to be about 50%, *regardless* of whether the group from which he had been randomly selected consisted of 70% engineers or 30% engineers. Thus, participants . . . ignor[ed] the base rate information that made it much more (or less) likely that Dick was an engineer than a lawyer.[57]

Although Feigenson fails to make the explicit connection in his section on representativeness, elsewhere he acknowledges that "melodramatic blaming blocks awareness of the systemic causes of accidental injuries."[58] Thus, systemic imperfections in an industrialized society that produce predictable injury rates will be routinely ignored when compared to more compelling attributions of causality, such as a melodrama presented at trial.

Feigenson's book is about stories and melodrama, not accident rates. One of the keys to the compelling stories told in court is norm theory.[59] People use norm theory, also known as counterfactual analysis, when they postulate that a series of events culminating in an accident is the result of a deviance from the normal state of affairs.[60] Jurors attempt to construct a normal script in which the accident does not occur (the counterfactual hypothesis) and then compare this norm to what actually occurred in order to detect a deviance. Once the deviance is found, the search is on for the cause of the deviance. Feigenson illustrates norm theory with a canonical example from an experiment by Kahneman and Tversky:[61]

> [S]ome participants read a story about a man who left his office at the usual time but drove home by an unusual route; others read a version in which he left early but took the usual route. In both stories, the man braked hard to stop at a yellow light, although he could easily have gone through. When the light changed, he started through the intersection, only to be rammed and instantly killed by a teenager driving a truck while under the influence of drugs. Participants were

57. FEIGENSON, *supra* note 14, at 48–49 (citing Daniel Kahneman & Amos Tversky, *On the Psychology of Prediction*, 80 PSYCHOL. REV. 237, 237–51 (1973)). But for a more optimistic view of human capacity to weigh statistical information, see GERD GIGERENZER ET AL., SIMPLE HEURISTICS THAT MAKE US SMART 211–34 (1999).

58. FEIGENSON, *supra* note 14, at 216.

59. *Id.*

60. *Id.* at 53–56.

61. Amos Tversky & Daniel Kahneman, *Judgment Under Uncertainty: Heuristics and Biases*, *in* JUDGMENT UNDER UNCERTAINTY: HEURISTICS AND BIASES, *supra* note 41, at 3.

> asked how the man's family, dwelling on the accident, completed the sentence stem, "If only . . . ." Those who read the "unusual route" version most often responded that if only the man had taken his usual route, the accident would not have occurred. Those who read the "unusual time" version most often responded that changing the time of departure from the office would have avoided the accident.
>
> This and other research shows that people most readily imagine the alternative scenario that changes (and thus locates as the actual cause) some event in the actual story that stands out as surprising or deviant. They "normalize" that event by mutating it to conform to the expected, routine scenario (hence, "norm" theory), in which bad outcomes do not occur.[62]

Note that the process is slanted toward finding the single deviant element in the real world script. This predilection for finding one primary cause for any effect is monocausality. In general, "[p]eople tend to prefer simple explanations for events or behaviors to complex ones."[63] The roots of monocausality have been traced both to the scarcity of cognitive resources and to the need for closure.[64] The structure of the trial (plaintiff versus defendant) and effective advocacy play to this bias for simplicity by reducing the number of options the jurors may have for assigning blame. If a lawyer can make one cause of an accident stand out, it immediately becomes the favorite for selection as the element deviating from the counterfactual script.[65] Monocausality creates incentive for a lawyer to identify one or more deviant elements within the control of the other party or parties. The lawyer thus effectively gives the jury (commonsensical, but not necessarily legal) grounds for attributing blame to someone other than his or her client.

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62. FEIGENSON, *supra* note 14, at 53–54. See generally Barbara A. Spellman & Alexandra Kincannon, *The Relation Between Counterfactual ("But For") and Causal Reasoning: Experimental Findings and Implications for Jurors' Decisions*, 64 LAW & CONTEMP. PROBS. 241 (2001), for more on counterfactual techniques and their relationship to causal reasoning. *See also* Robert N. Strassfeld, *If . . .: Counterfactuals in the Law*, 60 GEO. WASH. L. REV. 339, 360–61 (1992) (discussing the jury's unfortunate but unavoidable evaluation of the counterfactual).

63. FEIGENSON, *supra* note 14, at 51.

64. *Id.* at 52.

65. A predilection for one cause does not necessarily mean lack of richness in narrative description. A trial lawyer might (and one suspects successful attorneys do) also emphasize details that activate a variety of scripts and schemas that lead to the same result, namely framing the opposing party as the cause of the critical or deviant event. In fact, Feigenson points to just such a dynamic in his analysis of one lawyer's closing arguments: "Faverty's lawyer gave jurors *several* options . . . allowing different jurors to blame [the defendant] on the basis of different violations of common-sense justice norms. Thus, the jurors' decision reflects a confluence of various cultural norms but a common pattern of inferring blame from the transgression of those norms." *Id.* at 165 (footnote omitted). See *infra* notes 88–101 and accompanying text for more analysis of Feigenson's analysis in *Faverty v. McDonald's Restaurants of Oregon, Inc.*, No. A9001-00394 (Or. Cir. Ct. Mar. 24, 1991), *aff'd*, 892 P.2d 703 (Or. Ct. App. 1995).

With great regularity, the party to whom blame is deflected happens to be a deep pocket.

At this point, the fundamental attribution error comes into play. The fundamental attribution error leads people, when they have a choice between ascribing causality either to an environment or to some agent, to ascribe causality to the agent. As Feigenson puts it, "people tend to attribute the behavior of others to the others' corresponding personality traits or dispositions rather than to situational constraints, even where the circumstances explain the behavior quite adequately."[66] Therefore, juries are more likely to isolate the actions of a human or corporate agent as the deviant element in the construction of counterfactuals. In legal terms, agents are more likely than environmental factors to be seen as a proximate cause. Feigenson goes directly to the heart of the matter:

> The fundamental attribution error suggests two implications for jurors' decisions in accident cases . . . . First, jurors are likely to assume that accidents do not happen unless someone was negligent. Second, they are likely to attribute causation (and, hence, fault and responsibility) on the basis of the parties' personal dispositions to decide that the plaintiff or defendant acted as he did because "he's that kind of guy." . . .
>
> . . . .
>
> . . . The question jurors in a negligence case are actually asked to confront is, "Who, if anyone, is responsible for the accidental injury?" But given the fundamental attribution error, jurors may reformulate this question as, "Who among the parties before the court is responsible?" Because the accident must have been caused by someone's carelessness, the jurors' task is simply to determine whose.[67]

Commonsense reasoning turns the search for the proximate cause of an accident into a search for the agent most proximate to the accident, no matter how tenuous the link.

Culpable causation, yet another heuristic, finishes the job. Culpable causation is the tendency to weight the causal input of a factor more heavily if that factor is the result of moral blameworthiness. Feigenson uses a hypothetical from a research study to illustrate this effect.[68] A person is speeding home in a car and collides with another vehicle in an intersection. The driver of the second vehicle is severely injured. Study participants were asked to gauge the degree to which the first driver's speeding contributed causally to the accident. The only variable changed in the two versions of

66. The hypothesis recited here comes from FEIGENSON, *supra* note 14, at 57.

67. *Id.* at 59–61.

68. *Id.* at 56–57 (citing Mark D. Alicke, *Culpable Causation*, 63 J. PERSONALITY & SOC. PSYCHOL. 368–78 (1992)).

the story was the reason the driver was speeding home: In one version the driver was racing to hide an anniversary present from his returning spouse and in the other version to hide a vial of drugs. Study participants found that the person speeding home to hide drugs contributed to a greater degree to causing the accident than the one hiding the anniversary present. Of course, the purpose for speeding home has no logical connection to the degree to which speeding caused the subsequent accident. Culpable causation creates an incentive for the advocate to find some moral flaw in the opposing party's conduct. The jury can (and will, Feigenson suggests) use that flaw to justify an assignment of causation, that is, causation of the deviant element in norm theory analysis.[69]

The habits of thought described above can act in concert. In fact, we would expect them to work together whenever necessary to make sense of a situation. Thus, for any given event, the average human expects that the event is caused by a single agent (fundamental attribution error). Furthermore, if the event is wrongful, the expectation is that the agent, in consonance with his character (culpable causation), had control over the one deviant element in an otherwise normal series of events without which the wrong would not have occurred (norm theory). The deviant element is usually the one that sticks out the most against the background of normal happenings (availability heuristic). Finally, the flaw that led to the deviant factor may be linked to the agent's identification with some group known generally to be susceptible to such character flaws (representativeness heuristic).

III. The Trial as a Melodrama

As just summarized, Feigenson in his early chapters stresses that the individual identified as the most deviant party in the course of an accident seems to be both the cause *and* the one at fault for the accident. It is Feigenson's contribution that he identifies the conflation of the cause and duty elements of a tort as a staple of the fact that *the trial is a melodrama*.[70] This idea may seem mundane to dedicated watchers of the television program *Law & Order*,[71] but the consequences of this paradigm are striking. This conflation lends itself naturally to the fashioning of stories about a good guy being injured by a bad guy or about a bad guy injuring himself.[72]

69. *See id.* at 56.

70. *Id.* at 94.

71. *Law & Order* (NBC).

72. Because the paradigm is predicated on a particular story in which causation and fault are arrived at derivatively from character attribution and availability, the elements of tort are more the products of this melodramatic process than a mode of weighing the evidence.

In a chapter titled *How Jurors Think*, Feigenson more fully defines melodrama in the context of an accident trial:

> A melodramatic conception of an accident is a narrative in which (a) events, such as accidents, are caused by individual human agency; (b) the acts of individuals are explicable in terms of their characters; (c) the agents involved in the accident can be divided into "good guys" and "bad guys"; (d) the focus of the narrative is the accident victim and his or her suffering; and (e) the good guy wins (at trial) and the bad guy gets his or her comeuppance.[73]

Feigenson found through empirical research on mock juries that "the angrier [jurors] felt toward the defendant, the more sympathy and sadness they felt for the plaintiff."[74] In short, this means that to blame one party is to exonerate the other—a zero-sum game.

Feigenson emphasizes that "jurors' emotional reactions reflect a view of responsibility for accidents that is not only simplified but also dichotomized."[75] The simplification arises from the fact that "[m]any accidents[, including those extensively analyzed in *Legal Blame*,] are caused by inadvertence or impulse rather than intentional or even reckless disregard of the safety of the actor or others."[76] In other words, the jury is asked to assign fault where fault is often, at most, relatively attenuated.

But, Feigenson tells us, jurors have a way around the seemingly intractable problems of inadvertence and inattention, the twin obstacles to assigning anything like dishonorable guilt in a modern, technological world where any misconduct is most often inadvertent and thus at worst amoral rather than immoral. Jurors can rationalize the imperfect assignment of blame by focusing on the injury of the victim instead of the conduct of the putative transgressor.[77] Because the consequences of momentary, relatively innocent inattention in such a world "can be enormous, such as death or severe injury," jurors must often assign responsibility disproportionate to blameworthiness.[78] But, "[t]o restore proportionality, a hallmark of common-sense justice, jurors may resort to blaming habits that convert mere inadvertence into (greater) culpability, so that the cause will seem to resemble the effect and the punishment will seem to match the offense."[79]

Just who is to be identified as which character in this morality play or melodrama is a major strategic choice left to the lawyer on each side of the

73. FEIGENSON, *supra* note 14, at 89.
74. *Id.* at 94.
75. *Id.*
76. *Id.* at 95 (citation omitted).
77. *Id.*
78. *Id.*
79. *Id.* (citations omitted).

dispute. Once a lawyer has crafted a persuasive melodrama for the jury, the blame game (or culpable causation heuristic[80]) predicts that the melodrama likely will lead to a better result for the lawyer's client.[81]

A. The Lawyer as Auteur

Professor Feigenson effectively applies the trial-as-melodrama paradigm in several careful case studies. One mode of his analysis—parsing closing arguments taken from trial transcripts—has been used before by Anthony Amsterdam and Randy Hertz in their article, *An Analysis of Closing Arguments to a Jury*.[82] Amsterdam and Hertz focused on linguistic structures, story creation, and metaphorical substrata embedded in the closing arguments of a New York murder trial.[83] Feigenson's book extends this analytic mode to negligence cases, making use of many of the same tools, with the added interpretative lens of cognitive psychology.[84]

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80. *Id.* at 49.

81. In a modified comparative negligence jurisdiction, this amplification of causality may be the difference between recovery and no recovery. Of course, even in a pure comparative negligence jurisdiction, the client of the lawyer who can successfully use these techniques still benefits in the relative size of the recovery.

82. Anthony G. Amsterdam & Randy Hertz, *An Analysis of Closing Arguments to a Jury*, 37 N.Y.L. SCH. L. REV. 55 (1992).

83. *See id.* at 64–110.

84. While Feigenson prefers the analytical framework of cognitive psychology, there is a significant body of literature interested in the role of drama and narrative in the law as seen through the lens of postmodern critical literary theory. Scholars applying this analysis to courtroom events also see lawyers as storytellers who use "meaning-making" tools that include images, story forms and symbols in order to craft a narrative that induces others to believe in its truth. *See* RICHARD K. SHERWIN, WHEN LAW GOES POP: THE VANISHING LINE BETWEEN LAW AND POPULAR CULTURE 41–71, 235–64 (2000). Richard K. Sherwin worries that legal culture and popular culture are not merely intermingling on television shows. *Id.* at 17. He argues in his new book that televised depictions of law are also shaping the perceptions and the processes of reasoning that influence the way jurors judge and voters vote. *Id.* at 15–39. Owing to the narrative demands of television, which require images rather than arguments, and which are driven by sentiments rather than by facts, law is increasingly becoming a spectacle, mimicking the style, the techniques, and the visual logic of advertising and public relations. *Id.* at 23–25.

"'The trial stories that offer the most familiar images, characters, and plot forms,' . . . 'are the ones most likely to get on the air. Once ensconced there, they are more likely to stick in the viewer's mind (including actual or prospective jurors). . . . This encourages lawyers and their public relations agents to pitch their clients' stories in terms of TV reality.'" Jeffrey Rosen, *And Prime Time for All*, NEW REPUBLIC, Aug. 5 & 12, 2002, at 27 (quoting Richard K. Sherwin, *supra*) (reviewing *First Monday* (CBS); *The Court* (ABC); RICHARD K. SHERWIN, *supra*; THE FORGOTTEN MEMOIR OF JOHN KNOX: A YEAR IN THE LIFE OF A SUPREME COURT CLERK IN FDR'S WASHINGTON (Dennis J. Hutchinson & David J. Garrow eds., 2002)). Furthermore, according to Rosen, Sherwin worries that as the courts are internalizing and reflecting the image-based logic of popular culture, "'law's breaking [sic] function, its ability to check popular passions and prejudices, breaks down.'" *Id.* at 27. "The transformation of legal into televised reality 'involves sensationalization, subjectification . . . the fragmentation of authority,' and a general erosion of law's legitimacy. And 'that is what happens when law goes *pop*.'" *Id.*

In particular, Feigenson looks at the powerful combination of narrative structure and cognitive tools. To paraphrase Shakespeare, the story is the thing to catch the conscience of the jury, as opposed to a rational analysis of due care from an ex ante viewpoint:

> [I]t is the internal structure of the story that people find credible or not, rather than its correspondence to external evidence. Specifically, audiences find stories that vary from their expectations, that leave gaps or contradict their "stock scripts" or prototypes, to be dubious. The more a story departs from the prototype, the more ambiguities and gaps at crucial junctures, the less credible the story is. Hence, one would expect to find advocates organizing information about the case and the world into stories that conform to the stock scripts they expect the jurors to bring with them to the courtroom.
>
> . . . Research in story comprehension indicates that readers will try to explain a deviation from a prototypical story (or script) by searching for another deviation and then by trying to make a causal connection linking the deviations. Hence, one might expect each attorney to construct a plausible "normal" or background scenario in which the accident does not occur, and which differs from the actual events by including something the *other party* did not do or by omitting something he or she did do. Each attorney would thereby emphasize that his or her client behaved normally, but that the other party acted "outside the script" in some respect. The attorneys would then play to the jurors' tendency to link the two deviations causally, thus attributing causal and legal responsibility for the accident to the other party. This process of attributing responsibility to the party whose conduct deviated from the relevant norm is, of course, exactly what norm theory describes. Consequently, one should look in the lawyers' arguments for discourse that reflects the dynamic of normalcy and deviance.[85]

In this rough-and-tumble world of rhetorical artistry, the nice points of tort law give way. The internal dynamic of the story becomes the focal point—gaps must be filled with hypotheses; normality and deviance (whether asserted or implied) must be contrasted; stock scripts invoked. Finally, the whole lot must be shaped to lead the jury to attributing responsibility.[86] The similarities to the tasks of a playwright, novelist,[87] or film

85. FEIGENSON, *supra* note 14, at 117–18. Citations to the trial transcript in this and the following case are omitted.

86. The U.S. Supreme Court recently elevated the importance of narrative almost to the status of law in *Old Chief v. United States*, 519 U.S. 172 (1997):

> [M]aking a case with testimony and tangible things not only satisfies the formal definition of an offense, but tells a colorful story with descriptive richness . . . . Evidence thus has force beyond any linear scheme of reasoning, and as its pieces come together a narrative gains momentum, with power not only to support conclusions but to sustain the willingness of

director are striking. Indeed, it is not inappropriate in an article in the *UCLA Law Review* to emphasize that both the lawyer in a closing argument and the film director as auteur in a "final cut" have accumulated far more material than can be used, with much of it perhaps out of order depending on the vicissitudes of scheduling. In each case, the shaping of the relatively undigestable mass by the director or lawyer is crucial.

Feigenson uses *Faverty v. McDonald's Restaurants of Oregon, Inc.*[88] as a powerful case study for the application of cognitive tools and a melodramatic paradigm. The plaintiff, Faverty, was hit while driving his employer's truck down a divided highway in the early morning by a car driven by an eighteen-year-old high school student, Matt Theurer.[89] Theurer, an employee at a McDonald's, was habitually eager and available to work overtime to help pay for his car.[90]

> The previous day [Theurer] had worked at McDonald's after school from 3:30 P.M. to 7:30 P.M., then gone out with friends, then returned to work at midnight. McDonald's own policy barred "split shifts" or more than one shift in a day; technically Theurer's schedule did not violate this policy because the midnight shift was on a different calendar day than the preceding shift, but it was his second shift within 24 hours. A little past 8:00 the next morning, very tired, Theurer left work to drive home. He never got there. Minutes after leaving, he fell asleep at the wheel, and his car drifted into the oncoming lane, striking a small truck driven by Frederic Faverty. Faverty was seriously hurt. Theurer was killed. Faverty settled with Theurer's estate [for the maximum of Theurer's insurance, namely $20,000, a relatively small sum], then sued McDonald's.[91]

The central question became whether deep-pocketed McDonald's could be held responsible for the accident. Did McDonald's create a legally foreseeable risk that Theurer would fall asleep at the wheel, guilty, in Robert

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> jurors to draw the inferences, whatever they be, necessary to reach an honest verdict . . . and so to implicate the law's moral underpinnings and a juror's obligation to sit in judgment.

Id. at 187–88. *Old Chief* looks at the centrality of narrative (based on evidence) in the context of the criminal trial, where the state has a tremendous burden, the legal standards are clearly defined, the stakes are high(est), and the jury is understandably reluctant to find criminal liability. Should narrative richness be given the same pride of place in the normal civil context (exclusive, say, of punitive damages), where the burden is comparatively low, the legal standard notoriously open-ended, and the jury arguably not all that disinclined to find civil, as opposed to criminal, liability?

87. *See, e.g.*, JOHN GARDNER, THE ART OF FICTION: NOTES ON CRAFT FOR YOUNG WRITERS *passim* (1985).

88. No. A9001-00394 (Or. Cir. Ct. Mar. 29, 1991), *aff'd*, 892 P.2d 703 (Or. Ct. App. 1995).

89. *Faverty*, 892 P.2d *passim*.

90. *Id.* at 705.

91. FEIGENSON, *supra* note14, at 153 (footnote omitted).

Rabin's seminal phrase, of "an enabling tort."[92] Or, was Theurer, as an adult off the job at the time of the accident, the one legally responsible for it?

To see the impact of melodrama in the case, Feigenson incisively and evocatively dissects the closing arguments of the attorneys in the case. A successful attorney will seek to build a melodramatic story designed to elicit the sympathy of jurors. (Subtly, if possible; sympathy, after all, is not supposed to be the dominant means of persuasion at trial.) Here is an excerpt from the closing argument of the plaintiff's attorney in the *Faverty* case:

> "This kid is set up. He is ripe to fall asleep and like all kids that age, if they don't get enough sleep, they're tired; they're nodding off in school. Okay. Then that's not McDonald's fault necessarily. They may contribute a little bit too, but the point of it is that's the background we start with. We don't start with a kid who's fresh and awake."
>
> . . . .
>
> "And when you take somebody who has a cumulative loss of sleep over a period of time, it brings down that period between being awake and the danger of falling asleep dramatically. And it's worse in the earlier morning hours. And then if you miss an entire night's sleep—and that's exactly what happened. This kid should have been home and in bed by 11 o'clock. And that is where McDonald's blew it, because they should have known and they're the ones that kept him up. He's doing work for them; they're going to make money because they're going to have clean deep fat fryers, and they pushed Matt Theurer over the edge."
>
> . . . .
>
> "Take Matt Theurer off that shift, you put him home, you put him in bed, by 8:30 in the morning he's not on the road with heavy eyelids, with impaired judgment, with poor concentration, all the other things that Dr. Rich [an expert witness for the plaintiff] told you go along with sleep deprivation. That's why McDonald's is responsible."[93]

Feigenson then takes us on a tour of the rhetorically sophisticated aspects of this argument, namely active verbs, second-person pronouns, and favorable metaphoric formulations. For instance, the lawyer is careful to cast McDonald's as active ("pushed him over the edge," "blew it") and Theurer as passive ("ripe to fall," the object "pushed . . . over the edge").[94] Also, the lawyer addresses the jurors in the second person ("you put him home," "you put him in bed"), inviting them in personal terms to imagine the slight

92. Robert Rabin, *Enabling Torts*, 49 DEPAUL L. REV. 435 (1999).
93. FEIGENSON, supra note 14, at 154–55 (alterations in original).
94. *Id.* at 157.

change of events it would have taken to avoid the catastrophe.[95] The noticing of these linguistic details lends richness to the book, but its author has bigger fish to fry.

Feigenson detects that the real engines driving the lawyer's argument are what he terms "schemas": "*Theurer as a child and McDonald's as his parent*," and "*McDonald's as a (greedy) corporate profiteer*."[96] These schemas in turn activate certain societal norms that the plaintiff's attorney hopes will become the baseline for deciding who is to be held responsible. As Feigenson explains:

> First, the repeated references to Theurer as "the kid" invoke a schema or prototype of *Theurer as a child and McDonald's as his parent*.[97] The operative norms, deeply embedded in our culture, are *parents have responsibility for their children*, and, relatedly, *parents are supposed to know better*. Accordingly, it is no excuse that Theurer volunteered for the late shift and chose to drive home; common-sense norms dictate that McDonald's still should have done more to keep Theurer from putting himself and others at risk.
>
> Second, consider the lawyer's assertions that McDonald's "ha[s] a couple of high school kids clean out the deep fat fryers for 4 bucks an hour" and that McDonald's is "going to make money because they're going to have clean deep fat fryers." This invokes a schema or prototype of *McDonald's as a (greedy) corporate profiteer*, which triggers the following cultural norms: *Corporations should not be allowed to cut corners on safety for profit*, and perhaps also *corporations should not get away with exploiting low-paid employees*.
>
> How does Faverty's lawyer call the jurors' attention to McDonald's deviance from these norms? . . . [J]urors are more likely to "undo" acts—that is, to complete their "if only . . . " counterfactual thinking with [reversing] an act ("If only McDonald's had not done x") rather than [reversing] an omission ("If only McDonald's had done x")—and thus they are more likely to target acts as the cause(s) of the accident. Faverty's lawyer, therefore, tries to cast McDonald's as the active party and its failure to keep Theurer off the road as an affirmative mistake, while describing Theurer as passive.
>
> . . . .
>
> The depictions of McDonald's as the agent of harm and Theurer as passive came together most (melo)dramatically in the assertion that McDonald's "pushed Matt Theurer over the edge." Certainly this is a cliché, but in context it is disturbingly graphic: the image of a person falling off a cliff and striking the ground evoking the terrible

95. *Id.* at 156.

96. *Id.*

97. When Feigenson describes a schema or cultural norm, he sets it off with italics.

> force of the fatal car crash. The phrase encapsulates the complex chain of events leading up to the accident as a compact, monocausal account: McDonald's did it, Theurer did not. Moreover, it evokes popular cultural stereotypes of the "bad guy"—who but a cad would push someone off a cliff?
>
> In sum, the rhetorical techniques that allow the lawyer to invoke norm theory simultaneously construct the accident as a melodrama. And this is so in yet one more respect: the elicitation of emotional response. . . . [A]ccident cases tend to lack those sudden plot developments on which melodramas rely to exploit their audience's emotions. . . . [But norm theory provides] salient norms . . . [that] establish the expectations that the defendant's behavior, portrayed as deviating from those norms, upsets. The result, norm theory research predicts, is that the more deviant McDonald's conduct appears, the more likely jurors are to respond with more intense emotions, to blame the defendant more, and to award the plaintiff greater compensation—all without any need for the plaintiff's lawyer to make too overt an emotional appeal.[98]

Feigenson's analysis continues in this vein, drawing on more of the tools of cognitive psychology to help make his case that "[t]his is a melodramatic argument. It is melodramatic because it conceives of the accident in simplified, personalized, moralized, and dichotomized terms."[99] Feigenson also asserts that "without the melodramatic conception of the accident, the jurors may not have held McDonald's responsible at all."[100] In fact, the jury by a vote of nine to three found for Faverty against McDonald's, awarding $400,000 in damages, a verdict upheld on appeal.[101] The analysis of the *Faverty* closing arguments thus provides penetrating glimpses into the rhetorical artistry of the courtroom lawyer's work. The combination of the plaintiff's lawyer's linguistic, metaphorical, and psychological interpretive tools is most impressive.

The same could be said of the plaintiff's lawyer in *Butler v. Revere Copper & Brass, Inc.*,[102] another one of Feigenson's case studies. In that case,

> George Butler, a truck driver, was sent by his company to pick up a load of industrial machinery at Revere's plant and take it back to be fixed at his company's shop. Revere's employees loaded the machinery onto Butler's truck with a crane. Butler then tried to put a tarpaulin over the load; he fell, landed on his head, and was seriously

98. FEIGENSON, supra note 14, at 156–58 (citations omitted).

99. *Id.* at 155.

100. *Id.* at 169.

101. *Id.* at 220–21.

102. No. Civ. N-87-476 (D. Conn. Nov. 1, 1990).

> injured. There was no evidence of how he fell. No one saw him fall, and he did not remember what happened.[103]

Other important details are: Revere's people had changed the work order in that they insisted that the load be tarped; Butler did not ask for help from Revere's workers; and, for part of the time that Butler attempted to cover the load, Revere's crew went on a coffee break.[104] Although Butler did not ask for help, these factors clearly can lead to counterfactual arguments similar to those in the *McDonald's* case that would point to the actions or inactions of Revere's workers as the deviant element in a norm theory analysis; Butler's lawyer makes the most of it.

Perhaps the most winning ploy for Butler's lawyer is his ability to personalize responsibility for the accident in a single Revere worker: Al Brockway, a Revere foreman present at the site.[105] The following is again an excerpt from the plaintiff's lawyer's closing argument:

> "Al Brockway . . . talks to [Butler] for up to ten minutes while he's putting the tarp on, watching him struggling. . . ."
>
> . . . .
>
> "My next question [to Brockway], 'Is part of your job to, say, take measures that will prevent people from being injured?'
>
> "Answer, 'Yes, sir.'
>
> "What did Mr. Brockway do? Mr. Brockway didn't lift a finger to help him with that canvas. Mr. Brockway, like everyone else . . . who was in the area, went on their 5:30 coffee break because they weren't going to do anything. It was coffee break time. . . .
>
> "[L]ater on in his deposition, I said, 'Mr. Brockway, tell me again how come you didn't help him?' He said, 'Well, maybe, morally, I should have.' Well, yeah, you should have. But he didn't. And I even went so far to ask him, 'Mr. Brockway, did you think [Butler's task] was a one-man job?' No, sir. He knew it wasn't a one-man job, but he did nothing, absolutely nothing. What would it have taken to walk to the edge of the truck, straighten out the canvas a little bit, so that George could pull it a little easier? . . .
>
> "It's that kind of attitude, it's that kind of carelessness that resulted in this injury. Wouldn't have taken very much. Mr. Brockway told you it was his job. And he didn't do it. He didn't do it for the sake of a cup of coffee."[106]

103. FEIGENSON, *supra* note 14, at 123–24.

104. *Id.* at 129–30.

105. *Id.* at 128–29.

106. *Id.* at 124–25 (second, fourth, and last alterations in original).

In analyzing this segment of the attorney's closing argument, Professor Feigenson again persuasively finds a cultural norm implicit in the attorney's words:

> Working people are supposed to do their jobs, and *one who begins to help someone else with a difficult physical job at the workplace continues to help until the job is done*, if he or she can do so without significant inconvenience to himself or herself. . . . Butler behaves according to this scenario. His conduct is therefore "normal." . . .
>
> Brockway's conduct, on the other hand, deviates from the normal story. Indeed, the coffee break is a prototypical image for not working at the workplace. . . . In contrast to the proffered normal scenario, the "cup of coffee"—the failure to help—becomes the salient, deviant behavior. Jurors striving to make sense of the accident by linking this deviation with the other (Butler's fall itself) are therefore likely to target it as the cause of the accident and to hold Revere responsible.[107]

Feigenson contrasts the treatment of Brockway with the story built around Butler:

> [Another important] theme is Butler as a *fighter*. The lawyer says that Butler "continues to fight" [in his struggle against a disability that has resulted from the accident] and describes him as a "fighter." The lawyer also notes that Butler [is the type who] will give a job "his best shot." Also, "he's worked as hard as he can to get to this point," that is, the mental and physical skills he has partially recovered under rehabilitation since the accident. And, like an underdog pugilist, Butler has "beaten all the odds."
>
> Put together the fighter with the difficult journey and the result is *Rocky*: Sylvester Stallone running up the museum steps. . . . The implicit reasoning is that George Butler is an underdog hero who deserves to be compensated for his unfortunate injury because of the sort of person he is. And to the extent he deserves to be compensated, he cannot be to blame.[108]

Feigenson savors the plaintiff's lawyer's technique in coming up with a legal duty on the part of Revere (in the person of Brockway), and rightly so if it is looked at in isolation as an artifact of rhetorical skill: the indifferent supervisor and his subordinates versus the apotheosis of the American spirit. But what of the law? In Feigenson's footnotes, we find that "[r]equiring the load to be tarped does not appear to have been 'unreasonable' in the legal sense that it unreasonably increased the risk of harm to Butler or others."[109]

107. *Id.* at 128–29 (citation omitted); *see supra* text accompanying note 53.
108. FEIGENSON, *supra* note 14, at 134.
109. *Id.* at 130 n.15 (citation omitted).

Feigenson writes with even greater clarity on the issue of causation. Even assuming

> [t]he strength of the breach-of-duty argument, [it still] leaves Butler's lawyer with a rather weak connection between that breach and the plaintiff's injury. To appreciate how problematic is the causal attribution that Butler's lawyer implies through norm theory, recall that there is no evidence at all of how Butler fell, and thus no way to determine whether Revere's employees' failure to help really had anything to do with the fall. For all we know, it is at least as likely that Butler fell because he simply lost his footing, without any carelessness on anyone's part.[110]

Again, the orthodox model of tort law is given short shrift and rhetorical artistry is elevated. Judging from Feigenson's treatment of closing arguments, the courtroom is a Dionysian festival at which a verdict is awarded as the prize. The truth attained, contrary to the goal of a trial, is manifestly created rather than reconstructed. The approving jury awarded Butler (also rewarding the lawyer auteur) with a $2 million verdict, even deciding the award should not be reduced by Butler's 40 percent responsibility for the accident.[111]

Note that the only aids juries have to decide these cases are the notoriously flexible reasonableness standard under negligence criteria, and the trial attorneys' help in constructing and construing such a rule of reasonableness. It is in the protean ground of the reasonableness standard that the application of a trial lawyer's storytelling skills bears fruit. Although according to the understanding of a juror in the *Faverty* case, the facts of the case "fit[ ] right into the judge's definition" of negligence, that was true "only if McDonald's conduct was *unreasonable*."[112] Furthermore,

> what makes that conduct unreasonable is that it *deviates from a norm the juror* himself *has supplied*. [One juror's] comment that McDonald's "work[ed] him more hours than they should have" is based on an implicit ideal of how McDonald's "should have" behaved, not (as we have seen) on any clear evidence of industry custom or . . . on any clear notion of what might constitute cost-effective accident avoidance.[113]

Nor must it be thought that the blame game is played only by plaintiffs' lawyers. Defense lawyers play it, too, although such a strategy is available to them less often. In one medical malpractice case, the defense placed great

110. *Id.* at 132 (citation omitted).

111. *Id.* at 136.

112. *Id.* at 168.

113. *Id.*

emphasis on the fact that the plaintiff was drug-addicted.[114] Ostensibly this was to indicate that her adverse medical result was due to her physical debilitation, but mostly it was to portray her as the "bad guy" in contrast to the respectable, upright ("good guy") surgeon she was suing.[115] Similarly, it was probably no coincidence that in the more conservative sexual mores of the 1960s, one of the first product liability cases against the castigated Corvair that General Motors (GM) allowed to go to trial involved a female plaintiff driver on a camping trip with her fiancée and her five children (GM won).[116]

IV. THE RESULTS OF A MELODRAMATIC FOCUS

Having extensively discussed tort law's reliance on melodrama, all the while admiring counsels' skills in exploiting melodramatic strategies, Feigenson, in one of the many turnarounds in his book, is not reluctant to condemn such an approach as myopic—that is, such a focus overlooks broader societal factors that are the real cause of accidents. "[I]ncreased technology," he reminds us, "leads to a greater need to find individualized justice in the wake of an accident, which, somewhat ironically, can divert attention from the systemic causes of modern accidents."[117] Feigenson continues:

> Thus, through [tort law's] familiar . . . techniques . . . responsibility for these accidents is simplified, personalized, dichotomized, and moralized—[focusing on] individual responsibility (the "unsafe" driver) rather than corporate (the "unsafe car") or collective (the "unsafe road" or "unsafe transportation system") responsibility.[118]

Feigenson proceeds to go much further than the IOM approach in a way that will strike many as odd in what otherwise seems a careful, if flawed, piece of scholarship. He attacks the melodramatic approach as bourgeois.[119] He notes that such an approach

> tends not to question the systemic ways in which life under corporate capitalism subjects people to risks of accidental injury. And yet melodramatized blaming in individual accident cases gives people the *sense* that they are addressing those risks, those feelings of vulnerability, just as the anti-corporate melodrama in popular culture allows people to indulge in fantasies of individual control and self-realiza-

114. *$115 M Win by Using Plain English*, NAT'L L.J., Dec. 17, 2001, at B10.
115. *Id.*
116. *See, e.g.*, JEFFREY O'CONNELL & ARTHUR MYERS, SAFETY LAST: AN INDICTMENT OF THE AUTO INDUSTRY 186 (1966) (advancing the driver's inexperience as the cause of the accident in question).
117. FEIGENSON, supra note 14, at 225 n.13.
118. *Id.* at 215.
119. *Id.* at 214.

> tion—in the belief that they can do something about corporate conduct that harms them—while in fact control over the conditions of economic life increasingly rests in the hands of fewer and larger corporations.[120]

Except for a footnote, however, Feigenson largely seems to ignore the safety benefits of "corporate capitalism." He does ask in that footnote

> how medical malpractice claims and verdicts can be increasing at the same time that medical technology has been advancing (and, presumably, making people safer and healthier) . . . . Once again, advancing technology advances the controllability of what has been thought of as fate, and this, in turn, generates expectations that fate *will* be controlled and hence increases the urge to blame for not controlling it. Hence, increased technology leads to a greater need to find individualized justice in the wake of an accident, which, somewhat ironically, can divert attention from the systemic causes of technology-based accidents.[121]

Having opened this topic of the conflict between tort litigation as melodrama on the one hand, and societal, systemic causes of accidents on the other (with or without the Marxist innuendoes), Feigenson, in another turnaround, hastens back to his admiration of tort law and its melodrama. In the first place, argues Feigenson, the good guy versus bad guy nature of tort law as melodrama at least has the advantage of occasionally leading to increased liability of corporate defendants (except, as he fails to note, when it is the injured claimant who is painted as the bad guy). Feigenson admits that

> jurors' inclination to use admissible evidence in ways that do not conform to the law—for instance, determining causal and hence legal responsibility in part on the basis of information about [somebody's] character, a habit of thought using culpable causation and the fundamental attribution error—does suggest a (melo)-dramatic blaming practice at odds with the formal law and with the leading rationales for how the costs of accidental misfortune ought to be allocated.[122]

As a result, Feigenson tells us that "jurors may hold liable a defendant who either did not cause the accident or whose behavior was not legally wrongful."[123] But for Feigenson this has the advantage that, although "[m]elodramatized blaming typically leaves the systemic causes of accidents unscathed, . . . occasionally it may be a kind of Trojan horse, a way not to reconcile ourselves to the status quo but to challenge it" by indirectly point-

120. *Id.* at 224.
121. *Id.* at 225 n.13.
122. *Id.* at 228; *see also supra* notes 66, 68, 115, 116 and accompanying text.
123. FEIGENSON, *supra* note 14, at 218.

ing to systemic, rather than only individual, causes of accidents.[124] So, for Feigenson, melodrama may not be so bad after all because "thinking about accidents as melodrama extends tort liability beyond legal norms, and in some . . . cases, the language of melodrama may actually be the means for attending to systemic causes of accidents."[125]

That this result occurs episodically and unpredictably, far from bothering Feigenson all that much, seems, as with counsels' rhetorical skills in maximizing melodrama, to exhilarate him. Such results ("hold[ing] liable [it will be recalled] the defendant who either did not cause the accident or whose behavior was not legally wrongful"[126]) stem from jurors' healthy instincts in seeking what Feigenson characterizes as "total justice."[127]

V. TOTAL JUSTICE

"Total justice" is definitely more than a descriptive term for the process Feigenson analyzes. It obviously has a normative ring to it.

Feigenson introduces the term as a shorthand for "the common sense of accidents at a . . . general level."[128] We are told that "[j]urors' justice in accident cases is 'total' in five interrelated senses."[129] First, jurors view their job as "*squaring . . . the accounts* between the litigants;" thus, doing justice "becomes a morality play."[130] Second, in blatant disregard of limiting instructions, jurors use all information available to them.[131] Hindsight bias is thus inevitable for juries who refuse to look at accidents, as the law demands, from an ex ante perspective.[132] Third, jurors "tend to merge the law's distinct elements, making a global responsibility judgment that may ignore or give improper weight to legally relevant considerations and take into account legally irrelevant ones."[133] Particularly, "[n]orm theory and culpable causation lead us to expect jurors to conflate fault and causation, legally distinct elements in negligence cases."[134] Fourth, common sense justice is phenomenologically total in that "jurors realize that it is within their power to supply [a] satisfying resolution to the accident story before them."[135] In fact, jurors "persistently resort to melodramatic and other common-sense

124. *Id.* at 223.
125. *Id.* at 212.
126. *Id.* at 218.
127. *Id.* at 226–33.
128. *Id.* at 104.
129. *Id.*
130. *Id.*
131. *Id.* at 105.
132. *Id.*
133. *Id.* at 106 (citation omitted).
134. *Id.*
135. *Id.* at 106–07.

blaming practices in the face of contrary legal instructions because the melodramatic account makes them feel right about doing what [they think] the law requires."[136] Fifth, the interpersonal nature of the jury decision makes it total;[137] the task of reaching a difficult decision together in a fair manner results in "increased self-respect within the group."[138]

Feigenson does not fail to recognize the anarchy of his "total justice":

> Critics of tort juries are probably on their strongest footing when using the criterion of efficiency to evaluate jury decision making. As we have seen, total justice, as displayed by the lawyers' and jurors' talk in cases like *Butler* . . . [and] *Faverty* may lead to results that are questionable in terms of efficient accident avoidance, although . . . the issue is certainly debatable. And there are several other reasons, in addition to their inclination toward total justice, why civil juries may not be especially well suited to regulate the major risks of accidents that arise in a mass industrial society. The jury is a discontinuous decision maker (a different jury decides each case) and is neither asked nor presented with the information necessary to make comparative cost-allocation judgments across cases (does this plaintiff deserve compensation more than that one?). Lay jurors may be particularly ill equipped to perform the kind of quantitative analyses required in risk management. The few accident cases to reach trial are unlikely to be representative in important respects relevant to societal risk management of the far greater number of accident-causing incidents as a whole, and each case tried offers at least partly idiosyncratic facts. And the presentation of those facts, and thus the jury's decision, may be affected by the vagaries of skill and resources the respective lawyers possess. All of these points argue in favor of giving other decision makers, legislative or administrative, the primary authority to make these kinds of decisions.[139]

Despite all that, in still another turnaround, juries and their total justice nevertheless win Feigenson's warm approval. He writes:

> [Even if] jurors' striving for a kind of justice that is total in its incorporation of their emotions as well as their "reason," presents another characteristic that is not easily reconciled with the formal law's dictates . . . . [W]ould it be preferable for jurors to exclude emotion from their decision making, even if that were possible? As I have written elsewhere about sympathy, but in words that apply to the use of emotion generally: "[t]o conceive of justice as non-emotional implies a model of decision making in which the decision maker acts without

136. *Id.* at 107.
137. *Id.*
138. *Id.*
139. *Id.* at 229 (citations omitted).

> body or soul. It seems reasonable to suppose that many people would find such a model of decision making not only impossible to approximate, but also not worth striving for."[140]
>
> . . . .
>
> . . . [O]ne may want juries, seeking total justice, to make some decisions [that are arguably better allocated to legislative or administrative authorities] about how the losses from accidents should be allocated. Society should consider community participation in the process of doing justice to be worthwhile as an important democratic value in itself . . . . One may also value the jury as a relief valve in just those most difficult cases that are likeliest to go to trial, and within those cases, with regard to those issues, like apportioning fault or deciding damages, that "involve a complex value judgment as well as a literal determination of fact."[141]

Furthermore, Feigenson argues that "total justice, like common sense in other domains, often, but not always, leads to results that are right by the relevant normative standards, albeit for the wrong reasons."[142] Such a realization should serve to rehabilitate the jury because it "lend[s] greater credit to jurors than they receive in many of the disparaging accounts of juror behavior in the media."[143]

Before finishing our discussion of Feigenson's "total justice," it might first be noted that in the *Faverty* case, for example, the accident took place in 1988, the trial in 1991, and the intermediate appellate opinion issued in 1995.[144] This is scarcely undelayed justice, though the delay is not mentioned by Feigenson, nor does the word delay or any synonym appear in his lengthy index.[145] Second, given that the case was appealed, one can assume plaintiff's counsel fees came to about 40 percent of the recovery ($160,000), though here again Feigenson makes no mention in the text (or index) of such a fee or other transaction costs of his "total justice."

In sum, Feigenson argues:

> The social psychological conception of legal blaming that I have explained and illustrated in this book may help to . . . foster a more appreciative, as well as a more accurate, view of the world of juries in the civil justice system. . . .

140. *Id.* at 228 (citing Neal R. Feigenson, *Sympathy and Legal Judgment: A Psychological Analysis*, 65 TENN. L. REV. 1, 37–38 (1997)) (fourth alteration in original).

141. *Id.* at 230 (citations omitted).

142. *Id.* at 109.

143. *Id.* at 111.

144. *Id.* at 152.

145. *Id.* at 291–300. *See generally* Jeffrey O'Connell, *Judges and* Real *Tort Reform Concerning Uncertainty, Delays and Transactions Costs*, 49 DEPAUL L. REV. 497 (1999); Jeffrey O'Connell & Craig A. Stanton, *Justice Delayed Is . . . Delay Ignored: The Indifference of Judges and Law Professors to Legal Lassitude*, 49 DEPAUL L. REV. 489 (1999).

> . . . .
>
> . . . [B]y providing a way to understand how even those jurors whose decisions we regard as incorrect may have honestly thought they were doing justice, we may be better able to accept the decision makers as members of a common community with ourselves. *We* are, indeed, the jury; and before we too hastily treat juries in accident cases as scapegoats onto which we can displace our own misgivings about our uncertain grasp of contemporary life, perhaps we should try to understand them as people essentially like ourselves, trying their best to do justice . . . .[146]

Oscar Wilde put it more crisply in noting during a trip to the American West a saloon sign that said, "'Please don't shoot the pianist; he is doing his best.'"[147]

All in all, with friends like Feigenson, tort law hardly needs enemies.

CONCLUSION

While Feigenson describes both the incompatibility of systemically produced harm on the one hand and the melodramatic system of blaming on the other,[148] the ultimate emphasis of *Legal Blame* on exonerating the jury reads as a capitulation to its role in the blame game and to the blame game itself. Feigenson neatly avoids the issue of the merits of the blame game and its reform by observing that "people's views about the proper role of jury decision making in the civil justice system are political judgments, not scientific ones,"[149] and therefore beyond his ken as a scientist. Instead, Feigenson, as we have seen, decides to be content with—and indeed celebratory of—the second-best solution: the jury trial. In fact, neither a capitulation to the status quo nor a celebration of the jury trial is in order.

Quite apart from Feigenson's failure to deal with tort law's delays and transaction costs,[150] if his celebration of melodrama in the calculus of juries is inappropriate, so is his failure to grapple with or even much mention alternatives to the current system of personal injury liability.[151] Systemic technological factors inevitably result in systemic injuries, as Feigenson, along with the IOM report, is at pains to emphasize. Systemic factors, as he and the IOM also emphasize, require systemic solutions. This includes both preventive and remedial solutions. Tort law's approach to both types of solutions

146. FEIGENSON, *supra* note 14, at 232–33.

147. RICHARD ELLMANN, OSCAR WILDE 204 (1988).

148. FEIGENSON, *supra* note 14, at 213–26.

149. *Id.* at 230.

150. *See supra* note 145 and accompanying text.

151. *See* FEIGENSON, *supra* note 14, at 228–29.

has been a tragic failure,[152] only too paradoxically revealed by Feigenson's attempts to defend it.

The point of all this is that we need not, with Feigenson, both condemn and yet take pride in tort law's emotionally overwrought distortions, so strikingly and ably revealed by Feigenson himself. Shortly after the turn of the last century, our great-grandparents largely abandoned tort law for a more viable and stable no-fault insurance arrangement, covering under workers' compensation that first great wave of systemically inevitable, technologically based accidents: industrial injuries. Apart from no-fault auto insurance laws (modest and otherwise),[153] little else has been done as to other areas of personal injury. Except for auto accidents and limited areas such as slip-and-falls and ultrahazardous activities—for the reasons of constraints ably restated by Jim Henderson in this symposium[154]—we cannot realistically apply sweeping no-fault solutions to all other areas of personal injury such as product liability, medical malpractice, or toxic torts. But surely a century after enactment of workers' compensation laws, it should not be beyond our capacity to find other less sweeping but efficacious alternatives to tort law, alternatives that will lessen tort law's intolerable uncertainties, delays, and transaction costs. Indeed, under a federal no-fault auto choice bill and a federal neo no-fault bill for other injuries,[155] both sponsored by Republican Senator Mitch McConnell of Kentucky and both adaptable to state enactment, there are means readily available whereby we can play off the very threat of tort law's defects to improve matters for both plaintiffs and defendants, as we did with workers' compensation.

In accord with another piece in this symposium, this one by Professor George Fletcher,[156] the neo no-fault proposal allows personal injury claimants and defendants to bypass full-scale fault-based litigation for the great mass of cases by prompt payment of economic losses, but preserves fault-based claims for both economic and noneconomic losses (including punitive damages) for wanton misconduct provable beyond a reasonable doubt. Thus, the plan seeks, in accord with Professor Fletcher's impressive views, to

152. Many of the senior author's writings endorse attempts to deal with the failures of tort law head-on. *See, e.g.*, JEFFREY O'CONNELL & C. BRIAN KELLY, THE BLAME GAME: INJURIES, INSURANCE AND INJUSTICE *passim* (1987).

153. *See* Jeffrey O'Connell et al., *The Comparative Costs of Allowing Consumer Choice for Auto Insurance in All Fifty States*, 55 MD. L. REV. 160 (1996).

154. James A. Henderson, Jr., *Why Negligence Dominates Tort*, 50 UCLA L. REV. 377 (2002). In a similar vein, but also suggesting neo no-fault tort reform in light of those constraints, see COMMITTEE FOR ECONOMIC DEVELOPMENT, BREAKING THE LITIGATION HABIT: ECONOMIC INCENTIVES FOR LEGAL REFORM (2000). *See also* O'CONNELL & KELLY, *supra* note 152, at 127–36.

155. Auto Choice Reform Act of 1996, S. 1860, 104th Cong. (1996); Legal Reform and Consumer Compensation Act of 1996, S. 1861, 104th Cong. (1996). A disclaimer: The senior author of this piece largely drafted both bills.

156. George P. Fletcher, *Remembering Gary—and Tort Theory*, 50 UCLA L. REV. 279 (2002).

integrate "the closely related fields of [tort and] criminal law," the intersection of which, as Fletcher points out, has long been surprisingly and regrettably overlooked.[157]

Where is the political will to accomplish this kind of balanced change such as that developed with workers' compensation, a system fairer to both sides? To start with, as one wag put it, the Democratic Party is now in total thrall to poor school teachers and rich trial lawyers. Quite apart from this huge "rent" (in the technical sense economists use) accruing to the trial bar from present personal injury law, a deeper substantive issue lurks: Writing of the highly touted candidacy for the 2004 Democratic presidential nomination of Senator John Edwards (D-NC), journalist Nicholas Lemann emphasizes Edwards's background as a rich personal injury plaintiff's lawyer who used millions of his contingency fee winnings to help gain a U.S. Senate seat in 1998.[158] Lemann mentions that Republicans would seem to relish running against an "unsavory ambulance chaser-type [who] has . . . figured out how to get really rich in a way that drives businesses into bankruptcy and makes worthwhile activities uninsurable."[159] Expanding on the point made earlier in this piece, a potentially far-reaching closing of the loop suggests that not only does the whole American cultural propensity for melodrama infect the courtroom but the courtroom's propensity for melodrama may reinfect the whole of America.[160]

"The personal-injury lawsuit," writes Lemann, "a drama of individual injustice and recompense, [may] become the metaphor that does the political work for liberalism."[161]

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157. *Id.* at 292. For more on this neo no-fault proposal, see Jeffrey O'Connell, *Two-Tier Tort Law: Neo No-Fault & Quasi-Criminal Liability*, 27 WAKE FOREST L. REV. 871 (1992), and Jeffrey O'Connell & Geoffrey Paul Eaton, *Binding Early Offers as a Simple, If Second-Best, Alternative to Tort Law*, 78 NEB. L. REV. 858 (1999), which recognize both the need for much complex fault-based liability and for means of circumventing its worst features. In this connection, because personal injury claims—unlike all other damage claims—routinely entail damages for both economic and noneconomic loss, it becomes uniquely feasible to allow defendants ex post not only to make, but to enforce, a socially attractive "early offer" settlement as suggested in the text. This involves claimant's acceptance of defendant's early offer of claimant's economic damages, with statutory sanctions of a lower standard of care proven with a higher burden of proof if the offer is refused. This means that pursuit of a common law claim for full damages is allowed only with proof beyond a reasonable doubt of aggravated negligence. Obviously, in nonpersonal injury claims, where only economic damages are at stake, no similarly equitable means are available to sanction a claimant who refuses to accept an offer of only a portion of total damages claimed. For more along these lines, especially concerning Gary Schwartz's writings, see Jeffrey O'Connell & Christopher J. Robinette, *The Role of Compensation in Personal Injury Tort Law: A Response to the Opposite Concerns of Gary Schwartz and Patrick Atiyah*, 32 CONN. L. REV. 137 (1999).

158. Nicholas Lemann, *The Newcomer*, NEW YORKER, May 6, 2002, at 58, 82.

159. *Id.*

160. *See supra* notes 30–36.

161. Lemann, *supra* note 158, at 82.

How? It is no coincidence, says Lemann, that the epicenter of the personal injury bar's influence is the South.[162] The South's background as impoverished, defeated, largely rural, and agricultural was only gradually transformed, initially by migration of (mostly) Northern textile mills to the anti-union South.[163] This greatly reinforced an already socially conservative ethos that opposes not only the traditional bulwark of economic liberalism, unionism, but also noneconomic liberal causes such as environmentalism, legalized abortion, and gun control.[164] Yet, as Lemann emphasizes, the South still has a deep sense of its underdog status, which manifests itself in, among other ways, greater emphasis on personal injury litigation.[165] Redistribution of income in the South takes the form not of legislation but litigation—of hitting (often Northern) deep pockets with personal injury verdicts. Writes Lemann, "It does not seem at all far-fetched to imagine that this version of liberalism could someday reach a national audience, [because] the country is moving more and more toward a courtroom-style politics of anecdote."[166] As television's long-standing evening news staple drops in ratings, news magazines, Lemann tells us, often feature tort law narratives of individuals striking back at callous, rich health maintenance organizations and other corporations.[167] Books and popular films such as *Erin Brockovich*[168] and *A Civil Action*[169] feature the same tale. To repeat Feigenson's words, a message that is "simplified, personalized, moralized, and dichotomized"[170] is sent when John Edwards speaks of his courtroom days "fighting for people who . . . played by the rules, and got hurt by people who didn't play by the rules," and of getting "justice from powerful, uncaring corporations for little Valerie Lakey and little Ethan Bodrick and . . . others."[171] Similar litigation-like messages from him, or others if his particular act falters,[172] may well be our lot in forthcoming American elections. But what should be our lot is truly balanced reform of tort law—fair to both those claiming and those claimed against.

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162. *Id.*

163. *Id.*

164. *Id.* at 83.

165. *Id.*; *see also, e.g.*, Robert Pear, *Mississippi Gaining as Lawsuit Mecca*, N.Y. TIMES, Aug. 20, 2001, at A1.

166. Lemann, *supra* note 158, at 83.

167. *Id.*

168. ERIN BROCKOVICH (Paramount Pictures 2000).

169. A CIVIL ACTION (Touchstone Pictures & Paramount Pictures 1998), *based on* JONATHAN HARR, A CIVIL ACTION (1995).

170. FEIGENSON, *supra* note 14, at 155.

171. Lemann, *supra* note 158, at 63–65, 81.

172. For more on John Edwards's presidential aspirations and the role of the trial bar in financing campaigns, see Jim VandeHei, *Trial Lawyers Fund Edwards*, WASH. POST, Sept. 3, 2002, at A4.

With all Gary Schwartz's huge talents and energy, and with all the years that should have been left to him, what would have been his role in appraising objectively, and perhaps even fashioning, such efforts at improvement?[173]

Unfortunately, we will never know.

173. For Schwartz's scrupulously thorough appraisal of, and suggestions for improving, no-fault auto laws, see Gary T. Schwartz, *Auto No-Fault and First-Party Insurance: Advantages and Problems*, 73 S. CAL. L. REV. 611 (2000).

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