This issue contains the proceedings of a Symposium held at Brooklyn Law School on October 18, 2002, sponsored by the Brooklyn Law School Center for the Study of Law, Language and Cognition. The Symposium was timely then, and this issue is timely now. As Dean Joan Wexler said in her introductory remarks at the Symposium:

Terrorist attacks in New York, Washington, and around the world; war in Iraq; and the disclosure of one financial scandal after another have forced us all to ask serious questions about blame and about how to hold wrongdoers responsible for their actions. Perhaps it is always the case that soul-searching comes at times of crisis. Clearly, we are at such a point now.

We live under a rule of law, and our legal system purports to establish through our body of laws just when a person or corporation has engaged in legally blameworthy conduct, and what should be done when that happens. An overriding theme of [the Articles published in this issue] asks a rather frightening question: What should we do if we learn that people really assign responsibility and
blame in ways that are different from the ways that the legal system assumes? Most importantly, we must ask whether adjustments are necessary to align the legal system with its stated goal of doing justice.\footnote{Joan G. Wexler, Introductory Remarks at the Brooklyn Law School Center for the Study of Law, Language & Cognition Symposium, Responsibility & Blame: Psychological & Legal Perspectives (Oct. 18, 2002).}

In fact, significant advances in social psychology have shown that people often do assign blame in ways that the legal system does not take into account, sometimes making it unrealistic to expect the system to achieve its stated goals.

The Articles in this issue are organized into three groups. The first addresses the question of how cognitive and emotional factors contribute to the assignment of blame. Sharon Lamb argues that fear drives a great deal of moral attribution. She explores some ramifications of fear-based condemnation by drawing on the family as a mental model for blaming and exploring shaming sanctions. Because fear focuses on the future, Lamb’s perspective relates to both retributive and deterrence models of justice.

Relying upon a somewhat different psychological literature, Neal R. Feigenson focuses on how emotions and cognition interact in our modeling of events in the world, and in attributing moral judgment. Drawing on work in social psychology, he explores some likely scenarios for the course of litigation arising out of the World Trade Center attacks. Feigenson highlights the interactions between emotions and cognition, which are complex and operate in both directions, speculating on how this will affect jurors in those 9/11 cases.

My contribution draws on both linguistic and psychological literatures to examine some of the cognitive foundations of blaming. It argues that most of the elements of the impulse to blame are very basic cognitive functions that we use routinely for purposes that have nothing to do with assignment of moral responsibility. Their ease of access explains in part the ease with which we assign blame. Like Feigenson’s contribution, it discusses reactions to 9/11.

The second set of Articles addresses some of the same issues, in the context of tort law. Anthony J. Sebok’s Article explores the history of blame as the controlling principle in private litigation. His arguments show that blame, while perhaps a natural psychological process, has not always
dominated tort theory, and is justified by somewhat contradictory theories. In determining how well the legal system assigns responsibility, it is necessary to consider the system’s goals, whether they be an attempt to punish in circumstances that the criminal justice system often ignores, a somewhat unsatisfactory substitute for social insurance or an effort to deter careless conduct.

Three other Articles deal with psychological aspects of blame in the setting of contemporary tort law. Jeffrey J. Rachlinski examines the reasonable person standard against some robust findings in the psychological literature, which show that the system expects more of tort defendants than should be expected of an ordinary person. Factfinders tend to overestimate certain cognitive abilities, such as the ability to perceive change in the environment and the ability to perceive at the periphery. To the extent that these skills are implicated in legal disputes, the system is likely to hold blameless people responsible for harm. Rachlinski explores some of the consequences of this propensity.

Valerie P. Hans and Juliet Dee examine the phenomenon of blaming the victim in a classic tort setting: whiplash. Notwithstanding complaints that juries are biased against defendants and in favor of plaintiffs, people are very suspicious of plaintiffs claiming to have suffered from whiplash. Hans and Dee examine this negative reaction from both social psychological and political perspectives. For example, when people identify more with a defendant than with a victim, they tend to minimize the complaints of those in the “other” group. Other considerations, such as press coverage of the tort system, round out their discussion.

Jennifer K. Robbennolt, John M. Darley and Robert J. MacCoun investigate a complicated dynamic embedded in the allocation of responsibility in civil cases. Factfinders must evaluate the evidence and make decisions in order to further a number of goals that sometimes conflict with each other. For example, if compensating the plaintiff appropriately and seeing that a defendant gets its just deserts are both goals, then awarding punitive damages on top of compensatory damages, which overcompensate plaintiffs, requires that one goal be placed above the other. Their discussion explains a great deal of the apparent incoherence in civil litigation.

The final two Articles in this issue come from a different, very important perspective. The Symposium’s title, “Responsibility and Blame,” is open to multiple interpretations.
One understanding of the expression is that the two concepts—responsibility and blame—are very similar, perhaps two sides of the same coin. A decent society should hold blameworthy people responsible for their actions. Most of the Articles in this issue adopt that perspective. But there is another way of looking at these concepts. One can look at responsibility as a duty to impose on oneself: the duty to act responsibly. Leonard V. Kaplan’s Article analyzes responsibility from just this perspective. Using Ingmar Bergman’s film *Shame* as a vehicle for exploring personal responsibility, Kaplan focuses our attention on failures to take responsibility for the most basic interpersonal interactions in contemporary society. Academics are by no means excluded from the critique. Kaplan’s Article relates to Sharon Lamb’s in that they both focus on similar emotional responses and personal experiences in establishing models of conduct between oneself and others.

The final Article, by Susan Bandes, also plays on our ability to understand “responsibility” in more than one way. Bandes turns her attention to misconduct within government. Because government presumably represents the citizenry, government has a duty to *act responsibly*, and should be *held responsible* when it does not. But government, like other entities such as corporations, legislatures and the like, becomes slippery once something goes wrong. Since government purports to be a responsible entity (in the sense of acting responsibly), it eschews responsibility (in the sense of blame) when a bad actor within the government causes harm by acting outside this benevolent picture of the public’s representatives. She illustrates this process dramatically with police torture cases.

As this brief summary of the issue suggests, the Articles all respond to a few complex, but closely related issues. This is not always the case when academics are asked to participate in a symposium with a stated theme. Yet the temporal proximity of this conference to the 9/11 attacks and the earlier accomplishments of the participants allowed it to happen here.

I conclude with two notes of thanks. First, Professor Dan Kahan participated in the conference and provided a great deal of intellectual stimulation. The Articles published in this issue are all the better for his contributions. Last, but by no means least, the concept and structure of the Symposium benefited greatly from the many valuable discussions that I had with my colleague, Tony Sebok, throughout the planning of the event.
THE PSYCHOLOGY OF CONDEMNATION:
UNDERLYING EMOTIONS AND THEIR SYMBOLIC
EXPRESSION IN CONDEMNING AND SHAMING

Sharon Lamb

It is not so difficult for the general public, along with many a philosopher, to distinguish between judging and condemning. Roger Wertheimer reminds us that abstaining from judgment is not an option for human beings. While lawyers, philosophers and psychologists alike would agree that the cognitive act of judging is integral to moral practice in any culture, condemning, its emotional sister, may be even more profoundly connected to morality. Judgments are anchored by social standards of behavior, which may shift by way of changes in time and differences in place. In contrast, condemnation is more unpredictable and less controllable, stemming as easily from an emotional impulse as from an awareness that someone has violated an important social norm.

Dan Kahan argues that emotional impulse always underlies judging and we fool ourselves to think otherwise. He suggests that an affect-laden perception arrives on the scene before cognition kicks in and that all subsequent doctrine conforms to it. He even goes so far as to argue that the law cannot be based on anything else; it will always be reduced to these primal reactions. In an earlier essay, Kahan went further to argue that an emotional impulse such as disgust

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3 See id.
might be an important basis for legal judgments. However, other scholars, like Martha Nussbaum and Toni Massaro, write on the danger of using emotional impulses, such as disgust, as the basis for legal judgments. All agree that the emotion of disgust may be a prime motivator, sometimes appropriate and sometimes not, of condemnation.

This Article examines fear, one of the so-called “universal” emotions, that may underlie more advanced emotions such as guilt, shame and disgust. I use the word “advanced” as a developmental psychologist does, although there are evolutionary implications therein. Fear is an emotion that is present very early on in life and is identifiable in most cultures. Guilt, shame and disgust, the moral emotions, appear after the second year of life when an awareness of standards emerges.

In this Article, I discuss the emotions underlying condemnation from a psychological perspective and go on to look at a particular kind of fear as a root cause of condemnation. In the first Section, I examine the need to express condemnation for certain events from both a social psychology perspective as well as an individual psychology perspective. Section II explores the emotion fear as it underlies

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5 See Martha C. Nussbaum, Secret Sewers of Vice, in THE PASSIONS OF LAW, supra note 4, at 19; Toni Massaro, Show (Some) Emotion, in THE PASSIONS OF LAW, supra note 4, at 80.

6 Emotion theorists who do cross-cultural work seem to agree that fear is universal. Even cultural constructionists would argue that a variant of fear is present in all cultures even though the source of that fear would vary. See DYLAN EVANS, EMOTION: THE SCIENCE OF SENTIMENT 1-17 (2001) and RANDOLPH R. CORNELIUS, THE SCIENCE OF EMOTION: RESEARCH AND TRADITION IN THE PSYCHOLOGY OF EMOTIONS 35-36, 189-92 (1996) for general overviews of the research on the universality of certain emotions.

The urge to condemn and is expressed in a disguised form, dressed in indignation. Having explored the relationship of fear to condemnation in both criminal and tort cases and its roots in early childhood, I go on to examine the parenting function of the law in addressing those fears. Thus, drawing on research on effective parenting and using parenting as a model judicial system, Section III explores how society can address the fear that underlies over-reaching condemnation. Section IV looks at shaming sanctions through the lens of parenting and discusses alternate condemning practices that may be more effective, not only in terms of deterrence, but in terms of the moral development of individuals. This Article concludes in Section V that the law, as a collective expression of cultural values, must establish moral standards to balance its condemnatory function, a function which, alone, fails to address our societal ideals.

I. THE NEED TO EXPRESS CONDEMNATION FOR CERTAIN TRANSGRESSIONS

Condemnation would not be such a controversial and institutionalized practice if it didn’t meet the needs of a culture on a variety of levels. Condemnation can serve social needs, personal needs and unconscious needs. Below I describe the kinds of needs that condemnation satisfies, enabling an examination, in the next Section, of the function of condemnation in addressing primitive and early fears that are aroused when those around us transgress certain social norms.

A. The Social Need to Express Condemnation

Condemnation serves a social function, communicating to members of society that we don’t do that (whatever the transgression might be)—that we abhor that act, that way of thinking and that lack of feeling that may have led to the transgression. The law provides boundaries around behavior serving as “a continuous, repetitive set of instructions as to how we should think about good and evil, normal and pathological, legitimate and illegitimate, order and disorder.”

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9 David Garland, Punishment and Culture: The Symbolic Dimension of
The expression of condemnation binds people in a society together in common feeling when a boundary has been crossed. In its communicative function, condemnation also makes a claim to objectivity and impersonality.\(^{10}\) While vengeance and vindictiveness are more personal responses, sometimes rightfully felt as a response to a violation of our rights,\(^{11}\) sometimes serving baser goals, condemnation has an air of objectivity. We condemn, or we like to believe we condemn, on behalf of some larger moral principle.

Condemnation can also be assaultive.\(^{12}\) Through condemning a wrongdoer, we may want to see him or her squirm or show some other sign of suffering. This also may serve a social and communicative function in that public displays of suffering can offer a form of deterrence to would-be transgressors and can solidify community through an expression of a boundary: “These acts will not be tolerated.”

The assaultive potential of condemnation suggests an important distinction that is frequently blurred in the process of condemning and punishing, that there is a difference between condemning the act and condemning the agent. Although the law addresses acts, information about intent and character is frequently a part of indicting, trying and sentencing a criminal. Separating the act from the self is harder to achieve than one might guess, and while the intent may be to focus on a specific act, moral outrage is more easily expressed to an individual.\(^{13}\)

Another function of condemnation is its service in a culture that has an ambivalent relation to the emotion of anger. Condemnation gives authoritative approval to the expression of anger, vindictive feelings and moral superiority in certain circumstances where, for the most part, such feelings, in ordinary social relations, are often kept under wraps. Indeed, Carol Tavris’s point that the expression of anger

\(^{10}\) See Wertheimer, supra note 1, at 499.

\(^{11}\) Jeffrie G. Murphy, Two Cheers for Vindictiveness, 2 Punishment & Soc'y 131, 133-35 (2000).

\(^{12}\) Wertheimer, supra note 1, at 493.

\(^{13}\) See Michael Corrado, Notes on the Structure of a Theory of Excuses, 82 J. Crim. L. & Criminology 465 (1992) (discussing character theory and how, in excuse-making, the perpetrator sets his self apart from his act). See also Jeffrie G. Murphy, Forgiveness and Resentment, in Forgiveness and Mercy 14, 24 (Jeffrie G. Murphy & Jean Hampton eds., 1988) (reminding us of St. Augustine’s injunction to “hate the sin but not the sinner”).
is more acceptable for those in power, than for those not in power,\textsuperscript{14} implies that condemnation may serve the “little guy” by democratically allowing all of us, at some time or another, to feel superior and express justified anger. While this may seem like a personal benefit, it is still a social one. In a democratic society replete with hierarchies and deep class and racial inequities, the opportunity to condemn someone lower than oneself relieves the tension of racial and class differences.

Finally, Jennifer Robbennolt, John M. Darley and Robert J. MacCoun argue that condemnation arises when there has been an incursion onto a community’s sacred values.\textsuperscript{15} Moral outrage and punitiveness are the response to such incursions, followed by attempts to cleanse the community by distancing oneself from the offender and the offense.\textsuperscript{16} Sacred values, however, are not only products of community consensus; they also hold deep, personal meaning for individuals. Otherwise it would be difficult to arouse the requisite emotion necessary to condemn. Sacred values are sacred because they reflect our ideas of the moral worth of individuals and the importance of certain relationships. Feelings about our worth as individuals and about what we can and should expect from other people are grounded not only in social practices but in individual development within the culture.

B. \textit{The Personal Need to Express Condemnation}

Before addressing the individual or personal need to condemn, it is important to understand why the law should consider an individual’s personal need to condemn. After all, isn’t the law a social mechanism meant to rise above the selfish or idiosyncratic impulses of the individual? There are, however, two reasons for the law to take into consideration the individual’s need to condemn. The first takes the meaning of individual needs quite literally and suggests that such individual needs can interfere with the social goals of equity and objectivity in the court. This might occur through, for

\begin{footnotesize}
\begin{enumerate}
\item See Carol Tavris, \textit{Anger: The Misunderstood Emotion} 198 (1982).
\item Robbennolt et al., \textit{supra} note 8, at 1133-34.
\item This theory is laid out in Robbennolt et al., \textit{supra} note 8; however, this work derives from Philip Tetlock et al., \textit{The Psychology of the Unthinkable: Taboo Trade-Offs, Forbidden Base Rates, and Heretical Counterfactuals}, 78 J. Personality & Soc. Psychol. 853, 853-56 (2000).
\end{enumerate}
\end{footnotesize}
example, individual jurors, who introduce their own idiosyncratic concerns in the guise of social concerns in jury deliberation, and judges whose emotional impulses and personal histories may lead to statements or sentences that express condemnation in ways that go beyond the law.\(^{17}\)

The second reason takes the meaning of individual needs to mean “human” needs, needs that each of us most likely harbors based on similar experiences in our culture of having once been infants, having once been parented and having been brought into the culture by shared socialization practices, the meanings of which we share. For instance, we all have dependency needs, some more than others, and these needs are deeply human, formed and shaped early on, through our own histories with our parents and through the cultural practices that influenced their caregiving.\(^{18}\) The urge to please important others whom we admire is another example of a human need. Our individual experiences of being parented as well as the cultural rules that define the relations between children and adults influence how we express these needs.

C. \textit{The Unconscious Need to Express Condemnation}

Thus, in discussing the relationship between individually felt human needs and their relation to the law, it may be useful to return to the psychoanalytic concept of unconscious needs and impulses. According to object relations

\(^{17}\) See Laura E. Little, \textit{Adjudication and Emotion}, 3 FlA. COASTAL L.J. 205 (2002) (discussing emotions such as disgust and hate as motivators of judges’ decisions).

\(^{18}\) In this latter meaning of individual needs, the individual is not separate from the social, which is, of course, a false distinction. Note that I am careful to describe a cultural basis for these shared human impulses along the lines of Richard Shweder and Robert Levine expressed in \textit{Culture Theory: Essays on Mind, Self, and Emotion} (1984); Anna Wierzbicka, \textit{Emotion, Language, and Cultural Scripts, in Emotion and Culture: Empirical Studies of Mutual Influence} 138 (Shinobu Kitayama & Hazel Rose Markus eds., 1994); Catherine A. Lutz, \textit{Unnatural Emotions: Everyday Sentiments on a Micronesian Atoll & Their Challenge to Western Theory} (1988); and James R. Averill, \textit{Anger and Aggression: An Essay on Emotion} (1982), anthropologists and social constructionists, for example, all of whom believe that even our basest impulses are shaped socially. This position does not discount evolutionary theory in total, but argues that whatever capacities that come to us via evolution or biology quickly are shaped through the culture via various cultural practices.

It may be helpful also to look at the growing literature on therapeutic jurisprudence for a discussion of the hoped for results when the law takes into consideration the psychology of individuals, at least within the lawyer-client relationship. See \textit{Practicing Therapeutic Jurisprudence: Law as a Helping Profession} (Dennis P. Stolle et al. eds., 2000).
theory, human needs are based on early experiences and, though common to all, are shaped through individualized social experiences, the earliest of which are with one’s parents.¹⁹

Those who discuss the expressive function of punishment²⁰ seem to focus primarily on what punishments express to society, although within the last decade the therapeutic jurisprudence movement began focusing on what the law and lawyers express to clients in symbolic and unconscious ways.²¹ When examining the human emotions underlying punishment, scholars often take disgust, hatred and the desire for revenge at face value instead of seeking out other hidden emotions these expressed emotions might be serving. Jeffrie Murphy is savvy enough to note, in his article on shame, that “shame creeps through guilt and feels like retribution,” suggesting complex and buried emotions underlying the urge to condemn.²² His writing is consistent with a psychoanalytic theory of the unconscious that puts forth a sort of hierarchical or layered approach to emotions wherein some emotions are more straightforward, on the surface, while others lie beneath. This idea of surface versus hidden emotion is central to psychoanalytic theory of the unconscious where emotions can be viewed as censored or acceptable, unconscious or conscious.²³

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¹⁹ Object relations theory is an outgrowth of Freudian psychoanalytic theory. Although it shares with Freudian theory the principle of unconscious motivation, rather than placing sexual and aggressive impulses at the foundation of unconscious motivation, object relations theory places early feelings in relation to mothering (and sometimes parenting) as the basis of motivation. Object relations theorists include MELANIE KLEIN & JOAN RIVIERE, LOVE, HATE, AND REPARATION (1964). For several essays see also DONALD W. WINNICOTT, THE MATURATIONAL PROCESS AND THE FACILITATING ENVIRONMENT (1965); and W.R.D. FAIRBAIRN, OBJECT RELATIONS THEORY OF THE PERSONALITY (1954), all of whom differ in terms of what aspects of the early relationship are important, how psychic structures are formed based on these early relationships and to what extent abnormalities derive from normal versus defective parenting; however, these differences are not important for the purposes of this Article.


²¹ See supra note 8; see also Symposium, Therapeutic Jurisprudence and Preventive Law: Transforming Legal Practice and Education, 5 PSYCHOL. PUB. POL’Y & L. 795 (1999); Gary Melton, Therapy Through Law, 39 CONTEMP. PSYCHOL. 215 (1994).


²³ Nietzsche is well known for his “psychoanalytic” view of the urge to condemn: namely, that it came from a combination of resentment, spite, malice and envy. See Jeffrie G. Murphy, Moral Epistemology, the Retributive Emotions, and the “Clumsy Moral Philosophy” of Jesus Christ, in THE PASSIONS OF LAW, supra note 4, at
Current studies of emotion often run up against the problem of studying emotions one by one; more typically, emotions are experienced simultaneously with other emotions. Those researchers who work with physiological measures have discovered that it is very difficult to identify discrete physiological responses for each emotion.\(^{24}\) Moreover, social constructionists would argue that the boundaries around emotions, how we define an emotion and differentiate it from others, are a matter of cultural practice.\(^{25}\) Still, psychoanalytic theory can be brought to bear on this problem of multiple emotions for, in layering emotions, the theory implies that more than one emotion is experienced at one time and that the more important emotion is the underlying one. Additionally, the psychoanalytic concept of ambivalence holds that people can, and often do, feel more than one way at the same time. Roger Wertheimer claims that we as a culture are deeply ambivalent about our urge to condemn.\(^{26}\) The law, however, understandably does not like ambivalence because it is so difficult to state and enforce standards about which we feel ambivalent. Still, unconscious needs are often ambivalent and conflicting. Moreover, those needs that we keep from awareness are often in conflict with what we express.\(^{27}\)

Taking that bit of psychoanalytic theory as truth: What is the hidden side of condemnation? Where is the ambivalence? What is the unacceptable feeling? As Freud urged us to look at extreme cases to understand the psyche,\(^{28}\) we can perhaps gain insight through examining the most extreme cases of condemnation, e.g., “runaway juries” who award exorbitant amounts to consumer plaintiffs or judges who, wrongly believing all sex offenders are incurable, throw the book at a “monster” of a man. In both of these cases disgust may be

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154-55 (discussing Nietzsche’s views on self-deception and cruelty as the basis of retribution).

\(^{24}\) See CORNELIUS, supra note 6.

\(^{25}\) For an excellent overview, see id.

\(^{26}\) Wertheimer, supra note 1, at 490.

\(^{27}\) This is a core understanding of psychoanalytic theory, that expressed emotion may not represent felt emotion and the individual might still be unaware of the felt emotion.

\(^{28}\) Here I refer to Freud’s famous metaphor of the psyche as a piece of crystal. When thrown to the floor, it breaks “not into haphazard pieces [but] comes apart along its lines of cleavage into fragments whose boundaries, though they were invisible, were predetermined by the crystal’s structure.” XXXI SIGMUND FREUD, Dissection of the Personality, in NEW INTRODUCTORY LECTURES ON PSYCHO-ANALYSIS AND OTHER WORKS 59 (James Strachey et al. eds. & trans., 1964).
present, but I argue that fear is the underlying emotion behind these condemnations. Before discussing the fear that underlies condemnation, however, it is important to examine the anger and outrage that seem more obviously to fuel the judgment.

Were we to ask those who condemn what they actually were feeling in the moment of condemnation, they would most likely describe anger and outrage, maybe even indignation, but not fear. In Western society, anger and outrage are more acceptable emotions to individuals than fear because as one experiences anger and outrage, and one has the option to act on these feelings, one often feels powerful. For Westerners, anger and outrage are associated with strength rather than weakness; but this is not true in all Western cultures. Linguist Anna Wierzbicka tells us that the Polish have a word for anger, *zlosc*, which connotes weakness—immaturity, lack of restraint, almost a childish rage. But in the United States, one need only look at the last few decades worth of Schwarzenegger movies to understand that anger is action. It is force. While social constructionists argue that we feel anger as overwhelming us, as a passion that allows us to act on our anger without taking responsibility for the damage we might inflict, this does not contradict the authority, superiority and strength that anger affords us. As Carol Tavris and James Averill have each argued, those who are in a superior position in any hierarchy are given permission (and give themselves permission) to “lose control” and get angry, thus expressing superiority and authority as well as strength through anger. In experiencing anger, we rarely feel like “the victim.” In fact, therapy with victims frequently involves getting in touch with one’s anger as a form of self-empowerment.

Fear, on the other hand, is, well, it’s frightening. Why? Because it is so difficult to sit with it. When jurors feel afraid, they feel vulnerable and too much like the victim who was harmed by the offender. While we certainly go through rituals to distance ourselves from wrongdoers, we also go through

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29 See Wierzbicka, supra note 18.
31 See BONNIE BURSTOW, RADICAL FEMINIST THERAPY: WORKING IN THE CONTEXT OF VIOLENCE (1992) for a scholarly discussion. For a more popular approach to working with victims, see ELLEN BASS & LAURA DAVIS, THE COURAGE TO HEAL: A GUIDE FOR WOMEN SURVIVORS OF CHILD SEXUAL ABUSE (3d ed. 1994).
32 Tetlock et al., supra note 16; Wertheimer, supra note 1; SHARON LAMB, THE TROUBLE WITH BLAME: VICTIMS, PERPETRATORS, AND RESPONSIBILITY (1996);
rituals to distance ourselves from victims. Distancing is similar to the “flee” response, well known to be a response to fear, its psychological parallel.

Fear can have an internal as well as an external basis. Cognitive theorists might argue that all fear is based on internal factors, one’s attributions and assessments of what is fearful and how fearful a person or event actually is. However, by internal I mean to refer to an internal source—fears about one’s self, one’s emotions, one’s potential for action. This view of internal fears stems from a psychoanalytic understanding of the unconscious. For example, an internal fear may be that one cannot control one’s anger, that it would destroy other people if one expressed it. In contrast, external fears are those fears based on the perception of actual threat to the self. An external fear would be about others’ anger destroying you. Of course, an external fear can be real, but it can also be based wholly or in part on a defense against the internal fear. I want to make clear from the outset that although I am focusing on these internal fears, projected outward, I take seriously the actual fear that wrongdoing in our world evokes in all of us, even when more primitive fears may influence the understanding and experiencing of that fear (caused by the horrors or indifference of the external world).

The primitive fears to which I refer relate to safety, security and our utter helplessness as infants when we enter the world. Fear is one such “primitive” emotion, not only because it is one of the “basic” emotions identified by evolutionary and emotion theorists, but because it is an early emotion upon which social relations are built. A parent’s ability to soothe fears and provide a secure space for the infant and child to develop is fundamental to healthy development.


See Paul Ekman & W. V. Friesen, Constants Across Cultures in the Face and Emotion, 17 J. PERSONALITY & SOC. PSYCHOL. 124-29 (1971); Carroll Izard, Innate and Universal Facial Expressions: Evidence from Developmental and Cross-Cultural Research, 115 PSYCHOL. BULL. 288-99; ROBERT PLUTCHIK, EMOTION: A PSYCHOEVOLUTIONARY SYNTHESIS (1980). But saying that fear is basic doesn’t mean it’s the same in all cultures. Ekman and Friesen found that the Fore tribe in New Guinea and Western college students were least likely to agree on what constituted a “fearful” expression.

This is a basic tenet of both the object relations theories and interpersonal theories that came out of traditional Freudian psychoanalytic theory, developed in the
This primitive emotion, fear, is dressed up to make it acceptable in two important ways. First, the individual psyche transforms less acceptable emotions into more acceptable or empowering ones, e.g., fear into anger. Second, we use the defense of projective identification, denying parts of ourselves and finding unconscious ways to make others live out these feelings for us.\textsuperscript{37} Joan Riviere, an object relations theorist, wrote of projection:

\begin{quote}
The first and the most fundamental of our insurances or safety-measures against feelings of pain, or being attacked, or of helplessness—from which so many others spring—is that device we call projection. All painful and unpleasant sensations or feelings in the mind are by this device automatically relegated outside oneself; one assumes that they belong elsewhere, not in oneself.\textsuperscript{38}
\end{quote}

Projective identification moves one step beyond projection by involving another in our fantasy, by in effect inducing another to play a role that satisfies our own disowned emotions. When we feel fear, through projective identification, we find a way to make someone else afraid so that we no longer have to own and experience that uncomfortable emotion. Condemnation serves this function by allowing us to deny our own fears, making those condemned quake at their punishment.

\section{Fear as an Internal Motivator for Condemnation of Criminals}

W. Ian Miller writes that fear is “the passion which underwrites all coercive law.”\textsuperscript{39} Because of fear, protection is one of the primary goals of the law and punishment. How,

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\textsuperscript{37} Projective identification was first introduced to psychoanalytic theory by Melanie Klein. \textit{Melanie Klein, The Psychoanalysis of Children} (1932).

\textsuperscript{38} \textit{Joan Riviere, Hate, Greed, and Aggression, in Love, Hate, and Reparation}, supra note 19.

\textsuperscript{39} William Ian Miller, \textit{Fear, Weak Legs, and Running Away: A Soldier’s Story}, \textit{in The Passions of Law}, supra note 4, at 243.
then, does condemnation express that people in society are safe and need not fear? We have seen already how condemnation expresses moral outrage and confirms shared beliefs about what kinds of acts are terribly wrong, and how we use condemnation as a defense against fear, functioning as a show of force. In such cases, to condemn says: “We are not afraid.” One who condemns confronts, and confronts with legitimized authority; thus, condemnation transforms fear into strength.

Illustrating how fear motivates society’s condemnation of murderers and rapists may be useful before moving on to more subtle cases involving negligence, especially cases of incommensurability, which I examine below. Finally, cases where motherhood is explicitly involved may be quintessential cases that evoke a certain kind of fear, which is dealt with more readily through condemnation.

It is easiest to see the fear beneath condemnation in criminal cases. Take, for example, the recent sniper shootings in the Washington, D.C. area. The community’s fear, publicized and addressed in police broadcasts to the community, was palpable for the rest of the country as we watched the hunt for the snipers play out on television. The fear was great and the public condemnation of the shooters even greater, even though one was a seventeen-year-old boy.

Fear is also aroused in sex offense cases, particularly those involving child sex offenders. These criminals, more frequently men than women, are usually treated publicly as if they were monsters, although, in fact, they are a very diverse group. But while fear is somewhat present, anger and disgust are more salient. In the promotion of Megan’s Laws around the country, the media and legislatures continue to portray the sex offender as the worst of the worst, incurable, insatiable, unable to exercise simple restraint and untreatable by medication or psychotherapy. Thus, the community must be notified of the

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40 See supra notes 8-11.
41 One USA Today poll showed over 50% of those in the Washington D.C. area had a “great deal of anxiety” over sniper shootings as well as terrorist attacks. Rick Hampson, Nation Pulled Into Sniper’s Widening Circle of Fear, USA TODAY, Oct. 24, 2002, at A3. It was interesting to see the anger played out after the snipers were caught; states jockeyed for prosecutorial position to ensure that they were tried in a state that would permit execution as retribution. See Shopping For Death, ST. LOUIS POST-DISPATCH, Nov. 13, 2002, at B6.
offender’s presence. Such notification, while it may ease fears within a community, often creates a danger for a recently released sex offender, who is then the target of outrage and disgust.43

Of course we fear victimization—if not our own, then that of our children, and particularly our daughters, wives and sisters. Yet, the law has not historically been strong in its protection of the victims of sexual violence, which leads us to ask what other fears such harsh laws and media condemnation might address? My thought is that this condemnation reflects our culture’s deep ambivalence about sexuality. We choose all forms of arousing entertainment, accept the commercialization of sexiness and support the sexualization of youth through the media; but we remain rather puritanical when it comes to the sexual impulses of youth and ourselves.44 Sex offenders thus evoke a fear of our own sexuality, a fear that it will spiral out of control or that it can be disgusting and ill-placed. In over-punishing sex offenders, in creating monsters, we differentiate us from them and ease our self-conscious fears about our own sexuality.45 More importantly, by turning them into monsters, we separate them from the people we know and love, fathers, stepfathers, uncles and cousins who are much more likely to be the sexual offenders in the lives of little boys, girls and women. The real fear is that someone like a father, someone who was meant to protect children, caused harm. When that happens, a

43 See Lois Presser & Elaine Gunnison, Strange Bedfellows: Is Sex Offender Notification a Form of Community Justice?, CRIME & DELINQ., July 1999, at 299. They noted that such trouble ranges from threats to the offender from community members, as cited in Matthew Stadler, Stalking the Predator. N.Y. TIMES, Nov. 7, 1995, at A23; and Joel B. Rudin, Megan’s Law: Can It Stop Sexual Predators-and at What Cost to Constitutional Rights?, 11 WESTLAW CRIM. JUSTICE 1 (1996), to an inability of the state to place a halfway house among citizens. See Kevin Murphy, State to Build Halfway House, MILWAUKEE J. & SENTINEL, Apr. 21, 2001, at 3B. In one unusual community in Canada, an organization called “Circles of Support and Accountability” was started to help offenders returned to the communities to find housing and jobs and keep therapy appointments. Elsewhere, such support for offenders is rare. Tamson Tillson, Sex Offenders Find Hope Through Community Support Program, 5 J. ADDICTION & MENTAL HEALTH 12 (2002).


45 See Lamb, supra note 32; Sharon Lamb, Constructing the Victim: Popular Images and Lasting Labels, in NEW VERSIONS OF VICTIMS 108 (1999) [hereinafter Constructing the Victim].
primitive fear is aroused that necessitates seeing an offender as alien, a “loner,” not like us, and, therefore, condemnable.\textsuperscript{46}

But what of the fear that cases of negligence arouse when some person or entity fails to take care. Even worse, what of the fear that cases of incommensurability arouse, when an institution or company puts a value on our safety or our lives, taking risks that put us in danger for financial reasons often based on a cost-benefit analysis. Robbennolt and her colleagues note that in cases of incommensurability, punitive damages awards are quite high.\textsuperscript{47} The famous Ford Pinto case\textsuperscript{48} seems the prototype of such cases; but more recently, the unprecedented punitive damages awarded to cigarette smokers seem to represent an unbounded outrage.\textsuperscript{49} In cases of incommensurability, Robbennolt et al. observe that the wrongdoer seems quite separated from social norms in that he or they could put a pricetag on human life.\textsuperscript{50}

Robbennolt and associates suggest that the urge to condemn in these cases goes hand-in-hand with seeing the wrongdoer as less of a person.\textsuperscript{51} They propose that this may be an attempt to balance the power scale that such acts of wrongdoing tip. As in the case of sex offenders, seeing the wrongdoer as sub-human, as less of a person, may be a way of seeing the offender as alien, not us, and thus worthy of condemnation. Seeing a wrongdoer as less of a person, though ironically an agent still, makes it easier for a jury to impose exorbitant punitive damages, especially if this is the only means by which it can act aggressively toward the wrongdoer and make him suffer.

In cases of incommensurability, Robbennolt and colleagues argue, juries make a symbolic statement, showing the world that this kind of thinking or behavior is unacceptable.\textsuperscript{52} The exorbitant awards appear to address jurors’ and the general public’s outrage at an impersonal, material world. But the private is not so separate from the public. The

\textsuperscript{46} See LAMB supra note 32; Udell supra note 32.
\textsuperscript{47} Robbennolt et al., supra note 8, at 1138.
\textsuperscript{50} See Robbennolt et al., supra note 8, at 1134-37.
\textsuperscript{51} Id. at 1139-41.
\textsuperscript{52} Id. at 1136-37.
desire to make some person or agency suffer for his inhumanity or negligence may arise not only from the outrage we experience knowing that large, impersonal organizations rule our lives, but also because the wrong act (or wrongful failure to act) has evoked our earliest and most primitive fear—that we won’t be taken care of, that those in charge of our care can put their own needs ahead of ours. Clearly the outrage against negligent organizations is overdetermined, but even the rage against our feeling that the world is impersonal and dangerous hearkens back to infancy; the antidote for being treated impersonally and like a number is being treated as special, unique and important, which is fundamentally a part of parent/child love. While the act of condemning makes us feel strong and superior, money, or at least a verdict in our favor, is a sign of importance.

The infant who is not treated well rails against the loss of this basic right to be important. Various psychologists and psychoanalysts call this right a sense of security, safety, basic trust and an experience of “going on being.” The “mother” serves as the archetypal image of such care, although religion as a cultural institution also serves this primitive function for people. Our urge to condemn in cases where a mother or father figure or institution doesn’t care, and our urge to make someone suffer, to get even, speaks of an emotional hurt that needs soothing.

In cases of incommensurability and, at times, in cases of negligence, when juries unpredictably award huge punitive damages they may be making a symbolic expressive statement of their outrage, but they likely also want to express the more personal injunction that someone should have “taken care.” Cass Sunstein, Daniel Kahneman and David Schkade note that punitive damages have a “retributive or expressive function designed to embody social outrage at the actions of serious wrongdoers.” What seems then to appear “arbitrary” and “unpredictable” in the doling out of damages may be a result of such punishments stemming not only from “social outrage” but also from “private fear.” If a government or a company that is

53 See supra note 36.
54 This, of course, is one of the reasons why the outrage against the Catholic church runs so deep. The bishop did not protect. He put the church’s needs before his parishioners’ needs. ERIKSON, supra note 36.
supposed to nurture and support doesn’t, it becomes the target for our most basic aggressive feelings. It becomes the bad parent that must be destroyed to restore the pleasant fiction of a secure world. Fear is about annihilation, and, as Neal Feigenson has shown us in his discussion of “Terror Management Theory,” the unconscious effort to suppress fear, measured through making mortality issues more or less salient, leads people to punish more.56

Condemnation, in the guise of impartiality, serves a psychic goal of punishing the bad parent who did not keep us safe. Laws demanding such care from governments and companies reinforce the profoundly human expectation that everyone should be cared for. When this expectation is challenged, when it becomes clear that those who have power over us may not care or could have put a monetary value to caring, we are more inclined to see the wrongdoer as less than human, a projective screen for evil, and to punish severely.

Defense lawyers sense this and do what they can to make defendants more individual and more human. When a judge or jury’s impulse is to dehumanize the criminal, to make him part of an institution or a monster of greed, the only way to counteract this tendency is to re-humanize him. Bringing defendants’ families into the courtroom is an effort to symbolize that a defendant can take care, that he or she is a caretaker.

The process of making monsters is a process that addresses underlying fears. Governments and corporations may be more vulnerable to being cast as monstrous and, as archetypically male institutions, come to represent the law of the father, stern and overly critical.57 Whenever a defendant fits an archetypal image and evokes primal worries about annihilation, about who counts, and about who will take care of “me,” I suspect juries and judges impose higher damage awards and stronger sentences. Susan Bandes writes about the problems of blaming entities rather than agents with “no soul


57 The father has been cast in this role through Freudian theory; Freud wrote that the Super-Ego, based on identification with the father, was an overly harsh version of the father based on fear instead of actual personal relations. See FREUD, supra note 28.
to be damned, no body to be kicked.\textsuperscript{58} However, institutions can be personified and can come to archetypally represent certain classes of persons about whom we have feelings and expectations. For example, the Catholic church recently has taken a beating. While it is satisfying to some to point the finger at Boston’s Cardinal Law and see him step down, the church itself has lost the trust of many of its parishioners.\textsuperscript{59} The best the church can do is to ask Catholics to separate their attitudes toward the wrongdoing priest from their attitudes toward the church. This would prevent parishioners from personifying the church as a parent who let them down and reconfirm their faith in God as the ultimate parent who provides.

While both institutional representations of mothers and fathers (like teachers and priests) may evoke equally strong reactions in us, actual mothers who are negligent or criminal seem to evoke much more public condemnation or confusion than actual fathers who do wrong. Because of the need to find archetypal representations, mothers are often initially portrayed by prosecutors and the media as monster criminals. Once again, our deepest fears of not being taken care of, deeper, I would argue, than disgust or shame, are most directly evoked when a mother doesn’t take care. Mothers who don’t protect their children well enough are blamed for the aggression perpetrated on their children by their boyfriends. Recently, in Chicago, Tabitha Pollock, a mother who was convicted of first degree murder of her daughter seven years ago was finally acquitted and released after Lawrence Marshall and associates at The Center for Wrongful Convictions at Northwestern University Law School took on her case and convinced the Illinois Supreme Court to overturn her conviction.\textsuperscript{60} What was so interesting about this case was that Tabitha Pollock’s boyfriend, not she, was the murderer, that

\textsuperscript{59} Angie Cannon et al., \textit{Catholics in Crisis}, U.S. NEWS & WORLD REP., Apr. 1, 2002, at 50.
\textsuperscript{60} All Things Considered, (NPR radio broadcast, Nov. 27, 2002) (discussing the conviction and acquittal of Tabitha Pollock for the murder of her daughter). See also Adam Liptak, \textit{Judging a Mother for Someone Else’s Crime}, N.Y. TIMES, Nov. 27, 2002, at A17. It is interesting that right after the state supreme court overturned the Pollock decision, another Chicago mother, Linda Kee, was charged with first degree murder after her boyfriend, who was babysitting, fatally beat her son, Anthony Moore, while she was at work. See Annie Sweeney, \textit{Mom, Boyfriend Held in Child Death}, CHI. SUN TIMES, Nov. 27, 2002, at 11.
she was asleep when it happened, and that she expressed
significant distress and guilt when she learned from the police
that her boyfriend had murdered her daughter.\footnote{Liptak, supra note 60, at A17.}

Mothers like Ms. Pollock become sites of great cultural
conflict—not just condemnation, but ambivalence.\footnote{There
was also significant debate over Hedda Nussbaum, the mother
who did little to prevent her adopted daughter, Lisa Steinberg's
Nussbaum was present, using drugs with her boyfriend, Joel
Steinberg, when Lisa lay dying near her on the floor. Some saw her
as a victim of “Battered Women’s Syndrome.” Others reject the
incapacitation argument, as there were numerous incidents in
the life of this girl that received little attention. For more
information on Nussbaum and the Steinberg case, see Mark
Gabo’s The Killing of Lisa Steinberg at http://www.crimelibrary.com/notorious_murders/family/lisa_steinberg/1.html
(last visited Mar. 5, 2003).}

How could they not care? Headlines and news stories descriptively point
to callousness for its shock value: Natalia Higier, 47, a Latvian
native, “was more concerned about her dog than her child;”\footnote{Marie Szaniszlo
& David Weber, Mother Nabbed in Tot’s Death, BOSTON HERALD, Aug. 16, 2002, at 1.}
and a Scottish newspaper headlined “Mother ‘smoked as baby
was battered to death’” when Andrea Bone, a young mother,
allegedly “sat on a sofa, smoking a cigarette and drinking a cup
of coffee” as her baby was murdered.\footnote{Frank Urquhart, Mother ‘Smoked as Baby
was Battered to Death’, SCOTSMAN, Sept. 25, 2002, at 8.}

In spite of such condemnation, very few mothers who
have murdered their children have been put to death save for
Christina Riggs.\footnote{David Crary, Beyond the Andrea Yates Case; Outcomes Have Varied
Sharply in Trials of Mothers Who Kill Kids, ASSOCIATED PRESS, Aug. 10, 2001.}
Although she offered an insanity defense, which is typical of mothers who
murder their children, she was executed by lethal injection in May of 2000.\footnote{See Emily Yellin, Arkansas Executes a Woman Who Killed Both Her
Children, N.Y. TIMES, May 3, 2000, at A22.}

In cases like Susan Smith\footnote{Rick Bragg, Life of a Mother Accused of Killing Offers No Clues, N.Y.
TIMES, Nov. 6, 1994, at A1.}
and Andrea Yates,\footnote{Megan K. Stack, Killings Put Dark Side of Mom’s Life in Light, L.A.
TIMES, Jul. 8, 2001, at A20.}
media stories focused on whether and how to hold these women
responsible, searching, perhaps, for that syndrome or sign of
insanity that would explain these horrible acts. The media first portrayed
Susan Smith as getting rid of her children to further a love affair, but
when information about her own childhood abuse was revealed,
the media coverage was more sympathetic. Society came to
view Andrea Yates’s murder of her four children as an act of a
severely depressed and unbalanced person, although, in the beginning, the media pointed to her Christian fundamentalism and allegedly authoritarian husband.69

Are women treated differently from men? In the case of Tabitha Pollock and other cases like Linda Kee or Andrea Bone, the mother was charged with the murder of her child that her boyfriend actually committed,70 but Andrea Yates’s husband was not held responsible legally for failing to recognize his wife’s depression as potentially dangerous to his children. Nor was Natalia Higier’s husband Louis, who initially laughed when police questioned him about the child’s injuries, charged.71

Regardless of whether the law treats men and women differently, we know that female jurors may condemn differently. Research shows that in negligence cases, female jurors rated defendants’ behavior as more outrageous than male jurors do.72 Women perceived more punitive intent and recommended higher punitive awards.73 Moreover, women were most punitive and most outraged when the defendant was a woman.74 Are women acting as guardians of maternal care? Do they act as “honorary” men, keeping women in line with regard to their mothering role? Or, do they value care more and condemn it more heartily? Is a woman’s refusal to care, that urge to walk away, more frightening to female jurors? Coming from a position of dependence, which in many communities still characterizes financial relations between men and women, is the refusal to take care even more personally frightening?

Problems of unfairness arise when the law expresses these deepest and most profound impulses, in a way that makes condemnation a defense against our fears of our own impulses as well as our basic insecurities about lack of care. The treatment of individuals as representatives of larger institutions, both real and psychological, poses a problem to a system that prizes autonomy and agency. And the enactment of rage onto institutions and persons without an examination of our own fears guarantees overreaction and even, at times, cruel

70 See supra notes 60-64.
71 See Szaniszlo & Weber, supra note 63.
72 Sunstein et al., supra note 55, at 2100.
73 Id.
74 Id.
punishment. We must examine the way we condemn and the punishments we inflict that are based on fear. In addition, the law may benefit from an examination of how other institutions operate to soothe fears and constrain rageful acting out. I turn now to the family as one such institution that deals with fear and examine which practices best produce moral citizens.

III. PARENTING AND THE LAW

Because expressions of condemnation, motivated by fear and self-preservation, have their roots in family life, parenting practices can be used to understand how the law might best soothe certain impulses that underlie our need to condemn. In its socialization of our youngest moral citizens, the family doles out punishments and addresses fears and insecurities; the way parents, or parental figures, take care—the way they judge, provide support and instill cultural values—forms the foundation of our moral impulses.

Proposing parenting as a model for the state in relation to its wrongdoers, though, is risky business. It flies against our liberal notions of individual autonomy, and it seems to demean citizens to the level of children, while elevating the state to a false hierarchical position of parental overseer. This understanding, however, derives from the fact that parenting is often construed as only a heteronymous relationship, where the "law" of the family is handed down in absolute edicts from adults who are superior in every way to the ones over whom they rule. We use words like "paternalistic" and "patriarchal" not only to describe the rule of the father, but also to describe organizations that depend on hierarchy and prescribe the laws and to describe systems where the rule maker does not give due agency to the person or persons under her care.75

This may be a distorted or one-sided view of parenting, for parents can be more than law makers. Elements of caretaking, for example, which are integral to the problematic institution we call the family, can counteract coercive and hierarchical elements.76 These two functions of the family have

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75 Indeed, an honest assessment of the family does support a view of it as a deeply problematic institution. My analysis seeks not to deny it but rather to uncover other aspects of family life that co-exist with the hierarchical, patriarchal rule that also is foundational. See Carol Gilligan, The Birth of Pleasure (2002).

76 This is a notion set forth by Carol Gilligan in In A Different Voice: Psychological Theory and Women's Development (1989).
been historically represented as a gendered split, with the father representing the rule-enforcing and rule-setting function while the mother represents the care-taking function. Such a split is reflected in our legal institutions where the therapeutic is kept at a distance rather than embedded within the system, as it has been in periods where rehabilitative ideas are prominent.\(^77\)

Parenting, like law, is a system in which those under its care are brought to understand and eventually internalize the law. However, over and over again, research and clinical material suggest that family discipline enforced without love, guidance and care does not produce children who love the law and internalize it as their own.\(^78\) Instead, it produces either empty or fearful do-gooders or rebellious rule breakers.

Research on parenting behaviors has shown that the “authoritarian parent” or the parent who uses “power assertion” produces children who are angry and aggressive,\(^79\) who fail to internalize moral values\(^80\) and who do not develop a coherent sense of conscience.\(^81\) Children whose parents use withdrawal of love to socialize moral behavior may inhibit misbehavior, comply with rules and show self-control; however, these children do so to feel less anxious rather than as an expression of moral standards.\(^82\) In contrast, the authoritative parent uses firm standards and control, communicated with warmth and nurturance to produce children who respect and internalize the law.\(^83\) These kinds of parents confront children with the consequences of their acts and the harm to victims,

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\(^77\) See Garland supra note 9 about this split between the legal and the therapeutic.

\(^78\) Perhaps this observation prompts Judge Judy Mitchell-Davis to hug and kiss juvenile wrongdoers in drug treatment court in Chicago. See Adam Lasker, Her Stock in Trade is “Therapeutic Jurisprudence,” CHI. DAILY L. BULL., June 13, 2001, at 3.


\(^82\) See LAPSLEY, supra note 79, at 191.

\(^83\) See Diana Baumrind’s original work Current Patterns of Parental Authority, 4 DEVELOPMENTAL PSYCHOL. MONOGRAPHS 1 (1971) and more recently The influence of Parenting Style on Adolescent Competence and Substance Use, 11 J. EARLY ADOL. 56 (1991). See also L. Steinberg et al., Authoritative Parenting and Adolescent Adjustment Across Various Ecological Niches, 1 J. RES. ON ADOL. 19 (1991).
show a commitment to the standards they set by noting them consistently and communicate generally that it is “good” to obey legitimate authority. Through care, warmth and nurturance, they convey to the child that he is a worthwhile human being even though he might have done something condemnable. The implication is that condemnation alone, without warmth, won’t work with children. When a parent neither withdraws from the relationship nor indulges his or her own aggressive impulses, the parent generally produces children who feel safer in the world and who obey the law not because it is imposed from above but because it is theirs too—they understand it.

The goal of parenting vis-à-vis moral values is to hope for and support increased agency, internalization, self-regulation and understanding with regard to laws of behavior. Within the family, shaming techniques and love withdrawal are the least effective means of fostering internalization of morality. Children who fear being shamed may avoid wrongful behavior due to anxiety, but they are unlikely to develop a relation to the law that is meaningful and makes them a full citizen to that law. And why? Shaming makes one want to hide; it doesn’t produce pro-social behavior in wrongdoers; it increases internal fantasies of revenge; and it can provoke the child to externalize blame and act out. Finally, shaming can reduce empathy.

The alternative to shaming is not allowing children to do as they wish, but rather inducing guilt through relationship and a strong commitment to standards of behavior. Morris writes that in a “guilt morality,” what is valued is “a relationship with others . . . With guilt we have a conceptual scheme of obligations and entitlements (leading to) the idea of

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84 LAPSLEY, supra note 79, at 192.
owing something to others . . . With guilt one’s status is intact but one’s relationship to others is affected. 87

How do parenting practices relate to our urge to condemn? Those who socialize through shaming, giving “deficiency messages,” threatening separation and blatantly shaming the child, arouse fear of abandonment and produce a fundamental insecurity that can not be relieved because the only way to please the parent is to change the core self. 88 Those children who have received the kind of parenting that addresses fundamental fears and insecurities, even when they do wrong, will need to condemn less. As adults, they will be less inclined to clamor for protection when the slippery sidewalk or the sniper arouses early fears, and will be less likely to need to defend against this panic by seeking aggressive satisfaction in overly harsh sentencing of criminals or high punitive damage awards. 89

In addition, what we have learned about parenting that instills internalized moral values suggests that the acting out of condemnation through shaming techniques, exorbitant awards or overly harsh sentences does little to promote rehabilitation. I further suggest that when the law acts on feelings of condemnation, on its moral outrage, there are psychological as well as social costs.

IV. SHAMING VS. APOLOGY IN THE COURTS

Dan Kahan argues that shaming penalties “unambiguously express condemnation and are a feasible alternative to imprisonment for many offenses.” 90 He divides shaming practices into four categories: (1) those that stigmatize through publicity; (2) those that literally stigmatize; (3) self-debasement; and (4) contrition. I deal with contrition separately from the other three and argue that it need not be a form of shaming. 91 Professor Kahan argues that shaming

87 See HERBERT MORRIS, ON GUILT AND INNOCENCE 60-62 (1976) (noting that messages that convey the child is not good enough or that there is something fundamentally wrong with them).
89 See Albert A. Ehrenzweig, A Psychoanalysis of Negligence, 47 NW. U. L. REV. 855, 856 (discussing our insistence in finding fault when there is none as a way we “clamor for protection”).
90 Kahan, Alternative Sanctions, supra note 4, at 594.
91 Id. at 631.
It resonates with the public, and indeed it does.\textsuperscript{92} It expresses some of our strongest negative emotions, such as hate, disgust and moral outrage. But should we look for a punishment that unambivalently expresses our strongest negative emotions?

To answer that question, we may draw on experiences with shame in our culture, independent of our family experiences. American junior and senior high school students are notorious for shaming practices, especially among boys.\textsuperscript{93} Recent work on girls’ relationships discusses a more verbal, class-related form of shaming that occurs.\textsuperscript{94} While peers shame girls for not wearing clothing from the right stores, boys will be shamed for any behavior that appears feminine, for being too eager in class, for looking weak or for tattling. The quintessential shaming speech act currently in our culture is to call a boy a “fag.”\textsuperscript{95} The quintessential shaming act (memorialized in several teen movies) is to dunk his head in a toilet while others look on and laugh. This latter example clearly illustrates Toni Massaro’s point that shame is not a discrete emotion but involves embarrassment, humiliation and mortification “in porous ways.”\textsuperscript{96} Lest we think that shaming is nothing more than a sign of immaturity, we should recall that shaming is also an all too common parenting practice. Yet, as noted above, researchers and clinicians alike have found that shaming as a parenting practice produces aggressive or tortured individuals.\textsuperscript{97}

In a 1996 article, Kahan cites a 1995 Newsweek poll indicating that the public is prepared to endorse shaming penalties with enthusiasm.\textsuperscript{98} For Kahan, this is one reason punishments should express appropriate condemnation, consistent with desert and equality—because they represent

\textsuperscript{92} Id. at 637.
\textsuperscript{93} See DAN KINDLON & MICHAEL THOMPSON, RAISING CAIN: PROTECTING THE EMOTIONAL LIVES OF BOYS (1999).
\textsuperscript{94} See LYN MIKEL BROWN, GIRLFIGHTING (2003); RACHEL SIMMONS, ODD GIRL OUT: THE HIDDEN CULTURE OF AGGRESSION IN GIRLS (2002); LAMB, supra note 44.
\textsuperscript{95} Michael Kimmel, Mars, Venus, of Planet Earth, Speech given at Saint Michael’s College, Colchester, VT (Oct. 2002) (on file with author).
\textsuperscript{96} Massaro, supra note 5, at 89. For a complete discussion of shame and the law, see Toni M. Massaro The Meanings of Shame: Implications for Legal Reform, 3 PSYCHOL. PUBLIC POLICY & L. 645 (1997).
the public’s emotional response and desires.\textsuperscript{99} He describes the waning of the use of corporal punishment as due to its inconsistency with democratic principles. Corporal punishment, it was believed, reflected a monarchical, hierarchical, master/slave relationship between the law and the wrongdoer. Kahan writes that “[s]haming penalties are free of any historical association with slavery or other forms of inequality,”\textsuperscript{100} a very odd conclusion given the longstanding practice in this country of masters humiliating slaves, straight men humiliating gay men, and men humiliating women through unwanted sex acts. Shaming is indeed a practice that evokes superior/inferior relations, a practice through which (as any junior high schooler will tell you) “in” groups make “out” groups feel inferior and unwanted: rejected.

As with the socialization of children, criminals and other wrongdoers will derive little benefit from wholesale rejection and the ending of a relationship through shaming acts. Instead, as in good parenting practices, we want the relationship between wrongdoer and those he has offended to be salient. We want wrongdoers, when they have done something wrong, to feel not only that they have not acted according to their own standards of behavior but also that they have somehow hurt us. Jeffrie Murphy makes this point nicely in his discussion of the story of Adam and Eve as a narrative that is not only about disobedience to authority but also about the transforming of the relationship between Adam, Eve and God.\textsuperscript{101}

While shame is a moral emotion, and it may be good to feel ashamed for some of the things we have done, producing shame in another person is a different story. We might assume that if shame is a good moral reaction to a bad act, then the induction of shame may be appropriate. But self-produced shame is different from externally produced shame. It comes from a feeling that one has done something that is so wrong one feels embarrassed, humiliated and deeply and profoundly bad. Self-produced shame reflects a conflict between the kind of person we are and who we had hoped we were. Shame derived from external sources is something altogether different, and perhaps we might find a different word for it. Degradation and

\textsuperscript{99} Id.
\textsuperscript{100} Id. at 647.
\textsuperscript{101} Murphy, supra note 22, at 333-35.
humiliation are two words Murphy suggests, and these do not strike at the core of the moral self.  

In condemning, if we do not aim to degrade and humiliate, we aim to make the wrongdoer suffer and, perhaps, to be afraid and to comply with the law out of fear of being ashamed again. But here is the cost to those who condemn. When we act on our aggressive impulses and project our own unwanted fear and insecurity onto others, we will never feel completely safe. When we brutally punish or condemn others to produce shame, we raise two unconscious fears—that we too might be brutally punishable and that the world is very, very unsafe. Linda Ross Meyer raises this point with regard to shaming and the moral worth of human beings, arguing that tying a victim’s moral worth to the offender’s punishment is senseless. This externally produced shame never redresses an imbalance because one cannot assert the moral worth of one person by denying the moral worth of another.

In contrast to shaming practice, apology may produce positive results for the wrongdoer and society. Melanie Klein found that all infants harbor deep aggressive impulses born of frustration and noted that adults carry the worry of these impulses throughout their lives. She suggested that only through acts of reparation can a soul find relief for those internal fears. Thus, acts of apology, even forced apologies, seem to me something apart from shaming techniques and should not be considered a variety of “shaming practice.”

While such practices can evoke shame in the apologizer, they are not generally meant to shame, and thus the distinction between self-produced shame and externally produced shame remains intact. Apologies reconnect the wrongdoer to some party he or she has wronged, if only briefly, whether it is an individual or society. Apologies assert the wrongdoer’s moral worth because he or she is not rejected but rather is brought back into however tenuous a relationship.

102 Murphy, supra note 11, at 24-28.
105 See KLEIN & RIVIERE, supra note 19.
106 Id.
107 Kahan, Alternative Sanctions, supra note 4, at 631.
Apology is distinct from remorse, because the former is an act rather than a feeling and can be performed devoid of feeling. However, apology makes remorse possible in a way that the experiencing of shame may not. Lawrence Voogel, writing on moral responsibility, claims that blameworthiness depends on one’s capacity to be influenced by the world in the right way as well as one’s capacity for proper sensitivity. When we make criminals monsters in order to justify acting on moral outrage and feelings of condemnation, we make them less blameworthy. When we ask for an apology, we hope this act will influence them and suspect that they have the proper sensitivity to carry it out.

Some emotion theory suggests that performing the act associated with the emotion can create the experience of the emotion: “By acting the part of one affected by a given emotion, one can actually awaken some of the feeling characteristic of it.”108 If holding our faces in a smiling position makes us feel happier,109 perhaps because the physiology suggests happiness or because the cognitive associations with that position are evoked through bodily memory, why not ask wrongdoers to enact remorse. In so doing, wrongdoers may actually feel it, and such remorse, more than shame, may work toward deterrence.

Genuine remorse is, of course, better than remorse simply acted and is one of the best possible outcomes of any wrongdoer's punishment from the perspective of making us all feel safer. According to Nicholas Tavuchis, apologies make us feel safer.110 As symbolic expressions of genuine remorse, they are “quintessentially social . . . a relational symbolic gesture occurring in a complex interpersonal field, with enormous reverberatory potential that encapsulates, recapitulates, and pays homage to a moral order rendered problematic [and unsafe] by the very act that calls it forth.”111 Thus, where degradation and humiliation—external shaming—fail to achieve their desired ends, apology may better approximate self-produced shame and its ascendant social benefits.

111 Id. See Mea Culpa for an excellent discussion of the function of apology.
I have argued in this Article that feeling safe and secure is dependent on a variety of factors, some of which are independent of the law. When we are allowed to express our most aggressive feelings through the law, however symbolically, the risk “of disproportionate punishments” is that much higher,\textsuperscript{112} and we never deal with the fear within. Thus, the fear within remains a hidden, yet motivating force and we make others symbolically express that fear for us through experiencing our condemnation and punishment. Naturally we try to deal with our fears through aggression against those who mean us harm; but the restraint of the aggressive impulse, and the opportunity to witness symbolically the remorse of wrongdoers, addresses our fears and creates a counteractive feeling of safety.

Currently, the law allows us to address our fear through the pleasure of retribution. Psychoanalytic theory, however, suggests that such pleasure has its costs. It raises other fears, like the fear of our own impulses—our inability to contain our aggression. When we allow for apology, and when courtrooms give room for remorse, above and beyond the blatantly coercive space for remorse that now exists, we will have less need to see wrongdoers as monsters, less need to turn our fear of our own aggression into disproportional punishments of others who have acted on their aggressive impulses or their own fears.

V. CONDEMNATION AS SYMBOLIC EXPRESSION

Condemnation through the law serves an important expressive function for the culture in the way it reaffirms the kinds of behavior we support and the kinds of behavior we condemn. But it also functions on an individual level by giving expression to the kind of person each of us feels we are, based on the kinds of things we condemn as well as the ferocity of our condemnation. On this individual level, condemnation expresses our relationship to our own “bad” impulses, those that urge us toward selfish and aggressive acts,\textsuperscript{113} as well as to our fears concerning our frailty, our dependence on other people and our smallness in relation to larger events and institutions. In its social function, however, there is a burden to insure that what the law expresses is consistent with larger

\textsuperscript{112} Massaro, \textit{supra} note 5, at 99.

\textsuperscript{113} See Ehrenzweig, \textit{supra} note 89.
social goals and not merely an expression of individual psychological motives, which are often, at heart, contradictory. The urges to shame and wreak revenge, although deep-seated emotions, are not unambiguously experienced or felt. To yoke the law in any one case to only this defensive impulse does a disservice not only to the legal system but also to those who want revenge but are unaware of their more subtle and mixed motives.

If the law is an expression of cultural values, values that children, and all citizens hopefully, wish to obtain, it cannot only condemn wrongdoers; the law must also provide standards and moral ideals. Freud argued that the super ego, that symbolic structure from which moral judgment arises, was not only a restraining, condemning, harsh inner parental voice but also the bearer of ego ideals without which the burden of morality would be that much harder to bear. Tom Tyley wrote that the “law moralizes through good will. Individuals are more disposed to obey particular laws, whether or not those laws accord with their moral beliefs when they perceive the criminal law as a whole to be basically just.” I suggest this observation becomes even more accurate when they perceive the law to be high minded, to elevate and to be more than simply responsive to their baser impulses.

Condemnation through acts of shaming, exorbitant jury awards and overly harsh sentencing, while it expresses and satisfies our impulses to punish and seek revenge, does not address the ideals of our society very well. Instead, in getting revenge or meting out a severe punishment, we may feel satisfied and superior to the offender who is made to suffer, but that superiority comes from a denial of those impulses in ourselves, a projection of those impulses onto the other, an other that we create as a monster and thus as little like us as possible.

Is condemnation then always suspect? Will we always be able to ask of those who condemn, have you looked at yourself too? Is there any act that deserves our total and most unambivalent condemnation? There may be acts that deserve the full strength of our condemnation. Even so, we ought to

114 FREUD, supra note 28.
fully examine the social costs of expressing that emotion as fully as we can.
Emotions combine with cognition to shape our perceptions, memories and judgments. Social psychologists have conducted many studies, especially in the last fifteen years or so, seeking to identify the roles of affect in social judgments, including legal judgments. Psychologists have also studied how people perceive risks to their (or others’) health and safety and, in particular, how their perceptions and related decisions may be biased by various factors that expert risk analysts would consider extraneous to those judgments. In this Article, I draw on some of this research to explore the roles that emotions and risk perceptions may play in jurors’ decision making in cases arising out of the September 11, 2001 attacks on the World Trade Center, should any such cases get that far.

People reacted and continue to react to the 9/11 attacks with strong and complicated emotions, including horror, fear, anger, sympathy and sadness. But how might these or other emotions influence jurors’ attributions of responsibility and blame to, for instance, the Port Authority in a lawsuit alleging (among other things) negligence in the reinforcement and fireproofing of the towers,¹ or to Saudi princes, banks and

¹ Mulligan v. Port Authority, No. 02 Civ. 6885 (S.D.N.Y. Sept. 6, 2002);
charitable organizations in a case alleging (among other things) that these defendants financially aided and abetted the terrorists who committed the attacks?²

In the first portion of this Article, I survey the empirical research on the effects of people’s moods and emotions on their judgments of legal responsibility and blame. This complex body of research indicates that jurors’ emotions may influence their legal judgments in two kinds of ways: by affecting how carefully jurors process trial information, and by inclining jurors toward particular attributions of responsibility or blame. This Section concludes with a discussion of the processes by which emotions influence attributions of responsibility and blame. In the second Section, I summarize more briefly some of the research on lay risk perceptions, the intersections between people’s risk perceptions and their emotions and how both may affect decisions regarding legal responsibility.

In the third Section of this Article, I apply these cognitive and social psychological findings to 9/11 cases against the Port Authority and the Saudis, respectively. The research suggests that while the overall effect of jurors’ emotions and risk perceptions on their judgments in 9/11 cases may very well be increased blaming of defendants, those effects may be quite nuanced and complicated. Jurors’ sympathy for the victims of 9/11 is predicted to incline them to blame the defendants more than they otherwise would, because they will be more inclined to compensate the victims, and the only way they can do this is to hold the defendants liable. Jurors’ anger may increase blaming through several processes: their increased reliance on heuristic cues (e.g., stereotype-based appeals); their increased tendency to interpret ambiguous behavior as blameworthy; and their use of anger itself as a signal that the defendants deserve


blame and punishment. Moreover, fear provoked by the attacks may lead to blaming through at least two distinct processes. Under one process, fear increases the perceived risks of terrorism, which, in combination with the hindsight bias, may lead jurors to hold defendants liable for not having done more to avoid that risk. And to manage the terror that contemplation of their own deaths would otherwise provoke, jurors are likelier to respond punitively to defendants whom they perceive to have challenged their shared cultural norms and symbols.

The complexity of emotional responses and contextual features of juror decision making, however, suggests that the effects of emotions on blaming in these cases are likely to be moderated by several case-specific factors, including the identity of the defendant(s); the legal theory of recovery; the strength of the parties’ respective arguments; and the emotional tonality encouraged by lawyers’ case presentations. In particular, while jurors’ sympathy may play a role in both the case against the Port Authority and the case against the Saudis, their anger and fear are more likely to increase blaming of the Saudis. I also briefly discuss the extent to which jurors may be expected to adjust their judgments appropriately to correct for any emotional influences they perceive to be undesirable.

In a relatively brief Article, I can only skim the surface of the immensely complicated subject of the effects of emotions and risk perceptions on each other and on social judgments. Speculations about likely effects are especially problematic where, as here, the underlying research is inconclusive, the emotions are so complex and conflicting and many situational variables could affect both emotional responses and ultimate judgments. And, of course, what happens in a single case cannot confirm or disconfirm inferences derived from research that yields probabilistic findings. Nevertheless, theory and research on the emotions and risk perception may help us to understand better not only 9/11 litigation but also legal decision making in less exceptional cases.
I. THE ROLE OF EMOTIONS AND MOODS IN ATTRIBUTIONS OF RESPONSIBILITY AND BLAME

It will help to start with a very brief introduction to emotion theory. While any capsule description is bound to be problematic, “emotion” may be defined as:

a complex set of interactions . . . mediated by neural/hormonal systems, which can (a) give rise to affective experiences such as feelings of arousal, pleasure/displeasure; (b) generate cognitive processes such as emotionally relevant perceptual effects [and] appraisals . . . ; (c) activate widespread physiological adjustments to the arousing conditions; and (d) lead to behavior that is often, but not always, expressive, goal-directed, and adaptive.

That is, emotions combine affect, cognition and action (or inclinations to act, whether or not realized).

The primary function of emotions is to signal changes in the environment that are important to the person experiencing the emotion, and to help that person choose among and coordinate competing goals and values. While some of this processing occurs pre- and subconsciously, the signaling function is inescapably cognitive. The cognitive theory of emotions, which just about all research on emotions and social judgment takes to be valid, explains that each emotion depends on an (implicit) appraisal of the significance for the person of changes in that person’s environment. And emotions, or groups of them, can be differentiated based on the general cognitive structures of these appraisals. These cognitive structures are also known as their “appraisal structures” or “core relational themes.” For instance, the cognitive structure of anger is “disapproving of someone else’s blameworthy action and being displeased about the related event,” its core relational theme is

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3 For a brief overview of the psychology of the emotions, from which the following material in the text is adapted, see NEAL FEIGENSON, LEGAL BLAME: HOW JURORS THINK AND TALK ABOUT ACCIDENTS 69-86, 235-41 (2000).
5 Within the general category of affect, “moods, which tend to be less intense, more diffuse, and relatively enduring, and to lack a readily identifiable source, may be distinguished from emotions, which tend to be more intense and short-lived, and to have an identifiable cause.” FEIGENSON, supra note 3, at 235.
6 See ANTONIO R. DAMASIO, DESCARTES’ ERROR 165-201 (1994).
9 ORTONY ET AL., supra note 7, at 148.
to have perceived “a demeaning offense against me and mine.”

The core relational theme of sympathy is to “be moved by another’s [undeserved] suffering and want to help.”

Emotions and moods can influence social judgments in at least two kinds of ways. They can affect the depth of information processing: how carefully people think through the task or message before them. They can also affect how people make particular kinds of judgments, such as estimating risks or attributing blame. I discuss these types of effect in turn.

A. The Influence of Emotions and Moods on Information Processing

Research has uncovered robust effects of emotions and moods on information processing, including receptivity to persuasive messages. Many studies, for instance, have shown “that people in a (moderately) positive mood tend to think more creatively and to be better at drawing associations and [at] inductive reasoning than people in a neutral mood, whereas people in a (moderately) negative mood tend to be . . . better at analytic and deductive reasoning.” Research supporting the prominent Elaboration Likelihood Model (“ELM”) of attitude change, for instance, shows that negative moods lead to more deliberate, bottom-up information processing, more careful consideration of the content of persuasive messages and less reliance on peripheral and heuristic cues.

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10 Lazarus, supra note 8, at 164. In addition, emotional response, expression and interpretation are also shaped by culture, see, e.g., EMOTION AND CULTURE (Shinobu Kitayama & Hazel Rose Markus eds., 1994), even if certain “basic” emotions and their expressions seem to be experienced and recognized across cultures, see, e.g., Paul Ekman, All Emotions are Basic, in THE NATURE OF EMOTION 15 (Paul Ekman & Richard J. Davidson eds., 1994). I put these complications to the side.

11 Lazarus, supra note 8, at 164. Lazarus does not include “undeserved” in his expression of sympathy’s core relational theme, but extensive research by Bernard Weiner (see infra notes 19-21 and accompanying text) and others warrants its inclusion. See Neal Feigenson, Sympathy and Legal Judgment: A Psychological Analysis, 65 TENN. L. REV. 1, 4-8 (1997) (definitions and conditions of sympathy).


13 Richard E. Petty & John T. Cacioppo, The Elaboration Likelihood Model of Persuasion, in 19 ADVANCES IN EXPERIMENTAL SOCIAL PSYCHOLOGY 123 (Leonard Berkowitz, ed., 1986). Relatedly, framing a message negatively (to emphasize risks over benefits) has been shown to induce greater message processing, although this effect is moderated by the audience’s need for cognition and expectations regarding the message frame; i.e., persons low in need for cognition who were led by the title of the stimulus article to expect a negatively framed message engaged in less processing of such a message. Stephen M. Smith & Richard E. Petty, Message Framing and
An increasing amount of research traces the influence of affect on information processing not (only) to the valence of the affective state—whether the mood or emotion is positive or negative—but to particular qualities of the specific emotion experienced. For instance, some studies have found that although anger and sadness are both negatively valenced emotions, only anger leads to less systematic information processing (i.e., greater reliance on heuristics).\(^{14}\) This effect is due to what scholars have labeled the “appraisal tendencies” of the respective emotions. Specifically, some emotions such as anger, disgust and happiness are typically associated with a greater sense of certainty; other emotions, such as hope, anxiety and some forms of sadness, are typically associated with uncertainty. The more certain people feel, the less inclined they are to process information systematically, because they are more confident that they already know what they need to know to address the task at hand. Accordingly, Larissa Tiedens and Susan Linton found that the higher degree of certainty associated with anger, as opposed to sadness (or fear), leads to greater susceptibility to heuristic cues.\(^{15}\) In one experiment, for instance, participants were asked to indicate how much they agreed with an essay on grading policies. In one condition, the essay was presented as a published work and attributed to an education professor (expert); in the other, it was presented in typewritten format, authored by a student (non-expert). Participants who had been induced to feel angry (or another emotion associated with certainty) were influenced by the expertise cues (they registered greater agreement with the “expert” essay); those induced to feel worry were unaffected by these cues. Tiedens and Linton also found that angry

\(^{14}\) Sadness, by contrast, leads to more careful information processing. See Carolyn Semmler & Neil Brewer, Effects of Mood and Emotion on Juror Processing and Judgments, 20 BEHAV. SCI. & L. 423 (2002) (reporting that mock jurors whom simulated case facts made sad were better able to identify testimonial inconsistencies than mock jurors whose mood remained neutral).

participants were less able to distinguish substantively stronger from weaker arguments. Other researchers have similarly found that anger leads people to consider fewer factors when making judgments\textsuperscript{16} and makes them more likely to be influenced by stereotypes in making related social judgments.\textsuperscript{17}

B. \textit{The Influence of Emotions and Moods on the Attribution of Responsibility and Blame}

Psychologists have also identified relationships between emotions and particular judgmental tasks, such as attributing responsibility and blame, as well as the actions or inclinations to act (such as punishing or awarding compensation) associated with those attributions. This research provides varying degrees of evidence for at least four sorts of judgmental paths involving jurors’ emotional responses:

- Path one: from construal of target features to attributions of responsibility to emotional response (and associated actions or inclinations to act);
- Path two: from construal of target features to emotional response to attributions of responsibility (and associated actions or inclinations to act);
- Path three: from emotional state to construal of target features to attributions of responsibility (and associated actions or inclinations to act);
- Path four: from emotional state to attributions of responsibility (and associated actions or inclinations to act).

Differentiating these paths is useful for reviewing the relevant literature and summing up the present state of psychological


\textsuperscript{17} Galen V. Bodenhausen, \textit{Emotions, Arousal, and Stereotypic Judgments: A Heuristic Model of Affect and Stereotyping, in AFFECT, COGNITION, AND STEREOTYPING} 13 (Diane M. Mackie \& David L. Hamilton eds., 1993); Galen V. Bodenhausen et al., \textit{Negative Affect and Social Judgment: The Differential Impact of Anger and Sadness}, 24 EUR. J. SOC. PSYCHOL. 45 (1994). Bodenhausen also reports a study showing that anxiety, like anger, leads to increased stereotypic processing. Most of the studies of the effects of specific emotions on information processing, however, distinguish anger (and happiness) from sadness (or neutral conditions). See Bodenhausen, supra.
knowledge on this topic. Most importantly, differences between
the paths may affect how emotions relevant to potential 9/11
cases are likely to figure in jurors’ decision making.¹⁸

In path one, relevant features of a case can affect
attributions of responsibility and blame, which in turn affect
emotional responses and associated action tendencies. The
research design takes some stimulus of interest—say, how
blameworthy the victim is—as the independent variable, and
measures emotional response and inclination to act on it as the
dependent variable. For instance, in a series of studies
spanning a generation, Bernard Weiner and his associates
have found that emotional responses to suffering depend on
attributions of responsibility.¹⁹ When an observer perceives a
person in need of aid (including a victim of accident, disease or
natural disaster), the observer attempts to discern the cause of
the need. If the cause is perceived to be outside the sufferer’s
control,²⁰ the observer reacts with sympathy and is inclined to
help. If the cause is perceived to be within the sufferer’s
control, the observer reacts with anger and is inclined to ignore
the sufferer.²¹ Thus, emotion figures as an output of the
attribution of responsibility or blame.

¹⁸ I do not mean to argue that emotions, even where jurors feel them, entirely
drive their legal judgments, or that those judgments may not also be subject to other,
non-emotional cognitive biases (such as availability, representativeness, framing
effects and so on). Further, I do not address in this Article the difficult question of the
extent to which the law (notwithstanding the formal proscription of emotional
influence typically found in jury instructions) does or ought to accommodate or even
welcome jurors’ emotions. It can be argued that many aspects of evidence law and trial
procedure acknowledge jurors’ emotions and perhaps even enhance their salience, e.g.,
through dramatic concentration. See generally ROBERT P. BURNS, A THEORY OF THE
TRIAL (1999). And whether legal decision making ought to incorporate emotions to an
even greater degree than it does has been the subject of much spirited debate. See, e.g.,
THE PASSIONS OF LAW (Susan Bandes ed., 1999). (I thank my colleagues Steve Latham,
Greg Loken and Linda Meyer for raising these issues.)

¹⁹ Much of the research is collected and synthesized in BERNARD WEINER,
JUDGMENTS OF RESPONSIBILITY: A FOUNDATION FOR A THEORY OF SOCIAL CONDUCT

²⁰ The dependent variables in the cited research variously include
attributions of control, responsibility and blame; these can be treated as synonymous
for the present purposes. See Feigenson, supra note 11, at 58 n. 247.

²¹ Other researchers have posited other factors as well, such as the actor’s
intent and the absence of adequate justification for the act, as preconditions for a
response of anger. See, e.g., Brian M. Quigley & James T. Tedeschi, Mediating Effects
of Blame Attributions on Feelings of Anger, 22 PERSONALITY & SOC. PSYCHOL. BULL.
1280, 1280-81 (1996). Quigley and Tedeschi found that attributions of blame mediated
the effect of these variables and of the extent of the harm on participants’ anger. They
used a different research design, however, in which participants were asked to
remember an incident in which someone had harmed them, to rate the perceived levels
of harm, blameworthiness and justification, and then to report the amount of blame
In path two, relevant features of a case may provoke emotional responses, which in turn affect attributions of responsibility or blame.\textsuperscript{22} That is, the emotion is an input to, not an output of, the attribution. This path is established by research showing that jurors’ emotions \textit{mediate} the effects of case features, such as the severity of an accident or a party’s blameworthiness, on attributions of responsibility and damage awards.\textsuperscript{23} The case features are the independent variables; the attributions are the dependent variables; the former affect the latter \textit{because} of the effect they have on jurors’ emotions.

For instance, Brian Bornstein has found that sympathy mediates the effect of outcome severity on mock jurors’ responsibility judgments.\textsuperscript{24} In one set of experiments, a product liability lawsuit against the manufacturer of a birth control pill, mock jurors were more sympathetic to the more seriously injured plaintiff, and this greater sympathy made them more likely to find the defendant liable.\textsuperscript{25} Similarly, Jai Park, Peter Salovey and I found in comparative negligence cases that anger mediated the effect of the parties’ blameworthiness and the severity of the outcome on participants’ apportionments of fault (but not their damage awards).\textsuperscript{26} Increasing the severity of the accident made participants angrier at the defendant, which led them to apportion more fault to the defendant. Increasing the
plaintiff's blameworthiness made them angrier at the plaintiff, which led them to apportion more fault to the plaintiff.\textsuperscript{27}

Why do emotions figure in people's blaming in these ways? What functions do emotions serve in these first two paths—what are emotions doing, for instance, when they mediate the effect of case features on jurors' attributions of blame? The most plausible explanation is that in these situations, people use their current emotional state (affect) as an informational cue regarding the judgment target. For example, because the cognitive or appraisal structure of anger is "disapproving of someone else's blameworthy action and being displeased about the related event,"\textsuperscript{28} being angry sends a signal\textsuperscript{29} to the person that the target of judgment has behaved in a blameworthy fashion and, therefore, deserves to be blamed (path two). Similarly, because the cognitive structure of sympathy includes an awareness that another is suffering undeservedly and a desire to help,\textsuperscript{30} feeling sympathy for a target thus signals that the person is not to blame (path two) and deserves to be helped (path one).

These paths involve what may be labeled intrinsic emotion sources: Features of the judgment target itself provoke decision-relevant affective responses. Extrinsic emotions, ones provoked by stimuli incidental or extraneous to the judgment task, have also been shown to affect attributions of responsibility and blame, as well as other kinds of judgments.\textsuperscript{31}

\textsuperscript{27} Outcome severity is, of course, legally relevant to the determination of damages if the defendant is found liable. It may even be legally relevant to the determination of fault to the extent that the decision maker uses the (type and) extent of the harm that actually occurred to infer the harm that should have been foreseen, and hence whether the defendant failed to use reasonable care when it failed to avoid (or otherwise increased the risk of) that harm. Such reasoning, however, is prone to the hindsight bias and anchoring effects, among other non-emotional cognitive biases. The research cited in the text does not dispute these contentions; it simply shows that outcome severity can affect attributions of fault and liability because it affects the amount of anger jurors feel toward the responsible party.

\textsuperscript{28} Ortony et al., supra note 7, at 148.

\textsuperscript{29} See Damasio, supra note 6.

\textsuperscript{30} See Feigenson, supra note 11, at 4-8 (noting definitions and conditions of sympathy).

\textsuperscript{31} See Reid Hastie, Emotions in Jurors' Decisions, 66 Brook. L. Rev. 991 (2001). Hastie classifies as "anticipated emotions" most of what I regard as intrinsic emotions, arguing that the sympathy, anger and so on that the case itself may engender are best understood in terms of the decision maker's desire to decide in such a way as to relieve the emotional disquiet the case produces; thus, anticipated emotions concern the expected consequences of the decision. Id. at 1004-06. Hastie reserves for the category of "decision-relevant" emotions the effects on information processing believed to obtain while the decision maker is deciding. Id. at 1002-04.
Paths three and four start from emotional responses to extrinsic stimuli.

In path three, extrinsically induced emotion affects the way people construe the relevant features of the target, which in turn affects their subsequent judgments. For instance, research consistently shows that people who are angry tend to blame more. Jennifer Lerner, Julie Goldberg and Philip Tetlock found that participants who viewed an anger-provoking video clip and then read several vignettes of accident cases blamed the defendants who caused the injuries more than did participants who had watched an emotion-neutral video.\(^{32}\) Similarly, Dacher Keltner, Phoebe Ellsworth and Kari Edwards found that angry participants tended to attribute more responsibility to the person than to the situation regarding ambiguous social mishaps; sad participants did the opposite.\(^{33}\) Keltner and his colleagues found that anger and sadness affected participants’ attributions of causal responsibility, which in turn affected blaming.

The process or mechanism posited to explain this influence of extrinsic emotion on subsequent judgments of responsibility is *appraisal tendency*, the same process offered to explain the effects of specific emotions on information processing mentioned above.\(^{34}\) Experiencing an emotion makes

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\(^{32}\) Lerner et al., *supra* note 16.

\(^{33}\) Dacher Keltner et al., *Beyond Simple Pessimism: Effects of Sadness and Anger on Social Perception*, 64 J. PERSONALITY & SOC. PSYCHOL. 740 (1993). The only other study of specific extrinsic emotion effects on blaming judgments that I have been able to find is Dennis Gallagher & Gerald Clore, *Effects of Fear and Anger on Judgments of Risk and Evaluations of Blame* (unpublished paper presented at proceedings of Midwestern Psychological Association, May 4, 1985) (discussed *infra* note 46).

\(^{34}\) See *supra* notes 15-16 and accompanying text. Appraisal tendency may appear to resemble closely what the literature refers to as *affect priming*, at least in a loose sense of that phrase which encompasses any exposure preceding the judgment task to a stimulus with properties congruent, or that the participant may perceive to be congruent, with properties of the judgment target. See, e.g., Forgas, *supra* note 12, at 10-13. Thus, in the appraisal tendency research, the appraisal theme or cognitive structure of the experienced emotion biases subsequent judgments that relate to that theme or structure, and does so in the directions one would expect. Anger makes people blame more by priming them to interpret ambiguous features of a scenario consistently with anger’s appraisal theme, in which human agency causes bad outcomes. Anger makes people less pessimistic about future risks because anger’s appraisal tendency includes a sense of control and certainty, which makes them think that future events can be known and controlled. This sense of control tends to undermine the perceived seriousness and frequency of future events, according to the psychometric model of risk perception. See *infra* notes 75-83 and accompanying text. In the strict sense, priming may bypass cognitive appraisals entirely. Robert B. Zajonc, *Feeling and Thinking: Closing the Debate Over the Independence of Affect*, in *FEELING & THINKING: THE ROLE OF AFFECT IN SOCIAL COGNITION*, 31, 49-50 (Joseph P. Forgas ed., 2000) [hereinafter
features of that emotion’s cognitive structure more accessible and thus more likely to be utilized (consciously or not) in subsequent perceptions and judgments. Accordingly, angry people blame more because the cognitive structure of the anger they experience (e.g., “disapproving of someone else’s blameworthy action and being displeased about the related undesirable event”) makes salient the role of other people, as opposed to situational factors, as causes of harm, which in turn engenders blame. In this way, emotion influences blaming judgments indirectly: path three proceeds from extrinsic emotion to attribution (of causation or fault) and thence to judgment of blame and inclination to punish.

One especially interesting feature of the appraisal tendency process is that even when people are aware that the source of their emotional state has nothing to do with the judgment target, the emotion continues to affect their judgments. Anger, for instance, has been shown to persist past the emotion-provoking episode in the form of a residual arousal.

FEELING AND THINKING]. Jennifer Lerner told me that she views appraisal tendencies “as a kind of affect priming [that] go beyond the general ‘priming’ label by specifying the mechanisms” by which the effects on judgments occur (personal communication, September 24, 2002). Another way of thinking about this is that appraisal tendency refers to the “functional ends” of appraisal, while priming, as generally understood, does not require this functionalist orientation. Jennifer S. Lerner & Dacher Keltner, Fear, Anger, and Risk, 81 J. PERSONALITY & SOC. PSYCHOL. 146, 147 (2001).

This is true whether the emotion induction itself involved appraisals of causal responsibility (e.g., stories meant to provoke anger or sadness) or was purely physical (e.g., adoption of facial expressions and postures indicated by anger and sadness) and thus largely non-cognitive, proving that it was the experience of the emotion rather than the cognitive appraisals alone that influenced subsequent attributions. Keltner et al., supra note 33, at 748-49.

ORTONY ET AL., supra note 7, at 148.

Keltner et al., supra note 33. Arguably, Keltner, Ellsworth and Edwards’s article is the only set of studies that unambiguously shows appraisal tendency effects on judgments of blame. In Sober Second Thought, Lerner et al. do not clearly state that appraisal tendency is the process behind their finding that angry participants blamed and punished more; they even state that their findings “might represent a form of misattribution,” but then carefully explain in a footnote why they do not believe that affect as information best accounts for their results. Lerner et al., supra note 16, at 572, 573 n.9. It does not seem that the emotion effects in Lerner et al.’s study, by enhancing the salience of human agency in ambiguous situations, had similar results to those in Keltner et al., supra note 33, because in all four scenarios, the causal role and indeed culpability of the human protagonist was quite clear. Lerner et al., supra note 16, at 572. In their subsequent papers on the effects of emotions on risk perception, however, Lerner and her colleagues define the appraisal tendency model more thoroughly and provide empirical evidence. See, e.g., Lerner & Keltner, supra note 34; Jennifer S. Lerner & Dacher Keltner, Beyond Valence: Toward a Model of Emotion-Specific Influences on Judgment and Choice, 14 COGNITION & EMOTION 473 (2000) [hereinafter Beyond Valence]. In these papers, they cite Sober Second Thought as well as Keltner et al.’s 1993 paper as instances of appraisal tendency effects.
or excitation, which may then influence subsequent, unrelated decisions.\textsuperscript{38} Apparently, people remain at least partly unaware of the ways in which that emotion has primed them to construe the target.\textsuperscript{39}

In path four, as in paths one and two, people take their experience of an emotion as \textit{directly informative} about the target of their judgment.\textsuperscript{40} Indeed, the literature describes path four as the \textit{affect-as-information} model.\textsuperscript{41} The difference between this path and paths one and two is that here, the real source of the emotion is extrinsic. But how can extrinsic emotion, which by definition is not provoked by the judgment target, possibly be regarded as directly informative of the judgment target? It can when people \textit{misattribute} their emotional response to the target instead of its true source. For instance, in a classic study, people asked on rainy days to gauge their life satisfaction gave more negative responses than did people asked on sunny days.\textsuperscript{42} When the attention of the former group of respondents had been called to the weather, however, the difference disappeared.\textsuperscript{43} That is, people took their current mood (negative or positive) as informative about the judgment target ("How satisfied am I with my life?"). In effect, they misattributed the experienced emotion, which was provoked by something not relevant to the target of judgment, to the target. When the misattribution was corrected by


\textsuperscript{39} Lerner et al., \textit{supra} note 16, at 570; see also Zajonc, \textit{supra} note 34, at 51-52 (finding that affective priming influenced liking even when participants were told about possible extrinsic source effects).

\textsuperscript{40} Thus, while path four resembles path three in that the source of the emotion is extrinsic, it differs from path three in that the effect on social judgment is direct rather than indirect.


\textsuperscript{42} Schwarz & Clore, \textit{Mood and Misattribution, supra} note 41, at 519.

\textsuperscript{43} \textit{Id.} at 520.
identifying the true source of their emotion, the effect disappeared.\footnote{Id.}

Extrinsic emotion effects on many sorts of decisions, from judgments of life satisfaction to risk perceptions,\footnote{David DeSteno et al., Beyond Valence in the Perception of Likelihood: The Role of Emotion Specificity, 78 J. PERSONALITY & SOC. PSYCHOL. 397 (2000).} have been explained in terms of the affect-as-information mechanism. This process has also been invoked to explain extrinsic emotion effects on judgments of blame,\footnote{Gallagher & Clore, supra note 33. This brief, unpublished research report does not clearly distinguish between the affect-as-information and appraisal tendency processes. The authors write that “[t]he idea guiding the present work is the notion that people use their momentary feelings as information for making judgments,” which is the main idea of affect-as-information. Id. (manuscript at 2). They also conclude that “[t]he effects observed in this study are consistent with the notion that feeling states provide the experiencing person with information with which to make judgments.” Id. (manuscript at 8). Their finding that anger influenced an anger-related judgment (by leading participants to blame more) and not a fear-related judgment, however, is consistent with affect priming as well. Norbert Schwarz, one of the leading proponents of the affect-as-information account, also explains the findings of Keltner, Ellsworth and Edwards in Beyond Simple Pessimism: Effects of Sadness and Anger on Social Perception in these terms, although, as noted above, Keltner et al.’s studies seem to provide the least ambiguous support for the appraisal tendency model. Schwarz, Feelings as Information, supra note 41, at 541, 544 (explaining Keltner et al., supra note 33).} although, to the best of my knowledge, no studies directly test the process using such judgments as the dependent variable.

Another type of emotion influence on blaming and other social judgments that is highly relevant to the inquiry into 9/11 cases and can be prompted by either intrinsic or extrinsic stimuli is described by terror management theory. According to this line of research, people’s awareness of their own mortality and what would otherwise be their consequent terror at the prospect of personal annihilation engenders two levels of defensive reactions: conscious efforts to suppress thoughts of death or to rationalize death-risking conduct, and subconscious efforts to defend the cultural worldview that is one’s bulwark against impermanence and meaninglessness.\footnote{Jeff Greenberg et al., Terror Management Theory of Self-Esteem and Cultural Worldviews: Empirical Assessments and Conceptual Refinements, in 29 ADVANCES EXPERIMENTAL SOC. PSYCHOL. 61 (1997); Tom Pyszczynski et al., A Dual-Process Model of Defense Against Conscious and Unconscious Death-Related Thoughts: An Extension of Terror Management Theory, 106 PSYCHOL. REV. 835 (1999).} The terror or fear that drives this latter defensive process is not consciously experienced (at least, not if the defenses are working), so it is not the emotion, but rather emotion-relevant thoughts, that mediate the effects of mortality salience on consequent
judgments. Nevertheless, terror regarding the threat of personal annihilation is the motivating force for this process.

When people’s mortality is made salient, they punish more severely those who transgress cultural norms. They also feel greater attachment to shared cultural symbols. For instance, participants in one experiment were asked to sift sand from dye and were given either a white cloth or an American flag to do the job; everyone did it, but those who had been induced to think about their death took longer to use the flag and expressed greater reluctance about doing so. They indulge in more racial/cultural stereotyping. And they attribute more blame to members of outgroups. In another experiment, participants were shown a video of an auto accident said to be the result of a defect in either an American or Japanese car. Those who had been induced to think about their mortality blamed the Japanese car manufacturer more than did those who had not.

At least in theory, jurors’ decision making in 9/11 (or other) cases could reflect the impact of any or all of the emotions mentioned so far—sympathy, anger, fear—as well as any or all of the paths of emotional influence described above.

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48 Pyszczynski et al., supra note 47, at 836-37. Hence, the effect of mortality salience on subsequent judgments most resembles path two, except that emotion-relevant thoughts, rather than emotional experience, mediate the effect of the independent variable (mortality salience) on the dependent variable (e.g., blame or punishment).


50 Jeff Greenberg et al., Evidence of a Terror Management Function of Cultural Icons: The Effects of Mortality Salience on the Inappropriate Use of Cherished Cultural Symbols, 21 PERSONALITY & SOC. PSYCHOL. BULL. 1221 (1995). The mortality salience manipulation varies from one experiment to another. In the cited experiment, researchers asked participants to “please describe briefly the emotions that the thought of your own death arouses in you” and to “jot down, as specifically as you can, what you think will happen to you as you physically die and once you are physically dead.” Id. at 1223.

51 Greenberg et al., supra note 47, at 82-83.


53 For instance, research suggests that extrinsic emotion may affect jurors’ decision making through both paths three and four, i.e., through both the appraisal tendency or priming and affect-as-information processes. According to the most comprehensive model of the relationships between affect and social cognition, the Affect Infusion Model (“AIM”), affects priming and affect as information could influence jurors’ decision making, although it is not clear which process would be more important. See Joseph P. Forgas, Affect and Information Processing Strategies: An Interactive Relationship, in FEELING AND THINKING: THE ROLE OF AFFECT IN SOCIAL
It is worth identifying the processes as well as the emotions because jurors’ judgments are likely to depend on the how as well as the what of affective influence. I sketch a few possibilities below.

While all emotional responses reflect an appreciation (even if partly subconscious) of the relevance for the self of something in the perceiver’s environment, some emotions implicate the ego more than others. Specifically, the anxiety aroused by the awareness of one’s own mortality, which leads to a variety of defensive coping mechanisms, such as terror management, is a more highly ego-driven response to the environment than, say, sympathy (or anger resulting from other processes). This difference may be important because highly ego-driven emotional responses may be more durable, and their effects less amenable to correction or debiasing, than others.

Among the “cooler,” less ego-driven emotional effects, we need to distinguish intrinsic from extrinsic sources of emotion. Because intrinsic emotion sources are located in the judgment target itself—the parties and the facts of the case—lawyers are likelier to succeed in arousing the corresponding emotions (should they choose to do so, and perhaps in some instances even if they do not). The probative value of the potentially emotion-provoking evidence is less likely to be outweighed by the danger of undue prejudice than it is when the emotion source is recognizably dubious or of no legal relevance, as it is when the source is extrinsic. Therefore, simply in the course of appropriately presenting evidence and making arguments regarding the severity of the harm the plaintiffs suffered and the blameworthiness of the defendants’ conduct, lawyers are likely to trigger the emotional effects described by paths one

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Cognition 253 (Joseph P. Forgas ed., 2000); Joseph P. Forgas, The Role of Emotion in Social Judgments: An Introductory Review and an Affect Infusion Model (AIM), 24 EUR. J. SOC. PSYCHOL. 1 (1994); see also Feigenson, supra note 3, at 237-38. This dual effect (for both priming and affect as information on juror judgments) would also be consistent with the Elaboration Likelihood Model (“ELM”) of persuasion: Appraisal tendency or priming would be likely to occur under what ELM describes as “high elaboration” conditions (what Forgas refers to as “substantive” processing), while affect as information would more likely occur under “low elaboration” conditions (what Forgas refers to as “heuristic” processing). See Richard E. Petty & Duane T. Wegener, The Elaboration Likelihood Model: Current Status and Controversies, in Dual-Process Theories in Social Psychology 41 (Shelly Chaiken & Yaacov Trope eds., 1999).

54 See supra note 7 and accompanying text.
55 See FD. R. EVID. 403.
Extrinsic emotion sources should fare differently to the extent that they are recognized as extrinsic. When people are made aware that the source of their emotion is actually extrinsic to the target, they regard the emotion as irrelevant to their judgment task; the emotion should, therefore, cease to have any directly informational effect. The affect-as-information mechanism from extrinsic emotion to judgment depends on the misattribution of that emotion to the target. By definition, this mechanism works only when the true source of the emotion is unrecognized. Relatedly, jurors are more likely to follow judicial instructions to disregard emotional influences that the jurors themselves perceive to be extrinsic, and therefore irrelevant to their judgment task.

By contrast, even recognized extrinsic emotion may influence judgment through the appraisal tendency process.

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56 Compare the doctrine of “intra-judicial” vs. “extra-judicial” bias as it pertains to the disqualification or recusal of judges. The federal standard regarding extrajudicial bias is set forth in 28 U.S.C. § 455(b)(1) (2002): A judge should disqualify himself whenever he has a “personal bias or prejudice concerning a party . . . .” With regard to bias arising from the litigation itself—extra-judicial bias—disqualification is warranted only when the judge’s remarks “reveal such a high degree of favoritism or antagonism as to make fair judgment impossible.” Liteky v. United States, 510 U.S. 540, 555 (1994).

57 See supra text accompanying notes 43-44.

58 See Jonathan M. Golding et al., Instructions to Disregard Potentially Useful Information: The Effects of Pragmatics on Evaluative Judgments and Recall, 29 J. MEMORY & LANGUAGE 212 (1990) (finding that jurors follow instructions to disregard evidence when they believe that the evidence has been excluded for irrelevance, and not for “technical” reasons that do not undermine its relevance). For research indicating that people take extrinsically induced emotion into account when they deem it relevant to their decision task but not otherwise, see Karen Gasper & Gerald L. Clore, Do You Have to Pay Attention to Your Feelings To Be Influenced by Them?, 26 PERSONALITY & SOC. PSYCHOL. BULL. 698 (2000). Extrinsic emotion effects on judgment would also seem to be normatively unjustifiable, see Hastie, supra note 31, at 1002, but judges’ instructions typically advise jurors not to be influenced by any emotions: “Your verdict must be based absolutely and solely upon the evidence . . . . You should not be swayed or influenced by any sympathy or prejudice for or against any of the parties.” Douglass B. Wright & William L. Ankerman, 1 CONNECTICUT JURY INSTRUCTIONS (CIVIL) § 312, at 510 (1993). See Feigenson, supra note 11, at 13 (discussing law’s exclusion of emotion). Standard instructions do not distinguish between what is labeled here as extrinsic or intrinsic sources of emotion; if anything, the standard instruction quoted above focuses on intrinsic sources.

59 See supra notes 32-37 and accompanying text. It can be argued that with regard to extrinsic specific emotions (as opposed to moods), appraisal tendency is a more likely mechanism than affect as information, because people are less likely to misattribute the source of a specific emotion (to the target) than they are a more diffuse mood. See Klaus Fiedler, Affective Influences on Social Information Processing, in HANDBOOK OF AFFECT AND SOCIAL COGNITION 163, 174-75 (Joseph P. Forgas ed., 2001); Lerner et al., supra note 16, at 573 n.9. But cf. supra note 45 and accompanying
In this process, as discussed earlier, emotion influences attributions of responsibility by priming people to interpret an ambiguous situation in accordance with the cognitive structure of the emotion. This suggests that for appraisal tendency effects to occur, the claim or defense must implicate emotion-relevant features (e.g., human agency as an element of blameworthiness), and those features cannot already be so salient that there is no room for the emotion to make them significantly more salient.

Yet this is not all. So far I have discussed more or less linear paths between individual emotions and judgments. Affective responses, especially to a tragedy like 9/11, are likely to be more complex than this. Researchers have identified three kinds of complex relationships among multiple emotions and attributions of responsibility and blame.

First, the relationship between an emotion and an associated pattern of blaming or other judgment can form a feedback loop. For instance, blame arising from the construal of target-relevant features, or the construal of those features itself, can generate anger (paths one and two, respectively). That anger then makes salient the role of other people as causes of harm, which engenders blame (path three).

Thus, anger and attributions of blame comprise a feedback loop, a reciprocal relationship in which each can increase the other.

In Beyond Simple Pessimism: Effects of Sadness and Anger on Social Perception, which reports the experiments that most clearly articulate path three, the judgment scenarios were highly ambiguous as to human versus situational agency. Keltner et al., supra note 33. In Sober Second Thought, at least two of the four scenarios quite plainly indicated that the defendant was responsible. Lerner et al., supra note 16. Effects were still found for extrinsically induced anger, but it is difficult to interpret these as other than consistent with path three, because the authors did not separately measure attributions of causation and collapsed their measures of blame, deservingness of punishment, etc. into a single punitiveness measure. Id. at 567, 572.

See Quigley & Tedeschi, supra note 21; cf. Larissa Z. Tiedens, The Effect of Anger on the Hostile Inferences of Aggressive and Nonaggressive People: Specific Emotions, Cognitive Processing, and Chronic Accessibility, 25 MOTIVATION & EMOTION 233, 248 (2001) (noting that aggressiveness, anger and the drawing of hostile inferences create a vicious cycle). Additional evidence of a feedback loop is suggested by a study showing that experimental instructions to adopt the perspective of a target person, leading to more sympathy for that person, leads participants to attribute to the target more of the participants’ own positive traits. See Mark H. Davis et al., Effect of Perspective Taking on the Cognitive Representation of Persons: A Merging of Self and Other, 70 J. PERSONALITY & SOC. PSYCHOL. 713 (1996). If sympathy, which includes perspective taking, is elicited by case-relevant features (paths one and two), that sympathy might then affect jurors’ subsequent interpretations of the facts of the case, further biasing the judgments they derive from those interpretations. See Feigenson,
Second, the effects of one emotion can be overcome by the effects of another. For instance, in a study of judgments in comparative negligence cases, Jai Park, Peter Salovey and I found that mock jurors’ sympathy for an accident victim was partly overcome by their anger toward the victim. What alerted us to this possibility was the finding that participants’ decisions were biased against victims: The more serious the accident, the more participants blamed the victim, not the defendant. Participants did feel sympathy for the victims (as Weiner’s research would predict), and they felt more sympathy the more seriously the victim was injured (as Bornstein found). Yet, they also grew angrier at the victim and were less able to imagine themselves in the victim’s place, the more blameworthy the victim was. This anger and lack of empathy are hallmarks of defensive attribution, an intuitive habit of thought in which observers, by blaming an accident victim, distance themselves from the victim and preserve their belief that they will not find themselves in the same position. Defensive attribution is a way of coping with fear. Thus, anger, driven by fear, can at least partly trump sympathy for an accident victim.

Third, different emotional responses can also complement one another. In another study of comparative negligence judgments, participants seem subconsciously to have taken into account their emotional responses to each party in deciding how they felt about the other party. Correlational analyses indicated that the angrier participants got at the defendant, the more sympathy and sadness they felt.

The notion of the feedback loop suggests that appraisal tendency effects may not be limited to extrinsic emotion. Although, to the best of my knowledge, there is as yet no research that directly shows appraisal tendency effects using intrinsic emotion sources, Quigley and Tedeschi used what is best described as an intrinsic stimulus to obtain significant paths from blame to anger and also from anger to blame. Quigley and Tedeschi cited, among other sources, Keltner et al., as consistent with their findings. Quigley & Tedeschi, supra note 21; Keltner et al., supra note 33.

Neal Feigenson et al., Effect of Blameworthiness and Outcome Severity on Attributions of Responsibility and Damage Awards in Comparative Negligence Cases, 21 LAW & HUM. BEHAV. 597 (1997).

See supra notes 19-20 and accompanying text.

See supra notes 24-25 and accompanying text.

That is, the more seriously injured the accident victim, the more anxious our mock jurors became about the prospect of suffering such a terrible fate themselves, and the more inclined they were to respond defensively to that fear.
for the plaintiff; the angrier they felt toward the plaintiff, the greater their sympathy for the defendant. 68

In sum, the important connections between emotions and blaming judgments that may be especially germane to jury decision making in 9/11 cases are as follows: Sadness leads to more careful, systematic information processing; anger leads to less careful thinking and more reliance on stereotyping and other heuristic cues. Sympathy for victims and anger (whether extrinsic or aroused by the defendant) both lead to greater blaming of defendants, although anger directed at the victim (through defensive attribution) can trump sympathy and thus (through complementarity) decrease blame for the defendant. And just as anger may increase blame, greater blaming in turn may lead to more anger, creating a feedback loop. Finally, the subconscious effort to suppress the fear or anxiety created by mortality salience leads to greater stereotyping of outgroup members and more punishment for those perceived to have violated shared cultural norms or symbols.

II. RISK PERCEPTIONS, EMOTIONS AND RELATED JUDGMENTS

Let me move on to the topic of people's risk perceptions and their susceptibility to emotional and other kinds of bias. First, I introduce one of the leading theories that seek to explain lay risk perception, the *psychometric theory*. Then I discuss some recent findings on how emotions may bias risk perceptions. Finally, I briefly mention how media coverage of a risk may also bias risk perceptions and related judgments.

A robust finding in the risk perception literature is that popular estimates of the likelihood and seriousness of various risks, as indicated in survey responses and associated behaviors, often diverge from expert estimates of the objective probability and severity of those risks. For instance, people (based on data from about twenty years ago) tended vastly to overrate the riskiness of nuclear power plants and underrate the riskiness of smoking and motor vehicle accidents, relative to the respective risks as experts perceived them.

68 FEIGENSON, supra note 3, at 104. This suggests that participants were attempting to balance emotional accounts between the parties (and not just legal accounts, as the law of comparative negligence required by instructing that the assigned percentages of fault sum to 100%). This and other evidence suggests that jurors try to conceive of their decision as a satisfying whole, emotionally as well as cognitively. See id.
Why? Various theories have been proposed to account for this and other patterns in popular risk perception. One leading theory is the psychometric paradigm,\(^6\) which posits that ordinary people perceive risks to be more serious the more dreaded and the more unknown the risks are.

A risk is dreaded to the extent it is perceived to be uncontrollable, involuntary and potentially catastrophic in its consequences. A risk is unknown to the extent it is new, not observable and not understood. Thus, people dread a nuclear reactor accident because they think that there is nothing they can do about it and the consequences would be catastrophic; it is unknown because nuclear radiation cannot be seen, its workings are obscure to laypeople and it is thought to be “unnatural.” Hence, people (in the early 1980s) perceived it to be among the most serious risks. Motor vehicle accidents, by contrast, are much less dreaded because people think they can control their vulnerability (“It won’t happen to me because I drive more safely than most people”); such accidents are also not unknown because they are a familiar, easily visualized risk. People tended to take them much less seriously.\(^7\)

The point of the psychometric model is not that popular risk perceptions usually diverge from those of experts—often they do not—or that they are “wrong” when they do,\(^8\) but simply that factors other than objective data tend to guide popular risk perceptions.

One relevant research finding consistent with the psychometric paradigm is that the more people dread a risk, the more people believe that steps should be taken to regulate or eliminate it. For instance, dread of cancer led to the Delaney Clause, which requires the FDA to ban any carcinogenic substance added to food, regardless of the cost of avoiding the risk or the benefits of declining to avoid it.\(^9\)

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\(^{7}\) See Slovic et al., Behavioral Decision Theory, supra note 69, at 28-35.

\(^{8}\) See, e.g., Baruch Fischhoff, Heuristics and Biases in Application, in Heuristics and Biases: The Psychology of Intuitive Judgment, supra note 41, at 730.

People’s moods and emotions can influence their risk perceptions. A classic study by Eric Johnson and Amos Tversky showed that negative mood, consisting of sadness and anxiety, induced by reading a story about a person’s death tended to increase the perceived likelihood of all kinds of health and safety risks, whether or not related to the subject matter of the story. \(^73\) Thus, negative affect had a generalized effect on risk perception. \(^74\)

More recent research on the role of affect in risk perceptions, like that on affect and judgments of responsibility and blame, has pursued the influences of specific emotions rather than more generalized moods. Jennifer Lerner and Dacher Keltner have found that fearful people are more likely to think that bad things will happen to them; i.e., they make pessimistic risk estimates. \(^75\) Angry people are more optimistic, and less likely to believe that bad things will happen to them. \(^76\) Lerner and Keltner argue that angry people make more optimistic risk estimates than sad people because the appraisal tendency of anger is associated with greater certainty and control, which tends to reduce or negate those qualities of risks that (according to the psychometric approach) make people concerned about them—the extent to which those risks are dreaded and unknown. Thus, emotion affects risk perception because the cognitive structures or appraisal tendencies of the respective emotions (anger, fear) either do or do not respond to the cognitive components of perceived risk, as explained by the psychometric approach. \(^77\) Moreover, these emotion effects are account for divergences between lay and expert risk perceptions; his approach differs in some respects from the psychometric model, but resembles it in that he thinks that lay risk perceptions and lay judgments regarding the advisability of risk-avoidance measures are based on people’s “visceral” sense of the seriousness of risks, rather than the kind of cost-benefit analysis based on objective data that a professional risk analyst would favor. See generally id.


\(^74\) Id.

\(^75\) Lerner & Keltner, supra note 34; Lerner & Keltner, Beyond Valence, supra note 37.

\(^76\) Lerner & Keltner, supra note 34; Lerner & Keltner, Beyond Valence, supra note 37.

\(^77\) Cf. DeSteno et al., supra note 45 (finding emotional congruence in risk perceptions: Angry people believe that angering events are more likely to occur than sad ones; sad people believe the opposite). DeSteno et al.’s findings, which they explain in terms of the affect-as-information process, are not directly in conflict with those of Lerner and Keltner, due in part to the different dependent measures used in the respective studies. A direct test of the two approaches to emotion effects on risk perception could be conducted, e.g., by measuring the effects of anger on items high on
most pronounced when the certainty and controllability of the future event are ambiguous; clearly controllable or uncontrollable events do not display the same pattern.\textsuperscript{78}

Most recently and most directly on point, Lerner and other colleagues have found, in a study conducted since 9/11, that asking people to reflect on the fearful aspects of the 9/11 attacks increased their subsequent estimates of the risk of terrorism as well as other, unrelated negative events (e.g., getting the flu or being victimized by violence other than another terrorist attack), while asking them to reflect on the anger-provoking aspects of the attacks reduced those estimates.\textsuperscript{79} People’s emotional reactions to 9/11 displayed several other interesting features as well.\textsuperscript{80} First, their post-9/11 risk estimates were wildly inflated relative to any plausible objective measure. For instance, respondents rated the likelihood that they themselves would be hurt in a terrorist attack in the year following 9/11 at 20.5\% (and the likelihood that the “average American” would be hurt at 47.8\%).\textsuperscript{81} Second, as these and other figures exemplify, people also believed that bad things are much more likely to happen to others than to themselves—the “optimism bias.”\textsuperscript{82} Finally, people’s emotional responses to 9/11 also affected their policy judgments. Those whose anger at 9/11 was induced more strongly supported more

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\textsuperscript{78} Lerner & Keltner, supra note 34, at 151-52. In unambiguous situations, emotional valence alone predicted risk estimates: Angry and fearful people were more optimistic, happy people less.

\textsuperscript{79} Jennifer S. Lerner et al., Effects of Fear and Anger on Perceived Risks of Terrorism, \textit{Psychological Science} (forthcoming). Lerner et al. also found that women were much more pessimistic than men, but that differences in self-reported emotion (women reported being sadder, men angrier, in response to 9/11) explain most of this gender variance. Incidentally, this research also shows that Lerner’s previous research on the effects of emotion on risk perception generalizes from the perceived likelihood of self-relevant outcomes (“will it happen to me?”) to other-relevant outcomes as well. See supra notes 75-76 and accompanying text.

\textsuperscript{80} Lerner et al., supra note 79. These observations are based on mean risk estimates, collapsed across emotion condition.

\textsuperscript{81} Id. (manuscript at 12-13, 25-26).

\textsuperscript{82} Neil D. Weinstein, Unrealistic Optimism About Future Life Events, 39 J. Personality & Soc. Psychol. 806 (1980). For instance, respondents estimated their likelihood of being the victim of a non-terrorist violent crime at 22\%, but the likelihood that the average American would be so victimized at 43\%. Lerner et al., supra note 79 (manuscript at 26).
punitive policies (deporting foreigners without valid visas) and less strongly supported more conciliatory policies (building ties with Moslem countries) than did those who were prompted to feel sad about 9/11.\(^83\)

One additional influence on lay risk perceptions is worth mentioning in the current context: media effects. Media coverage of a risk can influence perceptions and related judgments regarding that risk by making particular information about that risk more available to audiences of that coverage,\(^84\) and/or by framing the risk as something worth or not worth avoiding.\(^85\) For instance, Dan Bailis and I found that print media coverage of air bag risks that overemphasized, in comparison with objective data, the dangers of air bag deployment (persons, especially children, killed or injured by air bags going off in low-speed collisions) relative to air bag benefits (saving people from death or serious injury in high-speed collisions) led readers to overestimate the magnitude of air bag risks and to adopt less favorable views toward air bags.\(^86\)

In sum, people judge risks to be more serious, and fear them more, the more the risks are dreaded and unknown. The more a risk is dreaded, the more people believe that something should be done to regulate or eliminate it. Furthermore, people’s emotional states influence their risk perceptions: The most consistent finding is that fearful people tend to be more pessimistic, and angry people less pessimistic. Finally, media coverage helps shape the frame in which people make risk-related judgments. These findings regarding people’s emotions, risk perceptions and judgments of responsibility may help us to understand the possible decision-making processes of jurors in two types of cases that have arisen from the 9/11 attacks on the World Trade Center.

\(^83\) Lerner et al., supra note 79 (manuscript at 13, 27-28).
\(^84\) Slovic et al., Behavioral Decision Theory, supra note 69, at 19-21.
III. THE ROLE OF EMOTION AND RISK PERCEPTION IN ATTRIBUTIONS OF RESPONSIBILITY AND BLAME IN 9/11 CASES

Roughly 1,000 plaintiffs have filed dozens of suits against the Port Authority alleging various acts of negligence in connection with 9/11, including the arrangement of and building materials used in the stairwells, the condition of the fire prevention materials and equipment (including non-compliance with fire safety rules) and the evacuation procedures (especially the announcement encouraging South Tower employees to remain at or return to their offices). As in any negligence case, these plaintiffs must prove not only that the defendant was careless, but also that its carelessness was the legal (or proximate) cause of their injuries. While it is difficult to predict confidently until more information is gathered, even if the plaintiffs can show that the Port Authority breached its duty of care by carelessness in design, construction, procedures and the like, proving legal cause will be a daunting challenge. Causation requires persuading the judge and jury that the attacks were sufficiently foreseeable to charge the Port Authority with responsibility for not doing more to avoid the consequences, and that the intervening malicious behavior of the terrorists was not a superseding cause of the tragedy, relieving the Port Authority of responsibility.

In another case, about 600 families of victims have filed an action against the government of Sudan, three members of the Saudi royal family and several Saudi banks and charities, seeking over $100 trillion in damages. In addition to various statutory causes of action and other common law counts, the complaint includes counts for wrongful death, conspiracy and aiding and abetting, all of which charge the defendants with knowingly or deliberately “engaging in, sponsoring, financing, aiding and abetting and/or otherwise conspiring to commit acts of terror including the terrorist attacks of September 11, 2001.”

87 Chen, supra note 1.
90 Plaintiffs' Complaint at 244, Burnett v. Al Baraka Inv. & Dev. Corp.
charge of aiding and abetting only. Again, as relevant information is only beginning to emerge, any forecasts about eventual trial outcomes remain highly speculative, but the plaintiffs likely will face, among other difficulties, the challenge of linking the defendants specifically to the 9/11 attacks, as required by applicable tort doctrine.

A. Emotion and Attributions of Responsibility and Blame in 9/11 Cases

While jurors’ emotional responses to these cases are likely to be both complex and individually variable, some general characteristics appear probable. First, jurors’ emotional reactions to 9/11 are likely to be strong even years after the tragedy. Many of their initial reactions may be somewhat attenuated or changed by the passage of time, but they are also likely to be revived by repeated media exposure, especially extensive coverage around anniversaries of the attacks, as well as by exposure to accounts of the attacks in the courtroom itself. Second, although jurors may experience at trial all of the emotions they initially felt—horror, fear, sympathy, anger and sadness—some emotions may dominate others. For instance, research indicates that in the immediate aftermath of the attacks, anger was a more prevalent response than fear. Third, media coverage of 9/11 not only continues to stimulate emotional responses but also tends to model


92 A third party’s advice, encouragement, inducement or support for a tortious act may make that third party liable for that tortious act under a theory of aiding and abetting or concert of action or the like, but the third party is not liable for acts that were not reasonably foreseeable by him. RESTATEMENT (SECOND) OF TORTS § 876 cmt. d (1979). The same factors used to determine generally whether an intervening cause is considered a superseding cause are used to determine the foreseeability required for liability in the context of aiding and abetting. Id. §§ 442-442B. It is possible that in interpreting “aiding and abetting” for purposes of these plaintiffs’ claims, the court will be guided by its interpretation of the Anti-Terrorism Act, 18 U.S.C. §§ 2331-39 (2001), relied on by the plaintiffs and construed by another court to permit civil tort aiding and abetting liability. Plaintiff’s Complaint at 82, Boim v. Quranic Literacy Inst., 291 F.3d 1000, 1015-21 (7th Cir. 2002). On aiding and abetting in the context of claims brought under the Alien Tort Claims Act, see Anthony J. Sebok, Should American Courts Punish Multinational Companies for their Actions Overseas?, Findlaw, available at http://writ.news.findlaw.com/sebok/20020729.html (last visited Dec. 11, 2002).

93 The perceived exceptionality of the 9/11 attacks also contributes to heightening emotional responses generally. See ORTONY ET AL., supra note 7, at 64-65.

94 Lerner et al., supra note 79 (manuscript at 9).
“appropriate” emotional responses to the attacks—sympathy for victims; determination in the face of adversity; communal spirit; anger at perpetrators resolved into righteous indignation—and this modeling may shape jurors’ thinking about which emotions they ought to take into account when determining responsibility and damages in civil cases.

We also need to keep in mind the various contextual factors that may moderate emotion and risk perception effects; i.e., emotions, risk perception and blaming will influence one another differently in different situations. The most likely moderators, as noted earlier,\(^95\) will be: the identity of the defendant(s) (i.e., Port Authority or Saudis); the legal theory of recovery (e.g., negligence, aiding and abetting); the strength of the parties’ respective arguments; and the emotional tonality encouraged by lawyers’ case presentations (i.e., the ways they weave the law and facts together into their narrative theories of the case).

According to the research discussed earlier, the generally negative valence of jurors’ moods relating to 9/11 would be predicted to lead them to think more carefully about their decision-making task. But, as noted earlier, recent research suggests that only sadness, and not anger, will have this effect.\(^96\) Now, while the precise mix of moods and emotions 9/11 jurors may experience is impossible to predict accurately, it is likely to have something to do with what emotions the lawyers tend to emphasize.\(^97\) To whose advantage would it be to evoke one emotion or the other?

It might seem at first glance that the party with the weaker evidence and argument would be advised to elicit jurors’ anger (so long as it can be diverted from the client), so that jurors would consider the substance of the case less carefully. Given what currently is known, this party appears to be the plaintiffs in both cases.\(^98\) Conversely, to the extent that

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\(^95\) See supra p. 961.
\(^96\) See supra notes 15-17 and accompanying text.
\(^97\) Of course, the lawyers would be advised not to do this too overtly, because rules of evidence and trial practice forbid undue, explicit appeals to jurors’ emotions.
\(^98\) I assume that emotion and risk perception effects would be largest where the case is closely balanced and would diminish as the case becomes one-sided in either direction. Cf., e.g., HARRY KALVEN & HANS ZEISEL, THE AMERICAN JURY 164-66 (1966) (stating that where evidence is closely balanced, jurors’ emotions affect their verdicts by leading them to construe evidence one way or the other). I further assume that if the case gets to the jury, it is not entirely one-sided, or else the judge would already have directed a verdict (or dismissed the case before trial on summary judgment). Within this considerable range, based on the current state of information, I speculate that the
the plaintiffs’ case against the Port Authority depends on jurors’ careful consideration of somewhat counterintuitive notions of legal responsibility—that the Port Authority should be held liable for its negligence even though another party’s intervening intentional wrongdoing more immediately brought about the harm— the plaintiffs’ lawyers may want to foster the jurors’ deliberate processing of the complex trial information. The lawyers might do this either by specifically seeking to elicit sadness or by relying on the dominantly negative valence of jurors’ less differentiated mood.

What about the attributional effects of particular emotions? A good place to start is with jurors’ likely sympathy for the victims of 9/11, which may very well incline them to attribute more responsibility for the tragedy to the defendants in both cases than they would if not so moved. Three factors enhance sympathy: the greater the extent of the suffering; the less the victims are themselves judged to be responsible for their plight; and the more unusual the event leading to the suffering. The victims of 9/11 should be highly sympathetic on all counts.

According to Brian Bornstein’s research, greater sympathy for the victims should make jurors more likely to hold the defendant responsible because sympathy inclines observers to help, and jurors know the only way they can help a tort plaintiff is by holding someone else liable. Defendants will have the stronger case, apart from any of the potential effects discussed here.

See Restatement (Second) of Torts § 449 (1979) (stating that if the likelihood that a third person may act tortiously or even criminally is one of the hazards that makes a person negligent, the fact that such a tortious or criminal act occurs does not relieve the person of liability). I believe that jurors may find this principle counterintuitive because their common sense will tell them that if a criminal act more immediately brought about the plaintiffs’ harm, the criminal should be the blameworthy party. Compare the idea of “monocausality” discussed in Feigenson, supra note 3, at 51-52. For an example of courts’ awareness that juries may be prone to consider one party’s criminal culpability as relieving another party, negligent or strictly liable, from responsibility for the event, see Rozier v. Ford Motor Co., 573 F.2d 1332 (5th Cir. 1978).

100 Bornstein, supra note 24.
101 Weiner, supra note 19, at 65.
103 This sympathy, moreover, could very well be enhanced (or at least sustained) in the local jury pool by the victims’ stories featured in the New York Times and elsewhere after 9/11.
104 See supra note 24 and accompanying text.
two, described earlier, predict these influences of sympathy on jurors’ judgments. Confidence in the prediction is enhanced for two reasons: The empirical support for these paths is more extensive than for paths three and four, and the intrinsic nature of the source of the emotion may make jurors less inclined to disregard the resulting emotional influence even if so instructed. Yet, at least with regard to the Port Authority, jurors may very well also feel some sympathy for the defendant—the Port Authority, after all, had offices in the World Trade Center and lost employees in the attack—and greater sympathy for the defendant may mean less sympathy for the plaintiff and hence less anger at the defendant, reducing blame.

Jurors’ anger is a more complicated matter. At first glance, we might assume that jurors’ anger at the 9/11 attacks would also incline them to blame the defendants in both cases. The blameworthiness of the defendants’ alleged conduct should provoke anger, more so in the case of allegedly intentional wrongdoing (the Saudi defendants) than in the case of allegedly negligent wrongdoing (the Port Authority). The catastrophic harm caused by the attack may also increase jurors’ anger, and according to the research, anger will make jurors likelier to blame the party they hold responsible for that harm, which will be the defendants, if anyone, not the plaintiffs. Paths one and two, at least, appear to support these effects. Moreover, the complementarity of jurors’ emotional responses predicts that the great sympathy jurors are likely to feel toward the victims of 9/11 may indicate more anger toward the defendant, and thus, more blame for the defendant.

105 See supra notes 19-27 and accompanying text.
106 Id.
107 Although we did not find that more sympathy for one party meant less for the other, Feigenson et al., supra note 26, at 592, Brian Bornstein has found this in one study. Brian Bornstein, David, Goliath, and Revered Bayes: Prior Beliefs About Defendants’ Status in Personal Injury Cases, 8 APPLIED COGNITIVE PSYCHOL. 233 (1994).
109 ORTONY ET AL., supra note 7.
110 Feigenson et al., supra note 26; Keltner et al., supra note 33.
111 See supra notes 67-68 and accompanying text.
112 This is a likelier outcome than the other possible configuration of sympathy and anger mentioned earlier—that sympathy for the victim might be trumped by anger toward the victim arising from defensive attribution—because there does not seem to be any plausible psychological basis for jurors to derogate or otherwise distance themselves from the victims of the 9/11 attacks. Indeed, people’s spontaneous
To pursue this further, we need to return to the distinction between intrinsic and extrinsic emotion sources. I assume that the terrorists will be the focal point for jurors’ most intense anger. It is unclear, though, whether jurors’ likely anger at the terrorists should be considered intrinsic or extrinsic. This anger appears intrinsic in that it is provoked by the events at issue, considered as a whole, as opposed to some obviously judgment-irrelevant stimulus. But the anger may also be considered extrinsic because the terrorists are not parties and thus are not an explicit judgment target.

To the extent that the source of jurors’ anger is considered to be extrinsic because it is directed at the terrorists rather than the defendants, and jurors do not recognize it as such, it may bias their judgments toward blame through either the appraisal tendency (path three) or the affect-as-information process (path four), regardless of who the defendants are. But if, as may be expected, the defendants’ lawyers in both cases try to call jurors’ attention to the terrorists as the “real” source of jurors’ angry responses, then jurors may recognize the source of their anger as extrinsic: not the defendant. Any misattribution of the anger to the judgment target should be eliminated. Therefore, the informational value of the extrinsic emotion—i.e., jurors blaming the judgment target more because their current anger tells them that “this person is blameworthy, deserving of punishment”—should disappear.

We would then be left with the appraisal tendency process. According to the study that most unambiguously supports this model in the context of attributions of responsibility, anger biases people toward blaming others for bad outcomes because it makes more salient the role of human beings as causes of harm where both situational and human

responses in the form of memorials and repeated media coverage have displayed and encouraged precisely the opposite phenomenon: enhanced empathy and sympathy for the victims.

As in the classic affect-as-information and appraisal tendency studies; see supra notes 32-44 and accompanying text.

It could be that the intrinsic/extrinsic distinction is not always as tidy in real cases, especially complex, high-profile cases like these, as it is in the psychology lab, and that the lawyers’ case presentation strategies will have something to do with whether jurors treat anger at the terrorists as one or the other (as I discuss below).

See, e.g., Keltner et al., supra note 33.

See, e.g., Schwarz & Clore, Mood and Misattribution, supra note 41.

Keltner et al., supra note 33.
factors are plausible targets of attribution. In both kinds of 9/11 cases, however, the role of human causes of disaster—the terrorists—is already highly salient. Appraisal tendency could, presumably, also explain bias arising from the heightened salience of other components of anger’s cognitive structure, such as the severity of the outcome. But here, too, the horrific consequences are already obvious. So the appraisal tendency model generates the possibly counterintuitive prediction that anger at the terrorists, recognized as such, would not have much of an effect on jurors’ judgments because there is little or no room for that emotional bias to operate.

Nevertheless, I think that jurors’ anger will matter, and that its effect will be moderated by (among other things) the identity of the defendant and the plaintiffs’ legal theory. Consider the case against the Saudis. The plaintiffs’ legal strategy in a claim for aiding and abetting or concert of action is to join the defendants with the terrorists in a kind of common enterprise. This is most explicit in the plaintiffs’ count of conspiracy. These causes of action link the defendants to the terrorists. Jurors may thus be encouraged to view their anger at the causes of the 9/11 attack as intrinsic, not extrinsic. If this is the case, then the effect of anger will not depend on priming or appraisal tendency mechanisms. To the contrary, the emotional signal the anger provides will be viewed as informative of the judgment to be made, along paths one and/or two.

Another psychological process, assimilation and contrast, may help us to understand this. Assimilation and contrast effects can occur whenever a target (here, the Saudis) is evaluated differently in the presence of other targets than it would be alone—either more like those other targets in the case of assimilation, or more unlike them in the case of contrast. The upshot for the case against the Saudis is that jurors may be led to assimilate the defendants to the terrorists and thus get angrier at the defendants (and, consequently,

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118 See supra note 37 and accompanying text.
119 This might also be described as a “ceiling effect”: Because the values on the blameworthiness and severity scales are already so high, they’re close to the ceiling that jurors could plausibly assign to them, leaving little room for the influence of other variables.
blame them more) than they otherwise would—anger and blame for which the terrorists are the “proper” target. In addition, angry jurors are likelier to engage in stereotyping.\textsuperscript{121} Stereotyping would probably work to the advantage of the plaintiffs in the case against the Saudis but not in the case against the Port Authority, both because jurors’ anger may be greater against the Saudis (for the reasons just explained) and because the defendants’ ethnicity will provide more salient cues for stereotyping.

Conversely, in the case against the Port Authority, anger at the terrorists may not lead to more anger at the defendant, because jurors are likelier to regard the source of their anger as extrinsic to the target. That anger, therefore, should not be regarded as informative of the decision; i.e., path four, the affect-as-information model, should not be implicated. Further, because appraisal tendency effects (path three) may be minimized by the pre-existing salience of the severity and human causes of the harm, that process is not likely to be very influential either.\textsuperscript{122}

Indeed, anger at the terrorists may even lead to less anger at the Port Authority, due to assimilation and contrast effects. If one defines the category of surrounding judgment targets to include the terrorists, jurors may readily contrast the defendant to those obviously more culpable persons, which should reduce the level of blame attributed to the defendant (compared to the blame that would attach in the absence of a salient comparison category).\textsuperscript{123} Similarly, once the terrorists are a salient comparison, lawyers for the Port Authority may encourage jurors to assimilate the Port Authority instead to the innocent plaintiffs (“We’re all unsuspecting victims of this terrible attack”), which would be harder to do without the terrorists as a foil.\textsuperscript{124} The complementarity of emotional

\textsuperscript{121} See Bodenhausen et al., \textit{supra} note 17.
\textsuperscript{122} See \textit{supra} notes 60, 118-19 and accompanying text.
\textsuperscript{123} The Port Authority’s lawyers might benefit from the extrinsic anger source even beyond what the contrast effect suggests: In a kind of “reverse misattribution,” they may be able to get jurors to misattribute their intrinsic anger to the obvious extrinsic source, reducing the former. \textit{Cf. supra} notes 40-44 and accompanying text.
\textsuperscript{124} Contrast effects may also help the defendant in another way: Jurors may contrast the plaintiffs to those victims who have accepted Victim’s Compensation Fund payouts in lieu of suing and trying to recover even more. \textit{See, e.g.,} David W. Chen, \textit{Fund for Terror Attack Victims Offers Awards in 14 Test Cases}, \textit{N.Y. Times}, Sept. 30, 2002, at B1. Considering popular mythologies of tort plaintiffs, they may conclude that the plaintiffs are greedy, perhaps even un-American, and thus, undeserving. \textit{See, e.g.,} Valerie Hans & William Lofquist, \textit{Jurors’ Judgments of Business Liability in Tort
responding may also lead jurors to contrast the defendants with the terrorists: The angrier jurors are at the terrorists, the less anger and more sympathy they may feel for others involved in the tragedy, and the Port Authority, after all, was victim as well as possible tortfeasor.125

On the other hand, jurors’ anger may work against the Port Authority. First, outcome severity may be regarded as an intrinsic anger source that biases judgments through path two. Second, under the relevant law of apportionment of liability, in which jurors will be instructed, a defendant whose negligence consists of failing to protect the plaintiffs from a specific risk of intentional wrongdoing is liable for the intentional wrongdoer’s share of responsibility as well as its own.126 This law may prompt jurors to attribute to the Port Authority not only the blame but also (some of) the anger they feel toward the terrorists, in effect leading jurors to treat that anger as intrinsic. Third, even to the extent that jurors regard their anger at the terrorists as extrinsic, they may be at least partly unaware of some residual anger,127 which may then affect their judgments through either affect as information or appraisal tendency. Fourth, for jurors to integrate their emotions (specifically anger), cognitions and judgment into a relatively

Cases: Implications for the Litigation Explosion Debate, 26 LAW & SOC’Y REV. 85 (1992). Cf. Philip K. Howard, Facing the Limits of Law, and of Lawsuits, N.Y. TIMES, Sept. 21, 2002, at A15 (arguing that lawsuits by 9/11 victims are futile because dollars can’t make up for lost lives, will “harm all of society” by draining resources from other uses and fomenting bitterness, and should be prohibited by Congress).

125 See supra notes 67-68. Relatedly, according to the cognitive heuristic of monocausality, one sufficient cause (the terrorists) tends to occupy the attributional field and reduce blaming of others. See Feigenson, supra note 3, at 51-52.

126 RESTATEMENT (THIRD) OF TORTS § 14 (2000) (discussing apportionment of liability). If a person is liable based on a failure to protect another from the specific risk of an intentional harm, that person is jointly and severally liable for the share of responsibility assigned to the intentional tortfeasor. (I thank Brad Saxton for pointing this out to me.) Under New York law, non-parties can be assigned a percentage of comparative responsibility for plaintiffs’ non-economic losses, but the Port Authority will not be able to reduce its liability for these losses by any percentage of fault attributed to the terrorists if, as seems likely, the plaintiffs, after exercising due diligence, will not be able to get jurisdiction over the terrorists. N.Y. C.P.L.R. § 1601 (2003); see also Siler v. 146 Montague Assocs., 228 A.D.2d 33, 38-41, 652 N.Y.S.2d 315, 319-21 (2d Dep’t 1997) (ruling that negligent defendant may seek apportionment of liability against non-party intentional tortfeasor, but not if the plaintiff shows that with due diligence it was unable to obtain jurisdiction over the non-party). It is possible that jurisdiction will be obtainable over other arguably culpable persons besides the terrorists (e.g., one or more of those named as defendants in the case against the Saudis).

127 See supra note 38 and accompanying text.
satisfying whole, they may be inclined to do something and blame someone. The only targets for blame before the court in this case would be the plaintiffs and the defendant Port Authority, and as between the two of them, the defendant will be a far more likely candidate for blaming.

Fear or anxiety may also have ramifications for blaming as indicated by terror management theory. Under this theory, the effects are very likely to be moderated by the defendant’s identity: Any such effects are likely to be seen in the case against the Saudis and not the case against the Port Authority. Jurors whose mortality is made salient to them—and no event in recent American history has done this more emphatically than the 9/11 attacks—are more inclined toward nationalistic impulses and more inclined to punish a blameworthy member of an outgroup than a member of an ingroup who has behaved identically. Obviously, the Saudi defendants would more readily be classified as outgroup members than would the Port Authority.

Terror management theory also predicts a greater inclination on the part of those who are made to think about their own mortality to punish those who transgress against cultural symbols. The World Trade Center was certainly such a symbol, one of American capitalist wealth and might, which is why the terrorists twice chose it as a target. The Saudi defendants are especially vulnerable to this effect because it will be easier to portray them as belonging to an outgroup. Indeed, the Saudis could potentially be assimilated to the specific outgroup (fundamentalist terrorists) who have been challenging another, even more treasured cultural symbol: the American flag.

128 See Feigenson, supra note 3, at 107.
129 Nelson et al., supra note 52.
130 Similarly, the racial stereotyping that mortality salience increases would also be predicted to work against the Saudi defendants and not the Port Authority. See supra note 121 and accompanying text.
131 See, e.g., Stephen Labaton & Jonathan D. Glat, Twin Towers at Center of Legal Brawl, N.Y. TIMES, Nov. 3, 2001, at C1 (quoting leaseholder of World Trade Center as saying, “What these terrorists have tried to do is destroy the symbol of... our economic progress, our strength, our way of life”).
132 Consider the prominence of the flag in post-9/11 events, from the one(s) recovered at the World Trade Center site, to the ones used to drape coffins of police officers and firefighters who died there, to the ubiquitous images of the flag in television programs and videos about 9/11; and consider also the televised images, going back at least to Iran in 1979, of Islamic fundamentalist protesters burning American flags.
B. Risk Perceptions and Attributions of Responsibility and Blame in 9/11 Cases

Jurors’ risk perceptions are likely to affect and be affected by their emotions and to play a role in how they assign blame for 9/11. Here again, the defendants’ identity will be important: Risk perception effects are much likelier to occur in the case against the Port Authority than in the case against the Saudis. The argument proceeds in two steps. First, jurors’ emotions will lead them to take the risk of terrorism very seriously and to favor taking significant steps to reduce that risk. Second, the hindsight bias may lead them to think that such steps should have been taken before 9/11, and to blame the defendant for not having done so.

Jurors’ perceptions regarding the risk of terrorism are likely to engender fear, as indicated by the psychometric model. Terrorist threats rank high on the dread dimension: People sense that they have little control over the prototypical feared attack (a plane used as a missile, a bomb), and the consequences of a terrorist attack could very well be catastrophic, as 9/11 was. Terrorist threats are also feared because they are unknown. Of course, people now have a sense of what can happen (e.g., a suicide bomber), but the various possibilities are beyond comprehension. What, for instance, would a release of toxic chemicals in the middle of a city be like? Moreover, the sheer variety of possible methods of attack, plus the complete uncertainty about where and when such an attack might occur, make the specific threat an unknown.\footnote{There may even be a kind of feedback loop, in which the dread and unknown nature of the terrorism risk enhances people’s fear, which in turn leads them to be even more pessimistic about the prospects of a terrorist attack (which leads them to be even more fearful, and so on).}

There may even be a kind of feedback loop, in which the dread and unknown nature of the terrorism risk enhances people’s fear, which in turn leads them to be even more pessimistic about the prospects of a terrorist attack (which leads them to be even more fearful, and so on).\footnote{The government’s vague warnings about “terror alerts” may well have served to increase this sense that the risk is unknown—even by experts.}
One might think that people’s elevated perceptions of terrorism and other risks would be attenuated as time passes, since the likeliest explanation for the heightened risk perceptions is the availability of words and images about the attacks in the media, which were most pronounced in the immediate aftermath of the attacks. It is very likely, however, that by the time of any trial in a 9/11 case, media coverage will have kept the risk of terrorism salient, thus reinforcing how seriously people take that risk. Every juror will have seen repeated images of the attacks, both at the time and in television specials and print media coverage since. In addition, media coverage of the war against terrorism (in all its many guises, in Afghanistan, Iraq and elsewhere, including perhaps also coverage of suicide bombings in the Middle East) will serve to keep the idea of the 9/11 attacks in the foreground of public awareness. Moreover, media coverage that emphasizes the risks of terrorism, as opposed to the costs of avoiding those risks, would be predicted to underscore this perception.

Research consistent with the psychometric approach shows that the more a risk is dreaded, the greater the support for strict regulation to reduce or eliminate the risk. And with regard to an “off the charts” risk like that of a terrorist attack, jurors may well believe that the risk is to be avoided at (almost) any cost, especially if most of those costs (e.g., defense budget expenditures, infringement of civil liberties) remain “off-screen” for most jurors.

In addition to these risk perception habits, jurors are susceptible to the hindsight bias. Their judgments of the ex ante likelihood or foreseeability of an event are influenced by knowing the ex post outcome (whether the event occurred or

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135 See supra note 81 and accompanying text.
136 This is not to say that media coverage will provide the exclusive frame for perceptions of the risks of terrorism, especially in New York City, where just about everyone in the jury pool will have visited Ground Zero or at least looked at the skyline since 9/11 and reflected on the destruction of the buildings.
137 In the absence of a systematic content analysis, I cannot say that media coverage of terrorism has been biased in the way that, say, Dan Bailis and I found regarding coverage of air bag safety, but I conjecture that the same slant toward the risks (or the benefits, as opposed to the costs, of risk avoidance) would be found. Feigenson & Bailis, supra note 86. Certainly, it seems that this slant characterizes the current administration’s rhetoric, and hence most media coverage, of the recent invasion of Iraq—a leading rationale for which is a supposed risk avoidance benefit, reducing the likelihood of future terrorist attacks against the United States.
138 See supra note 72 and accompanying text.
139 Cf. MARGOLIS, supra note 72 (offering a “risk matrix” approach to the understanding divergence between lay and expert risk perceptions).
not). Studies show that the hindsight bias affects mock jurors’ tort decisions. In determining whether someone should have foreseen that harm might occur—an essential component of negligence liability—jurors are influenced by knowing that the harm did occur. In this situation, the hindsight bias would make jurors more likely to think that the Port Authority should have known that a catastrophic terrorist attack might occur. If we presume that jurors may believe that practically no precaution would be deemed too great in the face of such a serious risk, jurors may well believe that a party who failed to do more to avoid that risk should be blamed for not having done so.

This line of thinking—from dreaded risk to fear to even more dreaded risk, and from that to increased blaming via the hindsight bias—is not, however, likely to be much of a factor in the case against the Saudis. There, the alleged misconduct that claims of aiding and abetting or conspiracy evoke looks much more like intentional wrongdoing. The main issue is not so much whether the Saudi defendants should have foreseen the attacks, but how closely connected they were to the actual perpetrators. If the plaintiffs’ argument is that the Saudis are liable because they tried to help bring about a particular action, the foreseeability of that action seems beside the point.

See Jeffrey J. Rachlinski, A Positive Psychological Theory of Judging in Hindsight, 65 U. CHI. L. REV. 571 (1998); see also Feigenson, supra note 3, at 62-64.

Another theoretically possible effect of fear on jurors’ decision making can be discounted: It is unlikely that jurors’ fear will lead to defensive attribution, the distancing or even angry response that could override jurors’ great sympathy for the victims. First, it may be that fear leads to victim-blaming only when there is some plausible basis for blame. In our first comparative negligence study, for instance, we found that participants attributed some fault even to victims in the low-blameworthiness condition, whose conduct was designed to be legally blameless. See Feigenson et al., supra note 63. There were gaps in our brief scenario, however, that participants plausibly could have filled in with victim behavior that would warrant blame. In the case of 9/11, most if not all occupants of the World Trade Center were obviously innocent. There would seem to be no psychologically plausible way for observers to hold them responsible for what happened (except, perhaps, with regard to particular victims who are known to have delayed leaving their offices or to have returned for no good reason). It is also possible that any tendency toward defensive attribution and its emotional distancing of observers from victims will be overcome by the communal and patriotic fervor engendered by 9/11. It may be harder to maintain (even subconsciously) an “us-them” attitude after months of genuine (and media-encouraged) rallying together.

As noted supra note 92, the foreseeability of the harmful act does limit the liability of one who allegedly aided and abetted that act.

Not only jurors’ fear, but also their anger may, via their risk perceptions, affect their inclination to blame. It might seem that jurors’ anger would lead to less
C. DeBiasing Jurors in 9/11 Cases

Before drawing conclusions about the possible role of emotions and risk perceptions in 9/11 cases, it is important to consider the likelihood that jurors, pursuant to the judge’s instructions or otherwise, will be able to avoid or reduce any unwanted influence of their emotions on their responsibility judgments. Generally speaking, the research on debiasing (or correction) indicates that in order to purge judgments of unwanted bias, the decision maker must be: (i) aware of the unwanted influence; (ii) motivated to correct the bias; (iii) aware of the magnitude and direction of the bias; and (iv) able to adjust the response appropriately.

blaming in this regard: Angry people make more optimistic risk estimates, and thus are less likely to elevate the likelihood of a terrorist attack. See supra notes 76-77 and accompanying text. This, in turn, would be predicted to make them less susceptible to believing that no precaution is too great when terrorism is the threat, which, in turn, may make them less likely to judge in hindsight that the defendant is to blame for not having foreseen the risk and not having done more to protect against it. But recall that the reason that angry people make more optimistic risk estimates is that experiencing the emotion primes them to perceive risks as controllable and/or certain. See supra note 77 and accompanying text. And the likelier jurors are to believe that the risk was controllable, the more likely they are to believe (in hindsight) that the defendant should have controlled for it. Again, this line of thinking seems to be especially applicable to the Port Authority, because with regard to the Saudi defendants, the claim is that they could have controlled the risk and failed to but instead that they deliberately helped to create (and realize) the risk. Note also that Lerner and her colleagues recently found that it was angry people, not fearful people, who were most supportive of punitive measures to reduce the risk of terrorism. See supra note 83 and accompanying text.

144 As noted supra note 18, I am not directly addressing whether emotions should be regarded as an “unwanted influence” on legal judgment; I am simply outlining how jurors would have to go about reducing that influence if they did perceive it to be unwanted.

145 Timothy D. Wilson & Nancy Brekke, Mental Contamination and Mental Correction: Unwanted Influences on Judgments and Evaluations, 116 PSYCHOL. BULL. 117 (1994); Timothy D. Wilson et al., Mental Contamination and the Debiasing Problem, in HEURISTICS AND BIASES: THE PSYCHOLOGY OF INTUITIVE JUDGMENT, supra note 41, at 185. In addition, people who try to respond to bias in their decision-making processes do so in accordance with their naïve theories regarding the source and extent of the bias. This is explained by Richard Petty and Duane Wegener’s “flexible correction model.” Richard E. Petty & Duane T. Wegener, Flexible Correction Processes in Social Judgment: Correcting for Context-Induced Contrast, 29 J. EXP. SOC. PSYCHOL. 137 (1993); Duane T. Wegener & Richard E. Petty, The Flexible Correction Model: The Role of Naïve Theories of Bias in Bias Correction, in 29 ADVANCES EXP. SOC. PSYCHOL. 141 (1997) [hereinafter The Flexible Correction Model]. Other research, however, indicates that if an instruction to adjust or correct for bias is sufficiently blatant, people will correct their judgment in the direction suggested by the instruction rather than in accordance with any intuitive theory regarding the bias. Diederik A. Stapel et al., The Smell of Bias: What Instigates Correction Processes in Social Judgments?, 24 PERSONALITY & SOC. PSYCHOL. BULL. 797, 801-03 (1998).
Not all jurors’ judgments will be strongly “contaminated” by emotional influence. A number of factors should mitigate contamination. For instance, voir dire should exclude at least some of the most evidently biased prospective jurors. Judicial pre-instruction, where available, also may help focus jurors more on the applicable legal rules and less on the lawyers’ emotion-laden stories of the case. Additionally, adversarial argument, judicial instructions to jurors not to use their emotions in deciding and group deliberations may prompt jurors to engage in correction processes. Nevertheless, it seems unlikely that 9/11 jurors will be able to adjust their judgments appropriately to correct for all emotional influences.

First, jurors may perceive no need to correct for bias (“Despite what the judge is saying, my emotional reactions aren’t influencing my judgment”). These jurors are likely to remain unaware of many sources of unwanted influence on or “mental contamination” of their decision making, if only because people usually believe that their own thinking and judgments are unbiased. This may be especially true in the case against the Port Authority, in which emotions other than sympathy may be less salient. They may also (perhaps incorrectly) believe that they have already (properly) put aside any extrinsic emotional responses in compliance with the judge’s instructions.

Second, jurors may not be motivated to correct for any emotional influence, believing that taking at least certain

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146 “Contamination” refers to the title of Wilson and Brekke’s leading article on the subject. See Wilson & Brekke, supra note 145.

147 I thank Brad Saxton for suggesting this point.

148 See supra note 18.

149 Each of these potential sources of debiasing, however, may also increase rather than decrease the role of jurors’ emotions in their decisions. Lawyers may use voir dire to begin presenting their theories of the case, with all their emotional ramifications; judicial pre-instruction may frame the case for the jurors in a way that draws out their emotions (e.g., in addressing whether the fault of non-party intentional tortfeasors may be taken into account, the judge may enhance assimilation and/or contrast effects and their emotional implications, discussed supra notes 120, 123-24 and accompanying text); adversarial argument may emphasize as well as attenuate emotion-provoking factors; and the support of fellow jurors during deliberations for a given juror’s own emotion-driven positions may increase the strength of that juror’s commitment to those positions.

150 Wilson et al., supra note 145, at 189-90.

151 See Stapel et al., supra note 145, at 801-03 (finding that participants who received “subtle” instruction to adjust for context-driven bias in their judgments if they should perceive any adjusted only when that bias was salient).
emotional responses into account—such as their sympathy for accident victims—is proper. Third, jurors may not want to correct for the effects of the fear of mortality described by terror management theory, precisely because the self-protective mechanisms that mortality salience triggers—such as blaming outgroup members—are so highly motivated. Fourth, judicial instructions to disregard emotional influence may even lead to a “paradoxical” effect in which that influence is enhanced, not diminished, due to the increased availability of the proscribed influence.

Fifth, jurors may not know how to adjust appropriately even if they perceive the need to debias and are motivated to try. For instance, decision makers who are made highly aware of their feelings and are highly motivated to reach a fair and accurate decision may overcorrect for any emotional influence. This happens when people overestimate, in accordance with their naïve views of their own cognitive processes, how much their feelings are distorting their judgment, and consequently overadjust to achieve the correct result they seek. Overcorrection may also occur as a consequence of the demand characteristic of the situation: Sufficiently blatant instructions not to be influenced by a given contextual feature may lead people to presume that their judgments have been so influenced, regardless of whether they actually were, and to instigate the (unnecessary) correction process. Overcorrection is very possible, for instance, with regard to jurors’ awareness of their sympathy for 9/11 victims: Their emotion will be strong and they may very well (correctly)

152 See FEIGENSON, supra note 3, at 37-38.
153 See supra p. 975.
155 See Wilson & Brekke, supra note 145.
156 Leonard Berkowitz et al., On the Correction of Feeling-Induced Judgmental Biases, in FEELING AND THINKING, supra note 34, at 131.
157 Wegener & Petty, The Flexible Correction Model, supra note 145; Wilson & Brekke, supra note 145.
158 This may occur because jurors, without being aware of it, already implicitly adjusted for the unwanted influence. Wilson et al., supra note 145.
159 Stapel et al., supra note 145. The typical judicial instructions to disregard emotional influence seem closer to the “blatant” than the “subtle” instruction condition in Stapel et al.’s study, which suggests the viability of the overcorrection hypothesis. It is unclear, however, whether this possible effect would outweigh the contrary reasons to predict undercorrection or no correction. See supra notes 150-54 and accompanying text.
believe that sympathy may bias their judgment in favor of the plaintiffs and against the defendants, yet they may overestimate the extent of that bias. Overcorrection for the perceived biasing effects of anger is especially likely in the case against the Saudis, in which that and other emotions are likely to be more salient.

Conversely, there is some evidence that jurors can follow instructions not to let their emotions improperly influence them. David DeSteno and his colleagues found that participants with high need for cognition could avoid the biasing effects of emotion on risk perception when instructed to be careful and accurate (and where the emotion manipulation was very salient). Moreover, knowing that one will be accountable for one’s decision has been shown to attenuate the effect of extrinsic emotional influence on that decision, specifically, anger leading to punitiveness. Yet, the emotion source in that study was extrinsic and participants knew that it was. Accountability may not have the same effect with regard to either intrinsic or unrecognized extrinsic emotional influences.

DeSteno et al., supra note 45, at 407-11. Note that of the studies that have found emotion effects on social judgments, including judgments of responsibility and blame, some—especially those illustrating path two—included more or less realistic instructions to participants not to use their emotions in making their decisions; others, especially those illustrating the extrinsic emotion effects described in paths three and four, did not. See supra notes 19-46 and accompanying text. So the research is not yet conclusive that emotion may affect legal judgments through any or all of the four paths, notwithstanding judicial instructions to the contrary. However, the literature on jurors’ willingness and ability in general to follow limiting instructions and instructions to disregard, and the research finding paradoxical effects for instructions to disregard emotion, support the thrust of my claim that such instructions are likely not to be effective as intended. The likelihood that jurors’ emotions in actual 9/11 cases would be much stronger than those induced experimentally in the studies cited also supports the claim. See, e.g., Saul Kassin & Christina Studebaker, Instructions to Disregard and the Jury: Curative and Paradoxical Effects, in INTENTIONAL FORGETTING: INTERDISCIPLINARY APPROACHES 413 (Jonathan M. Golding & Colin M. MacLeod eds., 1998); Edwards & Bryan, supra note 154.

On the other hand, in Second Sober Thought, Lerner et al. explain that the effect of accountability on emotional influence seems to have been mediated by systematic rather than heuristic or automatic thinking. Id. at 571. For example, accountability attenuated anger-driven punitiveness, not by reducing the anger participants felt, but by influencing how they dealt with that anger. So their findings regarding accountability may generalize to other emotion sources.
CONCLUSION

The preceding analysis is subject to some limitations. First, I have greatly oversimplified my discussion of mood and emotion effects on social judgment. Emotions and moods are very complicated in themselves; they are especially complicated when, as here, so many different emotions and moods are likely to be involved. Further, moods and emotions work together with other cognitive and social psychological phenomena (e.g., availability, norm theory, assimilation and contrast), some of which I have mentioned in passing, others not at all. Moreover, the research on the effects of emotion on social judgments, while more developed than it was fifteen years ago, is still very fragmentary. Some aspects of the models I use here as a basis for inferences or predictions about legal decision making are at present directly supported by only one or two studies, or only indirectly supported. Therefore, any inferences from the research to outcomes in particular cases must remain tentative.

Second, I have spoken very generally about hypothetical 9/11 cases. A basic finding of social psychology, however, is that human judgment and behavior is highly dependent on the situation in which people find themselves. As noted, relevant contexts that must be considered include the defendants’ identities, the nature of the plaintiffs’ legal theories and the strength of each side’s proof and arguments, as well as the broader context of previous and continuing media coverage of relevant events. It is especially hard to predict with any assurance how the context in which relevant risks are perceived may change by the time these cases go to trial: Perhaps media coverage will by that point not emphasize the risk of terrorism as much as it has, or perhaps the emphasis will be even greater. Moreover, it is also difficult to predict the particular facts that will emerge before or at trial that could affect jurors’ judgment (e.g., information suggesting recklessness or knowing disregard of risks by the Port Authority). Finally, jurors’ emotional and cognitive responses to the case and their legal judgments will depend in part on how the lawyers for the respective parties frame their stories of the plaintiffs, the defendant and the 9/11 attack. Although I

have suggested some possible approaches here, we cannot know precisely how the lawyers will strategize and present their respective cases.

Third, I have not discussed individual differences in emotional response and risk perception, which would of course play a role in any jury determination. The impact of 9/11 on voir dire in other sorts of cases is already a matter of speculation in the profession; the impact on cases dealing with 9/11 will obviously be significant. Nor have I addressed the possible impact of deliberations on the decision-making process.

Despite these limitations, I hope that this summary of research on the emotions, risk perceptions and social judgments has shed some light not only on the litigation that has already begun in the wake of 9/11, but more generally on decision making in more routine cases. I also hope that by attempting to trace some of the complex connections among the habits of thought and feeling that cognitive and social psychologists have identified, I have indicated where further empirical research is needed.

164 The venue of any 9/11 cases may affect jurors' emotional responses. For instance, people geographically closer to the attacks may be relatively sadder and more fearful because they are likelier to know family, friends or co-workers who died; in those farther removed from the attacks, anger may be a more dominant emotion. (I thank Linda Meyer for suggesting this.)

COGNITIVE FOUNDATIONS
OF THE IMPULSE TO BLAME

Lawrence M. Solan

At a prominent New York law firm, the associates playfully refer to their telephone extensions as their “blame codes.” “Did you ever get in touch with the clerk about filing the TRO?” “No.” “Sounds like blame code 443 to me.” The intuitions of these semi-fictional characters are sound. Once something goes wrong, it is only natural to assign responsibility to someone for the ensuing unfortunate state of affairs. We do not necessarily decide to blame others, we just do it.

Psychological research suggests that moral judgment, at least initially, involves intuition based on experience rather than studied reason. Responsibility and blame are preliminarily assigned quickly as a result of one’s perception of events matching mental models of blameworthiness. Later, more refined analysis is possible. “Dual process theories” in psychology suggest that many decisions are based first on rapid, intuitive evaluations of situations, with subsequent reasoning available only later. The rapid judgment of

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2 For a collection of articles, see DUAL-PROCESS THEORIES IN SOCIAL PSYCHOLOGY (Shelly Chaiken & Yaacov Trope eds., 1999).
blameworthiness happens so quickly and so effortlessly that I call it here “the impulse to blame.”

This Article examines some of the cognitive structures that trigger this impulse. It argues that the ease with which we blame arises in part from the fact that the impulse’s triggers consist of cognitive elements that we use routinely and completely independent of moral judgment in everyday life. This impulse is a combination of cognitive and emotional responses to bad events. It is largely a by-product of other, morally-neutral aspects of our psychology—the attribution of cause, recognition of good and bad outcomes and the drive to theorize about what others have in mind when they speak or act. Thus, being a moral actor is “inexpensive” in the sense that to attribute blame requires very little other than the implementation of structures that serve other purposes.

The ease with which we blame has its consequences. First, to the extent that this impulse occurs just when our theory of morality says that indignation is appropriate, it means that people are designed to be moral actors. Correspondingly, to the extent that the impulse’s triggers are at odds with notions of justice and fair play, a society must ensure that its legal order corrects for any such mismatches. And we do. For example, I describe research that puts causation (or at least contribution) at the center of the blame impulse. But we do not want to blame people for every harm they cause, and we want to distinguish among different causal situations. Doctrines of justification and excuse are examples of some solutions to the problem of overblaming. Similarly, some conduct is blameworthy even if no harm resulted. Responsibility for inchoate crimes, such as attempted criminal activity, is a solution to underblaming.3

Second, if we are aware of the impulse, consciously or subliminally, we may wish to undermine its application for a variety of reasons by not acknowledging triggering events as such. One can avoid blame by altering the evidentiary standards for finding that the triggering factors apply, by denying the facts themselves or by selecting alternative stories,

3 In fact, empirical research suggests that our system does not adequately punish some inchoate crimes according to people’s everyday moral sense. PAUL H. ROBINSON & JOHN M. DARLEY, JUSTICE, LIABILITY, AND BLAME: COMMUNITY VIEWS AND THE CRIMINAL LAW (1996).
consistent with the facts but inconsistent with blaming one party instead of another.\(^4\)

These “avoidance” techniques can be seen as second order effects of the blame impulse. They have serious ramifications in both everyday life and in the legal decision-making process. For example, the drive to create narratives consistent with the facts, but which do not trigger the blame impulse, is characteristic of the litigation process, as noted by many scholars.\(^5\) More generally, it is not uncommon for people to blame the victim under a variety of circumstances, such as when the person making judgment has more in common with the perpetrator, or when blaming the victim is more consistent with the judgment-maker’s view of the world as just.\(^6\)

Philosophers who write about responsibility and blame, such as Jeffrie Murphy and Jean Hampton,\(^7\) P.F. Strawson\(^8\) and R. Jay Wallace,\(^9\) discuss the relationship between blame and emotion, and recognize that emotions have a cognitive basis.\(^10\) This Article agrees with that position, and offers a broader cognitive foundation for blaming.

Part I describes the circumstances in which the impulse to blame is triggered in everyday life. Part II then examines some of the cognitive structures that underlie the blame impulse. Finally, Part III focuses on second order effects: What do we do to avoid blaming people whom we would rather not blame, and what do we do to increase the likelihood of blaming those whom we would like to blame? A brief conclusion explores some ramifications of the ease with which we blame in designing a system of justice.

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\(^4\) For a discussion from a social psychological perspective, see Mark D. Alicke, Culpable Control and the Psychology of Blame, 126 PSYCHOL. BULL. 556, 566-68 (2000) [hereinafter Culpable Control]; Mark D. Alicke, Culpable Causation, 63 J. PERSONALITY & SOC. PSYCHOL. 368 (1992).


\(^6\) There is substantial literature on this issue. For a recent contribution that summarizes some of the history, see Melvin J. Lerner & Julie H. Goldberg, When Do Decent People Blame Victims?, in DUAL-PROCESS THEORIES IN SOCIAL PSYCHOLOGY, supra note 2, at 627; Sharon Lamb, The Trouble with Blame: Victims, Perpetrators, & Responsibility (1996).

\(^7\) Jeffrie G. Murphy & Jean Hampton, Forgiveness and Mercy (1988).


\(^10\) See Murphy & Hampton, supra note 7, at 5 n.7.
I. WHEN WE BLAME

Probably the best way to characterize the process by which we assign blame is with reference to cognitive schemata. Three decades ago, the psychologist Harold Kelley suggested that various causal schemata are at the center of attribution decisions.\(^{11}\) He described causal schema as follows:

> In general, a causal schema is a conception of the manner in which two or more causal factors interact in relation to a particular kind of effect. A schema is derived from experience in observing cause and effect relationships from experiments in which deliberate control has been exercised over causal factors, and from implicit and explicit teaching about the causal structure of the world. It enables a person to perform certain operations with limited information, and thereby to reach certain conclusions or inferences as to causation.\(^{12}\)

Kelley presents a number of examples, such as our ability to understand from experience that some effects may result from a limited set of causes, each of which is sufficient, but none of which is individually necessary.\(^{13}\) When we experience the effect, we can infer that at least one of the causes is present as well.

Psychologists continue to associate attribution with causation, but the schemata have become more complex. Mark Alicke suggests that blame has three components: mental states, behaviors and consequences.\(^{14}\) The mental and behavior components of blame correspond to volitional and causal control. In the prototypical blame situation, someone with a culpable mental state behaves unacceptably, leading to a bad result. According to Alicke, the key factor in determining whether we assign blame to an individual, and if so how much blame, is the amount of control that the individual exercised over the situation, whether through bad acts or bad motives.\(^{15}\) This consideration is independent of causation, although experiments show that it contributes to people’s judgments of causation. Alicke found that people are more likely both to find


\(^{12}\) Kelley, supra note 11, at 152.

\(^{13}\) Id. at 154-55.

\(^{14}\) Alicke, *Culpable Control*, supra note 4, at 557; ROBINSON & DARLEY, supra note 3, at 188-89.

\(^{15}\) Alicke, *Culpable Control*, supra note 4.
causation and to assign liability when a person performs a bad act for a bad reason. In one experiment, for example, participants considered a person who got into a car accident rushing home with an anniversary gift for his parents to be less of a cause of the accident than a person rushing home to hide some illegal drugs, even when the rest of the facts were exactly the same.\footnote{Alicke, \textit{Culpable Causation}, supra note 4, at 370.}

We will see below how affective considerations, such as bad motives and unsympathetic suspects, contribute to assigning blame. It is important to note, however, that no one rejects causal models as irrelevant. If I cause a car accident and leave the scene, one cannot sensibly claim that my neighbor should be blamed simply because my neighbor is not a likeable person and performs bad acts more often than I do. Yet, if the facts about the accident are in dispute, these negative feelings about my neighbor may color the investigation, and motivate the investigators to find fault in him rather than in me. If we know in advance that looking at an event in a particular way will lead us to assign blame, that knowledge may motivate us to perceive the event differently. These experiences are examples of “observer bias,” a commonplace phenomenon in the legal system.\footnote{For discussion, see D. Michael Risinger et al., \textit{The Daubert/Kumho Implications of Observer Effects in Forensic Science: Hidden Problems of Expectation and Suggestion}, 90 CAL. L. REV. 1 (2002).}

Moreover, when more than one causal scenario is available and consistent with some version of the facts, one has no choice but to select among them. As Dan Kahan observed, the fact that blaming involves more than the logic of causation is not just a matter of noise entering the system. It is an important aspect of how we assign moral judgment.\footnote{Professor Kahan made this important observation forcefully during the Symposium. Dan Kahan, The Aesthetics of Blame in Criminal Law, Remarks at the Brooklyn Law School Center for the Study of Law, Language & Cognition Symposium, Responsibility & Blame: Psychological & Legal Perspectives (Oct. 18, 2002).} While this Article continues to look at blame in terms of causal schemata, we return later to how people decide which model of an event to accept when the facts make more than one available.

What do these cognitive schemata look like? The linguist Anna Wierzbicka has written about “cognitive scenarios” associated with emotions, including negative ones
that we associate with blame. According to Wierzbicka, many emotional responses emanate from reactions to good and bad events. Among the emotions that stem from bad events are sadness, unhappiness, outrage, grief, anger and distress. Others, such as anxiety, fear, panic and nervousness, involve concern about bad things happening in the future. Psychologists write similarly about assigning positive and negative valences to events.

Interestingly, the elements of Wierzbicka’s cognitive scenarios for emotional responses contain, by and large, the same elements that psychologists propose in describing the circumstances under which we blame. For example, Wierzbicka describes circumstances in which we might say that someone is angry. One such scenario is as a reaction to the harm caused by another. We say that someone is angry in the following situation:

Sometimes a person thinks: “Something bad happened because someone did (didn’t do) something. I don’t want things like this to happen. I want to do something because of this if I can.” When this person thinks this, this person feels something bad.

That bad feeling, Wierzbicka maintains, is anger. The somewhat juvenile-sounding tone of the scenario is not accidental. The tone reflects the fact that the scenario uses primitives that are by and large universal in the expression of emotion in languages around the world. There are few such universals; those that do exist are very basic. Were the scenarios that describe emotional responses not expressed in such basic terms, it would be difficult to account for their universality.

Negative emotional experiences generally, according to Wierzbicka, stem from scenarios that include, “something bad happened.” Sadness, for example, comes from a more passive

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20 Id. at 60-90.
21 See SHAVER, supra note 11, at 3.
22 Id. at 89.
23 Judge Posner argues that the paucity of moral universals makes it unlikely that moral theory can inform legal theory in a meaningful way. While this Article does not take a position on that issue, Wierzbicka’s work certainly supports Posner’s factual statement about there not being a great number of moral universals. See Richard A. Posner, The Problematics of Moral and Legal Theory, 111 HARV. L. REV. 1637 (1998).
24 WIERZBICKA, supra note 19, at 60.
reaction to bad outcomes. Of course, emotions can combine. One can feel sad and helpless with respect to the negative result and simultaneously angry at its cause. In fact, this mixture of feelings is commonplace.

Each of these reactions comes first from a perception of something that happened in the world, and then from one’s thoughts about the events. For reasons that Alicke explains, the perceptions of what happened need not be accurate. We can attribute an event to someone because a causal schema is present, but we can be wrong about causation in this particular instance. In other words, we are all casual causal profilers in everyday life.

Philosophers writing about blame often associate it with emotions of resentment and indignation, sometimes called “moral sentiments.” Wierzbicka describes indignation as a person thinking: “I know now: someone did something bad. I didn’t think someone could do something like this. I don’t want things like this to happen. I want to say what I think about this,” and experiencing negative feelings as a result. The reaction is a complicated one, involving an undesired outcome, bad conduct, surprise at the bad conduct and a negative emotional reaction as a result of experiencing these things.

I do not claim that Wierzbicka has captured all of the nuances of these emotional reactions, or that the relationship between blame and emotion can be reduced to a single emotion. Nonetheless, what triggers blame and what triggers such emotions as anger seem very similar. To capture the relationship between blame and negative emotional reaction to events, let us posit the following as a typical scenario that triggers blame:

Sometimes a person thinks: “Something bad happened because someone did (didn’t do) something. (That person should have known better.) I don’t want things like this to happen. When I think about the bad thing that happened, I also think about the fact that this person did something to make it happen.”

Thus, blaming involves focusing on the wrongdoer when thinking about an undesirable outcome that the wrongdoer has
caused. The scenario has all three elements of Alicke’s control theory: state of mind, a causal connection and a bad outcome.\(^30\)

Blaming seems so close to negative emotions that it is tempting to call blaming itself an emotional response. The same things, more or less, that lead to anger and indignation trigger blame as well. We could then say that holding someone responsible is a societal response to an emotional reaction based on a causal schema. But we routinely blame situations for bad outcomes with little emotional commitment. Especially relevant is our propensity to blame inanimate forces. Consider the following sentence, taken from a recent newspaper article: “A cold front, not Hurricane Lili, was to blame for last night’s storm system, officials said.”\(^31\) It is easy enough to find or construct other examples. Moreover, some cultures tend to focus blame more on situations than on people, suggesting the salience of alternative cognitive scenarios in those cultures.\(^32\)

On the other hand, we sometimes experience anger without blame. Consider a parent who is angry at a child for leaving a bicycle outside unlocked, allowing it to be stolen. The parent feels anger toward the child for his carelessness, but does not care at all about the bicycle, perhaps because it was already in bad shape and too small for the child. In this situation, it would be strange to say that the parent blames the child for the loss of the bicycle, notwithstanding the parent’s irritation.

As for the volitional component of blame, the more we can say that someone should have known better,\(^33\) the more blameworthy that person is. Intentionally vicious acts, for example, are worse than negligent ones. Studies repeatedly show a relationship between the assignment of responsibility on the one hand, and the bad actor’s state of mind on the other.\(^34\) The cognitive scenario for blame captures this sense by including the sentence “that person should have known better”

\(^{30}\) Alicke, Culpable Control, supra note 4, at 557.

\(^{31}\) Shannon Tangonan & Chris Quay, Tornadoes are Reported During Storm, COURIER-JOURNAL (Louisville, Ky.), Oct. 5, 2002, at 1B.

\(^{32}\) See, e.g., Tanya Menon et al., Culture and the Construal of Agency: Attribution to Individual Versus Group Dispositions, 76 J. PERSONALITY & SOC. PSYCHOL. 701 (1999).


\(^{34}\) See ROBINSON & DARLEY, supra note 3; Alicke, Culpable Causation, supra note 4, at 370; Alicke, Culpable Control, supra note 4, at 559-61.
in parenthesis to indicate both that it is not a necessary element and that it is itself graded.

A separate problem exists with respect to the causal element of the blame scenario. Just as there are progressively more culpable states of mind, there are progressively more direct causes. The law recognizes this in such concepts as proximate causation, and even “efficient proximate causation,” a concept still used in determining the liability of insurers in some states.\(^\text{35}\) I will defer dealing with this issue until we more closely examine different ways in which we express causation.

Finally, while I have argued for the distinction between blaming and emotion, I have said little about the relationship between the two. Several possible accounts are consistent with what I have said thus far. It is possible that the cognitive scenario that triggers blame also triggers emotional responses such as anger, resentment and sadness. At that point, the emotion and the impulse to blame reinforce each other. This version can be described in terms of a causal fork:\(^\text{36}\) A single scenario triggers two responses—blame and anger/resentment. But it is also possible to describe the relationship as a causal chain: The cognitive scenario triggers the emotional reaction as Wierzbicka describes,\(^\text{37}\) and the impulse to blame derives from the emotional response. After all, the characteristic of blame is associating causal attribution with the bad act. Anger and resentment are certainly good enough to provoke such focus. Conversely, it may be that recognizing blameworthy conduct as such helps to trigger an emotional response as well, as when we say, “how dare she!” In his contribution to this Symposium, Neal Feigenson describes a number of different ways in which emotion and attribution of responsibility can interact, and I agree with his position.\(^\text{38}\)

II. WHAT MAKES IT EASY TO BLAME?

Now let us examine more closely some interesting aspects of the cognitive scenario that triggers blame. As noted,

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\(^{35}\) See, e.g., Tento Int'l, Inc. v. State Farm Fire & Casualty Co., 222 F.3d 660 (9th Cir. 2000).


\(^{37}\) See WIERZBICKA, supra note 19, at 87-90 (describing scenarios for anger and indignation).

blaming seems to be triggered by a model whose prototypical instantiation has three elements: a bad state of affairs, causation and a culpable state of mind. Did evolution give us these cognitive structures for the sake of making us moral actors? We can never know. But we can look at some linguistic evidence that shows us using each of these constructs in everyday life without regard to moral content. In short, it appears that our strong impulse to attribute responsibility is built upon constructs that we need and use independently of moral judgment. Below I examine a few of them: our perception of events based on causal schemata; our distinguishing between good and bad outcomes; and our use of state of mind in the acquisition of concepts. The presence of the blame impulse’s building blocks in everyday thought may, at least to some extent, explain some of the reasons it is so easily triggered.

A. Event Structure

This Section makes the following argument: We conceptualize the world in terms of events and we conceptualize events in terms of cause and result. We do all of this automatically and in circumstances having little or nothing to do with moral attribution, which means that use of these constructs in the attribution of responsibility comes with little cognitive cost.

1. Events as Units of Analysis in Everyday Life

For many years, linguists and philosophers of language have considered events to have ontological status in language the same way that objects do. Compare the following:

(1) a. The bird flew into the nest.
   b. The yellow bird with the red beak flew into the nest.

These two sentences can be used to describe the same event in the world. The second sentence entails the first, and provides more information about the bird than does the first. Now consider the sentences in (2), taken from Ernest Lepore, a philosopher who writes about the relationship between language and logic:

(2) a. “The dog bit the man in the park.”
b. “The dog bit the man in the park after midnight on Wednesday under his arm.”

Just as (1)(b) entails (1)(a), (2)(b) entails (2)(a). But the difference between the sentences in (2) is not in the detail concerning an object, but rather in the detail concerning an event: The event of the dog biting the man. A theory of semantics should be able to account both for the entailments themselves and for the similarity between the entailments in (1) and (2). Creating a logic that performs operations on both objects and events accomplishes both tasks.40

There are other reasons for believing that our language uses events as primitives. Consider (3), also taken from Lepore:41

(3) John buttered his toast, and he did it after midnight.

Or consider (4):

(4) It just happened again!

Both of these sentences contain the pronoun it. But it does not refer to an object in either of these sentences. Rather, it refers to an event. In (3), the event is buttering toast. In (4), we don’t know what the event is. It refers to a concept of an event that the speaker has in mind and presumably the hearer can understand through context. In fact, you can utter (4) even if no one has said anything else and it would still be appropriate in the right circumstances. This does not mean that it in (4) is not a pronoun or, for that matter, that it is not the subject of the sentence. It is both. But it does mean that we can use pronouns to refer to events that we have in mind, something we can do only if we actually have events in mind. As the linguist Ray Jackendoff explains, examples like these provide linguistic evidence that we conceptualize in terms of events and that this conceptualization makes its way into some rather technical aspects of linguistic knowledge.42


40 For a detailed exposition of the role of events in formal semantics, see TERENCE PARSONS, EVENTS IN THE SEMANTICS OF ENGLISH: A STUDY IN SUBATOMIC SEMANTICS (1990).

41 LEPOR E, supra note 39, at 288.

42 For other arguments concerning the role of pro-forms in semantic interpretation, see RAY JACKENDOFF, FOUNDATIONS OF LANGUAGE: BRAIN, MEANING, GRAMMAR, EVOLUTION 915-18 (2002).
2. Causation in the Structure of Events

The ontological status of events in language is relevant to this discussion because we often characterize events in terms of cause and result. Psychologists have studied how people structure events. An interesting set of studies by Jeffrey Zacks, Barbara Tversky and their colleagues suggests that events are structured around their object.\textsuperscript{43} For example, people understand making a bed as an event that ends when the bed is made. To the extent that the entire purpose of the event is to effectuate the result, their findings mean that people structure events around causation and result. The fact that event perception is purposeful is akin to Alicke's notion that blame is based on control.\textsuperscript{44} If we look at events in everyday life according to their object, then it should not be surprising that we look at events that way in assigning blame. That's just the way we look at events.

3. Causation in Everyday Speech

In everyday speech, we typically do not use the word \textit{cause} to express causation. Rather, causation is such a basic part of our conceptualization that is part of the meaning of many verbs that we use routinely. Consider the following classic examples from the linguistic literature, which John Darley and I discuss in an article on causation and legal liability:\textsuperscript{45}

(5) a. Bill broke the vase.
   b. The vase broke.

We understand these sentences as related to one another. (5)(a) means something like (6):

(6) Bill \textbf{CAUSED} the vase to break.

Other examples include: “Bill baked a cake” (the cake baked), “Bill burned the toast” (the toast burned) and “Bill opened the door” (the door opened).\textsuperscript{46}


\textsuperscript{44} Alicke, \textit{Culpable Control}, supra note 4.


\textsuperscript{46} For detailed discussion of these alternations, see Beth Levin & Malka Rappaport Hovav, \textit{Unaccusativity at the Syntax-Lexical Semantics Interface}
Now consider the following sentences, discussed in a recent article on certain sentences called resultatives:

(7) “Ms. Bates, are you mad to let your niece sing herself hoarse in this manner?”

(8) “Leslie scrubbed her knees sore.”

To “sing oneself hoarse” means to sing until the singing causes one to become hoarse. Again, causation is built into the meaning of the expression, without reference to it as a separate linguistic item.

Of course, we can express causation separately. We can use the word “cause” itself or, in English, we can use the verb “make” to indicate causation:

(9) Look what you made me do.

The verb “make” is called the “periphrastic” causation marker in English. It is often used to express causation in situations that cannot use a causative verb. Consider (10):

(10) Mr. Mathis made the unruly student leave the room. We can’t say, “Mr. Mathis left the unruly student” to mean that he caused the student to leave. Note, in contrast, that when it is possible to express causation by using a causative verb, using the verb “make” instead of the causative verb implies indirect causation:

(11) Mr. Mathis made the unruly student stand by the window.

Here, we really could have said that he “stood” the student by the window. The use of the periphrastic marker suggests that no physical contact was involved.

An even more indirect means of expressing causation when a causal verb is available is to use the verb “cause,” as (12) illustrates:

(12) Mr. Mathis caused the unruly student to stand by the window.

Here we really don’t know what Mr. Mathis did, but the implication is that it was indirect and perhaps unusual.

For the most part, we call all of this causation. Yet, consider the following sentence:

(13) The colonel let the soldiers sleep outside in the field.


For discussion of this concept, see Levin & Hovav, supra note 46, at 293 n.3.
Is this causation? If by “let” we mean “made,” then perhaps it is. If “let” means “allowed” then we would probably not consider it to be a matter of causation. The question becomes important if one of the soldiers becomes ill from having been exposed to the elements all night. Should we blame the colonel? It depends on whether we believe that the colonel was a cause of the bad results.

In fact, people frequently do not distinguish between enablement and causation, although logicians do. Darley and I presented subjects with a story about a car owner who left his key in the ignition, later to learn that it was stolen by a teenager who got into an accident. Subjects were divided over whether the key-leaver could be said to have caused the accident, or whether he was only an enabler. Of those who found him to be only an enabler, about half thought he should be held liable for tort damages, while just about everyone who thought he was a cause thought he should be held liable. Thus, many look at enablement as a matter of indirect causation. In fact, some languages have separate words for direct and indirect causation, with enablement being part of the latter class of verbs.

4. Causation and Cognitive Scenarios for Blame

It appears, then, that causation is not a unitary concept. Causal schemata vary with the directness of the cause. Yet, we can blame for any level of directness. Part III of this Article looks at public opinion polls from the United States and Muslim countries on the question of who was responsible for the destruction of the World Trade Center in 2001. Consider the following possibilities, some of which reflect public opinion in different parts of the world:

(14) a. Arab terrorists destroyed the World Trade Center.
    b. The United States made terrorists destroy the World Trade Center.
    c. The United States caused terrorists to destroy the World Trade Center.
    d. The United States created circumstances that legitimizod terrorists in some quarters and

49 See Solan & Darley, supra note 45.
50 Id. at 289-90.
51 Id. at 295-96 (discussing the expression of causation in Dutch).
provided them with motivation to destroy the World Trade Center.

e. The United States destroyed the World Trade Center.

The consensus in the United States is that (a) is true. Those who blame the United States, in whole or in part, for the World Trade Center disaster typically would subscribe to (d), although some in Muslim countries subscribe to (e), as opinion polls discussed below show. But I believe most everyone would agree that (a) and (e) are far more blameworthy scenarios than is (d). The use of the causative verb “destroy” instead of either words of enablement or a periphrastic causal verb (“make” or “cause”) implies direct involvement, which we consider more culpable. It appears, then, that we do distinguish between direct and indirect cause in assigning blame. This has been demonstrated experimentally. Darley and I found that participants considered the teenager who stole the car subject to more liability than the person who left the key in the ignition. Yet, we remain uncomfortable equating (a) and (d) even if only by putting them at different places on the same continuum. If acknowledging (d) is psychologically tantamount to admitting (e), we have good reason to avoid thinking about (d) altogether. As Part III demonstrates, this sort of denial process is commonplace.

B. Good and Bad Outcomes

Returning to Wierzbicka’s analysis of emotion words, different cultures have different concepts with which they categorize emotions. Sometimes the differences are subtle; sometimes they are huge. In fact, there are very few universals when it comes to emotions. Among the universals that do exist are expressions of anger, feeling good and feeling bad, and recognizing that good and bad things happen.

Joshua Knobe has recently performed a simple but elegant experiment that shows one way that good and bad outcomes are part of our everyday thinking. He presented each subject with one of two stories. The first read:

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52 See infra note 76.
53 Solan & Darley, supra note 45 at 293.
54 WIERZBIKa, supra note 19, at 276-89.
The vice-president of a company went to the chairman of the board and said, “We are thinking of starting a new program. It will help us increase profits, but it will also harm the environment.”

The chairman of the board answered, “I don’t care at all about harming the environment. I just want to make as much profit as I can. Let’s start the new program.”

They started the new program. Sure enough, the environment was harmed.56

Subjects were asked how much blame the chairman deserved for the harm to the environment, and whether they thought the chairman intentionally harmed the environment.57 Eighty-two percent of the subjects said the chairman intentionally hurt the environment, and subjects thought he should receive a great deal of blame.58

The second story was identical to the first, but instead of explaining that the process harms the environment, the vice-president explained that the process helps the environment.59 The chairman answered, “I don’t care at all about helping the environment. I just want to make as much profit as I can. Let’s start the new program.”60 The result was just the opposite. Seventy-seven percent said that the chairman did not intentionally help the environment, and gave him little credit for having done so.61

Knobe’s study shows that people react differentially to good and bad outcomes. The point here is simpler: In order to make the judgments they did, subjects must have, without prompting, distinguished between good and bad outcomes. That we do so routinely is part of what makes possible the impulse to blame without complex intellectual analysis.

C. States of Mind

In assigning blame, people care about the actor’s state of mind. In fact, tort law is organized around such distinctions. Putting aside strict liability, we typically do not hold people responsible for innocent acts that lead to bad outcomes. We do,

56 Id. (manuscript at 3).
57 Id.
58 Id. (manuscript at 4).
59 Id.
60 Id.
61 Id. (manuscript at 4).
however, hold them responsible for being negligent ("you should have known better") and we permit punitive damages for people who are reckless or who knowingly cause harm. Criminal law makes similar distinctions, but draws its lines elsewhere.

Experimentally, Darley and I found a bootstrapping effect with respect to state of mind. Returning to the key-leaver, we varied his state of mind from innocent to negligent (leaving the keys because he was late to a meeting) to knowing (wanting his car stolen for the insurance money). We found that not only did subjects assign more liability the worse the state of mind, but that intentionally bad actors were perceived to have contributed more to the accident causally. Alicke reached similar conclusions in his studies of causation.

One interesting aspect of state of mind is how it comes to be that we even consider what others are thinking. Strawson, in his essay *Freedom and Resentment*, calls the fact that we do so a "commonplace," which forms the basis for much of his discussion:

> The central commonplace that I want to insist on is the very great importance that we attach to the attitudes and intentions towards us of other human beings, and the great extent to which our personal feelings and reactions depend upon, or involve, our beliefs about these attitudes and intentions.

If taking into account the thoughts of others were limited to the work of a careful moral thinker after considerable analysis of the blameworthiness of others, it would be surprising to find people using such information so reflexively. The harder it is to consider the thoughts of others, the more work it takes to attribute fault, and the less impulsive blaming should be.

In fact, people use state of mind information for reasons that have little to do with moral judgment. Developmental psychologists put it at the center of how children learn concepts. A mother who points out an elephant at the zoo to her toddler is really pointing out a large area containing all kinds of things. The child immediately grasps that the mother is talking about the elephant because she grasps that the

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63 See generally Solan & Darley, *supra* note 45.
64 Alicke, *Culpable Causation*, *supra* note 4.
65 Strawson, *supra* note 8, at 75.
mother's goal is most likely bringing the large animal to the child's attention. Thus, children learn what elephants are by seeing them (perhaps in pictures) and by understanding the state of mind of the person telling them about elephants.

Psychologists call this phenomenon the “theory of mind” approach to concept acquisition, or the “theory theory” approach. There is now extensive research on how and when children develop a theory of the minds of others. At this point, it is hard to deny that they do. The observation is an important one with legal ramifications beyond the scope of this Article. For example, it means that those who argue that the law should be less concerned with actors’ states of mind are proposing a change less realistic than they may realize. For present purposes, though, we need only recognize that attributing a culpable state of mind uses cognitive skills that we employ daily for purposes other than moral judgment, and that we do so easily and routinely.

III. AVOIDING AND DEFLECTING BLAME: SECOND ORDER EFFECTS OF THE BLAME IMPULSE

This Part uses two examples to develop a point made at the beginning of this Article: While blaming may be impulsive once we have the cognitive scenario that triggers it, we often have considerable latitude in how we conceptualize the world and can accept or reject alternative scenarios of the same event.

Psychologists have demonstrated convincingly that people routinely evaluate evidence of causal theories in a self-serving manner in order to avoid reaching unwanted conclusions. In an ingenious study, Ziva Kunda had both male and female subjects read a newspaper story about the effects of caffeine on women's health. The article “associated caffeine with fibrocystic disease, reportedly associated with often

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67 Alison Gopnik & Andrew N. Meltzoff, Words, Thoughts, and Theories (1997).
painful lumps in the breast that could go unnoticed in the early stages but that grew progressively worse with age. The disease was said to be serious because it was associated in its advanced stages with breast cancer. The article further stated that caffeine caused the disease by increasing the level of a substance called cAMP.

After completing the article, subjects answered questions about what they remembered and how convincing they found the arguments. They were subsequently questioned about their consumption of caffeine. The study revealed that women who were heavy caffeine users found the arguments less convincing than women who were light caffeine users, but caffeine intake played no role in how convincing men found the arguments. In other words, the greater the stake one has in the outcome, the less one will consider evidence likely to trigger causal attributions that one would like to avoid.

Now let us turn to how people interpret facts to trigger or avoid blame scenarios. The prototypical situation, in which it is easiest to blame, involves a bad person doing a bad thing for a bad reason. Nowhere is this more evident than in the various reactions to the World Trade Center disaster, which is addressed below in Section A. Section B then discusses more legally relevant examples: cases of police brutality discussed by Susan Bandes in this Symposium and elsewhere, and experimental evidence on jurors’ use of evidence.

A. *The World Trade Center Tragedy: Blaming and Refusing to Blame*

In the year following the destruction of the World Trade Center, polls showed that many Muslims did not believe that the hijackers were Arab men. According to one Gallup poll taken in six Muslim countries, only 18% of those polled...
believed that Arabs carried out the attacks, while 61% said that Arabs were not responsible.\textsuperscript{76} Assuming these respondents to be entirely wrong in their assessment of what happened, their response reflects a complicated moral position.

Why would intelligent people from the Muslim countries deny facts that seem so well-proven to the rest of us? While those involved in the deed and their close supporters may wish to stave off punishment, ordinary people most likely had other motives. The story probably goes something like this: “I am a Muslim and know my people. I can’t imagine anyone I know perpetrating such a violent act, which I denounce along with most of the rest of the world. I would never do so, the people I know would never do so, and none of us would ever support such a thing. It must be someone else.” In Iran, a more recent poll found two-thirds responding that the attacks on New York and Washington were unjustified,\textsuperscript{77} yet an earlier poll showed only 15% believing that Arabs carried out the attack.\textsuperscript{78}

This story has two sides. The first is revulsion and condemnation of a reprehensible deed—a moral position. The second part of the story is avoiding the truth. These two parts of the story are related. The most plausible reason for denying the obvious, even at the cost of losing one’s credibility, is recognition of the blameworthiness of the acts being denied. Nonetheless, in addition to being bad strategy, since everyone else is able to see what happened, denial here is immoral. This immorality has two aspects. First, taking responsibility for our actions is a good in itself. The more this happens, the more we are likely to exercise control over our worst impulses. Second, a person who turns his back on the truth turns his back on finding a cure for the evil he denies. If acknowledging responsibility leads to less societal support of those who foment violence and hate, then failing to do so can lead to further violence and hate. A moral actor would want to reduce this violence—not allow it to escalate on his watch.

Now let us move closer to home, where a similar dilemma characterized the discourse for months after the

\textsuperscript{76} In Poll, Islamic World Says Arabs not Involved in 9/11, U.S.A. TODAY, Feb. 27, 2002, at 1A. The countries were: Indonesia, Iran, Kuwait, Lebanon, Pakistan and Turkey. Saudi Arabia, Jordan and Morocco did not permit this question to be asked.


\textsuperscript{78} Richard Benedetto, Differences in Perceptions Fuel Mistrust, USA TODAY, Mar. 5, 2002, at 11A.
tragedy, and still does to a surprising extent. A poll taken one year after the attacks by the *Globe and Mail* of Toronto found that 84% of Canadians believed that the United States was wholly or partly responsible for the 9/11 disaster, while only 14% believed that the United States was not to blame at all.\(^79\) Canadians blame American foreign policy in the Middle East and around the world, according to the report.\(^80\) Polls show similar sentiments in Europe, although fewer Europeans blame Americans than do Canadians.\(^81\) How do these attitudes compare with those of Americans? I could find no polls during that period asking these questions, perhaps because pollsters assume the responses would so obviously be an overwhelming rejection of any culpability on the part of the United States. We do know that 90% of those polled shortly after the attacks supported military action against those responsible.\(^82\)

What is especially telling is that there has been little national debate on the matter. For months it was taboo to raise the issue at all. We dismiss reports like those from Canada, Europe or the Middle East with no serious substantive discussion of their merits. It is not difficult to find discussions of American foreign policy with respect to Iraq (the war there is ongoing as this volume goes to press), but finding reports with respect to the destruction of the World Trade Center is difficult.

Consider in this light the negotiations between Congress and President Bush over the creation of a commission to investigate possible intelligence failures prior to 9/11 and to suggest possible improvements in the gathering and analysis of intelligence information. From the beginning, this was a controversial proposal. Opponents, including Vice President Cheney, protested playing a “blame game” when we should be focusing our attention on fighting terrorism.\(^83\)

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\(^80\) Id.


administration then supported the formation of a commission, but did not agree to the terms under which such a body could operate, frustrating members of Congress in both parties, and families of 9/11 victims who consider the investigation important. Eventually the matter was resolved, and a National Commission on Terrorist Attacks Upon the United States was established by Title VI of the Intelligence Authorization Act for Fiscal Year 2003. But when the President named Henry Kissinger as its head, the fighting began again. Kissinger eventually resigned over his refusal to comply with ethics rules governing the disclosure of potential conflicts of interest.

I suggest that the same psychology that caused those polled in Muslim countries to deny Muslim involvement in the 9/11 attack has caused us to refuse to examine seriously anything other than retaliation against the perpetrators. I further suggest that the American response too has both its moral and immoral elements. On the one hand, focusing on anything other than the horror of the 9/11 attacks feels like a dilution of our moral outrage at an unspeakable act of mass murder. It also smacks of blaming the victim, a dynamic well-studied. Better not to ask the question if the answer can lead to misdirecting blame for the criminal acts of others.

But to the extent that we fail to examine American foreign policy dispassionately, to inquire whether it legitimately provokes a level of anger that is likely to engender terrorism and other violent responses, our denial is likely to lead to more violence. This is not to preordain the result of such an inquiry. We may decide that American foreign policy is, on

Cheney ask congressional leaders not to investigate the events leading up to September 11.

Michelle Mittelstadt, Outside Inquiry into 9-11 is Stalled; Victims' Families Lobbying Vigorously for Bipartisan Commission, DALLAS MORNING NEWS, Oct. 22, 2002, at 1A.


See David Firestone, Kissinger Pulls Out as Chief Of Inquiry Into 9/11 Attacks, N.Y. TIMES, Dec. 14, 2002, at A1. Subsequently, former New Jersey Governor Thomas H. Kean was appointed to chair the commission, which was soon to run out of funding before getting off the ground. An apparent compromise on that issue was reached in March 2003, as this volume goes to press. Dan Eggen, 9/11 Panel to Receive More Money; Negotiations Cut Commission's Request by $2 Million, WASH. POST, Mar. 29, 2003, at A4.

See supra note 6. Of course, whether one considers this phenomenon blaming the victim depends upon the extent to which one identifies a country with its political leaders, a question beyond the scope of this Article.
balance, good policy regardless of the consequences. But we cannot justify refusing to ask the questions, even if our refusal is morally motivated in its own right. When we evaluate serious crises in which we are not so closely involved, either historically or contemporaneously, it would never dawn on us to exclude serious inquiry into the broader circumstances surrounding the crisis, and to exclude analysis of those circumstances in our overall evaluation of the situation. It is not taboo for us today to ask about the circumstances in Germany between the two world wars that allowed Hitler to take power, or to look at the circumstances that led to the French or Russian Revolution, to take some obvious examples.

I do not mean to argue that foreign and American responses to 9/11 are morally equivalent. But on a psychological level, the two situations are quite similar. What is behind the popular reactions in both the Middle East and the United States is a second order effect of the impulse to blame.

B. **Evidentiary Maneuvers in Legal Contexts**

It should be no surprise that a similar dynamic recurs in legal contexts. Theorists have convincingly argued that legal fights are often battles between competing narratives. To the extent that blame is involved, which is generally the case in legal battles, the parties attempt to portray the facts of the case in a manner that is consistent with blaming only the other party.

Experiments show how jurors selectively use evidence to support outcomes they think are just. Kristin Sommer, Irwin Horowitz and Martin Bourgeois presented jury-eligible participants with a tape recording of a mock products liability case in which the defendant was at fault, although it unsuccessfully tried to warn the plaintiff of the danger, and the plaintiff was also negligent to some extent. They presented different groups with various jury instructions which, if adhered to, would lead to different outcomes: One set of subjects was instructed on strict liability, which would guarantee full recovery to the plaintiff, another on comparative

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88 See supra note 5.
90 Id. at 312.
negligence, which would result in weighing the relative fault of the parties in issuing an award, and a third on contributory negligence, under which the plaintiff's negligence bars recovery completely. In a pre-test of the experimental materials, a separate group of participants judged the strict and contributory liability conditions less fair than the comparative negligence condition. In the study relevant to this discussion, participants were divided into six-person juries, which deliberated after the trial. The deliberations were taped.

The results are striking. In reaching a verdict, some juries followed the judge's instructions (compliant juries), others did not (noncompliant juries). For our purposes, what is most important is what the juries discussed during the deliberations. Sommer et al. summarize their findings:

[N]oncompliant juries in the contributory negligence condition discussed the most proplaintiff evidence and noncompliant juries in the strict liability condition discussed the least proplaintiff evidence, whereas compliant juries (including those who nullified the law by altering damage awards) and those operating under the fair rule of comparative negligence discussed equal proportions of proplaintiff information.

Although I have not discussed all aspects of the results of this study, the basic message is clear: People tend to maximize the evidence that supports reaching conclusions they believe to be fair, and to minimize the evidence that supports conclusions that they believe not to be fair.

Sometimes the system itself facilitates the avoidance of blame when the system perceives that it has a stake in the outcome. Consider Susan Bandes's description of the hurdles faced by an individual attempting to hold the government responsible for police brutality in the context of a longstanding pattern of torture in Chicago:

Complaints are discouraged, confessions are not videotaped, record keeping is lax or nonexistent, records are sealed or expunged, patterns are not tracked, and police files are deemed undiscoverable. If a history of past incidents does exist and, despite these hurdles, becomes known to the brutality victim, he faces additional hurdles introducing evidence of the brutality in court, including restrictive

91 Id.
92 Id.
93 Id. at 314.
94 Sommer et al., supra note 89, at 316.
95 Id.
evidentiary rulings, protective orders, judicial toleration of police perjury or of “the blue wall of silence,” assumptions about credibility that favor police officers, the absolute immunity of testifying officers, substantive constitutional doctrines insulating failures to act or demanding an exceptionally high level of proof of wrongdoing, restrictive municipal liability standards coupled with a lack of receptivity to evidence of systemic wrongdoing, and standing doctrines that make injunctive relief nearly impossible to obtain.

Quite obviously, these hurdles are calculated to make it especially difficult for the legal system to draw the conclusion that police brutality is a systemic problem. This absolves the government that runs the department from the responsibility to see that it stops.  

My point here is not that we should suddenly be shocked that the system of justice is not always just. Rather, my point is that the ease with which we blame plays such a huge, albeit tacit role in our lives, including our legal system, that the lengths to which we are willing to go to avoid blame are virtually limitless. It is easy enough to compare the legal maneuvering that Bandes describes with the intellectual activity that leads to such radically different accounts of the World Trade Center attacks from one culture to another.

CONCLUSION

This Article has explored a notion of blame that results not from conscious reasoning, but rather from reacting to cognitive scenarios that trigger it. Much of the Article focused on what those scenarios may be, and where they come from. All of the elements of the blame impulse—state of mind, bad events and causation—function routinely in other psychological processes. In fact, all are so basic that we could not function well without them. This means that the impulse to assign responsibility and blame, while moral, may consist primarily of

96 Bandes, Patterns of Injustice, supra note 75, at 1279-80.
97 The legal difficulty of attributing blame to a governmental entity, rather than an individual, is the issue that Bandes raises in her contribution to this issue. See Bandes, Not Enough Blame, supra note 75. There is also a psychological literature that discusses cultural differences in assigning blame to individuals versus entities. See Menon et al., supra note 32.
98 In a dramatic announcement, outgoing Governor Ryan of Illinois pardoned four prisoners on death row in January 2003, who had alleged that they confessed under torture to the crimes of which they were convicted. Other prisoners on death row had their sentences commuted. Jodi Wilgoren, 4 Death Row Inmates are Pardoned, N.Y. TIMES, Jan. 11, 2003, at A13.
a secondary use of other cognitive tools, just as language uses parts of the mouth and nose that serve other primary functions, such as breathing and eating. If this is true, then it also would not be surprising that the impulse to blame underdetermines our larger system of moral judgment, which includes such things as inchoate crimes, justification and excuse. I conclude with a few words about this larger picture.

Assuming this perspective on responsibility and blame to be even partly right, it produces both first order and second order incongruities. The first order incongruities involve adjustments that a legal order will need to make to compensate for overblaming and underblaming. This is a matter of legal doctrine.

The blame impulse suggests that it is no accident that the legal system is conventionally organized as it is: basic crimes, inchoate crimes, justification and excuse. Inchoate crimes fall outside the blame paradigm since they typically require no bad outcome, and justified and excused conduct fall inside the blame paradigm. To the extent that the blame paradigm is the organizing principle, it would suggest that the conventional taxonomy is not only firmly rooted in a historically contingent but entrenched system, it is also the default position in the way we conceptualize responsibility and blame.

Second, it might be interesting to examine these doctrines to determine whether they have a different status in everyday judgments of responsibility and blame. Some work has been conducted in this regard. Robinson and Darley performed a set of studies to determine the attitudes of people concerning responsibility and blame, and to compare those attitudes with the legal treatment of various situations. Among their findings was that attempted crimes are viewed to be almost as blameworthy as successful ones when the person attempting the crime is in dangerous proximity to the scene. People do not necessarily think that the bad marksman is any less culpable than the good marksman. But the law makes an enormous distinction, most vividly in jurisdictions that have capital punishment. In contrast, the law often treats attempts that are remote, but still sufficient to result in legal liability more harshly than everyday morality would call for.

99 ROBINSON & DARLEY, supra note 3.
100 Id. at 20.
Robinson and Darley also looked at how people react to certain legally acceptable excuses, focusing on cases of diminished capacity. 101 Briefly, their subjects typically believed that people who were legally insane for various reasons should not be punished, but rather should be civilly committed. 102 However, there was far less sympathy for people who committed crimes because they were involuntarily intoxicated. 103 It would be very useful for research to focus more on how people react to defendants who enter the judicial system with a wide variety of problems that make them more susceptible to conducting their lives outside of socially acceptable norms.

In today’s world, however, it is perhaps the second order consequences that are the more interesting. Awareness of the impulse to blame leads to strategies to avoid acknowledging the cognitive scenarios that trigger the impulse. This effort to avoid continues to make the world far more dangerous and the system of justice somewhat less just.

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101 Id. at 127.
102 Id. at 132.
103 Id. at 141.
THE FALL AND RISE OF BLAME IN AMERICAN TORT LAW

Anthony J. Sebok

It is a truism that tort law changed in character sometime in the middle of the twentieth century. At some point—maybe 1950, maybe 1960—tort experienced, in the words of two recent commentators, “a plaintiff-oriented expansion.” Virtually all commentators, regardless of their particular normative views, agree that, as a matter of empirical fact, courts and legislatures changed tort doctrine in ways that made it easier for injured persons to recover. In a path-breaking 1985 article titled The Invention of Enterprise Liability, George Priest announced that “since 1960, our modern civil liability regime has experienced a conceptual revolution that is among the most dramatic ever witnessed in the Anglo-American legal system.” In 1992, Gary Schwartz criticized Priest’s analysis of the post-1960 revolution, but agreed that since 1960 the courts instituted a series of “liability-expanding changes in tort doctrine.”

One might think from this description that tort law experienced a Kuhnian revolution that shocked its practitioners from one paradigm into another. Thomas Koenig and Michael Rustad gave this impression in their recent book, In Defense of Tort Law, in which they state that “the American

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† Professor of Law, Brooklyn Law School. I would like to thank John Goldberg, Larry Solan and Ben Zipursky for their comments. Ningur Akoglu and Vijay Balign provided excellent research assistance.

1 THOMAS H. KOENIG & MICHAEL L. RUSTAD, IN DEFENSE OF TORT LAW 46 (2001).
law of torts was a relatively sleepy outpost prior to the 1940's. But this statement is true only if one interprets “the law of torts” to mean tort law’s doctrines as accepted by the courts and laid out in the treatises. During the 1920s and 1930s, the legal realists set out the theoretical framework for the revolution that would erupt in the 1960s.

As G. Edward White has noted, realism changed tort law in two ways. First, by attacking nineteenth century conceptualism, scholars such as Leon Green undermined the foundations upon which traditionalists like Francis Bohlen based assertions concerning the existence of concepts like proximate cause, duty and assumption of risk. Green was the ultimate nominalist; his casebook did not have index entries for doctrinal categories like assumption of risk. Instead, he categorized tort cases by context: “automobile traffic” or “manufacturers and dealers.”

Green’s point was not only that students would become better lawyers if they learned about the patterns of legal decision making, he was also genuinely skeptical about the theoretical assumptions that lay behind conventional tort categories. For example, Green thought that both Justice Cardozo and Justice Andrews made a mess of the famous Palsgraf decision. According to Green, Cardozo’s abstract discussion of duty and Andrews’s hypotheticals concerning proximate cause simply threw the case into a useless “realm of metaphysics.” Similarly, on the eve of America’s entry into the Second World War, William Prosser rejected the idea that proximate cause could be reduced to “absolute rules” and denounced the “fruitless quest for a universal formula” of causation.

The second way in which legal realism changed tort law is that it gave judges a new rationale for decision. Green believed that what both Cardozo and Andrews were concealing in their conceptualist rhetoric was that Palsgraf was really a very simple case involving the “adjustment by government of

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4 Koenig & Rustad, supra note 1, at 46.
5 In Tort Law in America, White described the impact of realism (which he locates as occurring between 1910 and 1945) as foundational. See G. Edward White, Tort Law in America: An Intellectual History 112 (1985).
8 Leon Green, The Palsgraf Case, 30 Colum. L. Rev. 789, 791 (1930).
risks which . . . cannot be eliminated from the hurly-burly of modern traffic and transportation.\textsuperscript{10} Realism in torts meant that concepts like negligence and causation had to be replaced with interest balancing between parties to a suit, based on the specific context of the accident.\textsuperscript{11}

One might think that the rejection of conceptualism would have committed the realists to a form of legal skepticism or at least agnosticism about how to decide individual tort cases.\textsuperscript{12} In fact, Green’s radical nominalism, in a way, implied that every case was sui generis and that nothing scientific could be said about cases other than a report of their facts.\textsuperscript{13} However, realists like Harry Shulman found just the opposite. In a review of Green’s casebook, Shulman noted that an implication of Green’s radical organization was that “[i]ndividual cases should be studied not merely as particular private disputes, but as instances of larger social problems.”\textsuperscript{14} In the casebook Shulman published with Fleming James ten years later, he boasted openly that the book was designed to teach students to view tort law as an instrument of “social engineering.”\textsuperscript{15} This was consistent with the view of realists in other parts of law who saw the “agencies of government, including courts, as social engineers who balanced the claims of competing interests on behalf of the public good.”\textsuperscript{16}

Where the conventional histories of tort law are correct is that, as a matter of doctrine, tort law did not really exhibit pro-plaintiff tendencies until about 1960. The litany of changes are well known. Courts and legislatures abolished immunities for charities, governments and family members.\textsuperscript{17} They

\textsuperscript{10} Green, supra note 8, at 791.
\textsuperscript{11} See WHITE, supra note 5, at 107.
\textsuperscript{14} Harry Shulman, Book Review, 45 HARV. L. REV. 1445, 1448 (1932).
\textsuperscript{15} HARRY SHULMAN & FLEMING JAMES, CASES AND MATERIALS ON THE LAW OF TORTS vii, viii (1942).
\textsuperscript{16} WHITE, supra note 5, at 106.
\textsuperscript{17} For charities, see, e.g., Restatement (Second) Torts § 895E (1965); Colby v. Carney Hospital, 254 N.E.2d 407 (Mass. 1969); Howle v. Camp Amon Carter, 470 S.W.2d 629 (Tex. 1971); N.C. Gen. Stat. § 1-539.9 (2003). For governments, see, e.g., Owen v. City of Independence, 445 U.S. 622 (1980) and Restatement (Second) of Torts § 886C.
eliminated auto-guest statutes and guest doctrines.\textsuperscript{18} Tort law dissolved the special rules of liability for landowners, sometimes even with regard to trespassers.\textsuperscript{19} In medical malpractice, the elimination of the locality rule and the emergence of patient-oriented informed consent made it easier for plaintiffs to overcome physician defenses.\textsuperscript{20} Courts recognized new affirmative duties on the part of building owners, therapists and others to prevent injuries to third parties.\textsuperscript{21} Bars and liquor stores acquired the obligation to prevent injuries caused by drunk driving, as did, on occasion, social hosts.\textsuperscript{22} The expansion and codification of manufacturers’ obligations to consumers, which existed since the early part of the twentieth century, catalyzed the emerging doctrine of strict products liability.\textsuperscript{23} The emergence of negligent infliction of emotional distress under the bystander rule and intentional infliction of emotional distress created entirely new forms of civil wrong.\textsuperscript{24} Comparative fault replaced the defense of contributory negligence, and many courts merged the defense of assumption of risk into comparative fault.\textsuperscript{25} Courts and legislatures relaxed the rules of causation as well, first with the introduction of alternative liability, then with the expansion of the substantial factor test through the introduction of concepts like market-share liability and loss of chance.\textsuperscript{26} As Gary Schwartz famously commented, until the early 1980s, the modern cases added to casebooks were “almost

\textsuperscript{18} For auto-guest statutes, see, e.g., \textit{McConville v. State Farm Mutual Automobile Insurance Co.}, 113 N.W.2d 14 (Wis. 1962); Zumwalt v. Limland, 396 P.2d 205 (Or. 1964); Brown v. Merlo, 506 P.2d 212 (Cal. 1973).
\textsuperscript{19} See, e.g., Rowland v. Christian, 443 P.2d 561 (Cal. 1968); Peterson v. Balach, 199 N.W.2d 639 (Minn. 1972).
\textsuperscript{20} N.Y. PUB. HEALTH LAW § 2805-d (1994); Morrison v. MacNamara, 407 A.2d 555 (D.C. 1979); Moore v. Regents of the Univ. of Cal., 793 P.2d 479 (Cal. 1990).
\textsuperscript{24} For negligent infliction of emotional distress, see, e.g., \textit{Dale v. LaCroix}, 179 N.W.2d 390 (Mich. 1970). For intentional infliction of emotional distress, see, e.g., \textit{State Rubbish Collectors Ass’n v. Siliznoff}, 240 P.2d 282 (Cal. 1952).
\textsuperscript{25} See, e.g., McIntyre v. Balantine, 833 S.W.2d 52 (Tenn. 1952).
all triumphs for the plaintiffs; the collection of these cases could be referred to as ‘plaintiffs’ greatest hits.’

One popular explanation for the rise of the plaintiff in the 1960s is that the shift of the balance of power away from defendants and toward victims was an extension of the basic concept of negligence that had developed in American law in the nineteenth century. This argument explains the change in the doctrines, not as a change in the conceptual premises of American tort law, but as an example of the law “working itself pure.” Thus, for Schwartz, post-1960 tort doctrine was a consequence of judges taking negligence seriously and creating a “full regime of negligence liability.” His explanation for why this evolution occurred when it did is quite subtle, making the very reasonable point that it was no accident that judicial activism in tort law coincided with judicial activism in other areas of the law, especially civil rights. Under this theory, the elimination of arbitrary limitations on liability simply gave more Americans the right to the same redress for injury caused by faulty behavior that other Americans (namely the rich, white or powerful) had enjoyed since the time of Holmes.

Others have viewed the doctrinal change more critically. George Priest, for example, attributed the change to a revolution in tort theory. According to Priest, erosion of the traditional concepts of negligence gave way to an ideology of enterprise liability. Enterprise liability is a normative claim: It states that the right system of tort law is one which spreads the costs of accidents as broadly as possible by imposing such costs on those actors who are in the best position to charge those costs to the parties best able to bear those costs. Enterprise liability is therefore grounded in a descriptive claim: It assumes that society will be better off if its system of torts spreads the costs of accidents broadly. Finally, according to Priest, enterprise liability is closely linked to one specific doctrinal principle, namely strict liability or liability without fault. According to Priest, the reason for the marked shift toward plaintiffs after 1960 is that American judges accepted

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27 Schwartz, supra note 3, at 604.
29 Schwartz, supra note 3, at 607.
30 Id. at 610-12.
31 Priest, supra note 2, at 527.
32 Id. at 462.
the ideology of enterprise liability and implemented it by expanding strict liability in American tort law.  

As with all complex historical questions, both sides are right in this debate. Clearly, Schwartz was correct when he observed that the vast majority of doctrinal changes in the torts revolution of the 1960s and ’70s were merely extensions of the fault principle, and that even products liability, after a brief flirtation with true strict liability, settled back into a version of the fault principle. But Priest was also correct in that the principles of enterprise liability played a role in the rise of the plaintiff after 1960. Both scholars are correct because the expansion of the fault principle in favor of plaintiffs was part of the legal realists’ academic agenda, which set the stage for the revolution of the 1960s. These legal realists believed fervently in the theory of enterprise liability. Scholars in 1930, when Leon Green, Fleming James and Harry Shulman wrote, believed that the idea that the doctrines of fault favoring defendants were arbitrary and formal and should be expanded to allow more plaintiffs to win was consistent with the idea that costs of accidents should be spread broadly. If, as I noted above, one believed, as did the realists, that tort principles were just instruments in the service of social engineering, then there was nothing dishonest about using the language of fault to create the right social outcome.

I want to stress, however, that the realist project, which was most certainly progressive in spirit and pro-plaintiff in effect, had a very different philosophical foundation than the pro-plaintiff consensus described by Schwartz and, in the context of today’s “tort wars,” defended today by most liberals. The realists’ project had two defining features: enterprise liability and the elimination of fault. I discuss each in turn.

The idea that law should solve “social problems” was not just a vague jurisprudential platitude to the realists when it came to torts. It soon took on a very specific and precise meaning. The work of Fleming James, the most outspoken and persuasive realist advocate of enterprise liability, illustrates this meaning. By the 1920s, the American experiment with workman’s compensation was well under way. What is remarkable about the history of workman’s compensation is how many diverse parts of American society came together to

33 I take this to be Carl T. Bogus’s central claim as well in WHY LAWSUITS ARE GOOD FOR AMERICA (2001).
support its adoption. This was in part because its rationale could be viewed differently depending on one’s social role. For businesses, it seemed like a necessary way to cut off the incipient expansion of the fault principle into the workplace. For progressives, it seemed like the best way to get capitalists to give back to workers some of the surplus value that the wage system took from them. For James, it was simply an illustration of the principle of risk distribution. That is, it was always better “to divide a loss among a hundred individuals than to put it on any one.” 34 This was because a single, unpredictable, catastrophic loss to an individual costs far more to society than the same loss distributed in small, predictable payments. 35 This was, of course, the theory of enterprise liability.

James and other realists measured all tort rules against the standard of enterprise liability. This usually led to pro-plaintiff conclusions at the level of doctrine, since defendants were generally in a better position to distribute risks. 36 For example, William O. Douglas criticized Young B. Smith’s defense of the doctrine of vicarious liability, which argued that entrepreneurs should be held liable for costs associated with the actual control they have over their profit-making ventures. 37 Douglas was skeptical that there really was any intelligible distinction between the control an enterprise had over its workers and the control it had over independent contractors. He argued instead for vicarious liability based on a firm’s size: The bigger the firm, the more able it would be to spread the cost of the accident. 38

Sometimes the logic of enterprise liability brought the realists to conclusions which seemed, at first blush, pro-defendant. When Charles Gregory argued in favor of contribution, he thought that he was promoting a progressive reform in the face of nineteenth century conceptualism: From the plaintiff’s point of view, imposing the damage burden on

34 Priest, supra note 2, at 471 (paraphrasing Fleming James, Jr., Contribution Among Tort Feasors in the Field of Accident Litigation, 9 Utah. B. Bull. 208 (1939)).

35 See Fleming James, Jr., Contribution Among Joint Tort Feasors: A Pragmatic Criticism, 54 Harv. L. Rev. 1156 (1941).

36 Id. at 1169.

37 Young B. Smith, Frolic and Detour (pts. I & II), 23 Colum. L. Rev. 444, 716 (1923).

only one defendant worked against risk distribution. 39 James argued that Gregory’s analysis was incomplete: The virtue of the old system of several liability was that the victim usually picked the largest and wealthiest of defendants to sue. Contribution would allow that first defendant to spread some of the cost onto a smaller and less solvent faulty party, thus inhibiting the goal of enterprise liability. 40 Gregory later admitted that James’s logic was correct, and he noted that if James’s reasoning was extended, tort law should just be replaced by “a program of socialization of loss through taxation . . . [and] I would be most sympathetic.” 41

One might think that a realist like James would have been loath to support a doctrine that would have let small enterprises off the hook if they were indeed responsible for injuring people. But that assumes that James and the realists viewed the world of torts through a simple capital versus labor dichotomy. This may have been true of certain sociological jurisprudences, like Brandeis, but by the late 1930s, any class analysis that may have colored nineteenth century progressivism was drained from the movement. For James, the logic that argued for workman’s compensation—which he found irresistible—also argued for no-fault automobile insurance, even though there was no obvious class orientation to the set of defendants and plaintiffs in the typical road accident. 42

Returning to James’s critique of Gregory’s argument for contribution, one wonders why James did not view attributing a cost to a faulty party as something that would always benefit society in the end. According to Learned Hand, the purpose of negligence law is to benefit society by making defendants pay for their negligent conduct, where negligence means activities whose cost of prevention is less than the expected loss. 43 One would think that James, whose interest seemed wholly focused on social welfare, would have seen that allowing a large enterprise to pay more than its expected loss, and small

40 James, supra note 35, at 1165-66.
42 See Fleming James, Jr. & Stuart C. Law, Compensation for Auto Accident Victims: A Story of Too Little and Too Late, 26 Conn. B.J. 70 (1952) (detailing James’s thirty-year interest in this topic).
enterprises to get away by paying nothing, would defeat the incentive structure of the Hand test. This is, of course, exactly what a law and economics scholar would argue, and, like the realists, law and economics is solely concerned with social welfare.

One certainly should view James as a proto-realist. He can be seen as the direct precursor to Guido Calabresi, a foremost liberal law and economics scholar. But none of this should obscure the one great point of departure between the realists and modern law and economics: The realists were skeptical of the idea that rules of tort law had anything to do with the number of accidents in society. Law and economics scholars premise their entire system on the power of law to incentivize, and the application of the principles of negligence is one of the means by which incentivization occurs.\textsuperscript{44} What law and economics scholars fail to appreciate is that the realists viewed incentivization as another conceptualist myth. To understand why this is so, we must examine the second defining feature of the realist project in torts: the rejection of fault.

Beginning with Holmes’s famous rejection of the confusion of criminal and civil wrong in \emph{The Common Law},\textsuperscript{45} modern tort scholarship took for granted that when we talk about “fault” in tort law, we mean a failure to achieve an objective standard of conduct, not a subjective state of mind that is evil or motivated by wrongful intent. However, those who followed Holmes never adequately explained why a negligent person (as opposed to the victim or a third party) ought to pay for an accident. On a pragmatic level, many torts scholars felt that there was no need to answer the question. One could say, as many courts have, that as between two innocents (the faulty defendant and the victim) the faulty party who caused the harm should pay. Yet, as the realists pointed out, this left too much up for grabs. How to define “fault”? What if both parties were at fault? What about duty? Proximate cause? How should these concepts be decided, if not by reference to the defendant’s decisions and choices? And so, throughout the early part of the twentieth century and, in fact,


\textsuperscript{45} Oliver Wendell Holmes, Jr., \textit{The Common Law} (1949).
up to today, the content and character of the choices made by
the defendant remains a central question in a negligence case.

For the traditional corrective justice theorist, the
question of breach is twofold. The factfinder first asks, “did the
defendant act reasonably” and then, “could the defendant have
acted reasonably?” If the answer to the latter question is “no,”
then the answer to the former question is irrelevant. For the
modern law and economics theorist, the content of the choices
made by the defendant is just as important. From the
perspective of the Hand test, the question of breach is twofold.
The factfinder first asks, “did the defendant act efficiently” and
then, “would a finding of liability in a similar case have
incentivized the defendant to act efficiently?” If the answer to
the latter question is “no,” then the answer to the former
question is irrelevant.

All of this assumes that, in general, the choices made by
the defendant are conscious choices that a self-conscious
deliberation could affect. The realists were skeptical of this
assumption. As James mentioned in his discussion of the “last
clear chance” rule, “[i]t is a wrong not to look for danger when
reasonable people would, even though failure to look springs
from a habit of inattentiveness which a psychologist might
regard as the inevitable outcome of heredity and
environment.” This skepticism about the connection between
choice and fault formed the foundation of James’s insistence on
cost spreading as the only scientific goal of tort law. In 1950,
James explicitly set out the empirical evidence which he
believed supported his viewpoint; he used studies by industrial
psychologists and the United States Army to support his view
that most accidents were the inevitable consequence of certain
persons being more “accident-prone” than others. James cited
one study that suggested that 10% of the workforce was
responsible for 75% of workplace accidents, and he cited
another that claimed that 4% of drivers were responsible for
33% of all auto accidents. From these and many other studies,
James concluded that although accident-proneness is not
randomly distributed throughout the population, its presence
in certain persons is not attributable to any self-conscious

46 Fleming James, Jr., Last Clear Chance: A Transitional Doctrine, 47 YALE
L.J. 704, 714 (1938).
47 Fleming James, Jr. & John J. Dickinson, Accident Proneness and Accident
Law, 63 HARV. L. REV. 769 (1950).
48 Id. at 770.
mental state. Absent "from the causes of accident-proneness are 'carelessness' or 'fault'... 'accident proneness may be a... phenomenon independent of any question of responsibility, conscious action or blameworthiness."49

If it were true that people who caused accidents were not consciously responsible for their actions, what should the tort system do? James advised (as would Calabresi twenty years later) that there were two choices: (1) take measures that reduce the number of accidents caused by the accident-prone; or (2) take measures that minimize the bad effects of the accidents that do happen.50 James briefly considered the idea of the government segregating the accident-prone from society, but, as he noted, the "accident-prone—about four percent of the total population—can scarcely be kept out of work and off the roads."51 On the other hand, steps obviously could be taken by the individual or her employer to minimize the degree to which the accident-prone individual imposes risks on others. But James thought it obvious that the individual was in a terrible position to regulate her own conduct. Not only is it psychologically impossible for the individual to decrease the risks she imposes on others by self-conscious effort, but the types of decisions which could make a difference—about rates of activity, for example—are precisely the sorts of decisions which only large institutions are good at making.52

This meant, of course, that if one wanted to use tort law to minimize the risks posed by the accident-prone, litigation focusing on the choices made by faulty individual defendants would be ineffectual, because it "emphasize[s] the relatively insignificant part which the individual's conscious free choice plays in causing or preventing accidents."53 Instead, asking large organizations, like corporations and insurers, to make those determinations was far more rational.54 And finally, given

49 Id. at 775 (citation omitted).
50 Id. at 777.
51 Id. at 776.
52 James & Dickinson, supra note 47, at 780.
53 Id.
54 Large organizations could reduce overall costs if they could (1) remove the individual actor from a dangerous position; (2) train the actor to act safely despite his or her accident-proneness; or (3) construct prophylactics so that when the individual acted unsafely (an inevitable event) their injury was ameliorated. Of these three options, industrial America was especially keen on (2) and (3). See John Fabian Witt, Speedy Taylor and the Ironies of Enterprise Liability, 103 COLUM. L. REV. 1, 37 (2003) (describing the work of "safety engineers" on behalf of large corporations who wished to reduce their workman compensation costs after 1910).
that accidents were mostly inevitable and were not the result of conscious ill will, the cost of trying to deter them would be at some point much higher than allowing them to occur and spreading their costs. Thus, if accident-proneness was a medical or psychological condition (and not even necessarily a disease), the appropriate response was enterprise liability, not fault-based deterrence or corrective justice.

James’s argument against fault was clearly rooted in the new science of behavioralism, which was in vogue in the middle of the twentieth century. But other realists had their own reasons for being skeptical of fault. Albert Ehrenzweig saw fault as an expression of a repressed social desire to impose order onto the world, in much the same way that Freud understood certain psychoanalytic-desires categories that, although repressed, govern action subconsciously.\(^{55}\) Ehrenzweig noted that, even though tort law claimed to have abandoned the idea that fault reflected moral defect, there remained, even in the conception of “objective” fault, “a primitive urge to find a wish and a will behind all causation.”\(^{56}\) Although we agree that a faulty actor might not have been able to act differently, we “single him out . . . [because] we refuse to believe in the harmdoer’s innocence, and that negligence, however objectively conceived, implies blame for subconscious fault.”\(^{57}\)

Ehrenzweig anticipated Schwartz’s observation that American tort law, because of the pressure exerted on it by various progressive forces, would provide greater and greater recovery to plaintiffs through an expanded menu of claims under the fault principle. What intrigued Ehrenzweig was that the American tort system clung to the fault principle despite its contradictions and suspect conceptualist roots. He cited James’s article on accident-proneness and said that no one could possibly believe that the reason the fault rule is retained in automobile cases is for deterrence.\(^{58}\) Ehrenzweig could not see how the fault principle, through deterrence, could possibly produce safer products under the emerging doctrine of products liability.\(^{59}\) In the end, Ehrenzweig argued, deterrence and reformation were mere rationalizations designed to dress up


\(^{56}\) Id. at 861.

\(^{57}\) Id. at 862.

\(^{58}\) Id. at 865.

\(^{59}\) Id.
the fault principle so that it would fit into the scientific modes of discourse that characterized social science in the twentieth century. The real mystery, from a socio-psychological point of view, was the persistence of the fault principle, since it seemed obvious to Ehrenzweig that the fault principle was simply a “more refined form of retaliation” rooted in the early “barbaric system of revenge” that Holmes claimed had been left behind with the adoption of the objective system of negligence.  

Ehrenzweig was no more impressed by strict liability than by the fault principle. Strict liability merely pushed the question of revenge back to the step of causation. All strict liability says is that “the person innocently causing the harm is ‘less innocent’ than the injured,” strict liability projects onto innocent conduct a ground for liability.  

Thus, the selection of an innocent causal actor under strict liability is no different from the selection of a faulty but well-intentioned actor under the objective test for negligence. In both cases, what is doing the legal work is really the subconscious “animism which sees fault in all causation.”  

Thus, Ehrenzweig observed that in the end, fault is “the mother of all absolute liability statutes.”  

For Ehrenzweig, the only “mature” response to accident would be some form of social or loss insurance.  

In making this claim, he was, of course, explicitly and half-seriously comparing modern America’s “choice” of the fault system to the sorts of immature and self-defeating choices that an immature or untherapized adult might make in his personal life. Ehrenzweig noted that where experts had recommended no-fault programs, society (or influential elements in society) resisted: The Saskatchewan no-fault auto insurance program was undercut by the retention of a right to recover for injuries caused by negligence—thus forcing the insurance scheme to retain “the most irrational feature of our law.”  

In 1959, Fleming James delivered a lecture at the University of Buffalo School of Law in which he looked back at tort law in the middle of the twentieth century. According to

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60 Ehrenzweig, supra note 55, at 866.
61 Id. at 870.
62 Id.
63 Id. (citations omitted).
64 Id.
65 Ehrenzweig, supra note 55, at 871 (citing Leon Green, The Automobile Accident Insurance Act of Saskatchewan, 32 J. COMP. LEGIS. & INT'L L. 39 (1950)).
the accepted histories of tort law, this speech occurred just before the beginning of the “revolution” in torts. The tone of the lecture is slightly depressed. James noted that, given the forty years of empirical studies on the question of the incidence and cost of accidents in society, he could easily state a number of conclusions. First, most victims of accidents were undercompensated for their economic losses. Second, there was a tremendous randomness in the amount of compensation that victims of similar accidents received. Third, many people had no first party insurance, and the people who needed it the most (the working poor) had it the least. Fourth, most tort damages were paid not by the party found in fault, but by either an insurer or an employer. Fifth, since most accidents were caused by accident-prone persons who were ignorant that they were accident-prone, and who would not be able to do anything about it if they knew, “putting the pressure of tort liability directly on individuals” was futile. Sixth, programs like workman’s compensation had led to a reduction in industrial accident rates.

From this James concluded: “[T]he present system is a miserable failure, marked by stark overall inadequacy punctuated by occasional fantastically high awards.” He suggested that one day America might get around to adopting a system of social insurance based on the principles of enterprise liability. And in the meantime? In a section titled The Role of Courts in the Meantime, James listed the things that he thought progressive torts scholars like himself should encourage as satisfactory intermediate steps.

The first idea James endorsed was that the courts adopt a laundry list of pro-plaintiff doctrinal changes. These included: eliminating intra-family and charitable immunities; allowing recovery for negligently inflicted emotional distress; expanding products liability; eliminating the special limitations of liability for landowners; abolishing or reducing contributory negligence; expanding res ipsa loquitur; and further developing the

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67 Id. at 328-29.
68 Id. at 329.
69 Id. at 329-30.
70 Id. at 330.
71 James, supra note 66, at 330.
72 Id. at 331.
73 Id.
74 Id. at 335-37.
substantial factor test in causation. Of course, this “wish list” contained virtually all of the doctrinal changes that materialized after 1960. What is odd, of course, is that James should have endorsed these moves as part of his realist agenda. As noted above, according to Schwartz, these doctrinal changes were part of the expansion of the fault principle, not its elimination.

The reason for James’s apparent change of heart is easy to see—as a realist, he had no trouble recommending doctrinal changes that would make the tort system look more like a social insurance system, even if the conceptual foundations for those changes were quite different from his own. James did not actually believe in the fault principle, or even in deterrence. He would not, however, oppose the adoption of a doctrine just because its champion believed in that doctrine because it was a perfection of the fault principle (or would achieve deterrence). For James, half a loaf was better than none.

For the remainder of this Article, I describe what has happened since the realists helped us achieve their half a loaf. It is possible that James and Ehrenzweig thought that after tort law expanded to include more participants within the fault system and allowed more recoveries through the litigation process, their real agenda would gradually take hold, and America would replace the negligence system with a system of social insurance. Perhaps they thought that, at the very least, some form of strict liability would replace negligence, so that the problems identified by the realists with the concept of fault would be gradually removed from our law and thrown into the dustbin of tort history, along with other embarrassing concepts like the *wergeld.* But nothing like that has occurred. I argue that not only has negligence remained vital to our tort system, but, in fact, fault is being “remoralized”—that is to say, more and more tort litigation is using a concept of fault that asks the factfinder to focus on the defendant’s subjective state of mind.

A very interesting episode in the history of American tort law illustrates my argument. The realists were, as I described above, absolutely certain that, after workman’s compensation, automobile accidents would be the next part of American tort law to fall to the logic of enterprise liability.

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75 Id. at 336.
76 In ancient Germanic and Anglo-Saxon law, *wergeld* was a person’s value in monetary terms, which was paid by a person committing an offense to the injured party or, in the case of death, to his family.
James was certain that automobile litigation exhibited all the characteristics of an excellent candidate for treatment under a no-fault system. In 1970, Massachusetts enacted the first no-fault automobile insurance law, and about half the states in the country followed suit within a few years. No-fault had been the sort of “good-government” issue that many liberals supported. They saw it as part of a progressive, regulatory response to an expensive, inequitable and inefficient system. Not surprisingly, Consumer’s Union—probably the leading consumer’s rights group in the country at the time—supported no-fault. The basic argument for no-fault was that it helped low-income drivers by insuring that they received a minimum of guaranteed coverage for economic losses with no litigation in exchange for limits on non-economic damages.

Beginning in the 1980s, no-fault regimes around the country came under attack. The primary complaint was that they had not achieved real reductions in auto insurance costs, although the reasons for that are somewhat complex. What is more interesting for purposes of this Article is the fact that some of the strongest critics of no-fault today are consumer groups such as Public Citizen and Consumer’s Union. In the midst of the somewhat arcane debate over whether any state has really tried a “pure” no-fault scheme (compared to “modified no-fault” which allows litigation once low thresholds are met), one cannot but be amused by Ralph Nader’s comments in 1999:

No-fault systems explicitly contradict the fundamental principle of American justice that wrongdoers are held responsible for the harm they cause. By eliminating “fault,” no-fault effectively treats good drivers and bad drivers the same. This is not merely a philosophical

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77 A young Michael Dukakis, who had recently been elected to the state legislature, championed no-fault in Massachusetts.
79 In 1971, 1973 and 1984, Consumer’s Union strongly endorsed no-fault in editorials in its magazine Consumer Reports.
80 A common criticism of no-fault regimes was that many state legislatures did not adopt true no-fault, but weak hybrids compromised by add-ons or monetary thresholds. In the add-on states there are very few or no restrictions on lawsuits, and typically some plaintiffs recover economic damages in the form of no-fault payments and then use the tort system to sue for pain and suffering. In the monetary threshold states, a plaintiff who incurs medical costs above the threshold preserves his right to bring a lawsuit. These thresholds, although varied but most often being low in the dollar level, create an incentive to incur higher medical costs.
concern. A body of evidence shows that no-fault leads to more accidents because it weakens the deterrent effect of the tort law.\textsuperscript{81}

Nader may be right; maybe James was completely wrong about no-fault insurance, fault, deterrence and accident-proneness. What is incredible to note, however, is how far “progressive” tort law has come since the 1930s. Obviously, at least when it comes to automobile accidents, the consumer movement has very little in common with the philosophical foundations of the realists.

It is no secret that the Naderite organization, Public Citizen, today opposes any effort to move to non-tort compensation schemes. There are cynical explanations for this position, but I do not want to pursue them. Rather, let us take Nader at his word: It is a fundamental principle worth upholding that faulty actors should pay for the injuries they cause. What would be the philosophical foundation that would underpin this new “progressive” view of fault?

One place to gain insight into this worldview is a new book, \textit{In Defense of Tort Law}, written by two self-identified pro-consumer torts scholars, Thomas H. Koenig and Michael L. Rustad. The book begins with a quote from Prosser: “[T]he law of torts is a battleground of social theory.”\textsuperscript{82} At the beginning of the book, they tell with admirable clarity the history described above. They add an additional historical epoch, which they describe as “Tort Law Retraction: 1981-Present.” This makes sense, since as Schwartz noted in the title of his 1992 history of modern tort law,\textsuperscript{83} by the 1980s the pro-plaintiff explosion in tort doctrine had come to a standstill and might even have begun to reverse. The rest of the book’s six chapters are a guided tour of the current doctrinal areas which Koenig and Rustad think are noteworthy, either because they are emerging areas of tort law or because they are under siege from the forces of “tort reform.” Therefore, although titled a “defense” of tort law, the book does not claim to be a comprehensive defense of all of tort law. One must assume that Koenig and Rustad thought that some parts of the doctrine are so uncontroversial as to require no defense.


\textsuperscript{82} \textit{Rustad & Koenig, supra} note 1, at 1.

\textsuperscript{83} See Schwartz, \textit{supra} note 3.
Yet, there is something very peculiar about the world of torts described in the book. When Koenig and Rustad discuss medical malpractice, they discuss medical malpractice so heinous that it looks like battery, and when they discuss products liability, they discuss conspiracies on the part of manufacturers to conceal and deceive. Of course, as Rustad and Koenig know, as an empirical matter, only a tiny fraction of torts involve conduct which warrants punitive damages. In reality, modern tort law in America is about car accidents: About two-thirds of all claims, three-quarters of all lawyers' fees and three-quarters of all payouts in the personal injury liability system arise from auto accident cases. Punitive damages are very rarely awarded in car accident cases for the obvious reason that Americans, litigious as they are, do not claim that the person who struck them was anything more than careless. The remaining one-third of claims, those arising from non-automobile related injuries, are usually the result of mere accident.

Rustad and Koenig's highly unrepresentative review of "modern" tort law reflects their interpretive standpoint. The reason they highlight such rare and unusual cases is that cases involving highly culpable conduct (as opposed to mere negligence) represent the true core function of modern tort law. In their book's conclusion, Koenig and Rustad describe the "most important function" of tort law as "compensating for wrongs that are rarely [but could be] punished through criminal law." Criminal activity is an odd place to begin describing the basic or most important function of tort law. Holmes rejected subjective standards of liability in negligence cases, in part because he believed that in the modern world there was and ought to be a great difference between tort law and criminal law. Needless to say, the realists would have found this characterization of tort law strange. James thought that tortfeasors suffered from something akin to an illness. So

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84 RUSTAD & KOENIG, supra note 1, at 137-38. The cases discussed in these pages are, in fact, clear cases of battery.
85 Id. at 180-81.
86 Id. at 39.
88 Nonetheless, Americans are likely to blame car accidents on someone else: A Rand Institute study discovered that 90% of drivers in two car accidents blamed someone else for the crash. See id. at 159.
89 Id. at 207.
well was the modern legal academy schooled in the teachings of Holmes that Ehrenzweig thought that the desire to punish, while at the root of modern tort law, was something with which any self-respecting torts scholar would vehemently deny any connection. To put it bluntly, Koenig and Rustad’s claim is not merely nonobvious, it contradicts the dominant tradition of modern tort theory.

Political scientists offer two explanations for the resurgence of blame in tort law. One explanation is that reversion to the tort system has proven to be a relatively successful strategy for political actors interested in changing the status quo, because American political institutions are so diffuse and difficult to control. According to this “constitutional theory,” decentralization combined with a post-war demand for “governmental activism on social problems” channels to the courts energy that would otherwise go toward other democratic institutions. Three features of the courts make them a relatively more attractive site for activism in the United States. First, courts are independent of the state apparatuses (the “insulation incentive”); second, they are powerful (the “control incentive”); and third, they do not have to raise funds to achieve the ends which they command—instead they force the losers of the adjudged lawsuits to implement their will, on pain of being found in contempt of court (the “cost-shifting incentive”).

According to the constitutional theory, it is no accident that Ralph Nader perceives a coincidence between his interest in redistribution and the admittedly inefficient private tort system. Unlike the realists in the 1920s and ‘30s and progressive social democrats in Europe, Nader has a visceral distrust of government bureaucracies. He believes that government agencies are subject to capture and fall prey to the same cost-benefit reasoning that corporations use. On the other hand, “for everything wrong with bureaucracies, Nader sees something right with courts.” Since courts are not part of a centralized and rationalized structure, they can be reached

91 Burke, supra note 90, at 15.
92 Id. at 53-54.
93 Id. at 54.
and persuaded by mavericks with new and unconventional points of view (e.g., people like Nader). Of course, one might argue that rationally organized, bureaucratic approaches to the questions of social policy are more likely to actually help the poor than are “maverick” appeals to isolated courts—that is, of course, the lesson of success of the Weberian tradition in Europe. Sometimes the tradeoff between the Naderite program—driven as it is by the insulation, control and cost-shifting incentives—and the interests of those it wants to help is quite palpable. For example, in Lawyers, Lawsuits, and Legal Rights Thomas Burke details how Nader and his allies in the California Democratic Party fought a coalition of Latino and poverty activists who wanted to push a low-cost, no-fault program through the California legislature in 1988.

The constitutional theory is attractive, but it can only tell half the story. There would be no point to the structural incentives offered by the courts if the substantive decisions made in the courts were not of interest to the groups who were in a position to choose the venue where, all things being equal, they wanted the question of the cost of accidents to be heard. If, for example, judges and juries were indifferent to the rhetoric of blame, or worse yet, were more likely to blame plaintiffs as opposed to defendants for their injuries, then there would be no reason to believe that courts would be a more attractive venue than legislatures and agencies for those interested in redistributing the costs of accidents.

This is where the second theory from political science, which attempts to explain the rise of litigiousness in America, helps to clarify matters. According to Daniel Polisar and Aaron Wildavsky, American political culture has always been a product of the interplay (or tension) between individualism and egalitarianism. Both ends of this spectrum place blame at the center of their political worldview: Individualists explain accidents by looking at the fault of individuals, while

95 BURKE, supra note 90, at 120-41. For a less restrained and much more bitter account of Nader’s role in thwarting no-fault in California, see Andrew Tobias, Ralph Nader is a Big Fat Idiot, WORTH, Oct. 1996, at 94.
96 Daniel Polisar & Aaron Wildavsky, From Individual to System Blame: A Cultural Analysis of Historical Change in the Law of Torts, 1 J. POL’Y HIST. 133, 143-44 (1989). Individualism and egalitarianism form two cells of a four-cell matrix. The other two cells are fatalism and hierarchy. An example of a society suspended in tension between egalitarianism and hierarchy is a social democracy such as Sweden.
egalitarians explain accidents by blaming “the system.” When egalitarians blame “the system,” they do so by viewing its symbols—experts, corporations, municipalities, etc.—as filled with the potential for wrongdoing which is made manifest whenever there is an accident.

The theory of system blame is a little misleading, since it is not really about a shift of blame away from individuals to society. In fact, ironically, true system blame would not have much use for a tort system. If egalitarians truly believed that “the system” were at fault for the injuries suffered by consumers, auto drivers, workers and patients, then they would probably want to scrap individual litigation designed to identify defendant fault and support government-sponsored insurance schemes and no-fault. True system blame would lead an egalitarian to exactly the same position as that adopted by the realists seventy years ago.

The insight motivating Polisar and Wildavsky’s concept of “system blame” is that blame is a shared point of orientation around which American political culture, in its different modalities, revolves. This is consistent with Kagan and Burke’s analysis of the three incentives that drive political actors toward the courts under the conditions of weak government in their constitutional theory. Courts, not agencies, are sites where the language of blame is readily heard. System blame is really nothing more than the relative intensification of the number of occasions when society will deem certain actions as potentially blameworthy, and a shift in the identity of the actors. Under the regime of what Polisar and Wildavsky call individual blame, relatively more accidents were presumed or adjudged to be either the victim’s or no one’s fault, while in the period of system blame, relatively more accidents are presumed or adjudged to be the fault of someone with whom the victim had some sort of relationship.

Under this interpretation, there is no a priori reason to presume that the episodes of blaming in law that characterize the constitutional theory and the theory of system blame will go necessarily against capital and achieve redistribution.

97 Id. at 144.
98 Somewhat hyperbolically, Polisar and Wildavsky characterize the effect of the shift from individualism to egalitarianism on American tort law thusly: “Fault once had to be proved; now it is presumed.” Id. at 146.
99 See BURKE, supra note 90, at 13-15.
100 Polisar & Wildavsky, supra note 96, at 148.
Indeed, as America’s experience with no-fault auto insurance has demonstrated, activists who want to use the tort system to promote redistribution will vigorously defend a regime of blaming through litigation, even when it clearly hurts the poor. One might view the tactical adoption of blame structures as part of a progressive strategy of the second best. That is, if the constitutional theory is correct, then given the embedded separation of powers at the very core of government, private litigation is the best that the poor could ever hope to get, notwithstanding the claims of academics to the contrary.

Another explanation for the postwar embrace of blaming structures by progressives is that American progressivism, like American political culture, is itself deeply affected by the individualism/egalitarianism split identified by Polisar and Wildavsky. That is to say, progressive thought in the United States simply may not be as concerned with economic justice as it was in the earlier parts of this century. To be sure, Polisar and Wildavsky assume that they must solve the problem of why the growing influence of egalitarianism produced the phenomenon they identify as system blame. But consider, if just for a moment, whether progressive political culture became more concerned with identifying and punishing the wrongs of individuals than with improving the average utility functions of society since the era of legal realism. Burke observes, almost as an aside, that although he is skeptical that American political culture is characterized by an increase in “rights talk” (as argued by Mary Ann Glendon in 1991), he is much more persuaded that what followers of Glendon are really seeing is an increase in “punishment talk” in American political discourse.\(^{101}\)

Burke does not pursue his point, partly because his constitutional theory is supposed to explain the rise of litigation without reference to political culture, and partly (I suspect) because he associates Glendon’s work with a certain kind of political conservatism, which would be hard to square with the pro-litigation actors whose decisions he has tried to explain in his book. Nonetheless, I think that Burke may be on to something. As he notes, punishment talk was doing a lot of work in the Naderite campaign against no-fault auto insurance in California: “[T]he campaign consultant who successfully beat back Proposition 104 . . . found that voters responded less to a

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\(^{101}\) **Burke, supra** note 90, at 184.
rights argument than to a punishment argument—that bad drivers should pay the price for their mistakes."\(^{102}\) I suspect that the argument that would work best to convince citizens to keep other unwieldy parts of our tort system—such as medical malpractice or products liability—is not that victims have a right to the sometimes oversized awards they receive, but that a system which provides for punishment is better than one which distributes wealth evenly but bloodlessly.

To conclude, I recommend that scholars engage in further study on the present attraction of punishment to progressive torts scholars and activists. This may seem like a strange research agenda to recommend, given the important role that progressives play today in opposing America’s Draconian criminal justice system. Nonetheless, we may find that, ironically, realism’s assault on the philosophical and psychological assumptions behind the concept of fault has been set aside by realism’s heirs to pursue—perhaps with justification—an agenda in which punishment, and hence blame, provide the clarion call of progressive torts.

\(^{102}\) *Id.* at 184.
MISUNDERSTANDING ABILITY,
MISALLOCATING RESPONSIBILITY

Jeffrey J. Rachlinski

Allocating responsibility for accidents is one of the law’s primary functions. An important default principle of tort law in the Anglo-American legal tradition is that harm must “lie where it falls.” When harm results from conduct that the law considers negligent, however, the law requires the negligent party to bear the costs of the harm. Defining negligent conduct and administering this definition properly is therefore critical to determining who bears the cost of accidents.

Although the courts have adopted numerous formulations of negligence, all revolve around the reasonableness of a party’s behavior. As noted in the Restatement (Second) of Torts, “the standard of conduct to . . . avoid being negligent is that of a reasonable man under like circumstances.” Even though virtually all activities create a risk of injury to others, tort law is not meant to convert everyone into insurers whenever they undertake any action. So long as one’s conduct conforms with the definition of reasonableness, harm ordinarily will not result in liability. But where the conduct is unreasonable, liability attaches.

In turn, the determination of reasonableness can only be made with reference to the underlying purposes of tort law. Scholars and courts disagree somewhat as to the primary purpose of tort law, but there is substantial agreement on a

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1 Oliver Wendell Holmes, Jr., The Common Law 144 (1949).
2 Restatement (Second) of Torts § 283 (1965).
3 James A. Henderson, Jr., Expanding the Negligence Concept: Retreat From the Rule of Law, 51 Ind. L.J., 467, 524-25 (1976).
number of basic principles. The two purposes scholars and courts most commonly cite for tort law are to encourage efforts to minimize the cost of accidents (the deterrence function) and to make careless parties compensate their innocent victims (the corrective justice function). In general, when people do not account for the risk of harm to others that their activities pose, courts consider their conduct unreasonable. Holding people responsible for conduct that poses a substantial likelihood or degree of harm, or for harm that is easy to avoid, furthers the goal of deterring socially undesirable conduct by forcing people to pay for the harm caused by actions with excessive social costs. Liability also furthers corrective justice goals by forcing those who engage in destructive behavior to compensate the victims of their actions.

In determining what constitutes reasonable conduct, however, courts might inadvertently set unattainable standards. On its face, the law demands nothing more than that people perform as well as their physical abilities allow. People are required only to apply such skill and care in avoiding accidents as a hypothetical reasonable person would under the circumstances. To determine whether an actor’s conduct was reasonable, a factfinder inevitably must examine the circumstances surrounding an accident and judge whether a reasonable person could have avoided the accident. If the reasonable person, using her attention, memory and perceptual abilities, would have avoided an accident, then the fact that an accident occurred implies that the actor was engaged in unreasonable conduct. Thus, determining whether a reasonable person could have avoided an accident requires courts to endow the hypothetical reasonable person with cognitive abilities.

Recent research on intuitive understanding of cognitive abilities (known as “meta-cognition”) suggests that the tort law’s seemingly sensible reasonable person test holds people to an unobtainable standard. The law’s hypothetical reasonable person possesses those mnemonic and perceptual abilities

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8 G.P. Fletcher, Fairness and Utility In Tort Theory, 85 Harv. L. Rev. 537 (1972).
9 Restatement (Second) of Torts § 289 (1965).
consistent with the lay intuition of a judge or jury. If lay
intuition suggests people can see things that most people
actually fail to see, hear sounds that most people actually
cannot hear, attend to stimuli that most people actually miss
and remember events that most people actually forget, then the
reasonable person is actually a superhero; ordinary people
cannot conform their conduct to the entity endowed with these
abilities. Consequently, factfinders relying on the reasonable
person test will find people liable for accidents that they could
not have avoided with the exercise of reasonable care. By
comparing the conduct of ordinary people to that of an
idealized superhero, the law allocates fault where none exists
and labels reasonable conduct as unreasonable. Because recent
research suggests that people commonly overestimate cognitive
abilities, the application of the reasonable person test might
undermine the deterrence function and produce results wholly
inconsistent with ordinary notions of justice and fairness.

This Essay explores the question of whether the law’s
reliance on an intuitively based standard creates a kind of
strict liability for accidents and the consequences of that
system’s approach. Unlike some other cognitive impediments to
sound legal judgment, courts have never really considered the
possibility that they systematically overestimate people’s
cognitive abilities. Consequently, it is difficult to place this
cognitive difficulty into a legal analysis. Nevertheless, this
Essay makes an attempt. Part I defines the reasonable person
test in more detail, evaluates the standard in light of the
purposes of tort theory and examines whether the research on
meta-cognition indicates that this standard is excessive. Part II
describes the consequences of an excessive reasonableness
standard. This Essay concludes in Part III by noting that even
though the standard appears too high, other factors suggest
that perhaps an excessive, idealized standard is not so
disastrous to the system as to warrant significant reform.

I. THE REASONABLE AND THE REAL PERSONS

It is well understood that tort law’s reasonable person
represents an idealized standard to which no one conforms all

10 Jeffrey J. Rachlinski, A Positive Psychological Theory of Judging in
Hindsight, 65 U. Chi. L. Rev. 571 (1998) (describing how the hindsight bias adversely
affects legal judgments and how the courts have adjusted to account for this problem).
People commonly take risky shortcuts, and attention often lapses in the face of monotonous tasks. Such is the stuff of negligence. Even though the law defines the reasonable person in idealized terms rather than in terms consistent with actual behavior, the reasonable person test is intended to describe an ideal to which all can, if they try, conform. If the hypothetical reasonable person possesses abilities that exceed those of most real people, however, then courts hold people liable for innocent conduct.

A. **Who is the Reasonable Person?**

The definition of the reasonable person necessarily incorporates the purposes underlying the tort system: deterring socially undesirable conduct and compensating the victims of such conduct. In an effort to further these purposes, however, the tort system has created a standard to which no one conforms all of the time. This is an acceptable aspect of the tort system, however, because tort law is intended to signal acceptable and unacceptable choices about how to behave. Everyone sometimes behaves in a socially unacceptable manner, and the obligation that the reasonable person test creates is simply to pay for the consequences of such conduct. The reasonable person test is meant simply to create an administratively workable scheme for identifying inappropriate choices that people make.

1. The Reasonable Person and the Purpose of Tort Law

The reasonable person is a fiction, a “creature of the law’s imagination.” Courts and legal scholars have attempted to define the reasonable person precisely, but its meaning remains elusive. Inevitably, definitions of the reasonable person are intertwined with tort law’s diverse and sometimes conflicting purposes. Many scholars agree that the purposes of the tort system are both to vindicate the rights of aggrieved parties and to deter people from engaging in excessively risky conduct. This view is, however, not universal. Many law and economics scholars contend that deterrence is the primary goal

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of tort law. They worry that without the prospect of tort liability, people will take little or no account of the harm that their activities can impose on others.\footnote{GUIDO CALABRESI, THE COST OF ACCIDENTS (1970); LANDES & POSNER, supra note 7, at 8.} For these scholars, tort law is a way of encouraging people to take cost-effective measures to reduce the number and cost of accidents. Other scholars deny that the tort system is meant to deter economically inefficient activity, arguing instead that it primarily serves to vindicate the rights of those who have been injured wrongfully.\footnote{JULES L. COLEMAN, RISKS AND WRONGS (1992); Weinrib, supra note 6.} These scholars argue that people have a right to be free from carelessly caused injuries, and tort law is a way of vindicating that right. This latter notion requires some definition of the specific rights that tort law will vindicate, but there is general agreement that community standards of conduct determine which risks are unacceptable.\footnote{COLEMAN, supra note 15, at 334.}

Despite some conflicts, the two basic purposes of tort law coincide often enough that courts rarely find it necessary to delineate tort law’s purposes with greater precision.\footnote{Richard A. Posner, The Concept of Corrective Justice In Recent Theories of Tort Law, 10 J. LEGAL STUD. 187 (1981).} To illustrate, consider a stylized example. Suppose a driver is running late for a business meeting and wants to speed to arrive on time. Assume that if he is late for the meeting, there is a one in ten chance that his client will be so angry at his tardiness that he will lose $5,000 in lost sales. Also assume that if he drives fast, he will make the meeting, but if he drives at a normal speed, he will miss it. Further assume that at a normal speed, he incurs a one in 100,000 chance of hitting (and seriously injuring) a pedestrian, whereas if he drives fast that risk increases to one in 1,000. Suppose that the accident will impose $1,000,000 in costs on the pedestrian for lost wages, hospitalization and some monetary quantification of pain and suffering. Under these circumstances, the social costs of driving fast are $990 ($1,000,000 (1/1,000 - 1/100,000)) and the social benefits are $500 ($5,000 (1/10)). Without liability for negligence, the driver faces incentives to drive fast, even though the net social costs outweigh the benefits, because he realizes only the benefits. A liability rule that imposes the full social costs of driving too fast on the driver, however, eliminates this incentive. Thus, under a deterrence-oriented
analysis, driving fast to make the meeting imposes unreasonable risks because the costs outweigh the benefits; driving fast is economically inefficient. An assessment under a corrective justice theory produces a similar result. Exposing unwitting strangers to great risks of bodily injury for the sake of a business relationship violates their rights to safety, and a reasonable member of the community would not engage in such conduct.

Both deterrence and corrective justice concerns place the degree of risk imposed as a critical factor in the negligence calculus.\textsuperscript{18} Under a deterrence theory, if driving fast only slightly increases the risk of hitting a pedestrian, say to one in 10,000, then the social costs of driving fast are relatively small (only $99). In such a case, the decision to drive fast is reasonable, inasmuch as it averts a $500 loss at a cost of only $99. If a business loss seems too trivial to compare to a physical injury, one can change the hypothetical to suppose that the driver is a doctor or ambulance driver speeding to the aid of an injured person so as to make the type of injury consistent, but so long as we are willing to quantify physical injuries, this change is unimportant. Even though the decision to drive fast imposes costs on the pedestrian, the law would consider such costs a necessary part of ordinary life. Likewise, under a corrective justice theory, people are entitled to drive, even though doing so places others at risk. Pedestrians are entitled only to freedom from careless driving that needlessly places them at risk of injury. Walking the streets and driving necessarily entail some risks, but so long as those risks are not excessive, or not undertaken without regard to the pedestrian’s interests, the risks lie where they fall. Thus, risk is the critical factor in the negligence calculus under both theories underlying tort law, which often complement rather than compete with each other.

In some instances, however, the principles underlying tort law and the specific circumstances of the behavior produce different outcomes. Scholars argue, for example, that in many circumstances, even if the private benefits of an activity outweigh the social costs, a reasonable person might refrain from engaging in the activity.\textsuperscript{19} To illustrate, consider the

\textsuperscript{18} Id. at 202-04.
difference between the rush to a business meeting and the rush of a medic to an accident. A deterrence theorist might argue that a reasonable person does not rush to a business meeting, but does rush to a medical emergency, because the stakes in the latter case are higher. Under this analysis, a reasonable person would speed to a business meeting if the net benefits were high enough to justify the social costs associated with potential accidents that speeding would cause. In contrast, tort theories based on corrective justice might condemn certain activities, such as speeding, as inconsistent with social norms. Hence, a court might deem unreasonable any speeding to a business meeting, regardless of the stakes, while finding acceptable and reasonable a medic’s rush to an accident.

Even with this mix of potentially competing concerns, courts have settled upon a generally accepted definition of the reasonable person. This definition includes corrective justice goals by referring to social norms: “The words ‘reasonable man’ denote a person exercising those qualities of attention, knowledge, intelligence and judgment which society requires of its members for the protection of their own interests and the interests of others.” 20 The definition also incorporates deterrence concerns by taking account of the value society places on the risk the reasonable person creates and the activity she undertakes. 21

2. Conformity with the Reasonable Person Standard

Whatever the definition, the idealized nature of the reasonable person has long made it the subject of mockery. As one scholar observed, “this excellent but odious character stands like a monument in our Courts of Justice, vainly appealing to his fellow-citizens to order their lives after his own example.” 22 According to this influential description, the reasonable person:

invariably looks where he is going, and is careful to examine the immediate foreground before he executes a leap or bound; . . .

20 Restatement (Second) of Torts § 283 cmt. b (1965).
21 Id. § 283 cmt. e (stating that conduct is reasonable if the “magnitude of the risk outweighs the value which the law attaches to the conduct which involves it . . . [requiring the actor to] give an impartial consideration to the harm likely to be done [in] the interests of the other as compared with the advantages likely to accru to his own interests, free from the natural tendency of the actor . . . to prefer his own interests to those of others”).
22 A.P. Herbert, Misleading Cases in the Common Law 12 (1930).
neither star-gazes nor is lost in meditation when approaching trapdoors or the margin of a dock; . . .

never mounts a moving omnibus and does not alight from any car while the train is in motion; . . .

will inform himself of the history and habits of a dog before administering a caress; . . .

never drives his ball until those in front of him have definitely vacated the putting-green; . . .

never swears, gambles, or loses his temper; [and] . . .

uses nothing except in moderation. 23

Obviously, this tongue-in-cheek description is intended to persuade the reader that everyone engages in conduct that falls short of the requirements of the reasonable person. Although each of the examples above arises from actual cases in which a court held some conduct to be unreasonable, we easily recognize ourselves in the failings of at least some of the people in these cases. Only the hypothetical reasonable person is free from negligence all of the time; the rest of us commit negligent acts.

Identifying the characteristics of the reasonable person also reveals the two common ways in which negligence occurs. First, people choose to undertake excessive risk in their activities. They take shortcuts, hurry along at an unreasonable pace or simply choose to engage in conduct that entails more risk than is socially sensible. Because the tort system forces people to bear the cost of such decisions, it removes any economic incentives for such conduct. Nevertheless, people might irrationally hope that their choices will not result in harm, or they might rationally recognize that in some circumstances an injured party is unlikely to bring a successful tort action against them. People often might not consider the risks that their actions impose on others, but tort law holds them responsible for failing to do so. Second, people’s attention often lapses in the face of monotonous, albeit dangerous tasks. Despite tort law’s requirement of reasonableness, it is difficult to maintain focus on a repetitive task. Failing to pay as much attention to a task as the reasonable person would may not be a conscious choice, but it is still negligence and doubtless a common source of accidents.

23 Id. at 10-11.
The reasonable person, of course, never engages in either folly. She never makes choices that impose an excess of socially unacceptable risk, and she never lets her attention lapse when undertaking risky activities. This is not to say the reasonable person imposes no risks on others. She imposes those risks that are socially acceptable and pays as much attention as is needed to minimize the danger her activities pose.

3. Why Rely on the Reasonable Person Standard?

Of course, no one conforms to the reasonable person standard all the time. The attributes that courts ascribe to the reasonable actor are true of no one. All of us have, at one time or another, leapt before we looked. Consequently, some have called for the elimination of the reasonable person test: “[I]f [the reasonable person] is truly an inadequate, unrealistic, and unmanageable creation and cannot readily be transformed into something more satisfactory, perhaps we should admit failure in our attempts to make fault a requisite to negligence liability.”

Why does the law rely on a standard to which not even saints conform? The use of a legal fiction to identify unreasonable conduct is a deliberate choice meant to solve the difficult problem of identifying negligent conduct. Identifying when conduct imposes a socially inappropriate degree of risk is no easy task. Risk is an essential part of social life. At the same time, it is wrong to impose an excess of risk on the innocent or to impose it for no good reason. So long as the law attempts to sort reasonable from unreasonable risks, the law requires some means of distinguishing reasonable and unreasonable. Courts developed the hypothetical reasonable person in an effort to make the task tractable.

The administrative challenge of sorting reasonable from unreasonable conduct is complicated by the necessity of incorporating the underlying purposes of tort law into the sorting process. Simply describing the purposes of the system to the decision maker, without further elaboration, does not provide enough guidance. Identifying the deterrent goal of the system provides some indication as to what constitutes

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25 KEETON, supra note 11, § 32.
unreasonable conduct, but this is clearly inadequate on its own. Rarely will the full numeric estimates needed to impose the risk calculus be available.\textsuperscript{26} Similarly, identifying the imposition of community norms as the standard is unhelpful without identifying what those norms or standards are or, at least, how to identify and ascertain them. The available cost-benefit calculus and the sense of community standards will be impressionistic at best.

The reasonable person test converts the esoteric and intractable distinction between reasonable and unreasonable risks into a comprehensible, intuitive inquiry. People commonly judge the conduct of others in their ordinary lives. Sorting people into those we would hire, befriend or date requires judging the conduct of potential employees, friends or lovers and assessing it as acceptable or unacceptable. In making such determinations, we inevitably judge the conduct of others against an idealized, hypothetical standard. An employee who performs below expectations might get fired; we might reduce contact with a friend who mistreats us; and a disappointing first date might easily be the last date. In all three examples, we judge the gap between what we expect out of an employee, friend or romantic interest and what we observe. It is only natural that the law should borrow the same judgmental skills for identifying unreasonable conduct. Rather than conduct a meaningless, open-ended inquiry or a detailed cost-benefit assessment requiring information that is unlikely to be available, tort law asks only that the factfinder assess the actor’s conduct against an idealized norm, just as we tend to do for our acquaintances.

The example involving the driver who is late for a meeting illustrates this point. The law asks the factfinder to ascertain whether a reasonable person, under the same circumstances, would drive fast. A detailed cost-benefit calculation is not available, but an intuitive one is. The risks associated with speeding are well known (or can be identified and articulated during the trial), even though they cannot be quantified precisely. Likewise, most people understand the benefits of getting to a meeting on time. The court can judge, intuitively, whether driving fast is too risky by asking whether a reasonable person who weighs the risks and benefits and

\textsuperscript{26} See Moisan v. Loftus, 178 F.2d 148 (2d Cir. 1949) (Hand, J.) (expressing doubt about the wisdom of using a precise formula for the negligence standard).
considers community standards would engage in the conduct. If not, then the conduct is unreasonable, negligent and creates the potential for liability.

The reasonable person test thus performs the basic task of tort law—assignment of responsibility—in a way that relies on familiar cognitive processes. Just as tort law attempts to attribute harm either to unavoidable risks that are not entitled to compensation or to blameworthy conduct by one or more legal actors, so too do ordinary people attribute conduct either to stable personality traits or to vagaries of a situation in which people find themselves. Just as friends, employees and romantic interests sometimes disappoint our expectations, people inevitably fall short of the reasonable person standard from time to time. Reliance on this idealized standard makes the law’s inquiry intuitive and tractable.

The use of the reasonable person test has other virtues beyond the familiarity of its methodology. It is also intended to avoid blaming the actor for accidents attributable to inalterable physical limitations. Ascribing liability to someone for physical deficiencies would be inconsistent with both the deterrence and corrective justice theories underlying tort law. The question for tort law is not whether a stronger, faster or taller person would have avoided the accident, but whether a person with the abilities of the actor facing the same situation could have avoided the accident. The reasonable person test easily incorporates these concerns by formulating its inquiry in terms of whether a reasonable person with the actor’s physical characteristics could have avoided the harm.

Finally, the reasonable person test largely maintains an objective standard for liability. The test is not whether someone felt that he did his best to avoid harm, given his own personality, concerns and interests, but whether a reasonable person would have been able to do so. As Justice Holmes noted:

[W]hen men live in society, a certain average of conduct, a sacrifice of individual peculiarities going beyond a certain point, is necessary to the general welfare. If, for instance, a man is born hasty and awkward, is always having accidents and hurting himself or his neighbors, no doubt his congenital defects will be allowed for the

27 KEETON, supra note 11, § 32.
28 DOBBS, supra note 4, § 118.
29 Id. §§ 117-18.
courts of Heaven, but his slips are no less troublesome to his neighbors than if they sprang from guilty neglect.  

The standard of care is that of society at large and not that of the individual. Thus, the standard easily can accommodate changes in community norms or even changes in the goals of tort law itself. Courts can also mold the reasonable person test to support the underlying purpose of tort law. Under a deterrence analysis, the reasonable person is expected to make choices that maximize social utility. Under a corrective justice analysis, the reasonable person conforms to a community standard of conduct. Should society change its goals or the value it places on certain activities, the reasonable person test changes with it. In effect, the reasonable person is aware of how the community views certain activities and certain risks and incorporates these views into his or her own decision making.

The reasonable person test is thus “a child of a certain social necessity.” It is designed to provide a means of identifying when it is inappropriate to take a shortcut or allow oneself to get distracted. If a reasonable person would take the shortcut or get distracted, then doing so does not give rise to liability. If not, then doing so risks liability for any resulting harm. The exact contours and nature of the risks a reasonable person avoids are defined largely by a collective intuition about appropriate behavior. This makes the standard tractable; collective intuition properly focuses attention on choices that could have been made and evolves as community norms about behavior change.

Beyond these attributes, the persistence of the reasonable person test in tort law also arises from the mildly individualistic, almost libertarian flavor of the common law. In the American legal tradition, people are free to let their attentions wander or lapse, just as they are free to trespass or break contracts, so long as they pay for the consequences of their actions. Tort law sets a standard intended to guide people’s conduct, to identify right and wrong. But the obligation tort law creates is merely to pay for the consequences of these lapses, not necessarily to avoid them at all costs. After all, this

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30 Holmes, supra note 1, at 108.
31 Dobbs, supra note 4, § 118.
is torts, not criminal law. People can avoid liability by paying more attention, avoiding shortcuts, making appropriate inquiry into their surroundings and generally behaving like the reasonable person.

In creating the hypothetical person, the law borrows heavily from the intuitive attribution process familiar to social psychologists. Social psychologists have argued that one of the fundamental cognitive tasks people face in social life is determining whether a person’s conduct results from her personality or from the situation in which she finds herself.\(^33\) Although errors can creep into this process, people generally rely on a set of rational heuristics to make such attributions. People attend to whether they observe the same behaviors in different situations and whether other people behave the same way in the same situation.\(^34\) These observations allow people to assess whether a behavior is the product of a stable, internal characteristic of the actor or whether it is a transient behavior that is attributable to the features of a situation. The reasonable person test is meant to incorporate these well developed abilities into the assessment of negligence. If the conduct of even an idealized reasonable person would replicate the adverse outcome that the actor in question produced, then blame for the adverse outcome does not lie with the actor. In such a case, blame more sensibly is ascribed to other actors or to the unavoidable risks of living in a complex industrial society.

The goal of the reasonable person test is to harness the familiar process of social attribution to the task of identifying when a person should have behaved differently so as to avoid harm to others. The system is designed to avoid making people pay for harms that result from unavoidably risky situations and to avoid making people pay for their physical limitations. Unavoidable injuries cannot be deterred and are also unlikely to justify compensation. Thus, the focus of the reasonable person test is on choice and lapses, not on the circumstances or the physical or cognitive deficiencies of the actor.


B. The Role of Human Abilities in Assessing Reasonableness

The assessment of the reasonable person could end at this point in a neat rule: People are free to make choices about the risk their activities pose to others so long as they pay for any consequences. The reasonable person test is meant to allow the factfinder to distinguish between accidents attributable to lapses in attention or to bad decisions, and those accidents attributable to unfortunate, but unavoidable, situations or to a lack of physical ability. Nevertheless, if judges and juries endow the reasonable person with abilities greater than most people possess, then close attention and good judgment might be insufficient to avoid liability. If judges and juries overstate people’s physical or cognitive abilities, then accidents that are unavoidable in spite of reasonable conduct will be attributed to negligence.

To see this, consider again the hypothetical in which a driver faces a choice to drive moderately (and potentially miss a meeting and suffer monetary loss) or quickly (and risk hitting a pedestrian). Suppose this driver hits a pedestrian and the pedestrian sues the driver. If negligent haste caused the accident, then the driver is liable; if the accident was the result of ordinary misfortune, then the driver is not liable. To defend himself, the driver must claim that he was proceeding at a reasonable speed. In some cases, the legal factfinder (judge or jury) may have an objective indication of this choice. The length of any skidmarks could indicate the driver’s speed, or an eyewitness might provide information on the reasonableness of the driver’s conduct. Commonly, however, direct indications are unavailable. Instead, the factfinder must make an inference about the driver’s conduct from the circumstances. The question in many cases thus becomes whether a driver proceeding at a reasonable speed would have been able to avoid hitting the pedestrian. If so, then the only logical inference is that the driver was not proceeding at a reasonable speed.

This analysis reveals the important role that intuitions about cognitive abilities play in law. The inquiry requires that the factfinder mentally simulate the circumstances surrounding the accident with the hypothetical reasonable person at the wheel. The factfinder must assess the accident as if the driver were traveling at a reasonable speed and then determine whether this fictitious driver would have avoided
the accident. This hypothetical driver must have some cognitive abilities in order for the factfinder to ascertain whether the situation would result in an accident.

To make the example more specific, suppose that the driver strikes a pedestrian who darted out into an intersection. Further, suppose the pedestrian claims that a driver traveling at a reasonably safe speed should have been able to stop or swerve in time to avoid hitting her. The driver denies this claim and asserts that he was traveling at a reasonably safe speed. Unless the trial produces direct evidence of the driver’s speed, the factfinder will have to infer his speed from the facts surrounding situation. In such a situation, the reaction time imputed to a hypothetical reasonable driver could determine the outcome of the case.

Suppose that 25 miles per hour (“mph”) is the speed limit and would be considered a reasonable speed. Further suppose that expert testimony reveals that after the brakes were applied the driver’s car would travel 37.5 feet if the driver was traveling at 25 mph. The factfinder must also impute to the driver a perception time (time needed to see the pedestrian and identify her as a hazard requiring full braking) and a reaction time (time needed to get the foot to brake). If the factfinder assesses both at 0.5 seconds, the factfinder will believe the total braking distance for the car to be 74.5 feet if the driver was traveling at 25 mph (37 feet per second plus 37.5 feet of braking). If the factfinder can then determine that the pedestrian entered the intersection when the driver was greater than 74.5 feet away, then the factfinder can conclude that the driver was driving too fast. The comparison of the outcome to that which a reasonable actor would have obtained facilitates the assessment of the actor’s conduct as reasonable or unreasonable.

But what if the factfinder overestimates the reasonable person’s reaction time? Suppose the reaction time of most people under these circumstances is actually 0.75 seconds to perceive and process the pedestrian and 0.75 seconds to react. The total stopping distance for the true reasonable actor would therefore be 93 feet at 25 mph (55.5 feet for the reaction time

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35 These numbers are just fabricated, but it might be important to consider that the stopping distance upon braking will increase exponentially rather than linearly with the speed of the car. The same is not true of the distance the car will travel between the time when the driver sees the obstacle and when the driver applies the brake, which will increase as a linear function of speed.
plus 37.5 feet for the stopping distance). Thus, if the driver was actually driving at the reasonably safe speed of 25 mph and the factfinder believes that the driver was roughly 80 feet from the pedestrian when the pedestrian entered the intersection, then the factfinder using the 0.5 second reaction time will mistakenly deem the driver negligent.

The problem gets worse as conditions that might impair cognitive ability become part of the circumstances. Even if the factfinder has an accurate appreciation of the abilities of the average person under good conditions, the factfinder might fail to appreciate the effects of darkness, unexpected situations or distractions. In effect, a court cannot cure misperception simply by adopting a uniform standard for human reaction times—reaction times depend too much on external circumstances. So long as a factfinder overestimates people’s abilities or underestimates the effect of adverse conditions on abilities, he will infer that people are negligent when their behavior, in fact, was reasonable.

A similar analysis applies to lapses of attention. For example, suppose a woman is walking along a sidewalk that is under repair. Suppose at the same time she approaches a break in the sidewalk that sensibly should be circumvented, she hears screeching brakes and a car sounding its horn in a nearby intersection. Although distracted, she continues walking and catches her heel on the broken sidewalk. She falls and is seriously injured. Is she negligent? The answer turns on whether a reasonable person would have been so distracted under the circumstances that she would have failed to notice a gap in the sidewalk. If not, then the factfinder must attribute the accident to a negligent lapse in attention. The court must conclude that a reasonable person would not have allowed the distraction to affect her behavior.

Thus, although the legal system’s goal is to encourage people to make reasonable decisions, the assessment of their conduct commonly turns on an assessment of human abilities. Because of the importance of human abilities, the courts have tried to define the cognitive abilities of the reasonable person. Indeed, defining the reasonable person’s abilities plays an important role in the Restatement (Second) of Torts’s definition

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36 Note that if she is, she may be unable to recover compensation for her injury from the municipality for failing to repair the sidewalk; but if she is not, then it is possible that she could recover.

37 DOBBS, supra note 4, § 120.
of negligence, which requires that people use “such attention, perception of the circumstances, memory, knowledge of pertinent matters, intelligence, and judgment as a reasonable man would have.”\textsuperscript{38} Hence, the focus on reasonable behavior quickly turns to an assessment of whether the actor, if she had behaved reasonably, would have avoided causing harm.

At this point, the law provides little further guidance. Courts rely heavily on intuition to define human ability. Courts assume only that people remember things a reasonable person would remember, attend to things a reasonable person would attend to and see things a reasonable person would see. The law assumes that judges and juries have accurate knowledge about human mnemonic and perceptual ability. This assumption, however, may be deeply flawed.

C. \textit{The Abilities of the Real Person}

Recent cognitive psychological research indicates that people’s beliefs about cognitive processes are indeed inaccurate. Although people underestimate some cognitive abilities, such as the ability to recognize pictures,\textsuperscript{39} overestimation of cognitive abilities presents a greater problem for the legal system. Cognitive psychologists have documented two important circumstances in which people overestimate cognitive abilities: inattention blindness and change blindness.\textsuperscript{40} Both are critical to the kinds of tasks that jurors and judges must perform and can contribute to misidentification of reasonable behavior as negligent.

First, people show a marked inattention blindness.\textsuperscript{41} That is, people overestimate their ability to detect peripheral stimuli when concentrating on a particular task. In one compelling demonstration, subjects were asked to concentrate on the complex cognitive task of tracking the movements of three basketballs among six people. Fifty percent of the subjects failed to notice the appearance of a person dressed in a gorilla suit among the basketball players, even though all of the subjects predicted that they would notice the appearance of

\textsuperscript{38} \textsc{Restatement (Second) of Torts} § 289 (1965).


\textsuperscript{40} \textit{Id.}

such an unusual stimulus. This finding, along with the results of several similar studies, suggest that people underestimate the dramatic effects that concentrating on a particular task can have on one’s ability to attend to peripheral events.

Second, people also fail to appreciate the difficulty of detecting changes in the perceptual environment: so-called change blindness. For example, in one study, subjects failed to notice changes in the environment that occurred between cuts of a video portraying a conversation between two women, even though the subjects predicted that people would notice such changes. In the study, although 76% of the subjects predicted that they would notice a change in the color of dinner plates in the video, no subject actually watching the video noticed such a change. Other studies reveal that when two scenes that differ only slightly are presented in succession to subjects, those looking for the change take much longer to identify the change than subjects who are aware of the change predicted that they would take. People’s intuition about vision and attention tells them that they would notice changes right before their eyes, but studies show that people discount how cognitively difficult it is to recognize many changes.

Both inattention blindness and change blindness have the potential to mislead courts as to the reasonableness of an actor’s conduct. Drivers who fail to notice a stop sign, bicyclist or construction worker might not be acting unreasonably. A factfinder might infer that the failure to detect hazards was the result of excess speed or failure to pay adequate attention to the task, even if the appropriate inference is that the hazard presented a particularly difficult detection profile. Similarly, underestimating the length of time that detecting a change in the visual environment takes in an ordinary person can distort the inferences people make about the circumstances surrounding an accident. As noted above, a factfinder who underestimates the length of time perception

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43 See generally LEVIN & BECK, supra note 39.
45 Id.
46 Ronald A. Resnick et al., To See or Not to See: The Need for Attention to Perceive Changes in Scenes, 8 PSYCHOL. SCI. 388 (1997).
takes will infer that a driver was traveling faster than was actually the case. These two phenomena suggest that reliance on intuition about cognitive processes leads courts astray.

The studies of inattention blindness and change blindness arguably fail to reflect natural conditions. People in gorilla suits do not commonly pop unexpectedly into basketball games, nor are they often the cause of accidents. Likewise, the kinds of changes in the change blindness studies often involve unlikely or even impossible changes in the environment. Plates do not magically change color outside the psychologist’s laboratory. By using exotic or outlandish changes, researchers may be exaggerating the existence of change blindness in two ways. First, an impossible change in the environment is necessarily an unexpected change. If people’s expectations influence the ease with which they can detect changes, then impossible changes should be among the hardest to detect because they fail to track people’s lifetime of experience with the real world. Second, impossible changes seem so outrageous and exotic that once identified, it becomes harder to see how they were missed than more ordinary or mundane changes. To be sure, some of the studies involve changes in meaningless symbols in which no expectations can be said to be present, and others involve impossible, but fairly mundane, changes. Nevertheless, the magnitude of the effects seen in the studies so far might greatly exceed the effects present in the real world. The underlying processes that produce inattention blindness and change blindness might not be a generic overstatement of cognitive abilities, but rather a failure to appreciate how sensitive the perceptual system is to distractions and expectations. If so, then the research thus far might be exaggerating the effect.

The subject matter of lawsuits, however, does not consist of a random sample of the experiences people encounter in the real world. Tort suits only arise from those accidents that might be attributable to the carelessness of someone other than the injured party. If many accidents occur precisely because of unusual or unexpected circumstances, then the

48 See generally MACK & ROCK, supra note 41.
49 See generally Levin et al., supra note 44.
psychological experiments might have more external validity for tort lawsuits than it would otherwise seem. People’s sense of their own cognitive abilities usually keeps them safe. Drivers understand that a complex visual horizon filled with cars, bicycles, pedestrians, construction workers and intricate traffic signs requires them to slow down to process potential hazards properly. If people fail to appreciate the importance of certain kinds of less familiar distractions, however, then they will fail to take precautions against instances of change blindness and inattention that lead to accidents. Likewise, the same failure to appreciate change blindness and inattention that caused the accident will influence the factfinder. Thus, courts will necessarily review behavior in those settings in which inattention blindness and change blindness blindness have the biggest effects. Even if the psychological studies seem a bit artificial, they might mimic the circumstances in which the effects are the most important both to identifying the causes of accidents and to assigning responsibility for accidents.

One final link is also missing to connect the erroneous intuitions about cognitive abilities to the process of assigning blame in the courtroom: No direct empirical evidence exists on the issue. Although psychologists have conducted numerous experiments to identify misperceptions about cognitive abilities, no one has yet clearly demonstrated that these misperceptions lead to mistaken assignments of blame. It may be that the legal context adds safeguards that prevent the kinds of mistaken attributions that might arise from misperception of cognitive ability. A reluctance to assign blame to individuals who otherwise seem to have tried their best to avoid accidents might make factfinders skeptical enough to overcome their misunderstanding of cognitive abilities. Nevertheless, in the context of eyewitness identification, psychologists have convincingly demonstrated that mistaken beliefs about cognition can and do lead to wrongful criminal convictions. Assignment of blame in a tort suit is much less serious than in a criminal case; hence, the influences cognitive abilities misperceptions on blame might be even more pronounced in this setting. All available evidence and some intuition indicate that overestimation of cognitive abilities has

enormous potential for affecting judgments in tort suits, even without the final link in the empirical chain.

II. CONSEQUENCES OF THE MISMATCH BETWEEN THE REASONABLE AND REAL PERSONS

A mismatch between people’s actual abilities and those of the law’s reasonable person seems, at least superficially, to be a legal disaster. The magnitude of this effect is circumstance-specific, but overstating people’s ability to avoid accidents generally leads judges and juries to brand as negligent conduct that was reasonable. Reliance on this misunderstanding of cognitive abilities might be unjust and create inefficient incentives. It is easy to overstate the adverse effects of this problem, however. A closer analysis suggests that courts do not completely trust the somewhat ad hoc reasonable person test. Several legal doctrines have evolved that reduce the influence of the reasonable person test and thereby ameliorate, to some extent, the impact of the mismatch. These doctrines, however, are not the product of judicial recognition of the intuitive misunderstanding of cognitive ability. Rather, they have resulted from efforts to address other concerns or from a sense that the reasonable person test is too vague to be reliable. Consequently, these doctrines are likely to provide only inadequate mechanisms to address the consequences of overstating people’s cognitive abilities.

A. Strict Liability in the Guise of Negligence

If judges and juries persistently overstate the cognitive abilities of legal actors, then the system of negligence, in practice, might more closely resemble a system of strict liability. When a legal factfinder mistakenly assumes that a reasonable person could have avoided an accident, the factfinder might mistakenly attribute the accident to some unreasonable conduct, rather than to misfortune. Thus, people who are acting reasonably will seem unreasonable when judged under a standard that misstates human abilities. In practice, the system finds people liable even though their behavior conformed to that of the reasonable person. In effect, the system consists of liability without fault, that is, a system of strict liability. The conversion of de jure negligence into de facto strict liability has some adverse effects on the incentives tort law creates and its ability to promote corrective justice.
1. Adverse Incentives

Although it intuitively seems that the unwitting conversion of a negligence system into a strict liability system would profoundly influence the incentive structure tort law creates, the effects are apt to be much more subtle. It is well understood in the legal literature that strict liability does not create undesirable incentives with respect to the level of care actors might take.\textsuperscript{51} That is, whether legal actors face a negligence regime or a strict liability regime, they face incentives to take reasonable precautions against causing harm. Under a negligence regime, someone who takes all reasonable precautions against causing injury saves money by avoiding liability. Any extra safety measures beyond reasonable care simply impose costs on the actor without conferring any benefits to him. Under a strict liability regime, an actor is responsible for all harm his activities cause, whether he takes reasonable precautions or not. Under such a regime, a person minimizes his total costs by taking all reasonable precautions and taking no further precautions. Safety precautions above and beyond reasonableness would reduce the number (or cost) of accidents for which someone is strictly liable, but the costs to the actor would exceed the savings. So long as courts define reasonableness as minimizing total social costs, then both negligence and strict liability create the same incentives as to the degree of care to take when engaging in an activity. Both schemes encourage people to behave as would the reasonable person.\textsuperscript{52}

Strict liability, however, has several advantages. Strict liability is a cheaper system to administer because it does not create complicated and expensive litigation over what constitutes reasonable behavior under the circumstances.\textsuperscript{53} Although litigation over whether the actor has actually caused the harm may still occur, a negligence system incurs the same litigation expenses for proving causation. Strict liability simply removes the fault issue from the litigation process. Inasmuch as this issue is frequently contentious and costly to resolve, strict liability will make the system more cost effective. Furthermore, relieving the court of the burden of determining


\textsuperscript{52} Id.

\textsuperscript{53} \textsc{Landes & Posner}, \textit{supra} note 7, at 65.
whether conduct was negligent might improve decision making. The actor might well know more about the costs and benefits of the available precautions than a court would and might thereby make a better choice. Strict liability gives actors the incentive to make the best choice with no need for a court to judge their conduct afterwards. As a related issue, because of the uncertainty associated with the reasonableness test, a negligence rule creates incentives to take an excess of care. This occurs because potential tort defendants may recognize that if they are slightly more careful, they might avoid liability, thereby significantly reducing their likely costs.

Strict liability has its problems, however, particularly when it is unintended. Most notably, it raises the cost of the underlying activity. As the driving example shows, it is more expensive to drive under a strict liability system than under a negligence system. By “taxing” an activity, strict liability might inefficiently shift people’s behavior from one activity to another. More people might walk if driving were governed by strict liability. Therein lies the economic danger of administering a negligence system in a way that converts it into a system of strict liability. Limiting liability to negligent conduct is meant to keep down the cost of activities. We want people to be free to drive or walk without facing the costs associated with strict liability. Only in rare instances is strict liability thought to be more sensible.

Furthermore, strict liability that results from a bias in the negligence determination has other undesirable effects. Inasmuch as the scheme is not straightforward strict liability, it still requires that a court assess reasonableness. Thus, a biased negligence system produces results similar to strict liability, but without saving litigation costs. More troublesome, however, is that a negligence system biased in favor of liability also is likely to produce incentives to take an excess of care beyond that required by reasonableness alone. Because the

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54 John E. Calfee & Richard Craswell, Some Effects of Uncertainty on Compliance with Legal Standards, 70 Va. L. Rev. 965 (1984); Rachlinski, supra note 10, at 596-600.
55 See Polinsky, supra note 5.
56 Id.
57 For example, manufacturers are strictly liable for manufacturing defects in products liability cases. See James A. Henderson, Jr., Coping with the Time Dimension in Products Liability, 69 Cal. L. Rev. 919, 931-39 (1981) (discussing the virtues of strict liability for manufacturing defects in products liability cases).
58 Rachlinski, supra note 10, at 611.
system is not true strict liability, the possibility exists that an actor can undertake an excess of care so that when accidents happen, even under a biased inquiry, the court will not find the actor’s conduct unreasonable. The savings that the actor realizes from avoiding liability encourages the actor to take excessive precautions. This incentive does not occur with true strict liability because no degree of precaution will protect the actor from liability in the event that harm results.

Consider how this might work, using the running example involving an accident between a driver and a pedestrian. In the example, the factfinder would find the driver liable because of a mistaken belief that the reaction time of the reasonable person is one second, even though a reasonable person would take 1.5 seconds. If the driver understood that he would be judged as if his reaction time were quicker than is actually the case, the driver could simply drive slower so as to avoid any accident for which he could be held negligent. Suppose that the driver drives at 20 mph. If so, then the braking distance is 45 feet during the 1.5 second reaction time, plus 24 feet traveled after the driver applies the brake for a total of 69 feet. This means that for an accident to occur the pedestrian would have to have appeared in front of the driver at 69 feet or less (otherwise the driver would have stopped in time). With its bias about a one-second reaction time, the jury would assume that a reasonable person traveling at 25 mph or less would have been able to stop within 74.5 feet. Thus, any accident that could occur would necessarily lead a factfinder to determine that the driver was traveling at less than 25 mph. By overcomplying with the requirements of reasonable person test, the driver would avoid liability. This excess compliance would cost the driver in terms of lost time, but avoiding the risk of liability would likely offset that loss. The excess of caution might be worth the price to the driver, even though it is inefficient overall.

Although it might seem perfectly sensible for the system to produce incentives to undertake a slight excess of safety, excess safety has hidden costs. Often, safety precautions can be so cumbersome that they make the underlying activity worthless. Consider, for example, police safety vests; they can be made with open sides or completely wrap around the user.

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59 See supra note 35 and accompanying text.
The latter type are safer, but they make it so difficult for the user to move that they create other risks. Similarly, if drivers drive too slowly, they might reduce the overall speed of traffic, thereby costing other drivers time or creating traffic jams that cause pollution. Thus, excess safety might undermine its perceived benefits.

2. Corrective Justice

Whatever the economics, strict liability seems unjust. Branding someone's conduct as negligent when it was reasonable smacks of inherent unfairness. As a matter of justice, if the courts deliberately have adopted a system of liability for negligence, then finding people negligent when they actually took due care is wrong. The wrongful finding of negligence mislabels an innocent party as a wrongdoer and compensates a party that is not entitled to compensation. Furthermore, where the actor only seems negligent because of a biased negligence calculus, the injured party does not deserve compensation for the harm because the actor was not, in fact, negligent. The victim of the accident did nothing to deserve the injury, but if the actor who caused the injury behaved reasonably, then the actor is not at fault. After all, the actor obeyed society's command to behave reasonably. The law's basic maxim to let the harm lie where it falls trumps any desire to compensate the injured victim. Shifting the cost onto the actor when the actor was indeed reasonable is costly and unfairly brands the actor a wrongdoer. Unless the actor actually failed to conform to social norms, the cost and the label are not justifiable. Biased negligence processes thereby undermine the very morality of the tort system.

On the other hand, whatever the label, this misbranding is perhaps not such a serious injustice. Most drivers, for example, recognize that the act of driving exposes them to liability. They know that even if they are careful, they might find themselves the target of a lawsuit, which they might even lose. Most people insure against serious loss and live with the consequences of a system that might occasionally mislabel one's conduct. Furthermore, after an accident occurs, the defendant can review his own conduct only in light of the meta-cognitive biases that psychologists have identified. If the driver is uncertain about what speed he was traveling, he might make the same inferences about reaction time, reasonableness and speed that the legal factfinder might make. Oddly enough, even
if the process is unjust, the actor himself, suffering from the same cognitive biases as the factfinder, might fail to notice the injustice.\footnote{Rachlinski, supra note 10, at 600-02.}

Furthermore, there is a global sense that some of the biases in cognitive meta-cognition are intuitive. A lifetime of experience teaches people that when they focus their attention on one task, they often fail to notice peripheral events.\footnote{See supra notes 41-43 and accompanying text.} The ability to avoid processing distractions is the essence of concentration, and people learn that when their attention is so focused, they likely will fail to process stimuli outside of their attentional focus. In the driving example, the fact that the driver was traveling too fast is not what makes him a negligent danger to pedestrians. Rather, it is the attentional focus that being late creates. The pressure of having to drive quickly can lead the driver to miss important aspects of the environment and thus fail to respond to them within an appropriate time. The mistake lies in failing to arrange one’s time properly so as to avoid driving while in a hurry. Arguably, inasmuch as everyone seems to suffer from meta-cognitive biases, this mistake is not negligent—it is a byproduct of how reasonable people think about their cognitive abilities. Nevertheless, it is a mistake. In the end, people might get roughly what they deserve; people put others at risk because they overestimate their abilities, yet they are found liable because a factfinder also overestimates their abilities.

3. The Effect of Conflicting Cognitive Biases

The influence of these meta-cognitive biases also likely has an effect beyond the courtroom. If people overstate cognitive abilities, then they also might overestimate their own ability to perform various skilled tasks, such as driving, safely. For example, if drivers overestimate their ability to perceive and react to hazards, they might drive faster than they would if their understanding of their cognitive abilities was accurate. In fact, overestimating cognitive abilities might underlie the common finding that people are overconfident about their abilities. For example, in one study, 86\% of automobile drivers stated that they drive more safely than the average driver.\footnote{Ola Svenson, Are We All Less Risky and More Skillful Than Our Fellow Drivers?, 47 ACTA PSYCHOLOGICA 143 (1981).} If
people constantly see other drivers failing to react as quickly as they predict they would be able to react, people experience a world filled with unreasonable drivers who are less safe than they are.

Legal scholars have noted that such overconfidence in ability might lead people to engage in conduct that seems safe to them but that is, in fact, negligent or even reckless. People who believe that they can easily avoid an accident might not worry much about their risk of causing an accident or the legal liability they might face if they do cause an accident. Overconfidence can thus undermine the ability of the legal system to induce people to undertake reasonable care. People who engage in unreasonable conduct while believing their conduct to be reasonable cannot easily be deterred by the prospects of tort liability.

In the only thorough assessment of the effects of excess optimism on efforts to avoid accidents, however, Eric Posner has argued that, although an excess of optimism can induce people to undertake excessively risky activities, it also can induce people to take an excess of precautions under some circumstances. Posner contends that optimism can produce an excess of care if people overestimate the benefits of precautions that they consider taking. For example, if drivers believe that undertaking a single precaution (perhaps driving 5 mph under the speed limit) would reduce the possibility of an accident to zero, then they will undertake that precaution, even if doing so is not cost-effective. It is unclear whether an excess of optimism arising from misperception of cognitive abilities would operate the way Posner describes. Overestimating one’s cognitive abilities seems intuitively like a prescription for inducing dangerous conduct. In particular, overestimation of one’s abilities might keep drivers from slowing down when they face a complicated or distracting array of stimuli. If such overestimation also produces a tendency to overestimate one’s ability to avoid an accident with just a little excess of care, however, it might produce an excess of care.

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If overestimation of cognitive abilities produces excessively risky conduct, then it has a doubly pernicious effect on the legal system. It may be that we have a system in which people unwittingly drive negligently (i.e., they drive in a manner they mistakenly feel is safe), while at the same time they are held to a standard that they cannot meet (i.e., legal factfinders assume the reasonable person can drive more safely than people really drive). Even though the legal system is actually creating incentives for drivers to drive too slowly, drivers, overconfident in their abilities, disregard or fail to recognize these incentives and go on driving in a dangerous fashion.

Overestimation of cognitive abilities by both potential tortfeasors and legal factfinders thus combine to produce an odd system. Potential tortfeasors overestimate their abilities and thereby fail to undertake reasonable precautions against causing harm. At the same time, the system, overestimating peoples’ abilities, holds potential tortfeasors accountable for failing to use the abilities the system mistakenly ascribes to them. In effect, people behave as if they possess heroic cognitive abilities and are held accountable as if they had such abilities. Although it is possible that tortfeasors recognize that they will be held to a high standard if they are found liable and adjust their behavior accordingly, it does not seem likely that this doubly biased system is altogether a sensible arrangement.

B. Legal Doctrines that Blunt the Effect of Misjudgment

Several developments in the common law over the past century have blunted the effect of mistaken beliefs about cognitive abilities on judgments of liability. Indeed, if the effects of these mistaken beliefs are widespread, it would be surprising if centuries of common-law development had not, in some way, accounted for these misperceptions. Judges, as intuitive psychologists, are unlikely to have uncovered the same phenomenon that required careful research to document, but judges might have observed difficulties with the reasonable person test as it evolved. Biased application of the reasonable person test might have produced undesirable or unreliable sets of verdicts that astute courts or legislatures might, over time, have noticed and attempted to correct. Identification of such problems might be one reason that courts developed alternative means of identifying negligence.
1. Bright Line Rules

In fact, courts avoid the ad hoc implementation of the reasonable person test whenever possible. To combat the undesirable effects of the reasonable person test, several bright line rules of conduct have emerged as a means of making negligence judgments more reliable. Most notably, for accident law, the violation of a safety rule or regulation provides per se evidence of negligence. For example, driving at a speed in excess of the speed limit is, without excuse or justification (as might be the case for a life-threatening emergency), sufficient evidence to support a determination that the driver was negligent. In effect, drivers are not entitled to rely on their own judgment about what would constitute a safe speed, nor may a judge or jury substitute their judgment. The law provides a safe maximum speed, and exceeding it is negligence, even if one believes a reasonable person would do so.

To be sure, bright line rules are incomplete. Bright line rules tend to be asymmetric. Although exceeding the speed limit provides conclusive evidence that the driver was traveling at a negligent speed, driving within the posted speed limit does not provide per se evidence that the driver was driving at a reasonable speed. This leaves plenty of room for judges and juries to determine the safety of a driver who does not cross a bright line but who nevertheless might be negligent.

2. Comparative Negligence

Perhaps the most dramatic shift in negligence law in the last half-century has been the nearly universal adoption of shared liability systems. The common law developed under a fairly absolute system in which the courts attributed liability completely to the plaintiff or the defendant. Defendants found to be negligent could expect to pay for the full extent of harm their negligence caused unless they could show that the plaintiff was also negligent, in which case they would pay nothing. This system, known as contributory negligence, however, survives only in a handful of American jurisdictions.

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66 DOBBS, supra note 4, at 315-16.
67 KEETON, supra note 11, at 233.
68 DOBBS, supra note 4, at 503-04.
69 Id. at 504.
Comparative negligence regimes, in which the two negligent parties share liability, are now the dominant norm.

Comparative negligence can blunt the effects of metacognitive biases on the assessment of negligence. The same biases that would lead a factfinder to overestimate the defendant’s abilities would also lead the factfinder to overestimate the plaintiff’s abilities. For example, the jury that believes that a defendant who was driving reasonably would have seen a pedestrian in time to avoid him might just as likely think that a reasonable pedestrian would have seen the driver in time to leap out of the way. Even if neither the driver nor the pedestrian are at fault, both will be held responsible. To be sure, if the defendant was not really at fault, the defendant should have to pay nothing. The comparative negligence scheme, however, reduces what the defendant would have to (wrongfully) pay under a biases assessment of liability. Likewise, even though the plaintiff might be blameless (and hence should be entitled to a full recovery), the jury might find him negligent. His recovery will be reduced because of metacognitive biases, but not eliminated, as it would be under a contributory scheme. A comparative scheme might lead to a balancing of biases.

Misperceptions of cognitive abilities help explain the attraction of a comparative negligence system. Although the attraction of comparative negligence might seem obvious—in that it apportions liability between the parties in a way that is commensurate with their relative fault—the comparative fault system also entails a significant downside. Economic analysis suggests that comparative fault does nothing to make incentives more efficient, but it does make the system more expensive because it is a complicated determination that entails significant litigation costs. Thus, an economic efficiency analysis finds little or no use for comparative negligence. Aside from economics, the scheme also seems to blunt many of the useful, sharp distinctions the law makes between degrees and types of misconduct. Some misconduct is so pernicious that the liability it creates should not be reduced by the good fortune of directing it at someone who may have been only slightly negligent. The overall advantage of a comparative system becomes more apparent once the courts recognize that the negligence analysis they have created

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70 LANDES & POSNER, supra note 7, at 82.
contains significant potential for inaccuracy. If the reasonable
person test is truly unreliable, then it makes little sense to rely
on it as if it were a perfect indicator of reasonable and
unreasonable conduct. In effect, the comparative scheme is a
less confident approach to liability that softens the unnaturally
sharp divisions the law otherwise might make. The courts’ lack
of confidence in the reasonable person test can be justified in
many different ways, but clearly if factfinders lack an accurate
understanding of human cognitive abilities, their assessments
of reasonableness commonly will be inaccurate.

3. The Adverse Consequences of Comparative
Negligence

Even though the switch to comparative negligence
blunted the rough edges that contributory negligence creates,
thereby reducing the adverse impact of mistaken beliefs about
law, it also might have undermined the development of some
bright line rules that could have further reduced the effect of
meta-cognitive biases on the courts. For example, the courts
were at one time developing a “legal distraction” doctrine.\(^\text{71}\)
That is, some courts determined, as a matter of law, that
certain distractions common to modern life were so prevalent,
uncontrollable and pernicious as to constitute a complete
defense to a claim of negligence. For example, in one case, a
woman tripped on a recently repaired sidewalk while being
distracted by the sound of a nearby car horn.\(^\text{72}\) She claimed that
she failed to notice the danger because of the distraction. The
court found that such a distraction would have diverted any
reasonable person’s attention, and deemed her momentary
inattention reasonable.\(^\text{73}\)

The legal distraction doctrine developed in response to a
comment in the Restatement (Second) of Torts defining the
skills and abilities of the reasonable person.\(^\text{74}\) The Restatement
contends that distractions that cannot be avoided might undo a
finding of negligence that would otherwise attach to a lapse in
attention. It also identifies examples of distractions that do not
have such an effect. For example, driving while also trying to
quiet a screaming child might be considered a legal distraction,

\(^{71}\) KEETON, supra note 11, § 67.
\(^{73}\) Id. at 577.
\(^{74}\) RESTATEMENT (SECOND) OF TORTS § 289 cmt. b (1965).
inasmuch as any reasonable parent might find driving to be more difficult under the circumstances. At the same time, however, the reasonable driver arguably should consider pulling over to console the child. Sudden distractions outside of the actors control might divert most people’s attention and should preclude a finding of negligence for inattention. Had the doctrine developed more thoroughly, it would have had to identify whether the decision to press on in the face of distractions would be considered negligent.

In developing this legal distraction doctrine, of course, the courts relied on their own intuition about what a reasonable person would find distracting. In effect, they substituted their own judgment about the effect of distractions on attention for that of a jury. Perhaps such judgments are no better informed than a jury’s ad hoc judgments about cognitive abilities applied in every case. Nevertheless, the development of such a doctrine reflects an attempt to reach a consensus on human ability that at least has a chance to be informed by empirical findings and expert analysis.

The doctrine has not flourished, arguably because of the shift to comparative negligence. Courts, in effect, took the easy way out by forcing legal factfinders to weigh the relative fault of each party in a case-by-case fashion. Courts began to proliferate the legal distraction doctrine (much like its more influential cousin, “last clear chance”) as a means of softening the apparent harshness of contributory negligence. Under a contributory negligence scheme, a plaintiff-driver who would otherwise recover from a clearly negligent driver could lose entirely if his attention had lapsed somewhat. This seemed to courts an unjust result if the lapse in attention was not really the plaintiff’s fault. The courts developed the legal distraction doctrine to address such circumstances. By contrast, under a comparative negligence regime, courts simply place the conduct of each party into evidence and let the factfinder compare fault under the circumstances.

In a comparative negligence regime, the effects of biases in meta-cognition are uncertain. Both parties will seem more culpable than is the case. In practice, the effects of such biases on each party is that they are unlikely to cancel out each other. Instead, depending on the role that cognitive abilities play in the assessment of each party, one of the two parties may gain

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75 See Fleming James, Jr., Contributory Negligence, 62 Yale L.J. 691 (1953).
some unwarranted advantage. Under a comparative negligence system, however, it is difficult to determine whether overestimation of human abilities generally benefits plaintiffs or defendants more; and further research may be necessary before one can make any clear statements about legal policy.

4. The Plaintiff in Products Liability Cases

One area of law where the courts do seem concerned with the overstatement of human ability is the law governing products liability. If courts overstate people’s ability to avoid injuries, then the users of many products might find themselves unable to recover from manufacturers and others in the distributive chain who sell products that fail to protect users against foreseeable lapses in attention or ability. That is, users often erroneously will seem to be negligent in failing to pay enough attention while using a product or in otherwise using the product in an unreasonable fashion. If such findings exonerated manufacturers, they would fail to safeguard against such avoidable injuries. To avoid this problem, courts charge manufacturers with saving plaintiffs from their own negligence, so long as such negligence is foreseeable.\(^\text{76}\)

Again consider the example of the driver who is traveling at a reasonable speed, but whose actions are deemed unreasonable because the factfinder overestimates human ability to react to road hazards.\(^\text{77}\) Suppose that instead of hitting a pedestrian the driver hits a large rock in the road, causing him to lose control of the vehicle.\(^\text{78}\) Should the factfinder determine that a reasonable person could have seen the rock sooner than was actually the case, or determine that the driver should have been able to react to the hazard more quickly than actually was possible, the factfinder will identify the driver’s negligence as a primary cause of his injuries. If products liability recognizes driver negligence as a defense to any claim by the driver that the automobile manufacturer failed to install available, cost-effective safety devices into the car, then the manufacturer will face fewer incentives to install such precautionary devices. Misperception of plaintiffs’ cognitive abilities might make negligence determinations so

\(^{76}\) Dobbs, supra note 4, at 1027.

\(^{77}\) See supra note 35 and accompanying text.

\(^{78}\) The example is based loosely on Heaton v. Ford Motor Co., 248 Or. 467 (1967).
common and so erroneous that the manufacturer's ability to hide behind a phony negligence defense would dramatically undermine the manufacturer's incentives to make a car crashworthy. Recognizing this, the courts limit the use of a negligence defense when such negligence is foreseeable.

This analysis is even more compelling for lapses in attention. A plaintiff who sliced off a finger while using a meat grinder can still recover from the grinder's manufacturer, even if he was negligently distracted while using the product.\(^\text{79}\) The logic underlying this outcome is that manufacturers of such devices know that, at one time or another, users will get distracted or use the product in a way that is, given human ability, unsafe. If, in the face of such knowledge, a manufacturer fails to install cost-effective safeguards to protect the user from his own negligence, then the manufacturer will be liable.\(^\text{80}\)

In developing modern products liability law, courts have recognized the inevitability that users occasionally will take shortcuts or get distracted. By adopting this position in products liability cases, courts effectively avoid ad hoc, case-by-case judgments about users' abilities. The manufacturer, with a host of knowledge about the product and the likely consequences of the users' lapses in attention or ability, is much better positioned to prevent harm.\(^\text{81}\) Furthermore, manufacturers effectively control the circumstances that determine the product's use: whether it will invite distraction, present an overly complicated array of stimuli or encourage haste. Manufacturers' design choices are closely analogous to drivers' decisions about when and under what conditions to drive. Like drivers, manufacturers might also suffer from misunderstandings of cognitive abilities. But unlike drivers, manufacturers have the capacity to employ human factors experts and rely on aggregate data on the effects of product design to guide their choices. Ignorance of human ability might constitute a viable defense for an automobile driver, but not for an automobile manufacturer.

Hence, the manufacturer remains accountable, even though it may appear that users were negligent. Even though courts will discuss plaintiffs' apparent negligence in such cases,

\(^{79}\) Dobbs, supra 4, at 1024.

\(^{80}\) Id.

\(^{81}\) Id. at 985-86.
plaintiff negligence does not preclude recovery. In effect, courts do not trust their own judgments about a user's negligence, instead they force manufacturers to guard against foreseeable misuse by the consumer. Thus, even if courts overstate users' abilities, this overstatement does not adversely affect liability and recovery in the products liability system.

C. Expert Testimony on Human Performance and Perception of Human Performance

Perhaps the most straightforward means of correcting erroneous beliefs about cognitive abilities is with expert testimony. Under prevailing standards for admissibility of expert testimony in the federal courts (which are also followed in many states), expert testimony is admissible if it is reliable and would prove helpful to the jury. Reliability requires courts to delve into the scientific process, but the standard that courts use clearly favors admissibility of the psychological research on both cognitive ability and on meta-cognition. Virtually all of the psychological research is published in peer-reviewed journals, which courts view as an important element of reliability. Moreover, none of it was prepared specifically for litigation, which has been a problem for some types of testimony. Such testimony faces other obstacles, however.

Courts might determine that expert testimony on human abilities is not helpful to the factfinder. To the extent that judges believe that intuition about human abilities is reasonably accurate, they will see no need for expert testimony. Such reasoning clearly treats psychology as a second-class science, but scholars have identified such treatment in other contexts. A serious review of the research on cognitive beliefs should convince an objective observer that there is much that is not intuitive about human cognitive ability. The recent research on meta-cognition should pave the way for admissibility of research on cognitive ability.

A more serious obstacle to admitting expert testimony on meta-cognitive processes is that such testimony might sound to judicial ears more like testimony about the law than testimony about helpful facts. The meta-cognitive research goes well beyond identifying gaps in ordinary understanding of

cognitive abilities. Indeed, the meta-cognitive research undermines reliance on the reasonable person test altogether. To date the literature includes no evidence that erroneous beliefs about human cognitive abilities can be corrected sufficiently to make the system workable. Consequently, testimony indicating that lay intuition overstates cognitive abilities is more of a general legal issue than a factual or contextual issue that might dispose of a specific case. As such, it is best addressed toward broad legal reform rather than case-specific inquiries. Courts will therefore be reluctant to admit it because expert testimony is supposed to help the factfinder determine what happened, not help the court determine what rules to apply.

CONCLUSION

The conclusions of cognitive psychologists who study what people believe about cognitive abilities identify a deeply troubling aspect of the reasonable person test. The reasonable person must be endowed with cognitive abilities in order to aid the factfinder in identifying reasonable and unreasonable conduct. If these hypothetical abilities exceed those of most people, then the system improperly will identify reasonable conduct as being unreasonable and the standard to which litigants are held will be unfair. Although some legal doctrines soften the effects of this error somewhat, these doctrines were not intended to remedy meta-cognitive biases and cannot be expected to correct perfectly for them. Neither is expert testimony necessarily going to correct the problem in any meaningful way.

Realistically, the research on visual meta-cognition is unlikely to affect the widespread reliance on the reasonable person test as it now exists and is implemented. First, the test has a long history behind it. Adherence to such a long history of precedent is generally advisable, inasmuch as departures from it might have many unintended consequences. Second, the intuitive aspects of the test are at the heart of its virtues. The intuitively based aspect of the test is designed precisely to make the negligence inquiry tractable. Tractability at the expense of accuracy is hard to tolerate, but the degree of inaccuracy would have to outweigh the virtues of tractability. Third, as the research now stands, the influence of meta-cognitive biases on real behavior and real negligence determinations is uncertain. In the real world, other aspects of
cognitive processes might allow people to muddle through well enough.\textsuperscript{84} Meta-cognitive errors may lead us astray only in unusual or novel circumstances.\textsuperscript{85}

Despite these limitations, the research on meta-cognitive biases has serious implications for the legal system that should not be ignored. Even a venerable judicial institution should not be exempt from progress in the social sciences. To the extent that the heavy reliance on mistaken intuitive beliefs about cognitive biases creates mistakes, the courts should entertain some remedy.


\textsuperscript{85} See LEVIN & BECK, supra note 39.
WHIPLASH: WHO’S TO BLAME?1

Valerie P. Hans & Juliet Dee†

Tom is sitting in his car at an intersection, waiting for the red light to change. Without warning, the car behind him, driven by a distracted mother named Elaine, slams into the rear of Tom’s car. After the accident, Tom experiences severe neck pain, which interferes with his work and family life.

Who’s to blame?

This straightforward account of a car accident is a common story in today’s legal landscape. It may seem immediately obvious that Elaine, who drove her car into Tom’s, is the blameworthy party. If Tom suffered physical injury as a result, then under current legal principles she is responsible for compensating him for his injury. However, research on jury decision making in civil cases suggests that a constellation of psychological, legal and political factors operate together to focus a surprising degree of attention, critical scrutiny, blame and responsibility on Tom, our hypothetical victim.

Attention, blame, personal responsibility and legal liability are conceptually distinct phenomena.1 Attention does

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1 Kelly G. Shaver, The Attribution of Blame: Causality,
not necessarily lead to blame. Legal responsibility does not attach to all morally blameworthy conduct. Yet, as a practical matter, they are often intertwined. In reality, from both moral and legal perspectives, not all plaintiffs are blameless and not all defendants are culpable. For example, if we look at jury verdicts as one measure of the defendant’s legal culpability, we find that plaintiffs win about half of their tort cases, including 60% of automobile accident cases. Our interest is in analyzing a striking tendency to blame the victims of personal injury, even in instances where they are legally blameless. Therefore, this Article focuses on the related phenomena of attention, responsibility assessments, blame and legal judgments in the context of the personal injury plaintiff.

In this Article, we describe the tendency for jurors to focus on injury victims in their assessments of legal responsibility. In Part I, we discuss recent empirical research indicating this predilection in the larger context of personal injury cases generally. In Part II, we explore this tendency by focusing on attributions of responsibility and blame in whiplash cases. This Part identifies three main factors that cause jurors to focus on injury victims rather than defendants: psychological factors, social and political norms, and media coverage. In Part III, we propose and discuss the feasibility of developing mechanisms to shift attention and blame away from injury victims and back onto the perpetrators of accidents.

I. VICTIM BLAME AND DEROGATION IN PERSONAL INJURY LAWSUITS

Perhaps no assumption about the civil jury is so universally accepted as the belief that juries are highly sympathetic to injured plaintiffs. Opinion surveys, business and insurance industry briefs and court opinions reflect beliefs that juries naturally take the side of the injured plaintiff.


Id.
Research on civil juries, however, provides evidence that jurors and the public are inclined to question the credibility and claims of plaintiffs who bring personal injury lawsuits. In Valerie Hans’s interviews with civil jurors who decided lawsuits against businesses and corporations, many jurors expressed hostility toward the plaintiffs who brought the lawsuits, even when they eventually found for the plaintiffs. Jurors searched for ways that plaintiffs could have contributed to their own injuries, and worried about trumped-up claims and fraudulent or exaggerated injuries. Jurors tended to blame the victim, finding responsibility in injured persons and their families, as well as the corporate defendants.

A central task of the civil jury is to assess the competing claims of the defendant and the plaintiff. However, in retrospective accounts of their own decision making, the civil jurors interviewed by Hans seemed to focus more on the plaintiffs, and their scrutiny was often extraordinarily intense. “Jurors’ suspicions about plaintiffs’ claims led them in most cases to dissect the personal behavior of plaintiffs, with seemingly no limits. Jurors criticized plaintiffs who did not act or appear as injured as they claimed, those who did not appear deserving, and those with preexisting or complicated medical conditions.” Juror interviews also reflected concerns about money-hungry plaintiffs: “I just thought they felt they were going to come into a big sum of money and just live the rest of their life on easy street” or “I think, probably, looking at these medical claims, [the plaintiff] said, ‘well, maybe I can cash in on this knee injury’.”

Of course, jurors’ reactions to the plaintiffs in their cases could have as much to do with the facts of the case and the individual parties to the lawsuit as with jurors’ predispositions toward plaintiff blame. The factual circumstances of the event, the causal actions of the defendant, any contributory fault on the part of the plaintiff and the presence of extenuating circumstances will figure centrally in how jurors judge the responsibility for an accident. Yet, Neal Feigenson, Legal Blame: How Jurors Think and Talk About Accidents (2000).
Feigenson and his colleagues conducted experimental studies confirming that, in certain cases, people ascribe some responsibility to legally blameless plaintiffs.11 They conducted a scenario experiment in which the plaintiffs' blameworthiness varied between conditions. They found that, even when the plaintiff was completely blameless as a legal matter, some participants still held him accountable. For example, one condition involved a worker who obeyed all the rules, and thus did not appear to deserve blame, yet study participants judged him to be 22% responsible for his accident.12 In another scenario, study participants allocated to a homeowner 14% of the blame for injuries stemming from a faulty valve on a propane gas tank in his home that was the property of the gas company.13

Questions about credibility in individual personal injury cases reflect larger doubts about the general merits of plaintiff claims in civil litigation. Recent polls indicate that most people believe that many lawsuits are worthless. In one recent national survey, 92% of the respondents agreed with the statement: “There are far too many frivolous lawsuits today.”14 In fact, 76% of respondents said that they “strongly agreed” with the statement,15 suggesting an emotionally laden endorsement. Beliefs in frivolous lawsuits are ubiquitous. Public opinion polls expose a common concern about the amount of illegitimate litigation today.16 There is widespread agreement among the public that many people who sue are not negligently injured; instead, they are just trying to blame others for their problems.17 Plaintiff lawsuits are seen as attempts to violate the important principle of individual

11 See Feigenson, supra note 5; Neal Feigenson et al., Effect of Blameworthiness and Outcome Severity on Attributions of Responsibility and Damage Awards in Comparative Negligence Cases, 21 LAW & HUM. BEHAV. 597, 610-12 (1997); see also Feigenson et al., supra, at 600-01 (describing other research showing anti-plaintiff bias). See also Douglas J. Zickafoose & Brian H. Bornstein, Double Discounting: The Effects of Comparative Negligence on Mock Juror Decision Making, 23 LAW & HUM. BEHAV. 577, 579 (1999).
12 Feigenson et al., supra note 11, at 611.
13 Id. See also id. at 610-12 (discussing plaintiff blame).
15 Id. at 572.
16 See studies cited in Hans, supra note 3, at 236-37 nn.16-18.
17 Hans & Vadino, supra note 14, at 572 (stating that 77% of national poll respondents agreed that people who bring lawsuits are just trying to blame someone else for their problems).
personal responsibility. Indeed, President George W. Bush recently exploited this widespread perception of frivolous lawsuits in advocating his administration’s plan to limit jury awards in medical malpractice cases: “We’re a litigious society,” the President proclaimed, “[e]verybody is suing, it seems like.”

At the same time that members of the public believe that jurors are highly sympathetic to civil plaintiffs, they hold a concomitant view that fraud among claimants is rampant. Respondents in one national poll estimated which was likely to be more frequent, an insurance company denying a valid claim or a person attempting to bring a fraudulent claim. Over half of the poll respondents thought that an individual was more likely to bring a fraudulent claim. Although the extent of fraudulent claims is unknown, practitioners in the insurance industry consider false claims a major problem. The Insurance Research Council reported that people submitted $42 billion worth of claims for auto accident injuries in 1997, and estimated that as many as 40% of these claims ($16.8 billion) could have been fraudulent. The Coalition Against Insurance Fraud asserts on its Web site that insurance fraud is an $80 billion problem. It is difficult to assess the validity of these estimates. A separate but related question is the extent to which false legal claims result in lawsuits, since personal injury attorneys provide an additional layer of scrutiny before filing a lawsuit.

Whatever the accuracy of public perceptions about frivolous or false litigation, jurors’ general views about the extent of frivolous lawsuits are related to how they assess an individual plaintiff’s claims. For example, Hans’s research found that beliefs in a litigation explosion significantly related to actual and mock juror judgments in civil disputes. Actual

19 Hans & Vadino, supra note 14, at 585.
20 Attack on Insurance Fraud, PATRIOT LEDGER (Quincy, Massachusetts), Sept. 8, 1998, at 10.
21 The Coalition Against Insurance Fraud home page warns: “Watch out! Insurance crooks are picking your pockets. Insurance fraud is an $80-billion crime wave. It’s driving up everyone’s insurance prices . . . .” See Coalition on Fraud, at http://www.insurancefraud.org (last visited Feb. 1, 2003). The Coalition Against Insurance Fraud identifies itself as a national advocacy organization consisting of insurance companies, consumer and public interest groups and government agencies concerned with crime control. Members are listed at http://www.insurancefraud.org/-member_list.html.
22 See HANS, supra note 3, at 22-23.
and mock jurors who believed that there was a lot of frivolous litigation were much more likely to question a plaintiff's claims, a finding replicated in other studies.\textsuperscript{23}

II. WHIPLASH CASES: “JURY JURY, HALLELUJAH!”

Once I had an accident—not too bad, just a little dent
A new Mercedes hit me from the rear
Man got out in a 3 piece suit & asked if a thousand dollars would do
I said, “Well, let me think for a minute here”
I'm gonna talk to my lawyer—I might have whiplash
I might have trauma—let's not talk petty cash
I've got a witness—to put a hand on the Bible
Jury jury, hallelujah—you might be liable.\textsuperscript{24}

The tendencies to question plaintiff credibility and to wonder whether a plaintiff might be responsible for his or her own injury are likely to be exacerbated in whiplash cases. As singer and songwriter Chuck Brodsky suggests, whiplash cases (or “whip-cash” cases) are commonly and even comically equated with fraud. For example, in the situation comedy \textit{Yes, Dear}, when Greg’s car just barely taps the car that Jimmy’s freeloding father is riding in, Jimmy’s father blithely feigns a crick in his neck: “Say, Greg, you have insurance, right? Gee, I think I got some whiplash.”\textsuperscript{25}

The features of a typical whiplash case invite the questioning of plaintiff credibility. A plaintiff’s broken bone can be seen in an X-ray, but whiplash and other soft-tissue injuries do not manifest themselves on common medical tests. Instead, the injuries are demonstrated primarily through the plaintiff's claims about physical symptoms and problems stemming from the injury. The lack of definitive medical testing means that the plaintiffs and their credibility lie at the heart of the case.

\textsuperscript{23} Id. at 74-76. See also Edith Greene et al., \textit{Jurors' Attitudes About Civil Litigation and the Size of Damage Awards}, 40 AM. U. L. REV. 805 (1991) (finding lower awards by mock jurors who supported tort reform); Shari Seidman Diamond et al., \textit{Juror Judgments about Liability and Damages: Sources of Variability and Ways to Increase Consistency}, 48 DEPAUL L. REV. 301, 307-09 (1998) (finding that mock jurors who believe plaintiffs receive too much in damages are less likely to hold the defendant liable).

\textsuperscript{24} From the song \textit{Talk to my Lawyer} by \textsc{Chuck Brodsky}, on \textit{LETTERS IN THE DIRT} (Red House Records 1996), reprinted with the permission of Chuck Brodsky. Lyrics are available online at http://www.chuckbrodsky.com/lyrics.html. For full lyrics and more information on the artist and his music, please see http://www.chuckbrodsky.com/music.html.

\textsuperscript{25} \textit{Yes, Dear: House of the Rising Son} (CBS television broadcast, Jan. 13, 2003).
General perceptions about the tendency of plaintiffs to bring frivolous lawsuits, and beliefs that plaintiffs commonly and easily fake whiplash injuries, are likely to have a more pronounced effect in connective-tissue trials than in other types of cases.

Some preliminary research shows that whiplash cases are indeed problematic for plaintiffs and their attorneys.26 In a focus group study, participants expressed substantial skepticism about whiplash claims.27 One study reflected a common theme of doubts about the validity of claims and the exaggeration of injury: “Yeah, if you are in a car accident and you sprain your thumb and now you can’t flip the remote and you want ten grand because you can’t flip the remote for two months, give me a break.”28 Another participant voiced the opinion, “I think we’re a sue-happy society. And I think so many people are out for what they can get from the insurance company, from whoever . . . .”29

In addition, many participants did not know the meaning of the common terms—including soft-tissue injury and connective-tissue injury—that lawyers and medical experts use to describe whiplash and other injuries in the courtroom.30 The ambiguity surrounding connective-tissue injury seemed to encourage focus group members to minimize and even dismiss those injuries.31 A scenario experiment in a national poll conducted by Hans and Nicole Vadino varied according to whether a hypothetical plaintiff in an accident experienced a broken bone or a connective-tissue injury, both of which a doctor confirmed.32 Respondents were significantly more likely to believe plaintiff claims of the broken bone.33 They saw the broken bone as more serious than the connective-tissue injury, even though the consequences of the injury were held constant.34 Notably, people who reported that they, or a close

27 Hans & Vadino, supra note 14.
28 Id. at 573.
29 Id. at 572-73.
30 Id. at 577-79.
31 Id.
32 Valerie P. Hans & Nicole Vadino, After the Crash: Citizens’ Perceptions of Connective-Tissue Injury Lawsuits (unpublished manuscript, on file with authors).
33 Id. (manuscript at 14-15).
34 Id.
friend or family member, had experienced whiplash were more supportive of the plaintiff in the case.\footnote{\textit{Id.} (manuscript at 17).}

Yet, even if a jury believes that the plaintiff suffered a connective-tissue injury, it may blame the plaintiff for that injury. It may seem counterintuitive for a jury to blame the victim rather than the person who caused the accident. Our analysis, however, shows that there are potent psychological motivations for attributing blame to victims of injury, particularly in accident cases. We argue that these psychological factors interact with other variables, including social and political norms and media coverage, to encourage jurors and lay observers to blame the victim.

\textbf{A. Why Blame the Whiplash Victim? Psychological Factors}

Psychologists have generated a substantial body of empirical research indicating people do sometimes blame victims for negative outcomes. The landmark work by psychologist Melvin Lerner, as well as a body of experimental research on attribution theory, provides ample evidence of victim blaming.\footnote{\textsc{Melvin Lerner, Belief in a Just World: A Fundamental Delusion} (1990); Howard Tennen & Glenn Affleck, \textit{Blaming Others for Threatening Events}, 108 
\textsc{Psychol. Bull.} 209 (1990); \textsc{Shaver, supra note 1}; \textsc{Bernard Weiner, An Attributional Theory of Motivation and Emotion} (1986); Sharon Lamb, \textit{The Psychology of Condemnation: Underlying Emotions and their Symbolic Expression in Condemning and Shaming}, 68 
\textsc{Brook. L. Rev.} 929 (2003).} Lerner’s original insight was that people’s need to believe in a just, predictable and controllable world created considerable discomfort when they observed suffering.\footnote{See generally \textsc{Lerner, supra note 36.}} In response, people engaged in strategies to minimize their own discomfort, including derogating innocent victims, minimizing their injuries and reinterpreting injuries as victim-precipitated.\footnote{See generally \textit{id.}} Lerner reasoned that, if we see another person survive a negative event, such as being struck by a car, it is psychologically more comforting to believe that that person did something to cause it, rather than to believe that the event occurred by chance.\footnote{Id.} After all, if negative events are random, they could easily befall \textit{us} as well.

One strategy in blaming the victim is to attribute unfortunate circumstances to a character flaw or other

\begin{thebibliography}{9}
\bibitem{35} \textit{Id.} (manuscript at 17).
\bibitem{36} \textsc{Melvin Lerner, Belief in a Just World: A Fundamental Delusion} (1990); Howard Tennen & Glenn Affleck, \textit{Blaming Others for Threatening Events}, 108 
\textsc{Psychol. Bull.} 209 (1990); \textsc{Shaver, supra note 1}; \textsc{Bernard Weiner, An Attributional Theory of Motivation and Emotion} (1986); Sharon Lamb, \textit{The Psychology of Condemnation: Underlying Emotions and their Symbolic Expression in Condemning and Shaming}, 68 
\textsc{Brook. L. Rev.} 929 (2003).
\bibitem{37} See generally \textsc{Lerner, supra note 36.}
\bibitem{38} See generally \textit{id.}
\bibitem{39} Id.
\end{thebibliography}
negative feature of the victim. In his classic work from the 1950s, social psychologist Fritz Heider explained, “[t]he relationship between goodness and happiness, between wickedness and punishment is so strong, that given one of these conditions, the other is frequently assumed. Misfortune, sickness, and accident are often taken as signs of badness and guilt.”40 We prefer to think that people who suffer deserved their suffering for some reason.41 We can scrutinize the victim’s actions, and if no negligent action can be found, we might derogate the person’s character. Both strategies allow us to distance ourselves, albeit unconsciously, from threatening circumstances.42

The blame accorded to victims of sexual assault and domestic violence illustrates this phenomenon in a criminal justice setting.43 Psychologist Sharon Lamb argues, “[w]e do not hold perpetrators responsible enough for the harms they inflict. Perpetrators are masters at self-deception, blaming themselves too little; victims blame themselves too much.”44 She summarizes research studies on attributions of responsibility in rape cases, which regularly find that people focus on the rape victim, her characteristics and her actions in making culpability judgments.45 Similarly, Regina Schuller has found in her work on juries and battered women that juries focus on a woman’s character and actions in assessing blame, responsibility and legal liability in battering incidents.46 The theoretical underpinnings of this work help to explain why both juries and the general public attribute blame to victims even when it is unwarranted.

In analyzing the issue of victim blame, it is worth examining the fundamental processes underlying the attribution of responsibility. An attribution of responsibility points to who can be held accountable for a positive or negative

42 M e l v i n J. L e r n e r & C a r o l y n H. S i m m o n s , O b s e r v e r ’ s R e a c t i o n t o t h e “I n n o c e n t V i c t i m ”: C o m p a s s i o n o r R e j e c t i o n ?, 4 J. P E R S O N A L I T Y & S O C. P S Y C H O L. 203 (1966).
44 L A M B, s u p r a n o t e 43, a t 8.
45 I d. a t 92-96.
46 R e g i n a A. S c h u l l e r, T h e I m p a c t o f B a t t e r e d W o m a n S y n d r o m e E v i d e n c e o n J u r y D e c i s i o n P r o c e s s e s , 1 6 L A W & H U M. B E H A V. 5 9 7 (1992).
Attributions of responsibility presuppose a judgment of causality, and attributions of blame presuppose judgments of both causality and responsibility. In ascribing blame, a jury must also eliminate acceptable excuses, rationalizations or justifications. Mark Alicke’s culpable control model of blame delineates the conditions that increase as well as mitigate blame. Alicke identifies three important components that affect blame. They include volitional behavior control, that is, whether a person’s actions were freely chosen or compelled by circumstance; causal control, which focuses on the actor’s link to the harmful consequence; and volitional outcome control, or whether an actor desired or anticipated the specific outcomes. Compared to an individual who knowingly chooses an action with harmful consequences, a person who causes an accident is less likely to be blamed because of low volitional behavior control and low volitional outcome control. If jurors perceive that the person who caused the accident had personal control over the situation, this will intensify attributions of blame, whereas if there were constraints on the person’s control of the situation, this will mitigate attributions of blame. Thus, juries are most likely to attribute responsibility when (1) a particular person can be identified as the source of the action; (2) the jurors believe the that person should have foreseen the outcome of the action; (3) the person’s actions were unjustified by the situation; and (4) the person operated under the condition of free choice. Suppose the brakes fail on a private plane and it careens into a truck on the runway, killing the truck driver. Would the pilot of the plane be held responsible? He is most likely to be held responsible and blameworthy if he was aware that his brakes were faulty and he failed to have them checked. He is less likely to be held

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50 Alicke, supra note 1, at 557.

51 See generally Alicke, supra note 1.

52 Id. at 557.

53 Id.

54 Id.

55 Id.
responsible if he did not know of, and could not have known of, the mechanical failure in the plane’s brakes that caused the accident. In other words,

an attribution of blameworthiness is typically reserved for cases in which a causal agent is regarded as subject to censure or punishment for a negative event. A jury would tend to attribute blame only when an actor is seen as intending to produce an outcome, and achieving a negative outcome was the actor’s purpose.56

The culpable control theory proposes that accidents, because they typically are not foreseen, may be less likely to engender strong blaming of the individual who causes the accident. That supplies one piece of the puzzle of plaintiff blame in automobile accident cases. In looking for fault, observers may not be strongly motivated to blame the defendant, since the accident was not intended and the outcome was not foreseen. Other pieces of the puzzle fall into place when we consider the phenomenon, uncovered by psychological research, of defensive attribution. When an observer evaluates the responsibility of another individual, attributional processes may take on a defensive posture if the person is highly similar to the observer and is in a situation that the observer might also experience.57 Defensive attribution processes may encourage people to hold responsible for negative outcomes actors whose behavior has linked them to negative outcomes, even when the actors have not caused those outcomes.58 If people are motivated to distance themselves from the possibility that an accident could happen to them, they may adjust their responsibility judgments of others so that the subjective likelihood of an accident occurring is low, or at least so that no one would blame them for the consequences.59 Two factors have been associated with the tendency toward defensive attribution: the similarity of the observer to the actor and the severity of the injury. We take up each of them.

56 FISKE & TAYLOR, supra note 49, at 83-84.
57 SHAVER, supra note 1, at 134-35.
1. The Role of Similarity in Defensive Attributions

Kelly Shaver hypothesized that situational and personal similarities facilitate defensive attribution. Shaver argued that if an observer is never going to find herself in a situation like that of the actor who caused the accident (low situational similarity: she does not drive, so she would never be guilty of hitting the car in front of her), the accident may not arouse a great deal of defensiveness. But if the observer is likely to be in a similar situation (high situational similarity: she does drive), her defensiveness could be aroused and she may attempt to deny personal similarity to the actor. If personal similarity to the actor is high, Shaver predicts that the observer might also look for other distancing strategies. The observer may attribute the accident to chance or bad luck, or minimize resulting injuries. Indeed, in research studies, Shaver found that observers rating the responsibility of a person with similar personal characteristics to themselves are more lenient, compared to their rating of a person with dissimilar personal characteristics to themselves.

In twenty-two studies testing the defensive attribution hypothesis, J. M. Burger found support for Shaver’s predictions about the role of similarity. When subjects were personally and situationally similar to the person who caused the accident, they attributed less responsibility to that actor, particularly as the severity of the consequences increased. When subjects were situationally or personally dissimilar to the actor, they attributed more responsibility to the actor as the accident’s severity increased. Presumably, these defensive

60 Shaver, supra note 47.
61 Id.
62 Id.
63 Id.
64 Id.
65 Id.
67 Id. See also Dongo Rémi Kouabenan, Degree of Involvement in an Accident and Causal Attribution, 7 J. OCCUPATIONAL ACCIDENTS 187 (1985); Dongo Rémi Kouabenan et al., Hierarchical Position, Gender, Accident Severity, and Causal Attribution, 31 J. APPLIED SOC. PSYCHOL. 553 (2001); Simo Salminen, Defensive Attribution Hypothesis and Serious Occupational Accidents, 70 PSYCHOL. REP. 1195 (1992).
attributions served to deflect the threatening implications for the subjects.

Bill Thornton and his colleagues have also found that the more personally similar observers are to the victim, the greater the observers’ motivation to engage in defensive attribution. Arguably, jurors most likely to “blame the victim” are those who have the most in common with the victim or plaintiff. Donald Vinson explains, “[i]n the jurors’ minds, blaming the victim reduces the chances that they too will suffer a similar fate. Jurors confronted with the details of a terrible injury want to conclude that ‘this wouldn’t happen to me.’”

What would Shaver’s theory predict in the typical whiplash case? Most jurors across the country drive automobiles, and automobile accidents are very frequent, suggesting high situational similarity for the vast majority of jurors. Personal similarity to the defendant or the victim could play a key role. In our hypothetical whiplash case, in which Elaine hits Tom from behind, a young mother sitting on the jury might be most inclined toward leniency for Elaine and fault-finding, derogation or injury minimization for Tom.

Interestingly, research on people’s reactions to whiplash cases suggests that direct experience with whiplash is positively and significantly related to perceptions about whiplash plaintiffs. In one public opinion poll, 44% of respondents reported that they themselves, a close friend or a family member thought they had experienced whiplash. Those who said they had some firsthand experience with whiplash were more likely to grant it legitimacy. Fully 40% of respondents with whiplash experience said that people who claimed whiplash were “usually” or “always” injured, in contrast to only 20% of the respondents without whiplash experience.

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68 Bill Thornton et al., Physiological Evidence of an Arousal-Based Motivational Bias in the Defensive Attribution of Responsibility, 22 J. EXPERIMENTAL SOC. PSYCHOL. 161 (1986).
70 Id.
71 Hans & Vadino, supra note 14, at 575.
72 Id.
73 Id.
74 Id.
2. The Role of Accident Severity in Defensive Attributions

Injury severity also may affect judgments of blame, responsibility and legal liability. The tendency to engage in defensive attribution appears to intensify as the consequences of an action increase in severity. The more serious the injury from an accident, the greater is the bystander’s need to engage in defensive attribution. In a meta-analysis of seventy-five studies, Jennifer Robbennolt concluded that people attribute greater responsibility for the outcome of a negative incident when that outcome is more severe than when the outcome is minor. More severe injuries are more likely to lead to compensation.

The fact that whiplash injuries are relatively minor raises the question of the extent to which observers are psychologically motivated to engage in defensive attribution. Defensive attribution motives may be entirely absent. Further, because the whiplash injury is relatively minor, people may be psychologically comfortable calling it an accident that is no one’s fault. Unfortunately, the research does not clearly indicate the level of psychological pressure to engage in defensive attribution faced by jurors in whiplash cases.

Viewing the problem from an angle that contradicts the just world and defensive attribution phenomena, we observe that jurors have an easy avenue for relieving any personal discomfort in observing the plaintiff’s suffering—they can hold the defendant liable and provide a generous compensatory award for the plaintiff. In Valerie Hans’s research with civil jurors, however, she found a substantial amount of plaintiff criticism and blame, even in cases in which the jury ultimately found for the plaintiff.

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78 HANS, supra note 3.
B. **Social and Political Factors Affecting Plaintiff Blame**

In addition to psychological factors, social norms and political issues encourage people to hold personal injury plaintiffs responsible. Perhaps no social norm is more strongly held in the United States than the ethic of individualism, with its emphasis on individual responsibility and freedom. In an insightful early study of people's reactions to civil lawsuit plaintiffs, Professor David Engel conducted interviews with residents of a rural Illinois community in the 1970s. He discovered that the community members had negative views of plaintiffs who brought personal injury lawsuits. The residents saw these plaintiffs as troublemakers who would not accept responsibility for their own actions. They viewed the plaintiffs as attempting to blame others, undermining the community's strong commitment to personal individual responsibility. In the eyes of the community, those who suffered personal injuries were usually at fault in some way, and would have been able to prevent their injuries had they been more careful.

Similarly, Professor Robert Hayden maintains that society perceives, rightly or wrongly, plaintiffs who bring legal claims against other individuals or against corporate entities as violating important social norms. In addition to the norm of personal responsibility, Hayden points to the way that some citizens may see civil lawsuits as violating the social norms of equality and wealth redistribution. Individual litigants use the state's resources to bring a lawsuit, lessening the formal equality between the parties as the machinery of justice is used on behalf of the plaintiff and against the defendant. Furthermore, a monetary compensatory award for an injury gives a financial benefit without a plaintiff having to work for it, much as welfare recipients are seen as receiving financial

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81 Id. at 553-54, 559-60.
82 Id. at 553.
83 Id. at 558-59.
85 Id.
benefits without work.\textsuperscript{86} These perceived advantages, inequalities and benefits for the civil plaintiff may create hostility.

Some political realities also help to shape contemporary views of the plaintiff in a civil lawsuit. Many lawsuits today pit an individual plaintiff against a business or corporate defendant.\textsuperscript{87} The National Center for State Courts reports that in forty-five of the largest state courts, over half of the civil jury trials included a corporation as a defendant.\textsuperscript{88} Some major corporations, along with insurance companies, have pointed to the high cost of fraudulent claims and supposedly frivolous litigation to support their civil justice reform efforts, which are aimed at limiting their legal liabilities.\textsuperscript{89} These efforts have succeeded in many state courts.\textsuperscript{90} Part of the secret of their success, we believe, is the skewed media coverage that shapes public views of civil litigation.

C. Media Coverage

Media coverage of excessive litigation, combined with negative views that whiplash is a fraudulent injury, could create initially negative impressions of the whiplash plaintiff that, in turn, could shape the jury’s liability judgments. Media coverage and advertising campaigns could be potent influences in framing how the public perceives legal claims.\textsuperscript{91} Most people obtain information about legal proceedings through television, newspapers, magazines and other media.\textsuperscript{92}

\textsuperscript{86} Id.

\textsuperscript{87} Hans, supra note 3, at 10.

\textsuperscript{88} Ostrom et al., supra note 2, at 237.


Media coverage of civil litigation presents an inaccurate and sensationalist picture of civil lawsuits. Daniel Bailis and Robert MacCoun’s systematic analysis of media stories about tort litigation in popular national magazines from 1980 to 1990 found that magazines devoted disproportionately high attention to big award cases. For example, median jury awards ranged from a low of $51,000 in state court tort trials to a high of $318,000 in federal products liability cases. Yet, the median jury award in cases discussed in the magazine articles was $1,750,000. The media also favor heavy coverage of the lawsuit “horror story.” Whether it is a woman who spills coffee on herself and wins a $2.9 million jury award from McDonald’s, a Philadelphia “psychic” who wins a $1 million jury award after a botched medical treatment or a bystander who sees a car hit a bus and then hops on the bus in order to fraudulently claim a whiplash injury, media coverage of these and other horror story cases provides familiar and readily available exemplars of the excesses of our civil justice system.

Advertising campaigns by businesses and insurance companies also promote the ready availability of horror stories. Stephen Daniels analyzed insurance advertisements that called attention to seemingly questionable lawsuits. One Aetna Insurance ad read:

The right to sue is as essential to a free and fair country as any right guaranteed in the Constitution. But when a woman riding in an automobile spills hot coffee on her lap, then sues the restaurant where she bought the coffee, something is wrong. And when a man

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94 Id. at 426.
95 William Glaberson, Ideas and Trends: The $2.9 Million Cup of Coffee, N.Y. TIMES, June 6, 1999, at D1. Glaberson observed that although the media raised a hue and cry over the $2.9 million jury award, far less media attention was devoted to the fact that the woman who spilled the coffee was eighty-one years old and the coffee scalded her so badly that she needed skin grafts for third-degree burns. There were also far fewer media reports when the woman settled for $600,000 after the judge reduced her jury award. See generally Michael McCann et al., Java Jive: Genealogy of a Judicial Icon, 56 U. MIAMI L. REV. 113 (2001).
96 Glaberson, supra note 95. Although a jury awarded the “psychic” $1 million, Glaberson pointed out that the media barely reported the fact that the psychic’s verdict was reversed and she collected nothing at all. Id.
97 See, e.g., McCann et al., supra note 95.
98 See Daniels, supra note 89.
can drag a liquor company into court because he has become an alcoholic, something is wrong.99

Fraudulent claims of whiplash and other soft-tissue injuries in accidents have been exposed in high-profile news stories. For example, in 2001, the New York State Insurance Department conducted an investigation, dubbed “Operation Whiplash,” which exposed an insurance fraud ring that created fake accidents and injury claims and ripped off insurance companies for millions of dollars.100 In another highly publicized series of incidents, the fraud division of the New Jersey Insurance Department staged a sting operation using fake bus accidents.101 They were concerned about the phenomenon of “ghost riders,” people near a public transit vehicle who hop aboard after an accident and then submit false injury claims.102 The sting operation staged a number of false bus accidents and filmed the events. They were then able to catch bogus claimants and some of their doctors and lawyers.103

These widely publicized insurance fraud cases no doubt contribute to negative schemata toward plaintiffs in whiplash cases.104 As jurors begin their task of apportioning legal responsibility, these examples may help to shape their views of the plaintiff in the case before them. Jurors may be more alert for evidence of fraud, but they may also be more suspicious of legitimate injury claims.

III. SHIFTING BLAME BACK TO THE DEFENDANT

The psychological literature suggests that plaintiff blame, derogation and injury minimization will be a common occurrence in personal injury lawsuits, resulting in a possible disinclination to hold a defendant responsible for the plaintiff’s injury. Focus group results and the national survey on whiplash also indicate that whiplash cases present distinctive

99 Id. at 288.
100 Celeste Katz, Insurers Lose Big to Fraud Ring Scam, N.Y. DAILY NEWS, Feb. 12, 2002, at 53.
102 Two Cops, Doctor Indicted in Phony Bus Accident, RECORD (Bergen County, N.J.), Aug. 18, 1993, at A4.
104 Robbennolt & Studebaker, supra note 91, at 17.
problems. The relatively low severity of many whiplash injuries may lessen the jury's need to find a defendant responsible. The extensive publicity and high visibility of insurance fraud cases may present challenges even for plaintiffs with meritorious cases to convince a jury that their injuries are real and deserve compensation.

Having documented the problem and having outlined some of the psychological and social processes that underlie it, we ask whether it is possible to do anything to correct it. That is, can we modify the arguments and evidence presented in a trial so that jurors are more likely to believe and compensate a deserving plaintiff? In a whiplash case, can we shift blame away from the plaintiff and back onto the defendant? How can we effectively communicate the severity of a whiplash injury and ensure adequate compensation?

Trial handbooks and communication and psychology treatises on effective communication and persuasion can inform our inquiry on trial tactics. We do not aim to survey that voluminous literature here, although we draw on its insights. Instead, we focus on a set of questions, identifying two key areas for fruitful exploration: blame shifting from plaintiff to defendant, and the communication of injury validity and severity. In proposing relevant strategies, we draw on the work of major psychological researchers, communication scholars, persuasion theorists and lawyers.

A. Influencing Jurors' Attitudes

First, we begin with the insight that jurors' attitudes toward the issue of personal injury litigation and even whiplash will be based on their beliefs and values, the building blocks of attitudes. Attitudes about related issues linked

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105 Hans & Vadino, supra note 14, at 573-77.
107 SIMONS, supra note 106, at 27.
together form a knowledge structure or schema. A relevant example is a schema of frivolous and fraudulent plaintiffs bringing sham lawsuits. Once formed, schemata are resistant to change, but it is sometimes possible to alter schemata if individuals are receptive to new information. The first small step in the persuasive process is providing new information that will change a juror’s negative schemata about the plaintiff.

Framing is another approach to effective persuasion. “A frame . . . is one among a number of possible ways of seeing something, and a reframing is a way of seeing it differently, in effect changing its meaning.” Attorneys might try to frame or reframe an argument in such a way as to cause jurors to alter their pre-existing schemata. For example, successful reframing occurred in a survey of respondents who were generally opposed to the federal welfare program called Aid to Families with Dependent Children (“AFDC”). If researchers told the survey respondents that federal spending on welfare was about 1% of the annual federal budget, they thought that it was a small amount and were far more favorable toward welfare. In contrast, if researchers told survey respondents the actual amount in dollar figures (over $10 billion), they expressed alarm at the amount spent on welfare.

Another approach to predicting how jurors might react to an argument is the Elaboration Likelihood Model (“ELM”) of persuasion developed by Richard Petty and John Cacioppo. Petty and Cacioppo differentiate between circumstances that encourage central processing of information, that is, systematic analysis of the content of a persuasive argument, and peripheral processing of information, which relies more on shortcuts and heuristics to evaluate the validity of a persuasive message.
In one study, Richard Petty, John Cacioppo and Richard Goldman found that listeners with a high degree of personal involvement in an issue were more persuaded by strong, as opposed to weak, arguments and were less concerned with the communicator's degree of expertise.\textsuperscript{115} In contrast, they found that listeners with a low degree of personal involvement in an issue were less concerned with the strength or weakness of various arguments, but were more persuaded by a speaker who they perceived to have high, rather than low, expertise on the subject.\textsuperscript{116} Highly complex material appears to have a similar effect in shifting people from central to peripheral processing, at least in laboratory experiments.\textsuperscript{117}

Predictably, jurors, given the significant consequences of their decision, will be highly motivated to engage in central processing of the evidence. Trial consultant Donald Vinson, however, maintains that jurors also rely on heuristics or shortcuts to simplify their task, especially in complex trials.\textsuperscript{118} In some instances, reliance on heuristics may decrease the accuracy of decision making.\textsuperscript{119} The representativeness heuristic, for example, leads jurors to estimate the probability of an event from the ease with which particular examples come to mind.\textsuperscript{120} The widespread publicity given to frivolous litigation and insurance fraud stories may make it easy for jurors to recall specific instances, which in turn may increase their estimate of how often frivolous and fraudulent lawsuits are filed. Plaintiffs’ attorneys should anticipate that fraud cases will be readily available in jurors' memories and should confront the matter directly.

Vinson explains how to identify affective and cognitive approaches in jurors.\textsuperscript{121} An affective juror is one who “makes decisions on an emotional rather than a rational basis.

\textsuperscript{115} Richard E. Petty et al., \textit{Personal Involvement as a Determinant of Argument-Based Persuasion}, 41 J. PERSONALITY & SOC. PSYCHOL. 847 (1981).
\textsuperscript{116} \textit{Id.}
\textsuperscript{118} VINSON, \textit{supra} note 69, at 63.
\textsuperscript{119} \textit{Id.}
\textsuperscript{120} \textit{Id.}
\textsuperscript{121} \textit{Id.} at 60.
Affective jurors are generally impulsive decision makers. They often base their decisions on highly selective perception and organization of what they see and hear, rather than reserving judgment until all the facts have been gathered.\(^\text{122}\) In contrast, cognitive jurors are “very orderly and logical decision-makers, . . . information seekers because they are information processors.”\(^\text{123}\) Affective jurors tend to remember and respond to emotional appeals.\(^\text{124}\) Focusing on how an injury affected the plaintiff’s ability to participate in family life has more emotional impact than does documentation of a plaintiff’s lost wages. Vinson concludes, “[s]uccessful plaintiff personal injury lawyers are . . . masters at structuring affective communications. At the same time, most defense lawyers adhere to a highly structured cognitive approach.”\(^\text{126}\) Yet, if jurors respond to diverse appeals, attorneys on both sides would do well to include both affective and cognitive appeals.

Persuasion researchers have found some evidence that listeners are most persuaded when they believe that the speaker is actually arguing against her own belief or position.\(^\text{127}\) Listeners tend to form prior beliefs regarding the position that the witness is likely to take. If the witness’ message is then seen as the opposite of the prior position, the witness gains credibility and, thus, is more persuasive.\(^\text{128}\) Interestingly, whiplash cases sometimes put the defendant in a position to benefit from this phenomenon. If a defendant admits liability but disputes damages, a frequent occurrence in rear-end automobile accidents, the admission of liability may enhance her credibility.

B. Addressing Defensive Attributions at Trial

The attribution literature suggests that the perceptions of personal control and individual self-determination are strongly linked to judgments of responsibility. Thus, the most powerful strategy for shifting responsibility and blame away from a plaintiff and toward a culpable defendant is to frame or

\(^{122}\) Id.
\(^{123}\) Id., supra note 69, at 61.
\(^{124}\) Id.
\(^{125}\) VINSON, supra note 69, at 62.
\(^{126}\) VINSON, supra note 69, at 62.
\(^{127}\) Alice H. Eagly et al., An Attribution Analysis of Persuasion, in 3 NEW DIRECTIONS IN ATTRIBUTION RESEARCH 37 (John H. Harvey et al. eds., 1981).
reframe the issue of individual responsibility, emphasizing the factual circumstances that constricted the plaintiff's personal control and expanded the defendant's personal control. As described above, if the plaintiff had any possible way of influencing the outcome of the situation, jurors exhibit strong tendencies to blame the plaintiff. In our hypothetical case, despite the fact that Elaine's fault seems more direct and obvious, if Tom could have moved his car as he saw Elaine hurtling toward him in his rear-view mirror, jurors will likely blame him for failing to avoid the accident. Based on the psychological and social phenomena explained above, we should expect at least a modest degree of belief that Tom is at fault, even if it is clear that he had no warning or personal control over the situation. Nonetheless, we think that emphasizing the plaintiff's inability to avoid an accident would be a worthwhile strategy.

The theme of individual responsibility that leads jurors to scrutinize plaintiffs for fault can also be applied to a personal injury defendant. If jurors view plaintiffs as avoiding personal responsibility by bringing lawsuits, so too might jurors come to view defendants as avoiding responsibility by fighting a reasonable request for compensation. The factual circumstances that support defendant control and responsibility, along with the possible steps that a defendant could have taken to avoid an accident, underscore the extent of the defendant's culpability for the untoward event. Negative dispositional attributions about the character of the defendant may flow from the facts and circumstances of the case. As some persuasion scholars maintain, "[p]ersuading jurors to make this type of dispositional attribution increases the likelihood of significant damages."129 If Tom's lawyer can succeed in showing Elaine's lack of care and irresponsibility, the tendency to blame the injury victim should decrease.

A plaintiff's attorney may want to establish common ground between the jurors and the plaintiff,130 for example, by emphasizing that a plaintiff's attitudes and background are similar to those of the jurors.131 Shaver's research132 and

129 Id. at 92.
Burger's research, discussed earlier,\textsuperscript{133} suggest that jurors could be more lenient toward people who are similar to themselves. Arguably, then, the best jurors for the plaintiff may be those who have already been victims of a car accident because they will not want to blame themselves for their accident.\textsuperscript{134} Another tack is to search for jurors with similar backgrounds or experiences. As noted above, Hans and Vadino's study found that respondents with whiplash were more likely to believe that whiplash victims were actually injured.\textsuperscript{135} Muzafer Sherif and Carl Hovland's classic observation from social judgment theory posits that people make social judgments based on anchors or reference points.\textsuperscript{136} Personal experience can provide a powerful anchor or reference point that a litigator could employ to make a persuasive argument.

In terms of structuring the argument, the plaintiff's attorney will probably be more persuasive when using a two-sided message with refutation rather than a one-sided message.\textsuperscript{137} For example, suppose Elaine was momentarily distracted by her children fighting in the back seat of the car just before the accident. Elaine's situation highlights the accidental quality of the event and also diminishes an observer's perception of Elaine's personal control. Indeed, as Professor Sharon Lamb pointed out to us, the woman could be seen as acting as a good mother, doing the best she could to handle her important parental responsibilities.\textsuperscript{138} The plaintiff's attorney might be tempted to ignore or downplay Elaine's excuse. However, the attorney would be better off by acknowledging Elaine's defense that her children's fighting distracted her, and then refuting her argument by pointing out

\textsuperscript{133} See Burger, supra note 66.
\textsuperscript{134} Vinson, supra note 69, at 101. Vinson makes the argument that a defense attorney in an auto accident case would want jurors who believe that a similar accident could happen to them. Donald Vinson explains that, "[c]onsistent with defensive attribution theory, a juror who thinks he or she could personally have such an accident will possess a deep need to rationalize the situation" and blame the victim. Id. Vinson further explains that during voir dire, defense attorneys should focus on the key question of whether prospective jurors believe that such an accident could have happened to them, and put those who believe it could have on the jury. Id.
\textsuperscript{135} Hans & Vadino, supra note 14, at 575.
\textsuperscript{137} Advances, supra note 106, at 93.
\textsuperscript{138} Sharon Lamb, Remarks at the Brooklyn Law School Center for the Study of Law, Language & Cognition Symposium, Responsibility & Blame: Psychological and Legal Perspectives (Oct. 18, 2002). For an interesting discussion of mothering and responsibility attribution, see Lamb, supra note 36, at 945-48.
her irresponsibility in failing to pull over to stop their fighting. And, of course, all lawyers know that choice of words can be crucial, so the plaintiff's lawyer may be drawn to words with highly visual negative imagery, such as “smashed” and “struck,” rather than the more benign “hit” and “bumped.”

The omnipresence of the individual responsibility ethic among jurors suggests that the theme of personal control will figure importantly in jurors’ perceptions of the accident. Emphasizing the plaintiff's lack of control, as well as the actions and choices that the defendant made that led to the accident, is a potentially fruitful way to have the individual responsibility ethic work for, rather than against, the plaintiff.

C. Communicating the Severity of a Whiplash Injury

The widespread media coverage of insurance fraud, coupled with tendencies to minimize injuries and derogate plaintiffs, make challenging the presentation of a convincing case of injury, particularly when the injury is not readily visible, as with whiplash and other soft-tissue injuries. Establishing and emphasizing the impossibility or low likelihood of fraud, either by referring to the plaintiff's personal characteristics or to external confirmations of the injury, is an essential first step.

Plaintiffs' attorneys have made many suggestions for the more effective presentation of a whiplash client’s case. Concerned by the aura of fraud and triviality surrounding the term whiplash, plaintiffs’ attorneys have proposed alternative words to convey the injury. One favorite recommendation is that attorneys use the term “connective-tissue” injury because of its medical connotation. Of course, the use of this term is likely to be one-sided, particularly if the defense uses other

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139 In the adversarial context, people have information about opposing arguments; therefore, a two-sided message with refutation is more effective. RICHARD M. PERLOFF, THE DYNAMICS OF PERSUASION 167 (1993).

140 Elizabeth F. Loftus and John C. Palmer showed subjects a film of a multi-car accident. After seeing the film, the researchers asked the subjects one of two leading questions: “About how fast were the cars going when they smashed into each other?” or “About how fast were the cars going when they hit each other?” If Loftus and Palmer asked the question using the word “smashed,” they found that subjects estimated that the cars were going faster, and they also reported seeing broken glass at the accident scene despite the fact that none was shown in the film. Elizabeth F. Loftus & John C. Palmer, Reconstruction of Automobile Destruction: An Example of the Interaction Between Language and Memory, 13 J. VERBAL LEARNING & VERBAL BEHAV. 585 (1974).
words, such as whiplash or soft-tissue injury, to minimize the perceived injury or connote fraud. Furthermore, focus group discussions of whiplash cases show that many people do not have a firm grasp of the meaning of connective-tissue injury, whereas whiplash, and even the prosaic “neck injury,” are more understandable. The national poll on perceptions of personal injury showed that people rated a neck injury as more serious than soft-tissue injury, connective-tissue injury and whiplash. Whether simply changing the injury label used by one side without any other trial modifications would be effective is unknown.

Other plaintiffs’ attorneys are worried, and reasonably so, that jurors will not grant credibility to whiplash claims if there is only minimal damage to the vehicle in a car accident and no strikingly visible physical deformity on the plaintiff. They have searched for concrete analogies to whiplash injuries. One is the “egg carton” analogy. It is a common experience for all of us to get an unblemished egg carton that nonetheless contains one or more broken eggs. Similarly, the more sensitive muscles and tissue surrounding an accident victim’s bones can be injured even though the vehicle’s impact does not leave a dent. A migraine headache is also analogous to whiplash in the sense that it can produce devastating pain although there is no external visible sign of the pain during a migraine.

Finally, plaintiffs can draw on psychological principles in effectively framing the injury’s worth for the jury. Experimental studies find that “selling price” approaches to asking juries what an injury is worth generate higher recommended awards than “making whole” approaches. That is, if we ask jurors to consider how much money they would want for selling their good health, the amount is considerably larger than if we ask how much a plaintiff needs to receive to buy back her good health, to be made whole again after an injury.

In sum, effective communication of the validity and severity of injury may include confronting the possibility of plaintiff fraud directly, modifying terminology, using apt analogies and incorporating insights from framing theory.

141 Hans & Vadino, supra note 14.
144 Id. at 1353-54.
CONCLUSION

The research summarized in this Article shows that psychological, social and political factors as well as media coverage tend to encourage observers and civil jurors to search for fault in personal injury plaintiffs and, most acutely, whiplash plaintiffs. A plaintiff's attorney will have a better chance of prevailing in a whiplash case by seeking common ground between the jurors and the plaintiff; looking for jurors with whiplash experience; underscoring the plaintiff's lack of personal control over the accident; directly addressing presumptions about the plaintiff's blame; and emphasizing the theme of the personal responsibility (or irresponsibility) of the defendant.

Effective communication of the severity of a whiplash injury might best be accomplished by referring to the whiplash injury as a “neck injury” rather than whiplash or connective-tissue or soft-tissue injury, which are mystifying terms to most people; focusing on concrete ways in which the neck injury has done serious damage to the plaintiff's quality of life, providing both emotional and rational appeals and using effective analogies to whiplash (such as the egg carton or migraine metaphors). Framing can also be used to convey the full worth of the injury.

Some open questions remain about the causes of plaintiff blame in personal injury trials, particularly those involving whiplash and other soft-tissue injuries. Are the psychological motivations described above likely to be the prime causes of derogation of plaintiffs who bring lawsuits? Are jurors simply less willing to compensate because of the low severity of the injuries? Are the readily available media examples of fraudulent claims so powerful that they trump plaintiff evidence of injury?

Then, too, there is the problem of prediction. When attorneys look to research in the areas of psychology (attribution theory) or communication (persuasion theory) to inform their approaches to arguing civil cases, they are no doubt aware that research in both disciplines can point in a general direction with broad strokes, but cannot predict with absolute certainty how twelve individual jurors will decide a particular case. Nonetheless, the literature reviewed here provides some specific ideas for how to present an injury victim's case. We hope that the theoretical literature will guide the design of finely tuned empirical studies on jurors’
perceptions of plaintiffs and more effective methods for the presentation of their injuries.
SYMBOLISM AND INCOMMENSURABILITY
IN CIVIL SANCTIONING: DECISION MAKERS
AS GOAL MANAGERS∗

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INTRODUCTION

Factfinders in civil cases must often make a constellation of decisions, such as assigning responsibility and blame, making compensation and (sometimes) giving out punishment. These decisions are likely to evoke numerous social and moral concerns and, therefore, inevitably implicate a variety of instrumental and symbolic goals. We argue that descriptions of legal decision making that fail to consider the psychological interplay among these different goals are likely to come up short in their efforts to explicate the ways in which jurors and other factfinders make decisions in civil cases. Instead, we suggest that decision making in civil cases can profitably be thought of as a process by which decision makers attempt to maximally satisfy a wide variety of goals in parallel.

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The authors would like to thank the participants at the Brooklyn Law School Symposium, “Responsibility and Blame: Psychological and Legal Perspectives,” for their valuable comments and Jason Moore and Josie Potterbaum for their very helpful research assistance.
In contrast to many traditional legal and economic portrayals of legal decision making which posit that decision makers can pursue single motives as instructed, Part I argues that jurors and other finders-of-fact deciding civil cases ought to be thought of as pursuing many different goals simultaneously. This Part briefly describes many of the goals that may underlie decision making in civil cases and introduces a set of basic goal management principles that define how these goals interrelate. Part II describes social psychological research that suggests that legal decision makers may be motivated to pursue a variety of goals in addition to the traditional goals of determining fault, compensating plaintiffs and deterring defendants. Different motives for distributing resources, value expressive goals and a need to restore the proper relative moral balance between the parties may all play a role in civil decision making. In Part III, we propose that decision makers may attempt simultaneously to satisfy these multiple goals through a process of parallel constraint satisfaction.

I. DECISION MAKER GOALS

A. Traditional Legal and Economic Models of Decision Making

Traditional descriptions of legal decision making presume, at least implicitly, that jurors and other legal factfinders are driven by a single motive at any given time and are able to focus on one purpose to the exclusion of others in making a given decision. Further, these descriptions assume that the single purpose on which decision makers will focus is the one that the legal system finds appropriate for making the judgment in question. Since the legal system regards different purposes as appropriate for the different decisions it asks decision makers to make about a single case, it assumes that the decision makers will rotate into place the decision rule that the justice system instructs them to use. The system assumes further that decision makers will apply that (and only that) decision rule for the decision in question. This view of system conforming, single rule governed factfinders underlies numerous legal rules that assume decision makers can compartmentalize information and make independent judgments. For example, decision makers are asked to isolate their reactions to extra-evidentiary information, such as
pretrial publicity or inadmissible evidence, from their evaluation of the trial evidence.\(^1\) Similarly, decision makers are expected to use certain evidence for some purposes, but not for others. For example, decision makers may use prior record testimony to impeach a defendant’s credibility as a witness but not to determine his or her culpability.\(^2\) Decision makers are also often asked to reach independent verdicts on multiple claims, for multiple plaintiffs or against multiple defendants in a single trial.\(^3\)

Sometimes it is not the trial evidence that requires compartmentalization, but the rules or motives for the decision or set of decisions made. For instance, in civil trials decision makers are expected to compartmentalize their decisions so that liability, compensation and punitive damages judgments are each made independently. Decision makers are presumed to pursue different goals through each decision. Specifically, decision makers are expected to be driven by a motive of causal accuracy in making liability determinations, by the plaintiff-focused motive of compensation in making compensatory damages determinations and by the defendant-focused motives of retribution and deterrence in making punitive damages determinations.\(^4\) In fact, it becomes more complicated. Given the different decision motives, decision makers are asked to use each decision to achieve separate objectives and may, therefore, be asked to consider certain evidence as relevant to only some

\(^{1}\) See generally Christina A. Studebaker & Steven D. Penrod, Pretrial Publicity: The Media, the Law, and Common Sense, 3 PSYCHOL. PUB. POLY & L. 428 (1997); Shari Seidman Diamond & Neil Vidmar, Jury Room Ruminations on Forbidden Topics, 87 VA. L. REV. 1857, 1860 (2001) (“In both instances [pretrial publicity and legally irrelevant evidence], jurors are instructed to set aside (to erase) information that is already available to them and to reach their verdicts based simply on the legally permissible evidence which has been presented at trial. While courts recognize that jurors cannot be expected to proceed in this fashion on some occasions, granting a change of venue or a mistrial as a remedy, the reliance on simple admonitions to disregard inadmissible information reflects a perception of the jury as a blank slate on which trial testimony can be written and erased.”).

\(^{2}\) See FED. R. EVID. 404(b), 609.

\(^{3}\) See FED. R. CIV. P. 13 (counterclaims and cross-claims); 14 (third-party practice); 18 (joinder of claims and remedies); 19 (joinder of persons needed for just adjudication); 20 (permissive joinder of parties); 21 (misjoinder and non-joinder of parties); 22 (interpleader); 23 (class actions); & 24 (intervention).

\(^{4}\) With regard to punitive damages, the goal of deterrence has been the primary focus of many legal analysts. See, e.g., David Crump, Evidence, Economics, and Ethics: What Information Should Jurors be Given to Determine the Amount of a Punitive-Damage Award?, 57 MD. L. REV. 174 (1998); A. Mitchell Polinsky & Steven Shavell, Punitive Damages: An Economic Analysis, 111 HARV. L. REV. 869 (1998); But see Marc Galanter & David Luban, Poetic Justice: Punitive Damages and Legal Pluralism, 42 AM. U. L. REV. 1393 (1993).
of these decisions but not to others. For example, defendant wealth is often appropriately considered as a factor in punitive damages decisions, but should not affect decisions about liability or compensatory damages.\(^5\) Similarly, decision makers may be asked to postpone certain judgments until others have been reached, and to prevent possible conclusions of the postponed judgments from influencing prior decisions. In civil trials, for instance, jurors’ views regarding damages are not to influence their evaluation of defendant liability.\(^6\)

In a similar way, economic models of legal decision making also tend to presume that legal decision makers pursue unitary objectives. A clear example of this is the optimal deterrence model, where the primary purpose of a civil verdict, including any punitive damages award, is to set damages at the level that will result in the most efficient deterrence of harmful behavior.\(^7\) According to optimal deterrence theory, the


\(^6\) Similarly, in criminal trials, jurors’ views regarding sentence severity should not influence their evaluation of defendant guilt.

\(^7\) Polinsky & Shavell, *supra* note 4; W. Kip Viscusi, *The Challenge of Punitive Damages Mathematics*, 30 J. LEGAL STUD. 313, 331 (2001). The notion of "optimal" deterrence “implies deterring offensive conduct only up to the point at which
purpose of punitive damages is to offset any deficit in the ability of compensatory damages to deter harmful behavior caused by any ability the defendant has to escape detection or liability. In accordance with this theory, the likelihood that the harmful conduct will be detected ought to be related to the appropriate degree of punishment. Under this model, decision makers are expected to render punitive damages decisions that vary inversely with the likelihood of detection; their decisions are considered to be erroneous if they do not. Even when these traditional legal and economic models are viewed as purely normative or prescriptive—rather than descriptive of actual decision making—their use as a baseline or benchmark for evaluating jury performance implicitly adopts the models’ narrow goal conceptualization.

Much empirical research into legal decision making, however, demonstrates that decision makers have difficulty with the tasks these models require; the models assume that decision makers can select and exclusively use a single, legally appropriate decision rule. Decision makers have trouble, for example, ignoring pretrial publicity or inadmissible evidence; using specified evidence for some purposes but not

society begins to lose more from deterrence efforts than from the offenses it deters” in contrast to “complete” deterrence in which the goal is to “stop[] offenders from committing offensive acts.” Hylton, supra note 5, at 421.

It follows from these observations that a crucial question for consideration is whether injurers sometimes escape liability for harms for which they are responsible. If they do, the level of liability imposed on them when they are found liable needs to exceed compensatory damages so that, on average, they will pay for the harm that they cause. This excess liability can be labeled “punitive damages,” and failure to impose it would result in inadequate deterrence. In summary, punitive damages ordinarily should be awarded if, and only if, an injurer has a chance of escaping liability for the harm he causes.

Id.

9 Id. at 889-90.

10 See generally Polinsky & Shavell, supra note 4; Viscusi, supra note 7.


12 See Stephan Landsman & Richard F. Rakos, A Preliminary Inquiry into the Effects of Potentially Biasing Information on Judges and Jurors in Civil Litigation,
for others;\textsuperscript{13} reaching independent verdicts on multiple claims, for multiple plaintiffs or against multiple defendants in a single trial;\textsuperscript{14} compartmentalizing liability, compensation and punishment decisions;\textsuperscript{15} and effecting optimal deterrence to the

\textsuperscript{12} BEHAV. SCI. & L. 113 (1994) (finding that judges’ and jurors’ liability decisions and perceptions of the trial were similarly influenced by exposure to potentially biasing, but inadmissible, evidence).


\textsuperscript{15} While some studies find that jurors and other legal decision makers are somewhat successful at compartmentalizing information in deciding civil cases, other studies demonstrate areas of difficulty. For empirical studies examining the possibility of leakage among the different decisions jurors must make in civil cases see Corrine Cather et al., Plaintiff Injury and Defendant Reprehensibility: Implications for Compensatory and Punitive Damage Awards, 20 LAW & HUM. BEHAV. 189 (1996); Michelle Chernikoff Anderson & Robert J. MacCoun, Goal Conflict in Juror Assessments of Compensatory and Punitive Damages, 23 LAW & HUM. BEHAV. 313 (1999); Irwin A. Horowitz & Kenneth S. Bordens, An Experimental Investigation of Procedural Issues in Complex Tort Trials, 14 LAW & HUM. BEHAV. 269 (1990); MacCoun, supra note 5; Robbenolt, supra note 5; Jennifer K. Robbenolt & Christina A. Studebaker, Anchoring in the Courtroom: The Effects of Caps on Punitive Damages, 23 LAW & HUM. BEHAV. 353 (1999); Roselle L. Wissler et al., The Impact of Jury Instructions on the Fusion of Liability and Compensatory Damages, 25 LAW & HUM. BEHAV. 125 (2001); Douglas J. Zickafoose & Brian H. Bornstein, Double Discounting: The Effects of Comparative Negligence on Mock Juror Decision Making, 23 LAW & HUM. BEHAV. 577 (1999). For empirical studies examining the effects of bifurcation in civil cases, see Stephan Landsman et al., Be Careful What You Wish For: The Paradoxical Effects of Bifurcating Claims for Punitive Damages, 1998 WISC. L. REV. 297; Edith Greene et al., Compensating Plaintiffs and Punishing Defendants: Is Bifurcation Necessary?, 24 LAW & HUM. BEHAV. 187 (2000); Horowitz & Bordens, supra; Robbenolt & Studebaker, supra. See also Hans Zeisel & Thomas Callahan, Split Trials and Time Saving: A Statistical Analysis, 76 HARV. L. REV. 1606 (1963).
exclusion of other goals. In contrast to the legal and economic models that portray jurors and other finders-of-fact as single-mindedly pursuing individual, separable goals, we suggest that legal decision makers attempt to best use the available verdict options to satisfy numerous goals simultaneously.

B. Decision Makers as Goal Managers

Civil cases evoke multiple social and moral concerns, both normative and non-normative, that factor into legal decision making. For example, legal decision makers may attempt to reach a verdict that is consistent with the available evidence. They may attempt to achieve distributive justice by assessing liability proportionally with fault or by allocating resources to each party in proportion to that party’s need. They may seek to compensate plaintiffs appropriately, avoiding overcompensation and undercompensation. They may endeavor to effect deterrence in some measure, exact retribution or restore an appropriate balance of justice between the parties.

Just as the law more generally may serve an expressive function, so too may jurors attempt to express symbolic values through their verdicts. In addition, jurors may show reactance in the face of blatant manipulative tactics by counsel, attempt to comply with economic logic and attempt to reconcile conflicting (intrajuror and interjuror) interpretations of the judge’s instructions. At the same time, they may desire to

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18 See Morton Deutsch, Equity, Equality, and Need: What Determines Which Value Will be Used as the Basis of Distributive Justice, 31 J. SOC. ISSUES 137 (1975). See also infra Part II.A.
21 See infra Parts II.B and II.C.
“finish the trial and go home; avoid fighting with other jurors; [and] avoid the wrath of the defendant, plaintiff, or community.”

While decision makers in civil cases may struggle to satisfy this assortment of goals, the legal decision making task affords only limited mechanisms through which to do so—primarily, a liability verdict, compensatory damages and, sometimes, punitive damages.

The array of possible goals and the avenues available to accomplish them are interrelated in complex ways. We propose four basic goal management principles that describe the interrelated nature of these goals and actions. First, the principle of equifinality holds that some goals may be alternately satisfied through multiple pathways. Decision makers, for example, can compensate the plaintiff most straightforwardly through a compensatory damage award, but can also award punitive damages to achieve this goal.

Second, the principle of best fit holds that pathways may sometimes fulfill some goals better than others. For example, compensatory damages may serve compensatory goals better than retributive goals. For example, compensatory damages may serve compensatory goals better than they do retributive goals. Third, the principle of multifinality holds that a particular pathway may accomplish multiple goals simultaneously. Some of the decision makers’ objectives may be consistent with each other and may be achieved concurrently. Requiring a defendant to pay money to a plaintiff, for example, may serve to compensate the plaintiff, to educate the defendant and others about socially acceptable conduct and also to punish the defendant.

Similarly, a punitive damage award may fulfill goals of punishment and deterrence. Finally, the principle of goal incompatibility holds that some objectives will inevitably conflict and, thus, be difficult or impossible to satisfy concurrently. For instance, a particular punitive damages award may be thought to punish appropriately the defendant, but to overcompensate the

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22 Anderson & MacCoun, supra note 15, at 315 (internal citations omitted).

23 Arie W. Kruglanski et al., A Theory of Goal Systems, 34 ADVANCES EXPERIMENTAL SOC. PSYCHOL. 331, 334 (2002) (describing principle of equifinality). See Anderson & MacCoun, supra note 15, at 315 (“We suggest that jurors manage goal conflict through a principle of equifinality. By equifinality, we mean that actors can pursue goals through multiple pathways; if one pathway is thwarted, another is used.”) (internal citations omitted).

24 Kruglanski et al., supra note 23, at 334 (describing principle of multifinality).
plaintiff. The challenge for jurors and other legal factfinders is to reach a verdict that best reconciles these different goals.25

II. COMPETING GOALS

In addition to the traditional goals of the civil justice system of determining liability, compensating plaintiffs and deterring defendants, we suggest that there are numerous other goals that play a role in deciding cases. When assessing compensatory damages, for example, legal decision makers may consider the relative needs of the parties rather than solely attempting to reach outcomes that are proportionate to fault. Moreover, decision makers may use their decisions as much to “make statements” and endorse or reinforce community values as to influence behavior directly. Thus, in trying to understand decision making in civil cases, expressive goals are an important consideration. In addition, legal decision makers may be concerned not just with a commodified conception of compensation, but also with restoring the moral balance between the parties to the lawsuit.

A. Distributive Justice

Models of distributive justice attempt to explain how people determine whether an outcome is fair. In general, the law is intended to follow a model of distributive justice based on allocation of fault such that a person is considered blameworthy when she engages in conduct that causes intended harm or involves an undue risk of harm.26 Under a model of distributive justice based on fault, the losses resulting from an injury-producing incident are allocated to each party in proportion to that party’s fault. A pure comparative negligence standard can be thought of as following a proportionality model.27

Psychologically, however, it is plausible that in attempting to realize distributive justice among the parties, decision makers may be motivated not only by a desire to achieve an allocation of loss proportionate to fault, but also by

25 In Part III, we describe a constraint satisfaction perspective that might be deployed to formalize these principles.
27 But see Zickafuse & Bornstein, supra note 15 (finding that jurors have difficulty implementing a pure comparative negligence standard).
a desire to allocate resources among the parties equally or in proportion to each party’s need.\textsuperscript{28} Empirical data suggest that both motives may come into play when jurors are asked to decide civil cases. Consistent with the traditional doctrine and a norm of equity, Robert MacCoun found that jury pool members, who were asked to decide a fictitious civil lawsuit, strongly endorsed the notion that verdicts should be based on fault, such that the agent at fault should bear the cost of the injuries.\textsuperscript{29} At the same time, however, MacCoun also found that, second to achieving fault-proportionality, the next most commonly endorsed goal of mock jurors was to help needy plaintiffs obtain compensation.\textsuperscript{30} This goal is consistent with a norm of distributive justice based on need. Thus, jurors may hold a defendant responsible in order to compensate the plaintiff for her loss. Supporting this notion, a number of empirical studies have found a relationship between injury severity and civil liability, such that defendants are more likely to be found liable for plaintiffs’ injuries when those injuries are more severe.\textsuperscript{31}

Each of these motives—equity, equality and need—among others, may simultaneously exert influence on decision makers attempting to make appropriate determinations in civil cases. While one or another of these norms may predominate in a given case or for a given decision within a case, other cases or decisions may implicate several of the norms at the same time.\textsuperscript{32} Accordingly, decision makers must attempt to balance the competing concerns of the different distributive justice principles in order to satisfy concurrently their competing goals.

\textsuperscript{28} See Deutsch, supra note 18.
\textsuperscript{29} MacCoun, supra note 5, at 133.
\textsuperscript{30} Id.
\textsuperscript{32} See Deutsch, supra note 18, at 143-47 (discussing the conditions under which each norm is likely to emerge).
Another class of goals that may influence legal decisions is related to the expressive functions such decisions can serve. The law functions expressively to the extent that its role is more symbolic than instrumental, as it focuses on “making statements’ as opposed to controlling behavior directly.”

Similarly, civil factfinders who hold a defendant liable for a civil wrong and require that defendant to compensate the plaintiff for her injuries make statements about socially acceptable and unacceptable behavior as well as the appropriate relationship between the parties. In particular, punishment, including civil punishment, is said to serve, in part, the symbolic function of expressing “moral condemnation,” “attitudes of resentment and indignation, and . . . judgments of disapproval and reprobation.” As Joel Feinberg says of punitive damages: “What more dramatic way of vindicating his violated right can be imagined than to have a court thus forcibly condemn its violation through the symbolic machinery of punishment?”

Although deterrence theories can accommodate such expressions by interpreting them post hoc as threats or incentives, we believe that a rational choice perspective fails to capture the complexity and emotional resonance of these more symbolic messages. The following discussion of attitude functions, sacred value protections, taboo trade-offs and incommensurability highlights this complexity.

1. Attitude Functions

The functional attitude tradition in social psychology suggests that attitude expressions may serve a variety of functions and may even serve more than one function or goal simultaneously. Importantly, in addition to holding and

33 Sunstein, supra note 20, at 2024.
34 Dan M. Kahan, Punishment Incommensurability, 1 BUFF. CRIM. L. REV. 691, 696 (1998) (“Since condemning is central to what society is trying to accomplish when it punishes, substituting a form of affliction that doesn’t convey that meaning for one that does is expressively irrational.”); Dan M. Kahan, What Do Alternative Sanctions Mean?, 63 U. CHI. L. REV. 591 (1996).
36 Feinberg, supra note 35, at 104.
expressing attitudes on utilitarian or instrumental grounds such as structuring knowledge or as a result of the rewards or punishments associated with the object of the attitude, people may also hold and express attitudes for symbolic or expressive reasons. 37 Attitudes serve value-expressive functions when they are “based on needs to define oneself by expressing important values and aligning oneself with important reference groups.” 38

A particular attitude may function primarily to fulfill instrumental or expressive goals, to fulfill both types of goals simultaneously (a “complex attitude”), or to fulfill neither instrumental nor expressive goals (a “nonfunctional attitude”). 39 Features of the individual holding the attitude, of the attitude object and of the situation calling for an attitude expression may all interact to determine whether a particular function or functions is elicited. 40 Consistent with this functional understanding of attitudes, Gregory Herek and John Capitanio found, for example, that attitudes toward people with AIDS are motivated both by evaluative concerns (personal apprehension about contracting HIV) and expressive concerns (conveying political or religious values), with expressive


In a similar way, the Heuristic-Systematic Model of persuasion proposes that systematic processing of attitude-relevant information is motivated not only by an instrumental concern for accuracy (i.e., “achieving valid attitudes that square with relevant facts”), but also by expressive concerns such as defense motivation (i.e., “the desire to form or to defend particular attitudinal positions”) and impression motivation (i.e., “the desire to express attitudes that are socially acceptable”). See Eagly & Chaiken, supra, at 339-40; Roger Giner-Sorolla & Shelly Chaiken, Selective Use of Heuristic and Systematic Processing Under Defense Motivation, 23 PERSONALITY & SOC. PSYCHOL. BULL. 84 (1997) (testing defense motivations); Serena Chen et al., Getting at the Truth or Getting Along: Accuracy- Versus Impression-Motivated Heuristic and Systematic Processing, 71 J. PERSONALITY & SOC. PSYCHOL. 262 (1996) (contrasting the processing and expressions of accuracy- and impression-motivated participants).

38 Herek, Neofunctional Theory, supra note 37, at 106. Herek also identifies two other expressive functions: social-expressive (based on needs for acceptance) and defensive (based on needs to reduce anxiety). Id.

39 Id. at 106-07.

40 Herek, Functional Approach, supra note 37, at 299-301.
concerns predominating.\textsuperscript{41} Similarly, both value-expressive symbolic considerations and instrumental concerns for controlling behavior have been shown to underlie support for capital punishment, though there is evidence that symbolic concerns predominate.\textsuperscript{42}

2. Sacred Value Protection

Philip Tetlock has recently proposed a model of behavior that suggests that, in addition to other goals, people may attempt to symbolically affirm core values that they believe have been threatened.\textsuperscript{43} Specifically, people will act to defend those “sacred values” that are “implicitly or explicitly treat[ed] as possessing infinite or transcendental significance that precludes comparisons, trade-offs, or indeed any other mingling with bounded or secular values.”\textsuperscript{44} In his “sacred value protection model,” Tetlock provides evidence that, in the face of a perceived threat to one of these central beliefs, people will endeavor to “protect their private selves and public identities from moral contamination by impure thoughts and deeds.”\textsuperscript{45}

The sacred value protection model posits that witnessing incursions onto sacred values triggers responses that attempt to re-affirm those values. First, the model posits


\textsuperscript{44} Tetlock et al., supra note 43, at 853. See also Tetlock, supra note 43, at 454 (stating that sacred values are “values that—by community consensus—are deemed beyond quantification or fungibility”).

\textsuperscript{45} Tetlock et al., supra note 43, at 853 (portraying people as “struggling to protect sacred values from secular encroachments by increasingly powerful societal trends toward market capitalism (and the attendant pressure to render everything fungible) and scientific naturalism (and the attendant pressure to pursue inquiry wherever it logically leads)”); Tetlock, supra note 43, at 458 (“[T]he principled defense of the sacred from encroachments by powerful societal trends toward science, technology, and the calculus of capitalism (and attendant pressures to pursue inquiry wherever it leads and to translate all values into a utility or monetary metric).”). In this way, Tetlock suggests that people operate as intuitive theologians (as compared to intuitive scientists, economists, politicians or prosecutors). Tetlock et al., supra note 43, at 853-54.
that people will respond with moral outrage when core values are threatened. Moral outrage has been shown to manifest itself in negative evaluations of, and negative emotional responses, such as anger, toward individuals who have intruded on closely held values. Moral outrage also leads to greater support for the punishment of those who have threatened these moral norms. This connection between feelings of moral outrage and punitiveness is also supported by research on the psychology of punitive damages awards, which has demonstrated that jurors’ feelings of moral outrage about a defendant’s conduct predict the degree to which they believe that the defendant ought to be punished.

Second, the model predicts that threats to sacred values will elicit expressions of moral cleansing that are designed to distance the witness from the offense and to buttress the threatened principles. In this way, the witness affirms the closely held value and upholds his or her connection to the moral community. For example, people who observe a decision that threatens a sacred value, such as the selling of bodily organs to the highest bidder, are more likely to volunteer for a campaign to promote organ donation than are those who do not observe such a decision. This behavior serves to distance them from the offensive trade-off and affirms the threatened sacred value.

3. Taboo Trade-Offs and Incommensurability

One type of threat to sacred values occurs when decision makers entertain what are considered to be illegitimate comparisons between entities and values that defy comparison. In their theory of “taboo trade-offs,” Alan Page Fiske and Philip

46 Tetlock et al., supra note 43, at 855.
49 Tetlock et al., supra note 43, at 853-54.
50 Id. at 855.
51 Id. at 858-59.
Tetlock brought together Fiske’s theory of relational models\(^{52}\) and Tetlock’s work on the psychology of value trade-offs\(^{53}\) to explain when trade-offs will be viewed as illegitimate (or taboo).\(^{54}\) Fiske posited four fundamental models that individuals in society use to structure their social relations. First, in relations governed by *communal sharing*, we classify individuals into groups and treat members of a class identically.\(^{55}\) Second, *authority ranking* is a relational model in which we treat individuals by their rank within the hierarchy of a group.\(^{56}\) Third, in relations governed by *equality matching*, we keep track of contributions and outcomes and attempt to keep them in balance.\(^{57}\) Finally, relations governed by *market pricing* operate in terms of exchange, as we value factors on an absolute metric and make trade-offs among them.\(^{58}\) Each relational model operates to appropriately govern different consensually agreed upon spheres of the social community. Moreover, different relational operations, modes of conduct and norms of distributive justice are appropriate within relationships governed by different relational models.\(^{59}\)

A taboo trade-off occurs when there is a comparison or exchange between relationships that are treated as appropriately falling into different relational domains. This is particularly the case when a relationship appropriately treated with market pricing is compared or exchanged with relationships normally falling into one of the alternative relational models: communal sharing, authority ranking or equality matching. Especially proscribed are those trade-offs that “treat ‘sacred values’ like honor, love, justice, and life as fungible.”\(^{60}\) Thus, exchanges of money for things such as votes,


\(^{54}\) Fiske & Tetlock, *supra* note 47.

\(^{55}\) Fiske, *supra* note 52, at 690-91.

\(^{56}\) *Id.* at 691.

\(^{57}\) *Id.*

\(^{58}\) *Id.* at 691-92.


\(^{60}\) Tetlock et al., *supra* note 43, at 854; Fiske & Tetlock, *supra* note 47, at 256 (“By a taboo trade-off, we mean any explicit mental comparison or social transaction that violates deeply-held normative intuitions about the integrity, even sanctity, of certain forms of relationship and of the moral-political values that derive from those relationships.”).
babies, loyalty or love strike most people as distasteful and morally offensive.\(^61\)

Such negative reactions are likely due, in part, to the cognitive difficulty that individuals have with comparing and making trade-offs between incommensurable entities.\(^62\) The lack of a common metric for evaluating things such as money and love make any comparison and attempt to make trade-offs cognitively challenging. However, Fiske and Tetlock suggest that this “resistance also runs deeper: there are moral limits to fungibility. People reject certain comparisons because they feel that seriously considering the relevant trade-offs would undercut their self-images and social identities as moral beings.”\(^63\) Fiske and Tetlock invoke the concept of “constitutive commensurability” to describe instances in which “entering one value into a trade-off calculus with the other subverts or undermines that value. This means that our relationships with each other preclude certain comparisons among values.”\(^64\) In these cases, it is not merely that the trade-off is cognitively complex or that we think that a proper quantitative valuation has not been achieved monetarily, i.e., that not enough money has been paid for the baby or the organ. Rather, the difficulty comes from a belief that to value some things in monetary terms is qualitatively incorrect; such comparisons invoke the wrong relational template and, accordingly, the valuation is of the wrong type.\(^65\)

\(^61\) Tetlock et al., supra note 43, at 854 (“To transgress this boundary, to attach a monetary value to one’s friendships, children, or loyalty to one’s country, is to disqualify oneself from the accompanying social roles.”); Fiske & Tetlock, supra note 47, at 292 (“People probably cannot make reliable, meaningful comparisons across relational models, and they experience deep unease when asked to do so.”).

\(^62\) For discussions of incommensurability in law generally, see Margaret Jane Radin, Compensation and Commensurability, 43 DUKE L.J. 56 (1993); Cass R. Sunstein, Incommensurability and Valuation in Law, 92 MICH. L. REV. 779 (1994).

\(^63\) Fiske & Tetlock, supra note 47, at 256.

\(^64\) Id. See also Sunstein, supra note 62, at 796 (“Incommensurability occurs when the relevant goods cannot be aligned along a single metric without doing violence to our considered judgments about how these goods are best characterized.”) (emphasis omitted); Kahan, Punishment Incommensurability, supra note 34, at 695 (“Signification of respect cannot be reproduced by any amount of money; even to attempt the substitution conveys that he does not value his colleague in the way appropriate to their relationship.”).

\(^65\) Sunstein, supra note 62, at 788 (“We should distinguish between cases in which a monetary offer is entirely inappropriate . . . and cases in which the monetary sum, while appropriately offered, does not reflect a full or fully accurate valuation of the item in question.”); id. at 795 (“But perhaps the resistance [to comparisons between money and risk to life or health] rests on a claim about appropriate kinds, not levels, of valuation.”). Resource theory also suggests that different resource classes (love, status, information, money, goods and services) are not equally substitutable. See, e.g.,
As with other threats to sacred values, taboo trade-offs engender feelings of anger and outrage, negative attributions about those entertaining such comparisons, a desire to punish such offenders and a need to engage in moral cleansing. Punishment is central to symbolically restoring sacred values:

\[\text{Only reassurance that the wrong-doer has indeed been punished by the collective (whose norms have been violated) should be sufficient to restore the moral status quo ante and to reduce whatever cognitive and emotional unease was produced in individual observers by the original trade-off transgression. Indeed, punishments are forceful impositions of the relational models themselves, reestablishing their validity and hegemony.}\]

Accordingly, we might expect civil decision makers to react negatively to, and to express their discomfort punitively against, defendants who have made or entertained taboo trade-offs.

4. Resistance to Cost-Benefit Analysis

Legal scholars have also noted this deeper reaction to taboo trade-offs. Cass Sunstein writes that

many people find it jarring to hear that, in light of actual occupational choices, a worker values his life at (say) eight million dollars, or that the protection of a life is “worth” eight million dollars. These claims are jarring not because we believe infinite social resources should be devoted to occupational safety. The claims are jarring because of the widespread perception that a life is not instrumental to some aggregate social goal, but worthy in itself—a belief in tension with applying the language of prices to human life. This is a plausible concern even if one ultimately concludes that (say) an eight million dollar expenditure is fully appropriate in cases of lives at risk. Certainly intrinsic goods do not have infinite value for purposes of law and policy. But even though they do not, the fact

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Indeed, people tend to deny the necessity for many trade-offs, and are often distressed, angry, or confused when faced with the finds of explicit trade-offs we have been discussing. People commonly censure those who make such trade-offs explicit because they regard such trade-offs as transgressions indicative of aberrant, antisocial motives that threaten the social order. *Id.* at 282. See *supra* notes 46-51 and accompanying text.

Fiske & Tetlock, * supra* note 47, at 286.

See MacCoun, * supra* note 59.
that we find it jarring to hear that a life is “worth” a specified amount of money is socially desirable, and not a product of simple confusion.  

Consistent with this observation and the theory of taboo trade-offs, recent empirical evidence suggests that civil jurors may be more punitive against companies that undertake cost-benefit analyses in making safety decisions than they are against those who do not. W. Kip Viscusi examined the effect of corporate cost-benefit analyses on mock jurors using a scenario in which a defendant automobile company manufactured a line of cars with a defective electrical system which led to a specified number of burn deaths per year. The study used two versions of the case; in one version, the company used a cost-benefit analysis to decide that it should not change the defective design to prevent this risk. Jurors appeared to react negatively to evidence that the company had conducted a cost-benefit analysis. Viscusi found that jurors were more likely to award punitive damages and made marginally larger punitive damage awards when the company conducted a cost-benefit analysis.

These findings, though preliminary, are consistent with common intuitions about the effects of corporate cost-benefit analysis on jurors. The theory of taboo trade-offs provides a psychologically sophisticated explanation for these findings and suggests that symbolic motives may have an influence on legal judgments. It is possible that by punishing

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[69] Sunstein, supra note 62, at 804.
[71] Id.
[72] Id.
[73] Additional research is needed to disentangle the multiple conditions in Viscusi’s study and to explore the boundary conditions on any effects. See, e.g., Kevin M. O’Neil et al., Companies’ Risky Decisions: Jurors Reactions to Cost-Benefit Analyses (March 8, 2002) (unpublished paper presented at American Psychology-Law Society Biennial Meeting, Austin, TX).
[74] Steven Garber, Product Liability, Punitive Damages, Business Decisions and Economic Outcomes, 1998 Wis. L. Rev. 237, 287 n.135 (“It seems widely agreed by both plaintiffs’ and defense attorneys that credible trial evidence of cost-benefit balancing—so-called ‘trading off lives against dollars’—makes punitive damages particularly likely. This is in stark contrast to the fact that economic efficiency—and deterrence aimed at economic efficiency—requires cost-benefit balancing.”). See also Mark Dowie, Pinto Madness, MOTHER JONES, Sept.-Oct. 1977, at 18 (describing the controversy over the revelation that the Ford Motor Company relied on a cost-benefit analysis in deciding against an eleven dollar safety alteration in each Ford Pinto, despite their anticipation that this could prevent almost two hundred burn deaths).
the corporation through a punitive damage award, the mock jurors were attempting to distance themselves morally from the proscribed trade-off and symbolically reaffirm the value that they and their moral community place on life and safety.\footnote{See MacCoun, supra note 59.}

C. Restoring Moral Balance

1. Valuing the Victim

In similar ways, legal decision makers may also attempt to express support for the value of the victim of the wrongdoing through their verdicts. Philosopher Jean Hampton has developed an expressive theory of retribution based on the messages that wrongful behavior and sanctions send about the relative worth of the parties.\footnote{See Jean Hampton, Correcting Harms Versus Righting Wrongs: The Goal of Retribution, 39 UCLA L. REV. 1659, 1677 (1992).} Hampton posits that

[a] person behaves wrongfully in a way that effects a moral injury to another when she treats that person in a way that is precluded by that person’s value, and/or by representing him as worth far less than his actual value; or in other words, when the meaning of her action is such that she \textit{diminishes} him, and by doing so, represents herself as elevated with respect to him, thereby according herself a value that she does not have.\footnote{Id.; Hampton, supra note 35; Jean Hampton, The Retributive Idea, in FORGIVENESS AND MERCY, supra note 77, at 111.}

When a wrongdoer engages in behavior that does not appropriately respect the value of another person, it “sends a false message about the value of the victim relative to the [wrongdoer].”\footnote{Hampton, supra note 35, at 5. See also Hampton, supra note 76, at 1678 (“[H]arms anger us not merely because they cause suffering we have to see in others, but also because we see their inflections as violative of the victim’s entitlements given her value.”).} Such an action symbolically “demonstrates that she believes the worth of the victim makes such treatment permissible.”\footnote{Hampton, supra note 35, at 8. See also Hampton, supra note 77, at 44 (“When someone wrongs another, she does not regard her victim as the sort of person who is valuable enough to require better treatment.”). See also Jeffrie Murphy, Forgiveness and Resentment, in FORGIVENESS AND MERCY, supra note 77, at 14, 25 (“[S]uch injuries are also \textit{messages}—symbolic communications. They are ways a wrongdoer has of saying to us, ’I count but you do not,’ ’I can use you for my purposes,’ or ’I am here up high and you are there down below.’”).}

To illustrate the message about the victim’s worth sent by a wrongful act, Hampton uses the example of an asbestos
plant, where managers know the health risks, but fail to warn and protect their employees.

Their actions demonstrate how important the company’s profits are to these managers: in virtue of their importance, they regard it as permissible to allow the employees to assume these risks to their health, rather than pay the costs necessary to do something to lower the risks and thereby lower profits. Those who commit such crimes essentially reason: “Nothing personal, but I’ve got to harm you in these ways given my interests—which are so important that you can be used or damaged to serve them.” Such reasoning explains why these people inflict treatment upon others which is disrespectful of their value as persons.80

Similarly, Marc Galanter and David Luban argue that “culpably harming another person or being culpably negligent expresses a false view of the wrongdoer’s value relative to that of the victim. . . . ‘I can be negligent in marketing Dalkon Shields because you, the customer, do not matter very much.’”81

Hampton argues that civil punishment is a way of attempting to reestablish the value of equality; that is to “remake the world in a way that denies what the wrongdoer’s events have attempted to establish, thereby lowering the wrongdoer, elevating the victim, and annulling the act of diminishment.”82 Because the message sent by the wrongful act “threatens to reinforce belief in the wrong theory of value by the community,”83 punishment is sought that “symbolizes the correct relative value of wrongdoer and victim.”84 Galanter and Luban characterize this purpose for punishment as inflicting an “expressive defeat” on the wrongdoer.85

This philosophical account of retribution is consistent with the social psychological account provided by equity theory.

80 Hampton, supra note 35, at 8.
81 Galanter & Luban, supra note 4, at 1432.
82 Hampton, supra note 76, at 1686-87. See also Hampton, supra note 35, at 12 (“a way of denying a false message about worth, and thus a way of vindicating the worth of those who have been victims of wrongdoing”).
83 Hampton, supra note 76, at 1678.
84 Hampton, supra note 77, at 125. See also Hampton, supra note 35, at 13 (“[J]ust as the crime has symbolic meaning, so too does the punishment. . . . the punishment ‘takes back’ the demeaning message. . . . the evidence of value loss provided by the crime is nullified by the new evidence provided by the subordination effected through the punishment.”); Hampton, supra note 76, at 1686 (“[R]etribution is a response to a wrong that is intended to vindicate the value of the victim denied by the wrongdoer’s action through the construction of an event that not only repudiates the action’s message of superiority over the victim but does so in a way that confirms them as equal by virtue of their humanity.”).
85 Galanter & Luban, supra note 4, at 1432.
According to equity theorists, a wrongdoer’s transgression against an injured party results in an inequity in their relationship; that is, the wrong creates a moral imbalance between the parties.\textsuperscript{86} Moreover, equity theory posits that “when individuals find themselves participating in inequitable relationships, they become distressed. The more inequitable the relationship, the more distress individuals feel.”\textsuperscript{87} Upon discovering that a relationship is inequitable, individuals are motivated to attempt to restore equity to the relationship.\textsuperscript{88} This is true, not only for participants in the relationship, but also for impartial observers, such as jurors or other legal factfinders. “When participants are unable—or refuse—to restore equity, impartial observers often intervene and attempt to set things right.”\textsuperscript{89} Thus, civil verdicts may reflect, in part, decision makers’ attempts to restore moral balance to the relationship between the parties.

In affirming the proper moral balance between the parties, civil sanctions may restore corrective justice by adjusting “an unjustified state of affairs between an injurer and a victim, when the injurer’s activity has caused the injustice, so that such changes bring about a just state of affairs between them, and one that is related in a morally appropriate way to the status quo ante.”\textsuperscript{90} Interestingly, tort litigants themselves may share this restorative goal with jurors. Both tort plaintiffs and tort defendants appear to care as much about receiving dignified and respectful treatment, and a chance to “tell their story,” as about the actual monetary outcomes at stake.\textsuperscript{91}

\textsuperscript{86} See Elaine Walster et al., New Directions in Equity Research, 25 J. PERSONALITY & SOC. PSYCHOL. 151 (1973).
\textsuperscript{87} Id.
\textsuperscript{88} Id.
\textsuperscript{90} Radin, supra note 62, at 60.
\textsuperscript{91} See E. Allan Lind et al., In the Eye of the Beholder: Tort Litigants’ Evaluations of their Experiences in the Civil Justice System, 24 LAW & SOCY REV. 953 (1990); ROBERT J. MACCOUN ET AL., ALTERNATIVE ADJUDICATION: AN EVALUATION OF THE NEW JERSEY AUTOMOBILE ARBITRATION PROGRAM (1988).
2. Punitive Damages as Restorative

In one demonstration that jurors may pursue restorative or expressive goals, Michelle Chernikoff Anderson and Robert MacCoun examined the potential influences on juror decision making of whether the punitive damage award is to be paid to the plaintiff or to the state.statute92 While punitive damage awards are traditionally paid to the plaintiff who brought the case, a number of states have passed legislation that allocates some portion of the punitive damage award to the state.93 Such legislation responds to concerns that plaintiffs receive a windfall when they receive punitive damage awards that are intended to punish the defendant, in addition to damages intended to compensate them for their losses.94

Counter to many commentators’ intuition that allocating punitive damages awards to the state will result in an increase in the likelihood and size of such awards,95

92 Anderson & MacCoun, supra note 15.
93 Statutes that allocate punitive damages to the state are often called “split-recovery” statutes. See, e.g., ALASKA STAT. § 09.17.020(j) (LEXIS 1997) (50% to general state fund); GA. CODE ANN. § 51-12-5.1(e)(2) (2000) (in products liability actions, 75% less costs and fees to Office of the Treasury and Fiscal Services) (see State v. Moseley, 436 S.E.2d 632 (Ga. 1993), cert. denied 511 U.S. 1107 (1994) (upholding statute)); 735 ILL. COMP. STAT. 2-1207 (1992) (court may apportion award among plaintiff, plaintiff's attorney and State Department of Human Services); IND. CODE ANN. § 34-51-3-6 (West 1999) (75% to Violent Crimes Victims Compensation Fund); IOWA CODE ANN. § 668A.1(2) (West 1992) (under some circumstances, 75% to civil reparations trust fund); MO. REV. STAT. § 537.675(3) (West supp. 2003) (50% to Tort Victims’ Compensation Fund); OR. REV. STAT. § 18.540 (1999) (60% to Criminal Injuries Compensation Account); 73 PA. CONS. STAT. § 2105(3) (West 2001) (court has discretion to select organization(s) “engaged in charitable or educational activities involving the fine arts” to receive award); UTAH CODE ANN. § 78-18-1(3) (2000) (50% of amount in excess of $20,000 less fees and costs to general state fund). But see ALA. CODE § 6-11-21(l) (1999) (no portion of the punitive damage award shall be allocated to the state). Provisions allocating punitive damage awards to the state have been challenged on both state and federal constitutional grounds. For cases upholding split-recovery statutes, see Gordon v. Florida, 608 So. 2d 800 (Fla. 1992); Mack Trucks v. Conkle, 436 S.E.2d 635 (Ga. 1993); Shepherd Components v. Brice Petrides-Donohue & Associates, 473 N.W.2d 612 (Iowa 1991); Fust v. Missouri, 947 S.W.2d 424 (Mo. 1997); Hoskins v. Business Men's Assurance, 79 S.W.2d 901 (Mo. 2002); DeMendoza v. Huffman, 51 P.3d 1223 (Colo. 2002). But see Kirk v. Denver Publ'g Co., 818 P.2d 262 (Colo. 1991) (holding Colorado provision unconstitutional in violation of the takings clauses of the state and federal constitutions).
94 See Smith v. Wade, 461 U.S. 30, 59 (1982) (Rehnquist, J., dissenting) (“Punitive damages are generally seen as a windfall to plaintiffs, who are entitled to receive full compensation for their injuries—but no more. Even assuming that a punitive ‘fine’ should be imposed after a civil trial, the penalty should go to the State, not to the plaintiff—who by hypothesis is fully compensated.”).
95 First, it is thought that if punitive damages are awarded to the state, jurors will be relieved of any concern about awarding a windfall to the plaintiff and will feel free to fully punish the defendant. E. Jeffrey Grube, Punitive Damages: A
Anderson and MacCoun found that mock jurors were more likely to award punitive damages in personal injury cases when they were to be awarded to the plaintiff than when they were to be awarded to the state.\textsuperscript{96} This was true both when the state treasury was to receive the award\textsuperscript{97} and when a consortium of relatively uncontroversial state funds was to receive the award.\textsuperscript{98} Because participants already had an opportunity to compensate the plaintiff through compensatory damages, Anderson and MacCoun suggested that punitive damages serve a symbolic restorative function that is dependent on receipt by the plaintiff.\textsuperscript{99} In such a relational capacity, punitive damages may advance a societal interest in mending the breach caused by the defendant’s reprehensible actions.\textsuperscript{100}

\textit{Misplaced Remedy}, 66 S. Cal. L. Rev. 839, 855 (1993). Second, because judges and jurors are residents and taxpayers in the states that would be receiving the award, they have some interest in the amount of the award and, accordingly, may award higher amounts in punitive damages than they would if the entire award was to go to the plaintiff. Development in the Law—Jury Determination of Punitive Damages, 110 Harv. L. Rev. 1513, 1535 (1997) \cite{Jury Determination}; Michelle Riley Stephens, \textit{Punitive Damages: Making the Plaintiff Whole or Making the State Wealthy?}, 19 Am. J. Trial Advoc. 698, 700 (1996). Moreover, if the portion of the punitive damage award allocated to the state is directed to a state fund which jurors perceive as a “good cause,” the temptation, again, may be to increase the punitive damages assessed. Jury Determination, \textit{supra}, at 1535-36. One commentator stated the intuition thus: “If jurors realized that any punitive damage award were to be returned to public use, the size of the awards would not simply skyrocket. They would follow the Voyager spacecraft out of the solar system.” Steven J. Sensibar, \textit{Punitive Damages: A Look at Origins and Legitimacy}, 41 Fed’n Ins. & Corp. Couns. Q. 375, 387 (1991). Indeed, in response to such concerns, some states do not inform the jury that part of the punitive damage award will go to the state. See, e.g., Ala. Code § 6-11-21(g) (1999) (“jury may neither be instructed nor informed”); Ind. Code Ann. § 34-51-3-3 (West 1999) (the jury may not be informed of the allocation of punitive damage awards). But see Shari Seidman Diamond & Jonathan D. Casper, Blindfolding the Jury to Verdict Consequences: Damages, Experts, and the Civil Jury, 26 Law & Soc’y Rev. 513, 518 (1992) (discussing the consequences of keeping information from the jury).

\textsuperscript{96} Anderson & MacCoun, \textit{supra} note 15, at 320-21 (finding, however, no differences in the size of awards).

\textsuperscript{97} Id. (study 1).

\textsuperscript{98} Id. at 325 (study 2). The charities used were adapted from the tax donation charities listed on the 1995 California state income tax form: State Children’s Trust Fund for the Prevention of Child Abuse; California Breast Cancer Research Fund; California Firefighters’ Memorial Fund; California Public School Library Protection Fund; and California Infectious Disease Research Fund. Id. at 323.

\textsuperscript{99} Id. at 326-27. See also G. Bazemore and M. Umbreit, \textit{Rethinking the Sanctioning Function in Juvenile Court: Retributive or Restorative Responses to Youth Crime}, 41 Crime & Delinqu. 296 (1995).

\textsuperscript{100} Jonathan Baron & Ilana Ritov, \textit{Intuitions about Penalties and Compensation in the Context of Tort Law}, 7 J. Risk & Uncertainty 17, 25 (1993) (finding that twenty-four of eighty-three participants awarded greater amounts of compensation when the money was to be paid directly to the plaintiff than when a penalty was to go to the government who would then compensate the injured party (only four participants paid less)). They conclude that “many people assign
Writing about a non-commodified conception of compensation, Radin suggests that compensation can serve to restore the moral balance between the parties by “symboliz[ing] public respect for rights and public recognition of the transgressor’s fault by requiring something important to be given up on one side and received on the other, even if there is no equivalence of value possible.”\textsuperscript{101} Similarly, a punitive damages award, specifically required to be paid by the wrongdoer to the injured party, may affirm the appropriate value of the injured party vis-à-vis the wrongdoer.

3. Apologies

While the payment of money by the defendant to the plaintiff may sometimes serve the expressive purpose of reestablishing respect for the victim of wrongdoing, it may not always be the only or the most satisfactory pathway for accomplishing this goal. At least in some contexts, “the medium of monetary damages has very limited expressive power,”\textsuperscript{102} and may suggest an inappropriate valuing of the victim.\textsuperscript{103}

An alternative mechanism by which the appropriate moral balance between the parties can be restored is an apology given by the wrongdoer to the victim. Indeed, equity theorists have suggested that one possible means through which equity might be restored to the relationship between the parties is for the wrongdoer to offer an apology.\textsuperscript{104} To apologize is to engage in a social “ritual whereby the wrongdoer can symbolically bring himself low (or raise us up).”\textsuperscript{105} Jonathan Cohen suggests that, in some cases, “[p]laying monetary damages may help take care of the financial consequences of an injury, but it may take an apology to ‘wipe the moral ledger’ clean and construct an understanding of the injury and the relationship which both parties can accept.”\textsuperscript{106}

compensation not in terms of the injury but rather in terms of setting the balance right between the injurer, if any, and the victim.” Id. at 31.

\textsuperscript{101} Radin, supra note 62, at 69.

\textsuperscript{102} Galanter & Luban, supra note 4, at 1439 (suggesting that juries provide an explanation for their punitive damages, to spell out the retributive message).

\textsuperscript{103} See Sunstein, supra note 20, at 2036 (“A complex network of social norms governs the acceptable uses of money.”).

\textsuperscript{104} Walster et al., supra note 86.

\textsuperscript{105} Murphy, supra note 79, at 28.

\textsuperscript{106} Jonathan R. Cohen, Advising Clients to Apologize, 72 S. CAL. L. REV. 1009, 1020 (1999). Intuitively, it seems central to an apology that the apology be offered to the injured party. See Damon Hack, Moss Sorry for Car Incident, N.Y. TIMES, Sept. 27,
Accordingly, as sociologist Nicholas Tavuchis recognizes,

genuine apologies . . . may be taken as the symbolic foci of secular remedial rituals that serve to recall and reaffirm allegiance to codes of behavior and belief whose integrity has been tested and challenged by transgression, whether knowingly or unwittingly. An apology thus speaks to an act that cannot be undone but that cannot go unnoticed without compromising the current and future relationship of the parties, the legitimacy of the violated rule, and the wider social web in which the participants are enmeshed.¹⁰⁷

Similarly, Hampton argues that, “by apologizing, we deny the diminishment of the victim, and our relative elevation, expressed by our wrongful action.”¹⁰⁸ In this way, an apology offered by the transgressor to the victim may repair the breach created by the wrongful conduct and affirm the relative value of the parties.¹⁰⁹

Indeed, experimental studies of apologies in non-legal contexts have found that apologies, or other expressions of remorse, affect decision making in numerous ways, influencing attributions of responsibility for the incident, beliefs about the stability of the behavior (i.e., its likelihood of recurrence), perceptions of the character of the wrongdoer, affective reactions such as anger and sympathy, and behaviors such as forgiveness, aggression and recommendations for punishment.¹¹⁰ In addition, experimental studies of reactions to
criminal defendants have generally shown that remorseful defendants are perceived more positively and sentenced more leniently than are defendants who do not show remorse. Similarly, the only experimental study of remorse in a civil case found that defendants in civil trials who show remorse were perceived more positively than those who did not. Remorse did not, however, appear to substitute for compensatory damages.


111 See Michael G. Rumsey, Effects of Defendant Background and Remorse on Sentencing Judgments, 6 J. APPLIED SOC. PSYCHOL. 64 (1976) (finding that participants gave a defendant in a drunk driving case who was described as “extremely remorseful” a shorter sentence than they did a defendant who gave “no indication of remorse”); Christy Taylor & Chris L. Kleinke, Effects of Severity of Accident, History of Drunk Driving, Intent, and Remorse on Judgments of a Drunk Driver, 22 J. APPLIED SOC. PSYCHOL. 1641 (1992) (finding that a defendant who expressed remorse was rated as being a person of greater responsibility and sensitivity than a defendant who did not express remorse, but not finding significant differences in sentences); Chris L. Kleinke et al., Evaluation of a Rapist as a Function of Expressed Intent and Remorse, 132 J. SOC. PSYCHOL. 525 (1992) (finding that a convicted rapist was judged to have acted less intentionally, to be of less negative character and to have more potential for rehabilitation if he demonstrated remorse than if he did not. Moreover, recommended sentences were predicted by perceived remorse); Randolph B. Pipes & Marci Alessi, Remorse and a Previously Punished Offense in Assignment of Punishment and Estimated Likelihood of a Repeated Offense, 85 PSYCHOL. REP. 246 (1999). For some boundary conditions on these types of effects see Keith E. Neidermeier et al., Exceptions to the Rule: The Effects of Remorse, Status, and Gender on Decision Making, 31 J. APPLIED SOC. PSYCHOL. 604 (2001). Interviews with jurors in capital cases also provide evidence that the degree to which jurors perceived defendants to be remorseful influenced their choice between a sentence of life in prison and death. See Theodore Eisenberg et al., But Was He Sorry? The Role of Remorse in Capital Sentencing, 83 CORNELL L. REV. 1599 (1998).

112 Brian Bornstein et al., The Effects of Defendant Remorse on Mock Juror Decisions in a Malpractice Case, 20 BEHAV. SCI. & L. 393 (2002). In his first study, Bornstein found that remorse had a significant positive effect on jurors’ overall perceptions of the defendant. Id. at 400. In a second study, Bornstein found that defendants who expressed remorse were perceived as having suffered more than defendants who did not express remorse. Id. at 404.

113 Id. at 404. In the first study, male participants awarded marginally less in damages against the defendant, a physician, who expressed remorse at the time of trial or who did nothing to indicate remorse or lack thereof, than they did against defendants who were remorseless or who expressed remorse early (at the time of the
Thus, while offering an apology may not be the best mechanism by which to achieve compensation, it may be a better mechanism by which to express the proper relative moral positions of the parties than is a monetary award. To the extent that a voluntarily offered apology has restored equity between the parties in whole or in part, decision makers may view and use the sanctioning options available to them differently. Similarly, if civil decision makers were allowed to compel an apology as part of their verdict, they might choose to do so as a better way by which to restore equity.\footnote{\textit{See, e.g.}, Richard Monastersky, \textit{Former History Professor Wins $5.3-Million Verdict Against Fairleigh Dickinson U.}, \textsc{Chron. Higher Educ.}, May 21, 2001 (describing a jury that asked the defendant to “offer a formal written apology” to the plaintiff). Civil jurors, however, do not typically have the ability to compel an apology from the defendant to the plaintiff. The First Amendment raises potential obstacles to compelled apologies in civil cases. \textit{See} Wooley v. Maynard, 430 U.S. 705, 714 (1977) ("[T]he right of freedom of thought protected against state action includes both the right to speak freely and the right to refrain from speaking at all."). \textit{See also} Griffith v. Smith, 30 Va. Cir. 250 (1993) ("First Amendment concerns preclude the Court from ordering the apology originally suggested."); Imperial Diner, Inc. v. State Human Rights Appeal Bd., 417 N.E.2d 525 (N.Y. 1980).}

To the extent that the transgressor’s wrongful conduct has conveyed the message that the offender considers the victim to be beneath her, an apology, voluntary or compelled, serves as a degradation ceremony that restores equal footing between victim and offender. If the apology involves a public expression of remorse, it may address the loss of face that the victim has suffered in front of the witnessing community. Moreover, the victim may see an apology that is enforced by a judgmental body, even if insincere, as a community statement that the victim is not to be treated as less valuable than others. The apology, then, sends a signal to the offender, the victim and the community that the victim is a valued and defended member of the community who cannot be treated in a fashion that diminishes her worth.
III. LEGAL DECISION MAKING AS CONSTRAINT SATISFACTION

The above theories and studies suggest that legal decision makers make decisions that may reflect a variety of expressive goals in addition to other goals, including those contained in legal theory, that they hope to achieve. Accounts of legal decision making that ignore these expressive motives are likely to be inadequate. In addition, any account of legal decision making that portrays decision makers as having singular goals is likely to be insufficient. Thus, for example, accounts of legal decision making premised on decision makers being solely concerned with effecting optimal deterrence are unlikely to capture important aspects of the decision-making task. Similarly, an account based solely on a picture of decision makers pursuing only expressive goals will miss important parts of the picture. Accordingly, accounts of legal decision making should comprise the variety of considerations that decision makers might bring to bear on their verdicts.

To this end, legal decision making might profitably be conceived of as a process of parallel constraint satisfaction that can be represented using connectionist models. These models attempt to simulate situations in which the decision maker must integrate numerous “mutually interacting” elements (e.g.,

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115 See Sunstein et al., supra note 16; Baron & Ritov, supra note 100; and Viscusi, supra note 7 for evidence that jurors do not always effect optimal deterrence. See also Galanter & Luban, supra note 4, at 1450 (“[C]itizens and legislators may rightly insist that they are willing to tolerate some loss in economic efficiency in order to deter what they consider morally offensive conduct, albeit cost-beneficial morally offensive conduct: efficiency is just one consideration among many.”).

116 See generally CONNECTIONIST MODELS OF SOCIAL REASONING AND SOCIAL BEHAVIOR (Stephen J. Read & Lynn C. Miller eds., 1998). See also Stephen J. Read et al., Connectionism, Parallel Constraint Satisfaction Processes, and Gestalt Principles: (Re)Introducing Cognitive Dynamics to Social Psychology, 1 PERSONALITY & SOC. PSYCHOL. REV. 26 (1997) (“Connectionism, neural networks, and parallel distributed processing models are among the fastest growing research areas in the study of the mind.”). There are other theoretical traditions in psychology that might also be invoked to characterize goal multiplicity and goal conflict, including the psychodynamic (or Freudian) approach, the cognitive consistency approach (including cognitive dissonance theory) and the control theory or cybernetic approach. Interestingly, the constraint satisfaction approach appears to capture important insights from all three traditions. See Paul Thagard & Josef Nerb, Emotional Gestalts: Appraisal Change and the Dynamics of Affect, 6 PERSONALITY & SOC. PSYCHOL. REV. 274 (2002); Dan Simon & Keith J. Holyoak, Structural Dynamics of Cognition: From Consistency Theories to Constraint Satisfaction, 6 PERSONALITY & SOC. PSYCHOL. REV. 283 (2002); Charles S. Carver & Michael F. Scheier, Control Processes and Self-Organization as Complementary Principles Underlying Behavior, 6 PERSONALITY & SOC. PSYCHOL. REV. 304 (2002).
pieces of evidence, concepts, propositions or goals), that may or may not be consistent, into a coherent whole.\textsuperscript{117}

A. \textit{Parallel Constraint Satisfaction}

When decision making is thought of as a constraint satisfaction network, the factors related to the decision are conceived of as nodes or elements in a neural-like network. Depending on the decision-making task, these elements can be pieces of evidence, propositions, concepts, goals and so on.\textsuperscript{118} Elements are connected by links that are weighted (indicating the strength of the link) and valenced (indicating the coherence or incoherence between the elements). The valence of the link represents the extent to which the elements constrain or reinforce each other. Elements may be coherent; that is, they are mutually supportive of each other. In contrast, elements may be incoherent, or negatively associated.\textsuperscript{119} Thus, if one element explains or facilitates another element, the link between them will be positively valenced. Conversely, elements that are incompatible or that inhibit each other will be connected by negatively valenced links.\textsuperscript{120} For example, one person might be observed hitting another in the shoulder. The blow might either be interpreted as a violent strike or as a friendly cuff. An element representing the blow itself would be positively linked to elements representing each of these interpretations; the elements representing these two inconsistent interpretations, however, would be connected by a negative link.

Decision making, then, is the process by which the “best compromise among the constraints”\textsuperscript{121} is selected by “dividing a set of elements into accepted and rejected sets in a way that satisfies the most constraints.”\textsuperscript{122} This division is achieved based on each element’s level of activation (e.g., ranging from -1 to 1). In a parallel constraint satisfaction connectionist

\textsuperscript{117} CONNECTIONIST MODELS OF SOCIAL REASONING AND SOCIAL BEHAVIOR, supra note 116, at vii.
\textsuperscript{118} Read et al., supra note 116, at 29 (“What the nodes and links represent depends on the theoretical assumptions of a specific model.”).
\textsuperscript{119} Id. at 28; PAUL THAGARD, COHERENCE IN THOUGHT AND ACTION 17 (2000).
\textsuperscript{120} Read et al., supra note 116, at 28; Thagard, supra note 119, at 17.
\textsuperscript{122} Thagard, supra note 119, at 17.
model, each element is assigned an equal initial activation value (e.g., .01). The central aspect of the model is that the activation level of each element in the model is then updated simultaneously based on four factors: (1) the number of other elements connected to it; (2) the level of activation of those elements; (3) the strength of the links to these other elements; and (4) the valence of those links. This updating process is iterated with activation of elements spreading through the network based on the configuration of links between the elements until the activation of each element stabilizes. Once the network settles, each element is accepted or rejected based on its final degree of activation.

In this way, a parallel constraint satisfaction model “simultaneously solves for a set of constraints among a set of concepts.” As Stephen Read, Eric Vanman and Lynn Miller describe it:

When activation spreads through such a network, nodes with positive links will tend to activate each other and nodes with negative links will inhibit each other. Because the activation of a node is a result of all of its positive and negative links to other nodes, the final activation of the node can be thought of as a solution to all the constraints represented by the links. Moreover, because activation is spread in parallel among all the connected nodes, this process results in a global solution to the constraints among the entire set of nodes.

This basic model, in which multiple, complexly related elements are simultaneously integrated in parallel to achieve a coherent decision, “is general enough to be applicable to any judgment task that requires the integration of many sources of

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123 Id. at 30-31. Within the model, it is possible to link favored elements (such as empirical data) to an element that is set at a maximum activation. This gives priority to those elements, at least initially, as the model updates. Id.
124 Read et al., supra note 116, at 29.
125 Id. at 27-28; THAGARD, supra note 119, at 30-31. Read et al., supra note 116, at 37 (“[O]ne way to view what is happening is that this is an attempt to minimize the degree of tension or conflict . . . . given the constraints imposed by the actual set of relations among the cognitive elements.”).
126 THAGARD, supra note 119, at 30-31 (describing how elements are accepted if activation is above specified threshold).
127 Read et al., supra note 116, at 27.
128 Id. at 29. See also Read & Marcus-Newhall, supra note 121, at 431 (“The greater the number of excitatory links to a concept and the greater the strength of the links, the higher the activation of that concept. Conversely, the greater the number of inhibitory links and the greater their strength, the lower the activation of that concept. By this process, concepts that are not supported by other concepts die out, and concepts that are supported are strengthened.”).
information. Thus, it is a useful model with which to understand legal decision making. First, legal decision makers engage in constraint satisfaction with regard to the story they select to account for the evidence presented at trial (explanatory coherence). Second, decision makers attempt to select verdicts that maximize satisfaction of their goals (deliberative coherence). We explore these possible applications of the basic parallel constraint satisfaction model below.

B. Explanatory Coherence

A parallel constraint satisfaction model of explanatory coherence is particularly useful for understanding how legal decision makers select a story that represents what happened in a case, integrating the numerous pieces of potentially relevant evidence into a coherent whole. This model is illustrated in Figure 1 below.

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131 While our remarks here focus on the decisions of individual decision makers, the concepts involved in parallel constraint satisfaction networks can be extended to model decisions by groups such as juries. For example, Thagard describes a model of consensus decision making in which consensus arises when individuals in a group exchange information to a sufficient extent that they come to make the same coherence judgments about what to accept and what to reject. The information exchange involves both elements to be favored in a coherence evaluation . . . and descriptions of the explanatory and other relations that hold between elements. THAGARD, supra note 119, at 225-26.

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contradictory evidence presented at trial. 132 In a model of explanatory coherence, decision makers “construct an interpretation that fits with the available information better than alternative interpretations.” 133 As Paul Thagard explains, “the best interpretation is one that provides the most coherent account of what we want to understand, considering both pieces of information that fit with each other and pieces of information that do not fit with each other.” 134

In a connectionist model of the theory of explanatory coherence applied to legal decision making, the elements in the model are the evidence presented and propositions, explanations or hypotheses about this evidence. The links between the elements are based on “relations of explanation and analogy that hold between propositions.” 135 For example, a hypothesis would have a positive link to a piece of evidence that it explains and a negative link to a contradictory hypothesis; contradictory pieces of evidence would be connected by a negative link. In a connectionist model, the activation of the elements is updated in parallel until the network iteratively converges on a configuration of activated elements that represents maximal satisfaction of the constraints imposed. Decision makers then choose the account or story that has the best coherence as indicated by the final pattern of activation among the elements.

This process of parallel constraint satisfaction is consistent with psychological understanding of juror decision making. In making sense of contradictory facts and testimony presented at trial and different explanations for the evidence presented by the opposing sides, jurors are often called upon to accept an account that best fits with the available evidence. 136 Pennington and Hastie’s story model of juror decision making proposes that jurors: (1) construct and evaluate narrative stories of the events at issue based on the information

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132 Paul Thagard & Ziva Kunda, Making Sense of People: Coherence Mechanisms, in CONNECTIONIST MODELS OF SOCIAL REASONING AND SOCIAL BEHAVIOR, supra note 116, at 3 (“Processes of maximizing explanatory coherence are particularly well-suited for accounting for jury decision making, where the task is to evaluate the coherence of accounts presented by the prosecution and the defense.”).

133 THAGARD, supra note 119, at 16.

134 Id.

135 Id. at 21.

136 Read & Marcus-Newhall, supra note 121, at 429 (“We suggest that part of what people do in trying to explain such a sequence of behaviors is to try to find the explanation that best fits or is the most coherent with the events to be explained.”).
presented at trial; (2) learn the verdict alternatives; and (3) match the story that they have accepted to the appropriate verdict. The coherence of each proposed account or story is integral to its acceptability: While multiple stories may be considered, a more coherent story is more likely to be accepted. Connectionist models provide a formal structure for the mechanism by which the coherence of different stories is evaluated. Recently, these types of parallel constraint satisfaction models have been applied to explain decisions in both mock jury experiments and in actual jury trials.

C. Deliberative Coherence

Another way in which parallel constraint satisfaction models could be applied to legal decision making is more central to our point here. In a model of deliberative coherence, decision makers both evaluate potentially inconsistent goals and select actions to perform, “with the desirability of actions and goals determined by a judgment of . . . deliberative coherence,” that is, the degree to which the system of interconnected actions and goals cohere. As Thagard explains:

In brief, decision making is inference to the best plan. When people make decisions, they do not simply choose an action to perform, but rather adopt complex plans on the basis of a holistic assessment of various competing actions and goals. Choosing a plan is in part a matter of evaluating goals as well as actions. Choice is made by

137 Nancy Pennington & Reid Hastie, Evidence Evaluation in Complex Decision Making, 51 J. PERSONALITY & SOC. PSYCHOL. 242 (1986); Nancy Pennington & Reid Hastie, Explanation-Based Decision Making: Effects of Memory Structure on Judgment, 14 J. EXPERIMENTAL PSYCHOL.: LEARNING, MEMORY, & COGNITION 521 (1988); Pennington & Hastie, supra note 130. See, e.g., Pennington & Hastie, supra note 17, at 198 fig. 8.1.

138 Pennington & Hastie, supra note 130, at 198.


arriving at a plan or plans that involve actions and goals that are coherent with other actions and goals to which one is committed.\textsuperscript{141}

Parallel constraint satisfaction modeling of deliberative coherence provides a formal model for how decision makers “mediate among the influence of multiple, salient, and often conflicting goals and do so in a way that results in reasonable behavior that is sensitive both to the desires of the individual and the opportunities and constraints of the environment.”\textsuperscript{142}

In the context of civil cases, we suggest that decision makers attempt to reach a decision that balances multiple, potentially inconsistent goals and fits within the constraints of the legal decision-making task (e.g., jury instructions, verdict options, etc.). Just as parallel constraint satisfaction models of explanatory coherence frame the way in which legal decision makers map the trial evidence onto a coherent story and match that story to the verdict options, we propose that parallel constraint satisfaction models of deliberative coherence can frame the way in which legal decision makers map their myriad goals onto the available verdict options.

The elements in such a connectionist model of deliberative coherence are actions and goals. The links between these elements are based on whether they facilitate or inhibit each other, or are compatible or incompatible, and the degree to which this is so.\textsuperscript{143} For example, the goal of engaging in moral cleansing may be connected by a positive link to the action of awarding a particular dollar amount, while the goal of appropriately compensating the plaintiff may be connected by a negative link to that same dollar award.

It is useful to think of these links as implementing the goal management principles described earlier. For example, a goal might be connected by positive links to more than one action (equifinality) and each possible action may be connected by positive links to more than one goal (multifinality). At the same time, the links between a goal and several different

\textsuperscript{141} Id. at 440 (describing deliberative coherence as “an account of the nature of human decision making that we think is more psychologically realistic than classical decision theory”).

\textsuperscript{142} Read et al., supra note 116, at 47 (describing deliberative coherence generally). For a thorough discussion of deliberative coherence see Thagard & Millgram, supra note 140. See also Suzanne M. Mannes & Walter Kintsch, Routine Computing Tasks: Planning as Understanding, 15 COGNITIVE SCI. 305 (1991) (describing model of goal-directed behavior based on parallel constraint satisfaction).

\textsuperscript{143} Thagard & Millgram, supra note 140.
actions may have different weights (best fit) and some of the links between two goals or two actions may be negatively valenced (incompatibility). The connectionist network updates activation of the elements (goals and actions) in parallel until the network stabilizes. In this case, the final activation of the elements represents the decision maker's chosen set of selected actions and goal valuations.\(^\text{144}\)

While distinct from explanatory coherence, deliberative coherence is connected to explanatory coherence. Any of the many “[f]acilitative and competitive relations [among actions and goals] may often depend on the coherence of the goals and actions with factual beliefs, which indicate the degree of facilitation or inhibition that is believed to be the case.”\(^\text{145}\) Thus, the deliberative coherence of an action taken (e.g., a particular dollar award) to further a given goal (e.g., deterrence) depends in part on the explanatory coherence of the judgment that that action will facilitate the desired goal (e.g., beliefs about the degree to which the dollar award will in fact deter the defendant).

A simplified example illustrates these relationships. Imagine a decision maker has determined that a defendant is liable for a plaintiff's injuries and is attempting to determine whether a monetary award in the amount requested by the plaintiff or in the amount recommended by the defendant would be more appropriate. Imagine further that the decision maker has only the following goals: to express disapproval of the behavior, to cover the plaintiff's out-of-pocket expenses, and to not overcompensate the plaintiff. Figure 1 below represents these verdict options and decision maker goals in one possible connectionist framework. Solid lines represent compatible relationships and broken lines represent incompatible relationships. The decision maker might believe that either award would cover the plaintiff's expenses (equifinality), but that the larger amount would overcompensate the plaintiff (incompatibility). At the same time, the decision maker may

\(^{144}\) Id. at 444. See also Read et al., supra note 116, at 49 (“[T]he decision maker is predicted to choose the set of actions and goals that are most coherent and have the highest levels of activation. Actions and goals with high levels of activation are part of the plan to be performed.”). In order to account for the “intrinsic desirability of some goals,” goals may be linked to units that begin with different levels of activation to indicate “different degrees of desirability.” Thagard & Millgram, supra note 140, at 444.

\(^{145}\) Read et al., supra note 116, at 49; Thagard & Millgram, supra note 140, at 442; THAGARD, supra note 119, at 129-30.
believe that either amount would serve to express disapproval (equifinality), but believe that the larger amount may better convey this disapproval (best fit). Thus, the smaller award would serve to cover the plaintiff’s expenses while not overcompensating the plaintiff, and would express to some degree the decision maker’s disapproval of the defendant’s behavior (multifinality). Yet, the larger award would serve to cover the plaintiff’s expenses and would strongly express disapproval (multifinality), but would overcompensate the plaintiff (incompatibility). The decision maker would choose the award that best satisfies the various goals based on the strength of each goal, the relationships between the goals and the verdict options and the decision maker’s beliefs about effectiveness of each verdict option for satisfying each goal (explanatory coherence).  

This conceptualization of legal decision making suggests that decision makers faced with different arrays of verdict options or possessing different combinations of goals may reach different judgments based on identical bodies of evidence, and it suggests the mechanism by which this could occur. Consistent with this notion, empirical research on punitive damages decision making suggests that changing the available verdict options can affect how decision makers utilize the remaining options to effectuate their goals. Anderson and MacCoun found that jurors who were not allowed to award punitive damages in response to a personal injury scenario awarded more in pain and suffering than did those who were allowed to make an award of punitive damages. Similarly, in their recent investigation of limits on punitive damages, Edith Greene, David Coon and Brian Bornstein found that jurors who were not given the opportunity to award punitive damages awarded more in compensatory damages than did jurors who

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This model is highly simplified; a more sophisticated model would incorporate additional possible verdict options, additional goals and other influences on decision making. Importantly, it is likely that decision makers’ judgments about damages are made along a more continuous scale than is suggested by this simplified model. See Kahneman et al., supra note 48; Sunstein et al., supra note 48. A more elaborate modeling effort would be necessary to address these scaling issues. But cf. Bibb Latane, Strength from Weakness: The Fate of Opinion Minorities in Spatially Distributed Groups, in UNDERSTANDING GROUP BEHAVIOR 193 (Erich H. Witte & James H. Davis eds., 1996).

Correspondingly, changes in the goals the decision maker seeks to fulfill ought to change how the decision maker uses the verdict options to fulfill those goals. Anderson & MacCoun, supra note 15, at 319-20.
were allowed to make unrestrained punitive damage awards. Moreover, they found no differences in the total damages awarded by the two groups. The results of these studies suggest that decision makers who are blocked from expressing their punitive intent through punitive damages find other mechanisms through which to satisfy their goals (i.e., equifinality). Similarly, if the defendant had already fulfilled, in whole or in part, one or more of the decision maker’s goals, for example, by offering an apology, the decision maker might be expected to make use of the verdict options differently than if no apology were forthcoming or could be compelled.

Thus, just as different accounts of the events in a case compete for acceptance by the finder-of-fact, so too legal decision makers attempt to address multiple goals that compete to be satisfied. Verdict options, including a liability verdict and compensatory and punitive damages, may be used by legal decision makers in their attempts simultaneously to fulfill compensatory, expressive, punishment, deterrence, distributive justice and moral cleansing goals along with other normative and non-normative goals. Conceiving of civil verdicts as the outcome of attempts to use the available verdict options to satisfy these multiple, potentially competing goals in parallel provides a useful model for more thoroughly understanding such decisions.

CONCLUSION

A multi-motive conception of jurors, in contrast to traditional accounts of decision makers as focused on singular goals, provides a richer picture of the cognitive processing of legal decision making in civil cases. Considering goals that have not been traditionally considered by the law, such as differing notions of distributive justice, expressive and value concerns, reactions to taboo trade-offs and concerns for moral balance between the parties, explains a variety of empirically observed phenomena that are difficult to account for with

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149 Greene et al., supra note 19, at 226.
150 Id. at 228 (i.e., the compensatory damages awarded by the group not allowed to award punitive damages were no different from the total of the compensatory and punitive damages in the group allowed to award both).
151 Galanter & Luban, supra note 4, at 1406 (“[T]he legal line between punitive damages and compensatory damages does not accurately demarcate the presence of motives or perceptions of punishment.”).
152 See supra Part II.C.3.
typical single motive accounts (e.g., the optimal deterrence model). Moreover, insight into how decision makers manage these diverse goals is gained by conceptualizing these multiple goals as interrelated in complex ways according to a set of goal management principles and dealt with through a system of cognitive processing that attempts to satisfy as many of these goals to the greatest extent possible through a process of parallel constraint satisfaction.
“Where is this place?” Oedipus asks Antigone as they enter Colonnus, the famous dwelling place of the transformed Eryns. This verse has captured me as powerfully as Hillel’s admonitions that if I do not stand for others, who will stand for me? and “if not now when;” Marx’s admonition about the “poverty of philosophy,” and Lenin’s “what is to be done?” These few quotes tie humanity to place. They identify the mystery of identity and ultimately, the need for action even in the face of the ineffable or noumenal.

We live at a very dangerous time. It may be that every time was dangerous. So be it. At this time global war is in the air—a war to protect globalized economies under which a small part of humanity does very well while most of humanity struggles. Domestically, almost a banality but a truth, the poor get poorer, the rich richer, the gap between skilled and unskilled gets larger and the middle becomes more anxious. We have a crisis in health delivery, an industrial prison complex, continued poverty, a further disaffection from politics, a breakdown of political leadership here and in much of the world and a culture of complaint. At the more institutional level, our courts are more politicized—not a new but a more obvious condition than immediately in the past. The United

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1 Mortimer Jackson Professor of Law, the University of Wisconsin School of Law. I thank Mike Morgalla of the University of Wisconsin Law School Library Staff for his invaluable research assistance.

1 SAYINGS OF THE FATHERS, OR PIRKE ABOOTH (Isaac Unterman ed. & trans., 1964) (“If I am not for myself, who will be for me? And if I am only for myself, what am I? And if not now, when?”).


3 See V.I. LENIN, WHAT IS TO BE DONE, BURNING QUESTIONS OF OUR MOVEMENT (1929). The first cite I can find to this famous Lenin query is from the Acts of the Apostles. See THE WRITINGS OF ST. PAUL 160 (Wayne Meeks ed., 1972).
States Supreme Court is more imperious, more activist and more disdainful of Congressional power than anytime since its struggle with the executive branch over the New Deal.\footnote{See John T. Noonan Jr., Narrowing the Nation's Power, The Supreme Court Sides with the States (2002).} State legislatures and the U.S. Congress are captured by corporate interests.

Perhaps I am overstating? How colored is my consciousness by developmental trauma and adaptive mechanisms? How prescient am I about reading the world as a text through my own subjectivity? This is the very point of the Essay: What difference does my assessment of national and global conditions make to what I owe the world or what it owes me? Or in the terms of this Symposium, what is my responsibility, what is my potential blame and for what aspect of the world am I responsible? These questions entail assessments of the epistemological, ontological, ethical, legal and, more generally, political understanding of what responsibility means philosophically, theologically, legally and politically. And what does theory along any of the fault lines mean for individual and social practice both normatively and empirically?

My view is not from nowhere but from here and now. It is colored by theologies that are committed to the other, it is unhappy with the liberal state both theoretically and actually and it prefers the liberal state theoretically over many other current alternatives. In the first part of this Essay, I briefly discuss the role of responsibility under liberal and republican theories of the state. This Essay then contemplates our individual responsibility for what is currently happening. It expresses no great faith in theory or writing against the current grain, but that is the practice at hand and here we are. So, I argue that we owe a responsibility to do more than we are doing, but that we do not have the energy, time or money to do more, and that we do not know what to do; this has consequences for how we feel about ourselves, about the quality of our life and souls. I do not posit an afterlife. This life is scary and fascinating enough.

At the outset, I assert the following claims: (1) as an individual, I am responsible no matter what I do; (2) we do not do enough; (3) we do not know what to do; (4) structural constraints and distortions rationalize present quietism; (5)
theory about the state of the state, though engaging, will be unavailing in shaping particular persons to be more responsible and effective in defining and addressing whatever is seized upon as the current commodified evil; and (6) social and intra-psychic motivational distinctions between shame and guilt explain little about most structural politics and less than we might hypothesize about interpersonal responses—at least for responsible action in the public sphere. My object is to explore these issues by analyzing Ingmar Bergman’s film *Shame.*

In the second part of this Essay, I analyze and critique *Shame,* placing it in context with the theological. Ultimately, this Essay looks to the implications of theologically shaped theories to ask about a theoretical advance beyond Bergman’s *Shame.* I propose that Bergman provides a suggestive narrative to explore the problem of individual responsibility for self, other and state. He provides a frame for both an ethic and an argument that psychology is intimately related to ethics as a matter of ontology. Bergman’s view in this work complements theologically informed philosophers of Jewish, Protestant and Catholic orientation toward questions of responsibility, particularly Emmanuel Levinas, Dietrich Bonhoeffer and Jan Patocka respectively. It also accords with the strain of metaphysics that Plato bequeathed to western thought.

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5 Barrington Moore gave us the concept of the commodification of moral outrage, meaning that, as a culture, we choose a particular social harm as a focus, write and talk about it, perhaps research it, deliver policy papers, perhaps show a modicum of institutional concern, then grow tired of the problem and turn to a new outrage as the social harm de jour. BARRINGTON MOORE, INJUSTICE, THE SOCIAL BASES OF OBEDIENCE AND REVOLT 500-05 (1972).

6 Screened in 1968, *Shame* starred Liv Ullmann and Max von Sydow. Sven Nykvist was the director of photography. The film’s Swedish title is *Skammen.*

7 For perhaps the best critical, complete analysis of Bergman’s cinematic work see PAISLEY LIVINGSTON, INGMAR BERGMAN AND THE RITUALS OF ART (1982). I am indebted to Professors David Bordwell and Noel Carroll, each of whom suggested Livingston’s work when I mentioned I was working on this Essay. Bergman himself wrote an autobiography, *THE MAGIC LANTERN* (Joan Tate trans., 1988) and a critical book on his films, *IMAGES, MY LIFE IN FILM* (Marianne Ruuth trans., 1994). In the latter book, Bergman is critical of *Shame.* He sees the movie divided into two parts, one about the events of war which he found wanting and another about the effects of war which he felt was good. *Id.* at 298. He worried about the film’s reaction and apparently received little satisfaction, though the initial review in Sweden was very good. *Id.* The film was nominated for best foreign picture but did not win the Academy Award. David Shipman comments that *Shame* was one of two movies where Bergman “takes his place as one of the great creative figures of [the twentieth] century.” SEE DAVID SHIPMAN, THE STORY OF CINEMA: A COMPLETE NARRATIVE HISTORY FROM THE BEGINNINGS TO THE PRESENT 953 (1982).

8 This may be unsurprising since Bergman came out of a tradition akin to
Contrasting drama with a particular set of philosophical claims allows experiential testing of narrative plausibility and perhaps even conditional truth of the representational mimesis.

In important ways, the “theological” view of responsibility that suffuses Shame is anti–liberal. It intimates a direction for how one should live a life different from the market and institutional demands of mass society survival. But Bergman’s vision, even where he suggests a positive direction, remains bleak. Moreover, whatever the truth of my reading of the film with respect to interpersonal obligation and the soul, Bergman provides little direction toward how to reform institutions to negate the chilling despair he represents. He does not have to. Neither Plato, Hegel nor Rawls provided a successful institutional frame for republican, liberal or any other institutional array to shape conditions to avoid the world that enervates and kills Bergman’s players. Even Karl Marx refused to offer a precise politics, asserting in very enlightenment fashion in The Critique of the Gotha Program that the workers would have to fashion the appropriate politics together for themselves through struggle.9

In Part III, I call primarily on three thinkers to contrast with Bergman: Emmanuel Levinas, Dietrich Bonhoeffer and Jan Patocka. Each of these three continues a personal synthesis of Athens and Jerusalem, taking his ethical concerns from Jerusalem, measured against philosophic rigor and matched against competing philosophic analyses.10 In Susan Handelman’s terms, I seek possibilities in the “fragments of redemption” currently available for anchoring a practice of responsible public and private action.11

Bonhoeffer’s. Bonhoeffer was captured and executed by the Nazis for his part in the Abwehr’s conspiracy to kill Hitler. See generally DIETRICH BONHOEFFER, ETHICS (1955).

9 Ralph Miliband concludes his then important The State in Capitalist Society by calling on Marx’s analysis in The Critique of the Gotha Program to conclude that eventually the working class will work through all internal conflict and rally toward a transformational politics. RALPH MILIBAND, THE STATE IN CAPITALIST SOCIETY (1969).

10 Jeffrey S. Shoulson argues persuasively that through history any defined boundary separating Athens and Jerusalem has long been blurred. See JEFFREY S. SHOULSON, MILTON AND THE RABBIS: HEBRAISM, Hellenism, and Christianity (2001). Nevertheless, prophetic Judaism ethically and stylistically presents very differently from Greek-derived philosophy.

I. **LIBERAL AND REPUBLICAN THEORIES OF THE STATE AND THE CONSTITUTION OF THE RESPONSIBLE SELF**

The legal academy continues to debate the extent to which the United States is a liberal or republican government. This debate hinges on an intuition about the nature and constitution of the self and the degree to which the self is self-determining. Republican theorists emphasize the contingency of the self to the shaping community in which it develops. Republican theory holds the self to be contingent, communally dependent. The communitarian ethos embodied in republicanism theory is central to certain aspects of feminist and critical studies jurisprudence. The point of communitarian theory, backed independently by thinkers such as George Herbert Mead, is that the self is intrinsically social or, to follow Aristotle, political. To the contrary, liberal proponents assert and assume that the self is autonomous and responsible, unless incapacitated through age, mental illness or defect.

As people, the republican argument asserts that we are first constituted by the social and its internalized meanings. We are born into sex with gender, linguistic, religious and nationalistic expectations. These constituent aspects of the individual self flourish, regardless of any asserted personal autonomy, through internalized cultural reinforcers that nourish self-formation. Republicanism, for some, makes for a better fit with this communitarian “insight.” Republican theorists would change institutions and public practices to accommodate and enhance the self’s more “natural” development along these communal lines. In contrast, liberal theory rests on the autonomous self as the bedrock of its legal and political world view. How we get to a republican polity is certainly as unclear as whether we ever had one, or could have one in mass societal conditions. Likewise, how can we actualize a truly liberal state, if such is defined as a state whose purpose is to provide, as Georg Wilhelm Friedrich Hegel insisted, for the conditions of human flourishing, is equally unclear and unlikely in current conditions.\(^\text{12}\)

The liberal autonomous self is part of a liberal, mythology, supporting a liberal jurisprudence that, as Roberto

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\(^{12}\) For the argument that Hegel held a liberal position and that his position posited the conditions for individual actualization in an integrated, mediated social space motivated by a capitalist political economy see **SHLOMO AVINERI, HEGEL’S THEORY OF THE MODERN STATE** (1972).
Unger argued in *Knowledge and Politics*, presents but one of liberalism's antinomies.\(^\text{13}\) We are all monads negotiating our arbitrary desires through a rational instrumentalism in a preference-maximizing and marketing social space. C.B. MacPherson charted one important narrative of the liberal self toward a “possessive individualism” and claimed that liberal capitalism could best be characterized as the end state of that development.\(^\text{14}\) Hence, the republican or communitarian self would be both more contingent and more generous to communal concerns. Thus, it seems that the autonomous self of liberal theory would dictate a different understanding of individual and social responsibility and, therefore, different notions of individual and social blame. Except for a defined set of “worthy” losers—e.g., the nineteenth century’s worthy poor—all others who lack or need can only blame themselves for their individual and social inadequacy.\(^\text{15}\)

A. *Current Legal Practice and Individual Responsibility*

The nature of the self is a significant question for any jurisprudence, and the extent of any presumptive autonomy or contingency must be considered in micro or under a more structural framework, and in legal practice. The legitimacy of strict liability, negligence and any variations depends on the basic fit and fairness of the public’s intuitions. Criminal jurisprudence has occupied itself with the insanity defense well beyond any real world applications, given that the nature of the self and the attribution of responsibility play out dramatically in this venue, particularly where the death penalty hangs as a possible sanction. Focusing on the individual, whether in a tort or criminal context, tends to narrow the focus on attribution of fault and blame to one disposition: Do we charge (blame) the individual economically or through punishment?

This focus on fault and blame sharpens certain aspects of our social judgments, which have showed historical variation if not “progressive” advance. For example, a jury in Wisconsin

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\(^{13}\) **ROBERTO MANGABEIRA UNGER**, *KNOWLEDGE AND POLITICS* (1975).


\(^{15}\) Today, we are seeing at least one tendency in the United States toward a neo-social Darwinism, in practice if not name, in our attitude toward the poor, where compassionate conservativism stands for private altruism or charity and undercuts the state’s obligation to the needy.
deemed human cannibalism legally sane in the Jeffrey Dahmer case.\textsuperscript{16} Insanity was not a category that the Wisconsin jury would affix to Dahmer. The humanizing tendency that David Bazelon tried and failed to establish with the insanity defense is well documented.\textsuperscript{17} The defense, never well-liked publicly, is not the subject of a wide movement for new reform. Yet, in the tort context, for example, policies like that embodied in the fellow servant rule have been long since discarded, apparently as improperly ideologically motivated. Would a thorough-going republican or communitarian ethos set differing standards for criminal or tort accountability and blame? Would such a standard play out differently for questions outside of liability establishing legal entitlement? These issues are important but only mentioned here to make the point that such issues are of concern to legal theorists.\textsuperscript{18} In practice, the public experiences the legal attribution of responsibility in a frame where the focus is on only one event and the question is one of individual punishment or fault without a broader context. This focus domesticates and, at times, distorts possible clarity about social complicity in any particular enterprise.

\textsuperscript{16} Dahmer did not appeal his conviction. Jim Stingl, \textit{Dahmer Won't File an Appeal of Verdicts}, MILWAUKEE J., Mar. 5, 1992, at B6. Two years later, he was "bludgeoned to death in prison." Don Terry, \textit{Jeffrey Dahmer, Multiple Killer, is Bludgeoned to Death in Prison}, N.Y. TIMES, Nov. 29, 1994, at A1. The first year, he was kept in protective custody but prison officials decided he would be safe in the general population. Id. I certainly was not surprised that he was murdered in prison.

\textsuperscript{17} Chief Judge David Bazelon, of the D.C. Circuit Court of Appeals was instrumental in persuading the D.C. Circuit to experiment with the application of the insanity defense. He was the force behind the \textit{Durham} product test but finally despaired of ever finding a formulation that would compel a mental health expert to provide information, but not a conclusion, on the insanity issue. Bazelon was responsible for an unsuccessful judicial experiment with the application of the insanity defense. He wanted to allow psychiatrists to provide as much relevant expertise to the trier of fact as possible to inform judgment but he did not want to allow such testimony to substitute for the jury's determination. So psychiatrists were not limited in testimony except for conclusory statements, sane or insane. See \textit{Durham v. United States}, 214 F.2d 862 (D.C. Cir. 1954). The so-called \textit{Durham} test or product test did not work, however. Psychiatrists still gave conclusions and sometimes did so because of the trial court's questions. Bazelon and the D.C. court gave up on the \textit{Durham} experiment in \textit{United States v. Brawner}, 471 F.2d 862, 1010 (D.C. Cir. 1972) (Bazelon, C.J., concurring in part and dissenting in part). See generally DAVID L. BAZELON, \textbf{QUESTIONING AUTHORITY: JUSTICE AND CRIMINAL LAW} (1988).

Current ideological proponents of tort reform—i.e., reducing a plaintiff’s rights against manufacturers, doctors, etc.—emphasize individual responsibility, bad moral luck and individual burden, and seek to cut back on a structural frame, in place for over a century, for locating who should bear tort responsibility and burden. Criminal responsibility jurisprudence and even tort accountability have problematic relationships to the responsibility concerns I address here. Criminal accountability is binary: guilty or not, sane or not, competent or not. Tort liability is similar, but it incorporates economic analysis, which has more to do with the distribution of loss than an assessment of ethical blame. Neither readily addresses my question of whether a republican or liberal frame could set different standards for attributions of accountability and blame.

A classic political-philosophic problem concerns responsibility that differs from the attribution of responsibility in judicial settings: What does the citizen owe to the polity as citizen? The apologetics of Socrates exemplify a citizen’s responsibility in the polity, although Socrates eschewed public responsibility until one was specifically called on in an official role to respond to a political demand. What is the responsibility of the citizen as citizen rather than as merely a human, in a world where state sovereignty seems precarious in a globalized economy and where the complexity of the liberal state seems to alienate more and more of the populace, who have become more or less disaffected consumers and not citizen actors? Human rights, as opposed to civil rights, remain a significant problem for jurisprudence in the United States (and in the world generally). Where a contest to preserve civil rights

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20 Socrates made it very clear in his trial that if he had responded beyond those times Athenian practice officially called on him, he would not have lasted his seventy years. See R.E. Allan, Socrates and Legal Obligation 37 (1980). So the public/private split in the liberal state did not of itself affect a fragmentation of the individual’s obligation to respond. One could argue that a motivation for Plato’s The Republic was to provide a space for a Socrates to thrive. Plato, The Republic, The Statesman (George Burges trans., 1901). But Socrates would have to be one of the philosopher kings, or else he would surely perish once again. The Athenian state that tried and executed Socrates was unlike our liberal, capitalistic state in kind and scale. Moreover, we must also distinguish the rights and responsibilities of citizens from human rights and responsibilities. This distinction has significant legal and cultural consequences regarding current entitlements in the United States and elsewhere.
is increasingly tense, a more general defense of human rights is subject to strategic and real sacrifice.

B. The Responsibility of the Citizen and of Human Beings

This Essay is not concerned with the attribution of fault in the narrow adjudicative context of torts or criminal law. Nor do I argue for class entitlement along lines of race, gender or any other putative deserving set of the population. Rather, my objective is to analyze a subject more difficult to assess and yet ultimately no less significant for contemporary jurisprudence: What does the individual owe to the polity? Asking the question in this form seems a bit ponderous, portentous, vague and anachronistic. We do not have a polity in the classic Greek meaning. Arguably, professionals assume guild or professional responsibility as a smaller set of social responsibilities. Max Weber warned us of the loss of vocation and the undermining of guild responsibility. He warned us of the loss of spirit that the iron cages of mass bureaucracies entailed. But even professionals have experienced a rationalization of their respective worlds to the point of achieving significant compensation but a diminishing actual power to run their own professional lives. From very different political vantage points, the best of the twentieth century’s best literature carried the same theme. Consider Yeats’s “the best lack all conviction, while the worst/ Are full of passionate intensity” as commentary on the virulent illogic of much of early twentieth century mass governance.

21 See generally, the influential work of Michel Foucault on power and disciplinary practice, particularly in medicine and more specifically in psychiatry. Foucault points toward the dispersal of power into disciplines that are governed by their own immanent institutional needs. For just one of many relevant works, see THE FOCAULT EFFECT, STUDIES IN GOVERNMENTALITY (Graham Burchell et al. eds., 1991). Long after his death, Foucault is still giving an edited set of lectures where he takes on the “history of thought” on pararchesia (free speech and its relationship with frankness, truth and democracy, inter alia). See MICHEL FOUCAULT, FEARLESS SPEECH (Joseph Pearson ed., 2001).

22 MAX WEBER, THE PROTESTANT ETHIC AND THE SPIRIT OF CAPITALISM 180 (Talcott Parsons trans., 1958). Weber’s classic diagnosis was that capitalism could well end with “[s]pecialists without spirit, sensualists without heart.” The quote continues, “this nullity imagines that it has attained a level of civilization never before achieved.” Id. at 182.


Anthony Kronman’s *Lost Lawyer* examines the corruption of law as a vocation, implicitly asking what is to be done about the degradation of law’s fraternity and the profession’s obligation to the state and community.\(^{26}\) He analyzes the tension that Kantian liberalism creates for his neo-Aristotelian valuation of prudence.\(^ {27}\) He finds that Kantian obsessiveness with respect to an idealized individual equality undermines a more reasonable and ultimately more effective and just neo-Aristotelian conception.\(^{28}\) We have lost individual prudence in the service of structural analysis, particularly to a variant of economic analysis in the legal academy.\(^ {29}\) Kronman does not express much optimism for the core of legal practice to be one based on social obligation.\(^ {30}\) As a legal profession, we have lost soul and direction. I might add that we also have not achieved the Kantian respect for the juridical (hypothesized) individual in juridical or political practice. Theoretical gains frequently remain theoretical. Kronman writes about the particular obligation of the bar toward the social good, but the loss of professional control over its own work extends to medicine as well.\(^ {31}\) Further, the alleged good that lawyer-statesmen did for the state was at best restricted to citizen rights, most likely making a more general contribution to governance.

Richard Dagger and others attempt to create a new synthesis, a liberal republicanism, resolving any conceptual and real impediment to participatory and engaged politics.\(^ {32}\) We are not bereft of theory. From John Rawls and Ronald Dworkin through Michael Sandel and Jean Bethke Elshtain and beyond, we have identified theoretical issues with some real subtlety. But just as Plato failed to construct a new state in *The


\(^ {27}\) Kronman, supra note 26.

\(^ {28}\) Id. at 37-39.

\(^ {29}\) Id. at 236-38.

\(^ {30}\) Id. at 6-7.

\(^ {31}\) Id.

Republic and Laws, we do not live in a world where we can construct or reconstruct either a Rawlsian neo-liberal (Kantian) state or a new republic from a theoretical drawing board.

We are not Greek; we do not have a polity. We have consumers more than we have citizens. Most of us, including law professors and political philosophers, do not want or have the time to act as citizens. Theorizing is not acting as a citizen. Gregory Vlastos, perhaps the leading student of Socrates, critiqued even Socrates for his lack of participation as a citizen of Athens. Vlastos had the war in Vietnam in mind, but the matter applies generally. What is our obligation and what enforces such an obligation on us as theorists and as human beings, living in an uncertain, morally ambiguous world? How do we define or account for individual responsibility to others or the society outside of dispute resolution or other formalized state institutions?

II. BERGMAN'S SHAME

In Shame, Bergman layers the individual, interpersonal and political, dramatizing the open-ended quandary of existence for the artist and every person in a contemporary world in the throes of an unintelligible war, where commitments are beyond Sartrean absurdity yet choices nevertheless have consequences for the individual soul and for the greater community. Every meaning of shame is structured into the film. Blame is an unvoiced result of living that the film’s narrative demands.

A. The Film

The film is set during a war. It is unclear whether the war is civil or between countries. The ambiguity of its setting bolsters its power and makes the film significant as an object for analysis of shame and responsibility. Bergman’s film

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34 See id. at 132-33.
35 This very ambiguity counted against Bergman in some critical reviews at the time of the film’s release in Sweden. Maria Bergom-Larson in her book, Ingmar Bergman and Society details Swedish critical reaction to the film. MARIA BERGOM-LARSON, INGMAR BERGMAN AND SOCIETY 99 (Barrie Selman trans., 1978). She also analyzes the movie and finds it wanting from a left, political viewpoint. She, among
captures my attention because its very lack of specificity about the competing sides sets forth a more powerful narrative about more than war: It portrays the consequences of self-defense and the avoidance of responsibility in the face of ambiguity, contingency and horror.

The film opens with Jan and Eva Rosenberg\(^{36}\) awaking for a new day on an island separated by a short ferry ride from the mainland.\(^{37}\) They have been at a small cottage where they maintain a modest living growing their own food, keeping chickens and selling berries to the townspeople. For four years, they have been modestly self-sufficient, away from politics and a war they and most of the others they encounter seem not to understand. Viewers are certainly left without a clue concerning the reasons for the war and the combatants’ competing concerns.

In the first scene, Bergman sets the tone for the first part of the film by catching the couple waking up.\(^{38}\) Eva, played by Liv Ullmann, wakes with energy. She performs her morning ablutions. The more vital member of the couple, she has to admonish Jan to shave. He seems enervated, passive, listless. Through the first part of the movie, Eva dictates the responses for the two. Jan, played by Max von Sydow, is weak, self-pitying, selfish, cowardly and a hypochondriac. He is also most likely Bergman’s reference to himself, the artist contingent on patronage, a parasite on society on the one hand, a critic on the other.

We find that the war has been going on for four years and that the two were musicians. Eva was the first violinist for others, is critical of Bergman’s critical aim in the film. The Swedish left generally saw the movie as an apology for the United States’ involvement in Vietnam. She refers to Bergman’s statement that the script, which he wrote in 1967, would have been different if written after the escalation in the Vietnam War and the Soviet invasion of Czechoslovakia. \textit{Id.} at 93. But she notes that the ethical status of the war was a significant issue in Sweden given the war tribunal that Bertram Russell and others held in 1967 in Stockholm. \textit{Id.} She says that Bergman himself had ethical qualms about the movie, not only with respect to the Vietnam issue but also with respect to the central role of the Soviet Union in its invasion of Czechoslovakia. \textit{Id.}

\(^{36}\) That the name Rosenberg may strike the observer as Jewish though not necessarily so has not gone unobserved. It also may be significant that it was the last name of Julius and Ethel, the infamous couple convicted of espionage during the Red Scare.

\(^{37}\) Viewers today are aware that there are no island retreats in a globalized economy and that local wars tend to have broader implications.

\(^{38}\) Bergman, a tough critic of his own work, likes the first scene of the movie and stands behind the movie though he would have changed certain scenes on aesthetic grounds. \textit{Bergman, supra} note 7, at 299-301.
the state orchestra, which was disbanded because of the war. Jan seems to be a virtuoso. This assumption is reinforced by the fact that he possesses a rare, invaluable violin, a Pampini. Underscoring his expertise, Eva does not know the history of the violin maker. She may know less about the history of music and even her own instrument, but she controls their everyday life. She knows that he has been sexually unfaithful, and this continues to bother her though she attempts to suppress her feelings. She knows he is selfish. She may not even like him, but she says she loves him and makes love with him in an early, spontaneous scene. She seems to appreciate any positive attention he gives her.

Bergman shows us another scene from their marriage with its irritations, minor regrets and cruelties. The war at this stage has changed their lives but not their basic modes of relating to each other. Eva wants a child and challenges Jan to be examined by a doctor to see if he is the biological cause of her failure to get pregnant. Jan is unwilling to see a physician, not out of a fear of biological deficit, but because he is not particularly interested in becoming a father. This failure of generativity emphasizes the extent to which Jan is self-obsessed. It also reveals his unwillingness to reach beyond himself. His stance in the world seems unrelated to the war. He would be superior, selfish, unfaithful and self-pitying in any case. He is bored and does little. He fiddles with the car, which is always breaking down, and with the radio, which is also chronically malfunctioning. He fails to pay the phone bill. When challenged by Eva, his stance is why pay when the phone does not work anyhow? We can pay our neighbor for any phone call. When Eva expresses irritation in response, ominously the dysfunctional phone rings. Eva picks it up, but no one answers. Despite Eva’s general discontent, as in most marriages, there are moments—particularly early in the movie—when Jan is seductive and Eva’s smile radiates.

Even before the war more immediately intrudes on their life away from the mainland, we have evidence that Jan is not maintaining any commitments beyond self-gratification and survival. His desultory care of his own grooming and mere tinkering with the car and radio register his disaffection from

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39 Bergman’s work frequently deals with the theme of marriage and its potential destructiveness. See for just one example his SCENES FROM A MARRIAGE (1973).
any vital commitment. He is not even committed to his art. Neither he nor Eva practice together or alone any longer. This is highlighted on the occasion where Jan and Eva meet Jacobi, the mayor, and his wife on the ferry and reminisce about playing together, as they had done once, but it is clear to them all that a new engagement is a hollow commitment.

Before the war violently comes to their doorstep, Jan presents himself as too sensitive. He cringes on the steps inside of the house when Eva reminds him to get a jacket before they leave to deliver berries to the Jacobis. Eva, who is presented as vital and compassionate, is obviously disgusted with what she sees as his hypochondria. In their interactions he cajoles, don’t you like me a little; don’t you love me? His posture is whining, needy, ill—a Woody Allen character without the humor. His posture works. Despite her disgust, Eva responds to his seductive moves. When touched, she smiles. Yet, aware of his adultery and in light of his overall behavior, she is under no illusion about his basic selfishness.

As presented, the war is not primarily responsible for much of this behavior. Their art itself is not sustaining or even important without an audience. They talk as if they will practice but do not; they plan, after the chance meeting with the Jacobis, to play a string quartet. This is the talk of an enervated marriage. Jan does not appear clinically depressed, which could explain his general disinterest. Rather, Jan is a paradigmatic narcissist and, as such, needs mirroring and constant affirmation. For him, other people exist only for their instrumental value. His art seems instrumental and not worthy in itself. All this changes when he learns he is capable of murder. In any event, Jan has no sense of shame or for that matter guilt. Staying alive, without physical pain, suffices. He can live with the personal anguish that seems his lot, but the viewer cannot be sure how deeply his suffering is actually felt. His suffering does seem postured but even hysterics, after all, experience suffering though those on the outside find their behaviors flamboyant, overwrought, histrionic.

\[40\] Eva and Jan deliver berries to the mayor's home to earn subsistence money.

\[41\] The Rosenbergs' interaction was characterized by many of my female students, in a recent showing, as typical of married life.

\[42\] Bergman, as clinically aware as any film director, would have made depression clear if that were his intent.
All is not always glum, however. In one of the film’s few delightful scenes, Eva and Jan enjoy fresh fish and wine, talk about music and discuss Eva’s commitment to learn Italian. But when finally Eva complains about not having a child, Jan declares himself a determinist. Here, Bergman plays with philosophy as mere noise. Eva laughs and says that she really is not interested in philosophy. Jan gets seductive and they fall under the table together. Bergman’s genius is to illuminate even the dour and to indicate life can yield simple delight.

Their pleasure abruptly changes. The war intrudes and the film speeds toward a degradation and forlorn doom. An army attacks and parachutists fall from the sky. A soldier, suspended from a tree, screams and Eva runs toward the scream despite Jan’s demand that she stay away. She looks at Jan with contempt. She is impulsively brave. He thinks her foolhardy. The soldier may need help and Eva will help. The soldier dies but others arrive demanding to know what happened. The tension heightens. We see Jan’s panic and cowardice.

A patrol stops at their house and demands that Eva express her opinion about her political views on camera. She is frightened, confused and intimidated. She says that she and Jan are apolitical. She is a musician and they have no knowledge about what is going on in the war but it has been going on too long. The patrol challenges her about whether she believes in democracy. Jan cringes and claims he is sick. The patrol later doctors the interview and uses it against Jan and Eva as propaganda. In so doing, Bergman demonstrates the hypocritical ease with which competing sides can doctor propaganda by distorting objective reality. Despite the camera control squad’s claim that the Rosenbergs stood for democracy, the viewer has no reason to differentiate one set of combatants from the other. Even the uniforms of the competing sides are without discernible difference.

The war has come home. Another attack and more bombing prompt Eva and Jan to try to escape, but the road is out and they are forced home. Before their aborted journey, Eva suggests they take food. Jan can’t bring himself to kill a chicken. He looks foolish, cartoonish, not like someone who values life. The scene would be funny if the consequences were not so serious. The fortunes of war shift. Jan, Eva and others are rounded up and interrogated. Eva is roughed up but Jan doesn’t go to her aid. Others are more severely hurt and some killed. We see some of the badly hurt acting stoically whereas
Jan acts as if he were terribly tortured when he clearly received little harm.

Jacobi, an acquaintance and the town’s mayor, changes sides from the resistance to become a Quisling.\textsuperscript{43} Jacobi reveals to Eva and Jan that they were taken into custody for propaganda reasons and he knew that their filmed statements were doctored. Jacobi sends the couple home. He treats the two with deference where others experience a less kind fate. We quickly find out that Jacobi has personal motives for his seeming kindness. Jacobi starts to visit Jan and Eva, bringing gifts to each. In front of Jan, he tries to seduce Eva. Eva tells Jan that Jacobi’s favoritism is going to bring them retribution from Filip, a friend who we saw selling freshly caught fish to Eva. Filip is now clearly the head of the resistance. Filip gives Eva notice that the resistance does not like the Rosenbergs’ ostensible friendship with Jacobi. Eva looks to Jan for leadership but finds little help. Their marriage begins to unravel.

Jacobi’s last visit marks a climactic shift in the film. Jacobi presents Jan with a first edition of Dvorák’s Trio in E Flat. He gives Eva an expensive ring, a family heirloom. When Eva mentions the fact that his visits are putting them at risk of attack from the resistance, Jacobi threatens them with internment in a camp if they refuse his friendship. The three drink until Jan seems to fall into a stupor from too much wine. Jacobi tries to pay Eva to have sex with him. He gives her a wad of money, twenty-three thousand, all his savings.

Jacobi represents middle order, local leadership. He is a handsome man, generally held in esteem, successful, dignified. In reality, he is a man who has a wife, a son he has just visited and a grandson. But his posture in the world is all persona. He makes clear that he has always had a problem with fellow feeling. He fears that enemy patrols are going to murder him if they can find him. He switched sides so he would not be sent with a gun to fight. Bergman reveals that this man of some prestige and class is motivated by personal fear and an almost infantile sexuality. He seems to want mothering from Eva more than mature sexual satisfaction. He has a sadistic side and a want of emotional depth, except when he perceives the pain of others. He is not a pronounced sadist; rather, he is in a position

\textsuperscript{43} Bergom-Larson refers to Jacobi’s Quisling regime evoking the name of the famous World War II turncoat traitor. See BERGOM-LARSON, supra note 35, at 95-97.
fraught with personal danger and aggresses on the cowardice of others, perhaps masking his own. He seems to have lived life as façade: his wife, family, community are all surface, all aesthetics but lacking aesthetic pleasure. Jacobi represents the “as if” personality, the individual who lives a pretense life, one motivated by appearance.

Jacobi’s seduction of Eva is inept. He reaches for her in front of a seemingly oblivious Jan and sinks his head into her breast, a child looking for comfort. She tells him she has never cheated on Jan, but leads him by the hand to the greenhouse where they have sex. Compared to the earlier scene with Jan, this coupling lacks sexual frisson; Eva matter-of-factly resigns, and Jacobi follows Eva passively. The money is left on the table. Jan awakens, grasps what has happened and puts the money in his pocket. No sooner do Jacobi and Eva come back to the house than Filip and a patrol arrive. They grab Jacobi, who tries to buy his freedom with the money he has given to Eva.

Eva demands the money from Jan; he disavows knowledge of the money. Filip orders his crew to search the house. They rip apart the house, destroying everything, including the rare Pampini violin. The irreplaceable violin is worth more than the thousands Jan is secreting. When it becomes clear that the money is not forthcoming, Filip puts his arm around Jacobi, a comrade he knows is about to be executed. Filip hands the gun to Jan to execute Jacobi. Jan at first drops the gun and then picks it up in a replay of the pantomime with the chicken that he could not kill. Finally, he awkwardly fires at Jacobi, hits him and then chases him around a wagon where he shoots him again. A soldier then uses an automatic weapon and finishes the job, but that shooting seems gratuitous. Jan killed Jacobi.

Jan changes. He is now toughened. He will live. He does not seem traumatized but rather determined.44 When Eva says she will not go with him, he tells her that her absence will make his opportunities easier. She follows. But I think, in fact, despite her strength and palpable humanity, Jan has always been in control in the relationship. He has the control of the suffering one as well as the virtuoso husband who has been the

44 He is not an example of the beserker that Jonathan Shay exemplarily describes in his excellent analysis of war trauma that relates Homer’s Achilles to Vietnam War veterans suffering post traumatic stress disorder. See Jonathan Shay, Achilles in Vietnam, Combat Trauma and the Undoing of Character (1994).
object of desire of other women. Eva looked toward him to no avail. Now he is in command.

On the road, they encounter an exhausted young soldier, Johan. Eva makes Johan feel comfortable. He falls asleep, but Jan grabs Johan’s rifle, awakens him and chases the terrified boy down the road. Jan returns with Johan’s boots and information about a boat that will be leaving the next morning. Jan killed the boy, but not for the boy’s boots. He could have had them anyway.

Filip, who replicates Jacobi in seemingly changing character, is the boat’s captain. With some irony, Filip accepts Eva and Jan as passengers. When Jan approaches Filip for passage away from the war, he does not bother to negotiate price. He offers the whole of the twenty-three thousand of Jacobi’s “gift” to Eva. Although unstated in the film, the script specifies that the boat is on the water seven days. The world may have been created in seven days, but there is no creativity on this boat as its inhabitants either struggle to stay alive or resignedly give up. To the viewer, the horror is undifferentiated. At an early point on this death voyage, Filip lifts himself over the side and commits suicide. We do not know if this was always Filip’s intention.

Jan, however, struggles for survival and nothing more. His life is revealed as having survival and little more as his principal motivation. At one point, the boat is hindered by the bodies of dead soldiers. With grim determination, Jan plows through the bodies, moving them aside with an oar. Jan killed Jacobi to save his own life. He had good reason to believe that Filip would kill him if he did not kill Jacobi. He kills to protect himself. But he killed Johan for no good reason. When Filip goes over the side of the boat, Jan seems unconcerned. He pays little attention to Eva and her needs, as he paid no real attention to her desire for a child. More than anyone, he keeps up the struggle on the boat, fighting through the dead bodies. Yet, he does not reach out to respond to anyone beyond his own need. Though he is now a murderer and has lost his music, he seems more ruthless and in command. He has no guilt or

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45 Emmanuel Levinas would point out that Jan’s incapacity to respond to another limits the meaning of his own life. See, e.g., EMANUEL LEVINAS, ETHICS AND INFINITY; CONVERSATIONS WITH PHILIPPE NEMO 65-72 (Richard A. Cohen trans., 1985) [hereinafter ETHICS AND INFINITY] (noting where Levinas talks about relating to the feminine and also to paternity; in each case the self must reach toward the mystery of the other and yet remain self).
shame. These are irrelevant behaviors. Nor is this state a consequence of war.

The film ends with the survivors at sea, rudderless, with a watery horizon, seemingly out of food and water. Where horizon can mean openness, freedom, here the implication is a desert of inhuman, endless despair. Where water symbolizes life in Bergman’s *Virgin Spring,* here it represents a meaningless, inescapable death. Jan has negotiated himself to a loss of meaning and caused loss of life. Eva is left with a dream of an infant and the intimation that Jan would “tell me the important thing that I had forgotten.”

B. **Theological Implications of Shame**

In the 1960s, the then most famous scholar of the Frankfurt school in the United States, Herbert Marcuse, wrestled with the possibilities of emancipation from a one-dimensional society, a society so bureaucratically rationalized that there was little escape from futile consumer-deluded

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46 *Virgin Spring* was released in 1960. Sven Nykvist was the director of photography.

47 The script is not quite so bleak in the final interaction between Jan and Eva. In the script’s ending, on the sixth day Jan turns to Eva, “wondering what it said in those letters we wrote to each other during the summer tour. Whether it said ‘My hand in yours’ or ‘Your hand in mine.’” Eva answers “it said ‘My hand in yours.’” See INGMAR BERGMAN, PERSONA AND SHAME, THE SCREEN PLAYS OF INGMAR BERGMAN 191 (Keith Bradfield trans., 1972). The last instruction on the script states in italics: “On the seventh day a storm blows up, and there is a heavy rain. The survivors slake their thirst with poisoned water.” *Id.*

The film generally presents a bleaker view than the script. Bergom-Larson observes Bergman’s different use of class in the script. BERGOM-LARSON, *supra* note 35, at 97. In the script, a scene near the end of the movie has a tank pointing toward the fleeing boat, calling out the names of the upper class occupants of the small boat trying to escape the war. Several of the escapees are called out by name, but Jan and Eva are not even mentioned. In the script, Jan demands why their names are not called with the others who are upper class and have been corrupt. The implication is they lack importance. But Bergman dropped this scene and its Marxist message from the film. Bergom-Larson takes the position that the vagueness of the competing sides in the war, and the compassion for Jacobi, who she understands to be only a torturer, sentimentalizes the movie and removes the moral gravitas against an unjust war and against injustice itself in a more general apolitical attack on human violence. *Id.* at 95-96. Bergman fails in his quest to show the relationship between inner and outer violence because “it lacks any social or political contours.” *Id.* at 101.

Another example of a change from the script to the film is the action around the boy Johan, the young soldier who deserted the war. The script makes Jan’s motivation for killing him something more than gratuitous. Jan and Eva kill him to take his place on the boat escaping the island and the war. But in the movie, Johan knows about the boat’s prospective leaving, but he has no reserved place and it is not clear that he had the money to get on the boat. Jan claims to shoot him for his boots in the film, but that seems a rationalization for a new indifference in Jan concerning murder.
seduction. Even before his *One Dimensional Man*, Marcuse argued in a debate with Norman O. Brown that only a change in capitalistic culture could free the individual from enmeshment in a soporific society dedicated to tepid self gratification. With a real loss of the essence of polymorphic perversity, Marcuse found, contra Freud himself, in Freud's insights. For Marcuse, only a cultural revolution would free the individual from a deadening society; Brown saw the possibility of individual salvation.

In his own terms, Bergman sets forth a similar quandary. Can the individual escape from a culture whose violence threatens to destroy him physically as well as psychologically? Is there a relationship between individual salvation and ethical obligation? How and why commit to a side when the various sides are equally ideological, sanctimonious and corrupt?

Bergman does more than merely culturally relativize violence and equate moral social ambiguity with a rationale to escape responsibility. He makes clear the cost of avoidance, even if he does not solve the institutional question any more than did Plato or Marcuse. The war for Bergman is real but, whatever his qualms, the moral questions in the war's ambiguity are strengthened and universalized beyond Vietnam. So what does Bergman present? How plausible is his representation of the ethical, and what does he point to as

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50 See Herbert Marcuse, *Eros and Civilization, A Philosophical Inquiry into Freud* (1955) [hereinafter EROS AND CIVILIZATION] (arguing how Freud can be appropriated for social liberation at the political level). Marcuse carries his cultural analysis along in *One Dimensional Man*. See supra note 48.


53 Julia Annas persuasively argues that Plato is more successful in arguing for the possibility of a man being just despite a corrupt society than Plato was in drawing up the foundations for a just state. See Julia Annas, *An Introduction to Plato's Republic* (1981). See also Julia Annas, *Platonic Ethics, Old and New* (1999).

54 See supra note 35.

55 Emmanuel Levinas would later posit that the ethical is prior to ontology. See, e.g., Emmanuel Levinas, *Totality and Infinity* (Alphonso Lingis trans., 1979);
any way out for the cowardly, befuddled Jan and his dependent wife Eva Rosenberg? In fact, I argue that no one in the film escapes the loss of self and soul as they work through their respective roles in the narrative. At best, the resistance leader Filip, at first blush, seems to possess a quiet dignity. The torturer, interrogator and Quisling, Jacobi, also seems to possess a human dignity when confronted with certain death. But does either possess an ethical dignity rather than the aesthetic choice Søren Kierkegaard identifies in his opposition of the “either” of the ethical to the “or” of the aesthetic? 

Martha Nussbaum argues for the continued relevance of Hellenistic philosophy for contemporary edification. The Epicureans, Stoics and Skeptics all shared an understanding of the corruption in the politics of their times. She argues these schools differed on the individual’s ethical obligation against widespread social corruption. She counsels a reasoned modification of attitudes on coveting unnecessary material objects. Happiness and psychological health depended on calibrating desire to the necessary or natural, not to socially induced, artificial need. Jan and Eva certainly acted in accord with this wisdom. They separated themselves and reduced their desires to human maintenance. But they could not thereby escape the shame that the dominant political forces visited on them. In declaring the self a non-political person, Bergman clarified that, like Aristotle, he understood that humanity is essentially political. Shame exemplifies the essentially social nature of beings, no matter what the social construction of the self might be.

Dietrich Bonhoeffer argued in his Ethics, written while in prison, that human responsibility sometimes entails transgressing the laws of man and God. We owe an obligation, a response to the other in need. And we must put ourselves on the line, whatever the prevailing ethics. In fact, Bonhoeffer, citing the exile from Eden, argued that Western ethics itself has been a defense of narcissistic, sanctimonious deceit. We are

Emmanuel Levinas, Otherwise Than Being or, Beyond Essence (Alphonso Lingis trans., 1991).

56 See supra note 36.
57 See SØREN KIERKEGAARD, EITHER/OR (David Swenson et al. trans., 1944).
59 Id. at 501.
60 See supra note 8.
estranged from God and wish through ethical rationalization to assuage our self-esteem by ethical nicety. Nietzsche, not Kant, was the philosopher against whom Bonhoeffer measures his analysis. For Bonhoeffer, the particularity of the others’ need, not a universalized imperative, dictates responsible action.

But Bonhoeffer tempered his demands on the individual. He posed three mandates that command fidelity: state, family and church. As a Lutheran minister, he remained an authoritarian. But at moments of breakdown, when at the abyss, the individual must respond despite the empirical reality of the mandates, and incur whatever guilt necessary on behalf of another. His position, however, was not one of passive witness or civil obedience when the situation commanded response. But the situations at the edge are not everyday. They are limited to the kind of breakdown the Nazi thrust exemplified. Bonhoeffer eschewed the possibility of a rule-bound ethics, Kantian or otherwise. He could not, however, state when one should respond beyond the mandates and transgress for the other. He thought such states were necessarily atypical; we should all remain bound to Caesar, the family and the Church. In this he followed Luther, who himself followed Augustine and ultimately Paul, who called forth an ethos that grounded obligation in the city of Caesar and hope in the city of God.

The predicate for Bergman’s Shame, however, is a state of war. War is the situation wherein Bonhoeffer felt compelled to reach beyond institutional structure. War has been seen as a deviant case, one where normal civility falls apart. Deviant cases mark and define the normal. But the conditions of the war in Shame do not reach its players except as a backdrop of anxiety. Only when the war actually comes to their very doorstep do we see a significant change in their respective characters; they move to the island to escape the war, but otherwise they remain the same. Further, the shift to war,
while extreme, is part of a continuum in the movie, problematizing the boundaries of Bonhoeffer’s authority structures.

Who can determine when the abyss is present, when action demands transgression? Bonhoeffer’s inbred, Lutheran, authoritarian bias may be unhelpful for those who fail to respond to such internal Protestant constraints. And individual transgression may be justified on Bonhoeffer’s own grounds. Jan and Eva Rosenberg tried to opt out of a war but were not allowed to. The war came home. We cannot say whether the war changes the Rosenbergs. Does it bring out what is latent or does it effect structural, characterological alteration through terror or trauma? What is within their respective compasses, and what must be understood as bad moral luck? These are among the classical questions clustered in discussions of responsibility.

C. The Elision of Shame and Guilt

Levinas maintains that everyone owes an asymptotic responsibility to the other, stranger or intimate. As in Bonhoeffer’s view, this responsibility is ethical, called forth by the face of the other and not limited to any natural, i.e., ontological mandates. Levinas deems it essential for one to possess awareness of shame. None of the characters in Shame understand this position—to their shame. In the film’s interactions there is not any sense of shame. The Rosenbergs tried to avoid the war and any commitment to a life beyond themselves.

Jan and Eva change indeed but viewers may differ on the reasons for, and their personal control over, the changes. If Jan is the narcissist, locked into himself and survival at all costs, Eva, alternatively, is a lovely, vibrant, compassionate human being. But she is dependent on Jan. For Levinas, this would in some ways be an ethical strength in that Eva understands her need for the other, in this case Jan. But Levinas understands that responsiveness to the other must occur at a certain level of human development. Understanding, and responding to, the other becomes meaningful only when a certain security in the self is achieved, a certain level of

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See, e.g., Emmanuel Levinas, Time and the Other 110-16 (Richard Cohen trans., 1987).
narcissism. For Levinas, one must reach a certain level of autonomy to appreciate that an autonomous state is insufficient for psychological development and a recognition of the obligation of responsibility to the other.\textsuperscript{67} A reaching out to the other without a prior sense of self does not mark the ethical attainment of responsible action. Nevertheless, one must credit Eva; her first response is toward others—the parachutist who is part of the attack on the island and Johan, the boy soldier trying to flee the war. She even seems to respond to Jacobi, moving beyond her fear of him, because he appeals to her nurturing tendencies, certainly not because of his gifts. She may also have responded to Jacobi out of disgust at Jan. Levinas’s “difficult freedom” demands an adult developmental attainment.\textsuperscript{68} Eva’s impulses are a necessary but insufficient reaching out of herself. Ultimately, she remains in thrall to Jan, who, as usual, is not there for her.

In what way does Eva express a face of shame, a lack of responsiveness? Bergman indicates no harsh judgment toward Eva. Indeed, Bergman makes even Jan human. This is his very point. Eva’s incapacity may be her strength. She is committed to Jan and her marriage even in the face of his cowardice at the beginning of the film and, later, in her despondent passivity toward him in the face of his brutality. Ultimately, however, her impulses are more human, responsive and attractive than Jan’s.

Would her “being in the world” present a problem for Levinas’s philosophy? He would understand her reaching out and her impulse toward caring for the other, even the stranger in need.\textsuperscript{69} He would be less judgmental than Bergman. He would point out that Eva’s incapacity to follow through effectively on her humane impulses hurt and infantalize her.\textsuperscript{70} The war, an extreme state, reveals her implicit regard for others. It also reveals her ultimate dependency on Jan. She may well have stayed with him had there been no war, more adultery and no children.

\textsuperscript{67} See Levinas, Ethics and Infinity, supra note 45, at 52.
\textsuperscript{68} See Emmanuel Levinas, Difficult Freedom: Essays on Judaism 11-23 (Sean Hand trans., 1990).
\textsuperscript{69} See Emmanuel Levinas, Toward the Other, in Nine Talmudic Readings 12-29 (Annette Aronioiwicz trans., 1990).
\textsuperscript{70} Id. In Nine Talmudic Readings Levinas indicates his understanding of the difficulty of forgiving, in his case Heidegger. His work and ethos call for compassion and a recognition of the difficulty of becoming separate and then responding to the other.
Jacobi, Filip and Lobelius, the antique dealer, must be accounted for as well.\textsuperscript{71} Jacobi, the mayor turned enemy Quisling, presents himself as a man who feels little except during the pain of others, despite his seeming sense of dignity.\textsuperscript{72} He preys on Jan to reach Eva, who sees through him but is certainly resigned and afraid. In his attempt to seduce Eva in front of Jan, he says he is lonely and alienated. “Eva give me a kiss. Jan won’t mind.” Jacobi’s character is perhaps the significant, explicit attack on the artist society’s parasitic nature and lack of responsibility, a general theme for Bergman. Jacobi has a wife, a son and a grandson; yet he gives the family’s heirlooms away. Eva certainly is attractive, but Jacobi does not seem a passionate man; his approach to her expresses a kind of need for intimacy. Perhaps he is a sadist, one who gets sexual pleasure from the suffering of others, both Jan and Eva. But Bergman presents him with sympathy as well. He dies well, too. He is a man who expresses authority, dignity and familial responsibility but ultimately lives a lie. The war brings out, but does not cause, his response. The war reveals that he has no sense of shame and that the responsibility he previously exemplified was a misrepresentation. His behavior did not make him grow or take him outside himself toward any other.

Filip, at first blush, provides the model for responsible, committed action. A contrast to Jacobi, he seems to keep the faith. At the beginning of the film, we first encounter Filip as a pastoral fisherman who sells fish to Eva when she and Jan are on their way to deliver berries. We later learn that he is the leader of the resistance. He seems a man of dignity, justice and commitment. When Jacobi presses his friendship on the Rosenbergs primarily to get to Eva, Filip warns Eva and Jan to avoid Jacobi. When Jacobi offers a trapped Filip his life for money to continue the resistance, the viewer, and more importantly Filip, seems to take him at his word. He will honor the deal. He does kill Jacobi—a turncoat—but only when Jacobi cannot recover the money he gave Eva. Bergman never makes clear what Filip or the others fought for. At the very end Filip wavers. He captains the escaping boat, but his true intent is murky until he eases himself over the side to a watery grave.

\textsuperscript{71} See supra note 73 and accompanying text. A few other characters who are tortured show courage and care but they are supplementary, serving to highlight Jan’s deficits.

\textsuperscript{72} BERGOM-LARSSON, supra note 35, at 96.
His resignation is not without dignity, but he abandons the refugees who paid him to escape. While Bergman seems to sympathize with Filip’s choice, he undercuts the most committed character in the film. He leaves viewers with another betrayal, a lack of shame in the face of a resigned death.

Bergman provides other reflections relevant to shame and responsibility in capturing the Rosenbergs’ social relations. For example, there is a scene where Jan and Eva, having earned more money than expected selling their berries to the Jacobis, buy a good bottle of wine from Lobelius, the musty antique shop keeper. Lobelius appears in an old uniform. He has been drafted. An elderly man, he worries that he will be sent to fight and no one will miss him. His cleaning woman will look after the shop, but even she, with whom he sleeps once a week, will not miss him. Lobelius shares a bottle of fine wine with Eva and Jan and sells them one of his last bottles to go with Filip’s fish. He also shows them a fine antique Meissen porcelain music box. Eva and Jan express a perfunctory sympathy. That they meet the scene, with its aged objects from a dead past and old antique dealer, with merely conventional concern leaves a sense of melancholy and failed community. Jan and Eva want to leave, to eat their fish and drink their wine. They leave Lobelius confused, afraid and alone.

Shame as an emotion can mean humiliation. But Shame also represents the sense that the characters and the culture that produced them are shameful, worthy of blame. Here, the long debated relationship between shame societies and guilt societies arises. The issues go to individual attributions. How does shame differ from guilt? If there are differences in the two terms, how do they affect our understanding of responsibility? Bergman’s characters seem locked into the shameful. They express no sense of guilt. But it is not clear whether shame is a felt emotion, as opposed to a cultural structure and behavior, regardless of felt emotion.

When I interviewed for admission to study at The Institute for Psychoanalysis, Gerhard Piers asked how I would

73 The script for the film indicates that the shop is filled with “objects (vain, meaningless, fragile, ugly, indispensable).” BERGMAN, supra note 47, at 120.

74 This is certainly a theme, perhaps the significant theme, in Bergman’s film work. See LIVINGSTON, supra note 7.

75 See GERHARD PIERS & MILTON B. SINGER, SHAME AND GUILT, A PSYCHOANALYTIC AND CULTURAL STUDY (1971).
differentiate between shame and guilt. I told him that guilt referred to an act. One conceivably could pay for the act through punishment or be granted forgiveness. Shame was an attack on one’s being regardless of a particular act. Bernard Williams’s noted study holds that guilt results from an internalization where the internalized imago is anger and the subjective feeling is fear. Shame, according to Williams, arises from the humiliation of being watched and found lacking. Piers told me that he used to think along the lines I suggested, which accorded with Williams’s view, but came to the position that the two states could probably not be differentiated. While wandering through a bookstore after my interview with Piers, I found a copy of Piers and Singer’s Shame and Guilt. Piers never mentioned his theoretical contribution to the distinction.

Psychoanalysis still has much to teach about the intra-psychic organization of the individual patient, including the shame/guilt differentiation. It also may be suggestive of the ways in which culture helps shape the internalized world. Bergman, however, makes the case that shame reveals more about social and individual denial or, even more significantly, a failure of a social imperative of responsibility to the other. In the world of Shame, neither guilt nor shame prompts any significant character toward responsible action. Talking about a guilt or shame culture is not relevant to the motivation of the film’s characters. Piers observed the way in which shame and guilt are intra–psychically confounded or not differentiated, picking up on a culture of narcissistic inwardness where success is counted in materiality and appearance, and where tending one’s own garden is the exemplary ethos. Bergman shows us a world where guilt and shame ceased to affect human response. He shows us a set of consequences where such emotions no longer motivate.

76 BERNARD WILLIAMS, SHAME AND NECESSITY (1993).
77 See id. at 220.
[T]he root of shame lies not so much in observed nakedness itself, but in something of which that is, in most cultures, but not all, a powerful expression. . . . The root of shame lies in exposure in a more general sense, in being at a disadvantage: in what I shall call, in a very general phrase, a loss of power. The sense of shame is a reaction of the subject to the consciousness of this loss: . . . “it is the emotion of self-protection.”
Id. (quoting Gabrielle Taylor’s phrase).
78 See PIERS & SINGER, supra note 75.
Paisley Livingston argues against those who view Bergman's often bleak cinematic worlds as nihilistic. Livingston urges that Bergman presents our world to us for an assessment of our actions (and inactions), for consideration of how any change or transformation may be possible, if even called for. Bergman, that is, is bearing witness. From this perspective, a set of questions arise from *Shame*. What is Bergman showing us about basic human relationships (1) between the self and the self, and (2) between the self and significant others, the self and more generalized sociality, and the self and the institutions that constitute the formal and informal modes of governance?

III. JERUSALEM AND ATHENS: THE THEOLOGICAL APPROPRIATION OF PHILOSOPHY FOR AN ETHICS OF RESPONSIBILITY

A. Levinas and the Ethical Over the Ontological

The individual psychology of the characters in *Shame* affirms the ethical position of Emmanuel Levinas. Levinas follows in a long line of philosophers who sought to bring philosophy into the service of theological concerns, bringing the tools of Athens under the revelatory dictates of Jerusalem. Perhaps more than any other philosopher, Levinas makes the argument for what he calls a scandalous position: that ethics precedes ontology. Levinas means that an individual cannot

79 See LIVINGSTON, supra note 7, at 15-21.
80 Id. at 20.
81 I examined the work of Levinas on responsibility and law elsewhere, so I will summarize my views. See Leonard V. Kaplan, *Intentional Agency, Responsibility and Justice*, in *INTENTIONS AND INTENTIONALITY: FOUNDATIONS OF SOCIAL COGNITION* (Bertram Malle et al. eds., 2001). From his first recognition, for his translation of Heidegger's *Being and Time* and his footnoted place as Jacques Derrida's teacher, Levinas, even before his death, gained recognition as a significant philosopher in his own right, engendering a still growing critical commentary.
82 I should make clear that the Islamic thinkers Averroes and Avicenna made Aristotle available to the Jewish philosopher Maimonides, who, in turn, was read by the Christian Alfred and Alfred's student St. Thomas Aquinas. In the ninth century, before Maimonides, the Jewish theologian Saadia Gaon brought philosophy to Jewish thought. Of course, even early in the first century, the Jewish philosopher Philo, who was more influential on Christian than Jewish thought, had already incorporated Greek philosophy into his thinking about Jewish theology.
83 See, e.g., LEVINAS, *NINE TALMUDIC READINGS*, supra note 69; LEVINAS, *ETHICS AND INFINITY*, supra note 45 (containing an influential interview with the philosopher Philippe Nemo).

Arguably, and truly from Levinas' point of view, he shares his position with
achieve any real personhood without making the ethical central to personal development. Without the primacy of the ethical we are lost as individuals. For Heidegger, ontology culminated in the authenticity of the Nazi regime.\textsuperscript{84} The logic of authenticity and the care of ontology fundamental to Heideggerean philosophy demanded universalizing the particular (Nazi racial theory) into an all-encompassing being for the other who was now in concert with yourself.\textsuperscript{85} Heideggerean ontology, from Levinas’s point of view, celebrates sameness, not the particularity that an individual soul brings to existence.\textsuperscript{86}

In historical terms, Heidegger was able to prefer as the universal class of existence the peasant class with its conservative tendency toward the authoritarian, a class that ironically tamed existence into a sameness that ultimately privileged Nazi mechanization. The necessity of recognizing the particularity of an individual soul grounds Levinas’s ethics of responsibility with respect to what is owed the other and the third. Further, by demanding that the ethical precedes ontology, Levinas also attacks any idealization or idolatry of theory or practice.\textsuperscript{87} He attacks any theoretical or practical totalization where the individual is lost to a greater entity. This even includes the state, itself a precarious third for the pragmatics of justice. The third marks the position of institutions and justice in Levinas’s account of his prophetic

one of the most quoted and perhaps least read of twentieth century Jewish thinkers, Franz Rosenzweig. See, e.g., ROBERT GIBB, CORRELATIONS IN ROSENZWEIG AND LEVINAS (1992). Levinas acknowledges his debt to Rosenzweig often. See, e.g., LEVINAS, ETHICS AND INFINITY, supra note 45, at 78; STEPHANE MOSES, SYSTEM AND REVELATION: THE PHILOSOPHY OF FRANZ ROSENZWEIG (Catherine Tihanyi trans., 1992).

See, e.g., LEVINAS, ETHICS AND INFINITY, supra note 45, at 100-01. See also ETHICS AS FIRST PHILOSOPHY, THE SIGNIFICANCE OF EMMANUEL LEVINAS FOR PHILOSOPHY, LITERATURE, AND RELIGION (Adrianne T. Peperzak ed., 1995). The notion of ethics as first philosophy is that ethics makes the humanity human. Fabio Ciaramelli captures Levinas’s struggle to get at the concrete experience of ethical responsibility and the necessity thereby to go beyond (prior) to the language of ontology. See Fabio Ciaramelli, Levinas’s Ethical Discourse Between Individuation and Universality, in RE-READING LEVINAS 81-105 (Robert Bernasconi & Simon Critchley eds., 1991).

\textsuperscript{85} For an important analysis of Levinas’s political philosophy, see HOWARD CAYGILL, LEVINAS AND THE POLITICAL (2002).

\textsuperscript{86} Levinas is concerned with the way in which Heidegger, particularly in his later work, moves away from particularity of the individual’s concrete being and responsibility to an abstracted concept of existence. See, e.g., LEVINAS, ETHICS AND INFINITY, supra note 45, at 40-44.

\textsuperscript{87} EMMANUEL LEVINAS, IN THE TIME OF THE NATIONS 55-75 (Michael B. Smith trans., 1994).
politics—but a precarious and often unreliable third. Justice for Levinas precariously partakes of an overlapping of ontology and ethics. The state may be a necessary institution to ground justice but it also often reifies into an oppressor itself. Ultimately, in his prophetic politics Levinas also ratifies Plato’s insight that justice can and sometimes only lies in the just person who can and must resist institutional oppression.

Levinas differs from Bonhoeffer in his historical judgment that existence is always either in the market place or at war. Peace is precarious and the state cannot be trusted as the guarantor of justice. Bonhoeffer seems to argue that the state, though flawed as a divine mandate, is generally good enough for human deferment. In *Shame*, Bergman exemplifies the borderland between Levinas and Bonhoeffer.

Bergman did not intend the kind of apology for war like the thinker Carl Schmitt’s philosophy reflected. Schmitt’s liberalism was both soft with no meritorious telos and too strong; it weakened the human spirit, which required the agon of struggle (side against side) to create human meaning. Bergman’s poetic, in fact, is beyond a governmental configuration. Whatever informs the competing sides does not justify the war’s violence.

Levinas, a Jew, and Bonhoeffer, a Protestant, each wrote in the face of World War II. Each generalized notions of responsibility informed by that struggle to something more universal. A Czech thinker, Jan Patocka, also starts from Edmund Husserl and Heidegger as does Levinas. Patocka incorporates Christian, likely Catholic, theology into the center of an analysis of human history and of a responsibility that is necessary to the struggle against the nihilism engendered by the Nazi experience. To what extent do we need historical

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88 See Levinas, *Totality and Infinity*, supra note 55, at 233 (stating Levinas’s position that market relations and war are constant, though commerce is a better state than war). See Caygill, *supra* note 85, at 94-107. For Bonhoeffer the state is “a restrainer,” a “force for order” one of the mandates that express God’s will for humanity’s good. See Bonhoeffer, *supra* note 8, at 55.

89 Bonhoeffer remains a good Lutheran except at times of extraordinary crisis, given his commitment to the Lutheran worldview of the two kingdoms, one of God and one of Man, each of which has his place and must be obeyed. See Bonhoeffer, *supra* note 8, at 55.

90 For one solid presentation and criticism in the literature concerning Schmitt’s critique of liberalism, his ties to the Nazi regime and his place in liberalism’s right wing enemies, see William E. Scheuerman, *Carl Schmitt: The End of Law* (1999).

91 Like Bonhoeffer, Patocka gave his life resisting an evil regime. He was the
specificity to ground responsibility and to affect character responses through shame, guilt or some other mechanism to care for others? Is the debate about republican or liberal forms of governance instructive toward creating more responsible subjectivities? Patocka provides historical analysis toward a history of actualized responsibility, one that fruitfully contrasts with Bonhoeffer and Levinas. Patocka furthers Bergman’s representation of the war and shame as silencing responsibility as human institutional and everyday practice.

B. Patocka and the Relationship of the Material Base to Responsibility

Patocka, like Bonhoeffer, was the victim of a repressive regime. He was not allowed to teach or publish in Czechoslovakia because he was antagonistic to its totalitarian brutality. He became a leader of the dissent and was ultimately killed at the hands of the police during forced interrogations. Only now is his work being translated into English and becoming widely known.

Patocka was a student of Husserl and Heidegger and had command of their respective work. Heidegger is very much in the background of Patocka’s essay on European decadence. Heidegger’s notion of authenticity is thematic to the analysis. The Heideggerian attempt to capture human existence and ontology relies on the notion that only when the self confronts death can it live an authentic life. The function of true philosophy is to teach how life can be so lived. In short, there is a right and a wrong way to live. Following Heidegger, Patocka fears that Western civilization through technology veered toward decadence and the inauthentic. Since the rise of capitalism, various thinkers of left, right and center feared the extent to which technology could so dominate consciousness as

spokesman for the Charter 77 movement that demanded, in 1977, that the Czech government adhere to universal human rights commitments. His exhaustive interrogation by the police cost him his life before his seventieth birthday. See JAN PATOCKA, HERETICAL ESSAYS IN THE PHILOSOPHY OF HISTORY 161 n.2 (James Dodd ed., Erazim Kohák trans., 1996) [hereinafter HERETICAL ESSAYS].

92 Id. at vii.
93 Id. at vi.
95 PATOCKA, supra note 91, at 95.
96 Id.
to undercut self-awareness and human awe at the mysteries of existence, without, however, coming to theological speculation.

Patocka has the credentials that Heidegger sorely lacked on his biographical commitments to responsible and just action. Like Bonhoeffer, Patocka grounds his analysis on the essential nature and the possible development of Christian theology. He is both deeply Christian and critical of the Christian practice of responsibility in Europe.\textsuperscript{97} He contends that Christianity has for a long time informed and dominated the metaphysics of responsibility in Europe.\textsuperscript{98} He claims that Christian influence dominated and subsumed the Greek model that prevailed in the West to motivate and rationalize responsibility.\textsuperscript{99}

Patocka’s analysis uses Plato’s Greek model with respect to the unification of thought toward a general, overarching, integrative good. Lenn Goodman, in his recent \textit{God of Abraham}, argues that Jerusalem and Athens share the common genius of organizing meaning into an integrative quest for the good, and that pluralism can contribute to more subtle and nuanced elaborations for determining the human good.\textsuperscript{100} Patocka, however, in his genealogy of good to God, Greek to Christian, differentiates very different stances in the world predicated on Greek good or Christian God.\textsuperscript{101}

Patocka asserts the triumph of the Christian over the Greek in the metaphysics of responsibility, not as a sectarian matter, but as historical fact. Bernard Yack noted that postmodern discourse notwithstanding, certain traditions have maintained themselves through history through uninterrupted argumentation, clarification, commentary and the like.\textsuperscript{102} Patocka takes the view that the Christian model has been ideologically dominant for the West since its elaboration. Derrida is convinced by Patocka’s assertion that Western responsibility, or at least European responsibility, is Christian.\textsuperscript{103} (This claim does not mean that there are not other competing, lower visibility traditions like Judaism and Islam.)

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\begin{itemize}
  \item \textsuperscript{97} \textit{Id.} at 95-108.
  \item \textsuperscript{98} \textit{Id.} at 107-18.
  \item \textsuperscript{99} \textit{Id.} at 106-07.
  \item \textsuperscript{100} L.E. GOODMAN, GOD OF ABRAHAM (1996).
  \item \textsuperscript{101} \textit{Id.}
  \item \textsuperscript{102} BERNARD YACK, THE FETISHISM OF MODERNITIES: EPOCHAL SELF-CONSCIOUSNESS IN CONTEMPORARY SOCIAL AND POLITICAL THOUGHT (1997).
  \item \textsuperscript{103} DERRIDA, supra note 94, at 1-35.
\end{itemize}
What then constitutes the Greek and the Christian for Patocka’s analysis? Patocka grounds his Greek representation on Plato’s rendition in the *Symposium* of Socrates’s interaction with male beauty and the lesson that he teaches. Plato ascribes Socrates’s wisdom to his female sage—Diotima. Patocka argues that the Platonic move pushes philosophy past the exuberance and delirium associated with previous Greek religiosity that signified the human will for ecstatic merger with the Godhead. Plato has Socrates separate himself from the need to fuse. Socrates recognizes the need as desire and the desire as an impediment to spiritual growth. Individuation, not orgy, is the Socratic instruction. The beautiful is the good to which reason points, or it points to nothing at all and can only be obtained by consciousness through the frustration of desire. Socrates banishes orgy. Socrates also establishes the intent to act so as to achieve higher understanding as something very different from the will to power. As Euripides discerned and warned, however, Dionysus is not so readily dismissed.

According to Patocka, Christianity, in its triumph over the Greek good and its rationality, historically and metaphysically instantiated a Christian representation of God as the model of human responsibility. Patocka’s sense of Christian responsibility identifies God as a “Person who sees into the soul without being itself accessible to view,” exemplary of responsibility over the more rational commitments exemplified by Maimonides and, at least probably, by St. Thomas Aquinas. Mankind as an image of God has occupied Old Testament commentators from the very beginning of commentary. Maimonides, the famous Jewish metaphysician and rationalist, argued in *The Guide of the Perplexed* that humanity is Godlike in its capacity to reason, not in any

105 Id.
106 *Patocka, supra* note 91, at 103-06.
108 *Patocka, supra* note 91, at 107.
identification with a corporeal object representing God. In this, Maimonides is in accord with Plato and Aristotle, both of whom influenced his thought. He, in turn, integrated Aristotle into the work of the great Moslem theologians, as did Thomas Aquinas, who, like his teacher, studied Maimonides.

Patocka’s point is that God’s transformation to human form, forced to experience human passion, suffering and finitude, provided a model of human responsibility more intimate and less cerebral than the Greek good. Patocka, however, both laments the potential twilight of the Christian revelation and the fact that it did not enter more deeply and critically into human consciousness. He argues that there is much to develop in Christian responsibility. He fears that technocracy invaded human consciousness to such an extent that the Christian moment of revelation becomes nugatory.

Where Patocka agrees with Heidegger about the causal, dire implications of technology for the human spirit, Levinas, recognizing the problem of technology, maintains that technology is necessary for humanity to respond adequately to food shortages and famine, to provide for the substantive good for individual existence. But Heidegger’s notion of care and its ontological centrality to his philosophy is sterile and abstract. This is the point of Patocka’s insistence on the particularity of the Person as a model of human responsibility. But the Person remains *mysterium tremendum* and, therefore, secret, not worked through in Christian and not, therefore, the European self-understanding of responsibility. And now we are in danger of losing that advance over the pre-Platonic moment. Regardless of the status of technology, aiding or mystifying human existence cannot be universalized without losing the difference required by individuals who are at very different levels of development, capacity and need.

Hans Jonas, another student of Heidegger, makes this point much like Patocka. In his general discussion of the role of philosophy in everyday life in his essay, *Philosophy at the End of the Century*, Jonas criticizes his brilliant teacher on two
points. First, Jonas attacks Heidegger’s concept of care for its sterile quality, his failure to really probe what human care must entail. In his analysis, Jonas observes that Heidegger follows an ideal strain in philosophy that separates the human spirit from fundamental, everyday bodily need. Jonas also notes the fissure between Heidegger’s ontology of care and his practice in the world as the rector of a university that embraced Nazi ideology and his repudiation of former colleagues and friends for their Judaism or other anti-Nazi commitments. Jonas wonders about the brilliant Heidegger’s support of evil in the world and contrasts Heidegger with another of his philosophy teachers, Julius Ebbinghaus, whose “strict and uncompromising” Kantianism supported him in a steadfast resistance to Hitler. Heidegger’s atrocious behavior and brilliant philosophy, and Ebbinghaus’s less original philosophic commitments but ethical heroism cause Jonas to question philosophic brilliance and the philosophic project itself as it relates to living the wise and just life.

Patocka cautions that we are subject to losing the principal issue of actualizing a Christian responsibility with the many particulars that engage human thinking and practice. Technology is here to stay. Any attempt to claim that it has confounded the human spirit as the independent factor must come to terms with how to harness technology so it does not hide the question of human responsibility. But the various attempts to demonize a particular set of human practices and institutions for causing a falling away from human responsiveness to the other must reconcile the fact that Western theology and philosophy have grappled with the deficit of human care for the other. Western societies have engaged this problem, from the Hebrew prophets and Jesus’s Sermon on the Mount to Plato’s attempts at providing arguments and maps for just people even in unjust conditions. Neither technology nor capitalism caused the existence that Bergman directs at us to our shame.


116 Jonas, Mortality and Morality, supra note 115, at 47.

117 Id. at 49.

118 Jan Patocka, Is Technological Civilization Decadent, And Why?, in Heretical Essays, supra note 91, at 95. In this essay, Patocka analyzes the genealogies of responsibility that undergird Western metaphysics.
CONCLUSION

In *Shame*, Bergman makes clear that self-defense, confined to self-protection in the face of evil, can assure survival. But the survival gained, if gained, is at the cost of human meaning. So what do we owe to the other? Bergman, Bonhoeffer, Levinas and Patocka suggest everything—and for our own good. When Plato argued in *The Republic* that justice is such an intrinsic good that it is better to be just and appear foolish, he set an unpersuasive standard philosophically. Patocka’s claim that the Christian notion of responsibility must be actualized or we will face a fall greater than that of the abyss of World War II falls on deaf ears. The world seems to negate both Plato’s insistence for the just life and the prophets’ or Christian call for responsibility to the other. Manachean heresy seems to be winning the day. Too many are being forced into the rhetoric and practice of crusade. The return of the repressed implication of the ontological reality of choosing sides between a putative necessary good or evil, of evil empires and axes of evil, ignores what Bergman’s *Shame*, as an already forgotten work, taught: The loss is ultimately ours. Bergman does not tell us what to do but shows us what inaction does. We will ignore the civil rights of a class of citizens in the name of security and it will be common sense to do so. We can hardly be expected to look out for others—aliens, strangers—when we fear, distrust or disdain our own. Levinas always feared the potential idolatry of even the state of Israel, for whose existence he wished and defended. Bonhoeffer gave his life in responsibility and remained an authoritarian Lutheran.\footnote{See Carl Rasmussen, *Justice, Justification, and Responsibility in Bonhoeffer’s Ethics*, in *4 Graven Images: Essays in Culture, Law and the Sacred*, supra note 26, at 86 (describing Bonhoeffer as authoritarian).} Patocka lamented the continued need to become Christian. Bergman showed what happens when we have lost a sense of shame.
How should we think about blame and responsibility when a governmental entity, rather than an individual, is accused of wrongdoing? Neither blame nor responsibility is a term capable of precise definition. Blame, however, is a concept with particular resonances. I suggest that a tendency to premise government liability on blame rather than responsibility has become increasingly pronounced, and that it is worth noticing both for its consequences and for the particular emotional variables it injects into the question of government accountability.

To place the workings of blame and responsibility in a concrete context, let me briefly describe one particular situation with which I am quite familiar. It involves, as is so often the case with governmental wrongdoing, a complex series of interlocking actions and inactions by a variety of actors. As I summarize the situation, think about the concepts of “responsibility” and “blame” and where they might attach.

I. WHO’S TO BLAME FOR POLICE TORTURE?

During a period of at least thirteen years beginning in the early 1970s, more than sixty men, all of them African-American, alleged that they had been tortured by several named police officers in the Area Two Violent Crimes Unit on Chicago’s South Side. Complaints were filed with the
applicable administrative agencies, the mayor, the state’s attorney and the United States Attorney, and allegations were raised in numerous judicial proceedings. These complaints and allegations came from numerous unconnected sources; were corroborated by, among others, hospital personnel and defense attorneys; described alarmingly similar acts of torture; and named the same police officers over and over. The response, until 1990, was one of inaction and denial. The internal police agency charged with investigating such allegations, the Office of Professional Standards, tended to treat each allegation as sui generis, and dismiss it for lack of credibility. It did not conduct an investigation of the alleged pattern of torture until 1990, and when it did, the city suppressed its report finding systematic torture for two years. The Area Two unit commander and ringleader, John Burge, was not fired until 1993. The other officers involved have been subjected to no discipline, and many have been promoted, commended and allowed to retire with full benefits. Ten men who allege their confessions were the product of torture in Area Two spent years on death row. In January 2003, Governor George Ryan pardoned four men who had spent a total of sixty years on death row, finding that they had confessed to crimes that they did not commit after being tortured.2

Inaction was the prominent behavior that permitted the torture ring to continue for so long. Supervisors at Area Two looked the other way and failed to supervise, as did Illinois Assistant Attorneys General who took statements from the torture victims and as did doctors and other personnel at Cook County Hospital, where the men were sometimes brought for treatment. Police departments failed to accept complaints, the State’s Attorney and United States Attorney failed to investigate, several successive chiefs of police and at least one mayor of Chicago3 ignored complaints, and a series of state and

1 Police Brutality in the Courts, 47 BUFF. L. REV. 1275, 1276-78, 1288-1305 (1999). See the article and sources cited therein for a fuller account of the Area Two scandal.

2 Steve Mills & Christi Parsons, “The System has Failed”: Ryan Condemns Injustice, Pardons 6 and Paves the Way for Sweeping Clemency, CHI. TRIB., Jan. 11, 2003, at 1. The remaining men who had alleged their confessions were the product of torture were part of the group who had their sentences commuted to life without parole. See Steve Mills & Maurice Possley, Decision Day for 156 Inmates, CHI. TRIB., Jan. 12, 2003, at 1.

3 For an account of the current Mayor Daley’s role in the widespread governmental failure to act, see Bandes, supra note 1, at 1302.
federal judges failed to suppress confessions or to allow inquiry into the possibility of a pattern.

The scandal I've described crosses all sorts of jurisdictional boundaries—a dizzying array of governmental agencies let down the Area Two torture victims. This fact alone makes it difficult to affix responsibility in legibly manageable ways. We might have a wide-ranging discussion about moral blame, but legal responsibility requires a legally cognizable actor: either an individual or an entity. As to individual legal responsibility, the question seems relatively straightforward. Several police officers, clothed with the authority of law, spent at least thirteen years torturing suspects, and then consistently lied about doing so on the witness stand and elsewhere. Thus, as to the street-level officers and even some supervisory personnel there are no really hard lines to draw between action and inaction; negligence, intent and malevolence; responsibility and blame; or even legal and moral blame. Commander Burge and his men satisfy the conventional story of evil men bent on evil acts. If they had been disciplined, fired or even criminally prosecuted for their individual acts, we might say that the most blameworthy actors had received their just punishment, but this would be shortsighted. The role of the government entities raises all the most difficult issues, given that the entities have yet to address the systemic problems that allowed the scandal to continue unchecked for so long. How do notions of blame and responsibility help—or hinder—the inquiry into how to deal with the applicable entities?

The question of how to measure and enforce the accountability of entities, governmental or private, has always been complicated by the abstract nature of the wrongdoer. There is an initial hurdle: how to think about the entity’s capacity for acting wrongly. The law often approaches this question by considering whether the corporation, municipality or agency should be considered a person within the reach of some common law or statutory scheme. But even once the entity is recast as a person for this purpose, there remains the

4 See, e.g., Valerie P. Hans, Business on Trial: The Civil Jury and Corporate Responsibility 83-93 (2000) (discussing legal approaches to corporate liability, including jury instructions informing that “[a]ll persons are equal before the law, and corporations, big or small, are entitled to the same fair consideration that you would give any other individual party”). See also Will v. Mich. Dep’t of State Police, 491 U.S. 58 (1989) (holding that a state and instrumentalities of a state are not persons subject to suit under Section 1983).
practical difficulty of determining when this constructive person has acted. For reasons I explore below, courts have difficulty answering this question without analogizing an entity to an actual person. At times, the law looks to the question of which actual persons have acted for or as the entity.\(^5\) Alternatively, it may attempt to understand or evaluate an entity’s behavior using human behavior as a yardstick or analogue.\(^6\) It is not surprising, and not necessarily problematic, that abstract entities are so insistently anthropomorphized. The explanations for the drive to transform an abstract notion into something human and manageable can be understood through multiple lenses: narrative, linguistic, psychological and philosophical, among others. The tendency to humanize becomes problematic when the reasons for the transformation are forgotten or papered over; when heuristic goals are confused with descriptive accuracy. It becomes a problem when, for example, a municipality is confused with an actual person who ought not to be held responsible unless his actions are blameworthy.

It is neither coherent nor helpful to talk about government responsibility in the abstract. The responsibilities of government entities, like their very existence, derive from a complex web of regulatory schemata. In order to think about blame and responsibility and how they work when government is the wrongdoer, I want to focus in particular on the major source of municipal liability: Section 1983.\(^7\) The development of decisional law interpreting this statute will illustrate my concern about the shift from responsibility to blame.

When the Supreme Court in *Monell v. Department of Social Services of New York*\(^8\) overruled *Monroe v. Pape*\(^9\) to hold that municipalities are persons within the meaning of Section 1983, it transformed a marginally useful statute into a potentially powerful force for governmental accountability. At the same time, *Monell* began a quarter century (and counting)

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\(^6\) See, e.g., Bd. of County Comm’rs v. Brown (Bryan County), 520 U.S. 397 (1997) (discussed infra note 10 and accompanying text). See also HANS, supra note 4, at 85 (noting that “elements of the personhood conception continue to play a significant role in shaping legal treatment of the corporation”).
\(^8\) 436 U.S. 658 (1978).
of torturous grappling with when, exactly, a municipality had acted, and could therefore be held accountable.

How should the Court determine when a municipality has subjected someone to a deprivation of rights? There are a variety of defensible directions the Court could have taken in interpreting the reach of municipal liability, and a variety of defensible tools it could have used to determine which direction was best. My particular focus is on how the debate over the proper scope of the doctrine has been influenced by the seductive pull of the notion of blame.

II. MUNICIPAL LIABILITY: THE OFFICIAL STORY

The Supreme Court consistently portrays itself as faced with a conundrum: The municipality is an aggregation of persons, it can act only through those persons, yet the municipal entity must be distinguished from its agents for purposes of the statute.\(^10\) The perceived statutory mandate to distinguish municipality from agents is the driving force behind the Court’s municipal liability jurisprudence. This perceived conundrum is, in complex ways, both the source and the result of the troubled state of current municipal liability jurisprudence. It rests on the mistaken notion that the municipality can \textit{in fact} be distinguished from its agents. Municipal liability, as Larry Kramer and Alan Sykes persuasively argued, “is necessarily vicarious.”\(^11\) Municipal actions are always carried out by agents. Any means of distinguishing the municipality from those agents will be prescriptive rather than descriptive. The Court’s efforts to resolve the perceived conundrum have driven many of its crucial interpretive choices about the scope of municipal liability, yet the prescriptive nature of those choices is rarely acknowledged. Indeed, the conundrum itself is largely the result of the Court’s own doctrinal choices. For example, it would disappear if the Court adopted respondeat superior liability, rendering the municipality liable for its agents’ acts.

The drive to distinguish the municipality from its agents also has a deeper source: the need to render an abstract


entity understandable—not just legally, but cognitively. How are we to think about wrongdoing in relation to a bureaucracy, a complex regulatory creation with “no soul to be damned, and no body to be kicked?” We tend to try to grasp the concept either by focusing on particular individual actors of the entity, or by humanizing, anthropomorphizing the entity itself. At times courts attempt to identify the particular employees who act on behalf of the municipality, thus transforming an abstract sovereign into a more familiar aggregation of human actors, with familiar human attributes. To the extent there is room for the notion of the municipality itself as wrongdoer, the measures of its wrongdoing often take human form—it is cast as an actor with motives, emotions and volition. These may be useful devices in their place, but the question then becomes: What is that place? The Court all too often seems to forget why it resorts to these devices, and its lack of clarity has consequences.

The starting point in defining municipal liability must be the statute itself. One of the challenges of interpreting Section 1983 is that the language of the statute is famously spare and unhelpful, and the relevant legislative history virtually non-existent. The language of the statute imposes liability on any “person” who, under color of state law, “subjects or causes to be subjected” a person within United States jurisdiction to a deprivation of federal rights. How does a municipality subject or cause to be subjected? Although the Monell Court purported to rely heavily on Section 1983’s literal language, this language affords little in the way of direction or limitation. As Justice Breyer argued most recently in his dissent in Board of County Commissioners of Bryan County, Oklahoma v. Brown, “as a purely linguistic matter,” the municipality could be said to subject someone to a deprivation, or cause someone to be so subjected, any time one of its employees acts within the scope of his or her employment.

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13 See HANS, supra note 4, at 84-91 (noting that jurors in trials with corporate defendants tend to focus on specific individuals, or to search for analogies enabling them to reduce the corporation to an individual template).
16 Bryan County, 520 U.S. at 430 (Breyer, J., dissenting).
17 Id. at 431.
NOT ENOUGH BLAME TO GO AROUND

language itself would not preclude liability even under the purest respondeat superior scenario, the scenario that Oklahoma v. Tuttle, 18 for example, found most objectionable: in which the municipality had no prior notice that the officer would engage in excessive force; the officer only did so on one occasion; and the municipality took all appropriate steps after the wrongful act occurred.

The irony of the Court’s claim of reliance on statutory language is quickly made plain. To ward off the possibility of collapsing the distinction between entity and employee, the Monell Court created a requirement found nowhere in the language of the statute: the requirement that liability attach only to acts taken pursuant to official policy. 19 In support of this requirement, the Court relied on a legislative history whose tenuous nature is well documented. 20 As the Monell Court readily conceded, the legislative history of the Civil Rights Acts contains “virtually no discussion of” 21 Section 1983. 22 Section 1983’s engagement with legislative history generally consists of attempts to divine why the House of Representatives rejected the Sherman Amendment to the 1871 Civil Rights Act, which would have imposed liability on a municipality for acts of private parties occurring within its borders. 23 These attempts at divination have caused much mischief. They led to the Court’s holding of municipal immunity in Monroe, 24 and, once that was corrected, to the Court’s ill-advised policy requirement in Monell, 25 which has spawned over the past twenty years

19 Monell, 436 U.S. at 694. See also Pembaur v. City of Cincinnati, 475 U.S. 469, 479-81 (1986) (describing the policy requirement as intending to distinguish the municipality’s acts from those of its employees); Harold S. Lewis, Jr. & Theodore Y. Blumoff, Reshaping Section 1983’s Asymmetry, 140 U. Pa. L. Rev. 755, 787 (1992) (discussing the reasons for adoption of the policy requirement, and noting that its derivation is a “source of wonder”).
20 See, e.g., Kramer & Sykes, supra note 11, at 257-61.
21 Monell, 436 U.S. at 692 n.57.
22 Sec. 1, which later became 42 U.S.C. § 1983.
23 Monell, 436 U.S. at 683-90. See also Kramer & Sykes, supra note 11, at 257-61 (discussing rejection of the Sherman Amendment). The Court also seeks to determine legislative intent by looking at the state of non-civil rights law in 1871, and assuming that absent a specific provision to the contrary, the 1871 Congress intended to incorporate current law into the statute. For critiques of this methodology see, e.g., Kramer & Sykes, supra note 11, at 264-66; Richard Matasar, Personal Immunities Under Section 1983: The Limits of the Court’s Historical Analysis, 40 Ark. L. Rev. 741 (1987).
25 436 U.S. at 694.
what Justice Breyer called, with some understatement, “a highly complex body of interpretive law.”

In short, the twin pillars of the Court’s municipal liability jurisprudence, the language of the statute and its legislative history, provide little support for the rejection of respondeat superior, and for the resulting policy requirement by which the Court seeks to ensure that the municipality and its employees do not collapse into one entity for liability purposes. Nevertheless, the Court increasingly finds a state of mind requirement for municipalities in the same questionable language and history.

The policy requirement in Monell focuses inquiry on the “nature of the [governmental] decision and the process by which it is made,” deflecting attention from the harm caused by the actions of government. The focus on delineating “policy” lays the groundwork for an unfortunate fixation on identifying causal links to formal decision making by identifiable persons (and that harms identifiable persons). This fixation carries with it the potential to deflect from the complex ways in which government subjects people to deprivations. In Owen v. City of Independence, decided two years after Monell, the Court came as close as it ever would to recognizing the municipality as a thing apart from its agents, understandable on its own terms, without analogy to malevolent individual actors. In Owen the Court recognized that systemic governmental injuries often “result . . . from the interactive behavior of several governmental officials, each of whom may be acting in good faith,” and refused to impose a state of mind requirement for municipal liability. When, however, the Court began to deal with governmental inaction—failure to train, discipline or supervise—the specter of respondeat superior, or “too much

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27 Given the paucity of legislative history and the spare text, the Court, despite its protestations to the contrary, (see, e.g., Wood v. Strickland, 420 U.S. 308, 316 (1975)) has filled in the interpretive gaps by creating a complex body of common law to interpret the statute. Modern Section 1983 jurisprudence therefore, when articulating the policies animating the statute, considers factors like fairness to the affected parties, cost allocation, federalism and the proper balance between official discretion and official constraint. However, these factors tend to be presented as merely additional gloss on text and legislative intent, and not surprisingly, they too seem to increasingly demand proof of municipal state of mind. See, e.g., the discussion of federalism in Bryan County, 520 U.S. at 414.
28 Kramer & Sykes, supra note 11, at 252.
30 Id. at 652.
liability,” once again propelled it to define wrongdoing in terms of deliberate choice of action by identifiable persons.31 The Court was determined that liability should lie “only where the municipality itself causes the constitutional violation at issue.”32 The Court in City of Canton v. Harris limited liability in such cases to deprivations flowing from “a deliberate or conscious choice . . . by [city policymakers.]”33 In Bryan County, the Court then upped the ante with what was essentially a malice aforesaid requirement: that the policymaking official “consciously disregarded an obvious risk that the officer would subsequently inflict a particular constitutional injury.”34

Returning to the Area Two torture ring, it becomes obvious that several layers of municipal government, including the Chicago Police Department itself, are exempt from liability under the Canton, Bryan County standard. As Judge Posner saw the problem, (even at a time when Canton controlled, before Bryan County tightened the standard), municipal liability would lie only if the police chief had actually condescended the activities, for example by telling “the office of investigations to pay no attention to them.”35 "Proof of dereliction of duty was not enough. But that was all there was."36 In the Area Two situation, as is often the case, every incentive was skewed in favor of not knowing—not investigating, not gathering information, not sharing information, not acknowledging the receipt of information—suppressing information.37 Deliberate

31 See City of Canton v. Harris, 489 U.S. 378, 392; Bryan County, 520 U.S. at 410.
32 City of Canton, 489 U.S. at 385 (citations omitted).
33 Id. at 389.
34 520 U.S. at 411.
35 Wilson v. City of Chicago, 6 F.3d 1233, 1240 (7th Cir. 1993).
36 Id. at 1241.
38 To highlight a few examples, failure to collect and organize data enabled the defendants to deny the existence of or knowledge of a pattern of torture. It enabled the internal investigating agency to refuse to investigate, and then, when it finally did investigate, it enabled the police chief to call its report “statistically flawed.” See Charles Nicodemus, Brutality Rap Hits Merit Cop, Chi. Sun Times, Mar. 18, 1995, at 3. Failing to collect and organize data then enabled the police department’s general counsel, when confronted with long-suppressed evidence of the department’s knowledge and acquiescence, to declare the case closed because it was “too old.” See Bandes, supra
indifference to a known risk was hardly necessary—mere indifference, coupled with refusal to learn about the risks involved, was sufficient to insulate every actor but those who wielded a cattle prod. Certainly it was enough to insulate the police chief, the designated policymaker under Monell and Praprotnik, from knowledge of the day-to-day actions of his low-level employees. As Peter Schuck so well described, we rely on government officials to take affirmative action when appropriate, yet they face incentives heavily skewed toward inaction. Current municipal liability doctrine creates even stronger incentives toward not knowing, not deliberating and, ultimately, not acting.

III. BUT DID THE GOVERNMENT REALLY DO IT?

The Court’s direction, in short, is toward requiring blameworthy behavior by municipalities, while simultaneously rejecting the idea that these entities are capable of engaging in such behavior, or at least creating formidable hurdles to proving its existence. My argument is not that this move is doctrinally indefensible, but rather that it bespeaks a shift from doctrine to attitude, or from formal notions of responsibility to emotive notions, and that this shift goes unacknowledged. Two conceptions of liability are at war here, and only one is articulated. Wrongdoing, in the legal context, and more specifically in the municipal liability context, is a legal term that identifies behavior that ought to lead to liability. It marks deviation from an agreed upon, socially created standard of conduct. The notion of wrongdoing that has increasingly misinformed municipal liability law is a highly personal expression of the wrongdoer’s attitudes or

note 1, at 1292-1303.

40 Barbara Kritchevsky, A Return to Owen: Depersonalizing Section 1983 Municipal Liability Litigation, 41 VILL. L. REV. 1381, 1410 (1996) (arguing that narrow standards for determining who is a policymaker are likely to identify only persons who are so insulated from the day-to-day actions of municipal employees that they are unlikely to know of specific misconduct (and therefore to possess the level of knowledge required for deliberate indifference)).
41 SCHUCK, supra note 37, at ch. 3.
42 See, e.g., City of Newport v. Fact Concerts, Inc., 453 U.S. 247 (1981) (holding that ordinarily municipal entities cannot be subjectively malicious); see also Kritchevsky, supra note 40, at 1396 (discussing City of Newport).
43 Thanks to Robert Schapiro for helping me articulate these ideas.
emotions toward the victim. It locates wrongfulness in malevolent desire or disposition; thus, it is a judgment of private features of the self, rather than of professional violation of shared, externalized norms.\footnote{See also Judith Shulevitz, \textit{There's Something Wrong With Evil}, N.Y. TIMES, Oct. 6, 2002, at 39 (reviewing Susan Neiman, \textit{Evil in Modern Thought: An Alternative History of Philosophy} (2002)). Shulevitz argues against thinking of evil as based on intensity or content of beliefs, since such beliefs might be strongly held and sincere, yet still lead to terrible wrongs. She suggests defining evil by the acts performed and by whether they violate standards of behavior.}


Trouble arises . . . when psychologists, sociologists, economists, and others in the social and behavioral sciences use abstract words for hidden psychological processes. Often, these words fail to specify critical information such as the type of agent, the situation in which the agent is acting, and the source of evidence for the ascription.\footnote{Id. at 13.}

The problem Kagan describes is not, of course, confined to description of psychological processes. Any abstract concept runs a high risk of being insufficiently constrained, of failing to specify critical information that would limit its uses across disparate contexts. As linguist Ray Jackendoff noted, some words for abstract objects present themselves as referring to things “in the world,” despite the fact that they represent not concrete entities but a bundle of inferential features.\footnote{Ray Jackendoff, \textit{Foundations of Language} 323 (2002). Thanks to Larry Solan for introducing me to these materials.} Unless we “tune” our conceptualizations, as Jackendoff puts it,\footnote{Id. at 332.} constantly checking to see whether they converge, we are likely to be using identical signifiers for entirely disparate sets of inferences. The legal realm is rife with such abstract concepts. Fred Schauer explains that certain concepts are “pervasively indeterminate,” in the sense that they cannot be applied to specific cases without the addition of supplementary premises.\footnote{Frederick Schauer, \textit{Formalism}, 97 YALE L.J. 509, 514 (1988). See also Susan Bandes, \textit{Erie and the History of the One True Federalism}, 110 YALE L.J. 829, 866 (2001).}
In the context of municipal liability, the abstract charge of "wrongdoing" is leveled against the abstract entity "government." Determining when such wrongdoing had occurred was never easy, but the determination became increasingly unconstrained, even unmoored, as the Court shifted from viewing the government entity as a construct whose goals should be judged against norms of governmental behavior, to viewing it as a concrete object in the world. It began using the language of human behavior, not as a useful heuristic, but as a description of what really exists.

The early post-Monell case of City of Newport v. Fact Concerts, Inc. is a good example of the curious mix these opinions contain. The Court, rejecting the imposition of punitive damages against municipalities, rested its analysis in part on its view of the purposes behind Section 1983 and on its view of the optimal allocation of the costs of government wrongdoing. It also veered into descriptive assertions of "what really is:" statements about municipalities as if they are "in the world" and have identifiable attributes. The Court opined that punishment, through the imposition of punitive damages, should be applied not to the entity, but only to the actual wrongdoer. It found that a government official can act knowingly, willfully and maliciously, but a municipality cannot. The Court concluded that it makes no sense, therefore, to assess punitive damages against the municipality and that, moreover, such an award would act as retribution against blameless and innocent taxpayers.

In more recent cases, continuing to use the language of descriptive accuracy, the Court created the double bind of requiring the very mental states of which it earlier pronounced the entity incapable. In Canton it imposed a deliberate indifference standard to ensure that liability is fixed only

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53 Id. at 266-71.
54 See, e.g., id. at 267.
55 Id.
56 Id. Here the Court quoted what it calls the "rationale" of an 1882 state court case: "[T]he city is not a spoliator and should not be visited by vindictive or punitive damages." Id. at 262 (citing Wilson v. City of Wheeling, 19 W. Va. 323, 350 (1882)).
57 City of Newport, 453 U.S. at 266 (citing McGary v. President & Council of the City of Lafayette, 12 Rob. 668, 674 (La. 1846)). Here the Court cited language from a pre-1871 state court case explaining that such damages would be "borne by widows, orphans, aged men and women, and strangers." Id.
“where the municipality itself causes the constitutional violation at issue.”65 In Bryan County, it spoke of limiting liability to action for which the municipality is actually responsible59 and avoiding the risk of holding it responsible for an injury that it did not cause.60

Notice that the language becomes not only emotive, but morally tinged. This shift marks the unannounced and undefended move from responsibility to blame, in the sense that “blame is a word we reserve for humans who are both responsible and morally responsible in an unpleasant way.”61 It suggests that it would not be fair or right to blame the entity for something it did not do. It is not hard to understand the urge to thus moralize and personify. It is difficult to tell a compelling and coherent story about a complex entity, so the storyteller borrows metaphors, and often does so sloppily. In our stories, we tend to want people with whom we can identify and people we can judge. We want someone to blame and someone to root for. We want evil to have, as Andrew Delbanco put it, “a name, a face, and an explanation.”62 If someone does wrong, we want it to be the result of a choice to act by someone capable of reasoning. We want a motive. We want simple causal links between actor and act, between wrongdoing and consequence.

The drive for coherent and affecting narrative can be understood through many lenses. We can look to narrative theory, beginning with Vladimir Propp’s taxonomy of the common structures of all folktales.63 We can look to cognitive theory’s treatment of the powerful pull of metaphor, a field that Steven Winter has explicitly linked to this area of law.64 And we can look to the development of the legal system, from primitive notions of retribution and revenge for the blameworthy person with evil design, toward a more

60 Id.
64 Winter, supra note 10.
enlightened and forward-looking focus on protection of the public interest. Indeed, the Owen Court, more than twenty years ago, approvingly noted that the evolution of tort law from a focus on individual blameworthiness to a principle of equitable loss-spreading harmonized well with the goals of Section 1983. Yet the drive toward humanizing and emotionalizing is deeply rooted.

The move toward the emotive is understandable, but in this context it is highly problematic. As Jerome Kagan notes, “all words for cognitive, emotional and behavioral processes are functional categories . . . .” To employ abstract notions like malice, blame or conscious choice is to risk uncritically importing assumptions from one category to another. Or, to put it another way, it is to reach for a highly available prototype though it is poorly tailored to the situation at hand. Social psychologists have found that individual judgments about responsibility tend to be closely linked to the defendant’s intentions, knowledge and proximity. This linkage creates difficulties when neither the bureaucratic decision-making process nor the criteria for liability fit within the individual, fault-based template.

Recalling Area Two, we understand what it means to blame Commander John Burge for torturing helpless suspects; this resonates with most every pre-existing set of beliefs about evil human behavior. When the concept is imported to the category of bureaucratic failure to act, however, those resonances remain, though the functional category has changed dramatically. The question is now whether a public official, such as a police chief or even a mayor, has abused his authority in a way that led to the deprivation of constitutional rights. In this context, the resonances serve mainly to mislead. We will not hear stories about the police chief or the mayor that fit the script, or satisfy the basic urge to punish evildoers, who acted


67 See HANS, supra note 4, at 90-91 (noting jury tendencies to invoke individual templates and search for appropriate human analogies).

68 KAGAN, supra note 46, at 80.


70 HANS, supra note 4, at 93.
consciously and alone and caused easily traceable harm.\textsuperscript{71} As Justice White observed in the context of a challenge to inhumane prison conditions, they “often are the result of cumulative actions and inactions by numerous officials . . . sometimes over a long period of time. In those circumstances, it is far from clear whose intent should be examined. Intent simply is not very meaningful when considering a challenge to an institution . . . ”\textsuperscript{72} Indeed, the intent standard is worse than “not very meaningful” in this context. Intent and deliberate indifference standards exacerbate the incentive structure that exists in most bureaucratic institutions: They put a premium on delegating, not knowing, not acting, not making a paper trail. They insulate acts, or failures to act, that flow from the conflicting and multiple motives, goals and agendas that most collectives, and most individuals, possess. They insulate acts that flow from unconscious racism,\textsuperscript{73} from “external” problems like lack of funding\textsuperscript{74} and even from bureaucrats doing the best they can, though it is inadequate to prevent serious constitutional harm.

The problem of misdescription is not a function solely of the seductive pull of blame. Municipal liability jurisprudence relies on other misleading models as well; it draws from tort models that erase the difference between private wrongs and constitutional harm,\textsuperscript{75} from economic models that conflate corporate with governmental bureaucracies,\textsuperscript{76} even from interest group theories that fail to distinguish top-level politicians from street-level bureaucrats.\textsuperscript{77} There is far too little nuanced information on the ways in which governmental entities make decisions, and the sorts of incentives, legal or otherwise, that would best promote accountability.\textsuperscript{78}

Thus, the misuse of the concept of blame is not the sole culprit in skewing municipal liability doctrine. Conversely, I am not arguing that the concept of blame ought to be banished

\begin{footnotesize}
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\item\textsuperscript{71} Susan Bandes, The Negative Constitution: A Critique, 88 Mich. L. Rev. 2271, 2320-23 (1990); Bandes, supra note 1, at 1328-38.
\item\textsuperscript{73} See, e.g., Charles R. Lawrence III, The Id, the Ego, and Equal Protection: Reckoning With Unconscious Racism, 39 Stan. L. Rev. 317 (1987).
\item\textsuperscript{74} Kritchevsky, supra note 40, at 1433.
\item\textsuperscript{75} See, e.g., Bandes, supra note 71, at 2320-23; Nahmod, supra note 44.
\item\textsuperscript{76} Rubin, supra note 51, at 1438.
\item\textsuperscript{78} See, e.g., id. at 353-54.
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from municipal liability jurisprudence. It should, however, be approached as a functional concept with a particular purpose. Peter French, who writes about corporate intent and integrity, has argued that it does make sense to ascribe moral virtue to corporations. He suggests, in an article written several years before the Enron scandal and related revelations, that we acknowledge that “there are distinctly corporate plans and policies that provide the reasons why corporations do the things they do,” and that these need not be reduced to statements about the plans “of humans who happen to be agents of the corporate actor.” Once we focus on their unique structure, we see that corporations can be structured to pursue integrity, or not. The fascinating recent obstruction of justice trial of Arthur Andersen suggests the contortions juries go through when attempting to force systemic misconduct into an individual model. They tend to search for the wrongdoing actor, even the scapegoat.

Concerns about the moral integrity of bureaucracies take on particular urgency when the bureaucracies are governmental. Government in particular, the “omnipresent teacher,” is a moral agent. Justice Brennan stated so eloquently in Owen:

How “uniquely amiss” it would be . . . if the government itself—“the social organ to which all in our society look for the promotion of liberty, justice, fair and equal treatment, and the setting of worthy norms and goals for social conduct”—were permitted to disavow liability for the injury it has begotten.

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79 See generally my introduction to THE PASSIONS OF LAW (Susan A. Bandes ed., 1999) for discussion of the problems with decontextualized treatment of the role of emotions in legal contexts.
81 Id. at 152.
82 Id. at 152-55.
84 By the same token, a recent book on corporate crime points out that the FBI's Uniform Reporting Program, which determines the “nation's crime index,” does not report crime by corporations, even when the corporations are convicted of felonies. See THOM HARTMAN, UNEQUAL PROTECTION: THE RISE OF CORPORATE DOMINANCE AND THE THEFT OF HUMAN RIGHTS 184 (2002). See also Mark Fishman, Crime Waves as Ideology, in JUSTICE AND THE MEDIA 159, 172 (Ray Surette ed., 1984) (pointing out that police blotters do not report white collar crime).
Municipalities are capable of wrongful and even reprehensible acts, and when they engage in such acts, it is important to place the responsibility, and indeed the stigma, where it belongs. To do so holds the entity responsible for the public meaning of its actions, affirms the importance of the rights at stake and puts the moral onus where it belongs upon those who collectively failed to avoid abusing the public trust.

87 See Levinson, supra note 77, at 408 (singling out the government official closest to the harm will be arbitrary from a moral point of view if that officer is merely responding to bureaucratic incentives or carrying through the inevitable results of lack of training or resources.) Of course, the individual official may be liable in his individual capacity, and this should be true whether or not municipal liability lies. See City of Los Angeles v. Heller, 475 U.S. 796 (1986) (finding by jury that police officer inflicted no constitutional injury on plaintiff removed any basis for liability against the city); but see Barbara Kritchevsky, Making Sense of State of Mind: Determining Responsibility in Section 1983 Municipal Liability Litigation, 60 GEO. WASH. L. REV. 417, 454-59 (1992) (arguing that Heller should not mean that exoneration of individual defendants precludes municipal liability).
NOTE

THE WIDENING OF THE ATLANTIC: EXTRADITION PRACTICES BETWEEN THE UNITED STATES AND EUROPE

When American soldiers entered Afghanistan after the September 11, 2001 terrorist attacks, the press questioned what the criminal process would be if foreign forces captured alive key members of the Al Qaeda terrorist organization. Popular sentiment in Europe stirred about this issue, particularly after the British government committed ground forces in the campaign to topple the Taliban government in Afghanistan. Many Europeans wondered what British forces would do if they captured terrorists alive.

Most observers feared that the Americans would try key plotters of the attacks and seek the death penalty. British law, however, forbids extradition of anyone facing the death penalty. British Defense Secretary Geoff Hoon thus originally announced that Britain would hand no one, not even Al Qaeda

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1 The British, as well as the rest of Europe, have a particular interest in and concern with the September 11 attacks. First, seventy-eight British citizens were killed in the World Trade Center. Gregory Katz, Britons Mourn Countrymen Killed in New York Attacks Queen, Blair, Elder Bush Pays Tribute to 78 Dead, DALLAS MORNING NEWS, Nov. 30, 2001, at 24A. Second, some of the early leads in the fight against terrorism have led to Europe. The first person to face criminal charges in the U.S. for 9/11, Zacarias Moussaoui, is a French national who worshipped at a London Mosque. Brooke A. Masters, Invoking Allah, Terror Suspect Enters No Plea, WASH. POST, Jan. 3, 2002, at A1. Richard Reid, a British citizen who tried to ignite an explosive in his shoe on a flight between Paris and Miami attended the same London mosque as Moussaoui. Id. Furthermore, terror experts believe that there are undiscovered Al Qaeda terror cells in Europe, for most of the September 11 terrorists lived and studied in Europe. Peter Finn, Hijackers Depicted as Elite Group, WASH. POST, Nov. 5, 2001, at A1.


leader Osama Bin Laden, over to the Americans if he would face the death penalty. However, the British government backed down from this stance a few days later when it publicly acknowledged that it would immediately hand any key terrorists over to the Americans.

The hunt for those responsible for recent terrorist activity demonstrates the potential for international conflicts in connection with the extradition of fugitives and criminals from foreign countries to the United States. This Note discusses situations where nations, in particular the U.S. and European countries, have squarely disagreed on extradition practices and, as a result, have delayed extradition, frustrated punishment and allowed wanted criminals to roam free. September 11 should be a sobering reminder to all nations that extradition practices must be streamlined to vanquish the modern threat of terrorism. If terrorism is to be eradicated, nations must be capable of combating dangerous activities across borders, for crime today often transcends national and even continental borders. Bin Laden’s Al Qaeda terror web, for example, is estimated to span over sixty different countries.

Europe in particular is home to many of the active Al Qaeda cells. To ensure success in America’s fight against terrorism and crime in this highly mobile world, extradition practices between the U.S. and Europe must be revised and streamlined.

This Note briefly chronicles American extradition history in Part I, and then turns, in Part II, to the theories underlying extradition. Part III outlines some of the tensions that occur when extradition cases arise between the U.S. and Europe. The two continents have developed differing approaches to extradition: America embraces the non-inquiry model, while European nations tend to use the judicial inquiry model. This Note uses cases to highlight the differences between the two approaches, which sometimes lead to

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4 British Defense Secretary Geoff Hoon announced on December 9, 2001 that Bin Laden or any other terrorist would be handed over to American authorities only after the U.S. gave assurances that the death penalty would not be sought. Joan Smith, *Death Penalty is a Gulf Between Us and America*, INDEP. (London), Dec. 16, 2001, at 24.

5 Officials from British Prime Minister Tony Blair’s office announced that Bin Laden would be handed directly over to the Americans if captured alive in Afghanistan. *Id.*

6 Juan O. Tamayo, *War on Terror Unfinished as Targets Move*, MIAMI HERALD, Sept. 9, 2002, at 1A.

7 See discussion *supra* note 1.
international crisis, threatening the countries’ diplomatic relations. The Ira Einhorn case, for example, has headlined newspapers for years as the American killer hid in France to evade extradition to Philadelphia where he had been sentenced to death in absentia. Part IV explains how the U.S. uses assurances to solve problems created by extradition conflicts. Assurances, while effective in ultimately gaining jurisdiction over a fugitive, force the U.S. to compromise its own judicial process. Part V explores trickery and abduction—legally recognized methods of obtaining wanted criminals that circumvent the formal extradition request—and criticizes them as unrealistic solutions in the context of American-European diplomacy. Finally this Note discusses possible future trends in extradition between the U.S. and the European Union, in light of the recent global threat of terrorism, and proposes a solution of a single extradition treaty between the U.S. and the EU.

I. AMERICAN EXTRADITION PRACTICES: A BRIEF HISTORICAL TOUR

The American government now prioritizes the improvement of extradition practices in an effort to find the parties responsible for 9/11 and to prevent future attacks. Extradition was not always a priority in American foreign policy, however, for it was rarely necessary or practical. In early American history, fugitives could more easily disappear into the wilderness of unsettled America. The border between Canada and the U.S. was another useful escape route for fugitives fleeing the U.S. because no official certification was necessary to travel between the countries until the Civil War. The difficulty of world travel and problems tracking travelers in early American history made extradition even less practical.

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8 See discussion infra Part III.B.1.
9 Rural, undeveloped lands of America provided an easy escape for criminals, for there were no organized law enforcement bodies to capture them. See Ethan A. Nadelmann, The Evolution of United States Involvement in the International Rendition of Fugitive Criminals, 25 N.Y.U. J. INT’L L. & POL. 813, 820 (1993).
11 Although the U.S. has issued passports to its citizens traveling abroad since 1789, the process of tracking movement of people to foreign lands did not become centralized until 1856, when Congress passed the Passport Act that gave the U.S. government the sole power to issue passports. See U.S. DEPT. OF STATE, THE AMERICAN PASSPORT 36-42 (1898). Prior to this act, states and judicial authorities were permitted
The U.S. was initially reluctant to enter into extradition treaties with other countries. The U.S. did not want to handcuff its democratic ideals with the legal confines of extradition treaties to protect its reputation as a haven for political refugees who were enemies of foreign governments. However, the increase in open-seas trading during the nineteenth century eventually made such treaties a necessity. In the 1840s, Congress finally enacted a statute that required the U.S. government to use a treaty to extradite. The use of extradition treaties began an era of diplomacy during which the U.S. entered into many bilateral treaties with other countries. These treaties spelled out the boundaries and terms of extradition. Historically, the precise language contained in the extradition statutes restricted extradition to persons accused of certain specifically listed offenses. When an extradition case presented an offense the statute did not list, Congress had to overhaul and rewrite the treaties to accommodate the new offense. The U.S. still uses this system today. Current extradition treaties between the U.S. and other

to issue passports, and, thus, there was no clear way of monitoring the movement of people into and out of America. Id.

12 Nadelmann, supra note 9, at 820-21.

13 Foreign travel began to increase rapidly during the nineteenth century. The State Department issued roughly 130,360 passports between 1810 and 1873. That number, however, jumped to more than 1,184,085 between 1912 and 1925. National Archives and Records Administration, Passport Applications, at http://www.archives.gov/research_room/genealogy/research_topics/passport_applications.html (last visited Jan. 30, 2003).

14 18 U.S.C. §§ 3181, 3184 (1948). The need for a defined extradition process was exposed in the nation’s first extradition case, United States v. Robins, 27 F. Cas. 825 (D.S.C. 1799) (No. 16,175). In Robins, the U.K. requested the defendant’s extradition after he had participated in a mutiny aboard a British ship. The U.S., lacking defined extradition laws, struggled with the case, which soon turned into a small controversy. One commentator noted that Robins was one of the causes of the overthrow of John Adams’s administration. Jacques Semmelman, Federal Courts, the Constitution, and the Rule of Non-Inquiry in International Extradition Proceedings, 76 CORNELL L. REV. 1198, 1207 n.62 (1991) (quoting JOHN B. MOORE, A TREATISE ON EXTRADITION AND INTERSTATE RENDITION 549 (1891)).

15 Each treaty contained detailed lists of extraditable offenses. For example, the 1843 extradition treaty between the U.S. and France listed the following as extraditable crimes: murder, attempted murder, rape, forgery, arson and embezzlement by public officials. Nadelmann, supra note 9, at 829. The descriptions of each crime were carefully defined in each instance to discourage abuse by either country. Id.

16 See generally id. at 830.

17 The U.S. overhauled many of its extradition treaties in the 1970s due to two principle reasons: the increasing problem of drug enforcement and because many of the colonial powers controlled by European colonization projects were now independent countries. Id. at 825.
nations, while all based on the same fundamental principles, are each unique because each country tends to have separate needs and goals that it wants to address.

II. RATIONALES SUPPORTING EXTRADITION

Many political and legal rationales support the need for extradition. A traditional state interest exists in obtaining reciprocal return of fugitives. For law-abiding nations to thrive and prosper, it is necessary to establish a society in which citizens are confident in their legal system. If one is wronged he can feel confident that the justice system will work in his favor. For retribution’s sake, nations need to be able to punish those who have wronged their citizens. Any potential crimes might also be deterred if there is a legitimate fear that illegal activities will have real consequences.

The U.S. in particular has a heightened interest in procuring the return of known fugitives because, in the past, other countries that tried criminals sought by the U.S. sometimes allowed fugitives to return to society after light punishment. In 1985, for example, Italian authorities released Mohammad Abul Abbas, the suspected mastermind behind the Achille Lauro cruise ship hijacking and murder of American passenger Leon Klinghoffer, without explanation. Another international incident involved Abu Daoud, who was “arrested . . . for coordinating the murder of eleven Israeli athletes in the 1972 Olympic games in Munich.” French authorities released Daoud four days later to the Algerian government where he returned with a hero’s welcome.

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19 Id.
20 See id. at 350.
21 See MICHAEL S. MOORE, LAW AND PSYCHIATRY 238 (1984); see also infra note 168 and accompanying text.
23 Specter, supra note 22, at 740.
24 Id.
Many countries fear retaliation by other countries or militant groups for punishing foreign criminals, especially for politically motivated crimes, and thus are less stringent than American authorities may be for the same crimes. France, for example, released Daoud in fear of reprisals by other terrorists. Conversely, America is known as a bastion of uncompromising justice. Fugitives fear the swiftness and severity of the American justice system and thus try to resist extradition. For example, in 1989, Shiek Obeid, arrested by Israel for the murder of American hostages in Lebanon, said he was “terrified” of being extradited back to the U.S. Obeid knew that the American justice system would not bend to political pressure and that he would be prosecuted swiftly.

Today’s criminals’ fears of capture are lessened because the increasingly borderless world gives them the ability to evade arrest. Governments of many nations have made recent strides to allow free borders between countries in order to facilitate trading. For example, the emergence of the EU and the fall of Communism in Eastern Europe allow for relatively easy travel between European countries. As a result, travel between EU countries for its citizens is becoming similar to travel between the states of the U.S. The relaxing of borders may conveniently ease trade and travel, but with the increased liberty also comes the risk of abuse by criminals.

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26 Specter, supra note 22, at 740 n.5.

27 Id. at 753. This fear is probably well founded. U.S. District Court Judge William G. Young recently voiced this sentiment, addressing convicted shoe-bomber, Richard Ried at his sentencing: “You are a terrorist, and we do not negotiate with terrorists. We hunt them down one by one and bring them to justice.” Pam Belluck, Unrepentant Shoe Bomber is Given a Life Sentence for Trying to Blow Up Jet, N.Y. TIMES, Jan. 31, 2003, at A13.

28 Specter, supra note 22, at 753.

29 Id.

30 The “Chunnel,” for example, linking France and England by train and car now allows passengers and freight to travel between the nations in less than twenty minutes in what used to take several hours by ferry. See Rail Europe, The Channel Tunnel, at http://www.raileurope.com/us/rail/eurostar/channel_tunnel.html (last visited Feb. 9, 2003).

For a nation choosing to scrutinize passage along its borders, an increasing frequency of illegal border crossings also necessitates extradition. The border between the U.S. and Mexico, spanning 1,933 miles, is a prime example of the infeasibility of patrolling everyone crossing an international border. While a majority of the border is virtually impassible due to the harsh desert conditions, each day three to five thousand people attempt to cross the California-Mexico border alone. Those who attempt to cross international borders illegally are becoming more creative and evasive in their methods. At America’s borders, for example, semi-trucks have been pulled over and found with over 100 illegal immigrants; shipping containers in foreign boats have been found packed with illegal aliens; and tunnels have been carved under the borders. As borders open, the futility of trying to stop every unreported border-crosser forces countries to rely on extradition practices to ensure that their fugitives be returned to them.

Public safety further encourages the improvement of extradition practices. Countries want to avoid becoming a haven for criminals who evade other countries’ judicial systems. While some countries are quite isolated and
impervious to uncontrolled entry, other nations are geographically susceptible to becoming a popular hideout for a neighboring country’s criminals. Canada, for example, is especially prone to becoming a safe haven for American criminals due to its 4,000 mile, largely unguarded, border with the contiguous U.S.\(^{39}\) Similarly, the border between Afghanistan and Pakistan is rough, mountainous terrain that makes it nearly impossible to track the movement of people.\(^{40}\) Harboring criminals can exacerbate a country’s crime problem and provide aid or indifference to criminals, particularly terrorists. Given the severity of the 9/11 attacks, states that are safe havens for criminals create problems for the entire international community.\(^{41}\)

Finally, extradition helps countries avoid international tension and diplomatic crisis.\(^{42}\) One case in particular exhibits how the extradition battle over fugitives can cause foreign relations between the U.S. and other nations to deteriorate. In 1997, Benjamin Sheinbein was suspected of the killing and gruesome dismemberment of an acquaintance in Maryland.\(^{43}\)

\(^{39}\) See Craig R. Roecks, Extradition, Human Rights, and the Death Penalty: When Nations Must Refuse to Extradite a Person Charged With a Capital Crime, 25 CAL. W. INT’L L.J. 189, 215 (1994); see also Leinwand & Anwar, supra note 32. In Walhalla, North Dakota, for example, a border highway is routinely left unguarded at night, leaving only a set of orange traffic cones to stop unwanted persons. Id. The Canadian border is the suspected entryway for many terror suspects. In 1999, U.S. border patrol in Vermont captured Algerian Ahmed Ressam, a suspected terrorist with “118 pounds of urea, used to make fertilizer or explosives; two 22-ounce jars of nitroglycerin; and, where the spare tire should have been, four circuit boards connected to Casio watches.” Id.

\(^{40}\) There are countless un-patrolled mountain passes between Afghanistan and its five neighbors. See Ali Ahmad Jalali & Lester W. Grau, The Other Side of the Mountain: Mujahideen Tactics in the Soviet-Afghan War 339, 402-03 (1995); Lester W. Grau, The Bear Went Over the Mountain 75 (1998); Steven Tanner, Afghanistan: A Military History from Alexander the Great to the Fall of the Taliban 3-6 (2002).

\(^{41}\) President Bush, in his speech before the United Nations directly following the September 11 attacks, identified the danger of safe-haven states: “Terrorist groups like Al Qaeda depend upon the aid or indifference of governments. They need the support of a financial infrastructure and safe havens to train and plan and hide.” President George W. Bush, Address at the United Nations (Nov. 10, 2001) (transcript available at http://www.cnn.com/2001/US/11/10/ret.bush.un.transcript).

\(^{42}\) See generally Henning, supra note 18, at 350.

Sheinbein fled to Israel three days after the body was found. Because Israeli law forbids extradition of any of its citizens for any crime, Sheinbein argued that he was an Israeli citizen. Although Sheinbein claimed Israeli citizenship through his father who was in fact an American citizen, Israeli courts nonetheless refused to grant his extradition to the U.S. The American government fiercely responded to the extradition refusal. Robert Livingston, Chair to the U.S. House of Representatives Appropriations Committee, for instance, threatened to cut off Israel’s $3 billion American aid package unless Sheinbein was extradited to the U.S. Secretary of State Madeleine Albright personally contacted Israeli Prime Minister Benjamin Netanyahu and asked for his “maximum cooperation” with extraditing Sheinbein. These efforts were for the murder of a single person. In the wake of the thousands of people murdered in the World Trade Center and Pentagon terrorist attacks, tensions will undoubtedly increase between the U.S. and nations reluctant to extradite.

III. DIFFERING APPROACHES TO EXTRADITION

A. The Executive Model of Extradition: Non-Inquiry

Nations generally take one of two differing approaches to extradition requests. The first approach is called non-inquiry, which places the power of extradition decisions solely in the hands of the executive branch rather than a nation’s judiciary. The Supreme Court in *Neely v. Henkel* established non-inquiry as the American approach to extradition requests from other countries. In *Neeley*, the defendant, Charles Neely, faced extradition from the U.S. to Cuba on a charge of almost beyond recognition. The body was later identified as that of Enrique Tello, Jr., a local teenager.”; see also Henning supra note 18, at 350.

44 Abramovsky & Edelstein, supra note 43, at 309.
45 Id. at 306-07.
46 Sheinbein’s father moved from Israel to America in 1950 and therefore the American government viewed his Israeli citizenship as tenuous. Id. at 318.
47 Id. at 310.
48 Id. at 316.
49 Abramovsky & Edelstein, supra note 43, at 317 (“Livingston’s efforts, however, went considerably beyond a protest note to the Secretary of State. On October 15, 1997, a House subcommittee which reported to Livingston’s Appropriations Committee froze approximately $76 million in U.S. aid payments to Israel.”).
50 Semmelman, supra note 14, at 1203-04.
51 180 U.S. 109 (1901).
embezzling more than $10,000. Neely argued that the American statute governing extradition did not guarantee him “all of the rights, privileges and immunities that are guaranteed in the Constitution.” Neely further argued that he would not receive a fair trial if he were to be extradited to Cuba. The Court rejected Neely’s arguments and spelled out the principle of non-inquiry, stating that American citizens committing crimes in other countries must submit to their method of trial and punishment.

Non-inquiry was recently restated and reaffirmed in *Ahmad v. Wigen*. Petitioner Mahmoud El-Abed Ahmad, a naturalized American citizen, filed for habeas corpus relief to stop his extradition to Israel after he was accused of attacking an Israeli bus. When faced with the prospect of Ahmad being mistreated by Israeli authorities if the extradition was granted, the Second Circuit Court of Appeals ruled that it was not the duty of the American court system to monitor the integrity of other nations’ courts.

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52 Id. at 113.
53 The statute included a provision for the return of a fugitive “to the authorities in control of such foreign country or territory . . . who shall secure to such a person a fair and impartial trial.” Ch. 793, 31 Stat. 656, cited in *Neely*, 180 U.S. at 112.
54 *Neely*, 180 U.S. at 122.
55 Id. at 123.
56 Id.

When an American citizen commits a crime in a foreign country, he cannot complain if required to submit to such modes of trial and to such punishment as the laws of that country may prescribe for its own people, unless a different mode be provided for by treaty stipulations between that country and the United States. By the act in question the appellant cannot be extradited except upon the order of a judge of a court of the United States, and then only upon evidence establishing probable cause to believe him guilty of the offense charged; and when tried in the country to which he is sent, he is secured by the same act “a fair and impartial trial,”—not necessarily a trial according to the modes established in the country where the crime was committed, provided such trial be had without discrimination against the accused because of his American citizenship. In the judgment of Congress these provisions were deemed adequate to the ends of justice in cases of persons committing crimes in a foreign country or territory “occupied by or under the control of the United States,” and subsequently fleeing to this country. We cannot adjudge that Congress in this matter has abused its discretion, nor decline to enforce obedience to its will as expressed in the act of June 6th, 1900.

*Id.*

57 910 F.2d 1063 (2d Cir. 1990).
58 Id. at 1063.
59 Id. at 1067 (citing *Jhirad v. Ferrandina*, 536 F.2d 478, 484-85 (2d Cir. 1976) (“The interests of international comity are ill-served by requiring a foreign nation such as Israel to satisfy a United States district judge concerning the fairness of its
American courts follow the non-inquiry method in extradition cases because extradition treaties are delegated to the executive branch. In 1829, Supreme Court Chief Justice John Marshall explained in the case of Foster v. Neilson that, “[o]ur Constitution declares a treaty to be the law of the land. It is, consequently, to be regarded in courts of justice as equivalent to an act of the legislature, whenever it operates of itself without the aid of any legislative supervision.” Thus, very early in American history, non-inquiry guided courts when dealing with treaties executed by the executive branch.

The United States continues to follow the non-inquiry approach to extradition for several reasons. First, the United States does not want its courts to scrutinize foreign affairs. The Constitution gives such responsibility to the executive branch, not the judiciary. Second, the courts are not suited to investigate and evaluate foreign affairs. Third, courts are reluctant to render decisions that would infringe upon another nation’s sovereignty. Finally, judicial scrutiny of foreign judicial practices impedes the extradition process, therefore allowing dangerous criminals to evade prosecution.

Non-inquiry functions under the diplomatic theory that all countries will fully cooperate with each other; meaning, each country should strive to accommodate another country in returning fugitives without questions, for one day that country may need the favor returned. For such a liberal policy to work, non-inquiry relies on the assumption that the requesting country will give the criminal a fair trial. As one extradition expert noted:

In truth the assumption by an extradition judge that delay or other defences would not be given the appropriate consideration by the

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60 The United States cannot extradite criminals unless there is a treaty between itself and the requesting country. See Factor v. Laubenheimer, 290 U.S. 276, 287 (1933).

61 27 U.S. 253, 314 (1829). Marshall's theory that treaties should fall wholly within the power of the executive branch was first established in 1800 in a speech before the House of Representatives while he was a congressman. See Semmelman, supra note 14, at 1206.


63 See U.S. Const. art. II, § 2.

64 Shea, supra note 62, at 93.

65 Id.

66 Id.

foreign court is even more offensive than the assumption of control
over the actions of foreign diplomatic and prosecutorial officials. It
amounts to a serious adverse reflection not only on a foreign
government to whom [the requesting country] has a treaty obligation
but on its judicial authorities concerning matters that are
exclusively within their competence.

Because European countries do not follow the non-inquiry
process in extradition, as described below in Part II.B, the U.S.
is essentially practicing unreciprocated diplomacy with
European nations.

B. The Judicial Inquiry Model: Increased Scrutiny and
Criticism of American Legal and Domestic Affairs

Judicial inquiry takes the opposite approach to
extradition from non-inquiry: The judiciary asserts an active
role in determining whether particular cases merit extradition.
Since extradition cases are weighed on individual merits and
are not decided in a per se manner, this approach naturally
finds favor with those who support individual human rights.
European countries tend to apply the judicial inquiry model in
extradition cases. In 1960, the Second Circuit considered
abandoning the non-inquiry approach in favor of a judicial
inquiry model in Gallina v. Fraser. The court, in dictum,
quoted in John Dugard &
Christine Van den Wyngaert, Reconciling Extradition with Human Rights, 92 Am. J.
Int’l L. 187, 189-90 (1998) (quoting Justice La Forest, Canada’s leading authority on
extradition law).

70 278 F.2d 77 (2d Cir. 1960).
71 Id. at 79 (“Nevertheless, we confess to some disquiet at this result.”).
72 Id.
extradition of fugitives to the U.S. after reviewing judicial practice and prison conditions. The case of *Soering v. United Kingdom* established the current trend of extradition practices for European nations dealing with the United States.

In 1985, eighteen-year-old Jens Soering and his girlfriend brutally murdered the girl's parents at their home in Virginia. Soering, a West German citizen, fled to the U.K. after the murder. He was arrested in the U.K. one year later and the U.S. government promptly asked the U.K. to extradite Soering in accordance with the 1972 extradition treaty between the two countries. Europe allowed for the death penalty in certain circumstances according to the Convention for the Protection of Human Rights and Fundamental Freedoms ("Convention"), a 1950 treaty to which the U.K. was a signatory nation. Since the signing of the Convention, however, the regional trend in Europe was to abolish the death penalty. The U.K. domestically abolished the death penalty for all but military crimes in 1989, before the U.S. requested extradition for Soering. Soering argued that he should not be extradited because the U.K. internally abolished the death penalty and the regional trend in Europe forbade the U.K. from extraditing a criminal to any nation that would impose the death penalty. Adding to the complexity of the extradition request, Soering argued that he should not face the death penalty because he was only eighteen years old when he committed the murders, and that he suffered from a psychological disorder called "folie a deux."

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74 See, e.g., infra notes 87 & 165 and accompanying text.
76 *Id.* at 11.
77 *Id.*
78 *Id.* at 11-12.
80 Protocol Six of the Convention, which specifically outlawed the death penalty, was ratified by thirteen European countries in 1983, but the U.K. had not yet ratified it before *Soering*. *Soering*, 161 Eur. Ct. H.R. at 40.
83 *Id.* at 41.
84 "Folie a deux" is a condition in which a person loses his identity and acts at the suggestion of another. It is recognized in the U.K. to be a defense of "not guilty to murder but guilty of manslaughter." Roecks, *supra* note 39, at 198-99 n.63.
The European Court of Human Rights ruled that according to the Convention, Soering should not be extradited back to the U.S. if he faced the death penalty. A dominant argument used in the court’s decision was that Soering should not be returned because of the “death row phenomenon” that he might experience in the U.S. The Soering court’s interpretation of the Convention is likely to limit European extradition of future criminals to the U.S. who face the possibility of the death penalty.

1. The Ira Einhorn Case

Ira Einhorn’s extradition from France to the U.S. evolved into a long, international episode epitomizing the current struggle of opposing extradition viewpoints and approaches between European nations and the U.S. The duration of the battle and the publicity it received in both the American and French media make it the most powerful example of the increasing problems surrounding extradition cases.

The U.S. sought the extradition of Einhorn for the murder of his ex-girlfriend, Holly Maddox. Einhorn was a hippie leader in Philadelphia during the 1960s who was quite radical and outspoken on ecological and political issues, calling himself a “planetary enzyme.” Einhorn became a well-known and well-connected political figure in Philadelphia. In 1970, Einhorn helped organize the first national Earth Day.

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86 The “death row phenomenon” is the inhuman treatment of prisoners waiting on death row, including the agonizing wait in the shadow of death and the actual conditions of the Virginia detention center where Soering would have been held. Id. at 61.
89 STEVEN LEVY, THE UNICORN’S SECRET 13-14 (1999). Einhorn, which means “one horn” in German, referred to himself as “the Unicorn.” Lopez, supra note 22, at 52 (“Einhorn charmed many into believing the planet was warping into new frontiers and only the Unicorn could lead them to the age of Aquarius.”).
celebration, a day devoted to ecological awareness and preservation.

Einhorn and Maddox met in 1972 and began a very stormy five-year romantic relationship. In 1977, Maddox attempted to end the relationship and see other people. Einhorn was angered by the break-up and threatened to destroy all of her belongings that were stored in his apartment. In the early autumn of 1977, Maddox returned to the apartment to appease Einhorn and to retrieve her personal belongings. Maddox was last seen the following evening at a movie theater with Einhorn. A neighbor living below Einhorn’s apartment recalled hearing a “blood curdling” scream followed by heavy banging one evening in the autumn of 1977. Two teenage girls testified that a few nights after the night Maddox and Einhorn were spotted at the movie theater, Einhorn asked them to help him toss a heavy trunk into the river, but the girls refused. Soon after Maddox’s disappearance, Einhorn spent a semester as a fellow at Harvard’s Kennedy School of Government. During his time away from Philadelphia, a neighbor living beneath Einhorn’s apartment complained to the police about a putrid smell and a dark-brown fluid leaking through the ceiling from Einhorn’s apartment. Einhorn refused to allow building janitors to open a closet in his apartment to investigate the problem. He kept the closet locked with a padlock and refused to let anyone open the door. On March 28, 1979, however, the Philadelphia Police obtained a warrant and opened the closet door, finding Maddox’s mummified body inside a locked steamer trunk.

90 LEVY, supra note 89, at 138.
92 LEVY, supra note 89, at 160.
93 Id. at 340.
94 Id.
95 Id. at 341.
96 Id.
97 Lopez, supra note 22, at 53.
98 LEVY, supra note 89, at 342.
99 Id. at 354.
100 Lopez, supra note 22, at 53; LEVY, supra note 89, at 349.
101 Lopez, supra note 22, at 53.
102 LEVY, supra note 89, at 24, 362.
103 Id. at 26-27.
Her skull was fractured in at least six places by trauma from a blunt instrument.  

After discovering Maddox's body, the Philadelphia Police arrested Einhorn for murder. Einhorn claimed the KGB or CIA planted Maddox's body in his closet in a plot against him due to his knowledge of secret mind control weapons research. Bail was set at $40,000 and Einhorn was quickly released with the assistance of his affluent friends in Philadelphia. Instead of using his conspiracy theory defense in court, Einhorn fled to Europe. He fled to Ireland first, under the alias of Ben Moore, and attended Trinity College. A Trinity professor reported Einhorn to Irish police in 1981, but without an extradition treaty in place with the U.S., the Irish police could do nothing. Einhorn then left Ireland, living undetected in Europe for more than sixteen years under the Moore alias, and then later using the alias Eugene Mellon.

In 1993, while the global search for Einhorn continued, the Philadelphia District Attorney decided to try Einhorn in absentia, fearing that material witnesses and important evidence would disappear before he was found. The jury deliberated for less than two hours and found Einhorn guilty.

Finally, in May 1994, French authorities found Einhorn living in rural France with his Swedish wife, Anika Flodin. At his trial in France, Einhorn hired a flashy, powerful defense attorney, Dominique Tricaud. Tricaud argued that it was illegal for the Philadelphia District Attorney to try Einhorn in absentia and that France should therefore not grant the request of the extradition. Tricaud filled his presentation

\begin{footnotes}
\footnotetext[104]{Id. at 348.}
\footnotetext[105]{Id. at 27.}
\footnotetext[106]{Id. at 351.}
\footnotetext[107]{LEVY, supra note 89, at 39.}
\footnotetext[108]{Id. at 388.}
\footnotetext[109]{Lopez, supra note 22, at 56.}
\footnotetext[110]{Id. The U.S. requires an extradition treaty with another country in order to extradite criminals back to its jurisdiction. 18 U.S.C. §§ 3181, 3184.}
\footnotetext[111]{Lopez, supra note 22, at 57; LEVY, supra note 89, at 389.}
\footnotetext[112]{See Steven C. Kiernan, Extradition of a Convicted Killer: The Ira Einhorn Case, 24 SUFFOLK TRANSNAT'L L. REV. 353, 357 (2001).}
\footnotetext[113]{Henning, supra note 18, at 369. Einhorn was sentenced to life imprisonment without parole. LEVY, supra note 89, at 391.}
\footnotetext[114]{Authorities traced Einhorn to Flodin after she applied for a French driving permit. LEVY, supra note 89, at 391.}
\footnotetext[115]{Levy, supra note 88, at 60.}
\footnotetext[116]{Id.}
\end{footnotes}
with anti-American rhetoric concerning the negative treatment that Einhorn would receive in the U.S. if the French granted extradition. Tricaud told reporters that the French would not send a man back to a “barbaric” country where he was tried without being present to defend himself. Tricaud later added that the Einhorn case was a chance for France to “give the United States a lesson in human rights.” Tricaud emphasized his argument by presenting the French judges with facts about America’s death penalty practices, including a record of imposing the death penalty on the mentally ill and minors. The French Appeals Court decided to free Einhorn, providing no explanation for its ruling.

Einhorn resumed a normal life after the trial, although he was under investigation by the French for immigration violations. American authorities were frustrated that the French court denied the U.S. custody of an American citizen who killed another American citizen on American soil.

French authorities arrested Einhorn again in February 1999, after a second request for extradition by the Americans. The French agreed to the extradition as long as Einhorn was allowed a second trial. Einhorn was permitted to remain free pending further French appeal, leaving open the possibility that Einhorn would flee again. The highest French administrative court finally agreed to the extradition in July 2001. Einhorn appealed his case to the European Court of Human Rights. That court, however, decided that Einhorn could be extradited because of American authorities’

117 Id.
118 Lopez, supra note 22, at 49.
119 Id. at 57.
120 Levy, supra note 88, at 59. See also discussion infra notes 208-10 and accompanying text.
121 Levy, supra note 88, at 59.
123 Levy, supra note 88, at 59.
124 Kiernan, supra note 112, at 359.
125 The Pennsylvania legislature passed a law in 1998 permitting a new trial for those tried in absentia. This was done specifically to appease the French courts who refused to extradite Einhorn unless the Pennsylvania law, stating that a defendant who forgoes his trial in absentia automatically waives his constitutional right to an appeal, was repealed. Id. at 357-58.
assurances that they would not seek the death penalty.\footnote{128} Upon having exhausted the last of his appeals to avoid extradition back to America, Einhorn slashed his throat, hoping to kill himself in France rather than return to face a second trial in America.\footnote{129}

On July 19, 2002, French Officials arrested Einhorn and turned him over to awaiting U.S. Marshals in Paris.\footnote{130} He arrived back in Philadelphia to stand trial for the murder that he had already been convicted of in abstentia. The jury, once again, took less than two hours to convict Einhorn of first-degree murder.\footnote{131} Einhorn is currently serving a life sentence in prison.\footnote{132}

The saga of Einhorn’s extradition headlined newspapers in America and Europe, and actually spawned a television mini-series in the U.S.\footnote{133} While the bizarre facts may have produced an interesting movie plot, the case highlights a point of contention between the U.S. and Europe and the lack of corresponding laws and procedures that would please both parties to the extradition.

2. Beyond Soering & Einhorn: Continued Scrutiny by Europe and the International Community

Einhorn and Soering manifest the differing viewpoints in Europe of the U.S. Because of many of these differences, America increasingly faces scrutiny from Europe regarding many of its domestic legal policies. In 1990, the EU Parliament called for a resolution on the abolition of the death penalty in

\footnote{128} Id. Assurances are discussed further infra Part IV.  
\footnote{129} Keith B. Richburg, \textit{U.S. Fugitive Ordered Extradited by France}, WASH. POST, July 13, 2001, at A14. Alternatively, Einhorn was trying to put his health in such a status that it would be unsafe for him to travel and thereby prolong his return the U.S. The treaty between the U.S. and France allowed for a refusal of extradition if the fugitive’s health made it too risky to physically survive the extradition. Einhorn blamed French Prime Minister Lionel Jospin for the wound: “Einhorn invited a television crew inside his house after the suicide attempt. ‘He created this,’ Einhorn . . . said as blood dripped onto his shirt. ‘He is responsible. He is sending me back to America where I will stay for the rest of my life in prison, without mercy.’” Id.  
\footnote{130} Theresa Conroy et al., \textit{The World’s a Better Place}, PHILA. DAILY NEWS, July 20, 2001, at 3.  
\footnote{132} Id.  
\footnote{133} The \textit{Hunt for the Unicorn Killer} (NBC television broadcast, May 9-10, 1999).
In December 1997, the EU Parliament held a meeting in Strasbourg and proposed a resolution aimed at discouraging EU businesses from investing in the U.S. in an effort to persuade America to abolish its death penalty practices. The goal of the proposed resolution was to brand the U.S. as a pariah nation. European companies, while not heeding the call to cease trade with the U.S., have joined in the protests against American social policies. For example, in January 2000, the Italian fashion company Benetton ran a worldwide advertising campaign condemning the death penalty practices of the U.S. The large billboards and magazine pages displayed solemn photographs of American prisoners condemned to death.

European public opinion on criminal justice fuels European legal and political pressure. Strong European distaste for American criminal procedure is manifested through the actions and words of the European government officials and citizens alike. For example, Tricaud’s statements in Einhorn’s defense were undoubtedly fodder for the French papers; Tricaud knew that his words would stir up public opinion against extradition to sway the French courts. Editorials in European newspapers routinely lambaste the U.S. Prior to 9/11, President George W. Bush made his first official visit to Europe and was coolly greeted by protesters in

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136 Id.


138 The information project was headed by Italian photographer Oliviero Toscani. Id.

139 See supra notes 117-20 and accompanying text.

several countries who voiced their disapproval of American policies. A popular Austrian newspaper commented on the Bush visit, stating: “It’s been a long time since a U.S. president got such a bad reception in Europe.” In another example, immediately following 9/11, a majority of French online pollsters showed a lack of confidence concerning calculated American responses in disciplinary matters. The polls prove that, even in the wake of an event that produced an enormous amount of European sympathy towards the U.S., the French still remained critical of American disciplinary actions. The trend of popular European criticism continues, as more recently, Gerhard Schroder won reelection as German Chancellor on a largely Anti-American platform.

The United Nations has also expressed their disapproval of, or at least their concern with, the internal practices of the U.S. In 1996, the U.N. Human Rights Commission’s (“Commission”) special rapporteur, Senegalese lawyer Waly Ndaye, demanded several times in 1996 to make a special visit to the U.S. in order to survey its prisons. Ndaye’s desire to visit was particularly prompted by the United States’ executions of the mentally retarded, practices that did not satisfy the international community’s legal standards to guarantee a fair trial.

In May 2001, U.N. members voted the U.S. off the Commission, a division of the U.N. that the U.S. started in 1947, and had retained a seat on since its origin. The U.S. was voted off the Commission while notorious abusers of human rights were voted on, including Sudan, Sierra Leone, Pakistan and Uganda.

142 Id.
143 65.5% of those polled said that they do not have confidence that the U.S. will respond to the terrorist attacks in an appropriate manner. LE MONDE, Votre Avis, at http://www.lemonde.fr/sondage/0,5987,177,00.html (last visited Mar. 16, 2003).
145 Schabas, supra note 134, at 553.
146 Id. at 552. For a discussion of the United States’ problematic standards and practices, see infra notes 208-11 & 217-18 and accompanying text. The U.S. government granted Ndaye’s request on October 17, 1996. Schabas, supra note 134, at 552. Ndaye performed a two-week long tour of American prisons in California, Florida and Texas. Id.
148 Id.
Despite heavy foreign criticism of its legal practices, the American government does not seem overly concerned about how it is perceived abroad.\textsuperscript{149} Chair of the Senate Foreign Relations Committee, Jesse Helms called the visit by the U.N. special rapporteur Ndaye “an absurd U.N. charade.”\textsuperscript{150} Helms asked the United States’ Permanent Representative to the U.N., William Richardson, if the U.N. was confusing the U.S. with another country or if Ndaye’s visit was an international insult to the U.S. and its legal system.\textsuperscript{151} In 1990, Robert Friedlander, minority counsel of the Senate Foreign Relations Committee, said of international law enforcement matters that, “it seems to be the practice of the United States to do what it wants to do; it long has been so and probably will continue to be so.”\textsuperscript{152} The development of the war with Iraq reinforces the foreign perception of America as a go-it-alone, arrogant world leader. Even though key historical allies and many U.N. member states objected to an American invasion of Iraq, the George W. Bush Administration vowed to act alone if necessary.\textsuperscript{153}

As evinced above, the U.S. and many of the European nations have a growing philosophical rift concerning crime prevention and punishment. In order to avert any future controversies similar to those presented by Einhorn or Soering, both sides of the Atlantic must reconsider and ameliorate their extradition practices and find a middle ground of cooperation.

\begin{footnotes}
\textsuperscript{149} The American public, too, does not seem motivated to change traditional American legal practices. For example, statistics show that with respect to the death penalty, Americans are concerned only with the sovereignty of the nation and do not think much about the legal practices or concerns of other states. In May of 1966, only 42\% of Americans surveyed approved of the death penalty. However, in May of 2001, 65\% were in favor. The Gallup Organization, \textit{The Death Penalty}, at http://www.gallup.com/poll/topics/death_pen.asp (last visited Feb. 14, 2003).
\textsuperscript{150} Schabas, supra note 134, at 553.
\textsuperscript{151} Id. Ndaye was surprised that the U.S. would view the visit as an insult, considering the support that the U.S. provided on his human rights mission to the Congo. Id. at 554.
\textsuperscript{152} Nadelmann, supra note 9, at 884-85.
\end{footnotes}
IV. ASSURANCES: THE CURRENT AMERICAN-EUROPEAN COMPROMISE AND ARGUMENT

U.S. law enforcement officials use assurances in retrieving fugitives from foreign nations that refuse to extradite because of differences in legal opinions. To make an assurance, a representative from the requesting country promises the country holding the fugitive that if the fugitive is extradited, the requesting country will conform to the holding country’s requests. 154 Harvard Law School drafted a model extradition treaty in 1935, stating that a country may refuse to extradite unless it had proper assurances that the requesting country would not impose cruel and unusual punishment. 155 The model was used in drafting many early extradition treaties between the U.S. and Europe. 156 While the Harvard model treaty’s intended use was generally to prevent extradition if it was to result in cruel and unusual punishment, as countries began abolishing the death penalty, countries began using the treaty in death penalty cases. A 1991 U.N. General Assembly Resolution resulted in a model treaty on extradition that included assurance language, in particular surrounding the death penalty. 157

France sought assurances in the Einhorn case, specifically that he would get a second trial at which the District Attorney would not seek the death penalty. 158 The U.S. also offered assurances to the U.K. that it would not seek the death penalty if it extradited Soering. 159 In another recent case, the U.S. gave assurances that it would sacrifice the normal path of justice in order to retrieve a highly sought-after fugitive.

That fugitive, James Charles Kopp, murdered New York abortion doctor Barnett Slepian in 1998 and was one of the FBI’s ten most wanted persons for over two years. 160 Kopp killed Slepian with a gunshot that pierced through Slepian’s

154 BLACK'S LAW DICTIONARY 121 (7th ed. 1999).
155 Roecks, supra note 39, at 194.
156 Id.
158 See supra note 128 and accompanying text.
kitchen window at his home in Amherst, New York. Authorities caught Kopp after a two-and-a-half-year manhunt that finally ended in Dinan, France. American authorities requested extradition but were refused due to Kopp’s possible death penalty sentence under the Freedom of Access to Clinic Entrances Act. The U.S. Ambassador in Paris originally gave assurances that American authorities would not seek the death penalty; however, the French court distrusted the assurances, forcing U.S. Attorney General John Ashcroft to deliver an unprecedented direct assurance. Kopp lost his final appeal in France’s highest court, the Conseil d’Etat, and was extradited to the U.S. in June 2002. In March 2003, Kopp was tried in Buffalo, New York and convicted of second degree murder.

Assurances, while ultimately an effective means to retrieve fugitives, require the U.S. to concede to foreign pressure and alter its normal prosecutorial procedures. Attorney General John Ashcroft faced this problem when seeking the extradition of James Kopp. He said of the event:

I share the sentiments of Dr. Slepian’s widow . . . that if the choice is between extraditing Kopp to face these serious charges in a United States court, or risking his release by France, the priority must be [in his] return. In order to ensure that Kopp is not released from custody and is brought to justice in America, we have had to agree not to seek the death penalty.

162 Id.
163 Id.
164 Richburg, supra note 160. The Freedom of access to clinic entrances act makes it a crime to:
by force or threat of force or by physical obstruction, intentionally injure, intimidate or interfere with or attempt to injure, intimidate or interfere with any person because that person is or has been, or in order to intimidate such person or any other person or any class of persons from, obtaining or providing reproductive health services . . . .
165 Richburg, supra note 160.
168 Richburg, supra note 160.
When foreign courts scrutinize and discredit American assurances, as the French courts did in the case of Kopp, they jeopardize even this loophole in retrieving wanted criminals from foreign countries.

V. NEW DIRECTIONS AND ALTERNATIVES FOR THE UNITED STATES IF EUROPEAN NATIONS CONTINUE TO REFUSE EXTRADITION

A. Forced Abductions and Trickery

Forced abductions and trickery sound like plots from an action film, but the U.S. has used both in recent times to obtain fugitives from foreign lands, bypassing the traditional extradition request approaches. The legal basis for forcible abductions on foreign soil is known as the Ker-Frisbe Doctrine. The Supreme Court established the doctrine in the 1886 case *Ker v. Illinois*. In this case, the defendant, living in Peru at the time, was indicted in Illinois for charges of larceny and embezzlement. The Governor of Illinois made a formal extradition request with the U.S. Secretary of State in accordance with the extradition treaty between the U.S. and Peru. An American agent was dispatched to Peru to obtain Ker. Instead of following the formal procedure established by the extradition treaty, however, the American agent forcibly took Ker onto a boat and escorted him back to the U.S. Ker was subsequently tried and convicted in Illinois despite his protest of the forceful abduction.

While American courts continue to allow forcible abductions to gain personal jurisdiction, now the country on

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169 119 U.S. 436 (1886).
170 Id. at 437.
171 Id. at 438.
172 Id.
173 Id.
175 The Court reiterated the legality of forceful abductions to gain personal jurisdiction later in the twentieth century. *Frisbie v. Collins*, 342 U.S. 519 (1952). In *Frisbie v. Collins*, the defendant, wanted for a murder in Michigan, was forcibly abducted from his residence in Chicago. *Id.* at 521 n.5. The Court stated:

[The power of a court to try a person for a crime is not impaired by the fact that he had been brought within the court's jurisdiction by reason of a forcible abduction. Due process of law is satisfied when one present is
whose soil the abduction occurs must approve of the abduction. In *Alvarez-Machain v. United States*, U.S. officials went into Mexico and forcibly removed Dr. Alvarez-Machain.\(^{176}\) The abduction was particularly forceful, including beatings, electrical–shock treatments, starvation and injections of unidentified chemical substances, causing Dr. Alvarez-Machain nausea and dizziness.\(^ {177}\) Alvarez-Machain, a Guadalajara gynecologist, was accused of murdering a U.S. Drug Enforcement Agency (“DEA”) agent.\(^ {178}\) Dr. Alvarez-Machain assisted a drug syndicate by medically keeping the agent alive for days after the syndicate brutally tortured the agent in an attempt to extract information.\(^ {179}\) The Mexican government did not condone the doctor’s abduction, and sent a series of diplomatic notes to Washington stating that the abduction violated the Mexican-American extradition treaty.\(^ {180}\) The Ninth Circuit found the abduction legal according to the Ker-Frisbe Doctrine, but found that the DEA agents had indeed violated the treaty between the U.S. and Mexico because they did not consult with Mexican authorities prior to the abduction.\(^ {181}\)

Abduction is likely not an option to obtain fugitives from European countries. If Europeans view the U.S. government and legal system as brutal and uncivilized as suggested above,\(^ {182}\) then they likely would perceive American agents storming foreign flats as a menace to another country’s internal affairs, and thus, a per se violation of that country’s sovereignty.\(^ {183}\) Forcible abductions seem to be a more appropriate alternative to extradition in unstable regimes and underdeveloped nations, in which a violation of sovereignty

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\(^{176}\) 107 F.3d 696 (9th Cir. 1996).

\(^{177}\) Id. at 699.

\(^{178}\) The DEA agent was found dead in Mexico. See *United States v. Caro-Quintero*, 745 F. Supp. 599, 602 (C.D. Cal. 1990).


\(^{180}\) Id. at 497.

\(^{181}\) *Alvarez-Machain*, 107 F.3d at 703. Alvarez-Machain was acquitted of murder and is currently pursuing a tort claim against the U.S. See *id.* at 699; Alvarez-Machain *v. United States*, 284 F.3d 1039 (9th Cir. 2002).

\(^{182}\) See, e.g., supra notes 139–40 and accompanying text.

would be more justifiable once all other means of extradition were exhausted.  

Trickery is another method that American officials have successfully used to retrieve criminals from abroad. In 1987, the DEA, FBI and CIA conducted an operation where an agent lured Fawaz Younis, a suspected Lebanese terrorist connected to the June 1985 hijacking of a Jordanian airplane, onto a boat in the Mediterranean Sea and arrested him in international waters. In 1975, the DEA worked with Senegalese authorities to arrest wanted drug trafficker Dominique Orsini while the flight from Argentina to France briefly stopped in Senegal for refueling. Orsini was sent directly to the U.S. to face drug charges.

Trickery, however, requires full cooperation by the foreign government in which the criminal is located. In 1971, for example, the U.S. arrested a Panamanian official during a softball game in the U.S. territory of the Canal Zone. Tensions were high after U.S. officials bypassed the traditional method of extradition and essentially went behind the back of the controlling regime in Panama. Also, in 1983, the U.S. ambassador to the Bahamas vetoed a plan to lure a suspected money launderer onto a boat off the coast of the Bahamas, fearing harm to the diplomatic relations between the two countries.

In the past, trickery has proven a useful tool for the U.S. in capturing wanted criminals in foreign countries. It is unlikely, however, to be a practical alternative with many of today’s wanted criminals. Osama Bin Laden, for example, is very wary of any plots toward capture or trickery. He

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184 See McAlister, supra note 179, at 512-13. Forcible abductions should also be limited to only serious international crimes, as violating another country’s sovereignty violates international law. Id. at 513. This, however, raises another problem with defining what is meant by a “serious international crime.” Id. at 514. Commentators suggest that those offenses listed in international documents could form the basis of a definition. Id. Listing those offenses that result in the loss of life could further narrow the definition. See id.

185 Nadelmann, supra note 9, at 867.

186 Id. at 866.

187 Id.

188 Id. at 867-68.

189 Id. at 868.

190 Nadelmann, supra note 9, at 867.

191 Bin Laden’s camps and cave complexes in Afghanistan took over two hours to reach from a main city through treacherous roads and passes. The camps and caves were heavily guarded by armed Al Qaeda fighters. Bin Laden constructed his own grocery stores and schools, creating Al Qaeda’s own autonomy and detaching himself
maintains extreme secrecy and an armed entourage to protect him, and has hidden in some of the most remote places on earth.\textsuperscript{192} Only a few non-Al Qaeda members are permitted to meet with Bin Laden.\textsuperscript{193} Hamid Mir, a Pakistani journalist widely known for his frequent contacts with Bin Laden, received permission to interview Bin Laden in Afghanistan after 9/11.\textsuperscript{194} But even Mir had to be blindfolded and then taken on a five-hour-long drive to a cold mud hut where the interview was held.\textsuperscript{195} The most elusive and most sought-after criminals will probably prove too reclusive, cautious and protected to be susceptible to methods of trickery.

B. A Proposed Alternative

A future possibility to ease the frustrating extradition problems between the U.S. and European countries is for the U.S. to develop a new, single extradition treaty with the EU instead of treaties with each individual country. While this idea may be somewhat premature due to the European Union's inexperience in handling foreign relations, it may prove to be a successful approach to solving future extradition problems for the U.S.

Recently, the EU has made increasing strides to become unified not only in economic matters, but also in political matters.\textsuperscript{196} More and more, the EU has committed itself to strengthening its internal political ties.\textsuperscript{197} It is likely, as time passes, that the EU will politically act as a single unit, rather than individually in regards to foreign affairs.

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\textsuperscript{192} Id.
\textsuperscript{193} See generally id.; Donna Petrozzello, S. FLA. SUN-SENTINEL, Nov. 22, 2001, at 4E.
\textsuperscript{194} Christina Lamb, Meeting in a Cold Mud Hut; Pakistani Reporter Describes Talk With Osama Bin Laden, CHI. SUN-TIMES, Nov. 11, 2001, at 5.
\textsuperscript{195} Id.
\textsuperscript{196} LAURENCE W. GORMLEY, INTRODUCTION TO THE LAW OF THE EUROPEAN COMMUNITY 1271 (1998). The recent intervention of American soldiers in the former Yugoslavia highlighted Europe's lack of a unified, powerful voice even in its own geographical region. Id. America's central role in the attacks on the former Yugoslavia spawned discourse among European officials that drove a unified Europe in executive matters to the top of political agendas. Id.
\textsuperscript{197} TREATY OF AMSTERDAM ("The Union shall set itself the following objectives: . . . to assert its identity on the international scene, in particular through the implementation of a common foreign and security policy including the eventual framing of a common defence policy, which might in time lead to a common defence . . . ").
\end{flushleft}
Precedence already exists for European nations using a single collective voice in matters traditionally handled by each nation’s executive.\textsuperscript{198} For example, the EU has, as a whole, recognized new nations and regimes.\textsuperscript{199} They have also used a single political voice in the open criticism of American legal practices.\textsuperscript{200} Europe also has precedence for executing treaties with other nations as a unified European Union.\textsuperscript{201} European courts have struck down any extension of this treaty power to other areas in the past,\textsuperscript{202} however, as the legislative backbone of the EU strengthens, so too may its ability and desire to enter into treaties as a unified European voice.

European nations would benefit from unity in their decisions, as the chorus of their voices rings much louder than one solo nation in the fray of international debate and decision making. The logic of unifying and streamlining to become a more powerful economic entity carries over to the political arena as well.\textsuperscript{203}

The U.S. could also profit from a single extradition treaty with the EU, by gaining an important and powerful ally in international extraditions, particularly in high-profile American cases. Individual nationalistic challenges, as perhaps the French thumbing their noses at America in the Einhorn case, could be balanced out by other reasoned, unified voices.\textsuperscript{204}

\textsuperscript{198} See GORMLEY, supra note 196, at 1271.
\textsuperscript{199} Id.
\textsuperscript{200} For example, opening Alaskan oil drilling expeditions and rejecting the Kyoto treaty. Id.
\textsuperscript{202} GORMLEY, supra note 196, at 1271.
\textsuperscript{203} TREATY OF AMSTERDAM (introduction) (“Determined to promote economic and social progress for their peoples, . . . within the context of the accomplishment of the internal market and of reinforced cohesion and environmental protection, and to implement policies ensuring that advances in economic integration are accompanied by parallel progress in other fields . . . .”).
\textsuperscript{204} Lopez, supra note 22, at 61. Defense counsel argued to the French courts that the small courtroom that they were in could send a message about human rights to “the new masters of the world across the ocean.” Id. While some nations such as France and Germany routinely defy America’s foreign policy, other European countries remain staunchly loyal to the U.S. For example, leaders of eight European nations recently wrote an open letter to the U.S. pledging solidarity for the then looming attack on Iraq. Jose Maria Annar et al., United We Stand, WALL ST. J., Jan. 30, 2003, at A14 (Spain, Portugal, Italy, United Kingdom, Hungary, Poland, Denmark and the Czech Republic). This stance is starkly in opposition to the views of other European nations, such as France and Germany.
It is unlikely, however, that the EU will enter into a current American-law-friendly extradition treaty with the U.S. due to the manner in which the U.S. enforces the death penalty. The EU has voiced its political views on the death penalty as an important foreign policy issue. Countries seeking entry into the EU must, for example, achieve “stability of institutions guaranteeing democracy, the rule of law, human rights and respect for and protection of minorities.” The EU recognizes abolishing the death penalty as part and parcel to this human rights standard. The EU can only be persuaded to agree to such a treaty if the U.S. makes its death penalty practices seem more democratic to international critics. If the death penalty is becoming a “barbaric practice” according to international custom, then the U.S. must take strides to make the process as humane and consistent as possible.

The U.S. needs to address the most severe and criticized areas of its death penalty address. The practice of executing juveniles is one of the most heavily criticized areas of American law. Currently, twenty-four states allow for the death penalty for crimes committed under the age of eighteen. Since 1990, the U.S. has executed seventeen juvenile offenders. Only the Congo, Iran, Nigeria, Pakistan, Saudi Arabia and Yemen executed juveniles during the same time period, none of them with more executions than the U.S.
Despite all of the negative statistics, America has made some progress in reforming its death penalty practice. Historically, the U.S. position on executing the mentally ill garnered much criticism. In the case of *Ford v. Wainwright*, decided in 1986, the Supreme Court clearly established that the execution of the mentally ill was forbidden. Many criticized the decision for not establishing sufficient guidelines for states to define what “mentally ill” meant. Recently, however, the Supreme Court revisited this subject and held that executing a mentally ill convict is cruel and unusual punishment and violated the Eighth Amendment. In another recent Supreme Court decision, the dissent voiced an opposition to execution of minors, citing “further debate and discussion both in this country and in other civilized nations.” While only a dissent, the mention of international debate lends hope that the U.S. may change its views to facilitate interaction with other nations.

While the U.S. may be on the track to abolishing the death penalty and other practices that offend the international community, that date may be long in coming. Alternatively, it may be possible for America to keep its legal procedures, like the death penalty, but apply them more justly. For example, the United States must address the racial disparity in death penalty sentencing. Blacks account for only 12% of the American population, yet they comprise 42% of prisoners sentenced to death. In 1998, only five prisoners of twenty-six sentenced to death under federal law were white. Such staggering statistical disparity indicates significant social problems with death penalty sentencing in the U.S. One way to more fairly apply the death penalty is through the increased use of technology to determine the guilt or innocence of alleged

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211 Id.
212 477 U.S. 399, 401 (1986).
216 In Illinois, for example, Governor George Ryan declared a commutation on the death penalty in the state due to the repeated finding of innocent prisoners sentenced to death. Illinois Governor George Ryan, Speech on Commutation (Jan. 11, 2003) (excerpt from speech reprinted in N.Y. Times, Jan. 12, 2003, § 1, at 22).
218 Id.
criminals. It appears increasingly certain that DNA evidence absolutely pins offenders to a crime.\textsuperscript{219} Expanded use of DNA evidence is desperately needed in the U.S., as many prisoners sentenced to death have subsequently been proven innocent and exonerated before their execution.\textsuperscript{220}

CONCLUSION

Senator Helms’s comment about whether U.N. Special Rapporteur Ndaye was confusing the U.S. with another country\textsuperscript{221} is a telling remark about the state of American legal practices vis-à-vis the rest of the world. As shown above, it is quite possible to confuse American disciplinary practices with other notorious human rights violators.\textsuperscript{222} The U.S. must address the glaring statistical problems arising from implementation of its practices\textsuperscript{223} before any country, or as proposed here, the EU, likely will consider entering into a liberal extradition treaty, which allows the U.S. to maintain its swift system of justice. Moreover, since the worldwide trend seems to suggest that abolition of the death penalty is a global goal, more countries in the future will pose a threat to extradition practices of the U.S.\textsuperscript{224}

After 9/11, the U.S. will likely be seeking extradition of wanted criminals and fugitives more ardently. Crime is becoming an increasingly international threat due to an increase in mobility and ease of travel. The U.S., therefore, has a high incentive to streamline its extradition practices both for national security and for retribution’s sake.

The emergence of the EU as a political power is an opportune chance for the U.S. to refine its extradition practices. Assurances, while generally effective in ultimately gaining custody of a wanted criminal, allow other nations to politically manipulate the U.S. and, thus, force the American judicial


\textsuperscript{220} Over eighty prisoners have been exonerated from life sentences or death row due to DNA evidence. Dianne Molvig, DNA Evidence: Freeing the Innocent, Wis. LAW., Apr. 2001, at 14.

\textsuperscript{221} See supra notes 150-51 and accompanying text.

\textsuperscript{222} See supra notes 209-10, 217-18 and accompanying text.

\textsuperscript{223} See id.

\textsuperscript{224} 111 countries have abolished the death penalty in law or in practice. See Facts & Figures, supra note 209.
system to succumb to their views on justice. Future cases in which the U.S. must resort to assurances, could lead to more international incidents, particularly if the wanted criminal is a high-profile terrorist. To remedy future extradition problems, the U.S. should craft a single extradition treaty with the EU rather than negotiate the terms of extradition with each of the (soon to be) twenty-five member states.

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