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EXPLORING THE HIDDEN DOMAINS OF CIVIL JUSTICE: "NAMING, BLAMING, AND CLAIMING" IN POPULAR CULTURE

*Austin Sarat**

INTRODUCTION

On September 21, 1989, at 7:40 a.m. in a small Texas town, a Coca-Cola truck, its brakes failing, ran a stop sign and hit a school bus.¹ The bus, loaded with children on their way to school, careened off the road into a rain-filled gravel pit, killing twenty-one children. Newspapers throughout the country reported the accident and its aftermath, including the subsequent filing of numerous wrongful death suits.²

This was merely the beginning of a nightmarish legal morass. Lawyers swarmed over the grieving town, signing up, and then stealing each other's clients. Members of the community accused each other of trying to profit from its collective tragedy.³ These events led to even more litigation. The town sued the state for failing to construct guard-rails; the rescue workers sued for the emotional distress incident to their efforts to save children at the scene of the accident; lawyers sued other lawyers, lawyers were prosecuted for barratry, and residents of the town were sued for slander.⁴ A tragic accident became just another episode in the seemingly unending saga of America's explosion of litigation.

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1. See Michael Kennedy, *Grief, Greed and the Lawyers*, L.A. TIMES, May 29, 1990, at E1.

2. See, e.g., Lisa Belkin, *19 Students Die When Bus Plunges Into Water*, N.Y. TIMES, Sept. 22, 1989, at A12; *School Bus Crash Probed: NTSB Finds No Sign of Brake Failure in Truck*, UNION-TRIBUNE, (San Diego), Sept. 23, 1989, at A3.

3. In many communities,

[t]ragedies draw people closer together. In this clannish rural community near the Mexico border, the school bus accident that killed 21 children last fall did not simply split the town, but splintered it. First by grief, then by greed. In the eight tumultuous months since the accident, Alton has been jolted by death threats, brawls, a fast-proliferating spate of lawsuits, city financial probes, a mayoral recall drive, charges of ambulance-chasing against prominent Hispanic leaders, the suspension of the entire 30-man volunteer fire department—even accusations of witchcraft.

Paul Weingarten, *Lawsuits, Greed Tear Grieving Texas Town*, CHI. TRIB., May 27, 1990, at A23.

4. For examples of this litigation, see *Perez v. Kirk & Carrigan*, 822 S.W.2d 261 (Tex. App. 1991); *Lopez v. Texas*, 846 S.W.2d 90 (Tex. App. 1992); *Texas v. Sandoval*, 842 S.W.2d 782 (Tex. App. 1992); *Murillo v. Valley Coca-Cola Bottling*, 895 S.W.2d 758 (Tex. App. 1995).

In 1991, Russell Banks turned this tragedy into fiction, in his critically acclaimed novel *The Sweet Hereafter*. Using four different characters as narrators, Banks tells the story of life and death in a small town. However, in Banks' account, the accident has no obvious cause. Inexplicably, the bus leaves the road, crashes through a guardrail, and then sinks slowly into a freezing lake.

Six years later, the novel was turned into a film by Atom Egoyan, its plot intact. The film, like the book, takes us into the hidden domains of civil justice as it chronicles a lawyer's intense, sometimes frantic efforts to enlist some of the bereaved parents as plaintiffs in a wrongful death suit and convince them that the bus accident was an injustice, not a misfortune.⁵ This film marks an important, and somewhat unusual, moment in the cultural life of law because it does not focus on a trial as the key element in law's representation,⁶ but rather examines the social, psychological, cultural, and professional forces at play in the emergence and transformation of disputes. While trials provide a ubiquitous dramatic framing for popular representations of law, the processes through which problems are defined, blame is assigned, and claims are made, remain virtually unexplored as subjects in popular culture.

Watching *The Sweet Hereafter*, prompted me to revisit an article I co-authored almost twenty years ago that urged scholars to explore the hidden domains of civil justice and to examine processes that we labeled "naming, blaming, and claiming."⁷ In that article, my co-authors and I argued that "trouble, problems, [and] personal and social dislocation are everyday occurrences. Yet, social scientists have rarely studied the capacity of people to tolerate substantial distress and injustice."⁸ We suggested that responses to those events could be understood as occurring in three stages. The first stage, defining a particular experience as injurious, we called naming.⁹ The next step in the life

5. Judith Shklar has asked, "[w]hen is a disaster a misfortune and when is it an injustice? Intuitively," she claims,

the answer seems quite obvious. If the dreadful event is caused by external forces of nature, it is a misfortune and we must resign ourselves to our suffering. Should, however, some ill-intentioned agent, human or supernatural, have brought it about, then it is an injustice and we may express indignation and outrage.

See JUDITH SHKLAR, *THE FACES OF INJUSTICE* 1 (1990).

6. On the ubiquity of the trial in popular culture representations of law, see Carol Clover, *Law and the Order of Popular Culture*, in *LAW IN THE DOMAINS OF CULTURE* 97 (Austin Sarat & Thomas R. Kearns eds., 1998).

7. See William L.F. Felstiner, et. al., *The Emergence and Transformation of Disputes: Naming, Blaming, and Claiming*, 15 *LAW & SOC'Y. REV.* 631, 631-54 (1980-81).

8. *Id.* at 633.

9. *Id.* at 632-33.

cycle of a dispute “is the transformation of a perceived injurious experience into a grievance. This occurs when a person attributes an injury to the fault of another individual or social entity.”¹⁰ This stage we called blaming. The third step occurs “when someone with a grievance voices it to the person or entity believed to be responsible and asks for some remedy.”¹¹ This final stage is called claiming.

We contended that “only a small fraction of injurious experiences ever mature into disputes. Furthermore, we know that most of the attrition occurs in the early stages: experiences are not perceived as injurious; perceptions do not ripen into grievances; grievances are voiced to intimates but not to the person deemed responsible.”¹² Paying attention to the process of dispute transformation and the high rate of attrition in, or resistance to, the emergence of disputes was, we contended, a way of putting the burgeoning argument about the litigation explosion in context.¹³ We argued that the processes through which disputes emerge, or through which people decide to “lump it,” are “subjective, unstable, reactive, complicated, and incomplete.”¹⁴ Most of what occurs in this domain of civil justice is cultural, not legal. These events occur in the everyday lives of ordinary citizens who struggle to make sense of who they are and who they want to be in a world of risk, danger, and injury.¹⁵ Yet, it should not be a surprise that lawyers play key roles as agents and audiences in the complex cultural processes of naming, blaming, and claiming, sometimes assisting to calm people down, thereby discouraging the blaming or claiming, while at other times, amplifying grievances and encouraging disputing.

10. *Id.* at 635.

11. *Id.*

12. *Id.* at 636.

13. For one example of a critique of the litigation explosion, see Jethro Lieberman's, *The Litigious Society*. “Ours,” Lieberman contends, “is a law-drenched age Though litigation has not routed out all other forms of fight, it is gaining public favor as the legitimate and most effective means of seeking and winning one's just deserts. So widespread is the impulse to sue that litigation has become the nation's secular religion.” JETHRO LIEBERMAN, *THE LITIGIOUS SOCIETY* xi (1981). See also PETER HUBER, *LIABILITY: THE LEGAL REVOLUTION AND ITS CONSEQUENCES* (1988). We suggested that attention to the emergence and transformation of disputes renders “problematic one of the most fundamental political judgments about disputing that there is too much of it, that Americans are an over-contentious people, far too ready to litigate. The transformation perspective suggests that there may be too little conflict in our society.” Felstiner, *supra* note 7, at 651.

14. Felstiner, *supra* note 7, at 637.

15. For a rich and interesting picture of this world, see PATRICIA EWICK & SUSAN SILBEY, *THE COMMON PLACE OF LAW: STORIES FROM EVERYDAY LIFE* (1998); see also *LAW IN EVERYDAY LIFE* (Austin Sarat & Thomas R. Kearns eds., 1993).

Since the time I co-authored that article, what is sometimes referred to as the "litigious society,"¹⁶ or at other times labeled the quest for "total justice"¹⁷ has firmly secured its place in the cultural argot, becoming a taken-for-granted aspect of our culture's self-understanding. The mass media and popular culture have been important arenas for the dissemination of beliefs about the uses and abuses of litigation.¹⁸ "In these . . . [arenas] 'people are suing each other with abandon.' A twenty-five year old victim of 'improper parenting' seeks damages from his mother and father. A customer having a 'bad hair day' sues the beautician. A woman tries to dry her poodle in a microwave following a bath and demands compensation from the manufacturer for the unhappy outcome. From these cases, the media constructs a culture of the 'hair trigger' litigation and 'legal hypochondria.'"¹⁹ Several notable efforts have been made to respond to these accounts and to set the record straight by using the tools of social science to provide what Marc Galanter has called, an "antidote to anecdote."²⁰ Not surprisingly, there is little reason to believe that such efforts are fruitful, or that social science prevails over popular culture representations. The conviction that we are a distinctively, if not uniquely, litigious society, and that the legal profession bears a large share of the blame for this condition, persists.

If there is to be a persuasive alternative story, it must be constructed or identified within popular culture. It is with this belief in mind that I present a reading of *The Sweet Hereafter*,²¹ a film that depicts one example of how an alternative story may look. I turn to film because law exists in a world of images whose power is not located primarily in their representation of something exterior, but rather within the images themselves. Samuel Weber observes, in his

16. See LIEBERMAN, *supra* note 13.

17. See LAWRENCE FRIEDMAN, *TOTAL JUSTICE* 5 (1985). Total justice, Friedman argues, involves "a general expectation of justice, and a general expectation of recompense for injuries and loss." *Id.*

18. See Jack Anderson, *U.S. Has Become a Nation of Lawsuits*, WASH. POST, Jan. 25, 1985, at B8.

19. Deborah Rhode, *A Bad Press on Bad Lawyers: the Media Sees Research, Research Sees the Media*, in *SOCIAL SCIENCE SOCIAL POLICY AND LAW* 139, 142 (Patricia Ewick et al. eds., 1999).

20. See Marc Galanter, *Real World Torts: An Antidote to Anecdote*, 55 MD. L. REV. 1093 (1996); see also Neil Vidmar, *Maps, Gaps, Sociological Scholarship, and the Tort Reform Debate*, in *SOCIAL SCIENCE SOCIAL POLICY AND LAW*, *supra* note 19 at 170; Deborah Rhode, *Too Much Law, Too Little Justice: Too Much Rhetoric, Too Little Reform*, 11 GEO. J. LEGAL ETHICS 989 (1998).

21. Of course, law also exists in the materialization of state power (see Robert Cover, *Violence and the Word*, 95 YALE L.J. 1601 (1986)) and in the meanings and messages constituted in, and by, legal doctrine and the actions of legal officials. See Robert Gordon, *Critical Legal Histories*, 36 STAN. L. REV. 57 (1984).

reading of Heidegger and Benjamin, that “the ‘world’ itself has become a ‘picture’ whose ultimate function is to establish and confirm the centrality of man as the being capable of depiction.”²² In this age of the world as a ‘picture,’ the proliferation of law in film, on television, and in mass market publications, has altered and expanded the sphere of legal life.²³ “Where else,” Richard Sherwin asks, “can one go but to the screen? It is where people look these days for reality Turning our attention then to the recurring images and scenarios that millions of people see projected daily on TV and silver screens across the nation is no idle diversion.”²⁴

The Sweet Hereafter provides a vehicle for understanding the manner in which civil justice is mythologized in that world of images. *The Sweet Hereafter* tells a story in words and pictures of the seldom seen processes of naming, blaming, and claiming. The film positions law against fate, thereby exposing the fragility and the power of law, as well as the avoidance and allure of litigation. At this point, I am particularly interested in highlighting the exploration of the contingency and variability in the reception of law’s appeals that are presented in *The Sweet Hereafter*. Through such an exploration, this film provides one counterweight against media portraits of the much ballyhooed litigation explosion.

The Sweet Hereafter also exemplifies the ways that film, as a medium, always highlights the contingencies of our legal and social conditions. Typically, films cast what Gary Morson calls a “sideshadow” on “realities” outside itself,²⁵ realities with which sociologists of law, like the people we study, may have grown quite comfortable.²⁶ Film is not simply a mirror reflecting distorted legal and social realities.²⁷ Rather, film always projects alternative realities which are made different by their filmic invention, or the editing and framing on which film always depends. The viewing of projected images, no matter what their subject matter, is a reminder that

[a]lternatives always abound, and, more often than not, what exists need not have existed Instead of casting a foreshadow from the future, [they cast] a shadow ‘from the side,’ that is, from other

22. Samuel Weber, *Mass Mediauras, or: Art, Aura, and Media in the Work of Walter Benjamin*, in WALTER BENJAMIN: THEORETICAL QUESTIONS 29 (David Feitis ed., 1996).

23. Today we have law on the books, law in action, and now, law in the image.

24. Richard K. Sherwin, *Picturing Justice: Images of Law and Lawyers in the Visual Media*, 30 U.S.F. L. REV., 894, 896 (1996).

25. GARY S. MORSON, NARRATIVE AND FREEDOM: THE SHADOWS OF TIME 117 (1994).

26. I am not claiming that film has a unique ability to sideshadow. Indeed almost any work of fiction might be said to have this property as well.

27. VIVIAN SOBCHACK, THE ADDRESS OF THE EYE: A PHENOMENOLOGY OF FILM EXPERIENCE 17 (1992).

possibilities Sideshadows conjure [a] ghostly presence [in which] the actual [what we know of the world] and the possible [what film shows of that or other worlds] are made simultaneously visible. [A] present moment subjected to sideshadowing ceases to be Ptolemaic, the unchallenged center of things. It moves instead into a Copernican universe: as there are many planets, so there are many potential presents for each one actualized.²⁸

The moving image attunes us to the “might-have-beens” that have shaped our worlds, as well as the “might-bes” against which our worlds can be judged and toward which they might be pointed. In so doing, film images contribute to both greater analytic clarity and political sensibility in our treatments of law, whether they are in the hidden domains of civil justice or elsewhere.

The Sweet Hereafter provides a close-up of the social dynamics that inform reactions to the bus accident of various characters, such as parents of children who die, parents of children who survive, the bus driver, and most importantly, a lawyer, Mitchell Stephens. Simultaneously, a parallel story emerges, a story of Stephens’s own troubled relationship to his drug-addicted daughter Zoe. It is a narrative device through which this film explores the complex connections of private need and public action.

The Sweet Hereafter utilizes characters who are differently situated in relation to the bus accident and the ensuing litigation to provide other vantage points on the processes of naming, blaming, and claiming. As a result, the film makes sideshadowing, a formal property of film, into an important part of its own visual and narrative work. This film fragments, pluralizes, and denaturalizes responses to tragedy. Grief is given many faces and histories. While watching this film, we confront the contingencies and possibilities of the hidden domains of civil justice.

The film highlights the emergence and transformation of disputes as a social, rather than a natural process, and a contingent, rather than an inevitable event. The film reminds us of the different ways that loss and suffering become part of the life stories of different people, with some people accepting their fate and others insisting that causes be identified, blame be assigned, and compensation be provided. The film takes us behind the scenes, enabling us to see the roles lawyers play in the processes of naming, blaming, and claiming. In addition, the film makes law’s polyvalent claims visible, while also exposing law’s own vulnerabilities.²⁹

28. MORSON, *supra* note 25, at 118.

29. In mythological terms, law is fate, an all-powerful force, operating unpredictably, incomprehensibly, unaccountably, and imposing loss without explanation. This law is God command-

The Sweet Hereafter addresses a complex array of fears, desires, needs, and demands in our culture's imagining of law and litigation.³⁰ The film shows the appeal as well as the distasteful quality of litigation, the desires that move some toward the law and others away from law. The film illustrates the fantasies of law's remedial power that sit alongside our fears of the power that law exerts. This film tells two stories at once, one is a story about the renaming of a misfortune in the language of injustice, the other story is the resistance and refusal of law in favor of the continuing claims of community over law, of fatalism over blame. These stories provide a more subtle and complicated portrait of the hidden domains of civil justice and the role of litigation than is usually available in the imagined world of law. These stories exemplify a popular culture narrative which is available to counter the by now well-documented distortions and simplifications in media and other popular culture representations of law and litigation.

II. WHAT WE TALK ABOUT WHEN WE TALK ABOUT LITIGATION: FROM MISFORTUNE TO INJUSTICE

In *The Sweet Hereafter*, Mitchell Stephens is law's primary image and voice. Through him, the film tells the first story; through him, the film displays the allure, but also the dangers of naming, blaming, and claiming. At the beginning of the film, Stephens, and we with him, enter a fallen world, a town in mourning. However, the law which Stephens embodies, the law of personal injury litigation, has already fallen and been discredited.³¹ The history and dominant fiction that frames *The Sweet Hereafter* is represented by a town populated with leftover hippies from the 1960s, families built around interracial adoptions, disabled people, and Vietnam veterans who have been turned into single fathers and Allman Brothers "wanna-bes." In this town, we see the aspirations of our age, to collect such differences and forge a community.³² We see a town comfortable with its plurality and open to the possibilities that plurality offers. However, as the film suggests, such aspirations and comfort are indeed quite fragile.

ing Abraham, for seemingly no reason at all, to slay his innocent son. Law is fate entrapping Oedipus in a tragic drama from which he cannot extricate himself. The law we live with, more specifically, the positive law, is a mere shadow of law as fate, awesome in the power it can wield, but shackled by the need to justify the power it does wield, and unable to forestall or undo fate that befalls Abraham. Oedipus, or us, less-storied figures.

30. For a more complete exploration of these themes, see Austin Sarat, *Imaging the Law of the Father: Loss, Dread, and Mourning* in *The Sweet Hereafter*, 34 *LAW & SOC'Y REV.* 3 (2000).

31. RHODE, *supra* note 19, at 142.

32. See Austin Sarat & Roger Berkowitz, *Disorderly Differences: Recognition, Accommodation, and American Law*, 6 *YALE J.L. & HUMAN.*, 285 (1994).

Stephens brings another history to this community. His history and the community's present collide as he tries to introduce them to law's distinctive way of responding to loss. Stephens represents the alien presence of legality, with its habits of assigning guilt and constructing hierarchy. Evoking the standard critique of litigation, the film suggests that while the community survives the tragedy of the bus accident, it is endangered by the law's presence, and its invitation to turn grief into greed. A dread-inducing legality threatens to pit people against one another, while transforming differences into advantage for some and disadvantage for others. Rather than providing closure, the law promises to prevent the healing of psychological wounds left behind after the accident. And Stephens, continuously obsessing about his drug-addicted daughter, cajoles, pleads, and even gets down on his knees in an attempt to convince the parents of the dead and injured children to sue, thereby embodying the promises and the dangers of this law.

How do we imagine the role of law in the hidden domains of civil justice through such an icon? Stephens is unnervingly polyvocal and chameleon-like. What he says and how he presents himself shifts as he moves from place to place, more specifically, from potential plaintiff to potential plaintiff. Stephens is a seducer of the weak, preying on the human vulnerabilities and needs which his finely tuned legal sensibilities can discover in a minute. Nonetheless, these very attributes remind us of the plurality and possibility, which, in this case, may lie below the surface of a dread-inducing, community-destroying legality.

To some of the town's parents, Stephens offers dignity and status. Stephens treats the parents as the embodiment of the community's values and its respectability, even as he invites them to gossip about their neighbors' debts, defects, and criminal records. To other people, Stephens holds out different hopes, promises, and benefits, if they join his "cause." Some of Stephens's promises and ploys are predictable, others are surprising, even counter-intuitive. However, this approach only marks our distance from Stephens, the gap between common sense and the sharply-honed legal mind, and it arouses fear of a law that can see through us and identify precisely our needs and vulnerabilities.³³

33. Thus, Stephens offers money to Sam, who readily and eagerly wants to profit from his daughter's pain. To Nicole, Stephens suggests that the lawsuit will transform her from a pitiful victim to agent, that it will enable her to act in a way that will stop people from seeing her only as a "cripple." Stephens makes this pitch by identifying with those who see her only that way. "I don't like to think about the accident," Nicole tells Stephens. "I don't even remember it happening. Besides it just makes people feel sorry for me," she says. "You hate that," Stephens replies, "[P]eople can't help it. They see you in this wheelchair and they are going to feel sorry for you. I

A. The Promise of Respectability

Stephens's first contact with the town's citizens arises when he checks into the Bide-A-Wile Motel, a dingy and disheveled place run by Risa and Wendell Walker, who are themselves parents of one of the children killed in the bus accident. Wendell, an overweight, unshaven, unpleasant man, first thinks that Stephens is another of the reporters who recently descended on the town. However, Stephens corrects Wendell by stating, "I'm a lawyer. I realize that this is an awful time, but it is important that we talk."

Stephens soon engages the Walkers in a conversation about their neighbors and other parents who lost children in the accident. Encouraged by Stephens, Wendell eagerly plays the role of the town gossip, telling Stephens about the drinking and domestic problems of others in the town. "Kyle Mastersons' a drunk," says Wendell, beginning a snarling monologue that invites viewers to wonder whether what he says about Kyle is also true of himself, "no one likes him. He's a nasty piece of work." Risa joins in the gossip sporadically, reluctantly, and sympathetically, adding that Kyle spends too much time at the local bar, that he feels "trapped by his life," that he blames "his wife for that, and . . .," Wendell triumphantly interjects, "and he beat her!" Talking later about another victim's father, Wendell tells Stephens, "everybody knows that Joey steals antiques from summer cottages and sells them to dealers in the city. He has been doing that for years."

Stephens responds approvingly, posing the needs of law against the bonds of community solidarity. Stephens states, "that's right Wendell. That's exactly what I need to know so it won't come back to haunt our case later on." Stephens not only encourages the gossip, but treats the Walkers, who themselves hardly seem to be paragons of virtue, as model citizens, by telling them, "you see to do this right, to actually have a chance of winning, of getting some money to compensate you for the loss of your boy, we need folks like you, sensitive, loving parents, with no criminal backgrounds, no history of trouble in the town." Stephens brands the Walkers as arbiters of respectability, asking them to judge the character and reputation of the townspeople. Stephens then asks, "now of the people you have told me about, whose kids were killed, who do you consider to be good, upstanding neighbors, people who will help us with our cause?"

didn't even know you and how exciting your life was before the accident and even I feel sorry for you."

Soon Risa brings up another family, a family she admires, the Ottos. She tells Stephens this couple lost an adopted Indian son, Bear. "That's good," Stephens responds in a cynical, realist moment, "Judges like adopted Indian boys. Tell me more about the Ottos."³⁴ Risa praises the Ottos' intelligence and devotion to their son, but Wendell interrupts, insisting that the Ottos use drugs. With this statement, the bitterness lurking below the surface of the Walkers' relationship erupts, and they begin to argue. Just then Stephens' cell phone rings, and he excuses himself as he walks out of the living room into the adjoining corridor. Viewers then hear snippets of the Walkers' argument, catching a few muffled phrases just as Stephens might have heard the argument. The scene dissolves as we watch Stephens inch gradually closer to the room from which he just departed, in order to eavesdrop. Stephens then overhears Wendell state, "did you hear what that man said. He said good, good Wendell"

In his encounter with the Walkers, Stephens is, on the surface, smooth and controlled, the well-dressed, successful, big-city lawyer. Stephens plays well to his audience, offering Wendell the kind of attention that he rarely gets, and investing in the Walkers the type of social status that they hardly seem to deserve. At the same time, Stephens explains the law's interest in the character and reputation of litigants without mentioning the merits of their case. Finally, Stephens shows viewers a glimpse into the way he practices law, as he tries to overhear a conversation that clearly was not intended for his ears. When viewers later learn that Stephens's pitch worked and the Walkers have retained him, we are left to wonder whether it was the fact that he treated them with respect and offered them respectability that moved them to join the "case" and the "cause."

B. *"There's No Such Thing as an Accident"*

There is, however, nothing subtle or indirect, nothing for the viewer to wonder about in the manner that Stephens approaches the Ottos, or in the way he attempts to engage them in the process of naming, blaming, and claiming. If respectability was the major currency of Stephens's appeal to the Walkers, to the Ottos he promises the restoration of order in a disorderly world, the substitution of blame and responsibility for fatalism and acceptance. This is the classic call of total justice, "the general expectation that somebody will pay for any and all calamities that happen to a person . . . , that there ought to be

34. On the pervasiveness of such cynical realism about law, see AUSTIN SARAT & WILLIAM FELSTINER, *DIVORCE LAWYERS AND THEIR CLIENTS: POWER AND MEANING IN THE LEGAL PROCESS* 85-107 (1995).

some sort of redress."³⁵ However, unlike the Walkers, who quickly succumb to the allures of litigation and assume the role that Stephens offers them, the Ottos, especially Mrs. Otto, put up a fierce, if ultimately futile, resistance.



STEPHENS WITH THE OTTOS³⁶

In an extended and rather claustrophobic scene shot inside their A-frame home, the camera focuses closely on the faces of Stephens and Mrs. Otto, the former focused earnestly on his prey, the latter deeply pained and saddened. Introducing himself to Mrs. Otto, Stephens mentions the Walkers, citing information that they supposedly told him, information that the film's viewers know to be false.

STEPHENS: Mrs. Otto, my name is Mitchell Stephens. The Walkers told me that you might be willing to talk to me. I'm sorry for coming unannounced like this, but the Walkers said you'd understand. It's an awful time, but it is important that we talk. The Walkers spoke very highly of you.

35. FRIEDMAN, *supra* note 17, at 43.

36. Images reproduced herein have been expressly authorized by Camellia Frieberg, producer and copyright holder of *The Sweet Hereafter*. *The Sweet Hereafter* is copyrighted by New Line Cinema, Alliance Atlantis International, and Camellia Frieberg.

MRS. OTTO: You've been retained?

STEPHENS: Yes.

MRS. OTTO: Their child dies and they got a lawyer?

That final comment is the voice of fate, "[t]heir child dies and they got a lawyer," expressing incredulity that someone who lost a child would turn to the law.

However, Stephens artfully acknowledges the limits of the law and of the services he can provide, even as he searches for something with which to engage Mrs. Otto.

STEPHENS: It should be said that my task is to represent the Walkers only in their anger, not their grief.

MRS. OTTO: Who do they get for that?

STEPHENS: You are angry aren't you Mrs. Otto. That's why I'm here to give your anger a voice, to be your weapon against whoever caused the bus to go off the road.

Anger, not grief, is the material used to create a lawsuit. Recognizing and fueling that anger is essential for the lawyer seeking to generate a suit. In order to accomplish this goal, Stephens makes the type of appeal that Judith Shklar says is crucial in the movement from misfortune to injustice, introducing the idea that a human agent caused the accident. As Shklar notes, "most people hate to think of themselves as victims; after all, nothing could be more degrading. Most of us would rather reorder reality than admit that we are the helpless objects of injustice."³⁷

This reordering continues as Stephens refocuses Mrs. Otto's initial identification of the responsible agent, away from the bus driver, toward a more financially lucrative target. Stephens states, "it is my belief that Delores [the bus driver] was doing exactly what she's been doing for years. Besides the school board's insurance on Delores was minimal. No, the really deep pockets are in the town or the company that made the bus." These lines represent caricatures of the attitude that critics of the litigation explosion argue is typical of the plaintiff's personal injury bar, namely, that blaming follows judgments about the value of potential recovery.³⁸ Nevertheless, these comments barely engage Mrs. Otto.

Mrs. Otto asks, "do you think someone else caused the accident Mr. Stephens?" Again, Stephens offers up an almost pure rendition of the difference between misfortune and injustice, simultaneously battling

37. SHKLAR, *supra* note 5, at 38.

38. See HUBER, *supra* note 13, at 79-80. "Behind every great fortune there is a great crime, Balzac once said. New tort practitioners managed to reverse things entirely. Searching for the fortune came first; a crime would then be found, one way or another, in the vicinity of the cash." *Id.*

fatalism with an ethic of blame and responsibility. Stephens represents the world of tortfeasors as a cold world of cost-benefit calculation in which the plaintiff's lawyer is the moral hero.

Mrs. Otto, there is no such thing as an accident. The word doesn't mean anything to me. As far as I'm concerned somebody, somewhere made a decision to cut a corner, some corrupt agency or corporation counted the cost variance of a ten cent bolt and a million dollar out-of-court settlement. They decided to sacrifice a few lives for the difference. That's what is done, Mrs. Otto. I've seen it happen so many times before Somebody calculated ahead of time what it would cost to sacrifice safety. It is the darkest most cynical thing you could imagine. But it is absolutely true. And now it is up to me to insure moral responsibility in this society?³⁹

"There is no such thing as an accident," surely this is one of law's most powerful stories, comforting in its assurance that cause and effect always can be identified, blame assigned, and fair compensation assessed.⁴⁰ Law offers its own distinctive forms for responding to pain; it refuses fate and promises to make the mysterious comprehensible. Law asks us to substitute reason for faith, and to act in this world against forces that threaten to overwhelm us. What Stephens offers to Mrs. Otto is an account of a world that makes sense, horrible, horrifying sense perhaps, but sense nonetheless. In this world, events have causes, human agents make the world what it is, even if they hide in the background, sometimes dimly perceived if perceived at all, when things go wrong. As Shklar explains,

We blame ourselves and each other unjustly simply to avoid Voltaire's conclusion that the world is a mass of random evil, of bad luck. Even impersonal, shared, tangled responsibility without a face is too much to bear Behind every disaster there must be ill-will and fault, and their consequences do not just happen. They are de-

39. Stephens's speech might well have been addressed to his own life, to the dreadful question of why Stephens's daughter Zoe, in spite of all the advantages brought by wealth and two apparently loving parents, became a drug addict. While Stephens is tormented by the question of why Zoe turned out as she did, he invites the film's viewers to ask whether what he says might be applied to his own life. If there is no such thing as an accident, is Stephens himself responsible for his daughter's drug addiction? Did this father on trial in the distinctive juridical space of the moving image cut corners in the way he raised Zoe? Is he more like the good father (Billy Ansel) whose child is inexplicably, unfairly taken from him? Or, like Sam, who loses his child because of his own bad acts? Or is he caught up in the conventionally defined roles of fatherhood, the contingency of which is made visible in the multiple characterizations of fatherhood that the film provides? Is he so bound by them that the way he fathers mirrors the way he practices law? For an extended treatment of these questions, see, e.g., SARAT, *supra* note 30, at 26.

40. Exploring the significance of the discourse of responsibility in the face of death, Derrida notes that some believe that "the reign of responsibility and, along with its freedom [sic] consists perhaps of a triumph over death, in other words a triumph of life." JACQUES DERRIDA, *THE GIFT OF DEATH* 16 (David Wills trans., 1995).

signed to occur, by ourselves and powerful others. Injustice makes sense, and we can cope with it and carry on . . . Someone simply must be blamed to maintain the unquenchable belief in a rational world.⁴¹

Even in the face of this reordering appeal, Mrs. Otto is not easily convinced. She persists in refusing law's invitation to reorder her world in the categories of guilt and blame. Mrs. Otto asks sarcastically, "so you are just the thing we need?" She continues, "isn't that what you want us to believe Mr. Stephens, that you know what is best for us?"

Stephens is unfazed by Mrs. Otto's attack. It is as if he has seen and heard it all before. Crawling toward her on his hands and knees, he responds directly, that in fact he does "know what is best," that the other side is lining up lawyers to take advantage of the town's "grief-stricken parents." Finally, Stephens appeals to his own anger as he reiterates the reality of blame and responsibility. Stephens states, "if everyone had done their job with integrity, your son would be alive and safely in school this morning . . . Now that makes me very, very mad."

As Mrs. Otto breaks down, overcome by the invitation to imagine the quotidian reality of her son alive in school, Stephens continues, his words quickening as if sensing her vulnerability. Stephens states, "I promise that I will pursue and reveal who it was that didn't do their job, who is responsible for this tragedy, and then in your name, the Walkers' name, and in the name of anyone else who decides to join us, I will sue. I will sue for negligence until they bleed."

Throughout this speech, the tone of Stephens's voice and the close-ups of his face are crucial, revealing lawyers as consummate actors, moving from shouts to whispers, from compassion to indignation, in a seemingly effortless and sincere expression of emotion. When Mrs. Otto finally bursts forth with her previously unspeakable wish that "whoever did this" should go to jail "for the rest of his life," Stephens moves easily to another register, calmly reigning her in, explaining, as if completing a primer on the law of torts and its purposes, that

it is unlikely that anyone will go to prison. But her or his company will pay in other ways and we must make him pay, not for the money for the compensation for your lost boy. That can't be done, but for the protection of other innocent children. You see, I'm not just here to speak for your anger, but for the future as well.

This scene, which consumes more than eight minutes, is of a length which underlines its dramatic importance in the first story of the hid-

41. SHKLAR, *supra* note 5, at 54.

den domains of civil justice. The story of law's seemingly irresistible gravitational attraction ends with Mrs. Otto inquiring about the cost of Stephens's services. After he explains the way contingency fees work, he momentarily seems to pull back, showing human consideration and concern, suggesting that "you should have a chance to discuss this without me before you make a decision." However, this moment is quickly undercut as we watch Stephens put on his coat and race to his car to get a retainer agreement for the Ottos to sign.

C. *Suits and Seductions*

In the scene with the Ottos, *The Sweet Hereafter* makes the hard work of transforming fatalism into blaming vivid and visible. However, no such work is necessary with Sam, whose participation in the suit is unexplored in the film because it is simply taken for granted. We are shown no appeals to his needs for respectability, for the restoration of order in the face of tragedy, or for anything else. Sam, the father of one of the few children, Nicole, who survives the accident, is Stephens's most eager client and his spiritual ally in the film. With regard to the lawsuit, Sam seems concerned only with money, asking Stephens at a particularly awkward and inappropriate moment in the film, "when do they award the damages?"

However, interestingly enough, Sam is also guilty of sexually molesting his daughter. This act of incest and the way Nicole comes to terms with it, play out as a parallel and ultimately intersecting narrative with the story of the accident and the lawsuit.⁴² This parallel is suggested in a scene where Sam and Nicole are being briefed by Stephens about an upcoming deposition. Nicole, almost too eagerly volunteers that "I won't lie No matter what I'm asked I'll tell the truth." The camera then shifts quickly to Sam, as his eyes, registering his uncertainty and anxiety about the meaning of her promise, dart in Nicole's direction.⁴³

Having presented himself to the Walkers as pursuing a "cause," and to Ottos as a man on a mission, filled with righteous indignation, play-

42. As Atom Egoyan, the film's screen writer and director, stated, "[t]here are two primary scenes of 'catastrophe' in *The Sweet Hereafter*. The first, an image of incest between Nicole . . . and Sam . . . is almost completely sublimated The school-bus accident, in contrast to the incest scene, is the catastrophe that the viewer of *The Sweet Hereafter* must anticipate." Atom Egoyan, *Recovery*, in *7 SIGHT & SOUND* 20, 21 (1997).

43. Still later, Sam's fear is registered when they talk in Nicole's room. Nicole's monosyllabic, non-responsiveness to his questions, leads Sam to note that she "seems distant." Her distance, her withdrawal empowers her just as it unnerves him. Nicole exercises her dread-inducing power when she evokes the scene of incest by calling on Sam to "[r]emember, Daddy, the beautiful stage you were going to build for me. You were going to light it with nothing but candles."

ing a key part in a morality tale of good battling evil, Stephens changes his tactic when dealing with Nicole, whom he mistakenly believes to be fragile and fearful. In this situation, the language of cause is put aside; anger and indignation is displaced as Stephens tries to reassure her that the lawsuit is simply a matter of people doing their jobs. Discussing what the defense lawyers will do in the deposition, Stephens emotionlessly says,

[t]hey work for the people that we are trying to sue. Their job is to try to minimize damages and ours is to try to maximize them. That's the way you have to think of it as people doing their jobs. There's no good guys or bad guys. There's just their side and our side.

These shifting appeals serve not only to implant doubts about Stephens in the film's viewers, but they remind us that naming, blaming, and claiming do not occur naturally. Rather, these concepts are aspects of the social lives we lead, and are often dialogic events in which appeals and audiences play key roles in overcoming doubt.⁴⁴

The Sweet Hereafter offers its viewers a clear parallel between Stephens effort to convince the citizens of the small town to litigate, and Sam's incestuous seduction of his daughter. In creating this parallel, the film speaks to the first story of civil justice, the story of the movement from misfortune to injustice, the story of naming, blaming, and claiming, joining critics in the media and popular culture who warn of the dangers of litigation. The parallel between the suit and the seduction is drawn in many ways, the most powerful of which involves the use of a fable, *The Pied Piper of Hamelin*,⁴⁵ which is narrated gradually and intermittently, often in voice-over by Nicole. The lawsuit and the fable both pose a grave threat to the town and its children. The idea that the suit is itself a kind of seduction, and that Stephens is a dangerous seducer, is suggested by the many different appeals that Stephens makes, appeals in which he positions himself in sometimes contradictory ways. While none of the characters recognize the contradictions we do. Viewers watch Stephens engage, first one and then another of the potential plaintiffs, in a colloquy about the accident and its aftermath. Beware of the lawyer making promises.

44. Lynn Mather & Barbara Yngvesson, *Language, Audience, and the Transformation of Disputes*, 15 *LAW & SOC'Y REV.* 775 (1980-81).

45. Robert Browning, *THE PIED PIPER OF HAMELIN*, *EVERYMAN'S CHILDREN'S CLASSICS* (Bracken Books 1993), see also GRAHAM ANDERSON, *FAIRYTALE IN THE ANCIENT WORLD* 133 (Routledge 2000).

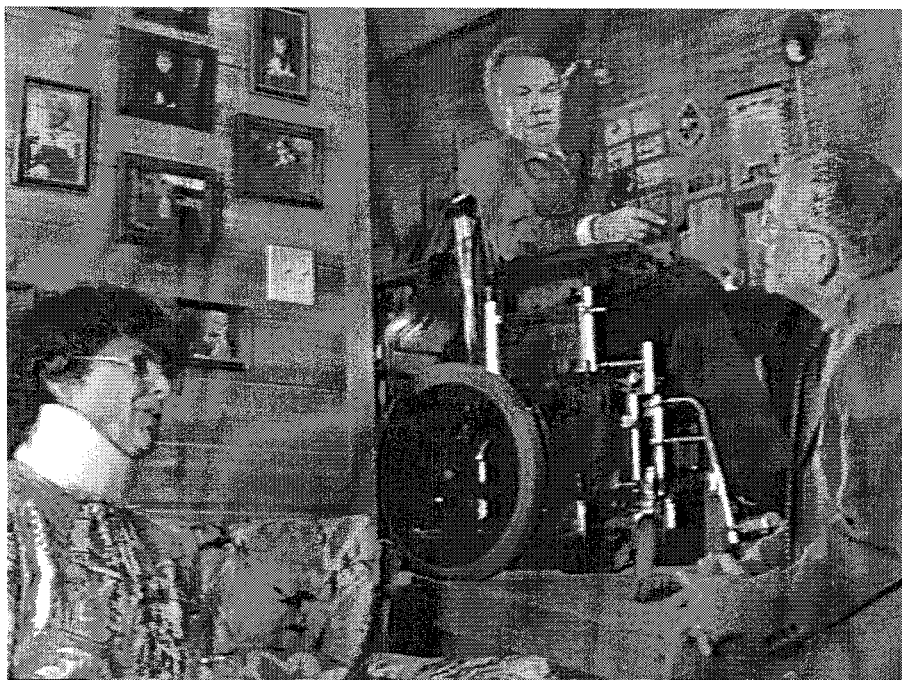
III. RESISTING THE ALLURE OF LITIGATION: FATALISM AND FIDELITY IN THE FACE OF MISFORTUNE

As *The Sweet Hereafter* appears to join the chorus of critics warning that the pull of litigation is irresistible, its allure as dangerous as the “romantic” exploitation of a young girl by her father, the film undercuts this narrative by introducing another story, one of a community’s triumph over law and fatalism’s resistance to the language of blame. These interweaving stories remind us of the contingency and variability of responses to tragedy, reactions to law, and of the uncertainty of law’s seemingly alluring appeal. Fatalism is not so easily or surely overcome; loyalties are not so easily dislodged. As powerful as the promise of substituting a tale of injustice for a tale of misfortune might be, the film shows that doubt is not always overcome, and seductions do not always succeed, because other voices and forces intervene to short-circuit the process of naming, blaming, and claiming. Law is as often defeated as it is successful in offering itself as the correct response to pain and suffering.

A. *Who Can Judge?*

The second story, the counter-narrative of the hidden domains of civil justice, begins with Delores, the steadfast, sensitive, childless woman who drove the bus the day of the accident, with the same loving attention to the town’s children that she had shown in driving the bus everyday for fifteen years. Delores’s pain and suffering are made visible in several ways. First, they are revealed in the way she is positioned when we initially see her sitting in her living room. Delores is in front of a wall covered with framed photographs of children, whose gentle faces we see long before we learn that they are the town’s children, who it had been her special pleasure to care for and drive. Other visible evidence of her injuries are a neck brace and a splint on her wrist. Still, another badge of the suffering in her life is Abbott, her husband, confined to a wheelchair by a stroke, who sits quietly just inside the right of the frame as Delores is shown conversing with Stephens about the accident. Nevertheless, it is to the photographs on the wall that the camera continually draws our attention, suggesting by its insistent focus that Delores has lost all of her children.⁴⁶

46. Thus, as she speaks slowly and tenderly about the Ottos, testifying to their good character and talking in the present tense about their love for Bear, the camera gives a close-up of his photograph hung in her living room.



DELORES, ABBOTT, AND STEPHENS

The film assigns Delores a special narrative role, first taking us to, then away from, and later back to Stephens's effort to enlist her as a plaintiff. Almost an hour into the film, Delores begins to provide Stephens, and through him the film's viewers, the first description of the events leading up to the accident. However, even as she recounts the event, her tender regard for the town's children is again conveyed.

By the time I reached the bottom of Bartlett Hill Road, I had half my load, Let's see, twenty, no twenty-two kids aboard. They'd walk to their places on the main road from the smaller lanes and private roadways. Bright little clusters of three or four children, like berries waiting to be plucked. That's the way I thought of them sometimes . . . like I was putting them into my big basket, clearing the hillside of its children.

This tender regard sits uneasily alongside her concern that she will be blamed for the accident, and her doubt that her innocence can be proven. In an effort Stephen attempts to reassure Delores Stephens says that

STEPHENS: Billy Ansel (who was driving behind the bus at the time of the accident) will insist that you were doing 50 miles per hour just like you've been doing every morning for fifteen years.

DELORES: He knows that, Billy?

STEPHENS: Yes he does.

DELORES: He said that?

STEPHENS: Um-Hmm.

DELORES: You talked to Billy?

STEPHENS: Yes I did.

However, what is reassuring for Delores is unnerving for the film's viewers, who again are privy to Stephens's duplicity, already having seen that Billy has refused to talk with Stephens about anything having to do with the accident.

Stephens quickly moves to enlist Delores in the process of naming, blaming, and claiming, offering to represent her in a suit charging "negligent infliction of emotional harm." Stephens says that she must join the Walkers, the Ottos, and Sam, in assigning blame for her suffering and making a claim for redress. This time he insists that what is at stake is her good name, her reputation, her very place in the community. Stephens states, "Delores, people have to know about your suffering. They won't understand until I can clear your name once and for all."

At this point, Abbott interrupts, introducing a story of community against law. His presence represents the disabled, almost silenced, outsider. Abbott seems quite disturbed as he emits a seemingly unintelligible stream of noises. However, what is unintelligible to Stephens and the film's viewers, is quite intelligible to Delores who translates as if she was the parent of a toddler whose first words have meaning only to her. Abbott, inarticulately, but powerfully, reaches out to Delores, sounding the alarm, reminding her of a set of values that she might have been tempted to forget burdened as she is by sadness and fear. "You heard what Abbott said," Delores says quite unselfconsciously, as if what he said was in need of no translation. Delores continues, "Abbott said that the true jury of a person's peers is the people of her town. Only they, the people who have known her all her life and not twelve strangers can decide her guilt or innocence."

Law is overcome by belief in, and loyalty to, the community. The lawyer's articulateness is defeated by scrambled noise, a voice from another place. What Abbott says to Delores reminds her, and the film's viewers, that her type of innocence cannot be proven, that there are things for which law can provide no effective redress. She will either be believed or she will not be. In order to know the truth of her role in the events surrounding the bus accident, one must know her and her character. Law, embodied in a jury of twelve strangers, cannot, unlike the film's viewers, be inside the bus during the accident. Law cannot recapture the truth of what happened in the bus. Law does not have a God's eye view. As a result, law can no more restore

her reputation, than it can restore the lives of the children she has lost. Delores's only possibility of redemption is to resist the law, to blame no one, and to claim nothing. Her ability to accomplish this goal, exemplifies the fragility of law's offer of blame, responsibility, compensation, and exoneration; an offer overcome by Abbott and Delores's fidelity to an ideal of community which sustains their lives.

When viewers see Delores giving a deposition, recounting the horror of the accident, stating that the bus was "like a huge wave about to break over us," we are reminded of the gap between her world and the world of law. Delores sobs as she particularizes the "us," by naming every child on the bus. The panning of the camera from Delores to Stephens, who sits impassively toying with a ring on his finger, ignoring her distress as he asks matter-of-factly, "and then what happened," suggests that the gap is truly unbridgeable.

B. "Leave Us Alone"

Billy Ansel, Vietnam veteran, garage mechanic, widowed parent of two, seems to be the classic embodiment of certain traditional male virtues. He is sturdy, unrefined and self-reliant. However, he is so devoted to his children, so eager to protect them, that everyday he follows the school bus waving to them until they reach their destination. He is, in addition, Stephens' greatest adversary as Stephens tries to convince grieving parents to sue; Billy is the most important voice of resistance and of refusal to law's invitation to name, blame, and claim.

The Sweet Hereafter goes out of its way to show that Billy's qualities as a father afford him no protection against the tragedy that befalls his community. Thus, it is through Billy's eyes that we first see the accident. We watch as he helplessly witnesses the bus skid off the road and slide down a hill onto the frozen lake.⁴⁷ We register the horror of the sound of ice cracking and the sight of the bus slowly sinking, simultaneously with Billy.⁴⁸ The camera then sweeps skyward, marking the ascent of souls departing for the sweet hereafter, and suddenly cuts to the ethereal image of the sleeping family of the young Mitchell Stephens. This cut is unsettling, marking the short and uncertain distance from sleeping innocence to unfathomable human tragedy.

47. This shot provides one example of the way the camera focuses attention upon "the look rather than its object" and in so doing "brings the look emphatically within the spectacle." KAJA SILVERMAN, *MALE SUBJECTIVITY AT THE MARGINS* 131 (1992).

48. "I felt," Egoyan explains, "it was imperative to shoot the accident from the vantage point of the widower Billy Ansel . . . as he *experienced* it. I believed that this would . . . situate it, like the incest scene, within a primary character's point of view." See Egoyan, *supra* note 42, at 23 (emphasis in original).

Yet, this is not Billy's first confrontation with loss. Billy's wife earlier died of cancer, and Billy becomes an example of what Kaja Silverman claims to be true of male characters in other films. As a result of Billy's confrontation with his own "lack . . . [he] acquires the capacity to become something other than what the male subject has classically been."⁴⁹ But it is not Billy as father figure that is critical in *The Sweet Hereafter's* exploration of the hidden domains of civil justice, and of the contingency and variability of naming, blaming, and claiming. Rather, the crucial role is seen in Billy's resistance to Stephens.

Billy's resistance is presented in three separate scenes. The first scene, a brief interlude, takes place after the bus accident at the scene of his regular assignations with Risa Walker. On this occasion, however, there is no intimacy, only a shared grief accompanied by a serious disagreement about how to respond to the tragedy. The disagreement between the two begins when Billy asks Risa whether it is true that she has signed up with Stephens. Mimicking words we know Stephens has said to others, Risa answers, "something made this happen Billy, and Mr. Stephens said he's going to find out." Billy insists, *contra* Stephens, "it was an accident."

Billy is willing, and able, despite the depth of his suffering, to live in a world in which accidents happen. A world where one can neither predict nor respond to fate, and where reason points to the limits of reason. Thus, Billy reminds Risa that he serviced the bus and knew that there was nothing wrong with it. However, she persists, "the guardrail wasn't strong enough." At this point, Billy's cold disdain shows through as he asks, "you believe that?" Risa responds, "I have to." Billy exclaims, "well, I don't," and in words reminiscent of some of Shklar's own analysis, he says, "maybe you should get yourself [a] witch doctor, not a lawyer, or maybe they are the same thing."⁵⁰

The second scene of Billy's resistance to naming, blaming, and claiming occurs in his only direct confrontation with his nemesis, Stephens. In this pivotal scene, Billy returns to his gas station and auto repair garage, where the salvaged bus is being kept, to find Stephens moving around inside the bus, video camera in hand. Oblivious to what it represents, Stephens treats the bus as just another piece of evidence that needs to be preserved for use in future litigation, walk-

49. SILVERMAN, *supra* note 47, at 155.

50. As Shklar says, "[w]itchcraft is as good an answer to 'Why me?' as any . . . Witchcraft . . . clearly integrates misfortune into an existing social and moral framework and warns people against giving way to malice." SHKLAR, *supra* note 5, at 62.

ing around and defiling the tomb in which the dead childrens' spirits reside.



ANSEL AND STEPHENS

Billy, on the other hand, approaches the bus reverently, taking off his hat, staring at the smashed back door from which his kids waved every morning as he followed the bus to school. Discovering Stephens, he approaches him menacingly, orders him to “get the fuck away from the bus,” and announces his intention to “beat you [Stephens] so bad until you piss blood and can’t walk for a month.” Stephens is, however, undeterred by these threats; “I can help you,” he calmly states. Nonetheless, Billy’s response marks the world in which he lives, a world where there can be no earthly compensation for the loss of one’s children. “Not unless you can raise the dead.”

However, Billy quickly moves from this posture of existential acceptance, fatalism in the face of loss, to one in which he allies himself with the community and its interests, acting as its protector even as he expresses deep incredulity that his neighbors would use the law to respond to their loss.

BILLY: You leave the people of this town alone. You can’t help.

STEPHENS: You can help each other. Several people in the town have agreed to let me represent them in a negligence suit. Your case as an individual will be stronger if I'm allowed to represent you together.

BILLY: Case?

STEPHENS: The Walkers have agreed. The Ottos have agreed. Nicole's parents.

BILLY: Listen, I know Risa and Wendell Walker. They wouldn't hire a goddamn lawyer. The Ottos, they wouldn't deal with you. We're not country bumpkins you can put the big city hustle on.

STEPHENS: You are angry, Mr. Ansel, and you owe it to yourself to feel that way. All I'm saying is let me direct your rage.

At this point, Stephens' cell phone rings, but this time he does not answer. Instead, he uses the call to appeal to Billy, an attempt to identify with him as a father in mourning. Stephens enlists his private suffering as a tactic in his professional work. Stephens states, "it's my daughter, or it may be the police to tell me they have found her dead. She's a drug addict." Whatever its meaning to Bill, this speech reflects Stephens's own grief, bewilderment, and vulnerability. Stephens continues, "why am I telling you this, Mr. Ansel? Because we've all lost our children. They're dead to us. They're killing each other in the streets. They wander comatose through shopping malls."

However, Billy is so unmoved by this effort at identification that he simply puts on his hat and walks away. Unlike his neighbors, he has seen through Stephens, the witch doctor using all the tricks at his disposal to cast a spell. The only safe response is exit. Billy's exit shows that he is strong enough to confront loss, and to live and grieve in a world he can neither fully understand nor control.⁵¹ Billy refuses to believe that law can aid mourning, make the irrational rational, or make the accidental have a cause. His strength is a measure of the law's weakness, a reminder that law is indeed not irresistible, that litigation is neither the necessary nor the inexorable response to injury, that the quest for total justice is not all encompassing.

As Billy leaves, Stephens turns his eyes skyward, as if addressing a different audience, and continues, "something terrible has happened. It has taken our children away. It is too late. They're gone." In this moment, the distinction between public and private completely disappears. The lawyer is just another frightened, confused father, vulnerable to the very loss to which his professional work is now responding. Just as Stephens can do nothing for the children who died or for their

51. What Derrida says about the biblical Abraham is also true of Billy Ansel. They both recognize that "even if one thinks one knows what is going to happen, the new instant of that happening remains untouched, still unaccessible, in fact unlivable." DERRIDA, *supra* note 40, at 54.

surviving parents, he is overwhelmed by the fear that Zoe is also “gone,” that it is “too late” for her as well. At this point, Stephens momentarily acknowledges the weakness of law before a fate whose workings he can neither understand nor control.

The third scene of Billy’s resistance to naming, blaming, and claiming occurs late in the film when he goes to see Sam. This scene is a classic confrontation between good and evil, between fidelity and greed, played out over the question of the fate of the lawsuit. In this conversation, we see Billy’s dread before the law, his desperate desire to avoid entanglement with it and its traumatic repetition, even as he appeals to Sam to drop the suit.⁵² Through Billy, law is shown to contain its own excesses and to stand in the way of the healing that comes with the completion of mourning.⁵³ Billy conjures a legal world gone awry, a world in which one misstep can have catastrophic consequences.

I don’t want a darn thing to do with it. Lawyers are suing lawyers, [and] people are pointing fingers at each other and making side deals and dickering over percentages. He [Stephens] is going to force me to testify in court. I was driving behind the bus and I saw it happen. He’s going to force me to go over all this again. Then all those other lawyers are going to line up behind him and try to do the same thing.⁵⁴

Billy insists that if Sam drops the suit, others will do so as well, and he offers to give Sam the money he received from the school board’s liability insurance on Delores. Yet, Billy’s ultimate, and ultimately unsuccessful, appeal is to the ethic of mutual aid that he insists previously animated their town. For Delores, the community is the only true source of judgment, and for Billy, the community and only the community, is an appropriate source of assistance. Billy states, “I could pay for Nicole if that is what you are really talking about. I’ll even give you the money I got for my kids. That’s what we used to do, remember, help each other cause this was a community.”

52. Trauma is “the response to an unexpected or overwhelming violent event or events that are not fully grasped as they occur, but return in repeated flashbacks, nightmares, and other repetitive phenomena.” CATHY CARUTH, *UNCLAIMED EXPERIENCE: TRAUMA, NARRATIVE, AND HISTORY* 91 (1996).

53. For a different view of the capacity of law to help the healing process after traumatic events, see MARTHA MINOW, *BETWEEN VENGEANCE AND FORGIVENESS: FACING HISTORY AFTER GENOCIDE AND MASS VIOLENCE* 61-70 (1998).

54. Saying “I saw it happen,” Billy reminds us that, we too, saw it happen. This reminder provokes viewers to retrieve their own experience of witnessing the bus go off the road and to imagine the dread of having to re-live that event in a rhythm and manner which, while it may stand in the way of completing the work of mourning, is nonetheless what the law requires.

Billy's unsuccessful attempt to dissuade Sam is crucial to the dramatic unfolding of the film and to the full articulation of its second story, enabling another voice to enter the conversation about naming, blaming, and claiming.⁵⁵ Thus, while the good father turns out to be powerless before the Pied Piper of law, Nicole is not. Nicole's role in articulating the second story, the story of refusal and resistance, and her power over law, is revealed late in the film when she gives her deposition. We watch her sitting near Sam and Stephens, as a defense lawyer asks questions about her recollection of the accident. "I remember it clearly now," Nicole asserts, "see we were going too fast down the hill and I was scared. The speedometer was large and easy to read from where I was sitting . . . [Delores] was going 72 miles an hour."

Since Nicole's testimony, which the film's viewers knows to be a lie, places blame on the person with the shallowest pockets, it effectively ends the suit. The testimony serves as a satisfying (at least for us, if not for Nicole) act of revenge against Sam, depriving him of the money he so desperately wants, but also as a means of exposing the weakness and vulnerability of law. Sam substitutes for Stephens, Nicole for Zoe, and all of Stephens's legal acumen, all his work, is defeated and derailed by a teenaged girl, who, like Stephens, works out a private conflict in a public setting.

Stephens tells Sam, "[t]he lawsuit is dead. Everyone's lawsuit is dead. It's over," announcing Nicole's symbolic castration of them both. The lie that kills the lawsuit is, however, not only an act of revenge; it is also an act of love. Through her lie, Nicole saves Billy from the law he so deeply dreads, and she asserts the priority of ethics over duty.⁵⁶ At the same time, Nicole represents the Pied Piper, exacting vengeance in response to the "sins" of fathers, and the lame child saving Billy, her village, and ultimately herself from the Piper.⁵⁷

Emphasizing Nicole's empowerment and the importance of her resistant voice and transformative vision, *The Sweet Hereafter* concludes its dialogue with Nicole speaking, again in voice-over, first to Stephens and then to Billy. Her words provide yet another perspective on the role of naming, blaming, and claiming, in responding to loss and suffering. As Stephens sits in a limousine at an airport, looking

55. Billy appeals to Sam as one father to another, as one citizen to another. "If you would drop your case," he pleads, "then the others would come to their senses. You are good, sensible parents. People respect you."

56. See DERRIDA, *supra* note 40, at 61.

57. Over close-ups, first of the lips of her father, and then of Stephens, we hear Nicole's voice, again reciting the fable. "And why I lied he only knew. But from my lie this did come true. Those lips from which he drew his tune were frozen as a wintry moon."

straight into the camera, we hear Nicole say, “two years later I wonder if you realize something. I wonder if you understand that all of us, Delores, me, the children who survived, the children who died. . . .”

The scene then shifts to Billy’s garage, the camera captures a crane gently raising the damaged bus, the end of the lawsuit freeing the dead children to make a long delayed journey to heaven. With the bus suspended in mid-air in the background, Billy stands, at first with his back to the camera, hat in hand, in a gesture of respect. His work of mourning is now complete. He turns away from this symbol of death, puts his hat on, and looks straight at us, reminding us that he, and the viewers, “saw it [the bus accident].”

The camera then moves from a close-up of Billy’s face, to that of Nicole, who continues enveloping him in her vision. She softly speaks, “that we are all citizens of a different town now, a place with its own special rules, its own special laws, a town of people living in the sweet hereafter.” The last word in this film is given neither to the lawyer, nor to those who joined his cause, but rather to a child or a victim’s hope for a resolution of this culture’s ambivalence about law and litigation.

Nicole’s statement reminds us of the contingency and variability of responses in the hidden domains of civil justice, even as it points to a transformation of our desires and anxieties about law and litigation, and even as it points to the possibility of a legality which no longer will seduce the innocent with false promises and empty hopes.

IV. CONCLUSION

Today, law lives in images that saturate our culture and have a power all their own. Mass mediated images are as powerful, pervasive, and important as other social forces, such as globalization, neo-colonialism, and structural disempowerment of the poor, with which scholars are already engaged. Like the engagement with these other critical turn-of-the-century phenomena, reading film may lead us to new places in our understanding of law. Film may open up new possibilities for engagement with some of the most pervasive myths about civil justice and civil litigation. Where “objective” and “neutral” social science evidence is today unable to persuade or even initiate new conversational possibilities, we may find that the resources for critique of, and critical engagement with, those myths are already present in popular culture.

The Sweet Hereafter is a significant moment in the cultural life of law, focusing on the hidden domains of civil justice. In a culture obsessed with trials, this film explores the social, psychological, cultural,

and professional dimensions involved in the emergence and transformation of disputes. While the emphasis on the litigation explosion that saturates the media might lead one to assume that law and litigation exert a daunting and virtually irresistible allure, this film explores the contingency and variability that necessarily are a part of the process of naming, blaming, and claiming.

I have held out *The Sweet Hereafter* as one example in which popular culture focuses on what Stuart Scheingold calls “paradoxes of power,” as they emerge in the hidden domains of civil justice.⁵⁸ In such domains, law is powerful, but hardly seems to be an adequate antidote to fate. Law is vulnerable to excess or indifference, to lies, and to loss. This film shows us that litigation is a contingent social fact, not an invariant social phenomenon. As a result, the film reminds its viewers of the uncertainties and vulnerabilities that abound in the civil justice system, showing law to be powerful, but fragile, attractive, but resistible.

The Sweet Hereafter advances a critique of litigation; warning that naming, blaming, and claiming may be as dangerous to the social health of a community, as to the psychic health of persons in mourning. The film highlights the key, perhaps even dangerous, role of lawyers in promoting litigation, even as it explores their own falsity and fragility. In this film, the lawyer turns out to be most unscrupulous in his inability to disentangle private need from public role.

Yet, while *The Sweet Hereafter* speaks to and fuels our fears of a litigious society, it makes available images of other possibilities. The film invites us to attend to voices at the margins, those society often ignores, to society’s least articulate members, its invisible victims, members whose loss and suffering is most profound. These voices tell an alternative story that partializes, if it does not undercut, the more familiar story of litigation and its irresistible allure. This is a story of desire, rather than fear. It is a story of desire for alternative responses to loss and suffering. In voices at the margin we hear resistance, a refusal to name, blame, and claim.

For some it is fatalism, for others it is community, for still others it is love that lights the path away from law. *The Sweet Hereafter* makes the contingencies and possibilities of law and of our responses to tragedy available to us. It provides but one dissenting note in popular culture against the chorus of those who warn of the irresistible pull of litigation. In the end, *The Sweet Hereafter* demonstrates that neither the law, nor the litigation that some now dread, are the law or the

58. This phrase was contained in a note from Scheingold to the author.

litigation that we must have. These are not the only elements present within the hidden domains of civil justice.