NEW YORK LAW SCHOOL

NYLS Law Review

Volume 43
Issue 3 *VOLUME 43 NUMBERS 3 & 4 1999-2000: SYMPOSIUM LAW/MEDIA/ CULTURE: LEGAL MEANING IN THE AGE OF IMAGES*

Article 8

January 2000

ACCIDENTS AS MELODRAMA

Neal R. Feigenson

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NEAL R. FEIGENSON

I. INTRODUCTION

Common sense thinking about accidents,[1] of the sort that lawyers proffer to jurors and in which jurors themselves engage, displays important features of melodrama. Common sense, like melodrama, takes the often complex question of responsibility for suffering and simplifies, personalizes, and moralizes it.

The claim that jurors tend to conceive of accidents in melodramatic terms may strike the reader as implausible, banal, or both. Implausible, because "the situations and sentiments [of classical melodramas] def[y] all categories of verisimilitude and [a]re totally unlike anything in real life"[2]; thus melodrama seems singularly inappropriate to describe how

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* Portions of this paper were presented at the Law, Culture, and Humanities workshop at Georgetown University Law Center in Washington, DC in March, 1998, the Law and Society Association annual meeting in Aspen, Colorado, in June, 1998, and the Law/Media/Culture symposium at New York Law School in March, 1999. I would like to thank Brian Bix, Steve Gilles, Rich Lipman, Leonard Long, Linda Meyer, Phil Meyer, Elayne Rapping, Richard Sherwin, Christina Spiesel, and John Thomas for their helpful comments, and Dean Neil Cogan for his generous research support.

1. My focus in this paper is common sense judgment about unintentional harms. Of the leading alternatives to the somewhat unwieldy "unintentional harms," I prefer "accidents" (or "accident cases") to "negligence" (or "negligence cases") because the latter may be read to presume fault—and even to reflect the insinuation of the melodramatic conception of unintended harms I analyze in this paper. Moreover, while the unintended harms that I discuss here are those for which the defendant's legal liability, if any, would sound only in negligence, the analysis also generally applies to cases in which any liability would be strict. I realize, on the other hand, that some may read "accident" to imply that no one is responsible for resulting injuries, although in modern, as opposed to classical, tort law, the category of "accidents" is usually thought to include negligently caused harms. *See* Stephen G. Gilles, *Inevitable Accident in Classical English Tort Law*, 43 EMORY L.J. 575, 576, 592 (1994).

2. Thomas Elsaesser, *Tales of Sound and Fury: Observations on the Family Melodrama*, *in* HOME IS WHERE THE HEART IS 43, 49 (Christine Gledhill ed., 1987). Or, as Alan Dershowitz titled his essay for LAW'S STORIES 99-105 (Peter Brooks & Paul Gewirtz eds., 1996), *Life Is Not a Dramatic Narrative*. To put the matter another way, melodrama certainly induces belief, but a belief in the emotional dynamics implicated by the fiction rather than in the world of fact or even the values of the fictional worlds depicted.

decision-makers would grapple with the facts of ordinary, real-life accidents. Banal, because the accepted stereotype of the plaintiff's lawyer in a personal-injury case is of someone who appeals to the jurors' emotions in the same blatant fashion as melodrama manipulates its audience's sentiments,[3] and jurors' sympathy for the injured plaintiff is widely believed to be a major factor in their decisions.[4] Moreover, televised legal events, both fictional[5] and real,[6] show popular cultural visions of the justice system in general that seem to be permeated by melodrama.

These prevalent views about the common sense of accidents are partly accurate, but also partly inaccurate and even contradictory.[7] My aim in this paper is to map the extent of the accuracy and to elucidate the apparent contradiction. Jurors' thinking about accidents is indeed melodramatic, but not entirely in the ways or to the extent commonly supposed. In response to the view that the melodramatic conception of accidents is implausible, I show how common sense thinking about accidents at trial really does share important features of melodrama. In response to the opposing view that jurors naturally conceive of accidents as melo-

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See Charles Affron, *Identifications*, *in* IMITATIONS OF LIFE 98, 108-09 (Marcia Landy ed., 1991).

3. *See, e.g.*, David Azevedo, *Destroying the Sympathy Element in a Malpractice Trial*, 67 MED. ECON. 102, 102 (1990) ("The plaintiff's attorney will play on a jury's heartstrings like a virtuoso."). In the terms Peter Brooks applies to Balzac in his classic *The Melodramatic Imagination*, we expect on observing a personal injury lawyer to be "witnesses to the creation of drama—an exciting, excessive, parabolic story—from the banal stuff of reality." PETER BROOKS, THE MELODRAMATIC IMAGINATION 2 (1976). For a recent collection of elaborations and extensions of the concept of melodrama, using Brooks's recent work as a point of departure, see MELODRAMA: STAGE, PICTURE, SCREEN (Jacky Bratton et al. eds., 1994).

4. *See* Neal R. Feigenson, *Sympathy and Legal Judgment: A Psychological Analysis*, 65 TENN. L. REV. 1, 20-22 (1997) [hereinafter Feigenson, *Sympathy*].

5. *See, e.g.*, David Ray Papke, *Prime Time Lawyers*, IND.U.SCH.L.—INDIANAPOLIS ALUMNI MAG., Spring 1995 at 2, 4-5 (discussing *Perry Mason* and other televised melodramas about law practice).

6. *See, e.g.*, George Lipsitz, *The Greatest Story Ever Sold: Marketing and the O.J. Simpson Trial*, *in* BIRTH OF A NATION'HOOD 3, 9 (Toni Morrison & Claudia Brodsky Lacour eds., 1997).

7. In this regard, our "common sense" views about how common sense works in accident trials resemble our common sense about other matters. *See, e.g.*, CLIFFORD GEERTZ, *Common Sense as a Cultural System*, *in* LOCAL KNOWLEDGE 73, 90-91 (1983) ("immethodicalness" of common sense); RICHARD NISBETT & LEE ROSS, HUMAN INFERENCE: STRATEGIES AND SHORTCOMINGS OF SOCIAL JUDGMENT 119 (1980) ("haphazard" nature of our collection of common sense causal theories).

dramas, I indicate the limits of that conception. Jurors, confronted with the serious task of making sense of and doing justice with regard to ordinary accidents, and instructed by the judge to consider the evidence and not to be influenced by emotion, are *invited* by plaintiffs' lawyers to respond to the case in ways that fit the patterns of melodrama, and they are in fact *inclined* to so respond; yet melodrama does not entirely govern their ultimate judgments of fault and compensation.

I also explore the social, cultural, and legal significance of our practice of thinking about accidents in melodramatic terms. Structuring accidents as melodramas primarily serves the purposes of plaintiffs' lawyers in particular cases. At the same time, by personalizing responsibility, melodramatic blaming in both law and popular culture often obscures the systemic causes of accidents. It thereby tends to protect the corporate industrial status quo and to shift public attention from our implicit societal choice to endure significant and largely random injury as a price of modern life.

The tools I use to understand the melodramatic aspects of negligence cases are drawn from social psychology. Negligence trials and melodramas, like all manifestations of culture, serve multiple functions, one of the most important of which is to provide "system[s] for making sense of experience."[8] Serious accidents beg to be made sense of; even if potentially explicable in terms of the parties' conduct, the victim (or his survivors) cannot help but wonder: why me of all people, and why at this particular moment? The need to explain is great.[9] Social psychology offers concepts and experimental techniques for describing, measuring, and identifying relationships among the processes of meaning-making in the wake of accidents.

I begin by offering a working definition of "melodrama."[10] I then summarize the psychological constructs that indicate why common sense conceptions of accidents may take the form of melodrama: monocausality, norm theory, culpable causation, and the fundamental attribution error.[11]

Next, I discuss evidence from two lines of research supporting the

8. BROOKS, *supra* note 3, at xiii.

9. *See, e.g.*, Denis J. Hilton, *Conversational Processes and Causal Explanation*, 107 PSYCHOL. BULL. 65 (1990) (causal questions triggered by difference between target case and implicit contrast case, such as between actual event and normal or ideal event).

10. *See infra* notes 17-43 and accompanying text.

11. *See infra* notes 44-71 and accompanying text.

claim that common sense decision-making in accident cases is at least partly melodramatic. The first, an analysis of discourse in a personal-injury trial, shows that the language a plaintiff's lawyer uses to persuade jurors and the language the jurors themselves use to explain their decision share key structural features of melodrama. Both attribute blame for bad outcomes in the same way, by simplifying, personalizing, and moralizing responsibility.[12] The second, an experiment involving different versions of real accident cases, shows that accidents in which only one party is blameworthy (i.e., which display the good guy / bad guy structure of melodrama) elicit stronger empathetic responses by mock jurors toward the plaintiff than do otherwise identical accidents in which blameworthiness is more complex.[13] This finding suggests that jurors respond emotionally to accident cases as if they think the typical accident is structured like a melodrama. Together, these lines of research suggest not only that melodrama is something that jurors' thinking has in common with lawyers' talk and popular culture, but also that structuring an accident case in melodramatic terms *causes* jurors to have predictable emotional reactions.[14]

I then put this research in perspective by indicating some of the limitations of using melodrama to understand jurors' decision-making about accidents.[15] Finally, I explore the cultural and legal significance of the melodramatic conception of accidents.[16]

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12. *See infra* notes 72-108 and accompanying text.

13. *See infra* notes 109-118 and accompanying text.

14. By contrast, my analysis of trial and post-trial discourse cannot prove that the way lawyers talk has any causal effect on the way jurors think. Even if the two correspond, as I hope to show (*see infra* notes 72-108 and accompanying text), the jurors could very well have thought the way they did for reasons having nothing to do with the plaintiff's lawyer's closing argument. (For a more complete discussion of this question, see Neal R. Feigenson, *The Rhetoric of Torts: How Advocates Help Jurors Think About Causation, Reasonableness, and Responsibility*, 47 HASTINGS L. J. 61, 70 & n.20 (1995) [hereinafter Feigenson, *Rhetoric*].) On the other hand, evidence that the "factual information" about accidents generally with which prospective jurors are likely to be acquainted is itself structured in melodramatic form (*see infra* notes 109-118 and accompanying text) does suggest, although it cannot prove, that the melodramatic form in the culture at large may lead to melodramatic thinking by jurors in the particular accident case. *See also infra* note 156 (possible causal relationship between depictions of personalized responsibility in Vietnam movies and subsequent personalized attributions of responsibility regarding Vietnam veterans' difficulties).

15. *See infra* notes 119-137 and accompanying text.

16. *See infra* notes 138-214 and accompanying text.

II. A WORKING DEFINITION OF "MELODRAMA"

What I have in mind by a melodramatic conception of accidents is a narrative in which: (1) events such as accidents are caused by individual human agency; (2) the acts of individuals are explicable in terms of their characters; (3) the agents involved in the accident can be divided into "good guys" and "bad guys"; (4) the focus of the narrative is the accident victim and his or her suffering; and (5) the good guy wins (at trial) and the bad guy gets his come-uppance. I will support this definition by reference to treatments of melodrama in the fields of literary, film, and media studies.

The first two features of this definition—*human agency* as the cause of events, or *personalization*, and *actions derived from character traits*—are implicit in the third, the *polarization of narrative into good versus evil*, and cannot really be understood apart from it. As Peter Brooks writes in his classic study, *The Melodramatic Imagination*, "[m]elodramatic good and evil are highly personalized: they are assigned to, they inhabit persons who indeed have no psychological complexity but who are strongly characterized. Most notably, evil is villainy; it is a swarthy, cape-enveloped man with a deep voice."[17] That is, melodrama is populated with easily recognizable character types that are without personal idiosyncrasy and can be clearly distinguished from one another.[18] The point of such characterization, clearly, is to *explain behavior*; the emphasis on simply defined traits makes such traits, and the person-in-situation stereotypes they invoke, the leading candidate for the cause of the actor's conduct. A bad guy is a bad guy always, whatever the situation; he is a bad guy because he does bad things, but before he does those bad things, we are cued to expect them by his appearance. In melodramas, then, things happen because people make them happen, and what things people make happen depends on the kind of people they are. Melodramatic *polarization* of the world into good versus evil deserves further emphasis.

> The essential action of melodrama is to polarize its constituents, whatever they may be—male and female, East and West, civilization and wilderness, and, most typically, good and evil. . . .

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17. BROOKS, *supra* note 3, at 16-17.

18. *See* George Bernard Shaw, quoted by Martin Meisel, *Scattered Chiaroscuro: Melodrama as a Matter of Seeing*, *in* Bratton et al. eds., *supra* note 3, at 65, 66.

> [T]he melodramatic world is composed of binary oppositions. Individuals are either wholly good or wholly evil, and it is this Manichæan vision that most obviously characterizes melodrama . . . .[19]

The melodramatic narrative is thus simplified in a third way: not only by limiting the causes of events to human agency and the causes of human action to character traits, but also by limiting the range of instrumental characters to two—the good guy and the bad guy.

The fourth feature of melodrama is a *focus on the victim and his suffering*. "One of the characteristic features of melodramas in general is that they concentrate on the point of view of the victim."[20] The victim thus becomes the central object of the audience's emotional participation in the story.[21] Finally, in melodrama, *the good guy usually wins*. Melo-

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19. JEFFREY D. MASON, MELODRAMA AND THE MYTH OF AMERICA 16-17 (1993). David Grimsted adds: "Humans find comfort in escaping the ambiguities of personal and social life by entering a morally simple world of perfect virtue and total vice, the latter always painted black enough to allow even the conspicuously shoddy to see themselves as among the children of light." David Grimsted, *Vigilante Chronicle: The Politics of Melodrama Brought to Life, in* Bratton et al, eds., *supra* note 3, at 199, 210. And, as Peter Brooks writes, "we find [in melodrama] an intense emotional and ethical drama based on the manichæistic struggle of good and evil." BROOKS, *supra* note 3, at 12-13. *See also id.* at ix (the novels of Balzac and Henry James "seemed in fact to be staging a heightened and hyperbolic drama, making reference to pure and polar concepts of darkness and light, salvation and damnation").

20. Elsaesser, *supra* note 2, at 64. Geoffrey Nowell-Smith elaborates: in classical tragedy the hero also suffers, but starting in the romantic period there is "a split, producing a demarcation of forms between those in which there is an active hero, inured or immune to suffering, and those in which there is a hero, or more often a heroine, whose role is to suffer. Broadly speaking, in the American movie the active hero becomes protagonist of the Western, the passive or impotent hero or heroine becomes protagonist of what has come to be known as melodrama." Geoffrey Nowell-Smith, *Minelli and Melodrama, in* Gledhill ed., *supra* note 2, at 70, 72; *see also* Grimsted, *supra* note 19, at 206, 210 (theatrical melodrama of 19th century America, to be contrasted with "vigilante" melodrama, offered to rationalize brutality toward members of the local underclass). Note also the resemblance between the fourth (and third) characteristics of melodrama and what Northrop Frye describes as "low mimetic" tragedy. NORTHROP FRYE, ANATOMY OF CRITICISM 38-39 (1957).

21. *See infra* notes 29-33 and accompanying text. It is interesting to note that the Motion Picture Producers and Distributors of America adopted in the 1930s a Production Code that more or less decreed the third and fourth elements of melodrama by stipulating that "the sympathy of the audience shall never be thrown to the side of . . . evil or sin." RAYMOND MOLEY, THE HAYES OFFICE 98-99 (1945), quoted in Dershowitz, *supra* note 2, at 101 n.11.

drama denotes a story that "ends on a happy or at least a morally reassuring note."[22]

To be sure, this definition oversimplifies matters. I do not mean to suggest that melodrama is the only kind of story or even the best kind of story that can be told about an accident, even though melodrama as defined above does share key features with the classic story form in which people most readily believe, what screenwriter Robert McKee calls the "archplot"[23] events are what happens to characters and what characters do, events do not happen by coincidence, and the story should end with a satisfying closure. Even within the realm of melodrama, this definition may appear to some to be a superficial pastiche that ignores the historical contexts in which melodramatic form originated and developed,[24] the ideologies that melodrama has represented or combated,[25] and the significance of distinctions among the various media in which melodrama may appear.[26]

Perhaps the most obvious way in which this conception diverges from the usual understanding of melodrama is by not emphasizing the heightened emotionality of the form. Most every treatment of melodrama features "emotional shock-tactics and the blatant playing on the audience's known sympathies and antipathies."[27] (Recent analyses of melo-

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22. David Thorburn, *Television as Melodrama, in* UNDERSTANDING TELEVISION: ESSAYS ON TELEVISION AS A SOCIAL AND CULTURAL FORCE 73, 74 (R. Adler ed., 1981). Once again, Peter Brooks: melodrama requires the "persecution of the good, and final reward of virtue," BROOKS, *supra* note 3, at 11-12, and on a somewhat more ambiguous note: "The ritual of melodrama involves the confrontation of clearly identified antagonists and the expulsion of one of them," *id.* at 17.

23. ROBERT MCKEE, STORY: SUBSTANCE, STRUCTURE, STYLE, AND THE PRINCIPLES OF SCREENWRITING 44-62, 136-141 (1997).

24. *Cf.* MELODRAMA: THE CULTURAL EMERGENCE OF A GENRE vii (Michael Hays & Anastasia Nikolopoulu eds., 1996).

25. *See, e.g.*, Gledhill ed., *supra* note 2. One of the many feminist studies of melodrama and "women's cinema."

26. One might, for instance, consider distinctions among opera, theatre, novel, film, and television; *see, e.g.*, THOMAS SCHATZ, HOLLYWOOD GENRES 221-60 (1981) ("family melodrama" as a specific film genre). All of these are to be distinguished from the *original* literal definition of "melodrama" as *musical* accompaniment of dramatic narrative to mark or heighten emotional effects. *See* BENÉT'S READER'S ENCYCLOPEDIA 636-37 (3d ed. 1987).

27. Elsaesser, *supra* note 2, at 44; *see also* BENÉT'S READER'S ENCYCLOPEDIA, *supra* note 26, at 636-37 (melodrama "has come to mean a play . . . in which . . . the object is to stimulate the audience's emotions without regard to convincing character portrayal"); WAYNE BOOTH, THE RHETORIC OF FICTION 130 (2d ed. 1983) (melodrama as

drama concur in the centrality of emotion to melodrama, but tend to consider it positively rather than pejoratively.[28])

I neither stress nor, I hope, ignore emotion as part of a conception of melodrama that might usefully be applied to accident cases. First, consider one obvious difference between the contexts of dramatic performance and law: by and large, the law in tort cases explicitly purports to prohibit jurors from using their emotions to decide cases.[29] A typical civil jury instruction, for instance, tells jurors that "[y]ou should not be swayed or influenced by any sympathy or prejudice for or against any of the parties."[30] This does not mean that emotions—lawyers' and jurors'—do not figure in accident cases; of course they frequently do. And emotional response, specifically sympathy, is plainly invoked by the fourth element of the definition, the emphasis on the plaintiff and his suffering.[31] This difference in sanctioned response between the theater (or the living room) and the courtroom does, however, suggest that extreme emotion is less likely to be integral to legal judgment than to artistic melodrama.[32] (Later I will offer some evidence that jurors' emotions in-

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cheap or obvious manipulations of our emotional responses); BROOKS, *supra* note 3, at 11 (melodrama's "indulgence of strong emotionalism"); Thorburn, *supra* note 22, at 74 (melodrama "makes sensation appeals to the emotions of its audience").

Melodrama elicits these emotions through plot structure, characterization, and, importantly, the actors' own displays of affect. So reliable (or "readable") is the connection between melodrama and emotion that social psychological studies have used soap operas as stimulus materials in establishing a high degree of cross-cultural agreement in recognition of emotional expressiveness (i.e., ratings by American viewers of expressed emotions by actors in both Japanese and American soap operas [viewed without sound] were highly correlated with ratings by Japanese viewers.) *See* Robert Krauss, Nancy Curran, & Naomi Ferleger, *Expressive Conventions and the Cross-Cultural Perception of Emotion*, 4 BASIC & APPLIED SOC. PSYCHOL. 295, 300 (1983).

28. *See, e.g.*, Affron, *supra* note 2, at 98-117.

29. *See* Feigenson, *Sympathy*, *supra* note 4, at 13-19.

30. DOUGLASS B. WRIGHT & WILLIAM L. ANKERMAN, 1 CONNECTICUT JURY INSTRUCTIONS (CIVIL) § 312, at 510 (1993).

31. *See id.* at 51-55 (discussing salience of suffering and other factors that influence intensity of sympathy).

32. *See* Valerie P. Hans & Krista Sweigart, *Jurors' Views of Civil Lawyers: Implications for Courtroom Communication*, 68 IND. L.J. 1297, 1318, 1322-25, 1331 (1993) (discussing jurors' perceptions of "appropriate" emotionality by lawyers). Of course, the fact that judges instruct jurors not to be swayed by emotion when they decide may lead jurors to *think* or *say* that they are not being influenced by emotion, when in fact their emotions will play just the same or an even greater role in their thinking than it would in the absence of such instruction. *See* Feigenson, *Sympathy*, *supra* note 4, at 72-74; *see also*

deed play a smaller role in their decision-making than usually believed).[33]

Second, the presentation of a legal case is at least somewhat constrained by the evidence and the rules governing its presentation in court in a way that the scripting of a theatrical drama is not, and this limits the range of both the emotions that are likely to be evoked and the plot devices available for evoking them. "Melodrama utilizes material that will invariably produce strong emotional shocks for the spectator . . . : murders, large-scale thefts or forgeries, confrontation with a murdered victim, trial, sentencing, preparation for the execution, hard labor, beggary, futile efforts to earn a living, a father's curse, tragic or joyous shocks connected with sudden recognitions."[34] And it composes this material into plots with unexpected, sharp reversals,[35] the better to provoke intense emotional response.[36] It is the rare personal injury case that permits such manipulations of the story line, even though lawyers may orchestrate witnesses and their testimony in the hope of enhancing dramatic

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Kari Edwards & Tamara S. Bryan, *Judgmental Biases Produced by Instructions to Disregard: The (Paradoxical) Case of Emotional Information,* 23 PERSONALITY & SOC. PSYCHOL. BULL. 849 (1997) (instruction to jurors to disregard sympathy actually increases jurors' use of sympathy). But people can sometimes regulate the effect of emotions on their thinking, and can sometimes recognize the difference between decisions that are driven by emotion and those that are not. *See* Feigenson, *Sympathy, supra* note 4, at 49-50, 68-69. For this reason, and because of the empirical research discussed *infra* note 109-118 and accompanying text, I believe that emotions may often be less crucial to people's judgments about responsibility and compensation for accidents when they are sitting as jurors, than it is to their response to theatrical, literary, or cinematic melodrama.

33. *See infra* notes 119-137 and accompanying text.

34. Daniel Gerould, *Russian Formalist Theories of Melodrama, in* IMITATIONS OF LIFE, *supra* note 2, at 118, 121. "Melodramatic narratives are driven by the experience of one crisis after another, crises involving severed familial ties, separation and loss, misrecognition of one's place, person, and propriety. Seduction, betrayal, abandonment, extortion, murder, suicide, revenge, jealously [sic], incurable illness, obsession, and compulsion—these are part of the familiar terrain of melodrama." Marcia Landy, *Introduction* to IMITATIONS OF LIFE, *supra* note 2, at 14; *see also* Elsaesser, *supra* note 2, at 52.

35. *See* GEROULD, *supra* note 34, at 121: "Especially forceful is the denouement with an unexpected reversal which determines the fates of all the characters, resolves all side issues, restores to normality the violated relationships, and satisfies the spectator." Here Gerould connects the importance for melodrama of plot construction and happy closure, the fifth element in my working definition.

36. *See, e.g.*, ANDREW ORTONY ET AL., THE COGNITIVE STRUCTURE OF EMOTIONS 64-65 (1988) (unexpectedness as factor in emotional intensity).

effect.[37]

In general, we can expect that melodrama would not be found in the arguments of counsel in accident cases in precisely the same forms in which it appears in the dramatic arts. Lawyers are, of course, subject to *situational constraints* that guide the explicit form and content of their arguments. Rules and conventions of trial procedure provide some of these constraints.[38] Jurors' expectations provide others.[39] If the melodrama is too blatant, jurors may not accept it as a plausible depiction of reality,[40] and so plaintiffs' lawyers can go only so far in explicitly invoking melodramatic response patterns. Therefore, if so motivated, they must try to accomplish these ends *implicitly*. It is the mediation of melodramatic sensibilities by the requirements and expectations of trial procedure that makes the uncovering of melodrama in accident cases such an interesting task.

But if accident trials seem *un*melodramatic because, *inter alia*, they do not emphasize the expression of strong emotions and the plot devices that elicit them, certain features of melodrama can illuminate the role that emotions—specifically, sympathy and anger—do play in common sense judgments about accidents. Sympathy and anger are strongly affected by what we may call the *structural features* of melodrama, what social psychologists would call the *attributional* features of the case, namely, who appears to have *caused* the accident and *why*.[41] For instance, whether people respond with sympathy or anger to someone who is suffering depends greatly on whether they believe the sufferer is responsible for his predicament.[42] The first three elements of our working definition articulate these structural or attributional features of melodrama. By focusing on them, we can better understand the place of emotions in common sense thinking about accidents.[43]

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37. I thank Richard Sherwin for this observation.

38. *See, e.g.*, Feigenson, *Rhetoric*, *supra* note 14, at 138-39.

39. *See, e.g.*, Hans & Sweigart, *supra* note 32.

40. *See infra* note 156 (why the melodramatic account must be a plausible substitute for a view of reality that takes systemic conditions into account in order to effectively channel attention away from the latter).

41. For an example of an attributional theory of the emotions, see Ortony et al., *supra* note 36.

42. *See, e.g.*, BERNARD WEINER, JUDGMENTS OF RESPONSIBILITY (1995).

43. In any event, if the reader objects that I cannot really be talking about melodrama if I fail to put emotionality in the central position, my response would be: fine, find another word to describe the set of features—responsibility simplified, personalized,

III. THE SOCIAL PSYCHOLOGY OF THE MELODRAMATIC VIEW OF ACCIDENTS

Social psychologists have identified many of the everyday habits of thought and feeling that people use, mostly unconsciously, to make judgments under conditions of uncertainty—such as judgments about who is causally or legally responsible for an accident.[44] Several of these habits form a cluster that I call the "normalcy and deviance" dynamic. These include people's tendency to select as the cause of an event the prior event that deviates the most from some relevant norm ("norm theory");[45] to assign more causal responsibility to an act the more morally blameworthy the act is ("culpable causation");[46] and to attribute others' behavior to their character traits rather than situational constraints ("fundamental attribution error"[47] or "correspondence bias"[48]). People who

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dichotomized, and moralized—that I have identified in common sense decision-making about accidents. My argument in this paper is that these features form a cluster that is significant because it (a) describes what is going on at different levels of the reality of accident trials, as revealed by different sorts of data (lawyers' discourse, jurors' discourse, jurors' emotional responses), and (b) permits interesting connections to be drawn between accident trials and popular culture. If the construct "melodrama" helps us understand behavior at trial and relationships between trials and popular culture better than we can without the construct, then it seems to me that the construct is useful. I acknowledge, of course, that other genres, motifs, or *topoi*, e.g., the protagonist as hero (*see, e.g.*, Feigenson, *Rhetoric, supra* note 14, at 141-43), or as fool (*see* Philip N. Meyer, *'Desperate for Love': Cinematic Influences upon a Defendant's Closing Argument to a Jury*, 18 VT. L. REV. 721 (1994)), or the jury as hero (Anthony G. Amsterdam & Randy Hertz, *An Analysis of Closing Arguments to a Jury*, 37 N.Y.L. SCH. L. REV. 55 (1992)), may also help us to understand trial behavior and its relationship to the larger culture, and that some of these other conceptions have features in common with what I am describing as melodrama (*e.g.*, the triumph of good over evil).

44. *See generally* SUSAN FISKE & SHELLEY TAYLOR, SOCIAL COGNITION (2d ed. 1991); JUDGMENT UNDER UNCERTAINTY: HEURISTICS AND BIASES (Daniel Kahneman et. al. eds., 1982); NISBETT & ROSS, *supra* note 7.

45. Daniel Kahneman & Dale T. Miller, *Norm Theory: Comparing Reality to Its Alternatives*, 93 PSYCHOL. REV. 136 (1986).

46. Mark Alicke, *Culpable Causation*, 63 J. PERSONALITY & SOC. PSYCHOL. 368 (1992).

47. Lee Ross & Craig Anderson, *Shortcomings in the Attribution Process: On the Origins and Maintenance of Erroneous Social Assessments*, *in* JUDGMENT UNDER UNCERTAINTY, *supra* note 44, at 145-50.

48. Daniel T. Gilbert, *Ordinary Personology*, *in* 2 THE HANDBOOK OF SOCIAL PSYCHOLOGY 89-150 (Daniel T. Gilbert et. al. eds., 4th ed. 1998); Daniel T. Gilbert & Patrick Malone, *The Correspondence Bias*, 117 PSYCHOL. BULL. 21 (1995).

employ these habits of thought would be inclined to think that a bad thing like an accident probably occurred because one person did a deviant, i.e. bad, thing, and that the person behaved that way because of the sort of person he or she is. Add to this a fourth habit of thought: people tend to prefer simple decision-making strategies, and, particularly relevant here, simple to complex causal explanations (the "monocausal" model).[49] The result is that jurors would be expected to possess a common sense schema of responsibility for accidents in which one and only one party, the "bad guy," is to blame, while the other party is more or less innocent. That is, jurors may tend to conceive of accidents as melodramas, and social psychology helps explain why melodrama would tend to strike jurors as a plausible explanation for accidents.

A. *Monocausal Explanation*

Let us begin with the simplest concept: people tend to prefer simple explanations for events or behaviors to complex ones. A century and a half ago, John Stuart Mill identified "the prejudice that a phenomenon cannot have more than one cause."[50] We tend to be "satisficers," content to rely on what first strikes us as a plausible sufficient cause for an event, guided consciously by simple schemas for "how things go" or unconsciously by the mere availability of causal candidates.[51] And even though people can sometimes generate multiple possible causes of their own or others' behavior, they tend to *act* as if causation were "hydraulic," such that the presence of one sufficient causal factor reduces the tendency to attribute causal force to any other factor.[52]

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49. NISBETT & ROSS, *supra* note 7, at 129-30.

50. JOHN STUART MILL, A SYSTEM OF LOGIC, *quoted in* NISBETT & ROSS, *supra* note 7, at 127.

51. NISBETT & ROSS, *supra* note 7, at 118-20, 122-30.

52. *Id.* at 128-30. For instance, providing extrinsic incentives for behavior (*e.g.*, rewards for helpful conduct) can *decrease* people's willingness to engage in such behavior later. C. Daniel Batson, *Altruism and Prosocial Behavior*, *in* 2 THE HANDBOOK OF SOCIAL PSYCHOLOGY, *supra* note 48, at 282, 292. This would not occur unless actors believed that their willingness to help must be caused by *either* the reward *or* an intrinsic cause (i.e., inherent altruism); they act as if they understand their own behavior in monocausal terms ("If I got a reward for helping, I must not be helpful by nature"). Similarly, in a famous experiment, children presented with an extrinsic motivation (a reward) for engaging in an activity which they could very well find intrinsically motivating (playing with markers) later engaged *less* in that activity when the reward was taken away than did children who had never been given the extrinsic motivation in the first place. The chil-

This preference for simple causal explanations may derive from the need to conserve scarce cognitive capacity.[53] Accordingly, people are

> primarily motivated to seek a single sufficient explanation for any event, rather than one that is the best of all possible explanations. That is, individuals may exert more cognitive effort in seeking an adequate explanation when none has yet come to mind than they do in seeking for further (and possibly better) explanations when an adequate one is already available.[54]

The preference for monocausality may also be traced to the "need for closure": the stronger one's need for closure, the more inclined he or she will be to choose a monocausal account.[55]

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dren who had been rewarded later acted as if they found drawing less intrinsically interesting; apparently they had inferred that the reward, not the intrinsic interest of drawing, had been the reason for engaging in the activity the first time around. NISBETT & ROSS, *supra* note 7, at 129. To similar effect is research showing that surveillance leads overseers to distrust those whom they have been asked to oversee. Apparently the overseers come to attribute conscientious behavior by their charges to their surveillance, thus preferring a monocausal explanation for that behavior ("they're behaving well because I'm watching them") to more complex alternatives. *Id.* at 129-30.

53. *See* FISKE & TAYLOR, *supra* note 44, at 13.

54. David E. Kanouse, *Language, Labeling, and Attribution*, *in* ATTRIBUTION: PERCEIVING THE CAUSES OF BEHAVIOR 121, 131 (Edward E. Jones et. al. eds., 1972).

55. On epistemic motivation and causal attributions, *see* ARIE KRUGLANSKI, LAY EPISTEMICS AND HUMAN KNOWLEDGE (1989). According to Kruglanski's model of lay epistemics, "[a] 'need for closure' refers to the striving for clear-cut knowledge on a given topic, and the intolerance of confusion and ambiguity. This particular need is assumed to inhibit the formulation of alternatives to a given hypothesis, as these introduce confusion and hence undermine existing closure." Arie Kruglanski & Ofra Mayseless, *Contextual Effects in Hypothesis Testing: The Role of Competing Alternatives and Epistemic Motivations*, 6 Soc. Cognition 1, 9 (1988). And for some people, the (closely related) *personal need for structure* (PNS) leads them to prefer relatively simple cognitive structures in making social and non-social judgments. Steven L. Neuberg & Jason T. Newsom, *Personal Need for Structure: Individual Differences in the Desire for Simple Structure*, 65 J. PERSONALITY & SOC. PSYCHOL. 113 (1993). These bodies of research suggest that jurors might be epistemically motivated to avoid complex judgments in comparative negligence cases; and if they are so motivated, then perhaps cases that confront them with unwanted yet unavoidable ambiguity might make them hesitate before responding, which could be reflected in their emotional responses.

The need for closure construct could very well apply to juror decision-making in accident cases because jurors would appear to desire what Kruglanski describes as "nonspecific" closure, i.e., a resolution of their attributional task, but not any particular one. Jurors want closure because they are legally obligated to decide the case before them

Melodrama offers a simple account of an accident: one and only one party is to blame. We should thus expect melodrama to be a satisfying form for understanding accidents. But it is not the only conceivable form that meets the preference for causal simplicity. To understand why the common sense of accidents might be melodramatic, we turn to the attributional habits that incline people to identify *which* single party is to blame and *why*.

B. *Norm Theory*

Norm theory[56] describes how people decide what caused an accident. It posits that people trying to identify the cause(s) of some outcome imagine, or simulate, scenarios other than the one that actually occurred by "undoing" or "mutating" one or more of the events that preceded the outcome. They imagine: "If only X had been different, the outcome would have been different." The easier it is to imagine a particular change in the events preceding the outcome, the more probable they judge that alternative, and the more likely they are to think that the actual outcome need not have occurred. The cause of the actual event becomes

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(although real juries may hang) and, presumably, would like to do so as quickly as their other goals (e.g., deciding fairly) permit. Jurors want *nonspecific* closure because, presumably, they are not committed in advance to any particular outcome (those jurors who give indications of such bias before or at voir dire are likely to be excluded for cause).

"[T]he need for nonspecific closure is assumed to effect an initiation of attributional activity and its quick freezing, once a plausible hypothesis has been generated and found consistent with extant evidence." KRUGLANSKI, *supra* at 77. Jurors should generally be likely to "freeze" their attributions of fault as soon as they have found one party responsible for the accident (assuming that that judgment is consistent with the evidence, as it is almost certainly likely to be, because few cases in which neither party can plausibly be assigned legal responsibility are likely to make it to trial), and not to be inclined to pursue the matter further.

On the other hand, it could be argued that real as opposed to mock jurors' decision-making context *discourages* closure in the relevant sense. The adversarial context and the judge's instructions would encourage jurors to listen to both sides of the case and to entertain competing hypotheses. The process of deliberation would lead jurors to believe that it is appropriate to consider alternative points of view, and real jurors have plenty of time to reach a decision that they tend to take quite seriously. Real jurors would thus seem to be less likely to rely on a "satisficing" mode of thought and more likely to have an incentive, or at least opportunity, not to rest with the first plausible attribution of responsibility.

56. Research and theory on counterfactual thinking appears to have first been brought under the label "norm theory" in KAHNEMAN & MILLER, *supra* note 45.

the prior occurrence that is changed in the alternative story.[57]

In Daniel Kahneman and Amos Tversky's now classic experiment which uncovered this phenomenon,[58] some subjects read a story about a man who left his office at the usual time but drove home by an unusual route; other subjects read a version in which he left early but took the usual route. In both stories, the man braked hard to stop at a yellow light, although he could easily have gone through. When the light changed, he started through the intersection, only to be rammed and instantly killed by a teenager driving a truck while under the influence of drugs. Subjects who read the "unusual route" version most often responded that if only the man had taken his usual route, the accident would not have occurred. Subjects who read the "unusual time" version most often responded that changing the time of departure from the office would have avoided the accident.

This and other research shows that people most readily imagine the alternative scenario that changes some event in the actual story that stands out as surprising or deviant. They "normalize" that event by mutating it to conform to the expected, routine scenario (hence, "norm" theory), in which bad outcomes do not occur. In the "unusual route" story, the man's choice of route is deviant; in the "unusual time" version, the deviance is his decision to leave the office early. The experiment also shows that people tend to imagine a counterfactual that changes some feature of the main object of attention or concern: the behavior of the protagonist, not that of a third party. For neither group of subjects was undoing the teenager's conduct the most frequent response. It follows that the more readily jurors can imagine a person acting differently and thus avoiding the accident, the more likely they are to find that the person's actual conduct caused the accident.[59] Especially worth noting is

57. *See generally* WHAT MIGHT HAVE BEEN: THE SOCIAL PSYCHOLOGY OF COUNTERFACTUAL THINKING (Neal J. Roese & James M. Olson eds., 1995).

58. Daniel Kahneman & Amos Tversky, *The Simulation Heuristic*, in JUDGMENT UNDER UNCERTAINTY, *supra* note 44, at 201-08.

59. Further research on the social psychology of counterfactual thinking, though its findings are not entirely consistent, has largely confirmed and expanded Kahneman and Tversky's early results. Deviance in many senses—conduct that varies from a routine, stands out from the perceptual background (i.e., salience), or is simply perceived to be infrequent—has been shown to characterize the prior event that people mutate when they imagine how things might have been otherwise. Norm theory stresses the importance of deviance from the norm, i.e., exceptionality, in the mutability of prior events in counterfactual thinking. This does seem to be the most powerful factor observed in the research on counterfactual thinking, but several other factors have also been shown to

that people are more likely to undo acts than omissions.[60]

When people engage in counterfactual thinking of the sort norm theory describes, judgments about fault and compensation, as well as causation, follow. In one set of experiments, participants read about a case in which a construction worker painting the rafters at a shopping mall was injured when he fell from scaffolding. The defendant mall owner had asked its warehouse manager to order safety lines to secure the scaffolding, but none had been available. Participants who mentally undid the accident by imagining that the mall had obtained the safety lines found that the defendant's conduct was more abnormal and more negligent, and were more likely to decide for the plaintiff, than participants who did not mutate the story in this way. Similarly, in a follow-up experiment, participants who read a version of the case that prompted them to think that the shortage of safety lines was unusual were more likely than those not so prompted to imagine that the defendant mall owner could have avoided the accident, that its conduct was abnormal, and that it should be liable.[61]

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influence how, why, and to what ends people imagine counterfactual worlds. Some of these are discussed *infra* notes 60-61 and accompanying text (acts versus omissions). For a comprehensive review of the literature, see Neal J. Roese & James M. Olson, *Counterfactual Thinking: A Critical Overview*, *in* WHAT MIGHT HAVE BEEN: THE SOCIAL PSYCHOLOGY OF COUNTERFACTUAL THINKING, *supra* note 57, at 1-55. In addition, research shows that controllable antecedents are more mutable than uncontrollable ones. *See id.* at 31-32. This may explain why relatively few participants in Kahneman and Tversky's experiment targeted the teen-aged driver as the event that could have been otherwise: from the protagonist's perspective, there was nothing he could do about the teenager's presence on the road.

How a person "undoes" some aspect of the scenario that led to the accident depends in part on the person's purpose for identifying the cause of the accident, which, in turn, depends on the context in which the causal inquiry occurs. A fire inspector may trace the destruction of a building by fire to the storage of flammable materials in the basement, a building inspector, to inadequate insulation and fire walls, a police investigator to the person who struck a match in the basement. Although role, context, and purpose shape the inquiry, the answer, according to norm theory, is likely to be that aspect of the scenario that *contrasts* with (is abnormal, unexpected, or deviant with respect to) the norms the inquirer embraces (as a result of his or her role, context, and purpose). *See, e.g.*, HILTON, *supra* note 9, at 71 (comparing types of cause identified by different sorts of causal inquiry).

60. *See, e.g.*, KAHNEMAN & MILLER, *supra* note 45. *But cf.* ROESE & OLSON, *supra* note 57, at 29-31 (action/inaction distinction explains nothing in counterfactual availability not already accounted for by salience and expectancy).

61. *See* Richard L. Wiener, *Social Analytic Jurisprudence and Tort Law: Social Cognition Goes to Court*, 37 ST. LOUIS U. L.J. 503 (1993); Richard L. Wiener & Chris-

The social psychology of the emotions provides further support for the connection between perceived abnormality, blame, and compensation. Studies show that abnormal events provoke more intense emotional reactions than normal ones (Kahneman and Tversky's original experiment about the driver who changed his routine asked participants to imagine which circumstances provoked greater regret in the driver's surviving family[62]). In particular, many studies show that the more unusual a bad outcome is perceived to be, the greater the sympathy observers feel for the victim.[63] Other studies show that greater sympathy for the tort victim yields more blame for the defendant and greater compensation for the victim.[64] The crucial point is that the more unusual or deviant jurors perceive some event preceding the accident to be, the more likely the jurors are to think not only that the accident need not have occurred, but that it *should* not have occurred, and that the person causally responsible for the accident is also to be blamed for it.[65]

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tine C. Pritchard, *Negligence Law and Mental Mutation: A Social Inference Model of Apportioning Fault, in* APPLICATIONS OF HEURISTICS AND BIASES TO SOCIAL ISSUES 117-36 (Linda Heath et al. eds., 1994) (reporting and discussing same research). Other researchers have found that participants awarded greater compensation to a passenger hurt by the sudden stopping of the train in which the passenger was riding when the stop was due to exceptional circumstances (the failure of a mechanical device or a human engineer, either of which is expected to be successful in avoiding accidents, to stop the train before it hit a fallen tree) rather than routine circumstances (the device or the engineer succeeded in stopping the train before it struck the tree, but did so suddenly enough to injure the passenger). Ilana Ritov & Jonathan Baron, *Judgements of Compensation for Misfortune: The Role of Expectation*, 24 EUR. J. SOC. PSYCHOL. 525 (1994).

62. *See* KAHNEMAN & TVERSKY, *supra* note 58, at 204.

63. For example, participants read a story about a woman who went to dinner at her usual restaurant *or* at an otherwise identical restaurant she had never before visited. In both stories she got food poisoning. Participants who read the "unusual restaurant" version found the defendant restaurant more responsible, felt more sympathy for the woman, and awarded the woman greater damages than those who read the "normal restaurant" version. C. Neil Macrae, *A Tale of Two Curries: Counterfactual Thinking and Accident-Related Judgments*, 18 PERSONALITY & SOC. PSYCHOL. BULL. 84 (1992).

64. *See* FEIGENSON, *Sympathy*, *supra* note 4, at 20-21, 57-61.

65. *Cf.* Dale T. Miller & William Turnbull, *The Counterfactual Fallacy: Confusing What Might Have Been with What Ought to Have Been*, 4 SOC. JUS. RES. 1, 12 (1990) (the person whose action is most easily imagined otherwise will be blamed the most). *But cf.* studies showing that where *only the defendant* can plausibly be held legally responsible, the defendant's liability will be enhanced where the *victim's* behavior is deviant. In one experiment, for instance, participants read a story of a woman who walked to work along either her normal or an unusual route. In both scenarios, she passed a building under construction, and a piece of scaffolding fell and struck her on the back. Participants

C. *Culpable Causation*

People tend to attribute greater causal significance to acts, and greater responsibility to those who perform them, the more morally blameworthy those acts are—even though the relative degree of blameworthiness is causally irrelevant to the result.[66] In one experiment, for instance, subjects more often identified a driver's speeding as the cause of an accident, and held the driver more responsible for the accident, when the driver was rushing home to hide a vial of cocaine from his parents than when he was rushing home to hide an anniversary present he had bought for them. A possible explanation for these results is that subjects react more negatively to those who act in a morally objectionable fashion, "staining" the actor's character, and then seek to validate that stain by attributing to the actor greater responsibility for the negative outcome.[67]

Culpable causation complements norm theory as an account of how people identify the causes of accidents. According to both, the more deviant the act preceding an accident, the more likely observers are to think that the act need not have been done, and therefore that the person who did it is responsible for the accident. The salient norm (the regular commute, the person who doesn't use drugs) provides the observer with a set of expectations for how the actors should behave and highlights any variations as deviant in the moral as well as the statistical sense. Both habits of thought underscore the common sense tendency to conceive of accidents in terms both personalized and moralized, important features of the melodramatic form.

D. *Fundamental Attribution Error*

Social psychological research indicates that jurors are prone to as-

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who read the unusual-route version found the scaffolding company more negligent and awarded greater damages to the woman. *See* Macrae, *supra* note 63. In a similar study, participants read about a woman who dined at either her usual restaurant or one she had never tried before. In both cases she got food poisoning. The latter restaurant was found more negligent. *See id.* For different analyses of the same scenario, showing that empathy-set instructions enhanced counterfactual thinking and its effects, see C. Neil Macrae & Alan B. Milne, *A Curry for Your Thoughts: Empathic Effects on Counterfactual Thinking*, 18 PERSONALITY & SOC. PSYCHOL. BULL. 625 (1992).

66. *See* ALICKE, *supra* note 46.

67. *See id.* at 371-72.

sume that if an accident has occurred, someone deserves blame for it. In a lawsuit, jurors tend to allocate blame based on the kind of people they believe the parties to be. At the core of these tendencies is a habit of thought psychologists have labeled the "fundamental attribution error" or "correspondence bias."

Every human behavior is situated in circumstances, and so is *a priori* attributable to *both* the actor and the situation. Yet people tend to attribute the behavior of others to the others' corresponding personality traits or dispositions rather than to situational constraints, when the latter attribution would be more accurate.[68] In one classic experiment, for instance, listeners assumed that speakers' pro-Castro remarks corresponded to the speakers' private opinions even though the listeners knew that the speakers were obeying the experimenter's explicit request to make those remarks.[69] In another, basketball players randomly assigned to shoot free throws in poorly lighted gyms were judged as less capable than players randomly assigned to shoot free throws in well-lighted gyms.[70] As these and many other examples illustrate, attributions of behavior to the actor's traits rather than to the circumstances are likely to be erroneous to the extent that there is little correlation between dispositions and behavior across markedly different situations.[71]

The fundamental attribution error, the belief that another person acted the way he did because "he's that kind of guy," is plainly a central component of melodrama, in which stock characterizations of an actor as the good guy or the bad guy are offered to frame the audience's expectations regarding the actors' behavior and thus as implicit explanations for the behavior that ensues. Along with norm theory and culpable causation, the fundamental attribution error is part of a cluster of mental habits in which attributions of responsibility are guided by perceived individual

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68. *See* Gilbert, *supra* note 48; Ross & Anderson, *supra* note 47, at 145-50. At the same time, people tend to overattribute *their own* behavior to situational factors. The difference between attributions for others and oneself is known as the "actor-observer effect." *See* NISBETT & ROSS, *supra* note 7, at 123-26.

69. *See* Ross & Anderson, *supra* note 47, at 136 (citing research of Jones & Harris).

70. *See* Gilbert & Malone, *supra* note 48, at 22 (citing research of Ross, Amabile, & Steinmetz).

71. *See, e.g.*, Thomas C. Monson, *Implications of the Traits v. Situations Controversy for Differences in the Attributions of Actors and Observers, in* ATTRIBUTION THEORY AND RESEARCH: CONCEPTUAL, DEVELOPMENTAL AND SOCIAL DIMENSIONS 293, 295-97 (Jos Jaspars et al. eds., 1983).

deviations from assumed behavioral norms.

In the next section, I analyze an accident case that displays the dynamic of normalcy and deviance in action. I then discuss experimental findings indicating that, at an *emotional* level, people prefer monocausal accounts for accidents. Together, these two very different kinds of research converge toward my central proposition that the common sense of accidents displays important features of melodrama.

IV. ACCIDENTS AS MELODRAMA: TRIAL DISCOURSE

This section presents a discourse analysis of portions of an accident trial. I will examine how one plaintiff's attorney made use of common sense habits of thought—especially norm theory—to encourage jurors to attribute responsibility for an accident to the defendant where the legal basis for the defendant's liability was, to say the least, controversial. We can then see how the jurors' own explanations for their decision reflected the ways of thinking about the case that the lawyer invoked. The case I will analyze is *Faverty v. McDonald's Restaurants of Oregon, Inc.*,[72] in which an Oregon jury held McDonald's liable for $400,000 in damages to a truck driver who was seriously injured when a teen-aged McDonald's employee, falling asleep at the wheel after leaving a midnight shift at McDonald's, crossed the center line and collided with his truck.

A. *The Facts and the Issue*

Matt Theurer was an eighteen-year-old high school student who worked at McDonald's to make money to pay for his car. As he had done occasionally in the past, he volunteered to work a midnight shift cleaning deep-fat fryers. The previous day he had worked at McDonald's after school from 3:30 p.m. to 7:30 p.m., telling his supervisor that he would get some rest before the midnight shift. Instead he went out with friends, then returned to work at midnight. McDonald's Restaurants' own policy

72. My account of the case is drawn from transcripts of the closing arguments at trial in *Faverty v. McDonald's Restaurants of Oregon, Inc.*, No. A9001-00394 (Oregon Circuit Court, Multnomah County, March 29, 1991) (hereinafter cited to as "F.xxx.yy," where "xxx" refers to the transcript page(s) and "yy" to the transcript line(s)), the appellate opinion (*see* Faverty v. McDonald's Restaurants of Oregon, Inc., 892 P.2d 703 (Or. Ct. App. 1995)), and an article by Stuart Taylor, Jr., *Behind a Jury's Crazy Verdict: The Law Made Them Do It*, AM. LAW., Sept., 1991, at 86, *available in* LEXIS, Genfed Library, Amlawr File.

barred "split shifts," or more than one shift in a day. Technically, Theurer's schedule did not violate this policy because the midnight shift was on a different calendar day than the preceding shift, but it was his second shift within twenty-four hours.

A little past 8:00 a.m. the next morning, very tired, Theurer left work to drive home. Minutes after leaving, he fell asleep at the wheel, and his car drifted into the oncoming lane, striking a small truck driven by Frederic Faverty. Faverty was seriously hurt. Theurer was killed. Faverty settled with Theurer's estate, then sued McDonald's.

The main facts were not really in dispute; no one, for instance, thought Faverty was contributorily negligent, although the attorney for McDonald's raised the possibility.[73] The basic question was whether McDonald's should be held responsible in any way for allowing an eighteen-year-old high school student to work midnight shifts and put himself into a sleep-deprived state, then allowing him to drive home on the highway, creating a foreseeable risk that he would fall asleep and endanger other drivers and himself, or whether Theurer, an adult, should be held fully responsible for his choice to work late, not get adequate sleep, and then drive home from work, knowing how tired he was. In sum, what sense would it make to divert responsibility for the accident from Theurer, the driver, to McDonald's, especially considering that the accident occurred after working hours when McDonald's had no right or ability to control Theurer's behavior?

B. *What the Plaintiff's Lawyer Said*

Frederic Faverty's lawyer made one explicit legal argument for holding McDonald's responsible. He analogized McDonald's to a bar that serves liquor to an intoxicated person who then gets into an accident.[74] Under common law, the bar is typically liable for injuries to third parties caused by the drunken driver in these circumstances.[75] This is the traditional technique of argument by analogy, a straightforward request to apply established law to a new situation. If the argument is successful,

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73. F. 617.17-23.

74. F. 575.1-19. "[T]his case . . . is about a business that caused a young man's impairment, a sleep impairment, no different than if they'd handed him sleeping pills until the point he was ready to fall asleep." F. 575.13-17.

75. *See, e.g.*, Vesely v. Sager, 486 P.2d 151 (Cal. 1971); Campbell v. Carpenter, 566 P.2d 893 (Or. 1977).

then the fact that Theurer was the immediate cause of the accident does not excuse McDonald's; rather, Theurer's foreseeably dangerous driving is the very reason McDonald's is responsible. The argument was indeed effective enough to be adopted by the appellate court,[76] but only one of the jurors referred to it when explaining her decision.

A more promising clue to how the jurors thought about the case may be found in a set of arguments *implicit* in the plaintiff's lawyer's summation. Consider this brief excerpt:

> This kid is set up. He is ripe to fall asleep and like all kids that age, if they don't get enough sleep, they're tired; they're nodding off in school. Okay. Then that's not McDonald's fault necessarily. They may contribute a little bit too, but the point of it is that's the background we start with. We don't start with a kid who's fresh and awake.
>
> And when you take somebody who has a cumulative loss of sleep over a period of time, it brings down that period between being awake and the danger of falling asleep dramatically. And it's worse in the earlier morning hours. And then if you miss an entire night's sleep—and that's exactly what happened. This kid should have been home and in bed by 11 o'clock. And that is where McDonald's blew it, because they should have known and they're the ones that kept him up. He's doing work for them; they're going to make money because they're going to have clean deep fat fryers, and they pushed Matt Theurer over the edge.
>
> The evidence is that McDonald's is the only one that does that, and what's crazy is they didn't have to do it. They didn't have to make this kid work on an all-night shift on a school night. Common sense tells—should have told them that. Common decency should have told them that . . . .
>
> Was McDonald's thinking about safety? Was safety job one at McDonald's? Is this sad event something that could have been easily prevented: to have a couple of high school kids clean out the deep fat fryers for 4 bucks an hour, stay up all night on a

76. *Faverty*, 892 P.2d at 710.

> school night.... And that's why McDonald's is responsible for Matt Theurer's death and Fred Faverty's injuries.
>
> Take Matt Theurer off that shift, you put him home, you put him in bed, by 8:30 in the morning he's not on the road with heavy eyelids, with impaired judgment, with poor concentration, all the other things that Dr. Rich told you go along with sleep deprivation. That's why McDonald's is responsible.[77]

This is a melodramatic argument. It is melodramatic because of what I have been calling the *structural features* of melodrama, the features that map onto the habits of thought that social psychology elucidates.

The habit of thought most crucial to this argument is norm theory. Faverty's lawyer takes advantage of norm theory in several ways to pin responsibility on McDonald's. First, the argument emphasizes that what made the difference between accident and no accident was what McDonald's did, not what Theurer did. It was acts or omissions of McDonald's, not of Theurer. The climactic last paragraph of the excerpt above focuses on what McDonald's could and therefore should have done differently.[78]

Now look at the particular norms the plaintiff's lawyer makes salient for the jurors, in contrast to which the behavior of McDonald's appears deviant. First, the repeated references to Theurer as "the kid"[79] invoke a schema or prototype of *Theurer as a child and McDonald's as his parent*. The operative norms, deeply embedded in our culture, are that *parents are responsible for their children*, and *parents are supposed to know better*. So it is no excuse that Theurer volunteered for the late shift and chose to drive home. According to common sense norms, McDonald's still should have done more to keep Theurer from putting himself and others at risk.

Second, consider the lawyer's assertions that "McDonald's ha[s] a couple of high school kids clean out the deep fat fryers for 4 bucks an

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77. F. 584.25-585.6; 585.15-25; 589.17-21; 589.25-590.17.

78. The use of the second person to encourage jurors to (imaginatively) avoid the accident, and thus "correct" the error of McDonald's, puts them in the role of *performing* corrective justice. (I thank Tony Sebok for this observation.) On the use of rhetoric to draw jurors into an active decision-making role, *see* Amsterdam & Hertz, *supra* note 43; *see also* Feigenson, *supra* note 14.

79. *See, e.g.*, F. 582.23-24 ("an eighteen year old kid"), 583.2 ("that eighteen year old"), 584.19-20 ("Matt Theurer was not the kind of kid . . ."), 584.22 ("it's a kid who's right for an approximate bad problem").

hour" and that McDonald's is "going to make money because they're going to have clean deep fat fryers."[80] This invokes a schema or prototype of *McDonald's as a greedy corporate profiteer*, which triggers the following cultural norms: *corporations should not be allowed to cut corners on safety for profit*, and *corporations should not get away with exploiting low-paid employees*.[81]

How does the plaintiff's lawyer call jurors' attention to the deviance of McDonald's from these norms? One crucial technique is to exploit the active versus passive distinction. As noted above, jurors are more likely to "undo" acts than omissions, and thus to target acts as causally and legally responsible. The plaintiff's lawyer casts McDonald's as the active party and its failure to keep Theurer off the road as an affirmative mistake, while describing Theurer as passive. Of course, just about any behavior can be characterized as either an act or an omission. Here, McDonald's could be said to have failed to keep Theurer from working late (omission) or to have created a system that invited him to work late and then refused to prevent him from working (which sounds more like an act). The plaintiff's lawyer uses verbs and sentence structure to identify McDonald's as the agent of harm. He talks about what McDonald's "did," "was doing," or "does." He says that McDonald's "kept [Theurer] up," that they "ma[d]e this kid work on an all-night shift on a school night."[82]

At the same time, the lawyer casts Theurer as a passive victim. It would have been implausible to argue explicitly that Theurer was not a

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80. As with other important aspects of his conception of the case, Faverty's lawyer did not emphasize Theurer's exact job duties from the start; there is no mention of deep-fat fryers or Theurer's wages in his opening statement.

81. This "norm" may seem to occupy an uncertain status, because it is so routinely violated in policy and practice, and because it conflicts with perhaps more deeply entrenched beliefs in individualism and free-market capitalism. Nevertheless, it seems consistent with a broad egalitarian attitude toward justice in accident cases. *See* 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. 129 (1989). It is also consistent with the "relational" view of justice, which views the courts as agents for rectifying broad social inequalities. *See generally* JOHN CONLEY & WILLIAM O'BARR, RULES VERSUS RELATIONSHIPS (1990).

82. The lawyer uses similar locutions in his opening argument as well: "McDonald's had had Mr. Theurer go to work" (F. 9.7); "they had him work until 11:30 that night" (F. 9.14); "The issue in this case is whether or not someone who makes a young person—makes any worker work those kind of hours ought to be responsible . . . ." (F. 11. 17-19); "that's what McDonald's did to this young man" (F. 13.3-4).

human being who made choices, so the lawyer does it implicitly, through the use of metaphor. Matt is "ripe" to fall asleep, like a fruit about to fall off the tree.[83] Matt is "set up," the passive victim of what, impliedly, is a sort of entrapment by McDonald's.

The depiction of McDonald's as the agent of harm and Theurer as passive come together most (melo)dramatically in the assertion that McDonald's "pushed Matt Theurer over the edge."[84] Certainly this is a cliché, but in context it is disturbingly graphic, the image of a person falling off a cliff and striking the ground evoking the terrible force of the fatal car crash. The phrase encapsulates the complex chains of events leading up to the accident as a compact, monocausal account—McDonald's did it, Theurer did not.[85] Moreover, it evokes popular cultural stereotypes of the "bad guy." Who but a cad would push someone off a cliff?

In sum, the rhetorical techniques that allow the lawyer to invoke norm theory simultaneously construct the accident as melodrama. And this is so in yet one more respect, the elicitation of emotional response. I observed earlier that accident cases tend to lack those sudden plot developments on which melodramas rely to exploit their audience's emotions.[86] As psychologists of the emotions explain, plot twists and rever-

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83. Elsewhere the lawyer analogizes Theurer to "narcoleptics [who] fall asleep almost at the drop of a hat" (F. 587.22-23), again imagining Theurer as an inanimate object without will.

84. *See supra* note 77 and accompanying text.

85. In one sense, of course, this accident is simply *not* monocausal—it took both Theurer's falling asleep at the wheel and McDonald's bringing him to that state (not to mention Faverty being at the wrong place at the wrong time). The plaintiff's lawyer admits as much: "Mr. Theurer[,] let's face it, folks, he was on the wrong side of the road; and that in our society, you're responsible," F. 576.10-12, and "[i]t wasn't all [Theurer's] fault." F. 599.3. But the Oregon comparative negligence statute in effect at the time of the case prohibited any nonparty's responsibility from being taken into account. OR. REV. STAT. § 18.470 (1975). So in the context of the litigation, given Faverty's lack of fault, the question whether McDonald's should be responsible really was one of monocausality: either McDonald's (in part) did it, or McDonald's didn't do it. Thus, even though Theurer may indeed have been responsible for the accident, as Faverty's lawyer acknowledged (F. 576.10-13), the law kept the jury from taking Theurer's fault into account in the suit brought by Faverty against McDonald's. So the decision came down to Faverty's fault (none) versus McDonald's Restaurants' (*see also* F. 576.17-20). Oregon later revised its comparative negligence statutes to require the percentage fault of any person with whom the claimant has settled to be taken into account when computing each defendant's percentage fault. OR. REV. STAT. § 18.470 (1995).

86. *See supra* notes 34-37 and accompanying text.

sals would tend to have this effect because the more unexpected an event, the more intense the emotional reaction to it.[87] Prior events create expectations which the plot twist upsets. Norm theory works in precisely the same way, but here the salient norms rather than prior events establish the expectations which the defendant's behavior, portrayed as deviating from those norms, upsets. The result, norm theory research predicts,[88] is that the more deviant the conduct of McDonald's appears, the more likely jurors are to respond with more intense emotions, to blame the defendant more, and to award the plaintiff greater compensation—all without any need for the plaintiff's lawyer to make too overt an emotional appeal.

Culpable causation underscores this interpretation of the accident-as-melodrama. Deviations from the norm of responsible parent are, of course, morally blameworthy in our culture. Deviations from the norm of decent corporation are also morally blameworthy, although perhaps less so. In both instances, the moral stigma that jurors may attach to the conduct of McDonald's reinforces jurors' tendency to see what McDonald's did or failed to do, and not what Theurer or anyone else did or failed to do, as the cause of the accident.

The role of fundamental attribution error in the plaintiff's lawyer's argument—attributing the parties' actions to "the sort of people they are"—is a little more complicated. As noted earlier, plaintiff's lawyers in civil cases are unlikely to depict defendants, especially familiar corporate defendants like McDonald's, as purely "bad guys" who do bad things, because jurors can be expected to depend on the defendant for the satisfaction of their own consumerist desires and, to some extent, to trust it. Thus, notwithstanding the implications of the prototype of the exploitative, profit-seeking corporation and the entity that shoved Matt Theurer off a cliff, the plaintiff's lawyer also acknowledges that "[t]he issue in this case is not whether it's okay for McDonald's to make money. There's no challenge that they're a business and that's okay."[89]

On the other hand, Faverty's lawyer does not forgo the opportunity

87. *See supra* note 36 (Ortony, Clore, & Collins's theory of emotional response).

88. *See supra* notes 56-65 and accompanying text (research of Kahneman & Tversky, Macrae).

89. F. 11.24-12.1 (opening statement).

to present his client as a good guy.[90] More importantly, he takes every opportunity to present *Theurer* as a good guy. Matt "was a good kid. Everybody liked him. All the terrible things that kids can get involved in and exposed to, he'd done a good job of avoiding most of them."[91] What possible relevance to the case can these assertions have? None, except to frame the case for the jurors as an opposition between a good guy and a somewhat bad guy.

Indeed, throughout the argument the plaintiff's lawyer puts Theurer, not his client, on center stage. This is, of course, not inadvertent. "Today . . . you'll judge the life of Matt Theurer,"[92] he begins his summation, and he closes it by telling the jurors, "you write the epitaph that goes on Matt Theurer's tombstone."[93] By doing this, the lawyer not only seeks to bootstrap jurors' sympathy for his client onto their sympathy for the dead young man, but also puts the several relational norms identified earlier (parent/child, corporation/employee) at the center of the case. This is, therefore, not a violation of the element of melodrama that highlights the plaintiff and his suffering; rather, it is a strategic elaboration of that element. And there is no question that Faverty's lawyer sought to emphasize the plaintiff and his suffering. He devoted nearly two-fifths of his opening statement[94] and a third of his closing[95] to the essentially uncontested issue of Faverty's injuries and the argument for damages. So, despite the typical disclaimer that he was not seeking jurors' sympathy for his client,[96] the plaintiff's lawyer made the plaintiff's suffering salient for the jurors, one of the most important factors in the arousal of sympathy[97] and, of course, a key element in the melodramatic conception of accidents.[98]

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90. *See, e.g.*, F. 13.17-14.7 (opening statement) (Fred Faverty was just beginning to fulfill his dream of having his own business taking care of horses); F. 594.15-17 (Faverty handy around the house).

91. F. 8.25-9.3 (opening statement).

92. F. 574.13-14.

93. F. 598.23-24.

94. 108 out of 274 lines (39.4%).

95. 204 lines out of 618 (33%).

96. F. 578.17-25.

97. *See supra* note 31 and accompanying text.

98. As a final flourish that could be described as melodramatic in the sense of excessive (*see* Brooks, *supra* note 3, at ix) and gothic detail (*id.* at 17), Faverty's lawyer tells jurors: "You judge not only Faverty today, you write the epitaph that goes on Matt Theurer's tombstone. You decide should the stonemaker write, here lies a young man

C. *What the Jurors Said*

We may know how the plaintiff's lawyer wanted the jurors to think about the case, but was he successful? In terms of outcome, yes. The jurors voted nine to three to hold McDonald's liable, returning a general verdict for Frederic Faverty in the amount of $400,000. (This verdict was affirmed by a closely divided Oregon Appellate Court.[99] The case was argued before the Oregon Supreme Court but was settled before that court rendered a decision.[100]) But more germane to our purposes, did the jurors think about the case in a way that matches the features of melodrama?

It happens that we know something about the jurors' thinking in *Faverty,* thanks to interviews Stuart Taylor, Jr. conducted with them for an article in *The American Lawyer.*[101] Here is some of what the jurors said:

> I kind of agreed with the McDonald's view that the employer shouldn't get involved in the personal lives of its employees. . . . [McDonald's] could have used a little better judgment. . . . [But] I asked myself, where is this kid's mother? . . . Why is it up to McDonald's? . . . I've done that kind of thing at work, come in at eight in the morning and stay until eight-thirty in the evening, and I don't expect my employer to be checking on me . . . . And now am I going to have my employer telling me I can't work overtime? Where is it going to stop? . . . Is it their job to know what I do in my off hours?...The way [the judge's instruction] was worded, it was really hard to say no . . . Were they [McDonald's] at fault at all, any little bit? . . . Yeah, they should have known this kid's schedule, they should have told him, "No thanks, Matt, don't work" [Thomas Berguin, 30 years old, man-

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who died at his own hands or here lies the body of a young man who died because of a mistake, a series of mistakes that could have been avoided" (F. 598.23-599.3).

99. *See* Faverty v. McDonald's Restaurants of Oregon, Inc., 892 P.2d 703 (Or. Ct. App. 1995).

100. Telephone interview with Robert Neuberger, lawyer for the plaintiff in *Faverty,* March 11, 1998 (notes on file with author).

101. Taylor, *supra* note 72. The *Faverty* case has received some media attention, including nearly three dozen newspaper and magazine articles nationwide since 1991 (a NEXIS search conducted in March, 1998 of "Faverty and McDonald's" turned up 33 hits, including three stories during the summer of 1996 about the deceased's mother's suit against McDonald's).

ager].

Somebody should have asked, "Are you too tired to drive your car?" . . . I just don't think McDonald's should be able to get away with that kind of crap . . . They're just absolutely using these high school kids for all they can get out of them [Irma Wilson, 64 years old, factory worker].

My first feeling . . . was, "Well, here's an 18-year-old boy, why should McDonald's be responsible for him?" . . . But by the end I thought, "Well, why not?" . . . It was important that he was a student. Perhaps because I am a mother, I thought that if he was my son I would appreciate it if they'd said he shouldn't work this shift. Somebody's got to take responsibility. . . . You'd have to be a robot not to feel some emotion about the situation. . . . [The case was] almost like letting a drunk go out on the road . . . [and] these companies should not let a person out to drive an automobile home with that lack of sleep [Verna Misenhimer, 49 years old, teacher's aide].

[T]he whole thing was bordering on the ridiculous. [There's nothing unusual about an employee working long hours and driving home] barely on the edge of consciousness. . . . I know I've done it. I'm sure you have too [Pat Weiler, 52 years old, electronics technician].

My way of thinking . . . is that if [employers] are going to be punished for that, they're going to dictate what all us employees can do on our off time. . . . It's just going to put Big Brother more in our pocket....[A] young man that age is going to run himself down [one way or another] [Edra Nohr, 44 years old, laborer].

McDonald's [was] responsible in some way for breaking their own scheduling policies, so we all felt that yes, McDonald's shouldn't have done that, and they were negligent in that respect.

> And [that] yes, they had some part in causing the deceased to fall asleep at the wheel. . . . [McDonald's needed to] hold some responsibility in their scheduling practices . . . and not schedule [students] on a school night all night and expect them to function.
>
> I was divided in my own mind. . . . A lot of us didn't like the idea that an employer could be liable for getting his employees to and from work. . . . [But t]he way the judge gave us the questions, it was like we didn't really have a choice. . . . We all reviewed that over and over, and we even had to listen to the tape again, and I think that's what changed a lot of people's minds [Teri Killaby, 27 years old, registered nurse].

Perhaps the first thing these excerpts reveal is that the jurors did not have an easy time reaching a decision. Not only did they disagree with one another, but several were also, as juror Killaby put it, divided in their own minds. The jurors' words also suggest that emotion—sympathy for the plaintiff or anger toward the defendant—played some part in their judgment, although it is unclear how much. Juror Wilson, for instance, expressed anger at McDonald's. But aside from what may be read into that remark, the jurors did not attribute their own decisions to emotion or to deep-pocket bias, although some jurors said that *other jurors* were so motivated.[102]

It does not seem at first glance, then, that these jurors simply gave in to what I have described as the melodramatic conception proffered by the plaintiff's lawyer. Yet, as I will argue below, we can find in many of

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102. For instance, juror Diana Debray (28 years old, bookkeeper), said of juror Wilson that "I wanted to gag her . . . . She would interrupt you every time you started to say something, and I wanted to bonk her head. She was one of the little people who works for a big company who [thinks] that big companies are responsible for you totally, and big companies have a lot of money, so why shouldn't you take some?" Juror Thomas Berguin also attributed sympathy and anti-corporate defendant sentiment to his fellow jurors.

It should be noted that even jurors striving to be honest and accurate in their post-verdict assessments would be expected to understate the extent of emotion in *their own* decision-making, because of both self-presentation bias (they want others to believe, and they want to believe themselves, that they complied with the judge's instructions not to be influenced by emotion) and an inability to identify the real causes of their judgments. *See* Richard Nisbett & Timothy DeCamp Wilson, *Telling More Than We Can Know: Verbal Reports on Mental Processes*, 84 PSYCHOL. REV. 231 (1977).

these jurors' remarks the basic structure of the melodramatic conception of accidents. These jurors thought about responsibility in a personalized and moralized way. Their words reflect that they thought in accordance with the dynamic of normalcy and deviance. More specifically, the plaintiff's lawyer gave jurors several options as to what the defendant could have done differently to avoid the accident, thereby allowing different jurors to find that different acts or omissions by McDonald's violated different common sense justice norms. Thus the jurors' decision reflects a confluence of cultural norms and a common pattern of inferring blame from the transgression of those norms.[103]

At one end of the continuum were jurors such as Wilson and Misenhimer, who focused on the belief that McDonald's should not have worked teenagers so hard and especially not midnight shifts on school nights. Culpable causation makes this convincing as the target of blame because, as we've seen, exploiting kids seems morally deviant.[104] This behavior also conflicts with the norm that corporations should not be allowed to cut corners on safety for profit. Justice is then served by blaming McDonald's for harms traceable to its corporate policies, not because McDonald's is the deep pocket, but because such a standard of care, even if it entails greater responsibility for the well-being of others than an individual defendant would have to bear, is appropriate, given corporations' superior ability to foresee risks and marshal resources to address them.[105]

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103. I do not mean to claim that each juror who found McDonald's responsible based that judgment on only one act or omission and justified his or her conclusion in terms of only one conception of negligence. No doubt at least some jurors (perhaps without realizing it) entertained multiple grounds for believing McDonald's to be at fault.

104. Jurors could also find that McDonald's' employment practices were abnormal in the sense that other fast-food restaurants did not conduct themselves as McDonald's did. F. 589. 9-18. It is, however, unclear from the transcript of his closing argument just what Faverty's lawyer was referring to when he contrasted McDonald's' conduct with that of other fast-food restaurants: e.g., allowing teenagers to work late at night, allowing them to work shifts beginning at midnight, not monitoring them more carefully for sleepiness, or some other conduct.

105. *See supra* note 32 (research of Valerie Hans); *see also* Valerie Hans, "Lay Reactions to Corporate Defendants" (unpublished paper presented at the 1994 annual meeting of the Law and Society Association, Phoenix, AZ); Daniel S. Bailis & Robert J. MacCoun, *Estimating Liability Risks with the Media as Your Guide: A Content Analysis of Media Coverage of Tort Litigation*, 20 LAW & HUM. BEHAV. 419, 420 (1996) (how mainstream print news media exaggerate plaintiff win rates and size of verdicts). Jurors may also have reasoned this way out of an "egalitarian" tendency to hold corporations

A narrower conception of what McDonald's did wrong was expressed by the several jurors who, like Killaby, thought that "McDonald's [was] responsible in some way for breaking their own scheduling policies (barring split shifts or multiple late shifts in a single week), so we all felt that yes, McDonald's shouldn't have done that, and they were negligent in that respect." According to norm theory, jurors would be likely to blame McDonald's for deviating from its own scheduling policies, which limited workers' hours for their own safety.[106] Indeed, this may have been prima facie evidence of negligence according to modern tort doctrine.[107] Again, however, in the words of these jurors, the mistake that McDonald's made was to break its scheduling policies by allowing Theurer to work the late shift *on a school night.* In terms of the causal connection between the alleged negligence and the fatal accident, whether Theurer was going to be driving to school, or whether he would have been able to "function" adequately at school the next day, should be irrelevant. The only relevant causal connection ought to be between the conduct of McDonald's and the ability of Theurer to drive safely, whatever his destination. Instead, the jurors are taking a plausible legal basis for negligence and moralizing it, as culpable causation predicts.

Finally, there were the jurors who seem to have focused blameworthiness most narrowly. These jurors imagined a counterfactual world in which McDonald's avoided the accident by asking Theurer, "[A]re you too tired to drive your car?" "[T]hey should have known this kid's schedule, they should have told him, 'No thanks, Matt, don't work.'" In this view, McDonald's was responsible because it failed to perceive that Matt Theurer was tired on the early morning of April 5, 1988 or to do

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responsible for all accidents flowing from their activities. *See* Polisar & Wildavsky, *supra* note 81.

106. *See* Taylor, *supra* note 72, at 89.

107. *See, e.g.*, Lucy Webb Hayes National Training School v. Perotti, 419 F.2d 704 (D.C. Cir. 1969). Moreover, culpable causation could lead jurors to solidify the somewhat problematic causal status of this conduct. This particular act or omission supports a stronger doctrinal argument for breach of duty, but it makes a less convincing case for causation. Allowing Theurer to work that last shift may indeed have led to his being more tired (and having to drive while tired) than he otherwise would have been. But even in compliance with company policies, someone like Theurer could still work a midnight shift after a sufficiently long period without sleep (for reasons other than working prior shifts) and be tired enough to be at risk of falling asleep at the wheel. Other possible precautions e.g., prohibiting all midnight shifts or scrutinizing all employees for tiredness (and keeping the overly tired from driving)—are much more likely to reduce the risk of the sort of harm that occurred in this case.

anything about it. The negligence of McDonald's consisted of its failure to act carefully *on this particular occasion* to avoid a foreseeable risk of harm to Theurer and any driver unfortunate enough to be in his way that morning.[108] Norm theory makes this lapse by McDonald's very convincing as the act which, had it been taken, would have avoided the accident, because so little effort would seemingly have been required to act otherwise.

But why was this norm salient to jurors in the first place? Why should it have been relevant that McDonald's *could* have asked or told Theurer not to work? The plaintiff's lawyer's closing argument provides an answer. By repeatedly referring to Theurer as a "kid," the lawyer invoked the social norm that parents are responsible for their children, especially when the parent knows or should know that the child may do harm to himself or others. And we know from the jurors' own words that they took up this implication. Note how juror Berguin, in offering his counterfactual explanation of why McDonald's was responsible, speaks of Theurer as "the kid." Once jurors have identified this norm as one that governs this situation, they can readily infer the responsibility of McDonald's from its "abnormal" behavior. Thus it is the dynamic of normalcy and deviance, central to the idea of melodrama at the accident trial, that best explains how the majority of the *Faverty* jurors thought about this case.

Plainly the paternalistic norms which the plaintiff's lawyer sought to have the jurors adopt and which a majority of them seem to have accepted were not the only common sense values that this accident story engendered. Jurors Berguin and Nohr refer to the competing value of individual liberty and autonomy. They believe, as Nohr puts it, that holding McDonald's responsible for its employees' off-work behavior raises the specter of Big Brother. Against this background value,

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108. Perhaps jurors combined this act or omission with the first, broader one as follows: it may not be negligent for McDonald's to allow teenagers to work midnight shifts, but given that it does, creating a significant safety risk, McDonald's has a duty to take reasonable precautions to prevent overly sleepy teenagers from driving home. Allowing Theurer to work that last shift or allowing him to drive himself home right after that shift breached that duty. (I thank Steve Gilles for this observation. Private communication from Stephen G. Gilles to author, at 2 (June 5, 1997) (original on file with author)). This construction of duty and breach avoids the argument that holding McDonald's liable for the broader act or omission by itself is not cost-effective. It still faces, however, the argument that it is not cost-effective (or even practicable) to impose on employers a duty to scrutinize employees for sleepiness and then do something about it.

McDonald's did not behave deviantly in not inquiring into Theurer's degree of wakefulness or his activities once he left the workplace. Furthermore, jurors Berguin and Weiler remark that it is the way of the world that people sometimes work too hard and sometimes drive home tired. Against this norm, Faverty's accident was just one of those things. These common sense beliefs about the way the world works are no less intuitively compelling than the ones favoring the plaintiff.

The words of most of the *Faverty* jurors, though, coincide with the plaintiffs' lawyer's argument in conceiving the accident as a melodrama in which causal and hence legal responsibility is placed on the one party who deviated from popular cultural norms of behavior. Justice is simplified, personalized, moralized, and dichotomized. And, thanks to the jury, the story also achieves closure with the most satisfactory ending possible under the circumstances: the good guy is rewarded with compensation, even though his injuries cannot be undone.

V. ACCIDENTS AS MELODRAMA: EXPERIMENTAL EVIDENCE

The study of emotions must be a part of any complete analysis of juror decision-making, because emotions are widely suspected to influence jury verdicts. In fact, relatively little research has addressed whether they do and, if they do, how. In a recent experiment, Jaihyun Park, Peter Salovey, and I uncovered some interesting aspects of the role of emotions in legal judgments about accidents.

We asked over 200 participants to be mock jurors and read accounts and view photographs of two accidents based on actual cases. In one, a man resting at home heard a hissing noise in his kitchen and smelled gas. He ran outside just before his house exploded and injured him. In the other, a railroad worker was riding on the back of a line of boxcars and "talking" the engineer via radio through a back-up maneuver. A crossover switch had been left in the wrong position, and the line of boxcars ran into another line of cars sitting on a different track, catching the worker between the cars. We created eight different versions of each story, manipulating the severity of the plaintiff's injury (severe—e.g., serious internal damage and multiple amputation; or mild—e.g., a broken ankle), the degree of the plaintiff's blameworthiness (high—e.g., the homeowner, safely outside on his front lawn, ran back into the house as it exploded; or low—e.g., the homeowner kept running away from the house), and the degree of the defendant's blameworthiness (high—e.g., the railroad did not mark crossover switches with flags and targets,

which might have enabled the plaintiff to see the crucial switch; low—e.g., the railroad marked its switches). After reading about each accident, participants completed a questionnaire in which they registered their emotional responses to the case, apportioned fault between the parties, and assessed damages.

Our most striking finding was that mock jurors were much more emotionally involved with the plaintiffs in accident cases when only one party was highly blameworthy. When only one party, whether the plaintiff *or* the defendant, was highly blameworthy, mock jurors reported that they felt sadder for the plaintiff, sorrier for the plaintiff, and could more easily imagine themselves in the plaintiff's position.[109] Simply put, the more attributionally unambiguous the case, the more intense the jurors' empathetic responses to the plaintiff. This is what I call the *melodrama effect.* I will explore some cognitive and social psychological explanations for this effect, and then draw some connections to the structure of melodrama.

One way to explain the melodrama effect is to turn it around and ask why, in attributionally *ambiguous* cases, i.e., those in which both parties were highly blameworthy or neither was, empathetic responses to the plaintiff were *reduced.*[110] We suspect that when it was more difficult for mock jurors to figure out who should be held responsible for the accident, they had to spend more time thinking about the details of the case. Thinking harder about the case tended to blunt or override their initial emotional impulses to be sympathetic toward the plaintiff, and so their reported emotional responses tended to be attenuated.[111]

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109. Sadder for the plaintiff, $F(1, 206) = 4.34$, $p < .05$; sorrier for the plaintiff, $F(1, 206) = 5.83$, $p < .02$; more easily imagine self in the plaintiff's position, $F(1, 206) = 5.21$, $p < .03$.

110. Indeed, we (Feigenson, Park, & Salovey, *The Role of Emotions in Comparative Negligence Judgments*, J. APPLIED SOC. PSYCHOL. (forthcoming 2001)) call this same phenomenon the "attributional ambiguity" effect.

111. Other researchers have found that participants in whom a negative mood had been induced and who were then given an incentive to expend effort on a substantively unrelated cognitive task reported feeling better afterwards. The experimenters reasoned that the involving, unrelated cognitive task resulted in fewer thoughts related to the negative mood and hence a reduction in the intensity of that mood. Ralph Erber & Abraham Tesser, *Task Effort and the Regulation of Mood: The Absorption Hypothesis*, 28 J. EXPERIMENTAL. SOC. PSYCHOL. 339 (1992). In our experiment, similarly, task difficulty (determining responsibility in an attributionally ambiguous situation) may have occupied jurors' cognitive capacity, reducing their capacity to process and sustain thoughts that might have reinforced their initial emotional state.

Another way to think about the pattern of emotional response we found is that it reflects a mind-set in which the parties to an accident case are linked in a relationship of *complementarity*. That is, mock jurors' emotional reactions to the plaintiff depend not only on their perception of how blameworthy the plaintiff was (observers tend to feel more anger for a more blameworthy sufferer, more sympathy for a less blameworthy one)[112], but also on how blameworthy they perceive the *defendant* to have been. Thus, mock jurors take *both* parties' levels of blameworthiness as relevant information to their emotional responses to the plaintiff. When the defendant is highly blameworthy and the plaintiff is not, all signals point toward sympathy for the plaintiff. When the case is attributionally ambiguous because both parties are to blame or neither is, the signals provided by each party's blameworthiness point in opposite directions, mitigating the intensity of the jurors' emotional response.[113]

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112. *See, e.g.*, WEINER, *supra* note 42.

113. That is, a highly blameworthy plaintiff indicates less sympathy for the plaintiff; but if the defendant is also highly blameworthy, this suggests that the plaintiff is *not* as blameworthy, which indicates *more* sympathy for the plaintiff. Indeed, jurors seem to interpret not only a party's degree of blameworthiness but also their *emotional reaction* to that party as a cue to how they ought to feel about the *other* party. Negotiators who perceive the negotiation as a zero-sum or "fixed pie" event take their opponents' apparent level of satisfaction and happiness about the outcome as cues to how satisfied and happy they themselves ought to feel, so that those who believe that their opponents are happy feel less successful. *See* Leigh Thompson, Kathleen L. Valley, & Roderick M. Kramer, *The Bittersweet Feeling of Success: An Examination of Social Perception in Negotiation*, 31 J. EXP. SOC. PSYCHOL. 467 (1995). Similarly, jurors who perceive the giving of justice in comparative fault cases as a zero-sum affair—what the plaintiff wins, the defendant loses; to the extent the defendant is to blame, the plaintiff must not be—may take their emotional response to one party as a cue to how they ought to feel about the other party. When attribution of blame seems unambiguous, all cues are consistent; for instance, anger toward the blameworthy injurer, sympathy for the victim. In the attributionally ambiguous case, however, the emotional cues may be understood to conflict, leading to ambivalence. The blameworthy plaintiff may inspire anger, but if one is also angry at the defendant, then one may be led to temper one's anger at the plaintiff.

Complementarity is further indicated by the fact that our mock jurors' emotional reactions to one party generally correlated significantly, and in the expected direction, with their corresponding emotional reactions to the other party. For instance, anger toward the defendant was positively and significantly correlated with sympathy for the plaintiff and sadness for the plaintiff, and anger toward the plaintiff was positively correlated with sympathy for the defendant.[114]

To react to accident cases as if the parties are linked in this complementary way is to conceive of the accident as a melodrama. Mock jurors' emotional reactions reflect a view of responsibility for accidents that is not only simplified but dichotomized. Jurors seem to feel that one party is to blame only to the extent the other is not, and that each party deserves an emotional response that depends on the emotional response appropriate to the other party. Thus, if one party is the "good guy," the other cannot be. This is melodrama. And the fact that this mind-set influences not *all* emotional response, but only empathetic responses to the plaintiff, is consistent with the element of melodrama that places the plaintiff and his suffering at the center of the accident narrative.

We can also put our findings in the context of social psychological research on *affective expectancies*[115] in order to suggest that jurors respond emotionally to accident cases *as if they expect accidents to take melodramatic form.* This research shows that expectations help drive emotions, so that "if the actual experience fits their expectancy, their affective reactions are faster; if the experience is slightly discrepant, they may still assimilate it to the expectancy. When the experience is quite discrepant and they notice it, people have more trouble forming preferences."[116] Now, if jurors have a prior schema for how accidents generally happen—that they are caused by one and only one party—and a set of affective responses is associated with that schema—feeling sorry for the

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114. Anger toward the defendant was positively and significantly correlated with sympathy for the plaintiff, $r = .49$ ($N = 214$), $p < .0001$, and sadness for the plaintiff, $r = .24$ ($N = 214$), $p < .001$; anger toward the plaintiff was positively correlated with sympathy for the defendant, $r = .22$ ($N = 214$), $p < .002$.

115. *See* Timothy D. Wilson et al., *Preferences as Expectation-Driven Inferences: Effects of Affective Expectations on Affective Experience*, 56 J. PERSONALITY & SOC. PSYCHOL. 519 (1989).

116. Fiske & Taylor, *supra* note 44, at 427-28.

victim—then cases that fit the schema by being attributionally unambiguous would be expected to trigger stronger indications of those emotions. Attributionally ambiguous cases, which vary from the schema, would be expected to yield less intense emotional responses. This is precisely what we found.

We are not the first experimental psychologists to show the connection between melodrama and empathetic response. Melodramatic structure in television drama has been shown to facilitate empathetic involvement with the characters depicted.[117] And some film scholars have posited empathetic involvement with portrayed sufferers as the *sine qua non* of movie melodrama.[118] What is new about our research is that we have identified these patterns of emotionality in response to the most ordinary of accident cases, based on real-life incidents, and, for that matter, comprehended by jurors without the benefit of live accident victims or lawyers' histrionics. This provides compelling support for the claim that melodrama is a useful construct for understanding at least some aspects of common sense decision-making in accident cases.

VI. LIMITATIONS OF USING MELODRAMA TO UNDERSTAND THE COMMON SENSE OF ACCIDENTS

Despite this evidence of the melodramatic conception of accidents in the discourse of lawyers and jurors and in the emotional responses of jurors to the facts of accident cases, jurors' ultimate judgments regarding fault and compensation are not completely governed by the framework of expectations that the melodramatic narrative provides. First and most obviously, plaintiffs win only a little more than half of tort cases tried to juries: over 60% for auto accidents, about 40% for products liability, and about 30% for medical malpractice[119] for an overall rate of about 55%, which held more or less steady during the most recent decade studied.[120] Even if jurors are sympathizing with plaintiffs or giving vent to anger against defendants, as the typical accident melodrama would incline

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117. *See* Dolf Zillmann, *Empathy: Affect from Bearing Witness to the Emotions of Others*, *in* RESPONDING TO THE SCREEN: RECEPTION AND REACTION PROCESSES 135, 162 (Jennings Bryant and Dolf Zillmann eds., 1991).

118. *See* Affron, *supra* note 2, at 102-05.

119. *See* STEPHEN DANIELS & JOANNE MARTIN, CIVIL JURIES AND THE POLITICS OF REFORM 79-81, 88 (1995).

120. *See* ERIK MOLLER, TRENDS IN CIVIL JURY VERDICTS SINCE 1985 47 (1996).

them to do, other factors must be entering into their judgments—for instance, perceptions of the relative weakness of plaintiffs' cases and/or the relative strength of defendants' in those claims that are tried to juries.[121]

Second, jurors in comparative negligence cases are quite willing to apportion fault between the plaintiff and the defendant, rather than to allocate all of it to one party or the other as would appear to be consistent with the Manichæan, monocausal world of melodrama. Indeed, mock jurors tend to apportion significant percentages of the fault to plaintiffs whom the facts indicate are more or less legally blameless.[122] Even the outcome in *Faverty* cannot be cited as proof that jurors thought the corporate defendant was wholly blameworthy, because under relevant law, the jurors needed to determine only that McDonald's was *more at fault* than the plaintiff, Faverty, in order to hold McDonald's liable.[123]

Third, experimental research suggests that jurors do not simply give in to emotion, melodramatic or otherwise, in reaching their decisions. Even in the experiment in which we found the melodrama effect in jurors' empathetic responses to the plaintiff, the melodramatic causal structure of the case did not significantly affect jurors' apportionments of fault or their damage awards. Indeed, mock jurors' decision-making in general does *not* appear to be driven mainly by their emotional responses to the case. Mock jurors do respond emotionally to accidents in ways

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121. At issue here are *case selection effects*. *See* Kevin M. Clermont & Theodore Eisenberg, *Do Case Outcomes Really Reveal Anything About the Legal System? Win Rates and Removal Jurisdiction*, 83 CORNELL L. REV. 581, 581-92 (1998). For instance, although in general cases that go to trial differ from cases that settle by presenting closer questions of liability or damages or both (e.g., defendants who think they have a sure loser are likelier to settle), cases tried to juries probably include weaker plaintiff's cases than cases tried to judges, perhaps (ironically) because plaintiffs' lawyers believe jurors will be more favorable to them than judges will be. Kevin M. Clermont & Theodore Eisenberg, *Trial by Jury or Judge: Transcending Empiricism*, 77 CORNELL L. REV. 1124 (1991).

122. *See* Neal Feigenson, Jaihyun Park, and Peter Salovey, *Effect of Blameworthiness and Outcome Severity on Attributions of Responsibility and Damage Awards in Comparative Negligence Cases*, 21 LAW & HUM. BEHAV. 597, at 611 (1997) (hereinafter Feigenson, Park, & Salovey, *Effect*); Feigenson, Park, & Salovey, *Role of Emotions*, *supra* note 110.

123. Although Stuart Taylor's article hints at some skepticism that the *Faverty* jurors decided as they did because "the law made them do it," the jurors' judgments in fact seem perfectly consistent with Oregon law. If McDonald's was indeed "any little bit" at fault, as one of the jurors remarked, then if Faverty himself was blameless (as all jurors agreed (Taylor, *supra* note 72, at 7)), McDonald's had to be responsible under Oregon law for all of Faverty's damages. *See supra* notes 72, 85.

that attributional theories of emotional response would predict.[124] For example, they react with more sympathy to an accident victim whom they perceive not to be responsible for his own suffering, and with more anger to a blameworthy victim.[125] But their anger and sympathy play only a very limited role in their ultimate judgments. Our mock jurors attributed more fault to more blameworthy parties because they were angrier at those parties, but their anger did not affect their damage awards, and their sympathetic reaction to seriously injured plaintiffs, although considerable, played no significant causal role in their judgments of either responsibility or damages.[126]

Jurors, then, do not simply yield to the melodrama often offered by plaintiffs' attorneys. One possible reason is that the sheer amount of attention that jurors devote to trial information and the seriousness with which they undertake their duties[127] may tend to supersede superficial understandings of the case, to yield deliberate rather than automatic mental processing.[128] Jurors may thus have an incentive not to behave as "satisficers" for whom the first sufficient explanation of the accident is enough; instead, they may entertain more complex alternatives.[129]

More importantly, the plaintiff's lawyer may not construct the case primarily as a melodrama; she may acknowledge the complexity of accident causation and/or decline to portray the defendant as the "bad

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124. *See supra* notes 109-118.

125. *See* Feigenson, Park, & Salovey, *Role of Emotions*, *supra* note 110.

126. *See id.*

127. *See, e.g.*, VALERIE P. HANS & NEIL VIDMAR, JUDGING THE JURY 245-51 (1986).

128. For the position that jurors tend (or would be expected) to process information using conscious, systematic strategies rather than intuitive heuristics, see J. Alexander Tanford & Sarah Tanford, *Better Trials Through Science: A Defense of Psychologist-Lawyer Collaboration*, 66 N.C. L. REV. 741, 751-52 & nn.63-68 (1988); *cf.* Steven J. Sherman & Eric Corty, *Cognitive Heuristics*, *in* 1 HANDBOOK OF SOCIAL COGNITION 189, 245 (Robert S. Wyer, Jr. & Thomas K. Srull eds., 1984) (the more important the task, the greater the reliance on formal, systematic reasoning rather than heuristics).

129. *See supra* notes 50-55 and accompanying text (preference for monocausal explanations). On the other hand, some researchers believe that complexity and unfamiliarity of the task may lead to *greater* use of heuristic processing. Galen V. Bodenhausen & Meryl Lichtenstein, *Social Stereotypes and Information-Processing Strategies: The Impact of Task Complexity*, 52 J. PERSONALITY & SOC. PSYCHOL. 871 (1987) (the more complex the judgmental task, the greater the reliance on heuristics, specifically stereotypes). Because people in such situations have no reliable guides for more systematic thinking, they may fall back on simple cues (including melodrama-based stereotypes).

guy."[130] And even if the plaintiff's lawyer proffers melodrama, the adversarial system ensures that jurors will hear *competing versions* of the case, making it less likely that the plaintiff's version of the case will be accepted without qualification.[131] In any given case, jurors may prefer a different account of the accident, even a different melodrama. Defendants' lawyers in accident cases often do not structure their arguments in narrative form at all, offering as an alternative to the plaintiff's story a rule-element or paradigmatic account of why the plaintiff has failed to satisfy one or more requirements of the prima facie case.[132] But contem-

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130. In medical malpractice cases, for instance, the plaintiff's attorney may want to portray the doctor not as a bad person (who is to be expelled from the community, according to Brooks, *supra* note 3, at 17) but as a (typical) doctor who just happened to make a mistake this time. More broadly, defendants in civil cases tend not to be conceived of like criminal defendants, who these days are increasingly portrayed as entirely other (*see, e.g.*, Richard K. Sherwin, *Cape Fear: Law's Inversion and Cathartic Justice*, 30 U.S.F. L. REV. 1023 (1996); Elayne Rapping, *Aliens, Nomads, Mad Dogs, and Road Warriors: Tabloid TV and the New Face of Criminal Violence* (paper presented at Law and Society Association annual meeting, Aspen, Colorado, June 6, 1998)). At worst, most defendants in cases of unintentional harm (including corporate defendants) resemble the criminals in Rapping's description of "highbrow," traditional television crime dramas, whose bad acts result from planning or explicable lapses in judgment or care. That is, we do not want to exclude the typical (corporate) tort defendant from the community; we simply want it to do what it does more carefully: we still want McDonald's to serve fries and hot coffee. Possible exceptions to this, in which the defendant in a case of unintended harm is demonized, include drinking drivers (*see* JOSEPH GUSFIELD, THE CULTURE OF PUBLIC PROBLEMS (1981)) and perhaps also cigarette manufacturers (*see* Richard A. Nagareda, *Outrageous Fortune and the Criminalization of Mass Torts*, 96 MICH. L. REV. 1121 (1998)).

131. I do not think that jurors reject the melodramatic conception because they accept the postmodernist insight that "it's all just stories," and that the accident-as-melodrama is simply one more spin (as opposed to "reality"). Even if jurors *know* that they are hearing only competing stories (and not directly experiencing "the event itself"), there are no postmodernists in the foxhole of the jury box; for the most part, they have to prefer some account or other. We can live with alternative versions of stories but prefer not to when we're dealing with "scientific" matters (*see* JEROME BRUNER, ACTS OF MEANING 55 (1990)) and when getting at the "fact of the matter" behind an accident, jurors very much think of themselves as in the realm of science and not fiction. Therefore, jurors would not reject the melodramatic understanding simply because it is a dramatic narrative form. In addition, jurors cannot simply debias themselves from being influenced by deep-seated habits of thought. Even if they are aware of those habits of thought, they may lack the motivation or the tools to correct properly for what they perceive to be a bias in their thinking. Timothy D. Wilson & Nancy Brekke, *Mental Contamination and Mental Correction: Unwanted Influences on Judgments and Evaluations*, 116 PSYCHOL. BULL. 117 (1994).

porary images of the legal system also offer defendants' lawyers a popular melodrama to import into the courtroom: the story of the greedy, undeserving plaintiff versus the good corporation that is just doing its best to give customers what they want.[133] The currency of these anti-plaintiff messages in the media[134] makes it quite plausible that jurors could think about accident cases this way.

Indeed, the sort of thinking encouraged by the pro-plaintiff melodrama is only part of our multifarious common sense about responsibility for misfortune. The tendency to engage in defensive attribution—to blame the victims of rapes, muggings, or environmental disasters in order to preserve one's faith that one will not be victimized oneself—has been proven in many studies.[135] So has the related "belief in a just world," the credo that people get what they deserve, which leads observers to derogate the victims of misfortune.[136] Add to this the admission that there is

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132. For an example of this, see Feigenson, *Rhetoric*, *supra* note 14, at 103-04. The defendant's lawyer may try to argue that the unfortunate event was simply a random accident that cannot be accounted for by any coherent narrative, and that jurors should not try to impose a fictional coherence on events that points to the culpability of the defendant. *See* Dershowitz, *supra* note 2. According to the plaintiffs' bar, "stuff happens" is a potent mind-set among potential jurors. *See* Gregory S. Cusimano, *Understanding How and Why Jurors Decide Issues and Using That Information to Your Advantage*, Association of Trial Lawyers of America, National College of Advocacy, *Overcoming Juror Bias* seminar, at F-7 (March, 1998).

133. The contemporary prototype for this is *Liebeck v. McDonald's Restaurants*, No. CV-93-92419 (D. N.M. August 18, 1994), the "McDonald's coffee spill" case. On jurors' attitudes toward corporate defendants generally, *see* Valerie P. Hans, *The Illusions and Realities of Jurors' Treatment of Corporate Defendants* 6-7 (1998) (paper presented at DePaul University School of Law, "The American Civil Jury: Illusion and Reality," Fourth Annual Clifford Symposium on Tort Law and Social Policy, April 3-4) (jurors have generally favorable attitude toward business, although they hold corporate defendants to higher standard of care than individuals due to the greater expertise and resources corporations can devote to risk-avoidance).

134. *See* Judith Aks, William Haltom, & Michael McCann, *Media Coverage of Personal-Injury Lawsuits and the Production of Legal Knowledge* (paper presented at the annual meeting of the Law & Society Association, St. Louis, Missouri, May 29-June 1, 1997) (discussing media coverage of the "McDonald's coffee spill case"); *cf.* MacCoun, *supra* note 105.

135. *See* Kelly Shaver, *Defensive Attribution: Effects of Severity and Relevance on the Responsibility Assigned for an Accident*, 14 J. PERSONALITY & SOC. PSYCHOL. 101 (1970).

136. *See* MELVIN J. LERNER, THE BELIEF IN A JUST WORLD (1980).

simply much we do not know about how jurors think,[137] and it is not terribly surprising that melodrama cannot explain all of what jurors think and decide.

Nevertheless, the research presented in the preceding section suggests that melodrama is an important part of how we think and talk about accidents. In the next section I attempt to indicate the broader significance of the melodramatic conception of accidents.

VII. CULTURAL AND LEGAL IMPLICATIONS OF MELODRAMATIC BLAMING

Most accidents do not result in claims for compensation,[138] and most claims are resolved without jury trial.[139] But when jurors decide, they usually blame someone for the accident, and when jurors conceive of accidents as melodrama, they implement a particular, culturally significant way of blaming. By simplifying and personalizing responsibility, melodrama in accident cases, as in popular culture generally, tends to divert attention from the more systemic causes of many unintended harms and thus to preserve the status quo of corporate industrial society. Melodramatic blaming is often perfectly consistent with legal norms, which invite this way of assigning responsibility for accidents. Sometimes, however, thinking about accidents as melodrama extends tort li-

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137. Much is known about jury behavior from the considerable amount of empirical research that has been and continues to be conducted, but much remains unknown. *See* Feigenson, *Rhetoric, supra* note 14, at 67-70 & n.13 (summarizing sources of jury research). Moreover, the effects of individual variables that have been shown to influence decision-making—for example, attributional complexity, which is what the melodrama effect measures—may be statistically *significant* in the conventional sense (that there is less than a given probability, usually 1 in 20, that the observed effect is due to mere chance) and yet not be overwhelmingly *large*. The *size* of the melodrama effect on various dependent measures is in the small-to-medium range: e.g., on ability to imagine oneself in the plaintiff's position, Cohen's d = .31; on sadness for the plaintiff, Cohen's d = .22, where the standard interpretation of the Cohen's d statistic is that .25 is a small effect, .50 a medium effect, and .75 a large effect. *See* David M. Lane, *Alternative Approaches to Interpreting Effect Size, at* http: // www.ruf.rice.edu / ~lane / hyperstat / B153659. html. And, of course, to establish psychological effects that are significant, large, and robust (i.e., often replicated) is not to imply that *everyone* displays the effect or that any one person *always* does.

138. *See* DEBORAH R. HENSLER, ET AL., COMPENSATION FOR ACCIDENTAL INJURIES IN THE UNITED STATES 122 (1991).

139. *See, e.g.*, Michael J. Saks, *Do We Really Know Anything About the Behavior of the Tort Litigation System—And Why Not?* 140 U. PA. L. REV. 1147 (1992).

ability beyond legal norms, and in some of those cases, the language of melodrama may actually be the means for attending to systemic causes of accidents.

A. *The Culture of Melodramatic Blaming*

Melodrama is a way of implementing a culturally significant *blaming practice*. Mary Douglas's anthropological analysis, *Risk and Blame*,[140] explains the cultural-political, i.e. the *forensic*, purposes of various ways of attributing responsibility for misfortune. In certain tribal societies Douglas observed, personal calamity is attributed to the victim's own sin, the violation of taboo. In others, it is attributed to enemies outside the community. Still another type of society tends to attribute such misfortune to individual adversaries within the community.[141]

A heterogeneous society of 270 million people is bound to display various attitudes toward misfortune. On the whole, and contrary to much popular wisdom, Americans are reluctant to blame others for accidents.[142] We attribute only a third of our own accidents purely to human acts, and of those accidents believed to have been caused in part or in whole by human agency, victims blame themselves nearly two-thirds of the time.[143] Some Americans profess a sense of individualism that emphasizes rugged self-sufficiency, according to which the victim of accidental injury is supposed to take misfortune in stride.[144] Others are fatalistic, believing simply that "stuff happens."[145]

Still, many accidents do result in claims for compensation, including lawsuits and trials. While these comprise a small minority of all accidents,[146] their significance extends beyond their numbers—in their influence on the filing and settlement of other claims, and on popular images

140. MARY DOUGLAS, RISK AND BLAME (1992).

141. *See id.* at 5-6. A fourth possible way of reacting to misfortune would be not to blame at all, but rather to focus on compensation. This, indeed, is the practice that Douglas favors (*see id.* at 17-18), and it is illustrated by no-fault accident insurance and workers' compensation laws.

142. *See* SAKS, *supra* note 139.

143. *See* HENSLER et al., *supra* note 138, at 155.

144. *See* David M. Engel, *The Oven Bird's Song: Insiders, Outsiders, and Personal Injuries in an American Community*, 18 L. & SOC'Y REV. 551 (1987).

145. *See, e.g.*, CUSIMANO, *supra* note 132.

146. *See* HENSLER et al., *supra* note 138, at 122 (10% of injuries result in claims and 2% in lawsuits).

of our litigation system.[147] From these accident claims and trials, it is clear that *blaming individual others* for misfortune is a culturally important practice.

Douglas writes that this kind of blaming "is partly a public backlash against the great corporations."[148] The globalization of the marketplace has led to an increasing sense of personal vulnerability and increasing demands for protection against that vulnerability as a basic matter of fairness.[149] The more the normative foundations of our lives are threatened, especially the belief that our fate can be controlled, if not by ourselves then by some identifiable other, the more forcibly we articulate and seek to implement those very norms.[150] Thus, as Douglas somewhat hyperbolically writes, "the [blaming system] we are now in is almost ready to treat every death as chargeable to someone's account, every accident as caused by someone's criminal negligence, every sickness a threatened prosecution. 'Whose fault?' is the first question. Then, 'what action?' Which means, 'what damages? What compensation?'"[151]

Yet Douglas also contends that blaming others for misfortune is perfectly suited "to the task of building a culture that supports a modern industrialized society."[152] How can the blaming of "bad guy" corporate defendants *support* a largely corporation-driven industrialized society? The answer, I believe, derives mainly from the way in which melodrama *simplifies* and *personalizes* responsibility. This tends to obscure the social and systemic causes of accidents and thus to protect the underlying corporate industrial power structure from critical reassessment.

Attributing responsibility in melodramatized fashion is pervasive in our society. We can explore the connections between melodramatized blaming and the blocking out of systemic responsibility by turning to

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147. *See generally* DANIELS & MARTIN, *supra* note 119.

148. DOUGLAS, *supra* note 140, at 15.

149. *Id.*; *see also* LAWRENCE M. FRIEDMAN, TOTAL JUSTICE 38-43 (1985).

150. I thank Richard Sherwin for pointing this out to me. *Cf.* "terror management theory" in social psychological research: certain cultural symbols serve to reinforce faith and solidarity in the face of fears of mortality, so the more salient the fear of death is made, the more strongly people react to deviant behavior that calls those symbols into question. *See, e.g.*, Abram Rosenblatt et al., *Evidence for Terror Management Theory: I. The Effects of Mortality Salience on Reactions to Those Who Violate or Uphold Cultural Values*, 57 J. PERSONALITY & SOC. PSYCHOL. 681 (1989).

151. DOUGLAS, *supra* note 140, at 15-16. On the interconnection of causal attributions and political agendas. *See also* GUSFIELD, *supra* note 130, at 47-49.

152. DOUGLAS, *supra* note 140, at 15.

theorists of melodrama in film and other media. According to Thomas Elsaesser:

> The persistence of the melodrama might indicate the ways in which popular culture . . . has . . . resolutely refused to understand social change in other than private contexts and emotional terms. In this, there is obviously a healthy distrust of intellectualisation and abstract social theory—insisting that other structures of experience (those of suffering, for instance) are more in keeping with reality. But it has also meant ignorance of the properly social and political dimensions of these changes and their causality . . . .[153]

If we substitute "the injuries resulting from modern technology and industry" for "social change," we begin to get an idea of the effect of melodramatic thinking on judgments of legal responsibility for accidents.[154] Ariel Dorfman's analysis of superhero melodrama[155] makes even plainer the analogy between melodrama's personalization and simplification of conflict and the concealment of systemic responsibility for accidents:

> [A given episode of *The Lone Ranger* presents] a typical situation, a real dilemma, which the reader should be able to recognize. A man is fired. Reasons: laziness, drunkenness, bad company, an unlawful past. People have been fired, it is true, for that sort of conduct. But this is only part of the truth. There is nothing to remind the reader that people are fired primarily due to other pressures: mechanization, competition for lowering costs, etc. So

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153. ELSAESSER, *supra* note 2, at 47.

154. Similarly, Geoffrey Nowell-Smith writes that melodrama "supposes a world without the exercise of social power," in which "[t]he characters are neither the rulers nor the ruled" (NOWELL-SMITH, *supra* note 20, at 71); rather, power in the melodrama is local and personal, the universe that of the family or the small town. If the *form* of such melodrama, as it has developed since the late eighteenth century, connotes a similar background of power relations even when transposed to the very different world of the modern industrial (or highway) accident, then perhaps the result will similarly be the masking of underlying social forces. *Cf.* Elayne Rapping, *The Movie of the Week: Law, Narrativity, and Gender on Prime Time*, *in* FEMINISM, MEDIA, AND THE LAW 100 & n.12 (Martha A. Fineman & Martha T. McCluskey eds., 1997) [hereinafter Rapping, *Movie*] (how melodrama personalizes social issues).

155. *See* ARIEL DORFMAN, THE EMPIRE'S OLD CLOTHES 91-98 (1983).

> the crisis that the reader witnesses (and often suffers) in the real world is only apparently, externally, similar to the one that fiction presents. It is, however, similar enough to allow the reader to automatically correlate and substitute the one for the other, so that the solution given in the comic can be translated by the reader into the kind of solution that will work for his own genuine, ongoing troubles.[156]

Chuck Kleinhans' analysis of melodrama and ideology[157] situates the analogy between melodrama in the arts and in accident trials in its historical context. The emergence of melodrama coincided roughly with the Industrial Revolution and the rise of capitalism.[158] Industrial culture divided work from family, putting unprecedented and ultimately unbearable demands on the private family to satisfy the sense of meaning in life

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156. *Id.* at 92-93. Dorfman thus makes two important points: that melodrama *substitutes* for a real awareness of the systemic causes of misfortune a self-contained morality play that leaves the status quo unchanged; and that for melodrama to work, to channel our frustrations about harm and injustice effectively away from challenging the status quo, it must on some level be a *plausible* substitute. I argue above that social psychology explains why melodramatic blaming habits would indeed seem to provide a plausible way of doing justice (*see supra* notes 44-71 and accompanying text). *See also* LIPSITZ, *supra* note 6, at 3, 19 (discussing C.L.R. James's theory that popular culture of 1930's allowed audiences to vent their frustrations with economic difficulties at the same time as it "prevent[ed] other stories from emerging, stories about history, power, and social relations").

While Elsaesser, Dorfman, and other media scholars tend to *infer* effects on audience beliefs from the content of the movies, television programs, and other objects of study, there is limited empirical evidence that the audiences for melodrama actually respond as these media theorists predict. One study shows that people exposed to "traditional" movies about Vietnam, in which protagonists are portrayed as in control of events (in other words, in which responsibility is personalized, as in melodrama), tend to make *internal* attributions for real Vietnam veterans' postwar problems (i.e., they think that the problems are mainly due to something about the veteran), while people exposed to "situational" movies, in which protagonists are portrayed as strongly influenced by and/or attempting to cope with war-related circumstances, tend to make *external* attributions for those same problems (i.e., they think that the problems are mainly due to the veterans' war experience). Robert J. Griffin & Shaikat Sen, *Causal Communication: Movie Portrayals and Audience Attributions for Vietnam Veterans' Problems*, 72 JOURNALISM & MASS COMM. Q. 511 (1995). Even so, we should remember that "[f]act and fiction, art and action, life and literature, story and history less imitate one another than grow from the same seed of human need to round miscellaneous experience towards meaning . . . ." Grimsted, *supra* note 19, at 210.

157. Chuck Kleinhans, *Melodrama and the Family Under Capitalism*, *in* IMITATIONS OF LIFE 98, 197-204 (Marcia Landy ed. 1991)., *supra* note 2, at 197-204.

158. *See id.*

that was now absent from the public sphere of work. The bourgeois domestic melodrama arose and continues to thrive because it expresses this basic contradiction in people's everyday lives.[159] Explicit mention of the conditions of capitalism (e.g., lay-offs, unemployment, underemployment) that often give rise to family tensions are generally avoided.[160] By analogy, in a world of increasing privatization and decreasing faith in elected government, legal cases and especially jury trials bear an ever-growing and perhaps ultimately unbearable burden of providing the sense of justice that is otherwise absent from the public sphere.[161] In the face of such circumstances and the very real difficulties of understanding

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159. *See also* KLEINHANS, *supra* note 157, at 199-200:

> The more the family loses its possibilities for material production, the more it becomes a prime site of consumption. Mass consumption, the domestic side of imperialist market expansion, contains an ideology of pleasure and self-gratification which is defined largely in individual rather than social terms. With consumption detached from production (the fetishism of commodities Marx describes in the first chapter of Capital), a full life is thwarted. Rather than life, one has a succession of lifestyles.
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> The family becomes a center of subjectivity, cut off from the world of action and decisions. Home is for passion, suffering, sympathy, sacrifice, self-attainment. Work is for action, doing, for the money which pays for the home. Yet home is also shaped by the ideology of individualism, especially as shaped by the Puritan-Protestant heritage of U.S. life. The family is supposed to achieve the personal fulfillment denied in the workplace for adults and denied in school for children. At home everyone becomes a consumer trying to get a bigger slice of the emotional pie.

Id.

In the present discussion I am omitting Kleinhans' appropriate emphasis on the central role of women in, and, consequently, as audiences for, contemporary melodrama. It is the woman rather than the man in the nuclear family who most feels the contradiction and constraint of the situation of the family under capitalism. Thus the woman's struggles (e.g., whether to sacrifice her own goals for the happiness of others) are the most common theme of such melodrama. *See id.* at 201.

160. *See id.* at 203.

161. Of course other institutions besides juries address the vast majority of claims of accidental injury, seeking to accomplish the goals of deterrence (e.g., through governmental regulation) and/or compensation (e.g., through settlement, with or without insurance, before or after the filing of a lawsuit). *See infra* note 180 and accompanying text. But insofar as we see accidents as occasions for *doing justice*, jury decision-making carries significance far out of proportion to the number of cases in which it takes place.

the often complex causes of accidents, the temptation to resort to the simplified, personalized, moralized justice—accidents as melodramas—may be great.

When we move from the dramatic arts to the world of "facts," we continue to find evidence that our culture conceives of accidents as melodrama. For instance, many studies show that media reporting on hazards and accidents tends to adopt a melodramatic structure. The media tend to report harms, not risks, i.e., they individualize danger.[162] The media tend to prefer monocausal accounts of hazards,[163] and to identify individuals rather than physical or social forces as causes.[164] Thus, "news of disaster tends to be portrayed as melodrama—a form of communication that relies heavily on plot predictability and stereotype."[165] In all of this, media coverage of accidents and hazards is consistent with its coverage of news in general.[166]

The social construction of our knowledge about accidents as matters

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162. *See* Eleanor Singer & Phyllis Endreny, *Reporting Hazards: Their Benefits and Costs*, 37 J. COMM. 10 (1987).

163. *See* J. William Spencer & Elizabeth Triche, *Media Constructions of Risk and Safety: Differential Framings of Hazard Events*, 64 SOCIOLOGICAL INQUIRY 199 (1994).

164. *See* Robert A. Stallings, *Media Discourse and the Social Construction of Risk*, 37 SOC. PROBS. 80 (1990).

165. Lee Wilkins & Philip Patterson, *Risk Analysis and the Construction of News*, 37 J. COMM. 80, 81 (1987). The authors add that "[b]ecause news is based on the concept of novelty rather than situational analysis . . . [and because of] the professional demands to 'humanize' individual stories, . . . news reports of risk make . . . the fundamental attribution error." *Id.* at 82-83.

166. *See* STUART EWEN, ALL CONSUMING IMAGES 265-66 (1988) ("The assembled facts, as joined together by the familiar, formulaic, and authoritative personality of "The News," becomes the most accessible version of the larger reality that most Americans have at their disposal. Consciousness *about the world* is continually drawn away from a geopolitical understanding of events as they take place in the world. As nations and people are daily sorted out into boxes marked "good guys," "villains," "victims," and "lucky ones," style becomes the essence, reality becomes appearance."); *see also* Daniel C. Hallin, *We Keep America on Top of the World*, *in* WATCHING TELEVISION 9, 33-34 (Todd Gitlin ed., 1986) (television shows conflict in good-versus-evil terms); Sharon Sperry, *Television News as Narrative*, *in* Adler ed., *supra* note 22, at 295, 300-04 (television news stories as hero narratives).

There are, of course, perfectly good reasons why the media talk about hazards and accidents in this way. First and foremost, they believe it sells. Space or time constraints and the anticipated attention and intelligence level of the audience may also explain these tendencies in media coverage. None of these explanations detract from the descriptive points made in the text.

of personal rather than corporate or systemic responsibility extends beyond the mass media to government and private industry sources of information—indeed, to the entire cultural and institutional apparatus by which we identify certain kinds of recurring events but not others as worthy of attention. As Joseph Gusfield explains so brilliantly in *The Culture of Public Problems*,[167] from the collecting of relevant information to its analysis, dissemination, and use in subsequent debate, Americans have tended to approach automobile accidents, and in particular, those involving the use of alcohol by one or more drivers, as a matter of individual morality. In research reports and Congressional hearings, the focus becomes not drinking and driving, but the *drunk driver*. He or she is the sinner against society, the deviant "problem drinker" as opposed to the "normal" user of alcohol, *the* cause of half of all traffic deaths.[168] From a complex reality,[169] the drunk driver is constructed as the villain in a cultural melodrama,[170] the sower of disorder in an otherwise orderly world.[171] Thus, through the familiar techniques of monocausality, norm theory, culpable causation, and fundamental attribution error, responsibility for these accidents is simplified, personalized, dichotomized, and moralized—individual responsibility (the "unsafe driver") rather than corporate (the "unsafe car") or collective (the "unsafe road" or "unsafe transportation system") responsibility.[172]

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167. GUSFIELD, *supra* note 130.

168. *See id.* at 80-82, 94-100, 152-57.

169. The social construction of our knowledge about drinking and driving out of uncertain fragments of reality begins in the realm of science: "the continuing transformation of partial, qualified, and fragile knowledge into certain and consistent fact." *Id.* at 76. Blood alcohol levels at or marginally above the legal limit are taken to imply impaired driving ability; other features of the accident, such as the age of the driver, are inadequately weighted; an *association* of alcohol and a fatal accident becomes a *causal connection* between the former and the latter; inferences about accidents in general are drawn from incomplete samples. *See id.* at 63-74. Hence confident pronouncements of the "fact" that drinking and driving causes half of all automobile deaths. *Id.* at 78-79.

170. *See id.* at 104 (drawing on Kenneth Burke for his understanding of the forms of drama, Gusfield uses precisely the same term—"low mimetic tragedy"—to classify the dramatic construction of drinking-driving accidents). *See* FRYE, *supra* note 20, at 38-39 (describing the melograma of accidents generally).

171. *See id.* at 156-57.

172. *See id.* at 33-50. Thus, melodramatized thinking about accidents leaves unchallenged the decision about the *amount* of risky industrialized activities with which we should live, which is a much more important determinant of the number of accidents we suffer than are particular instances of suboptimal *care* in the conduct of those activities. In other words, whatever society does to address drinking-driving, as long as we have

Personalized blaming is indeed everywhere. Social psychologist Daniel Gilbert, quoting and discussing the ideas of Gustav Icheiser, who wrote in the 1940s, gets to the heart of its ideological function:

> [Icheiser] believed that the fundamental [attribution] error was not a rationalizing maneuver designed to pamper a frail ego, but a stubborn cultural myth:
>
> > These misinterpretations [i.e., overattributing behavior to dispositions] are not personal errors committed by ignorant individuals. They are, rather, a consistent and inevitable consequence of the social system and of the ideology of the nineteenth century, which led us to believe that our fate in social space depended exclusively, or at least predominantly, on our individual qualities—that we, as individuals, and not the prevailing social conditions, shape our lives. [Citation omitted.]
> >
> > . . . In a society that rewarded some with wealth and others with hardship, the tendency to attribute people's outcomes to dispositions served to justify the status quo. Classist society could only perpetuate itself by brainwashing its members to think of people as the authors of their actions, and thereby deserving of their fates.[173]

Thus, melodramatic blaming supports a culture of individualism.[174] It offers us a world in which human agency is responsible for bad outcomes, and in which responsibility for those outcomes is assigned to the people (the bad guys) who deviate from accepted behavioral norms, leaving to their fate victims whose losses cannot be so explained. In this way the norms are reinforced, the wrongs done to the good guys are rec-

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enough millions of cars on the road being driven enough billions of miles, we will also have tens of thousands of fatalities every year. *Id.* at 50.

173. GILBERT, *supra* note 48, at 128. Another spin on the same point would be that individualized blaming, as opposed to, say, fatalism, supports modern industrial capitalism is by purporting to value the sort of individual initiative and responsibility that Weber and others have argued is essential to the growth of capitalism (I thank Brian Bix for this observation.).

174. *See* DOUGLAS, *supra* note 140, at 28-34.

tified—and the systemic causes of those bad outcomes are ignored.[175]

In all of this, to claim that melodramatic blaming blocks awareness of the systemic causes of accidental injuries is *not* to argue that we would necessarily prefer to avoid those injuries at any cost. It is not to contend that we would (or should) give up the convenience of private automobile driving in order to eliminate auto accidents, the pleasure of certain affordable consumer goods in order to avoid the environmental hazards incident to their production, or the benefits of corporate capitalism in order to reduce unemployment and income inequality. The point is that melodramatic blaming tends to impede our recognition that in our everyday lives we trade off vast, "accidental" human suffering for these benefits, and that the trade-offs are ones we *might not* want to make, or make on the same terms, if we fully confronted the choice.[176] Conceiving of accidents as melodrama diverts our focus from *systemic alternatives* to the mixes of benefit and harm we tacitly accept under the status quo.

Melodramatic thinking leads us to think that we know what unduly risky behavior looks like. Sometimes, however, undue risk does not wear a black cape and speak with a deep voice. Sometimes it is practically invisible because it is just part of the background of our daily lives. The melodramatic conception makes it harder for us to foreground causes of accidental harm we might be better off recognizing.

B. *Melodramatic Blaming and the Law*

Common sense is inclined to simplify and personalize responsibility for accidents, and when common sense sits in the jury box, it works

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175. It could be argued that there is nothing distinctive about the melodramatic form in this regard—that *any* personalized conception of responsibility would tend to obscure systemic responsibility and hence our collective choice to endure great and largely random injury. The correspondences between melodrama in popular culture and the common sense of responsibility for accidents, however, extend beyond merely the personalization of responsibility. Note also how other features of melodrama—e.g., causal simplification, and the linkage of plaintiff and defendant in a self-contained relation of complementarity—tend to lock perceptions of responsibility for accidents still more firmly in the individualized frame.

176. This is, of course, the problem posed by the "gift of the evil deity" with which Guido Calabresi opens IDEALS, BELIEFS, ATTITUDES, AND THE LAW (1985); it is also the theme of his TRAGIC CHOICES (1978), co-authored with Phillip Bobbitt, *see infra* notes 181-182 and accompanying text. Indeed, Joseph Gusfield introduces his book with a similar trope, which he credits to Calabresi's former Yale Law School colleague Morris Raphael Cohen. *See also* GUSFIELD, *supra* note 130, at 2-3.

within a tort law regime that largely encourages exactly those habits of judgment. When an accident victim decides not to accept his injury and insurance does not suffice, he must seek compensation from identifiable defendants, not from the corporate economy or society as a whole.[177] At trial, judge and jury are constrained by rules of evidence to focus on the causation of particular harms rather than the creation of more general risks. The requirement of proximate cause, despite its reformulations throughout the century, still tends to discourage assigning responsibility too far beyond the immediate injurer.[178] And the instruction in negligence cases to gauge the parties' culpability by comparing their behavior to that of the "reasonable person" further encourages jurors to personalize responsibility.[179] In sum, the substance and procedure of tort law itself display important features of the melodramatic conception of accidents.

Tort litigation is not, of course, the only way in which our society allocates accident costs and resolves disputes arising from accident claims. Workers' compensation statutes offer an obvious and important example of how we deal with a large class of recurring types of accidents without recourse to individualized blaming at all. Instead of conceiving of workplace accidents as fault-based aberrations from an accident-free status quo, workers' compensation schemes understand those accidents to be largely chance-driven but, in the aggregate, statistically certain consequences given the technology and ecology of the modern workplace. This collectivist model was argued for, rejected, and ultimately applied to automobile accidents, albeit to a lesser extent, in the form of mandatory insurance.[180] Yet individualized litigation and particularized blaming remains a prominent method for allocating the costs of uninsured acci-

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177. Arguably the theory of "market share liability," under which the plaintiff may in effect sue an entire industry, is something of an exception to this generalization. *See* Sindell v. Abbott Laboratories, 607 P.2d 924 (Cal. 1980).

178. Landmark cases extending liability, in the face of proximate cause counterarguments, for what is in effect the negligent creation of dangerous conditions exploited by a third party to the plaintiff's detriment include a landlord's liability for third-party assaults on tenants (*see* Kline v. 1500 Massachusetts Ave. Apartment Corp., 439 F.2d 477 (D.C. Cir. 1970)), a psychotherapist's liability, in certain circumstances, to the estate of a person murdered by the therapist's outpatient (*see* Tarasoff v. Regents of University of California, 551 P.2d 334 (Cal. 1976)), and many others.

179. *See* FEIGENSON, *supra* note 14, at 163 & n.334.

180. *See* Jonathan Simon, *Driving Governmentality: Automobile Accidents, Insurance, and the Challenge to Social Order in the Inter-War Years, 1919 to 1941*, 4 CONN. INS. L.J. 521 (1997/1998).

dent losses.

Nowhere is the unconscious denial of systemic responsibility for accidental harm clearer than in the very use of the jury as an institution for allocating accident losses. Guido Calabresi and Philip Bobbitt[181] argued twenty years ago that as a society, we make a de facto "tragic choice" to let a certain large number of ourselves be maimed and killed in typical industrial and transportation accidents, because some such large number of injuries and deaths is a statistical certainty, given our methods of manufacture and transportation. In order to avoid confronting this choice collectively and explicitly, we assign to juries the task of allocating the costs of, and thus responsibility for, these accidents. Because different groups of citizens sit on different juries, each deciding responsibility for a single accident, the allocation is decentralized and discontinuous. And because we do not require juries to give reasons for their decisions, the allocation is made without accountability. The decentralization, discontinuity, and lack of accountability allow us not to consider the cumulative tragedy as collectively chosen.[182]

It can be seen that melodrama, which focuses on individual rather than social forces and does so in a moralizing way, is an appropriate mind-set for jurors deciding responsibility for accidents, especially when they are deciding a negligence case, in which liability is based on fault, i.e., individual blameworthiness.[183] Moreover, the fact that jurors' emotions reflect a view in which the accident victim and injurer are linked in a relation of complementarity corresponds to norms of both distributive and corrective justice often argued to underlie tort law. Perceived complementarity matches the legal rule governing apportionment of fault in

181. CALABRESI & BOBBITT, *supra* note 176.

182. *See id.* at 57-72.

183. The fault standard for gauging liability facilitates the avoidance of the tragic choice because it makes the award of compensation hinge on an "absolute standard of worthiness" instead of a comparative judgment across cases. *Id.* at 62-63, 72-79. Victims recover only if they can show that defendants' conduct (but not their own, to an extent depending on the comparative negligence law of the jurisdiction) falls short of the standard. The victim deserves compensation only because the defendant acted wrongfully—not because our industry and transportation systems are designed, quite beyond the control of the individual parties, in a way that is bound to cause some great number of injuries. The fault standard is a "perfectible" standard—in each individual case, its application allows us to believe that if only no one had been at fault, no one would have been hurt; it is individual fault that brings about injuries, not the fact that society collectively has set up the game to injure large numbers, however carefully they act. CALABRESI & BOBBITT, *supra* note 176.

comparative negligence cases—that the parties' perceived fault must sum up to 100% of the responsibility for the accident—and thus the ideal of distributive justice that accident losses should be apportioned in accordance with perceived fault.[184] Complementarity also corresponds to the ideal of corrective justice, according to which the defendant has allegedly upset the status quo by wrongfully injuring the plaintiff,[185] and the jurors' job is to correct the imbalance to the extent it deserves to be corrected. Jurors who conceive of their decision as linking the parties in a complementary way are giving corrective justice. A damage award for the plaintiff takes just that amount away from the defendant; a verdict for the defendant "saves" the defendant and "deprives" the plaintiff by precisely the same amount. In addition, this sense of closure, the squaring of accounts, which people seek in melodrama,[186] exactly matches the self-contained nature of discontinuous decision-making by juries.[187] Thus,

184. Indeed, this is the *raison d'etre* of comparative negligence. *See* Li v. Yellow Cab Co. of California, 532 P.2d 1226 (Cal. 1975); *see also* Gary T. Schwartz, *Contributory and Comparative Negligence: A Reappraisal*, 87 YALE L.J. 697, 721-27 (1978).

185. *See, e.g.*, Jules Coleman & Arthur Ripstein, *Mischief and Misfortune*, 41 MCGILL L.J. 91 (1995).

186. *See supra* notes 55 and accompanying text (melodrama effect understood in terms of squaring of accounts and "total justice.")

187. The consequence of this way of thinking is that decision-making in accident cases focuses on whether the actors behaved carefully enough (according to a perfectibility standard), not on their level of activity, which, as noted above (*see supra* note 183), is a more important determinant of the absolute number of accidents. Brian Bix has argued to me that it may very well make economic and pragmatic sense to focus on care level rather than activity level, because it is likely to be easier to do something about the former. Nevertheless, reducing the number of car accidents, such as, by deterring suboptimal care will still leave us with a substantial residuum of accidents; more importantly for the present purposes, the way the tort litigation system poses the liability issue *leaves unasked* the question whether we might prefer a radically different way of life (e.g., in which residential patterns and transportation systems did not demand so much use of private automobiles). In sum, both the form and the process of decision-making about accidents thus tends to hide the tragic choice for accidents that we make at the societal level. Likewise, the discontinuous nature of jury decision-making allows us to disclaim any particular instance of melodramatic thinking as possibly indicating a collective choice: we can maintain in any given case that "this way of thinking doesn't represent our social identity or ideology; it's just one jury using its (possibly flawed) common sense, with no necessary implications for the next case."

Observe another analogy between legal decision-making and melodramatic form: we seem to be satisfied with doing justice with regard to accidents as a series of self-contained instances, each of which is but a fragment of the injury-wreaking activity in the aggregate. It has been observed that the fragmentation of television melodrama into episodes and of episodes by commercial interruptions, and the failure of characters to

jurors whose thinking and decisions fail to address the systemic causes of accidents are to a great extent behaving just as the situation demands, implementing both the substantive and procedural norms inherent in tort litigation.

For the distinct contribution that jurors' melodramatic blaming makes to blocking awareness of systemic responsibility for accidents, we must look to cases in which jurors' decision-making appears to diverge from legal norms.[188] A main source of this divergence is jurors' tendency to conflate elements of liability that the law keeps separate into a single, holistic judgment of responsibility.[189] The judge in a negligence case ascertains whether the defendant is responsible for the accident by focusing on what the plaintiff identifies as one or more "untaken precautions" by the defendant. The court decides first whether the untaken precaution would have avoided the harm, and second whether the precaution was worth taking.[190] Causation and fault remain separate, albeit interrelated, elements of the case.

Jurors, by contrast, tend to conflate causal with legal responsibility. Thinking in the way that norm theory describes, jurors who determine that the party in question *could* have acted otherwise may infer as well that the party *should* have acted otherwise. Thinking in terms of culpable causation, jurors may draw the converse inference from blameworthiness

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achieve any overall psychological plausibility, are virtues and not flaws (*see* THORBURN, *supra* note 22, at 78-81; *see also* KLEINHANS, *supra* note 157, at 201), because what's important in melodrama is not overall coherence but the emotional truth of the individual scene or episode. Similarly, with regard to accidents, seeming to do justice in the individual case may matter to us at least as much as coherent planning to reduce accidental injuries in general.

188. That is, in many cases jurors' melodramatic thinking probably leads them to the same conclusions that non-melodramatic thinking would have, in which event we cannot attribute any independent causal weight to the former—even if the use of melodramatic thinking in such cases remains an interesting ethnological fact.

189. *See* KANOUSE *supra* note 54. Jurors may also diverge from the law due to ignorance, prejudice, or lack of attention, among other things; leading scholars agree, however, that jurors take their work seriously and in general perform ably (*see* HANS & VIDMAR, *supra* note 127 and accompanying text), which reduces the probable importance of these other factors as causes for juror-legal norm divergence.

190. *See* Mark F. Grady, *Untaken Precautions*, 18 J. LEG. STUD. 139 (1989).

to causation.[191] In either event, jurors may hold liable a defendant who either did not cause the accident or whose behavior was not legally wrongful.

An example of blame without much proof of causation is *Butler v. Revere Copper & Brass, Inc.*, which I have discussed at length elsewhere.[192] The plaintiff, a truck driver, slipped and fell off his truck while pulling a tarpaulin over a load of industrial machinery he was picking up from the defendant's plant to be taken to his company's plant for repairs. He landed on his head and was seriously injured. There was no evidence at all as to why he fell. His attorney, however, took advantage of the tools of melodrama, especially norm theory and fundamental attribution error, to encourage jurors to blame the defendant's employees, whose untaken precaution was that they could have helped the plaintiff with the tarpaulin but did not.[193]

To understand the larger significance of melodramatic blaming in such a case, consider that slips and falls—at home, at the workplace, or elsewhere—account for nearly forty percent of reported accidental injuries.[194] These kinds of things often just happen; although slip and fall victims more often blame others for their accidents when they slip at work, they also chalk up their injuries partly or entirely to chance two-thirds of the time.[195] So Butler's accident was typical, endemic to work and life. In situations like this, where the limits of effective deterrence are quickly reached, the more important causes of accidents are systemic. They include the sheer number of people engaged in the activities in question, the extent to which they engage in them, and the basic environment in which they find themselves. The analogy is to automobile accidents; whatever incentives we create to deter unusually risky driving, as long as we have enough millions of cars on the road being driven enough billions of miles by ordinary people with ordinary levels of attentiveness and degrees of coordination, we will also have tens of thou-

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191. *Cf.* NAGAREDA, *supra* note 130, at 1168-70. According to Nagareda, a sufficiently strong showing of the defendant's fault or blameworthiness (his examples are the mass tort litigations concerning silicone breast implants and harms from tobacco smoking) can make up for a weak (or non-existent) showing of causation, because jurors tend to "commingle" the two judgments. *Id.* at 1168.

192. *See* FEIGENSON, *supra* note 14, at 79-84, 102-07, 124-26, 141-44, 150, 155-57, 159-60.

193. *See id.* at 102-07, 124-26.

194. *See* HENSLER, ET AL., *supra* note 138, at 31.

195. *See id.* at 156-57.

sands of automobile fatalities every year.[196]

In *Butler*, therefore, to blame the defendant's employees because of their supposed individual failings on this one occasion is to divert attention from all of the ways in which the configuration of Butler's workplace (e.g., the loading dock, availability of adequate machinery), standard work practices (e.g., Butler's own employer's implicit expectation that he could do the job alone), and workplace safety rules, none of which were at issue, may have increased the risk of slip and fall injuries, including serious ones like Butler's. Our melodramatic conception of responsibility for accidents envisions a world of willful, rational actors who can control outcomes and who respond to incentives. But a world of habitual, subconscious behavior primed by situational cues over which actors have little control is much closer to reality.[197] Individualized blaming tends to block our awareness of the importance of the situational causes of accidents, just as focusing blame for automobile accidents on the unsafe driver tends to block our awareness of the importance of unsafe cars, unsafe roads, and inadequate transportation alternatives. *Not* blaming in *Butler* and similar cases, on the other hand, could very well increase the pressure on legislators and regulators to re-evaluate the background level of risk.[198]

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196. *See supra* notes 167-172 and accompanying text (discussing work of Joseph Gusfield).

197. *See* Daniel W. Shuman, *The Psychology of Deterrence in Tort Law*, 42 KAN. L. REV. 115, 164 (1993); *see also* SIMON, *supra* note 180, at 5-6.

198. The risk perception literature provides a useful analogy. *See* HOWARD MARGOLIS, DEALING WITH RISK (1996). People's "visceral reactions" to risk, which influence how much they are inclined to avoid those risks, may depend on any number of features of the risk, including unfavorable moral associations. Thus, laypeople are much more bothered about dioxin than aflatoxin, even though the latter is a greater cancer risk due to our wider exposure to it (in peanut butter), in part because of the unfavorable associations between dioxin and the napalm used during the Vietnam War. So our attitude toward dioxin is "better safe than sorry," which means, spend billions to eliminate trace amounts (at Times Beach, Missouri, for example); our attitude toward the more pervasive risk posed by aflatoxin is pretty much "who cares?" The consequence of this diversion of attention from what is in fact the more pervasive risk is *not* necessarily that we would want to eliminate aflatoxin in the same way we have tried to eliminate dioxin, but simply that our disproportionate attention keeps us from performing a rational cost-benefit analysis with respect to either; indeed, according to Margolis, it keeps us from even seeing that there is a trade-off to be made (in the case of dioxin or other feared contaminants, no risk-avoidance cost is too great).

199. *See* United States v. Carroll Towing Co., 159 F.2d 169, 173 (2d Cir. 1947).

An example of blaming the defendant despite a weak case on fault is *Faverty*. What McDonald's did or failed to do may very well have contributed to the accident, but unless McDonald's behaved unreasonably, it should not have been held responsible. And whether we understand negligence in terms of social utility defined either by public policy or by optimal care, i.e., the Learned Hand test,[199] or fairness, there are good reasons to think that any act or omission by McDonald's was not unreasonable.

First, whether the defendant's conduct unreasonably created a risk of the type of harm that befell the plaintiff "involve[s] considerations of public policy,"[200] and public policy in this case is almost certainly on the side of McDonald's. A plaintiff's verdict could "make all employers potentially liable for their employees' off-premises negligence when an employee becomes tired as a result of working,"[201] a rather broad but plausible extension of the majority's decision.[202] Second, it does not seem that McDonald's behaved unreasonably under the standard optimal care definition of negligence, because not letting teenagers work late shifts or effectively scrutinizing all departing employees for sufficient signs of drowsiness would very likely be inefficient.[203] Third, in terms of

200. *Faverty*, 892 P.2d at 718 (Edmonds, J., dissenting) (footnote omitted).

201. *Id.* at 714 (Edmonds, J., dissenting).

202. Among other things, the dissenters wondered how employers, at the time they scheduled employees for work assignments as much as thirty days in advance, could possibly anticipate those employees' mental and physical states at the end of those assignments, as the majority's holding made them responsible for doing. *Id.* at 719. The enormity of the potential consequences is suggested by the fact that some 20 million Americans work on rotating or night shifts and are particularly susceptible to increased accident risk from drowsiness. Martin Moor-Ede, *When Things Go Bump in the Night*, 81 A.B.A.J. 56, 59 (1995) ("[s]everal studies suggest that the 20 million Americans who work on rotating or night shifts have double the number of highway accidents as other workers"). Representatives of employer groups naturally agreed with this assessment of the policy implications of the *Faverty* verdict. One said that "[i]t's like putting someone's boss in the position of being their parents and deciding when they should go home to bed." Taylor, *supra* note 72, at 86 (remarks of Mona Zeiberg, senior labor counsel for the U.S. Chamber of Commerce). Another said that the next case "will be a lawsuit blaming an employer for 'an employee who leaves work mad and then causes an accident.'" *Id.* at 86-87 (remarks of John Sullivan, president of the Association for California Tort Reform).

203. The cost of not scheduling (willing) high-school students to work midnight shifts may very well have been paying extra to others to induce them to work those shifts (a cost that would eventually be passed on to customers), delaying the opening of business each morning while waiting for the clean-up that could not be completed overnight

(perhaps resulting in lost business), or reducing work opportunities for willing, able teenagers (with consequent effects on the local economy; for instance, the Matt Theurers of the world might not be able to purchase cars). Against these costs could be set the arguable social benefits of not allowing teenagers to work midnight shifts (e.g., interfering with their ability to study and engage in extracurricular activities, depriving older adults of work). (I thank Steve Gilles for pointing out to me the social benefits of a rule barring teenagers from working late shifts.)

Moreover, the cost of enforcing a don't-let-tired-employees-work (-and-then-drive-home) policy would likely be enormous, as supervisors, fearful of liability, would have to spend time and effort scrutinizing every employee for signs of sleepiness. See remarks of Michael Lowery, a corporate attorney for McDonald's (reported in Taylor, *supra* note 72, at 3): "[T]he potential consequence . . . is that an employer would be required to check the physical condition of every employee before the employee leaves work and make a determination as to whether the employee may pose a danger to himself or others. . . . [This] establishes an insuperable burden upon employers." Extending this line of thought was James M. Coleman, counsel to the National Council of Chain Restaurants, a restaurant owners' association (reported in Jon Lafayette, *The Case of the Off-Duty Employee*, 91 RESTAURANT BUS., July 20, 1992, at 30): "What are you supposed to do, sit there and run a monitoring device at the door as your employees leave and make a decision as to who looks too tired to drive home and start taking people's key? Then you're liable for false imprisonment." Presumably supervisors would be held to a standard of "reasonable" accuracy in detecting problematic levels of sleepiness, but it is unclear how any such standard would be applied.

My colleague Steve Gilles has argued to me that "there is a plausible Hand formula case against McDonald's. . . : preventing obviously tired teen-age employees from working a second shift. Giles, *supra* note 108, at 2. *Cf. Vesely v. Sager*, 486 P.2d 151, 158-159. Yes, it would be very costly for bartenders and waitpersons to decide whether each customer has had too much to drink. But a rule that says don't serve people who are obviously intoxicated will prevent some accidents at much lower cost." Gilles, *supra* note 108, at 2. With all due respect, I disagree. "Obvious" tiredness (of the sort likely to lead a person to fall asleep at the wheel) seems to me to be much more difficult to discern than obvious intoxication. *See* remarks of Janet Bachman, vice president for claims administration for the American Insurance Association (reported in Deborah Shalowitz, *McDonald's Seeks Retrial of "Fatigue" Suit*, CRAIN'S BUS. INS., May 6, 1991, at 73): (They're [the trial court] expecting an employer to be responsible for a circumstance he cannot control or predict. How can you tell how tired someone is unless they fall asleep while you're talking to them?) *Id.* The supervisors, moreover, would have every incentive not to let workers (whatever their age) work their shifts, leading to costly reassignments and overtime.

The *benefits* side of the optimal care formula presents a closer question but still seems to favor McDonald's. Automobile accidents can be very costly. But given the driver's presumably superior ability to gauge his or her own level of wakefulness and competence to drive it could certainly be argued that the probability of an accident, ex ante, was small. McDonald's could reasonably anticipate that employees who were so tired at the end of their shifts as to pose a driving risk would rest first, find alternate transportation, or pull over rather than falling asleep at the wheel. To put this observation in another light, it could be argued not only that McDonald's did not fail to use optimal

fairness, there is another compelling reason not to hold McDonald's liable: it was Theurer who caused the accident, and his responsibility dwarfs that of McDonald's. As the dissenting judges on the appellate court believed:

> That question [whether McDonald's created an unreasonable risk] must be answered in light of the uncontroverted facts that Theurer was an adult employee, that defendant did not require him to work the shift, that Theurer assured defendant's manager that he would rest between shifts and that he would be able to handle the shift physically, that Theurer never asked to be relieved from the shift, and that the harm to plaintiff occurred off defendant's work premises as a result of an activity over which defendant had no right of control.[204]

Arguably, then, *Faverty* is another case in which jurors stretched the bounds of negligence law,[205] although the appellate court's affirmation suggests that the decision is at least defensible. And yet imposing liability on McDonald's—albeit in terms of a personalized, melodramatized

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care in these circumstances, but that McDonald's was not the cheapest cost-avoider with respect to this kind of risk; the employee/driver was. So holding McDonald's liable is probably inconsistent with the leading economic rationale even for strict liability. On the other hand, evidence that at least two other employees had recently fallen asleep while driving home after late shifts and gotten into accidents, though contested, loomed large at trial and in the appellate court's reasoning. *See Faverty*, 892 P.2d at 709.

204. *Faverty*, 892 P.2d at 717 (Edmonds, J., dissenting). As a matter of tort law, of course, Theurer's responsibility need not exclude a third party's, and if one thinks that McDonald's should have done more to keep a sleepy Theurer off the road, then one might hold McDonald's liable as well. As in the dram shop case to which Faverty's lawyer drew an analogy (*see supra* text accompanying note 74), the impaired driver's responsibility does not exonerate the alcohol provider (or McDonald's), but rather is the very way in which the alcohol provider's (or McDonald's') negligence was realized. The dissenters on the appellate court, then, may be understood as providing numerous reasons why it would be *unfair* to charge McDonald's with responsibility for not doing more.

205. Stuart Taylor, Jr., described it as "a jury's crazy verdict" (Taylor, *supra* note 72), and the purely anecdotal evidence provided by the reactions of various people (within and outside of the legal profession) to whom I have described the case indicates that the vast majority view the jury's decision with surprise or even outrage. My colleague Brian Bix suggests that these reactions may have something to do with the context of litigation: attributing responsibility to McDonald's might seem less outrageous if voiced by, say, a parents' association to the town council than it does when offered as a basis for tort compensation.

conception of responsibility—could lead to a questioning of at least one of the underlying, systemic causes of such accidents. Faverty's lawsuit did not challenge the entire status quo in which eighteen-year-olds want and need cars so badly that they would drive twenty miles to and from midnight shifts to work at minimum wage to pay for them.[206] But the lawsuit did ask whether accidents like this need be inherent in a world in which employees drive to and from round-the-clock businesses. Holding McDonald's liable could have prompted it and other similarly situated organizations to consider alternative ways of doing business—for instance, by implementing an "alertness assurance plan" including worker training and task forces as well as alternatives to driving home from work.[207] If this reading of the case is correct, then perhaps the plaintiff's lawyer really was inviting jurors to question at least some of the underlying conditions that increased the risk of accidents like Theurer's and Faverty's.[208] If it is true, however, that "people can only speak through the stories they understand,"[209] then we should not be surprised to find

206. Faverty's lawyer explicitly disclaims this question: "This is not a case about whether high school kids should work or shouldn't work." F. 11.14-15.

207. These plans are being implemented at an increasing number of 24-hour industries, including railroads, manufacturers, power plants, and paper mills; *see* Ed Coburn, *Fatigue Can Spawn Perils at Round-The-Clock Cos.*, NATIONAL UNDERWRITER, PROPERTY & CASUALTY/RISK & BENEFITS MANAGEMENT EDITION, Aug. 5, 1996, at 9, *available in* LEXIS, Insure Library, Asapii File.

208. This alternative conception of the argument proceeds as follows. In looking beyond the other driver's estate for a deep pocket from which to seek compensation for his client's injuries, Faverty's lawyer could not sue the government (for designing, building, and maintaining the roads, which in all respects were adequate), or the manufacturer of Faverty's truck (which met all standards of crashworthiness). That left Theurer's employer, McDonald's. Faverty's lawyer thus reconceived a highway collision case as a kind of workplace (or employment-related) injury case, and in so doing gestured at one of the systemic conditions for highway accidents. Many people in our society have to drive to and from work; and given this, it is a statistical certainty that some of them will sometimes do so in a dangerously sleepy state. Faverty's lawyer could not, however, sue society at large for creating the patterns of residence, work, and transportation that required Theurer and Faverty to be driving between home and work; "society at large" is not an identifiable defendant. Instead, he personalized systemic risk-creation in the form of a discrete party—the employer—and then argued that the employer behaved in a deviant way that caused the accident. Only by using the language of personalized, moralized (i.e., melodramatic) responsibility, therefore, could such an argument for systemic responsibility succeed. (I thank my colleague Linda Meyer for showing me the force of this interpretation of melodramatic blaming.)

209. Robert A. Ferguson, *Story and Transcription in the Trial of John Brown*, 6 YALE J. L. & HUMAN. 37, 73 (1994).

this awareness of a systemic cause of highway accidents couched in the language of melodramatized responsibility.[210]

It is unclear what common factors, if any, distinguish the cases in which melodramatic thinking broaches the issue of systemic causes of accidents from those in which it typically inhibits people from considering such causes. Perhaps the first group is especially likely to include cases in which the plaintiff argues that while the defendant is not the direct cause of the harm, the defendant created a dangerous condition of which some other party took advantage to harm the plaintiff. *Faverty* is such a case. So too are lawsuits against tobacco companies for harm to smokers, although in these it is the plaintiff who harms himself. Richard Nagareda has recently described these cases as efforts to use tort suits to punish the cigarette manufacturers for blameworthy conduct, such as concealing nicotine's addictive properties and marketing to minors, even though the cigarette manufacturers arguably do not cause the harm.[211] One upshot of this stretching of tort doctrine is to make us think about whether we should continue to accept the background condition—the availability of cigarettes—that allows so many millions of people to risk lung cancer and other diseases as the price of relaxation and stimulation.[212] Lawsuits against gun manufacturers for injuries caused by the use of non-defective guns may prove to be another example.[213]

Then again, the reasons why melodramatic thinking sometimes points society toward rather than away from the systemic causes of accidents may be extrinsic to tort litigation itself. It may be that only where

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210. Similarly, Mary Douglas observes that political action to protect the environment must be couched in the language of protecting individual health. *Cf.* Douglas, *supra* note 140, at 28 (citing work of Edward Burger).

211. Nagareda, *supra* note 130, at 1131-32. Nagareda argues that tort law is thus being used in a criminal-law like fashion, to penalize conduct that has not caused harm. *See id.*

212. Nagareda also argues that tort litigation may not be the most appropriate forum in a democracy to decide such questions. *See id.* at 1182-92.

213. *See, e.g.*, Fried, *Nine Gun Makers Called Liable for Shootings*, N.Y. TIMES, Feb. 12, 1999, at A1 (reporting jury verdict in federal lawsuit, the first to hold gun manufacturers liable to persons injured or killed by properly functioning guns on a theory of negligent marketing and distribution); *see also* In re 101 California Street, No. 959316 (Cal. Super. Ct. S.F. County Apr. 10, 1995) (lawsuit arising from massacre at Petit Martin law offices). Responding to a spate of highly publicized school shootings in 1997-98, one letter writer to the *New York Times* observed that "[a] correct analysis views the killings as accidents in areas where there are many guns.... The availability of guns leads to gun incidents." N.Y. TIMES, May 27, 1998, at A20.

the trade-off of safety for pleasure and convenience becomes sufficiently prominent in the mass media and other aspects of popular culture does personalized responsibility become a vehicle for considering systemic responsibility. This is certainly more true of the tobacco cases than of *Faverty*; the danger posed by overtired drivers has failed to capture public attention. Even so, the *Faverty* trial does suggest the ambivalence of the melodramatic conception. Melodramatized blaming typically leaves the systemic causes of accidents unscathed, but occasionally it may be a kind of Trojan horse, a way not to reconcile ourselves to the status quo but to challenge it.[214]

VIII. CONCLUSION

Ever since the theatrical melodramas of the mid-nineteenth century,[215] Americans have reveled in stories in which the rich and powerful are the bad guys, while the humble are virtuous.[216] This traditional American populism, of course, has persisted into the twentieth century and today through innumerable movies and television programs. Media content analyses consistently find that prime-time television dramas depict business people as villains.[217] Business people lie, cheat, and, most

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214. *Cf.* Rapping, *Movie*, *supra* note 154 (melodrama as field for expression of feminist values within dominant culture); *cf. also* Thorburn, *supra* note 22, at 73-76 (melodrama as vehicle for grappling with disturbing conflict in familiar terms).

215. *See* Grimsted, *supra* note 19.

216. *Id.* at 206.

217. *See* CROOKS, CONMEN, AND CLOWNS: BUSINESSMEN IN TV ENTERTAINMENT ix, 14, 25 (Leonard J. Theberge ed., 1981) (in sample of 200 prime-time network shows from 1979-80 season, two-thirds of all portrayals of businessmen were negative, and businessmen were portrayed most negatively when engaged in activities relating to their business); S. Robert Lichter, Linda S. Lichter, & Daniel Amundson, *Does Hollywood Hate Business or Money?*, 47 J. COMM. 68, 79 (1997) (in sample of 600 episodes from prime time television fictional series over 30-year period from 1955-56 to 1985-86 seasons, business characters behaved significantly more negatively than non-business characters; business characters were portrayed most negatively when engaged in activities relating to their business, whereas non-business characters were portrayed most positively in activities relating to their occupation; and business dealings that played a major part in the plot were most often portrayed as antisocial); Media Research Center, *Businessmen Behaving Badly: Prime Time's World of Commerce* (June 16, 1997) *at* http://www.mrc.org/specialreports/fmp/behbad.html. (study by right-wing think tank of 863 television fictional shows from 1995-97, finding that business people tend to be portrayed as venal, unscrupulous, and criminal).

often, kill;[218] they are often, in the words of a 1981 study, "crooks, conmen, and clowns."[219] And the heads of big businesses, the characters most readily taken to represent the stereotype of *the corporation*, are the worst of all.[220] Their villainy consists of easily recognizable, discrete criminal acts for which they are brought to justice by the end of the show.[221] Thus melodrama encourages us to believe that we can do something about the harms that corporate capitalism causes. By contrast, when corporate conduct that actually hurts real people—for instance, when General Motors closes a major plant and displaces thousands of workers—goes on screen, it is not the stuff of fictionalized melodrama, but of fact, and major news media frame the story to imply that workers and local communities have no alternative but to accept the plant closure and consequent misery as a business necessity.[222]

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218. *See* Media Research Center, *supra* note 217 (of depicted murderers with known occupations, more than two-fifths were businessmen, more than three times as many as the next highest category (career criminals); businessmen were more likely to be shown as cheating to get ahead than as contributing to society's needs).

219. Theberge ed., *supra* note 217.

220. *See id.* at 23 (three-quarters of corporate leaders portrayed negatively were shown behaving illegally). Moreover, business people portrayed negatively were overwhelmingly more likely to be shown as criminals if their characters were making one-shot appearances on the series. *See id.* at 21. That is, the characters whom jurors would be most likely to draw on as a model for the corporate defendant in court—those who by status are most closely identified with the corporation, and those who are most unfamiliar to the juror, appearing only once in the jurors' history of viewing a particular series—are portrayed as the most criminal. *See also* Media Research Center, *supra* note 217 (three-quarters of fictional businessmen who murdered were "big businessmen," and three times as many big as small businessmen shown cheating to get ahead). *But cf.* S. ROBERT LICHTER, LINDA LICHTER, & STANLEY ROTHMAN, PRIME TIME: HOW TV PORTRAYS AMERICAN CULTURE 214, 239 (1994) (same data analyzed in Lichter, Lichter, & Amundsen, *supra* note 217, shows that big businessmen not portrayed more negatively than smaller businessmen).

221. *See* Theberge ed., *supra* note 217 (more than 40% of all negative acts performed by businessmen portrayed in television dramas were criminal acts, as opposed to behavior that was merely malevolent, foolish, or self-interested).

222. *See* Christopher R. Martin & Hayg Oshagan, *Disciplining the Workforce: The News Media Frame a General Motors Plant Closing*, 24 COMM. RES. 669 (1997); *see also* Peter Dreier, *The Corporate Complaint Against the Media*, in AMERICAN MEDIA AND MASS CULTURE 77 (Donald Lazere ed., 1987) ("The national press may criticize or expose *particular* corporate or government practices or *particular* corporations or elected officials who violate the public trust. Thus, a scandal like Watergate . . . or a Pentagon weapons boondoggle lends credence to the view that these violations are *exceptions* to an otherwise smoothly running system.").

As in popular melodrama, melodramatized blaming in the accident case allows us to think and feel that we're doing something about misfortune, as it diverts our attention from the underlying causes of injuries in industrialized society and our real lack of control over the riskiness of our lives.[223] In the melodrama of the accident case, as in popular culture, the plaintiff is the little guy, the innocent sufferer, the good guy who deserves to win against the bad guy defendant. Empirical research confirms

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223. It could be argued that the urge to understand accidents as melodrama is becoming greater the more technologically advanced society becomes. As Lawrence Friedman writes in TOTAL JUSTICE (*supra* note 149, at 38-43), increases in technology lead us to expect that riskiness in our lives can be controlled—if not by ourselves, then surely by someone (*e.g.*, most of us have no personal control over airplane safety, but the manufacturers, airline maintenance crews, and pilots presumably do), and we expect those others to exercise that control (Friedman's thesis is that we turn to law and the state to make sure those others do their job; thus the law expands in response to our increasing expectation of absolute security). The greater that expectation of security, the more a catastrophic accident stands out as senseless, shocking, something that *shouldn't be. Cf.* Simon, *supra* note 180, at 22 (writing of increasing awareness in the early decades of this century of the carnage from automobile accidents, "[t]he linking of technology and all its promise of productivity and order with the grotesque destruction of human life has produced a lasting and powerful counter-symbol to the progressive self-image of modernity"). The need to *make sense* of accidental harm becomes even greater, and melodrama is one of the primary ways we do this. A similar argument may be found in Mark F. Grady, *Why Are People Negligent? Technology, Nondurable Precautions, and the Medical Malpractice Explosion*, 82 NW. U. L. REV. 293 (1988). Grady poses the question of how medical malpractice could increase at the same time as medical technology has. He answers that advancing technology makes available more "durable" precautions (e.g., dialysis machines) to avoid harms which formerly would have been chalked up simply to misfortune (i.e., nothing we can do about this case of kidney disease). *See id.* The presence of those precautions, however, increases the need for accompanying "nondurable" precautions—having sufficient machines, operating them properly, etc.—and thus multiplies the opportunities for failing to take those nondurable precautions, which may be negligence. Once again, advancing technology enhances the controllability of what had been thought of as fate, and this, in turn, generates expectations that fate *will* be controlled, and hence increases the urge to blame for not controlling it. Hence, increased technology leads to a greater need to find individualized justice in the wake of an accident, which, somewhat ironically, leads to greater blockage of the systemic causes of technology-based accidents. This speculation yields an empirically testable hypothesis: has melodramatized blaming for accidents increased over time?

In any event, there is good reason to believe that the absolute *amount* of drama of all sorts, including melodrama, to which people in the last two generations have been exposed, primarily through television, is much greater than that to which people in previous generations were exposed. *See* RAYMOND WILLIAMS, TELEVISION: TECHNOLOGY AND CULTURAL FORM 59-60 (1975). This suggests that whatever the influence of the melodramatic sensibility on people's judgments about their world, it has been increasing.

that jurors sometimes do take up the invitation to blame the corporate defendant. One of the more robust findings in the literature on juror decision-making in accident cases is an anti-corporate defendant bias.[224] But these individual instances of liability, even under products liability, the most anti-defendant theory of recovery, have not on the whole been detrimental to corporate welfare.[225] Perhaps this is because the baseline response to accidental injury remains simply to accept it,[226] for whatever reasons, and thus tacitly to accept the status quo. Or perhaps it is because melodramatized blaming tends not to question the systemic ways in which life under corporate capitalism subjects us to risks of accidental injury. And yet melodramatized blaming in individual accident cases gives us the sense that we are addressing those risks, those feelings of vulnerability, just as the anti-corporate melodrama in popular culture allows us to indulge in fantasies of individual control and self-realization—in the belief that we can do something about corporate conduct that harms us, while in fact our world becomes increasingly subject to corporate dominance.[227]

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224. *See, e.g.*, Brian H. Bornstein, *David, Goliath, and Reverend Bayes: Prior Beliefs about Defendants' Status in Personal Injury Cases*, 8 APPLIED COGNITIVE PSYCHOL. 233 (1994); MacCoun, *supra* note 105. The anti-corporate defendant effect (corporate defendants held liable more often on same facts than individual defendant) may be justified by people's belief that corporations have greater resources to gather information on risk avoidance and to implement means of avoiding those risks when warranted (*see supra* note 133). It may also reflect, in some instances, a belief that risky corporate behavior (e.g., a defectively made mass-manufactured product) is more blameworthy because it has the potential to harm many more people than a similar misdeed by an individual. *Cf.* Nagareda, *supra* note 130, at 1170; *see* Paul Slovic, Baruch Fischhoff, & Sarah Lichtenstein, *Facts Versus Fears: Understanding Perceived Risk*, *in* Kahneman et al. eds., *supra* note 44, at 463 (psychometric analysis of risk perception: catastrophic risks that threaten many people are more feared). Note that neither of these rationalizations for the anti-corporate effect is based on mere populism or egalitarianism (*cf. supra* note 81).

225. *See* Don Dewees, David Duff, & Michael Trebilcock, EXPLORING THE DOMAIN OF ACCIDENT LAW 197-205 (1996) (effects on product innovation and international competitiveness not clear, and detriments claimed by CEOs of manufacturing firms apparently balanced by benefits).

226. *See supra* note 143 and accompanying text.

227. My analysis is thus consistent with leftist critiques of popular media, which "interpret these results [the fictionalized portrayals of businessmen as bad guys] as a form of Marcusean 'repressive tolerance,' in which television neutralizes resistance against a repressive capitalist system by providing a fantasy outlet for the expression of mass resentment." Lichter, Lichter, & Amundson, *supra* note 217, at 79-80. *See also* Todd Gitlin, *Television's Screens: Hegemony in Transition*, in Lazere, ed., *supra* note 222 ("Television, like much popular culture through the ages, embodies fantasy images that speak to

A standard critique of juror decision-making in accident trials serves the same end. The popular stereotype of personal injury lawyers as melodramatic and jury verdicts in personal injury cases as driven by emotion can itself be understood as a forensic maneuver that preserves the status quo. As I have shown, jurors may indeed think about accidents in terms of melodrama, but for the most part it is melodrama in the "structural" sense—responsibility simplified, personalized, dichotomized, and moralized. The usual critique of juror decision making in accident cases, by contrast, focuses on the emotional aspect of melodrama.[228] This critique, spuriously supported by the biased reports of tort

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real aspirations.... The hegemonic image is an active shaping of what actually exists, but it would not take hold if it did not correspond, one way or another, to strong popular desires—as well as to defenses against them [citation omitted]. "False consciousness" always contains its truth: the truth of wish, the truth of illusion that is embraced with a quiet passion made possible, even necessary, by actual frustration and subordination.").

Lichter et al. themselves disagree with this interpretation, preferring to understand television's negative portrayals of businessmen as representing the opposition of Hollywood's relatively progressive creative community toward more conservative business interests. Lichter, Lichter, & Amundson, *supra* note 217, at 80-82; LICHTER, LICHTER, & ROTHMAN, *supra* note 220, at 239-40. The greater the consolidation of entertainment and other industries into fewer and fewer hands, the weaker Lichter's argument becomes, but I acknowledge their criticism of hegemony theory as essentially unfalsifiable (i.e., according to that theory, positive portrayals of business people reinforce the dominant capitalist structure, while negative portrayals also reinforce the dominant capitalist structure through repressive tolerance). Moreover, the fact that corporate interests and their right-wing advocates appear to attack, with great vigor and sincerity, negative portrayals of business people in the media (*see, e.g.*, Dreier, *supra* note 222, at 64; Media Research Center, *supra* note 217) indicates that they do not think those portrayals support capitalism, although the attackers could, of course, be wrong. Indeed, I suspect that both explanations are partly correct.

As evidence of the ubiquity and importance of melodrama in shaping our culture's views about capitalism, it is noteworthy that corporations themselves make use of melodrama in what might at first glance appear to be an undramatic forum, the boilerplate message from the company chairperson at the beginning of the annual report. A content analysis of these statements shows that they depict a drama of good and evil in which the corporation is the hero and the government is the villain. *See* Julie E. Kendall, *Good and Evil in the Chairmen's "Boiler Plate": An Analysis*, 14 ORG. STUD. 571 (1993).

228. This is, of course, not the only or even the most common basis for criticizing civil juries. Incompetence, capriciousness, and bias are also mentioned. *See* Daniels & Martin, *supra* note 119, at 9-12 (referring to claims of Peter Huber and others). But juries' susceptibility to emotional decision-making, especially sympathy for plaintiffs, is often cited. *See, e.g.*, Randall R. Bovbjerg et al., *Juries and Justice: Are Malpractice and Other Personal Injuries Created Equal?*, 54 L. & CONTEMP. PROBS. 5, 36-39.

litigation that appear in the corporate-sponsored mass media,[229] allows for selective criticism of jury verdicts as too frequent and too large, allegedly driven by irresponsible sympathy for the plaintiff or anti-corporate defendant animus. At the same time the critique leaves unquestioned and thus intact the structural components of thinking and blaming that support the status quo in modern industrial society.[230]

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229. *See* Bailis & MacCoun, *supra* note 105 (major print media describe unrepresentative sample of tort litigation, giving impression that plaintiffs win more often and larger amounts than they actually do on average); Neil Vidmar, Felicia M. Gross, & Mary Rose, *Jury Awards in Medical Malpractice: A Profile of Awards, Proportions for Pain and Suffering, and Post-verdict Adjustments*, (paper presented at DePaul University School of Law, *The American Civil Jury: Illusion and Reality, Fourth Annual Clifford Symposium on Tort Law and Social Policy*, April 3-4, 1998) (underreporting of reductions of awards through remittitur and appeal) (on file with author).

230. This is not the only purpose served by popular deprecation of jury verdicts as driven by emotion. Just as mass culture has traditionally been criticized using pejoratives associated with femininity (*see* ANDREAS HUYSSENS, AFTER THE GREAT DIVIDE 47 (1986))—irrationality, excess, emotionalism—so criticism of the jury in the same terms has increased as the representation of women and ethic minorities on juries has increased. *See* Laura Gaston Dooley, *Our Juries, Our Selves: The Power, Perception, and Politics of the Civil Jury*, 80 CORNELL L. REV. 325 (1995); *see also* Nikol G. Alexander & Drucilla Cornell, *Dismissed or Banished? A Testament to the Reasonableness of the Simpson Jury*, *in* Morrison & Lacour eds., *supra* note 6, at 57 (predominantly black female jury in O.J. Simpson case unfairly criticized for their supposed irrationality and emotionalism); *cf.* Taylor, *supra* note 72, at 10 (introducing discussion of pro-plaintiff juror views in *Faverty* with the subtitle "Mothers Get on McDonald's' Case," as if those views were somehow less worthy because women with children provided them). The critique of juries as too emotional can thus be understood as an anti-democratic polemic. Consider also that emotionality is crucial to the original *political* meaning of melodrama, which was to celebrate democratic "feeling" and identify feeling with truth, as against the dominant (aristocratic) institution of the law. Thus, melodrama opposed emotion to law, popular justice and truth to that of corrupt hierarchy. *See* Simon Shepherd, *Pauses of Mutual Agitation*, *in* Bratton et al. eds., *supra* note 3, at 30. The disparagement of common sense decision-making as overly emotional can be understood as anti-democratic in this sense as well. Drawing on both Huyssens and Shepherd, we can interpret "common sense" criticism of juror thinking about accidents as giving vent to dominant male fears about loss of control, at the same time as it leaves intact the habits of thought that preserve the status quo.

Note also how the widespread view of jurors as pawns of attorneys' emotional manipulations draws on the stereotype of women as passive. Contemporary literary and media criticism of melodrama that rehabilitates emotionality as a way of knowing and emphasizes the audience as active participants in the construction of meaning (*See* Gledhill ed., *supra* note 2; Landy ed., *supra* note 2; Bratton et al. eds., *supra* note 3) can be adapted as a useful antidote to this implicitly sexist view of jurors' common sense about accidents.

Through accident trials, we seek to reaffirm sense and meaning in the wake of accidental destruction, just as through popular melodramas we seek to reaffirm moral order in a confusing world. And just as melodrama offers a kind of fantasy that tends "to deny the always morally messy realities of life,"[231] at least some aspects of common sense thinking about accidents also display a reassuring fantasy of justice[232] that denies some of the causally messy realities of life—a fantasy that usually reinforces the economic status quo, even while appearing to challenge it.

231. Grimsted, *supra* note 19, at 202.

232. *See supra* note 183 (discussing Gusfield on how we interpret drinking-driving accidents to "create an orderly account of danger in the contemporary world"); *see also supra* note 223 (on how advancing technology increases our perception of accidents as moral aberrations that need to be explained).