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THE RHETORIC OF RESPONSIBILITY

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EVERY torts professor has a favorite hypothetical about causal responsibility—some wildly improbable and outrageous chain of events triggered by the defendant that somehow leads inexorably to the plaintiff's injury. I have always been partial to the facts of *United Novelty Co. v. Daniels*.² In *Daniels* the defendant negligently set the nineteen-year-old decedent to work cleaning a coin-operated machine with gasoline; the decedent worked in a small room warmed by a gas heater with an open flame. The gasoline vapors surrounding the machine ignited when a rat ran from the machine into the flame, caught fire, and then ran back toward the machine, causing an explosion that killed the decedent. Naturally, the defendant company argued that it was not causally responsible for the freak accident. Nevertheless, the court upheld a jury verdict against the company because it could have foreseen that setting the decedent to work in the room under these conditions was unduly dangerous.

The opinion in *Daniels* takes up barely a page in the reporters, but within this miniature one can find many of the most common structures of argument about human moral responsibility that occur in legal discourse. Consider, for example, the arguments that the

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² 42 So. 2d 395 (Miss. 1949).

defendant company might make (and probably did make) on its behalf:

- (1) The explosion was caused by the unpredictable movements of a rat, not by the defendant's negligence.
- (2) When the decedent began cleaning the machine with gasoline, it was completely unforeseeable that a rat would jump out of the machine, run headlong toward an open flame, catch fire, and then run back precisely where it could do the most damage.
- (3) Decedent was at fault for cleaning the machine with gasoline in the first place. The decedent must have known of the danger when the decedent voluntarily began work.

Next consider the plaintiff's likely responses:

- (1) Although the rat was the immediate cause of the explosion, the real cause was the defendant's ordering the decedent to work under unsafe conditions.
- (2) It is completely foreseeable that if you set someone to work in a small room filled with gas vapors and an open flame, there is an unacceptable risk of an explosion.
- (3) The decedent cannot be held responsible for the explosion, because the decedent was following the orders of the defendant employer and was a minor.

As one would expect, the defendant's arguments are designed to minimize the defendant's causal, legal, and moral responsibility, while the plaintiff's arguments are designed to enhance them. More importantly, however, each side *recharacterizes* the facts to support its position, emphasizing some details, minimizing or even omitting others—creating a coherent portrait of the situation from the raw materials of experience. Like all pictures, these characterizations are selective; for to record experience is always also to reorder and even to suppress it. In the second argument presented above, for example, the defendant describes the situation in minute detail, while the plaintiff speaks in more general, abstract terms. In this way each side can make plausible its claim about the foreseeability or unforeseeability of the decedent's injuries.

Most lawyers are well aware that facts can be recharacterized to support one side of a lawsuit or another. What is more remarkable is that styles of characterization and recharacterization recur in legal discourse in relatively standard and predictable forms that can be catalogued and analyzed. This Article is about these styles of factual

characterization of responsibility—the recurring rhetorical devices that people use to describe the same event in different terms. The goal of this Article is to discover and classify the most common of these structures of argument, and to show how they are implicated in many diverse areas of the law.

The most important previous discussion of recurring structures of factual characterization is Professor Mark Kelman's.³ Kelman's article, like many of the early works of the Critical Legal Studies movement, sought to break down previously unexamined assumptions about the rationality and the apolitical nature of law. Thus, Kelman sought to show that through conscious and unconscious "interpretive constructions," as he called them, "we are nonrationally constructing the legal world."⁴ Because legal argument was largely nonrational and political, Kelman argued, the existing system of rules could not be justified by reason alone.⁵

My purpose in investigating the rhetoric of responsibility is quite different. Uncovering the rhetorical structures of moral and legal argument does not establish that law is irrational. Law is a rational activity because lawyers make arguments about what the law is and what it should be, and attempt to convince others of the rightness of their views.⁶ For me, the central issue in the study of factual characterizations begun by Kelman is not rationality but ideology. We reason about legal issues, but we always do so within an ideological framework that gives coherence and meaning to our debates.⁷ The nature of the framework in which our rationality is inscribed is the concern of this Article.

³ Kelman, *Interpretive Construction in the Substantive Criminal Law*, 33 *Stan. L. Rev.* 591 (1981).

⁴ *Id.* at 672.

⁵ *Id.* at 671.

⁶ Our confidence that law is a rational activity, however, does not automatically legitimate law in general or our legal system in particular. To be sure, we might think reasoned argument is desirable as a normative matter. Yet reasoned argument neither necessarily guarantees nor necessarily frustrates justice and fairness. Rather, it is simply a means through which justice and fairness are discussed.

⁷ Here I must emphasize that as I use it, the term "ideology" has no necessarily pejorative connotations, such as those of false consciousness. Ideological thinking is largely unavoidable for social beings, and ideologies may differ widely in their degrees of functionality or disfunctionality, and in their liberating or oppressive characteristics. See Balkin, *Taking Ideology Seriously: Ronald Dworkin and the CLS Critique*, 55 *UMKC L. Rev.* 392, 393 n.5 (1987).

Just as the grammatical structure of a language can be revealed by carefully studying actual spoken and written examples, the ideological structure of legal and moral argument can be unearthed by carefully studying actual legal and moral rhetoric. This methodology does not seek to demonstrate that the rhetoric of responsibility is irrational, or even a subterfuge for base political motivation or unseemly prejudice. Rather, the goal is to take what people say very seriously indeed, because within our speech we will discover the building blocks of ideology—the background structure that supports our conceptions of reason.

The linguistic analogy just given is not accidental. This Article is part of an ongoing project of developing a semiotics of legal discourse—that is, understanding legal discourse as a system of interrelated signs, much like a language.⁸ As I hope to show, many of the most common rhetorical devices concerning human responsibility come in sets of opposing pairs, with each opposed device a transformation of the other. The rhetoric of human responsibility thus displays its semiotic or linguistic character; for language, and indeed, any system of signs, can be shown to be structured in a system of mutually self-defining relations.⁹ Thus, one might say that the rhetorical devices that I discuss here form a “language” of available arguments about human responsibility.

If factual characterizations about human responsibility are structured like a language, they can be used either consciously or unconsciously, just like a language. A native speaker of a language normally does not consciously consider the grammatical, semantic, and phonological constructs that enable her to speak and understand others. The fact that her understanding is somehow unconscious, however, does not preclude others from learning the language by consciously practicing these constructs; nor does it preclude the native speaker herself from learning more about her own language by a

⁸ For an introduction to semiotics, or the study of signs and systems of signification, see R. Barthes, *Elements of Semiology* (1968); J. Culler, *The Pursuit of Signs: Semiotics, Literature, Deconstruction* (1981); J. Culler, *Structuralist Poetics: Structuralism, Linguistics, and the Study of Literature* (1975); U. Eco, *A Theory of Semiotics* (1976); T. Hawkes, *Structuralism and Semiotics* (1977); R. Scholes, *Structuralism in Literature: An Introduction* (1974). For recent applications to law see B. Jackson, *Semiotics and Legal Theory* (1985); R. Kevelson, *The Law as a System of Signs* (1988).

⁹ For the classic statement of this approach, see F. De Saussure, *Course in General Linguistics* (W. Baskin trans. 1959).

study of grammar, semantics, and phonology. The latter reason is why we teach our children English in school, even if they are native speakers of the language.

Thus, it is quite possible to identify the "deep structures" of argument about human responsibility and to practice them consciously. There are good reasons to undertake such an exercise. First, we can use these structures to make our arguments more convincing, and we can identify them in the arguments of others to analyze and rebut their arguments. If your opponent makes her position seem stronger by cleverly manipulating time frames and descriptions of causality, it is certainly a valuable skill to be able to identify these rhetorical moves and turn them on their heads. Thus, a semiotics of human responsibility is clearly relevant to the study of legal rhetoric in general and, hence, to the goal of persuasive advocacy.

Moreover, as discussed above, an important reason to study these structures of argument is to discover important features of our legal and political ideology. Ideological thinking can be distinguished by the way in which it characterizes issues of human responsibility and desert. The success of an ideology consists precisely in its ability to make its assumptions seem natural or transparent to the mind.¹⁰ Thus, the study of the semiotics of responsibility is important to anyone who wants to understand how ideologies work in general and how ours work in particular.

Finally, a semiotics of responsibility has a therapeutic value. Once we see that existing views of human responsibility are merely constructs that are alternatively adopted and discarded in successive situations, we will understand that they are not necessary concomitants of the concepts of moral responsibility and desert. Thus, articulating the interpretive constructs in moral and legal discourse about human responsibility, making what is unconscious conscious, may have an enlightening effect; it may help us to understand legal and moral issues in a new way.

Part I of this Article provides a terminology for classifying positions or orientations of greater and lesser responsibility. Building on these distinctions, Part II discusses techniques for characterizing descriptions of events that affect conclusions about responsibility,

¹⁰ This is no less true for ideologies that we believe to be "true," "good," or "functional" than it is for ideologies that we disparage as "false consciousness."

using as examples cases concerning causal probability and foreseeability of harm. Part III discusses rhetorical techniques for shifting responsibility between the defendant and the plaintiff, or onto third parties. Part IV argues that the same rhetorical techniques outlined in Parts II and III appear in debates concerning the proper scope of individual rights. The Article concludes with a brief discussion of how ideological commitments lead people to characterize responsibility in different ways.

I. TWO ORIENTATIONS OF DISCOURSE

We might begin classifying arguments about responsibility by establishing different directions or orientations toward responsibility that can be compared and contrasted with each other. This task is more difficult than might at first appear. For example, one cannot speak of greater or lesser degrees of responsibility in the abstract, because to emphasize one person's responsibility for a sequence of events is often to deemphasize another's.

One of the most important distinctions in the literature of the Critical Legal Studies movement does attempt to deal with the problem of describing, or at least ordering, different degrees of responsibility. I am referring to Professor Duncan Kennedy's distinction between "two opposed rhetorical modes for dealing with substantive issues,"¹¹ which he called individualism and altruism.¹² Kennedy described this distinction as follows:

Confronted with a choice, the decision maker will have available two sets of stereotypical policy arguments. One "altruist" set of arguments suggests that he should resolve the . . . [choice] by requiring a party who injures the other to pay compensation, and also that he should allow a liberal law of excuse when the injuring party claims to be somehow not really responsible. The other "individualist" set of arguments emphasizes that the injured party should have looked out for himself, rather than demanding that the other renounce freedom of action, and that the party seeking excuse should have avoided bind-

¹¹ Kennedy, *Form and Substance in Private Law Adjudication*, 89 Harv. L. Rev. 1685, 1685 (1976).

¹² *Id.*

ing himself to obligations he couldn't fulfill.¹³

Kennedy was careful to emphasize that his concept of individualism is distinct from mere egotism, in that "[t]he notion of self-reliance has a strong affirmative moral content, the demand for respect for the rights of others."¹⁴ Thus, individualism also frowned on liberal excuses for failing to meet expected standards of conduct. Similarly, his vision of altruism consisted of more than mere self-sacrifice. "It is motivated by a sense of duty or by a sense that the other's satisfaction is a reward at least comparable to the satisfaction one might have derived from consuming the thing oneself."¹⁵ Yet "the altruist is unwilling to carry his premise of solidarity to the extreme of making everyone responsible for the welfare of everyone else."¹⁶

According to Kennedy, one could classify rule choices in contract law according to whether the rule (or its opposite) was relatively individualist or altruist. For example, denying contractual liability in the absence of consideration was relatively individualist, while permitting recovery in cases of detrimental reliance was relatively altruist. Implying a duty of good-faith performance in all contracts was relatively altruist, while refusing to imply the duty was relatively individualist.

Kennedy's distinction worked fairly well to demarcate directions of greater or lesser responsibility in contract law. It also provided a useful vocabulary for critical analyses of the history of legal thought. For example, it was easy to see that the general trend of contract law from the nineteenth century to the twentieth, for example, had been a movement from individualist doctrines to altruist ones.¹⁷ Kennedy's

¹³ Kennedy, *Distributive and Paternalist Motives in Contract and Tort Law, with Special Reference to Compulsory Terms and Unequal Bargaining Power*, 41 Md. L. Rev. 563, 581 (1982).

¹⁴ Kennedy, *supra* note 11, at 1715.

¹⁵ *Id.* at 1717.

¹⁶ *Id.* at 1718.

¹⁷ *Id.* at 1731-37. Indeed, one of Kennedy's points was that there had been a simultaneous movement from rules to standards. *Id.* at 1686-87. A connection between the form and substance of legal doctrine was postulated by Kennedy, but this connection does not appear to exist uniformly outside of contract law. See Balkin, *The Crystalline Structure of Legal Thought*, 39 Rutgers L. Rev. 1, 45-53 (1986). In partial defense of Kennedy, however, Mark Kelman has argued that there is an "aesthetic" connection between the "tough-mindedness" of individualism and a preference for hard and fast rules. M. Kelman, *A Guide to Critical Legal Studies* 59-61 (1987).

distinction was widely adopted in critical legal literature.¹⁸ It was ultimately equated with another, somewhat different issue, the mutual differentiation and dependence of self and other, which Kennedy called the "fundamental contradiction" of social life.¹⁹

When one moved to tort law or criminal law, however, the distinction between individualism and altruism quickly became problematic. According to Kennedy's original definitions, strict liability would be relatively altruistic in comparison to negligence,²⁰ but so too would be the rather draconian felony murder rule in criminal law. Moreover, both strict liability and the insanity defense would be relatively "altruistic" positions. The problem arose from Kennedy's faithful depiction of the late nineteenth century's treatment of excuses and defenses. Kennedy's individualism deemphasized both liability *and* the recognition of excuses and defenses, while altruism emphasized both liability *and* recognition of excuses and defenses. Yet in criminal law and tort law, allowing an excuse or defense often is just another way of diminishing liability.²¹ Thus, the distinction between individualism and altruism, which made some sense in contract law, became incoherent outside of it.

This theoretical difficulty is not Kennedy's fault but rather is due to the fact that his description of individualism was based quite deliberately on a historically contingent set of understandings shared by lawyers and judges in the late nineteenth century, while altruism was

¹⁸ See, e.g., Dalton, *An Essay in the Deconstruction of Contract Law*, 94 *Yale L.J.* 997, 1006, 1025 (1985); Feinman, *Critical Approaches to Contract Law*, 30 *UCLA L. Rev.* 829, 838-47 (1983) (individualism versus collectivism); Hutchinson & Monahan, *Law, Politics, and the Critical Legal Scholars: The Unfolding Drama of American Legal Thought*, 36 *Stan. L. Rev.* 199, 223-25 (1984); Olsen, *The Family and the Market: A Study of Ideology and Legal Reform*, 96 *Harv. L. Rev.* 1497, 1505, 1521-22, 1530, 1557 (1983); Schlag, *Rules and Standards*, 33 *UCLA L. Rev.* 379, 418-22 (1985); Singer, *The Legal Rights Debate in Analytical Jurisprudence from Bentham to Hohfeld*, 1982 *Wis. L. Rev.* 975 (opposition between freedom and security).

¹⁹ Kennedy, *The Structure of Blackstone's Commentaries*, 28 *Buffalo L. Rev.* 209, 211-13 (1979). Kennedy's original distinction between individualism and altruism is connected to the relation between self and other, but it is not identical with it. The mutually dependent and differentiated relationship of self and other produces many other antinomies that are not coterminous with individualism and altruism—for example, the antinomy between the opposed social conceptions I call individualism and communalism.

²⁰ Kennedy, *supra* note 11, at 1729-30.

²¹ For example, the defenses of contributory negligence and assumption of risk operate very much like a rule that no duty is owed to the plaintiff under certain circumstances.

crafted as its mirror opposite.²² These late nineteenth century understandings were in conflict with each other, but the tensions were more or less invisible to persons of that era.²³ Thus, the individualism of the late nineteenth century simultaneously promoted negligence over strict liability, and an objective standard of negligence over a subjective standard, even though the arguments for these two positions are quite different.²⁴ Similarly, lawyers in the late nineteenth century apparently believed that the question of whether to recognize a defense or excuse was analytically distinct from the question of whether a redressable injury had occurred. Thus, it was possible for them to argue that respect for individual liberty required liability based wholly on fault and yet not see that this principle taken to its logical conclusion required the most liberal expansion of excuses or defenses that were based on lack of fault.²⁵

The first inklings of the recognition of this difficulty can be traced to Holmes' famous essay, "Privilege, Malice, and Intent,"²⁶ where he noted that an affirmative right to act (without liability) also can be understood as a privilege to do harm.²⁷ Of course, by the time Wesley Newcomb Hohfeld wrote his classic article on fundamental legal conceptions,²⁸ it was clear that denying defenses and excuses was a way of increasing one's responsibility to others, and recognizing defenses and excuses was a way of deemphasizing responsibility for the effects

²² Kennedy, *supra* note 11, at 1713-17, 1728-31.

²³ See *id.* at 1731-37, 1745-51; Kennedy, *Toward an Historical Understanding of Legal Consciousness: The Case of Classical Legal Thought in America 1850-1940*, 3 *Res. L. & Soc.* 3 (1980). An obvious example of this tension was the simultaneous assumption that contractual liability was to be based upon will, and that the standards for determining offer and acceptance should be objective, even though such a standard might bind a party despite her actual intentions.

²⁴ Balkin, *supra* note 17, at 36-39 (arguing for negligence over strict liability is relatively individualist, but arguing for an objective rather than subjective standard of negligence is relatively communalist).

²⁵ This contradiction could only be avoided if one assumed that the original crime or tort was defined in accordance with principles of fault, and that defenses and excuses were exceptions offered by the state for reasons of mercy or public policy. See Peller, *The Metaphysics of American Law*, 73 *Calif. L. Rev.* 1151, 1204, 1211 (1985). Indeed, we still talk this way when we speak of "allowing" or "recognizing" defenses or excuses.

²⁶ Holmes, *Privilege, Malice, and Intent*, 8 *Harv. L. Rev.* 1 (1894).

²⁷ *Id.* at 1-6. According to Holmes, the question whether or not a privilege to cause harm should be recognized was simply a question of the particular factual circumstances, the intentions of the actor, and the policies the law sought to serve. *Id.*

²⁸ Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 23 *Yale L.J.* 16 (1913).

of one's behavior.²⁹ This is not to say that in formulating his famous distinction Kennedy was not conscious of Hohfeldian analytics. If anything, he was very much motivated and influenced by it.³⁰ Rather, he was trying to capture the essence of an historical attitude in classical legal thought that did not accept this Hohfeldian analysis and therefore ultimately proved to be incoherent.

Kennedy's original distinction was historically appropriate but analytically unwieldy outside of contract law. A few years ago, I began to explore and expand on Kennedy's already elaborate classification scheme for legal arguments.³¹ I chose an alternative distinction to describe different orientations toward responsibility. Instead of distinguishing between values of self-reliance and values of sharing and self-sacrifice, I drew a distinction between rules that deemphasize a person's responsibility for the effect of her behavior on others and rules that emphasize this responsibility. The former I term "individualist," the latter "communalist."³² As we shall see in the next few pages, my distinction has its own problems of coherence. Its advantage, however, is that these very problems lead us to a deeper understanding of legal responsibility and the connections between responsibility and ideology.

The distinction between individualism and communalism thus classifies arguments about responsibility according to whether they emphasize or deemphasize the responsibility of particular persons, either through rules of liability or through excuses and defenses. For

²⁹ For an excellent discussion of the history of the problem of legally nonredressable harms, see Singer, *supra* note 18, at 1025-56.

³⁰ See, e.g., Kennedy & Michelman, *Are Property and Contract Efficient?*, 8 Hofstra L. Rev. 711, 751-69 (1980), in which the analysis is expressly compared to Hohfeldian analytics.

³¹ See D. Kennedy, *Torts Materials* (unpublished manuscript on file with author); Kennedy, *supra* note 11; Kennedy, *supra* note 13; Kennedy, *A Semiotics of Legal Argument* (1988) (unpublished manuscript). For applications, see Boyle, *The Anatomy of a Torts Class*, 34 Am. U.L. Rev. 1003, 1040 (1985); Paul, *A Bedtime Story*, 74 Va. L. Rev. 915, 922-23 (1988). My extension appears in Balkin, *supra* note 17; Balkin, *supra* note 7.

³² I use this term to emphasize a duty or responsibility to others, which may or may not involve sharing or self-sacrifice. Enforcing the death penalty is a relatively communalist position, even though one does not normally associate it with altruism on the part of the defendant. Unfortunately, I have discovered that the word "communalism" is likely to be confused with "communitarianism," a theoretical position often contrasted with political liberalism. See M. Sandel, *Liberalism and the Limits of Justice* 59-65 (1982). Communalism, like individualism, is an orientation about responsibility that one finds within liberal discourse, not outside of it. And it goes without saying that "communalism" is not at all the same thing as the position concerning ownership of the means of production known as "communism."

example, in a tort suit, the plaintiff's best strategy normally is to emphasize the defendant's responsibility for the plaintiff's condition, while the defendant's best strategy is to deemphasize it. The defendant's position is individualist, the plaintiff's communalist. Thus, the felony murder rule and strict products liability are relatively communalist positions, while negligence, the insanity defense, and the actual malice rule in libel are relatively individualist.³³

Individualism and communalism, however, are not simply orientations of greater and lesser responsibility in general; they are claims about the responsibility of particular persons. Thus, while the defendant is likely to deemphasize her own responsibility for harm to others, she is likely to emphasize the responsibility of the plaintiff for the plaintiff's own predicament, as well as the responsibility of third parties. Thus, although the insanity defense is a relatively individualist position because it deemphasizes the defendant's responsibility for her actions, so too is the defense of contributory negligence because it emphasizes the plaintiff's responsibility for her own harm.

Conversely, the plaintiff will not simply emphasize the defendant's responsibility for the harm; she will also deemphasize her own responsibility and that of third parties for her predicament. Thus, if the felony murder rule is a relatively communalist position because it emphasizes the defendant's responsibility for any deaths committed in the course of a felony in which the defendant participated, so too is the doctrine of last clear chance.

Although it often helps to introduce the distinction between individualism and communalism as the distinction between what helps the defendant and what helps the plaintiff in the standard tort suit, the distinction does not depend on the procedural posture of the case. After all, the injured party is not always the plaintiff. For example, in a declaratory judgment action the traditional roles may be reversed. In a criminal prosecution, there is a defendant but no private plain-

³³ As these examples illustrate, individualism and communalism cut across traditional political lines. Traditional liberals tend to be much more individualist with respect to speech and sexual autonomy than traditional conservatives, while exactly the opposite is true with respect to issues of economic regulation. This neat division is rapidly changing with respect to speech, however. See Balkin, *Some Realism About Pluralism: Legal Realist Approaches to the First Amendment*, 1990 Duke L.J. (forthcoming).

tiff.³⁴ Economic regulations or subsidies may not give rise to any private lawsuit, but nevertheless affect the ways in which people are restrained from injuring others.³⁵

In order to make sense of the distinction between what increases and what decreases responsibility for the effects of one's behavior on others, we necessarily refer to a background set of assumptions about who is the injurer in a situation and who is the injured, and about what "being responsible" entails. Suppose the defendant shoots the plaintiff and attempts to defend her action on the ground that she is a battered wife and unreasonably (though sincerely) believed that her husband would kill her.³⁶ Allowing the jury to consider self-defense under these circumstances is relatively individualist. But this assumes a perspective in which the injurer is the wife, the injured party is the husband, and the injury is to the husband's legally protected interest in bodily security. An alternative perspective would be that the injurer is the husband, the injured party is the wife, and the injury is to the wife's interest in protection from systematic physical and mental abuse. Under this view, allowing consideration of self-defense by the wife is relatively communalist. Whichever perspective one believes more appropriate, it is important to recognize that the concepts of injury and responsibility themselves do not determine this sense of appropriateness. Rather, we impose our perspective on the situation to give these concepts meaning and coherence.

On a different level, when we say that strict products liability and the progressive income tax are relatively communalist positions, we are trading on our understandings about the relationship between various interest groups and social classes. We might justify these conclusions on the grounds that the progressive income tax makes richer

³⁴ Thus, rules that favor the defense in a criminal case tend to be relatively individualist, while those that favor the prosecution are relatively communalist.

³⁵ Economic regulations that restrict a business's freedom of contract because of threatened harm to a particular class (say, consumers or competitors) generally are relatively communalist, while relaxing such regulations generally is relatively individualist. This is best seen if one thinks of economic regulations as tort duties added to contractual provisions. See Kennedy, *supra* note 13, at 590-94. Redistributive social programs often, although not always, are relatively communalist, as they emphasize the responsibility of some citizens towards other, less fortunate, citizens. Conversely, policies that deny governmental protection in the hope of encouraging persons to take care of themselves usually are relatively individualist.

³⁶ See discussion of *Ibn-Tamas v. United States*, 407 A.2d 626 (D.C. 1979), *infra* text accompanying notes 89-91.

people more responsible for the welfare of poorer ones, and strict products liability makes manufacturers more responsible to consumers. Yet, from another perspective, the progressive income tax allows the poor to profit from the labors of the rich without recompense; a rule of strict products liability permits consumers to collect money from manufacturers through the tort system and otherwise restrict or penalize their activities.

Once introduced to the distinction between individualism and communalism, most people probably would not conclude that strict products liability or the progressive income tax were individualistic because they deemphasize the responsibility of certain groups (consumers, poor people) to avoid benefiting at the expense of other groups (manufacturers, wealthy people). That is because it seems clear to us from the social context who is the injurer (or the person being asked for assistance) and who is the injured (or the person requesting aid). Yet nothing in the concept of responsibility itself necessitates these conclusions. With suitably perverse determination, we could understand every individualist rule as communalist from another vantage point.³⁷ We simply would have to take a radically different perspective on what constitutes responsibility and injury.³⁸

³⁷ Sometimes remarking on this potential transformability will indeed seem merely perverse; in other situations, however, it will seem quite appropriate. Consider, for example, the question whether or not the law should recognize the tort of commercial appropriation of a person's name or likeness. Suppose that the manufacturer of a breakfast cereal places a photograph of a well-known football player on its boxes without obtaining the player's permission. Generally speaking, recognizing an additional tort duty is relatively communalist, because it increases the responsibility of the defendant (in this case, the cereal company) for the injury inflicted on the plaintiff. Such injuries, we might assume, would consist in shame and personal embarrassment, as well as diversion of income that the plaintiff might have generated had he been able to control the right to his publicity. Moreover, because recognizing the cause of action would interfere with the company's ability to compete in the free market, the individualist position clearly would be against recognizing the cause of action.

Yet, from the cereal company's perspective, refusing to recognize the tort also might be seen as communalist, because it would serve to make the football player more responsible for the consequences of his actions against the poor beleaguered cereal company. If the football player could enjoin the use of his name or likeness without his permission, his refusal to deal with the cereal company might cost them thousands of dollars in profits. Thus, from the company's perspective, granting the football player a property right in his name or likeness is highly individualist, while protecting the security of its profits and good will is relatively communalist.

³⁸ Note that Kennedy's original distinction has this same symmetrical indeterminacy. Using the example in the preceding footnote, recognition of the tort of commercial appropriation of name or likeness might seem relatively altruist, if we think that the company

Normally when one introduces a distinction, one is quite devoted to preserving its existence as a distinction and resists attempts to show that the distinction is manipulable, or that from different perspectives the distinction leads to opposite conclusions. Here, however, I have constructed a distinction between individualism and communalism only to deconstruct it a few paragraphs later, and nevertheless I shall continue to use it as the basis for the entire analysis contained in this Article. Naturally, I feel compelled to explain this somewhat unorthodox approach.

The distinction between individualism and communalism is equivocal in theory, yet it provides concrete expectations in practice. Once the distinction is explained, most people in fact do believe that strict products liability is more communalist than a negligence standard—that is, it makes the injurers (the manufacturers) more responsible for the effects of their behavior on the injured parties (the consumers). Why one believes this given the theoretical manipulability of the concepts of injury and responsibility is precisely what is most interesting; it is central to the argument presented in this Article.

Terms like “responsibility” or “injury” require a context in which to be understood and used. To the extent that we can vary this context, or rather our description of this context, we can vary the meaning of these terms. Indeed, I would go further and argue that without a grounding in a particular set of social assumptions, legal concepts like “responsibility,” “harm,” and “injury” threaten to become empty. By varying our assumptions we can produce radically different conclusions about who is harming whom, what is the relevant injury, and who is ultimately responsible for the injury.³⁹ If one accepts the force of this critique, the not too surprising conclusion is that individualism and communalism are really mirror images of each

should have to forbear from injuring the player's emotional tranquility and property rights without compensation. Yet from another perspective, we could view nonrecognition of the tort as altruist if we think that the player should be required to share the profits accruing from his name or likeness with the less fortunate company through the equivalent of a compulsory license.

³⁹ These claims are hardly as radical as they might at first appear. They are corroborated by two of the most orthodox positions in modern legal discourse: Hohfeld's analysis of legal concepts, and the reciprocity of causation and harm first noted by Coase and Calabresi, which is central to the modern law and economics movement. Calabresi, *Some Thoughts on Risk Distribution and the Law of Torts*, 70 *Yale L.J.* 499 (1961); Coase, *The Problem of Social Cost*, 3 *J.L. & Econ.* 1 (1960); Hohfeld, *supra* note 28.

other. Communalism emphasizes the responsibility of the injurer and deemphasizes the responsibility of the victim, while individualism takes precisely the opposite strategy. Because from different perspectives one can be either the injurer or the victim, individualist and communalist arguments turn out to be the same arguments with the parties reversed. This analytical indeterminacy as to who is the injurer and who is the victim is the source of the underlying symmetry between individualism and communalism.

In most cases, however, people more or less agree on who the injured party is. Here it makes sense to speak of the relatively individualist or communalist position because of an existing consensus about the identity of the injury and the victim. Nevertheless, one still can redescribe and recontextualize the situation to shift responsibility for the injury from one party to the other. One can attempt to shift responsibility onto the victim (individualism), or onto the alleged injurer (communalism). Even where there is no disagreement about which position is individualist and which is communalist, we will discover that the individualist and communalist strategies for shifting responsibility remain mirror images.

We are now equipped to understand the key move in developing a semiotics of responsibility—a move that synthesizes the previous work of Professors Kennedy and Kelman. The basic idea is this: Interpretive constructions of facts are systematically connected to individualist or communalist arguments about responsibility. In other words, there is an important relationship between the modes of factual characterization first identified by Kelman and the substantive orientations of discourse first identified by Kennedy.

The rest of this Article develops this basic insight by demonstrating how characterizations of act, intention, causation, free will, and available options can be made in an individualist or communalist manner. These debates appear in many different areas of legal doctrine and cut across the traditional legal distinctions of questions of fact, questions of law, and mixed questions of fact and law; they are implicated in doctrinal questions that might be classified under any of these categories. Although most of the examples of individualist and communalist characterization are taken from tort and criminal law, one easily could extend the analysis to other areas of law. This study of factual and legal arguments will reveal that just as the individualist and communalist positions are mirror images of each other, the individualist

and communalist methods of factual characterization are really transformations of each other. Moreover, as the various forms of factual depictions of responsibility are demonstrated, the connections between ideology and responsibility will become increasingly clear.

II. DESCRIBING EVENTS RELEVANT TO DETERMINATIONS OF RESPONSIBILITY

A. *Broad versus Narrow or Abstract versus Concrete Descriptions of Events*

1. *Broad versus Narrow Descriptions of Probability of Causal Connection*

A simple example of contrasting styles of argument arises in situations of causal uncertainty. Where the causal connection between the defendant's behavior and the plaintiff's harm is at issue, the parties can emphasize or deemphasize legal responsibility simply by recharacterizing causal probabilities. The well known tort cases of *New York Central Railroad Co. v. Grimstad*,⁴⁰ and *Kirincich v. Standard Dredging Co.*⁴¹ offer excellent examples of this technique.⁴² *Grimstad* arose under the Federal Employers' Liability Act. The plaintiff's decedent, the captain of a barge, fell off the barge into the water and subsequently drowned. The plaintiff sued the owner of the barge for negligently failing to equip the barge with life preservers, life buoys, and other lifesaving equipment. The plaintiff argued that but for the negligence, the captain would not have drowned. The court of appeals held that the defendant should have been granted a directed verdict on the issue of causation:

⁴⁰ 264 F. 334 (2d Cir. 1920).

⁴¹ 112 F.2d 163 (3d Cir. 1940).

⁴² Like Kelman, I have taken most of the cases to be discussed from standard law school casebooks. S. Kadish, S. Schulhofer & M. Paulsen, *Criminal Law and Its Processes: Cases and Materials* (4th ed. 1983); R. Epstein, C. Gregory & H. Kalven, *Cases and Materials on Torts* (4th ed. 1984); see Kelman, *supra* note 3, at 593. My reasons for doing this are quite simple—it is much easier to find representative examples this way. Moreover, because casebook editors are not particularly interested in making the points about rhetoric and ideology that interest me here, there is no reason to believe that the sample of cases is unrepresentative. To be sure, casebooks often include opinions precisely because the judges in these cases have made especially thorough or well-done arguments for the positions they adopt. In this sense, then, there is a clear sample bias. It is not, however, a bias that affects my argument that certain general forms of rhetorical characterization are associated with particular positions about responsibility.

Obviously the proximate cause of the decedent's death was his falling into the water, and in the absence of any testimony whatever on the point, we will assume that this happened without negligence on his part or on the part of the defendant. On the . . . question [of], whether a life buoy would have saved the decedent from drowning, we think the jury were left to pure conjecture and speculation. . . . [T]here is nothing whatever to show that the decedent was not drowned because he did not know how to swim, nor anything to show that, if there had been a life buoy on board, the decedent's wife would have got it in time . . . or, if she had, that she would have thrown it so that her husband could have seized it, or, if she did, that he would have seized it, or that, if he did, it would have prevented him from drowning.⁴³

The court in *Grimstad* is making an individualist argument that there should be no liability without causation.⁴⁴ Thus, it characterizes the defendant's causal responsibility as narrowly as possible. The court downplays the possible causal connection between having a life buoy on board ship and saving the captain's life. Dozens of unknown circumstances and intervening events might have prevented a successful rescue.

The court argues that in the face of causal uncertainty, and in the absence of evidence to the contrary, we may not assume that the absence of a life buoy caused the captain's death. Of course, if there was truly no evidence on the point, we might ask why we should not presume that the decedent's wife would have gotten to the buoy in time and would have thrown it correctly (since she had every incentive to do so), and that the decedent would have succeeded in grabbing and holding onto it (since, once again, he had every reason to try). In other words, why should we not assume, in the absence of evidence to the contrary, that people will act to maximize their (or their loved ones') chances of survival?

Indeed, this very sort of approach is taken in *Kirincich v. Standard Dredging Co.*⁴⁵ In *Kirincich*, the deceased fell off a dredge near the shoreline and was swept away by the tide. His shipmates tried to save him by throwing heaving lines, but they did not throw a life pre-

⁴³ *Grimstad*, 264 F. at 335.

⁴⁴ See Balkin, *supra* note 17, at 78.

⁴⁵ 112 F.2d 163.

server.⁴⁶ The court of appeals reversed a directed verdict for defendant on the issue of causation. Its argument is communalist; the defendant was at fault, and the plaintiff deserves recovery:

[W]ould Kirincich have drowned even if a larger and more buoyant object than the inch heaving line had been thrown within two feet of him? If he could swim, even badly, there would be no doubt. Assuming he could not, we think he might . . . have saved himself through the help of something which he could more easily grasp. We can take judicial notice of the instinct of self-preservation that at first compensates for lack of skill. A drowning man comes to the surface and clutches at what he finds there—hence the significance of size and buoyancy in life saving apparatus.⁴⁷

It is a favorite project of torts professors to set their students the task of distinguishing and reconciling cases like *Grimstad* and *Kirincich*, and I do not want to suggest that the cases are irreconcilable, even though they do seem to point in opposite directions.⁴⁸ My

⁴⁶ *Id.* at 163-64.

⁴⁷ *Id.* at 164. The court specifically took issue with the result in *Grimstad*:

In other words, we prefer the doctrine of Judge Learned Hand in the case of *Zinnel v. United States Shipping Board Emergency Fleet Corp.*, 2 Cir., 10 F.2d 47, 49: "There of course remains the question whether they might have also said that the fault caused the loss. About that we agree no certain conclusion was possible. Nobody could, in the nature of things, be sure that the intestate would have seized the rope, or, if he had not, that it would have stopped his body. But we are not dealing with a criminal case, nor are we justified, where certainty is impossible, in insisting upon it [W]e think it a question about which reasonable men might at least differ whether the intestate would not have been saved, had it been there." [We prefer Judge Hand's reasoning] to that of his colleague, Judge Hough, dissenting in that case, and concurring in the earlier case of *New York Central R. Co. v. Grimstad*, 2 Cir., 264 F. 334, 335.

Id.

⁴⁸ For example, Landes and Posner give a perfectly reasonable reconciliation based on efficiency analysis in their book on the economics of tort law:

[T]he probability that *Grimstad* would have drowned if there was no life buoy on board [was not much greater than] the corresponding probability if there was one

. . . .
 . . . *Kirincich* had actually reached for the line that his shipmates had tossed to him, and the court thought that if the object had been larger and more buoyant he would have been able to grasp and hold on to it. The difference between the two cases is not that *Grimstad* would have died even if the defendant in that case had taken care and *Kirincich* would have been saved, but that there was a much greater probability that care would have been effective in *Kirincich's* case than in *Grimstad's*.

W. Landes & R. Posner, *The Economic Structure of Tort Law* 240-41 (1987). Of course, this analysis involves its own manipulation of causal probabilities—the bare assertion that having a life buoy on board would not greatly increase *Grimstad's* chances of survival is not at all obvious. In defense of the result in *Kirincich*, Landes and Posner point out that the decedent

concern here, however, is not how the cases may be distinguished, but the ways in which the judges in each case characterized the facts before them—for it is often such characterizations that make distinctions possible.⁴⁹

The court's statements in *Grimstad* and *Kirincich* are statements about facts made in the presence of uncertainty. The uncertainty in *Grimstad* is one that necessarily attends any counterfactual speculation—what would have happened if there had been a life buoy aboard the ship? Uncertainty also can be caused by a gap in the record as to what actually happened. In either case, because of the presence of uncertainty, a judge or a lawyer can characterize facts to accentuate or downplay the degree of causal connection between the defendant's behavior and the plaintiff's injury. In *Grimstad*, the court adopts what I will term a *narrow* view of the defendant's causal responsibility: Where there is more than one way to characterize a fact or to estimate a probability of causal connection, the court chooses the characterization that reduces responsibility and estimates the probability as low rather than high. The court in *Kirincich*, on the other hand, adopts what I will term a *broad* view of defendant's causal responsibility: The court chooses the characterization that increases responsibility, and estimates the probabilities as great that even a person who could not swim would have sufficient instincts to survive by clinging to proper lifesaving equipment. A narrow characterization of the defendant's responsibility for the plaintiff's harm is more likely to be helpful in an individualist argument against liability; similarly, a broad characterization is natural in a communalist argument.

The court in *Grimstad* uses a distinctive rhetorical device to make the causal connection appear more tenuous—it multiplies the possible circumstances that could have prevented a successful rescue. It is as

almost caught the line thrown to him, but that is only because the defendant in that case already had some lifesaving equipment on board. Thus the decedent's chances in *Grimstad* might also have been increased greatly if some life preserving equipment had been aboard the barge.

⁴⁹ Judge Clark's opinion in *Kirincich* is quite candid on this point:

We think it fair to say that the resolution of the case at bar depends upon the judicial stigmatism of the court deciding it. . . . Our appraisal happens to differ with [the lower court's] and we find the same difference elsewhere in the "books". It is an application of facts to a point of view.

112 F.2d at 163.

if the court (rhetorically) places as many obstacles in the decedent's way as possible, in order to prove that he would not have survived. The court in *Kirincich* takes precisely the opposite tack, omitting references to other possible interferences and placing the rhetorical focus on the very moment in which the decedent grasped for the life line.

The court in *Grimstad* uses a second, related rhetorical device: It creates a disjointed perspective of events, thus metaphorically separating and distancing the defendant's acts from the decedent's death. The court's rhetoric identifies so many possible breaks in the causal chain that the defendant's fault appears remote and unconnected to the decedent's harm. Conversely, the court's rhetoric in *Kirincich* collapses the many possibilities into a single, exigent event: "A drowning man comes to the surface and clutches at what he finds there."⁵⁰ This depiction emphasizes the (temporal) closeness and unity of the events, and the immediacy of the fault to the harm. It is important to understand that neither court is simply describing the world; both are remaking it through rhetoric. Moreover, their techniques are simply mirror images of each other.

A second example of broad and narrow characterizations involves two slip and fall cases, *McInturff v. Chicago Title and Trust*⁵¹ and *Reynolds v. Texas & Pacific Railway Co.*⁵² In *McInturff*, the decedent was found dead at the bottom of defendant's stairway. The plaintiff presented evidence that the stairs were worn down in violation of a city ordinance, and that there was no railing on the right-hand side of the stairwell. On appeal, the court overturned a jury verdict for the plaintiff. Its argument is individualist, denying causal and therefore legal responsibility:

The fragmentary evidence on the issue of the defendants' negligence did not establish any relationship between the alleged negligence and the proximate cause of the decedent's fall and injury. There was no direct evidence relative to what took place prior to and at the time of the decedent's injury. There was no proof that the condition of the stairway, or the alleged failure to comply with the handrail ordinances, caused the injury or damage suffered by the plaintiff. . . . Damages cannot be assessed on mere surmise or conjecture as to what probably happened to cause [decedent's] injury and

⁵⁰ Id. at 164.

⁵¹ 102 Ill. App. 2d 39, 243 N.E.2d 657 (1968).

⁵² 37 La. Ann. 694 (1885).

death.⁵³

In *Reynolds*, the plaintiff, a 250-pound woman, hurriedly leaving a lighted waiting room, slipped and fell down unlighted steps leading to a train platform. The defendant argued that the plaintiff might have fallen even if it were broad daylight, but the appellate court affirmed a judgment for the plaintiff. Its argument is clearly communalist—defendant was at fault and therefore should pay:

We concede that [defendant's characterization of events] is possible, and recognize the distinction between *post hoc* and *propter hoc*. But where the negligence of the defendant greatly multiplies the chances of accident to the plaintiff, and is of a character naturally leading to its occurrence, the mere possibility that it might have happened without the negligence is not sufficient to break the chain of cause and effect between the negligence and the injury. Courts, in such matters, consider the natural and ordinary course of events, and do not indulge in fanciful [sic] suppositions.⁵⁴

Again, it may be possible to distinguish the two cases.⁵⁵ What is more important for our purposes, however, is that the same broad and narrow characterizations of the defendant's responsibility are present: broad, and thus communalist, in *Reynolds*; narrow, and thus individualist, in *McInturff*.

It is tempting to think that the judges use these characterizations in these cases because the facts really do point to a greater degree of causal connection in *Kirincich* and *Reynolds* than in *Grimstad* and *McInturff*; all the judges are doing is adding a little rhetorical flourish to an already correct assessment of probabilities. It may be the other way around, however—the cases may seem to come out right because of the way in which the facts are characterized. For example, we

⁵³ 102 Ill. App. 2d at 49, 243 N.E.2d at 662.

⁵⁴ 37 La. Ann. at 698.

⁵⁵ For example, in *Reynolds*, but not in *McInturff*, the plaintiff was available to testify that the darkness of the stairway did cause her to fall, and to deny personally that her injury was due to other factors. Of course, this attempted distinction cuts both ways, since the only reason that the plaintiff was able to testify in *Reynolds* is because she was not killed in the fall. A better ground of distinction is that, in *McInturff*, there was evidence that the decedent used the stairway daily and was aware of its condition. 102 Ill. App. 2d at 48-49, 243 N.E.2d at 662. Nevertheless, these extra facts still would not appear sufficient to establish that only an unreasonable jury could find that the decedent slipped and fell because of the unsafe condition of the stairs.

could adopt a narrow view of causation in *Kirincich* and *Reynolds* and a broad view in *Grimstad* and *McInturff*:

Narrow view of defendant's causal responsibility (individualist)

Kirincich: Plaintiff's decedent perished because he fell into the water and drowned; there is no evidence that defendant's violation of safety rules made any difference. Plaintiff's decedent might have drowned because he was unable to swim. Even if he could swim, the presence of additional lifesaving equipment does not guarantee that the crew would have been any more successful in getting a different line or a life buoy to the plaintiff. Indeed, it might have resulted in the line or the buoy landing further away from the drowning man. Even if the plaintiff had been able to swim, and had been able to grasp what was thrown him, there is no evidence that he would have had the strength to hold on until he could be pulled to safety.

Reynolds: There is no proof that plaintiff fell because the stairway was lit poorly. Plaintiff could have tripped, stumbled when her shoe broke, or been clumsy or drunk; there are literally hundreds of possible causes. Self-serving testimony by the plaintiff does not make poor lighting a more probable explanation than any other. Since the actual cause of the fall is mere speculation we should not send this case to the jury.

Broad view of defendant's causal responsibility (communalist)

Grimstad: Of course we cannot know for certain that the captain could have grasped the buoy if it had been thrown to him, yet the presence of the buoy certainly would have helped at the moment when the drowning man grasped for any available form of assistance. The result is uncertain, but where certainty is impossible we cannot insist on it. In any case, we never can know how well the wife would have thrown the buoy precisely because there was no buoy to throw due to the defendant's negligence. Nevertheless, given the decedent's profession, his will to survive, and the fact that it was his wife who was trying to save him, the probabilities are very good that throwing the decedent a buoy might have made the difference.

McInturff: Although there is no absolute proof of why the decedent was killed, we have enough of an idea of what happened to send this case to the jury. Where the negligence (worn staircases and no railing) greatly multiplies the chances of an accident, and is of a character naturally leading to its occurrence, the mere possibility that an accident might have occurred another way should not be enough to keep the case from the jury. The fact that the decedent is not here to testify as to the cause of his fall itself may be due to the defendant's negligence.

The famous case of *Regina v. Dudley & Stephens*⁵⁶ involves another example of characterization in the face of uncertainty, although here the problem concerns whether there is a causal connection that *exculpates* the defendants. Hence, the individualist perspective views causal probabilities broadly while the communalist perspective views them narrowly. The defendants were abandoned on a small lifeboat without water or food. Not knowing when, if ever, they would be saved, they killed a boy who was already near death from starvation and ate his body to survive. As the court characterized the facts, the defendants could not avail themselves of the defense of necessity (a choice between the lesser of two evils) because:

[T]he prisoners put to death a weak and unoffending boy upon the chance of preserving their own lives . . . with the certainty of depriving *him* of any possible chance of survival. The verdict finds in terms that "if the men had not fed upon the body of the boy they would *probably* not have survived," and that "the boy being in a much weaker condition was *likely* to have died before them." They might possibly have been picked up next day by a passing ship; they might possibly not have been picked up at all; in either case it is obvious that the killing of the boy would have been an unnecessary and profitless act.⁵⁷

The communalist position, taken by the court, downplays the possibility of a causal connection that exculpates the defendant. In the face of uncertainty, the court emphasizes the small probability that the defendants' act would have made a difference in preserving their lives, and the great probability (indeed, the certainty) that their act would end the boy's life. Thus, the court argues, the defendants in fact did not choose the lesser of two evils. Moreover, the court emphasizes the presence of available alternatives (a ship might arrive at any time) and (simultaneously) the possible futility of improving the situation (a ship might never arrive).

For each of these arguments there is a symmetrical individualist rejoinder. The defense would emphasize the probability that defendants were justified in acting as they did, which we might call the probability of "exculpatory causation": The actual choice made in the face of uncertainty "was between . . . the lad's very slight chance

⁵⁶ 14 Q.B.D. 273 (1884).

⁵⁷ *Id.* at 279.

of survival and . . . the increase in the already greater chances of survival of the men."⁵⁸ Characterized as a comparison between *marginal* increases in probability, the defendants did choose the lesser of two evils and thus were entitled to the defense of necessity.⁵⁹

As to the possibility of available alternatives, the defense would argue that time was running out for the starving men. The defendants had to act quickly and only one course of action was immediately available to them. The court should not require them to risk their lives on idle speculation about the possibility of being discovered by accident as they wasted away in a vast ocean, more than 1,000 miles from land. Finally, despite the possibility that they would never be found, killing the boy was necessary because it was the most likely to result in someone's survival; the defendants surely would have died more quickly if they had not devoured the boy's body.

We can summarize the rhetorical devices described above in the following chart:

	Individualist	Communalist
Inculpating defendant		
	Narrow	Broad
Exculpating plaintiff		
Exculpating defendant		
	Broad	Narrow
Inculpating plaintiff		

Figure 1

⁵⁸ Glazebrook, *The Necessity Plea in English Criminal Law*, 30 Cambridge L.J. 87, 114 (1972).

⁵⁹ I do not mean to suggest by this example that individualism regularly looks to marginal, and communalism to gross, probabilities. The point is that here the individualist characterization chooses to focus on marginal increases in probability because that perspective most justifies the defendants' actions and deemphasizes their moral and legal responsibility. In a case like *Kirincich* or *Grimstad*, the communalist argument might be that the victim's chances of survival, however slight in absolute terms, would have been greatly increased if the defendant's ship had proper life saving equipment, and that this equipment could have been provided at comparatively little cost to the defendant. In *Kirincich* or *Grimstad* an individualist characterization of the facts might stress the absolute probability of survival if that were comparatively small.

2. Concrete and Abstract Descriptions—Foreseeability of Harm

It has long been understood that lawyers can manipulate the foreseeability test of proximate causation to make the plaintiff's injury appear either as a foreseeable or an unforeseeable consequence of defendant's negligent act. What is less well known is that there are relatively mechanical ways of doing this, each of which reflect individualist and communalist forms of argument. Since foreseeability is a predicate for liability, we should expect arguments for defendant's responsibility based on the foreseeability of plaintiff's injury to be communalist and arguments against foreseeability to be individualist.

United Novelty Co. v. Daniels, the case involving the peripatetic rat discussed at the beginning of this Article, is an excellent example of how these techniques are used in practice. The defendant in that case surely would have argued that nothing is more unforeseeable than a rat jumping out of a coin-operated machine, hurling itself into an open flame, and then running back toward the machine at exactly the spot necessary to ignite gas vapors in the room and cause an explosion. Because foreseeability, or scope of the risk, is the general test of proximate causation in negligence law, the rhetorical move that defeats causation is *specificity*. The more specifically a situation is described, the more unforeseeable it is that the precise chain of events would have occurred.

The plaintiff's response, which the *Daniels* court accepts, characterizes the situation *abstractly*, in terms of a general type of harm that was clearly foreseeable. Thus, it is foreseeable that in placing an open flame in a room where gas vapors are leaking, there is the danger of an explosion, regardless of the exact instrumentality that causes the explosion. Obviously, abstracting from particular events and instead focusing on general categories of harm make an accident look more foreseeable than it otherwise might seem. The manipulability of the foreseeability standard, in other words, is based on the ability of language to categorize events in increasingly more (or less) general and abstract terms.

*Tuttle v. Atlantic City Railroad Co.*⁶⁰ and *Mauney v. Gulf Refining Co.*⁶¹ involve the foreseeability of a plaintiff's frightened response to a defendant's negligence. In *Tuttle*, one of defendant railroad's cars

⁶⁰ 66 N.J.L. 327, 49 A. 450 (1901).

⁶¹ 193 Miss. 421, 9 So. 2d 780 (1942).

derailed, "dashed" across an adjacent street, and struck a house.⁶² Mrs. Tuttle was on a nearby sidewalk, and in an effort to reach a place of safety, she fell and injured her knee. In fact, she would have been in no danger if she simply had stayed where she was. The court rejected defendant's claim that Mrs. Tuttle's own acts, and not the negligence of the railroad, proximately caused her harm:

[Mrs. Tuttle] was placed in peril by the negligent act of the defendant, and in her effort to escape from danger she fell, and was injured. Does it require any stretch of imagination to believe that everyone in the neighborhood of this derailed car was frightened? And it would be extraordinary, indeed, if they attempted to escape, and were injured, that they should be without remedy.⁶³

The court's technique is to characterize broadly the sorts of things a person would imagine happening: When you create a disturbance, it is foreseeable that people will be frightened and want to get out of the way. The court does not dwell on the foreseeability of the plaintiff's particular acts, but on acts of the same general nature.

In *Mauney*, the defendants negligently started a fire that spread to a filling station and a tank car full of gasoline. Bystanders rushed from the scene, shouting that the tank truck and the filling station were about to explode. Hearing this, the plaintiff, who was about fifty feet away in a cafe operated by her husband and herself, picked up their two-year-old child and began to run away. She tripped over a chair and suffered a miscarriage. In this case, the court denied that the injury to plaintiff was foreseeable:

If appellant didn't see a chair in her way in her own place of business, it would impose an inadmissible burden upon appellees to say that they should have foreseen from across the street and through the walls of a building on another corner what appellant didn't see right at her feet and in an immediate situation entirely familiar to her. Suppose she had run to the sidewalk and thence against a lamp post, or into the street and against a parked automobile. Or suppose she had run into a pedestrian, injuring him. These remote eventualities could be multiplied almost without number.⁶⁴

⁶² 66 N.J.L. at 328, 49 A. at 450.

⁶³ Id. at 331-32, 49 A. at 451.

⁶⁴ 193 Miss. at 431, 9 So. 2d at 782.

Here the court uses a narrow characterization of foreseeability, focusing on the plaintiff's specific acts: It was unforeseeable that there would be a chair in a particular place, that the plaintiff would not see it, and so forth. The more specifically a court details the actual chain of causation, the more improbable it appears that the defendant could have foreseen what happened to the plaintiff. Just as *Grimstad* uses the multiplication of intervening events to make causal connection appear remote, so the court in *Mauney* uses particular description to create a rhetorical effect of distance or remoteness in terms of foreseeability.

Note, however, that just as in *Kirincich* and *Grimstad*, the opinions in *Mauney* and *Tuttle*, rather than neutrally describing events, actively apply rhetorical devices to events; they provide us with representations of causality rather than causality itself. If we want to argue the other side of each case, we could reverse the characterizations by applying the opposite rhetorical devices. We could have a narrow characterization of foreseeability in *Tuttle* and a broad one in *Mauney*:

Tuttle: It was unforeseeable when the railroad car jumped its tracks that the plaintiff would run from a safe place to a more dangerous one, stumble over the specific object she did, fall, and injure her knee.

Mauney: It is foreseeable that if you negligently create a risk of a big explosion, people will run away from it as quickly as they can and, in their haste, will injure themselves.⁶⁵

⁶⁵ One of the most remarkable examples of using abstract and concrete descriptions to manipulate the doctrine of foreseeability appears in *In re Guardian Casualty Co.*, 253 A.D. 360, 2 N.Y.S.2d 232 (1938). In that case, an automobile and a taxicab collided due to both drivers' negligence. The taxicab was forced across a sidewalk and hit a stone building, imbedding itself in the stoop. A police officer and several other persons began to remove the car from the building. About half an hour after the accident, the decedent, who ran a laundry in the building, came out to inspect her store. She was struck and killed by falling stones that had been loosened by the impact of the car with the wall. The individualist argument against liability is that it was totally unforeseeable when the drivers acted negligently that one of the cars would crash into a wall loosening particular stones in a particular building that would pose a safety hazard for pedestrians some half hour later. Nevertheless, the court held that the two drivers' negligence proximately caused the decedent's death. The court's communalist argument for liability uses abstract descriptions and broad characterizations of foreseeability:

The [drivers of the two cars], whose wrongful acts caused a vehicle to be projected across a sidewalk and against a building, with such force as to loosen parts of the structure, must have foreseen the necessity of removal of the vehicle from the sidewalk. They might reasonably have anticipated that the parts of the structure which were

Similar considerations apply in substantive criminal law. In *People v. Arzon*,⁶⁶ the defendant started a fire on the fifth floor of an abandoned building. Firemen arrived and entered the building to put out the flames, but made no progress. After deciding to leave the building, they suddenly were "enveloped by a dense smoke, which was later discovered to have arisen from another independent fire that had broken out on the second floor. Although this fire was also determined to have originated in arson, there [was] virtually no evidence implicating the defendant in its responsibility."⁶⁷ The combination of the smoke from this second-floor fire and the existence of the defendant's fifth-floor fire made evacuation dangerous, and one of the firemen died as a result of injuries sustained while trying to escape. The defendant argued that regardless of his reckless conduct, he could not be convicted of second-degree murder because his act of arson did not cause the death of the fireman. The court disagreed:

Certainly, it was foreseeable that firemen would respond to the situation, thus exposing them, along with the persons already present in the vicinity, to a life-threatening danger. The [defendant's] fire . . . continued to burn out of control, greatly adding to the problem of evacuating the building by blocking off one of the access routes. At the very least, the defendant's act, as was the case in [*People v.*] *Kibbe*, [35 N.Y.2d 407, 321 N.E.2d 773 (1974)], placed the deceased in a position where he was particularly vulnerable to the separate and independent force, in this instance, the fire on the second floor.⁶⁸

dislodged by the blow would fall into the highway. That a passing pedestrian might be injured when such an event took place in a city street, was also foreseeable. It would seem plain that although the injury to the pedestrian did not occur for some minutes after the application of the original force, because of the circumstances that the dislodged stones were temporarily held in place by the vehicle, this would not alter the case, when there is nothing to show the application of a new force causing the stone to fall.

Id. at 362-63, 2 N.Y.S.2d at 234. Phrased even more generally, it is foreseeable when you drive negligently that you may damage other people's property in such a way as to cause it to become unsafe.

⁶⁶ 92 Misc. 2d 739, 401 N.Y.S.2d 156 (N.Y. Sup. Ct. 1978).

⁶⁷ Id. at 740, 401 N.Y.S.2d at 157.

⁶⁸ Id. at 743, 401 N.Y.S.2d at 159. In the *Kibbe* case to which the court refers, the defendants abandoned their helplessly intoxicated robbery victim by the side of a dark road in subfreezing temperature, partially undressed and without his eyeglasses, one-half mile from the nearest structure; the victim was killed by a passing truck. The court upheld the defendants' convictions for murder. *People v. Kibbe*, 35 N.Y.2d 407, 410-11, 321 N.E.2d 773, 775 (1974).

The communalist arguments in *Arzon* involve a broad view of foreseeability. Instead of focusing on the precise method by which the victim died, they characterize the danger to the victim in general terms, such as increased probability of harm. In particular, note the highly abstract language used in *Arzon*: The fire "placed the deceased in a position where he was particularly vulnerable to the separate and independent force";⁶⁹ it was foreseeable that setting the fire would "expos[e] [the firemen] . . . to a life-threatening danger."⁷⁰

By contrast, *People v. Stewart*,⁷¹ discussed and distinguished in *Arzon*, takes a narrow view of foreseeability. In *Stewart*, the defendant stabbed the victim with a knife. The victim was brought to a hospital where a surgeon operated to save his life. While the victim was still on the operating table, the surgeon performed an unrelated hernia operation that caused the victim to die. The court's argument for dismissing the homicide charge is individualist: The defendant was not causally responsible, because the patient would have survived if the surgeon had not performed the hernia operation. Here the court deemphasizes the causal connection by focusing on the *specific circumstances* through which the harm occurred: It is not foreseeable that stabbing someone would lead to their eventual death in a hernia operation.⁷²

Stewart certainly looks like a less convincing case than *Arzon*. Note, however, that we could adopt a broad view of foreseeability in *Stewart* simply by describing the facts more abstractly: It is certainly foreseeable that stabbing someone would send them to the hospital and would subject them to risk of dying in the process of medical treatment, either because of subsequent negligence by the surgeon or collateral procedures like the application of anesthesia, movement to and from the operating room, etc. Could we not say, as in *Arzon*, that stabbing the victim required him to undergo surgery, and thus "placed the deceased in a position where he was particularly vulnerable to the separate and independent force"⁷³ of the surgeon? After all,

⁶⁹ 92 Misc. 2d at 743, 401 N.Y.S.2d at 159.

⁷⁰ Id. Similarly in *Kibbe*, one can argue that stranding an inebriated victim increases the chances that he or she will be injured in some way or another—if not by overexposure, then by attempting to flag down a fast moving truck. See *Kibbe*, 35 N.Y.2d at 411, 321 N.E.2d at 776.

⁷¹ 40 N.Y.2d 692, 358 N.E.2d 487, 389 N.Y.S.2d 804 (1976).

⁷² 40 N.Y.2d at 698, 358 N.E.2d at 492, 389 N.Y.S.2d 808.

⁷³ *Arzon*, 92 Misc. 2d at 743, 401 N.Y.S.2d at 159.

once the stabbing victim was in the operating room, it is certainly foreseeable that the surgeon might try to fix whatever other problems she observed while the patient was under anesthesia.

Similarly, we could adopt a narrow view of foreseeability in *Arzon*. We could say what the court in *Arzon* said to distinguish *Stewart*: "the possibility that death resulted from a factor not attributable to the defendant could not be ruled out beyond a reasonable doubt, since the [victim] would, in all likelihood, have survived except for"⁷⁴ the second fire that blocked his path. Moreover, if we describe the risk created by the defendants in *Arzon* narrowly and precisely, as the court did in *Stewart*, the victim's death begins to look much less foreseeable. From the defendant's standpoint, it is hardly foreseeable that setting a fire creates an unreasonable risk of a fireman dying from a wholly independent fire that the defendant knew nothing about.

To sum up, a broad view of foreseeability normally involves a general and abstract description of events, while a narrow view generally involves a particularized and concrete description of events.⁷⁵ In all of the above examples, the individualist position describes the situation concretely, and the communalist position describes the situation abstractly. Nevertheless, there is no necessary connection between individualism and concrete descriptions or communalism and abstract descriptions. The courts adopt these forms of characterization in these cases because the primary issue is the defendant's responsibility; where the plaintiff's responsibility is at issue, the alliances are completely reversed. Thus, to return to *United Novelty Co. v. Daniels*, the defendant surely would claim that the plaintiff's decedent was contributorily negligent. But this claim requires an argument that the decedent engaged in conduct that a reasonable person would have foreseen to be dangerous. And in explaining why the decedent's conduct was unreasonable, the defendant must, either implicitly or explicitly, argue that it is foreseeable that cleaning the coin machine with gasoline in a room heated by an open flame might cause an

⁷⁴ Id. at 741, 401 N.Y.S.2d at 158.

⁷⁵ One can describe in abstract or concrete terms the type of *risk* created (for example, in *Kibbe*, whether the risk is "being placed in a precarious situation" or "exposure to freezing conditions"), the type of *harm* foreseeable (for example, in *Stewart*, whether the harm foreseen is "death" or "death from a stab wound"), and finally, the *class* of persons foreseen as affected (for example, in *In re Guardian Casualty*, whether the risk of harm was to "persons near the crash site" or to "pedestrians walking by a car thirty minutes after it crashed into a wall").

explosion. Thus, the defendant's (individualist) argument for contributory negligence abstractly describes events to accentuate the decedent's responsibility for his own situation. Conversely, the plaintiff would rebut the claim of the decedent's possible contributory negligence by arguing that if the movements of a solitary rat were unforeseeable from the defendant's standpoint, they were equally unforeseeable for the decedent. Thus, the plaintiff's (communalist) argument against contributory negligence narrowly and concretely characterizes events to minimize decedent's responsibility. Once again, it is the symmetries of characterization (that is, the relations of difference between the two sides) and not the precise alliances that are the key to understanding the semiotic character of the arguments:

DESCRIPTION OF EVENTS FOR PURPOSES OF FORESEEABILITY

	Individualist	Communalist
Caused by defendant	Concrete	Abstract
Caused by plaintiff	Abstract	Concrete

Figure 2

B. Time Framing as a Means of Emphasizing Inculpatory and Exculpatory Facts

Varying the relevant time period in which facts are to be considered is a frequently used device for characterizing the responsibility of the parties. Professor Kelman first demonstrated this point in the context of criminal law,⁷⁶ and my analysis in this Section will draw on his work in several important respects. Kelman showed how alternatively viewing events from a broad or narrow time frame, or from a unified or disjointed perspective, enables courts to justify particular conclusions about criminal responsibility.⁷⁷ The examples that follow demonstrate the use of these techniques as well as a third, related device: broad versus narrow contextualization.

⁷⁶ Kelman, *supra* note 3, at 592-93.

⁷⁷ *Id.* at 593-96.

1. *Expansion and Contraction of Time Frames—The Example of Act and Omission*

Moral and legal responsibility often depends on whether a person has acted or merely omitted to act. For example, this distinction is important in tort law because in many circumstances there is no affirmative duty to rescue a stranger, although one can be held liable for placing strangers in unreasonably dangerous situations and then failing to rescue them. In *Yania v. Bigan*,⁷⁸ the defendant, Bigan, had dug an eighteen-foot trench half-filled with water in the course of his strip mining operations. Bigan invited Yania, a neighboring stripminer, to visit his property to discuss business. Bigan then "urged, induced and inveigled" Yania to jump into the water.⁷⁹ Yania finally did so, and then drowned because he could not get out, while Bigan stood by and did nothing to assist him. The court rejected plaintiff's claim that Bigan had a duty to rescue, arguing that "[t]he complaint does not aver any facts which impose upon Bigan legal responsibility for placing Yania in the dangerous position in the water."⁸⁰ As the court characterizes the situation, Bigan simply stood at the edge of the trench and did nothing; no matter how morally culpable he might be, he was not legally responsible.

The court's argument becomes increasingly plausible the more we focus on Bigan's behavior at the moment Yania leapt in. In doing so we exclude the previous history that gave rise to this situation: the invitation and the subsequent tauntings and inducements which, after all, are verbal acts justly attributable to Bigan. In Kelman's terminology, the defendant's counsel and the court have chosen a narrow time frame in which to view Bigan's behavior.⁸¹ The plaintiff, however, probably would adopt a broad time frame to characterize the situation. The plaintiff would argue that Bigan's previous behavior constituted an integral part of an ongoing course of action—taunting plus failure to rescue—that ultimately resulted in Yania's death.

The defendant's and plaintiff's arguments employ another pair of opposed rhetorical devices in addition to broad and narrow time framing. Because in this case choosing a narrow time frame also sepa-

⁷⁸ 397 Pa. 316, 155 A.2d 343 (1959).

⁷⁹ *Id.* at 319, 155 A.2d at 344.

⁸⁰ *Id.* at 322, 155 A.2d at 346.

⁸¹ Kelman, *supra* note 3, at 593-94, 600-16, 637-42.

rates the acts of taunting from the failure to rescue, defendant's strategy is to emphasize a disjointed perspective of events.⁸² Conversely, the plaintiff's use of a broad time frame implicitly relies on a unified perspective of events—a continuous course of conduct or a coherent and interrelated system of action on the part of Bigan, rather than discrete and isolated instances of Bigan's behavior.⁸³

These rhetorical devices are used explicitly by the court in *Newton v. Ellis*.⁸⁴ In *Newton*, the defendant dug a hole in a public highway, which he left unlit at night. Shortly thereafter, the plaintiff fell into the hole while driving and was injured. The individualist argument against liability would use a narrow time frame and a disjointed perspective of events: At the precise moment when the plaintiff fell into the hole, the defendant was, strictly speaking, not doing anything. It might have been a good idea for the defendant to have lit the hole, but just as in *Yania v. Bigan*, one has no affirmative duty to aid a stranger. This argument implicitly relies on a perspective that separates the defendant's previous course of conduct from the events occurring at the moment of the accident. The court's communalist argument, however, adopted a broader time frame and a unified perspective of events. As one of the opinions put it: "This is not a case of not doing: the defendant does something, omitting to secure protection for the public. He is not sued for not putting up a light, but for the complex act."⁸⁵ Another judge agreed: "Here the cause of action is . . . making the hole, compounded with the not putting up light. When these are blended, the result is no more than if two positive acts were commit-

⁸² Id. at 594-95, 616-20.

⁸³ The fact that the act/omission distinction can be manipulated does not mean that *Yania* was wrongly decided. Even if one adopts a broad time frame and a unified perspective of events, one still might argue that it was Yania's own fault that he jumped in the first place. See *Yania*, 397 Pa. at 321-23, 155 A.2d at 345-46 (taunting addressed to an adult in full possession of his mental faculties does not constitute actionable negligence; performance of voluntary action by decedent was the cause of his unfortunate death). This argument is still clearly individualist as it stresses the plaintiff/victim's own responsibility for his predicament. The plaintiff might respond, however, that Bigan had the last clear chance to save Yania. The defendant might counter that Yania assumed the risk, but under the modern understanding of this concept, see *Meistrich v. Casino Arena Attractions, Inc.*, 31 N.J. 44, 155 A.2d 90 (1959), this argument would mean either that Yania was contributorily negligent, in which case the last clear chance argument would still be available, or that Bigan owed no duty to Yania, which is the very question at issue here, given that Yania was an invitee on Bigan's premises.

⁸⁴ 5 El. & Bl. 115, 119 Eng. Rep. 424 (1855).

⁸⁵ Id. at 124, 119 Eng. Rep. at 427-28.

ted, such as digging the hole and throwing out the dirt: the two would make up one act."⁸⁶

2. *Inculpatory and Exculpatory Facts—Contributory Negligence and Self-Defense*

From the examples given so far, it is tempting to assume that the individualist position always seeks a narrow time frame and a disjointed perspective, while the communalist position always seeks a broad time frame and a unified perspective. The previous examples, however, only involve the defendant's behavior, where the communalist position stresses responsibility while the individualist position denies it. Where the plaintiff's responsibility is at issue, the rhetorical strategies are reversed.

Consider, for example, the possibility of a contributory negligence defense in *Yania v. Bigan*. The question whether Yania acted or did not act probably would not be at issue. Nevertheless, time framing still would be a useful device for both sides in debating Yania's responsibility for his own situation. The plaintiff, using a narrow time frame, would focus on Yania's helplessness at the moment of his drowning, downplaying as much as possible his ill-considered decision to jump into the trench at Bigan's urging. Conversely, the defendant, expanding the time frame, would portray Yania's predicament as the direct result of a foolish course of action, beginning with his exchanges with Bigan and ending with his voluntary plunge into the water.

In fact, the relation between time framing techniques and individualism and communalism is still more complicated. The key idea behind these rhetorical strategies is that expanding or contracting the time frame, or unifying or disjoining factual perspectives, can include or exclude a number of different facts. Moreover, the facts included or excluded can assist or hinder either the plaintiff's or the defendant's cause. For purposes of this Article, I shall call facts that assist a party's position regarding her legal or moral responsibility "*exculpatory facts*," and facts that hinder a party's position regarding her legal or moral responsibility "*inculpatory facts*." An inculpatory fact about the defendant Bigan would be that before Yania jumped into the water Bigan spent some time taunting him, or that Bigan had spread a

⁸⁶ Id. at 124-25, 119 Eng. Rep. at 428.

rumor around town that Yania was a coward. An exculpatory fact about the plaintiff's decedent Yania might be that he was a mental incompetent, or that he had an argument with his wife the night before and was particularly sensitive to teasing that day.

Individualist arguments emphasize exculpatory facts about the defendant and inculpatory facts about the victim or third parties not under the defendant's control; communalist arguments emphasize inculpatory facts about the defendant and exculpatory facts about the victim or third parties not under the defendant's control.⁸⁷ It may seem strange at first to speak of exculpatory and inculpatory facts about the plaintiff or the victim, but this makes perfect sense given the symmetry of the individualist and communalist positions. The individualist always is trying to shift responsibility from the defendant to the plaintiff or third parties, while the communalist always is trying to shift responsibility from the plaintiff and third parties to the defendant. Even in criminal cases in which there is no plaintiff, the defendant's best strategy often is to place the responsibility for the victim's injury on the victim herself. The well known criminal defense strategy of "placing the victim on trial" can be understood in part as an attempt to place before the jury as many inculpatory facts about the victim as possible in the hope of exculpating the defendant.⁸⁸

A good example of using different time frames in the same argument occurs in a self-defense case like *Ibn-Tamas v. United States*,⁸⁹ in which the defendant attempted to justify shooting her husband by offering testimony that she was a battered wife. In *Ibn-Tamas*, the prosecution chose a broad time frame for inculpatory facts about the defendant, emphasizing the long period of time in which she could have left her husband. The prosecution also chose a narrow time

⁸⁷ Two points of clarification are in order. First, the same fact might be inculpatory or exculpatory depending on how one uses it; for example, consider the possibility that Yania was drunk when he jumped in. Second, saying that a fact is exculpatory or inculpatory is not the same as saying that if the fact were true, it would establish the case for or against a party, or even that it would be legally relevant to the party's claim. For example, under existing doctrines, Bigan might escape liability even if his prior history of tauntings were revealed, and the law might not recognize Yania's drunkenness as an excuse. Rather, saying that a fact is exculpatory with respect to a particular party merely says that it lends moral or legal force to her claims of lack of responsibility, while an inculpatory fact has precisely the opposite effect.

⁸⁸ Consistent with this approach, the individualist position concerning social and economic policy tends to emphasize the victim's own responsibility for her condition. See W. Ryan, *Blaming the Victim* (1979).

⁸⁹ 407 A.2d 626 (D.C. 1979).

frame to exclude facts tending to exculpate the defendant. For example, even though the defendant had been beaten by her husband only a few minutes earlier, the prosecution emphasized that at the exact moment she fired the gun, her husband was not beating her but rather was below her on the staircase.⁹⁰

In a case like *Ibn-Tamas*, the prosecution could also manipulate the time frame to make the *victim* look more sympathetic. The prosecution would narrow the time frame to exclude facts tending to inculpate the victim. Indeed, what counted, said the prosecution in *Ibn-Tamas*, is not whether the victim acted badly over the course of several years, but whether at the moment the defendant fired, the victim was threatening serious bodily harm to her. Conversely, the defense would choose a broad time frame to emphasize inculpatory facts about the victim. In *Ibn-Tamas*, the defense offered testimony concerning increasing physical abuse during the couple's four-year marriage (including beatings of the defendant while she was pregnant with the couple's second child), the victim's extensive gun and ammunition collection, and his abuse of his previous spouse.⁹¹

From this analysis it follows that there is a definite symmetry to the use of time framing and unification or disjunction of events. The individualist strategy will be to:

1. Narrow the time frame and adopt a disjointed perspective of events to exclude inculpatory facts about the defendant, while adopting a broad time frame and a unified perspective to include exculpatory facts about the defendant.

2. Broaden the time frame and adopt a unified perspective of events to include inculpatory facts about the plaintiff/victim, while adopting a narrow time frame and a disjointed perspective to exclude exculpatory facts about the plaintiff/victim.

The communalist strategy will be to:

1. Broaden the time frame and adopt a unified perspective of events to include inculpatory facts about the defendant, while adopting a narrow time frame and a disjointed perspective to exclude exculpatory facts about the defendant.

2. Narrow the time frame and adopt a disjointed perspective of events to exclude inculpatory facts about the plaintiff/victim, while

⁹⁰ Id. at 631.

⁹¹ Id. at 629-30.

adopting a broad time frame and a unified perspective to include exculpatory facts about the plaintiff/victim.

The following chart summarizes these strategies:

CHOICE OF TIME FRAMES		
	Individualist	Communalist
Inculpatory facts about defendant		
	Narrow	Broad
Exculpatory facts about plaintiff		
	Broad	Narrow
Inculpatory facts about plaintiff		
Exculpatory facts about defendant		

Figure 3

When we catalogue the rhetorical strategies in this way, their symmetry becomes apparent. What also becomes apparent is their internal tensions. As in *Ibn-Tamas*, the plaintiff (or the prosecution) and the defendant simultaneously may use broad and narrow time frames, or unified and disjointed perspectives, while describing the same series of events. The logical tensions in doing this normally are not felt. Indeed, the true skill of effective rhetoric is precisely the ability to make these shifts in time framing as invisible or as natural as possible.

III. CHARACTERIZING THE RESPONSIBILITY OF PERSONS

A. Characterizations of Free Will, Choice, and Adequate Alternatives

Assessments of responsibility often depend on our views regarding the choices available to an actor. The issue of choice arises in several different ways. First, at the most abstract level, there are questions about whether a particular actor has free will or whether her behavior is determined or somehow beyond her control. Issues of free will and determinism often arise, for example, in diminished capacity and insanity cases. Second, putting aside ultimate issues of free will and

determinism, there is the issue of the degree to which a person's choices are effectively constrained by circumstances. These issues include the availability of possible alternative courses of action and their practicality. Factual circumstances circumscribing effective choice might include age, education, access to information, emotional, psychological or physical condition, and economic status. Finally, issues of responsibility for choices made also arise with respect to one's responsibility for the choices made by others. Such issues involve, among other things, whether or not a third party's behavior is relatively predictable and hence foreseeable.⁹²

The individualist and communalist orientations take relatively standard and opposite positions regarding these issues. Because the individualist position stresses the defendant's lack of responsibility, it deemphasizes the defendant's free will and capacity to make reasonable, informed decisions, or deemphasizes the existence of alternative courses of action or their adequacy and efficacy. An individualist position also may claim that even if a reasonable person in defendant's position would have perceived alternatives, the defendant's psychological condition prevented her from understanding and reacting to her situation properly, and thus her choices were effectively constrained. Simultaneously, however, because the individualist orientation always places responsibility for the victim class on the victims themselves, the individualist position stresses the victim's free will, reasoning capacity, and adequate, available alternative courses of action.

The communalist orientation, unsurprisingly, is precisely the opposite. Since it stresses the defendant's responsibility for the plaintiff's harm, the communalist argument emphasizes the defendant's free will, her capacity to make reasoned, informed decisions, and the many reasonable alternative courses of action by which the defendant could have avoided harming the plaintiff/victim. Conversely, the communalist position downplays the responsibility of the victim class by characterizing the victims as lacking free choice, information, or any adequate, available alternatives.

⁹² See Kelman, *supra* note 3, at 597-98, 642-52 (discussing the use of intentionalism and determinism as conscious constructs in the criminal law).

1. Self-Defense

For a good example of these rhetorical styles, consider once again the self-defense case, *Ibn-Tamas v. United States*,⁹³ in which the defendant attempted to offer testimony that she was a battered wife. The prosecution's communalist strategy attempted to establish either that the defendant's act was unnecessary, and therefore that she acted with premeditation, or that the defendant acted unreasonably—that she was a rational being with free will who possessed plenty of alternatives other than shooting her husband. Thus, the prosecution predictably “implied to the jury that the logical reaction of a woman who was truly frightened by her husband (let alone regularly brutalized by him) would have been to call the police from time to time or to leave him.”⁹⁴ As the prosecutor stated during the closing argument: “‘Maybe she put up with too much too long, although whose fault was that? She could have gotten out, you know.’”⁹⁵

The defense's individualist strategy was to demonstrate that, contrary to popular belief, a battered wife genuinely believes that she lacks alternatives because her free will has been affected significantly by a pattern of physical and mental abuse. The defense offered testimony of a clinical psychologist that:

[W]omen in this situation typically . . . feel powerless Because there are periods of [marital] harmony . . . the women assume that they, themselves, are somehow responsible for their husbands' violent behavior. They also believe, however, that their husbands are capable of killing them, and they feel there is no escape. Unless a shelter is available, these women stay with their husbands, not only because they typically lack a means of self-support but also because they fear that if they leave they will be found and hurt even more.⁹⁶

The defendant's argument in *Ibn-Tamas* is that from her perspective, she had no alternatives; her remedies were unavailable, inadequate, or futile. The battered wife feels that she is helpless; she believes that if she tries to leave her husband or attempts to get police protection he will beat her even more. The prosecution's argument, conversely, is that the defendant has alternatives—that she has avail-

⁹³ 407 A.2d 626.

⁹⁴ Id. at 633-34.

⁹⁵ Id. at 634 n.14.

⁹⁶ Id. at 634.

able, adequate and efficacious remedies to her situation. She can get a court order, call the police, or leave home.

Note that in *Ibn-Tamas*, the issue of availability, adequacy, and efficacy of alternatives is bound up with the choice between an objective and a subjective standard in self-defense cases. The defense may argue that even if a normal person would have available alternatives, this particular defendant could not have escaped her situation because of her subjective mental condition. This complicating factor is not always present. In other self-defense situations, both sides may argue about available alternatives from the perspective of a reasonable person in the defendant's situation. The important point is that in both *Ibn-Tamas* and the more standard case, the defendant argues that she lacks adequate, available alternatives, whether the lack stems from objective circumstances or subjective constraints.⁹⁷

⁹⁷ Compare the arguments that might be raised in *State v. Schroeder*, 199 Neb. 822, 261 N.W.2d 759 (1978), in which a court upheld a 19-year-old prison inmate's conviction for assault with intent to inflict great bodily harm. Although the case nominally was argued under the doctrine of necessity, the similarity of the arguments to cases of self-defense is evident. The defendant stabbed his sleeping cellmate at 1 a.m. *Id.* at 823-24, 261 N.W.2d at 760. The defendant argued that his cellmate Riggs "had a reputation among the other prisoners for sex and violence," that the defendant owed Riggs money, and that Riggs had threatened to make the defendant into a "punk" (a prisoner who engages in homosexual acts with other prisoners) by selling the debt to another prisoner. *Id.* The night of the assault Riggs had told the defendant "that he might walk in his sleep that night" and "collect some of [the] money" defendant owed him. *Id.* at 824, 261 N.W.2d at 760.

The prosecution's argument (and that of the majority) straightforwardly collapsed the time frame—"there was no specific and imminent threat of injury to the defendant" at the moment the defendant assaulted Riggs. *Id.* at 826, 261 N.W.2d at 761. The defendant's argument (and that of the dissent) manipulates the time frame quite differently. Instead of considering the situation at the moment of the assault, this perspective views the defendant's predicament as extending over a longer period of time: "The defendant could not be expected to remain awake all night, every night, waiting for the attack that Riggs had threatened to make." *Id.* at 828, 261 N.W.2d at 762 (Clinton, J., dissenting).

The defendant argued that he lacked any reasonable alternative to killing or disabling Riggs—his remedies were either unavailable, inadequate, or futile. He was confined in a prison cell with a person who had threatened to force him to submit to sodomy; retreat, therefore, was not possible. *Id.* at 825-26, 261 N.W.2d at 761. The defendant and several other cell members already had requested that Riggs be transferred to another cell, but no action had been taken on this request. *Id.* at 824, 261 N.W.2d at 760. The prosecution, naturally, emphasized that defendant had available, adequate and effective alternatives: He could have stayed awake that night, and then requested a transfer for himself; or he could have bargained with the other prisoners in the cell to guard him from Riggs.

2. *Insanity*

The trial of John Hinckley, who was accused of attempting to assassinate President Reagan in 1981, provides excellent examples of arguments about moral responsibility, free will, and available alternatives. Here, as in *Ibn-Tamas*, the defense's arguments are not that a reasonable person in Hinckley's situation would not have perceived alternatives to assassination, but rather that Hinckley's mental condition caused his blindness to any alternatives. Under the law as it then existed, the defense had to establish that a mental disease or defect substantially impaired either Hinckley's appreciation of the wrongfulness of his conduct or his ability to conform his conduct to the requirements of law.⁹⁸ The prosecution, in turn, set out to prove that Hinckley was in control of his own actions, was not delusional, and deliberately chose a course of conduct while understanding its illegality.

The prosecution's closing arguments use classically communalist characterizations to emphasize the defendant's free will and available options:

[The defendant] stalked two Presidents. . . . He target practiced. . . . What is he target practicing with different caliber ammunition for? To pick the best weapon, the deadliest weapon. He found it. A .22 loaded with Devastator bullets.

It was also planned and premeditated in that . . . he thought about it. Dr. Dietz told you of his interest in assassination. . . . His interest in fame. . . . Mr. Hinckley admitted that he had thoughts of assassinating President Reagan as early as December of 1980.

I'm saying this to you to show you that this wasn't a wild, thoughtless, out of control act by a man who couldn't control his behavior. In fact, at 1:45 when Mr. Reagan arrived, Mr. Hinckley . . . [did not] shoot then. He waited for the best shot. . . .

. . . Mr. Hinckley admitted . . . [that] during the period of time when the President was in the hotel he said, "Should I do it? Should I not?" He is thinking, deliberating, planning, if you will.⁹⁹

⁹⁸ P. Low, J. Jeffries & R. Bonnie, *The Trial of John W. Hinckley, Jr.: A Case Study in the Insanity Defense* 18, 20, 113 (1986) (setting out the Model Penal Code standard, which was the law of the District of Columbia and was incorporated into the jury instructions).

⁹⁹ *Id.* at 84.

Note as well the prosecution's expansion of the time frame to include inculpatory facts about the defendant demonstrating his free will. Nevertheless, when the issue is exculpatory facts about Hinckley, for example his mental attitudes and condition, the prosecution chose a narrow time frame to exclude them:

[T]his indictment doesn't talk about anything else than March 30, 1981 He is not charged here with being sad at Christmas. . . . He is charged with 13 crimes that happened at 2:20 p.m. on the 30th of March.

That's the issue in this case and let us see as the day progresses how much the defense tells you about that.

. . . .

Isn't it interesting right from the opening statement of the defense, when Mr. Fuller stood up, you didn't hear about March 30, 1981. You heard about fantasies, Mr. Hinckley's background, mother, father, parents, family, good people, Texas Tech, writing, all these things. Jodie Foster. You didn't hear anything about March 30, 1981.¹⁰⁰

To demonstrate Hinckley's free will, the prosecution downplayed the seriousness of Hinckley's emotional condition, arguing that Hinckley was no worse off emotionally than most Americans. In fact, the prosecution argued, he was actually much better off than most because of his affluent background, which gave him opportunities and choices not available to others. This apparent non sequitur connecting economic advantage with free will clearly was calculated to suggest to the jurors that if Hinckley had emotional problems, they were largely his own fault. In this way the prosecution attempted to reinforce the communalist characterization of the defendant as responsible for his own situation and actions:

John Hinckley led an ordinary American life. . . .

. . . .

[His family] told you he was a loner. . . . Dr. Dietz indicated to you that loneliness is perhaps the most common phenomenon in the United States and depression or sadness probably runs No. 2.

. . . .

John was especially lonely. He was especially sad. . . .

¹⁰⁰ Id. at 85-86.

But these problems didn't prevent Mr. Hinckley from functioning from day to day, did it? Mr. Hinckley didn't want to work, but that wasn't because he was psychotic, but because he wanted money from his parents

Mr. Hinckley wanted to go chase after Jodie Foster. That is not because he was delusional or delirious. It was because he had the time to do it. Nobody made him work. He didn't have to.

. . . [He was] flying all over the United States. This man is not a drifter or a loner stumbling around some little town in Nebraska running into fence posts. He is flying United Airlines, he is flying American. He took the limousine, if you will, on March 6, 1981, from New York to Newark Airport. This is probably enough miles there to qualify for the 10,000-Mile Club in some of these airlines.

Did you ever hear any evidence that Mr. Hinckley didn't have the ability to make the airline connections, to travel around and do what he wanted?

. . . .

. . . Dr. Dietz . . . said Mr. Hinckley had a strong desire for fame

Why? Well, you can draw your own conclusions. I suggest to you Mr. Hinckley developed that over the years because he was sort of the fifth wheel. Scott [his brother], a successful businessman . . . Diane, successful daughter. Marriage, two children now, I believe, and there is John Hinckley, sort of loping beside. His dad, a successful businessman. John Hinckley wanted to be somebody. He wanted to be like John Lennon, but [he] . . . wanted to do this easy. He didn't want to work. He wanted to get his inheritance, if you will¹⁰¹

The defense's strategy was symmetrical to the prosecution's. In its closing arguments, defense counsel chose a broad time frame to include exculpatory facts that indicated Hinckley was without alternatives or free will:

[The government's] psychiatrists chose to ignore the kind of existence this defendant lived in the seven years prior to March of 1981.

Don't be misled by [the prosecution's] suggestion that only March 30, 1981, should be considered. Is there any way in this world that Mr. Hinckley or anybody else would become instantly insane on March 30, 1981? It took years and years of growth of the disease or

¹⁰¹ Id. at 86-88.

disorder to lead to the state of mind on March 30, 1981. . . . [T]o show what he was like [then], we must look at how he got there.

. . . [L]ook at the absolutely absurd travel pattern pursued by this man starting on September 17th and running through March of 1981. On its face, it is irrational, purposeless, aimless.

. . . .

Ladies and Gentlemen of the jury, I submit to you that Mr. Hinckley at the time of these events was living in such a self-contained world with no outside checks, no possibility of there being any realities, that he was unaware of anything except his goal and his goal was to achieve the love and admiration of Jodie Foster.

. . . .

. . . He was a prisoner of himself for at least seven years before this tragedy . . . to call him an ordinary . . . all American boy, is silly.¹⁰²

The defense emphasized Hinckley's "'disconnected'" college career, "'a semester here, a semester out,'" his trips to California and Nashville to become a rock star when there was no evidence of prior musical training or talent,¹⁰³ his fascination with the movie *Taxi Driver* and its star, Jodie Foster, and other strange and unusual behavior occurring over a span of years.¹⁰⁴ Additionally, the defense argued that the defendant's mental stress, which had developed through a series of other events, culminated in March of 1981 when his parents refused to allow him to stay with them; this rejection effectively severed his last tie to reality.¹⁰⁵ In short, the defense attempted to portray Hinckley as a man without control over his actions, and thus lacking the will or mental capacity to choose available alternatives to assassination.

3. Causation

In *Commonwealth v. Feinberg*,¹⁰⁶ the defendant operated a cigar store in a skid row area of Philadelphia. He regularly stocked and sold Sterno, and there was evidence that he knew that some of his customers consumed the Sterno as a substitute for liquor. He received a new shipment of less expensive "industrial Sterno" that

¹⁰² Id. at 93-94.

¹⁰³ Id. at 94.

¹⁰⁴ Id. at 94-96.

¹⁰⁵ Id. at 100-01.

¹⁰⁶ 433 Pa. 558, 253 A.2d 636 (1969).

had a higher concentration of methanol, which made it far more dangerous to consume internally. Imprinted on the lids of the new Sterno was the warning: " 'Institutional Sterno. Danger. Poison. For use only as a Fuel. Not for consumer use. For industrial and commercial use. Not for home use.' " Defendant sold approximately 400 cans of the new Sterno. During the period of those sales thirty-one persons in the skid-row area died from methanol poisoning. A substantial number of those deaths were traced to the consumption of industrial Sterno purchased from the defendant's store. Defendant was indicted and convicted of manslaughter, and the court upheld his sentence on appeal.¹⁰⁷

Defendant argued that the prosecution had not shown that he proximately caused the deaths of his customers. After all, they had a choice whether or not to purchase and then ingest the Sterno, and the inappropriateness of the product for internal consumption was clearly apparent from the label.¹⁰⁸ The defendant emphasized the free will of the victims and the alternatives available to them; the victims did not have to consume the Sterno because other, safer substances were available. Thus, the defendant argued, their free choice to endanger themselves broke the causal chain and excused him from liability.

In rejecting this argument, the court implicitly adopted a narrow view of the victims' free will and available alternatives. The defendant should have known, and indeed, the Court suggests, did know, that the victims near his store were alcoholics; the defendant knew that their actions were relatively predictable.¹⁰⁹ Moreover, their decrepit state gave them little hope of resisting the temptation to purchase the cheaper Sterno, and gave them few realistic alternatives. Note that the choices available to the victims appear narrower and narrower, and the predictability of their response appears greater and greater, as the time frame is collapsed. The defendant might argue that the denizens of his neighborhood had a number of long-term alternatives to consuming contaminated Sterno, such as joining Alcoholics Anonymous, getting a job, and escaping poverty. Thus, it is important to recognize that, just as in the *Hinckley* case, characterizations of free will or the existence of alternatives often depend on

¹⁰⁷ Id. at 560-61, 568, 573, 253 A.2d at 638, 641, 644.

¹⁰⁸ Id. at 568-69, 253 A.2d at 642.

¹⁰⁹ Id.

manipulation of time frames.¹¹⁰ Here the defendant's individualist argument adopts a broad time frame to emphasize the victims' responsibility, while the court's communalist opinion adopts a narrow time frame to deemphasize it.¹¹¹

The same connection between time framing and characterizations of the victim's free will or available alternatives is also clear from cases involving the suicide of the victim as a result of defendant's negligent or criminal behavior. Again, an individualist view of defendant's causal responsibility would characterize the plaintiff broadly as a free moral agent who knowingly decided to take her own life, thus breaking the causal chain of responsibility. Simultaneously, the defendant also might emphasize that other events, either unforeseeable or beyond the defendant's control, drove the plaintiff to her act.¹¹² And again a communalist view of defendant's causal responsibility would emphasize how defendant's freely chosen negligent or criminal acts had foreseeable consequences that robbed plaintiff of the will to live, and would minimize the autonomous nature of plaintiff's actions, or the effect of other events on the plaintiff's decision.

In the famous case of *Stephenson v. State*,¹¹³ the defendant kidnapped the victim and sexually abused her over the course of several days. While in the hotel to which she had been taken, she purchased and took poison. Eventually she died from a combination of factors, including physical abuse and poisoning.¹¹⁴ The defendant argued that the victim's actions broke the causal chain; he thus emphasized her free will and available alternatives: "[A]fter [the defendant and the victim] reached the hotel, Madge Oberholtzer left the hotel and

¹¹⁰ Cf. Kelman, *supra* note 3, at 638-39 (discussing the manipulation of an act/omission distinction in a fact situation similar to *Feinberg*).

¹¹¹ The defendant's knowledge of the likely consequences of selling this particular variety of Sterno also may depend on time frame manipulation. From a broader time frame, it is more likely that the defendant had some knowledge of what his customers did with his product. Manipulating the time frame also makes the defendant appear to have different alternatives. If we expand the time frame, the defendant's choice to purchase the cheaper Sterno for resale when more expensive but safer versions were available in the market looks more blameworthy. From a narrow time frame, we look at the moral choices available to a storekeeper who already has invested considerable amounts of money in cans of Sterno that lie unpurchased on the shelf. Economic necessity might not be a defense to this criminal prosecution, but just as in the case of the victims, it tends to make the actor seem less blameworthy.

¹¹² See, e.g., *Scheffer v. Railroad Co.*, 105 U.S. 249 (1881).

¹¹³ 205 Ind. 141, 179 N.E. 633 (1932).

¹¹⁴ *Id.* at 167-77, 179 N.E. at 642-45.

purchased a hat and the poison, and voluntarily returned to his room, and at the time she took the poison she was in an adjoining room . . . and . . . he was not present."¹¹⁵

The court's decision rejected defendant's argument and emphasized that:

[T]he deceased had, before she left appellant's home in Indianapolis, attempted to get away, and also made two unsuccessful attempts to use the telephone to call help. She was justified in concluding that any attempt she might make, while purchasing a hat or while in the drug store to escape or secure assistance would be no more successful in Hammond than it was in Indianapolis.¹¹⁶

In *Stephenson*, the court faces a difficult problem in establishing a lack of free will through the usually simple expedient of shrinking the time frame. Although the court emphasizes the victim's helplessness at the moment she swallowed the poison, it must still explain how her will could have been overborne by an act that occurred several hours earlier. The court solves this problem by collapsing the time frame in a novel way—by treating the events as part of a single unit, rather than as disjointed and separated:

Neither do we think the fact that the deceased took the poison some four hours later after . . . the crime of attempted rape had been committed necessarily prevents it from being a part of the attempted rape. . . . *At the very moment Madge Oberholtzer swallowed the poison she was subject to the passion, desire, and will of appellant.* She knew not what moment she would be subjected to the same demands that she was while in the drawing-room on the train. . . . *The whole criminal program was so closely connected that we think it should be treated as one transaction . . .*¹¹⁷

4. Necessity

The question of available, adequate alternatives is usually present in cases raising the defense of necessity.¹¹⁸ This question is obvious in a case like *Regina v. Dudley & Stephens*,¹¹⁹ which involved cannibalism aboard a life boat. The prosecution emphasized that the defendants

¹¹⁵ Id. at 183, 179 N.E. at 647.

¹¹⁶ Id. at 188, 179 N.E. at 649.

¹¹⁷ Id. at 188-89, 179 N.E. at 649 (emphasis added).

¹¹⁸ See discussion of *Schroeder*, supra note 97.

¹¹⁹ 14 Q.B.D. 273 (1884); see supra text accompanying notes 56-59.

had alternatives to killing the victim and eating him immediately. At the moment when the boy was killed, there was no particular emergency; the defendants were not at the point of death and there was no threat of imminent harm. This argument emphasizes their alternatives: The defendants could have waited a few more days either for help to arrive or for the boy to die of natural causes before committing their act of cannibalism, or they could have drawn lots. The defense argued, on the contrary, that the circumstances constrained their actions. When one considers the defendants' situation not simply as a series of discrete instants but as a unified set of circumstances, their predicament required them to act—if not at a particular moment, then at least soon. They had no reason to think that help would come within a few days, and their steadily worsening condition left them no alternatives.¹²⁰

In *United States v. Kroncke*,¹²¹ the defendants broke into a local draft office to destroy files and registration cards. They argued that this action was necessary to bring to the attention of Congress and the public the immorality and illegality of the Vietnam War, because there was no effective political or legal recourse.¹²² The implicit claim was that they had no adequate, available, and effective alternatives to the burglary, and that destroying draft files would help bring an end to the war.¹²³

The appellate court disagreed, holding that the defense of necessity was inappropriate because "the relationship between the defendant's act and the 'good' to be accomplished is . . . tenuous and uncertain,"¹²⁴ thus denying the necessity of their course of action, but more importantly because "there are broad opportunities for peaceful and legal dissent, and . . . the power of the ballot, if used, is great."¹²⁵

¹²⁰ Note that both the prosecution and the defense simultaneously take positions on the issue of exculpatory causation that are in tension with their arguments about the nature of the emergency. The prosecution's argument that nothing the defendants could do was likely to save their lives (a narrow view of exculpatory causation) tends to undercut the prosecution's argument that there was no imminent peril that required immediate action. Conversely, the defendants' assertion that their situation was hopeless is in tension with the simultaneous assertion that killing the boy would surely increase their chances of survival.

¹²¹ 459 F.2d 697 (8th Cir. 1972).

¹²² *Id.* at 699.

¹²³ See *id.* at 699, 702.

¹²⁴ *Id.* at 701.

¹²⁵ *Id.* at 704.

Like many necessity cases, *Kronke* offers excellent examples of time frame manipulation to establish inculpatory and exculpatory facts. The defense introduced several witnesses who testified to the evils of the Vietnam War and the need to end its injustices. The prosecution argued, and the trial judge agreed, that all this testimony was immaterial and that the time frame should be narrowed. Thus the trial judge charged that the jury should consider only "the facts concerning what occurred at Little Falls, Minnesota on the late evening of July 10, 1970."¹²⁶ Of course, the prosecution would argue for a broad time frame in order to include inculpatory facts, such as evidence of the planning and preparation of the break-in.

In *Kronke*, as in *Dudley & Stephens*, the individualist argument is that the defendant's acts greatly increase the chances that better consequences will follow: The causal nexus between these acts and the desired state of affairs (or avoiding the greater evil) is strong—or the act greatly increases the marginal probability that the better consequences will follow. The risk, or marginal probability, of harm or additional harm if the defendant does not act is very great. This perspective is a narrow view of causal probabilities that inculcate the defendants and a broad view of causal probabilities that exculpate them.

The communalist response in each case is that the defendant's acts do not increase greatly the chance that better consequences will occur: The causal nexus between these acts and the desired state of affairs (or avoiding the greater evil) is weak—or the act only minimally increases or does not increase at all the marginal probability that the better consequences will occur. The risk (or marginal probability) of harm or additional harm if the defendant does not act is slight. This position is a broad view of causal probabilities that inculcate the defendants and a narrow view of causal probabilities that exculpate them.¹²⁷

The symmetry of arguments concerning free will and the existence of adequate, available alternatives is summarized below:

¹²⁶ Id. at 700.

¹²⁷ The communalist argument might choose to focus instead on the gross or absolute probabilities that defendants' act would avoid a serious harm if these probabilities seemed fairly small. See *supra* note 59.

VIEW OF FREE WILL, CHOICE, INFORMATION, OR ADEQUATE
AVAILABLE OPTIONS

	Individualist	Communalist
Of plaintiff	Broad	Narrow
Of defendant	Narrow	Broad

Figure 4

*B. Shifting Moral and Causal Responsibility to
and from Third Parties*

The individualist orientation attempts to shift responsibility away from the defendant. We already have seen that this shifting can be accomplished by deemphasizing the defendant's moral or causal responsibility for the plaintiff/victim's injury, while emphasizing the plaintiff/victim's responsibility for her own predicament. A further strategy involves shifting responsibility not onto the plaintiff/victim, but onto third parties who in some way may have contributed to the plaintiff/victim's harm. The individualist position emphasizes the free will, adequate alternatives, fault, bad intention, and causal responsibility of third parties who harm (rather than aid) the plaintiff/victim.¹²⁸ The individualist position also deemphasizes the foreseeability and predictability of third-party actions that harm the plaintiff/victim, as well as the defendant's control over such parties.

Because the communalist position seeks to emphasize the defendant's responsibility, it takes precisely the opposite approach; it stresses that third parties who harm the plaintiff/victim lacked free will or adequate, available alternatives, that these parties' actions were foreseeable or predictable by the defendant, and that the third parties were somehow under the defendant's control. Hence the defendant is responsible for what third parties do to the plaintiff/victim.

¹²⁸ The defendant's individualist argument also emphasizes the degree of the third parties' contribution to the plaintiff/victim's harm. For example, in a tort case with multiple defendants, each defendant tries to establish that the other defendants were responsible for most of the harm, could have avoided the harm more easily, or had greater freedom of choice.

Note that this Section only considers the defendant's responsibility for acts of a third party that harm the plaintiff/victim. Where the question presented is the defendant's responsibility for a third party who *helps* the plaintiff/victim avoid harm, the rhetorical devices used by each side obviously would be quite different.

1. Causation

Brower v. New York Central & Hudson River R.R.,¹²⁹ involved a grade crossing collision between the defendant's train and the plaintiff's horse-drawn wagon. The collision knocked the plaintiff unconscious, and thieves presumably stole the contents of the wagon. The railroad detectives, while posting a guard to protect the railroad's property from thieves, did not attempt to protect the plaintiff's property.¹³⁰ The plaintiff argued that the railroad's negligence in causing the collision made it responsible for the loss of the stolen merchandise, and the majority agreed, concluding that the plaintiff could recover.¹³¹ The majority's communalist argument deemphasized the plaintiff's responsibility for protecting himself and held that the defendant was responsible because the third parties' actions were foreseeable under the circumstances:

The negligence which caused the collision resulted immediately in such a condition of the driver of the wagon that he was no longer able to protect his employer's property; the natural and probable result of his enforced abandonment of it in the street of a large city was its disappearance; and the wrongdoer cannot escape making reparation for the loss caused by depriving the plaintiff of the protection which the presence of the driver in his right senses would have afforded.¹³²

The dissent's argument against recovery was individualist. It emphasized that the free actions of third parties insulated the defendant from liability:

Proximate cause imports unbroken continuity between cause and effect, which, both in law and in logic, is broken by the active intervention of an independent criminal actor. This established rule of law is defeated if proximate cause be confounded with mere opportunity for crime. A maladjusted switch may be the proximate cause of the death of a passenger who was killed by the derailment of the train, or by the fire or collision that ensued, but it is not the proximate cause of the death of a passenger who was murdered by a bandit who boarded the train because of the opportunity afforded by its derailment. This clear distinction is not met by saying that criminal intervention should be foreseen, for this implies that crime is to be presumed and

¹²⁹ 91 N.J.L. 190, 103 A. 166 (1918).

¹³⁰ *Id.* at 191, 103 A. at 166-67.

¹³¹ *Id.* at 193, 103 A. at 167.

¹³² *Id.*

the law is directly otherwise.¹³³

*Hines v. Garrett*¹³⁴ and *Henderson v. Dade Coal Co.*¹³⁵ are two good examples of third-party causation cases reaching contrary results. In *Henderson*, a coal company that leased convicts from the local authorities to work in its mines negligently had allowed one of them to escape.¹³⁶ The escaped convict raped the plaintiff. The plaintiff argued that the defendants should have known from his character that the convict was likely to rape someone if let loose.¹³⁷ The court, emphasizing the free will of the third party who had harmed the plaintiff, sustained a demurrer for the defendant:

Vile as this man was, it cannot be held that the defendants could reasonably have anticipated that he would, upon the first opportunity, assault and ravish any defenseless woman whom he might encounter. He was equally liable to commit some other heinous crime; and they were not bound to presume that he would commit any crime at all.¹³⁸

In *Hines*, a railroad conductor negligently carried the eighteen-year-old plaintiff past her stop one night, forcing her to walk back one mile through a dangerous area. During her journey she was raped once by a soldier and once by a hobo, both unidentified.¹³⁹ Unsurprisingly, the railroad company stressed the plaintiff's free will and available options.¹⁴⁰ More importantly for the comparison with *Henderson*, however, the railroad company argued that it could not

¹³³ Id. at 194, 103 A. at 168 (Garrison, J., dissenting); cf. H. Hart & A. Honore, Causation in the Law 129 (1959) ("[T]he free, deliberate and informed act or omission of a human being, intended to produce the consequence which is in fact produced, negatives causal connexion." (emphasis omitted)).

¹³⁴ 131 Va. 125, 108 S.E. 690 (1921).

¹³⁵ 100 Ga. 568, 28 S.E. 251 (1897).

¹³⁶ See id. at 570, 28 S.E. at 252.

¹³⁷ See id. at 570-71, 28 S.E. at 252.

¹³⁸ Id.

¹³⁹ *Hines*, 131 Va. 125, 129-30, 108 S.E. 690, 691.

¹⁴⁰ The railroad argued that the plaintiff was at fault for having gotten off the train; at that point she ceased to be a passenger and the railroad was no longer responsible for her. Thus, the railroad argued that the conductor offered the plaintiff two options—getting off the train immediately or remaining on the train until it returned to her stop some time later—and that the plaintiff voluntarily choose to leave the train. Id. at 132-33, 108 S.E. at 692. Similarly, the railroad argued that its options were limited greatly once it discovered that a train had passed its appointed stop. It might have been unsafe or inconvenient to the other passengers to back the train to the previous stop; in fact the railroad had a rule prohibiting movement against the

be held causally responsible for the rapists' actions. The court, however, permitted recovery:

The consequences which overtook this young woman were sufficiently probable to charge any responsible party with the duty of guarding against them. No eighteen-year-old girl should be required to set out alone, near nightfall, to walk along an unprotected route, passing a spot which is physically so situated as to lend itself to the perpetuation of a criminal assault, and which is infested by worthless, irresponsible and questionable characters known as tramps and hoboes; and no prudent man, charged with her care, would willingly cause her to do so.¹⁴¹

Thus, the defendant was causally responsible because it

expose[d] the injured party to the act causing the injury. It is perfectly well settled and will not be seriously denied that wherever a carrier has reason to anticipate the danger of an assault upon one of its passengers, it rests under the duty of protecting such passenger against the same.¹⁴²

2. *Duty*

Similar rhetorical strategies appear in debates concerning whether or not the defendant owes a duty to the plaintiff when third parties cause the harm.¹⁴³ Such issues are implicated, for example, in cases involving: (1) the duty to warn potential plaintiffs of harms that might

current of traffic without specific orders from the superintendent of transportation. *Id.* at 134-35, 108 S.E. at 693.

The court, however, adopted a communalist position, accepting a broad view of the defendant's available options while narrowly describing the plaintiff's options. The court argued that a jury could have found that backing the train would not have "caused the other passengers any risk or disproportionate inconvenience," and that the risk of danger was minimized because no scheduled train would follow soon. *Id.* at 135, 108 S.E. at 693. At the same time, the jury could have found that the plaintiff's decision to leave was not fully voluntary, because "[s]he was suddenly placed in a perplexing situation" by a conductor who treated her rudely and did not explain how long she would have to remain on the train before it would return to her stop. *Id.*

¹⁴¹ *Id.* at 138, 108 S.E. at 694.

¹⁴² *Id.* at 140, 108 S.E. at 695.

¹⁴³ This was, in fact, an issue in *Hines v. Garrett*: the duty was that of a common carrier to protect its passengers. The similarity and overlap between questions of duty and questions of causation is a familiar issue in tort law, especially in cases involving third parties who injure the plaintiff. See generally Prosser and Keeton on the Law of Torts 274-75 (W. Keeton 5th ed. 1984) (noting that "[i]t is quite possible" to restate questions of proximate cause as questions of duty).

be caused by persons with whom the defendant has a special relationship (or the duty to restrain those persons);¹⁴⁴ (2) the duty to warn or protect persons with whom the defendant has a special relationship from harms caused by third parties;¹⁴⁵ (3) employers' vicarious liability for their servants' acts;¹⁴⁶ and (4) the government's responsibility for private parties' infringement of the plaintiff/victim's rights.¹⁴⁷

A good example of arguments concerning the scope of a defendant's duty is *Lopez v. Southern California Rapid Transit District*,¹⁴⁸ in which the plaintiffs sued a local transit district for injuries they received when a fight broke out among passengers aboard a bus.¹⁴⁹ In explaining why the transit district owed a duty arising out of a special relationship to its passengers, the court emphasized the plaintiffs' helpless condition and the defendant's ability to foresee violence on crowded buses:

[B]us passengers are "sealed into a moving steel cocoon." Large numbers of strangers are forced into very close physical contact with one another under conditions that often are crowded, noisy, and overheated. At the same time, the means of entering and exiting the bus are limited and under the exclusive control of the bus driver. Thus, passengers have no control over who is admitted on the bus and, if trouble arises, are wholly dependent upon the bus driver to summon help or provide a means of escape. These characteristics of buses are, at the very least, conducive to outbreaks of violence between passengers and at the same time significantly limit the means by which passengers can protect themselves from assaults by fellow passengers.¹⁵⁰

Of course, the plaintiffs' options are much smaller when viewed from a narrow time frame. The defendant might have replied that plaintiffs did have alternatives; if they did not wish to ride buses in such crowded conditions, they simply could have found alternative means of transportation.¹⁵¹ Moreover, as the defendant transit dis-

¹⁴⁴ See *Tarasoff v. Regents of the Univ. of Cal.*, 17 Cal. 3d 425, 551 P.2d 334, 131 Cal. Rptr. 14 (1976).

¹⁴⁵ See *Farwell v. Keaton*, 396 Mich. 281, 240 N.W.2d 217 (1976).

¹⁴⁶ *Ira S. Bushey & Sons, Inc. v. United States*, 398 F.2d 167 (2d Cir. 1968).

¹⁴⁷ See *Riss v. City of New York*, 22 N.Y.2d 579, 240 N.E.2d 860, 293 N.Y.S.2d 897 (1968).

¹⁴⁸ 40 Cal. 3d 780, 710 P.2d 907, 221 Cal. Rptr. 840 (1985).

¹⁴⁹ *Id.* at 783, 710 P.2d at 908, 221 Cal. Rptr. at 841.

¹⁵⁰ *Id.* at 789, 710 P.2d at 912, 221 Cal. Rptr. at 845 (footnote omitted).

¹⁵¹ Plaintiffs could respond that their economic situation limits their choice of transportation. And defendant can respond to this argument by expanding the time frame still

trict argued, its ability to predict and prevent criminal acts on its buses is severely limited: Prevention would require an armed security force, and the combination of these expenses and the payment of money damages might bankrupt the transit district.¹⁵² In response, the court emphasized the defendant's available alternatives:

Finding such a duty to exist is not the functional equivalent of finding a duty to provide an armed security guard on every bus. There are a number of actions a carrier might take . . . which . . . might be sufficient to meet the duty For instance, where the disorderly conduct of certain passengers threatens the safety of others, the bus driver (subject, of course, to reasonable concern for his own safety), might warn the unruly passengers to quiet down or get off the bus; alert the police and summon their assistance; or, if necessary, eject the unruly passengers Carriers could provide radio communication between the bus driver and local police or bus headquarters to enable the driver to call for assistance when needed, and buses could be equipped with alarm lights to alert nearby police or carrier personnel of criminal activity taking place on board the bus. Bus drivers, especially those on routes with a history of criminal activity, could be trained to recognize and deal with potentially volatile situations.¹⁵³

more; the plaintiffs have the choice where to work, at what occupations, wages, working conditions, and so on. It should be clear at this point that many of the familiar debates concerning economic justice involve symmetrical expansion and contraction of time frames.

¹⁵² 40 Cal. 3d at 786-87, 710 P.2d at 910, 221 Cal. Rptr. at 843.

¹⁵³ *Id.* at 787-88, 710 P.2d at 910-11, 221 Cal. Rptr. 844 (citations omitted).

Compare the arguments made by the court in *Kline v. 1500 Mass. Ave. Apt. Corp.*, 439 F.2d 477 (D.C. Cir. 1970). The plaintiff was assaulted and robbed one night in the common hallway of her apartment building. She sued the landlord for negligently failing to provide protection for tenants. The majority opinion held that she stated a cause of action. *Id.* at 478-80. Its communalist arguments use the standard rhetorical devices. On the one hand, the court, using a narrow time frame, argued that the plaintiff had no adequate alternative means of ensuring her own safety. *Id.* at 480. On the other hand, the court, now using a broad time frame, emphasized the predictability and foreseeability of criminal attacks in the area, *id.* at 483, the landlord's actual and constructive notice of a real danger to the tenants, *id.* at 479-80 & n.3, 483, and the available measures the landlord could have taken to protect the tenants. *Id.* at 480, 484, 486. The court also stressed that previously the landlord had provided protection in the form of a doorman, garage attendants and a desk clerk, but these positions were no longer staffed by the time of the assault, even in the face of increasing numbers of assaults, larcenies and robberies. *Id.* at 479.

The dissenting opinion, predictably enough, used all of the opposite rhetorical strategies. It pointed out that the plaintiff was well aware of the decreased protection in her building and could have moved to a safer building, presumably with higher rental costs. *Id.* at 492-93 (MacKinnon, J., dissenting). The dissent also emphasized that there was no inequality of bargaining power between the tenants and the landlord. *Id.* at 493 n.10 (MacKinnon, J.

The chart below illustrates the symmetry of rhetorical strategies concerning the plaintiffs' and defendants' responsibilities for third parties' actions:

THIRD PARTIES		
	Individualist	Communalist
View of free will, choice, information, or adequate available options of third parties who harm plaintiff	Broad	Narrow
Defendant's responsibility, control, and foreseeability with respect to third parties who harm plaintiff	Narrow	Broad

Figure 5

We can sum up the argument of this Article in the following chart, which lists the basic categories of factual characterization and the corresponding devices employed by the individualist and communalist orientations. This chart dramatically displays the claim made throughout this Article that individualism and communalism are mirror images, or rhetorical transformations, of each other:

THE RHETORIC OF RESPONSIBILITY		
	Individualist Position	Communalist Position
FACTUAL CHARACTERIZATION		

dissenting). Moreover, it stressed the insufficiency of evidence that criminal activity was frequent and predictable in the particular building where the tenant lived, as opposed to the general metropolitan area, *id.* at 489, 491 (MacKinnon, J., dissenting), the landlord's lack of knowledge and certainty as to the frequency and nature of the attacks, *id.* at 489 (MacKinnon, J., dissenting), and the futility, impracticability, and prohibitive expense of the landlord investing in safety measures. *Id.* at 490, 492-93 (MacKinnon, J., dissenting).

Emphasizing Responsibility of	Plaintiff	Defendant
Deemphasizing Responsibility of	Defendant	Plaintiff
CHARACTERIZATION OF CAUSAL PROBABILITY		
inculpatory defendant	Narrow	Broad
exculpatory plaintiff	Narrow	Broad
exculpatory defendant	Broad	Narrow
inculpatory plaintiff	Broad	Narrow
DESCRIPTION OF EVENTS FOR PURPOSES OF FORESEEABILITY OF HARM TO PLAINTIFF		
caused by defendant	Concrete	Abstract
caused by plaintiff	Abstract	Concrete
TIME FRAME FOR		
inculpatory facts about defendant	Narrow	Broad
exculpatory facts about plaintiff	Narrow	Broad
inculpatory facts about plaintiff	Broad	Narrow
exculpatory facts about defendant	Broad	Narrow
VIEW OF FREE WILL, CHOICE, INFORMATION, OR ADEQUATE AVAILABLE OPTIONS		
of plaintiff	Broad	Narrow
of defendant	Narrow	Broad
THIRD PARTIES WHO HARM PLAINTIFF		
View of free will, choice, information, or adequate available options	Broad	Narrow
Defendant's responsibility, control, and ability to foresee	Narrow	Broad

Figure 6

IV. RESPONSIBILITY AND THE RIGHTS OF INDIVIDUALS

So far this Article has examined the ways in which we use rhetorical devices to emphasize or deemphasize responsibility. The rhetorical strategies discussed above, however, also are found in arguments for and against the recognition and regulation of particular rights. This claim should be hardly surprising, as one of the standard arguments against holding a defendant responsible for her conduct is that she had a right to do what she did.

Thus, the assertion and protection of rights is connected intimately with issues of personal responsibility. Rights can be viewed, and occasionally have been viewed, as spheres of private activity into which the state may not intrude, and within which the holder of the right may act with impunity.¹⁵⁴ Hohfeldian analysis confirms this view. In Hohfeldian terms, a "privilege" (or liberty right) to act creates a correlative "no-right" on the part of others to have the state prevent the actor from exercising the right.¹⁵⁵

For this reason, debates about whether or not a person has a particular right, or over whether or not a right extends to a particular degree, mirror debates about personal responsibility. Saying that a right extends to particular activity is often another way of saying that the person exercising that right has no legal responsibility for her actions. Of course, that is not all we are saying when we claim that a person has or does not have a particular right. Claims of legal responsibility, however, usually are implicated in claims of legal right.¹⁵⁶ A

¹⁵⁴ For an historical grounding, see Horwitz, *Rights*, 23 Harv. C.R.-C.L. L. Rev. 393 (1988).

¹⁵⁵ Hohfeld, *supra* note 28, at 30, 32-33. If the possessor of the liberty right also has a stronger claim right, or a "right" proper in Hohfeldian terminology, then there is also a correlative duty on the part of others not to interfere with the exercise of the claim right. The point here, however, is that even with respect to the lesser Hohfeldian "privilege," or liberty right, the holder of the privilege may act (if she is otherwise able) without fear of liability.

¹⁵⁶ I should note here, in pointing out the connection between claims of right and claims of responsibility, the relevance of the separation between law and morals. Few people believe that a person's moral responsibilities are always coterminous with the exercise of her legal rights. For example, we might argue that a person is morally responsible for a particular harm but decide that our theory of legal rights requires the person to escape punishment or regulation. My point, however, is that in this case we say that the person is not legally responsible for the harm her actions caused. Conversely, we might believe that a person was well within her moral rights to perform a certain act (or at least violated no one else's moral rights), and yet argue that legally she should be punished or her activity regulated, either out of administrative convenience or necessity, institutional concerns, or considerations of social

claim of legal right thus can be defended by all of the various devices associated with the individualist position. Therefore, arguments for protecting a right whose exercise injures a victim normally emphasize the victim's responsibility for her own injury, use a narrow time frame to exclude inculpatory facts about the exercise of the right, use a broad time frame to include exculpatory facts, and so forth.

One can see this phenomenon best by comparing two different rights that, in mainstream legal ideology, receive quite different treatment: the rights of speech and economic exchange. In modern (post-1937) constitutional law, speech, even quite harmful speech, is given extraordinary protection, while we have seen increasing restrictions on the freedom of contract and expanding tort liability for manufacturers and other businesses. Indeed, the opposite positions—that speech that has undesirable or injurious effects routinely could be regulated, and that the right to contract should receive strong constitutional protection—are presently out of the mainstream of legal thought, although each position has its adherents and perhaps may come into vogue again.¹⁵⁷

The dominant justifications of free speech often involve individualist factual characterizations. We do not hold speakers legally responsible for many of the harms their speech may cause to others. Even in cases of very dangerous speech, a speaker cannot be held directly responsible unless there is a clear and present danger of immediate violence, and courts usually characterize facts so that this test is quite difficult to meet in practice.¹⁵⁸ Similarly, first amendment libertarians often recharacterize the causal nexus between speech and the harms

costs and benefits. In this case, however, we are arguing that although she was not morally responsible, she was nevertheless legally responsible. Of course, in other cases it may be quite unclear whether our judgments about responsibility are moral, legal, or based upon some combination of both perspectives.

¹⁵⁷ Here I must emphasize that the issue of what protection should be accorded to a right is not a matter of complete protection or nonprotection, but is always a question of degree and kind. The mainstream position is much more protective of speech than contract. Yet even the mainstream position recognizes that some types of speech can be regulated (i.e., libel, perjury, bribery, etc.). And within the mainstream view of thinking on contractual freedom, there are limits to the state's regulatory power. The takings and contracts clauses are not yet a dead letter in our constitutional jurisprudence, and a statute prohibiting all commercial transactions of any kind, if it could be passed, probably would not survive even the limited scrutiny now given to economic regulation.

¹⁵⁸ See, e.g., *Brandenburg v. Ohio*, 395 U.S. 444, 445-47 (1969).

alleged to be caused by it as insignificant or at best speculative,¹⁵⁹ and deemphasize the harms to victims arising from speech.¹⁶⁰

A strongly libertarian position on the first amendment tends to shift responsibility for harm from the speaker to the listener or victim. This perspective portrays persons who claim to be injured by speech as responsible for their own failure to avoid harm or otherwise improve their situation.¹⁶¹ Similarly, free speech libertarians often depict the victims as having adequate, available alternatives to suffering the harm caused by speech that offends them or with which they disagree.¹⁶²

Finally, a strongly pro-free speech position usually characterizes the speaker as not ultimately responsible for the harm caused by third parties as a result of the speaker's expression. This lack of responsibility is either because the causal nexus between persuasion (or agita-

¹⁵⁹ See, e.g., *Abrams v. United States*, 250 U.S. 616, 628 (1919) (Holmes, J., dissenting) ("Now nobody can suppose that the surreptitious publishing of a silly leaflet by an unknown man, without more, would present any immediate danger that its opinions would hinder the success of the government arms or have any appreciable tendency to do so.").

Alternatively, courts taking pro-speech stands in free speech cases can argue that the legislature has not made a sufficient showing that the harms feared will occur, see, e.g., *Landmark Communications v. Virginia*, 435 U.S. 829, 841 (1978) ("The Commonwealth has offered little more than assertion and conjecture to support its claim that without criminal sanctions the objectives of the statutory scheme would be seriously undermined."), or that there has not been a particularized finding that they will occur in the particular case before the court, e.g., *Cohen v. California*, 403 U.S. 15, 23 (1971) ("We have been shown no evidence that substantial numbers of citizens are standing ready to strike out physically at whoever may assault their sensibilities with execrations like that uttered by Cohen.").

¹⁶⁰ Or the claim is made that there has not been a sufficient showing that the harm is as great as the legislature fears.

¹⁶¹ The classic version of this argument is that persons who are affronted by offensive visual expression merely need to "avert[] their eyes." See, e.g., *Cohen*, 403 U.S. at 21. The communalist (and therefore less speech-protective) rejoinder is that the victims are part of a captive audience and therefore lack effective means to avoid the harm caused by the speech. See, e.g., *FCC v. Pacifica Found.*, 438 U.S. 726, 748 (1978) ("[T]he broadcast media have established a uniquely pervasive presence in the lives of all Americans. Patently offensive, indecent material presented over the airwaves confronts the citizen . . . in the privacy of the home, where the individual's right to be left alone plainly outweighs the First Amendment rights of an intruder.").

¹⁶² This view is implicit in the traditional marketplace of ideas justification of free speech, and in the claim that "the fitting remedy for evil counsels is good ones." *Whitney v. California*, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring). Note the broad time framing that the marketplace of ideas metaphor implies. It is used to shift responsibility to the victim, just as an individualist argument does in the context of economic rights. See *supra* note 151. Conversely, the victim class uses a narrow time frame to demonstrate the futility or inadequacy of counter-speech.

tion) and action is too remote or uncertain, or because the third parties so agitated or persuaded are viewed as independent moral actors who freely choose to engage in the undesirable conduct or else have adequate, available alternatives to harming the victim. Thus, the speaker's control over the effects of her speech, and in particular, her control over third-party reactions to it, is deemphasized.

It is interesting to compare these factual characterizations with those used by courts before speech received the high level of protection it enjoys today. For example, in the early World War I free speech cases, the courts presumed that defendants intended the reasonable and foreseeable consequences of their speech, including the foreseeable acts of third parties who might be goaded into action by the speech.¹⁶³ Even after the Supreme Court adopted the clear and present danger test in *Schenck v. United States*,¹⁶⁴ courts routinely emphasized the likelihood and magnitude of the harms that might accrue from radical expressive activity.¹⁶⁵

Of course, when the right involved is not speech but contract, factual depictions change quite dramatically. One need only compare *Schneider v. State*,¹⁶⁶ an early case taking a strong pro-speech position in the area of time, place, and manner regulation, with a case like

¹⁶³ E.g., *Schafer v. United States*, 255 F. 886, 887-88 (9th Cir. 1919) (upholding the denial of a directed verdict for the defendant charged under the Espionage Act for mailing a book decrying patriotism as "murder and the spirit of the devil." The court held that even though the book did not mention recruitment, enlistment, or service, denigrating patriotism and labeling the war effort as immoral and criminal would tend to harm enlistment, and it is enough if "the natural and probable tendency and effect of the words quoted therefrom are such as are calculated to produce the result condemned by the statute.").

¹⁶⁴ 249 U.S. 47, 52 (1919).

¹⁶⁵ *Id.* In the alternative, courts deferred to legislative determinations that the harm was sufficiently great as to require regulation. *Gitlow v. New York*, 268 U.S. 652, 668 (1925) ("[T]he State has determined, through its legislative body, that utterances advocating the overthrow of organized government by force, violence and unlawful means, are so inimical to the general welfare and involve such danger of substantive evil that they may be penalized in the exercise of its police power. That determination must be given great weight."). *Id.* at 669 ("The State cannot reasonably be required to measure the danger from every such utterance in the nice balance of a jeweler's scale. A single revolutionary spark may kindle a fire that, smouldering for a time, may burst into a sweeping and destructive conflagration.").

During the McCarthy Era, these same communalist arguments reemerged. See, e.g., *Dennis v. United States*, 341 U.S. 494, 550 (1951) (Frankfurter, J., concurring in affirmance) ("It is not for us to decide how we would adjust the clash of interest which this case presents were the primary responsibility for reconciling it ours. Congress has determined that the danger created by advocacy of overthrow justifies the ensuing restriction on freedom of speech.").

¹⁶⁶ 308 U.S. 147 (1939).

Larsen v. General Motors Corp.,¹⁶⁷ holding a defendant liable for negligently failing to design a "crashworthy" vehicle—a car that minimizes injuries to the driver in the event of a collision.

In *Schneider*, the Court confronted a series of ordinances from different jurisdictions that prohibited the distribution of handbills on streets or in other public places.¹⁶⁸ The justification for this prohibition was that it helped to prevent littering. The lower court reasoned that although the handbill distributor may not have intended it, "[e]xperience teaches that the immediate result of the indiscriminate distribution of handbills on public streets is the littering of those streets."¹⁶⁹ The Supreme Court rejected this communalist characterization—communalist because the defendant was held responsible for the predictable acts of third parties that harmed the public interest. It argued that absent sufficient state interest, as in this case, the government could not criminalize "handing literature to one willing to receive it,"¹⁷⁰ and that the city had alternatives to punishing the defendant—namely "punish[ing] . . . those who actually throw papers on the streets."¹⁷¹

The Court's argument is, in practical terms, individualist—the Constitution requires that the leaflet recipient must be considered the responsible party, not the defendant, who has no control over what the recipient does with it. As if to emphasize the defendant's lack of causal responsibility, the Court describes littering as merely an "indirect" consequence of leafleting.¹⁷² Additionally, the Court holds that "[a]ny burden imposed upon the city authorities in cleaning and caring for the streets as an indirect consequence of such distribution results from the constitutional protection of the freedom of speech and press."¹⁷³ Here the Court is quite direct in placing the legal responsibility for cleaning up the litter on the injured party (here the city, representing its citizens) and not on the alleged injurer (the leafleter). Moreover, far from being powerless to prevent the harm,

¹⁶⁷ 391 F.2d 495 (8th Cir. 1968).

¹⁶⁸ One of the four ordinances prohibited canvassing without a permit. *Schneider*, 308 U.S. at 154-59.

¹⁶⁹ *People v. Young*, 33 Cal. App. 2d Supp. 747, 751-52, 85 P.2d 231, 233 (1938), rev'd sub nom. *Schneider v. State*, 308 U.S. 147 (1939) (overturning the Los Angeles ordinance).

¹⁷⁰ *Schneider*, 308 U.S. at 162.

¹⁷¹ *Id.*

¹⁷² *Id.*

¹⁷³ *Id.*

the injured party (the city) has plenty of alternatives. It simply can direct its enforcement efforts at the truly responsible parties—the litterers.

By contrast, *Larsen* held that General Motors could be held legally responsible for designing a car that, although not dangerous when driven carefully, might create additional hazards to a driver involved in an accident.¹⁷⁴ The court, in other words, required the defendant to take into account the effects of negligence by either the victim herself or a third party who crashed into her. An individualist argument along the lines of that in *Schneider* would have stressed that the defendant is not responsible for the plaintiff's or third parties' freely chosen actions that result in injury, even if it is predictable that some automobile accidents will happen. For example, in an earlier case, *Evans v. General Motors Corp.*,¹⁷⁵ a court argued that "the defendant also knows that its automobiles may be driven into bodies of water, but it is not suggested that defendant has a duty to equip them with pontoons."¹⁷⁶

The court's argument in *Larsen* reflects the generally communalist rhetoric characteristic of tort law in the latter half of this century. Where the plaintiff suffers "injuries or enhanced injuries . . . due to the manufacturer's failure to use reasonable care to avoid subjecting the user of its products to an unreasonable risk of injury"¹⁷⁷ the manufacturer is responsible. Moreover, the court emphasized that "[c]ollisions with or without fault of the user are clearly foreseeable by the manufacturer and are statistically inevitable."¹⁷⁸ Finally, while downplaying the plaintiff's own choices and alternatives for avoiding injury, the court argued that "[w]hile all risks cannot be eliminated nor can a crash-proof vehicle be designed under the present state of the art, there are many common-sense factors in design, which are or should be well known to the manufacturer that will minimize or

¹⁷⁴ *Larsen v. General Motors Corp.*, 391 F.2d 495, 502-05 (8th Cir. 1968).

¹⁷⁵ 359 F.2d 822 (7th Cir.), cert. denied, 385 U.S. 836 (1966).

¹⁷⁶ *Id.* at 825; see also *id.* at 824 ("The intended purpose of an automobile does not include its participation in collisions with other objects, despite the manufacturer's ability to foresee the possibility that such collisions may occur.").

¹⁷⁷ *Larsen*, 391 F.2d at 502; see also *id.* at 505 ("The normal risk of driving must be accepted by the user but there is no need to further penalize the user by subjecting him to an unreasonable risk of injury due to negligence in design." (footnote omitted)).

¹⁷⁸ *Id.* at 502 (footnote omitted).

lessen the injurious effects of a collision."¹⁷⁹

Certainly with a little effort one could distinguish the principle of decision in *Schneider* from that in *Larsen*. What is interesting about the juxtaposition of these two examples, however, is the dominant mode of discourse that each represents. The general trend of factual characterization in economic regulation cases is increasingly communalist—viewing victims as lacking in expertise, information, and alternatives, and emphasizing the injurer's knowledge of and responsibility for harms even when they are indirect or remote, or result from the confluence of several agencies. On the other hand, our decidedly pro-speech interpretation of the first amendment law has rejected every single one of these assumptions. The same plaintiff who is judged comparatively helpless in consumer transactions is assumed to be sufficiently responsible to take care of her own interests when faced with potentially harmful expression. Those considered inexperienced and disadvantaged in the marketplace of economics are deemed adept and competent in the marketplace of ideas.

The point of this discussion is not to call for a reevaluation of first amendment jurisprudence or of modern tort law, though perhaps some readers might find one or the other desirable. My point is that a background set of ideological assumptions undergirds our use of the terms "responsibility" and "causation." We simply have a different set of prejudices about who is doing what to whom and who is responsible for it when we move from economic rights to expressive rights. This difference no doubt explains the reactions that economic libertarians¹⁸⁰ occasionally receive in more mainstream circles. Such thinkers, who may hold the right of free contract almost as dear as that of free speech, undergird their beliefs with a consistent series of background assumptions about who is responsible for the injuries and losses that occur in a market economy. In fact, these beliefs are not too dissimilar from the mainstream views regarding responsibility with respect to speech. Nevertheless, the rhetoric of self-reliance embedded in the metaphor of the marketplace of ideas has a distinctly different political valence when it is applied to economic rights.

Similarly, I suspect that many traditional liberals find contempo-

¹⁷⁹ Id. at 503.

¹⁸⁰ See, e.g., R. Epstein, *Takings* (1985); R. Nozick, *Anarchy, State, and Utopia* (1974).

rary feminist critiques of pornography¹⁸¹ disturbing simply because these critiques refuse to take for granted traditional assumptions about responsibility and causation in the context of speech. Radical feminist arguments against pornography take a much more communalist attitude toward expressive conduct than many (male) lawyers are accustomed to.¹⁸²

Because of its relatively communalist orientation, the radical feminist critique adopts precisely the opposite rhetorical devices to describe the responsibility of injurers and victims. The critique views the pornographer as much more responsible for the foreseeable effects of pornography on the attitudes of third parties who harm women.¹⁸³ The critique emphasizes the harms that speech causes to the victim class; the victim class is subjected to violent assaults, and society-wide subordination and discrimination resulting from the structure of male-female relations, which is perpetuated by the widespread availability of pornography.¹⁸⁴ Finally, this perspective portrays the victims of pornography as lacking adequate alternatives to regulating pornography;¹⁸⁵ they are viewed as trapped in a patriarchal system that prevents their views from being heard and given credence.¹⁸⁶ This argument thus rejects the claim that counter-speech without regulation of pornography is an effective remedy to the harms caused by pornography.¹⁸⁷ Taken as a whole, the radical feminist critique's treatment of the harms accruing from pornographic speech bears a remarkable structural similarity to the communalist rhetoric we normally hear in the field of economic regulation. Clearly the standard mainstream legal ideology in this country characterizes responsibility quite differently than does the worldview that animates the radical feminist critique.

¹⁸¹ E.g., C. MacKinnon, *Feminism Unmodified* 125-213 (1987).

¹⁸² Note that the radical feminist position is relatively communalist only in the context of a particular set of issues—the regulation of pornography. As to other situations in which regulating speech is at issue, radical feminist thinkers may take just as individualist a position as traditional liberals do.

¹⁸³ C. MacKinnon, *supra* note 181, at 138, 156-57, 161-62, 171-72, 183-90, 199-200.

¹⁸⁴ *Id.* at 138, 156-57, 161-62, 183-90, 199-200, 202.

¹⁸⁵ *Id.* at 129-30, 140, 155-58.

¹⁸⁶ *Id.* at 140, 155-58, 181-82.

¹⁸⁷ *Id.* at 192-93.

V. CONCLUSION: RESPONSIBILITY AND IDEOLOGY

It should be clear by now that the ways in which people characterize responsibility are deeply tied to their ideological beliefs. Indeed, the examples in this Article suggest that a fruitful way to study ideology is to look carefully at the various situations and conditions under which people assign greater or lesser responsibility to actors.

Holding the members of a particular group (whether injurers or victims) more responsible is to emphasize their free will and available alternatives, to manipulate time frames to emphasize inculpatory facts, and (simultaneously) to deemphasize the responsibility, free will, and available alternatives of others. This double movement is important to recognize, for we do not hold everyone responsible for everything any more than we think that everyone is blameless. Responsibility is a concept understood through contrast and relation—in contrast to the responsibility of others, and in relation to other concepts like fault, causation, free will, and available alternatives. To the extent that we emphasize the responsibility of manufacturers for product-related injuries, we deemphasize the responsibility of consumers for product misuse. To the extent that we believe that the cause of poverty is individual sloth, we divert blame from social practices and institutions.

The methods we use to characterize responsibility do not change as we move from issues of consumer protection to criminal law to free speech to abortion. The same techniques of individualist and communalist argument recur, and they can be used to generate the same types of factual characterization and recharacterization. Ideology, then, is reflected by how people choose characterizations of responsibility in different social settings.

Responsibility and ideology also are connected through our attitudes toward rights. The more we consider an activity or right (say free speech or free contract) especially important and worth protecting, the more we tend to deemphasize the responsibility of actors who exercise that right for the harms that their activity causes to others. Put in more familiar terms, the individualist position for a given right opposes regulation of the right and characterizes the person exercising it as not responsible for its effects on others. The harm created by the exercise of the right is downplayed or deemphasized, and responsibility for the harm is placed on the victim class or third persons over whom the person exercising the right is claimed to have no control.

Conversely, the more we consider an activity or right as relatively unimportant and undeserving of special treatment, the more we tend to emphasize the responsibility of actors who exercise that right. Thus, the communalist position for a given right supports regulation of the right and characterizes the person exercising it as responsible for its effects on others. The harm created by the exercise of the right is highlighted and emphasized. The class of persons harmed by the exercise of the right is characterized as relatively less responsible for its predicament. Responsibility for the harm is placed instead on the person exercising the right, both for her own actions and the actions of third parties that harm the victim class.

The rhetorical devices used to stress or deemphasize the responsibility of injurers and victims are the same regardless of the right involved. Although the right at issue changes, the basic structure of opposing factual characterizations does not. What does change is the group of persons using individualist or communalist characterizations for any particular right. Thus, another way to understand ideology is to study the types of rhetorical devices used by people as they consider different categories of rights.

The previous examples of contrasting rhetoric about speech and contract rights should serve to indicate how we can illuminate the study of ideology through understanding the basic devices of the rhetoric of responsibility. If, as I have argued, we can distinguish political ideologies by the claims they make about rights and responsibilities, then the rhetorical devices identified in this Article can be seen as the building blocks of many different varieties of ideological argument. This study of rhetorical devices is a quite different and yet, I believe, quite important way to approach the study of ideology. Rather than viewing ideological argument as a smokescreen hiding the real interests of actors, the study of the rhetoric of responsibility takes the arguments that people make very seriously indeed. To understand how we argue is to understand how we think, and thus how we present the world to ourselves.

