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**The Perfect Storm, the Perfect Culprit:
How a Metaphor of Fate Figures in Judicial Opinions**

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The Perfect Storm, the Perfect Culprit: How a Metaphor of Fate Figures in Judicial Opinions

Carol McCrehan Parker*

*“After all, who can blame you if the ship goes down in one of those freak, once-in-a-century storms that result when three weather systems collide? It’s an act of nature that nobody could have predicted—or so the story goes.”*¹

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1. Steven Pearlstein, *A Perfect Storm? No, a Failure of Leadership*, WASH. POST, Dec. 10, 2008, at D01.

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I. INTRODUCTION

In the autumn of 1991, a swordfishing boat named the *Andrea Gail* was lost in the Halloween Gale, a terrible storm described by a meteorologist as a “perfect storm.”² After the publication of a book and release of a movie depicting that event, both titled *The Perfect Storm*, the phrase entered the popular culture often describing circumstances of entirely human origin, applied in apparently limitless contexts, including more than 160 judicial opinions.³ The phrase even appears in a Westlaw headnote to an opinion in which the phrase otherwise does not appear at all.⁴ The phrase must fulfill a rhetorical need, but what does it express? It is shorthand for something, but for what?

Although most people who use the phrase likely have not read *The Perfect Storm*, the phrase nevertheless operates as a narrative metaphor, conjuring up forces beyond human control, rooted in the story of the *Andrea Gail*. Something in the story of a devastating storm must speak to our collective understanding of the world. But what is that story? Is it a tale of “men against the sea,” as depicted in Sebastian Junger’s book, *The Perfect Storm*?⁵ Or is it the story of a reckless decision made by “a down-and-out swordboat captain who was obsessed with the next big catch,” as suggested in the film based on Junger’s book?⁶ Or is it the story of an employer’s negligence in sending out an unseaworthy fishing boat?⁷

While each of these stories offers a plausible explanation for the loss of the

2. See SEBASTIAN JUNGER, *THE PERFECT STORM: A TRUE STORY OF MEN AGAINST THE SEA* 150 (1997) (reporting that Bob Case, a National Weather Service meteorologist who was tracking the Halloween Gale on October 29, 1991, described it as “the perfect storm”).

3. A Westlaw search conducted on December 12, 2011 found the term “perfect storm” used as a metaphor in 168 cases decided after the release of the movie, *The Perfect Storm*, which was based on Junger’s book, *supra* note 2.

4. *In re Rhodes*, 356 B.R. 229 (Bankr. M.D. Fla. 2006). The head note says that a debtor’s nonpayment of a federal income debt was not shown to be willful, “given debtor’s prior history of consistently paying his taxes prior to ‘perfect storm’ caused by stock market collapse and downsizing of his business in wake of terroristic attack of September 11th.” *Id.* Although the phrase “perfect storm” is absent from the text to which the head note refers, the passage describes the circumstances in terms of key elements of the perfect storm narrative, including a convergence unpredictable events having devastating consequences. Despite noting that some of the debtor’s “conduct may be perceived, with the benefit of hindsight, as poor judgment or outright mistakes,” *id.* at 237, the court focused on the unexpected convergence of a stock market crash and the effects of the September 11th attacks—repeating several time the phrase “totality of circumstances”—and concluded that “Plaintiff is an honest but unfortunate debtor.” *Id.* at 239.

5. The full title of Junger’s book is *The Perfect Storm: A True Story of Men Against the Sea*. JUNGER, *supra* note 2.

6. *Tyne v. Time Warner Entm’t Co.*, 336 F.3d 1286, 1288–89 (11th Cir. 2003) (action by survivors of the captain of the *Andrea Gail* against producers and distributors of the movie, *The Perfect Storm*, alleging false light invasion of privacy and commercial misappropriation).

7. See Plaintiff’s Complaint and Jury Trial Demand at 2, *Shatford v. Sea Gale Corp.*, No. 91-13146C (D. Mass. Dec. 2, 1991) (on file with the *McGeorge Law Review*).

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Andrea Gail, the sense most often conveyed by the phrase is that of tragic fate. This is the story of a *force majeure*—a freak storm involving the convergence of weather systems—that could not have been predicted or controlled, and inevitable loss. Nothing could have been done to prevent that loss, and no one is to blame. The perfect storm is the single cause.⁸

Why does this story resonate? Why do we describe so many situations in terms of a convergence of forces beyond our control? To understand the popularity of the metaphor in popular discourse we must ask what in our common experience is reflected in the metaphor of the “perfect storm.” As Chad Oldfather has written, “[p]erhaps as important as their power to alter ways of thinking is the fact that metaphors reflect the beliefs and perceptions of those who use them.”⁹

Do we experience ourselves as part of a “true story of men against the sea,” caught in a drama of inevitability? Do we feel helpless in the face of forces beyond our control and seek reassurance that the results we fear are not our fault? Are events too complicated to sort out or too unusual to merit the effort of sorting them out? Or, is the convergence of circumstances, itself, the key? Is the whole wholly different from its parts, those parts inextricably linked? Do we feel more interconnected and so less able to differentiate among causative agents? Do we seek to avoid blame or save face? Or do we feel simply that whatever we may have done wrong or whatever we should have done differently—we didn’t cause *this*? We couldn’t have predicted *this*.

To explore those questions, this essay will examine how the perfect storm metaphor has been used in judicial opinions. Part II will discuss the principal narrative, as presented in Junger’s book, and two counter-narratives: one depicted in the movie *The Perfect Storm* and contested in a lawsuit brought by survivors of the captain of the *Andrea Gail* against the producers and distributors of that film; and the other one set out in litigation following the loss of the *Andrea Gail* between her owner and the families of her crew. Part III will discuss the construction of the perfect storm metaphor rooted in the principal narrative. Part IV will discuss how the narrative elements of the metaphor figure in judicial opinions. Finally, Part V will consider the deep hold the metaphor of a hundred-year storm has taken on our collective imagination and the troubling implications for the legal system of a metaphor that emphasizes the role of fateful coincidence and devalues the role of human responsibility.

8. For a fascinating extended discussion on allocation of legal blame, see generally, NEAL FEIGENSON, *LEGAL BLAME* (2000). According to Feigenson, “[p]eople’s preferences for simple, indeed monocausal, accounts of events points toward a melodramatic conception of accidents, in which one and only one party is to blame.” *Id.* at 92.

9. Chad M. Oldfather, *The Hidden Ball: A Substantive Critique of Baseball Metaphors in Judicial Opinions*, 27 *CONN. L. REV.* 17, 51 (1994). See also GEORGE LAKOFF & MARK JOHNSON, *METAPHORS WE LIVE BY* 19 (1980) (“In actuality, we feel that no metaphor can ever be comprehended . . . independent[] of its experiential basis.”) (emphasis omitted).

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II. THE NARRATIVES

Six fishermen went out in a fishing boat and never came back. A United States Coast Guard Marine Safety Office report offers the following account:

The F/V [fishing vessel] ANDREA GAIL, an uninspected commercial fishing vessel departed Gloucester Harbor, Massachusetts, September 20, 1991 with six crewmembers on board. The crew intended to make a fishing trip for swordfish in the area of the Grand Banks off Newfoundland, Canada. The vessel began its return voyage to Gloucester, MA on October 26–27, 1991. On October 30, 1991, the vessel was reported overdue by the owner, Mr. Robert Brown. An extensive air and sea search was conducted utilizing U.S. and Canadian resources covering an area from the Grand Banks to Cape Cod, Massachusetts. However, the search did not locate the vessel or any of the crewmembers. The vessel and six crewmembers remain missing and are presumed lost at sea.¹⁰

No one knows what happened to those fishermen. Narratives offered in a book, a movie, and litigation documents all tell stories of peril and risk inherent in commercial fishing, which the Department of Labor has identified as the deadliest job in the United States.¹¹ The narratives, though, differ as to which dangers are depicted as natural phenomena—to be accepted as unavoidable parts of life—and which dangers as attributable to people worthy of blame.

A. *The Book*

Like a lawyer drafting a statement of facts, Sebastian Junger, in his non-fiction novel *The Perfect Storm*, constructs a story of what-cannot-be-known from information that *is* known—by piecing together elements gleaned from multiple sources to create a compelling narrative from incomplete and sometimes

10. U.S. COAST GUARD MARINE SAFETY OFFICE, U.S. DEP'T OF TRANSP., DISAPPEARANCE OF THE FISHING VESSEL (F/V) ANDREA GAIL, O.N. 592898, IN THE NORTH ATLANTIC OCEAN, BETWEEN 28 AND 30 OCTOBER 1991 WITH THE PRESUMED LOSS OF SIX CREWMEMBERS. (Dec. 17, 1993) (on file with the *McGeorge Law Review*).

11. See BUREAU OF LABOR STATISTICS, U.S. DEP'T OF LABOR, NATIONAL CENSUS OF FATAL OCCUPATIONAL INJURIES IN 2008, at 4 (Aug. 20, 2009), available at http://www.bls.gov/news.release/archives/cfoi_08202009.pdf (on file with the *McGeorge Law Review*) (preliminary data for 2008 showing fishers and related fishing workers to have the highest fatality rate among selected occupations with high fatality rates). In 2000, a news release by the National Institute for Occupational Safety and Health, the federal agency responsible for research on prevention of occupational injury, Director Linda Rosenstock stated, “[c]ommercial fisherman need not be trapped in a ‘Perfect Storm’ to be in danger of death or serious injury on the job.” Nat’l Inst. for Occupational Health & Safety, Centers for Disease Control and Prevention, *Beyond ‘The Perfect Storm’: Preventing Death and Injury in the Commercial Fishing Industry* (2000) <http://cdc.gov/niosh/updates/perfstrm.html> (on file with the *McGeorge Law Review*). Seattle maritime attorney Jim Beard is quoted as saying, “[f]ishing is like a slot machine—always just enough payoff to keep a sailor coming back tomorrow. It’s like lawyering, except that I gamble my house; they gamble their lives.” Lynda Edwards, *The Cemetery Sea*, A.B.A. J., May 2009, at 35, 39.

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conflicting facts. The myth of the sea is interwoven in every aspect of the narrative.¹² Its seaport setting, Gloucester, Massachusetts, presented as rough¹³ and insular,¹⁴ becomes almost a character in the story.¹⁵

The Crow's Nest, a local bar frequented by fishermen and where the mother of one of the *Andrea Gail's* crew tended bar, is described as having "a touch of the orphanage to it. It takes people in, gives them a place, loans them a family."¹⁶ In describing the fisherman, where they lived, and the people who cared about them, the author not only introduces the reader to the very human crew of the *Andrea Gail* but also conveys a sense of inevitability; the reader knows what their fate will be, although the crew do not.¹⁷ Junger makes the characters important to the reader who seeks to find meaning in their fate.

Reading as a lawyer when I began the book, the first place I considered looking for meaning was in a lawsuit: the crew was lost, and I wanted to sue someone. The owner of the boat, Bob Brown, seemed a good candidate. He was not warmly presented in the narrative: "On the one hand he's a phenomenally successful businessman who started with nothing and still works as hard as any crew member on any of his boats. On the other hand, it's hard to find a fisherman in town who has anything good to say about him."¹⁸

In addition, Junger notes some facts suggesting that the boat may not have

12. The book begins with a prologue about a bottle retrieved in 1896 by the crew of a mackerel schooner on Georges Bank. Inside was a note written by a fisherman lost in a storm the year before saying, "[o]n Georges Bank with our cable gone, our rudder gone, and leaking. Two men have been swept away and all hands have been given up The one that picks this up let it be known. God have mercy on us." JUNGER, *supra* note 2, at 3. Adding to the reader's sense of inevitability, a story drawn from *Moby Dick*, written by Herman Melville in 1850, is juxtaposed with present-day Gloucester, MA to suggest that little has changed since the crew of that mackerel schooner was lost. *Id.* at 16–17.

13. Following the prologue, the story begins by describing Rogers Street in Gloucester—where the "smell of ocean is so strong that it can almost be licked off the air," where "men in t-shirts stained with fishblood" can be heard shouting "to each other from the decks of boats," where "[b]eer cans and old pieces of styrofoam rise and fall and pools of spilled diesel fuel undulate," and where one of the fishermen lies asleep: "He's got one black eye." *Id.* at 5. In its early years, "Gloucester was a perfect place for loose cannons It was poor, remote, and the Puritan fathers didn't particularly care what went on up there." *Id.* at 43–44.

14. The Crow's Nest bartender observed that "[t]here are people in town . . . who have never driven the forty-five minutes to Boston, and there are others who have never even been over the bridge." *Id.* at 18. Junger writes, "[t]o put this into perspective, the bridge spans a piece of water so narrow that fishing boats have trouble negotiating it. In a lot of ways the bridge might as well not even be there; a good many people in town see the Grand Banks more often than, say, the next town down the coast." *Id.*

15. Between two church bell towers, visible for miles by incoming ships, is a "sculpture of the Virgin Mary, who gazes down with love and concern at a bundle in her arms. This is the Virgin who has been charged with the safety of the local fishermen. The bundle in her arms is not the infant Jesus; it's a Gloucester schooner." *Id.* at 27.

16. *Id.* at 18.

17. Or do they? Junger writes, "[p]eople often get premonitions when they do jobs that could get them killed, and in commercial fishing . . . people get premonitions all the time." *Id.* at 31. Before this trip, Junger notes that at least one person had a "funny feeling" about the trip and walked off the boat, despite needing the work. *Id.* at 30–31. "Half the crew have misgivings about this trip, but they're going anyhow; they've crossed some invisible line, and now even the most desperate premonitions won't save them." *Id.* at 39.

18. *Id.* at 83. One of Bob Brown's employees, though, has written that she signed a standard employment agreement with him many trips ago, "trusting Bob to treat me fairly, which he has." LINDA GREENLAW, *THE HUNGRY OCEAN: A SWORDBOAT CAPTAIN'S JOURNEY* 15 (1999).

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been seaworthy. Unlike most boats in the fleet, the *Andrea Gail* stored fuel on an upper deck, which raised the center of gravity making the boat slower to recover from rolls.¹⁹ A near-disaster had occurred several years earlier when a wave pushed the boat “so far over that her rudder came part-way out of the water,” perhaps because the portside bulwark tended to hold water on deck.²⁰ Junger reports that Bob Brown had attributed the incident to “the inexperience of the man at the helm and said that it was [Brown’s] own quick action that saved the boat.”²¹

The crew, by contrast, saw the incident as “bad luck briefly followed by good.”²² Later in the book, Junger writes,

There’s a certain amount of denial in swordfishing. The boats claw through a lot of bad weather Still, every man on a sword boat knows there are waves out there that can crack them open like a coconut. . . . Once you’re in the denial business, though, it’s hard to know when to stop. . . . Coast Guard inspectors say that going down at sea is so unthinkable to many owner-captains that they don’t even take basic precautions.”²³

Thus framed, the narrative follows the voyage of the *Andrea Gail* as the weather worsens and routing decisions and the captains of the *Andrea Gail* and other fishing boats make routing decisions, until the captain sends the last message from the *Andrea Gail*, a weather check: “She’s comin’ on boys, and she’s comin’ on strong.”²⁴

The remainder of the narrative describes what might have happened to that crew, based on accounts of Coast Guard rescuers and others who experienced the storm. Near the end of the book, Junger writes,

Within weeks of the tragedy, families of the dead men get a letter from Bob Brown asking them to exonerate him from responsibility. . . . For several of the bereaved . . . this is the only letter they get from Bob Brown. . . . They see [him] as a businessman who has made hundreds of thousands of dollars off men like their husbands. To a woman, they decide to sue.²⁵

The families of the fishermen sued the owner of the boat under the Death on the High Seas Act,²⁶ described by Junger as “a vestige of the hard-nosed English Common Law, which saw death at sea as an act of God that shipowners couldn’t

19. JUNGER, *supra* note 2, at 82.

20. *Id.*

21. *Id.*

22. *Id.* at 82–83.

23. *Id.* at 95–96.

24. *Id.* at 106.

25. *Id.* at 215.

26. 46 U.S.C. §§ 30301–30308 (2006).

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possibly be held liable for.”²⁷ Thus, Junger’s narrative implies that the families sued not because they believed that the loss was attributable to any human cause but rather in response to Brown’s insulting demand.

The litigation progressed through discovery, which included the deposition of a former manager of the shipyard that had altered the *Andrea Gail* several years earlier. After the manager stated that no marine architect had been consulted and no tests had been conducted for stability or evaluation of the weight to be added, plaintiff’s counsel asked him how the *Andrea Gail* compared to other similar boats. Junger writes, “[the manager] doesn’t hesitate. Oh, top of the line.”²⁸

After that deposition, Junger describes the plaintiffs’ case as “fraying at the edges”:

By the standards of the industry she was a seaworthy boat, fit for her task, and sank due to an act of God rather than any negligence on Bob Brown’s part. The alterations to her hull may have helped her roll over, but they didn’t cause it. She rolled over because she was in the . . . Storm of the Century, and no judge is going to see it otherwise.²⁹

And so it would seem to the reader who has read a masterful defendant’s brief—or more accurately, its statement of facts—which conveys the clear message that any lawsuit would be futile. The fatalistic tone toward the lawsuit mirrors the fatalistic tone of inevitability surrounding the fishermen’s fate. The harm was caused by the Storm of the Century, “a tempest . . . created by so rare a combination of factors that it could not possibly have been worse.”³⁰ The reader is left with a “breathless sense of what it feels like to be caught, helpless, in the grip of a force beyond our understanding or control.”³¹

The storm was perfect; no person could have been responsible. Within the eternal conflict of man versus nature, the storm comes to represent man versus nature’s *perfection*: man versus Creation. In that conflict, man must lose and

27. JUNGER, *supra* note 2, at 216. In fact, the Death on the High Seas Act (DOHSA), 46 U.S.C. §§ 30301–30308 was enacted in 1920, as was the Jones Act, 46 U.S.C. § 30104 (2006). The DOHSA limits wrongful death damages to pecuniary loss. *Id.* at § 30303. Maritime law reflects a “special solicitude” for seamen and owes a “much greater debt to the civil law.” *Moragne v. States Marine Lines, Inc.*, 398 U.S. 375, 387 (1970). Brown brought suit under another statute, enacted in 1851, known as the Exoneration and Limitation of Liability Act. 46 U.S.C. § 30511 (2006). That act may have harsher consequences, limiting liability to the value of the vessel and cargo at the time of the loss. *See generally* FRANK L. MARAIST & THOMAS C. GALLIGAN, JR., *ADMIRALTY IN A NUTSHELL* 332–39 (4th ed. 2001).

28. JUNGER, *supra* note 2, at 217.

29. *Id.* at 218. Industry standards may not be the only hurdle for a plaintiff’s attorney to overcome. *See* Edwards, *supra* note 11, at 35, 43 (“Sometimes it is hard for maritime lawyers to explode the stereotype jurors and even judges may have of fishing crews. People figure these guys take risky jobs to hide from busted marriages or arrest warrants. There are problems with drugs and drinking, problems with women, the stereotype goes.”).

30. SEBASTIAN JUNGER, *THE PERFECT STORM: A TRUE STORY OF MEN AGAINST THE SEA* (paperback ed. 2000).

31. JUNGER, *supra* note 2, at back flap.

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nothing he can do will change that result. The perfect storm thus becomes a powerful metaphor for a convergence of forces that no one can fully understand—and for which no one can be held responsible.

B. The Counter-Narratives

Two counter-narratives offer alternative theories of responsibility. First, the story told in the movie *The Perfect Storm* attributes at least some responsibility to reckless decisions by the *Andrea Gail*'s captain. Second, lawsuits brought by the families of crew members argue that the crew might have been spared but for the unseaworthiness of the fishing boat and its owner's negligence.

1. The Movie

Several years after publication of *The Perfect Storm*, a movie based on the book and having the same title was released. As the Eleventh Circuit observed, “[u]nlike the book, the Picture present[s] a concededly dramatized account of both the storm and the crew of the *Andrea Gail*.”³² Of course, in this telling of the story, the vivid images are displayed on the screen, rather than evoked in the reader's mind.³³

In the movie, the ship's captain, Billy Tyne, “[is] portrayed as a down-and-out swordboat captain who was obsessed with the next big catch.”³⁴ He is driven to complete the voyage despite the storm, at one point berating his “crew for wanting to return to port.”³⁵ The captain “is convinced that he can change his luck by going beyond the normal reach of New England fishing boats to the Flemish Cap, a remote area known for its rich fishing prospects. . . . [H]e thinks he can beat the storm back to Gloucester, taking an enormous catch with him.”³⁶ He is “a captain who ‘has hit a dry patch’ and whose last catch ‘is dwarfed by that of rival captain Linda Greenlaw . . . and scorned by the greedy boat owner.”³⁷

For those reasons, “Tyne decides to head straight out again, despite the weariness of his men and the treacherous October weather. . . . [A]fter pursuing

32. Tyne v. Time Warner Entm't Co., 336 F.3d 1286, 1288 (11th Cir. 2003).

33. The cinematic images, at times, may more closely resemble such a reader's imagination than reality. For example, one website poster writes, “[w]hat the men of *Andrea Gail* have gone through, must have been terrible. The plot of the movie is ok, but the movie is showing waves being 3 times the size of the boat (72 ft), or about 216 ft!” Lettens Jan, MFV *Andrea Gail* (+1991), Wrecksite (June 12, 2010), www.wrecksite.eu (scroll over “wrecks” tab; follow “search wreck” hyperlink in the drop-down menu; search for “*Andrea Gail*”; then follow “*Andrea Gail* MFV (+1991)” hyperlink).

34. Tyne, 336 F.3d at 1288. In depositions, the filmmakers admitted fictionalizing characters and motivations for dramatic effect. Appellants' Brief in Support of Appeal at 8–13, Tyne v. Time Warner Entm't Co., 336 F.3d 1286 (11th Cir. 2003) (No. 02-13281), 2002 WL 33960143 [hereinafter Appellants' Brief].

35. Tyne, 336 F.3d at 1288.

36. Appellants' Brief, *supra* note 34, at 18.

37. *Id.* at 19 n.7 (quoting Peter Keough, *Sea Plus*, *The Perfect Storm is Downgraded*, BOSTON PHOENIX, June 20, 2000).

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the fish, with Ahab-like obsessiveness, he faces a choice of either waiting out the storm and losing the catch or facing it and perhaps losing all of their lives.”³⁸ He chooses to take the risk.

The movie’s opening credits announce, “THIS FILM IS BASED ON A TRUE STORY.”³⁹ However, a lawsuit brought against the film’s producers and distributors by the families of the captain and one of the crewmembers of the *Andrea Gail*, along with another fisherman depicted in the film, essentially alleged that the motion picture told the wrong story.⁴⁰ Instead of a tragic tale of men who go to sea, the movie told the story of a flawed captain, desperate to change his luck, who made a reckless decision to proceed in the face of well-known risks.⁴¹

2. *The Lawsuits*

On November 8, 1991—even before the search for the *Andrea Gail* and her crew had ended,⁴² Sea Gale Corporation filed its Petition for Exoneration from or Limitation of Liability in connection with the loss of the *Andrea Gail*.⁴³ The allegations set out in the Petition tell the story of a seaworthy vessel, as well-equipped as anyone could make it, presumed to have been lost in a violent storm:

On or about September 20, 1991 the F/V ANDREA GAIL departed Gloucester, Massachusetts and proceeded to the fishing grounds on the grand bank of Newfoundland. The F/V ANDREA GAIL at the commencement of her voyage aforesaid was tight, strong, fully manned, equipped and supplied, and in all respects seaworthy and fit for the

38. *Id.*

39. *See Tyne*, 336 F.3d at 1289. The closing credits, though, also stated that “[d]ialogue and certain events and characters in the film were created for the purpose of fictionalization.” *Id.*

40. The plaintiffs brought suit under Florida’s commercial misappropriation and common law false-light invasion of privacy. Although the District Court agreed that the film included fictional elements, it granted summary judgment to defendants on both counts. *Tyne v. Time Warner Entm’t Co.*, 204 F. Supp. 2d 1338, 1343 (M.D. Fla. 2002), *aff’d* 425 F.3d 1363 (11th Cir. 2005) (after certifying to the Florida Supreme court a question concerning construction of the commercial misappropriation statute).

41. Although defendants admitted fictionalizing those aspects of the film, the lawsuit was unsuccessful. *See Tyne*, 425 F.3d at 1364 (affirming grant of summary judgment to defendants). Some of the liberties taken with the text were identified in an opinion by the Eleventh Circuit: “For example, the main protagonist in the Picture, Billy Tyne, was portrayed as a down-and-out swordboat captain who was obsessed with the next big catch. In one scene, the Picture relates an admittedly fabricated depiction of Tyne berating his crew for wanting to return to port.” *Tyne*, 336 F.3d at 1288.

42. The last reported transmission from the *Andrea Gail* was received on October 28, 1991. Eight days later, on November 6, the boat’s distress-signal beacon was discovered, washed up on the shore of Sable Island. On November 10, the Coast Guard terminated its search for the *Andrea Gail*, and the crewmembers were presumed to have been lost at sea. United States Coast Guard, *supra* note 10, at 6–7.

43. United States District Court, District of Massachusetts (Boston), Civil Docket for Case 91-12894C, *Sea Gale Corp. v. Murphy*. Such petitions, brought under the Exoneration and Limitation of Liability Act, also known as the “end of the voyage rule,” may be filed by owners of boats lost at sea. If the petition is successful, the owner’s liability is limited to the value of the lost ship. 46 U.S.C. § 30511 (2006). For a vivid discussion of the operation of this statute, *see Edwards*, *supra* note 11 at 35, 37.

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service in which she was engaged.

On or about October 28 through November 1, 1991, the fishing grounds fished by the F/V ANDREA Gail were subjected to hurricane force winds and severe seas. The F/V ANDREA GAIL has not been heard from since October 28, 1991 and is presumed lost at sea along with its six man crew. On or about November 6, 1991, debris was found on Sable Island off the coast of Nova Scotia which is believed to be from the F/V ANDREA GAIL.⁴⁴

Also on November 8, 1991, families of the crewmembers brought a suit based on claims arising under the Jones Act,⁴⁵ the Death on the High Seas Act,⁴⁶ and General Maritime Law. The claimants sought to recover “all damages allowable at law resulting from the unseaworthiness of the ANDREA GAIL and the negligence of her owner the Petitioner as well as their statutory damages allowable under the Death on the High Seas Act.”⁴⁷ This lawsuit tells a story of negligence amounting to callousness on the part of the ship owner:

Exhaustive and ongoing investigations have revealed numerous defects afflicting the vessel at the time of her fateful voyage, which, more likely than not, led to her sinking. These defects include modifications to the vessel’s design which caused her to be top-heavy and which resulted in compartments which trapped water on deck.

Claimants’ most recent investigative efforts have reaped the most significant results yet. It has now been revealed that the fuel tanks of the ANDREA GAIL were so severely choked with organic debris that the vessel’s engines were repeatedly starved of fuel and caused to stall. The owner was aware of this anomaly, yet chose to disregard his engineer’s advise to haul her and decided instead to keep the vessel in the water at least throughout the lucrative fall fishing season; clearly a poor choice in hindsight. It is the Claimants’ belief that the seas at the time, easily managed by all the other seafaring vessels in the area, caused a churning up of the fuel tank debris, choking the fuel filters and stalling the engine. Without the ability to maneuver the seas, the ANDREA GAIL began taking the seas hard on the side. Already top-heavy with a tendency to roll, the vessel began taking water on her decks which was blocked from escaping by the compartments. Helpless to the seas, powerless and unable to recover from her rolls, the ANDREA GAIL finally went down

44. Pet. of Sea Gale Corp., *In re* Petition of Sea Corp., No. 91-12894C, at 1–2 (D. Mass. Nov. 8 1991).

45. 46 U.S.C. § 30104 (2006).

46. 46 U.S.C. §§ 30301–06 (2006).

47. Response by Lisa Shatford, et al. in opposition to motion for summary judgment, *In re* Petition of Sea Gale Corp., No. 91-12894C, at 2 (D. Mass. Aug. 11, 1993).

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with all hands aboard.⁴⁸

The shipowner's motion for summary judgment was allowed in part and denied in part.⁴⁹ Following that decision, the claims were settled.⁵⁰

III. THE METAPHOR

Since the publication of Junger's book and release of the movie based on that book, allusions to the "perfect storm" have been so frequent as to render the phrase a cliché.⁵¹ The meteorological term has entered the popular discourse to describe numerous crises of complex but entirely human origin.⁵²

In litigation, the image of the "perfect storm" has been invoked to conjure up the awesome and mysterious forces of nature in a variety of contexts to serve one or more of several different rhetorical purposes. In some cases, the allusion is to the devastating power of the storm,⁵³ in others cases, perhaps most often, it is to the convergence of circumstances creating the storm,⁵⁴ and in others, to the unforeseeable or highly unusual nature of that convergence.⁵⁵

When used to convey all of those attributes of the storm, the metaphor offers a complete explanation of the consequences of the storm in a way that absolves a human actor of all blame. No individual can be responsible for bad consequences when the end is inevitable and its causes unforeseeable. Moreover, in such a case, precedential clarity is of lesser concern than usual because its circumstances are unlikely to present themselves again: the perfect storm is also the exceptional case.

48. *Id.* at 1–2.

49. Clerk's notes, *In re* Petition of Sea Gale Corp., No. 91-12894C (D. Mass. Oct. 14, 1993) (on file with the *McGeorge Law Review*).

50. *See* Assented-To Motion and Order Allowing Motion, *In re* Petition of Sea Gale Corp., No. 91-12894C (D. Mass. Feb. 7, 1994) (on file with the *McGeorge Law Review*).

51. The phrase took first place in Lake Superior University's 33rd annual list of clichés to be "Banished from the Queen's English for Mis-Use, Over-Use and General Uselessness." 2008 *List of Banished Words*, LAKE SUPERIOR ST. U. (2008), <http://www.lssu.edu/banished/archive/2008.php> (on file with the *McGeorge Law Review*). *See In '08, Throw These Clichés Under the Bus*, CHI. TRIB., Jan. 1, 2008, at C4.

52. *See, e.g.*, Editorial, *How Cliché: Leaving No Stone Unturned, We Issue a Wake-Up Call on the Use of Trite Phrases. It's Time for a Change*, L.A. TIMES, Jan. 1, 2008, at A14 ("In 2007 alone, perfect storm was used to explain the troubles of race-car driver Dale Earnhardt Jr., a slide in the stock market and an uptick in the use of crystal meth."). For example, in an article in the Washington Post, business columnist Stephen Pearlstein objected to use of the phrase by business executives to describe financial crises brought about not by a force of nature but by "a widespread failure of business leadership—a failure that is only compounded when executives refuse to take responsibility for their misjudgments and apologize." Pearlstein, *supra* note 1.

53. *See infra* notes 61, 62, & 69.

54. *E.g.*, *Vandenberg v. Snedegar Construction, Inc.*, 911 N.E.2d 681, 684 (Ind. Ct. App. 2009) (expert testimony in worker's compensation case that the employee's "personality issues, the work-related accident, and other factors created a 'perfect storm' that caused [the employee] to commit suicide."); *Cleveland Fire Fighters for Fair Hiring Practices v. City of Cleveland*, No. 1: 00 CV 301, 2009 U.S. Dist. LEXIS 74221, at *17, 37 (N.D. Ohio Aug. 20, 2009) (City argued that a "perfect storm" of factors had made timely compliance with an affirmative-action consent decree "a virtual impossibility" and the court agreed, noting that the "circumstances were all unforeseen" and "beyond [the City's] control.").

55. *See infra* Part IV(C).

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This section will first discuss use of the perfect storm as descriptive imagery and then focus on its use as an explanatory metaphor. As Linda Berger has written, “[u]nderstanding how metaphor can affect legal decision making requires us first to focus on the metaphor and then to examine how it shapes and controls our subsequent thinking about a subject.”⁵⁶

A. “Perfect Storm” as Descriptive Imagery

The phrase, perfect storm, was not first coined by a meteorologist describing the Halloween Gale of 1991. Patricia O’Connor notes references published in the Oxford English Dictionary “going back to 1718 . . . though the earliest citations use the phrase positively, as in a ‘perfect storm’ of applause.”⁵⁷

Other early references, while not all positive, likewise lend the vivid image of a storm to descriptions of tumultuous expressions of emotion. For example, the following passage appears in a book published in 1894: “As soon as we found the Russian flagship within range, we opened fire upon her, and this action caused a perfect storm of projectiles to be directed upon us. The town was soon in flames, the shipping in the harbour sank, and the martello tower was blown to pieces.”⁵⁸

A lighter reference appears in a book published in 1906. In *The Annals of Covent Garden Theatre from 1732 to 1897*,⁵⁹ Henry Saxe Wyndham described a situation involving rival actors for the roles of *MacBeth* and *Richard III*. The actor originally selected for the roles had informed the proprietor that he intended to leave the company, but changed his mind after another actor, named Macklin, was retained to play the roles. An arrangement was made that the actors would play the roles in alternate performances.

Upon [Macklin’s] third appearance as MacBeth, some hissing was heard and Macklin jumped to the conclusion that it had been organized by some two or three brother actors, a theory he was quite unable to prove.

This . . . was seized upon by his enemies as a pretext for demanding his withdrawal from the company. He rightly disregarded the demand, and was met on his next appearance with a perfect storm of disapprobation. Finally, one of the actors came on the stage with a large blackboard on which was inscribed in white letters—‘*At the command of the public, Mr.*

56. Linda L. Berger, *What is the Sound of a Corporation Speaking? How the Cognitive Theory of Metaphor Can Help Lawyers Shape the Law.* 2 J. ASS’N LEGAL WRITING DIR. 169, 204 (2004).

57. Patricia T. O’Connor, *The Imperfect Storm*, THE GRAMMARPHOBIA BLOG (May 8, 2008), www.grammarphobia.com/blog/2008/05/the-imperfect-storm.html (on file with the *McGeorge Law Review*).

58. William LeQueux, *THE GREAT WAR IN ENGLAND OF 1897*, at 239 (1894). In the preface of this fantasy of a war to be fought in the future, the author is no less dire: “While many readers will no doubt regard this book chiefly as an exciting piece of fiction, I trust that no small proportion will perceive the important lesson underlying it, for the French are laughing at us, the Russians presume to imitate us, and the Day of Reckoning is hourly advancing.” *Id.* at 8.

59. HENRY SAXE WYNDHAM, *THE ANNALS OF COVENT GARDEN THEATRE FROM 1782 TO 1987* (1906).

Macklin is discharged.'

The rioters then forced [the proprietor] to appear on the stage and confirm this, and so the affair ended.⁶⁰

The phrase appears as descriptive imagery in two United States Supreme Court opinions that predate the Halloween Gale of 1991.⁶¹ Both opinions quote legislative history from 1897⁶² describing public response to legislation that “had the practical effect of reserving all of the public lands in the west from settlement.”⁶³ “[T]here came a perfect storm of indignation from the people of the West, which resulted in the prompt repeal of the extraordinary provision.”⁶⁴ It appears that Congressman Thomas McRae used the term to describe the intensity of the public’s response to the statute.⁶⁵

B. “Perfect Storm” as Explanatory Metaphor

Although the phrase was used in its meteorological sense as early as 1936,⁶⁶ the next judicial reference to a “perfect storm” does not appear until 2002,⁶⁷ beginning a wave of references in subsequent years.⁶⁸ Not only the frequency, but also the character of these references is different from the earlier references. While an occasional opinion written after the year 2000 uses “perfect storm” as a bit of dramatic imagery to describe the intensity of an event,⁶⁹ in the great majority of cases, the term alludes to additional elements of the story of the

60. *Id.* at 195–96.

61. *Utah Division of State Lands v. United States*, 482 U.S. 193 (1987); *California v. United States*, 438 U.S. 645 (1978).

62. *Utah Division of State Lands*, 482 U.S. at 199; *California*, 438 U.S. at 659.

63. *California*, 438 U.S. at 659.

64. 29 Cong. Rec. 1955 (1897) (statement of Cong. McRae).

65. *Id.* These early references to a “perfect storm” may be termed “decorative” in that they enliven description of an event rather than construct meaning for that event. A more recent opinion similarly employs the image to describe “a veritable ‘perfect storm’ of mistakes, errors, misdeeds, and improper litigation practices by plaintiff’s counsel.” *Erin Services Co. v. Bohnet*, 2010 WL 743828 at *1 (N.Y. Dist. Ct. Feb. 23, 2010).

66. See *Perfect Storm Definition*, MERRIAM-WEBSTER’S ONLINE DICTIONARY, <http://www.merriam-webster.com/dictionary/perfect%20storm> (last visited Jul. 19, 2011) (“A critical or disastrous situation created by a powerful concurrence of factors . . . [the] first known use of perfect storm [was in] 1936.”) (on file with the *McGeorge Law Review*). See O’Connor, *supra* note 57 (“The first use of the expression in the meteorological sense comes from the March 20, 1936, issue of the Port Arthur (Texas) News: ‘The weather bureau describes the disturbance as the perfect storm of its type. Seven factors were involved in the chain of circumstances that led to the flood.’”).

67. See *Calhoun v. Lillenas Publ.*, 298 F.3d 1228, 1235 (11th Cir. 2002) (Birch, J., concurring) (“[B]ecause the confluence of facts in this case presents a ‘perfect storm,’ I think it enticing, if not necessary, to address an alternative basis on which the district court’s judgment could be sustained—unreasonable delay.”).

68. See *supra* note 3 and accompanying text.

69. E.g., *Baden v. Dorflinger*, No. 445919, 2004 WL 3130536 at *4 (Conn. Dec. 2, 2004) (unpublished) (describing conduct by counsel as “a perfect storm of unprofessional behavior”); *In re Pharmaceutical Industry Average Wholesale Price Litigation*, 252 F.R.D. 83, 97 (D. Mass. 2008) (stating “a perfect storm of information” was available concerning average wholesale pricing of drugs.).

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Halloween Gale of 1991, as told in Junger's book, published in 2000, and later in the movie based on that book, released in 2002. Understood within the context of those narratives, "perfect storm" is more than a vivid descriptor, it is a story complete in itself.

The "perfect storm" has come into popular discourse as what researchers George Lakoff and Mark Johnson have termed a "new metaphor."⁷⁰ Lakoff and Johnson state, "[n]ew metaphors have the power to create a new reality. This can begin to happen when we start to comprehend our experience in terms of a metaphor, and it becomes a deeper reality when we begin to act in terms of it."⁷¹ Like any metaphor, it is employed to represent one concept in terms of another, more concrete, image that is closer to our visceral experience, providing a structure that emphasizes certain aspects of experience over others. Unlike conventional metaphors, however, a new metaphor is not—or not yet—systematically embedded in our conceptual system, as is, for example, a metaphor such as "Argument-is-War."⁷²

Rather, a new metaphor is one that offers a new imaginative understanding of experience.⁷³ The "facts" embodied in the metaphor correspond to aspects of the experience in the form of metaphoric entailments. These "new metaphors" are "outside our conventional conceptual system" and are "capable of giving us a new understanding of our experience."⁷⁴

Aspects of the metaphoric concepts provide a structure for making sense of the actual experience. For example, Lakoff and Johnson explain how we intuitively understand statements such as "We have covered a lot of ground in our argument" in terms of the metaphor, "An-Argument-is-a-Journey," based on experiential rather than objective similarities⁷⁵:

The Facts about Journeys

A journey defines a path.

The path of a journey is a surface.

The Metaphoric Entailments

An argument defines a path.

The path of an argument is a surface⁷⁶

70. LAKOFF & JOHNSON, *supra* note 9, at 139–46.

71. *Id.* at 145.

72. *See id.* at 4. The Argument-Is-War metaphor is reflected in such statements as "[y]our claims are indefensible;" "He attacked every weak point in my argument;" and "He shot down all of my arguments." *Id.* Lakoff and Johnson observe that

we don't just *talk* about arguments in terms of war. We can actually win or lose arguments. We see the person we are arguing with as an opponent. We attack his positions and we defend our own. We gain and lose ground. We plan and use strategies. If we find a position indefensible, we can abandon it and take a new line of attack. Many of the things we *do* in arguing are partially structured by the concept of war. Though there is no physical battle, there is a verbal battle, and the structure reflects this. It is in this sense that the ARGUMENT IS WAR metaphor is one that we live by in this culture; it structures the actions we perform in arguing.

Id.

73. *Id.* at 139.

74. Oldfather, *supra* note 9, at 20 n.8.

75. *See* LAKOFF & JOHNSON, *supra* note 9, at 153–54.

76. *Id.* at 91.

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Framing the facts of a case in terms of a perfect storm requires coherence between a perfect storm and the situation giving rise to the dispute. Based on Junger's narrative of the loss of the *Andrea Gail* in the Halloween Gale of 1991, the attributes of the perfect storm may be set out as follows:

a singular or highly unusual event
 involving the convergence of multiple forces
 which could not have been foreseen
 having devastating consequences
 which could not have been prevented

Each of these attributes is apparent in a recent Supreme Court opinion that described the "perfect storm of misfortune" that befell an Alabama capital prisoner, sentenced to death, whose petition for a writ of habeas corpus had been rejected because his time to appeal in state court had run out after his attorneys abandoned him.⁷⁷ In *Maples v. Thomas*, Justice Alito stated

What occurred here was not a predictable consequence of the Alabama system, but a veritable perfect storm of misfortune, a most unlikely combination of events that, without notice, effectively deprived petitioner of legal representation.⁷⁸

Analyzing the effect of the perfect storm metaphor in judicial opinions raises questions, including these: (1) how do the facts of cases line up with the metaphor's attributes?; (2) which aspects of the narrative are emphasized?; and (3) of what significance is the metaphor to the court's reasoning?

A corollary and equally important question asks which facts of the case are de-emphasized by the metaphor. As Lakoff and Johnson have written, "[t]he very systematicity that allows us to comprehend one aspect of a concept in terms of another . . . will necessarily hide other aspects of the concept."⁷⁹ Accordingly, a "[c]arelessly invoked metaphor" may be a means to obscure analysis or "avoid explicit consideration of a decision's consequences."⁸⁰ As Steven Winter cautioned, "[m]etaphor can . . . have as great a potential to mislead as to enlighten."⁸¹

IV. THE PERFECT STORM METAPHOR IN JUDICIAL OPINIONS

In litigation, the power of a metaphor to emphasize or obscure aspects of a

⁷⁷ *Maples v. Thomas*, No. 10-63, slip op. at *3, 2012 WL 125438, at *15 (U.S., Jan. 18, 2012) (Alito, J., concurring)

⁷⁸ *Id.* At *2-3.

⁷⁹ *Id.* at 10.

⁸⁰ Oldfather, *supra* note 9, at 30.

⁸¹ Steven L. Winter, *The Metaphor of Standing and Problem of Self-Governance*, 40 STAN. L. REV. 1384, 1387 (1988).

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case may have great significance. In discussing narrative metaphors as a persuasive device for trial lawyers, Jim Accardi defines metaphor as “a comparison which shocks or provokes the listener into a deeper kind of understanding,” observing that “[a]n excellent way to reach the unconscious mind, therefore, is through stories which match the key elements of the addressed topic.”⁸² Accordingly, “narrative metaphor is a superior linguistics device when it comes to complex topics or issues with which the jury does not have great familiarity. In these areas, use metaphorical stories to help each juror make unconscious associations which will, in turn, help shape his conscious opinions.”⁸³ In short, a lawyer employing a narrative metaphor uses “the story to help the jury organize its cognitive hardware to understand that which is true.”⁸⁴

The unconscious associations flowing from the metaphor of the perfect storm are ideal for defendants who argue that anything they may have done or failed to do was inconsequential under the circumstances; the outcome was inevitable. Under the complicated circumstances surrounding the singular event, it is impossible to determine what, if any part the defendant contributed to the plaintiff’s loss—the perfect storm caused it.

Moreover, the perfect storm is the perfect culprit because it requires no action from anyone except its victims. To agree that a party has suffered the effects of a perfect storm is not necessarily to find that the party is entitled to a legal remedy.⁸⁵ The victim of a perfect storm is entitled to compassion, but that may be all. Even when the victim of a perfect storm prevails, the perfect storm character of the case may limit the precedential value of the decision.⁸⁶

The perfect storm metaphor is invoked in a wide variety of cases, unlike metaphors that are closely associated with a particular area of law,⁸⁷ such as “the

82. Jim Accardi, *Winning Closing Arguments with Narrative Metaphor*, 33 THE PROSECUTOR 38, 38 (1999). “[T]he critical elements of the [metaphorical story] should match and exist in the same relationship as the critical elements of the [present case].” *Id.* at 39.

83. *Id.* at 41.

84. *Id.* at 39.

85. See, e.g., *In re Teron Trace, LLC*, 2010 WL 2025530 at *1 (Bankr. N.D. Ga. Jan. 28, 2010) (ruling that the debtor’s evidence suggesting that a “perfect storm” surrounded the loan in issue was irrelevant because the issue was whether the debtor could effectively reorganize). For a happier ending to a debtor’s story, see *In re Pigg*, 453 B.R. 728 (Bankr. M.D. Tenn. 2011). In a bankruptcy case brought by a debtor who had lost her home in a the 2010 Nashville Flood, the court said,

The perfect storm of the ‘Great Recession’ and these unspeakable natural disasters leaves debtors such as Ms. Pigg and other victims like her to suffer unbearable losses of their homes, all their belongs, and loved ones, and be denied the fresh start promised by bankruptcy. Ms. Pigg, and other like victims, suffer a wrong without a remedy.

Id. at 734. Invoking Aristotle, however, the court reasoned that “[t]he nature of equity is the ‘correction of the law where, by reason of its universality, it is deficient,’” *id.* at 735, and fashioned an equitable remedy by which the debtor would “truly receive a fresh start,” *id.* at 737.

86. See, e.g., *Mayor & Board of Aldermen v. Welch*, 888 So.2d 416, 428 (Miss. 2004) (specifically limiting the holding to the facts of this case).

87. In this respect, the “perfect storm” is similar to Justice Cardozo’s “Serbonian bog” metaphor. See Parker B. Potter, Jr., *Surveying the Serbonian Bog: A Brief History of a Judicial Metaphor*, 28 TUL. MAR. L.J. 519, 523–37 (2004).

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marketplace of ideas” in free speech cases,⁸⁸ or “the wall of separation” in establishment clause cases.⁸⁹ There are, however, several areas of law in which references to a “perfect storm” tend to cluster, including bankruptcy or insolvency cases,⁹⁰ criminal cases,⁹¹ child custody and child support cases, and lawsuits involving federal regulatory agencies. Not surprising, the cases usually involve complicated facts, a complicated regulatory scheme,⁹² or both—circumstances that are difficult to sort through to a satisfyingly complete explanation. Where fault is not an issue, as for example in workers’ compensation cases, the metaphor is inapt, and none of the cases referring to a perfect storm involve a claim for workers’ compensation benefits.

Also, unlike the “marketplace of ideas” metaphor and other metaphors that structure thinking in a particular area of law, the perfect storm metaphor rarely is given sustained treatment in judicial opinions.⁹³ Exceptions include the opinions in *United States v. Campa*,⁹⁴ in which the storm is accompanied by images of “waves,” “flooding,” and a “surge.” Noting that “[w]aves of public passion . . . flooded Miami both before and during this trial,”⁹⁵ the court concluded that “a new trial was mandated by the perfect storm created when the surge of pervasive community sentiment, and extensive publicity both before and during the trial, merged with the improper prosecutorial references [in closing argument].”⁹⁶ The images suggest that although public opinion is transitory and based on forces outside the defendants’ control, it may have permanent and devastating effects on the defendants.

In judicial opinions, the perfect storm metaphor often is used as a framing device to introduce or summarize a discussion of complicated facts or law. The metaphor usually describes a convergence of circumstances that may be offered to account either for a singular event or for the unforeseeability of the

88. See HAIG BOSMAJIAN, METAPHOR AND REASON IN JUDICIAL OPINIONS 49–72 (Robert K. Burdette ed., 1992).

89. See *id.* at 73–94.

90. Of the 168 cases employing the perfect storm metaphor, at least twenty arose in the context of bankruptcy or insolvency proceedings, perhaps because debtors often view themselves as affected by circumstances beyond their control. See, e.g., *McGrew v. Union Bank of California*, No. C053874, 2008 WL 934061, at *1 (Cal. Ct. App. Apr. 8, 2008) (unpublished) (“Within a relatively short time, [debtor] ‘experienced a ‘perfect storm’ of ultimately questionable business decisions, negative market forces and the prohibition of selling branded products to non-licensors.’”).

91. More than twenty of the opinions address issues in criminal cases.

92. Sometimes the metaphor is used to describe the effects of complicated regulation. See e.g., *Ortho-McNeil Pharmaceutical, Inc. v. Mylan Laboratories, Inc.*, 348 F. Supp. 2d 713, 757 (N.D. W. Va. 2004) (rejecting plaintiff’s argument attributing the commercial success of a competitor’s product to “clever marketing strategies and ‘a perfect storm’ of unforeseen FDA delays and regulatory changes”).

93. For discussion of a similarly functioning metaphor, a baseball game, see Oldfather, *supra* note 9, at 20 n.8.

94. 419 F.3d 1219, 1261–63 (11th Cir. 2005), *rev’d en banc*, 459 F.3d 1121, 1177–79 (11th Cir. 2006) (dissenting opinion). See also *Mayor & Board of Aldermen v. Welch*, 888 So.2d 416, 417 (Miss. 2004) (“The clouds of this ‘perfect storm’ began to gather in late 1996 . . .”).

95. *Campa*, 419 F.3d at 1261.

96. *Id.* at 1263. The decision was reversed *en banc*, and the perfect storm references moved to the dissenting opinion in the *en banc* opinion. *Campa*, 459 F.3d at 1155–80.

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consequences of the convergence of circumstances, or to describe the inevitable and unfortunate consequences themselves.

A. Framing Device

Often the perfect storm metaphor appears either at the beginning of a discussion, introducing exposition of the facts,⁹⁷ or at the end, providing a summary of reasoning.⁹⁸ As Chad Oldfather notes, metaphors often serve as “an almost indispensable aid to comprehension” of complex concepts, and the choice of a metaphor may set the terms of conceptual understanding in such cases.⁹⁹ The metaphor thus serves as a framing mechanism for complicated facts and law, providing a structure for reader expectations and understanding of cases presenting complicated issues.¹⁰⁰

The metaphor sometimes is used to introduce or summarize a set of facts or issues as if to suggest that otherwise the facts might seem overwhelming to the reader. For example, the first paragraph of a bankruptcy case warns the reader that “the exemption issues surrounding the homestead of [the debtor] . . . amount legally to a perfect storm.”¹⁰¹ This introduction prepares the reader not only for a difficult read, but also for an unusual case, involving a convergence of circumstances resulting in devastating loss.

However, courts have rejected arguments offering the metaphor as a substitute for specific discussion of particular facts in concrete terms. For example, in *Klaczak v. Consolidated Medical Transport*,¹⁰² *qui tam* Relators argued that a kickback scheme among ambulance companies and hospitals “was made possible by a purported ‘perfect storm’” of incentives and favorable circumstances for unlawful remuneration by the hospitals.¹⁰³ The court granted summary judgment to the hospital defendants, noting both a “global failure of proof” and the Relators’ implausible theory that the defendants “were prepared to

97. For example, a section in a dissenting opinion begins by saying that this case “represents a perfect storm for defendants in a medical malpractice case.” *Lockett v. Bodner*, 769 N.W.2d 504, 527 (Wis. 2009).

98. For example, a paragraph headed “Summation” at the end of a complicated presentation of facts concludes, “Each of the actors, despite his better instincts, had a personal motive for putting caution aside. This perfect storm of bad judgment precipitated the sinking of the [defendant’s yacht].” *Reliance Nat’l Ins. Co. v. Hanover*, 246 F. Supp. 2d 126, 134 (D. Mass. 2003).

99. Oldfather, *supra* note 9, at 21.

100. *Compare* *Commonwealth v. Kemp*, No. 05-P-1147, 2008 WL 305035 at *1 (Mass App. Ct. Feb. 4, 2008) (unpublished) (“Reduced to essentials, there was a perfect storm of dual and interfacing errors in the conduct of this trial . . . all of which errors taken together could have led to a different result on the one charge of which the defendant was convicted.”), *with* *Bond v. U.S. Manufacturing Corp.*, No. 09-11699, 2011 WL 1193385 (E.D. Mich., Mar. 29, 2011). In *Bond*, the court said, “[t]his case presents a challenging sanctions analysis, and involves something resembling a ‘perfect storm’ in the convergence of an untruthful client, aggressive lawyering by Defendant’s counsel, and the responses and other papers submitted by Plaintiff’s two attorneys that were significantly less than perfect,” and then undertook to “sort through all this to determine which actions were sanctionable, and which were merely mistaken or ill-advised.” *Id.* at *3.

101. *In re Davis*, 403 B.R. 914, 916–17 (M.D. Fla. 2009).

102. 458 F. Supp. 2d 622 (N.D. Ill. 2006).

103. *Id.* at 633.

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violate federal criminal law (and face all of the personal sanctions that might entail) so that the hospitals could more readily continue to provide low-cost medical care to the needy.”¹⁰⁴

Similarly, in *Clear Channel Outdoor, Inc. v. City of New York*,¹⁰⁵ the court was unmoved by plaintiff’s argument that city regulations concerning billboard restrictions should not be enforced because vague regulations and lax enforcement of zoning restrictions had “led to ‘a perfect storm’ which allowed ‘liberal interpretations’ of the zoning [restrictions] by outdoor advertising companies.”¹⁰⁶ The court granted summary judgment to the city, stating that plaintiff’s argument amounted to “a polite way of saying that the billboard companies routinely built illegal signs in order to make money,”¹⁰⁷ which plaintiff had not established.

B. Convergence of Multiple Forces

Most judicial references to a perfect storm involve some convergence of events. In some cases, the metaphor may appear simply as a vivid image of many things happening at the same time, serving a purpose more descriptive than explanatory. For example, in *In re Exxon Mobil Corp. Securities Litigation*,¹⁰⁸ the court considered whether shareholder suits should be dismissed as untimely filed. The court described its task as follows: “Because of the timing of both the underlying events and the filing of this case, we have a perfect storm of issues concerning the timeliness of plaintiffs’ complaint.”¹⁰⁹ More often, the metaphor describes situations created by the convergence of circumstances in which “anything that could go wrong, went wrong.”¹¹⁰

104. *Id.* at 677.

105. 608 F. Supp. 2d 477 (S.D.N.Y. 2009).

106. *Id.* at 483 n.4.

107. *Id.* In another case, the phrase served to politely dismiss an argument while acknowledging the plight of a party. *See In re Yanni*, 354 B.R. 708, 719 n.8 (E.D. Pa. 2006). The court stated that, although the debtor had “weathered a ‘perfect storm,’” the debtor did not offer evidence that “this storm of events contributed to the surge in [the debtor’s] need for cash.” *Id.* The case provides an illustration of the downside to a “perfect-storm” argument: the victim may simply be stuck with the result. The metaphor serves as a vehicle for expressing compassion while denying relief. *See also Sanders v. Cabana*, No. 4:05CV012-P-B, 2007 WL 922287 (N.D. Miss. Mar. 26, 2007). In *Sanders*, a prison inmate who had been attacked by another inmate alleged that the defendant prison employees had done nothing to protect him, despite his having told them of threats made against him. *Id.* at *1. The court noted, “what appears to be the ‘perfect storm’ of security failure” but granted defendants’ motion for summary judgment because plaintiff had “neglected to name as defendants the individuals who were in the best position to prevent the attack.” *Id.* at *4.

108. 500 F.3d 189 (3rd Cir. 2007).

109. *Id.* at 195.

110. *Noble v. Castor*, No. A113586, 2007 WL 4564972, at *6 (Cal. Ct. App. Dec. 31, 2007) (unpublished) (“This trial follows a perfect storm of litigation . . . in which, from a defense perspective, anything that could go wrong, went wrong.”). *See also In re Nashville Senior Living*, No. 08-07254, 2009 WL 1505591 at *3 (Bankr. M.D. Tenn. May 26, 2009) (unpublished) (“The United States Trustee . . . described the nondisclosures and ‘gaps’ in the record as the ‘perfect storm’ of ‘if it could go wrong, it did,’ but found no malice, ill-intent or deceptions in [creditors’ committee’s counsel’s] actions.”).

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1. Convergence of Facts Relevant to a Legal Standard

The metaphor may be used to suggest that evidence offered to satisfy a legal standard is connected in such a way that the circumstances draw strength from each other. For example, in *People v. Lewis*, the court said, “While Detective Hare was a credible and straightforward witness, the identification procedures he conducted were flawed in so many respects that together, they constitute the perfect storm for potential misidentification.”¹¹¹ Similarly, in *United States v. Merced*, in arguing that sentencing factors “counseled in favor of leniency,” a criminal defendant “claimed that he was a casualty of a perfect storm of discouraging forces: a splintered family, economic struggle, and an increasingly punitive criminal justice system.”¹¹²

2. Convergence of Evolving Legal Standards and Particular Circumstances

The metaphor may also characterize an intersection of evolving law and a particularly challenging set of facts. For example, the convergence of changes in law and particular circumstances presented by litigants in *Luckett v. Bodner*¹¹³ was described in a dissenting opinion as representing “a perfect storm for defendants in a medical malpractice case.”¹¹⁴ The dispute in *Luckett* arose during the nine-month period following a Wisconsin Supreme Court ruling that struck down the state’s cap on noneconomic damages in medical malpractice actions—but preceding the effective date of legislation establishing new limitations.¹¹⁵ In addition, the Court had recently overruled precedent that limited recovery of noneconomic damages in medical malpractice cases involving wrongful death to the statutory cap imposed by Wisconsin’s wrongful death statute. The practical effect of these developments in the law was to expose the *Luckett* defendants “to an award of unlimited noneconomic damages for pain and suffering over a

111. *People v. Lewis*, No. 3306/07, 2008 WL 3865213, at *1 (N.Y. Sup. Aug. 20, 2008) (unpublished). Interestingly, the court devoted considerable space in the opinion to discussion of social science research concerning the unreliability of eyewitness testimony in general before discussing flaws in identification procedures in that case. *See id.* at *1–3. For another example, see *Fed. Trade Comm’n v. CCC Holdings*, 605 F. Supp. 2d 26, 61 (D.D.C. 2009), in which defendants argued that a proposed merger posed no threat of anticompetitive threat, listing seven “market realities [that] here present a perfect storm of factors that impede coordination.” *See also* *Glencore AG v. Bharat Aluminum Co. Ltd.*, No. 08 Civ. 9765, 2008 WL 5274569, at *5 (S.D.N.Y. Dec. 15, 2008) (“[W]e have a kind of perfect storm in which the combination of expansive maritime attachments and expansive interpretation of admiralty jurisdiction would mean that just about any international dispute in any sort of commercial context all over the world, whenever anything came close to a boat would result in a potential for filing attachment in this District.”) (quoting *Shanghai Sinom Imp. & Exp.*, 2006 A. M.C. at 2952–53).

112. *United States v. Merced*, 603 F.3d 203, 210 (3d Cir. 2010).

113. 769 N.W.2d 504 (Wis. 2009).

114. *Id.* at 527. Evolving law in the area of identity theft provides another example. *See Stillmock v. Weis Markets, Inc.*, No. 09-1632, 2010 WL 2621041, at *9 (4th Cir. July 1, 2010) (unpublished) (Wilkinson, J., concurring) (“Simply put, the present case is a perfect storm in which two independent provisions [of federal statutes] combine to create commercial wreckage far greater than either could alone.”).

115. *Luckett*, 769 N.W.2d at 528.

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potential five-year period.”¹¹⁶ The dissent argued that the majority had failed to consider this context and unfairly discounted potential prejudice to defendants when it permitted plaintiffs to withdraw a mistaken admission two years after it was made.¹¹⁷

In *Knight v. Alabama*,¹¹⁸ the court addressed the convergence of state property tax policy and civil rights. In *Knight*, plaintiffs who had succeeded in seeking remedies for vestiges of segregation in higher education, sought additional relief with respect to state funding of public higher education. Plaintiffs alleged that Alabama’s property tax structure resulted in the underfunding of K-12 education, which in turn had a segregative effect on public higher education. The trial court found that the property tax policies were traceable to Alabama’s prior *de jure* segregation system,¹¹⁹ describing the history of the challenged property tax policies as the result of a perfect storm:

The convergence in one year, 1971, of four federal mandates requiring re-enfranchisement of African-Americans, . . . fair assessment of all property subject to taxes, and school desegregation, had thus created a “perfect storm” that threatened the historical constitutional scheme whites had designed to shield their property from taxation by officials elected by black voters for the benefit of black students.¹²⁰

However, the court held that plaintiffs had not demonstrated a relationship between the property tax policies and segregation in public higher education sufficient to merit the additional relief.¹²¹

In *Securities and Exchange Commission v. Tambone*,¹²² a concurring judge criticized the First Circuit majority for contributing to just such a troublesome convergence:

In recent months, the securities industry has been wracked by a treacherous combination of market forces, overly optimistic risk-taking, and lapses in judgment. The majority proposes to add to this perfect storm by judicial enlargement of the scope of primary liability for violations of the antifraud provisions of the securities laws.¹²³

116. *Id.*

117. *Id.* See also *Thomas v. Buckner*, No. 2:11-CV-245-WKW, 2011 WL 4071948 (M.D. Ala. Sept. 13, 2011) (slip opinion). In *Thomas*, the convergence of statutory and regulatory law surrounding a “quasi-public state registry of persons ‘indicated’ as child abusers,” *id.* at *1, created the possibility of a “perfect storm, where incorrect reports are entered, cannot be challenged, and are then disclosed, harming an innocent person’s reputation and more.” *Id.* at *15.

118. 458 F. Supp. 2d 1273 (N.D. Ala. 2004), *aff’d* 476 F.3d 1219 (11th Cir. 2007).

119. *Id.* at 1311.

120. *Id.* at 1294.

121. *Id.* at 1312.

122. 550 F.3d 106 (1st Cir. 2009).

123. *Id.* at 149–50 (Selya, J., dissenting).

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On the other hand, a particular case may present the precise set of facts that require a court to reconcile converging legal standards. The Third Circuit confronted such a convergence in a case involving a Confrontation Clause claim.¹²⁴ The unsettled question was what constitutes “clearly established federal law” for purposes of determining the admissibility of certain hearsay statements.¹²⁵ The court said, “[w]hile many courts have managed to avoid confronting these issues, . . . this case presents us with the inescapable obligation to decide the cutoff date for determining ‘clearly established Federal law.’ . . . [It] is the perfect storm of facts for resolving the issue of which date . . . should be used.”¹²⁶

3. Convergence of Events that Must Be Considered in Totality

The metaphor of convergence also is used to suggest that the totality of circumstances is greater than the sum of the individual circumstances. For example, in *Porzig v. Dresdner, Kleinwort, Benson, North America LLC*,¹²⁷ the Second Circuit invoked the metaphor to explain its decision to vacate an arbitration award, despite the “extremely deferential standard” it applies to arbitral awards. After listing four factors raising concerns as to the validity of the award, the court stated, “Taken individually, in all likelihood, such circumstances would not have overcome the deference owed to the Panel’s award. Taken together, however, these circumstances create, if not the perfect storm, then a disturbance ample enough to give us pause.”¹²⁸

The counter to a “perfect storm” argument, as to any totality-of-the-circumstances argument, is to identify and respond to each of the circumstances sequentially. For example, in *In re Peterman Family Living Trust*,¹²⁹ the court reviewed denial of a motion for a continuance after the trial court excluded documentary evidence offered by a trustee. The trustee argued that the trial court had abused its discretion by failing to consider the relevant factors, when doing so would have revealed “a veritable ‘perfect storm’ in favor of the granting of a continuance.”¹³⁰ The court reduced this perfect storm to three points, rejected

124. *Greene v. Palakovich*, 606 F.3d 85 (3d Cir. 2010).

125. *Id.* at 93–94.

126. *Id.* at 97.

127. 497 F.3d 133 (2d Cir. 2007).

128. *Id.* at 140.

129. No. 36044-6-II, 2008 WL 496891 (Wash. Ct. App. Feb. 26, 2008) (unpublished).

130. *Id.* at *5. *See also* *Terbrush v. United States*, 516 F.3d 1125 (9th Cir. 2008). In *Terbrush*, a similar argument was advanced by the family of a mountain-climber who was killed in a rockslide in Yosemite Park, alleging claims under the Federal Tort Claims Act (FTCA), 28 U.S.C. § 1346(b)(1) (2006). The court opined that the family’s “arguments amount to a ‘perfect storm’ theory wherein the NPS’s various failings over several decades built upon one another, making [the mountain-climber’s] death inevitable . . .” *Id.* at 1131. The government argued that each of those alleged “failings” fell within the discretionary function of the FTCA, and the court analyzed them sequentially to affirm in part and deny in part the district court’s dismissal of the claims. *Id.* at 1131–40.

each one, and affirmed.¹³¹

C. *Singular Event*

1. *Force Majeure*

The perfect storm metaphor is rooted in the story of a storm-of-the-century, an awesome force of nature. While a perfect storm metaphor would appear to describe a *force majeure*, the storm metaphor more often is invoked to describe circumstances entirely of human origin. For example, in awarding summary judgment to defendants on a claim of abuse of process, a bankruptcy court reasoned that the defendants had “tried at every turn to correct the perfect storm of errors . . . lead[ing] to the misapplied payments, the foreclosure that turned out to be in error, the trustee’s deed that was improperly titled, the quiet title action, and setting aside of the foreclosure.”¹³² Although every one of those errors was the defendants’ own, the perfect storm metaphor conjures up a vision of the defendant banks battling 100-foot waves, which serves to explain the court’s holding that the defendants had not used legal process for an improper purpose.

On the other hand, a court was unpersuaded by a taxpayer’s argument that “a ‘perfect storm’ had struck,” resulting from the taxpayer’s erroneous business judgment in “overbuil[ding]” to accommodate future demand. The court stated, “[E]xternal obsolescence is not established by a factor within the taxpayer’s control.”¹³³

2. *Unusual Case*

In judicial opinions, a perfect storm may characterize a dispute simply as a fluke or an exceptional case, making it sensible to limit the holding to its particular facts. By emphasizing the unusual nature of the case, the metaphor serves to minimize any threat its result might pose to settled precedent.¹³⁴ For example, in a zoning dispute involving a child’s treehouse, the parties “invested over \$50,000 in attorney fees and litigation costs.”¹³⁵ The case drew great public interest and eventually reached the Mississippi Supreme Court. The court said, “The clouds of this ‘perfect storm’ began to gather in late 1996 . . .”¹³⁶ Holding on constitutional grounds that the city could not require the defendants to remove the tree house from their yard, the court stated that its “holding today is limited to [its] facts.”¹³⁷ In an exceptional case, it will do no harm to hold in favor of the

131. *Terbrush*, 516 F3d. at 1131–40.

132. *In re Prince*, 414 B.R. 285, 295 (Bankr. M.D. Tenn. 2009).

133. *Level 3 Commc’ns v. Ariz. Dept. of Revenue*, No. 1 CA-TX 08-0001, 2009 WL 2195048 at *6 (Ariz. Ct. App. July 23, 2009) (unpublished).

134. *Mayor & Board of Aldermen, v. Welch*, 888 So.2d 416 (Miss. 2004).

135. *Id.* at 417.

136. *Id.*

137. *Id.* at 428.

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victim of a perfect storm.

That reasoning is also reflected in a bankruptcy court's use of the metaphor in explaining its decision to enjoin prosecution of an enforcement action brought against the debtor by the Federal Trade Commission:

The FTC is concerned that this Court's granting of a preliminary injunction against the Enforcement Action will set a precedent that a defendant can escape prosecution for committing deceptive and unfair trade practices by simply filing for bankruptcy. The Court is keenly aware of the FTC's concern and that is not what this Court intends. Rather, it is the unusual convergence—almost a perfect storm—of the trial schedule in the Enforcement Action and the critical first few months of a viable chapter 11 bankruptcy case that warrant a limited preliminary injunction at this time.¹³⁸

The perfect storm metaphor also has been employed to cabin unwelcome precedent. For example, in *Carter v. State*,¹³⁹ the defendant sought to distinguish a prior case in which prior convictions for burglary and attempted burglary had been admitted to prove that the defendant intended to burglarize a house rather than to seek help at that house.¹⁴⁰ In response to that argument, the court said,

[Defendant] attempts to obscure the issue by arguing that *Jones* is a jurisprudential anomaly where prior convictions, each attained through guilty pleas, were admissible because of the “perfect storm” of facts present in that case. Assuming *arguendo* that the facts of *Jones* were more egregious than those of the case *sub judice*, that case in no way limits the admissibility of prior felony convictions to those arrived at via guilty pleas.¹⁴¹

On the other hand, in some cases, the perfect storm embodies the improbable. The 100-year storm demonstrates that the highly unlikely *is* possible; it can happen because it *did* happen to the very real people described in Junger's book. The singular nature of the event permits departure from usual practices. For example, in *United States v. Bell*,¹⁴² the court described circumstances surrounding a sentencing hearing as

the “perfect storm” involving a lack of due process and ineffective assistance of counsel; an ineffective defense counsel who haphazardly,

138. *In re The Billing Resource*, No. 07-52890-ASW, 2007 WL 3254835, at *14 (Bankr. N.D. Cal. Nov. 2, 2007).

139. 953 So.2d 224 (Miss. 2007).

140. *Id.* at 230.

141. *Id.* at 231. *See also* *State v. Allen*, 778 N.W.2d 863, 929 (Wis. 2010) (Ziegler, J., concurring) (“[N]owhere in [the prior case] does the majority state that anything less than [that] ‘perfect storm,’ created by those extreme and extraordinary facts . . . would be sufficient to constitute a due process violation.”).

142. *United States v. Bell*, No. 08-20080, 2008 WL 4389832 (E.D. Mich. Sept. 25, 2008) (unpublished).

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and for the first time, advanced drastic sentencing arguments at the hearing, an absent case-AUSA [Assistant U.S. Attorney], and an absent case-Probation Officer. The totality of deficiency makes this case *sui generis*. Indeed this is the first case where the Court, in 14 years on the bench, has *sua sponte*, ordered a resentencing in the interest of justice.”¹⁴³

The opinions in *United States v. Campa*¹⁴⁴ provide insight into when such an argument may be persuasive. In *Campa*, the Eleventh Circuit considered the appeal of five defendants convicted of “acting as unregistered Cuban intelligence agents . . . [and] conspir[ing] to commit murder.”¹⁴⁵ Defendants argued that pre-trial publicity and existing community sentiment prevented them from obtaining a fair trial. The panel opinion used the imagery of the perfect storm to describe the convergence of pre-trial publicity and public sentiment surrounding the trial, stating, “Waves of public passion as evidenced by the public opinion polls and multitudinous newspaper articles . . . flooded Miami both before and during this trial.”¹⁴⁶ In that frame, the court found that the intensity of community response and the singular nature of its roots required a change of venue to protect the rights of the accused.¹⁴⁷ In addition, the court held that “a new trial was mandated by the perfect storm created when the surge of pervasive community sentiment, and extensive publicity both before and during the trial [] merged with the improper prosecutorial references.”¹⁴⁸

On rehearing en banc, however, that line of reasoning moved to the dissent in an impassioned plea for exceptional treatment of the case.¹⁴⁹ Stating that it was “not aware of any case in which any court has ever held that prejudice can be presumed from pretrial publicity about issues other than the guilt or innocence of the defendant,”¹⁵⁰ the majority reversed the panel decision. Ironically, this result may be more consistent with the metaphor because the ultimate decision requires no undoing of the *status quo*—that is, the trial court’s disposition—and permits no possibility of a different result. If these defendants were victims of a “perfect storm,” so be it.

Occasionally, the metaphor has described a standard of proof so high that only the singular case may satisfy it. For example, the Third Circuit reversed a decision granting a motion for substantive consolidation of corporate-debtors’ assets and liabilities, stating, “With no meaningful evidence supporting either test

143. *Id.* at *2.

144. 419 F.3d 1219, 1261–63 (11th Cir. 2005), *rev’d en banc*, 459 F.3d 1121, 1177–79 (11th Cir. 2006) (dissenting opinion).

145. *Campa*, 419 F.3d at 1219.

146. *Id.* at 1261.

147. *Id.* (“we find that empaneling [an impartial] jury in this community was an unreasonable probability”).

148. *Id.* at 1263.

149. *Campa*, 459 F.3d at 1177–79.

150. *Id.* at 1144.

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to apply substantive consolidation, there is simply not the nearly ‘perfect storm’ needed to invoke it.”¹⁵¹

More often, however, the metaphor is used to dismiss consideration of such a remote possibility.¹⁵² For example, a court used the metaphor to demonstrate that interpreting the Bankruptcy Act to require proof of all sixteen circumstances listed under its voluntary dismissal-for-cause provision would lead to an absurd result.¹⁵³ The court said, “if the statute truly requires, as the United States Trustee coined, a ‘perfect storm’ of all the elements constituting cause, it would render [the provision] a nullity and the statute cannot be interpreted that way.”¹⁵⁴

3. Unlikely to Recur

The “singular event” aspect of the perfect storm highlights those facts that suggest that a situation is unlikely to recur and therefore is not of continuing significance. For example, in *Midwest Independent Transmission System Operator, Inc. v. Federal Energy Regulatory Commission*,¹⁵⁵ the court rejected the argument that the Federal Energy Regulatory Commission’s response to the crisis in California’s electricity industry represented a change in regulatory policy, reasoning that any apparent change in the agency’s focus had “reflected the imperatives of a singular event—a ‘perfect storm.’”¹⁵⁶ Similarly, a court declined to find a materially adverse effect in problems in a firm’s textile division when those “troubles . . . [were] short-term in nature.”¹⁵⁷ The court noted that the textile business had “faced a so-called ‘perfect storm’ of macroeconomic challenges in the first half of 2008,” most of which had already been reversed¹⁵⁸ by the time the suit was filed.

Two cases involving the Federal Election Commission (FEC) focused on this element of the metaphor in addressing the mootness doctrine exception for cases that are “capable of repetition, yet evading review.” In *Wisconsin Right to Life v.*

151. *In re Owens Corning*, 419 F.3d 195, 216 (3rd Cir. 2005). *Cf.* *Sec. & Exchange Comm’n v. Lauer*, No. 03-80612, 2006 WL 2457671 (S.D. Fla. Jan. 24, 2006) (imposing the severe sanction of striking defendant’s defenses because his actions demonstrated “a ‘perfect storm’ of discovery abuse”).

152. *See, e.g., Henshaw v. Bd. of Appeals*, No. 304282, 2006 WL 2514177, at *8 (Mass. Land Ct. Aug. 31, 2006) (unpublished) (noting that plaintiff’s argument was based on “a ‘perfect storm’ scenario” requiring an unlikely coincidence, and holding that the zoning board was justified on determining that any potential harm was “outweighed by the certainty of addressing a pressing . . . affordable housing need”).

153. *In re TCR of Denver*, 338 B.R. 494, 499 (Bankr. D. Colo. 2006) (construing 11 U.S.C. § 1112(b)).

154. *Id.* at 499. Interestingly, the court’s sole reference to the metaphor, which appears in a paragraph in the middle of the court’s reasoning, features prominently in the case synopsis and both headnotes to the case supplied by West Publishing. *Id.* at 494.

155. 388 F.3d 903 (D.C. Cir. 2004).

156. *Id.* at 10.

157. *Hexion Specialty Chems., Inc. v. Huntsman Corp.*, 965 A.2d 715, 745 (Del. Ch. 2008).

158. *Id.* at 745. *See also In re Motor Vehicles Canadian Exp. Antitrust Litig.*, 522 F.3d 6, 10 (1st Cir. 2008) (in which plaintiffs argued that a number of “circumstances converged in . . . a ‘perfect storm’ of cross-border arbitrage opportunities,” which “suppress[ed] the supply of Canadian cars in the United States” and increased prices); *quoted in In re TFT-LCD (Flat Panel) Antitrust Litig.*, 267 F.R.D. 583 (N.D. Cal. 2010) (“the ‘perfect storm’ that allegedly precipitated massive arbitrage opportunities for selling Canadian cars in the United States ceased long ago.”).

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Federal Election Commission,¹⁵⁹ the U.S. District Court for the District of Columbia rejected the Federal Election Committee's argument that the controversy was "incapable of repetition," stating, "To the contrary, because we believe that our review should be limited to the text and images of the ads themselves . . . we are not concerned with the supposed 'perfect storm' of contextual characteristics alleged by defendants."¹⁶⁰ By contrast, in a similar suit heard by that court earlier that year, the metaphor was more successful for the Federal Election Committee.¹⁶¹ In *Christian Civic League of Maine v. Federal Election Commission*, the court reasoned that plaintiffs were challenging election rules as applied and therefore the challenge depended upon the convergence of specific circumstances peculiar to that case. The court concluded that "[t]he chance[] of recurrence of this perfect storm is small, thereby foreclosing application of the 'capable of repetition, yet evading review' exception" to mootness doctrine.¹⁶²

Perhaps the best-known case in which the perfect storm metaphor is offered to emphasize the singular nature of an event is *Goodridge v. Department of Public Health*,¹⁶³ the landmark case holding that denial of marriage licenses to same-sex couples violated equal protection under the Massachusetts Constitution. In *Goodridge*, the dissent opined that "the case stands as an aberration" of constitutional jurisprudence. The dissent noted that "there is much to be said" for the argument that denying marriage licenses to same-sex couples is unfair and "has a profound impact on the personal lives of committed gay and lesbian couples (and their children)." Acknowledging the "intense glare of national and international publicity," the dissent continued, "Speaking metaphorically, these factors have combined to turn the case before us into a 'perfect storm' of a constitutional question I trust that, once this particular 'storm' clears, we will return to the rational basis test as it has always been understood and applied."¹⁶⁴

159. 466 F. Supp. 2d 195 (D.D.C. 2006).

160. *Id.* at 203.

161. *See* *Christian Civic League of Me v. Fed. Election Comm'n*, No. 06-0614, 2006 WL 2792683 (D.D.C. Sept. 27, 2006) (unpublished).

162. *Id.* at *6.

163. 798 N.E.2d 941 (Mass. 2003).

164. *Id.* at 982. *See also* *Hurles v. Ryan*, 650 F.3d 1301, 1322 (9th Cir. 2011). In *Hurles*, the Ninth Circuit addressed a state prisoner's claim of judicial bias in a capital murder case and held that due process required the trial court judge's recusal. *Id.* at 1314. The court said:

We emphasize again that is the highly unusual facts of this case that compel us to conclude Hurles was denied his right to due process. . . . We deal here with a perfect storm of rare incidents that are unlikely to repeat themselves. Unlike [a prior case] where the Court had to contend with the possibility that its ruling would unleash a 'flood of recusal motions,' this case presents no such danger.

Id. at 1322 (citations omitted). The court noted also the devastating effect of this perfect storm, saying that "the consequences of an unfair capital sentencing are irreversible." *Id.*

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D. Unforeseeability of Consequences

The presence of a perfect storm suggests the absence of attributable causation. The visceral message conveyed by the narrative metaphor may be that the circumstances are too complicated—and their combination too fateful—to sort out. The consequences of any particular human error cannot be traced within the context of the perfect storm.

1. Intervening Cause

The mysterious nature of the storm-at-sea plays into the intricacies of causation issues in tort law. “As metaphor helps us understand the unfamiliar concept, it also shapes our thoughts about the new concept because it maps on top of the new experience the structures, inferences, and reasoning methods of the old.”¹⁶⁵ While proximate cause is hardly a new concept, it remains an elusive one, unique to each case.

*Collins v. Li*¹⁶⁶ offers the most extensive discussion of difficult causation issues surrounding a perfect storm. *Collins* was a personal injury action involving multiple negligent acts resulting in a tragic fire that killed two children and seriously injured three others in the basement apartment where they slept. The children had fallen asleep without extinguishing a candle they had lit during a power outage caused by an electrical storm. The candle ignited the fire, and unfortunately, an AC-powered smoke detector, installed nine years earlier, failed to activate because it did not have a battery back-up system.¹⁶⁷ After installing the smoke detector, the building owners completed construction of the basement without providing an emergency exit, in violation of building codes, and condoned the use of basement rooms as sleeping rooms.¹⁶⁸

Among the defendants were the manufacturers and installer of the smoke alarm, who sought dismissal of the claims against them, arguing that they “did not proximately cause plaintiffs’ damages because they could not have reasonably foreseen in 1989, the intervening negligent and illegal acts, when . . . they manufactured and installed a single-powered smoke detector in the unfinished basement.”¹⁶⁹ In addition, they argued that it was unforeseeable that the children’s parents would permit them to keep candles lit while they slept.¹⁷⁰ The trial court agreed and dismissed claims against the manufacturers and installer of the smoke alarm.¹⁷¹

165. Linda L. Berger, *Metaphor, Metonymy, and Corporate Money*, 58 MERCER L. REV. 949, 955 (2007).

166. 933 A.2d 528 (Md. Ct. Spec. App. 2007), *aff’d sub nom* Pitway Corp. v. Collins, 973 A.2d 771 (Md. 2009).

167. *Collins*, 933 A.2d at 537–38.

168. *Id.* at 539.

169. *Pitway Corp.*, 973 A.2d at 784.

170. *Collins*, 933 A.2d at 543.

171. *Id.*

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The appellate court reversed, holding that factual issues of foreseeability were not so clear as to permit only one inference. The court stated,

In addition to the highly extraordinary nature of the intervening acts of negligence, . . . the sheer number of acts which, had they not occurred or occurred in a different manner, create endless possibilities as to how the tragedy could have been averted. The combination of events leading up to the fire represents what could best be described as the ‘perfect storm.’¹⁷²

The Maryland Supreme Court affirmed, framing the justiciable issue in terms of the perfect storm metaphor.

On its face, the complaint leads to different, and contrary, inferences. On the one hand, the facts alleged in the complaint suggest that the deaths and injuries that resulted from the fire were the *ordinary* and *foreseeable* result of a defective smoke detector. . . . On the other hand, the facts . . . could suggest that the deaths and injuries . . . were *extraordinary*. The confluence of events that led to the children’s deaths and injuries represented a perfect storm that developed over a period of nearly ten years.¹⁷³

While providing a vivid image for the “confluence of events . . . develop[ing] over a period of ten years,” this use of the perfect storm appears simply to mean that the circumstances are too complicated to permit decision on the pleadings—either the injury was “*ordinary* and *foreseeable*” or it was the “*extraordinary*” and unforeseeable result of a perfect storm.¹⁷⁴

Responding to a similar argument in *Doerr v. Mobil Oil Corporation*,¹⁷⁵ the Louisiana Court of Appeals rejected the defendant oil company’s intervening-cause argument that it was not responsible for its pollution of drinking water because a water plant had “systematically ignored its operating procedures and breached its statutory duty to make clean water.”¹⁷⁶ The court quoted with approval the trial court’s support of allocating 90% of the fault to the oil company because the oil company was “negligent in allowing and causing harmful toxins to enter the Mississippi River and ultimately the homes of the plaintiffs. The defendants had the expertise and ability to prevent this situation and could not rely on the defense of ‘Act of God’ or ‘The Perfect Storm.’”¹⁷⁷

Even a defendant who lacks the expertise and ability to prevent his situation

172. *Id.* at 548.

173. *Pittway Corp.*, 973 A.2d at 792 (emphasis in original).

174. *Id.*

175. 935 So. 2d 231 (La. Ct. App. 2006).

176. *Id.* at 235.

177. *Id.*

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may find that defense of little avail. In *Lapidus v. State*,¹⁷⁸ the court considered issues of proximate cause presented by a former prison inmate who alleged that the state's negligence had incorrectly classified her as a second felony offender, causing her to serve substantially more time in prison than was appropriate. The lower court had dismissed the claim, finding that the claimant's failure to object to the erroneous classification was the supervening cause of her injury.¹⁷⁹

The appellate court disagreed, holding that the claimant's failure to controvert the state's error did not present a case "where the alleged intervening act . . . was independent of and divorced from the original negligence."¹⁸⁰ Observing "that the concept of proximate cause is an elusive one,"¹⁸¹ the court stated,

We conclude by observing that the facts presented herein constituted a 'perfect storm' of events which unfortunately culminated in Lapidus's service of a period of incarceration which was undeniably far over and above the sentence that she would have received . . . [as] a first felony offender.¹⁸²

This court, however, was willing to trust the legal process to sort out responsibility in the aftermath of a perfect storm: "Whether and to what extent [the plaintiff] should be permitted to recover damages . . . is an issue that ultimately must be resolved by the . . . trier of fact."¹⁸³ Apparently, this court's understanding of the story behind the perfect storm is that of the fishermen's families' lawsuits, rather than the one told in Junger's book.

2. *Shifting Causation*

The metaphor also has been offered to argue that causation should be attributed to a source other than that alleged. For example, in *In Re Civil Commitment of Bilderback*,¹⁸⁴ the trial court had ordered civil commitment of a psychiatric patient on the ground that he was mentally ill and dangerous. The patient challenged that decision, arguing that his "overt act causing . . . serious physical harm to another," on which the decision in part was based, was not caused by his mental illness, but instead was "provoked by circumstances . . . which together he calls a 'perfect storm.'"¹⁸⁵ The patient described as "unique" the circumstances that led him to attack a psychiatrist after another psychiatrist deliberately provoked the patient's rage in an effort to assess the extent of his

178. 866 N.Y.S.2d 711 (N.Y. App. Div. 2008).

179. *Id.*

180. *Id.* at 721.

181. *Id.* at 713.

182. *Id.* at 723.

183. *Id.*

184. No. A09-398, 2009 WL 2596067 (Minn. Ct. App. Aug. 25, 2009) (unpublished).

185. *Id.* at *2.

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mania.¹⁸⁶ The court declined to disturb the trial court's finding that the violent act was attributable to the patient's mental illness.¹⁸⁷

Similarly, in *State v. Moore*, the court found no error in the trial court's refusal to give to a jury instruction concerning imperfect self defense.¹⁸⁸ The court rejected defendant's argument that his "crimes arose from a perfect storm, a coincidence of events that he did not want or intend," leading to his "honest but unreasonable belief that he would be shot by police if they entered his home or he emerged from it."¹⁸⁹

On the other hand, in several opinions involving attorneys' conduct, the perfect storm metaphor works to diffuse the attorney's responsibility for delay by attributing its cause to a convergence of outside factors that would not, individually, have caused the harm. For example, in *McCormick v. Medicalodges, Inc.*,¹⁹⁰ the court permitted the plaintiff to respond late to an order to show cause for failure to timely serve her complaint and summons based on representations "that her attorney had experienced a 'Perfect Storm' of circumstances . . . including (1) a change of offices, (2) a family medical emergency and (3) a loss of paralegal help."¹⁹¹ Similarly, in *Macklin v. Mendenhall*,¹⁹² a court found no dilatory motive in the plaintiff's delay in seeking to amend her complaint, based on the busy schedule of the plaintiff's counsel, described as "'the perfect storm' involving four significant cases."¹⁹³

3. *Reckless Choice*

In most cases, the perfect storm metaphor embodies a tragic story of fateful coincidence, such as that presented in Junger's book. Courts rejecting such arguments attribute causation to identifiable human errors. In two bankruptcy opinions, however, a key element of the metaphor appears to be the reckless choice—or risky gamble. Such recklessness figured in the narrative of the down-on-his-luck-and-desperate fishingboat captain depicted in the movie *The Perfect Storm*, but was not an element in Junger's book. First, *In re Muniz* involved a debtor who opted to proceed *pro se*, a decision the court viewed as unfortunate.¹⁹⁴ The court stated,

This case illustrates a 'perfect storm' of bad consequences: the Debtor loses her discharge; she still has a judgment against her in favor of the Trustee for the value of property she failed to surrender to him; and . . .

186. *Id.*

187. *Id.*

188. 194 P.3d 18.

189. *Id.* at 21–24.

190. No. 05-2429-KHV, 2006 WL 1360403, at *1 (D. Kan. May 17, 2006) (unpublished).

191. *Id.*

192. No. 1:08cv0884, 2009 WL 1405005, slip op., at *8–9 (E.D. Cal. May 19, 2009).

193. *Id.*

194. *In re Muniz* 320 B.R. 697, 702 (Bankr. D. Colo. 2005).

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unsecured debt which . . . may not be subject to discharge The few hundred dollars that the Debtor saved by not hiring competent counsel is small compared to the amount of debt for which she will continue to be held responsible The result is regrettable in that it could have been avoided. But it is also the inevitable result of the Debtor's deliberate actions in the face of her knowledge of her obligations under the law.¹⁹⁵

Similarly, the court in *In re Saunders* emphasized the element of a poor choice:

[I]t must be remembered that Defendant finds herself in this unfortunate predicament because of her own conduct When Defendant elected to attempt an end-run on normal probate rules by listing her daughter as an owner of the Tacoma, she took a chance. She lost the gamble . . . in the perfect storm resulting from Debtors' bankruptcy filing.¹⁹⁶

In fact, the perfect storm was itself the natural consequence of the debtor's risky choice.

E. Unpreventable Consequences

Finally, the perfect storm metaphor can also convey a sense of the inevitability of unfortunate consequences.¹⁹⁷ In judicial opinions, it sometimes serves as a metaphor for judicial frustration induced by a convergence of forces, producing a result the court is helpless to prevent. For example, in *Leprich v. Byam*,¹⁹⁸ the court expressed frustration that the law could do nothing to retain in custody a former member of the Waffen S.S. who had "participated in the persecution of Jews, Gypsies, and other ethnic groups during the Second World War" and who had "misrepresented his wartime service and illegally procured American citizenship."¹⁹⁹ The court stated,

The convergence of petitioner's abominable history with [U.S. Supreme Court precedent, which limits to six months the detention of an alien who cannot return to his native country] present this court, not to mention American society generally, with the law's version of the 'perfect storm'.

195. *Id.* at 702–03. *See also* *Conway v. United States*, No. 4:08CV201, 2010 WL 1056468, at *15 (E.D. Tex. Jan. 29, 2010) (unpublished) ("The court is not unsympathetic to [the taxpayer's] plight. What transpired on his watch was the 'Perfect Storm.' Yet, the warning signals . . . loomed far in advance.").

196. *In re Saunders*, No. 07-40115-JDP, 2008 WL 538443, at * 3–4 (Bankr. D. Idaho Feb. 25, 2008) (unpublished).

197. In a dissenting opinion in a criminal case the metaphor portends doom: "This case is an example of the perfect storm developing over the sentencing judges in this Circuit." *United States v. Hunt*, 521 F.3d 636, 654 (6th Cir. 2007) (dissenting opinion).

198. No. 1:06-CV-679, 2007 WL 763812 (W.D. Mich. March 9, 2007).

199. *Id.* at *1.

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Petitioner has no legal claim and less moral claim to be in this country. . . . [but the law] requires that since he made it here, even illegally, he be set free to live in this country indefinitely.²⁰⁰

In *Duerson v. Indiana*, the metaphor seemingly conveys an apology for failings in the system.²⁰¹ For example, the metaphor was offered to jurors who were about to be excused because there were not enough jurors present to proceed with a trial. The judge said:

We had a number of perfect storm things that kind of came together at once. We had eleven jurors, I think, that were excused before we got here. Some of them we couldn't find. We had a higher number than normal of people who couldn't continue because of family obligations, not speaking English, those kinds of things, and having some feelings about the case which would not permit them to proceed. And so we ended up with ten of you This is the first time this has happened to me in twenty years So anyway, we do not have sufficient people to continue. So you are excused.²⁰²

Finally, in what may be a masterpiece of understatement, given that the litigants were “well into their second decade of litigating the issue of support for their child,” a court noted that the record before it could “only compromise public confidence in the Family Court system.”²⁰³ The opinion begins,

This case presents what we believe is a ‘perfect storm’ occasioned by respondent father’s repeated disobedience of Appellate Division, Supreme, and Family court orders, further[ed] by a series of errors by certain judges and support magistrates in Supreme and Family Court, and finally, made yet worse by the absence, at times, of legal representation for the parties.²⁰⁴

200. *Id.* at *4 n.3. *See also* *People v. Smith*, 34 Cal. Rptr. 3d 472, 473 (Cal. Ct. App. 2005). In *Smith*, the opinion begins:

Confronting a “perfect storm” of prejudicial legal error, we face, yet again, the consequences of the inexplicable reluctance of a prosecutor to request, and a trial court to give, a unanimity instruction when there is a risk that the defendant will be convicted even though there is no agreement among the jurors as to which act constituting the crime defendant committed. Here, the result is . . . a likely dismissal of charges should the prosecutor elect to retry the defendant.

Id. at 473,

201. No. 03A04-0811-CR679, 2009 WL 1294335, at *1 (Ind. Ct. App. May 11, 2009) (unpublished).

202. *Id.* at *1.

203. *Kent v. Kent*, 810 N.Y.S.2d 160, 161 (N.Y. App. Div. 2006).

204. *Id.*

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V. CONCLUSION: WHY EMBRACE THE STORY OF NO-ONE-TO-BLAME?

*"She's comin' on, boys, and she's comin' on strong."*²⁰⁵

*"There's a certain amount of denial in swordfishing."*²⁰⁶

Following publication of the book and release of the movie entitled *The Perfect Storm*, the phrase, "it was a perfect storm," entered the popular culture in apparently limitless contexts, including more than 160 judicial opinions. Although no one knows what happened to the *Andrea Gail* and its crew, the narrative set out in Sebastian Junger's non-fiction novel, *The Perfect Storm*, suggests what may have happened and provides a conceptual structure for the metaphor.

Apparently, even by those who have never read the book, a reference to the "perfect storm" is understood to embody that story, in which multiple forces converged in a singular event to produce devastating consequences that could not have been foreseen or prevented. The metaphor embodies the visceral experience of a violent storm and imports that physical response to a new set of circumstances, highlighting those aspects of a current situation that line up with the attributes of the storm story: a singular event involving a convergence of forces, which could not have been predicted or prevented, resulting in devastating harm.

In highlighting those aspects of experience, though, the metaphor may obscure others. By emphasizing the convergence of forces, the metaphor promotes a view of multiple causation as "perfect"—and separate from human agency. By emphasizing the singular quality of the storm, the metaphor invites a highly contextualized reading and suggests that a perfect storm is unlikely to recur, and therefore that any precedential effect of the case so described will be minimal. By conjuring up the awesome and mysterious forces of nature, the metaphor may work to absolve individuals of responsibility for their own actions. This view rejects the stories of the reckless sea captain and the negligent employer's unseaworthy vessel, which assert that events are attributable to human causation, danger is predictable, and harm can be prevented.

Still, a question posed earlier in this essay lingers: of the narratives available to explain the loss of the *Andrea Gail*, why would litigants choose this narrative of fateful coincidence? Why not prefer the story of a reckless sea captain or a negligent employer's unseaworthy vessel? It is easy to imagine why litigants would argue that anything they have done or failed to do was inconsequential under the circumstances—that the outcome was inevitable. Certainly it is comforting to think, "it wasn't *my* fault; there is nothing I could have done." But a perfect storm is not *anyone's* fault, and it is more difficult to understand the

205. The last radio transmission from the *Andrea Gail*, by Captain Tyne, on October 28, 1991. JUNGER, *supra* note 2, at 106.

206. JUNGER, *supra* note 2, at 95.

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appeal of an argument based on the premise that everyone is powerless.

Perhaps those alternative accounts are less satisfying because neither is capable of fully explaining the loss in terms that Neal Feigenson has described as a “simple, indeed monocausal, account[] of events [that] point[] toward a melodramatic conception of accidents, in which one and only one party is to blame.”²⁰⁷ Where multiple forces converge with unexpected consequences, the process of assigning blame is difficult and uncertain. Perhaps the answer to my question is that we prefer the complete solution offered by a version of the story in which the “perfect storm” is the culprit.²⁰⁸

Indeed, the perfect storm is the perfect culprit because it absolves human actors of responsibility to compensate victims for their loss. If the loss was inevitable, there is no point to a post-mortem dissection of contributing factors. The appeal of this line of argument is reflected in other popular figures of speech that minimize the value of allocating responsibility to human agency. For example, a fault-based analysis may be dismissed as an exercise in “the blame game.” Instead we may say “it is what it is.”²⁰⁹ The past is beyond our reach, and to attempt to sort out responsibility for past actions is to look backward, perhaps missing the opportunity to act effectively in the present. It is preferable to “move on.”

On one hand, the popularity of these figures of speech may suggest a trend toward the erosion of personal responsibility or simply laziness in our habits of mind. On the other hand, it may seem to us increasingly possible that events really *are* too complicated, their causes too intertwined, to be sorted out. To say that a result might have been different had one actor behaved differently assumes that the actor *could* have changed the outcome.

But maybe that isn't so; maybe no one had that power. In his recent book, *The Age of the Unthinkable*, Joshua Cooper Ramo writes,

Part of the reason a direct, head-to-head approach fails is that today we often can't find or name the threats we face The new-spun mashup risks of modernity, everything from greedy hedge funds to accidental bioreleases, can barely be understood, let alone confronted, in one place at one time. And often . . . the threats morph into something

207. FEIGENSON, note 8, at 92.

208. Defense counsel's argument at sentencing in *People v. Middagh*, provides an illustration: “This is not . . . an evil man. Maybe it was a perfect storm that night, but this is a good man and he's been convicted of a terrible thing and he'll have to deal with that for the rest of his life.” *People v. Middagh*, No. A123236, 2010 WL 1697557, at *8 (Cal. Ct. App. 2010) (unpublished).

209. “It is what it is” appeared on Lake Superior State University's List of Banished Words in 2008, the year that “the perfect storm” topped that list. *2008 List of Banished Words*, Lake Superior State University, <http://www.lssu.edu/banished/archive/2008.php> (last visited on July 22, 2011) (on file with the *McGeorge Law Review*). “Whatever,” usually “uttered witheringly to dismiss explanation of reasons” was 1997's winner. *1997 List of Banished Words*, Lake Superior State University, <http://www.lssu.edu/banned/archive/1997.php> (last visited on July 22, 2011) (on file with the *McGeorge Law Review*).

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unrecognizable and even harder to name or confront.²¹⁰

The alternative to a direct approach, Ramo argues, is “to look holistically instead of narrowly and then . . . to focus on our own resilience instead of trying to attack everything that looks scary.”²¹¹ Ramo’s view is reflected in both the resilience and the fatalism of the fisherman described in Junger’s book and may explain the resonance of that narrative of fateful coincidence and tragic heroes. Perhaps the idea that a devastating loss could have been prevented—was not inevitable—is too much to bear.

The implicit message carried by the perfect storm metaphor is troubling within a legal context.²¹² The perfect storm metaphor offers not only a way to avoid assigning blame but also a rationale for inaction and rough justice: a perfect storm cannot be undone, and its victims cannot be compensated, however deserving of compassion they may be. Conceptualizing a legal question in terms of a perfect storm suggests that the normal rules cannot apply—and perhaps that the legal system is incapable of reaching a just result.

In judicial opinions, the perfect storm image has been consciously invoked as a new metaphor; the audience is aware that it is offered for purposes of persuasion, and if the popularity of the phrase wanes, it may well cease to appear in judicial opinions.²¹³ However, if this new metaphor becomes embedded in legal discourse so as to serve as stand-in for some aspect of legal analysis, the audience will be less conscious of its effect, and the impact of the metaphor will be more powerful.²¹⁴

210. JOSHUA COOPER RAMO, *THE AGE OF THE UNTHINKABLE* 204 (2009).

211. *Id.* at 205.

212. *Cf.* Marc Galanter, *The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts*, 1 J. EMPIRICAL LEGAL STUD. 459, 518 (2004). Commenting on the phenomenon of the “vanishing trial” and the media’s role in shaping public perceptions of litigation, Marc Galanter observed, “[w]hatever the source of the skewed coverage, the audience receives the reassuring message that David generally manages to best Goliath, as well as the disturbing corollary that undeserving or spurious Davids are thick on the ground.” *Id.*

213. *See supra* text accompanying notes 70–74.

214. For a fascinating discussion of the development of the “fishing expedition” metaphor, *see* Elizabeth G. Thornburg, *Just Say “No Fishing”: The Lure of Metaphor*, 40 U. MICH. J. L. REFORM 1 (2006). Professor Thornburg quotes George Lakoff and Mark Turner, as follows: “Anything that we rely on constantly, unconsciously, and automatically is so much part of us that it cannot be easily resisted, in large measure because it is barely even noticed. To the extent that we use a . . . conceptual metaphor, we accept its validity. Consequently, when someone else uses it, we are predisposed to accept its validity. For this reason, conventionalized . . . metaphors have *persuasive* power over us.” *Id.* at 3 n.11 (quoting GEORGE LAKOFF & MARK TURNER, *MORE THAN COOL REASON: A FIELD GUIDE TO POETIC METAPHOR* 63 (1989)). Professor Thornburg notes that reliance on a metaphor “can replace rigorous analysis, disguising the factors that influence the result.” *Id.* at 3. *See also* Bill D. Herman, *Breaking and Entering My Own Computer: The Contest of Copyright Metaphors*, 13 COMM. L. POL’Y 231 (2008) (analyzing the metaphors of physical property, such as locked doors, used to describe efforts to circumvent encryption schemes in terms of “breaking and entering”).