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Pain and Suffering, Noneconomic Damages, and the Goals of Tort Law

Joseph H. King Jr.

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PAIN AND SUFFERING, NONECONOMIC DAMAGES, AND THE GOALS OF TORT LAW

*Joseph H. King, Jr.**

We have come to accept almost without question the monetary evaluation of the immeasurable perturbations of the spirit. But why should the law measure in monetary terms a loss which has no monetary dimension?¹

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* UTK and Walter W. Bussart Distinguished Professor of Law. I had an opportunity to share my ideas for this article with participants at a University of Tennessee College of Law Faculty Forum and at a Symposium on Damages sponsored by the Advocacy Center at the Tennessee College of Law.

1. Louis L. Jaffe, *Damages for Personal Injury: The Impact of Insurance*, 18 LAW & CONTEMP. PROBS. 219, 222 (1953).

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I. INTRODUCTION

THE awarding of damages for the noneconomic effects of pain and suffering² has become an established (and well entrenched) moiety of personal injury tort law. Nevertheless, as one writer (who apparently supports the practice) has noted, it is "widely perceived as one of the tort beast's uglier heads."³ Over the years there have been occasional calls or proposals to deal with the pain and suffering question. These have run the gamut from attempts to rationalize the criteria for those damages, to the imposition of limits on such awards, to occasional suggestions for the elimination of such damages in some types of torts claims. I wish to confront the essential question of whether noneconomic damages for pain and suffering should be retained at all in personal injury tort law. As an analytical framework, I will use a teleology grounded in the basal goals of personal injury tort law and discuss whether these damages are justified under those goals. I will argue that pain and suffering damages cannot be justified in any thoughtful way when one unprepossessedly considers such damages in the context of the goals of tort law. Pain and suffering damages and the policy goals of modern tort law are conceptually and operationally incompatible. Therefore, I propose an admittedly elegant solution (with some trepidation lest I be marked as a one with a "villainous disposition"⁴): that noneconomic damages for pain and suffering no longer be recoverable in any personal injury torts claims.

I will begin by offering a brief overview of the evolution of pain and suffering damages. I will then discuss the recognized goals of personal injury tort law and explain how I believe that these goals are subverted by the awarding of noneconomic damages for pain and suffering. And, finally, I will propose the complete elimination of damages for pain and suffering in personal injury torts cases and suggest (albeit tentatively and preliminarily) an outline of some compliments that ought to be consid-

2. The phrase "pain and suffering" is often used broadly to cover a whole range of noneconomic losses, such a physiological pain, mental anguish and distress, loss of enjoyment of life, and the non-economic effects of disfigurement. See 2 A.L.I. REPORTERS' STUDY: ENTERPRISE RESPONSIBILITY FOR PERSONAL INJURY 199-201 (1991) [hereinafter REPORTERS' STUDY]. I shall use the phrase, "pain and suffering," in the current article to signify this broad range of noneconomic effects. I use the phrase to embrace all noneconomic damages in personal injury torts cases for the sake of simplicity and ease of expression, since the phrase is almost a universally recognized expression in both the law and lay settings.

3. Steven P. Croley & Jon D. Hanson, *The Nonpecuniary Costs of Accidents: Pain-and-suffering Damages in Tort Law*, 108 HARV. L. REV. 1785, 1789 (1995).

4. William Zelermyer, *Damages for Pain and Suffering*, 6 SYRACUSE L. REV. 27, 28 (1955) (noting that to quarrel with the awarding of damages for pain and suffering "would not only contradict a practice long standing, but would also indicate a villainous disposition").

ered along with the elimination of pain and suffering damages. More specifically, I will conclude this article by positing a three-pronged approach to pain and suffering damages. First, I propose that compensatory damages no longer be awarded in any personal injury tort claims for the noneconomic consequences of pain and suffering. Second, I will urge that the scope of economic damages be broadly conceived to assure that comprehensive medical and rehabilitative strategies are employed to assuage the plaintiff's pain and mental suffering. And finally, I will suggest that the prevailing plaintiffs in personal injury torts claims be awarded reasonable attorneys fees.

A mantra in personal injury cases is that damages are supposed "to return the plaintiff as closely as possible to his or her condition before the accident,"⁵ or "make the plaintiff whole."⁶ The problem is that damages for pain and suffering do not accomplish that immediate end—they do not and never can return the injured person to his pre-injury position.⁷ The only damages that realistically can be said to contribute to the return of the plaintiff to his pre-injury state are economic damages that address loss of earning capacity and medical expenses. Of these economic damages, the only ones that can genuinely nullify some of the pain are economic damages for medical expenses to cover pain management and rehabilitation, not noneconomic damages for pain and suffering.

It is fitting that the period of emergence for pain and suffering damages as a central part of the measure of damages in personal injury torts cases⁸ roughly coincides with the first publication date of Hans Christian Andersen's classic tale, *The Emperor's New Clothes*.⁹ As the story goes, two swindlers masquerading as weavers declared that they made clothes from a marvelous and beautiful fabric, one, however, that was invisible to unfit or unworthy persons. Most everyone, including the emperor, colluded in their lie, fearful lest they appear unfit or unworthy. Eventually, the emperor made his appearance adorned in his "new clothes" and walked

5. MARC A. FRANKLIN & ROBERT L. RABIN, *TORT LAW AND ALTERNATIVES: CASES AND MATERIALS* 679 (7th ed. 2001); see also *McDougald v. Garber*, 536 N.E.2d 372, 374 (N.Y. 1989) (stating that the "goal is restore the injured party, to the extent possible, to the position that would have been occupied had the wrong not occurred"); A. I. Ogus, *Damages for Lost Amenities: For a Foot, A Feeling or a Function?*, 35 MOD. L. REV. 1, 2 (1972) ("Applying the *restitutio in integrum* principle, the court attempts to put the plaintiff in the position he would have been in but for the defendant's tort.").

6. Harry Kalven, Jr., *The Jury, the Law, and the Personal Injury Damage Award*, 19 OHIO ST. L.J. 158, 160 (1958).

7. See Richard L. Abel, *Critique of Torts*, 37 U.C.L.A. L. REV. 785, 803 (1990) (stating that the fundamental justification for torts damages "is hopelessly incoherent—money cannot restore victims to their status quo before the accident" and that "money is a poor equivalent for non-pecuniary loss"); Ogus, *supra* note 5, at 2 ("Restitution *in integrum*, in its ordinary sense, is impossible.").

8. See *infra* Part II.

9. See HANS CHRISTIAN ANDERSEN, *THE EMPEROR'S NEW CLOTHES* (1836), reprinted in *THE COMPLETE FAIRY TALES AND STORIES* 77 (Erik Christian Haugaard trans., 1974). The fairy tales and stories were first published over a period of years, with *The Emperor's New Clothes* making its first appearance in 1936. See *THE COMPLETE FAIRY TALES AND STORIES*, *supra*, at 1072.

under his crimson canopy in a procession for all to admire.¹⁰ Suddenly, a little child blurted out the truth—the emperor “doesn’t have anything on,”¹¹ sentiments loudly echoed by the crowd.¹² Although “[t]he emperor shivered, . . . certain they were right,” he nevertheless decided he must continue the charade and, we are told, “walked even more proudly.”¹³

For nearly two centuries, the courts and legal community have indulged similar new clothes on the damages model, an illusion that money can somehow be made to correspond to the noneconomic effects of pain and suffering, and can after a fashion be rationally calculated. But, there is no correspondence, and they cannot be rationally calculated. There is no basis for this reification of pain and suffering into currency. This emperor has no clothes, and all the legal fictions in the world cannot change that.

The only question that makes sense, then, is not whether damages for pain and suffering make the plaintiff whole—they cannot—but whether such damages are consonant with the underlying policy goals of tort law.¹⁴ A number of goals of tort law have been recognized over the years. The paramount contemporary efficiency-based goals of tort law contemplate that the costs of accidents be allocated to the most suitable actors and enterprises whose activities and products generate them, thereby spreading the costs of accidents to the consumers of the products and services.¹⁵ In so doing, both the enterprises and their consumers are informed through pricing and cost structures of the true and relative costs of accidents. This allocation operates to spread the losses of individuals to a broad class of consumers of the enterprise’s goods and services, or through liability insurance to a broad class of participants in the insured activity.¹⁶ Deterrence-incentive-based goals are premised on the assumption that the threat or potential for liability will inspire safer conduct or more efficient allocation of resources and loss prevention strategies.¹⁷ The attainment of all of the preceding economic goals hinges on the integrity and soundness of the process of valuing victims’ losses. Loss allocation and spreading are undermined by the incommensurability of pain and money.¹⁸ The deterrence-incentive-based goals, whatever their va-

10. ANDERSEN, *supra* note 9, reprinted in *THE COMPLETE FAIRY TALES AND STORIES* 80 (Erik Christian Haugaard trans., 1974).

11. *Id.* at 81.

12. *Id.*

13. *Id.*

14. This matter has received relatively scant attention. See Edward J. McCaffrey et al., *Framing the Jury: Cognitive Perspectives on Pain and Suffering Awards*, 81 VA. L. REV. 1341, 1343 (1995) (noting lack of exploration in the legal literature “of what ‘compensation’ in fact even means”). Some of the analysis developed in the following subsections dealing with the goals of tort law were previously explored in less detail in a prior article addressing strict tort liability. See Joseph H. King, Jr., *A Goals-Oriented Approach to Strict Liability for Abnormally Dangerous Activities*, 48 BAYLOR L. REV. 342, 382-89 (1996).

15. See *infra* Part III.C.3.

16. See *infra* Part III.C.2.

17. See *infra* Part III.C.4.

18. See *infra* Part III.B.

lidity, presumably depend on the presence of some rational foundation that individuals and enterprises can summon in making their cost-benefit analyses that optimize the expenditure of resources on loss avoidance. Deterrence and incentive goals of tort law are corrupted when the assessment of damages is arbitrary and lacks any objective referent.

A measure of damages that prominently includes noneconomic damages for pain and suffering subverts the very goals of tort law that personal injury damages are supposed to promote. Damages doctrine has thus been allowed to slip from its true analytical moorings and then to insidiously grow by its unchecked appetitive temper, all the while corroding the policy goals that should animate tort law. This process has been going on for decades. It is one of those phenomena more universally described by Leo Tolstoy at the conclusion of *War and Peace*.¹⁹ In what we might call his nation-ship metaphor, Tolstoy warns that “[i]t is only by watching closely, moment by moment, the movement of that flow, and comparing it with the movement of the ship, that we are convinced that every moment that flowing by of the waves is due to the forward movement of the ship, and that we have been led into error by the fact that we are ourselves moving too.”²⁰ And so in early astronomy, “the difficulty of admitting the motion of the earth lay in the immediate sensation of the earth’s stationariness.”²¹ Likewise, with these damages, the difficulty in challenging the current practice may rest with our sense of familiarity-based inertia despite the relentless persistence and expansion of these damages. As with tired astronomy, even though we do not feel firsthand the movement of the earth, if we assume its immobility we are reduced to absurdity, but by “admitting its movement, we are led to laws.”²²

II. EVOLUTION OF PAIN AND SUFFERING DAMAGES

There are three categories of potential damages in tort cases: nominal damages,²³ compensatory damages, and punitive damages.²⁴ Compensatory damages are the focus of most torts claims. They consist of both economic (or pecuniary) damages that include past and future loss of earning capacity and medical expenses, and damages for the

19. LEO NIKOLAYEVICH TOLSTOY, *WAR AND PEACE* (Constance Garnett trans., Modern Lib. 2002) (1865).

20. *Id.* at 1368.

21. *Id.*

22. *Id.*

23. According to the *Restatement*, “[n]ominal damages are a trivial sum of money awarded to a litigant who has established a cause of action but has not established that he is entitled to compensatory damages.” *RESTATEMENT (SECOND) OF TORTS* § 907 (1979); see also CHARLES T. MCCORMICK, *HANDBOOK ON THE LAW OF DAMAGES* 85 (1935) (“Nominal damages are awarded for the infraction of a legal right, where the extent of the loss is not shown, or where the right is one not dependent upon loss or damage, . . . [and] is made as a judicial declaration that the plaintiff’s right has been violated.”).

24. Punitive damages have no compensatory function, but instead “serve to give outlet, in cases of outrageous conduct, to the indignation of the jurors, and they are defended as furnishing a needed deterrent to wrong doing, in addition to that furnished by criminal punishment.” MCCORMICK, *supra* note 23, at 275.

noneconomic consequences of injuries, that is, those based on the noneconomic effects of victim's pain and suffering (and similar or related noneconomic affliction). Of course, a victim's pain and suffering may, and often does, cause economic consequences, such as pain-mediated disability that results in loss of earning capacity or that necessitates medical care.²⁵ To the extent that there are economic consequences of the pain and suffering, these are deemed economic losses and are therefore compensated as economic damages. I would continue to fully compensate torts victims for these economic consequences of their pain and suffering. It is the category of *noneconomic* "pain and suffering" damages²⁶ that will be the focus of this article.

Noneconomic consequences of personal injuries include the whole array of mental suffering or other compensable mental responses to a personal injury. The categories and terminology of noneconomic suffering have varied. I will not attempt to catalogue the disparate terminology and permutations here. What is important, for present purposes, is that my observations and recommendations apply to all noneconomic consequences to the victim²⁷ of a tortious personal injury. Typically, noneconomic consequences have included the usual pain and suffering consisting of the "[t]angible physiological pain"²⁸ and the "unpleasant sensory and emotional experience associated with actual or potential tissue damage,"²⁹ along with the "anguish and terror felt in the face of impending injury or death, both before and after the accident."³⁰ Such damages may also include the noneconomic effects of limitations caused by the injury, which are often referred to as "the enduring loss of enjoyment of life by the accident victim who is denied the pleasures of normal personal and social activities because of his permanent physical impair-

25. See Clarence Morris, *Liability for Pain and Suffering*, 59 COLUM. L. REV. 476, 476 (1959) (noting that "[s]uffering can disable," and that "pecuniary compensation for economic loss resulting from pain should be recoverable").

26. See *supra* note 2.

27. Compensatory damages may be claimed not only by or on behalf of the immediate victim of a personal injury, but also by persons sharing certain relationships with the victim that may entitle them to damages based on the adverse effects of the immediate victim's injury on those relational interests. These claims may include, for example, loss of consortium and wrongful death claims, the latter of which may in turn include not only economic damages for loss of pecuniary contributions from or earning of the deceased victim, but in some states also damages for loss of consortium, companionship, and guidance. See DAN B. DOBBS, *THE LAW OF TORTS* 807-13 (2000). There is a divergence of approaches on whether these latter wrongful death items should be considered economic or noneconomic losses. See *id.* at 812. These relational claims are beyond the scope of this article, although the analysis may also be pertinent to such claims to the extent that they are considered economic in nature.

28. REPORTERS' STUDY, *supra* note 2, at 199-200.

29. International Association for the Study of Pain, IASPO Pain Terminology, Pain Terms, "Pain," at <http://www.iasp-pain.org/terms-pain> (last visited Feb. 27, 2003).

30. REPORTERS' STUDY, *supra* note 2, at 199-200; see *Overstreet v. Shoney's Inc.*, 4 S.W.3d 694, 715 (Tenn. Ct. App. 1999) (describing pain and suffering as encompassing the mental and emotional responses to pain, and also as including "anguish, distress, fear, humiliation, grief, shame, or worry").

ment.”³¹ And, finally, noneconomic damages are typically also recoverable for “disfigurement.”³²

More than forty years ago, Louis Jaffe observed that “the crucial controversy in personal injury torts today is not in the area of liability but of damages.”³³ Nevertheless, it is damages law for noneconomic damages for pain and suffering that most foils and escapes convincing rationalization. Perhaps this is in part because the matter of damages is so preeminently “jury law.”³⁴ And with so much wealth and professional standing³⁵ riding on damages issues, the reticence and circumspection of the legal community when it comes to critical analysis of the professed justifications for pain and suffering damages may be understandable. The fact remains, however, that Jaffe’s largely unheeded observation is equally compelling today. And, no aspect of damages law is more controversial than the question of the place of recovery for pain and suffering in modern tort law.³⁶

Although precursors³⁷ and forerunners of pain and suffering damages may have been present for centuries,³⁸ the awarding of such damages as we understand them in torts cases probably began to evolve in English practice about the same time the English courts began to use juries.³⁹

31. REPORTERS’ STUDY, *supra* note 2, at 199-200; Dobbs, *supra* note 27, at 1052. There is some variation nationally over the number and contours of the categories of noneconomic damages and whether they should be computed together as a single sum or as separate items. See JAMES M. FISCHER, UNDERSTANDING REMEDIES 388 (1999). Some cases allow damages to be computed separately for each category of noneconomic harm, or at least some of the categories. See *Boan v. Blackwell*, 541 S.E.2d 242, 243 (S.C. 2001) (holding that “loss of enjoyment of life” and “pain and suffering” were “separately compensable elements of damages”); *Overstreet*, 4 S.W.3d at 715-16 (allowing the jury to separately assess each of the three categories of noneconomic damages). Other courts, however, strongly disagree, and do not allow the jury to make separate awards. See *McDougald v. Garber*, 536 N.E.2d 373, 375-76 (N.Y. 1989) (disallowing the jury to make separate awards for pain and suffering and loss of enjoyment of life).

32. *Overstreet*, 4 S.W.3d at 715-16. According to *Overstreet*, disfigurement “impairs a plaintiff’s beauty, symmetry, or appearance.” The courts are divided on whether damages for disfigurement should be assessed as part of the award for pain and suffering or separately. FISCHER, *supra* note 31, at 391.

33. Jaffe, *supra* note 1, at 221. This concern by Jaffe was echoed a generation later in an important article by Professor Ingber. See Stanley Ingber, *Rethinking Intangible Injuries: A Focus on Remedy*, 73 CAL. L. REV. 772, 856 (1985) (commenting that the torts process “focuses too much on rules limiting liability and too little on the fundamental issues of damages and remedies generally”).

34. Kalven, *supra* note 6, at 159.

35. *Id.* at 158 (commenting that the reputation of plaintiffs’ lawyers “is measured more in terms of what they would . . . get in a given case than it is in terms of winning or losing”).

36. See Oscar G. Chase, *Helping Jurors Determine Pain and Suffering Awards*, 23 HOFSTRA L. REV. 763, 764-65 (1995) (describing criticism of the noneconomic damages in tort claims).

37. The Anglo-Saxons may have (even before the Norman Conquest of Britain) employed a system of money compensation (or “bot”) for wrongs of violence that was based on a schedule of payments specified for certain types of injuries. McCORMICK, *supra* note 23, at 22. This system constituted a “step in the gradual substitution of judicial redress for the vengeance of the blood feud.” *Id.*

38. See Jeffrey O’Connell & Keith Carpenter, *Payment for Pain and Suffering Through History*, 50 INS. COUNS. J. 411, 412 (1983).

39. McCORMICK, *supra* note 23, at 24.

Damages for pain and suffering began to be recognized in Anglo-American law in the late 18th century.⁴⁰ The awarding of pain and suffering damages probably gained widespread acceptance as a part in the overall damages package in personal injury cases in Anglo-American practice during the nineteenth century.⁴¹ Noneconomic (pain and suffering) damages saw a spectacular increase following the Second World War.⁴² The increase has been attributed to general affluence,⁴³ popular awareness of larger verdicts,⁴⁴ and more effective trial techniques to achieve large awards.⁴⁵ The American Trial Lawyers Association is credited with a major role in the development and refinement of these trial techniques that has spurred the growth in damages for pain and suffering.⁴⁶ And, apparently these damages have continued to mushroom in size.⁴⁷ By some accounts, they currently comprise “perhaps one-half of the total damages paid out in the important categories of products liability and medical malpractice.”⁴⁸ Damages for pain and suffering are like vestigial appendages that once arguably had some minor function, but have since lost any defensible purpose. Yet, these damages have not only mindlessly survived, but have grotesquely grown in size and now command an ever increasing share of the host’s resources to sustain them.

III. SUBVERSION OF THE GOALS

A. FIRST PRINCIPLES

I will argue in this article that the goals of tort law are fundamentally threatened and undermined by awarding pain and suffering. I further conclude that if the goals are to be preserved, logic dictates that pain and suffering damages be eliminated in personal injury torts claims. My argument will thus employ a logic-based analysis, one that I recognize may be

40. JEFFREY O’CONNELL & RITA S. SIMON, PAYMENT FOR PAIN AND SUFFERING 3 (1972).

41. See O’Connell & Carpenter, *supra* note 38, at 412; Ogus, *supra* note 5, at 4.

42. See O’Connell & Carpenter, *supra* note 38, at 413.

43. *Id.* Jaffe has noted that “[o]ur concern about ‘security’ grows as our stake in it grows.” Jaffe, *supra* note 1, at 222.

44. See O’Connell & Carpenter, *supra* note 38, at 413; Jennifer K. Robbenolt & Christina A. Studebaker, *News Media Reporting on Civil Litigation and Its Influence on Civil Justice Decision Making*, 27 LAW & HUM. BEHAV. 5, 15 (2003) (noting that “large monetary damages reported in the media may affect what jurors come to consider as the appropriate range of recovery in subsequent cases,” and that “the large monetary damages reported in the media may serve as judgmental anchors”).

45. O’Connell & Carpenter, *supra* note 38, at 413. See generally Joseph H. King, Jr., *Counting Angels and Weighing Anchors: Per Diem Arguments for Noneconomic Personal Injury Torts Damages*, 70 TENN. L. REV. (forthcoming 2003) (discussing the trial technique of using per diem arguments for assessing damages and the background of pain and suffering damages in general); Neal Feigenson & Meghan A. Dunn, *New Visual Technologies in Court: Directions for Research*, 27 LAW & HUM. BEHAV. 109 (2003) (discussing design and methods for study of the effects of new visual technologies on legal decision making).

46. See O’CONNELL & SIMON, *supra* note 40, at 4.

47. Victor E. Schwartz & Leah Lorber, *Twisting the Purpose of Pain and Suffering Awards: Turning Compensation into “Punishment,”* 54 S.C. L. REV. 47, 64-68 (2002).

48. McCaffrey et al., *supra* note 14, at 1347.

challenged as philosophically incomplete. Thus, one might question why I stop at the goals listed instead of considering other potential interests. Accordingly, one might ask whether the goals of tort law, and by extension tort law itself, are worth preserving at all, given the tort system's costs and inefficiencies and the pressing demands for our limited resources from other interests such as the environment, primary education, or maternal health, to name a few. And, then, of course, one might further suggest that this analysis is itself incomplete because it does not consider whether other interests, perhaps intergenerational ones, might militate in favor of a different direction. The problem, of course, is that soon we would find ourselves on what philosophers like to call a "regress of reasons."⁴⁹ And, that regress of reasons then "threatens to become an infinite regress,"⁵⁰ in which we pursue a spiraling process seeking antecedent premises followed by more antecedent premises until we either admit to "infinite regress" or arrive at some set of reasons that are derived in some other fashion,⁵¹ such as by discovering a set of true "first principles" (a questionable and precarious posture with its overwhelming "conundra of induction and verification"⁵²). I have chosen not to travel that yellow brick road here and not to seek (probably in vain) to find that "invisible citizen."⁵³ Accordingly and admittedly, I will adopt a contextualist posture⁵⁴ in which there is room for beliefs to "vary from one context to another, and . . . from one field of discourse to another." This means that I will assume for the purposes of the present article that the goals (and thus the underlying system of tort law that animates them) should be preserved for now. Accordingly, I will leave to others (or at least to another day) further "regress" that leads to questions of the wisdom of the ultimate survival of the tort system in its current embodiment.

B. DISCONTINUITY OF PAIN AND MONEY

It is sometimes said that one of the aims of damages is "compensation."⁵⁵ But, compensation means simply transferring money in response

49. Kelly L. Ross, *The Foundations of Value: Logical Issues: Justification (Quid Facti), First Principles, and Socratic Method*, at <http://www.friesian.com-1.htm> (last visited June 23, 2003).

50. *Id.*; see also Henry Mather, *Natural Law and Right Answers*, 38 AM. J. JURIS. 297, 310 (1993).

51. For a brief summary of various possible theories of "epistemic justification," in response to the regress problem, see Mather, *supra* note 50, at 309-310.

52. Ross, *supra* note 49.

53. H.G. WELLS, *THE INVISIBLE MAN* (1898), reprinted in *THE COMPLETE SCIENCE FICTION TREASURY OF H.G. WELLS* 218 (Auenel 1978) (quoting Kemp dialogue with the invisible man that "[t]he world has become aware of its invisible citizen. But no one knows you are here").

54. See Mather, *supra* note 50, at 312-13.

55. See, e.g., PETER CANE, *ATIYAH'S ACCIDENTS, COMPENSATION AND THE LAW* 353 (6th ed. 1999) ("Compensation is, by definition, one of the functions of compensation systems."); DOBBS, *supra* note 27, § 10, at 17; Steven D. Smith, *The Critics and the "Crisis": A Reassessment of Current Conceptions of Tort Law*, 72 CORNELL L. REV. 765, 765 (1987) ("Most commentators assume that the system's primary objective is to provide compensation . . ."). Professor Dobbs states:

to an actionable event—here a personal injury resulting from conduct that is deemed tortious or liability-justifying. Compensation is not itself a goal. Compensation is what we do. It does not tell us why or when we should do it, or how much we compensate.⁵⁶ Similarly, it has become almost a mantra in tort law that damages are supposed “to return the plaintiff as closely as possible to his or her condition before the accident,”⁵⁷ or “make the plaintiff whole.”⁵⁸ But, again, that construct leaves unanswered questions. What does it mean in the context of damages that an injured person is rendered “whole”? How do we define “loss” for the sake of a damages remedy? As Australian tort theorist Peter Cane notes, “the legal meaning of ‘loss’ is not simply a question of proper linguistic usage but also of policy.”⁵⁹ If making one whole means to restore the victim with money to the victim’s pre-accident state, then taken literally, that “make him whole” charge does not logically lead to the inclusion of pain and suffering in the plaintiff’s award of damages. Damages for pain and suffering do not accomplish that—they do not and cannot ever return the plaintiff to his pre-accident position. Such damages have no restorative power to return the victim to his pre-accident status or to erase past pain (which time has perhaps already done).⁶⁰ The only damages that truly can negate some of the plaintiff’s pain are economic damages for

Compensation of injured persons is one of the generally accepted aims of tort law. Payment of compensation to injured persons is desirable. If a person has been wronged by a defendant, it is just that the defendant make compensation. Compensation is also socially desirable, for otherwise the uncompensated injured persons will represent further costs and problems for society.

DOBBS, *supra* note 27, at 17. See generally CANE, *supra*, at 349-53 (discussing the various meanings of “compensation”).

56. Compensation can be viewed as a means to achieve the goals of tort law: It is sometimes said that a principal function of tort law is to promote the compensation of those who have suffered injury. . . . If by a ‘function’ of tort law we mean a beneficial effect of the imposition of tort liability, then it is accurate enough to say that providing compensation to victims is a function of tort law.

KENNETH S. ABRAHAM, *THE FORMS AND FUNCTIONS OF TORT LAW* 18 (2d ed. 2002).

57. See sources cited *supra* note 5; see also Ingber, *supra* note 33, at 775 (noting the common suggestion that damages “are intended to restore the plaintiff to the position he occupied prior to the tortious act”).

58. Kalven, *supra* note 6, at 160; Daniel W. Shuman, *The Psychology of Compensation Law*, 43 U. KAN. L. REV. 39, 45 (1994) (“The commonly understood goal of tort compensation is to restore the injured to their preaccident condition, to make them whole.”); Smith, *supra* note 55, at 769 (referring to the “cardinal principle” of compensation as prescribing that “injured plaintiffs should receive an amount necessary to make them ‘whole,’ that is, to restore them to the position they would have occupied but for the defendant’s tortious conduct”).

59. CANE, *supra* note 55, at 353.

60. See *id.* at 354 (stating that “when all has been done to minimize the pain and suffering by medical means, any residual pain and suffering cannot be shifted: it remains with the victim, no matter what compensation is paid to that person by others”). To the extent that damages do restore the victim, as by providing medical care to treat the underlying medical condition and to manage his pain, and to replace lost earning capacity, damages do restore the victim to his or her pre-accident condition. But, those are not, it must be emphasized, *noneconomic* damages for pain and suffering as such, the focus of this article. Rather, they are classic *economic* damages.

medical expenses to cover treatment and pain management and to replace loss of earning capacity, but not noneconomic damages for pain and suffering.⁶¹

Damages cannot erase the memory of past pain, if it exists, nor can such damages avert future pain. To the extent that pain was disabling or necessitating medical care, those losses would then be economic losses and included within the loss of earning capacity and medical costs recoverable by the plaintiff. But, apart from the economic consequences of pain, money damages cannot nullify past or future pain. Some writers have nevertheless attempted to find a restorative dimension in noneconomic damages for pain and suffering to justify the monetary reification of pain represented by damages. These attempts to at least articulate a restorative role for pain and suffering damages have taken several tacks. First, some writers have characterized noneconomic damages for pain and suffering as a "solatium"⁶² for the victim's injured feelings.⁶³ Second, some have viewed noneconomic pain and suffering damages as providing funds to finance some pleasant activity that may in some ill-defined way constitute a substitute that sort of offsets or "makes up" for the fact that the victim has or may endure some pain.⁶⁴ The basic idea

61. See Abel, *supra* note 7, at 803 (stating that the fundamental justification for torts damages "is hopelessly incoherent—money cannot restore victims to their status quo before the accident" and "money is a poor equivalent for non-pecuniary loss").

62. Jaffe, *supra* note 1, at 224.

63. See Ingber, *supra* note 33, at 781 ("Compensation may restore the plaintiff's sense of self-value, and ease his sense of outrage.")

64. See ABRAHAM, *supra* note 56, at 210; CANE, *supra* note 55, at 351; FISCHER, *supra* note 31, at 383; Ingber, *supra* note 33, at 784-85; Ogus, *supra* note 5, at 8, 16 (stating that "[d]amages for non-pecuniary loss may be justified only to the extent that they might effectively be employed to provide the plaintiff with some measure of consolation," that "[t]he court . . . should not attempt to 'value' happiness," and that though it falls short of restoring to the plaintiff the happiness which he has actually lost, attempts the next best thing by supplying him with the means to obtain some alternative pleasure"); Richard N. Pearson, *Liability to Bystanders for Negligently Inflicted Emotional Harm—A Comment on the Nature of Arbitrary Rules*, 34 U. FLA. L. REV. 477, 502 (1982) (noting for at least some kinds of intangible harm, awarding damages for pain and suffering "would improve the plaintiff's pain to pleasure ratio" and that although "units of pain" do not disappear, they "will be easier to bear in Bermuda"). Thus, Abraham attempts to make the argument suggesting that damages may actually redress pain:

[E]ven if the plaintiff's pain and suffering cannot ever be fully compensated for with money, the plaintiff may be able to use an award to provide activities or enjoyments that substitute for those lost as a result of the injury in question. For instance, if the plaintiff no longer can play soccer because of paralysis, he might use the money from an award of general damages to purchase a satellite dish that will bring televised soccer from around the world into his home, or the plaintiff might use the award to take up an entirely new hobby.

ABRAHAM, *supra* note 56, at 210. Fischer also notes that one justification for pain and suffering damages may be to provide the injured party with

sufficient funds to purchase at least an imperfect substitute, i.e., the purchase of happiness equal to the pain and suffering the plaintiff has endured as a result of the tortious conduct. . . . [H]e can use the pain and suffering award to purchase happiness in the future to offset the pain and suffering sustained. The two accounts can be roughly balanced. When the ability to purchase happiness is in equilibrium with the pain and suffering sustained, it may be

here seems to be that noneconomic damages for pain and suffering can "offset intangible loss by awarding funds to purchase a substitute pleasure."⁶⁵ And, finally, some writers have raised the possibility of a host of complex psychological effects of tort recoveries that may provide a measure of relief to the victim.⁶⁶ These rationalizations for pain and suffering simply substitute a different set of incommensurables. Instead of the problem of dollars for pain, we now get the "satellite dish" for soccer-less Saturdays. As Steven Smith observed, "[t]his attempt at commensurability succeeds only if we can reduce the rich complexity of human experience to the procrustean categories of pain and pleasure."⁶⁷ Nor does the answer lie in some vague supposed potential psychological benefit from an award of damages, an award that cannot be addressed by medical expenses but rather must also include noneconomic damages for pain and suffering. Damages may be gratifying or pleasing to the plaintiff and the plaintiff's attorney and may perhaps assuage a sense of being wronged and even improve the plaintiff's self-confidence,⁶⁸ but more money does not nullify past or future pain. The plaintiff may feel more affluent after receiving damages, just like he would had he won a lottery. But he will not feel free of pain. In fact, some commentators have raised the question "whether the award may actually tend to reinforce the plaintiff's pain."⁶⁹ Others have noted that damages for pain and suffering "dehumanize the response to misfortune, substituting money for compassion, arousing jealousy instead of sympathy, and treating experience and love as commodities."⁷⁰

More importantly, even conceding some pleasant effects of damages for pain and suffering on the plaintiff's state of mind, those effects do not counterbalance the negative effects of the "arbitrary indeterminateness

said that the plaintiff has been "restored" to the position he would have achieved, absent the tortious conduct. While the restoration is approximate, it is the best the legal system can do and preferable to the alternative of no compensation, which may be perceived as a windfall for the defendant.

FISCHER, *supra* note 31, at 383-84.

65. Morris, *supra* note 25, at 479 (noting the fact that "image[s] of the law affording special pocket money to sufferers for books, television sets, and other distractions from pain is appealing," but rejecting the rationale for unintentional injuries); Shuman, *supra* note 58, at 47 (describing without endorsing this thesis).

66. See Shuman, *supra* note 58, at 51, 56-57, 60-64 (suggesting the possibility that imposition of tort liability for pain and suffering may be perceived as punishing the tortfeasor, empowering the victim, restoring the victim's sense of equity, providing direction for "therapeutic assessments of blame," enhancing the victim's sense of dignity and procedural justice, thereby providing psychological relief to the victim); Smith, *supra* note 55, at 784 (referring to the "psychological need for 'justice'").

67. Smith, *supra* note 55, at 771; see also 2 DAN B. DOBBS, LAW OF REMEDIES 398 (2d ed. 1993) (noting that "it is clear that the price of distractions is not the measure of these damages").

68. See Jaffe, *supra* note 1, at 224.

69. 2 DOBBS, *supra* note 67, at 398 n.102.

70. Abel, *supra* note 7, at 823.

of the evaluation.”⁷¹ How does one even begin to rationally and predictably measure and monetize those anticipated psychological benefits? No market or market mechanism exists for pain and suffering,⁷² and therefore there is no objective referent for such damages.⁷³ There is also a Catch-22 here. Presumably the more noneconomic benefits we award, the more psychological benefit will be derived. At what point then have we awarded enough when more can still, we are told, possibly yield more psychic benefit?

Jurors must undertake this “monetization” without a standard because “[t]here is none to give them.”⁷⁴ They are indefinite and without an intelligible guiding premise⁷⁵ or objective standard.⁷⁶ As one article noted, jury “instructions from the court are breathtakingly unhelpful” in achieving greater predictability of noneconomic awards.⁷⁷ Essentially, the only guidance for setting such damages is that they be fair and reasonable—an “empty shell.”⁷⁸ No “reservoir of experience”⁷⁹ accumulates to support a frame of reference for triers of fact. This abets “innumeracy”⁸⁰—the inability of most people to comprehend the reality of or difference between large numbers.⁸¹ Juries are given scant meaningful instructions from the

71. Jaffe, *supra* note 1, at 224. As one court observed recently, “[g]arden variety pain and suffering defies a nice standard for calculation.” *Duarte v. Zachariah*, 28 Cal. Rptr. 2d 88, 96 (Cal. Ct. App. 1994).

72. RESTATEMENT (SECOND) OF TORTS § 912 cmt. b (1977) (“There is no market price for a scar . . . since the damages are not measured by the amount for which one would be willing to suffer the harm.”); PATRICK S. ATIYAH, *THE DAMAGES LOTTERY* 15 (1997) (commenting that “there is no way of putting any real financial figure [on pain and suffering]—there is no market for these ‘losses’”); Ingber, *supra* note 33, at 778; Frederick S. Levin, *Pain and Suffering Guidelines: A Cure for Damages Measurement “Anomie,”* 22 U. MICH. J.L. REFORM 303, 308 (1989) (“No market for pain and suffering exists because a market is composed of willing buyers and sellers and very few persons voluntarily endure pain and suffering for a price.”).

73. See Chase, *supra* note 36, at 765 (“An inescapable reality of the pain and suffering conundrum is that tort law requires the monetization of a ‘product’ for which there is no market and therefore no market price.”).

74. *Id.*

75. “Juries are left with nothing but their consciences to guide them.” Ingber, *supra* note 33, at 778; see Zelermeyer, *supra* note 4, at 31 (stating that “the law supplies no instrument for the measurement of pain and suffering . . . except for vivifying the elements of pain and suffering”); Shari S. Diamond et al., *Juror Judgments About Liability and Damages: Sources of Variability and Ways to Increase Consistency*, 48 DEPAUL L. REV. 301, 313-14 (1998).

76. See REPORTERS’ STUDY, *supra* note 2, at 201-02 (stating that “no legal criteria exist for assessing the degree of harm that has been done and then translating it into a dollar figure,” and that “[j]urors are simply told to apply their ‘enlightened conscience’ in selecting a monetary figure which they consider to be fair”); Jaffe, *supra* note 1, at 222.

77. Roselle L. Wissler et al., *Instructing Jurors on General Damages in Personal Injury Cases*, 6 PSYCHOL. PUB. POL’Y & L. 712, 736 (2000).

78. Ogus, *supra* note 5, at 4.

79. James F. Blumstein et al., *Beyond Tort Reform: Developing Better Tools for Assessing Damages for Personal Injury*, 8 YALE J. ON REG. 171, 176 (1990).

80. Douglas R. Hofstadter, *Metamagical Themas—Number Numbness, or Why Innumeracy May be Just as Dangerous as Illiteracy*, SCI. AM., May 1982, at 20.

81. *Id.*

courts in assessing pain and suffering damages.⁸² Moreover, perhaps as a result of the fact-based nature and inherent subjectiveness of the determination, courts have been unable and therefore disinclined to meaningfully supervise jury awards for pain and suffering.⁸³

Not only are juries given virtually no useful direction in setting awards for pain and suffering, but jury decisionmaking is also subject to the influence of extrajudicial factors, such as race, gender, and social and physical attractiveness.⁸⁴ Commentators have found significant variation in pain and suffering awards for seemingly similar injuries,⁸⁵ and this so-called "horizontal inequity,"⁸⁶ cannot be explained or rationalized by the specific facts.⁸⁷ The wide disparity in outcomes also suggests that the amounts awarded for pain and suffering are arbitrary.⁸⁸ Not only are such damages without predictable criteria, but in practice the amount awarded may be influenced by a host of factors, such as the race, gender, insurance, or wealth of the defendant, that are extraneous to the actual level of pain of the victim (even if that could be objectively measured).⁸⁹ Pain and suffering damages may reflect efforts to replace sums once received under the rubric of punitive damages by now seeking to utilize pain and suffering damages as the vehicle for venting a jury's urge to punish a defendant.⁹⁰ At the very least, the sums assessed as damages

82. David W. Leebron, *Final Moments: Damages for Pain and Suffering Prior to Death*, 64 N.Y.U. L. REV. 256, 313 (1989); Wissler et al., *supra* note 77, at 713. Jury instructions do not really do much good. The Wissler article notes that "[t]he most noteworthy feature of current instructions regarding damages is the lack of guidance they provide. The consequence appears to be awards that have considerable variability and that are influenced by improper considerations." Wissler et al., *supra* note 77, at 713.

83. Leebron, *supra* note 82, at 265; *see also* Blumstein et al., *supra* note 79, at 175.

84. Levin, *supra* note 72, at 320 & nn.64-67.

85. Mark Geistfeld, *Placing a Price on Pain and Suffering: A Method for Helping Juries Determine Tort Damages for Nonmonetary Injuries*, 83 CAL. L. REV. 773, 775 (1995).

86. Wissler et al., *supra* note 77, at 713; *see* Geistfeld, *supra* note 85, at 784; Leebron, *supra* note 82, at 310.

87. Leebron, *supra* note 82, at 258-59; *see also* Blumstein et al., *supra* note 79, at 174; Wissler et al., *supra* note 77, at 713. Potential sources of this variation, in addition to the potential influence of extrajudicial factors, include basic human inconsistency aggravated by the lack of reference points, events at trial unrelated to the damages assessment, and, of course, manifold differences from one individual juror to the next. Leebron, *supra* note 82, at 314.

88. *See* 2 DOBBS, *supra* note 67, at 398-99 (stating that in connection with such damages that "verdicts vary enormously, raising substantial doubts whether the law is evenhanded in the administration of damage awards or whether in fact it merely invites the administration of biases for or against individual parties"); Geistfeld, *supra* note 85, at 783 (noting the arbitrariness of pain and suffering "because jurors are unsure how to derive the award").

89. *See* Tom Baker, *Blood Money, New Money, and the Moral Economy of Tort Law in Action*, 35 LAW & SOC'Y REV. 275, 314 (2001) (stating that "compensatory damages are valued according to a host of things beyond the harm done to the plaintiff: the size of the defendant's liability insurance policy, the wrongfulness of the defendant's conduct, the presence or absence of subrogation claims, the plaintiff's need for money, and in some cases, the amount of the defendant's other assets"); Chase, *supra* note 36, at 768-70 (noting that damages may be affected by the race, gender, and wealth of the defendant).

90. *See* Schwartz & Lorber, *supra* note 47, at 49 (stating that "plaintiffs' lawyers . . . have poured new wine of punishment evidence, once used to obtain punitive damages, into old bottles of pain and suffering awards"). Schwartz and Lorber explain how pain and

may be a product of the fusion of liability and damages issues.⁹¹ Pain and suffering are also notoriously easy to feign, and therefore the outcomes may often reflect various degrees of malingering rather than actual pain. As one author noted, "science has not yet discovered the magic elixir for distilling truthfulness from malingering."⁹² Thus, injured plaintiffs who apparently experience similar levels of pain have often received vastly different amounts of damages.⁹³ Furthermore, the scientific literature strongly suggests that individual levels of pain perception may be influenced by a host of subjective subject-specific variables.⁹⁴ These variables include, for example, differences in the perceived responsiveness and attentiveness of one's spouse to a person's chronic pain,⁹⁵ the gender of the subject,⁹⁶ cultural and ethnic differences,⁹⁷ and regular cigarette smoking.⁹⁸

suffering awards are being used as surrogates to replace the lost money that until recently (before the Supreme Court, state legislatures, and federal income tax laws put the brakes on or removed some of the wind from the sails), had been recovered as punitive damages. *Id.* at 53-59. Pain and suffering damages are being "twisted into a covert punitive damages substitute . . . [to] provide the next oil well for 'jackpot justice.'" *Id.* at 68 (quoting *McDougald v. Garber*, 536 N.E.2d 372, 375 (N.Y. 1989)).

91. See Edith Greene, *Is the Jury Competent?*, LAW & CONTEMP. PROBS., Autumn 1989, at 225, 232 (commenting that "jurors may fuse liability and compensatory damages issues"); Wissler et al., *supra* note 77, at 725 (stating that "the fusion of liability and damages reflects a discounting of awards for uncertainty about the defendant's liability or a surcharge to punish for reckless or egregious behavior").

92. Steven I. Friedland, *Law, Science and Malingering*, 30 ARIZ. ST. L.J. 337, 341 (1998) (examining the current methodologies for attempting to detect deceit and malingering in the legal system).

93. Leebron, *supra* note 82, at 310.

94. See generally Janet L. Abraham, MD & Lois Snyder, JD, *Pain Assessment and Management*, 28 PALLIATIVE CARE 269, 270 (2001) (stating that "[p]ain rating scales are subjective, not objective"); A.J.M. Clark, *Chronic Pain—Is Anything New?*, 42 CANADIAN J. ANESTHESIA R57 (1995) ("Due to their inherent subjectivity, pain, suffering, and disability are difficult to prove, disprove, or quantify in a satisfactory fashion."); Corinne Manetto, Ph.D. & Susan E. McPherson, Ph.D., *The Behavioral-Cognitive Model of Pain*, 12 CLINICS GERIATRIC MED. 461, 462 (1996) (noting that "[r]ather than a simple sensory event, the experience of pain is colored by an individual's unique physiology, psychology, and socio-cultural background," and that "psychosocial factors" may be "better predictors of pain than the extent of pathophysiologic damage").

95. Rebecca K. Papas et al., *Perceived Spouse Responsiveness to Chronic Pain: Three Empirical Subgroups*, 2 J. PAIN 262, 262 (2001) (noting that differences in the perceived responsiveness and attentiveness of one's spouse to a person's chronic pain may influence or correlate with pain levels, pain behavior, and dysfunction).

96. See Francis J. Keefe et al., *The Relationship of Gender to Pain, Pain Behavior, and Disability in Osteoarthritis Patients: the Role of Catastrophizing*, 87 PAIN 325, 326, 330-31 (2000) (noting significant gender differences in pain, pain behavior, and "catastrophizing," which is the "tendency to focus on and exaggerate the threat value of painful stimuli and negatively evaluate one's ability to deal with pain"). See generally Clark, *supra* note 94, at R56 (stating that gender "is an important factor in pain," noting the importance of menstrual cyclicity in pointing out rhythmic physiological patterns in pain and that pain also varies during the day).

97. See Rafael A. Ortega et al., *Ethnic Variability in the Treatment of Pain*, 26 AM. J. ANESTHESIOLOGY 429 (1999) ("Culturally and ethnically distinct groups interpret and react to pain differently.").

98. See W. B. Eriksen & D. Brusgaard, *Does Smoking Aggravate Musculoskeletal Pain?*, 26 SCANDINAVIAN J. RHEUMATOLOGY 49, 50-52 (1997) (discussing the potential role of smoking in the pathogenesis of musculoskeletal pain, and noting that "[s]mokers

The question is not whether important purposes served by tort law, such as loss spreading and loss allocation, are worthy goals in principle, but whether the effects of pain and suffering can be monetized and spread.⁹⁹ The insurmountable challenge is to arrive at a rational monetary valuation of pre-accident freedom from the pain that was lost as a result of the tortious injury. Thus, Jaffe observed that “[t]o put a monetary value on the unpleasant emotional characteristics of experience is to function without any intelligible guiding premise.”¹⁰⁰ The real problem is that suffering and money are incommensurable.¹⁰¹ As Professor Dobbs has said, such damages “have no restorative purpose, [and therefore] there is no way to measure the amounts that should be given.”¹⁰² In fact, it is “not clear what function they are intended to serve for the plaintiff.”¹⁰³ Thus, it is ironic that in a closing argument Melvin Belli himself once pointed to an “exemplary of a model argument”¹⁰⁴ on pain and suffering involving a wrongful death and survival claim based on an injury to a seven-year-old electrical-burn victim who lived for two months following his injury.¹⁰⁵ And, indeed, the plaintiff’s closing argument eloquently describes pain.¹⁰⁶ But, the undeniable fact remains that money cannot

experienced considerable pain and intense pain more frequently than nonsmokers,” particularly in young and middle-aged smokers).

99. Jaffe has stated the issue as “whether placing a money value on this sorrow serves a sufficiently valuable function to make it a legitimate charge against the national insurance funds.” Jaffe, *supra* note 1, at 231.

100. *Id.* at 222; *see also* Kalven, *supra* note 6, at 161 (characterizing the jury’s assessment of damages for pain and suffering as a “gestalt approach”); Schwartz & Lorber, *supra* note 47, 59-60 (stating that the law does not provide an effective formula for valuing pain and suffering).

101. *See* Botta v. Brunner, 138 A.2d 713, 720 (N.J. 1958) (“There is no exact correspondence between money and physical or mental injury or suffering, and the various factors involved are not capable of proof in dollars and cents.”), *modified*, N.J. Rule: 1:7-1(b); Smith, *supra* note 55, at 770. *See generally* McDougald v. Garber, 536 N.E.2d 372 (N.Y. 1989) (“Translating human suffering into dollars and cents involves no mathematical formula; it rests . . . on a legal fiction. The figure that emerges is unavoidably distorted by the translation.”); REPORTERS’ STUDY, *supra* note 2, at 221 (referring to “the nearly unanswerable question of how much money should be paid in redress for an inherently non-monetary harm”); Margaret J. Radin, *Compensation and Commensurability*, 43 DUKE L.J. 56, 56 (1993) (discussing the tension between concepts of compensation based on a premise of commensurability of pain and money and one based on the incommensurability of pain and money).

102. 2 DOBBS, *supra* note 67, at 398-99; *see also* FISCHER, *supra* note 31, at 383 (noting the criticism of pain and suffering damages based on the fact that “[p]ain and suffering cannot be undone”); Jeffrey O’Connell, *A Proposal to Abolish Defendants’ Payment for Pain and Suffering in Return for Payment of Claimants’ Attorneys’ Fees*, 1981 U. ILL. L. REV. 333, 341 (“Psychic loss . . . is highly idiosyncratic and relatively unmeasurable in dollars . . .”).

103. 2 DOBBS, *supra* note 67, at 398.

104. 5 MELVIN M. BELLI, MODERN TRIALS § 65.36, at 6 (2d ed. 1982 & Supp. 1984) (quoting from the closing argument of plaintiff’s attorney, Robert J. Glenn).

105. *See* Del Muro v. Commonwealth Edison Co., 464 N.E.2d 772, 773 (Ill. App. Ct. 1984).

106. The argument included the following language:

Pain is a four letter word. You hear about people praying for death, but you never hear anybody praying for pain. Pain is something we don’t want to think about. It’s horrible. It’s the window to hell, and that’s exactly what

erase that pain. In fact, death already has done so. What loss is compensated here? No one is "made whole." Except for medical treatment, pain and suffering are not reversible by money, nor is the victim's pre-accident status amenable to restoration by money. Suffering has no monetary analogue nor does it admit of intelligible criteria to guide jurors in transmuted it into a damages figure. Therefore, expecting an objective appraisal defies logic.

The process of assessing noneconomic damages for pain and suffering also assumes a degree of separateness of evaluator and object that is unrealistic. In 1926, Werner Heisenberg identified what has come to be known¹⁰⁷ as the "Uncertainty Principle."¹⁰⁸ Heisenberg postulated that the velocity and present position of an object could not be measured without shining light on the particle, but the energy of the light disturbs the velocity.¹⁰⁹ Thus, the more accurately one tries to measure the position of something, the less accurately one can measure its speed because the process of the analysis will affect the result.¹¹⁰ The Heisenberg principle has (not unexpectedly) been mined for deeper meanings that transcend the world of quantum physics. Thus, Professor Tribe finds two premises underlying Heisenberg's thesis. First, "that any observation necessarily requires intervention into the system being studied; and second, that we can never be certain that the intervention did not itself change the system in some unknown way."¹¹¹ Now, we have to be careful here leaping at the latest scientific revelation or insight in search of deeper meaning lest we end up like the Eastern priests, satirized by Pope, giddy from running in circles trying to imitate the sun.¹¹² That said, the Heisenberg Uncertainty Principle may hold implications for the question of pain and suffering damages. Without a monetary analogue for pain, nor a meaningful objective basis for its appraisal, the separateness of the evaluator and the evaluated becomes illusory. Jurors project a host of

this little boy went through for two months in that hospital with all that treatment, with all those surgeries in the Burn Care

5 BELLI, *supra* note 104, § 65.36, at 6 (quoting from the closing argument of plaintiff's attorney, Robert J. Glenn).

107. Heisenberg's Uncertainty Principle has become a popular allusion even in law review writing, particularly in the context of jurisprudence and statutory and constitutional analysis. See, e.g., Jack Greenberg, *Capital Punishment as a System*, 91 YALE L.J. 908, 909 (1982); Lawrence H. Tribe, *The Curvature of Constitutional Space: What Lawyers Can Learn from Modern Physics*, 103 HARV. L. REV. 1, 17-18 (1989); Daniel S. Goldberg, Comment, *And the Walls Came Tumbling Down: How Classical Scientific Fallacies Undermine the Validity of Textualism and Originalism*, 39 HOUS. L. REV. 463, 479-81 (2002).

108. STEPHEN HAWKING, *A BRIEF HISTORY OF TIME* 56 (10th ed. 1996).

109. *Id.* at 56-57.

110. *Id.* at 57.

111. Tribe, *supra* note 107, at 18.

112. Recall Pope's lines:

Go, wondrous creature! mount where science guides,
Go, measure earth, weigh air, and state the tides
As Eastern priests in giddy circles run,
And turn their heads to imitate the sun.

ALEXANDER POPE, *AN ESSAY ON MAN*, THE OXFORD AUTHORS, ALEXANDER POPE 281 (Pat Rogers ed., 1993).

extraneous, even arbitrary, factors into their appraisal of pain. And, victims (to the extent they are the ones who ultimately receive the payout) will also be affected by the process and prospects of new money.¹¹³ Professor Jack Greenberg, invoked the Heisenberg principle in his discussion of the death penalty, reasoning that just as "the act of observing may distort the phenomenon under observation,"¹¹⁴ so too does review of capital sentencing "so affect[] the system that it cannot accomplish its purpose."¹¹⁵ The solution, according to Greenberg, is a complete revision of our politic-legal system (hardly likely) or the abolition of capital punishment. I believe we are faced with the same dilemma with pain and suffering damages and the only solution is their abolition.

Should damages, then, be awarded for pain and suffering at all? For the answer to that question, I submit that we should turn more saliently to the underlying goals of tort law for the answer. In the discussion that follows, I shall undertake to apply a goals-based analysis of the wisdom of pain and suffering damages. I shall conclude that since money damages for noneconomic loss associated with pain and suffering have no restorative function—they do not eliminate pain—and since the "loss" represented by pain is not amenable to thoughtful or predictable calculation, such damages do not promote in any non-chaotic way the goals of tort law. Noneconomic damages for pain and suffering do just the opposite—they undermine the core modern goals of loss spreading, allocating losses to other more suitable loss bearers than the plaintiff, and deterring tortious (or encouraging non-tortious) conduct.

C. THE GOALS

1. *Preservation of the Peace and Retribution*

Historically, affording victims a tort remedy was thought to help preserve the peace by eliminating some of the impetus for victims to seek revenge or self-help by violent means.¹¹⁶ In the 16th century, Francis Bacon wrote: "Revenge is a kind of wild justice, which the more man's nature runs to, the more ought law to weed it out; for as for the first wrong, it doth but offend the law, but the revenge of that wrong, putteth the law

113. Tribe's observation, in another context, is apt. "The law," he says, is "not simply a backdrop against which the action may be viewed," it is itself "an integral part of that action." Tribe, *supra* note 107, at 20.

114. Greenberg, *supra* note 107, at 909.

115. *Id.*

116. See DOBBS, *supra* note 27, § 8, at 12 (stating that in medieval England, tort law had as a principal aim "discouraging violence and revenge"); Ingber, *supra* note 33, at 787; Shuman, *supra* note 58, at 40 ("Modern tort law is rooted in the legal system's search for an alternative to the blood feud"); Wex S. Malone, *Ruminations on the Role of Fault in the History of the Common Law of Torts*, 31 LA. L. REV. 1, 1-2 (1970) (identifying the blood feud, a characteristic of a "barbaric society organized along the lines of blood kinship" and clans, as the "primordial seed" from which tort law's system of compensation was to germinate).

out of office.”¹¹⁷ In keeping with this idea, pain and suffering damages “were justified at early common law as vindication for violent conduct . . . [where their] purpose was not so much to compensate for economic loss, but to forestall vengeance and retaliation.”¹¹⁸

There is serious doubts about the continuing validity of this goal in modern tort law. First, there is not even theoretical validity for the preservation-of-the-peace goal in the case of unintentional injuries, where there is obviously less of even a theoretical need to discourage retaliation.¹¹⁹ And, of course, unintentional injuries occupy the vast majority of the cases that comprise the personal injury landscape, especially where there are real assets or insurance with which to satisfy judgments for the victims. Second, society in general is less dependent on violent self-help as a means of responding to injuries. And, finally, the peace-keeping function of tort law, whatever its historical underpinnings, is overshadowed by the paramount modern economic-based redistributive goals such as loss-spreading¹²⁰ and loss allocation.¹²¹ Justice Traynor noted that damages for pain and suffering “originated under primitive law as a means of punishing wrongdoers and assuaging the feelings of those who had been wronged. They become increasingly anomalous as emphasis shifts in a mechanized society from ad hoc punishment to orderly distribution of losses through insurance and the price of goods.”¹²² Thus, P.S. Atiyah, formerly professor of law at Oxford, comments that “[t]his desire for vengeance may or may not be a good thing, but it is misdirected when it leads to demands for more compensation in more cases.”¹²³ Although vestiges of the impulse of revenge may still be found in tort law,¹²⁴ such impulses seem inconsonant with modern redistributive goals today. Occasionally, some writers almost nostalgically bemoan the fact that the transformation of the tort system has occurred “without adequate consideration of the role of the tort system as an alternative means for injured parties to satisfy their primal needs.”¹²⁵ This all unfortunately leaves unanswered the unanswerable question of where one is to find a defensible

117. FRANCIS BACON, OF REVENGE, IN *ESSAYS*, reprinted in *THE WORKS OF FRANCIS BACON* 14 (1932).

118. See O’Connell & Carpenter, *supra* note 38, at 417; Malone, *supra* note 116, at 1-3.

119. See O’Connell & Carpenter, *supra* note 38, at 417 (“[A]lthough damages for . . . pain and suffering gained recognition under the negligence action, the underpinning of nonpecuniary damages seems less appropriate when applied to inadvertently inflicted injuries.”).

120. See *infra* Part III.C.2.

121. See *infra* Part III.C.3.

122. *Seffert v. L.A. Transit Lines*, 364 P.2d 337, 345 (Cal. 1961) (Traynor, J., dissenting).

123. ATIYAH, *supra* note 72, at 161; see also Albert A. Ehrenzweig, *A Psychoanalysis of Negligence*, 47 Nw. U. L. REV. 855, 869 (1953) (“A maturing society will have to replace this fault formula by one less burdened with pseudo-moral considerations and more responsive to present needs, however devoid the new formula should prove of emotional satisfaction.”).

124. Thus, in advocating a rule of strict tort liability, Ehrenzweig suggests that “this barbaric system of revenge, in its more refined form of retaliation . . . lies at the root of our fault rule.” Ehrenzweig, *supra* note 123, at 866.

125. Shuman, *supra* note 58, at 41.

and discernible test for determining to what extent torts damages should be augmented to satisfy those "primal needs."

2. *Loss Spreading*

By requiring enterprises and insured actors to pay for the losses their activities and products tortiously cause, and to reflect those costs in the prices charged, losses are "spread" to a wider class of market participants beyond the immediate victims. Loss spreading thus is thought to ameliorate the harsh impact of injuries on individual victims by preventing their confluence on a few victims, and may also reflect notions of the declining marginal utility of money.¹²⁶ This is achieved by diffusing (or "spreading" or "distributing") the losses that would otherwise be borne by the victim into the costs of the services and goods generated by the injurious activities—in effect having damages be incorporated into the costs of those engaging in the injurious activities. Redressing economic losses for loss of earning capacity and past and future medical expenses largely prevents the concentration of the economic burden of accidents on individual victims. But, awards for the adverse noneconomic effects of tortious conduct, such as pain and suffering, do not similarly facilitate this end. In fact, imposing damages for noneconomic losses for pain and suffering may exhaust limited resources that would otherwise be available for redressing economic losses. In so doing, payment of noneconomic damages may thereby actually thwart the paramount loss-spreading goal of restoring to the plaintiff the loss of money due to impairment of the victim's earning capacity and necessitated by past and future medical expenses.

The ultimate goal of loss spreading, as animated by the more immediate goal of achieving "rectification,"¹²⁷ logically would seem to depend on a commodified-commensurable idea of compensation, where theoretically "the victim is by definition indifferent between having been injured and having money, on the one hand, and not having been injured but not having money, on the other."¹²⁸ In other words, loss spreading seems premised on damages that create a "state of affairs after the injury and compensation (having been injured and having the money) is identical with . . . the status quo ante (not having been injured but not having

126. See DOBBS, *supra* note 27, at 17-18 ("In this view, each individual purchaser of the products will pay a tiny fraction of the costs of injuries inflicted by those products and the injured person will not be compelled to bear the entire cost alone. Loss would thus cause less social dislocation."); David A. Fischer & Robert H. Jerry, *Teaching Torts Without Insurance: A Second-Best Solution*, 45 ST. LOUIS U. L.J. 857, 869 (2001); Fleming James, Jr., *Some Reflections on the Bases of Strict Liability*, 18 LA. L. REV. 293, 294 (1958) (articulating the rationale for loss spreading in terms of the declining marginal utility of money and its added relative importance to a victim as the victim has less of it); King, *supra* note 14, at 350-52, 383-84; Michael J. Trebilcock, *The Future of Tort Law: Mapping the Contours of the Debate*, 15 CANADIAN BUS. L.J. 471, 471-80 (1989) (describing loss-spreading as meaning that the costs of accidents are "collectively, not individually, borne").

127. Radin, *supra* note 101, at 60-61.

128. *Id.*; see also Smith, *supra* note 55, at 770 ("[T]he notion of calculating damages for intangible injuries inevitably suggests that mangled limbs and deceased spouses or children can be treated as a [sic] commodities subject to purchase, sale, or bargain.").

money.”¹²⁹ But, that is impossible because damages and pain are qualitatively incommensurable, and because damages cannot alleviate or eradicate past, present or future pain and suffering. Thus, as Jaffe says, “it is doubtful that the pooled social fund of savings should be charged with sums of indeterminate amount when compensation performs no specific economic function.”¹³⁰ There is in short “no obvious way to translate an intangible, nonmonetary injury into a monetary award. Moreover, there is no objective test that measures the severity of the victim’s pain and suffering injury.”¹³¹

The illogic of trying to fit compensation for pain and suffering within the goal of loss spreading is also apparent for other reasons. There is serious doubt whether accident victims, prior to accidents, even hold an expectation of compensation for pain and suffering.¹³² Some have argued that tort law can be viewed as a sort of surrogate for a mechanism of mandatory insurance against at least some kinds of accidental losses.¹³³

129. Radin, *supra* note 101, at 60-61.

130. Jaffe, *supra* note 1, at 225. Radin describes Jaffe’s language as identifying the “twin earmarks of incommensurability—‘indeterminacy’ and ‘no specific economic function.’” Radin, *supra* note 101, at 75.

131. Geistfeld, *supra* note 85, at 781.

132. O’CONNELL & SIMON, *supra* note 40, at 3. O’Connell and Simon conducted a survey of persons who had received liability insurance payments for auto accident. *Id.* at 14. Their conclusions included the following:

The most overwhelming impression from the findings is the large-scale confusion in the minds of accident victims about the concept of pain and suffering. Overwhelmingly, they did not know about payment for pain and suffering at the time of the accident; most victims learned about it during the settlement process; many were mistaken about whether they were paid for it; and, whether they were paid for pain and suffering—or whether they thought they were paid for it—made little or no difference in their attitudes toward the pain they suffered, toward having had the accident, or toward the other driver. . . .

Perhaps the most striking finding of our study is how little, prior to the any accident, traffic victims understood or expected payment for pain and suffering. . . .

Startling too are our findings of what little difference being paid for pain and suffering apparently makes to traffic victims. For example, very few victims, it will be recalled, ended up resenting the other driver with whom he collided, and whether one was paid—or how much one was paid—for pain and suffering had no significant relationship in assuaging any feelings of resentment. . . .

[O]n the basis of our findings, it would appear that auto victims do not feel “a sense of continuing outrage,” nor do damages for pain and suffering “wipe out” any sense of outrage.

Id. at 19, 43-44, 46, 48.

133. See REPORTERS’ STUDY, *supra* note 2, at 206 (identifying as one of the goals of torts a form of mandatory disability insurance); Croley & Hanson, *supra* note 3, at 1896-914 (extolling the role of tort liability as a mechanism for a virtual mandatory insurance); Alan Schwartz, *Proposals for Products Liability Reform: A Theoretical Synthesis*, 97 YALE L.J. 353, 362-67, 408-11 (1988); Fischer & Jerry, *supra* note 126, at 870. Croley and Hanson challenge the dominant view that the awarding of pain and suffering damages are incompatible with the insurance preferences of consumers, stating that “[c]onsumers, in effect, purchase along with their products an insurance policy against nonpecuniary losses that is

But, the mandatory-insurance notion has been challenged in the context of noneconomic damages for pain and suffering, where most scholars have concluded that consumers do not demand insurance against noneconomic harms from accidents.¹³⁴ Schwartz is somewhat more guarded, noting that it is difficult to say as a general proposition that people will insure against noneconomic harm from pain and suffering.¹³⁵ In the end, however, faced with the question of on which side to err, Schwartz leans toward the conclusion that people would want to buy no (or only "slight") coverage for noneconomic harms.¹³⁶ Steven Shavell reasons that the amount of insurance coverage against noneconomic loss that a person will wish to purchase "will clearly depend on whether such losses will affect the utility he would derive from receiving additional money,"¹³⁷ and that in many instances, "suffering a nonpecuniary loss will not alter an individual's need for money or . . . the utility he would derive from receiving additional money."¹³⁸ The idea of tort liability as a form of mandatory insurance has been roundly criticized with respect to noneconomic damages for pain and suffering.¹³⁹ The reason damages for

specially tailored for whatever loss they may incur." Croley & Hanson, *supra* note 3, at 1898-99. The authors argue that the absence of an insurance market for insurance against future pain and suffering should not be equated with consumer preference. Instead, the authors point to a variety of "nonmarket forces" including juries in personal injury cases, consumer groups, and everyday experience. *Id.* at 1837-45. The authors' terse arguments are conclusory. More important, they are circular. In effect, they argue that we need tort recovery for pain and suffering because we have tort recovery for pain and suffering (which suggests that consumers would desire insurance for pain and suffering).

134. STEVEN SHAVELL, *ECONOMIC ANALYSIS OF ACCIDENT LAW* 230 (1987) (observing that coverage for first party insurance against personal injury "usually approximates only direct medical expenses and foregone earnings"); Croley & Hanson, *supra* note 3, at 1790 & n.19, 1797-804; O'Connell, *supra* note 102, at 366 (stating that no insurance companies offer first party insurance for future pain and suffering, probably because there is no market for them, and that insurers are "understandably very chary of insuring against adverse results very much within the control of the purchaser (the insured), and perhaps relatively unimportant to the purchaser"); George L. Priest, *The Current Insurance Crisis and Modern Tort Law*, 96 *YALE L.J.* 1521, 1546-47, 1553 (1987). Croley and Hanson have stated:

The prevailing wisdom concerning consumer demand for insurance can be neatly summarized: consumers want full insurance for positively wealth-impacting accidents; they want no insurance for wealth-neutral accidents; and they want some form of 'disinsurance'—that is, some mechanism by which they can move money out of the accident state of the world and into the nonaccident state of the world—for negatively wealth-impacting accidents.

Croley & Hanson, *supra* note 3, at 1799-800.

135. Schwartz, *supra* note 133, at 364. He notes that one should not infer too much about consumer preferences from the fact that people do not routinely purchase such insurance because that might simply reflect supply-side difficulties facing insurers. *Id.* at 365.

136. He bases his decision on intuition, the fact that spending money is not a common response to grief, and the fact that insurers would have to charge high premiums because of the amorphyousness of suffering claims. *Id.* at 366.

137. SHAVELL, *supra* note 134, at 229; *see also* Schwartz, *supra* note 133, at 362 (saying that a consumer will choose insurance "that maximizes his expected utility").

138. SHAVELL, *supra* note 134, at 228.

139. *See* REPORTERS' STUDY, *supra* note 2, at 206 (1991) ("When tort doctrine is pictured in this way—as a port of entry into an insurance program paid for and provided by members of the community for themselves—the claim of pain and suffering to *any*, let alone *full*, compensation appears shaky."); Croley & Hanson, *supra* note 3, at 1790 & n.19 (noting the criticism, but differing with it).

pain and suffering do not fit with the mandatory-insurance view of tort law has been explained as follows:

If the injury is temporary, the actual pain will be over long before the money is collected. If the injury is permanent, the eventual payment of money will not directly undo the ongoing harm from the loss of a limb, for example . . . All that the tort/insurance system can do is reduce the money victims have available to spend *before* they are hurt in order to give them more money to spend *after* they are hurt, though we have no reason to suppose that in their injured state they would actually enjoy the money any more than they would while they were healthy. . . . Consequently, to the extent that tort law functions and is defended as an implicit mode of disability insurance, the logical conclusion is that pain and suffering should be deleted as an unwarranted feature of this coverage.¹⁴⁰

To summarize, loss spreading today is a core goal, probably the paramount goal, of the tort system. It depends on a rational system by which to value losses. Pain and suffering cannot logically be monetized or commodified into noneconomic damages, tends to be influenced by a wide variety of subject-specific and extrajudicial factors, and lacks meaningful criteria for assessment of damages or guidance of juries, all with the inevitable result that such damages are highly variable, unpredictable, and abjectly arbitrary.

3. *Loss Allocation*

Tort law, in imposing liability, seeks as a goal to allocate losses to defendants who represent suitable entry points for spreading losses and signaling to consumers that compensating such injuries are costs of the activity to be reflected in the prices charged.¹⁴¹ Professor Conrad explains, “[e]nterprises are conduits for the transmission of resources to injury victims from investors, consumers, workers, and other constitu-

140. REPORTERS’ STUDY, *supra* note 2, at 207 (noting also the paucity of private insurance coverage for first-party loss for pain and suffering).

141. Under this goal tort law can be pictured as a sort of “port of entry” into a de facto “insurance program, paid for and provided by members of the community for themselves.” *Id.* at 206; *see also* ABRAHAM, *supra* note 56, at 16-18 (noting that through pricing of products or services or the value of widely-owned companies the costs of losses are “distributed through the defendant to a larger number of individuals”); CANE, *supra* note 55, at 356-57; DOBBS, *supra* note 27, at 17-18 (stating that “[i]n this view, each individual purchaser of the products will pay a tiny fraction of the costs of injuries inflicted by those products and the injured person will not be compelled to bear the entire cost alone,” that “[l]oss would cause less social dislocation,” and noting the theory that some defendants are seen as good “risk distributors” who should be held liable “for any harms they cause regardless of fault because they can ‘distribute’ the costs of paying compensation” and that “[a]t the same time, an enterprise would be forced to internalize losses typically generated by the business itself”); King, *supra* note 14, at 350-52, 356-58; George L. Priest, *The Invention of Enterprise Liability: A Critical History of the Intellectual Foundations of Modern Tort Law*, 14 J. LEG. STUD. 461, 481 (1985) (tracing the modern intellectual history of enterprise liability and the premise that enterprises should be held liable in order to internalize the costs of the accidents they cause).

ents.”¹⁴² The aim is to “internalize” the costs of accidents, thereby achieving a rational distribution of losses and optimal allocation of resources.

The effectiveness of charging losses to the activities and enterprise that engender them depends on the method of defining and assessing losses to be charged to defendants. While economic losses are readily ascertainable, can be compensated in kind,¹⁴³ and can be evaluated and predicted by discernible objective criteria, the same cannot be said for noneconomic losses like pain and suffering damages, which vary for similar injuries. In as much as economic losses are alone amenable to reparation by damages, they are appropriately allocated initially to the activities and enterprises that caused them. Liability-mediated increases in the costs of goods, services, and insured activities also represent appropriate signals to potential consumers of the true costs of such goods, services, and activities. Contrariwise, awarding damages for noneconomic pain and suffering, with all their unpredictability and incalculableness, seriously distorts and destabilizes the process of loss allocation,¹⁴⁴ and at the same time reduces the amount of resources available to enterprises to pay for economic losses and to function in a free enterprise system. Limiting damages to economic losses is not only consistent with, but critical to, the loss-allocation function of tort law.

Another aspect of pain and suffering damages that undercuts the loss-allocative goal stems from the simple fact that such damages do not really have any effect on the pain. Thus, unlike economic damages, pain and suffering damages do not eliminate pain. The unsuitability of pain and suffering damages as a vehicle for loss allocation has been aptly described by Professor Ingber, who comments: “To the extent that intangible injuries are truly nontransferable, imposing liability burdens the defendant with the costs of an injury that the plaintiff nevertheless must bear. There is essentially a ‘double accounting’ in such cases that may present a danger of excessive avoidance and a concomitant misallocation of resources.”¹⁴⁵ Furthermore, the variability of pain and suffering damages creates perverse incentives for fraud and corruption. Thus, “since awards for pain and suffering are often roughly calculated as a multiple of medical expenses, the incentive to incur unnecessary medical expenses . . . is

142. Alfred F. Conrad, *Who Pays in the End for Injury Compensation? Reflections on Wealth Transfer from the Innocent*, 30 SAN DIEGO L. REV. 283, 287 (1999). “The tort system is sometimes credited with allocating resources away from zones of activity that are more injurious to other zones that are less so.” *Id.* at 303.

143. “An economic loss can be compensated in kind by an economic gain; but recovery for noneconomic losses such as pain and suffering and loss of enjoyment of life rests on ‘the legal fiction that money damages can compensate for a victim’s injury.’” *McDoughald*, 536 N.E.2d at 374-75 (quoting *Howard v. Lechen*, 366 N.E.2d 64, 65 (N.Y. 1977)).

144. Stanley Ingber has observed that damages for intangible injuries may “compound the aggregate societal injury by increasing the costs of certain activities without correspondingly reducing the impact of the plaintiff’s personal injury.” Ingber, *supra* note 33, at 772.

145. *Id.* at 799-800.

rampant.”¹⁴⁶

4. Deterrence and Incentives for Accident Avoidance

Another commonly stated goal of tort liability is to deter unreasonably dangerous conduct or create incentives for safer conduct or activities.¹⁴⁷ It has even been said that this goal “delineates tort law.”¹⁴⁸ Even though noneconomic pain and suffering are not amenable to objective monetization, this goal has nevertheless been invoked as justification of noneconomic pain and suffering damages.¹⁴⁹

The deterrence-incentive justification for pain and suffering damages is unconvincing for a number of reasons. First, there is a disjunction between those who actually pay for tort liability and those who actually engaged in the tortious conduct.¹⁵⁰ A number of factors contribute to this situation. Although individuals may be theoretically subject to liability, when they are employed, the actual payment of substantial damages will usually come from employer-enterprises through vicarious liability.¹⁵¹ Proponents of the deterrence goal tend to ignore the reality of vicarious liability and, in so doing, indulge, as Jaffe says, “a subtly anthropomorphic version of the employer.”¹⁵² There is often liability insurance that protects individuals even when their tortious conduct does not occur within the scope of an employment relationship.¹⁵³ And, frequently the

146. See Jeffrey O’Connell & Andrew S. Boutros, *Treating Medical Malpractice Claims Under a Variant of the Business Judgment Rule*, 77 NOTRE DAME L. REV. 373, 376 (2002); O’Connell, *supra* note 102, at 367 (saying that the prospects of pain and suffering encourages wasteful behavior by causing claimants to run up their medical expenses to buttress their pain and suffering claims and by inviting fraud).

147. See, e.g., ABRAHAM, *supra* note 56, at 206; Conrad, *supra* note 142, at 294-95; DOBBS, *supra* note 27, § 11, at 19; MARSHALL S. SHAPO, PRINCIPLES OF TORT LAW ¶ 1.04, at 8 (2003); Abel, *supra* note 7, at 808 (“At least since Learned Hand offered his famous formula . . . , judges lawyers, and legal scholars have argued that fear of liability will compel potential tortfeasors to engage in a cost-benefit analysis, taking just those safety precautions that cost less than the accidents they prevent.”); Daniel Shuman, *The Psychology of Deterrence in Tort Law*, 43 U. KAN. L. REV. 115, 118, 131 (1993).

148. Shuman, *supra* note 147, at 115; see also CANE, *supra* note 55, at 361 (referring to deterrence as “[o]ne of the most important of the suggested functions of personal injuries compensation law”).

149. See *Kwasny v. United States*, 823 F.2d 194, 197 (7th Cir. 1987). The court commented that if pain and suffering damages were not recoverable, “the cost of negligence would be less to the tortfeasors and there would be more negligence, more accidents, more pain and suffering, and hence higher social costs.” *Id.* Of course, in the very next sentence Judge Posner proceeds to cut the pain and suffering damages in half with a conclusory statement that it was his duty “to keep these awards within reason,” whatever that means. *Id.* at 197-98.

150. See Conrad, *supra* note 142, at 284. “Very few of the actual contributors are the ones whom the law holds liable.” Most payments are made by “enterprises.” *Id.* Only a small fraction of cases are “individual perpetrators of wrongful harms . . . the ultimate contributors of compensation.” *Id.* at 286.

151. Shuman, *supra* note 58, at 41 (noting the shift away from actual “individual injurer responsibility” by liability insurance and vicarious liability).

152. Jaffe, *supra* note 1, at 230.

153. See АТІУАН, *supra* note 72, at 163, 167 (stating that liability insurance undermines deterrence and that there is no effective experience rating of premiums); Conrad, *supra* note 142, at 286, 295-96.

limits of the tortfeasor's liability insurance will coincide with the actual payout in cases involving the liability of individuals unconnected to an enterprise "deep pocket."¹⁵⁴ Moreover, tort liability is characterized by long latency periods and delays between the tortious conduct and the imposition of liability and the actual extraction of payment.¹⁵⁵ Also, for some the deterrent "force of liability is close to zero because they do not have enough assets to be worth suing."¹⁵⁶

Second, there are good reasons to doubt the effectiveness of the supposed deterrent effect of tort liability generally. Most torts claims are settled, and when cases are tried the verdicts remain uncommunicated.¹⁵⁷ Even when the outcomes of trial court and appellate cases are reported, they may not be representative of the larger universe of all claims.¹⁵⁸ Moreover, a good deal of the behavior subject to the torts system is often impulsive rather than deliberative.¹⁵⁹ Errors are also often the results of cognitive deficiencies in processing information, as Professor Daniel Shuman has pointed out:

[The] examination of the psychology of deterrence in tort law lends support to those who argue that the current fault-based tort system does not serve the function of deterrence well. The organic and biological theories reveal the limited capacity of tort law to deter unsafe behavior. The psychodynamic psychological theories prove too much and threaten to weaken deterrence by excusing responsibility

154. See Baker, *supra* note 89, at 284, 314. Based on a survey of personal injury attorneys, the author concludes that there is a norm that "blood money" (referring to the term used by practicing personal injury attorneys to describe "money paid directly to the plaintiffs by defendants out of their own pockets") is seldom collected as a part of personal injury settlements against individual defendants personally. *Id.* at 276, 281. He explains:

[T]here is a norm among tort practitioners that tort litigation is supposed to be primarily about collecting insurance money, not blood money. . . . The liability insurance norm means that, except for institutional defendants or an outrageous wrong, liability insurance has become a prerequisite for tort liability. It also means that liability insurance limits function as a cap on tort damages and that tort claims are shaped to match the available insurance coverage, with the active participation of both the plaintiff's and the defendant's lawyers.

Id. at 314. This, in turn, has meant that for practicing personal injury lawyers, "it seems that tort law in action is less concerned with deterrence than tort doctrine and theory would suggest." *Id.* at 316. Baker offers a number of possible explanations for the unwritten but firmly entrenched convention that plaintiffs' attorneys in lawsuits against individuals "usually prefer not to go after blood money." *Id.* at 284. These include a sense that taking blood money is morally suspect, practical problems "in collecting real money from real people," the fact that collecting from an individual defendant out of his pocket "requires going to trial," the belief that some plaintiffs may like to demand insurance limits in hope that defendants' insurance carriers will refuse to settle within limits thereby setting up a potential claim by the insured for excess liability, and a sense that sometimes plaintiffs have available easier targets, such as underinsured motorist coverage. *Id.* at 286, 289, 290, 292-93.

155. ATIYAH, *supra* note 72, at 167 (noting that often the individuals whose conduct was actually responsible for the harm are long gone).

156. Conrad, *supra* note 142, at 295.

157. Shuman, *supra* note 147, at 126.

158. *Id.*

159. *Id.* at 127-28; cf. 2 DOBBS, *supra* note 67, at 398 (commenting that deterrent effects hardly support these damages when the injury is unintentional).

for much behavior that is now viewed as tortious. Cognitive psychology reveals that human decisionmaking is systemically flawed, and that faulty information processing is the norm. Thus, the risk of tort sanctions is not likely to induce safer behavior in appropriate cases. . . . The behaviorists' insights suggests that the tort system's use of delayed punishment rather than immediate positive reinforcement is not an effective means of shaping desirable behavior. Social learning theory holds potential, but unless better communication of tort law occurs and the percentage of meritorious tort cases brought is increased so that tort sanctions are observable with greater regularity in the case of tortious behavior, this theory suggests that the tort system [by demonstrating unpunished transgressions] is likely to increase rather than decrease the frequency of undesirable behavior. Thus, the collective wisdom from these theories of human behavior leads to the conclusion that tort law relying on monetary sanctions is not likely to be successful in deterring unsafe behavior.¹⁶⁰

More specifically, Shuman finds that the deterrent assumptions of tort law diverge from the behaviorist theory of human behavior in several ways. Behavioral theory depends on celerity and reinforcement of the tort system's response to injurious conduct, but "because of the absence of celerity in tort sanctions—there is little reason to expect tort law to result in safer behavior."¹⁶¹ Also, "the intermittent nature of the of the tort sanctions for tortious behavior is likely to render it less effective in achieving safer behavior."¹⁶² And finally, the torts system seeks to influence behavior coercively through the threat of liability, whereas behavioral theory suggests that positive rewards are more effective than the threat of punishment in guiding behavior.¹⁶³ Similarly, the cognitive psychology theory is undermined by a tendency of people to be influenced by heuristic biases and errors in processing information.¹⁶⁴

Any deterrence message emanating from tort law is, in reality, often so opaque and inaccessible that it is largely ineffective. Even if some message were ordinarily communicated by tort liability, it would emanate from such unpredictable and ill-defined outcomes that it would afford the public no readily discernible guidance.¹⁶⁵ Moreover, there is no irrefutable evidence that individuals generally respond to economic incentives to reduce their liability costs, in part because of a lack of information or feasible avenues to predict and manage accident costs.¹⁶⁶ Professor Abel

160. Shuman, *supra* note 147, at 165-66.

161. *Id.* at 153.

162. *Id.*

163. *Id.* at 153-54.

164. See Robert A. Prentice & Jonathan J. Koehler, *A Normality Bias in Legal Decision Making*, 88 CORNELL L. REV. 583 (2003); Shuman, *supra* note 147, at 160-64.

165. See King, *supra* note 14, at 387.

166. See Abel, *supra* note 7, at 812-13; Ingber, *supra* note 33, at 796. Abel comments: [T]he efficacy of tort liability in encouraging safety rests on several dubious assumptions about economic rationality and market conditions. Some actors are not profit maximizers in any simplistic sense. . . . Most individuals cause accidents so rarely they have little incentive to seek information about their frequency and severity or how to avoid them. Liability is no threat to those

has written that “although it is theoretically possible (if often difficult) to calculate the costs of safety precautions, it is theoretically impossible to calculate the benefits of accident avoidance.”¹⁶⁷

Third, even if one were to accept for the sake of argument that the threat of liability actually inspires greater safety, the deterrent effect of potential tort liability for economic losses would operate nearly as effectively as, and certainly less chaotically and arbitrarily than, the threat of liability that included an award of damages for pain and suffering. Furthermore, limiting damages to economic loss would pose less of a danger of over-detering and stifling essential technological and industrial innovation.

Fourth, the potential value and importance of tort-based deterrence is overestimated and does not outweigh the adverse consequences of attempting to award damages for noneconomic pain and suffering. There are a host of other potential mechanisms to deter unsafe conduct. Those include criminal sanctions,¹⁶⁸ safety regulations,¹⁶⁹ and the built-in deterrence that the plaintiff might become injured himself.¹⁷⁰ Any message from tort liability also suffers from the tendency of human thinking to be category-bound.¹⁷¹ In this connection, Cass Sunstein writes:

Our first psychological observation is that in law, as in ordinary life, people’s thinking is category-bound. People do not easily cross the boundaries of categories of harms in their thinking. When they consider an individual case of physical injury . . . the frame of reference for evaluation is usually a set of instances of the same kind of harm. . . . They are much less likely to concern themselves with the consistency of their determinations with punishments for other categories of harmful conduct, such as damage to endangered species. Yet, as we will show, simultaneous consideration of penalties for different kinds of infractions will often reveal that the more severe pun-

who are judgment proof. Even profit-seeking enterprises may be able to transfer liability costs to consumers rather than enhance safety if demand is relatively inelastic . . . , the market is highly oligopostic, [and] accident costs are an insignificant portion of price.

Abel, *supra* note 7, at 812-13.

167. *Id.* at 808 (explaining that “[e]conomists cannot tell us the value of bodily integrity, emotional well-being, or life because these are not defined by the market”).

168. See ATIYAH, *supra* note 72, at 162. For many drivers, for example, it is hard to imagine any tort-based deterrence that compares to the threat of loss of one license or right to operate a motor vehicle. See CANE, *supra* note 55, at 365.

169. ATIYAH, *supra* note 72, at 163, 168.

170. Atiyah notes in connection with auto operators that “[i]f all these things don’t deter many people from bad driving it is absurd to think that they will be deterred by the thought that their insurance companies may have to pay a damages claim.” *Id.* at 162; see also CANE, *supra* note 55, at 365. There is also a built-in deterrence for companies: “Quite apart from the sheer inhumanity or deliberately taking risks with life or limb, most companies will find themselves subject to financial penalties (and the ensuing bad penalties) for causing such injuries.” ATIYAH, *supra* note 72, at 173.

171. “When people make moral or legal judgments in isolation, they produce a pattern of outcomes that they would themselves reject, if only they could see that pattern as a whole. A major reason is that human thinking is category-bound.” Cass R. Sunstein et al., *Predictably Incoherent Judgments*, 54 STAN. L. REV. 1153, 1153 (2002).

ishment was assigned to the misconduct which, in context, appears to be the less serious.¹⁷²

I would take this a step further, and add that people's decisions are not merely category-bound, but also controversy-bound, tied to the immediate situation.

Even in the framework of a specific injury, multiple activities may have played a role,¹⁷³ and the tort system using a value-oriented process of selection, must determine which activity or activities should be held liable.¹⁷⁴ Matters are further complicated by the fact that "[m]any torts, particularly the most serious, are caused by collectivities, both public and private."¹⁷⁵

The threat of liability, far from promoting safety, may perversely produce unintended consequences. The threat of liability may inspire more dangerous conduct than the conduct that ostensibly is to be deterred. We may get instead the phenomena of the do-it-yourselfers who choose even more dangerous alternatives to an activity that the threat of liability has made less available.¹⁷⁶ This idea is sometimes denominated the "theory of the second best," under which high prices or unavailability of products or services leads consumers to use substitutes that are less safe.¹⁷⁷ The threat of liability may encourage not true safety, but efforts to avoid getting caught.¹⁷⁸ Or, "by focusing attention on accidents which generate

172. *Id.* See generally Abel, *supra* note 7, at 805 ("Large awards for severe pain and suffering have several additional consequences: they salve the guilt of the unimpaired at having been spared such torment (the survivor syndrome) and justify the 'temporarily able bodied' succumbing to the selfish desire to avoid and ignore the disabled (our new 'invisible man').").

173. Describing the Institute of Medicine study as emphasizing "that adverse results from health care commonly stem from complex, multicausal, systemic interactions, not from any monocausal individual mistake." O'Connell & Boutros, *supra* note 146, at 376.

174. Ingber, *supra* note 33, at 797.

175. Abel, *supra* note 7, at 792.

176. See PETER W. HUBER, *LIABILITY: THE LEGAL REVOLUTION AND ITS CONSEQUENCES* 166 (1988); Peter W. Huber, *Courting Danger: The Risky Business of Liability Law*, REASON, Apr. 1989, at 20, 24. Huber illustrates this phenomenon with an example from the products liability context. The threat of strict liability could, for example, induce ladder manufacturers to stop manufacturing ladders. That, in turn, might leave people with no choice but to use the more dangerous kitchen chair when they change a light bulb. Huber, *supra*, at 24.

177. Mark Geistfeld, *Implementing Enterprise Liability: A Comment on Henderson and Twerski*, 67 N.Y.U. L. REV. 1157, 1170-71 (1992). "[T]he theory of the second best shows that if individuals make choices from a set of activities, regulations designed to achieve efficient behavior with respect to one activity may lead to greater overall inefficiency if enough people switch from regulated to unregulated activities." *Id.* at 1170.

178. See Abel, *supra* note 7, at 814 ("[T]he threat of damages encourages entrepreneurs to minimize liability, not accident costs. It creates perverse incentives: to conceal information about danger, take actions that maximize success in litigation (such as defensive medicine), resist legitimate claims (especially those that may establish unfavorable precedents), use economic power to drive down claims, stall, and conclude settlements that limit publicity."); ATIYAH, *supra* note 72, at 170 (fearing that the threat of liability will simply cause everyone to "clam up"). Medicine is a prime example. In his pioneering work on the problems of error in medicine, Dr. Lucian Leape has written:

Physicians are expected to function without error, an expectation that physicians translate into the need to be infallible. . . .

compensation claims, the tort system diverts attention away from the majority of accidents which do not, and so discourages the formation of systematic and thorough accident prevention strategies."¹⁷⁹

Fifth, adding potential damages for pain and suffering to the tort liability "threat level" will distort the kind of cost-benefit or reasonableness analyses on which the deterrence-incentive goal of tort law is presumably grounded. The integrity of the kind of judgmental process that potential tort liability is supposed to induce "depends for its soundness on the assumption that accidents have a 'true' or 'real' cost, and that damages represent that true cost. . . . [and i]f this is not the case then companies who have to pay damages may be paying too little or too much, and either way the incentive to invest in the right levels of safety precautions will be distorted."¹⁸⁰ If decisionmakers, swayed by cognitive deficiencies in information processing, fail to adequately assess economic data and efficiency criteria,¹⁸¹ the addition of the abject arbitrariness and unpredictability of pain and suffering damages,¹⁸² and the inherent incommensurability of pain and money, cannot help but confound the process further.¹⁸³

. . . .
It has been suggested that this need to be infallible creates a strong pressure to intellectual dishonesty, to cover up mistakes rather than to admit them. The organization of medical practice, particularly in the hospital, perpetuates these norms. Errors are rarely admitted or discussed among physicians in private practice. Physicians typically feel . . . that admission of error will lead to censure or increased surveillance or, worse, that their colleagues will regard them as incompetent or careless. Far better to conceal a mistake or, if that is impossible, to try to shift the blame to another, even the patient.

. . . .
[T]he realities of the malpractice threat provide strong incentives against disclosure or investigation of mistakes. . . . It is hardly surprising that a physician might hesitate to reveal an error to either the patient or hospital authorities or to expose a colleague to similar devastation for a single mistake.

Lucian L. Leape, *Error in Medicine*, 272 JAMA 1851, 1851-52 (1994). What is required is "a culture in which errors and deviations are regarded not as human failures, but as opportunities to improve the system, 'gems,' as they are sometimes called." *Id.* at 1857.

179. CANE, *supra* note 55, at 366. Thus, in the medical context, Dr. Leape laments, "[r]oot causes, the underlying systems failures, are rarely sought." Leape, *supra* note 178, at 1855.

180. АТТЯН, *supra* note 72, at 167.

181. Prentice & Koehler, *supra* note 164, at 585-86.

182. See Geistfeld, *supra* note 85, at 786 (observing that the "arbitrariness and resultant unpredictability of pain-and-suffering awards undermine the deterrence function of the tort system" and that "it becomes difficult for risk-creating actors to determine whether the costs of prevention are less than the benefits of accident reduction"); King, *supra* note 14, at 387 (stating that the deterrence message of pain and suffering damages reflects "such unpredictable and ill-defined outcomes that it would afford the public no real guidance" upon which to base their conduct); O'Connell & Boutros, *supra* note 146, at 378 (stating that "arbitrary nonmonetary awards have the effect of undermining deterrence since risk-creating actors who perform cost-benefit analyses find it very difficult to determine whether the costs of prevention are justified in light of the costs of liability . . . that may arise in the absence of such precautions").

183. See Ingber, *supra* note 33, at 798-800 (stating that unless the amount of liability allocated to an activity is appropriate, deterrence and incentives may be distorted, producing a misallocation of resources, and that "[t]o the extent that intangible injuries are truly nontransferable, imposing liability burdens the defendant with the costs of an injury that the plaintiff nevertheless must bear," which "may present a danger of excessive avoidance

5. *Corrective Justice*

Some torts scholars have identified a separate goal commonly referred to as the goal of achieving “corrective justice.” Discussions of this goal sometimes subsume it into one of the other categories identified here, such as the preservation of the peace, deterrence, or even the “fairness” goal. I will address it as a discrete goal here to accommodate those theorists who believe it is conceptually distinct from other goals. I will use the corrective justice terminology here to connote a goal of using tort liability as a vehicle for reestablishing the moral balance between the parties.¹⁸⁴ Professor Atiyah couches this goal in terms of “public accountability,”¹⁸⁵ using the right to assert tort claims as a way of making tortfeasors “publicly accountable for their behavior.”¹⁸⁶

A number of torts theorists have attempted to use a corrective justice goal as a justification for the award of noneconomic pain and suffering damages. Margaret Radin has acknowledged the problem that the incommensurability of pain and money damages poses for noneconomic dam-

and a concomitant misallocation of resources”); Geistfeld, *supra* note 85, at 786, 788 (stating that “when the tort system imposes liability costs in an unpredictable manner, it becomes difficult for risk-creating actors to determine whether the costs of prevention are less than the benefits of accident reduction,” and that “[t]he arbitrary component of pain and suffering . . . cannot be experience rated” (citing Richard Craswell & John E. Calfee, *Deterrent and Uncertain Legal Standards*, 2 J. ECON. & ORGANIZATION 279 (1986))); O’Connell & Boutros, *supra* note 146, at 378 (stating that “arbitrary nonmonetary awards have the effect of undermining deterrence since risk-creating actors who perform cost-benefit analyses find it very difficult to determine whether the costs of prevention are justified in light of the costs of liability . . . that may arise in the absence of such precautions”).

184. See ABRAHAM, *supra* note 56, at 14 (explaining that “[w]hen one party wrongs another, correction of the wrong may help to restore the moral balance between them”); CANE, *supra* note 55, at 359 (stating that “the law aims to restore and redress the balance of fairness or justice which the defendant has upset by negligence or by creating a risk of injury”); DOBBS, *supra* note 27, at 12-13 (stating that “[l]iability is imposed . . . when and only when it is ‘right’ to do so,” and that tort law is “at least partly based on ideals of corrective justice, ideals of righting wrongs, or (somewhat relatedly) ideals about accountability or personal responsibility for harm-causing conduct”); John Borgo, *Causal Paradigms in Tort Law*, 8 J. LEG. STUD. 419, 419-20 (1979) (defining corrective justice as being founded “upon the notion that when one man harms another the victim has a moral right to demand, and the injurer a moral duty to pay him, compensation for the harm”); Fischer & Jerry, *supra* note 126, at 866-69 (describing this normative perspective on tort law as one designed to “nullify losses and gains that arise between individuals when one wrongfully injures another”); M. Stuart Madden, *Selected Federal Tort Reform and Restatement Proposals Through the Lenses of Corrective Justice and Efficiency*, 32 GA. L. REV. 1017, 1025, 1030-39 (1998) (describing corrective justice as characterized by a “strong overlay of moral obligation, and the annulment of a wrongdoer’s unjust enrichment,” and as positing the return of the victims to the status quo ante); Morris, *supra* note 25, at 478 (explaining that according to a corrective justice rationale, “[i]f injurers were not liable for the suffering they cause, the law would not reflect the notion that they are morally responsible for it,” and that “[s]omething primitive in us seems satisfied when we mark the bounds of a wrongdoer’s guilt”); Shuman, *supra* note 58, at 43 (noting that idea is based on the belief that “tort sanctions” represent “an appropriate response to a defendant’s wrongful conduct”).

185. ATIYAH, *supra* note 72, at 169.

186. *Id.* In other words, tort liability makes the tortfeasor who has caused pain and suffering “know that his breach of care has caused harm.” FISCHER, *supra* note 31, at 383.

ages under the traditional distributive torts goals,¹⁸⁷ in which damages operate restoratively (distributively or by "rectification"¹⁸⁸), serving to restore the plaintiff to his pre-accident state thereby spreading and allocating the costs of accidents. Thus, with respect to noneconomic consequences of pain and suffering, Radin writes:

Rectification is not possible ("the law cannot restore the injured person to his previous position," nor its equivalent), because the value to the victim of freedom from pain and suffering, cannot be reduced to money (the harm is "not in any way analogous" to a loss of money, and the desirable state, "peace of mind," is not the equivalent of a sum of money), nor can amounts of suffering be arrayed in a scale ("there is no scale") so that they might be paired in parallel with amounts on the money scale.¹⁸⁹

Notwithstanding this incommensurability Radin looks to a freestanding corrective justice goal, not tied to a restorative or rectification function, as a possible way to justify pain and suffering awards:

I think it most likely that the problem incommensurability poses for rectification as corrective justice will only be solved by developing an understanding of corrective justice that does not require rectification.

In other words, there must be some other way to restore moral balance between the parties than by putting the parties into the status quo ante, which may be irretrievable, or by putting them into a state equivalent in value to the status quo ante, which may be unachievable given the fact of incommensurability. . . . I suggest that compensation can symbolize public respect for rights and public recognition of the transgressor's fault by requiring something important to be given up on one side and received on the other, even if there is no equivalence of value possible.¹⁹⁰

Others also have sought umbrage for pain and suffering damages in a corrective justice rationale. Professor Steven Smith seems to use a blend of goals, resting primarily on corrective justice, but with preserving-the-peace and deterrent flavors as well.¹⁹¹ He says that "tort law's dispute resolution function is vital not merely because it prevents private violence, but more importantly because it reinforces the normative order upon which society depends."¹⁹² He paints a Hogarthian, almost apoca-

187. Incommensurability may pose a similar problem for the deterrence-incentive goal if it assumes the traditional deterrence model in which conduct is to be guided by costs and benefits, and costs are defined exclusively in economic terms. See Radin, *supra* note 101, at 58-59.

188. *Id.* at 70.

189. *Id.*

190. *Id.* at 68.

191. See Smith, *supra* note 55, at 766 ("Tort law's primary function . . . is not to compensate, deter, or punish, but rather to resolve disputes arising from perceived breaches of important social norms, thereby reducing conflict and reaffirming those norms.").

192. *Id.* at 782; see also Jonathan Baron & Ilana Ritov, *Intuitions About Penalties and Compensation in the Context of Tort Law*, 7 J. RISK & UNCERTAINTY 17, 31 (1993) (observing that many subjects of their study did not assess compensation solely on the basis of the

lyptic, picture of what life in society would supposedly be without the torts damages to peacefully resolve disputes.¹⁹³ He counsels that in cases involving serious intangible injuries, damages “makes the plaintiff ‘whole’ not by restoring the plaintiff to her former condition, but by reestablishing her belief in the reliability of the normative order and thereby alleviating the sense of injustice which is the basis of the dispute.”¹⁹⁴ Accordingly, he says that “[t]ort law should aspire . . . to a symbolic proportionality between injury and remedy: the more substantial the injury, the more substantial the award.”¹⁹⁵

There are a number of fallacies with a corrective justice rationale for pain and suffering damages. First, if corrective justice is effectuated by a restoration of the pre-accident status quo, it will then flounder on the rocks of incommensurability. Second, if the corrective justice rationale is distinct from the goals of loss spreading and loss allocation, then it seems premised on a measure of damages for pain and suffering that is not driven by the level of the victim’s pain—an amorphous standardless notion in its own right—but rather on some even less objectively discernible conceptual dynamic that in some ill-defined way is supposed to correct the moral balance. Nor are matters helped by blithely inviting juries to aspire to “substantial proportionality.” As Professor Dobbs has cautioned, even if a function of pain and suffering damages is to symbolically “assuage the plaintiff’s sense of outrage when his bodily security is violated and as a legal symbol of society’s commitment to recognize the dignity and bodily security of each individual,”¹⁹⁶ that purpose “hardly commands the unlimited verdicts for pain and suffering we now are accustomed to finding.”¹⁹⁷ Third, other institutions are better suited than the torts system to achieve public accountability.¹⁹⁸ In fact, haphazard tort litigation may actually skew the setting of public agendas and prioritizing public scrutiny.¹⁹⁹ Professor Atiyah calls it “jumping the

nature of the injury, but “rather in terms of setting the balance right between the injurer, if any, and the victim”).

193. Smith comments that injury victims either “would try to satisfy their grievances through private threats, violence, and vigilante justice” or their passivity: “would have corrosive consequences.” Many important norms would relinquish much of their power because few or no legal sanctions would follow upon their violation. People would lose the ability to conduct their lives on the assumption that others would act and respond in predictable, reasonable ways. Unless other institutions were to assume tort law’s role, social disintegration would inevitably ensue. Smith, *supra* note 55, at 782.

194. *Id.* at 788.

195. *Id.* at 788-89 (adding that jury instructions “probably communicate this aspiration as well as can be expected”).

196. 2 DOBBS, *supra* note 67, at 69.

197. *Id.* See generally ERNEST J. WEINRIE, *THE IDEA OF PRIVATE LAW?* 57 (1995) (observing that if corrective justice is presented “as a transactional equality,” then it “remains opaque to the extent that the equality that lies at its heart is unexplained”).

198. ATIYAH, *supra* note 72, at 72.

199. See generally Sunstein et al., *supra* note 171, at 1153 (“When people make moral or legal judgments in isolation, they produce a pattern of outcomes that they would themselves reject, if only they could see that pattern as a whole. A major reason is that human thinking is category-bound.”).

queue."²⁰⁰ Fourth, as previously mentioned,²⁰¹ the award runs counter to the usual pre-accident expectations of people. Fifth, in the vast majority of cases, the ones paying the damages will not be the individuals who committed the specific tortious conduct that caused the harm, but rather enterprises and liability insurers. Finally, even the conduct of the individual will usually be unintentional and inadvertent.²⁰² Thus, there often is little if any genuine fault to correct. That leaves us with merely a sad turn of fate, the work of "that monster, Fortune,"²⁰³ to blame. Now, what needs correcting? Certainly, the payment of the victim's economic losses should be sufficient to rebalance the "moral" scales.

6. Administrative Efficiency

Another concern of the torts system is to implement its goals with an acceptable level of administrative costs. Judge Calabresi has expressed this goal in terms of controlling the "tertiary" costs of accidents, meaning the system transaction costs of deciding questions of liability and damages.²⁰⁴ The aim here is to develop rules of liability that are workable and efficient to apply.²⁰⁵ This goal also considers ways to assuage problems of proof and access to evidence.

Awarding damages for pain and suffering may impede and frustrate administrative efficiency in the torts system in a number of respects. Disparity and variability in awards for pain and suffering undermine the legal system by exploding its claim of equal justice.²⁰⁶ Unjustified variation and unpredictability of noneconomic damages may erode the authority and legitimacy of the torts system.²⁰⁷ The unpredictability and variability

200. ATIYAH, *supra* note 72, at 171.

201. *See supra* notes 132-40 and accompanying text.

202. *See* Ingber, *supra* note 33, at 791 ("At least with simple negligence, the demand for restitutive justice is adequately fulfilled by limiting the tortfeasor's liability to pecuniary costs.").

203. BOETHIUS, *THE CONSOLATION OF PHILOSOPHY* 17 (Richard H. Green trans., 1962). Fortune might herself have explained (as related through the words of Philosophy as intermediary):

When nature produced you from your mother's womb, I found you naked and lacking in everything. I nourished you with my abundant gifts, and being inclined to favor you (an attitude which you now seem to hold against me), I endowed you with all the affluence and distinction in my power. Now it pleases me to withdraw my favor. You should be grateful for the use of things which belonged to someone else; you have no legitimate cause for complaint, as though you lost something which was your own. . . . I have done you no injury, Riches, honors, and all good fortune belong to me [T]hey come with me, and when I go, they go too.

Id. at 19.

204. GUIDO CALABRESI, *THE COSTS OF ACCIDENTS: A LEGAL AND ECONOMIC ANALYSIS* 28 (1991).

205. *See generally* James A. Henderson, *Judicial Reliance on Public Policy: An Empirical Analysis of Products Liability Decisions*, 59 *GEO. WASH. L. REV.* 1570, 1580-83 (1971). Henderson identifies several process norms that are important if torts rules are to provide a coherent guide to decisionmakers. The rules must be comprehensible, encompass verifiable facts, and lend themselves to adjudication. *Id.*

206. Chase, *supra* note 36, at 769.

207. Leebron, *supra* note 82, at 311.

of pain and suffering damages also make it harder to settle claims, thereby increasing transaction costs.²⁰⁸ This is because settlements may be impeded by divergences in the parties' evaluation of the value of their cases.²⁰⁹ There is more disagreement over evaluating pain and suffering than any other issue except perhaps the question of who was at fault.²¹⁰ Settlements may also be distorted by the coercive effects²¹¹ of the inestimable threat of pain and suffering damages. Disagreement among counsel and litigants over the unpredictable amount of pain and suffering can also contribute to unnecessarily high incidence of full-scale litigation to resolve claims.²¹² Furthermore, there is no medical litmus with which to confidently diagnose or objectively measure pain and suffering. Pain is readily feigned—"science has not yet discovered the magic elixir for distilling truthfulness from malingering."²¹³ Finally, the potential threat of awards of pain and suffering encourage "nuisance claims."²¹⁴

Although estimates tend to vary and may depend on the type of personal injury claims involved, it has been estimated that about two dollars are needed to confer one dollar of benefits on an injury victim.²¹⁵ It thus appears that only a fraction of the money spent by enterprises to insure against or pay for liability actually redounds to the benefit of victims. The torts system is a prodigiously expensive vehicle for redressing accidents. Liability for noneconomic damages for pain and suffering compounds this inefficiency by magnifying these inefficiencies. In a world of finite resources the money lost in systemic administrative and transaction costs cannot benefit accident victims. As administrative costs increase, the availability and costs of insurance are also adversely impacted.²¹⁶ Judged in terms of administrative efficiency and cost effectiveness, the torts system does not compare favorably to more efficient systems such as first party health and disability insurance.

7. Fairness

The goal of fairness is frequently invoked in torts cases, especially in the context of strict liability.²¹⁷ This goal depends on the nature of the values thought to be encompassed within the notion of fairness and varies with the eyes of the beholder. There has never been a clear understand-

208. See Chase, *supra* note 36, at 769; O'Connell & Boutros, *supra* note 146, at 378 ("Unpredictability of nonmonetary damages also makes the prospect of the parties agreeing to a settlement price much more elusive.").

209. REPORTERS' STUDY, *supra* note 2, at 202; Blumstein et al., *supra* note 79, at 176.

210. O'CONNELL & SIMON, *supra* note 40, at 5.

211. Ingber, *supra* note 33, at 779; Leebron, *supra* note 82, at 311.

212. REPORTERS' STUDY, *supra* note 2, at 201-03.

213. Friedland, *supra* note 92, at 341.

214. O'Connell, *supra* note 102, at 339.

215. REPORTERS' STUDY, *supra* note 2, at 440; Conrad, *supra* note 142, at 292.

216. Blumstein et al., *supra* note 79, at 176.

217. A survey of judicial reliance on policy norms reported that fairness was one of the most frequently invoked factors. See Henderson, *supra* note 205, at 1575.

ing or agreement on the meaning meant of "fairness."²¹⁸ An oft-cited construct for the fairness rationale is embodied in George Fletcher's paradigm of reciprocity.²¹⁹ This paradigm examines the relative magnitude and quality of the risks created by the activities of the defendant and by those of the victim. In other words, "a victim has a right to recover for injuries caused by a risk greater in degree and different in order from those created by the victim and imposed on the defendant—in short, for injuries resulting from nonreciprocal risks."²²⁰ This fairness rationale is commonly explicated, in the strict liability context,²²¹ simply as the proposition that, as between two innocent persons, the one who initiates and benefits from the injurious activity should be liable.²²² Thus, this goal may include an implicit preference for maintaining the economic status quo, but whether it should is of course another question. Problems of proof and access to evidence may also be addressed under the fairness goal.

The fairness rationale is subject to some serious reservations, even apart from its sheer lack of intelligible definition. Fletcher's reciprocity construct, for example, has been criticized as suffering from a misplaced focus because it is "temporally bound"²²³ and advances a "philosophical theory of desert . . . [with] new risks less deserving than existing (older) ones."²²⁴ Or, one might question why it is "fair" to compensate victims of tortious injuries caused by insured or solvent actors, but not victims of accidents arising from more benign or judgment-proof sources.²²⁵ It is difficult to justify damages for noneconomic pain and suffering when many persons who are injured or in poor health are dealt a hand without

218. *Id.* at 1592 (discussing policies underlying products liability and surmising that the vagueness of judges' attempts at articulating fairness considerations suggested that, while the judges may have "grasped the concept of fairness intuitively, [they nevertheless] found it difficult to explain analytically").

219. See George P. Fletcher, *Fairness and Utility in Tort Theory*, 85 HARV. L. REV. 537, 540-42 (1972). Fletcher apparently views fairness as also encompassing other concerns, and thus broader and not coterminous with his paradigm of reciprocity. *Id.* at 541.

220. *Id.* at 54; see also Virginia E. Nolan & Edmund Ursin, *The Revitalization of Hazardous Activity Strict Liability*, 65 N.C. L. REV. 257, 290 (1987) (referring to the "one-sidedness of risk creation").

221. See generally Henderson, *supra* note 205, at 1575-78 (discussing policies underlying products liability).

222. See William K. Jones, *Strict Liability for Hazardous Enterprise*, 92 COLUM. L. REV. 1705, 1774 (1992); King, *supra* note 14, at 359; Leebron, *supra* note 82, at 271; Lynda J. Oswald, *Strict Liability of Individuals Under CERCLA: A Normative Analysis*, 20 B.C. ENVTL AFF. L. REV. 579, 593-94 (1993).

223. Guido Calabresi & Jon T. Hirschoff, *Toward a Test for Strict Liability in Torts*, 81 YALE L.J. 1055, 1080-82 (1972).

224. *Id.* at 1081 n.84.

225. Judge, then professor, Keeton called this the "bathtub argument," in which he questioned why we offer victims of some accidents torts compensation, but not those who slip and fall in a bathtub (presumably a defect-free bathtub). See Robert E. Keeton, *Compensation for Medical Accidents*, 121 U. PA. L. REV. 590, 612-13 (1973); see also ATYAH, *supra* note 56, at 144 (commenting on the British experience, and noting that of the total number of persons stricken with disability or accidental injury, only about one and a half percent apparently obtain any damages at all," and asking how is that "tiny group selected for preferential treatment?").

tortfeasors or solvent ones; they receive no financial assistance even when they have suffered income loss and have incurred horrendous medical expenses.²²⁶ To the extent that limiting damages to economic losses reduces the total amount of torts payouts, it would concomitantly lessen this effect. Even when an injured person has a viable tort claim against an insured or solvent tortfeasor and therefore receives damages for pain and suffering, there is a pronounced lack of “horizontal equity” because similar injuries produce different damages.²²⁷

Some writers have identified a practice employed by liability insurers to consider the economic losses as a benchmark upon which to base their settlement postures regarding the amounts for pain and suffering.²²⁸ If that is so, then it suggests that persons suffering similar injuries may receive disparate amounts for pain and suffering based on differences in the economic losses such as loss of earning capacity. This would tend to favor male plaintiffs over female plaintiffs to the extent the latter receive less income than their male counterparts.²²⁹

Another criticism of the torts system in terms of fairness is that the persons who ultimately pay damages are usually innocent of any real wrongdoing, often because they are insurers or enterprises and are seldom the individuals whose conduct was responsible for the harm. In other words, since the punishment in tort law rarely “fits the crime,” limiting the liability of innocent parties concomitantly reduces the overall quantum of systemic unfairness. Limiting damages to economic loss eliminates those damages most subject to exaggeration and abuse—pain and suffering damages.

8. *Autonomy*

The preservation of autonomy is also a goal of tort law. The interests of potential victims of injuries should not be ignored. At the same time, the effects of the threat of liability on those who may be potentially liable for such injuries must also be considered. Thus, Justice Schauer reminds us:

[T]o the extent that the law intervenes in any area of human activity and declares that for certain consequences of that activity the actor shall be held civilly liable . . . , both the individual actor and society as a whole feel the effects of the restraint—a psychological effect in the form of a lessening of incentive, and an economic effect in the form of the cost of insurance necessary to enable the activity to

226. See *CANE*, *supra* note 55, at 353 (saying that “[i]t is hard to justify compensation for mental distress and deprivation of pleasure when many people receive little or no compensation even for income loss,” although some argue that “it might be thought that physical pain does deserve legal recognition in its own right, at least if it is severe”).

227. See *supra* notes 85-93 and accompanying text.

228. O’Connell, *supra* note 102, at 339.

229. See THOMAS H. KOENIG & MICHAEL L. RUSTAD, *IN DEFENSE OF TORT LAW* 114 (2001).

continue.²³⁰

The concern here is that the risks of an activity do not unreasonably inhibit the freedom of action of potential victims, that the threat of liability does not unreasonably inhibit the freedom of potential defendants to engage in worthwhile activities, and that the choices of consumers are preserved.

The goal of autonomy is consistent with limiting personal injury torts damages to economic loss. Liability limited to economic loss affords ample protection against encroachments on their autonomy from an enterprise's introduction of some new danger into the community. This is particularly so if one approximates a value for optimal compensation by using an analogy to compulsory insurance for plaintiffs in which we ask "how much insurance an individual [potential victim] would freely purchase to cover such an injury."²³¹ If, as has been suggested, "most people would be unlikely to purchase [first party] insurance for pain and suffering,"²³² then damages for non-economic losses cannot be justified by the autonomy interests of potential victims. In other words, if one views tort liability as a form of compulsory insurance, the imposition of liability for pain and suffering may encroach on the autonomy of consumers by compelling them "to buy the pain and suffering 'insurance' if they buy the goods, because the cost of paying pain and suffering judgments will be included in the cost."²³³ At the same time, limiting personal injury damages to economic losses and removing the primary source of the unpredictability of personal injury damages will enhance social and economic autonomy and freedom.

9. *Permit Freedom of Enterprise*

Another concern related to autonomy, or perhaps a subset of it, is that liability not take so large a portion of the capital of enterprises that too little is left to animate a free enterprise system or to allow for competition in a global economy. This goal recognizes the importance of avoiding excessive liability in order to leave at least a critical mass of capital and revenue to promote meaningful entrepreneurial decisionmaking. It is undeniable that tort liability is consuming an ever increasing part of America's resources and capital. According to recent estimates, the American torts system costs over \$200 billion annually (representing more than 2 percent of the gross domestic product, and, of course, more than any other developed nation against which American enterprises are

230. *Amaya v. Home Ice, Fuel & Supply Co.*, 379 P.2d 513, 524 (Cal. 1963) (en banc) (Schauer, J.), *overruled by* *Dillon v. Legg*, 441 P.2d 912 (Cal. 1968).

231. *Leebron*, *supra* note 82, at 273.

232. *Id.* at 274.

233. 2 DOBBS, *supra* note 67, at 399 ("These awards are generally reflected in the prices paid for goods and services, even if consumers would prefer to pay less and forego the prospect of receiving pain and suffering damages should he be tortiously injured.")

expected to compete).²³⁴ If these trends are not reversed (or worse allowed to continue along in their insidious way)²³⁵ there will be no economically viable enterprises left in the United States through which the true economic costs of accidents can be spread and allocated.

IV. GLIMPSE AT TORTS WITHOUT DAMAGES FOR PAIN AND SUFFERING

Perhaps at this point I should rest with the core thesis that pain and suffering damages should be eliminated because they are incompatible with the goals of modern tort law. I appreciate, however, that my thesis—calling for the elimination of pain and suffering damages—may at the very least create uneasiness in some circles.²³⁶ Therefore, I shall venture somewhat further by offering a preliminary profile of the remedial contours of tort law without discrete damages for pain and suffering. I propose a three-pronged approach. First, I am convinced that the corrosive effects noneconomic damages have on the goals of tort law and on the integrity of the torts system, demand elimination of those damages from the remedial scheme. At the same time, I think that a number of adjuvant changes should be considered to accompany the elimination of pain and suffering damages. Accordingly, and secondly, I propose that *economic* damages be enhanced in personal injury cases to provide a more effective (aggressive) compensation for medical and rehabilitative costs and to better assuage and manage the plaintiff's pain and enhance (preserve) the quality of his life. Finally, I suggest that prevailing plaintiffs in personal injury cases be awarded reasonable attorney fees.

A. ELIMINATE DAMAGES FOR NONECONOMIC CONSEQUENCES OF PAIN AND SUFFERING

Over the years, there have been a wide assortment of reform proposals for modifying the measure or process of assessing damages for pain and

234. Jim Copeland, *The Tort Tax*, WALL ST. J., June 11, 2003, at A16. Supreme Court Justice O'Connor admonished in a recent speech that "[n]o institution of government can afford now to ignore the rest of the world," adding that "[t]he importance of globalization should not be underestimated." Sandra D. O'Connor, Address at the 2002 Annual Meeting of the American Law Institute (May 15, 2002).

235. Recent data indicates that tort costs increased by 14.3%, much more rapidly than the United States economy even in the best of times. COPELAND, *supra* note 234, at A16.

236. See REPORTERS' STUDY, *supra* note 2, at 208 ("[M]any people feel intuitively uneasy about a proposal that any victim who happened to suffer no pecuniary loss (such as a retiree who experiences no income losses . . .) receive no legal redress at all for a severe disability inflicted by someone else's carelessness, even though the disability sharply interferes with the victim's quality of life, simply because the victim would not have opted to purchase loss insurance against this particular type of harm if it were a purely natural misfortune."); Jaffe, *supra*, note 1, at 225 (conceding, that even with the best of arguments against pain and suffering damages, the unlikelihood that the "courts will forthwith deny the right of the plaintiff to have these intangibles valued"); Zelermyer, *supra* note 4, at 28 (noting that to quarrel with the awarding of damages for pain and suffering "would not only contradict a practice long standing but also would indicate a villainous disposition").

suffering damages. Some have been enacted.²³⁷ Various proposals have spanned the gamut. Some have proposed different methodologies to guide jurors in the assessment of pain and suffering damages.²³⁸ There have also been a variety of proposals for placing limits on awards for pain and suffering. These have taken several forms, including outright ceilings or "caps" on the total amount of noneconomic damages for pain and suffering²³⁹ and schedules based on various criteria.²⁴⁰

237. See generally Schwartz & Lorber, *supra* note 47, at 60-63 & n.78 (discussing legislation).

238. See, e.g., Chase, *supra* note 36, at 777 (suggesting informing jurors of the range of awards in other cases); Diamond et al., *supra* note 75, at 321-22 (suggesting guidance to jurors in the form of "comparables" based on awards rendered in other cases); Geistfeld, *supra* note 85, at 842 (suggesting instructing jurors to base their awards on "the amount that a reasonable person would have accepted as fair compensation for the pain and suffering when confronted by the risk" of injury); Levin, *supra* note 72, at 303 (suggesting descriptive guidelines rather than hard and fast limits).

239. 2 DOBBS, *supra* note 67, at 397-98; REPORTERS' STUDY, *supra* note 2, at 217-19; Schwartz and Lorber, *supra* note 47, at 60-63 & n.78 (discussing legislation); Marcus L. Plant, *Damages for Pain and Suffering*, 19 OHIO ST. L.J. 200, 211 (1958) (proposing a maximum limit on damages for pain and suffering, perhaps to be set at 50% of, presumably the past, medical expenses proved at trial); Stephen D. Sugarman, *Serious Tort Law Reform*, 24 SAN DIEGO L. REV. 795, 807, 823-25 (1987) (proposing not only a threshold on pain and suffering damages, but also a ceiling to be adjusted regularly for inflation). Ceilings or caps on pain and suffering damages have been subject to various criticisms. Thus, some have noted that "standing alone, [they are] a crude means of controlling the award." 2 DOBBS, *supra*, note 67, at 397-98. Another criticism is that the cost of this reform would be born at the high end by the more severely harmed victims. REPORTERS' STUDY, *supra* note 2, at 219; see Geistfeld, *supra* note 85, at 790. It has also been noted that "a cap does little to cure the problem of erratic, arbitrary disparity in awards beneath the cap level, awards rendered by many different juries asked to grapple intuitively with the nearly unanswerable question of how much money would be paid in redress for an inherently non-monetary harm." REPORTERS' STUDY, *supra* note 2, at 221.

240. See REPORTERS' STUDY, *supra* note 2, at 222 (suggesting a threshold of seriousness before the awards of any pain and suffering damages, with such damages awarded pursuant to a scale according to which "the amount to be awarded for lesser injuries would be prorated downward from the figure that was fixed for the most severe injuries," and "[e]ventually the scale would terminate at the legal floor for any pain and suffering damages," and "[s]everity would be defined not just with reference to the nature of the injury . . . but also the age of the victim"); Geistfeld, *supra* note 85, at 791-92; O'Connell, *supra* note 102, at 350 (suggesting, as part of a set of proposals on damages reform, to abolish pain and suffering damages for non-serious injuries, and defining "serious injuries" as those for noneconomic losses of in excess of a specified amount or which result in death, significant permanent injury, serious permanent disfigurement, or inability to work more lasting more than 6 months); O'Connell & Boutros, *supra* note 146, at 424 (outlining in their "early offer plan," a proviso for those who would not be entitled to much in the way of economic loss providing that "seriously injured claimants, as rigorously defined under the statute, must be offered a choice between payment of net economic losses or a lump sum of, say, \$500,000"); Sugarman, *supra* note 239, at 823 (proposing a threshold under which no damages could be awarded for pain and suffering unless there was at least six months of disability, or serious disfigurement or impairment); Zelermyer, *supra* note 4, at 41 (suggesting a schedule of graduated amounts for pain and suffering "arrived at through a study of comparative severity"); Randall R. Bovbjerg et al., *Valuing Life and Limb in Tort: Scheduling "Pain and Suffering,"* 83 NW. U. L. REV. 908 (1989) (suggesting guidelines based on results in past cases); see also 2 DOBBS, *supra* note 67, at 397. An approach with guidelines derived from past awards has been criticized. See Geistfeld, *supra* note 85, at 791-92, 836-37 (commenting in connection with schedules for jurors or courts based on evidence of prior pain and suffering awards for similar cases, that "[i]f the system has been providing overly arbitrary pain and suffering awards, and if we have no method for deter-

In general, I find these proposals inadequate or incomplete. The ones attempting to come up with a new set of instructions for the jury are bound to fail because they attempt to articulate standards for a state that is not amenable to monetization—incommensurability. The reforms and proposals employing various limitations in the forms of ceilings or schedules simply do not go far enough. They shift the bar, but leave in place some level of noneconomic damages for pain and suffering. In so doing they not only continue to subvert the goals of tort law, but will often add a new level of arbitrariness to the process because some claimants will be excluded and others will have their pain and suffering limited by rules that may bear little relationship to the particular nature of their suffering. As my observations about the corrosive effects that noneconomic damages have on the goals of tort law suggest, tinkering with pain and suffering damages at the margin, while continuing to allow them, will only invite attempts to circumvent limitations, push the envelope, and invent strategies for obtaining that “more adequate award.”²⁴¹ These proposals really do not solve the problem. I would prefer for the courts to limit compensatory damages in all personal injury torts cases to economic losses. Thus, a plaintiff in a personal injury torts case would receive no damages for the noneconomic effects of pain and suffering, mental distress, loss of enjoyment of life, or any other non-economic (or nonpecuniary) loss. Damages would essentially be limited to recovery for loss of earning capacity, past and future medical and rehabilitative expenses, and property damages.

Over the years a number of thoughtful commentators have suggested, the elimination of pain and suffering damages in varying circumstances. For example, Fleming James and others have urged that pain and suffering damages be eliminated in strict liability claims.²⁴² James believed that limiting damages to economic loss was a “necessary rational corollary to strict liability.”²⁴³ Other writers, such as Stanley Ingber, have made a persuasive case for a broader repeal. Thus, Ingber has advocated that damages for noneconomic losses no longer be awarded for unintentional personal injuries, or at least when the injuries were not severe.²⁴⁴ And,

mining the appropriate award in the first instance, why should we make prior awards the cornerstone of future awards,” and that in any event there may not be a sufficient number of prior awards to make it feasible).

241. See Melvin M. Belli, Jr., *The Use of Demonstrative Evidence in Achieving “The More Adequate Award,”* Address Before the Mississippi State Bar Association (June 2, 1951) at 33-37.

242. See James, *supra* note 126, at 297; see also Jaffe, *supra* note 1, at 223; Fleming James, Jr., *Damages in Accident Cases*, 41 CORNELL L. Q. 582 (1956); King, *supra* note 14, at 383-89. See generally VIRGINIA E. NOLAN & EDMUND URSIN, *UNDERSTANDING ENTERPRISE LIABILITY* 9-10, 106-15 (1995). Nolan and Ursin propose that courts consider an array of approaches to limiting damages in the context of their proposal for expanding strict products liability and for creating strict business premises liability. NOLAN & URSIN, *supra*, at 168.

243. James, *supra* note 126, at 297.

244. See Ingber, *supra* note 33, at 784 n.53; Morris, *supra* note 25, at 477-78. Ingber hedges to some extent, saying that “damages should be limited to the extent that these injuries have caused or are anticipated to cause transferable, out-of-pocket expenses,” but

still others, have proposed elimination of pain and suffering damages as part of a more systemic way of approaching the matter of responding to disability and illness.²⁴⁵

My proposal does not fit neatly within any of these, but is sympathetic with many of their observations about the inherent shortcomings and illogic of noneconomic damages. Unlike some, I advocate the complete elimination of damages for pain and suffering. I would otherwise retain for now the contours of the existing system of individualized damages for redressing economic loss, thus continuing to award damages for medical expenses and loss of earning capacity. With respect to the noneconomic consequences of pain and suffering, I propose to end noneconomic damages for all personal injury torts without exception or qualification. If these damages cannot be justified because they make no sense, I prefer that we make a clean sweep. Thus, I would eliminate them for both strict liability and fault-based torts, for both unintentional and intentional injuries, and for both those injures described as severe and those not so severe. It makes no sense to award pain and suffering damages for only "severe" injuries. As I have discussed, money cannot really redress such harm. It is like saying that we will only treat melanoma but not dermatitis with an application of peanut butter because melanoma is a severe skin condition and dermatitis is not. The fact remains that peanut butter does not really cure or assuage either one.

A charge that such a proposal represents a Philistine's view of the law's response to suffering²⁴⁶ ignores the pervasive levels of legally unrequited suffering in this affluent society that are not addressed by helping with medical expenses and income loss, let alone pain and suffering.²⁴⁷ It also ignores the whole range of other legal responses available to control conduct that may cause personal injuries, including the threat of liability for economic damages, punitive damages, criminal sanctions, regulatory responses, and injunctive relief. It also overlooks the role of market forces.

then qualifies it. Ingber, *supra* note 33, at 809. Where noneconomic damages beyond pecuniary loss "are perceived as necessary to symbolically demonstrate societal concern for an injured party . . . , a schedule of damages for severe injuries . . . may be developed." *Id.* at 784 n.53. He also says that "nontransferable damages should be awarded only when the purpose is to punish the morally blameworthy or encourage primary cost avoidance. As such, general damages should be available only when restitutive justice and deterrence are both feasible and desirable." *Id.* at 809. He thus implies that pain and suffering damages are suitable when the defendant engaged in intentional or reckless conduct and for "individuals who calculatingly risk injury to others." *Id.* at 788, 791.

245. See Abel, *supra* note 7, at 823.

246. Jaffe, *supra* note 1, at 224 (rejecting the Philistine charge).

247. The vast majority of persons who are felled by accidents or illness never have or pursue a viable tort remedy. Moreover, victims of whole categories of severe accidental injuries and occupational diseases are prevented from recovering against their employer for nondisabling pain and suffering. See 1 ARTHUR LARSON & LEX K. LARSON, LARSON'S WORKERS' COMPENSATION LAW § 1.03[4] (2003) ("There is no place in compensation law for damages on account of pain and suffering, however dreadful they may be."). See generally Joseph H. King, Jr., *The Exclusiveness of an Employee's Workers' Compensation Remedy Against His Employer*, 55 TENN. L. REV. 405 (1988) (discussing the nature of the exclusive remedy rule).

B. ENHANCED ECONOMIC DAMAGES FOR ASSUAGING PAIN
AND LIMITATIONS

While proposing the elimination of traditional pain and suffering damages, I also recommend that economic damages be aggressively awarded for measures that may truly assuage a victim's pain. Thus, I would allow damages for compensating for pain and suffering but only to the extent such damages are reasonably and objectively necessary to relieve the actual pain and suffering of the victim (and of course to the extent that pain-based disability impairs a victim's earning capacity).

I believe that we should reconsider the basic notion of what it should mean to make a person suffering from pain "whole." Tort law should no longer indulge the impossible aim of returning the victim to his or her pre-accident mental and sensory state. Rather, I think that the victim should be compensated for past and future economic losses, and those economic losses should be broadly conceived to include sufficient money to help make the plaintiff whole and fulfilled *in his current condition*, or in other words a *whole person today*.

Accordingly, compensable medical expenses should include the sums needed for aggressive pain relief. The patient should also be provided with reasonable medical appliances and modifications for his home and transportation necessary to respond to the physical and mental limitations attributable to the tort.²⁴⁸ Damages would be directed at improving the victim's quality of life by providing the *costs of facilitation* of his activities in his post-accident condition. But, I disagree with those who have suggested that damages include a sum for purchasing surrogate pleasures or to pay for new activities, all to serve as substitutes for the former pleasures and satisfactions that the post-accident condition and limitations have now placed out of reach.²⁴⁹ Damages should include money needed to provide pain relief and creative comprehensive rehabilitation, and those rehabilitation services should encompass not merely vocational and medical dimensions, but also should focus more holistically on relieving the victim of discomfort. My broadened notion of economic damages to assuage pain and address limitations does not contemplate underwriting the purchase of substitutes,²⁵⁰ which would rekindle to whole the intractable problem of incommensurables.²⁵¹

The philosophical and psychological implications of the attenuation of suffering can be debated. Some writers have posited that pain must be a

248. Cf. REPORTERS' STUDY, *supra* note 2, at 229-30 (although suggesting that pain and suffering damages be retained, suggests not only that such damages be only paid to victims of serious injuries, but also "with substantial monetary awards paid to the permanently disabled who can use the additional funds to adjust to and better enjoy life in their future disabled state").

249. See *supra* notes 64-65, 67 and accompanying text.

250. See ATIYAH, *supra* note 72, at 16 ("Provided that their medical and other needs are met, and something can be done to let them enjoy their lives to the limits of their medical condition, still further payments serve no real purpose.").

251. See *supra* notes 101-02, 127-30, 187-89 and accompanying text.

part of the human experience if people are to realize their creative potential. This idea is captured in the Greek legend of Philoctetes.²⁵² According to legend, the demigod Heracles gave Apollo a bow that never missed its mark, and he bequeathed it to Philoctetes.²⁵³ On his aragoso to Troy, Philoctetes was bitten on the foot by a virulent snake, causing a chronic, suppurating wound.²⁵⁴ From this fateful juncture, Edmund Wilson draws a fundamental idea of “the conception of superior strength as inseparable from disability,”²⁵⁵ and that “genius and disease, like strength and mutilation, may be inextricably bound together.”²⁵⁶ Under one view, then, “[y]ou cannot get Philoctetes the astounding marksman without Philoctetes the loathsome invalid.”²⁵⁷ But, others take a different view, that “art grows out of suffering no more than do all human activities, successful and unsuccessful.”²⁵⁸

I don't know whether “it takes a worried man to sing a worried song.”²⁵⁹ But, irrespective of whether the crucible of pain and suffering is essential for some levels of human fulfillment, I believe that ideally the decision to experience pain and suffering that is amenable to palliation should be the potential victim's to make. Accordingly, to the extent that the pain and suffering caused by actionable conduct is reasonably amenable to medical relief, it should be included in the estimate of economic damages. Moreover, the response to the victim's pain and suffering should encompass not only aggressive medical pain management²⁶⁰ and rehabilitation, but also should include appropriate behavioral-cognitive therapy.²⁶¹ Thus, it should not only encompass “the wherewithal to purchase the equipment, training, assistance, and services that would al-

252. See PETER D. KRAMER, LISTENING TO PROZAC 276 (1993).

253. See EDMUND WILSON, *Philoctetes: The Wound and the Bow*, in *THE WOUND AND THE BOW: SEVEN STUDIES IN LITERATURE* 272, 275 (1947).

254. *Id.* at 276.

255. *Id.* at 287.

256. *Id.* at 289.

257. KRAMER, *supra* note 252, at 276.

258. This view is ascribed to Lionel Trilling by Peter Kramer, and is described by Kramer:

[A]rt grows out of suffering no more than do all human activities, successful and unsuccessful. Trilling counters the Philoctetes myth with those of Pan, Dionysius, Apollo, and Hermes, in which art is associated with the antithesis of neurosis: superabundant energy and power. We might say, in the language of psychobiology, that there is hyperthymic as well as dysthymic art.

Id.; see LIONEL TRILLING, *Art and Neurosis*, in *THE LIBERAL IMAGINATION: ESSAYS ON LITERATURE AND SOCIETY* 152, 160-80 (1951). Kramer seems to agree with this latter view. See KRAMER, *supra* note 252, at 276.

259. These words are from the lyrics of the famous folk song, *Worried Man Blues*, popularized in numerous recordings. The author is unknown. See *Worried Man Blues*, at <http://www.csufresno.edu/forlklore/ballads/BAF890.html> (last visited Aug. 28, 2003). Reportedly, the earliest known recording was in 1929 by the Carter family, and the song was copyrighted by A.P. Carter. *Id.*

260. See Abraham & Snyder, *supra* note 94, at 274, 278-90 (discussing the important strategies that should be followed in pain management, including assessment for spiritual and existential distress for dying patients).

261. *Id.* at 278-90; Manetto & McPherson, *supra* note 94, at 462, 466 (noting the need for “behavioral-cognitive therapy,” especially in the elderly for pain management).

low them to lead the best life possible after their tragic injury.”²⁶² It should also, under an expansive concept of medical and vocational benefits, include “a broad range of psychological and social adjustments to the new disabled state, the bulk of the expenditures made possible by this ‘functional’ view of pain and suffering damages would fit quite comfortably under the rehabilitative heading.”²⁶³ This more holistic approach to pain and suffering is consistent with recent trends in “practicing healing law,”²⁶⁴ based on “seeing the client as a whole person with diverse needs.”²⁶⁵

C. AWARDING REASONABLE ATTORNEY FEES TO THE PREVAILING PLAINTIFF

Unless modified by statute or subject to some special exception, the parties in torts cases must pay their own attorneys and are not required to pay the other party’s attorney’s fees.²⁶⁶ Plaintiffs in personal injury cases will often pay their attorney by entering into a contingent fee agreement pursuant to which the attorney will be paid from a percentage of the plaintiff’s recovery, but will not be paid a fee if the plaintiff does not recover any damages.²⁶⁷ The net effect of this practice is that a plaintiff who is theoretically fully compensated by a defendant will remain undercompensated because of the amounts to which his attorney will be entitled to receive.²⁶⁸

It is often said that one of the practical justifications for pain and suffering damages is based on the tacit assumption that such damages will augment damages so that plaintiff can pay his attorney with less diminution of his overall recovery (and especially his economic damages).²⁶⁹

262. REPORTERS’ STUDY, *supra* note 2, at 210.

263. *Id.* (“It seems reasonable to assume that after the injury the permanently disabled victim could make good use of the additional funds to diminish the impact of the injury.”).

264. Richard L. Halpert, *More Than One Kind of Recovery*, A.B.A. J., May 2003, at 58.

265. *Id.* at 58 (“[T]he client’s needs may include physical, emotional, social, financial and spiritual issues, any of which may affect the client’s ability to live successfully.”); see David B. Wexler & Bruce J. Winick, *Putting Therapeutic Jurisprudence to Work*, A.B.A. J., May 2003, at 54. Wexler and Winick explain: “Therapeutic jurisprudence focuses on the law’s impact on emotional life and psychological well-being. It is a multidisciplinary approach that seeks to bring insights from the behavioral sciences—psychology, social work, criminology and the like—into the law, the lawyer’s office and the courtroom.” Wexler & Winick, *supra*, at 54, 56.

266. See DOBBS, *supra* note 27, at 38; FISCHER, *supra* note 31, §§ 330-334.

267. See DOBBS, *supra* note 27, at 38.

268. *Id.*

269. See 2 DOBBS, *supra* note 67, at 399 (stating that pain and suffering damages “serve an eminently practical and important purpose in providing a fund from which the plaintiff’s attorney’s fee can be paid without drawing too heavily on that portion of the award actually needed to pay medical bills or replace lost earnings”); O’CONNELL & SIMON, *supra* note 40, at 51 (stating that damages for pain and suffering are “explained in part . . . in that lawyers take their fees from amounts supposedly paid for pain and suffering”); REPORTERS’ STUDY, *supra* note 2, at 215 (“[T]he crucial practical role that pain and suffering damages play in the current tort regime is generating the funds to pay for the fees charged by plaintiff’s attorney.”); Geistfeld, *supra* note 85, at 801 (“[P]ain-and-suffering damages have often been justified on the ground that these awards in effect compensate the plaintiff for her legal expenses.”).

Use of chaotic pain and suffering awards to replace attorney fees is at best, however, a blunt instrument,²⁷⁰ and at worst invites chaos and abuse. I have proposed that noneconomic damages for pain and suffering be eliminated. If the awarding of attorney fees is believed to be an essential ingredient in the plaintiff's remedial package to assure plaintiffs that their economic losses are fully redressed, then that can and should be accomplished directly and openly rather than through a haphazard back-door approach that relies on pain and suffering damages to replace the outlay for attorney fees. A number of commentators have recognized the wisdom of combining a proposal for significant change in the approach to pain and suffering damages with a concomitant introduction of some provision for the awarding of attorney fees.²⁷¹ As the third part of my overall proposal, I thus suggest that prevailing plaintiffs be awarded reasonable attorney fees based on the actual hours expended by the attorney or a reasonable fee, whichever is less.

V. CONCLUSION

The awarding of noneconomic damages for pain and suffering is an established part of personal injury tort law. Over the years, there have been numerous proposals to deal with the question of pain and suffering damages, running the gamut from attempts to rationalize the criteria for such damages to the creation of limits on such awards. There have also even been occasional calls for the elimination of such damages in at least some types of torts claims. I have argued that noneconomic damages for pain and suffering in personal injury torts claims cannot be justified under the recognized goals of tort law. Pain and suffering damages are conceptually and operationally incompatible with the policy goals of modern tort law. I have therefore proposed that noneconomic damages for pain and suffering no longer be recoverable in any personal injury torts claims.

In this article I began by offering a brief overview of the evolution of pain and suffering damages. I then sought to identify the recognized goals of personal injury tort law and explained why I believe these goals are subverted by the awarding of noneconomic damages for pain and suffering. And, lastly, I proposed the complete elimination of damages for pain and suffering in personal injury torts cases and suggested (albeit tentatively and very preliminarily) a brief outline of some developments that I believe should accompany the elimination of pain and suffering damages.

It has become almost a mantra in personal injury cases that damages are supposed make the plaintiff whole by replacing the losses attributable

270. Morris, *supra* note 25, at 477 (describing the use of pain and suffering to compensate plaintiffs for their attorney fees as a "clumsy substitute").

271. See Ingber, *supra* note 33, at 812 (proposing that the court grant attorney fees to successful litigants); Jaffe, *supra* note 1, at 234-35 (suggesting overtly making an allowance for attorney fees); O'Connell, *supra* note 102, at 351 (suggesting, as part of a set of proposals on damages reforms, that pain and suffering damages for non-serious injuries be abolished that plaintiffs who prevailed be reimbursed for their attorney fees).

to the tort by awarding the plaintiff a suitable amount of money damages. The problem is that damages for noneconomic consequences of an injury—the noneconomic effects of pain and suffering—do not accomplish that immediate end. They do not and never can return the injured person to his pre-injury position. The only damages that realistically can be said to return the plaintiff to his pre-injury state are economic damages that redress loss of earning capacity and medical expenses. Of these economic damages, the only ones that can genuinely nullify some of a plaintiff's pain are economic damages for medical expenses to cover pain management and rehabilitation, and to replace the loss of earning capacity to the extent that pain has caused vocational disability. But, noneconomic damages for pain and suffering cannot in any meaningful way reverse the noneconomic effects of pain and suffering. The only question that makes sense here is not whether damages for pain and suffering make the plaintiff whole—they cannot—but whether such damages are consonant with the underlying policy goals of tort law.

A number of goals of tort law have been recognized over the years. The paramount contemporary efficiency based goals of tort law contemplate that the costs of accidents be allocated to the most suitable actors and enterprises whose activities and products generate them, thereby spreading the costs of accidents to the consumers of the products and services. In so doing, both the enterprises and their consumers are informed through pricing and cost structures of the true and relative costs of accidents. This allocation operates to spread the losses of individuals to a broad class of consumers of the enterprise's goods and services, or through liability insurance to a broad class of participants in the insured activity. Deterrence-incentive-based goals are premised on the assumption that the threat or potential for liability will inspire safer conduct or more efficient allocation of resources and loss prevention strategies. The attainment of all of the preceding economic goals hinges on the integrity and soundness of the process of valuing victims' losses. Loss allocation and spreading are undermined by the incommensurability of pain and money. The deterrence-incentive-based goals depend on a rational foundation that individuals and enterprises can summon in making their cost-benefit analyses so as to optimize the expenditure of resources on loss avoidance. Deterrence and incentive goals of tort law are corrupted when the assessment of damages is arbitrary and lacks any objective referent.

I have recommended that a three-prong approach to pain and suffering damages be considered. First, I have proposed that compensatory damages no longer be awarded in any person injury tort claims for the noneconomic consequences of pain and suffering. Second, I have urged that the scope of economic damages be broadly conceived to assure that comprehensive medical and rehabilitative strategies are employed to assuage the plaintiff's pain. And finally, I have suggested that the prevailing plaintiffs in personal injury torts claims be awarded reasonable attorney fees.

