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ZEN AND THE ART OF TORT LITIGATION

*Anne Bloom**

Legal analysis in tort litigation should encourage deeper engagement with the plaintiff's pain and suffering. Focusing more on understanding the causes and experience of human suffering—the Zen approach—will advance traditional tort goals of compensation and deterrence, as well as provide the plaintiff with a more positive litigation experience. This Article argues that current practices in tort litigation place too much emphasis on bodily harm and expert testimony, and unnecessarily position the plaintiff as a victim. Alternatively, a Zen approach recognizes that the body and mind are linked, places greater weight on direct, experiential testimony, and acknowledges the complexity and fluidity of the plaintiff's identity.

Knock on the sky and listen to the sound.

—Zen proverb¹

I. INTRODUCTION

Law school trains lawyers to distance themselves from what is happening to people in cases.² This is as true in torts as in any other area of the law. Contemporary tort theories emphasize corrective justice and efficiency as the guiding principles for analysis.³

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1. *Zen Proverbs*, WIKIQUOTE.ORG, http://en.wikiquote.org/wiki/Zen_proverbs (last visited Aug. 3, 2010).

2. See, e.g., RICHARD D. KAHLENBERG, *BROKEN CONTRACT: A MEMOIR OF HARVARD LAW SCHOOL* (Univ. of Mass. Press 1999) (1992); DUNCAN KENNEDY ET AL., *LEGAL EDUCATION AND THE REPRODUCTION OF HIERARCHY: A POLEMIC AGAINST THE SYSTEM* (2004); see also Owen M. Fiss, *Reason in All Its Splendor*, 56 *BROOK. L. REV.* 789, 801 (1990) (noting that judges are expected to resolve cases in a detached way); William H. Simon, *The Ideology of Advocacy: Procedural Justice and Professional Ethics*, 1978 *WIS. L. REV.* 29, 30 (1978) (noting that lawyers are expected to separate themselves from the personal and social norms of others).

3. See generally RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* (Wolters Kluwer 7th ed. 2007) (1972) (articulating a law-and-economics or efficiency-based theory); John C. P. Goldberg, *Twentieth-Century Tort Theory*, 91 *GEO. L.J.* 513, 570–76 (2003) (describing corrective-justice approaches).

Applying these principles, students learn to analyze the wrongfulness of the defendant's conduct and the costs of preventing future inefficient behavior. The plaintiff's pain and suffering take a back seat to broader social objectives like compensation and deterrence.⁴

Some find it harder than others to keep this distance.⁵ A few years ago, some women in my torts class began to weep openly when we discussed a case involving a woman named Linda Riss.⁶ Riss's ex-boyfriend had hired someone to throw acid in her face.⁷ The attack left Riss blind and permanently disfigured.⁸ Riss sued the New York City Police Department for failing to protect her from the attack despite her numerous pleas for protection.⁹ Riss lost the case, but what makes the story truly tragic is that she later married her abuser.¹⁰

This last fact is not officially part of the case, but I share it with my students because it seems worth knowing. The additional information generates different reactions in different listeners. Some conclude that Riss's problem was not her abusive relationship or even the courts, but a preexisting emotional condition: "Clearly, there is something wrong with her," more than one student has commented in my classroom. Others cry because they have themselves been abused and identify closely with Riss.

There are two important points that the students' reactions illustrate. The first has to do with how we bring our own experiences into play when analyzing tort cases.¹¹ As it turns out, it is very difficult to distance ourselves from the pain and suffering in tort

4. See POSNER, *supra* note 3, at 196–200; Goldberg, *supra* note 3, at 571–73.

5. See Leslie Bender, *Hidden Messages in the Required First-Year Law School Curriculum*, 40 CLEV. ST. L. REV. 387 (1992).

6. *Riss v. City of New York*, 240 N.E.2d 860 (N.Y. 1968).

7. *Id.* at 862.

8. *Id.*

9. *Id.*

10. CRAZY LOVE (Magnolia Home Entertainment 2007). Riss explained her decision in terms of limited options: "I am now damaged merchandise." *Id.*

11. See Angela P. Harris & Marjorie M. Schultz, "A(nother) Critique of Pure Reason": *Toward Civil Virtue in Legal Education*, 45 STAN. L. REV. 1773, 1774 (1993) ("[E]motions can never successfully be eliminated from any truly important intellectual undertaking, in the law or elsewhere."); See generally PATRICIA WILLIAMS, *THE ALCHEMY OF RACE AND RIGHTS: DIARY OF A LAW PROFESSOR* 3 (1992) ("[S]ubject position is everything in [the] analysis of the law . . ."); J.M. Balkin, *Understanding Legal Understanding: The Legal Subject and the Problem of Legal Coherence*, 103 YALE L.J. 105, 110–13 (1993) (discussing the role of subjectivity in legal analysis).

litigation, especially when we have some sense, from our own personal experience, of what it must have been like for the parties.¹² The second has to do with how our reaction to the case changes when we learn what happened to the parties after the litigation concluded.

When the court ruled that Riss could not recover from the police for failing to protect her from her ex-boyfriend, it had no way of knowing that she would eventually marry her attacker. Moreover, it is far from certain that a different legal outcome would have had any impact on Riss's future. Yet when my students learn what did happen to Riss, they think about the case differently.

For some, the fact that Riss later married her abuser provides further support for the court's ruling against her. From this perspective, even a favorable ruling probably would have done little to help Riss because she is seen as fundamentally a "victim" and perhaps as someone destined to a life of abuse.¹³ For others, especially those who have some personal experience with abuse, the ruling becomes another instance of victimization with predictable effects;¹⁴ if the court had decided differently, Riss might not have married her abuser.

On one level, these reactions differ greatly. One group of students feels more sympathy for Riss after learning about her post-litigation life; the other group does not. On an analytical level, however, these reactions are more similar than not. For most students, learning more about the larger context of the case causes them to focus more on what has happened (and is continuing to happen) to Riss. Whether they think Riss is a "permanent victim" or was unfairly victimized, students are no longer focused on the

12. See Balkin, *supra* note 11, at 140.

13. See Alan D. Freeman, *Antidiscrimination Law: A Critical Review*, in *THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE* 96, 97–99 (David Kairys ed., 1982) (giving an overview of the "victim" versus "perpetrator" perspectives).

14. Some might view this as a "perpetrator" perspective. See *id.* at 98. Freeman notes that in the civil rights context, the corrective justice model conditions recovery on the wrongful actions of the "perpetrator" while largely ignoring the broader socio-economic conditions that help constitute the "victim." *Id.* at 98–99. Something similar may be taking place in the tort context. Students who were less inclined to permit Riss to recover from the City of New York viewed her injuries as more closely associated with her status as a "victim" in society than the failure of the police to protect her. See also MARTHA CHAMALLAS & JENNIFER B. WRIGGINS, *THE MEASURE OF INJURY: RACE, GENDER, AND TORT LAW* 125 (2010) (presenting evidence that we are less likely to sympathize with people whom we expect to suffer because of their status in life).

wrongfulness of the defendant's conduct or the most efficient way to deter wrongful conduct in the future; they are thinking about the pain and suffering of the plaintiff.

This Article argues for changes in tort law aimed at encouraging a similar change in perspective in a court's analysis of tort claims.¹⁵ It does so by drawing attention to how experience shapes our perception of tort claims and to how these perceptions can change over time. Like the students reading *Riss v. City of New York*,¹⁶ lawyers, experts, and other legal actors analyze tort claims through the lenses of their own experiences and in the limited context of a particular space and time. This Article suggests some ways that we can broaden the contexts and become more aware of our own reactions to the plaintiff's pain and suffering in the legal analysis of tort claims.¹⁷ More broadly, this Article argues that we should make more space in tort litigation for deeper engagement with the plaintiff's pain and suffering.

The emphasis on compensation and deterrence is so deeply ingrained in tort litigation that it is almost impossible to imagine an approach to tort litigation that focuses on understanding the plaintiff's suffering.¹⁸ Yet there are many reasons why adopting such an approach would be worthwhile. For one thing, many successful trial lawyers claim that a suffering-oriented approach is better for purposes of successfully resolving a case.¹⁹ In other words, from the

15. See FREEMAN, *supra* note 13, at 98–99. Some may view this as an argument to place more emphasis on the perspective of the victim. However, as I explain below, one of the aims of the approach proposed here is to move away from rigid characterizations (and construction) of the plaintiff as a “victim.”

16. 240 N.E.2d 860 (N.Y. 1968).

17. See Harris & Schultz, *supra* note 11, at 1774 (“[W]hen emotions are acknowledged and rigorously examined, they can serve as a guide to deepening intellectual inquiry . . .”).

18. *But see* CHAMALLAS & WRIGGINS, *supra* note 14, at 22 (advocating an approach that incorporates the victim's perspective into a legal analysis of tort claims utilizing a feminist and critical legal approach).

19. See, e.g., GERRY SPENCE, GIVE ME LIBERTY!: FREEING OURSELVES IN THE TWENTY-FIRST CENTURY 302–03 (1998) (criticizing formal legal education for ignoring the experience of law in our lives); Dana K. Cole, *Psychodrama and the Training of Trial Lawyers: Finding the Story*, 21 N. ILL. U. L. REV. 1, 22–23 (2001) (describing Spence's psychodrama “technique,” which involves intense client identification); see also Sande L. Buhai, *Emotional Conflicts: Impaired Dispassionate Representation of Family Members*, 21 GEO. J. LEGAL ETHICS 1159, 1161 (2008) (“Contrary to the vision of the hired-gun, the everyday practice of law is consumed with the humane arts of counseling, negotiation, mediation, and empathy.” (footnote omitted) (internal quotation marks omitted)); Lynne N. Henderson, *Legality and Empathy*, 85 MICH. L. REV. 1574, 1596–1609 (1987). See generally William J. Brennan, Jr., *Reason, Passion, and “The*

perspective of successful practitioners, the adoption of processes aimed at understanding the plaintiff's suffering produces better results.²⁰

Focusing more on the plaintiff's suffering in tort litigation may also yield institutional benefits. Many plaintiffs value being heard as much as, or more than, obtaining compensation for their injuries or deterring future conduct.²¹ Adopting practices that promote understanding the plaintiff's suffering will increase the likelihood that plaintiffs have a positive experience in the tort system.²² Such an emphasis is also more likely to meet with approval from the general public, which has grown cynical about the tort system and its emphasis on compensation in particular.²³

Reorienting the analysis of tort claims toward an understanding of the plaintiff's suffering would also allow tort litigation to play a more meaningful role in public discourse about injury and its relationship to suffering more broadly.²⁴ Plaintiffs have much to offer in advancing this dialogue, but so do others with similar life experiences. Litigation processes that help the public engage more deeply with these experiences may help society improve its understanding of the underlying claims and its responses to them.²⁵

I refer to the approach I propose here as a "Zen" approach because, as in Zen Buddhist practice, the emphasis is on better understanding the cause and experience of human suffering.²⁶ But the approach is also Zen-like in two other important respects. First, it

Progress of Law," 10 CARDOZO L. REV. 3 (1988) (arguing that the complex interplay of reason and passion is central to the vitality of the judicial process).

20. Buhai, *supra* note 19, at 1161.

21. See generally Tom R. Tyler, *What is Procedural Justice?: Criteria Used by Citizens to Assess the Fairness of Legal Procedures*, 22 LAW & SOC'Y REV. 103 (1988) (discussing citizen satisfaction with procedural justice).

22. See *id.*

23. PHILIP K. HOWARD, LIFE WITHOUT LAWYERS 74 (2009).

24. For an overview of the psychological literature on suffering and grief, see generally DANIEL GILBERT, STUMBLING ON HAPPINESS, 165–88 (2006). See also SCOTT VEITCH, LAW AND IRRESPONSIBILITY: ON THE LEGITIMATION OF HUMAN SUFFERING (2007) (arguing, among other things, that legal institutions help to organize irresponsibility by legitimizing human suffering); Stan Van Hooft, *The Meanings of Suffering*, HASTINGS CENTER REP., Sept.–Oct. 1998, at 13 (calling for more scholarship on the experience of suffering).

25. Brennan, *supra* note 19, at 5; Henderson, *supra* note 19, at 1576.

26. See, e.g., DAISSETZ TEITARO SUZUKI, AN INTRODUCTION TO ZEN BUDDHISM (1964). The title of this Article is a play on Robert M. Pirsig's bestselling book ZEN AND THE ART OF MOTORCYCLE MAINTENANCE: AN INQUIRY INTO VALUES (1974).

adopts a key Zen insight—the importance of direct experience—as its guiding principle.²⁷ Second, as in Zen practice, the approach offered here encourages skepticism about our capacity to understand our experiences in any static way.²⁸

Zen practices encourage recognition of suffering through mindful observation and direct experience but also emphasize acceptance of the impermanent nature of suffering.²⁹ This Article argues that tort litigation would benefit by adopting this approach as its own.³⁰ It also argues that if we take these ideas seriously, then certain contemporary tort-litigation practices—like the emphasis on bodily harm³¹ and the heavy reliance on experts³²—seem misguided. Instead of enhancing our understanding, these practices prevent us from understanding important aspects of the case, including the nature of the plaintiff's suffering and the uncertainties that surround it.

The remainder of this Article proceeds in two parts. Part II uses Zen principles as a starting point for critiquing current practices in tort litigation. Part III offers a Zen-influenced alternative. It argues for more direct engagement with the plaintiff's suffering in tort litigation and greater acceptance of the uncertainties surrounding the plaintiff's injuries.

The Article concludes with a meditation on the Zen proverb “Knock on the sky and listen to the sound” and its implications for tort litigation. It emphasizes the role that tort litigation plays in bringing hope to those who are suffering and suggests that the highest purpose of tort litigation is to make space for their suffering to be heard.³³

27. ALAN W. WATTS, *THE WAY OF ZEN* 52 (1974).

28. *Id.* at 43.

29. *Id.* at 46–47; see also James L. McHugh, *Zen and the Art of Lawyering*, 39 VILL. L. REV. 1295, 1296 (1994) (quoting a Zen master telling students, “Pay attention! Pay attention! Pay attention!”); *id.* at 1301 (discussing “mindfulness”).

30. See McHugh, *supra* note 29.

31. See *infra* Part II.A; see also CHAMALLAS & WRIGGINS, *supra* note 14, at 89 (noting that negligence law generally extends only to cases of physical injury).

32. See Anne Bloom, *To Be Real: Sexual Identity Politics in Tort Litigation*, 88 N.C. L. REV. 357, 410–13 (2010) (describing the heavy reliance on experts in tort litigation).

33. See Kathryn Abrams & Hila Keren, *Law in the Cultivation of Hope*, 95 CALIF. L. REV. 319 (2007) (arguing that law should cultivate hope in people who are despairing).

II. WHAT ZEN CAN TEACH US ABOUT TORT LITIGATION

Zen Buddhists believe that to be alive is to suffer.³⁴ Because of this, practices aimed at understanding and reducing suffering are central to a Zen perspective.³⁵ These practices, however, take a somewhat different approach to suffering than conventional tort theories.

Conventional tort theories acknowledge that the plaintiff has experienced pain and suffering, but they focus primarily on “making the plaintiff whole” through compensation.³⁶ Some of this compensation covers the plaintiff’s medical bills and lost income.³⁷ A separate amount is then meant to compensate the less-quantifiable aspects of the plaintiff’s pain and suffering.³⁸ The focus in both instances, however, is on using compensation to return the plaintiff to a pre-injury position.³⁹

Zen methods, in contrast, focus on the relationship between pain and suffering.⁴⁰ Zen practices do not attempt to eliminate pain (because that would be impossible); instead they seek to reduce suffering by helping practitioners accept pain rather than resist it.⁴¹ From a Zen standpoint, a great deal of suffering is caused by our attachment to a particular way of viewing the world in which we view our identities as somehow separate from the realities around us, including the pain we experience.⁴² Zen practices teach that the way to end suffering is to experience pain directly and accept it without

34. Or, more precisely, that “life as we usually live it is suffering.” WATTS, *supra* note 27, at 46.

35. *See id.*

36. *See* John C. P. Goldberg, *Two Conceptions of Tort Damages: Fair v. Full Compensation*, 55 DEPAUL L. REV. 435, 435 (2006) (citing 4 FOWLER V. HARPER ET AL., THE LAW OF TORTS § 25.1, at 490, 493 (2d ed. 1986)).

37. DOUGLAS LAYCOCK, MODERN AMERICAN REMEDIES 16 (Aspen Publishers 3d ed. 2002) (1985).

38. *Id.*

39. *Id.*; *see also* Goldberg, *supra* note 36, at 436 (describing tort damages as a “backward-looking notion of restoration”).

40. *See* WATTS, *supra* note 27, at 46–50; *see also* DARLENE COHEN, TURNING SUFFERING INSIDE OUT: A ZEN APPROACH TO LIVING WITH PHYSICAL AND EMOTIONAL PAIN (2002) (advocating a release of pain and suffering by paying closer attention to them).

41. *See* PEMA CHÖDRÓN, WHEN THINGS FALL APART: HEART ADVICE FOR DIFFICULT TIMES 38 (2000).

42. *See id.* at 38–39.

judgment.⁴³ Put differently, Zen does not seek to make its practitioners whole by eliminating pain and suffering; rather, it attempts to reduce suffering by helping its practitioners view themselves as whole, even when they are in pain.

At the same time, Zen teachings emphasize impermanence: the constantly changing nature of all things, including suffering.⁴⁴ “Impermanence” means that we live in a dynamic and ever-changing universe—there is no permanent self and no permanent condition except change itself.⁴⁵ Suffering arises when we become attached to a particular way of looking at the world and attempt to resist impermanence.⁴⁶ Suffering and our perceptions of it undergo constant change.⁴⁷ It is therefore impossible to restore a person to a pre-injury position, and Zen practices do not attempt to do so.

Many Zen teachings aim at helping Zen practitioners understand suffering in this way.⁴⁸ The goal of this Article is a much more limited one. We need not adopt the Zen Buddhist approach to suffering to see how Zen Buddhist beliefs shed light on some of the more problematic aspects of contemporary tort litigation. Similarly, we need not subscribe to Zen principles entirely to appreciate the interesting possibilities that they suggest for reform.

The remainder of this part focuses on three specific tort-litigation practices: the emphasis on bodily harm,⁴⁹ the heavy reliance on experts,⁵⁰ and the rigid positioning of plaintiffs as victims.⁵¹ These practices are problematic for many reasons.⁵² Zen

43. See *id.* at 38–40, 45, 63, 122; see also WATTS, *supra* note 27, at 52–53 (explaining the Buddhist concepts of “recollectedness” and contemplation).

44. See WATTS, *supra* note 27, at 42.

45. See *id.* at 42; see also CHÖDRÖN, *supra* note 41, at 10 (“Things are always in transition, if we could only realize it.”).

46. See WATTS, *supra* note 27, at 42–50; see also CHÖDRÖN, *supra* note 41, at 61 (encouraging the recognition of impermanence, suffering, and egolessness to find peace).

47. See CHÖDRÖN, *supra* note 41, at 10.

48. See SUZUKI, *supra* note 26, at 64–65.

49. CHAMALLAS & WRIGGINS, *supra* note 14, at 89–90.

50. See Bloom, *supra* note 32, at 410–13.

51. For a similar argument on the role of law in positioning parties as victims in a different context, see Laura L. Rovner, *Perpetuating Stigma: Client Identity in Disability Rights Litigation*, 2001 UTAH L. REV. 247, 302–04 (2001), which notes that calling people victims may lead them to identify as victims.

52. Bloom, *supra* note 32, at 410–13 (critiquing the reliance on experts); see, e.g., Nancy Levit, *Ethereal Torts*, 61 GEO. WASH. L. REV. 136 (1992) (critiquing the emphasis on bodily harm).

Buddhist principles suggest, however, that the most serious problem with these practices is that they interfere with our ability to fully grasp the complexity of the plaintiff's condition. Zen principles also expose something perhaps even more troubling: current approaches may aggravate the original harm by unnecessarily positioning plaintiffs as "victims."⁵³

A. *The Emphasis on Bodily Harm*

Most tort claims require some sort of bodily injury for recovery.⁵⁴ One of the most fundamental rules of tort law, for example, is the economic loss rule, which precludes recovery for purely economic harm in the absence of physical injury.⁵⁵ Similarly, tort claims for emotional distress typically require that the plaintiff demonstrate some form of physical impact or physical manifestation of harm.⁵⁶ While these rules are often criticized, the body is still considered the best indicator of the plaintiff's injuries.⁵⁷

This emphasis on the body stems, in part, from concerns about malingering (or fraud).⁵⁸ Even today, most legal commentators believe that bodily harm is easier to verify than emotional harm.⁵⁹ This is so despite advances in technology that have made it possible to distinguish between and physically verify many types of mental injuries.⁶⁰ In one sense, these technological advances might lead to greater emphasis on the body in tort law.⁶¹ One could argue that if

53. For a similar argument in a different context, see Rovner, *supra* note 51, at 302–04. See also Kathryn Abrams & Hila Keren, *Who's Afraid of Law and the Emotions?*, 94 MINN. L. REV. 1997, 2054–55 (2010) (describing how law tells us how to feel and how not to feel).

54. See, e.g., John C. P. Goldberg & Benjamin C. Zipursky, *Unrealized Torts*, 88 VA. L. REV. 1625, 1626 (2002) (noting how courts struggle with claims that do not involve bodily harm); see also CHAMALLAS & WRIGGINS, *supra* note 14, at 89 (noting that negligence, the preeminent theory in tort law, extends only to physical harm); Goldberg & Zipursky, *supra* note 54, at 1650 (“Traumatic bodily harm and illness are the paradigmatic forms of ultimate harm [in tort law].”).

55. See 2 DAN B. DOBBS, *Economic and Dignity Injury*, in THE LAW OF TORTS 1115 (2001); *id.* at 632–33 (discussing torts that address legal harms apart from physical injury).

56. See *id.*

57. See CHAMALLAS & WRIGGINS, *supra* note 14, at 90. The one exception to this general rule is the law regarding defamation. See DOBBS, *supra* note 55, at 1117.

58. CHAMALLAS & WRIGGINS, *supra* note 14, at 90.

59. See *id.*

60. Hubert Winston Smith, *Relation of Emotions to Injury and Disease: Legal Liability for Psychic Stimuli*, 30 VA. L. REV. 193 (1944).

61. See also W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 54, at 360 (5th ed. 1984) (“Mental suffering is no more difficult to estimate in financial terms, and no

mental injuries can be measured on the body, then there is no reason not to use the body to gauge the extent of the plaintiff's injuries in all types of tort cases. Indeed, some commentators have argued for a relaxation of the physical impact rules along precisely these lines.⁶²

From a Zen standpoint, however, taking such an approach ignores the relationship between the mind and the body with respect to injury.⁶³ Zen teaches that perceiving injury as harm is as much a mental act as a physical one.⁶⁴ This is easier to see when we switch our focus from the body to understanding the plaintiff's experience of suffering.

Zen practices encourage us to be attentive to when pain begins, when it eases, when it gets worse, and how our perceptions of pain and suffering change throughout this process.⁶⁵ Although the body signals relative harm or wellness at any given moment, physical and mental injuries are not static, and neither are our perceptions of them. One day we are feeling well; the next day less so. In suffering, as with anything else, there is continuous change.

How much we suffer as a result of these changes may be influenced in part by what others tell us about our conditions and by what we have otherwise come to expect.⁶⁶ In other words, how we

less a real injury than 'physical' pain."); *id.* at 361 ("Not only fright and shock, but other kinds of mental injury are marked by definite physical symptoms, which are capable of medical or other objective proof."); Peter A. Bell, *The Bell Tolls: Toward Full Tort Recovery for Psychic Injury*, 36 U. FLA. L. REV. 333 (1984) (describing continuing restrictions on tort liability for psychic injury).

62. See, e.g., W. PAGE KEETON ET AL., *supra* note 61, at 360–61 (discussing how some mental injuries have physical symptoms capable of medical proof); see also Bell, *supra* note 61, at 335 (describing the "full recovery approach," which allows a plaintiff to recover for psychic injury caused by the culpable conduct of a defendant under the same circumstances permitting recovery for physical injury).

63. See SUZUKI, *supra* note 26; see also COHEN, *supra* note 40 (describing how the mind can affect the body); Levit, *supra* note 52, at 184–85 (1992) (same).

64. See generally COHEN, *supra* note 40.

65. See CHÖDRÖN, *supra* note 41, at 62–63.

66. See, e.g., GILBERT, *supra* note 24, at 190–92 (describing how people perform in response to suggestions about their expected capacity); see also *id.* at 229 (explaining how theories about how people usually feel can influence memories of our own feelings); JOSEPH T. HALLINAN, WHY WE MAKE MISTAKES: HOW WE LOOK WITHOUT SEEING, FORGET THINGS IN SECONDS, AND ARE ALL PRETTY SURE WE ARE WAY ABOVE AVERAGE 113 (2009) (describing how familiarity leads us to see things not as they are but as we expect them to be); Abrams & Keren, *supra* note 53, at 2029 (arguing that law may influence, structure, and give meaning to emotions).

perceive pain depends, in part, on our point of reference.⁶⁷ This is not an argument for ignoring physical indicators of injury and suffering, nor is it a claim that physical injuries do not involve suffering. It is simply a call to recognize that bodily indicators are not the only source of information about the suffering a person has experienced.⁶⁸

There are perhaps no better examples of this than the cases of individuals seeking to amputate healthy limbs.⁶⁹ From the standpoint of the aspiring amputee, the presence of the healthy limb causes significant suffering. Focusing on bodily harm as an indicator of injury, however, obscures this reality. The only way to understand the suffering caused by a healthy limb is to listen closely to the individual's own account of her experiences.⁷⁰

Behavioral neurologist Vilayanur S. Ramachandran did just that and discovered that people who seek to amputate healthy limbs are not crazy (as was previously assumed); instead their perceptions are the result of an unusual reorganization in the brain that affects how would-be amputees perceive their bodies.⁷¹ By using low-tech methods like mirrors, Ramachandran showed that perceptions of the body can be reconstructed and changed.⁷² These changed perceptions, in turn, can lead to changes in the body that influence future perceptions.⁷³

Zen Buddhism's lessons about how we perceive the body are very similar. Zen teaches that our perceptions of injury and suffering

67. For a similar argument in the context of hedonic damages, see Samuel R. Bagenstos & Margo Schlanger, *Hedonic Damages, Hedonic Adaptation, and Disability*, 60 VAND. L. REV. 745, 747 (2007). See also Susan Bandes, *Empathy, Narrative & Victim Impact Statements*, 63 U. CHI. L. REV. 361, 375 (1996) (describing the role of personal experience in influencing perspective). For examples of how people perceive injuries and disability differently, see GILBERT, *supra* note 24, at 31–32, describing conjoined twins as “joyful, playful, and optimistic” to the surprise of surgeons without this physical difference, and ROSEMARIE GARLAND THOMSON, *EXTRAORDINARY BODIES: FIGURING PHYSICAL DISABILITY IN AMERICAN CULTURE AND LITERATURE* (1997) for an argument that mainstream views about disability have more to do with political marginalization of physical difference than medical conclusions.

68. See generally Bagenstos & Schlanger, *supra* note 67 (arguing a similar point in the context of hedonic damages).

69. See generally John Colapinto, *Brain Games: The Marco Polo of Neuroscience*, NEW YORKER, May 11, 2009, at 76 (telling the story of a doctor's meeting with a man who suffers from a rare condition compelling him to have a perfectly healthy limb amputated).

70. *Id.* (describing a doctor's method which involves interviewing and a few hands-on tests).

71. *Id.*

72. *Id.* at 85, 82–83. In one experiment, for example, Ramachandran found that if a person in pain views the painful area through a lens that makes it look smaller, she feels less pain. *Id.* at 86.

73. *Id.* at 86.

undergo constant change and, more fundamentally, that the mind and body are closely linked. Because of this, focusing on the body alone can only tell us part of the story.⁷⁴ While physical indicators may suggest more or less suffering at any particular moment, the plaintiff's changing perceptions of her injuries may be equally, if not more, important.⁷⁵ The conventional emphasis on bodily harm in contemporary tort litigation, however, prevents us from fully understanding this aspect of the plaintiff's injuries and suffering.

B. The Heavy Reliance on Experts

Zen principles suggest that the conventional emphasis on expert testimony in tort litigation is problematic for similar reasons.⁷⁶ Contemporary tort litigation places a great deal of emphasis on expert testimony because experts supposedly offer more "objective" testimony about the nature and causes of a plaintiff's injuries. From a Zen standpoint, however, this notion of expert "objectivity" is based on the mistaken belief that the expert and her observations are somehow separate. But, of course, they are not.

Even experts are influenced by a so-called normality bias that makes it easier for them to see something that they expect to see rather than something they do not.⁷⁷ This has particular relevance for tort law because the normality bias makes it more difficult for *anyone* to understand a plaintiff's injury from anything other than the perspective of our own expectations.⁷⁸ As the normality bias demonstrates, our understanding of others is deeply colored by our own experiences.⁷⁹ Because experts are also affected by this bias, it

74. See SUZUKI, *supra* note 26; see also COHEN, *supra* note 40, at 5 (alleviating pain and suffering requires that we familiarize ourselves with "the thoughts and feelings that define our suffering," and acknowledge how we perceive this suffering in our everyday lives).

75. See generally Bagenstos & Schlanger, *supra* note 67, at 747 (arguing that adoptive preferences should not be automatically rejected as a measure of justice or as a basis for policy).

76. See Bloom, *supra* note 32, at 410 (describing the heavy reliance on experts in tort litigation).

77. CHAMALLAS & WRIGGINS, *supra* note 14, at 127.

78. For example, as Chamallas and Wriggins observe, "the normality bias predisposes us to sympathize more with those who typically suffer less and inures us to the pain of hardships we expect." *Id.* (internal quotation marks omitted).

79. See *id.*

is a mistake to believe that their opinions are “objective.” In fact, they are not.⁸⁰

The emphasis on expert testimony in tort litigation is also problematic because it tends to obscure the fact that tort litigation necessarily involves a great deal of uncertainty.⁸¹ Although experts routinely offer opinions in tort litigation that sound conclusive, there are usually significant questions about both the nature and the cause of the plaintiff’s injuries.⁸² Many contemporary theories of legal analysis in tort law attempt to reduce this uncertainty.⁸³ And, in the typical case, experts play a leading role in these efforts.⁸⁴

Cases like *Riss*, however, expose the limitations of our methods.⁸⁵ We can put on expert witnesses to testify to the magnitude of a victim’s physical and emotional injuries, and, if the experts are good enough, they can even provide a rough quantification of the harms inflicted. But, no formula permits us to reliably predict how future events will change the injuries or, more importantly, how the victims will experience the injuries.⁸⁶

Experts also cannot fully eliminate the uncertainty surrounding causation. In theory, this should not be a problem because the legal test for causation incorporates a fair amount of uncertainty in its “more likely than not” standard.⁸⁷ In practice, however, uncertainty about

80. *Id.* at 123. Indeed, from a Zen perspective, expert opinion may be more problematic than the views of non-experts. See McHugh, *supra* note 29, at 1300 (noting that Zen teachers value the so-called “beginner’s mind” that is “open” and “uncluttered with preconceived notions.”).

81. Levit, *supra* note 52, at 137–38 (providing an overview of the problem).

82. See DOBBS, *supra* note 55, at 446. The remedies phase introduces more uncertainty. See LAYCOCK, *supra* note 37, at 16 (discussing the difficulties with restoring a plaintiff to the “rightful position”).

83. See Jason S. Johnston, *Bayesian Fact-Finding and Efficiency: Toward an Economic Theory of Liability Under Uncertainty*, 61 S. CAL. L. REV. 137, 139 (1987) (giving examples of attempts to reduce uncertainty in tort law); Levit, *supra* note 52, at 137–38; see also ARIEL PORAT & ALEX STEIN, *TORT LIABILITY UNDER UNCERTAINTY* (2001), at 185–206 (providing solutions for liability with uncertainty).

84. Bloom, *supra* note 32, at 410; see also Michael D. Green, *Expert Witnesses and Sufficiency of Evidence in Toxic Substances Litigation: The Legacy of Agent Orange and Bendectin Litigation*, 86 NW. U. L. REV. 643, 643–44 (“[U]ncertainty is the breeding ground of controversy and factual disputes. Where uncertainty exists . . . adversaries inevitably employ expert witnesses.”).

85. See *Riss v. City of New York*, 240 N.E.2d 860 (N.Y. 1968).

86. See Levit, *supra* note 52, at 137–38.

87. See DOBBS, *supra* note 55, at 464; see also RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL HARM ch. 6 (Proposed Final Draft No. 1, 2005) (making an actor liable for the harms caused by tortious conduct and limiting liability concurrently).

causation is a problem and parties and courts routinely employ experts in an attempt to eliminate the uncertainty.⁸⁸ But no amount of expert testimony can change the fact that uncertainty is inherent to causal analysis.⁸⁹

As the legal standard for causation acknowledges, causation is more a matter of probability than certainty.⁹⁰ Where experts may be helpful is in the employment of probability theory to estimate the odds of causation.⁹¹ Because probability theory involves complex scientific information and mathematical calculations, many assume that jurors will reach more accurate verdicts if they hear the experts' conclusions rather than attempting to draw conclusions on their own.⁹² But this assumption is inaccurate; experts have as much difficulty as jurors in determining causation.

In part, this is because scientific analysis simply does not lend itself to the types of causal analyses that tort litigation typically demands.⁹³ In a lawsuit, the causation question must be decided definitively. At the end of the day, a jury reaches a *final* conclusion about whether the defendant's actions were or were not the cause of the plaintiff's injuries. In science, however, the quest for understanding is ongoing.⁹⁴

In other words, scientific analysis of causation incorporates the Zen tenet of constant change; legal analysis does not. Despite the differences in analytical approach, however, tort litigation asks scientific experts to testify about causation in ways that suggest that questions about injuries and causation can be frozen in time and answered with certainty.

88. Green, *supra* note 84, at 643, 644–45. This is in marked contrast to the practices of earlier times when the causation determination typically went to a jury without the benefit of expert opinion. See generally Levit, *supra* note 52, at 137–38 (discussing the history and modern state of causation).

89. See Green, *supra* note 84, at 643, 644–45.

90. *Id.*

91. Levit, *supra* note 52, at 136–38.

92. *Id.*

93. CHAMALLAS & WRIGGINS, *supra* note 14, at 122–23. As a result of this, one of the key pieces of information that a lawyer conveys to an expert asked to provide an opinion is the applicable legal standard of “more likely than not.” Without a proper understanding of the appropriate legal standard, inexperienced experts may inadvertently make statements that harm a party's case.

94. As noted by Chamallas and Wriggins, “the nature of medical and scientific proof is . . . continually evolving, while legal proof calls for a more timely and final resolution.” CHAMALLAS & WRIGGINS, *supra* note 14, at 123.

A good example of this is the litigation involving the “lost chance” doctrine, a theory of causation used in a limited number of tort cases.⁹⁵ In the classic case, the plaintiff alleges that a doctor’s negligence caused her to miss out on a chance of recovery. Although the theory has a potentially broad application, most courts apply it only to medical malpractice cases involving misdiagnosis⁹⁶ and many courts do not apply the lost chance doctrine at all.⁹⁷

Much of the reluctance to adopting the doctrine stems from criticism that emphasizes the uncertainty surrounding what the plaintiff has lost.⁹⁸ In lost chance cases, however, there is no doubt that there is a loss.⁹⁹ Concern about how to prove the certainty of the loss, however, prevents courts from using the lost chance doctrine to provide meaningful relief.¹⁰⁰

But, of course, from a scientific (and Zen) perspective, this kind of uncertainty always exists.¹⁰¹ All an expert can ever do is estimate probability and even the best estimates will change over time. The challenge for tort law is to accept this reality and allow parties to litigate claims in light of it.

In sum, conclusions about injury and causation are fraught with bias even when they are made by experts.¹⁰² Instead of removing this

95. David A. Fischer, *Tort Recovery for Loss of a Chance*, 36 WAKE FOREST L. REV. 605 (2001).

96. *Id.*

97. *See id.* at 610 (suggesting only a increasing minority of courts accept the lost chance doctrine).

98. *See, e.g.,* Jones v. Owings, 456 S.E.2d 371, 374 (S.C. 1995) (“We are persuaded that ‘the loss of chance doctrine is fundamentally at odds with the requisite degree of medical certitude necessary to establish a causal link between the injury of a patient and the tortious conduct of a physician.’” (quoting Kilpatrick v. Bryant, 868 S.W.2d 594, 602 (Tenn. 1993))); *see also* Lars Noah, *An Inventory of Mathematical Blunders in Applying the Loss-of-a-Chance Doctrine*, 24 REV. LITIG. 369, 370 (2005) (emphasizing the difficulty of the mathematical calculations involved).

99. *See* Joseph H. King, Jr., *Causation, Valuation, and Chance in Personal Injury Torts Involving Preexisting Conditions and Future Consequences*, 90 YALE L.J. 1353, 1356 (1981).

100. *See, e.g.,* Bryson B. Moore, *The Law of Torts: South Carolina Rejects the Lost Chance Doctrine*, 48 S.C. L. REV. 201, 214 (1996) (“A major problem with extending the doctrine to other fields is the greater difficulty in ascertaining the percentage chance lost.”).

101. *See* Levit, *supra* note 52, at 136; *see also* Doll v. Brown, 75 F.3d 1200, 1207 (7th Cir. 1996) (“Yet no less uncertainty attends the efforts of triers of fact to fix the percentage of a plaintiff’s negligence in a tort case governed, as most tort cases are today, by the rule of comparative negligence.”); Paul M. Secunda, *A Public Interest Model for Applying Lost Chance Theory to Probabilistic Injuries in Employment Discrimination Cases*, 2005 WIS. L. REV. 747, 760 n.73 (2005).

102. *See* CHAMALLAS & WRIGGINS, *supra* note 14, at 123.

bias, the heavy reliance on experts in tort litigation makes an inherently subjective situation seem more objective than it really is. At the same time, the emphasis on expert opinion minimizes the significance of other potentially important sources of information, such as lay-witness testimony and juror experience.¹⁰³

Considering a broader array of perspectives cannot eliminate, or even reduce, the uncertainty surrounding causation and other issues in tort litigation. But placing more emphasis on non-expert perspectives may allow us to develop a better understanding of the plaintiff's suffering and the role that uncertainty plays in that experience. Experts offer the promise of greater objectivity and certainty but cannot fully deliver either. We have no such expectations about lay testimony and juror deliberations. And, for that very reason, they may be more helpful.

C. Positioning Plaintiffs as Victims

Taking Zen principles seriously also reveals another limitation of contemporary tort-litigation practices: the tendency to position plaintiffs as victims.¹⁰⁴ Zen practices emphasize the impermanence of all things, including suffering. The adversarial posture of tort litigation, however, tends to push plaintiffs into identifying categorically as victims whose sufferings are largely static.

While this positioning is understandable from a strategic perspective, the litigation proceeds as if this limited identity captures the entirety of the plaintiff's past and future experiences with her injuries. But plaintiffs have many other aspects of their identities beyond their role as "victims" in tort litigation. And, perhaps more important, all aspects of their identities are undergoing constant change. Because tort litigation offers little opportunity for plaintiffs to express this complexity, however, we get a distorted picture of what is going on.

103. *Id.* The Third Restatement emphasizes the difference between scientific causation and legal causation and attempts to recalibrate the balance back toward the jury. This shift seems unlikely, however, given tort law's heavy reliance on expert testimony. See Bloom, *supra* note 32, at 410 (describing the role of experts in tort litigation).

104. See, e.g., Bagenstos & Schlanger, *supra* note 67, at 755–56 (describing how lawyers and judges encourage a view of injuries as completely disabling); see also Rovner, *supra* note 51, at 250 (stating that plaintiffs' lawyers portray their disabled clients as "broken, weak, unable to function, and deserving of pity").

Unfortunately, the implications of this extend far beyond the litigation. Judges, lawyers, and other legal actors play important roles in shaping how plaintiffs perceive their injuries and, ultimately, their identities.¹⁰⁵ When experts and lawyers repeatedly present a plaintiff as a “victim,” with permanent injuries for which there is no possibility of change, they help the plaintiff to construct a particular experience or perception of suffering that may be more permanent and all-consuming than it would be otherwise.¹⁰⁶

These comments are not intended to minimize the trauma of serious injury. The point is simply that the experience of injury is not static. For tort litigation to pretend otherwise creates problems for everyone, including the plaintiffs. Under the current approach, plaintiffs are forced to identify over and over again as victims, rather than as individuals with more complex (and constantly changing) identities. This is stifling for the plaintiffs and does little to advance a more complex understanding of the injuries and suffering involved.

III. A ZEN-INFLUENCED ALTERNATIVE

What Zen-influenced practices might we adopt in tort litigation to help us better understand the nature of the plaintiff’s suffering? Zen Buddhism encourages practices that begin with a commitment to deep engagement with the plaintiff’s suffering. Zen also offers two key insights about suffering that are helpful: the importance of direct experience and the inevitability of change.¹⁰⁷

Part II argued that taking these insights seriously exposes three particularly problematic aspects of contemporary tort litigation: a misleading emphasis on bodily harm, an over-reliance on expert testimony, and the rigid positioning of plaintiffs as victims. All three

105. See Rovner, *supra* note 51, at 312–13; see also Bloom, *supra* note 32, at 365 (suggesting legal rulings shape perception of political and cultural reality); Austin Sarat & William L. F. Felstiner, *Law and Strategy in the Divorce Lawyer’s Office*, 20 LAW & SOC’Y REV. 93, 126 (1986) (“Lawyers serve the legal system by helping clients ‘redefine . . . [their] situation and restructure . . . [their] perceptions’ . . .”).

106. See Ellen S. Pryor, *Noneconomic Damages, Suffering, and the Role of the Plaintiff’s Lawyer*, 55 DEPAUL L. REV. 563, 565 (2006) (arguing that plaintiff’s lawyers influence their client’s experience of suffering); see also EDWARD B. BLANCHARD & EDWARD J. HICKLING, *AFTER THE CRASH: ASSESSMENT AND TREATMENT OF MOTOR VEHICLE ACCIDENT SURVIVORS* 171–86 (1997) (summarizing research on whether tort litigation prolongs or exacerbates suffering); Bagenstos & Schlanger, *supra* note 67, at 785 (“[B]y focusing on the negative feelings that occur during [the period of injury], plaintiffs with disabilities may delay or derail their ultimate ability to adapt to their new condition . . .”).

107. See *supra* Parts I, II.B.

of these practices obscure important aspects of the plaintiff's condition and, as a result, they prevent us from using tort litigation effectively as a tool to reduce suffering. At the same time, the critique of these practices also provides us with a rough outline of affirmative steps we could take in the direction of a Zen-influenced alternative.

The analysis in Part II suggests, for example, that a Zen-influenced approach to tort litigation would adopt a more complex view on the significance of the body in understanding plaintiffs' injuries. When we engage deeply with a plaintiff's suffering, we learn that the body is not always a reliable indicator of the nature and the extent of the plaintiff's suffering. We also learn that the plaintiff's perceptions of suffering and bodily integrity may undergo change.¹⁰⁸ For both reasons, a Zen-influenced approach to tort litigation would acknowledge that the mind and body are linked.

The critique offered in Part II also calls for a more complex perspective on the utility of expert testimony. Experts should be freer to acknowledge the complexity of causation but, more fundamentally, expert testimony should not occupy such a privileged place in tort litigation. Instead, greater attention should be paid to testimony from those with direct experience with the injuries.

Finally, Part II encourages us to allow plaintiffs to have more complex and fluid identities in which they are not always required to perform as "victims." A Zen-influenced approach to tort litigation would encourage legal actors to adopt more open and flexible characterizations of the plaintiff's injuries. Zen principles also suggest that there ought to be more room in tort litigation for acknowledging that suffering is a common experience. Defense lawyers often try to make this point to minimize the plaintiff's injuries, but the Zen point is a broader one. If we view suffering as a common experience, then our relationship to suffering tends to be different. We begin to see suffering as part of what makes us human and as something to be understood and processed when it happens rather than as something that should be eradicated as quickly as possible.

108. See Bagenstos & Schlanger, *supra* note 67, at 746 (noting that people adjust to their possibilities).

This is not an argument in favor of suffering. Nor is it a claim that all suffering is the same. On the contrary, the suffering of a tort plaintiff is likely quite different than the suffering that is encountered as part of ordinary life experience.¹⁰⁹ Rather, it is a suggestion that we should pay more attention in tort litigation to understanding the complex, diverse, and sometimes unexpected ways we experience suffering.

One way to make progress on all of these fronts is to make more room for testimony of direct experience. Contemporary litigation practices increasingly marginalize the plaintiff's voice in favor of expert testimony. Indeed, many trials are bifurcated and focus first on causation, which tends to privilege expert testimony over the plaintiff's own recounting of her experience.¹¹⁰ This silencing of the plaintiff may make sense from a short-term-efficiency standpoint, but it does little to advance the plaintiff's healing or our own understanding of the suffering involved.

Most plaintiffs long for an opportunity to tell the story of their suffering and, in many instances, having this opportunity is more important than obtaining compensation or preventing future harm to others.¹¹¹ Moreover, there is a wealth of evidence that telling one's story can be healing and is often transformative for the people involved.¹¹² We ought to make more space for these transformations in tort litigation.

We might also seek other sources of direct experiential testimony, such as third-party testimony from individuals who have

109. See Lee Taft, *On Bended Knee (With Fingers Crossed)*, 55 DEPAUL L. REV. 601, 612 (2006) ("The parent who loses his or her child because another fails to obey a traffic signal suffers differently from the parent whose child dies from illness. Both grieve, but the grief of the tort claimant is compounded with powerful and complex emotions because of the relationship of their loss to another's wrongful act.")

110. See generally Elizabeth G. Thornburg, *The Managerial Judge Goes to Trial*, 44 U. RICH. L. REV. 1261, 1272, 1302 (2010) (noting that causation is often phase one of a trial and commenting on the empirical studies that show bifurcation influences outcomes).

111. See, e.g., Kathryn Abrams, *Hearing the Call of Stories*, 79 CALIF. L. REV. 971 (1991); see also Henderson, *supra* note 19, at 1649; Tom R. Tyler, *What is Procedural Justice?: Criteria Used by Citizens to Assess the Fairness of Legal Procedures*, 22 LAW & SOC'Y REV. 103, 105 (1988) (noting that involvement in the decision-making process enhances the participants' perception of fairness).

112. For more on the value of experiential narratives, see Abrams, *supra* note 111, at 973–75, for an examination of feminist narrative scholarship as a distinctive form of legal argument and Richard Delgado, *Storytelling for Oppositionists and Others: A Plea for Narrative*, 87 MICH. L. REV. 2411, 2412 (1989), for an examination the use of stories in the struggle for racial reform.

undergone similar experiences but do not otherwise have the educational or professional background to provide expert testimony under traditional rules. Obtaining testimony from these “experiential experts” would be valuable to defendants, who may not be fully aware of how their conduct affected the plaintiff and who may be better able to hear the information when it comes from a third party. Third-party testimony would also provide a further check against faking because the plaintiff’s testimony would be heard in a broader context that includes testimony from others with similar injuries.

Making space for this type of testimony would also be valuable to plaintiffs. Tort litigation currently does little to encourage plaintiffs to connect with people who have the same or similar injuries. This is a mistake. Psychological studies confirm the value of hearing from others who have undergone similar experiences.¹¹³ Among other things, this testimony is the best source of information about the likely future of those involved in the current lawsuit.¹¹⁴ Experts also have a role in this process, of course, but experiential testimony should also be valued.

Third-party experiential testimony would also bring broad social benefits. By gaining a better understanding of how an injury is experienced, we might learn how to address and prevent such injuries in the future. Zen reminds us that questions about injury and causation are not scientific inquiries but social inquiries.¹¹⁵ Once we acknowledge this, it seems clear that we should allocate more space for discussions that allow us to understand the nature of the injuries in a broader context.

In short, can we make space for exploring not only the plaintiff’s experience of suffering but also the experiences of others? Can we also make space for understanding how the experience of this suffering can undergo change? And, finally, can we make space for a broader discussion about how the suffering in any given case relates to suffering in a broader context? These would seem to be some of the key qualities of a Zen alternative.

113. GILBERT, *supra* note 24, at 251 (and citations therein).

114. *Id.*

115. In fact, many commentators acknowledge just that. See generally PORAT & STEIN, *supra* note 83, at 16–17 (discussing the social necessity of relying on imperfect facts).

IV. CONCLUSION

Tort litigation takes place in a field of pain and death.¹¹⁶ Contemporary theories of legal analysis encourage lawyers, judges, and experts to act as analytical voyeurs in this field. The injuries are recognized; indeed, they are necessary.¹¹⁷ But the pain and death are kept at a distance.

This Article has argued for erasing this distance and, more broadly, for adopting practices that encourage greater personal engagement with the plaintiff's suffering. It has done so by relying on several insights from Zen Buddhism. Zen encourages recognition of suffering through observation and direct experience, and through acceptance of suffering's impermanent nature. Tort litigation would do well to adopt this approach as its own. To do so, however, requires adopting practices that allow for deeper engagement with the human experience of suffering and accepting the uncertainty that accompanies the constancy of change.

This Article has argued for practices that move us away from bodily harm as the starting place for understanding suffering and toward viewing the body and mind as linked. It has also cautioned against overreliance on experts, who have limited direct experience with the injuries involved in a particular lawsuit. Instead, it has encouraged us to listen more closely to the voices of plaintiffs and to seek out testimony from others who are similarly situated.

Although we live in a world of uncertainty, we know that our best capacity to predict the future comes from listening to those who have already been there.¹¹⁸ When it came to Linda Riss's injuries, some of my students had been there and they wished that they could have shared their experiences with Riss. Can we make space for voices like those of my students, especially where it is clear that their perspective is likely to prove beneficial? And might such space also allow plaintiffs room to redefine themselves within the litigation?¹¹⁹

116. The language is Robert Cover's. Robert M. Cover, *Violence and the Word*, 95 YALE L.J. 1601, 1601 (1986) ("[L]egal interpretation takes place in a field of pain and death."). Cover used this phrase to emphasize the role of judges and other legal actors in authorizing violence. *Id.* But tort litigation reminds us that pain and death are part of what the litigants themselves bring to the table.

117. See sources cited *supra* note 54 (noting the role of injury to obtain standing in tort cases).

118. GILBERT, *supra* note 24, at 114–16 (and citations therein).

119. See Lucie E. White, *Subordination, Rhetorical Survival Skills, and Sunday Shoes: Notes on the Hearing of Mrs. G.*, 38 BUFF. L. REV. 1 (1990); see also Stuart Scheingold & Anne

To attempt to do so may be, as the Zen proverb goes, an exercise in “[k]nock[ing] on the sky and listen[ing] to the sound.” In tort litigation, we need to acknowledge that we are, in a sense, knocking on the sky when we attempt to understand another person’s experience of suffering. It is truly that difficult to understand another person’s pain. But, just as importantly, we must listen to what our knocking produces. If we knock on the doors of experts and demand evidence in the form of bodily harm, we will hear accounts of suffering that are shaped by this knocking.¹²⁰ Alternatively, if we knock on the door of suffering with a more open posture, we may hear much more.¹²¹ It is this listening, and the hope that listening provides to those who are injured, that is perhaps tort litigation’s highest role.

Bloom, *Transgressive Cause Lawyering: Practice Sites and the Politicization of the Professional*, 5 INT’L J. LEGAL PROF. 209, 238 (1998) (reporting on lawyers who made special efforts to ensure that litigation would empower their clients).

120. See Martha Minow, *The Supreme Court, 1986 Term, Foreword: Justice Engendered*, 101 HARV. L. REV. 10, 26–30 (1987) (making similar points in the gender context); see also Abrams & Keren, *supra* note 53, at 2044–45 (“[T]he emotions that pervade law are often ‘invisible’ and therefore an independent effort is often necessary to expose the emotions that are relevant to the discussion.”); Linda Hamilton Krieger, *The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, 47 STAN. L. REV. 1161, 1208 (1995) (explaining that once something is categorized, we are more likely to see the attributes of the category).

121. See Minow, *supra* note 120, at 72 (arguing for identification with “the other”).