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Volume 43 | Number 1

Article 3

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9-1-2009

## Monetary Damages for Nonmonetary Losses: An Integrated Answer to the Problem of the Meaning, Function, and Calculation of Noneconomic Damages

Harry Zavos

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# MONETARY DAMAGES FOR NONMONETARY LOSSES: AN INTEGRATED ANSWER TO THE PROBLEM OF THE MEANING, FUNCTION, AND CALCULATION OF NONECONOMIC DAMAGES

*Harry Zavos\**

*Noneconomic damages are awarded for losses that have no market value or monetary equivalent. What function then can they rationally serve for losses that are not measurable in dollars? Noneconomic damages function as the defendant's symbolic atonement for a loss that cannot be replaced; the awarded sum reflects the severity of the loss. The appropriate amount of these damages is not a sum that plumbs the depths of contrition, but an amount that allows a defendant, with the approval of the community, to symbolically pay appropriate respect to the plaintiff for the loss. But if the losses have no monetary equivalents, how can juries determine noneconomic damages that are not arbitrary? In the current system, juries are given no guidance when they are asked to translate nonmonetary losses into monetary damages awards. Instead of prescribing the amount of damages for noneconomic losses, a jury is most capable of describing the severity of the plaintiff's noneconomic loss based on the jurors' shared community view of the relative severity of nonmonetary injuries. Instead of asking juries to determine the appropriate symbolic dollar amounts for a nonmonetary losses—about which there is no shared community understanding—the legislature in each state, in its policymaking capacity, should create a finite monetary scale that prescribes the conventional symbolic sum for the most serious noneconomic losses at one end and the least serious at the other. The jury, as the trier of fact, would then describe the relative severity of a plaintiff's nonmonetary loss as a point on that scale, which would correspond to the conventional sum awarded for that loss.*

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\* Professor Emeritus, Loyola Law School Los Angeles. I wish to thank my colleagues, Professors George Garbesi, Richard Hasen, Robin Kar, and Sam Pillsbury for reading and commenting on the initial draft of this Article. I particularly wish to acknowledge the generosity and encouragement of Professor David Leonard, who listened to many of the ideas in this Article, urged me to commit them to paper, and, after reading the initial draft, also read and advised me on revisions.

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## I. BACKGROUND AND OVERVIEW

The tail end of the last century witnessed a spate of legislation in which the distinction between *economic damages* (e.g., lost earnings damages) and *noneconomic damages* (e.g., pain and suffering damages) played a pivotal role.<sup>1</sup>

I address this distinction, which statutes seek to capture using these two diametric labels or their rough equivalents: *financial* and *nonfinancial*, *pecuniary* and *nonpecuniary*, and *monetary* and *nonmonetary*.<sup>2</sup> This distinction can play an important role in limiting the amount of damages an injured party may recover. I argue that statutory definitions of economic and noneconomic damages consist of word-to-word definitions, definitions by denotation, or both.<sup>3</sup> However, they fail to provide a designation. That is, they give no articulated cognitive criterion that an item must meet in order to

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1. The distinction appears in legislation covering a range of subjects. The following examples demonstrate this: (A) funds for crime victims, CAL. GOV'T. CODE § 13951 (West 2007); MISS. CODE ANN. § 99-41-5 (2007); N.C. GEN. STAT. § 15B-2 (2007); (B) restrictions on automobile liability insurance coverage, KY. REV. STAT. ANN. § 304.39-020 (West 2006); N.D. CENT. CODE § 26.1-41-01 (2007); (C) preclusion of plaintiff's recovery of noneconomic damages if plaintiff is (1) operating a motor vehicle in violation of specified state requirements, CAL. CIV. CODE § 3333.4 (West 2007); OR. REV. STAT. § 31.715 (2003); (2) a drug user, HAW. REV. STAT. § 663D-4 (2007); OKLA. STAT. tit. 63 § 2-425 (2007); or (3) an inmate, OR. REV. STAT. § 30.650 (2005); (D) abandonment of the collateral source rule for economic damages, N.D. CENT. CODE § 32-03.2-06 (2007); (E) a cap on the amount of noneconomic damages recoverable by plaintiffs generally, ALA. CODE § 6-5-544 (1993 & Supp. 1996), limitation on noneconomic damages ruled invalid under the Alabama Constitution in *Moore v. Mobil Infirmary Ass'n*, 592 So. 2d 156 (Ala. 1991); MD. CODE ANN., CTS. & JUD. PROC. § 11-108 (LexisNexis 2006); (F) a cap on noneconomic damages for: (1) medical malpractice, CAL. CIV. CODE § 3333.2 (West 2007); MICH. COMP. LAWS § 600.1483 (2009); and (2) product liability actions, MICH. COMP. LAWS SERV. § 600.2946a (2009); and, (G) in some comparative fault jurisdictions, the adaptation of several liability for noneconomic damages in multi-defendant actions, CAL. CIV. CODE § 1431.2 (West 2007).

2. As John Munkman points out, *economic* in its broadest sense, is not a correct description of financial or pecuniary loss. JOHN MUNKMAN, DAMAGES FOR PERSONAL INJURIES AND DEATH 105 n.1 (7th ed. 1985). However, I (and I believe the statutes also) use the word *economic* in a more restrictive sense. For example, "I have an *economic* stake in the success of John's company." I would argue that the meaning conveyed by this sentence to an ordinary recipient would not noticeably change if we substituted the words *financial*, *pecuniary*, or *monetary* for the word *economic*.

3. I use the terms *word-to-word* and *denotation* as they are described in JOHN HOSPERS, INTRODUCTION TO PHILOSOPHICAL ANALYSIS 25-26, 54-55 (1st ed. 1953). Briefly, a word-to-word definition is one in which one word is defined in terms of another word, usually a synonym. *Id.* at 54-55. To understand the meaning of *economic*, for instance, one must know the meaning of the other word or synonym. Definition by denotation is to name specific items that are members of the class of economic damages and those that are members of the class of noneconomic damages. *See id.* at 25-26.

belong to the class of economic damages or to the class of noneconomic damages. The failure to provide a designation results in definitions without content or coherence.

I posit the following such designations (or criteria): (1) for membership in the class of economic damages, a dollar amount equal to the amount of the plaintiff's loss due to the defendant's tortious conduct, as measured, in principal, by the decreased market value of an item that is recognized by the law as one of loss; and (2) for membership in the class of noneconomic damages, a dollar amount for the tortious deprivation or impairment of an item that is recognized by the law as one of loss and of value for which a defendant must pay the plaintiff damages, but one which, in principal, has no market value or exchange value. I use *market value* or *exchange value* as it is defined in the Restatement (Second) of Torts (the "Restatement"):

[T]he amount of money for which the subject matter [or item] could be exchanged or procured if there is a market continually resorted to by traders, or if no market exists, the amount that could be obtained in the usual course of finding a purchaser or hirer of similar [items] . . . .<sup>4</sup>

I use *nonmonetary loss* to refer to the items of loss for which noneconomic damages are given—those items of loss suffered by a plaintiff for which there is no market value. I use *monetary loss*—for which economic damages are given—to refer to those items of loss that have a market value.

Having arrived at these meanings, I address the first central question of this Article: What function do damages serve in tort law? The very designation of economic damages may rationally suggest that they function as the replacement of the wealth, in dollars, of which the plaintiff has been deprived by the defendant, who tortiously destroyed or impaired the plaintiff's items of value. The purpose of noneconomic damages, however, is not so apparent. For how does a measure of material wealth, namely money, function with regard to deprivations that, by definition, do not represent any aspect of such wealth, and thus, in principle, do not have a market value of which money is a measure?

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4. RESTATEMENT (SECOND) OF TORTS § 911(2) (1979).

In the course of answering this question, I touch on the Canadian functional approach<sup>5</sup> and Professor Louis L. Jaffe's suggestion that noneconomic damages "may somewhat reestablish the plaintiff's self-confidence, wipe out his sense of outrage," or "may be a consolation, a solatium."<sup>6</sup> I discuss England's relatively recent adoption of a tariff approach for such damages—an approach that stripped the jury of its role in determining damages and vested that role in judges.<sup>7</sup> While my approach will preserve a role for the jury in damages determinations, it shares many of the same concerns and postulates undergirding this recent English change.

Finally, I argue that noneconomic damages symbolically affirm that the plaintiff has been wrongfully deprived of something of value, even though that value cannot be expressed at its fair market equivalency. This approach shares a perspective espoused by Professor Stanley Ingber; but it parts company with him when he argues that this symbolic function is served by limiting damages to pecuniary losses that additionally result in nonmonetary harm.<sup>8</sup> As developed below, my views are more in line with the view of Margaret Jane Radin, who wrote: "[C]ompensation 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."<sup>9</sup> I argue that a modified tariff approach for nonmonetary losses can best serve this symbolic function<sup>10</sup>—noneconomic damages thought of as a societal determination of the appropriate symbolic atonement a defendant is required to pay the wronged plaintiff for a loss that has no market value. I propose that in the eyes

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5. See G.H.L. FRIDMAN, *THE LAW OF TORTS IN CANADA* 501 (2d ed. 2002), for an explanation of the Canadian functional approach.

6. Louis L. Jaffe, *Damages for Personal Injury: The Impact of Insurance*, 18 *LAW & CONTEMP. PROBS.* 219, 224 (1953).

7. LAW COMM'N, *DAMAGES FOR PERSONAL INJURY: NON-PECUNIARY LOSS* 19–27 (1995).

8. Stanley Ingber, *Rethinking Intangible Injuries: A Focus on Remedy*, 73 *CAL. L. REV.* 772, 809 (1985).

9. Margaret Jane Radin, *Compensation and Commensurability*, 43 *DUKE L.J.* 56, 69 (1993).

10. England has utilized a tariff approach to assess nonpecuniary damages where such damages are decided by judges. LAW COMM'N, *supra* note 7, at 20. This tariff approach organizes losses by types of injuries and reports the range of the monetary values actually given for those injuries. *Id.* at 19–21. Judges use the range of values for any given type to analyze a plaintiff's own particular injuries and to give him his appropriate damages. *See id.* at 22.

of the law, this symbolic sum, along with economic damages, operates to repair a rupture in the normality of a legal relationship caused by a defendant's wrongful invasion of a plaintiff's right. That is, to the extent the tort results in noneconomic losses, noneconomic damages repair or rebalance the rupture by requiring the defendant to publicly, and under the law, show the appropriate respect to the plaintiff for a loss the defendant caused and is unable to fix.

Thus, my answer to the first question is rooted in the idea that the role of tort damages, whether economic or noneconomic, as far as the law is concerned, is to repair the tortiously disturbed rights/duties equilibrium between the plaintiff and the defendant. These damages are the law's prescription of the appropriate atonement or price to restore the rights/duties equilibrium between the plaintiff and the defendant to its status quo ante. The amount of damages is chosen by reference to the plaintiff's losses. To the extent that the losses are economic—to the extent that they have a market value—the reference amount can be expressed in terms of lost dollars. Consequently, in addition to repairing the rights/duty relationship, such damages can compensate the plaintiff by making the plaintiff whole. They can, in principal, return the plaintiff's wealth to the status quo ante.

However, noneconomic losses have no monetary scale such as market value. Consequently, the reference amount can only be a meaningful, symbolic sum that reflects the relative seriousness of the losses. Thus, while such damages may repair the rights/duty relationship, they cannot return the plaintiff to the plaintiff's pre-injury condition—they cannot make the plaintiff whole. Rather, they can only compensate the plaintiff through a symbolic sum that offsets the loss. In this context, *compensation* is thought of as an offset (not a monetarily equivalent replacement), as in the following sentence: "He *compensated* for his early sharp and sometimes borderline illegal business practices that ruined so many people by later in life devoting his wealth to helping the poor." Interestingly, the meaning of the last sentence would not be materially altered if it read: "He *atoned* for his early sharp and sometimes borderline illegal business practices that ruined so many people by later in life devoting his wealth to helping the poor."

In short, prior to the defendant's alleged tortious conduct, in the eyes of the law, there was a recognized reciprocal balance of rights

and duties between the plaintiff and the defendant. Once the law determines that this balance was disrupted by the defendant's tortious conduct, it decides, by references to the extent of the plaintiff's loss, what the defendant must give to the plaintiff to restore it. The legal requirement for restoring balance, to the extent that the plaintiff suffered economic losses, is in terms of the monetary equivalent of the plaintiff's reduction in wealth. That, in turn, compensates the plaintiff by restoring the dollar equivalent of the plaintiff's lost wealth. To the extent that losses are noneconomic, the amount of damages necessary, as far as the law is concerned, is that which symbolically reflects the severity of the plaintiff's loss and compensates the plaintiff by offsetting or making up for (rather than replacing) the loss. I argue that the sum necessary to serve this symbolic function is an amount that represents all that can be fairly asked of a defendant to show the appropriate respect for a loss the defendant has caused and cannot fix.

How to determine that symbolic amount of noneconomic damages raises the second central question of this Article: How can the amount of money damages for nonmonetary losses be anything but arbitrary? Because no monetary scale exists for noneconomic losses, I accept the logical implication that the amount of noneconomic damages must be an artificial figure. Nevertheless, I argue that money damages for nonmonetary losses do not have to be arbitrary. Accordingly, I advocate for a conventional, statutory scale analogous to the one-to-ten scale we ordinarily use to order items in terms of differing quality—much like the scales used to judge competitive athletic performances such as diving, gymnastics, ice skating, and the like. However, this statutory scale is in dollars to provide a tangible and meaningful symbolic atonement for tortiously caused losses. Using a given point on the scale to determine the dollar amount of the tortiously caused loss both acknowledges the loss and recognizes its gravity. Like all such scales, this statutory scale has a finite range.

Because any such particular range, while artificial, would be conventional (i.e., a matter of social agreement), any one range, in terms of its symbolic function, is no more accurate than another. As a symbolic atonement, a range from \$1,000 to \$250,000 is no more factually correct than a range from \$500 to \$2,500,000. The legislature, as a matter of policy, would *prescribe* the conventional



amount that symbolizes the most serious noneconomic loss as well as the conventional amount that symbolizes the least serious loss. A jury, in its fact-finding function, would *describe* the severity of a loss as a point on the scale relative to the entire range of the scale. The jury would describe the loss based on a rough, shared community view of the relative severity of noneconomic losses. In reviewing an actual verdict of noneconomic damages, an appellate court would determine if the relative position on the scale chosen by the trial court for a particular loss is reasonable. I argue that the measure of noneconomic damages would become a matter of convention through the application of such a scale. Without the scale, awards of noneconomic damages remain arbitrary.

However, I do not question whether we should allow noneconomic damages for certain injuries that are widely undergirded by third-party insurance; nor do I question whether any losses flowing from these injuries should be redressed by a fault-based tort system. I accept such damages as a given in tort law. Having done so, I attempt to rationalize them by providing an integrated and coherent view for the meaning, function, and calculation of noneconomic damages.

I also do not argue whether tort law should serve either the goal of maximizing overall social wealth or the interests of corrective justice.<sup>11</sup> Nor do I consider whether damages should be assessed based on their ability to deter given behaviors or spread the risk of losses.

My inquiry is more narrow and immediate. We give monetary awards for losses that have no market or monetary value. On the face of it, our system appears to be an irrational self-contradiction. Because there is no monetary scale or metric to which we can appeal to determine whether the amount of an award for any particular noneconomic harm is appropriate or correct, this practice is irrationally arbitrary. In the face of these facts, I seek to render rational our practice of giving monetary awards for nonmonetary losses by providing an integrated and rational system for the meaning, function, and calculation of such damages.

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11. However, I could not argue with the proposition that my view is more in keeping with the latter as I understand both.

The argument portion of this Article in Part II consists of four subsections. In Part II.A, I posit definitions of some familiar words whose meanings in discourse are not always clear and consistent—words such as *injury*, *harm*, *damage* (singular), *damages* (plural), *objective*, *subjective*, *verifiable*, *descriptive*, and *prescriptive*. While I do so in order to inject some measure of precision in my analysis, this definitional process also constitutes part of my argument and demonstrates the poverty of the statutory definitions of *economic damages* and *noneconomic damages*.

In Part II.B, I discuss two concepts that serve as a context for my thesis. The first concept deals with how archaic peoples have dealt with private wrongs. It describes the ubiquitous retaliatory response of the offended that is directed at the offender as a means of evening the score, redressing the perceived wrong, and restoring (from the offended's point of view) a sense of the status quo ante relationship between the two (i.e., retaliation as a way of redressing a private wrong by inflicting a hurt on the offender with no tangible benefit accruing to the offended). And, of course, the offender and the offender's kin may view the offended's retaliation as an offense requiring retaliation, which in turn can lead to a blood feud.

I also describe the pervasive process of composition, whereby retaliation is avoided. The offender redresses the wrong by conferring a benefit on the offended sufficient to correct the imbalance and avoid the blood feud. I suggest that damages served this same function in early English law.

The second concept I turn to is the idea of damages as compensation for losses. I adopt a broad meaning of *compensation*. I view it as encompassing the idea of (1) restoring an equilibrium or balance that is unbalanced,<sup>12</sup> as in the statement, "to *compensate* for unjustly reprimanding the student, the teacher later chose her for the coveted position of homeroom monitor"; or (2) the result of seeking a substitution for something unacceptable or unattainable,<sup>13</sup> as in the statement, "to *compensate* for losing a promotion, he bought himself a luxury automobile." Neither of these formulations necessarily import the notion of equivalency, monetary or otherwise, but they

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12. WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE UNABRIDGED 463 (Philip Babcock Gove, ed., 3d ed. 1986) [hereinafter WEBSTER'S] (defining *compensation* as "counterbalancing" or "rendering equal").

13. *See id.* (defining *compensation* as "making up for a loss or a lack").

both share the notion of a mechanism for restoring balance (a means of evening things out). I show that this broader sense of *compensation* has a historical pedigree in the redress of private wrongs, and it can refer to the rebalancing of the legal rights/duties relationship between a plaintiff and a defendant, as well as the rebalancing of the plaintiff's pecuniary condition.

In Part II.C, I posit the definition of *noneconomic damages* to which I have alluded earlier. I make it clear that *market value*, as I use it, is not confined to an empirical concept. For example, there may be a market for body parts (e.g., a kidney), but it is a black market for us. I treat the idea of a loss for which there is no exchange value as having a normative dimension. Drawing on the discussion in Part II.B, and given that noneconomic losses have no pecuniary equivalence, I argue that the law's recognition of noneconomic damages can only be rationally explained as a symbolic atonement.

In making my argument, I reject the Canadian functional approach, which views noneconomic damages as a sum that allows a plaintiff to purchase physical arrangements that can make the plaintiff's life more endurable in the face of the noneconomic loss the plaintiff must continue to bear.<sup>14</sup> I also question Jaffe's idea that noneconomic damages may function to establish a plaintiff's self-confidence, wipe out his sense of outrage, or may provide consolation or solace.<sup>15</sup>

Further, I distinguish between two levels of compensatory damages: legal and personal. As I have indicated, at the legal level, both economic and noneconomic damages are aimed at rebalancing the legal relationship that was unbalanced by a defendant's tortious conduct. These damages, as far as the law is concerned, are the required atonement or cost to restore the rights/duties relationship between the parties to the status quo ante. Thus, all damages are the atonement required to restore the legal balance. The difference between the two types of damages is that economic damages are measured by the actual monetary equivalent of a plaintiff's loss while noneconomic damages are symbolic of the loss.

At the second level—the personal level—damages offset or rebalance (as best as a defendant can be asked to do) a plaintiff's

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14. FRIDMAN, *supra* note 5, at 501.

15. Jaffe, *supra* note 6, at 224.

losses. To the extent those losses can be measured in monetary equivalences, the offsetting consists of replacing the plaintiff's lost wealth. If the losses are noneconomic, the plaintiff's losses can only be compensated or offset symbolically. Noneconomic damages serve this symbolic function by providing a societal measure of the relative gravity of the plaintiff's losses, as well as the appropriate conventional and symbolic atonement for them. I argue that the appropriate symbolic atonement for any given noneconomic loss is an amount of money that represents, as a matter of convention, all that society can fairly ask a defendant to pay to offset a loss suffered by a plaintiff that money cannot replace.

In agreement with the English view, I argue in Part II.D that monetary amounts for nonmonetary losses are artificial figures. Thus, without some external standard to guide the fact finder, such damages will be arbitrary. Across a series of similar losses, damages awards will lack predictability and consistency. But, while artificial, they need not be arbitrary; rather, they can be rendered conventional. I point out that England has rendered such damages conventional by excluding the jury from participating in the determination of damages, and by instead adopting a judicial tariff system whereby damages are determined only by the judge, who has knowledge of the damages amounts that have been awarded for similar injuries by other judges.<sup>16</sup>

I take a somewhat different approach that preserves a role for the jury and is based on two postulates. First, people share a *rough* view of the relative severity of injuries, and thus, that determination is *descriptive*. Therefore, it can be left to the jury, whose task it is to decide fact issues about which reasonable minds can differ. Second, while there is rough agreement on the relative severity of injuries, the appropriate damages figure—an artificial number—for a particular severity is *prescriptive* (and a source of jury befuddlement). As such, those figures should be left to state legislatures, as the policy voice of their people, to prescribe appropriate sums. I propose that legislatures do so by creating a finite monetary scale for noneconomic losses. The low end of the scale would *prescribe* the

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16. MR. JUSTICE MACKAY ET AL., JUDICIAL STUDIES BOARD, GUIDELINES FOR THE ASSESSMENT OF GENERAL DAMAGES IN PERSONAL INJURY CASES (Oxford Press 8th ed. 2006). This compilation contains a narrow range of damages for approximately two hundred and fifty injury categories, which judges use as a guide for their award determinations. *Id.*

conventionally appropriate figure for the least serious losses and the high end would prescribe the figure for the most serious losses. The fact finder would determine and *describe* the severity of a particular loss, relative to the range of possible losses, as a particular point on that scale. Finally, I distinguish my approach from statutes that cap the amount of recoverable noneconomic damages. One can accept the argument in this subsection without necessarily accepting the views in Part II.C.

## II. ARGUMENT

### A. *Definitional Clarifications and Stipulations*

#### 1. Types of Definitions

##### a. *Word-to-word definitions*

I follow John Hospers's general scheme of describing the meaning of words,<sup>17</sup> which, while extensive, is not necessarily exhaustive.<sup>18</sup> Hospers points out that one method used to determine a word's meaning is a word-to-word definition.<sup>19</sup> That is, the definition of a word is given in terms of a second word or synonym. This method allows an individual to apprehend the relationship of the word to be defined to the world of things only if the individual knows the relationship of the second word to such things.

Statutes defining noneconomic damages or loss abound with this type of definition. For example, the Michigan legislature defines *noneconomic damages* by giving a list of examples and finishing with the words "and other nonpecuniary damages."<sup>20</sup> If an individual does not know the meaning of *noneconomic damages* in the sense of what items (other than those listed in the definition) belong to the class of noneconomic damages, then the use of *nonpecuniary damages* can inform the individual as to those items only if that

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17. HOSPERS, *supra* note 3, at 25–30, 54–56.

18. For example, Hospers's scheme does not deal with the connotative meaning of a word (later editions of Hospers's book cover this type of meaning). Nor does his scheme deal with conceptual and operational definitions as used in experimental studies in the field of social psychology.

19. HOSPERS, *supra* note 3, at 54–55.

20. MICH. COMP. LAWS § 691.1416(f) (2007).

individual knows which items belong to the class of nonpecuniary damages. But, if the individual knows the items belonging to the class of nonpecuniary damages, why even use the term *noneconomic damages*?

Put another way, if an individual needs the term *nonpecuniary* to inform the meaning of *noneconomic*, then why not merely use the term *nonpecuniary* and make no reference to the superfluous *noneconomic*? On the other hand, if an individual knows the meaning of *noneconomic*, what does the term *nonpecuniary* add? Does it not become superfluous? Why not simply say, “noneconomic damages include [a list of specific items] and other noneconomic damages”?

The California codes illustrate the possible circularity of word-to-word definitions for *economic* and *noneconomic*. On the one hand, section 13951(e) of the California Government Code defines *pecuniary loss* in terms of economic loss.<sup>21</sup> On the other hand, sections 3333.2 and 3333.4 of the California Civil Code define the term *noneconomic loss* (the complement<sup>22</sup> of *economic loss*) in terms of nonpecuniary damage or damages.<sup>23</sup> The California Supreme Court equates the term *loss* with the word *damages* in these code sections.<sup>24</sup>

Substituting another word for the one to be defined may give the illusion of informing us about the meaning of the word to be defined, but illusion may be all it gives. To illustrate, when a little girl asks her father why homing pigeons have the ability to always fly home and her father replies, “because they have a homing instinct,” the illusion is that her father introduced the little girl to some new knowledge. But the curious little girl is not satisfied and presses

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21. CAL. GOV'T CODE § 13951(e) (West 2009).

22. I use the term *complement* in the sense that *economic* and *noneconomic* are supplementing each other and being supplemented by each other in return. *Webster's* defines *complement* as “the quantity or number required to fill a thing or make it complete.” WEBSTER'S, *supra* note 12, at 464. *Webster's* also defines it as “either of two parts that complete the whole or mutually complete each other.” WEBSTER'S II NEW COLLEGE DICTIONARY 229 (3d ed. 2005) [hereinafter WEBSTER'S II].

23. CAL. CIV. CODE § 3333.2 (West 2009) (using the singular *damage*); § 3333.4 (using the plural *damages*).

24. See *Day v. City of Fontana*, 19 P.3d 1196, 1201 (Cal. 2001) (using the term *noneconomic losses* when discussing limitations on damages imposed by section 3333.4 of the California Civil Code); *Salgado v. County of Los Angeles*, 967 P.2d 585, 589–91 (Cal. 1998) (discussing damages allowed by section 3333.2 of the California Civil Code and section 667.7 of the California Civil Procedure Code in terms of losses).

further: "What is a homing instinct?" To which her father replies, "The ability to always fly home."<sup>25</sup>

However, defining terms using this word-to-word method may not be completely sterile. One may have a vague notion of which items belong to the class of nonpecuniary loss and to the class of noneconomic loss.<sup>26</sup> Coupling the two together may reduce this vagueness to some extent. Still, we should strive for greater precision because labeling an item of loss *economic* or *noneconomic* can have serious legal consequences.<sup>27</sup>

Furthermore, if we disagree about how to classify a given item, the lack of an explicit designation (i.e., a criterion that an item must meet before a certain label will be used to describe it) hampers our ability to carry on a rational discussion.

#### *b. Denotation definitions*

A second way to determine the meaning of a word—one that relates the word to the empirical world—is through denotation. Using this method, the meaning of a word is determined by naming members of the class for which the word stands.<sup>28</sup> Denotation is exhaustive when it names all items belonging to a given class and partial when it names only some.<sup>29</sup> There may be words that have a denotation without any designation (i.e., without an articulated cognitive criterion for determining if an item belongs to a given class).<sup>30</sup> This is particularly so with certain exhaustive denotations.

25. What we have is a type of analytical statement (one in which the subject already contains the concept in the predicate) posing as a synthetic statement (one in which the predicate adds something new to the subject). Jack Ray & Harry Zavos, *Reasoning and Argument: Deduction and Induction*, in PERSPECTIVES ON ARGUMENTATION 50, 55 (Gerald R. Miller & Thomas R. Nilsen eds., 1966) [hereinafter Ray & Zavos, *Deduction and Induction*]; Jack Ray & Harry Zavos, *Reasoning an Argument: Some Special Problems and Types*, in PERSPECTIVES ON ARGUMENTATION 80, 88 (Gerald R. Miller & Thomas R. Nilsen eds., 1966) [hereinafter, Ray & Zavos, *Special Problems*]; Harry N. Zavos, *Comparative Fault and the Insolvent Defendant: A Critique and Amplification of American Motorcycle Association v. Superior Court*, 14 LOY. L.A. L. REV. 775, 788 n.60 (1981).

26. As Hospers points out, we may be able to use a word with some consistency without being able to articulate its designation. HOSPERS, *supra* note 3, at 62–63.

27. *See supra* note 1.

28. *See* HOSPERS, *supra* note 3, at 25–30, 55–56.

29. *Id.*

30. Just as there are words that have only denotation without designation, there may be words that have designation without denotation—in other words, words without any class members. *Unicorn* is just such a word. Under one definition to be a member of the class of unicorns, an item must meet the following criteria: an animal that possesses the body and head of

For example, I may say that my three favorite foreign film comedies are *Mr. Houlot's Holiday*, *Bread and Chocolate*, and *The Tall Blond Man with the One Red Shoe*. There is no articulated cognitive criterion that determines which films fall in this class. As time passes, my top three choices may change, but not because of some articulated cognitive criterion. It will simply be a matter of which movie, at any given time, happens to appeal to my particular sense of comedy. The only way to determine the class members is to ask me for the names of my three favorite foreign film comedies.

Many statutes use denotation to identify the meaning of *economic* and *noneconomic* damages. Collectively, these statutes generate a long list of noneconomic damages or losses, including pain, suffering, mental anguish, disability or disfigurement, loss of consortium, injury to reputation, humiliation, loss of society and companionship, physical impairment, emotional distress, loss of benefits and pleasures of life, loss of mental or physical health, loss of well-being or bodily functions, and loss of love and affection.<sup>31</sup>

Definition by denotation can often be misleading. For example, a partial list of items that belong to the class of birds may cause one to mistakenly infer that a defining characteristic of this class is the ability to fly. However, ostriches do not fly but still fall within the class of birds. Indeed, some dictionaries define *ostrich* as a flightless bird.<sup>32</sup> This same problem exists in a typical statutory use of the phrase *loss of consortium* as a denotation of noneconomic damages. For example, a California statute names both loss of society and companionship and loss of consortium as encompassed in the class of noneconomic damages or nonmonetary losses; it also names expenses for substitute domestic services as belonging to the class of economic damages or monetary losses.<sup>33</sup>

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a horse, the hind legs of a stag, the tail of a lion, and a single horn in the middle of the forehead. WEBSTER'S II, *supra* note 22, at 1368. However, as yet there is no creature found which falls within this class. It is a class without any class members.

31. IDAHO CODE § 6-1601(5) (2004); MICH. COMP. LAWS § 691.1416(f) (2007); MO. REV. STAT. § 538.205(7) (2007); NEB. REV. STAT. § 25-21,185.08(3) (2007); OHIO REV. CODE § 2315.18(A)(4) (2004); WIS. STAT. § 893.55(4)(a) (2006); OR. REV. STAT. § 31.710(2)(b) (2003), *invalidated by* Lakin v. Senco Prods., Inc., 987 P.2d 463 (Or. 1999); WASH. REV. CODE § 4.56.250(1)(b) (2007), *invalidated by* Sofie v. Fibreboard Corp., 771 P.2d 711 (Wash. 1989).

32. *E.g.*, WEBSTER'S II, *supra* note 22, at 878.

33. CAL. CIV. CODE § 1431.2(b)(1)-(2) (West 2007); *see also* IDAHO CODE ANN. § 6-1601(3), (5) (2004); NEB. REV. STAT. § 25-21, 185.08(2)-(3) (2007); OR. REV. STAT. § 31.710(2)(a)-(b) (2005); WASH. REV. CODE § 4.56.250(1)(a)-(b) (2007).



In *Borelli v. Brusseau*,<sup>34</sup> the California Supreme Court explained that the marriage relationship creates inter-spousal mutual obligations that consist of such intangibles as offers of love, sympathy, confidence, fidelity, companionship, affection, society, sexual relationship, and solace.<sup>35</sup> The court pointed out, however, that these obligations also consist of such tangibles as *uncompensated* protective supervision services, including nursing care and assistance in operating the family home (i.e., domestic services).<sup>36</sup> When a defendant physically injures a plaintiff's spouse, and thereby interferes with that spouse's ability to fulfill these obligations to the physically uninjured plaintiff (obligations that can be measured in dollars), then that physically uninjured plaintiff has a cause of action for loss of consortium against the defendant for those dollar losses.

For example, let us assume an invalid's husband provides nursing care and takes care of the home, thereby negating the need to hire a nurse or domestic help. Under the reasoning in *Borelli*, he would not be due compensation for these domestic and nursing services because they constitute uncompensated duties that inure in the marriage relationship.<sup>37</sup> Now let us assume the defendant negligently causes physical injury to the husband so that he is unable to perform these services. Clearly, the wife would have a cause of action for loss of consortium, which, in addition to such intangible losses as love and companionship, would include the cost of replacing the uncompensated medical care the husband previously provided with compensated care with a hired nurse and the cost of replacing the domestic services the husband provided with a hired domestic helper. This is a monetary loss to the wife because such services have an exchange value. The point is that while loss of consortium encompasses intangible, nonmonetary losses for which there is no market (e.g., love, affection, and companionship), it also includes tangible, monetary losses for which there is a market or exchange value (e.g., domestic and nursing services).

But as we have seen, statutes use the cost or expense of obtaining services, such as domestic services, to denote *economic*

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34. 16 Cal. Rptr. 2d 16 (1993).

35. 16 Cal. Rptr. 2d 16, 18-19 (1993).

36. *Id.* at 18-20.

37. *Id.*

loss while at the same time using loss of consortium (which includes the cost of obtaining such services) to denote *noneconomic* loss.<sup>38</sup> Such inconsistency can be avoided by eschewing denotations in favor of designations. Then when an item of loss presents itself, the court need not consult a list of denotations; rather, it merely needs to determine which criterion or designation best describes the item.<sup>39</sup>

*c. Designation definitions*

As discussed above, designation involves determining the meaning of a word by specifying the criteria an item must meet to be considered a member of the class for which the word stands. Earlier I posited the following criteria or designation for economic damages: a dollar amount equal to the amount of the plaintiff's lost wealth due to the defendant's tortious conduct, as measured, in principal, by the decreased market value of an item that is recognized by the law as one of loss. For noneconomic damages I posited the following definition: a dollar amount for the tortious deprivation or impairment of an item that is recognized by the law as one of loss and of value for which the defendant must pay the plaintiff damages, but one which, in principal, has no market value or exchange value. Thus, if a defendant negligently causes physical injury to one spouse, disabling that spouse from rendering to the physically uninjured spouse those duties which inure in the marital relationship, we need not consult a list to decide whether the kind of damages paid to the physically uninjured spouse for loss of consortium are economic or noneconomic. Instead, we can look to see whether the losses suffered do or do not have a market or exchange value.

Hospers points out that we can, with a degree of consistency, use certain words without being able to state a designation.<sup>40</sup> Justice Potter Stewart took this view when he wrote that he might not be able to intelligibly define hardcore pornography, but he said, "I know it when I see it."<sup>41</sup>

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38. See *supra* note 36 and accompanying text.

39. The State of Montana was more thoughtful in its denotation of *noneconomic loss*. It excluded "household services" (but not "nursing services") from the loss of consortium class. MONT. CODE ANN. § 25-9-411(5)(d)(v) (2007).

40. Hospers uses the word *cats* as an example. HOSPERS, *supra* note 3, at 62–63.

41. *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964).

Although it is possible to use words consistently without designation, this does not mean that the law should not articulate designations that provide some measure of precision in the use of terms. Lay persons may be able to use the word *negligence* with some consistency even though they may not be able to articulate a designation. The parameters of a lay person's use of the term *negligence* may include the following statements: "John was *negligent* in failing to get his homework in on time," "Mary was *negligent* in not keeping her luncheon date," and "Harry was *negligent* in leaving a loaded gun where small children had access to it." The law, however, has a designation for *negligence* which would only cover the last statement. As sections 282 and 283 of the Restatement make clear, negligence is not merely conduct that falls below the standard of care a reasonable person would observe under like circumstances.<sup>42</sup> Rather, it is conduct that creates an unreasonable risk of harm to others.<sup>43</sup>

As with the term *negligence*, the law should strive to formulate designations for the terms *economic damages* and *noneconomic damages* to enable greater precision and intelligibility in identifying whether a given item is a denotation of economic or noneconomic damages.

## 2. Injury, Damage, and Damages

Because I will use the terms *injury*, *damage*, and *damages* in my inquiry, and because these terms are not always used consistently to denote the same thing, I need to establish my use of these terms.

Some treatises point out an ambiguity between the use of *damage* (singular) and *damages* (plural). While *damage* ordinarily designates a loss or harm suffered,<sup>44</sup> *damages* may have a different meaning. As Ralph Stanley Bauer observes:

Damage is loss or harm. *Damages*, the plural of damage, is, rather unfortunately, used in two senses: first, as the mere plural of damage; and second, as meaning compensation claimed or awarded in a judicial proceeding for damage or for the invasion of a legal right. In the study of this subject,

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42. RESTATEMENT (SECOND) OF TORTS §§ 282–83 (1965).

43. *Id.* § 282.

44. JACOB A. STEIN, DAMAGES AND RECOVERY 1 (1972).

the use of the word *damages* in the first of these two senses should, as far as possible, be avoided, in order to obviate difficulties arising from ambiguity of expression.<sup>45</sup>

To avoid blurring the line between the loss suffered and the compensation claimed or awarded for the loss, I will use the terms *detriment*, *harm*, and *loss* interchangeably to denote losses, and the term *damages* to denote the money claimed or awarded for the losses suffered.

As with the *damage/damages* distinction, there is some inconsistency in the use of *harm* or *damage* on the one hand, and *injury* on the other. Older treatises distinguish between the Latin *injuria* (injury) and *damnum* (damage).<sup>46</sup> These treatises use *damage* in the same sense as I will use *detriment*, *harm*, or *loss*, but they reserve *injury* to denote the tortious invasion of a legally protected right.<sup>47</sup> Using these terms in these senses, treatises discuss detriment without injury and injury without detriment.<sup>48</sup>

For example, at the turn of the twentieth century, a person might have suffered the detriment or harm of mental suffering due to the negligence of another. However, mental suffering standing alone (even if immediately and directly caused by another's negligence) ordinarily did not constitute the tortious invasion of a legally protected right. Mental suffering was a detriment without injury. If, however, a plaintiff could establish a cause of action for physical injury (i.e., the physical impairment constituting the injury), then that plaintiff could receive damages for mental suffering caused by or

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45. RALPH STANLEY BAUER, *ESSENTIALS OF THE LAW OF DAMAGES* 1 (1919) (footnote omitted).

46. See, e.g., WILLIAM B. HALE, *HANDBOOK ON THE LAW OF DAMAGES* 13–15 (Roger W. Cooley ed., 2d ed. 1912); 1 EDWIN A. JAGGARD, *HANDBOOK OF THE LAW OF TORTS* 78–90 (West Publ'g Co. 1895); ARTHUR GEORGE SEDGWICK, *ELEMENTS OF THE LAW OF DAMAGES* 18–19 (2d ed. 1909).

47. E.g., *RESTATEMENT (SECOND) OF TORTS*, § 7 cmt. a (1965).

48. Various treatises discuss injury without actual detriment in relationship to torts such as technical trespass to land, where a plaintiff suffers no detriment. *Id.*; H. GERALD CHAPIN, *HANDBOOK OF THE LAW OF TORTS* 69–73 (1917); HALE, *supra* note 46, at 13–15; JAGGARD, *supra* note 46, at 78–82; 1 THOMAS ATKINS STREET, *THE FOUNDATIONS OF LEGAL LIABILITY* 491–93 (1906). In such instances, to make out a prima facie case at law for money damages, a plaintiff can claim nominal damages. JAGGARD, *supra* note 46, at 80.

growing out of that physical injury, which are sometimes referred to as *parasitic damages*.<sup>49</sup>

The Restatement recognizes this older use of *injury* but chooses to separate the invasion of a legally protected right, which it defines as injury, from the *tortious* conduct that causes the invasion and is necessary to give rise to a cause of action.<sup>50</sup> The difference may be illustrated by California's position on the tort of intentional interference with prospective economic advantage.<sup>51</sup> To recover in California, a plaintiff must prove that the defendant intentionally and wrongfully interfered with the plaintiff's economic expectancy and caused pecuniary losses.<sup>52</sup> Under the older view, the injury would consist of interference with the plaintiff's economic expectancy, coupled with intentional and wrongful conduct. Under the Restatement approach, by contrast, the interference with the plaintiff's economic expectancy would constitute the injury, and the intentional and wrongful conduct would make the defendant's interference tortious.<sup>53</sup> I believe the difference between these two approaches is linguistic rather than substantive. But for the sake of clarity and consistency, I adopt the Restatement approach.

I indicated above that at one time, as a general rule, psychic harm or detriment standing alone did not constitute an *injury*. However, if pain and suffering grew out of an injury (such as physical harm to the person or harm to reputation), then a plaintiff could recover for psychic harm in the form of parasitic damages.<sup>54</sup> Relatively recently, severe emotional distress has emerged as a discrete cause of action.<sup>55</sup> In jurisdictions that recognize a cause of action for the negligent infliction of emotional distress, psychic harm

49. D.B. DOBBS, *THE LAW OF TORTS* 822 (2000); HALE, *supra* note 46, at 140–46; W. PAGE KEETON ET AL., *PROSSER AND KEETON ON THE LAW OF TORTS* 54–57, 361–65 (W. Page Keeton ed., 5th ed. 1984); *see* STREET, *supra* note 48, at 460–63.

50. RESTATEMENT (SECOND) OF TORTS § 7 cmt. a (1965).

51. *Della Penna v. Toyota Motor Sales, U.S.A.*, 902 P.2d 740 (Cal. 1995).

52. *Id.* at 741.

53. RESTATEMENT (SECOND) OF TORTS § 7 cmt. a (1965).

54. 3 FOWLER V. HARPER ET AL., *THE LAW OF TORTS* § 18.4, at 681–84 (2d ed. 1986); KEETON ET AL., *supra* note 49, § 54, at 362–65; STREET, *supra* note 48, at 461.

55. *See* *Kately v. Wilkinson*, 195 Cal. Rptr. 902 (1983) (permitting recovery for emotional distress resulting from a defective product); *Molien v. Kaiser Found. Hosps.*, 616 P.2d 813 (Cal. 1980) (permitting recovery for negligent infliction of emotional distress); *State Rubbish Collectors Ass'n v. Siliznoff*, 240 P.2d 282 (Cal. 1952) (permitting recovery for intentional infliction of emotional distress).

is essential to that action, for it is psychic harm that constitutes the injury. If a jurisdiction does not recognize psychic harm as an injury, and if a defendant negligently causes physical harm (for which I use the phrase *physical impairment*<sup>56</sup>) to a plaintiff, then psychic harm is not essential; however, when psychic harm occurs, it is separate from the injury and a plaintiff may only recover for it as parasitic damage traceable to the physical impairment.<sup>57</sup> Both Thomas Atkins Street and Edwin A. Jaggard point out that in an action for physical injury, mental suffering need not be specially pleaded because it is the natural consequence of personal injuries.<sup>58</sup> Accordingly, mental suffering is treated as general damage.<sup>59</sup> Additionally, Street makes the point that, in some instances, parasitic harm can completely overshadow legal injury.<sup>60</sup> In anticipation of the objective/subjective discussion to follow, we must keep in mind that physical impairment itself (e.g., loss of an eye) is a harm separate and distinct from the pain and suffering that accompanies it, and both are harms for which noneconomic damages are appropriate.<sup>61</sup> Indeed, many statutory denotations of noneconomic damage, detriment, or loss list “physical impairment” as separate and distinct from “pain and suffering.”<sup>62</sup>

While from this point forward I will endeavor to use the terms I have defined in this section consistently in the positions I take and in the arguments I make, I warn the reader that other authors to whom I make reference may not use them in the same way. Also, authors to whom I refer in Part II.D below collapse injury and its attendant harms under the term *injury*. Therefore, in that section, I will generally follow their usage.

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56. RESTATEMENT (SECOND) OF TORTS § 7 cmt. e (1965) (defining *physical harm* to person as “physical impairment of the human body”). I choose to shorten the phrase to “physical impairment.”

57. STREET, *supra* note 48, at 460–62.

58. JAGGARD, *supra* note 46 at 388; *Id.* at 460.

59. JAGGARD, *supra* note 46, at 388; STREET, *supra* note 48, at 459.

60. See STREET, *supra* note 48, at 460–62. I dare say that in some garden variety personal injury cases, the parasitic harm of pain and suffering overshadows the legal injury.

61. W.V.H. ROGERS, WINFIELD AND JOLOWICZ ON TORT 606 (11th ed. 1979); STEIN, *supra* note 44, § 98, at 165; see also 1 THEODORE SEDGWICK, A TREATISE ON THE MEASURE OF DAMAGES § 41, at 46–47 (Baker, Voorhis & Co., 9th ed. 1912).

62. CAL. CIV. CODE § 3333.2(a) (West 2007); FLA. STAT. § 766.202(8) (2009); KAN. STAT. ANN. § 74-7301(j) (2002); MD. CODE ANN., CTS. & JUD. PROC. § 11-108(a)(2)(i)(1) (LexisNexis 2006); MICH. COMP. LAWS § 600.2945(f) (2009); MONT. CODE ANN. § 25-9-411(5)(d) (2005); N.D. CENT. CODE § 32-42-01(8) (2008); OKLA. STAT. tit. 63, § 2-424(C)(2) (2009).

### 3. Objective/Subjective

Several statutory schemes define *economic damages* as being objectively verifiable and *noneconomic damages* as subjective.<sup>63</sup> However, the terms *objective* and *subjective* each have more than one meaning, and these schemes are silent as to the particular meaning they employ. I identify three distinct meanings in this Article.

#### a. Objective-nonaware and subjective-aware

*Consultation Paper No. 140* confronts the topic of nonpecuniary loss, discussing loss of amenities of life in particular, which “deprive[s] plaintiffs of the capacity to do the things which before the [tort] they were able to enjoy, and . . . prevent[s] full participation in the normal activities of life.”<sup>64</sup> The paper discusses this issue in terms of the objective/subjective distinction. Unlike the statutory schemes we will consider, the paper recognizes that *objective* and *subjective* each have more than one meaning.<sup>65</sup> The paper confines its use of those words to describe whether or not a plaintiff is aware of his condition. *Subjective loss* is defined as “loss which is dependant on plaintiff’s awareness of it,” and *objective loss* as “loss which is not dependant on plaintiff’s awareness of it.”<sup>66</sup> The paper adopts this sense of the words to avoid the competing meaning of taking account of the plaintiff’s particular circumstances<sup>67</sup> (i.e., the extent to which the assessment is particularized or standardized).<sup>68</sup> When I refer to *objective* and *subjective* in the sense used by *Consultation Paper No. 140*, I use *objective-nonaware* and *subjective-aware*, respectively.

#### b. Objective-public and subjective-private

Suppose I said, “I have a toothache.” That statement is not about a state of affairs or a fact external from my mental awareness or consciousness. It is a statement about my internal sense-experience. I

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63. CAL. CIV. CODE § 1431.2(b) (West 2007); IDAHO CODE ANN. § 6-1601 (2009); WASH. REV. CODE § 4.56.250(1) (2006).

64. LAW COMMI’N, *supra* note 7, ¶ 2.14.

65. *Id.* ¶ 2.3 n.10.

66. *Id.* ¶ 2.3; *see also id.* ¶¶ 2.15-17, ¶¶ 4.11-22.

67. *Id.* ¶ 2.3 n.10; *see discussion infra* Part II.A.3.c.

68. Part II.A.3.c. below deals with this concept.

posit that such a statement is subjective in the sense that it refers to my private sensation of pain, which only I experience. My pain qua pain is private and not public. Only I, and no one else, can suffer my pain. On the other hand, I may say, "The table in the other room is painted red." From a common sense view, the referent is about a fact or state of affairs external from me and not about my private sensations or consciousness. It is accessible and capable of being experienced by any normal individual besides me. It is in this sense objective or public.<sup>69</sup>

Another way of illustrating the distinction is to consider how one arrives at the truth of a statement. If I say that I have a toothache, I need not consult any evidence external to my consciousness to determine whether my statement is true or false. I am immediately aware if I have a sensation of pain or not. My evidence is private because it is directly and immediately accessible only to me. You, on the other hand, are not directly and immediately privy to my pain. To determine the truth of my statement, you would have to look at certain states of affairs external to my mental state to which only I have direct access. From those states of affairs, you could infer whether or not my statement is factually true. We might take x-rays of my tooth, which a dentist might say show conditions associated with tooth pain. You may put material on the tooth such as powdered sugar and other inert powdered material to see if I consistently report increased pain only when the sugar is placed near my tooth, and so forth. The point is that my internal sense experience is directly accessible to me and only indirectly accessible to you.

Now consider the statement that the table in the other room is red. The referent is to the color of the table in the next room. The evidence needed to verify the statement is, in principal, directly accessible to any individual with a normal sense of sight.<sup>70</sup> The evidence is, therefore, public.

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69. One may infer from my statement something about my mental state, namely that I entertain a belief in my statement. However, as developed in this text, the referent of my statement—that to which we would look to see if my statement was true—is the color of the table.

70. We can distinguish between the statement, "When I look at that table, I see the color red," and the statement, "That table is red." The first statement is one about my internal state; the second one is about something external to my mental state. It is possible that I am colorblind or have some other visual defect so that when I look at the table, I see the color red when in fact the table is green. You may persuade me that, even though I see red, the table is green. You may do so by showing me that certain light waves associated with red are not present in the table's color.



When we speak of the traditional intentional torts (e.g., battery, assault, false imprisonment, and trespass to real property) as subjective torts, we do so because a necessary element of the prima facie case is a state of affairs (or fact) internal or private to the actor, of which the actor is directly and immediately aware. Others can only know such a state through external or public states of affairs (or facts) from which the internal, private, or conscious state is inferred.<sup>71</sup> When I use the words *objective* and *subjective* in this sense, I use *objective-public* and *subjective-private*.

*c. Objective-societal and subjective-individual*

The tort of battery requires offensive contact that would offend a reasonable sense of personal dignity.<sup>72</sup> In determining what is offensive, we do not look to what the particular plaintiff would find or label offensive; rather, we look at what the “ordinary person” would find offensive (at least when the defendant is unaware that the plaintiff has sensitivity to touch that is not shared by the community as a whole). In this sense, we may describe the notion of offensiveness as objective and not subjective because *objective* is societally, not individually, defined.

The concept of negligence as an objective tort may be understood in this manner. The minimum standard for negligence does not inquire into the mental state of the tortfeasor, and in that sense it is not subjective-private.<sup>73</sup> Indeed, the most salient

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You may present me with a series of cards, all of which look red to me, but you assert that some are green and match the color of the table; and others are red and do not match that color. We then could put a “G” on the back of the cards you identify as green; “R” on the back of the ones you identify as red. If, without looking at the back of the cards, you consistently and repeatedly identified the ones with the “G” as green and the ones with the “R” as red, I may be convinced that I see red but the table is really green. Of course, even if we agree as to items we identify as red, our agreement does not mean that we *necessarily* have the same qualitative experience of red, the same consciousness of red. All we know for certain is that we consistently identified a color we call red as distinguished from colors we label otherwise. Compare this discussion with the discussion of ostensive definition by HOSPERS, *supra* note 3, at 56, 59–62.

71. Other torts also have subjective elements within this sense of *subjective*, including scienter in fraud, *see, e.g.*, RESTATEMENT (SECOND) OF TORTS, § 892B (1965), actual constitutional malice in defamation of a public official or figure, *see, e.g., id.* § 580A, actual reliance by plaintiff in misrepresentation, *see, e.g., id.* § 310, malice in many of the business and misuse of legal process torts, *see, e.g., id.* § 682.

72. *Id.* §§ 18, 19.

73. I deliberately use *minimum standard* because the subjective element should measure a tortfeasor’s conduct if the tortfeasor possesses knowledge beyond that of the hypothetical reasonable person. *Id.* § 289(b).

characteristic of negligence is that, with some exceptions, actors' conduct is not measured against what they were able to do or what they could have known; rather, it is measured against what society demands of them regardless of their individual characteristics. In the words of Justice Oliver Wendell Holmes,

[W]hen men live in society, a certain average of conduct, a sacrifice of individual peculiarities going beyond a certain point, is necessary to the general welfare. If, for instance, a man is born hasty and awkward, is always having accidents and hurting himself or his neighbors, no doubt his congenital defects will be allowed for in the courts of Heaven, but his slips are no less troublesome to his neighbors than if they sprang from guilty neglect. His neighbors accordingly require him, at his proper peril, to come up to their standard, and the courts which they establish decline to take his personal equation into account.<sup>74</sup>

Thus, when the law uses the word *reasonable* in connection with negligence, it is referring to a societal standard as opposed to an individual one. When I use *objective* and *subjective* in this sense, I use *objective-societal* and *subjective-individual*.<sup>75</sup>

Obviously there is overlap between the meanings of *subjective-aware* and *objective-nonaware*, *subjective-private* and *objective-public*, and *subjective-individual* and *objective-societal*. That which is subjective-private for a given actor is necessarily subjective-individual and subjective-aware.<sup>76</sup> This sort of overlap may understandably trap us into ignoring the conceptual differences between various senses of subjective and objective. For example,

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74. OLIVER WENDELL HOLMES, THE COMMON LAW 86–87 (Mark DeWolfe Howe ed., Belknap Press of Harvard Univ. Press 1963) (1881).

75. I do not address whether *societal* refers to a normative or descriptive standard. The *Restatement* appears to view the reasonable person standard as normative. See RESTATEMENT (SECOND) OF TORTS § 283 cmt. c (1965). That is, the reasonable person standard is an existing standard to which we *ought* to conform our conduct. When speaking of what constitutes offensive contact, the drafters appear to have had a descriptive concept in mind. See *id.* § 19 cmt. a. That is, offensive contact is contact which *is* unwarranted by the social usages prevalent at the time and place at which it is inflicted. *Id.* For the purposes of this Article, we need not concern ourselves with this question.

76. An individual's internal mental or conscious states or sensations are immediately and directly sensed only by the individual (subjective-private) and, therefore, are unique to that individual (subjective-individual). And given that they are conscious states, the individual is aware of them (subjective-aware).

that which is subjective-individual need not be subjective-private. Fingerprints and DNA illustrate this point well.<sup>77</sup>

Section 892 of the Restatement illustrates the same point by its definition of *consent*: “(1) Consent is willingness in fact for conduct to occur . . . . (2) If words or conduct are reasonably understood by another to be intended as consent, they constitute apparent consent and are as effective as consent in fact.”<sup>78</sup>

In subsection (1), the Restatement identifies *consent in fact* as subjective-private (and necessarily as subjective-individual and subjective-aware)—a mental state of the consenting individual. However, in subsection (2), the Restatement identifies *apparent consent* as objective-societal and objective-public, but not necessarily as either objective-nonaware or subjective-aware.<sup>79</sup> For apparent consent is not a matter of the actor’s actual internal or mental state (subjective-private). Instead, it is what another would reasonably understand (objective-societal) to be consent based on the conduct and words of the actor (objective-public), regardless of the consentor’s awareness or unawareness.

*d. Statutes based on the objective/subjective distinction*

With these distinctions in mind, we can analyze statutory schemes that define *economic damages* as objectively verifiable monetary losses and *noneconomic damages* as subjective, nonmonetary losses.<sup>80</sup>

By and large, in these schemes, legal consequences only follow if the damages are noneconomic.<sup>81</sup> Thus, I begin by exploring the

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77. However, I had a very good friend who explained to me (tongue-in-cheek) that more than one person shares the same fingerprints, and that whenever this situation arises, the FBI eliminates one of the individuals to keep intact the integrity of the fingerprint system.

78. RESTATEMENT (SECOND) OF TORTS § 892 cmt. b (1979).

79. *See id.*

80. CAL. CIV. CODE § 1431.2 (West 2007); IDAHO CODE ANN. § 6-1601 (2004); MONT. CODE ANN. § 25-9-411(d) (2005); NEB. REV. STAT. § 25-21, 185.08 (2004); OR. REV. STAT. § 31.710 (2005); WASH. REV. CODE § 4.56.250 (2007), *invalidated by* *Sofie v. Fibreboard Corp.*, 771 P.2d 711 (1989) (en banc) (holding cap on noneconomic damages unconstitutional), *amended by* *Sofie v. Fibreboard Corp.*, 780 P.2d 260 (Wash. 1989); *see also* N.H. REV. STAT. ANN. § 508:4-d (2007), *invalidated by* *Brannigan v. Usitalo*, 587 A.2d 1232 (1991) (holding cap on noneconomic damages unconstitutional).

81. For example, in California, which has adopted pure comparative fault, multiple defendants continue to be jointly and severally liable for economic damages, but they are severally liable for noneconomic damages. *See* CAL. CIV. CODE § 1431.2 (2007). In Oregon,

definition of *noneconomic damages*. I conclude with an analysis of economic damages because that analysis will uncover one of the most salient features of noneconomic damages.

At the outset, it should be observed that the definition of *noneconomic damages* (subjective, nonmonetary losses) in these schemes cannot be the complement<sup>82</sup> of *economic damages* (objectively verifiable monetary losses). This is because “subjective” in the definition of noneconomic damages is an adjective modifying “losses,” and “objectively” in the definition of economic damages is an adverb modifying “verifiable.”<sup>83</sup> With this observation, we can move on to an analysis of the coherence of these schemes’ definitions of *noneconomic* and *economic* damages.

By defining *damages* in terms of losses, these schemes present an ambiguity: is the term *damages* referring to the plural of my use of *loss* or *harm*, or is it referring to money claimed or awarded for harm suffered?<sup>84</sup> It appears that *damages* cannot refer to money for harm suffered; for regardless of the character of the harm suffered, the money claimed or paid for that harm will always be characterized in the same manner. For example, money for both pain (a universal denotation of subjective damages) and lost earnings (a ubiquitous denotation of economic damages) will be (1) objective-public (open, in principal, to the plaintiff and others in the same way); (2) subjective-individual (the various amounts of the money judgments for detriments suffered will vary with the particular circumstances of each particular plaintiff’s case); and (3) objective-nonaware (if one plaintiff dies unaware of a favorable judgment for lost earnings, and another dies aware, no one would argue that damages are subjective in the first case and not subjective in the second case).

Can we make sense of these schemes’ definitions by reading them as applying a subjective requirement to the harm suffered? Can we make sense of the definition by reading it to say, “Noneconomic

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there is no cap on economic damages, but there is a cap on noneconomic damages. See OR. REV. STAT. § 31.710 (2003).

82. See *supra* note 22.

83. A more apt complement of *noneconomic damage* in these schemes would be the following: “economic damages means objective, non-monetary losses or non-subjective, non-monetary losses.” Note, however, that the definition of *economic damages* uses *monetary* and the definition of *noneconomic damages* uses *nonmonetary*.

84. See *supra* note 45 and accompanying text.

damages are damages claimed or awarded for subjective, nonmonetary losses”?

While subjective-individual/objective-societal and subjective-aware/objective-nonaware distinctions do not differentiate between pain and suffering and lost earnings,<sup>85</sup> the objective-public/subjective-private distinction does. For lost earnings are always a public state of affairs, and pain and suffering is always a private state. However, these schemes also denote damages for injury to reputation as *noneconomic damages* (and indeed, there is no market value for one’s reputation). A moment’s reflection makes it clear that such a noneconomic injury, unlike pain and suffering, is always objective-public. The harm that constitutes the injury in defamation resides in how others may view the plaintiff.<sup>86</sup> And while humiliation damages (damages for noneconomic, subjective-private detriment) may be available, they are only available as parasitic damages.<sup>87</sup>

Indeed, one way to distinguish the torts of defamation and false light, which share many characteristics, is by the injury—the legally protected right that must be tortiously invaded—necessary to establish a claim for each. With defamation, the injury is the effect of the published falsehood on how others view the plaintiff (objective-public), while with false light, the injury is the psychic impact the falsehood has on the plaintiff (subjective-private).<sup>88</sup> The same analysis applies to the more common tort of negligent physical injury to the person, where the loss of an eye is the injury and is objective-public, and the parasitic pain and suffering accompanying the injury is subjective-private.<sup>89</sup> But, both the pain and suffering and the actual physical injury are noneconomic harms. Given that none of the objective/subjective distinctions can consistently distinguish between reputation harms and lost earnings (or differentiate the loss of an eye

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85. All harms, be they pain and suffering or lost earnings are (1) subjective-individual (they will vary with the circumstances of each plaintiff’s case), and (2) objective-nonaware (lost earnings under these schemes would not become noneconomic damages when an injured plaintiff lingers in a coma, unaware of her lost earnings, and if a plaintiff never comes out of the coma).

86. KEETON ET AL., *supra* note 49, at 771 (“[I]t involves the opinion which others in the community may have, or tend to have of the plaintiff.”).

87. *Id.*

88. *Fairfield v. Am. Photocopy Equip. Co.*, 291 P.2d 194, 197 (Cal. 1955); 1 J.T. MCCARTHY, *THE RIGHTS OF PUBLICITY AND PRIVACY* 5-133 to -139 (1999).

89. *See supra* notes 54–62 and accompanying text.

from its accompanying pain and suffering), defining *noneconomic damages* as subjective in these schemes means that the definitions loses content.

However, we can understand what these schemes are trying to achieve by a liberal paraphrase of the definition of *economic damages* such that “objectively verifiable” modifies “damages.” Thus, I paraphrase California Civil Code section 1431.2(b) to read as follows: ‘economic damages’ are objectively verifiable damages claimed or awarded for losses suffered.<sup>90</sup> We begin by inquiring into the meanings of *verifiable* or *verification*.

*Verification* appropriately applies to statements that purport to describe facts or states of affairs, not the facts or states of affairs themselves. States of affairs simply are. Statements about facts or states of affairs are accurate or true to the extent that they correctly describe existing facts or states of affairs.<sup>91</sup> When we use *verify* or any of its derivatives, we usually mean the process of determining the correspondence between facts and statements describing the facts.<sup>92</sup> In some instances, we look to our immediate sense experience for evidence to verify a statement. For example, if Jones claims that while working on the punch press, he lost three fingers on his right hand when the press was activated even though he did not press the start button, we can look at his right hand to verify the fact that he lost those fingers. In this case, the degree of certainty we would have in the truth<sup>93</sup> or accuracy of that part of the statement asserting the loss of three fingers would not admit of any practical doubt.

The same degree of confidence in the accuracy of a statement can exist when the supporting evidence is circumstantial. Assume Mr. X and Ms. Y are found dead in their respective automobiles, which crashed in the middle of an intersection. Mr. X had a stop

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90. CAL. CIV. CODE § 1431.2(b) actually defines *economic damages* as “objectively verifiable monetary losses.”

91. See HOSPERS, *supra* note 3, at 66.

92. See *id.* at 64–67. Verification may occur when one asserts a claim about the existence of a certain state of affairs and others look to see if the claim is accurate. Alternatively, the process may occur when one is agnostic as to the accuracy of the statement but is nevertheless interested in its accuracy. For example, one may say, “I can’t remember if I turned off the stove. I need to go home to verify that I did.”

93. *Truth* may have many different and sometimes overlapping meanings. When I use it in this Article, I am using it in the restrictive sense of correspondence between a statement asserting a given state of affairs or facts and the existence of that state of affairs or those facts.

sign, and there are unbroken skid marks from his car beginning sixty feet before the stop sign. Even though no one witnessed what happened, this body of evidence would leave no practical uncertainty as to a finding of fact that Mr. X ran the stop sign. When the evidence leaves no practical uncertainty as to the accuracy of a factual statement, I describe it as providing “a strong sense of verification.” Strong verification is captured in the law when, in a jury trial, a factual claim can be affirmed or denied by the court as a matter of law.

Let us return to Jones’s statement. I have stated that his claim of lost fingers is verifiable in the strong sense. However, his claim that the press was activated even though he did not press the start button is a different matter. Let us assume that there is one fellow worker who corroborates Jones’s testimony and two other workers who contradict it. Under these conditions, the evidence could rationally support either the accuracy or inaccuracy of the factual assertion. That is, based on the evidence, individuals may rationally disagree as to whether Jones pressed the start button or not. This “weak sense of verification” is captured in the law when the jury affirms or denies the assertion as a finding of fact. Of course, as the body of evidence in support of the assertion changes, our degree of confidence that the assertion is true also changes.<sup>94</sup> When a jury performs its usual fact-finding function in an ordinary tort case, it decides (on its view of the evidence, which rationally can support more than one finding) that its finding most likely describes a past or future fact.<sup>95</sup>

#### 4. Descriptive and Prescriptive

Finally, fact statements (descriptions of what *is*) are distinguishable from prescriptive statements (statements of what

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94. See Ray & Zavos, *Special Problems*, *supra* note 25, at 99–102 (illustrating this point by referring to argument from the circumstances).

95. Furthermore, when factual assertions have consequences (risks attached to errors in their accuracy), the level of proof (the extent to which the body of evidence allows us to accept and to act upon the statement) is a function of the interest that may be implicated in accepting or rejecting such assertions as true or accurate. This notion is captured in the law by its three different levels of proof: (1) beyond a reasonable doubt (when a defendant’s freedom or life is at stake); (2) clear and convincing evidence (for example, when First Amendment interests are at stake, see *Bose Corp. v. Consumers Union of U.S., Inc.*, 464 U.S. 927 (1984)); and (3) preponderance of the evidence (for ordinary civil disputes). See Ray & Zavos, *Deduction and Induction*, *supra* note 25, at 75–76 (illustrating this point by discussing induction as a wager).

ought to be). The point can be illustrated by contrasting science's use of *law* with the legal system's use.

When physicists state the law  $E=MC^2$ , they are stating a descriptive law—one that describes a state of affairs as it was, is, and will be. If people make observations that contradict the formula, physicists are constrained to try to revise the law to take account of those observations. Laws of physics are verified in the sense in which I have used *verification*. If two individuals disagree over a statement of fact, they can resort to evidence external from their private (subjective-private/subjective-individual) thoughts and judgments to try to resolve the disagreement. Resolution will depend on the strength of the available relevant evidence. When using the term *descriptive statement*, I refer to an assertion of fact.

In contrast, if there is a criminal law against stealing property or a civil law against negligently caused injuries, the fact that there may be widespread practices that violate these laws does not mean that they necessarily require revision. They are prescriptive laws; they are not statements of what is. There are no states of affairs that they purport to accurately describe. They are statements of what ought to be. They are statements where no state of affairs logically requires their revision.<sup>96</sup> I denote such statements or value judgments as *prescriptive statements*. They are statements that, even in principal, are not verifiable as I am using *verifiable*.

As trier of fact, the jury usually operates in the arena of fact determinations and not in the arena of prescriptive statements. For example, the jury in a negligence case determines whether the defendant's acts were consistent with the community standard for reasonable conduct.<sup>97</sup> The jury does not determine what the community standard *ought* to be; it determines what the standard *is*.

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96. Of course, there can be descriptive statements about such prescriptive statements, such as who accepts them, consequences that may follow from accepting them, and so forth.

97. The jury's findings regarding the facts and circumstances of the case (*res gestae*) are clearly different than its finding as to whether the defendant's conduct fell below the community's expectation of what a reasonable, prudent person would have done. The jury must decide the particular relevant facts and circumstances of the case based on the evidence. If there is insufficient evidence for the jury to resolve a disputed fact, it cannot make a finding and must decide against the party that has the burden of proof on that disputed fact. Once the facts and circumstances are established, the jury must determine if the defendant's conduct fell below the community's standard of reasonable care; that is, below the standard that reflects "the consensus of the community as to what is proper." 1 J.D. LEE & BARRY A. LINDALE, *MODERN TORT LAW* 3-16 (2d ed. 2003). The jury does not decide the case based on what care the jurors would have taken. *Warrington v. N.Y. Power & Light Corp.*, 252 A.D. 364, 367 (N.Y. App. Div. 1937);



With this discussion in mind, we now can ask what meaning can fairly be ascribed to my paraphrase of the definition of *economic damages*. That is, what is the reasonable content of *objectively verifiable damages*? Because my use of *verification* involves the process of determining if the damages (the amount of monies) claimed or awarded are true or accurate,<sup>98</sup> the process in all cases must be subjective-aware, regardless of whether the damages are for economic or noneconomic harms. Judging the correspondence between the damages claimed or awarded and the correct or true monetary amount for the harm suffered necessarily implies awareness on the part of the verifier. Also, all damages, economic or noneconomic, will be subjective-individual; damages and their verification will always vary with the particular circumstance of each case. Thus, in those senses, the objective/subjective distinction cannot distinguish between damages for lost earnings and those for the physical injury (e.g., lost fingers).

The objective-public/subjective-private and objective-societal/subjective-individual distinctions distinguish between damages for lost earnings and those for physical injury and the

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Louisville & N.R. Co. v. Gower, 3 S.W. 824, 827 (Tenn. 1887). But the jury's judgment as to whether the defendant's conduct fell below the community's standard of care is not ordinarily made based on adduced evidence. I say ordinarily because when the standard concerns professional practices (like medicine), where the jurors are unacquainted with the profession's standards, expert evidence of those standards is required. Similarly, in the ordinary negligence case, available and relevant custom evidence is admissible.

As Justice Learned Hand pointed out in *Conway v. O'Brien*, jurors, as members of the community, are in a position to make judgments as to community values that are determinative of negligence. 111 F.2d 611, 612 (2d Cir. 1940). He points out that a determination of negligence consists of balancing the following factors: "[ (1) ] the likelihood . . . [of] injur[y] [to] others, [ (2) ] taken with [the community's evaluation of] the seriousness of the injury if it happens [i.e., collectively the magnitude of the risk] . . . [ (3) ] as balanced against [the community's evaluation of] the interest which . . . must [be] sacrifice[d] to avoid the risk [i.e., the social utility of defendant's conduct]." *Id.* He goes on to state: "All [three elements] are practically not susceptible of any quantitative estimate, and the second two [i.e., seriousness of injury and social utility of the conduct] are generally not so, even theoretically. For this reason, a solution always involves some preference or choice between incommensurables, and it is consigned to a jury because their decision is thought most likely to accord with commonly accepted standards, real or fancied." *Id.* Whether these standards are real or fancied, the jurors' attention is not on what they would do under the case's *res gestae* (i.e., not subjective-individual), but instead they are focused on their judgment of what their community would consider prudent (i.e., objective-societal). Furthermore, their judgment is based on the knowledge and experience they have had by living in and interacting with the community rather than on evidence of that community's standards adduced at trial.

98. For the trier of fact, the damages would be those claimed; for the appellate court, the damages would be those awarded.

attendant pain and suffering. In some instances, verification will be objective-public and objective-societal, and in other instances it will not.

When it comes to verification of damages for lost earnings, the process is objective-public because the verifier must look to a body of external evidence to make this determination—evidence of the reduced market value of the plaintiff's ability to work due to the tort.<sup>99</sup> By the same token, that market value is objective-societal—the community's determination of value.

But when it comes to the physical injury and the attendant pain and suffering, the Restatement points out that “there *is no scale* by which . . . suffering can be measured and hence there can be only a very rough correspondence between the amount awarded as damages and the extent of the suffering.”<sup>100</sup> The U.S. Supreme Court implies the same notion regarding harm to reputation when it quotes from *Othello*: “Good name in man and woman . . . [i]s the immediate jewel of their souls. Who steals my purse steals trash . . . [b]ut he that filches from me my good name [r]obs me of that which not enriches him, [a]nd makes me poor indeed.”<sup>101</sup> A person's good name is a jewel beyond price and harm to a person's good name, like suffering endured, has no objective-public and objective-societal monetary scale of equivalence. Thus, we cannot verify the dollar amount claimed or awarded as damages for impairing a person's reputation. As our law presently exists, the fact finder is left only with her subjective-private and subjective-individual sense of the appropriate damages sum for a given noneconomic loss. As such, noneconomic

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99. The rules of evidence also prescribe what evidence the verifier may look to. In that sense, verification is also objective-societal.

100. RESTATEMENT (SECOND) OF TORTS § 903 cmt. a (1965) (emphasis added). My position is that without a monetary scale, there cannot be any correspondence, rough or otherwise. There is no objective-public and objective-societal state of affairs corresponding to the amount awarded by a jury for noneconomic losses. All that we are left with is each individual's subjective-private thoughts and inclinations. It is also my position that there can be rough objective-public and objective-societal correspondence between the amount of damages awarded and the extent of suffering if one has socially agreed to a finite monetary scale for nonmonetary losses (a conventional metric for translating severity of injuries into dollars). Verification of the damages claimed or awarded would then require judging whether the point chosen on the scale accords with what we believe is within the community's view of the relative severity of harms.

101. *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 12 (1990) (quoting WILLIAM SHAKESPEARE, *OTHELLO* act 3, sc. 3).

damages fall into the complement of *objectively verifiable*; namely, “not objectively verifiable.”<sup>102</sup>

This analysis of the term *objectively verifiable* resonates with one of my argument’s postulates; specifically, that noneconomic damages in our tort law are damages (monetary sums) for items of value that have no exchange or market value. Thus, damages are not a correct dollar equivalent of the item’s monetary loss in value, rough or otherwise. When the jury determines the amount of damages for noneconomic losses, it is not acting within the ordinary scope of its mandate. The jury is not describing what the correct amount *is* (the community’s sense of the correct amount); rather, it is prescribing the amount that it believes *ought* to be given for a particular noneconomic loss.

With these definitions in mind, we can now consider the meaning of *noneconomic damages*, the function of such damages, and how they should be calculated. Before we do so, there are two preliminary areas of discussion that will serve as a background for that consideration. The first area of discussion addresses how archaic people have dealt with private wrongs, and the second area addresses the content of *compensation* and its derivatives.

### B. Preliminary Areas of Discussion

#### 1. Archaic Treatment of Private Wrongs

Some brief observations concerning archaic<sup>103</sup> views of private wrongs<sup>104</sup> and their remedies will provide a useful backdrop to my

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102. The reader must keep in mind that *economic damages* is not the complement of *noneconomic damages*, for *subjective* is used as an adjective modifying *damages* and *objectively* is used as an adverb modifying *verifiable*. See *supra* notes 22, 82, 83 and accompanying text.

103. I take some liberty in my use of the term *archaic*. While dictionaries describe the word as denoting the primitive, they also associate it with much earlier times. I use it to refer to both of the following: (a) what we would consider as ancient societies (e.g., the Babylonians, the nearby Eshnunians, or medieval England); and (b) groups of people existing in modern times without written codes or what we would recognize as a system of stable institutions (such as a judicial system), and without the primacy of the government’s monopoly in the use of legitimate physical force (e.g., the Ifugao, the Plains Indians, or the Ashanti of West Africa). In the words of E. Adamson Hoebel,

The point to be grasped is that among contemporary societies primitiveness does not necessarily mean antiquity, in spite of the fact that primary means first. What it does mean is that the cultural forms of primitive societies are more similar in their general characteristics to those that presumably prevailed in the early cultures of the infancy of mankind.

thesis. Those who have studied primitive societies write that such societies call for an offended person (and not uncommonly, the offended's kinship group) to redress wrongs caused when others infringe on certain rights or prerogatives of the offended person.<sup>105</sup> The offended person aims this action at the offender (and not uncommonly, at the offender's kinship group) to redress the imbalance the offender caused—that is, to even the score. The phrase *even the score* connotes the idea of revenge or retaliation. It does so with some justification, for it is not uncommon in these societies that the offended seeks to hurt the offender rather than to receive a benefit from the offender. Scholars have widely described this pattern.<sup>106</sup> Once the offended retaliates, the offenders may perceive that retaliation as a wrong that, in turn, requires redress; and so the blood feud may begin. This retaliatory manner of redressing wrongs (of evening things out, of making things right, or of restoring balance) is ameliorated by the ubiquitous use of *composition*, whereby the offender confers a benefit on the offended rather than inflicting a hurt. One commentator describes *composition* as follows:

[T]he breach of obligations still tends to be treated upon the premises of the system of composition—that [is] a breach is regarded as an injury for which compensation must be made so that retaliation may be avoided.<sup>107</sup> Furthermore, it proceeds from the fears of the perpetrator of the deed . . . .<sup>108</sup>

Composition is not measured by the offended's loss. It is not an equivalent for the harm suffered. Rather, it is an offset for forgone retaliation. In the words of Robert Redfield, "There is something that may be given up, that people hate to give up, and that may be offered

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E. ADAMSON HOEBEL, *THE LAW OF PRIMITIVE MAN: A STUDY IN COMPARATIVE DYNAMICS* 290 (1954).

104. I use the phrase *private wrongs* to denote wrongs against an individual (tortious wrongs) that the individual's kinship group may also view as a wrong against them. Contrast this with wrongs against the wider community, tribe, or state (criminal wrongs).

105. A. S. DIAMOND, *THE EVOLUTION OF LAW AND ORDER* 22–23, 34, 108 (1951) (describing these wrongs as touching on homicide, wounding, theft, and wife stealing).

106. *Id.* at 22–23, 34–35, 42, 62–63; HOEBEL, *supra* note 103, at 309–22; NORBERT ROULAND, *LEGAL ANTHROPOLOGY* 276–79 (Philippe G. Planel trans., 1994); WILLIAM SEAGLE, *THE HISTORY OF LAW* 36–43 (1946); Robert Redfield, *Primitive Law*, 33 U. CIN. L. REV. 1, 6, 9–10 (1964).

107. SEAGLE, *supra* note 106, at 68–69.

108. *Id.* at 41.

as equivalent to vengeance.”<sup>109</sup> William Seagle distinguishes *compensation* by way of *composition* from *compensation* by way of *damages*: “In damages the idea of compensation for the actual loss suffered is dominant, but in composition the motive is rather the awarding of an amount which shall be sufficiently large to induce the relatives to keep the peace.”<sup>110</sup> That is, “a breach is regarded as an injury for which compensation must be made so that retaliation may be avoided.”<sup>111</sup> Seagle, among many others, extensively references *composition* as a means of keeping the peace or avoiding retaliation, which in turn, also avoids the blood feud.<sup>112</sup>

Literate archaic societies promulgated written codes regulating the acceptability of some practices, including recognition of some private harms or wrongs and the sanctions associated with them. Most of us are familiar with the *lex talionis* of the Code of Hammurabi and the Law of the Pentateuch—“life for life, eye for eye, tooth for tooth, hand for hand . . . [b]urn for burn, wound for wound, [and] bruise for bruise.”<sup>113</sup> The remedy for these injuries (injuries that would fit my definition of *noneconomic detriments*) has a rough equivalency (unlike in our modern law where the dollar value of damages is not a monetary equivalent for such harms). The equivalency consists of inflicting on the offender the same injury the offender inflicted on the offended. In other instances, such as theft, the retributive remedy might be death to the offender even though it is not an equivalent for the injury the offender inflicted.<sup>114</sup> For example, in the Code of Eshnunna, for which Reuven Yaron has concluded the *talion* is absent,<sup>115</sup> death was visited on the offender for certain injuries such as nocturnal burglary.<sup>116</sup> In these instances, unlike the *lex talionis*, there is no equivalency; but like the *lex*

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109. Redfield, *supra* note 106, at 11. I would take exception with the use of the term *equivalent* and would rather describe it as an appeasement or atonement to substitute for vengeance.

110. SEAGLE, *supra* note 106, at 42.

111. *Id.* at 69.

112. *Id.* at 29, 41–42, 45, 49, 73, 126–27, 255; see also DIAMOND, *supra* note 105, at 42, 63, 108–16; HOEBEL, *supra* note 103, at 310; JOHN MAXCY ZANE, *THE STORY OF LAW* 227 (1927).

113. *Exodus* 21:23–25 (New International Version).

114. See BERNARD S. JACKSON, *ESSAYS IN JEWISH AND COMPARATIVE LEGAL HISTORY* 65 (Jacob Neusner ed., 1975).

115. REUVEN YARON, *THE LAWS OF ESHNUNNA* 262–64 (E. J. Brill, Rev. 2d. ed. 1988) (1969).

116. *Id.* at 258.

*talionis*, the sanction bestows no benefit on the offended. However, a negotiated composition between the offended and the offender could avoid the harsh consequences of the offended pressing for the retribution sanctioned by these codes.<sup>117</sup>

The Laws of Æthelbert are the earliest of the written English language codes.<sup>118</sup> This code contained a list of tariffs to be paid by an offender to the offended for wrongs committed or injuries inflicted, including a list of fixed compositions as an alternative to retaliation by the offended.<sup>119</sup> The code consisted of *bot* or *boot* (the amount paid to the offended), *wer* (the amount paid to the offended family for the death of one of their members), and *wite* (“the usual word for a penal fine payable to the king or some other public authority”).<sup>120</sup> The amount of compensation, or *bot*, varied with the injury inflicted and the status of the injured.<sup>121</sup> Some commentators have pointed out that these written tariffs probably grew out of actual composition practices that predated the code.<sup>122</sup> Originally, negotiations between the parties determined the amount of composition; later, custom determined the amount; and finally, the code fixed the amount of the composition.<sup>123</sup> At first, the code’s fixed compositions may have been voluntary alternatives to retaliation. Later, public pressure forced parties to seek composition before seeking retaliation. Finally, public authority required a resort to composition before a resort to retaliation.<sup>124</sup>

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117. *Id.* at 259; SEAGLE, *supra* note 106, at 233; Saul Levmore, *Rethinking Comparative Law: Variety and Uniformity in Ancient and Modern Tort Law*, 61 TUL. L. REV. 235, 262–63 (1986); *see generally* ZANE, *supra* note 112, at 98–99 (discussing compositions in Jewish culture for various common crimes).

118. 1 FREDERICK POLLOCK & FREDERIC WILLIAM MAITLAND, *THE HISTORY OF ENGLISH LAW* 27 (2d ed., Little, Brown & Co. 1898); SEAGLE, *supra* note 106, at 123; A.W.B. Simpson, *The Laws of Eithelbert*, in *ON THE LAWS AND CUSTOMS OF ENGLAND* 3, at 4–5 (Morris S. Arnold et al. eds., 1981).

119. Simpson, *supra* note 118, at 12, 14, 15.

120. 1 POLLOCK & MAITLAND, *supra* note 118, at 48; Simpson, *supra* note 118, at 7.

121. DIAMOND, *supra* note 105, at 148–51; 1 POLLOCK & MAITLAND, *supra* note 118, at 46–48; 2 POLLOCK & MAITLAND, *supra* note 118, at 451; Simpson, *supra* note 118, at 7; ZANE, *supra* note 112, at 231.

122. SEAGLE, *supra* note 106, at 108; Simpson, *supra* note 118, at 14.

123. 1 POLLOCK & MAITLAND, *supra* note 118, at 46; SEAGLE, *supra* note 106, at 41–42; Simpson, *supra* note 118, at 14.

124. 1 POLLOCK & MAITLAND, *supra* note 118, at 46; Simpson, *supra* note 118, at 15.

Frederick Pollock & Frederic William Maitland equate *bot* with “betterment.”<sup>125</sup> The Oxford English Dictionary (OED) defines *betterment* as “amendment, improvement, amelioration, reformation.”<sup>126</sup> The OED defines *boot* as “[c]ompensation paid, according to Old English usage, for injury or wrong-doing; reparation, amends; satisfaction made.”<sup>127</sup> The OED also relates *boot* to the verb *beet*, which the OED defines as to “repair” and to “put right.”<sup>128</sup> *Bot* does not involve repairing the material deficiency that the offended has suffered, since *bot* is calculated as the payment necessary to avoid retaliation, not necessarily to restore to the offended that which the offended has lost. As I argue below, *bot* was meant to restore parties to their relational status quo ante and to prevent retaliation.

According to Pollock and Maitland, some offenses in medieval England were *bootless*, “that is, the offender [was] not entitled to redeem himself at all, and [was] at the king’s mercy.”<sup>129</sup> Other offenses, for which *bot* could be given, were called *emendable*.<sup>130</sup> The OED defines the term *emend* and its derivatives as: “to free (a thing) from faults,” “[t]o free (a person) from faults,” to “correct,” and to “repair.”<sup>131</sup>

With these definitions in mind, one might say that *bot* repairs the rupture in the legal relationship between the offended and the offender. Absent *bot*—that is, absent composition—the offended would have to retaliate to rebalance the disrupted relationship. In other words, the offended would have to even or level the score through vengeance.

In repairing the legal relationship, *bot* does not “put right,” “repair,” or “amend” the impaired condition of the offended; rather, it repairs and puts right the rupture in the legal relationship between the offended and the offender to its pre-injury status, even though the material condition of the offended may not be restored. Prior to

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125. 2 POLLOCK & MAITLAND, *supra* note 118, at 451.

126. 2 THE OXFORD ENGLISH DICTIONARY 153 (2d ed. 1989).

127. *Id.* at 403.

128. *Id.* at 60.

129. 1 POLLOCK & MAITLAND, *supra* note 118, at 48.

130. 2 POLLOCK & MAITLAND, *supra* note 118, at 451.

131. 5 THE OXFORD ENGLISH DICTIONARY 174 (2d ed. 1989).

payment of *bot*, the offender is at fault (or subject to fault); subsequent to payment, the offender is freed from fault.

Indeed, Pollock and Maitland repeatedly describe English *composition* as an atonement rather than a pecuniary equivalence of the retaliation forgone or the loss suffered.<sup>132</sup> According to the OED, the term *atone* and its derivatives denote “reconciliation,” “restoration of friendly relations between persons who have been at variance,” and, where one is “alienated by a sense of wrong or offence received,” “to reconcile or restore to friendly relations.”<sup>133</sup> *Atone* and its derivatives also mean “unit[ing] in harmony,” “being set at one, after discord or strife,” and “staunching of strife.”<sup>134</sup> Thus *composition* (or *bot*) is a means of restoring social equilibrium or rebalancing the disturbed relationship after the offender wrongfully injures the offended.<sup>135</sup> To the extent a governmental authority (which provided the remedy of *bot*) recognized the wrongs, the offender’s payment of *bot* restored the once-disrupted relationship in the eyes of the law. Such a reading of *bot* is consistent with its source in the word *bote* because *bote*’s verb form, *boten* means “to heal.”<sup>136</sup>

Seagle states, “Not far removed from the reign of composition [or *bot*], the sovereign remedy offered by the law . . . tends to be damages, and damages only.”<sup>137</sup> Pollock and Maitland assert that in England, the *bot* system disappears with “marvelous suddenness” to be replaced by damages.<sup>138</sup> This does not necessarily mean Pollock and Maitland view the healing function of damages as different from that of *bot*. For example, in describing the availability of damages as a remedy in a thirteenth-century trespass action (as an alternative to

132. 2 POLLOCK & MAITLAND, *supra* note 118, at 449–51; *see also* HOEBEL, *supra* note 103, at 314–16 (discussing compensation gifts in primitive societies); SEAGLE, *supra* note 106, at 41 (discussing composition in primitive societies).

133. 1 THE OXFORD ENGLISH DICTIONARY 754–55 (2d ed. 1989).

134. *Id.*

135. *See* HOEBEL, *supra* note 103, at 314–16; REDFIELD, *supra* note 106, at 9–10 (describing retaliation or composition in primitive societies as restoration of balance).

136. JOSEPH T. SHIPLEY, *DICTIONARY OF EARLY ENGLISH* 107 (1955). From our modern perspective, we may be tempted to view *to heal* as meaning to heal the injured party rather than to heal the ruptured relationship between the offended and the offender. However, we must remember that in *bot*’s era, *composition* (*bot*) was not principally concerned with the offended’s loss. Rather, its focus was on an amount necessary to avoid retaliation. *See infra* notes 137–43 and accompanying text. Thus reading *to heal* as referring to the ruptured offended/offender relationship is consistent with the bases of composition or *bot*.

137. SEAGLE, *supra* note 106, at 183.

138. 2 POLLOCK & MAITLAND, *supra* note 118, at 458–59.



retaliation, with its attendant risks and lack of tangible benefits for the offended), they assert, “[O]nce more instead of vengeance [the offended] could obtain, to use the old phrase, a sufficient *bót*, but a *bót* the amount of which was no longer fixed by law.”<sup>139</sup> Thus, *bot* and damages both functioned to restore the disturbed legal equilibrium between the parties. The difference is that *bot* restored equilibrium by providing an amount appropriate to offset against retaliation while damages restored equilibrium by providing an amount appropriate to offset the plaintiff’s loss.

To those schooled in ancient history or anthropology, this discussion may appear oversimplified and selective. I make no pretense of having the depth of expertise or the breadth of knowledge to give an authoritative exposition on the treatment of wrongs in archaic societies. The purpose of presenting this background is to provide support for my view that we can only rationalize pecuniary damages for noneconomic losses if we consider that all damages function to restore the legal relationship between the plaintiff and the defendant—the relationship that the defendant disrupted. My intention here is to use historical material to underscore one of the foundational assumptions of my argument, which Paul R. Hyams encapsulates as follows:

To request from people an account of justice today is to risk immersion in a bath of bad philosophy. But when we question ordinary men and women about injustice, many will at once begin to tell stories of real occasions in their own lives when others have wronged them. People feel injustice in a direct and personal manner. When they perceive it directed at themselves, and they cast themselves as victims, they soon begin to ponder whether and how to respond.<sup>140</sup>

Elsewhere, when discussing the impulse for vengeance in response to perceived injustice, Hyams writes,

Those who seek [vengeance] always have some reason, or we should not call it vengeance. We seek it “because we care about someone or something” and because we know we are expected . . . to live up to ideals of honor, shame,

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139. *Id.* at 489.

140. PAUL R. HYAMS, *RANCOR & RECONCILIATION IN MEDIEVAL ENGLAND* ix (2003).

and so forth. Our quest is fierce because it proceeds from a personal involvement . . . . One senses so constantly a *goal of balance, or fit, or leveling the score*, as to make one suspect that such a goal is *hardwired*.<sup>141</sup>

When people interact with others, they have certain expectations about how others *ought* to treat them. At one end, those expectations may be idiosyncratic (subjective-individual), and at the other end, they may be expectations that the wider community shares (objective-societal).<sup>142</sup> From the perspective of one whose expectations are not met (the offended), the consequences of confounded expectations may be trivial and will have no effect on the relationship between the offended and the offender. The offended would hardly use the word *wronged* (as the word is commonly used) to characterize the failure and its consequences.

For example, I may expect that individuals should be punctual when they agree to meet with friends. I have a friend who is repeatedly late for our meetings. For me, my friend's tardiness is a very minor annoyance, which I either ignore or, on occasion, mildly complain about to my friend. I would hardly use the word *wronged* (as the word is commonly used) to characterize my unmet expectation and its consequences. However, if a trusted friend publicizes personal and sensitive facts I shared with him in strictest confidence, I would not shrink from saying that he has *wronged* me. My sense of being wronged may cause me, if I am able, to retaliate or to end the relationship. My friend may be able to repair the breach by making some sort of amends. If my friend is also my employer in a job that I cannot afford to jeopardize, I may react to the breach by lumping it.<sup>143</sup> The range of responses to disappointed expectations is varied. However, I postulate that when the offense rises to the level of a "wrong," there is such a drive to restore balance or level the score as to suggest that such a goal is hard-wired.

In our society, certain expectations are objective-societal in the sense that they are recognized and sanctioned by the law. These expectations are expressed in terms of reciprocal rights and duties. For example, I have a legal right to be free from negligent conduct

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141. *Id.* at 39 (footnotes omitted) (emphasis added).

142. *See supra* Part II.A.3.c.

143. HYAMS, *supra* note 140, at x (defining *lumping it* as a victim inaction in response to a wrongdoing).

by others that causes me physical harm (injury) and its attendant detriments (pain and suffering, medical expenses, and so forth). By the same token, others have a legal duty to refrain from such conduct. The law, having given legal status to these expectations, also appropriates the remedy it considers sufficient to restore the ruptured legal relationship to its status quo ante and to level the score—to heal the ruptured legal relationship, to restore legal equilibrium.

Any action at law triggered by the disruption of a legal equilibrium can be divided into two phases: the liability phase and damages phase. Leopold Pospíšil tracks this division using the concepts *obligatio* and sanction, which he asserts are characteristic of law and are found not only in every human society, but also in every functioning subgroup of society.<sup>144</sup> He defines *obligatio* (which tracks *liability*) as follows:

[T]hat part of a decision which states the rights of one party to a dispute and the duties of the other. It defines the social-legal relations between the two litigants as they supposedly existed at the time of the defendant's violation of the law. It also describes the delict, showing how the relations became *unbalanced* by the act of the defendant.<sup>145</sup>

He describes *sanction* (which tracks *damages*) as “the judge's . . . decision about how . . . the *obligatio* should be *balanced and the situation corrected*.”<sup>146</sup>

This idea of *obligatio* (or liability) as a judicial determination of a tortiously unbalanced legal relationship and this idea of sanctions (or damages) as the judicial decision about how to restore balance are key to rationalizing pecuniary damages for nonpecuniary detriments. These two ideas can also inform a broad view of how *all* compensatory damages can operate in tort actions. Under the concepts of *obligatio* and sanction, the purpose of compensatory damages (or *bot*, for that matter) is primarily to restore the legal

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144. LEOPOLD POSPÍŠIL, ANTHROPOLOGY OF LAW: A COMPARATIVE THEORY 95–96 (1971).

145. *Id.* at 81 (emphasis added). Pospíšil's use of *obligatio* should not be mistakenly viewed as “the actual, objective social relation or obligation existing or incurred previous to the decision, an infringement of which brought about the suit and the legal decision,” but rather as “what is said in the decision to have existed, because this leads directly to the solution of the problem being adjudicated.” *Id.* at 84.

146. *Id.* at 83 (second emphasis added).

relationship between the plaintiff and the defendant to the legal equilibrium that existed prior to the wrongful injury. By contrast, restoring the plaintiff to the plaintiff's pre-injury condition is not a primary goal of compensatory damages under these concepts.<sup>147</sup> As we shall see, this view of compensation has a pedigree in the law of private wrongs.

## 2. Compensation and Its Derivatives

Damages are grouped into three broad categories: nominal, punitive, and compensatory.<sup>148</sup> Nominal damages are token amounts awarded to a plaintiff when the defendant's tortious invasion of plaintiff's legally protected right results in neither harm nor loss.<sup>149</sup> A court awards punitive damages to punish the defendant and to deter similar conduct by others.<sup>150</sup> Unlike compensatory damages (which I will discuss below), punitive damages are not determined by reference to the losses or detriments that the plaintiff suffered.<sup>151</sup>

*Compensation* and its derivatives are commonly used to describe money equivalents for services, losses, or expenses.<sup>152</sup> This usage may lead one to assume that compensatory damages are a monetary equivalent for plaintiff's losses, including noneconomic losses. No less an authority, Theodore Sedgwick asserts, "Physical pain is always regarded as a subject for compensation, this compensation being *its pecuniary equivalent* as measured by the jury."<sup>153</sup>

Other authors imply the same notion as Sedgwick when they describe the general purpose of compensatory damages as awarding

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147. Since our tort law fashions the remedy for rebalancing of the legal relationship in terms of the plaintiff's losses, in a personal injury case where the plaintiff was unable to work, rebalancing the legal relationship between the plaintiff and the defendant would require the defendant to replenish the plaintiff's wealth by paying the plaintiff the wages that the plaintiff lost as a result of the defendant's tort.

148. RESTATEMENT (SECOND) OF TORTS § 901 cmts. a–c (1965); STEIN, *supra* note 44, at 2; 1 J. G. SUTHERLAND, A TREATISE ON THE LAW OF DAMAGES §§ 1–2, at 1–4 (John R. Berryman ed., 3d ed. 1903).

149. CHARLES T. MCCORMICK, HANDBOOK ON THE LAW OF DAMAGES 87–88 (1935).

150. *Id.* at 275.

151. *Id.*

152. BALLENTINE'S LAW DICTIONARY 233 (3d ed. 1969) (defining *compensation* as "a remuneration for services"); BLACK'S LAW DICTIONARY 301 (8th ed. 2004) (defining *compensate* and *compensation* as payment for services rendered or injury suffered); WEBSTER'S, *supra* note 12, at 463, 1921 (defining *compensation* using the word *remuneration* which it defines in turn as payment for services, losses or expenses).

153. SEDGWICK, *supra* note 61, at 46, 73 (emphasis added).

the plaintiff “a sum of money which will restore him as nearly as possible, to the position he would have been in if the wrong had not been committed; in other words, to make plaintiff whole.”<sup>154</sup> A corollary of this position is that the plaintiff’s damages must be limited to the actual loss the plaintiff suffered so that recovery does not bestow a windfall on the plaintiff.<sup>155</sup>

Those same authors undercut the stated general purpose of making a plaintiff whole when they recognize that ubiquitous harms such as pain, suffering, emotional distress, and loss of dignity and honor—all losses recognized by the law—cannot be measured in dollars and cents.<sup>156</sup> Despite Sedgwick’s assertion that noneconomic damages are the pecuniary equivalent of losses such as pain and suffering, overwhelming authority recognizes that no amount of pain and suffering damages can restore a plaintiff to the status quo ante. Money cannot wipe away a plaintiff’s physical pain and mental anguish (past or future) to make the plaintiff whole. The weight of authority agrees with the following often quoted statement by Justice Frank J. Williams:

Pain cannot be measured in money. . . . An instruction that leaves the jury to regard it as an independent item of damages, to be compensated by a sum of money that may be regarded as a pecuniary equivalent, is not only inexact, but it is erroneous. The word *compensation* in the phrase “compensation for pain and suffering,” is not to be understood as meaning price or value, but as describing an allowance looking towards recompense for or made because of the suffering consequent upon the injury.<sup>157</sup>

The Restatement recognizes that while damages for pain, suffering, and humiliation are called compensatory, such damages cannot restore the injured person to his previous position. The sensations caused by harm to the body or by pain or humiliation are not in any way analogous to a pecuniary

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154. 1 JEROME H. NATES ET AL., DAMAGES IN TORT ACTIONS § 3.01[1] (2009); see also HOWARD L. OLECK, DAMAGES TO PERSONS AND PROPERTY § 80, at 59–60 (rev. ed. 1961).

155. NATES, *supra* note 154, § 3.01[1]; OLECK, *supra* note 154, § 80, at 59.

156. NATES, *supra* note 154, § 3.01[1]; OLECK, *supra* note 154, § 172, at 243.

157. Goodhart v. Pa. R.R., 35 A. 191, 192–93 (Pa. 1896); see also HALE, *supra* note 46, §§ 38–39, at 139; OLECK, *supra* note 154, § 176, at 247–49; SUTHERLAND, *supra* note 148, § 1256, at 3680–83; ARCHIBALD ROBINSON WATSON, A TREATISE ON THE LAW OF DAMAGES FOR PERSONAL INJURIES § 312, at 397 (1901).

loss, and a sum of money is not the equivalent of peace of mind. Nevertheless, damages given for pain and humiliation are called compensatory . . . . There is no scale by which the detriment caused by suffering can be measured and hence there can be only a very rough correspondence between the amount awarded as damages and the extent of the suffering.<sup>158</sup>

However, if there is no scale (monetary or otherwise) by which these losses can be measured, it is unclear what meaning to ascribe to the Restatement's phrase, "rough correspondence between the amount awarded as damages and the extent of the suffering."<sup>159</sup> When we speak of damages for economic losses, such as future lost earnings and medical expenses,<sup>160</sup> we would be correct to assert that the damages awarded roughly correspond to the actual amounts the plaintiff will suffer; that is, the finding of fact roughly corresponds to the fact itself. As the future unfolds, it may reveal that the damages that were awarded turn out to be inadequate or overly generous. Thus, unlike past lost earnings and medical expenses, future lost earnings and medical expenses can only be verified, at the time they are awarded, in a weak sense.<sup>161</sup>

The notion of *rough correspondence* implies the existence of a standard or body of evidence against which to measure the amount of damages given, but which does not admit of relative precision. Under current law, however, there is no such standard or body of evidence against which the trier of fact can measure the adequacy of the amount of damages claimed for pain and suffering or other noneconomic losses. Therefore, such damages are not even capable of being objectively verified in a weak sense.

In recognition of the absence of a monetary scale for pain and suffering, Archibald Robinson Watson acknowledges that the use of *compensation* to describe damages given for such losses is "both

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158. RESTATEMENT (SECOND) OF TORTS § 903 cmt. a (1979). The same can be said of losses not mentioned by comment (a), such as loss of reputation, and loss of consortium, which includes detriments like loss of sympathy, confidence, companionship, affection, sexual relationship, or solace.

159. *Id.*

160. *See id.* (describing such *damages* as "designed to place [the plaintiff] in a position substantially equivalent in a pecuniary way to that which he would have occupied had no tort been committed").

161. *See supra* text accompanying notes 91–95.

inappropriate and misleading, the preferable term being ‘indemnity,’ ‘amends’ or ‘reparation.’”<sup>162</sup> He concludes, however, that *compensation* is as good as any other term as long as the jury is “made to understand that no attempt should be made to give a money equivalent for elements of recovery wholly unsusceptible of a money valuation.”<sup>163</sup>

Professor Dan B. Dobbs recognizes that damages cannot replace noneconomic losses such as pain and suffering; and, since no market exists by which such damages can be established, he concludes that damages for such losses “are not compensatory, at least in the ordinary sense.”<sup>164</sup>

While in a narrow sense we use *compensation* to denote the pecuniary equivalent of services rendered or goods sold, the word has a broader meaning that refers to rectifying an imbalance. Indeed, the narrow sense of *compensation* fits within the broader sense. For instance, an employee gives his labor to an employer, thus creating an imbalance. Then, the employer pays the employee wages intended to restore the balance. In such a case, there is a monetary scale—derived from the labor market—that enables us to say the employee has received the monetary equivalent of his labor. While *compensation* is often used in the narrow sense just described, it can also be used to denote situations where there is no equivalency, but nevertheless one “makes up for” or “offsets against” the imbalance. The point is illustrated by the following two statements:

1. Jim, a running back for his football team, *compensated* for his lack of brute strength by relying on his quickness and agility.
2. She has more than *compensated* for her thoughtless and frivolous lifestyle in her twenties by her subsequent devotion to helping the poor.

In fact, legal use of *compensation* to describe something other than a monetary equivalent for an injured party’s loss has deep roots in Anglo-American legal history. As A.W.B. Simpson points out, *bot* is translated as “compensation,” and as we have seen, *bot* is not

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162. WATSON, *supra* note 157, § 312, at 397.

163. *Id.* § 312, at 398.

164. 2 DAN B. DOBBS, LAW OF REMEDIES § 8.1(4), at 382 (2d ed. 1993).

equivalent to items the injured party lost, monetary or otherwise.<sup>165</sup> Similarly, Joseph T. Shipley observes that *bote*, which originally referred to “remedy; advantage; health,” was the source of the noun *boot*, or *bot*, which he says was extended to mean amends and compensation for injury.<sup>166</sup>

In this discussion, I do not mean to suggest that words have true meanings, and that discovering these true meanings will determine the function of noneconomic damages. The meanings of words are a matter of social convention. They represent a tacit social agreement of how we will use certain words. For example, there are a number of bidding conventions in the game of bridge. A given bid under particular circumstances using a particular convention can convey certain information. One bidding convention is no truer than any other. As long as the players agree on the convention, they can communicate information about the cards they hold through the bids they make.

In my discussion of *compensation*, I seek to make the case that the broader view of compensation—one not confined to monetary equivalents—is consistent with how the word has been used in our Anglo-American legal tradition.

This broader meaning of compensation (one not limited to equivalence) in relation to private wrongs is illustrated by how archaic societies treated theft of chattel (our tort of conversion), a wrong where the loss can be measured by an equivalence in kind or in value.<sup>167</sup> Our typical civil remedy for conversion is “the value of the property . . . as of the time when, and the place where, the defendant converted it.”<sup>168</sup> A. S. Diamond points out that until recent times, the civil remedy for theft consisted of a multiple of the stolen object’s value, even when there was an additional punitive or criminal sanction along with the civil remedy.<sup>169</sup> For example, in ancient Athens, the civil remedy was the return of the stolen object and the payment to the plaintiff of twice its value (the compensatory amount), along with an equal amount paid to the state as a fine (a

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165. Simpson, *supra* note 118, at 12; see also *supra* notes 122–136 and accompanying text.

166. SHIPLEY, *supra* note 136, at 107.

167. See MCCORMICK, *supra* note 149, at 463–64.

168. *Id.*

169. DIAMOND, *supra* note 105, at 114.



punitive or penal amount).<sup>170</sup> The point is that where the plaintiff's loss could be measured by the equivalent of the item's value (be it in the form of an object for an object, or the monetary value of the object), some societies required the defendant to pay a multiple of the plaintiff's loss to level the score, to restore the parties to their status quo ante legal relationship, and to compensate the plaintiff for the wrong. The payment increased the plaintiff's prior wealth by three times the value of the converted property.

With this background, we can now turn to the role of noneconomic damages in our tort system. My discussion focuses on answering two questions: (1) What is the meaning and function of noneconomic damages in our tort system? (2) How can such damages be calculated so as not to be arbitrary? One need not accept my answer to the first question in order to accept my answer to the second.

### *C. Economic/Noneconomic Damages: Meaning and Function*

In discussing the meaning and function of economic and noneconomic damages, I address two levels: the personal level and the legal level. By *personal level*, I mean the function of damages for the parties, apart from the state's concern with the parties' legal relationship. By *legal level*, I mean the function of damages as used by the state to adjust legal relationships.

#### 1. Economic Damages

##### *a. Personal level*

I have posited the following designation for *economic damages*: a dollar amount equal to the amount of the plaintiff's lost wealth due to the defendant's tortious conduct as measured, in principal, by the decreased market value of an item, which is recognized by the law as one of loss. The amount of such damages is susceptible to objective (objective-public and objective-societal) verification.<sup>171</sup> These

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170. RUSS VERSTEEG, LAW IN THE ANCIENT WORLD 248 (2002). Cf. 2 POLLOCK & MAITLAND, *supra* note 118, at 495 (discussing a similar punishment scheme for theft in England).

171. Although, as I indicated earlier, future lost earnings may only be verified in a weak sense as compared to the verification of past earnings.

damages can be characterized as compensatory in a narrow sense because the defendant gives the plaintiff a monetary equivalent for the loss of an item's value.

At the personal level, the function of these damages can be viewed as restoring the plaintiff to the status quo ante as measured by a monetary equivalence, thus making the plaintiff whole. A moment's reflection, however, makes it clear that the plaintiff will not be made whole for all monetary losses directly traceable to the defendant's breach. For example, the plaintiff will not ordinarily recover attorneys' fees directly traceable to the defendant's wrong even though the defendant's wrong directly caused the plaintiff to resort to the courts for an appropriate remedy. Nevertheless, at least for those economic losses that the law recognizes as the subject of damages, the plaintiff can be made whole. Such damages compensate—make up for, offset, or rebalance—the plaintiff's losses by giving the plaintiff a monetary amount equal to that which the plaintiff lost. In other words, the plaintiff can be restored to the status quo ante—the plaintiff's pecuniary condition prior to the defendant's breach.

*b. Legal level*

I also contend that both economic and noneconomic damages have an additional function at the legal level. The state, using its coercive power, creates a legally enforceable remedy to rebalance a disturbance of a state-sanctioned rights/duties equilibrium. This remedy is an appropriate atonement for the restoration of that equilibrium even though it may not necessarily restore the plaintiff to the status quo ante.

By now, this view should be familiar. It is rooted in the idea, as expressed by Hyams, that individuals who see themselves as objects of injustice or wrongs are driven to "level the score"—"a goal of balance."<sup>172</sup> Certain wrongs are recognized by the state and are expressed in terms of rights and duties. When the rights/duties equilibrium is unbalanced, the state prescribes the sanction (the remedy) to rebalance the equilibrium.

In our Anglo-American tradition, we have seen individuals resort to retaliation as a means to rebalance, supplanted by the state's

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172. HYAMS, *supra* note 140, at 39.

remedy of composition. Codified compositions took the form of tariffs calibrated by the type of injury and the status of the injured. They were labeled *bot* or *boot*, meaning “[t]o free (a person) from faults”<sup>173</sup>—*bot* as an atonement “to produce harmony,” to “set at one, after discord or strife,” the “staunching of strife.”<sup>174</sup> *Bot* (compensation for retaliation forgone) gave way to damages (compensation for losses suffered). When losses are economic, there is an objective-societal metric of market value, which translates the loss into dollars. As we have seen in some societies, including ancient Athens, the price to restore the rights/duties equilibrium of economic losses (as in conversion) is a multiple of that metric. However, in our system, the price is capped by that metric, but only for economic losses that the law deems are recoverable. For example, in discussing how far liability for losses caused by a defendant will be extended, Prosser observes, “Just as liability for negligence has tended to be restricted within narrower boundaries than when intentional misconduct is involved, there is a visible tendency to restrict it still further when [in strict liability] there is not even negligence.”<sup>175</sup>

The observation illustrates the dual but distinct function of damages at both the personal and the legal level. For example, assume there are three plaintiffs who each suffer extensive, identical economic losses due to the same injury. The first asserts a claim based on the defendant’s intentional invasion of his legally protected right, the second is based on the defendant’s negligence, and the third is based on strict liability. Arguably, the first plaintiff could recover for more losses than the other two plaintiffs. Consequently, the amount of wealth restoration would be greater for the first plaintiff than for the others. This is true even though all three plaintiffs suffered the same injury, lost the same wealth, and for all

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173. 5 THE OXFORD ENGLISH DICTIONARY, *supra* note 131, at 174 (defining *emend*). Emendable offenses were harms for which *bot* was available. See *supra* text accompanying notes 130–131.

174. 1 THE OXFORD ENGLISH DICTIONARY, *supra* note 133, at 754–55 (defining *atone*). *Bot* was seen as an atonement rather than as a pecuniary measure of foregone retaliation. See *supra* text accompanying notes 132–135.

175. KEETON ET AL., *supra* note 49, § 79, at 560 (footnote omitted). Further, even though compensation for pain and suffering is a ubiquitous element of the price for rebalance in tort law, it is not a recoverable loss when it comes to the tort of injurious falsehood. RESTATEMENT (SECOND) OF TORTS § 623A cmt. f (1965).

three the rights/duties equilibrium would be restored to its status quo ante. Because our law has chosen to calculate the price of rebalancing this equilibrium in terms of a plaintiff's loss, damages for economic losses are, at the personal level, restorative of lost wealth. However, that should not obscure their function at the legal level.

This brings us to noneconomic losses, where we have no objective-societal metric with which to translate the losses into dollars.

## 2. Noneconomic Damages

### *a. Personal level*

I have posited the following designation for *noneconomic damages*: a dollar amount for the tortious deprivation or impairment of an item, which is recognized by the law as one of loss and of value, for which the defendant must pay damages; but, one which, in principal, has no market value—no exchange value. When I use the term *market value*, I do not refer only to a verifiable existing market. My use of the term includes a normative dimension. For example, one plot line in the film *Dirty Pretty Things* involves a market for kidneys sold by aliens illegally residing in England.<sup>176</sup> Even if such a market existed, as of now, it would not provide a metric for a lost kidney because it would be a black market.<sup>177</sup> Thus, the exchange rate to which I refer is one that also has a normative dimension in that the community recognizes and approves it.

If an item of loss, such as harm to reputation or pain and suffering, has no exchange rate or dollar value either in a factual or normative sense (meaning that it has no acceptable objective-societal metric for translation of the loss into dollars), we are faced with the following question: at the personal level, what function do damages serve for various losses that have no dollar values?

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176. *DIRTY PRETTY THINGS* (British Broad. Corp. 2002). If I recall correctly, the price for a kidney was £10,000 and an excellently forged British passport.

177. Of course, what is a black market in one community may not be one in another; and what is a black market in a particular community at a particular time may not be one at another time. See Laura Meckler, *Medical Malpractice: Kidney Shortage Inspires a Radical Idea: Organ Sales—As Waiting List Grows, Some Seek to Lift Ban; Exploiting the Poor?*, WALL ST. J., Nov. 13, 2007, at A1.

As noted earlier, Jaffe suggests that such damages may establish the plaintiff's self-confidence, wipe out the plaintiff's sense of outrage, or may be a consolation or solace.<sup>178</sup> As we have seen, the notion of damages as assuaging the plaintiff's sense of outrage has some pedigree in the archaic treatment of wrongs, specifically in composition. The notion of damages as solace is also not without precedent. For example, the law of Scotland uses the word *solatium* to describe what we call noneconomic damages as "an award made as solace or compensation for intangible non-pecuniary loss."<sup>179</sup>

But, as we consider these two rationales, we need to bear in mind the difference between a statement of how such damages actually function for the individual plaintiff (a descriptive statement), and how society says such damages ought to function (a normative judgment or prescriptive statement). The former is subjective-individual and the latter is objective-societal.<sup>180</sup> Any particular plaintiff may find that no sum will assuage the plaintiff's sense of outrage or console the plaintiff for pain and suffering at the hands of a negligent defendant. Others may feel no need to be assuaged or consoled by money. When a court determines the award of noneconomic damages, it does not do so by considering the psychic needs of the particular plaintiff vis-à-vis the plaintiff's sense of outrage and how many dollars it will take to quench it. Nor does the court consider how many dollars will be a sufficient solace for each particular plaintiff. It does not make subjective-individual determinations. At best, if noneconomic damages are to be justified as solace or catharsis, they can be so justified only as an amount that *ought* to be sufficient, not one that actually *is* sufficient. Thus, noneconomic damages are prescriptive rather than descriptive. Such rationales are not totally inconsistent with my position. However, in addition to failing to distinguish between descriptive and prescriptive, these rationales suffer by leaving the defendant out of the equation, whereas my view does not.

Before presenting my view, a word on the Canadian functional approach, which was first articulated as a rationale for loss of

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178. JAFFE, *supra* note 6, at 224.

179. DAVID M. WALKER, *THE LAW OF CIVIL REMEDIES IN SCOTLAND*, 886 (1974).

180. *See supra* Part II.A.3.c.

amenities, is appropriate.<sup>181</sup> In this view, noneconomic damages function to provide solace.<sup>182</sup> But *solace* is not used to describe a sympathy award; rather, it denotes an amount of dollars that allows the plaintiff to purchase physical arrangements that can make life more endurable in the face of the noneconomic loss that the plaintiff must bear—dollars sufficient to “purchase substitute sources of satisfaction.”<sup>183</sup> This approach is consistent with both the broad and narrow sense of compensation. It is consistent with the broad sense because it views noneconomic damages as an offset or counterbalance for losses rather than as an equivalent for them. Damages serve to purchase arrangements to make the plaintiff’s life more endurable—to offset the noneconomic loss the plaintiff must continue to endure. It is consistent with the narrow sense because the costs of those arrangements have a market value; dollars are the metric for those costs.

But the Canadian approach poses problems for our intuition and actual practice, for it is possible at some point that there may be an inverse relationship between the gravity of the harm and the amount given as noneconomic damages. In W.H.R. Charles’s words, “If, for example, a plaintiff will suffer severe pain and suffering . . . but nothing can be done . . . to make that pain and suffering more endurable then, according to the functional approach, [noneconomic] damages should not be awarded.”<sup>184</sup> Thus, a plaintiff who loses a leg and is curtailed in an activity in which the plaintiff engaged before the injury, and who can make use of a number of substitute satisfactions, may receive a larger award of noneconomic damages than a plaintiff who becomes confined to an iron lung machine for life due to the defendant’s conduct, but for whom there are few, if any, substitute satisfactions.

That may be one reason why, in practice, Canadian judges do not look to the cost of providing physical arrangements to make a

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181. See A.I. Ogus, *Damages for Lost Amenities: For a Foot, a Feeling or a Function?*, 35 MOD. L. REV. 1 (1972).

182. Fridman, *supra* note 5, at 501.

183. *Id.*; see also LAW COMM’N, *supra* note 7, ¶ 2.3 (explaining that damages for non-pecuniary loss under the functional approach are awarded as solace in the form of dollars sufficient to “purchase substitute sources of satisfaction”).

184. W.H.R. CHARLES, THE SUPREME COURT OF CANADA HANDBOOK ON ASSESSMENT OF DAMAGES IN PERSONAL INJURY CASES 17–18 (1982); see also LAW COMM’N, *supra* note 7, ¶ 4.9 (providing additional criticisms of the functional approach).

plaintiff's life more enduring. Instead, they use a comparative tariff system. They compare "the facts of the particular case to those of previous cases for similar injuries in determining damages for pain and suffering and loss of amenities of life."<sup>185</sup> The amounts given in similar cases guide the amount to be given in any particular case.<sup>186</sup>

Justice Williams helped point the way to my position on how noneconomic damages function at the personal level when he stated, "The word 'compensation,' in the phrase 'compensation for pain and suffering,' is not to be understood as meaning price or value, but as describing an allowance looking towards recompense . . ."<sup>187</sup> *Allowance* means as a sum of money allocated or granted for a particular purpose.<sup>188</sup> When *Webster's* defines the verb form of *recompense* as to "make up for by or as if by atoning for or requiting," it provides the following example: "a pleasure that *recompensed* our trouble."<sup>189</sup> The example implies that one item, pleasure, counterbalances against the other, trouble. And it does so without necessarily implying that they are commensurate—implying that they have a common measure. We may be able to quantitatively compare the value of the inability to work (lost earnings) to the cost of medical treatment we must undergo (medical expenses) because they can be expressed in terms of their common measure—their exchange values. We cannot do the same comparison with trouble and pleasure even though pleasure may make up for, offset, compensate, counterbalance, or meliorate trouble we have undergone. We can paraphrase Justice Williams as follows:

Compensatory damages for noneconomic losses cannot be understood as meaning price or value for such losses; rather, they are allocated money given to make up for (as much as possible) the loss suffered—to meliorate, offset, or counterbalance a loss which nevertheless remains a loss. It is a meaningful, symbolic sum, whereby a defendant can

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185. LAW COMM'N, *supra* note 7, at 62 n.148.

186. *Id.* ¶ 4.9(iii).

187. *Goodhart v. Pa. R.R. Co.*, 35 A. 191, 193 (1896); *see also supra* note 157 and accompanying text.

188. THE RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE UNABRIDGED 41 (1983).

189. WEBSTER'S, *supra* note 12, at 1897.

show the appropriate respect to the plaintiff for a loss he tortiously caused and is unable to fix.

The point where incremental dollar amounts lose their symbolic value may be a matter of dispute, or more accurately, a matter of agnosticism or befuddlement. Yet the acceptable (but artificial) amounts are not without limit. This thought is captured by Lord Patrick Arthur Devlin's discussion of damages for mental suffering:

What is meant by compensation that is fair and yet not full? I think it means this. What would a fair-minded man, not a millionaire, but one with a sufficiency of means to discharge all his moral obligations, feel called upon to do for a plaintiff . . . ? It will not be a sum to plumb the depths of contrition but one that will enable him to say he has done whatever money can do . . . . What more should he do so that he can hold up his head among his neighbours and say with their approval that he has done the fair thing?<sup>190</sup>

Devlin's formulation describes the appropriate symbolic sum as objective-societal (a sum that meets the approval of his neighbors) and not one which is subjective-individual (a sum that meets a particular plaintiff's or defendant's approval). I discuss how to calculate such a sum in Part D.

The logic underlying noneconomic damages can be recognized in nonlegal contexts. Suppose during a visit to your home, I carelessly break an irreplaceable and cherished family heirloom that has little, if any, market value. I may buy you a very nice gift as a tangible gesture intended to mitigate or offset, as much as possible, the loss that I have caused but cannot fix. While I did not replace the heirloom, my tangible, symbolic act constitutes my recognition of my responsibility for your loss. My act seeks, as far as possible, to do the fair thing by way of making amends. However, you may not require such a gesture to assuage your sense of anger or as a solace for your loss. Or it may be that no matter what I do, I cannot appease you. Yet because of the pervasiveness in our communities of gift-giving and making amends for the gamut of ordinary acts that

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190. *H. West & Son Ltd. v. Shephard*, [1964] A.C. 326, 356–57 (H.L.) (U.K.). This idea of the dual character of noneconomic damages (an offset for the plaintiff's loss and, at the same time, an amount whereby the defendant may say he has done the fair thing) has some recognition in German law. B.S. MARKESINIS, *A COMPARATIVE INTRODUCTION TO THE GERMAN LAW OF TORTS* 949 (3d. ed. 1994).



disappoint the legitimate expectations of others and cause them irreplaceable harms, a disinterested observer may be able to make a rough judgment as to whether the community would consider my act as all that can be fairly asked of me to show the proper respect—an appropriate offset—for the loss I have caused and cannot fix. Noneconomic damages function in a similar fashion at the personal level. They are the community's measure of the defendant's symbolic atonement to the plaintiff for losses that cannot be wiped away. They signify the fact that the plaintiff was wrongfully injured by the defendant, and the extent of losses suffered as a result of the injury. They represent the appropriate respect the defendant must fairly show the plaintiff for losses that the defendant tortiously caused but cannot fix.

*b. Legal level*

The function of noneconomic damages at the legal level, I argue, is the same as the function of economic damages. That is, noneconomic damages work to restore the legal relationship between the parties to the status quo ante. The defendant pays a symbolic sum that the jury determines will offset a loss that cannot be eliminated by that sum. When the defendant pays this sum, he has done all that can be fairly required of him to show the appropriate respect for the loss he has caused and which he is unable to fix. And, that payment restores the status quo ante legal relationship. This does not mean that the plaintiff will necessarily agree or view the defendant as he did prior to the tort. But it does mean that the legal relationship has been rebalanced; thus, from the legal perspective, the plaintiff has no further claim against the defendant.

I would like to illustrate (using punitive damages) how my approach could open up the possibility of looking at various damage issues in new ways. I believe that it may be possible to fold what we now call *punitive damages* into *compensatory damages*. Thus, we can avoid the various criticisms raised over punitive damages as part of a civil action.

In the nineteenth century, there was a debate between Simon Greenleaf and Theodore Sedgwick regarding punitive damages.<sup>191</sup>

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191. See generally SIMON GREENLEAF, 2 A TREATISE ON THE LAW OF EVIDENCE (3d ed. 1853, reprint 1972); THEODORE SEDGWICK, A TREATISE ON THE MEASURE OF DAMAGES (Arthur G. Sedgwick & Joseph H. Beale eds., 9th ed. 1912) (1847).

Greenleaf's position was that punitive damages are not appropriate in a civil action. He argued that what some point to as examples of punitive damages are in fact aggravated compensatory damages based on the character of the defendant's conduct and its effect on the plaintiff's psyche.<sup>192</sup> Sedgwick disagreed and argued in favor of allowing punitive damages in a civil action.<sup>193</sup>

The Supreme Judicial Court of New Hampshire summarized the Greenleaf/Sedgwick disagreement and sided with Greenleaf's position that the manner in which the injury was inflicted affected the seriousness of the impact of the defendant's wrong on the plaintiff.<sup>194</sup> "[T]he term *smart money* was employed . . . as indicating compensation for the smarts [suffered by] the injured person [as opposed to punitive damages] to make the wrong-doer smart."<sup>195</sup> The idea is that the psychic impact on the plaintiff is partly a function of the motive and character of the defendant's conduct. England has adopted this approach.<sup>196</sup> The defendant's motive and the character of his conduct may be considered in determining compensatory damages for losses that cannot precisely be calculated in monetary terms. In these instances, motive and character of conduct aggravate the plaintiff's noneconomic injury, and compensatory damages increase to reflect that. England's common law reserves punitive damages only for those instances involving (1) "oppressive, arbitrary or unconstitutional action by the servants of the government;" and (2) "cases in which the defendant's conduct has been calculated by him to make a profit for himself."<sup>197</sup>

Harking back to my previous example, the appropriate gift for me to give you when I destroy your irreplaceable and treasured heirloom, which has little market value, may differ depending on whether I broke it inadvertently or, by trying to juggle it with two other objects in disregard of your strenuous objections. Thus, before the jury can ask the defendant to show the appropriate respect for a loss he cannot fix, the jury may need to determine whether the

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192. GREENLEAF, *supra* note 191, at 244.

193. SEDGWICK, *supra* note 191, at 38–39.

194. *Fay v. Parker*, 53 N.H. 342 (1872).

195. *Id.* at 355.

196. CLERK AND LINDSELL ON TORTS 1625 (Anthony M. Dugdale et al. eds., 18th ed. 2000).

197. *Id.* at 1626–30.

defendant caused the loss through ordinary negligence or through reckless or intentional misconduct.<sup>198</sup>

In this discussion of noneconomic damages, I have repeatedly referred to the phrase *an appropriate sum*. This discussion would not be complete without addressing the questions of what is an appropriate sum and how it should be calculated. I turn to this calculation now with the reminder that one can accept the method I propose for the *appropriate calculation* of noneconomic damages without accepting my view of the *function* of noneconomic damages.

#### D. Calculation of Noneconomic Damages: Conventional Versus Arbitrary

##### 1. The Translation of Noneconomic Losses into Dollars

The lack of an external standard against which to measure the sum given for noneconomic losses—the fact that dollar amounts for such losses are not, in principle, objectively verifiable<sup>199</sup>—explains why in our system “the trier of fact has virtually untrammelled discretion in determining an award for pain and suffering [and] as a general rule, [the award] will not be rejected, reversed, or corrected by either the trial court or an appellate tribunal absent clear abuse or bias exercise of that discretion.”<sup>200</sup> It also explains why “the extent of recovery, after the liability . . . has been established, is, in theory at least, one of pure fact and not of law at all.”<sup>201</sup> Furthermore, it explains why courts are “extremely reluctant to interfere with the amount of damages given”<sup>202</sup> and will do so only when “the amount is so large as to indicate that the jury . . . [was] influenced by passion, prejudice, partiality or corruption.”<sup>203</sup>

An early New York case contrasted, on the one hand, compensation for pecuniary losses where “the jury ha[s] no arbitrary discretion, but must be governed by the weight of the evidence” with

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198. The civil remedy for theft in ancient Athens could be explained in this manner. *See supra* note 170 and accompanying text; *see also* FRANCIS M. BURDICK, *THE LAW OF TORTS* 232 (3d. ed. 1913) (explaining that jurisdictions that do not award punitive damages often take into account the defendant’s intent to compensate for the plaintiff’s injured feelings).

199. *See supra* notes 99–102 and accompanying text.

200. NATES, *supra* note 154, § 4.168–169.

201. WATSON, *supra* note 157, at 409.

202. *Id.* at 411.

203. *Id.* at 410.

compensation given for noneconomic losses, on the other hand. The court explained, "For pain and suffering or injuries to feeling, there can be no measure of compensation, save the arbitrary judgment of a jury."<sup>204</sup> The use of the term *arbitrary* is appropriate because the jury is not constrained or guided by anything other than its honest judgment of what it believes ought to be reasonable; its judgment is subjective-individual. Contrast this with the judgment a jury must make in determining if a defendant's act measures up to the reasonable standard of care. There, the trier of fact is directed to look to what the community would consider acts of a reasonable person (an objective-social judgment) rather than looking to what the trier of fact would consider reasonable (a subjective-individual judgment).<sup>205</sup> The court's use of the word *arbitrary* is apt; for without any external standard to guide the fact finders, a series of jury verdicts for similar injuries or losses will lack predictability and consistency.<sup>206</sup>

Mark Geistfeld recognizes the potential arbitrariness of such awards, but using the distinction between vertical and horizontal equity, he argues they are not completely arbitrary. He relies on data that suggest that as the severity of the injury increases, damages tend to increase ("indicating some degree of 'vertical equity'"); however, he also notes that the amount of such awards for similar injuries often significantly varies ("indicating a lack of 'horizontal equity'").<sup>207</sup>

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204. *Leeds v. Metro. Gas-Light Co.*, 90 N.Y. 26, 29–30 (1882).

205. RESTATEMENT (SECOND) OF TORTS §§ 283 cmt. c, 328(c) cmt. b (1965). In actual deliberations, jurors may be less than fastidious in separating what they may view as prudent from what the community would consider prudent. Even under such circumstances, however, we assume that by living in and interacting with their community, jurors' views would be influenced by and reflective of their community's view of the social utility of the defendant's conduct and the seriousness of the plaintiff's loss discounted by the probability of their occurrence. *See supra* note 97. Also, jury instructions tethering the jury to the reasonably prudent person standard should be some check on jurors who narrowly viewing the issue in terms of their own views, which may be idiosyncratic and out of the mainstream of plausible community standards. Of course, jury verdicts are also subject to review by judges who we assume are, by training and professional standards, more fastidious in separating their own views of whether the defendant acted prudently from a different but plausible community standard. The standard imposed, even if it is not always followed, calls for an objective-societal determination rather than a subjective-individual determination.

206. James F. Blumstein et al., *Beyond Tort Reform: Developing Better Tools for Assessing Damages for Personal Injury*, 8 YALE J. ON REG. 171, 172–78 (1991).

207. Mark Geistfeld, *Placing a Price on Pain and Suffering: A Method for Helping Juries Determine Tort Damages for Nonmonetary Injuries*, 83 CAL. L. REV. 775, 783–85 (1995).

This, I believe, accords with our basic intuitions. People would generally agree that compensation should increase to reflect the increased gravity of the loss being compensated, even if the compensation is symbolic. The amount of noneconomic damages must increase as the gravity of harm increases, particularly if those damages are supposed to enable defendants to hold their heads up among their neighbors and say that they have done all they can fairly be asked to do to offset with money a loss that they have caused but which money cannot replace. Individual jurors may find it difficult to distinguish, in terms of gravity, between complete paralysis from the neck down and third-degree burns over a large portion of one's body. But because individuals share a rough sense of relative severity, they would be able to agree that both are more serious than a fracture which, after treatment, will heal; so both should be compensated at a higher rate than the fracture. I also believe that we would find wide disagreement or befuddlement among juries regarding the appropriate dollar amount of damages for the paralysis or for the burns, even when they might agree as to the relative gravity of the harms. This disagreement leads to a lack of horizontal equity. As Peter Cane points out,

There appears to be no objective way of working out any relationship between the value of money . . . and damages awarded for pain, suffering and loss of amenities. All such damages awards could be multiplied or divided by two overnight and they would be just as defensible or indefensible as they are today.<sup>208</sup>

Because there is no community standard—no objective-societal metric—for translating noneconomic losses into dollars, the lack of horizontal equity should not be unexpected. Put another way, it should be expected that the noneconomic damages awarded will be arbitrary—that over a series of awards, the dollar amounts for similar losses will not be consistent and predictable.

Interestingly, Paul Robinson and Robert Kurzban report a parallel phenomenon that links the seriousness of criminal wrongdoing and appropriate punishment. They state,

It is not that everyone agrees on a specific sentence for each case [comparable to horizontal equity]. On the contrary,

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208. PETER CANE, *ATTIYAH'S ACCIDENTS, COMPENSATION AND LAW* 162 (7th ed. 2006).

some people would give generally harsher punishment and others generally less harsh punishment. But whether harsh or lenient punishers, people tend to agree on the relative degree of blameworthiness among a set of cases [comparable to vertical equity].<sup>209</sup>

Understanding that a noneconomic loss “is not susceptible of measurement in money,” England has recognized that “[a]ny figure at which the assessor of damages arrives cannot be other than artificial.”<sup>210</sup> Though *artificial*, such a figure can also be conventional; and “‘conventional’ . . . does not or should not mean that the amount is arbitrary, but rather that it is arrived at by general custom and agreement.”<sup>211</sup> To eliminate (or at least diminish) arbitrariness, England has created a conventional tariff system for noneconomic losses. A key case in that creation was *Ward v. James*.<sup>212</sup> The court, speaking of cases involving unconsciousness, stated that a pattern or scale of awards had emerged from cases where judges decided damages.<sup>213</sup> But because juries are not told about the pattern, “they are left to grope in the dark without any guidance.”<sup>214</sup> Consequently, jury determinations lack uniformity and predictability.<sup>215</sup> Lord Alfred Thompson Denning concluded,

We have come . . . to realise that the award of damages in personal injury cases is basically a conventional figure derived from experience and from awards in comparable cases. Yet the jury are not allowed to know what that conventional figure is. The judge knows it, but the jury do[es] not. . . . [Therefore] the judge ought not, in a personal injury case, to order trial by jury . . . . Even when the issue of liability is one fit to be tried by a jury, nevertheless he might think it fit to order that the damages be assessed by a judge alone.<sup>216</sup>

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209. Paul Robinson & Robert Kurzban, *Concordance and Conflict in Intuitions of Justice*, 91 MINN. L. REV. 1892, 1854–55 (2007).

210. *Wright v. British Ry. Bd.*, (1983) 2 A.C. 773, 777 (H.L.) (appeal taken from Eng.) (emphasis omitted); see also FRANCIS MCMANUS & ELEANOR RUSSELL, DELICT 521–22 (1998).

211. MUNKMAN, *supra* note 2, at 20–21.

212. *Ward v. James*, (1966) 1 Q.B. 273.

213. *Id.* at 299.

214. *Id.* at 299.

215. *Id.* at 300.

216. *Id.* at 303.

In effect, Lord Denning would have such damages always decided as a matter of law rather than fact.<sup>217</sup>

*Ward v. James* has taken hold in England, so personal injury damages are almost invariably assessed by judges. What has developed is a tariff system whereby ranges of awards are established for particular types of injuries and disabilities.<sup>218</sup>

At first, the awards were set by the small group of judges who regularly decided personal injury cases and who were able to discuss awards with one another. As a result, a sort of tariff system emerged from reported cases. Now the courts also have the assistance of the Guidelines for the Assessment of Damages in Personal Injury Cases (the "Guidelines"), which distills damages awards and gives the lower and upper figures for each type of injury listed.<sup>219</sup> In this way, the issue of horizontal equity (the greatest source of arbitrariness) is addressed. For it is to be expected that rough agreement among judges would emerge on the sums to be given for similar noneconomic injuries where (1) initially, such sums were not objective-publicly verifiable (no external standard existed that allowed them to test the correctness of the sums they awarded); and (2) in each case, the judge knew of and was influenced by all other judges' awards for similar injuries.

In the United States, some commentators have suggested ways to use past jury verdicts to achieve horizontal equity in sums given for similar injuries. Randall R. Bovbjerg et al. propose constructing a matrix that determines the relative ratios for noneconomic damages.<sup>220</sup> This matrix would be based in large part on data from previous verdicts, broken down by the nine-point severity scale (which appears in table 1) and by six age categories, yielding 54

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217. *But cf. supra* notes 198–207 and accompanying text.

218. One possible consequence of such a tariff system, as reflected in Munkman's statements, is to foster the idea that the conventional values established for the various types of injuries are money equivalents for these injuries—the "fair value on the lost limb or eye, or whatever the injury is." MUNKMAN, *supra* note 2, at 17. I obviously reject this view. We would not expect people to subject themselves to the loss of a limb in exchange for the highest tariff reported for such a loss. And even if someone were willing to enter into such an arrangement, the community would not sanction it. *See supra* notes 176–177 and accompanying text.

219. CANE, *supra* note 208, at 167–68. The 2006 Guidelines list approximately 250 injury categories along with their respective tariffs. Interestingly, burns are not among these categories.

220. Randall R. Bovbjerg et al., *Valuing Life and Limb in Tort: Scheduling "Pain and Suffering,"* 83 NW. U. L. REV. 908, 939 (1989).

cells.<sup>221</sup> The “65 and over age” and “severity level 9” cell would be the base cell with a value of 100 (the monetary equivalent for that base value would be a separate issue).<sup>222</sup> Once the jury finds the appropriate cell for the plaintiff’s claim, it would multiply that cell ratio by the base cell’s monetary equivalent.<sup>223</sup> For instance, in their sample matrix, the “51 to 64 age” and “severity level 6” cell ratio value is 88.<sup>224</sup> Once the jury finds that the plaintiff’s injury falls in this cell, it would determine damages by multiplying the monetary equivalent for the base call by 0.88.<sup>225</sup> The authors recognize that the rigidity of their matrix, which does not allow for variations within cells, may meet resistance.<sup>226</sup> They abandon any use of jury verdicts in suggesting how one might create cell flexibility (that is, ranges within cells).<sup>227</sup>

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221. *Id.* at 941–42.

222. *Id.* at 945.

223. *Id.*

224. *Id.* at 944.

225. *Id.* at 943–44.

226. *Id.* at 946–47.

227. *See id.* at 948. That is, dispersion within cells, where the lack of horizontal is most common, is not addressed using actual jury awards.



**TABLE 1****SEVERITY SCALE**<sup>228</sup>

<b>Level</b>	<b>Severity of Injury</b>	<b>Examples</b>
1	Emotional only	Fright. No physical damage.
2	Temporary insignificant	Lacerations, contusions, minor scars, rash. No delay.
3	Temporary minor	Infections, (mis-set) fracture, fall in hospital. Recovery delayed.
4	Temporary major	Burns, surgical material left, drug side-effect, brain damage. Recovery delayed.
5	Permanent minor	Loss of fingers, loss or damage to organs. Includes non-disabling injuries.
6	Permanent significant	Deafness, loss of limb, loss of eye, loss of one kidney or lung.
7	Permanent major	Paraplegia, blindness, loss of two limbs, brain damage.
8	Permanent grave	Quadriplegia, severe brain damage, lifelong care or fatal prognosis.
9	Death	

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228. Bovbjerg et al., *supra* note 220, at 921.

James F. Blumstein et al. propose the creation of a comprehensive databank of detailed jury verdicts.<sup>229</sup> Noneconomic damages sums would be sorted by the nine-point severity scale, which would show the range of awards for each category.<sup>230</sup> For any given severity of injury, an award within the twenty-fifth and seventy-fifth percentiles (i.e., the interquartile range, which subsumes 50 percent of the verdicts) would be presumptively permissible, but awards outside this range would require explanation.<sup>231</sup>

Both of these proposals are aimed at creating horizontal equity for noneconomic damages awards. While they seek to inject some consistency and predictability for awards for similar injuries, they also suffer drawbacks.<sup>232</sup>

First, the nine-point severity scale is too insensitive an instrument to capture the variety of factors that would call for distinguishing among various injuries within the same severity level. It masks too many factors that would call for different sums for injuries falling within the same severity level.<sup>233</sup> The *Consultation Paper No. 140*, for example, points out that there is a range of damages awards for each of the numerous types of categories covered by England's tariff system, and that the factors that determine the level within that range for any given case "are infinitely variable."<sup>234</sup> It singles out severity and duration,<sup>235</sup> but it goes on to list eight additional factors that may determine severity.<sup>236</sup>

Second, to seek to eliminate the lack of horizontal equity in jury awards (lack of consistency and predictability in sums given for similar injuries) using those same verdicts locks in and perpetuates

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229. Blumstein et al., *supra* note 206, at 178, 180–81.

230. *See id.* at 183–84.

231. *Id.* at 181–82.

232. *See* Peter H. Schueh, *Scheduling Damages and Insurance Contracts for Future Services: A Comment on Blumstein, Bovbjerg, and Slone*, 8 YALE J. ON REG. 213, 217–19 (1991).

233. Bovbjerg et al. acknowledge additional factors might be added to their age categories and the nine severity levels that make up their proposed matrix. But they also caution that adding these factors may render their approach "too complex to be administered and credible." Bovbjerg et al., *supra* note 220, at 946–47.

234. LAW COMM'N, *supra* note 7, at 22.

235. *Id.*

236. *Id.* at 22–27. The eight factors are as follows: (1) intensity of the pain; (2) level of insight; (3) age or stage of life; (4) reduced life expectancy; (5) pre-injury hobbies or amenities; (6) preexisting disability; (7) gender; and (8) circumstances in which the injury was sustained.

the very flaw one is seeking to eliminate. Such data are not a propitious antidote to the lack of horizontal equity because they contain as an ingredient the very thing the antidote is supposed to eliminate; namely, lack of social agreement. This point is illustrated by some of the data compiled by Bovbjerg et al. (the "Bovbjerg data") from 366 noneconomic Florida and Kansas City jury evaluations,<sup>237</sup> which appear in table 2.

**TABLE 2**

**INTERQUARTILE RANGE OF SELECTED JURY VERDICTS  
OF NONECONOMIC DAMAGES BY SEVERITY LEVEL**

<b>Severity Level</b>	<b>Interquartile Range (in thousands of dollars)</b>	<b>Number of Cases</b>	<b>75th Percentile as Multiple of the 25th Percentile</b>	<b>Increase from 25th Percentile to 75th as Percentage of 25th Percentile</b>
4	4-60	16	15	1,400%
5	3-152	104	50.67	4,967%
6	9-598	29	66.44	6,544%
7	336-3,466	15	10.32	932%
8	778-8,936	5	11.49	1,049%

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237. Bovbjerg et al., *supra* note 220, at 937, 944. The 366 cases upon which the data are based make up but a tiny sample of the multitude of such awards over the years and over various jurisdictions. I use them only to suggest propositions and to illustrate or lend plausibility to my intuitions and assumptions.

Even though the ranges in table 2 are compressed from the total range to the interquartile range,<sup>238</sup> the narrowest range, which occurs at level 7, represents a more than tenfold increase in the interquartile range. The widest range, which occurs at level 6, represents a more than sixty-six-fold increase.

The Bovbjerg data also report values falling two standard deviations from the mean (the “C-Values”).<sup>239</sup> For this data, there were no C-Values below the mean—only values above the Plus C-Values”).<sup>240</sup> Using the Plus C-Values reported by Bovbjerg, table 3 describes the increases from the 25th percentile to the Plus C-Value (i.e., the values that are two standard deviations above the mean).

TABLE 3

RANGE BETWEEN THE 25<sup>TH</sup> PERCENTILE AND THE PLUS C-VALUE  
FOR SELECTED JURY VERDICTS OF NONECONOMIC DAMAGES  
BY SEVERITY LEVEL

Severity Level	Range from 25th Percentile to Plus C-Value (in thousands of dollars)	Number of Cases	Plus C-Value as Multiple of 25th Percentile	Increase from 25th Percentile to Plus C-Value as Percentage of the 25th Percentile (approximate)
4	4–284	16	71	7,000%
5	3–1,507	104	502	50,133%
6	9–1,564	29	174	17,278%
7	336–8,970	15	27	2,570%
8	778–14,207	5	18	1,726%

238. According to Blumstein et al., verdicts within this range would be prescriptively permissible. See Blumstein et al., *supra* note 206 and accompanying text.

239. Bovbjerg et al., *supra* note 220, at 936 n.147.

240. The fact that there are values two standard deviations above the mean and none at two standard deviations below the mean suggests that jury verdicts were compressed below the mean and spread out above it—that there were more dramatic outliers above the mean. The data in table 5, which show that the means (which are arithmetically sensitive to the spread of values) are consistently higher than the medians (which are not spread-sensitive), imply the same distribution spread above and below the mean.

Table 3's extravagant ranges of jury verdicts (especially given the small number of cases upon which they are based), stand in stark contrast to judge verdicts under the English tariff system. We can make such a comparison because examples of injuries for the various severity levels given in table 1 have some counterparts in England's 2006 edition of the Guidelines. This comparison appears in table 4 below. The first three columns replicate columns one, two, and five in table 3. The fourth column describes the particular injuries listed by severity level in table 1 that also appear as injuries in the Guidelines.<sup>241</sup> The fifth column reports the tariff range for the injuries listed in the Guidelines (in thousands of pounds), and the last column reports the increase from the bottom of the tariff range to the top, as a percentage of the low figure.

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241. Mackay et al., *supra* note 16.

TABLE 4

**COMPARISON OF SELECTED JURY VERDICTS FOR  
NONECONOMIC INJURIES AND ENGLISH TARIFFS**

Severity Level	Bovbjerg Data		English Tariffs		
	Range from 25th Percentile to Plus C-Value (in thousands of dollars)	Increase from 25th Percentile to the Plus C-Value as a Percentage of 25th Percentile	Type of Injuries	Tariff Range (in thousands of pounds)	Increase from Low End of Tariff Range to High End as Percentage of Low End
6	9-1,564	17,728%	<ul style="list-style-type: none"> <li>• Total deafness</li> <li>• Loss of hearing in one ear</li> <li>• Amputation of one leg</li> <li>• One kidney</li> </ul>	18.1-81.5	350%
7	336-8,970	2,570%	<ul style="list-style-type: none"> <li>• Paraplegia</li> <li>• Loss of both arms</li> <li>• Total loss of both legs</li> </ul>	127.25-174.5	32%
8	778-14,207	1,726%	<ul style="list-style-type: none"> <li>• Quadriplegia</li> <li>• Very serious brain damage</li> </ul>	127.25-235	85%

While some swings in jury verdicts within severity levels can be explained by the crudeness of the nine-point severity scale, crudeness alone cannot account for the widely extravagant swings we see in the Bovbjerg data. I believe the explanation for this lies in the fact that there is no conventional metric that allows fact triers to translate a given noneconomic loss into dollars. Without such a metric, in the words of Lord Denning, "they are left to grope in the dark without any guidance."<sup>242</sup> Without a conventional monetary scale for the conversion of nonmonetary losses into dollar values, it would be surprising if we did not see these wide swings in monetary amounts given for similar nonmonetary injuries.

For the creation of such a scale, I would turn to state legislatures, which are sovereign in declaring the public policy of their states, subject only to constitutional limits. Given that there is no descriptively correct amount of dollars for noneconomic losses (those dollars are necessarily an artificial figure), legislative establishment of a conventional scale for noneconomic damages with a finite range would not establish anything contrary to fact. Thus, legislatures would not usurp the fact-finding function of juries. Rather, they would create a public policy regarding conventional symbolic dollar amounts for losses that have no dollar equivalents. At the upper end of the range, the scale would set the appropriate conventional, symbolic amount of noneconomic damages for the most serious noneconomic injuries. And at the lower end, the scale would set the amount for the least serious, but nevertheless cognizable, noneconomic injuries.<sup>243</sup>

A scale ranging from \$500 to \$2,500,000, in terms of its symbolic function, would be no more factually correct than one ranging from \$1,000 to \$250,000. The scale would not be an assertion about a state of affairs that could be objectively verified by looking at relevant evidence. That is, the scale would not be a statement about a fact; the issue would not be whether the scale accurately reflects the state of affairs it purports to describe. Thus,

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242. *Ward v. James*, (1966) 1 Q.B. 273, 299.

243. For others who see merit in a scale for nonmonetary losses, but who may not share my views, see PAUL C. WEILER, *MEDICAL MALPRACTICE ON TRIAL* 58–61 (1991) (exploring the concepts of damage caps tied to an inflation-proof index, damage scales, damage schedules, and hybrid models) and Stephen D. Sugarman, *Doctor No*, 58 U. CHI. L. REV. 1499, 1506–10 (1991) (reviewing PAUL C. WEILER, *MEDICAL MALPRACTICE ON TRIAL* (1991)).

the scale would not be descriptive; rather, it would be prescriptive. It would set the appropriate amount of symbolic damages for noneconomic injuries in terms of their relative gravity, as a matter of convention where now no such conventional understanding exists. This is not to say the establishment of the scale would be an act of whimsy. In addition to the symbolic function, the legislature might consider, among others, the following factors in determining the scale: (1) the wage or economic structure of the state; (2) the effect a given range might have on the cost and availability of insurance; and (3) the fact that plaintiffs rely on noneconomic damages to pay their attorneys' fees.

My approach addresses two issues: (1) how to determine the symbolic amount of damages for noneconomic injuries of varying degrees of seriousness (a monetary issue); and (2) how, in a given case, to determine the relative seriousness of the proven noneconomic injury (a gravity issue). So far, I have focused on the first issue, and I advocated a legislatively created finite scale of conventional sums, graduated in amounts from the least serious to the most serious injuries. Next, I take up the second issue.

## 2. Determining the Relative Severity of Noneconomic Losses

Unlike the matter of a monetary metric for noneconomic losses, I postulate that we share a rough sense of relative seriousness of noneconomic injuries, graduated from the least to the most serious. On that basis, I propose that the jury (or trier of fact) determine the relative gravity of the injury. The jury determination of relative gravity of injury would be described as a point on the legislatively created finite scale. The least serious noneconomic injury would be placed at the low end of the range, the most grave at the high end, and other injuries would be arranged along the scale according to their relative gravity. The Bovbjerg data suggest that there is some agreement (some shared convention), albeit rough, among juries in terms of the relative severity of injuries. The data for the means and medians (in thousands of dollars) for seven of the nine severity levels appear in table 5.<sup>244</sup>

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244. Bovbjerg et al., *supra* note 220, at 937.



TABLE 5

MEAN AND MEDIAN OF SELECTED JURY VERDICTS OF  
NONECONOMIC DAMAGES BY SEVERITY LEVEL  
IN THOUSANDS OF DOLLARS

Severity Level	Median	Mean
2	2	10
3	9	53
4	36	62
5	46	160
6	292	386
7	1,642	2,309
8	1,832	4,252

If we accept a monetary amount as a proxy for the severity of injury, then the means and medians of table 5 demonstrate a consistent increase in the monetary amount as the severity increases. This corresponds with the intuition that there is a shared (albeit rough) convention regarding the severity of injuries or harms.

However, juries may not be able to distinguish among the various noneconomic injuries with precision. Three different juries may differ in their relative comparisons of two cases, one involving third-degree burns over a large portion of a plaintiff's body, and the other involving a plaintiff who became paralyzed from the neck down due to the defendant's misconduct. One jury may judge the burn injury to be more serious than the paralysis; a second jury may judge the paralysis to be more serious than the burn injury; and, a third jury may judge them to be equally serious (although I suspect they would not disagree with great conviction). But I venture to say that all three juries would agree that the paralysis is far more grave than a broken arm. Cane captures this point when he writes,

Even if we cannot, in any objective sense, say what a leg or an arm is worth, it should at least be the case . . . that an

arm must be worth more than a hand; a hand more than a finger; two legs more than one . . . . Even here . . . there is great difficulty. Is an arm worth more than a leg? Is it worse to be totally blind than to lose both legs? Is a hand worth more than a foot? With what can you compare the inability to bear a child? But still, making every allowance for the element of arbitrariness in the whole process of compensating for disabilities, it is possible to have some internal consistency in the process, and such consistency would not be easily attained if the decision were left to a jury.<sup>245</sup>

But if we provide juries with a conventional monetary standard that they can use to express their judgment of the community's rough view of the relative gravity of noneconomic injuries, then they need not be "left to grope in the dark without any guidance"<sup>246</sup> when it comes to expressing the relative severity of a particular plaintiff's noneconomic injury in monetary terms. Such a standard can inject some measure of consistency and predictability into the determination of monetary amounts given for similar noneconomic injuries. However, such a scale cannot produce complete consistency or predictability because the social agreement as to relative gravity of injuries is not precise. Therefore, jury judgments of where particular injuries fall on the scale will reflect that lack of precision. But like the judgments regarding whether a particular defendant failed to meet the community's standard for reasonable care, these are the very types of judgments for which we depend on juries and for which we recognize that reasonable minds, *within limits*, can differ. And surely a legislatively prescribed convention for translating noneconomic injury into dollars will provide greater consistency and predictability (as well as a sense of rationality and fairness) than a system in which juries are left to fend for themselves without such guidance.

Before concluding, I wish to distinguish my approach from legislative caps on noneconomic damages. Many states have capped noneconomic damages by legislatively providing that such damages

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245. CANE, *supra* note 208, at 167.

246. Ward, 1 Q.B. at 299.

may not exceed a given figure.<sup>247</sup> In my proposal (which I will call the “conventional model”), the upper limit of the scale symbolizes the appropriate symbolic figure for the gravest of injury. In a system that utilizes caps (which I will call the “factual model”), the implication is that there is a factually correct (or at least defensibly correct) sum that may exceed the cap. Thus, by virtue of the cap, plaintiffs may be deprived of what a jury finds they are rightly due. In the conventional model, when the top of the scale is reached, no more damages are even theoretically possible; in contrast, in the factual model, the implication is that theoretically additional damages are possible, but the cap restricts a plaintiff from receiving them.

By way of illustration, assume the following facts:

1. In a jurisdiction that sets the upper limit on noneconomic damages at \$250,000, two passengers in the same car are injured by the same defendant.
2. Each plaintiff filed a complaint against the defendant and both cases are tried before the same jury. The jury finds the defendant liable in both cases.
3. Plaintiff 1, who suffered paraplegia, is awarded \$250,000 in noneconomic damages.
4. Plaintiff 2, who suffered quadriplegia, is awarded \$350,000 in noneconomic damages. The difference in the damages awards reflects the jury’s view that one injury is more serious than the other.

Under the conventional model, the jury would be constrained to render a verdict for Plaintiff 2 of only \$250,000 and to award Plaintiff 1 a lower figure to reflect the relative seriousness of quadriplegia as compared to paraplegia. Under the factual model, Plaintiff 1’s damages award would require no adjustment because it did not exceed the cap, but Plaintiff 2’s damages award would be reduced to equal the amount awarded to Plaintiff 1. Thus, both plaintiffs would receive the same amount of noneconomic damages even though the jury found that their injuries differed in severity.

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247. *E.g.*, CAL. CIV. CODE § 3333.2 (West 2007) (providing that noneconomic damages against health care providers shall not exceed \$250,000); MD. CODE ANN., CTS. & JUD. PROC. § 11-108 (LexisNexis 2006) (providing that noneconomic damages for personal injury or wrongful death shall not exceed \$500,000).

The difficulty that is posed by this illustration is captured in language from Kansas Supreme Court cases. In *Hanson v. Krehbiel*,<sup>248</sup> the court struck down a statute that limited a libeled plaintiff's recovery against a newspaper defendant to actual damages if the defendant published a retraction.<sup>249</sup> The court explained that, as defined, *actual damages* precluded damages for such detriments as injured feelings, mental suffering, and humiliation.<sup>250</sup> Part of the court's reasoning in striking down the statute's limitation is summarized in paragraph 3 of the syllabus report, which states,

The right to a remedy by due course of law is not satisfied by the requirement contained in a statute to make specific reparation for the injury done, which reparation is the same in all cases, bears no relation to the injury suffered, and has not been decreed by a tribunal after ascertainment of the extent of such injury.<sup>251</sup>

Eighty-four years later, the Kansas Supreme Court struck down statutory caps on noneconomic damage for medical malpractice actions.<sup>252</sup> In doing so, the court considered the state of Kansas law as it relates to the constitutionally permitted statutory limits on damages, consistent with its constitutional bill of rights.<sup>253</sup> In the process, it relied heavily on the *Hanson* case.<sup>254</sup> The court quoted the syllabus language in the paragraph cited above and characterized the constitutional infirmity of the statute in *Hanson* as follows: "The remedy provided by the statute was inadequate . . . because it treated every injury identically, irrespective of a court's findings."<sup>255</sup>

The problem identified in these Kansas decisions would not arise under the conventional model. Under this model, the remedy for noneconomic injuries would not be provided irrespective of the court's finding—the damages for a noneconomic injury *would* bear a relation to the extent of the injury suffered as ascertained by the trier of fact. The jury's finding of differences in the gravity of the injuries

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248. *Hanson v. Krehbiel*, 75 P. 1041 (Kan. 1904).

249. *Id.* at 1042.

250. *Id.*

251. *Id.* at 1041 (Syllabus by the Court, ¶ 3).

252. *Kan. Malpractice Victims v. Bell*, 757 P.2d 251, 261 (Kan. 1988).

253. *Id.* at 258–61.

254. *Id.* at 260–63.

255. *Id.* at 261.

would be reflected in the placement of a given plaintiff's injury along a finite scale of monetary amounts for noneconomic injuries.<sup>256</sup>

A more fundamental critique of the factual model stems from the implication that a jury's determination of the sum of dollars is a descriptive statement of a fact or state of affairs. With no external standard to which the fact finder can look for guidance in determining the sum, the damages award is no longer descriptive; it becomes prescriptive. It is no longer objective-societal; it is sub-individual—the fact finder's individual sense of the appropriate figure rather than society's determination of the appropriate figure). The damages award is not capable of being objectively verified because there is no state of affairs external to the fact finder against which to judge the finding.

The position I take, which allows the jury to make objective-societal determinations of damages, stems from my view that a money amount for a loss that has no market value or monetary equivalent is an artificial figure. Thus, the present system (which leaves it to the jury to decide the dollar amount for noneconomic losses without any external standard to guide it) puts the jury in the position of *prescribing* noneconomic damages awards rather than *describing* noneconomic losses. But prescriptions are best left to legislatures, which speak for society as a whole. Fact determinations for specific cases, on the other hand, where the evidence allows for more than one justifiable finding of fact as to the gravity of noneconomic injuries, are best left to juries.<sup>257</sup>

Before concluding, I also wish to call attention to the remarkable correspondence between my view of noneconomic damages and Robinson and Kurzban's findings in their studies of people's views of the seriousness of criminal wrongdoing and appropriate punishment. In their study, Robinson and Kurzban assert the following:

[W]hile [people] may disagree as to the point to which the punishment continuum should extend at its high end, they

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256. Note that if a jury somehow found that a broken arm warranted being placed at the top of the range of relative gravity, a court would reverse this finding as a matter of law, just as a court would reverse a jury's finding that the defendant was not negligent if it found that no reasonable jury, based on the evidence, could come to such a finding.

257. I leave for others to address whether there should be one scale or multiple scales depending on the injury—different scales for physical injury, severe emotional distress, defamation, and so forth.

agree on the relative placement of cases along that continuum. Once a society determines the end point . . . shared intuitions of justice will set each case on a specific point on the continuum in its appropriate place relative to other cases. The specific amount of punishment due each case is fixed, then, not because there is some magical connection between that amount of punishment and that particular offense but rather because that is the amount of punishment needed to distinguish that case from cases of noticeably greater and lesser blameworthiness on the limited continuum of punishment.<sup>258</sup>

I believe that the following substitutions (indicated in brackets below), which are intended to frame the issue in terms of noneconomic injuries and damages, demonstrate that our views both may stem from a common phenomenon:

[W]hile [people] may disagree as to the point to which [the range of noneconomic damages] should extend at its [monetary] high end, they agree on the relative placement of cases along that [range]. Once a society determines the end point . . . shared intuitions of [gravity of injuries] will set each case on a specific point on the [range] in its appropriate place relative to other cases. The specific amount of [damages] due [in] each case is fixed, then, not because there is some [correct relationship] between that amount of [damages] and that particular [noneconomic harm] but rather because that is the amount of [damages] needed to distinguish that case from cases of [roughly] greater and lesser [gravity].<sup>259</sup>

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258. Robinson & Kurzban, *supra* note 209, at 1855.

259. *See id.* This relationship between the severity of the crime and the appropriate sentence on the one hand, and between the severity of the nonmonetary loss and the appropriate amount in damages on the other hand, is the impetus for a system of determining noneconomic damages advocated by Fredrick S. Levin in *Pain and Suffering Guidelines: A Cure for Damages Measurement "Anomie,"* 22 U. MICH. J.L. REFORM 303 (1988–89), whose approach is similar to that of Bovbjerg et al., *supra* note 220.

## III. CONCLUDING REMARKS

In writing about pain and suffering, Dobbs states, Because the award for pain and suffering does not reflect economic loss it is difficult to establish workable standards of measurement. . . . The result is that there is almost *no standard for measuring pain and suffering damages, or even a conception of these damages or what they represent.* . . . Review of awards for excessiveness or inadequacy . . . becomes a real embarrassment when there are no standards for measurement.<sup>260</sup>

What Dobbs writes of pain and suffering applies equally to all noneconomic harms—including those harms that constitute the injuries that have given rise to the bulk of our torts (e.g., physical injury to person, injury to reputation, injury to privacy, severe emotional distress injury)—and the myriad of parasitic harms that may accompany injuries.<sup>261</sup> Given the pervasiveness of noneconomic damages in our rights/duties tort system, the unresolved difficulties identified by Dobbs deserve to be squarely addressed. I have tried to do so in this Article.

As for the last emphasized difficulty (“the conception of these damages or what they represent”), I have argued that because such damages are not a money equivalent for the loss,<sup>262</sup> they are artificial sums that should be thought of as symbolic of the defendant’s responsibility for the plaintiff’s loss based on the extent of its gravity. At the personal level, the award offers an offset or counterbalance to the loss by forcing the defendant to tangibly show the appropriate respect for a loss he has caused the plaintiff and which he cannot fix. The sum that serves this purpose is not one that plumbs the depths of contrition. Rather it is a sum that the community deems to be a satisfactory demonstration that the defendant has done the fair thing to make up with money, as much as

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260. DOBBS, *supra* note 164, at 383 (emphasis added).

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

262. Such awards do not wipe away the suffering the plaintiff had to endure and may continue to bear, restore the plaintiff’s damaged reputation, or replace the plaintiff’s lost eye. Nor would a reasonable person accept the award in trade to suffer the pain and suffering, the damage to reputation, or the loss of an eye.

money can make up, for a loss he has caused and which he cannot fix.

At the legal level, the law is concerned with the proper atonement that the defendant must make to heal the tortuous rupture in the rights/duties relationship between the plaintiff and the defendant and to restore it to its status quo ante. Noneconomic damages, along with economic damages, are that atonement.

As for the first emphasized difficulty (a “workable standard of measurement”), I advocate a conventional model that does not depend on my resolution of the aforementioned difficulty. The conventional model is based on two postulates.

First, I postulate that we share a rough view—that there is a rough social convention—regarding the relative severity of noneconomic losses. Therefore, it is appropriate for juries to determine the severity of such losses or injuries—to declare their belief as to the community’s view of what *is* the appropriate severity level of a given loss or injury relative to the gamut of such injuries or losses.

Second, I postulate that there is no accepted metric—no social convention—that can be used to translate noneconomic losses or injuries into monetary amounts. There is no scale that permits us to express the relative gravity of noneconomic injuries or losses in dollars. Thus, the jury’s award of noneconomic damage does not represent what it believes *describes* the sum that *is* the correct amount for the loss or injury. Rather, it *prescribes* what it believes the correct sum *ought* to be. As a corollary to this last point, I argue that such awards are arbitrary—the amounts for similar injuries or losses are not predictable or consistent.

To address this situation, I propose a legislatively created monetary scale that can be used to express the relative gravity of noneconomic injuries or losses in terms of dollars. Any one range for such a scale would not be any more factually correct than another range. And because such a scale would prescribe artificial monetary sums for noneconomic losses or injuries, the legislature would not infringe on the jury’s prerogative to determine the facts in a specific case. The jury would still determine the gravity of noneconomic losses or injuries and would still express its factual findings by selecting the point on the scale that corresponds to the determined severity of the injury or loss—the most serious at the high end, the



least serious at the low end, and the rest at appropriate points in between the two. This scale would provide juries with a simple and easily applied metric that they can use to translate the relative gravity of noneconomic losses or injuries into dollars—something that is not available under our current system.

When I was an undergraduate preministerial philosophy major, one of my professors told a story of how the medieval theologian characterized the philosopher and how the philosopher characterized the theologian. The theologian described the philosopher as the blind man who goes into a pitch dark coal mine to find a black cat that is not there. The philosopher described the theologian as the blind man who goes into the pitch dark coal mine to find a black cat that is not there and comes with a cat. I believe that asking juries—asking fact finders—to translate plaintiffs' noneconomic losses into the correct monetary amount, without providing them with a metric for that translation, is to put them in the position of the philosopher and the theologian. When the jury comes back with the award, it is like the theologian who comes back with the cat. I contend that the only way to avoid the absurdity of making factual determinations about the correct amount of dollars for given noneconomic losses—losses that, in principles, are not measured in dollars—is to provide some rational, conventional metric for such a translation. I hope this Article will inspire the adoption of such a legislatively created metric.