General Damages Are Incoherent, Incalculable, Incommensurable, and Inegalitarian (but Otherwise a Great Idea)

Richard Abel

Follow this and additional works at: https://via.library.depaul.edu/law-review

Recommended Citation
Available at: https://via.library.depaul.edu/law-review/vol55/iss2/3

This Article is brought to you for free and open access by the College of Law at Digital Commons@DePaul. It has been accepted for inclusion in DePaul Law Review by an authorized editor of Digital Commons@DePaul. For more information, please contact digitalservices@depaul.edu.
GENERAL DAMAGES ARE INCOHERENT, INCALCULABLE, INCOMMENSURABLE, AND INEGALITARIAN (BUT OTHERWISE A GREAT IDEA)

Richard Abel

Lawyers care deeply about damages. Before taking cases, plaintiffs’ lawyers are as concerned about what they are worth as about the difficulty of proving liability.\(^1\) Defendants and insurers want to know what to offer in settlement or invest in defense. But law professors marginalize damages.\(^2\) In the two years between December 2002 and December 2004, just 111 of the 1,100 scholarly articles on torts concerned damages (ten percent), of which twenty-one (two percent) discussed punitive damages (because recent Supreme Court decisions had constitutionalized the issue) and fifteen (1.4%) discussed medical malpractice caps (in response to the third wave of liability insurance “crises”).\(^3\) Treatises and texts give equally short shrift to damages, generally less than ten percent of their pages, often none at all (see Table A).\(^4\) If we use casebooks as a surrogate measure of the attention to damages in the basic torts course, it is equally minimal (see Table B).\(^5\) No casebook devotes more than ten percent of its pages to damages and almost all devote significantly less. Furthermore, virtually all casebooks postpone damages to the end of the first-year course. The torts catechism every 1L learns—duty, breach, causation, damages—embeds this ordering. In the overcrowded first-year torts course (especially during the first semester, when everything is new), that sequence typically produces a hasty overview of damages, conducted at a moment when students are increasingly anxious about ex-

---


2. Louis L. Jaffe was a rare exception: “[T]he crucial controversy in personal injury torts today is not in the area of liability but of damages.” Louis L. Jaffe, *Damages for Personal Injury: The Impact of Insurance*, 18 LAW & CONTEMP. PROBS. 219, 221 (1953). And so are those who teach and write about remedies, but these are upper-level courses, typically unrelated to substantive law. *See also A.I. Ogus, The Law of Damages* (1973).

3. For the ten year period ending December 2004, 533 of 7805 torts articles discussed damages (7%), of which eighty-two (1%) concerned punitive damages and fifty-five (0.7%) discussed damage caps. I am grateful to June Kim of the UCLA Law School Library for these data.

4. See infra app. tbl.A.

5. See infra app. tbl.B.
ams. If most students are asking themselves what the bolder students ask me—will this be on the test?—many of us have to admit it will not.

Marc Franklin and Robert Rabin (whose casebook I have used since coming to UCLA in 1974) actually began their first edition with *Seffert v. Los Angeles Transit Lines*.\(^6\) They used it to introduce the entire torts process, however, devoting only a page to damages. In the third edition, when they moved *Seffert* permanently to the end of the first-year course, they explained their cursory treatment of damages:\(^7\)

The reason for not going into greater detail is suggested in Jaffe, Damages for Personal Injury: The Impact of Insurance, 18 Law & Contemp. Probs. 219 (1953). Professor Jaffe asserted that questions of liability have "great doctrinal fascination" but that damage questions "and particularly their magnitude—do not lend themselves so easily to discourse. Professors dismiss them airily as matters of trial administration." The reason for the different treatment is not so much a "judgment of relative importance... as the relative adaptability of the subjects to conceptualization."

But should pedagogic convenience and convention dictate emphasis? For most of the last thirty years, I have begun my course with damages—much to the consternation of students who believe the table of contents is handed down from on high and who, by the second semester, have learned that if it is not black letter it does not count.\(^8\) (We are all too familiar with the "pens down" response to "policy" discussions—or the contemporary equivalent of switching to solitaire or e-mail.) I start from the back of the book not out of perversity but because damages are foundational. Students cannot understand whether and under what circumstances accident victims should have rights and defendants should have duties without knowing the remedy. This is true regardless of whether tort law is conceived as corrective or distributive justice. For the majority of teachers who believe efficiency should be at least one criterion for liability, Learned Hand's famous formula\(^9\) reminds us that negligence is a function of the magnitude of potential injuries. Furthermore, whereas the other two variables in Hand's formula—the probability of accidents and the cost of safety precautions—are empirically ascertainable, the "costs of acci-

---

\(^6\) 364 P.2d 337 (Cal. 1961).
\(^8\) Thomas D. Russell at the Sturm College of Law, University of Denver, and Tom Baker at University of Connecticut School of Law, also do so.
\(^9\) United States v. Carroll Towing Co., 159 F.2d 169 (2d Cir. 1947).
dents” (in Calabresi’s phrase)\(^{10}\) are an inescapably political decision (as Michelman observed when reviewing Calabresi’s book).\(^{11}\) Reflecting on those costs focuses us on the multiple ways in which history shapes tort law—not just the effect of technology on the ability of inadvertent actions to inflict catastrophic harm, but also the multiple changes that have redefined that harm: the shift from self-sufficient production to waged work, the concomitant inability of family members to provide care (and the increased opportunity costs of doing so),\(^{12}\) the growing capacity of medicine to repair the harm (at ever increasing prices), and the corollary sense of entitlement to physical and mental well-being. The enormous increase in the quantum of damages, in turn, profoundly influences the need for and contours of insurance, the centrality of vicarious and enterprise liability, and the ways in which lawyers’ contingent fees structure access to justice. The need for a deep pocket (and the differences among for-profit, charitable, and governmental; and insured, uninsured, and self-insured defendants), in turn, greatly complicates the capacity of tort law either to correct wrongs or to reduce danger.

An approach to torts from the perspective of remedies is inescapably critical. Tort law gives victims only money damages; it does not elicit apologies,\(^{13}\) provide care,\(^{14}\) change risky behavior,\(^{15}\) or punish. The single-judgment rule requires the jury (the usual trier of fact) to make impossible predictions about future earnings (which can be dramatically altered by unforeseeable macroeconomic trends, technological change, and cultural transformations like feminism and antiracism) and medical care (similarly affected by inflation, financing, and scientific advances). We fail to compensate disabled victims for losing the intrinsic satisfactions of work but also fail to deduct their opportunity benefits from not working. The victim’s death from other causes eliminates future loss if it occurs before judgment but not if immediately after (although structured settlements remedy this anomaly). The judgment has to be discounted to present value\(^{16}\)—another impossi-

---

11. Frank I. Michelman, Pollution as a Tort: A Non-Accidental Perspective on Calabresi’s Costs, 80 Yale L.J. 647 (1971).
15. Injunctions are very rare.
ble, decades long prediction of interest rates. We do not tax compensatory damages but do not know what allowance juries make for taxes. The inevitable errors compensate and deter too much or too little. We make predictions not because they are unavoidable but because plaintiffs' lawyers demand their entire fees at judgment and therefore in a lump sum.

Pecuniary damages reproduce inequality. Medical expenses vary with income, wealth, health insurance (despite the collateral source rule), and sophistication in consuming medical care. (Some lawyers send victims to doctors who will accept a lien on the judgment to guarantee payment and pad bills to inflate damages—and hence the contingent fee—without actually providing more or better care.) Damages for lost wages obviously reproduce income inequality (which now varies by magnitudes of 500:1 between CEO and worker in large corporations). The Mississippi Supreme Court sought refuge from such discomfort through denial: "Who is to say that a child from the most impoverished part of the state or with extremely poor parents has less of a future earnings potential than a child from the wealthiest part of the state or with wealthy parents?" (Answer: every sociological study of stratification.)

Both inequalities have further ramifications. First, victims, their families, and other audiences see the award as an official declaration of the victim's worth. Consider the anger over the disparities between the September 11th Victim Compensation Fund awards to corporate executives and to dishwashers at Windows on the World. Second, both rich and poor contribute to those unequal payments, through liability insurance premiums and taxes, in amounts that are not proportioned to what they will receive as victims. Third, because the "costs of accidents" vary with victim identity, entrepreneurs in a competitive market must seek to expose the cheapest victims to injuries, for instance by locating dangerous activities near poor people's homes. Nineteenth-century American industrialization was heavily subsidized by

---

20. Indiana Harbor Belt R.R. Co. v. Am. Cyanamid Co., 916 F.2d 1174 (7th Cir. 1990). Judge Posner stated: "Brutal though it may seem to say it, the inappropriate use to which land is being put in the Blue Island yard and neighborhood may be, not the transportation of hazardous chemicals, but residential living. The analogy is to building your home between the runways at O'Hare." Id. at 1181. This is presumably not a mistake Richard Posner would make. Cf. CSX Transp., Inc. v. Palank, 743 So. 2d 556 (Fla. Dist. Ct. App. 1999) (addressing a railroad switchyard located next to a poor, black, community).
uncompensated worker injuries. Union Carbide located its plant in Bhopal for many reasons, but one may have been the realistic expectation of paying much less for accidents than it would have in the United States. That few Chinese families recover even the low level of damages legally authorized for the 140,000 workplace deaths in 2002 (up from 109,000 in 2000) is part of the explanation for capital flight of industry to China. As former chief economist of the World Bank, Lawrence Summers argued:

[A] given amount of health impairing pollution should be done in the country with the lowest cost, which will be the country with the lowest wages. I think the economic logic behind dumping a load of toxic waste in the lowest wage country is impeccable and we should face up to that.

(This was not a position he could comfortably maintain as president of Harvard.) Environmental justice advocates have repeatedly documented these decisions.

Nonpecuniary damages raise many of the same problems, often in aggravated form, and introduce others. I expose students to these through an appellate court’s description of the injuries Joe Dial suffered in a car accident. He was thirty-two, married to Arrah, twenty-nine, father of a one-year-old daughter, and a part-time employee and doctoral student at the University of Arizona, which expected to hire him after he completed his Ph.D. in electrical engineering. His supervisor thought Dial would be number one or two in the country in the field of medical instrumentation in a few years. He played tennis, basketball, baseball, and volleyball, had a daily physical fitness program, rode his bicycle to work, and did a lot of hiking, backpacking, and camping with his wife. The crash inflicted severe burns over his entire face, neck and ears, including the inside of his mouth, tongue and tonsils. After a month of treatment, including debridement—stripping off dead skin following immersion in a water

---

22. Joseph Kahn, China's Workers Risk Limbs in Export Drive, N.Y. Times, Apr. 7, 2003, at A3 (explaining that an injured Chinese worker received 200,000 yuan—or $24,000—for loss of all of his fingers).
solution, a procedure so painful that it required sedation by morphine and still made some patients hate their nurses—Dial began getting skin grafts. But keloid scars formed at both the donor and recipient sites, making the procedure problematic. His greatly heightened risk of skin cancer would keep him indoors for the rest of his life and might force him to move to the overcast Northwest. He had to abandon all recreational activities. He was at higher risk of epilepsy. His constantly itching skin made sleep difficult. Although he had always been reserved, brain damage made him "frontal lobish": facetious, garrulous, and he displayed inappropriate responses and rapid mood swings. Fearing he was repugnant to everyone, he avoided being seen. He no longer ate with colleagues. He felt sexually repulsive to his wife and afraid to hold his daughter. He could no longer concentrate or remember adequately. He was unable to finish his Ph.D. and had lost any prospect of a university appointment. I ask the students to put themselves on the jury and imagine what they would propose for nonpecuniary damages at the beginning of deliberations. I graph the results, which always show a dramatic divergence, ranging from little or nothing to tens of millions of dollars (see Table C). In the ensuing discussion among those from opposite ends of the broad spectrum, I ask what victims want and deserve and explore the problems of compensability, commensurability, commodification, calculability, arbitrariness, and equality. Although I discuss these separately below, I acknowledge their overlap and interaction.

The goals of nonpecuniary damages are ambiguous, incoherent, and contradictory. Marc Franklin and Robert Rabin begin their treatment of compensatory damages with the conventional wisdom: "The fundamental goal of damage awards in the unintentional tort area is to return the plaintiff as closely as possible to his or her condition before the accident." But, as the Second Restatement of Torts acknowledges, general damages are even less capable of doing this than specials (which have their own serious problems). Joe Dial plus his injuries plus a lot of money does not equal the status quo ante. Chief

26. Id. at 983.
27. See infra app. tbl.C.
29. Cf. Victoria Laundry (Windsor), Ltd., v. Newman Indus., Ltd. [1949] 2 K.B. 528, 539, quoted in Oous, supra note 2, at 17: "It is well settled that the governing purpose of damages is to put the party whose rights have been violated in the same position, so far as money can do so, as if his rights had been observed." See MARC A. FRANKLIN & ROBERT L. RABIN, TORT LAW AND ALTERNATIVES 689 (7th ed. 2001).
30. Restatement (Second) of Torts § 903 (1979) (noting that when "tort causes bodily harm or emotional distress, the law cannot restore the injured person to his previous position").
Judge Wachtler of the New York Court of Appeals (a leading plaintiffs' personal injury lawyer before becoming a judge) made a virtue of necessity: "[A]lthough money damages will neither ease the pain nor restore the victim's abilities, this device is as close as the law can come in its effort to right the wrong."31 This is neither a true—American tort law rejects many other possible remedies—nor a sufficient response to the criticism. It perpetuates the common fallacy that to someone with a hammer every problem is a nail. Judge Posner, unsurprisingly, framed the same conclusion in economic language: "No one likes pain and suffering and most people would pay a good deal of money to be free of them."32 But giving victims money does not free them from pain. Survey respondents report they would pay more ex ante to avoid pain than they would want to be paid ex post.33 Most would pay everything they have to avoid Joe Dial's torment.34 Indeed, willingness to pay inevitably varies with ability to pay. Jaffe claims that nonpecuniary damages appease the victim's anger, deflect vengeance, and restore self-confidence; but he offers no evidence for these claims, never explains why it is right to do so, and fails to consider whether other responses would better advance these goals.35

II. WHAT DO VICTIMS WANT?

This turns out to be a hard question to answer. Remedies inevitably shape wants. Automobile accident victims favor general damages, and their enthusiasm varies directly with injury severity and whether they have filed suit.36 Victims are much more likely to feel they should get general damages than that others should.37 David Engel found that

32. Kwasny v. United States, 823 F.2d 194, 197 (7th Cir. 1987).
34. As another court has said, "We take it as a given that reasonable people of his age, in good mental and physical health, would not have traded one-quarter of his suffering for a hundred million dollars, much less twelve." Consorti v. Armstrong World Indus., Inc., No. 94-7501 (2d Cir. Aug. 28, 1995) (addressing a claim of imminent cancer death from asbestos exposure).
35. See Jaffe, supra note 2.
36. Seventy-six percent of all 378 respondents thought that when the person at fault has enough insurance, he should also pay something for the pain and suffering. ALFRED F. CONARD ET AL., AUTOMOBILE ACCIDENT COSTS AND PAYMENTS 265 (1964). Among serious injury victims the proportions were seventy-one percent of those who had not filed suit and eighty-eight percent of those who had; only seventy-one percent of minor injury victims felt tortfeasors should pay general damages. Id.
37. In a sample of 321 automobile accident victims in New York City in 1957, ninety-one percent thought compensation should include pain and suffering. ROGER BRYANT HUNTING & GLORIA S. NEuwirth, WHO SUES IN NEW YORK CITY? 41-42, 91 (1962). Forty percent felt they should get more than expenses compared with twenty-eight percent who felt they should get just
residents in rural downstate Illinois see tort claimants as "trying to look for something for nothing." A woman who suffered serious burns and permanent skin damage when a flight attendant spilled hot coffee on her legs settled for medical expenses and the cost of the lost vacation rather than claiming tort damages because "we don't do that." A mother whose seventeen-year-old daughter was killed and fourteen-year-old daughter injured in a tragic Texas school bus crash said, "I didn't want a lawyer . . . I said, 'The first lawyer who can bring my daughter back, I'll hire.' But everyone started telling me: 'No, that's the law. When this happens to you, you hire a lawyer and you get money. So now I have a lawyer.'"

Lawyers naturally focus on the bottom line (which is also their bottom line), discouraging clients from seeking "blood money" from uninsured or underinsured defendants. By contrast, Schneider National, the nation's largest trucking company, has a wholly owned subsidiary, INS Insurance, which practices "empathic adjusting." The widow of a man killed by a Schneider truck reported that if adjuster Frank Stackhouse had not been so kind "I'd have really thrown my anger at him." Instead, she settled for millions less than several lawyers estimated she could have won at trial because she felt that would have entailed years of mourning and rage. She said, "If I did not have Frank helping me . . . I don't think I could have gotten through it." The most systematic British study found (unsurprisingly) that victims' expectations (and presumably their sense of entitlement) derived entirely from what their solicitors said they could

expenses. Id. Twenty-one percent felt others should get more than expenses and forty-eight percent believed that they should get only expenses. Id. Consulting a lawyer reduced expectations of "profiting" from a lawsuit: thirty-six percent of those who had not consulted a lawyer believed they should recover more than expenses, compared with eighteen percent of those who had consulted a lawyer. Id.

39. Id.
42. Adam Davidson, Working Stiffs, HARPER'S MAG., Aug. 2001, at 48.
43. Id.
44. Id.
get. The limited survey research suggests that victims want a nominal payment beyond their out-of-pocket expenses, something like the Roman law "solatium," to acknowledge their hurt.

Indeed, anecdotes like these suggest that many victims have other priorities such as safety. Cass Sunstein argues that "[t]he specific performance remedy can be understood to stem from a resistance to commensurability." Although workers compensation is generally portrayed as a compromise between workers (receiving certain liability) and employers (receiving predictable, lower damages), some employees wanted to control their risks through worker ownership.

A fourteen-year-old boy rendered paraplegic by a defective lap belt recovered $3.3 million. But his father "became angry because Ford refused to admit to anything . . . . I sat there three weeks through the trial. It was like they were above everybody else, even after the jury came in. Ford didn’t care. They really didn’t care." His lawyers subsequently filed a petition with the United States Department of Transportation seeking to force Ford to recall 1.7 million cars.

The father of a seven-year-old girl killed by a lawn dart spent the next year trying to persuade the Consumer Product Safety Commission to ban them. He told a sympathetic Senate subcommittee staff member:

"My daughter’s dead. She used to bring me home notes like yours," he said gesturing to a child’s crayon drawings on the aide’s bulletin board. "Nobody knows what it’s like who hasn’t lost a child. I wake up miserable. I go to bed miserable, and it’s going to happen to other people unless we do something. I’m here with my February

45. Donald Harris et al., Compensation and Support for Illness and Injury 124 (1984).
50. Ordeal of Son's Auto Injury Spurs Father to Seek a Recall, N.Y. TIMES, Jan. 17, 1988, § 1, at 39 (internal quotation marks omitted).
51. Id.
house payment—that bought my airline ticket. I’ve spent $12,000 on this.53

A coal miner’s widow said, “It’s not about the money . . . I don’t want this to happen to anyone else’s husband. I want the company to make things safer. But the money is the only thing you are allowed to sue for.”54

Steven Sharp lost both arms in a defective bailer when he was sixteen.55 Although he initially had no interest in suing, he made the lawsuit a campaign to force the manufacturer to improve safety. But though he won $4.3 million in compensatory damages and two million dollars in punitives, the defendant did not recall the bailer or even warn users.56

Jodie S. Lane, a thirty-year-old doctoral candidate at Columbia University Teachers College, was electrocuted through the fault of Consolidated Edison (Con Ed) when she stepped on a metal plate in the sidewalk while walking her dog.57 Con Ed paid her estate and survivors $6.25 million (including $975,000 for pain and suffering), some of which they planned to give to the Jodie S. Lane Public Safety Foundation.58 Con Ed also agreed to donate one million dollars to Teachers College for a scholarship in her name and to create a panel of three electrical safety experts (two chosen by the Foundation) to monitor its improvements.59 Both New York City and New York State passed legislation requiring more inspections and reports.60 The East Village Community Board (where she lived and the accident occurred) renamed the street after her.61 Her father, an engineer who researched the accident’s cause, said: “Our family will never have closure because we will always live with the pain of this loss,” but “hope-fully it will help prevent the problems that caused our loss.”62

53. Id.
56. Id.
58. Id.
59. Id.
60. Id.
61. Id.
62. Id.
Brandon Maxfield was rendered a quadriplegic at seven when a Bryco pistol accidentally discharged. Nine years later, he finally won a twenty-four million dollar judgment, collecting $8.75 million before Bryco declared bankruptcy. With the backing of a philanthropically minded man who heard about the case from television (and called it "a public-safety issue"), Maxfield bid $505,000 for the company. His lawyer said Maxfield planned to destroy the 75,000 handgun frames included in the sale "to prevent other families from going through the hell Maxfield and his family have." But the former plant manager outbid him by $5,000. The manager first claimed to be using his "life savings" but later admitted contributing little of the purchase price. He denied his former boss was buying back the company but refused to disclose the source.

A mother whose son died in the World Trade Center attack said:

Someday, please God, I will see my son again . . . . I need to be able to look at him and say, "Tommy, I did the right thing." The right thing is not to take the government money. The right thing is to try to get answers, to see what sort of lapses allowed the murderers to do what they were able to do.

Other relatives of September 11 victims have joined a wide variety of groups dedicated to preventing a recurrence.

Apology is an institutionalized response to injury in Japan.


64. Butterfield, supra note 63. After losing another lawsuit fourteen years earlier, the same entrepreneur had sold his gun factory to his manager and then reconstituted it. Four years before the recent bankruptcy, he told Business Week: "They can file for bankruptcy, dissolve, go away until the litigation passes by, then reform and build guns to the new standards—if there is one." Id.

65. Anton, supra note 63.

66. Id.

67. Id.

68. Id.

69. Id.

70. Martin Kasindorf, Some 9/11 Families Choose Lawsuits Over Federal Fund, USA TODAY, July 14, 2003, at A1, quoted in Hensler, supra note 54, at 492 n.201 (internal quotation marks omitted).


72. Wagatsuma & Rosett, supra note 13. The restorative justice movement seeks to extend apology to western legal systems. See, e.g., Daniel W. Shuman, Role of Apology in Tort Law, 83
president traveled throughout the country to apologize to bereaved relatives before accepting full responsibility by resigning.\textsuperscript{73} When a Japanese nuclear fuel plant leaked, the president bowed to those endangered, even though they were not injured.\textsuperscript{74}

The United States occupies the other end of the spectrum: defense lawyers strongly discourage clients from accepting any responsibility.\textsuperscript{75} But apology is all some victims want. After the Diocese of Orange (California) announced it had settled the claims of ninety sexual abuse victims for $100 million, forty-year-old Max Fisher, who had been abused twenty-six years earlier, said, "I'm more pleased with the fact that I got what I was after, which wasn't money, but an apology from the church. The bishop pulled me aside and said, 'I'm deeply sorry that this happened.' That meant more to me than anything." Joelle Casteix, twenty-four, was equally emphatic about the diocese's agreement to give a Los Angeles Superior Court judge all its documents concerning the cases, which would be reviewed for confidentiality and privilege before being released. She said, "For many years, people have struggled to find out what the diocese knew and when it knew it . . . . Any settlement that did not include these documents would be nothing more than dirty money."\textsuperscript{76}

The father of a baby who suffered profound brain damage during a negligent delivery said: "Show me an admission of guilt . . . and I don't want a thing."\textsuperscript{77} A father who blamed his son's fatal leukemia on W.R. Grace, the defendant in \textit{A Civil Action}, wanted a public declaration of responsibility: "I didn't get into this for the money. I got into this because I want to find them guilty for what they did. I want the world to know that."\textsuperscript{78} The parent of a child killed in the bombing of the Pan American plane over Lockerbie, Scotland, was "very pleased" by the settlement.\textsuperscript{79} He stated, "It says in front of the whole world


\textsuperscript{73} Id.


\textsuperscript{75} The Automobile Association of America gives every insured instructions about what to do "if you have an accident": "Do not admit responsibility for or discuss the circumstances of the accident with anyone other than the police or an authorized Auto Club claims representative."

\textsuperscript{76} Nick Madigan, \textit{California Diocese Settles Sexual Abuse Case for $100 Million}, \textit{N.Y. Times}, Jan. 5, 2005, at A16 (internal quotation marks omitted).


\textsuperscript{78} Jonathan Harr, \textit{A Civil Action} 442 (1995).

that the Libyan regime ordered this and that they're responsible." But other parents felt that message was undercut by compensation. One declared, "there is . . . no amount of money, that can restore what I've lost." Another was even more emphatic: "This is supposed to be about justice and the truth. Instead, what the Libyans proposed amounted to a bribe." Accepting the approximately $3,000 the German government and industry recently paid each of the 130,681 Holocaust survivors, one insisted: "This money . . . can never compensate me for my lost family and childhood." The chairman of the American Gathering of Jewish Holocaust Survivors, who also had been in Auschwitz, insisted: "There must be limits to everything, even forgiveness." "[W]e will never equate morality and ethics in terms of dollars and cents . . . ." Sandra Gilbert felt the same way about her husband's death, which she blamed on medical malpractice: "money isn't the issue . . . . But accountability is . . . ." A Dalkon Shield victim agreed: "I wouldn't care if I hadn't gotten two cents out of it, if the publicity would make people realize what a crummy company that is." The victims of friendly fire—a laser-guided 500-pound bomb dropped on American soldiers in Iraq in 2003—wanted an accounting. Spc. Jeff Coyne, who still suffers back pain and grieves for dead comrades, said: "I'm not looking for somebody to spend their life in prison for whatever happened to me. . . . We just want the truth." Samuel C. Oaks, who lost a grandson he had raised, went further: "In court, they expect you to show remorse when you've done something wrong. . . . There's no remorse here."

Others want an official declaration of responsibility combined with a recognition of the victim's loss—something like Biff's poignant cry that "attention must be paid" to his father, Willie Loman, in Arthur Miller's *Death of a Salesman.* In the continuing struggle by Holo-

---

82. *Id., quoted in* Hensler, *supra* note 54, at 431.
84. *Id.*
85. *Id.*
89. *Id.*
caust victims and their descendants, one said: "What we are doing today is rehumanizing these individuals posthumously and saying that the grand theft that took place in fifteen countries was not permissible... It’s not about money." The executive vice president of the Conference on Jewish Material Claims Against Germany agreed: "We’re not restituting money. We’re restituting history." Their investigation had uncovered new information about slave labor networks and medical experiments. "This is going to be a tool for historians for generations to come." Damage claims can be acts of historical witnessing.

Anecdotes cannot answer the question, "What do victims want?" But they do cast doubt on the facile assertion that victims want only money for pain and suffering. Any normative theory of damages must also attend to victim concern with prevention, acknowledgement of responsibility, and recognition of the wrong. General damages are at best an indirect means towards these ends and at worst irrelevant, distracting, and inconsistent.

III. COMPENSABILITY

Later sections address the problems of equating money with experience: whether it can be done and the consequences of trying. But tort law itself concedes that money cannot compensate all losses. The most obvious example is death. Although all agree that the most grievous loss is life itself, once life is lost money can do nothing for the deceased—"You can’t take it with you." (Of course, many cultures believe that much can be done for the dead, both spiritually by way of prayer and materially by means of food and clothing.) Consequently, a tortfeasor pays no damages for the deceased’s lost years. The implications, however, quickly become troubling. When nursing home negligence allegedly allowed an Alzheimer’s patient to stray, the dispute concerned the defendant’s duty to the patient’s adult daughters (the court held it had none). Everyone took for granted there could be no claim on behalf of the missing patient; because she was never found, this wrong had no remedy. When a hospital’s negligence allegedly allowed a kidnapper to abduct a neonate, the dispute con-

92. Haberman, supra note 83.
93. Id.
95. Id. at 899.
cerned the defendant's duty to the mother.\textsuperscript{96} Again the court held the hospital had no duty, although the mother and not the fetus had contracted with the hospital. Had the baby never been found again there would have been no remedy. And though the baby's life was arguably affected (if in unknowable ways), her mother's injury was entirely distinct (and arguably greater).\textsuperscript{97}

For similar reasons, many jurisdictions reject survival actions for pain and suffering damages, which no longer can do anything for the victim.\textsuperscript{98} The New York Court of Appeals extended this reasoning to reject loss of enjoyment claims by a comatose victim who lacked "some level of awareness"—whatever this means.\textsuperscript{99} The dissenter insisted the victim's loss was an "objective fact"—whatever that means. The New York Appellate Division affirmed a survival action for pain and suffering and lost enjoyment on behalf of a neonate who died twelve days after birth.\textsuperscript{100} And Kansas, West Virginia, and Ohio allow such recovery.\textsuperscript{101} A fourteen-year-old shot in the head lost cognitive skills, inhibition, and also any memory of what he once had.\textsuperscript{102} Should he be compensated for a deficit of which he is unaware? Oliver Sacks described a man whose chronic alcoholism had deprived him of any memory: each day he greeted Sacks anew with a friendly blank stare, convinced they had never met before.\textsuperscript{103} If that profound amnesia had been caused by negligence, should it be compensated?

If it makes little sense to "compensate" the dead for loss of life, does it make any more to "compensate" the living for being denied the lures of limbo, the solace of Lethe, the charms of nonexistence? (Of course a defense lawyer could callously answer that the living can always mitigate damages—by suicide. But the endowment effect here

\textsuperscript{97} Id. at 504.
\textsuperscript{102} Haines v. Raven Arms, 640 A.2d 367 (Pa. 1994).
\textsuperscript{103} Oliver Sacks, The Lost Mariner, in The Man Who Mistook His Wife for a Hat and Other Clinical Tales (1987).
is uniquely powerful.) "Miniver Cheevy, child of scorn / . . . wept that he was ever born, / And he had reasons."104 But Cheevy's reasons would not persuade courts, which balk at compensating "wrongful life."105 One court stated, "[I]t is simply impossible to determine in any rational or reasoned fashion whether the plaintiff has in fact suffered an injury in being born impaired rather than not being born . . . ."106 Another court said, "Recognizing this kind of claim on behalf of the child would require us to weigh the harms suffered by virtue of the child's having been born with severe handicaps against the utter void of nonexistence; this is a calculation the courts are incapable of performing."107 In the words of a California court, "[T]here is no rational way to measure nonexistence or to compare non-existence with the pain and suffering of impaired existence."108 Whether "it is better never to have been born at all than to have been born with even gross deficiencies is a mystery more properly to be left to the philosophers and the theologians."109

At the other end of life, Ohio refused damages for wrongful prolongation because "the 'benefit of life' [was] a harm which courts have repeatedly refused to compensate."110 The basis of the objection is unclear and presumably multiple: existence will always be preferable to nonexistence (but then how to understand suicide); money cannot buy nonexistence (really a commensurability problem); there is no way to measure the pain of existence (a calculability problem); damages for being born handicapped degrade the disabled (problems of commodification and equality).

Because tort law awards no damages for lost years, it is often cheaper to kill rather than injure. (My students take a ghoulish delight in this further proof of law's perversity—until I remind them that homicide remains a crime.) But tortfeasors who boast about killing off their victims and offer a cost-benefit justification for their actions provoke justified outrage.

Philip Morris bought the state tobacco industry from the Czech Republic in the early 1990s, soon capturing four-fifths of the domestic

cigarette market. When the Czech Parliament considered raising cigarette taxes, Philip Morris commissioned an Arthur D. Little International study, which announced that smoking saved the government $23.2 to $30.6 million a year by eliminating healthcare, housing, and long-term care for those it killed. Prime Minister Milos Zeman, a heavy smoker, once defended his habit: "As a smoker, I support the state budget, because in the Czech Republic we pay tax on tobacco . . . . Also, smokers die sooner, and the state does not need to look after them in their old age." But that kind of Central European black humor was unacceptable coming from an American multinational. The leading Czech daily denounced the report as "first-class cynicism and hyena-ism," comparing it to the Nazi SS, which calculated the value of human life in its concentration camps: "What an offer: 'come help us make money on the death of your citizens.'" A government spokesman called it "ethically unacceptable to think and write about human life in those categories." American antismoking activists quickly seized the opportunity to attack. The Campaign for Tobacco-Free Kids said "a company that goes out of its way to rationalize as a good thing the fact that its products kill people doesn't deserve a seat at the table." It joined two other antismoking groups to buy full-page advertisements in leading American newspapers showing a body on a morgue slab with a price tag on its toe: "$1,227. That's how much a study sponsored by Philip Morris said the Czech Republic saves on health care, pensions and housing every time a smoker dies." New York Times columnist Bob Herbert condemned the "brazen and profoundly unethical disregard of the value of human life itself." Philip Morris quickly backtracked, noting that the report:

exhibited terrible judgment as well as a complete and unacceptable disregard of base human values . . . [It was] not just a terrible mistake. It was wrong. All of us at Philip Morris, no matter where we

---

114. Id.
115. Id.
116. Id.
work, are extremely sorry for this. . . . No one benefits from the very real, serious and significant diseases caused by smoking.\footnote{Holley, supra note 113.} 

(Don’t laugh.) The financing and release of the study “exhibited terrible judgment as well as a complete and unacceptable disregard of basic human values.”\footnote{Gordon Fairclough, Philip Morris Notes Cigarettes’ Benefits for Nation’s Finances, Wall St. J., July 16, 2001, at A2; see also Green, supra note 111; Herbert, supra note 118; Holley, supra note, 113. The report, Public Finance Balance of Smoking in the Czech Republic, is available on the Internet. Campaign for Tobacco-Free Kids, http://tobaccofieldsreekids.org/reports/philmorris/pmczechstudy.pdf (last visited Dec. 1, 2005).} But though Philip Morris regretted the public relations gaffe, no one acknowledged the basic mistake that Arthur Little’s economic analysis shared with tort law: disregard of the value of lost years to the deceased.

If tort law excludes significant damages because victims cannot be compensated, then arguments for general damages grounded in corrective or distributive justice lose some of their force.

IV. COMMENSURABILITY

General damages exemplify the fallacy of starting with the only remedy tort law offers—money—and applying it unreflectively to every wrong, as in the Roman law maxim: *Ubi remedium, ibi jus.*\footnote{Max Gluckman argued that the Lozi of Zambia reversed the maxim: *ubi jus, ibi remedium.* Max Gluckman, The Ideas in Barotse Jurisprudence 1 (1965).} The (usually implicit) justification for doing so is Jeremy Bentham’s hedonic calculus: the claim that all experience can be measured in positive and negative “utils,” so that rewards can neutralize misfortunes.\footnote{Jeremy Bentham, An Introduction to the Principles of Morals and Legislation (J.H. Burns & H.L.A. Hart eds., 1970). Elsewhere he referred to “hedos” and “dolors.” Id. Several contemporary commentators seem to adopt this view. See, e.g., Kenneth S. Abraham, The Forms and Functions of Tort Law 210 (2d ed. 2002); Peter Cane, Atiyah’s Accidents, Compensation and the Law 351 (6th ed. 1999); James M. Fischer, Understanding Remedies 383 (1999); Stanley Ingber, Rethinking Intangible Injuries: A Focus on Remedy, 73 Cal. L. Rev. 772, 784–85 (1985); A.I. Ogus, Damages for Lost Amenities: For a Foot, a Feeling or a Function?, 35 Mod. L. Rev. 1, 8, 16 (1972); Richard N. Pearson, Liability to Bystanders for Negligently Inflicted Emotional Harm—A Comment on the Nature of Arbitrary Rules, 34 U. Fla. L. Rev. 477, 502 (1982).} Of course, we all do this in response to daily stresses. A recent study found that letting infants nurse during inoculations seemed to relieve their pain.\footnote{Ricardo Carbajal, Analgesic Effect of Breast Feeding in Term Neonates: Randomized Controlled Trial, 326 Brit. Med. J. 13 (2003).} Parents have always known that hugs and kisses eclipse pain. Students (and professors) reward themselves for sustained periods of attention by taking breaks to eat, drink, and chat. When my torts students discuss Joe Dial’s experience, those who award high general damages engage in something very much like Ben-
tham’s hedonic calculus. That reflects their contemporaneous experience. Most are poor while in law school and sinking deeper into debt. They got where they are by postponing gratification. The more successful they are in law school, the longer that postponement: it is hard to party while billing over 2,000 hours annually. They sustain themselves with the hope (delusion?) that the extraordinary salary (and even greater prize of partnership) will buy future pleasure.

But our ability to offset minor discomforts and self-denials with small rewards should not mislead us to extrapolate that psychodynamic to all pain and loss. Some of my students feel that the enormity of Joe Dial’s injuries renders money damages inappropriate. Others find it incongruous to award money years after the injury (decades in the case of minors). Consider Samantha Fishkin. At twenty she suffered a catastrophic accident in a car driven by her fiancé, Travis. She had been a student at Lewis & Clark College with 1,500 SATs and a gift for art. Fifteen reconstructive surgeries replaced every bone in her face: “[h]er nose, eye sockets, and chin [were] refashioned out of three ribs; her cheeks and jaw contained 37 titanium plates.” She suffered profound amnesia and false memories. She no longer dreamed. Because her frontal lobes had been destroyed she lost all internal censors—“talk[ing] incessantly about sex,” “ask[ing] her father and brother to make love to her, exploding at strangers, then turning maudlin and infantile.” She insisted nothing was wrong with her. But she could not tolerate crowds and gained fifty pounds. The week after she released Travis from liability he broke off their engagement. She said, “I don’t have any friends left. . . . My friends don’t talk to me because they’re scared of me. . . . They think I’m in my bed drooling.”

What could money do for her, or Joe Dial? Some of the “jurors” in Neil Vidmar’s simulations expressed similar skepticism: “Pain is a part of life and money will not remove the pain”; “We all go through hardships in life . . . I do not

---

125. Id.
126. Id.
127. Id.
128. Id.
129. Id.
130. Id.
131. Id.
132. Id.
133. Id.
feel anyone is deserving of massive amounts for an incident in her life that she has totally recovered from except for memory”;  as uncompassionate as it may seem, I don’t feel Dr. . . . should pay anything for mental anguish because no amount can change her disfigurement.”

Philosophers have objected to utilitarianism on the basis of incommensurability, which Cass Sunstein defined as the impossibility of finding a single metric to compare different goods. Although it is appropriate to compensate strangers for causing inconvenience, it would be highly inappropriate to offer to pay a friend for canceling a lunch date, which would insult the friend and devalue the friendship. More appropriate responses would include an apology and a reaffirmation of the value of the friendship, perhaps by offering to take the friend to lunch another time. Sunstein believes that incommensurability enriches life. Elizabeth Anderson defined two goods as “incommensurable with respect to some scale if one is neither better, worse, nor equal in value to the other in the respects measured by the scale.” Although one of her examples is artistic excellence—Velasquez or Picasso, for instance—another is more germane to my inquiry: individual well-being. Richard Warner argued that values such as nature, beauty, nobility, honor, and loyalty are incommensurable with money.

Perhaps the best proof of incommensurability is our discomfort when we encounter equivalences. Most people are repelled by markets for sex or votes, which are generally illegal. One provocation for the Reformation was the Catholic Church’s sale of indulgences. The law occasionally acknowledges the incommensurability of money and experience. The Second Restatement of Torts, § 920 comment b, refuses to set off a benefit from one “interest” (e.g., the emotional rewards of parenting a baby who would never have been conceived or

135. Id.
136. Id. at 210, 217.
138. Sunstein, supra note 47, at 780.
139. Id. at 785.
140. Id. at 854–55.
142. Id.
144. Arild Vatn & Daniel W. Bromley, Choices Without Prices Without Apologies, 26 J. EnvTL. Econ. & Mgmt. 129 (1994).
born but for medical malpractice) against the detriment to another (the costs of childrearing). The New York Court of Appeals refused to undertake "the jurisprudentially improper task of recasting the immutable, intrinsic value of human life according to the financial burden thus imposed upon the parents." Kenneth Feinberg, the September 11th Victim Compensation Fund Special Master, told the mother of a dead firefighter: "I cannot make you happy. I cannot bring people back." The husband of a woman who died in the attack said "there's no value for Gricelda." A letter to the New York Times called "dispensing money in an attempt to alleviate pain and suffering . . . ludicrous and shortsighted." The fixed sum for noneconomic loss generated the greatest ire among survivors. Sunstein argued that "[a] recognition of incommensurability is necessary to keep alive the sense of tragedy . . . ."

In order to unsettle a facile equivalence of pleasure with pain and to make students question the commensurability of money and experience, I pose the following hypotheticals. If you suffered an injury shortening your life expectancy, should you get money now in lieu of old age? Students find that easy: they know that more money now can increase their pleasure; and they cannot imagine old people (like me) having much fun. So it sounds like a pretty good deal. That is hardly surprising: it is Faust's compact with Mephistopheles, updated for our secular age by substituting the years medical science has wrested from the Grim Reaper for the promise of an afterlife. Then I reverse the exchange: what about Sleeping Beauty—the comatose victim who eventually awakens? Can money spent late in life make up for the loss of youth? That is a harder question, but most students still believe it is better than nothing. Therefore, they have even less difficulty with the case of a neonate repeatedly hospitalized for projectile

147. Belkin, supra note 54.
148. Id.
151. Sunstein, supra note 47, at 859 (citing GUIDO CALABRESI & PHILIP BOBBIT, TRAGIC CHOICES 57–64 (1978)).
152. Oliver Sacks offers a vivid description in the context of sleeping sickness in OLIVER SACKS, AWAKENINGS (1987). Pedro Almodóvar beautifully evokes this in the movie Talk To Her. HABLE CON ELLA (Columbia Tri-Star 2002).
vomiting and dehydration during much of her first year, who recovers completely, with no retrievable memory of the experience (as far as doctors and psychologists can tell). But how does money at majority compensate for pain, suffered decades earlier that left no measurable trace?\textsuperscript{153}

If money is incommensurable with worldly suffering, it is even less commensurable (if that condition admits of degrees) with spiritual harm. The New York Court of Appeals bizarrely held that a hospital whose surgeon had circumcised a four-day-old boy breached no duty to the parents, who had elected to have the circumcision performed by a mohel on the eighth day.\textsuperscript{154} But if the lawsuit had been brought by the son (to whom a duty was owed, although he could not contract), would money damages have been appropriate for this breach of the Chosen People’s covenant with God? And what about other “religious malpractice”: a faulty marriage that left the couple living in sin and bastardized their children? Or defective last rites, which dispatched the unpurged soul straight to Hell? That was Hamlet’s only regret about killing Polonius:

\begin{quote}
Cut off even in the blossoms of my sin,  
Unhouseled, disappointed, unaneled,  
No reck’ning made, but sent to my account  
With all my imperfections on my head.\textsuperscript{155}
\end{quote}

Relational harms pose similar questions. Although wrongful death originally was limited to the pecuniary loss of those economically dependent on the deceased, courts have expanded damages to include the many forms of grief.\textsuperscript{156} But what can money do? One jury disregarded the judge’s instructions to award damages for the survivor’s pain and suffering because they believed “the pain would diminish with time . . . we all lose loved ones . . . we learn to adapt . . . no amount of money would compensate for the ache.”\textsuperscript{157}

Relatives of those killed when an Air Florida plane crashed into the Potomac immediately after take off from National Airport in 1982 were still suffering twenty years later.\textsuperscript{158} Patrick Zondler was nineteen when his father died and said, “I go through phases where I wish I had my father to talk to. . . . To get his advice, his perspective

\textsuperscript{155}. \textsc{William Shakespeare}, \textsc{Hamlet} act 1, sc. 5, lines 76–79.
\textsuperscript{156}. Green \textsc{v. Bittner}, 424 A.2d 210 (N.J. 1980) (discussing the “pecuniary value, excluding emotional loss” of child’s companionship).
\textsuperscript{157}. \textsc{Vidmar}, \textsc{supra}, note 134, at 245.
\textsuperscript{158}. Emily Yoffe, \textit{Afterward}, \textsc{N.Y. Times}, Aug. 4, 2002, (Magazine), at 36.
on things, on some choices I’m going to have to make at work.” Anthony Ivener, who was sixteen when his father was killed, said, “The hardest thing is not having my father know my family. . . . Not having my father know what I’ve done with my life.” Joy Friedberg was thirty when her twenty-six-year-old brother died. For two decades she had remembered him on every significant day. She stated, “There’s a tenacity the dead have on the living that no living person has on you. . . . The dead are truly gone. The only way you have to keep them is to think about them over and over again.”

Loss of consortium explicitly claims to compensate the physically unharmed spouse for the diminished relationship caused by the other’s physical injury. But in what sense is the plaintiff made whole by being given money after a loved one has been injured? What is the money for? Arrah Dial clearly would have been entitled to a substantial loss of consortium award. What does the law expect her to do with the money? Buy sexual and emotional services from a gigolo? Divorce Joe and use the money like a dowry to enhance her chances on the remarriage market? In fact, many marriages dissolve in the wake of profound injury. California first acknowledged a wife’s claim for loss of consortium in a case where her twenty-two-year-old husband was paralyzed from the chest down, depriving him of bowel and bladder control. The twenty-year-old wife stopped working to care for him around the clock, turning him during the night, washing and dressing him, helping him urinate and defecate. Their hopes for a large family were destroyed. A student who knew the couple said they divorced soon after she received a large judgment.

In what seemed like the archetypal fairy tale, a hospital negligently switched two babies at birth. When this was discovered three years later, the grandparents of one child (whose parents had died in an unrelated accident) accepted the two million dollar settlement, which the parents of the other child rejected. What was the money for? Disregarding the judge’s instructions, jurors awarded no loss of consortium to a man whose wife had suffered permanent brain injury impairing her hearing, vision, speech, memory, and balance so badly she

159. Id.
160. Id. (internal quotation marks omitted).
161. Id.
162. Id.
163. Id. (internal quotation marks omitted).
could no longer engage in childcare, cooking, shopping, and driving. Jurors felt that he had taken the marriage vow to love and cherish "in sickness and in health."\textsuperscript{167}

Emotional responses to death are as complex as feelings about the living. The Air Florida crash also killed Robert Silberglied, a promising Harvard scientist. His older sister, Joan, the black sheep of the family, had always resented him and was furious at her mother's obsession with Robert's death. Joan stated, "She made a spectacle of herself over it."\textsuperscript{168} How would money address the very different experiences of Joan and her mother?

Hard cases do not make bad law; they just expose the existing deficiencies. A reporter interviewed four victims dissatisfied with the $250,000 cap on pain and suffering imposed by California's 1975 Medical Injuries Compensation Reform Act (MICRA).\textsuperscript{169} But would an uncapped award have been any more satisfactory? A surgeon left gauze and a sponge inside Candy Negrete.\textsuperscript{170} "I started growing another breast underneath my armpit . . . now I have this deformed breast" and an understandable phobia of doctors.\textsuperscript{171} Dan Wingerd's kidney was transplanted on the wrong side, destroying his remaining kidney.\textsuperscript{172} Said Wingerd, "I didn't even get the pleasure of a single urination . . . I have to start over again on the transplant list, because now I'm not dealing with a family member's donated kidney."\textsuperscript{173} He had to stop working because he could not travel. He noted, "I'm in dialysis for five hours."\textsuperscript{174}

Kim Tutt was given three months to live after being diagnosed with cancer of the jaw.\textsuperscript{175} She agreed to radical surgery in the hope of another three months with her children, ten and twelve.\textsuperscript{176} Said Tutt, "Whatever time I could get was worth it."\textsuperscript{177} The surgeon removed her entire chin, from the left side to behind her right ear, replacing it with her fibula. But the diagnosis was wrong; she never had cancer.\textsuperscript{178}

[I]t was hard telling the boys I had cancer . . . but it was even harder telling them that I didn't. I am permanently disfigured. I've under-

\textsuperscript{167} Vidmar, supra note 134, at 241–43.
\textsuperscript{168} Yoffe, supra note 158, at 41. (internal quotation marks omitted).
\textsuperscript{170} Id.
\textsuperscript{171} Id.
\textsuperscript{172} Id.
\textsuperscript{173} Id.
\textsuperscript{174} Id.
\textsuperscript{175} Burton, supra note 169.
\textsuperscript{176} Id.
\textsuperscript{177} Id.
\textsuperscript{178} Id.
gone five surgeries. I'm still missing nine teeth. Chewing is not easy. People notice that I'm not normal—that really, really bothers the boys... 

Profound injury, like serious illness, transforms lives. But though no one would choose to suffer the transformation, those different lives are just that—different, neither better nor worse—incommensurable with each other and incapable of being given a financial equivalent.

Brandon Erickson lost an arm when his National Guard convoy was ambushed in Iraq. Two years later he is still self-conscious when people stare, but in his words:

that whole negative thing of complaining about, you know, the war, you know. I quit talking about that a long time ago... Just, you know, let it go... It's more of like I'm just, if it doesn't work out the way you want to, you know, find a way to make it work out... Last July 22nd [the first anniversary of the attack] was when I proposed to Dana [his wife]. I tried to turn a bad day into a good day... I lost a friend that day, I lost an arm that day, and, you know, changed my life forever, but I also gained a wife...

A deaf lesbian couple chose a deaf sperm donor to ensure that their two birth children would be deaf. The Washington Post story elicited letters from outraged hearing readers; one called it child abuse; the mother of two children born deaf, who gave both cochlear implants, proudly declared they had “never learned sign language and don’t need it to communicate.” The adopting couple, however, presumably believed that their lives and those of their children were different by reason of their deafness—but not diminished.

In rejecting a wrongful birth claim by the parents of a healthy child, the Washington Supreme Court emphasized the impossibility of predicting whether the outcome would be good or bad. The court said, “The child may turn out to be loving, obedient and attentive, or hostile, unruly and callous. The child may grow up to be President of the
United States, or to be an infamous criminal.”

One of the few survivors of the Air Florida crash was a flight attendant, who suffered a broken wrist and ankle, a permanent six-inch scar on the back of her thigh, and persistent survivor guilt. Just before the crash she bar-hopped from Miami to the Florida Keys. Afterwards, she said, “I had a U-turn and I changed... It just really was like God reached out and grabbed onto me.” Another survivor, a sixty-three-year-old GTE executive in the middle of a divorce, returned to his parents to convalesce. His father, a former Green Beret, cleaned the pins inserted into his shattered leg, while his mother held his head in her lap. He said, “I really got back in touch with my feelings and my family... That’s the joy side.”

But he still suffered chronic pain, lost his career, and called himself “a semi-recluse with a lot of infirmities.”

After two years of treatment, Samantha Fishkin started trying to recover her memories. Volunteering to read to children at the Central Park Zoo, she found that her lack of inhibition made her a better performer. She said, “I can use my little kid voice and they like that. I’m cute, and I’m kind of floppy. They don’t feel they have to defend themselves against me.” She had abused drugs and alcohol before the accident. Now, she declared, “I am reborn... It’s a second chance. I care about myself and what I do now. I’ve become a woman.” Triumphanty walking the few blocks from her apartment to the rehabilitation center for the first time, she said: “I see people in wheelchairs. I used to get annoyed, they were too slow. ‘Outta my way.’ Now I say, ‘Been there; done that; good luck.’

Two of the badly burned survivors of the Station nightclub fire in West Warwick, Rhode Island, shared a hospital room. Despite their very different personalities, they bonded during the unimaginably painful treatment process (similar to Joe Dial). One said: “I’m there...
to cheer him up and take him out of his anger. And when it’s my turn for a bad moment, [he] takes me out of my sadness.”

Marla Hanson was a model “on the verge of stardom . . . .” When she rebuffed the advances of her obsessed landlord, he hired two men to slash “her face with a razor.” After months of operations and an ordeal as a prosecution witness against the landlord, who accused her of inviting the attack, she became profoundly depressed. But after years of therapy she started a family and developed a successful career as a motivational speaker.

Joe Dial’s story is even more startling. Eight years after the accident a reporter found him volunteering to care for dialysis patients, to whom he was drawn by his expertise in medical technology (the career he had lost). He played chess weekly with a man who had endured five hours of dialysis three times a week for five years. Both were competitive and argumentative. Dial was the first person to be honored by the dialysis center for donating a hundred hours; he disliked the fuss but submitted to the publicity in order to motivate others. He was spending three hours a day on his investments but not working otherwise. He had two more children (ages three years and two weeks) and felt he had adjusted well. Dial said, “It hurts to live, but what a joy!” Thirteen years after the accident (which he could not remember), working as a senior engineer at Bell Technical Operations, he felt “fortunate” and “lucky.” He had to avoid the sun, but “that’s something I should have always done anyway.” During reconstructive surgery “I would get up in the morning, look in the mirror and say, ‘Well, it won’t be long now.’ Then I realized the scars would never go away.” He continued:

I think all that money has had more impact on friendships than my physical appearance. I can do a lot of things other people can’t because of it. But maybe I’m using that as a crutch. Maybe I think people don’t like me because I have a lot of money—not because I look funny.

197. Id.
198. Id.
200. Id.
201. Id.
202. Id.
203. Id.
Still, he did not regret the accident and even was grateful, stating "It brought me closer to God and to my family. Sure, there are times you think that the world doesn’t care. But you have to have the assurance that everything happens for the best. I wouldn’t want to go back to what I was before. No way."\textsuperscript{204}

Or consider the following story, which even O’Henry might have thought far-fetched.\textsuperscript{205} When Linda Riss was twenty-two she met thirty-year-old Burton Pugach, one of the most successful plaintiffs’ personal injury lawyers in the Bronx, who owned a house, an airplane, and a stake in a Long Island nightclub.\textsuperscript{206} When, after a year, he failed to make good his promise to divorce, she broke up with him.\textsuperscript{207} For six months he followed her home from work nightly or jumped out of the bushes beside her door.\textsuperscript{208} He carried a gun and threatened to kill her if she rejected him.\textsuperscript{209} Although she repeatedly called the police, the desk officer said they could do nothing because Pugach was a lawyer.\textsuperscript{210} Linda began a relationship with twenty-three-year-old Larry Schwartz. Pugach called her at the engagement party and warned that if he could not have her, “no one else will have you. And when I get through with you, no one else will want you.”\textsuperscript{211} The next day a man threw lye in her face, permanently scarring and ultimately blinding her.\textsuperscript{212} Three months later Schwartz broke off the engagement.\textsuperscript{213} Pugach was convicted of paying three men $2,000 for the assault and received a fifteen to thirty year sentence. Many know this much of story from the notorious New York Court of Appeals decision holding that the police had no duty to protect her—a position that provokes passionate debate among my students.

\textsuperscript{204} \textit{Arizona Daily Star}, Feb. 26, 1985, at 1A.
\textsuperscript{205} “O’Henry” was the pen name used by William Sidney Porter. See \textit{O’Henry, Sixes and Sevens} (1911).
\textsuperscript{207} \textit{id}.
\textsuperscript{208} \textit{id}.
\textsuperscript{209} \textit{id}.
\textsuperscript{210} \textit{id}.
\textsuperscript{211} \textit{id}.
\textsuperscript{212} Fass, \textit{supra} note 206.
\textsuperscript{213} \textit{id}.
Then I tell the denouement. Pugach wooed Riss from prison, writing her regularly for fourteen years. He divorced his wife. Forbidden by his parole to talk to her, he proposed to her via the television news cameras filming his release. Eight months later they married. Although disbarred, he became a prosperous and politically well-connected "paralegal" in Queens. But in 1991 he began an affair with Evangeline Borja, a married woman twenty-eight years younger, who worked in his building. They breakfasted together daily and made love in his office. After five years of feeling neglected on weekends, however, she ended the affair and began seeing a man thirteen years younger than her. Pugach offered to divorce Linda, marry Borja, buy her a house, take her to Europe, buy her a mink coat, and give her a million dollars. After she rebuffed him, she claimed he threatened to kill her and physically abused her. She complained to the police. This time they charged Pugach with harassment and sexual abuse. When Johnnie Cochran did not return his calls (despite Pugach’s belief that Cochran "needs another big case") Pugach defended himself. Throughout the six-day trial (his first ever) the judge sustained the constant prosecution objections to Pugach’s questions and denied his repeated motions for a mistrial. But the jury of three men and three women found him guilty only of misdemeanor harassment in the second degree, which carried a maximum fine of $250 and fifteen days in jail (some of which he had already served). Pugach claimed vindication, calling the prosecution political: "Here's a D.A. who, because of the notoriety surrounding

216. Onishi, Two Tales, supra note 215.
217. Id.
218. Id.
220. Onishi, Two Tales, supra note 215.
221. Id.
222. Id.
223. Id.
224. Id.
225. Id.
227. Id.
me, wanted to score political points."\textsuperscript{228} Linda loyally agreed: "What a waste of taxpayers' money."\textsuperscript{229}

Tort law would never consider setting off these life changes as "benefits," any more than it would allow a negligent car driver who strikes a pedestrian to set off against the damages inflicted the fact that the victim missed a flight that crashed, killing all aboard. (Indeed, the logic of such a set off would allow the tortfeasor to sue the victim \textit{in quantum meruit}.) The reason is not just predictability; we could discount the alleged benefit by the probability that the victim would have missed that flight for another reason. Rather it is that we, not our circumstances, determine the value of our lives. The miserable rich and the contented poor are literary clichés. Cultural conventions may make it easier to be happy with some lives than with others, but they certainly do not dictate the outcome. One fascinating study found that emergency healthcare providers evaluated the lives of traumatically injured spinal cord patients (a category they all had encountered) as far less satisfactory than the patients evaluated themselves.\textsuperscript{230} The providers were much less likely to imagine they would be glad to be alive with tetraplegia (eighteen percent) than the injured patients themselves (ninety-two percent), to believe their quality of life years later would be at least average (seventeen percent versus eighty-six percent), and to expect patients to be sexually active (ten percent versus sixty-six percent of patients who were indeed sexually active).\textsuperscript{231}

V. Commodification

The problem of commensurability is the difficulty of constructing equivalences between any two ontologically different phenomena. Marx focused his harshest criticism on the particular equivalences created by the market, which reduces everything to the commodity form:

Could commodities themselves speak, they would say: Our use-value may be a thing that interests men. It is no part of us as objects. What, however, does belong to us as objects, is our [exchange] value. Our natural intercourse as commodities proves it. In the eyes of each other we are nothing but exchange value.\textsuperscript{232}

\begin{flushleft}
\textsuperscript{228} \textit{Id.}
\textsuperscript{229} \textit{Id.}
\textsuperscript{231} \textit{Id.}
\end{flushleft}
Commodities assume independent lives, in which they own people rather than vice versa. Marx is commonly said to have turned Hegel on his head. But he was also (critically) observing how the market violated Kant’s categorical imperative: “So act as to treat humanity, whether in thine own person or in that of any other, in every case as an end withal, never as a means only.” Marx’s particular target, of course, was the capitalist commodification of labor. Georg Simmel generalized that critique, “[T]he more money dominates interests and sets people and things into motion, the more objects are produced for the sake of money and are valued in terms of money, the less can the value of distinction be realized in men and in objects.”

Extreme forms of commodification still shock. Slavery allows the sale of people, not just their labor power. Thomas Hardy grabbed his readers’ attention by beginning The Mayor of Casterbridge with a drunk Michael Henchard selling his wife and daughter to a sailor for five guineas. Despite its abolition in the nineteenth century, slavery continues to be discovered in my own city, Los Angeles: Thai workers imprisoned in an El Monte clothing factory and a Culver City television producer who enslaved his Filipino maid.

When the market for children’s life insurance exploded in the late nineteenth century, critics declared “there should be no bargaining or trafficking in our Commonwealth under our auspices, in infant life which has been held sacred. . . . No manly man and no womanly woman . . . should be ready to say that their infants have pecuniary value.” I remember being bemused when my children’s school enrollment provoked repeated sales pitches from direct mail solicitors proposing to insure their lives. What good would money do, I wondered, if they died? Socialist states rejected nonpecuniary damages: “Only the bourgeoisie thinks that mental suffering can be cured by

234. On the problem of subjecting all human life to the market, illustrated by consideration of prostitution, baby-selling, and surrogate motherhood, see Bernard Barber, The Absolutization of the Market: Some Notes on How We Got From There to Here, in Markets and Morals (G. Dworkin et al. eds., 1977); Margaret Jane Radin, Market-Inalienability, 100 Harv. L. Rev. 1849 (1987).
239. Zelizer, supra note 46, at 123.
money, and like commodities, can be exchanged by currency." 240 Richard Posner’s provocative proposal for a market in babies conferred just the notoriety he craved. 241

The hunger for recognition is rarely satiated. Athletes and entertainers exploit their celebrity to market goods. Sean P. "Diddy" Combs, Jessica Simpson, and Alicia Keys have made infomercials for Proactiv Solution (an acne-fighting product). 242 Hilary Duff, Freddie Prinze, Jr., Andie McDowell, Britney Spears, Jackie Chan, Spike Lee, and Tyra Banks, among others, sported a milk moustache for the “Got Milk” campaign. 243 Bette Midler, Lillian Hellman, and Joan Crawford, among many others, declared that a Blackglama mink became them most. 244 Environmental groups promote polluters: “World Wide Fund for Nature endorsing Procter & Gamble’s paper diapers and soap powder.” 245 Aristocrats franchise themselves: Earl Spencer golf clubs, Duchess of York children’s books, Prince Charles’s biscuits. Even more insidiously, ordinary people now push products to friends and strangers without revealing they are hucksters. 246 Indeed, many of these shills felt they were rendering a service rather than demeaning themselves as human commercials; they were motivated less by money than cultural superiority and recognition for being hip (what David Riesman once derided as “inside dopesterism”). 247 As advertising becomes omnipresent—in schools, in public spaces, in buildings, on all goods and services, and perhaps even in space—noncommercial behavior begins to seem unnatural, pointless, boring. Arlie Russell Hochschild has written eloquently about the “commercialization of human feeling” in service occupations that simulate emotion. 248 Pornography is as old as art, but the newer technologies of photography, film, television, cable, video, and the internet have dramatically expanded the market and allowed us all to become exhibitionists without ever leaving home.

240. Id. at 161.
Medical technology not only confers incalculable benefits but also allows commodification of new social domains. In the nineteenth century, some jurisdictions prohibited the trade in cadavers (in turn creating a black market of grave robbers). Charles Dickens sought to evoke sympathy for Silas Wegg, who wanted his amputated leg back from Mr. Venus, a skeleton merchant. More recently (and from different motives) a leukemia patient (unsuccessfully) asserted a legal claim to his spleen, removed in the course of treatment. Although the United States has outlawed markets in organs, poor people in third world countries sell theirs to rich recipients. An Israeli entrepreneur flew impoverished Brazilians to South Africa for kidney transplants, paying donors up to $10,000 but charging recipients up to $120,000. The film Dirty Pretty Things (melo)dramatized this trade in England. The founder of Stanley H. Kaplan Educational Centers pushed the envelope of legality by offering $5,000 for a bone marrow transplant for his great nephew, who had leukemia.

Cosmetic surgery lets people commodify themselves by remaking their bodies to resemble those idealized by the media—the latest twist on worshipping graven images. The New Me Surgical Institute offers the usual range of operations, including Botox ($150), full face lifts ($3,499), breast augmentation ($2,999) and reduction ($3,999), lip augmentation ($999), and nasal resculpture ($2,999). (Of course, nonmarket societies mandate even more extreme self-mutilation in pursuit of culturally constructed concepts of beauty: piercing, cutting, flattening, engorging, extending, and tattooing.)

People commodify their progeny too. There is a long-established market for sperm, which are cheap and hence not very profitable because production is pleasurable, brief, and risk-free (despite eons of religious and quack condemnation of onanism). The Genetics & IVF Institute has sought higher profits by offering MicroSort, "a


253. DIRTY PRETTY THINGS (Miramax Films 2003).


highly important new sperm separation technique for preconceptual gender selection . . . ."257 But eggs are different. The oldest profession is the sale not of sex but of women’s reproductive capacity (which used to be owned by fathers or brothers but now, after feminism, belongs to women). Because American law does not classify human eggs as organs, they have been thoroughly commodified.258 Indeed, religious opponents of abortion and stem cell research should favor the commodification of eggs, which generates children who otherwise would never be born; such critics might even embrace a market for babies as a disincentive for abortion. (eBay, interestingly, refuses to sell either sperm or eggs.)259 There were 7,000 egg transplants in 1998, a figure that had been doubling every two to three years.260 Donors must undergo weeks of hormone shots. Commercial brokers advertise in elite college newspapers, promising (if rarely delivering) six-figure payments.261 An ad in the UCLA Daily Bruin offered $80,000 to Caucasian women with SATs above 1300, adding: “Extra compensation available for someone who might be especially gifted in athletics, science/mathematics or music . . . ."262 The director of “A Perfect Match” explained: “You don’t go to a community college to get someone with a 1400 SAT . . . . You go to the Ivy League."263 A typical buyer might say, “I would really hate to have a fat kid. I want the donor to be tall, blond, athletic and with SATs over 1400.” Online registries allow buyers to select hair and eye color, ethnicity, height, and education. A Manhattan Beach broker sent prospective buyers photos of donors in bikinis.264

257. Genetics & IVF Institute, http://www.givf.com (last visited Nov. 27, 2005). “Single Mothers by Choice” is an organization that has twenty-four chapters. About three-fourths of its 4,000 members have bought sperm from banks, which charge $150–$600 per vial and identify donors by such traits as their medical history, ethnicity, physical characteristics, and answers to questions such as, “What is the funniest thing that ever happened to you?” Single Mothers by Choice, at http://mattes.home.pipeline.com (last visited Feb. 2, 2006). Additionally, Fairfax Cryobank, a well known sperm bank, charges more for Ph.D. donors. Amy Harmon, First Comes the Baby Carriage, N.Y. TIMES, Oct. 13, 2005, at G1.


259. Goldberg, supra note 258.

260. Weiss, supra note 258.

261. Id.

262. Id.

263. Id. (internal quotation marks omitted).

264. Id.
One website pictures women, gives their measurements, and lists their accomplishments. Its creator (a commercial photographer) asked rhetorically: "If you could increase the chance of reproducing beautiful children and thus giving them an advantage in society, would you?" It would be "very unfair to put a limit on a girl's ability to make money." Paying them all the same would be "like saying all women are the same, which is not the case." "A tall strawberry blond with a creamy complexion and blue-green eyes," who was completing a Harvard Ph.D., sold seventeen eggs in San Francisco for $18,000, prompting her to ask for a little more in San Diego seven months later. The first couple was particularly attracted by her five-foot-eleven-inch height and Norwegian ancestry. Other prospective buyers asked about her tennis game and measured her shoulders. Julia Derek, a Swedish college student in the United States, donated eggs twelve times, earning "slightly over $50,000." She said, "I didn't even have a green card at the time, so my options were very limited. This was, like, the best solution for me and lots of money for it and no tax on it. And it seemed like a fantastic idea." But the American Society of Reproductive Medicine recommends no more than six egg donations.

Conceptual Options in San Diego has a special category of "extraordinary donors," which included a, "stunning brunette with a perfect smile and an astounding resume. At age twenty-three, she is a third-year medical student in California. She’s five-feet-eight, a National Merit Scholar, professional ballerina, competitive equestrian and award-winning athlete." The broker was selling the eggs for $50,000. Commodification is so complete that donors feel empowered rather than exploited (just like the stealth advertisers discussed above). The tall Norwegian thought it was "neat to be picked ...." A mother who had donated four times, never accepting more than $2,500, "wanted to be able to help." A Rutgers University professor-turned-broker, after having two children with donated eggs,
claimed: “I’ve interviewed 1,100 college girls and they all say, ‘My genes are wonderful, and my eggs should be out there.’”

Kathy Stern, of Southwest Surrogacy Arrangements and Parenting Options in Houston, claims to have “turned young women down that they’re only hoping to gain a check out of it [sic].”

She asks, “What are you hoping to gain from this experience, outside of the check that you are going to receive?” She wants them to say: “providing the means for someone to have a baby is . . . something I’ll feel good about for the rest of my life.”

But another woman who had earned $22,000 for college through four donations felt “weird” seeing her baby’s picture “because it looked just like me” and did not think she ever wanted to meet the children.

When I raise the problem of assigning a dollar value to pain and suffering (the next topic), I suggest (facetiously) that we could avoid the arbitrariness and alleged excesses of jury verdicts by creating a market in sadism in which dominants paid to inflict pain on submissives (scrupulously excluding SM practitioners who enjoyed one or both roles). My crude attempt at black humor usually provokes embarrassed laughs. But professional sports have long pandered to spectator sadism—not only Roman slaves fed to lions or set to killing each other in the Coliseum, but also their contemporary equivalents: NASCAR racing; extreme fighting without rules or protective gear; even conventional boxing, wrestling, and football; and the sale of stories of suffering and endurance by explorers, mountain climbers, the shipwrecked, and so on.

Reality television shows have tried to exploit this commercial territory. Fox aired The Chamber twice, hoping to lift its ratings during the February sweeps. Contestants were bound to a chair and exposed to either subzero cold or flames that raised the temperature above 150 degrees Fahrenheit. ABC competed with The Chair, which remained on air longer although its ratings dropped. Fox also launched The Glutton Bowl, screening bouts staged by the International Federation of Competitive Eating, in which contestants vied

276. Id.
277. All Things Considered, supra note 272.
278. Id.
279. Id.
280. Weiss, supra note 258.
282. Id.
283. Id.
284. Id.
to down the most hot dogs, hamburgers, eggs, beef tongue, and butter in the least time.285

Like the examples above, money damages commodify human experience in multiple ways. Nineteenth-century courts rejected wrongful death actions because "[t]o the cultivated and enlightened mind, looking at human life in the light of the Christian religion as sacred, the idea of compensating its loss in money is revolting."286 As the decline of child labor transformed twentieth-century children from productive family assets to consuming liabilities, a court declared: "Awarding pecuniary damages to the next of kin of a child six years of age is merely making a business commodity out of the child, and subjecting the loss of that child's life to the dollars and cents argument."287 An unusually explicit example is the New York Workers' Compensation Law, which pays two-thirds salary for loss of a member for periods ranging from fifteen weeks for a fourth finger to 312 weeks for an arm.288 It replaces digits and limbs with money rather than the Tin Woodsman's metal.

Tort damages for nonpecuniary loss grotesquely elaborate these crude equivalences. A jury had to decide how much money would buy just the right amount of pleasure to neutralize Joe Dial's pain. All markets radically simplify differences among complex wholes by ranking them along a single dimension of desirability, calibrated by price.289 The market for human eggs revealed (unsurprisingly) that affluent Americans have been taught to prefer Scandinavian bodies. (Hitler was discomfited by the fact that the Aryan traits he prized were more pronounced among the Nordics he conquered than his German "master race.")

Wrongful life cases that award damages to children have to calculate how much less they are worth than "normal" children. When Nicholas Perruche's mother was four weeks pregnant, she told her doctor she might have been exposed to German measles and, if so, wanted to abort.290 After the doctor and laboratory negligently failed to diagnose her condition, Nicholas was born deaf, mute, largely blind,

285. Id.
with a weak heart, and confined to a wheelchair.\textsuperscript{291} By the time he was two his mother suffered a nervous breakdown, divorced, and institutionalized Nicholas, who spent alternate weekends with each parent.\textsuperscript{292} A French court’s decision granting him and his mother causes of action touched off a firestorm.\textsuperscript{293} An advocacy group for the handicapped sued the court that had rendered the judgment.\textsuperscript{294} The head of the Alliance for the Right to Life complained: “This sends a message to handicapped people that their life is worth less than their death.”\textsuperscript{295} The head of the Liberal Democratic Party (a doctor), said the decision “validates the principle that the birth of a handicapped child in itself is an abnormality.”\textsuperscript{296} Indeed, if medical science continues to make “progress” in its ability to create designer babies, why should not all children be entitled to be above average (as in Lake Wobegon)—and recover damages from their parents and doctors if born anything less?

But it is the relationship cases that make me most queasy. Some courts deal with the problem of pricing relationships by focusing exclusively on what has market value. One court limited damages for the death of a child to “the loss of that kind of guidance, advice and counsel which all of us need from time to time . . . that could be purchased from a business adviser, a therapist, or a trained counselor”\textsuperscript{297}—the antithesis of the parent-child relationship. When judges venture outside the market they necessarily introduce their cultural biases. Courts have justified awards for “a romantic husband and caring father . . . [an] all-American guy,”\textsuperscript{298} a marriage “of exceptional harmony and happiness” and a “life more meaningful than the great majority of people could anticipate or would experience,”\textsuperscript{299} and a “devoted husband.”\textsuperscript{300} But how can a jury know what one partner feels about the other? What should the jury have considered in determining Arrah Dial’s damages? The court called Joe “an attractive

\textsuperscript{291} Id.
\textsuperscript{292} Id.
\textsuperscript{293} Id.
\textsuperscript{294} Id.
\textsuperscript{295} Id. Early wrongful birth cases expressed concern that compensating parents would make children feel unwanted, though none denied compensation for this reason. Hartke v. McKelway, 707 F.2d 1544, 1552 n.8 (D.C. Cir. 1983); Boone v. Bullendore, 416 So. 2d 718, 722 (Ala. 1982); Wilbur v. Kerr, 628 So. 2d 568, 571 (Ark. 1982); McKernan v. Aasheim, 687 P.2d 850, 855 (Wash. 1984).
\textsuperscript{296} Simons, supra note 290.
\textsuperscript{298} Drews v. Gobel Freight Lines, 578 N.E.2d 970, 972–73 (Ill. 1991) (internal quotation marks omitted).
\textsuperscript{299} Ossenfort v. Associated Milk Producers, Inc., 254 N.W.2d 672, 686 (Minn. 1977).
\textsuperscript{300} Spaur v. Owens-Corning Fiberglass Corp., 510 N.W.2d 854, 869 (Iowa 1994).
man as far as his wife was concerned." My students laugh, especially the women, sensing a euphemism for: "he's dorky, but I love him." What about his "emotional IQ?" Or how much time they spent together and what they did? Should their sex life be calibrated by the frequency and quality of lovemaking or their precise sexual behavior? And what about fidelity on both sides? Should the jury predict the durability of the marriage? If so, what demographic and other variables are relevant? When courts extend relational damages to parents and children, how should they value that bond—by how skilled the child is in the overprogrammed activities of the middle class family: soccer, martial arts, music, gymnastics, dance, little league, skiing, computer science? And how should a jury evaluate the quality of parenting: by how closely it approached how-to manuals? If so, which ones? Attempts to assign money values to relationships universalize prostitution, extending throughout a lifetime the temporary insanity of high school rating dating, where everyone has a precisely defined place in the popularity pecking order.

The critique of commodification is both deontological and consequentialist. The first argues that we violate our essential humanity by pricing bodily integrity, emotional well-being, existence and nonexistence, and relationships. The second warns that doing so normalizes commodification, both perpetuating it and encouraging its extension to other domains. The latter predictions could be empirically tested.

VI. Calculability

The trier of fact needs a metric in order to calculate damages. The market provides an adequate one for pecuniaries: lost property, income, and medical expenses. The only problem is extrapolating the last two into the future and discounting to present value. But there is no market for human experience, and attempts to commodity it rightly provoke intense opposition.

Much criticism of general damages has emphasized their unpredictability and apparent arbitrariness. One of the most notorious er-

303. See Radin, supra note 28, at 84; Sunstein, supra note 47, at 817.
rors was Ford’s valuation of potential injuries from ruptured Pinto gas tanks at only $200,000 per victim, which led it to decide on cost-benefit grounds against spending eleven dollars per car to prevent such ruptures.\textsuperscript{305}

Vetoing legislation that would have authorized hedonic damages in Rhode Island, Governor Lincoln Almond called them “intangible, emotional, and highly subjective.”\textsuperscript{306} My torts students award wildly differing amounts to Joe Dial, from the purely nominal to tens of millions, in a distribution that is far from normal (see Table C). A comparison of damages awarded in a simulated case by lawyers and laypeople found that the standard deviation was considerably higher for the latter (although when lay responses were grouped in six and twelve person “juries” they displayed greater consensus than individual lawyers).\textsuperscript{307} But interviews with jurors in actual cases disclosed that, although they reached a “compromise” verdict, those who began at the extremes remained dissatisfied with the result.\textsuperscript{308} In the first plaintiff’s verdict in a Ford Explorer SUV rollover case, a California jury awarded a paralyzed driver more than four times what she had sought: $4.6 million specials, $13 million dollars for loss of consortium, and a staggering $105 million generals.\textsuperscript{309} Ford objected that “it’s not based on any rationale that we can comprehend.”\textsuperscript{310} Jury awards of nonpecuniary damages for ten of the passengers who died in the same Korean Airlines crash varied from nothing to $1.4 million.\textsuperscript{311}
GENERAL DAMAGES ARE INCOHERENT

jury wrongful death awards displayed large variations, with means ranging from two to more than five times medians.312

Among the twenty-one U.S. Roman Catholic Dioceses that have entered into global settlements with their many sexual abuse victims, average awards varied from $22,388 in Cincinnati, Ohio; and $38,260 in Camden, New Jersey; to $423,595 in Bridgeport, Connecticut; $511,628 in Hartford, Connecticut; $1,060,606 in Sacramento, California; $1.15 million in Orange County, California; $1,177,778 in Santa Rosa, California; and $1,363,636 in Tucson, Arizona.313 In Covington, Kentucky, the more than 100 awards varied between $5,000 and $450,000.314 A San Francisco jury, trying the first case in the state since the legislature lifted the statute of limitations, awarded $437,000, far more than the $200,000–$365,000 the archdiocese had proposed.315

The Archdiocese of Louisville retained Matt Garretson, an expert in evaluating damages, to divide the $25 million settlement among 243 victims.316 Because he was responsible to the supervising judge, he created a grid with three categories of abuse—"non-genital sexual touching," "penis-body contact," and rape—crossed with variables of frequency of abuse, age, and aggravating circumstances.317 Awards ranged between $15,000 and $175,000.318 When Garretson was hired by the Cincinnati Archdiocese to allocate the three million dollars it offered ex gratia to 132 victims (since Ohio refused to extend the statute of limitations), he made purely subjective judgments.319 This required him to put a figure on Marvin Armbuster's experience. In seventh grade he went to the house of his Catholic junior high school teacher to pick up newspapers for a Cub Scout drive.320 The teacher talked to him, gave him a beer, told him to undress for a nap, and

317. Simon, supra note 316.
318. Id.
319. Id
320. Id.
raped him.\textsuperscript{321} He dropped out of school and later became a heroin addict.\textsuperscript{322} He eventually married and had a son and daughter, but "I didn't hug them or kiss them like I should. I ache when I think of it."\textsuperscript{323}

Juries get little guidance from either lawyers or judges. Defense lawyers often choose not to offer evidence about damages out of a well-founded fear of alienating jurors.\textsuperscript{324} An alternate in a medical malpractice case said that he and the other jurors (who talked after the verdict) were "angry" that the defense lawyers "had been trying to put one over on us, claiming that Stephen was a normal teenage boy with a few minor handicaps."\textsuperscript{325} The alternate continued, "For seven weeks, the jury had sat in that courtroom listening to the defense lawyers belittle Stephen's problems. We saw the doctors refuse to acknowledge Stephen's handicaps or to accept responsibility for them."\textsuperscript{326}

Variation is much greater for general damages than specials.\textsuperscript{327} Unusual injuries produce greater variation.\textsuperscript{328} Psychological experiments that ask individuals to evaluate tort cases find much greater divergence in damage awards than severity estimates, and greater divergence among laypeople than lawyers (both plaintiffs' and defendants') and judges.\textsuperscript{329} Should victim characteristics be relevant? Should stoics recover less because they hide their pain or more because they are less in touch with their feelings? Trial manuals advise plaintiffs' and defendants' lawyers whom they want on and off their juries (without offering an empirical foundation).\textsuperscript{330} At least some trial lawyers select

\begin{itemize}
\item 321. Id.
\item 322. Simon, supra note 316.
\item 323. Id.
\item 324. VIDMAR, supra note 134, at 197.
\item 325. Id. at 102, 108; Steve Cohen, Malpractice Behind a $26-Million Award to a Boy Injured in Surgery, N.Y. Times, Oct. 1, 1990, at 23.
\item 326. VIDMAR, supra note 134, at 108.
\item 327. Shari Seidman Diamond et al., Juror Judgments About Liability and Damages: Sources of Variability and Ways to Increase Consistency, 48 DePaul L. Rev. 301 (1998). This remains true even after eliminating extremes and even when "jurors" deliberate collectively.
\item 328. Allen J. Hart et al., Injuries, Prior Beliefs and Damage Awards, 15 Behav. Sci. & L. 63 (1997).
on the basis of demographics. But other studies have found little difference between the judgments of legal professionals and laypeople and higher levels of agreement among jurors, real and simulated, than survey respondents. I know of no research on variation among trial judges, in either bench trials or ordering remittitur.

The lack of a metric is perfectly captured by the legislative mandate to appellate courts, which are authorized to order a new trial when the award "deviates materially from what would be reasonable compensation." None of the proposed solutions is either acceptable or effective. After the Mississippi Supreme Court allowed plaintiffs' "expert witnesses" to testify about loss of enjoyment, defendants' lobbyists persuaded the state legislature to prohibit such testimony. Most courts have rejected expert testimony, but there is no principled basis for preferring either approach. Mississippi continues to allow "character" witnesses to testify about how much a deceased victim enjoyed life. Because there is an adequate metric for pecuniary damages and greater juror consensus about them, many argue that generals should be proportional to specials, usually in the range of one

---


335. N.Y. C.P.L.R. 5501(c) (McKinney 2003).

336. Joseph Sanders agrees but still feels that some greater effort towards horizontal equity is desirable. Joseph Sanders, Why Do Proposals Designed to Control Variability in General Damages (Generally) Fall on Deaf Ears? (And Why This Is Too Bad), 55 DEPAUL L. REV. 489 (2006).


339. For example, federal courts and courts in California, Colorado, Hawaii, Illinois, Indiana, Louisiana, Nebraska, Ohio, and West Virginia have rejected expert testimony on such matters. See Schwartz & Silverman, supra note 304 at 1064 n.130.

340. Choctaw Maid Farms, 822 So. 2d at 922.
or two to one.341 But there is no necessary relationship between them. Those unsalaried and beyond medical assistance can still suffer extreme pain and loss of enjoyment. I could still teach law as long as I could read and speak, however physically impaired. Others may lose jobs while retaining most functions; and expensive medical care may eventually restore victims to full function. A California jury recently awarded a woman $7.5 million for the long-term emotional effects of a train crash, in which she suffered $900,000 in lost wages and $500,000 in medical expenses.342 One jury awarded eight million dollars to a child, with a seventy-two-year life expectancy, whom malpractice had rendered retarded, blind, deaf, and unable to use his arms or legs or sit in a chair without support—that was the uncontested amount of economic damages. The jury awarded nothing for noneconomic damages because many felt the economic damages were “huge,” “unbelievable,” “exorbitant,” and “running wild”!343 Furthermore, as discussed below, proportionality extends the profound inequalities that characterize income, wealth, and access to healthcare to those domains where we are essentially equal.

One commentator has suggested emulating the Federal Sentencing Guidelines.344 But those guidelines have rightly provoked great resistance from trial judges, criticism by commentators, and constitutional challenges, all of which might jeopardize civil guidelines as well.345 All schedules, from the Code of Hammurabi and the Roman Twelve Tables, to the New York Workers Compensation Law quoted above, impose slot-machine justice, sacrificing nuance and individualization to convenience. The Zhejiang (China) Department of Labor and Social Security awards six months pay for loss of one digit, ten months for two, fourteen months pay plus seventy percent pay to retirement for four, eighteen months and seventy-five percent for an arm or hand 341. As the dissent in Seffert explained, “A review of reported cases involving serious injuries and large pecuniary losses reveals that ordinarily the part of the verdict attributable to pain and suffering does not exceed the part attributable to pecuniary losses.” Seffert v. Los Angeles Transit Lines, 364 P.2d 337, 346 (Cal. 1961) (Traynor, J., dissenting). Trial lawyers and insurance claims adjusters use a similar rule of thumb. See H. LAURENCE ROSS, SETTLED OUT OF COURT 107–11 (1980).


343. VIDMAR ET AL., supra note 134, at 239–41.


and the thumb of the other, and twenty-four months and ninety percent for both arms.\textsuperscript{346}

Malpractice insurers divide injuries into nine categories, ranging from "emotional only" to death; but this, of course, is just a circular prediction of jury awards.\textsuperscript{347} Would anyone find it acceptable to simplify remedies for contract, property, business torts, or divorce this way?

The fixed and relatively low awards to 9/11 survivors for bereavement (raised from a proposed $50,000 to $100,000) and pain and suffering ($250,000) attracted sharper criticism than any other aspect of the compensation fund. Plaintiffs' personal injury lawyers were naturally outraged. "You can't get fair damages unless each case is treated individually," said a New York lawyer.\textsuperscript{348} A Cleveland lawyer criticized the grid as "a very incomplete and irrational method for evaluating a family's loss."\textsuperscript{349} And a Chicago lawyer called it an effort "to sterilize the process that ignores the individuality of each claim."\textsuperscript{350} A spokesman for the 9/11 Widows and Victims' Association asked: "Is the lack of a father for the next 20 years only worth $50,000? I don't think any parent would accept that price tag."\textsuperscript{351} Vincent Ragusa demonstrated with a photo of his son Michael in his firefighter's uniform and the caption: "If my son saved your life on 9/11 how much would he be worth to you?"\textsuperscript{352} Sarah Siller displayed a poster of her husband in his firefighter's uniform with the caption: "He didn't fail you!! Don't fail his 5 children!!!"\textsuperscript{353}

The enormous range of nonpecuniary damages offered by other terrorism compensation schemes dramatically illustrates the lack of any principled foundation. The United States paid $1.5 million to the families of each of those killed when it mistakenly bombed the Chinese Embassy in Serbia.\textsuperscript{354} In 1986, Libyan agents blew up La Belle nightclub in Berlin, killing three and wounding hundreds.\textsuperscript{355} The Libyan

\begin{flushright}
349. Id.
350. Id.
352. Id.
354. Belkin, supra note 54.
\end{flushright}
government has agreed to pay the family of the dead Turkish woman one million dollars, those seriously injured $350,000, and those with lesser injuries $190,000. Lawyers were still negotiating over the two dead and 169 wounded Americans. Libya agreed to pay $10 million to the families of each of the 270 passengers killed in the 1998 Pan Am bombing over Lockerbie. It paid one million dollars to each of the families of the 170 killed in the bombing of the French UTA jet over West Africa in 1989. Chile will pay the 27,255 people, whose claims were recognized by the special government commission on torture under Pinochet, a lifetime pension of about $200 per month plus special benefits or preferential access to education, healthcare, and housing.

The United States displays an equally ad hoc response to those it has killed and wounded in Iraq. Between May 2003 and June 2004, the military denied 5,700 claims while paying a total of $2.2 million to 5,600 claimants. The Commander’s Emergency Response Program paid out ten times as much as the Foreign Claims Act (which excludes combat), up to $11,000 per claimant for the former compared with $2,500 per death for the latter. The military offered $10,000 to the family of Mohammed Ghazi Kaabi, killed while trying to enter the government office in which he worked. The military gave $5,000 to Ali Kadem Hashem, who saw his three children killed by an American missile that hit his house and then watched his wife burn to death. The guidelines suggest a thousand dollars per injury and $2,500 per death. Given $6,000 for the death of his brother, sister, wife, and six children, Said Abbas Ahmed asked: “This war of yours cost billions. Are we not worth more than a few thousand?” After the United States destroyed Najaf in August 2004 in order to rid it of insurgents, the Marines doled out $8.9 million, $300 to $400 for most property damage claims. Although President Bush signed legisla-

356. Id.
357. Id.
358. Id.
359. Id.
362. Id.
363. Id.
365. Id.
366. Id.
tion sponsored by Sen. Patrick J. Leahy (D-Vt) authorizing $10 million for victims, none has been distributed. A Senate Appropriations Committee spokesperson said that both the State and Defense Departments "came to us with concerns about setting a precedent of compensation for war victims."

Others have recommended that jurors receive data on "similar" awards, like the tables used by German judges. But experience is unique, especially in cases where juries make large awards—precisely those that provoke the harshest criticism (which may be why courts have rejected this proposal). Furthermore, average general damages recently grew threefold between 1960–69 and 1980–87, after adjustment for inflation. Which awards were correct: the earlier, the later, or both? Ms. Seffert’s $134,000 was the largest pain and suffering award in California in 1961. Joe Dial's $2.5 million nonpecuniary damages was part of the largest compensatory judgment ever awarded in the United States in 1971. Three decades later, a jury awarded forty-eight million dollars in pain and suffering to a forty-six-year-old worker who had suffered third degree burns over more than seventy-five percent of his body, lost his marriage, and lived in chronic pain, unable to care for himself. Most states let plaintiffs lawyers ask juries to subdivide general damages into brief time periods. It is clearly easier to imagine being Ms. Seffert or Joe Dial for an hour than a lifetime; but small differences in valuation are greatly magnified when extrapolated over the latter (thirty-five years or 306,600 hours for Ms. Seffert, thirty-nine years or 341,640 hours for Joe

368. Duhigg, supra note 361.
369. Id.
371. Miksis v. Howard, 106 F.3d 754 (7th Cir. 1997); Richardson v. Champan, 676 N.E.2d 621 (Ill. 1997).
372. Leebron, supra note 311 (putting the figures at $48,000 in 1960–69 and $147,000 in 1980–87).
376. FRANKLIN & RABIN, supra note 7, at 293–94.
This confirms the intuition that juries award higher damages when the victim’s experience is conceptually subdivided into multiple categories, such as pain and suffering and loss of enjoyment. Economists have suggested several ways to price experience. Willingness to pay (WTP) asks randomly chosen respondents how much they would pay *ex ante* to avoid different consequences. But this methodology has multiple flaws. First, courts explicitly prohibit plaintiffs' lawyers from asking jurors to consider what they would require to be paid to change places with the victim. Second, answers to hypothetical questions about experiences the respondent never had, or even encountered secondhand, are of dubious value. Indeed, many respondents refuse to participate for that reason. Third, respondents demand much more *ex ante* than they want *ex post*. Fourth, WTP varies with income and wealth; given huge and rapidly increasing inequality, this would lead us to conclude that poor people suffer less pain (just as American hawks claimed that Vietnamese peasants suffered less when we killed or maimed their loved ones). Not surprisingly, some jurisdictions have rejected WTP. Perhaps the best response is found in the Talmud. Asked "how do we assess pain where there is permanent physical damage," the father of Shmuel...
replied: "We assess how much a person wants to take to have his hand cut off." But the Gemara objected: "To cut off his hand! It is not pain alone that is incurred in such a case. . . . And Furthermore, are we dealing here with fools?! What sane person would agree to have his hand cut off?" Economists also use wage risk premiums—amounts equally qualified workers require to be paid for jobs that differ significantly only in risk. But given the segmented labor market, the riskiest jobs often pay the lowest wages; it is the most desperate, vulnerable workers—typically undocumented—who are exposed to pesticides or other toxic chemicals, unsafe machinery, or hazardous demolition work (as shown in the Hurricane Katrina clean-up). There are other demographic differences. One study found that the wage risk estimate of the value of a life ranged from $2.6 million for men to $13 million for women and from $6.1 million for unionized men to $42.3 million for unionized women. Another found estimates ranging from $900,000 to twenty-one million dollars. Some workers explicitly deny that taking a job implies acceptance of the risk. The wage risk premium may decline as employment conditions worsen. There is some evidence that it grows with income, rising 1.5–1.7 times faster than inflation. Perhaps for that reason, cost-benefit analysts in the Bush Administration recently switched from wage risk premiums, which value life at five to seven million dollars, to willingness to pay, which values it at only $3.7 million. Defenders of this change shamelessly claimed that "de-

---

387. Id.
388. Id.
bates about risk are often emotionally heated and charged with competing values. Risk analysis adds a cooler, fact-based perspective, favoring no ideology, no political or corporate agenda."

But explicit commodification can provoke backlash. Dr. John Graham, former head of the Harvard Center for Risk Analysis and now Bush's regulatory czar, proposed the EPA's Aging Initiative, which would value the lives of those over seventy at thirty-seven percent less than younger adults ($2.3 versus $3.7 million). In response to criticism, Graham initially defended the "life-years saved" method by noting that it can also increase the value of the elderly, as the Clear Skies initiative did for those over sixty-five. But seniors and environmentalists demonstrated with big buttons advertising "Senior Discount, 37% Off." A sixty-seven-year-old who attended a public meeting with his eighty-seven-year-old mother asked: "What family do you know that would put a price on the life of a grandparent?" EPA Director Christie Whitman hastily capitulated: "The life-span one is fine if you're talking about medical determinations. Does it make more sense to give scarce lung transplants to someone 75 or someone 17? . . . But we don't think that that's as appropriate for the work that we do." An earlier proposal to use the elderly to handle radioactive waste inspired a cartoon of an old couple, with the wife saying to the husband: "As long as you're going out, why don't you take the garbage." Laws—especially judgments—are the reasons the state gives for exercising power. (Max Weber famously defined authority as power plus reasons.) Law claims to treat like things alike—one of its most fundamental reasons for existing. But without a metric we cannot say which experiences are alike or quantify the differences between those

398. Id.
399. Id.
400. Id.
402. The implication being that because of their advanced age, the couple was more likely to die from an infirmity other than cancer.
that are dissimilar. Under those circumstances, state action is arbitrary and unjust, not deserving the title of law.

VII. Equality

Pecuniary damages deliberately reproduce the existing distribution of income and wealth in pursuit of the status quo ante. Nonpecuniary damages preserve, create, or aggravate those and other inequalities.

Rejecting liability, Wagon Mound famously pronounced: "All are agreed that some limitation there must be." (Though many, including myself, do not agree.) Judicial skepticism about and hostility towards "pure emotional loss" (and legislative reaction in response to special interests when judges do extend liability) have led to bright-line rules articulated in terms of the conclusory concepts of duty and proximate cause. Courts required impact for more than a century. Injury was not the "natural and proximate result" or the "probable or natural consequences of fright, in the case of a person of ordinary physical and mental vigor." Such claims would create a "flood of litigation where the injury complained of may be easily feigned without detection, and where the damages must rest upon mere conjecture and speculation . . . ."

Once courts dispensed with impact, they limited recovery to victims within a narrowly defined "zone of danger." A California court declared that "civilized life would not be possible if there were such a tort" as fear of being struck by a falling airplane. It mocked the "loosey-goosey nature of a pure emotional distress claim" because "psychological symptoms are much more susceptible to being faked . . . ." In any case, it was "foreseeable that the actual fright itself will be short lived." Physics acts on our bodies; we will our emotions and should cultivate a stiff upper-lip (perhaps by growing a proper British military moustache). Florida courts have been especially contemptuous of emotional indulgence. In the nineteenth cen-

408. The arbitrariness of these bright lines is not an argument against internalizing the costs of fear in regulatory risk assessments. See Matthew D. Adler, Fear Assessment: Cost-Benefit Analysis and the Pricing of Fear and Anxiety, 79 Chi.-Kent L. Rev. 977 (2004).
410. Id. at 749.
411. Id.
tury they dismissed emotional distress as "spiritually intangible." A hundred years later they still maintained that "the requirement of a physical impact gives courts a guarantee that an injury to the plaintiff is genuine" and does not "open the floodgates for fictitious or speculative claims." Federal courts have been very cautious in recognizing emotional distress under the Federal Employer's Liability Act (FELA) because it is especially "difficult for judges and juries" to identify valid claims and prevent "unlimited and unpredictable liability" and a "flood" of "trivial" claims. Three years later the Supreme Court rejected the claim of a plaintiff who had no present symptoms of the disease he feared, imposing a rigid "categorization" in order "to deny courts the authority to undertake a case-by-case examination." When the Court ultimately allowed such a claim it still required the fear to be "genuine and serious" and to affect "the plaintiff's basic emotional security."

Earlier cases requiring "impact" found it in trivial contact, as well as in impact following emotional shock. A court applied the impact rule to award damages for fear suffered during the instant between a plane crash and death but not the long minutes of terror while the plane was falling. The New York Court of Appeals initially refused to recognize a negligent infliction of emotional distress (NIED) action:

[T]here is a limit to attaining essential justice in this area. While it may seem that there should be a remedy for every wrong, this is an ideal limited perforce by the realities of this world. Every injury has ramifying consequences, like the ripplings of the waters, without end. The problem for the law is to limit the legal consequences of wrongs to a controllable degree.

(Of course, the only "reality" that limited this ideal was the court's own exercise of arbitrary power. And the court was enhancing its control at the expense of the uncompensated victims.) The court dis-

418. Comstock v. Wilson, 257 N.Y. 231 (1931) (collision inducing fright causing victim to faint and fall).
paraged the emotional harm of seeing one’s child killed or maimed as simply “the risk of living and bearing children.” It was the parents’ risk only because the court declined to make it the tortfeasor’s. When New York ultimately enlarged the scope of duty, it continued to draw an arbitrary distinction between victims who fear for themselves and witness injury to loved ones, and those who suffer only the latter. It is impossible to justify the arbitrary distinction between not compensating the emotional harm of witnessing an injury to a loved one (arguably among the most painful experiences) and compensating fear for an injury to oneself that does not transpire.

The landmark California case creating the NIED action required contemporaneous perception by a close relative. Hence a father who heard a car hitting someone and ran out of his house to find his son dead would have no action; but he could invoke nineteenth-century precedents to claim damages if he were misinformed his son had been killed or saw his son’s lifeless body negligently dropped. (Indeed, Service Corporation International of Houston recently paid $100 million to settle with more than 2,000 Florida families for mishandling and removing remains.) For more than two decades California granted compensation to plaintiffs if they learned of the accident within moments but not minutes, to some but not others who reconstructed the accident using senses other than sight, to a mother who watched her son deteriorate and die in Juvenile Hall

421. Id.
430. Krouse v. Graham, 562 P.2d 1022 (Cal. 1977) (husband sitting in driver’s seat knew that wife was unloading groceries when car rearended, though he could not see her because trunk lid was up); Nazaroff, 80 Cal. App. 3d at 554 (mother hearing child’s name screamed could reconstruct that he had fallen into swimming pool out of sight).
431. Hathaway, 112 Cal. App. 3d at 730 (mother could not know from hearing child call “let go, Michael, let go” that son had been electrocuted); Parsons v. Superior Court, 81 Cal. App. 3d
over several days but not to the father who heard his wife’s nightly reports but could not visit because of work,\textsuperscript{432} and to mothers of still-born children but not to fathers in the delivery room who heard the fetal heartbeat falter and cease over the monitor.\textsuperscript{433} One court allowed a mother to recover for witnessing her child become convulsive and then comatose from an improper intravenous drip, although she did not know at the time this was negligent;\textsuperscript{434} another court, however, denied recovery to a mother who witnessed her daughter’s deterioration and death from an undiagnosed duodenal ulcer but lacked contemporaneous knowledge that this was negligence.\textsuperscript{435} California ultimately adopted rigid rules about relationships and contemporaneity\textsuperscript{436} and applied them to deny recovery to the adult daughter who saw her mother “bright blue” in the hospital but did not know at the time it was because her vein had been negligently nicked during catheterization.\textsuperscript{437} A California court denied recovery for distress caused from observing an injury via television,\textsuperscript{438} and to parents for emotional distress after they administered an excessive dose of medicine to their child as a result of negligent instructions from the pharmacist.\textsuperscript{439}

Massachusetts courts have allowed recovery by a plaintiff who saw the victim within minutes or hours\textsuperscript{440} but not the next day.\textsuperscript{441} Iowa allowed recovery by a plaintiff mistaken about injury severity,\textsuperscript{442} but Massachusetts denied it to a plaintiff mistaken about victim identity because “daily life is too full of momentary perturbation,” and the plaintiff’s distress was “ephemeral.”\textsuperscript{443} A Nebraska court agreed with Massachusetts: “[W]e should shed tears for the loss of [the youth who actually died], empathize with the grief of his family and friends,

\textsuperscript{506} (Cal. Ct. App. 1978) (father following daughters in another car came around curve, saw wreck and found them dead or dying).

\textsuperscript{432} Ochoa v. Superior Court, 703 P.2d 1 (Cal. 1985).


\textsuperscript{436} Thing v. La Chusa, 771 P.2d 814 (Cal. 1989).

\textsuperscript{437} Bird v. Saenz, 51 P.3d 324, 328–29 (Cal. 2002).


\textsuperscript{439} Huggins v. Longs Drug Stores, 862 P.2d 148 (Cal. 1993).


\textsuperscript{442} Barnhill v. Davis, 300 N.W.2d 104, 107 (Iowa 1981).

\textsuperscript{443} Barnes v. Geiger, 446 N.E.2d 78, 81 (Mass. 1983).
rejoice in Scott Sell's life [the youth thought dead], and move on.”

Most jurisdictions deny recovery for emotional distress from witnessing damage to property, although Hawaii has been more expansive. Some jurisdictions are more solicitous of pets. Although tortfeasors take victims as they find them physically (the “eggshell” or “thin skull” plaintiff rule), victims can recover emotional distress only if an objectively “reasonable” person would suffer it. And courts impose a de minimis requirement on emotional distress (which must be severe) but not on physical injury.

Plaintiffs can recover for witnessing harm to members of their nuclear families (whatever the emotional tie) but generally not to anyone else however strong the bond: neither cohabitants (thereby excluding gays and lesbians) nor members of the increasingly common blended families following divorce and death. An elevator’s sudden movement decapitated a man, leaving his body on the landing while his head—still wearing Walkman earphones—accompanied the horrified passengers up seven floors. But though the court found they were in the zone of danger, it denied recovery because they were unrelated.

The “zone of danger” test employed by most jurisdictions that recognize NIED is arbitrary when framed in terms of proximity in space and time: what does it mean to have been “in danger” if you are not physically injured? The concept is even less coherent when applied statistically to populations. A Minnesota court denied emotional distress damages to patients of an HIV positive gynecologist because there was “never more than a very remote possibility” of infection. A California court agreed because juries would “reach inconsistent results” (presumably it was better that judges make arbitrary distinc-

448. Williamson v. Waldman, 696 A.2d 14, 22 (N.J. 1997) (plaintiff, who had been pricked by discarded needle had to show serious and genuine distress “that would be experienced by a reasonable person of ordinary experience”); see, e.g., Portee v. Jaffee, 417 A.2d 521 (N.J. 1980).
451. Id.
452. Id.
So did Delaware, in order to forestall claims by those whose "irrational" fears had been provoked by "the slightest contact." 455 Ohio rejected the claim of a man who had twice within two months been negligently diagnosed HIV positive because he had not been in "real and existing physical peril," stating, "[N]ot every wrong is deserving of a legal remedy." 456 But unless law gives reasons for such distinctions it becomes mere fiat. Ohio also rejected the claim of a patient who suffered emotional distress when negligence delayed the report of test results confirming that his melanoma had not metastasized. 457 California required a plaintiff whom the defendant had negligently exposed to carcinogens to show that his fear was "serious, genuine and reasonable." 458 (How do you prove an emotion is genuine?) Although New York allowed recovery for fear following x-ray treatments that burned the plaintiff's arm, 459 Wisconsin denied recovery after a doctor negligently broke a catheter in plaintiff's shoulder, because liability would place "too unreasonable a burden" on medicine. 460 Although California allowed a husband to recover emotional distress damages from a doctor who negligently told a patient she had a sexually transmitted disease (and suggested her husband be tested to see if his infidelity were the cause), 461 New York denied emotional distress damages to the husband of a woman whom a doctor negligently misdiagnosed with cervical cancer. 462

The law of relational torts also makes arbitrary distinctions. No court has recognized a claim for harm caused by physical injury of a sibling. Yet studies of the siblings of children with autism, cerebral palsy, and Down syndrome find that they incur heavy emotional burdens, denying their own needs and assuming a quasi-parental role. 463 Courts recognize wrongful birth claims by parents but not grandparents. 464 Loss of consortium is recognized between spouses but not cohabitants 465 or parents and children. 466 Yet a recent study found that

---

465. Elden v. Sheldon, 758 P.2d 582 (Cal. 1988). The California Legislature overturned this in 2001. CAL. CIV. CODE § 1714.01 (West 2002). Other jurisdictions have accomplished this result
the death of a child sharply increases the likelihood that parents will suffer mental illness and substance abuse.\textsuperscript{467} A San Francisco trial judge recently extended a wrongful death action to the lesbian partner of a woman bitten to death by a neighbor's two 100-pound presa canario dogs.\textsuperscript{468} The September 11th Victim Compensation Fund extended wrongful death claims to gay and lesbian couples.\textsuperscript{469} Kenneth Feinberg said, "If the next of kin is supportive and there's no dispute, it's a nonissue."\textsuperscript{470} But House Republicans killed a bill to provide death benefits to the survivors of ten gay public safety officers.

Money inevitably engenders dispute. A 9/11 victim lived with his gay partner for twenty-six years but never divorced his wife.\textsuperscript{471} After his death his kin opposed the partner's claim.\textsuperscript{472} Feinberg rejected claims by those engaged to decedents, which included forty-four of the more than 600 Cantor Fitzgerald employees killed.\textsuperscript{473} Susann Brady, forty-three, was to have married Gavin Cushny, forty-seven, six weeks later.\textsuperscript{474} Brady said, "Here you lost the most important person in your life, and nobody gives you any recognition. You just kind of get bypassed."\textsuperscript{475} Rachel Uchitel concurred.\textsuperscript{476} Her fiancé, James Andrew O'Grady, had willed everything to his sister.\textsuperscript{477} She said:

Money doesn't necessarily compensate, but in this society that's what we use to compensate. What else is there, unless they're going


\textsuperscript{470} U.S. Fund for Tower Victims Will Aid Some Gay Partners, supra note 469, at A1.

\textsuperscript{471} Id.

\textsuperscript{472} Id.


\textsuperscript{474} No Dress, No Vows, and Less Status in Grief, supra note 473.
to give me some knight in shining armor? And in my eyes, that’s never going to happen. I lost the person I loved, and the person who loved me.\textsuperscript{478}

This newspaper account provoked a letter to the editor from a woman who had lost her fiancé in another accident:

I, too, was told: “You’re young, you’ll find someone else.” But when someone you love dies traumatically, you, too, are traumatized, particularly if the death is compounded by the lack of physical remains and financial problems stemming from your vague legal status. Your life changes forever. Many survivors of disaster never fully recover. I did not know it at the time, but Earl was the last man in my life who wanted to marry me, start a family and be my partner in all ways. Do not assume that because someone is young, recovery will be automatic. Falling in love with someone is a rare gift, not like a pair of slippers you can quickly replace if you lose one. Those who were engaged to the victims of the World Trade Center not only deserve a full measure of support, but will need it in the long run.\textsuperscript{479}

But the day I wrote about these events, I read the following story in the \textit{New York Times}.\textsuperscript{480} Rachel Uchitel went through a delayed grieving process and then experienced a “massive breakdown” two years after the attack.\textsuperscript{481} She said, “I felt like everyone else had forgotten about it. I was resentful. Lonely.”\textsuperscript{482} She took leave from her job and began therapy.\textsuperscript{483} At a 2003 Halloween party she ran into Steven Ehrenkranz, whom she had known in high school.\textsuperscript{484} He had interviewed at Cantor Fitzgerald the morning of 9/11 and left just before the first plane hit; everyone he met there was killed.\textsuperscript{485} The two got together again a few weeks later, when both were in Florida.\textsuperscript{486} They married on November 20, 2004.\textsuperscript{487} Her maid of honor, who lost her boyfriend and brother on 9/11, said “It gives the world, and me, so much hope.”\textsuperscript{488} This again demonstrates the impossibility of knowing how tragedy will affect people and therefore the impossibility of putting a dollar value on that impact.

\textsuperscript{478} \textit{Id.} (internal quotation marks omitted).
\textsuperscript{479} Letter, \textit{supra} note 473.
\textsuperscript{481} \textit{Id.}
\textsuperscript{482} \textit{Id.}
\textsuperscript{483} \textit{Id.}
\textsuperscript{484} \textit{Id.}
\textsuperscript{485} \textit{Id.}
\textsuperscript{486} Quealy, \textit{supra} note 480.
\textsuperscript{487} \textit{Id.}
\textsuperscript{488} \textit{Id.}
Another letter writer asked why the Fund did not compensate the parents who lost sons and daughters, those thousands of silent souls who wake each morning to know it's not a dream, who feel grief like a great weight that makes it hard to breathe. They have memories three and four decades long. It was the parents who nurtured, taught and encouraged the vibrant young people so poignantly portrayed in your pages. . . . It is the most unnatural thing in the world for parents to bury their children.489

The previous paragraphs identified tort doctrines that create inequalities by drawing arbitrary bright lines between those who will and will not receive any damages. Tort law offends egalitarian ideals in many other ways. The Anglo-Saxon price of homicide, or "wergild," varied with the victim's status.490 Damage awards vary by defendant (individual versus corporate), case type (automobile versus medical malpractice), 491 jurisdiction, 492 and the gender and household income of simulated jurors.493 Special damages reproduce the obscene and still growing inequalities of wealth and income (in which CEOs make 500 times as much as their workers and accumulate even greater multiples of wealth).494 To the extent that judges and juries proportion generals to specials, they extend these inequalities to experience.495 That is even more troubling. One could argue that accidental injuries

489. Letter supra note 473.
494. See supra note 18 and accompanying text.
495. The limited empirical data suggest that juries reproduce the economic inequalities associated with race and gender in their verdicts, though these data do not adequately distinguish pecuniary from nonpecuniary damages. EDIE GREENE & BRIAN H. BORNSTEIN, DETERMINING DAMAGES: THE PSYCHOLOGY OF JURY AWARDS 54–58 (2003).
are an inappropriate occasion to question the distribution of wealth and income; victims should be restored to the status quo ante, and any redistribution should be universal and use other mechanisms. (I am unpersuaded: the real question is whether state power should preserve inequality.) But in any case there is no justification for extrapolating material differences to the realm of experience. We all resonate to Shylock’s cri de coeur: “If you prick us, do we not bleed?”

Injury, disease, and death are central to the human condition. Even economists agree on the impossibility of interpersonal comparisons of utility. This may justify Kenneth Feinberg’s decision to award the same amounts for bereavement and the deceased’s pain and suffering (although he varied pain and suffering awards for injured survivors).

But I believe victim characteristics interact with jury composition to influence general damages. Certainly, plaintiffs’ personal injury lawyers play such hunches in deciding which cases to take and how to dramatize them. Manuals urge lawyers to show a deceased child “playing baseball, riding a merry-go-round, building sand castles at the beach, or seated on the floor in front of the Christmas tree rapidly solving a child’s puzzle.” And claims adjusters have their own algorithms for settling cases, offering more “if the guy coaches Little League” and has got “two little girls,” especially if “they’re cute.” His wife should be pretty but not “gorgeous” because “the jury goes, ‘Wait a minute, wait a minute... she’s probably a bitch.’” “Outdoorsy” people are worth more than homebodies: “People go, ‘He rock climbed... this guy enjoyed life.’” “If a mother said her son visited every week, that was worth a few hundred thousand. For spouses willing to testify, the loss of good, frequent sex could add $250,000 or more to a claim.” In a wrongful death case compensating parents for the grief of losing a child, the court said “it depends on all the circumstances important in the lives of a particular parent and a

496. William Shakespeare, The Merchant of Venice act 3, sc. 1.
499. Zelizer, supra note 46, at 159 n.52.
500. Davidson, supra note 42.
501. Id.
502. Id.
503. Id.
particular child . . . the ability of the child to offer companionship and society and the ability of the parent to enjoy it." 504 A jury awarded $480,000 to each of three children (fifteen, twelve, and eight) for loss of their mother’s advice, companionship, moral training, and education (was it equally important to each?) but $890,000 to her widowed husband. 505 What could possibly justify those numbers?

Many of my students award Joe Dial tens of millions of dollars because he resembles them: in graduate school, a striving professional, highly intelligent, taking pleasure in using his mind, happily married, a new father, physically fit, with a passion for sports and outdoor activities. Those characteristics also persuaded them that Arrah Dial loved him. What if Dial performed menial work, was unattractive, uneducated, a klutz, a couch potato? (Juries award higher damages to athletes than to those who read or watch television.) 506 Antisocial (even more than the stereotypical geeky engineer), single, or gay? Should those with greater genetic and cultural endowments receive higher damages because they lose more? (Quality Adjusted Life Years, pioneered by Oregon to ration healthcare, valued the lives of the disabled less; that was one of the many reasons for its quick repudiation.) 507 Or should those with lesser endowments receive more because they sink further below the average?

Decisionmakers inevitably introduce their own values in monetizing losses. Arguing that loss of enjoyment ought to be a category of noneconomic damages distinct from pain and suffering, New York Court of Appeals Judge Titone declared, “The capacity to enjoy life—by watching one’s children grow, participating in recreational activities, and drinking in the many other pleasures that life has to offer—is unquestionably an attribute of an ordinary healthy individual.” 508 The Mississippi Supreme Court singled out “going on a first date, reading, debating politics, the sense of taste, recreational activities, and family activities.” 509 A Louisiana Court of Appeals cited “the simple enjoyments of a father with a young child.” 510 The Ohio Supreme Court offered a different list: “loss of ability to play golf, dance, bowl, play

506. Davidson, supra note 42.
507. ERIK NORD, COST-VALUE ANALYSIS IN HEALTH CARE: MAKING SENSE OUT OF QALYS (1999); David P. Hamilton & Virginia Morell, Oregon Puts Bold Health Plan on Ice, 149 SCI. 468 (1990); Jonathan Oberlander et al., Rationing Medical Care: Rhetoric and Reality in the Oregon Health Plan, 164 CAN. MED. ASS’N J. 1586 (2001).
musical instruments, engage in specific outdoor sports.” Robert A. Clifford, whose generosity funded this Symposium, recently negotiated a thirty-five million dollar settlement on behalf of a severely injured internationally acclaimed violinist; should that combination of talent and practice influence her nonpecuniary damages? All of these examples assume middle-class heterosexuality. The dissent in the Mississippi case wondered whether defendants would, “be entitled to put on evidence that the decedent’s life was worth very little—because he was a habitual criminal or a drug user, a member of some disfavored social, political or religious group, or physically or mentally handicapped, or just unhappy?”

What facts should a jury hear? Affirming nine million dollars in general damages, a court described the plaintiff as forty-nine years-old, married for twenty-eight years, with a daughter and grandchild, a part-time teacher of anthropology at a community college, executive director of the local museum, who traveled extensively as president of the Midwest museum conference, had been named businesswoman of the year and YWCA woman of the year, and enjoyed sailing and reading. In another case the court noted that the plaintiff was an accomplished amateur violinist. Should she get more than a tone-deaf karaoke singer? A drummer with no sense of rhythm who played with a rock group in his garage? Someone who listens to radio indiscriminately?

An informed consent case turned on whether the doctor should have warned the patient that extracting a wisdom tooth carried a 1/100,000 chance of loss of sensation in a half inch square below the lower lip. Should a French horn player get higher damages? An amateur ornithologist who attracts birds by whistling? Courts have given women more money for facial injuries than men. Should they reinforce gender stereotypes? Should Marla Hanson get more for her slashed face because her beauty made her popular? What about racial stereotypes? Should whites get more for disfigurement because their appearance is valued by a larger proportion of the population?

518. See discussion of Hanson case, supra notes 196–98.
And Scandinavians more than other whites? If juries actually display such biases, does that violate the Fourteenth Amendment?

Unequal damage awards have four questionable consequences. First, they preserve (and may even aggravate) antecedent inequalities of wealth and income. Second, they constitute an official state imprimatur of those inequalities. Third, they violate corrective justice principles by making liability vary enormously with consequences rather than conduct. And finally, they reinforce the economic incentive to expose poorer people to greater risk. These inequalities become unacceptable when made explicit. When the Intergovernmental Panel on Climate Change’s 1995 report valued the loss of lives at $1,500,000 in rich countries, $300,000 in middle-income countries, and $100,000 in poor countries, the resulting furor forced a revaluation of all lives at $1,000,000 in the 2001 report.519

VII. LIMITING GENERALS

Many responses to injury display greater solicitude for pecuniary than nonpecuniary damages. In the mid-nineteenth century, Chief Baron Pollock (of the Court of the Exchequer) declared that as a barrister he had never claimed “compensation for bodily suffering” and thought it “an unmanly thing to make such a claim. Such injuries are part of the ills of life, of which every man ought to take his share.”520 Britain’s standardized pain and suffering payments have not kept pace with cost of living increases since 1960.521 But though the Law Commission recommended across the board increases and doubling in the most serious cases, the Court of Appeal decreed an increase of just one-third.522 Canada effectively capped general damages at Can$100,000 in 1978.523 Every campaign to limit medical malpractice liability has sought ceilings on general damages.524 California notoriously capped them at $250,000 in 1975 and made no adjustment for inflation in the following thirty years (during which inflation reduced


521. The Times (London), Mar. 24, 2000, at 6 (from £80,000-£95,000, £110,000-£138,000, and £135,000-£175,000).

522. Id.


the cap to $71,000 in 1975 dollars). Opposing any increase, the California Medical Association president warned that "if malpractice rates continue to go up, doctors will not want to take high-risk patients. There's the trade-off. Do you have access to doctors in an emergency, or do you have access to lawyers in the rare event that something goes wrong?" Other states have followed California's lead. The Medical Society of New Jersey president declared that "these huge jackpot awards, these $20 million and $9 million awards that [are] breaking the bank, that [are] depleting the insurance companies of funds they don't have," are "sacrificing the health care of millions of people in New Jersey." Plaintiff compensation funds—state malpractice insurance—cap noneconomic damages in four states. Some states have capped general damages for all torts. The 1979 Model Uniform Product Liability Act proposed to cap them at the lesser of twice pecuniaries or $25,000 unless the harm was serious and prolonged. States have preserved joint and several liability for special damages while making liability for general damages only several. California punishes uninsured motorists and drunk drivers by denying them general damages when they are injured.

President Bush responded to Democratic proposals to amend ERISA to allow patients to sue HMOs for denial of service by proposing first to cap generals at $500,000 and eliminate punitive damages, and then to cap both at a total of $1.5 million. He strongly supported federal caps on general damages for medical malpractice (including insurers, pharmaceutical companies, and medical device manufactur-

526. Colorado ($250,000), Massachusetts ($500,000), Michigan ($280,000, sometimes increased to $500,000), Missouri ($350,000 with a COLA), Montana ($250,000), Utah ($400,000, with a COLA), West Virginia ($250,000), and Wisconsin ($350,000, with a COLA). Schwartz & Silverman, supra note 304, at 1052 n.66.
532. Proposition 213 was passed by voters in 1996 and codified in CAL. CIV. CODE §§ 3333.3–3333.4 (West 1997).
ers), asserting in one 2004 campaign speech: "Excessive jury awards will continue to drive up insurance costs, will put good doctors out of business or run them out of your community, and will hurt communities like Scranton, Pa." The chairman of a doctors mutual insurer complained: "One jury might award $250,000 for an injury; for the next jury it might be $250 million." Representative Billy Tauzin (R-La), who had been in charge of the bill in the House, said the President had urged Representatives "to consider the importance of for the nation's good [sic]. This was a national thing that he was very invested in personally." Tommy G. Thompson, Secretary of Health and Human Services, claimed that a study had found that "the main factor causing the crisis is the rise in mega-awards and settlements." During a rare press conference soon after the 2004 election, Bush included the issue in the short list of topics he intended to address in his second term.

Respected academics like Paul Weiler and George Priest exaggerate the proportion of tort damages represented by nonpecuniaries, estimating them at nearly half. (Minor injuries probably are overcompensated, but they do not produce the large verdicts that outrage critics; in serious cases, verdicts do not even pay victims' economic losses: just fifty-seven percent in birth injuries and eighty percent in emergency room injuries.)

Each time the law has significantly extended liability (typically by disregarding fault) it has contracted damages (typically by reducing or eliminating generals). Workers compensation schemes award much less than traditional tort laws (usually a function of the member lost—a crude estimate of diminished earning power and an even cruder estimate of nonpecuniary damage). These awards provide nothing for injuries that do not impair the worker's labor power, such as dimin-

542. Id. at 736.
ished faculties of taste and smell, sexual and reproductive capacity, and relationships (thereby privileging the exchange value of labor power over use values). These inadequacies encourage workers to avoid workers compensation in favor of tort remedies. The federal program to compensate miners for black lung pays an arbitrarily determined partial wage replacement but no pain and suffering.\textsuperscript{543} No-fault automobile insurance reduced entitlement to general damages.\textsuperscript{544} Proposals to extend no-fault to medical malpractice typically exclude general damages.\textsuperscript{545} A no-fault compensation scheme for birth-related injuries, enacted in Florida and Virginia, excluded non-pecuniary damages.\textsuperscript{546} Proposals encouraging defendants to make early settlement offers deny nonpecuniary damages to plaintiffs who accept them.\textsuperscript{547}

Responses to catastrophes (both natural and man-made) typically exclude general damages. The Federal Emergency Management Agency is an example. The Price-Anderson Act allowed full tort damages for nuclear accidents (though it has never been invoked);\textsuperscript{548} but a proposal to extend the Act to commercial aviation victims would have eliminated most pain and suffering.\textsuperscript{549} The much older Warsaw Convention on international air travel has a very low cap on total damages (now $75,000)\textsuperscript{550} and excludes pure emotional distress.\textsuperscript{551} The National Childhood Vaccine Injury Act of 1986 limits general damages to $250,000 (but lets plaintiffs opt into tort).\textsuperscript{552} In the first two decades, total awards averaged $824,000. As I write there is a

\begin{itemize}
\item \textsuperscript{544} See, e.g., Robert E. Keeton & Jeffrey O'Connell, Basic Protection Automobile Insurance, 1967 U. ILL. L.F. 400 (Massachusetts prototype); see also N.Y. INS. LAW § 51 (McKinney 1995); Quebec Automobile No-Fault System: A Whole Different World Next Door, 7 CROSSROADS (Apr. 1998).
\item \textsuperscript{546} Virginia Birth-Related Neurological Injury Compensation Act, VA. CODE ANN. §§ 38.2-5000–5021 (2002).
\item \textsuperscript{548} 42 U.S.C. § 2210 (1988).
\item \textsuperscript{550} See Warsaw Convention for the Unification of Certain Rules Relating to International Transportation by Air, Oct. 12, 1929, 49 Stat. 3000 (1934).
\end{itemize}
proposal to increase the cap on generals to $350,000.553 The federal Superfund pays no pain and suffering (but allows victims to opt for tort).554

The post-9/11 federal program to vaccinate against smallpox in response to the threat of biological terrorism included a provision to compensate those injured by the vaccination but only for lost wages, up to a maximum of $262,100 (the ceiling on federal government payments to police and firefighters).555 The September 11th Victim Compensation Fund awarded a fixed $100,000 to each spouse and child of a decedent and $250,000 for the decedent’s pain and suffering (though it individualized pain and suffering for physically injured survivors).556 Democrats wanted to individualize pain and suffering for everyone. Senator Hillary Rodham Clinton (D-NY) agreed “it is expensive. But how do you put a price tag on a life?” (I taught her torts; did I fail—or succeed all too well?)557 But three powerful Republicans squelched this in a meeting in the office of House Speaker J. Dennis Hastert on the night of September 20, 2001.558

We respond much less generously to wartime fatalities: families receive the proceeds of a $250,000 life insurance policy (whose premium is heavily subsidized) and surviving spouses receive at least $10,000 per year.559 The military death gratuity—six months’ pay when it was established in 1908—was raised to $1,800–$3,000 (depending on rank) in 1956, then to $6,000 (tax free) until 1991 (the first Persian Gulf War), $12,000 in 2003 (with a COLA), and then $100,000 retroactive to the invasion of Afghanistan.560 Expressing both patriotism and

554. A REPORT TO CONGRESS IN COMPLIANCE WITH SECTION 301(E) OF THE COMPREHENSIVE ENVIRONMENTAL RESPONSE, COMPENSATION AND LIABILITY ACT OF 1980, S. COMM. ON ENV'T & PUB. WORKS, 97th Cong. (Serial No. 97-12 1982).
556. Kemper, Plan Compensates Health, supra note 555.
559. William Gluberson, Federal Plan for an Aid Formula Is Criticized, N.Y. TIMES, Nov. 7, 2001, at B7. Dependency and Indemnity Compensation is paid to surviving spouses (a minimum of $967 per month) and dependent children.
guilt, the Pentagon recently proposed to increase the $100,000 gratuity and life insurance to $400,000 (with no increase in premium) for those who die in a designated combat zone.561

The single most comprehensive no-fault scheme, New Zealand's Accident Compensation Act 1974, eliminated general damages, offering only a nominal solatium payment (NZ$17,000 for loss of a member and NZ$10,000 for other losses).562 Academic proposals for comprehensive no-fault compensation eliminate general damages.563 Social Security Disability pays no general damages.564 The 1942 Beveridge Report, which laid the foundation of the British welfare state, advocated only medical care and a guaranteed income.565

I ask my law students to consider the following. If the United States were to adopt a social insurance scheme—perhaps some variants of Nixon's negative income tax and Clinton's healthcare plan—should it pay general damages to those who were not tort victims, who suffer from genetic disabilities, illness, or natural catastrophes? I ask the minority who favor general damages: should we then make consolation payments to everyone who falls below the median along some dimension (which of course means everyone)? And what does "below" mean? Is it a hardship to be too short, too tall, too fat? Can one be too thin? If we opted for such payments, should we fund them by taxing those above the median (a graduated human endowment tax)? And what would "above" mean? I ask the majority who oppose payments to those who were not tort victims if the scheme itself should pay generals to tort victims (and perhaps be subrogated to the tort claim)? Most students find social insurance payments for nonpecuniary damages hard to justify, although they generally favor some recognition of the injury and the fact that it could and should have been avoided. One reason for their reluctance is the recognition that they will be paying these additional amounts through taxes. (Of course, that is an even stronger objection to saddling the smaller private liabil-


565. SIR WILLIAM BEVERIDGE, SOCIAL INSURANCE AND ALLIED SERVICES (1942).
ity insurance premium pools with general damages—precisely the argument defendants and insurers have made in their campaign for caps). I also ask if we care how such payments are spent: are they more like medical care (delivered in kind under professional control) or discretionary income (so that individuals have unique insights into their preferences)? Should the money be used to transcend the injury? Or to buy pleasures that somehow cancel the pain? And if the victim quickly blows a lump sum payment of general damages (gambling, unwise investments, or luxury purchases), should we replace it?

Just as I elicit these widely shared reservations about social insurance paying general damages in order to stimulate critical thinking about whether they should remain part of the private law remedy, so I ask similar questions about private loss insurance. If both tort law and social insurance excluded general damages, would the students pay premiums now to recover insurance payments for general damages if injured? I note that workers do not, even though workers compensation pays virtually no general damages. And people rarely buy loss insurance for general damages to cover themselves in situations where there is no solvent tortfeasor (uninsured motorist coverage being the exception). Life insurance does not pay for grief nor property insurance for the heartbreak of losing a lifetime of possessions. Indeed, both rarely cover the full material loss. Disability insurance replaces lost income, not the joy of work, much less leisure activities. Others have made similar arguments. Croley and Hanson have advanced a powerful argument that failures in the private loss insurance market make it risky to draw inferences from consumer decisions. But if consumer (and voter) preferences are not conclusive evidence against general damages, they certainly do not argue strongly for it.

VIII. ARGUMENTS FOR GENERAL DAMAGES

Proponents of general damages make a number of arguments. In response to criticisms of incommensurability and commodification, they reply that we live in a capitalist market economy that puts a price on everything, even human experience. It would be quixotic to single


out the nonpecuniary consequences of injury for different treatment or to believe that by doing so we would strike a significant blow against market hegemony. In response to problems of calculability, defenders of nonpecuniary damages propose incremental reforms: schedules, tables, criteria. They could also point to recent medical research demonstrating that pain affects the brain's cognitive capacity and emotional responses and accelerates aging, and that maternal stress and depression affect the fetal heart rate and neonatal nursing behavior. (These findings give new meaning to Holmes's contention that "the state of a man's mind is as much a fact as the state of his digestion.") In response to the criticism that general damages reproduce inequality, proponents reply that leaving the random tort victim inadequately compensated would do little to promote equality. Furthermore, egalitarians have argued that it is the disadvantaged—women, children, the elderly, people of color, immigrants—who have the lowest special damages and thus stand to benefit most from general damages (proportionately, if not absolutely).

Proponents make other arguments as well. General damages are essential to pay contingent fees, ranging from twenty-five to fifty percent, in order to ensure that victims are reimbursed for at least their


570. Catherine Monk et al., The Effects of Women's Stress-Elicited Physiological Activity and Chronic Anxiety on Fetal Heart Rate, 24 J. DEV. & BEHAV. PEDIATRICS 32 (2003); Catherine Monk et al., Fetal Heart Rate Reactivity Differs by Women's Psychiatric Status: An Early Marker for Developmental Risk?, J. AM. ACAD. CHILD & ADOLESCENT PSYCHIATRY (2004); Laurie Tarkan, Tracking Stress and Depression Back to the Womb, N.Y. TIMES, Dec. 7, 2004, at D5.


General damages are necessary to make cases profitable to plaintiffs' lawyers, especially where liability is uncertain, the defendant intransigent, and specials low. That is certainly the trial lawyers' argument against MICRA and other damage caps. Believers in corrective justice argue that the defendant has a moral responsibility to pay for all the damage caused. And economists contend that defendants will make efficient expenditures on safety only if compelled to pay the full cost. As Judge Posner wrote: "If [pain and suffering] were not recoverable in damages, the cost of negligence would be less to the tortfeasor and there would be more negligence, more accidents, more pain and suffering, and hence higher social costs."

IX. Conclusion

I find those arguments unpersuasive. The fact that the state cannot entirely prevent the market from offering people ever greater opportunities to commodify themselves (and arguably should not try) does not mean the state should lend its imprimatur and power to making an involuntary transaction (a tortious injury) an occasion for further commodification. As we learn more about how pain affects the body, those who suffer should receive medical, psychotherapeutic, and other rehabilitative care (paid by tortfeasors)—but not money. None of the mechanisms for calculating generals solves the problem of arbitrariness. That eliminating generals would do relatively little to increase equality is not an egalitarian argument against state complicity


576. Jamie Court, When the Incentive to Save a Life Dies, L.A. Times, Dec. 12, 2004, at M5 (noting that California's cap "makes it cheaper to let children die from malpractice in California hospitals than to save them").

577. Kwasny v. United States, 823 F.2d 194 (7th Cir. 1987). Robert Cooter argues that because people are willing to pay to avoid risk (e.g., the death of a child), even when they do not necessarily want to be paid when the risk transpires because of the incommensurability of money with those consequences (bereavement), such damages should be factored into "L" in the Hand formula. Cooter, supra note 312, at 1098-99. Using the example of ruined irreplaceable wedding pictures, Richard Craswell argues that "whenever nonpecuniary losses are involved . . . damages should be less than fully compensatory, insofar as we are concerned with providing efficient levels of insurance." Richard Craswell, Instrumental Theories of Compensation, 40 San Diego L. Rev. 1135, 1153 (2003).

578. For another advocate of abolishing general damages, see Joseph H. King, Jr., Pain and Suffering, Noneconomic Damages, and the Goals of Tort Law, 57 SMU L. Rev. 163 (2004).
in reproducing inequality.\textsuperscript{579} The onus is on defenders to offer convincing evidence that the disadvantaged gain more from general damages than they lose from the reproduction of inequality through the proportioning of generals to specials and jury biases in awarding generals. (At the least, I can turn their argument back on defenders: generals are at least as inefficient and haphazard a redistribution mechanism as the denial of generals. And I favor equalizing special damages as well, by setting income replacement at some minimum level—perhaps the median—thereby making those who wish to protect higher income streams pay the costs of doing so through loss insurance premiums.)\textsuperscript{580} If people really value general damages enough that they want to insure them, the state should correct the market imperfections that prevent this and, as a last resort, sell such loss insurance itself.

The use of general damages to pay contingent fees undermines other more fundamental rationales for general damages: the purchase of pleasure equivalent to the pain suffered, and public recognition of the loss (which cannot be important if the money goes to the lawyer). The obscene fees pocketed by the most successful plaintiffs' personal injury lawyers, who virtually monopolize the cases with the highest general damages, are not necessary to ensure adequate legal representation. First, lawyers themselves have worked long and hard to make sure that the market for legal services is seriously imperfect: entry barriers are high (especially to the provision of services by nonlawyers), and restrictive practices dampen intraprofessional competition. Britain allows nonlawyer claims agents to market their services freely to the injured and negotiate settlements with tortfeasors and their insurers.\textsuperscript{581} Second, there are many other possible fee arrangements: fee-shifting (perhaps not perfectly symmetrical), legal insurance (ex ante and ex post, perhaps with premiums recoverable from the defendant),

\textsuperscript{579} For arguments that tort law should pursue egalitarian goals, see Tsachi Keren-Paz, An Inquiry into the Merits of Redistribution through Tort Law: Rejecting the Claim of Randomness, 16 CAN. J.L. & JURISPRUDENCE 91 (2003); Tsachi Keren-Paz, "It Costs Me More": Rejecting the Arguments of Illegitimacy and Excessive Cost Brought against the Promotion of Equality in Private Law, 7 MISHPAT UMISHAL 541 (2004).

\textsuperscript{580} Interestingly, the one change Kenneth Feinberg would make on the basis of his experience administering the 9/11 fund is that "if Congress decides to provide compensation in the event of a new terrorist attack, all eligible claimants should receive the same amount." See FEINBERG, supra note 473, at 183.

Equality also responds to the criticism that eliminating generals will either distort the mix of cases brought in favor of those with high specials or divert the energy of lawyers and experts to inflating specials. See Catherine M. Sharkey, Unintended Consequences of Medical Malpractice Damages Caps, 80 N.Y.U. L. REV. 391 (2005).

and state subsidy (on the theory that the deterrent effect of damages creates a public good).582 (English legal aid covered tort claims until the misnamed Access to Justice Act 1999.)583 I remain unconvinced that corrective justice theories are relevant to tort because: liability is proportioned to consequences rather than conduct; consequences are significantly affected by chance (negligence or worse causing no damage, slight negligence causing immense harm); virtually all cases are settled for significantly less than the actual injury; awards are almost always paid by insurers or anonymous corporations, not individual tortfeasors; and the process is almost entirely opaque to victims, who see only a check, and even more to the public (especially since defendants often insist on a confidentiality clause). Taking corrective justice seriously would mean identifying real tortfeasors, who would acknowledge responsibility, personally suffer consequences, apologize to the victim, proclaim their misconduct to the public, and perhaps even play a role in caregiving.584 The most compelling argument for general damages is deterrence. But we know almost nothing about how effective tort law is as a deterrent, or the incremental safety gain produced by including general damages.585

Tort liability's greatest strength is its combination of: (1) individual initiative motivated by the self-interest of plaintiffs and their lawyers—a powerful antidote to bureaucratic sloth and indifference, and (2) the immunity of juries (which are both lay and ad hoc) to the capture that threatens all governmental regulation. But general damages are unconnected to either trait. Eliminating them has many potential advantages. Courts and legislatures might be more willing to extend liability beyond the present arbitrary limitations framed in terms of duty and proximate cause if they felt damages responded to necessities and did not overcompensate. The significant savings—the insurance or corporate reserves to pay general damages and the administrative costs of calculating them individually—would be freed


to fund more effective regulation (although I am skeptical this could be protected politically from diversion)\textsuperscript{586} and to compensate all tort victims, regardless of fault.\textsuperscript{587} Alternatively, fixed amounts could be assessed for general damages (like the 9/11 fund), thereby eliminating the need for individual adjudication, although aggravating arbitrariness. Over sufficiently large populations of injuries these could approximate the actual harm inflicted (and thus let liability send a more accurate signal of the costs of accidents). Plaintiffs would receive a small proportion in recognition of their injury (and to motivate victims and lawyers to claim), while the rest would be earmarked for regulation. (Posner has argued that compensatory damages “are paid over to the plaintiff (to be divided with his lawyer) as the price of enlisting their participation in the operation of the system,” whose “dominant function . . . is to . . . bring about . . . the efficient . . . level of accidents and safety.”\textsuperscript{588} Many jurisdictions already direct a proportion of punitive damages toward public goods.\textsuperscript{589}) No other legal system “needs” American-style general damages.\textsuperscript{590} Like many features of our law (as Holmes declared), general damages are the product of experience, not logic.\textsuperscript{591} Maybe it is time to jettison this bit of American exceptionalism.

\textsuperscript{586} Of the $40.7 billion states have received from settling with the tobacco companies, only five percent has been spent on reducing smoking. Illinois spent $315 million on tax relief, Michigan spent seventy-five percent on college scholarships, and North Dakota spent forty-five percent on water resources and flood control. Howard Markel, \textit{Burning Money}, N.Y. TIMES, Aug. 22, 2005, at A17.


\textsuperscript{591} \textit{Oliver Wendell Holmes, Jr., The Common Law} 1 (Dover Publ. 1991) (1881).
## APPENDIX

### TABLE A

<table>
<thead>
<tr>
<th>Book</th>
<th>Pages on damages/ Total pages</th>
<th>Percent Total Pages on Damages</th>
</tr>
</thead>
<tbody>
<tr>
<td>Harper et al.592</td>
<td>189/3376</td>
<td>6</td>
</tr>
<tr>
<td>Keeton et al.593</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>Calabresi594</td>
<td>37/318</td>
<td>12</td>
</tr>
<tr>
<td>Abraham595</td>
<td>14/250</td>
<td>6</td>
</tr>
<tr>
<td>Rabin596</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>Levmore597</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>Zittrain &amp; Harrison598</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>Robertson et al.599</td>
<td>50/601</td>
<td>8</td>
</tr>
<tr>
<td>Bell &amp; O'Connell600</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>Koenig &amp; Rustad601</td>
<td>10/236</td>
<td>4</td>
</tr>
<tr>
<td>Davies et al.602</td>
<td>50/576</td>
<td>9</td>
</tr>
<tr>
<td>Rabin &amp; Sugarman603</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>Steiner604</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>Cane605</td>
<td>36/426</td>
<td>8</td>
</tr>
<tr>
<td>ABA Committee606</td>
<td>67/981</td>
<td>7</td>
</tr>
</tbody>
</table>

595. Abraham, supra note 122.
599. David W. Robertson et al., Cases and Materials on Torts (3d ed. 2004).
601. Koenig & Rustad, supra note 573.
605. Cane, supra note 122.
<table>
<thead>
<tr>
<th>Casebook</th>
<th>Chapter #/Total Chapters</th>
<th>Pages/Total Pages</th>
<th>Percent Total Pages</th>
</tr>
</thead>
<tbody>
<tr>
<td>Franklin &amp; Rabin(^{607})</td>
<td>10/15</td>
<td>60/1273</td>
<td>5</td>
</tr>
<tr>
<td>Vetri et al.(^{608})</td>
<td>6/12</td>
<td>91/1288</td>
<td>7</td>
</tr>
<tr>
<td>Marshall &amp; Weissbrodt(^{609})</td>
<td>0/7</td>
<td>1.25/718</td>
<td>0.1</td>
</tr>
<tr>
<td>Twerski &amp; Henderson(^{610})</td>
<td>13/16</td>
<td>64/825</td>
<td>8</td>
</tr>
<tr>
<td>Best &amp; Barnes(^{611})</td>
<td>12/17</td>
<td>58/859</td>
<td>7</td>
</tr>
<tr>
<td>Henderson et al.(^{612})</td>
<td>7/13</td>
<td>74/845</td>
<td>9</td>
</tr>
<tr>
<td>Shulman et al.(^{613})</td>
<td>7/18</td>
<td>115/1239</td>
<td>9</td>
</tr>
<tr>
<td>Vandall et al.(^{614})</td>
<td>10/23</td>
<td>35/1099</td>
<td>3</td>
</tr>
<tr>
<td>Christie et al.(^{615})</td>
<td>9-10/19</td>
<td>148/1436</td>
<td>10</td>
</tr>
<tr>
<td>Weaver et al.(^{616})</td>
<td>8/22</td>
<td>68/1010</td>
<td>7</td>
</tr>
<tr>
<td>Farnworth &amp; Grady(^{617})</td>
<td>9/13</td>
<td>50/785</td>
<td>6</td>
</tr>
<tr>
<td>Keeton et al.(^{618})</td>
<td>14/23</td>
<td>54/1277</td>
<td>4</td>
</tr>
<tr>
<td>Goldberg et al.(^{619})</td>
<td>8/13</td>
<td>85/1085</td>
<td>8</td>
</tr>
</tbody>
</table>


\(^{608}\) Dominick Vetri et al., Tort Law and Practice (2d ed. 2003).


\(^{614}\) Frank J. Vandall et al., Torts: Cases and Problems (2d ed. 2003).


\(^{616}\) Russell L. Weaver et al., Torts: Cases, Problems, and Exercises (2003).

\(^{617}\) Ward Farnworth & Mark F. Grady, Torts: Cases and Questions (2004).


<table>
<thead>
<tr>
<th>Awards</th>
<th>2005</th>
<th>1999</th>
<th>2001</th>
</tr>
</thead>
<tbody>
<tr>
<td>≤$500,000</td>
<td>3</td>
<td>1</td>
<td>0</td>
</tr>
<tr>
<td>$501,000-1,000,000</td>
<td>1</td>
<td>11</td>
<td>0</td>
</tr>
<tr>
<td>$1,000,000-$2,000,000</td>
<td>3</td>
<td>13</td>
<td>0</td>
</tr>
<tr>
<td>$2,000,000-$3,000,000</td>
<td>4</td>
<td>4</td>
<td>22</td>
</tr>
<tr>
<td>$3,000,000-$5,000,000</td>
<td>15</td>
<td>14</td>
<td>0</td>
</tr>
<tr>
<td>$5,000,000-$10,000,000</td>
<td>14</td>
<td>7</td>
<td>22</td>
</tr>
<tr>
<td>$10,000,000-$15,000,000</td>
<td>12</td>
<td>2</td>
<td>15</td>
</tr>
<tr>
<td>$15,000,000-$20,000,000</td>
<td>5</td>
<td>1</td>
<td>0</td>
</tr>
<tr>
<td>≤$20,000,000</td>
<td>4</td>
<td>3</td>
<td>4</td>
</tr>
</tbody>
</table>