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DUE PROCESS AND THE DETERMINATION OF PAIN AND SUFFERING TORT DAMAGES

Mark A. Geistfeld*

In a line of relatively recent cases, the U.S. Supreme Court has held that a tort award of punitive damages must satisfy the procedural and substantive requirements of the Due Process Clause of the U.S. Constitution.1 Of all damage types, the Court so far has expressly applied due process requirements only to punitive damages. But as Justices Scalia and Thomas have argued, “[I]f the Court is correct, it must be that every claim that a state jury’s award of compensatory damages is ‘unreasonable’ (because not supported by the evidence) amounts to an assertion of a constitutional injury.”2 This claim is most compelling with respect to pain-and-suffering damages. As others have concluded, these damages appear to be particularly problematic as a matter of due process.3

Part II provides further reasons for concluding that pain-and-suffering damages are posing a constitutional problem. In the Court’s most recent case evaluating the constitutionality of a punitive damages award, it justified the due process inquiry by relying upon a set of constitutional concerns regarding punitive damages.4 These constitutional concerns all apply to pain-and-suffering damages.

Part III identifies the source of the constitutional problem. Judges routinely instruct jurors that there is no way to determine pain-and-suffering damages other than by reference to what is just or fair.

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* Crystal Eastman Professor of Law, New York University School of Law. Copyright 2006 Mark A. Geistfeld.

1. In 1989, the Court left open the question “whether due process acts as a check on undue jury discretion to award punitive damages in the absence of any express statutory limit.” Browning-Ferris Indus. v. Kelco Disposal, Inc., 492 U.S. 257, 277 (1989). A decisive, affirmative answer to that question was provided by the Court a few years later in BMW of N. Am., Inc. v. Gore, 517 U.S. 559 (1996).

2. Gore, 517 U.S. at 606 (Scalia, J., joined by Thomas, J., dissenting).


When juries determine damages on this basis, the tort award most plausibly involves a normative or value judgment concerning the amount of money that "can symbolize public respect for rights and public recognition of the transgressor's fault by requiring something important to be given up on one side and received on the other, even if there is no equivalence of value possible." The damages award redresses the rights-violation without representing any "equivalence of value" because the plaintiff's right to physical security is not commensurate with or directly comparable to money. The individual right to bodily integrity is simply not fungible with money. This conception of the tort right explains why jury instructions routinely state that there is no way to equate the injury or rights-violation with money. The concept, however, also implies that the damages award for the rights-violation involves an excessive amount of juror discretion in violation of due process.

Part IV discusses the potential impact of due process on tort awards for pain and suffering. The current procedure for determining these damages could be constitutionally defective, requiring wholesale change. Even if the current procedure does not produce per se constitutional violations, the jury's determination of damages does not plausibly involve a finding of fact, and so the damages award should be subject to de novo judicial review for cases in which the defendant challenges the award as being excessive in violation of substantive due process. In evaluating the constitutionality of a punitive damages award, judges must apply a set of factors identified by the Court. Such an inquiry might also be required for the de novo review of pain-and-suffering damages.

Jury awards of pain-and-suffering damages are not inherently vulnerable to these constitutional restrictions, however. Part V explains why the plaintiff's tort right provides a constitutionally sound method for determining pain-and-suffering damages. As a corollary of the tort right, the defendant owes a duty of care to the plaintiff. To determine the substantive content of the duty—the safety precautions required of the defendant—the standard of care must compare the cost of precaution to the injuries threatened by the risky conduct. To make this comparison, the standard of care must monetize the pain-and-suffering injury. A well-established methodology exists for making such a determination. The resultant monetary measure of the injury does not represent a "value" of the injury or the tort right, but merely rep-

6. State Farm, 538 U.S. at 418.
respects the safety demands that this particular injury imposes on the duty-holder. This monetary measure also provides a good basis for the damages award. To violate the plaintiff's right, the defendant must have breached the duty of care in a manner that caused injury to the plaintiff. The rights-violation links the duty of care to the injury, making it defensible to formulate the damages remedy in these terms. Redress of the rights-violation therefore can depend upon the monetary measure of the injury that is employed within the standard of care. Not only is this method an appropriate way to protect the plaintiff's tort right, it also involves a finding of fact by the jury. When based on this method, pain-and-suffering damages are secure from the attacks of due process.

II. THE CONSTITUTIONAL CONCERNS

In its most recent case addressing the constitutionality of a punitive damages award, the Court in *State Farm Mutual Automobile Insurance Co. v. Campbell* identified four different constitutional "concerns" that justify constraining those awards as a matter of due process. Each of these concerns also applies to pain-and-suffering damages, implying that due process also constrains these tort awards.

A. The First Constitutional Concern: The Nature of the Defendant's Interests

Under *Mathews v. Eldridge*, the "specific dictates of due process" depend upon three factors, including "the private interest that will be affected by the official action." Consistent with this test, the Court's first constitutional concern with punitive damages addresses the nature of the defendant's interests: "Although these awards serve the same purposes as criminal penalties, defendants subjected to punitive damages in civil cases have not been accorded the protections applicable in a criminal proceeding. This increases our concerns over the imprecise manner in which punitive damages systems are administered."

A defendant's private interest in liberty is at stake in a criminal prosecution. This justifies procedural safeguards more demanding than those required for civil actions, which impose monetary liability

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7. Id. at 417–18.
10. Id. at 335.
on the defendant. By concluding that punitive damages "serve the same purposes as criminal penalties," the Court apparently can justify procedural safeguards for punitive damages that would seem to be more demanding than the safeguards required for other forms of tort liability. A similarity of purpose implies that punitive damages and criminal liability implicate similar interests of the defendant, thereby requiring similar procedural safeguards for the analogous forms of liability.

The Court bases this constitutional concern entirely on the fact that both criminal penalties and punitive damages "are aimed at deterrence and retribution." The Court clearly assumes that the criminal law and tort law identically interpret the purposes of deterrence and retribution. Upon scrutiny, the assumption is unwarranted. Criminal penalties can further aims of deterrence and retribution that are fundamentally different from those furthered by punitive damages.

According to a leading treatise: "The broad aim of the criminal law is, of course, to prevent harm to society . . . . This it accomplishes by punishing those who have done harm, and by threatening with punishment those who would do harm, to others." Criminal liability punishes the defendant for the wrong suffered by the public. So too, criminal penalties are formulated to deter members of the public from committing crimes—a purpose commonly called "general deterrence."

Unlike the criminal law, tort law is based upon individual rights and a corresponding set of individual duties. As a result of this individual right-duty nexus, tort law can tailor punitive damages to punish the defendant duty-holder for the way in which he or she violated the plaintiff's right, while also deterring the defendant from violating the

12. See id. at 416.
13. WAYNE R. LAFAVE, 1 SUBSTANTIVE CRIMINAL LAW § 1.2(e) (2d ed. 2003).
14. See, e.g., 21 AM. JUR. 2D Criminal Law § 474 (1998) (stating that "a crime is by definition a public wrong, one against all the people of the state"). For a good discussion on the importance of limiting criminal liability to public punishment rather than private punishment, see GEORGE P. FLETCHER, BASIC CONCEPTS OF CRIMINAL LAW 35-40 (1998).
15. General deterrence is "the tendency of people who have not yet been sanctioned to be deterred by the prospect of sanctions for committing an illegal act." STEVEN S. SHAVELL, FOUNDATIONS OF ECONOMIC ANALYSIS OF LAW 515 (2004). Criminal liability necessarily involves general deterrence, because criminal penalties must be set prospectively for any given category or class of conduct. See LAFAVE, supra note 13, § 1.2(d) (describing necessity of prescribed criminal penalties).
16. See, e.g., Palsgraf v. Long Island R. Co., 162 N.E. 99, 100 (N.Y. 1928) (holding that a tort plaintiff can recover only by showing that the defendant's breach of duty constitutes "'a wrong' to herself; i.e., a violation of her own right, and not merely a wrong to someone else, nor conduct 'wrongful' because unsocial").
plaintiff's right in the future—a purpose commonly called "individual or specific deterrence."\footnote{17}{"[T]he notion of individual deterrence (sometimes called particular deterrence or special deterrence) ... is the tendency of a person who has been penalized for committing an illegal act to be more deterred from in the future from committing that act than he had been beforehand by the prospect of sanctions." SHAVELL, supra note 15, at 515.}

Thus, criminal liability and punitive damages can each serve the aims of punishment and deterrence without sharing a similarity of purpose, contrary to what the Court has assumed. Criminal liability provides retribution for public wrongs and the necessary incentives for general deterrence, whereas punitive damages can provide retribution for private wrongs and the necessary incentives for individual deterrence.

To illustrate this difference, consider a case involving a defendant who repeatedly drove her truck over the plaintiff's land in order to reduce considerably the travel distance between the defendant's property and her desired destination. Each trespass did not otherwise damage the land, so the defendant knew she would only have to pay nominal damages to the plaintiff landowner as compensation for each trespass. Reasoning that the nominal damages for trespass are less costly than the added travel time otherwise required for the trip, the defendant decided to commit trespass on an ongoing basis. The defendant's behavior warrants punitive damages. By behaving in this manner, the defendant has tried to convert the plaintiff's right to exclusive possession of the land into an easement without obtaining the requisite consent from the plaintiff. As the defendant's behavior reveals, the plaintiff's right to exclusive possession cannot be adequately protected by compensatory damages. Protection of the right requires punitive damages. This extra-compensatory damages award punishes the defendant for not previously respecting the plaintiff's right to exclusive possession, while further protecting the right by giving the defendant an incentive not to trespass in the future. The punitive damages award is tailored to protect the plaintiff's right and nothing else. In effect, these damages force the defendant to stay off the property or otherwise obtain the plaintiff's consent for the easement, the result required by the plaintiff's right to exclusive possession of the land.

Punitive damages therefore can be justified exclusively as a means of protecting the plaintiff's individual tort right from wrongful infringements by the defendant, just as other forms of tort liability can

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be justified as a means of protecting the plaintiff's tort right.\textsuperscript{18} Like any form of tort liability, punitive damages can be formulated to redress a private wrong fundamentally different from the public wrongs of concern to the criminal law.

To be sure, the trespassing defendant may also be subject to criminal liability, but that possibility provides another reason for concluding that punitive damages are not a criminal sanction. After all, if punitive damages were a criminal penalty for the trespass, then imposing criminal liability on the defendant for the same trespass would involve double punishment. In addressing this issue, the majority of courts have “avoided the double jeopardy problem by holding that punitive damages are punishment, not for the improper act in the abstract, or the wrong that the defendant caused to society, but for the legal wrong to the individual plaintiff.”\textsuperscript{19}

The Iowa Supreme Court, for example, concluded that

the clear weight of authority is . . . that the damages allowed in a civil case by way of punishment, have no necessary relation to the penalty incurred for the wrong done to the public: but are called punitive damages by way of distinction from pecuniary damages, and to characterize them as a punishment for the wrong done to the individual. In this view, the awarding of punitive damages can in no just sense be said to be in conflict with the constitutional or common law inhibition against inflicting two punishments for the same offense.\textsuperscript{20}

Hence, the mere fact that punitive damages serve the purpose of retribution and deterrence does not necessarily turn these damages into a form of criminal liability, a conclusion with ample historical and doctrinal support.\textsuperscript{21} Contrary to what the U.S. Supreme Court has assumed, the objectives of retribution and deterrence do not make punitive damages analogous to criminal liability for purposes of due process. The analogy must come from somewhere else.

\textsuperscript{18} The important tort doctrines can be justified in terms of the individual right to physical security defined in terms of an interpersonal priority of the security interest over the liberty interest. See Mark Geistfeld, Negligence, Compensation, and the Coherence of Tort Law, 91 Geo. L.J. 585 (2003).

\textsuperscript{19} Thomas B. Colby, Beyond the Multiple Punishment Problem: Punitive Damages as Punishment for Individual, Private Wrongs, 87 Minn. L. Rev. 583, 622 (2003).

\textsuperscript{20} Hendrickson v. Kingsbury, 21 Iowa 379, 391 (1866).

\textsuperscript{21} For an excellent discussion and thorough analysis of the historical issues, see Colby, supra note 19. For a contemporary example, see Romo v. Ford Motor Co., 113 Cal. App. 4th 738, 746 (Cal. Ct. App. 2003) (“There is a fundamental difference between parking fines and drug forfeitures, on the one hand, and punitive damages, on the other. . . . In the case of punitive damages, the exaction arises from a 'private' wrong; if there is no wrong resulting in compensable injury to this plaintiff, there can be no exaction of punitive damages.”).
Under the *Mathews* test, the due process inquiry depends upon the nature of the defendant’s interests implicated by the form of liability.22 The Court therefore could draw a defensible due process analogy between punitive damages and criminal liability if each form of liability burdens the same private interests of the defendant. When formulated in this manner, the due process inquiry shows that any constitutional concern generated by punitive damages is also generated by pain-and-suffering damages.

Criminal liability can directly restrict the defendant’s liberty interest by confinement. Tort law also directly restricts the defendant’s liberty interests by imposing behavioral requirements on the defendant as duty-holder. The negligence standard of reasonable care, for example, requires certain conduct on the part of the duty-holder with respect to particular forms of risky behavior. This direct restriction of liberty is not entailed by punitive damages, unless one concludes that the prospect of punitive damages provides the incentive for the defendant to comply with the tort duty. So conceptualized, punitive damages implicate an individual interest that is not fundamentally different than the interest implicated by pain-and-suffering damages. Ordinarily, the threat of liability for compensatory damages also gives the defendant an incentive to behave in the manner required by the tort duty.23 Insofar as the incentive effects of a damages award provide the direct restriction of the defendant’s liberty interest, there is no fundamental difference between punitive damages and pain-and-suffering damages.

Criminal liability can also indirectly restrict the defendant’s liberty interest by the imposition of monetary fines. In this respect, both criminal liability and punitive damages affect the same interest of the defendant. But the defendant’s private interest pertaining to money is also implicated by any form of tort liability requiring the payment of compensatory damages.24

By concluding that the nature of the defendant’s private interests creates a due process concern regarding punitive damages, the Court has invoked a constitutional concern that also applies to pain-and-suffering damages. Both types of damages burden the same set of pri-

24. One could also argue that punitive damages implicate different private interests than those discussed in text because “there is a stigma attached to an award of punitive damages that does not accompany a purely compensatory award.” *Pac. Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 54 (1991) (O’Connor, J., dissenting). But stigma can also attach to a compensatory award based on the nature of the tortious conduct. Negligent behavior can be morally blameworthy, as are many of the intentional torts such as the intentional infliction of emotional distress.
vate interests and accordingly require the same due process protections, unless there is some other constitutional difference between the two.

B. The Second Constitutional Concern: Arbitrary Deprivation of Property

Due process protects the defendant from arbitrary or unreasonable deprivations of property, providing a separate constitutional concern that the Court in State Farm could invoke to justify a due process constraint on the award of punitive damages:

We have admonished that "[p]unitive damages pose an acute danger of arbitrary deprivation of property. Jury instructions typically leave the jury with wide discretion in choosing amounts, and the presentation of evidence of a defendant's net worth creates the potential that juries will use their verdicts to express biases against big businesses, particularly those without strong local presences." 25

The concern that open-ended jury instructions can result in arbitrary or unreasonable deprivations of property also applies to pain-and-suffering damages. Consider the following pattern jury instruction from California:

No definite standard [or method of calculation] is prescribed by law by which to fix reasonable compensation for pain and suffering. Nor is the opinion of any witness required as to the amount of such reasonable compensation. [Furthermore, the argument of counsel as to the amount of damages is not evidence of reasonable compensation.] In making an award for pain and suffering you should exercise your authority with calm and reasonable judgment and the damages you fix must be just and reasonable in the light of the evidence. 26

Instructions like these provide juries with little or no guidance. As tort scholars have long recognized, this approach attempts to evaluate the "imponderable" by a method of "arbitrary indeterminateness." 27 Even the Court has recognized that jury instructions regarding punitive damages involve an amount of discretion that "is no greater than

26. CAL. JURY INSTRUCTIONS: CIVIL § 14.13 (2005); see also, FIFTH CIRCUIT, PATTERN CIVIL JURY INSTRUCTIONS § 15.4 (2005) ("There is no exact standard for fixing the compensation to be awarded for these elements of damage. Any award that you make should be fair in the light of the evidence.").
27. The quoted language comes from the classic exposition of this position: Louis L. Jaffe, Damages for Personal Injury: The Impact of Insurance, 18 LAW & CONTEMP. PROBS. 219, 224–25 (1953).
that" exercised by juries in the determination of pain-and-suffering damages.\(^{28}\)

The wide discretion afforded to juries poses a due process concern by giving jurors an unreasonable opportunity to base damages on extralegal factors like bias or prejudice. This concern, though, is generated by vague jury instructions and is not plausibly limited to punitive damages. Empirical studies have found that extralegal factors such as gender, race, socioeconomic status, or physical appearance become more influential in jury decisionmaking when the legal standards are the most ambiguous.\(^{29}\) Insofar as juries have a similar amount of discretion in determining punitive damages and pain-and-suffering damages, it follows that the possibility of bias applies equally to both.

\section*{C. The Third Constitutional Concern: Fair Notice}

Due process requires that individuals be given fair notice of what is required of them by the law, enabling the Court in \textit{State Farm} to identify another constitutional concern posed by punitive damages:

\[\text{T}he \text{ Due Process Clause does not permit a State to classify arbitrariness as a virtue. Indeed, the point of due process—of the law in general—is to allow citizens to order their behavior. A State can have no legitimate interest in deliberately making the law so arbitrary that citizens will be unable to avoid punishment based solely upon bias or whim.}\(^{30}\)

By this same reasoning, the vague jury instructions regarding pain-and-suffering damages cannot be defended because the arbitrariness is somehow “a virtue,” but that is the only real message conveyed by standard jury instructions.

\section*{D. The Fourth Constitutional Concern: Poor Decisionmaking}

Vague jury instructions can pose yet another constitutional concern, as the Court in \textit{State Farm} explains:

28. \textit{Haslip}, 499 U.S. at 20 (majority opinion) (“The discretion allowed under Alabama law in determining punitive damages is no greater than that pursued in many familiar areas of the law as, for example, deciding . . . appropriate compensation for pain and suffering or mental anguish.”).


30. \textit{State Farm}, 538 U.S. at 417–18 (quoting \textit{Haslip}, 499 U.S. at 59 (O’Connor, J., dissenting)).
Our concerns are heightened when the decisionmaker is presented . . . with evidence that has little bearing as to the amount of punitive damages that should be awarded. Vague instructions, or those that merely inform the jury to avoid "passion or prejudice," do little to aid the decisionmaker in its task of assigning appropriate weight to evidence that is relevant and evidence that is tangential or only inflammatory.\(^{31}\)

This final due process concern essentially restates the problem of overly vague tort rules. The problem of vagueness cannot be eliminated by instructing the jury to avoid "passion or prejudice" in awarding punitive damages. So too, the problem cannot be eliminated by instructing jurors to exercise their "authority with calm and reasonable judgment" in determining pain-and-suffering damages.\(^{32}\) When jurors must decide an issue without sufficient guidance from the law, they predictably make decisions that are not based upon an appropriate weighing of the evidence. Unable to discern the proper role of evidence, jurors are also unable to distinguish relevant evidence from "evidence that is tangential or only inflammatory."

Poor decisions presumably increase the likelihood of erroneous impositions of liability, which in turn increase the likelihood that liability involves an unreasonable deprivation of the defendant’s property in violation of due process. This constitutional concern need not have anything to do with the motives or character of the decisionmaker, but is an inevitable product of vague legal rules.

III. The Source of the Constitutional Problem

In explaining why due process constrains the tort practice of awarding punitive damages, the Court relied upon four different constitutional concerns that apply with equal force to pain-and-suffering damages. As a logical matter, due process must constrain both types of damages. To establish this point more completely, we need to identify the reason why pain-and-suffering damages have created the constitutional problem.

As a doctrinal matter, the constitutional problem involves vague jury instructions. In evaluating a defendant’s claim that the procedure for determining punitive damages violated due process, the Court has concluded that due process is violated if the jury is given "unlimited discretion" to determine punitive damages: "As long as the discretion

\(^{31}\) Id. at 418 (quoting Petition for Writ Certiorari at 108a–109a, State Farm, 538 U.S. 408 (No. 01–1289)) (internal citations omitted).

is exercised within reasonable constraints, due process is satisfied.\textsuperscript{33} To see why jury instructions are not providing "reasonable constraints" on the award of pain-and-suffering damages, it is worth repeating the pattern jury instructions from California:

No definite standard [or method of calculation] is prescribed by law by which to fix reasonable compensation for pain and suffering. Nor is the opinion of any witness required as to the amount of such reasonable compensation. [Furthermore, the argument of counsel as to the amount of damages is not evidence of reasonable compensation.] In making an award for pain and suffering you should exercise your authority with calm and reasonable judgment and the damages you fix must be just and reasonable in the light of the evidence.\textsuperscript{34}

The only potential constraint on the jury's discretion involves the instruction that jurors should exercise "reasonable judgment" in reaching the "just and reasonable award." The instruction to exercise "reasonable judgment" does not provide a reasonable constraint on juror discretion. As the Court said in \textit{State Farm}, "Vague instructions, or those that merely inform the jury to avoid 'passion or prejudice,' do little to aid the decisionmaker in its task of assigning appropriate weight to evidence that is relevant and evidence that is tangential or only inflammatory."\textsuperscript{35} This requirement is not satisfied by the California jury instructions, particularly since jurors are also told that "[n]o definite standard [or method of calculation] is prescribed by law by which to fix reasonable compensation for pain and suffering." Lacking any prescribed method, these jury instructions do not provide any reasonable constraints on jury decisionmaking.

This conclusion finds support in various empirical studies. Jurors have reported that they "find the guidance that is given to them on how to compute damages to be minimal . . . ."\textsuperscript{36} In one products liability case, jurors said they used a process of "guesstimation" to deter-

\textsuperscript{33} Haslip, 499 U.S. at 19–20.

\textsuperscript{34} CAl. JURY INSTRUCTIONS: CIVIL § 14.13 (2005); see also FIFTH CIRCUIT, PATTERN CIVIL JURY INSTRUCTIONS § 15.4 (2005) ("There is no exact standard for fixing the compensation to be awarded for these elements of damage. Any award that you make should be fair in the light of the evidence.").

\textsuperscript{35} State Farm, 538 U.S. at 418 (quoting Petition for Writ Certiorari at 108a–109a, State Farm, 538 U.S. 408 (No. 01–1289)) (internal citations omitted).

mine pain-and-suffering damages. Another study found that jurors "used different methods of calculating the awards." The vague jury instructions predictably result in highly variable damage awards. Plaintiffs who suffer more severe injuries tend to receive higher awards (indicating some degree of "vertical equity"), but those with similar pain-and-suffering injuries often are awarded significantly different amounts of damages (indicating a lack of "horizontal equity"). The jury instructions produce highly variable damage awards by permitting jurors to rely upon a variety of methods for calculating pain-and-suffering damages. Different methods predictably yield different results. One method can easily produce a damages award twice as great as the amount produced by a different method.

This due process problem would continue to exist even if jurors were given more explicit instruction on the nature and purpose of pain-and-suffering damages, each of which is described in the following passage by the New York Court of Appeals:

An economic loss can be compensated in kind by an economic gain; but recovery for noneconomic losses such as pain and suffering and loss of enjoyment of life rests on the "legal fiction that money damages can compensate for a victim's injury." We accept this fiction, knowing that although money 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. We have no hope of evaluating what has been lost, but a monetary award may provide a measure of solace for the condition created.

Jury instructions formulated in these terms would not give jurors any idea about how to determine the award. The instructions would still only tell the jury that it must reach the fair or just outcome without providing any guidance on what fairness or justice requires in this context. Due process requires that jury instructions provide reasonable constraints on juror discretion. Is this constitutional requirement satisfied by instructions that effectively tell jurors, one way or another, that the damages award is no more than a "legal fiction"?

40. Cf. Edward J. McCaffrey et al., Framing the Jury: Cognitive Perspectives on Pain and Suffering Awards, 81 VA. L. REV. 1341 (1995) (finding that the way in which jury instructions are worded has a substantial impact on the amount of "full compensation" that individuals award for a given pain-and-suffering injury, with some instructions yielding a fully compensatory pain-and-suffering award twice as great as the amount yielded by other instructions).
The constitutional problem becomes even more acute when considered in relation to the underlying rationale for this conception of pain-and-suffering damages. The best explanation of this rationale has been provided by Margaret Jane Radin:

Requiring payment is a way both to bring the wrongdoer to recognize that she has done wrong and to make redress to the victim. Redress is not restitution or rectification. Redress instead means showing the victim that her rights are taken seriously. It is accomplished by affirming that some action is required to symbolize public respect for the existence of certain rights and public recognition of the transgressor's fault in disrespecting those rights. In this conception of compensation, neither the harm to the victim nor to the victim's right not to be harmed are commensurate with money. They are not conceptually equated as fungible commodities.42

The conception of pain-and-suffering damages as involving redress for an "incommensurable" injury persuasively explains why judges tell jurors that there is no way to equate the injury or rights-violation with money, even though money damages are the only way to redress the rights-violation. The tort right is not a "fungible commodity" with money, and so there can be no "direct equivalence" between the rights-violation and a monetary damages award. But since a damages award is the only way for the jury to redress the rights-violation, at best the award can only represent "public recognition of the transgressor's fault in disrespecting those rights." The jury, in short, can only do what is just or fair in the circumstances—the instruction routinely provided by judges.

But if the tort right necessarily implies that the injury cannot be translated into some monetary amount, then a wide range of awards would seem to be appropriate, eliminating any reasonable constraint on jury decisionmaking.43 The very nature of the tort right would be the source of the constitutional problem.

42. Radin, supra note 5, at 61.
43. The concept of incommensurability is itself contested, but the different conceptions all seem to create the problem of excessive jury discretion. Under a "strong" form of incommensurability, "there is no basis in our knowledge of value to say that one decision rather than the other was the correct one." Jeremy Waldron, Fake Incommensurability: A Response to Professor Schauer, 45 HASTINGS L.J. 813, 816 (1994). If pain-and-suffering damages are incommensurable in this sense, then the jury does indeed have unfettered discretion. A "weaker" form of incommensurability maintains that there is no "common dimension of measurement that would allow trade-offs between" the pain-and-suffering injury and money, although "there is certainly a table or an order of priority, just as there is an order of suits in a bridge contract or an order of letters in the alphabet." Id. at 817. Presumably, the ordering would prioritize the right to bodily integrity over money. See infra notes 60-62 and accompanying text (explaining why the tort right is based upon this priority). The absence of any "common dimension of measurement" between the differently ordered priorities would seem to give the jury unfettered discretion for determining how the prioritized rights-violation translates into a lower order monetary damages award.
For this reason, the constitutional problem has not been solved by judicial review. Absent evidence that jurors relied on extralegal factors in deriving the award, what meaningful criteria can be applied by judges to evaluate the award? As Eric Schnapper has observed, the open-ended nature of the damages determination creates a particularly problematic situation for appellate review, because “[t]he jury itself must exercise considerable discretion in fixing the amount of the verdict; the trial judge in turn exercises broad discretion in approving or rejecting the jury’s action. This double exercise of discretion seems inconsistent with virtually any direct appellate review of these verdicts.”44 The difficulty of appellate review further underscores the constitutional problem, since judicial review of the damages award is required by procedural due process.45

Perhaps the reviewing court could evaluate the award in terms of its comparability with prior awards for similar injuries.46 But this approach inappropriately assumes that prior awards are constitutionally sound. As the Court concluded in a related context, “Retrospective case-by-case review cannot preserve fundamental fairness when a class of proceedings is governed by a constitutionally defective evidentiary standard.”47 Garbage in. Garbage out.

Rather than solve the problem of procedural due process, judicial review merely shifts the problem from jurors to judges. The constitutional problem cannot be avoided insofar as it is created by the underlying tort right.

IV. THE POTENTIAL IMPACT OF DUE PROCESS ON PAIN-AND-SUFFERING DAMAGES

The current procedure for determining pain-and-suffering damages may be constitutionally defective and needs to be changed accordingly. But even if the current procedure does not suffer from this problem, the defendant can also challenge a pain-and-suffering award as being excessive in violation of substantive due process. This constitutional challenge makes it necessary to consider how due process might affect the judicial review of the damages award.

In evaluating substantive due process challenges to a punitive damages award, the Court has held that the amount of punitive damages involves a mixed question of law and fact that is subject to de novo appellate review. 48 Under this approach, judges first identify the relevant substantive purposes that are supposed to be served by the award. Judges then engage in de novo review of the damages award to determine whether the amount is reasonable in light of the substantive purposes that should be served by the damages award.

The form of judicial review required by substantive due process would have less of an impact on tort practice if the reviewing courts did not engage in de novo review. For a damages determination involving a question of fact decided by the jury, both state and federal constitutional guarantees limit the scope of judicial review. For example, a finding of fact by a federal jury is governed by the Seventh Amendment's Reexamination Clause, which limits federal appellate review to a determination of whether the district court abused its discretion. 49

Ninety years ago, the Court held that a damages award for pain and suffering "involves only a question of fact and is not open to reconsideration here." 50 Recently, the Court has suggested that this holding continues to be valid. 51 The holding, however, cannot be squared with the Court's recent pronouncements on punitive damages, creating the possibility that substantive due process requires de novo appellate review of pain-and-suffering damages, the same type of appellate review now applied to punitive damages.

The Court has said that a damages determination involves a finding of fact if it "presents a question of historical or predictive fact." 52 Pain-and-suffering damages clearly depend upon both the historical fact of the injury already suffered by the plaintiff and the predictive fact of the future pain and suffering the plaintiff is likely to endure. But punitive damages also depend upon historical facts (the nature of the defendant's wrongdoing) and predictive facts (the way in which punitive damages will deter the defendant from engaging in future...
wrongdoing). By holding that punitive damages do not involve a pure finding of fact, the Court has implicitly rejected the claim that a finding of fact only requires some dependence upon historical or predictive facts. A finding of fact must instead entirely depend upon historical or predictive facts that presumably do not involve any sort of normative or value judgment.

This reasoning explains why punitive damages involve a mixed question of law and fact. Punitive damages serve the purposes of retribution and deterrence. The appropriate amount of damages for retributive purposes clearly involves some sort of normative or value judgment, enabling the Court to conclude that an award of punitive damages does not involve a finding of fact and therefore is subject to de novo appellate review.

The jury's determination of pain-and-suffering damages also involves some sort of normative or value judgment whenever jurors are not provided with a method for translating pain and suffering into a damages award. Lacking any guidelines, the jury must rely on value judgments, explaining why jurors are often instructed to use their "collective enlightened conscience" in reaching an award that is "fair and just." These jury instructions make clear that the damages depend upon a normative or value judgment, a dependence that makes pain-and-suffering damages a mixed question of fact and law that can be subject to de novo appellate review.

This conclusion has been implicitly recognized by Justice Ginsburg, who has argued that

[o]ne million dollars' worth of pain and suffering does not exist as a "fact" in the world any more or less than one million dollars' worth of moral outrage. Both derive their meaning from a set of underlying facts as determined by a jury. If one exercise in quantification is properly regarded as factfinding, it seems to me the other should be so regarded as well.

Since the Court has concluded that the jury award of punitive damages does not involve a mere finding of fact, the equivalence identified by Justice Ginsburg implies that an award of pain-and-suffering damages also does not involve exclusive factfinding by the jury. The jury's award of damages for pain and suffering can be subjected to de novo appellate review.

53. See supra notes 7-31 and accompanying text.
54. Graham Douthwaite, Jury Instructions on Damages in Tort Actions §§ 6-17, at 274 (2d ed. 1988) (instructing jurors to use their "collective enlightened conscience"); Eleventh Cir. Pattern Jury Instructions: Civil § 2.1 (West 1993) (instructing jurors that any award for pain and suffering "should be fair and just in the light of the evidence").
55. Cooper Indus., 532 U.S. at 446-47 (Ginsburg, J., dissenting) (internal citations omitted).
The de novo review of any given award for pain and suffering would seem to create the need for some type of guidelines for evaluating an award, the approach adopted by the Court with respect to the judicial review of a punitive damages award. The way in which due process has affected punitive damages practice fully illustrates the vulnerability of pain-and-suffering damages to constitutional restriction.

V. THE TORT RIGHT: CONSTITUTIONAL PROBLEM OR SOLUTION?

Just as the problem of due process can be traced to the tort right, any solution to the problem must also be based upon that right. The nature of the tort right determines the relevant state interests that are promoted by an award of tort damages for pain and suffering. According to the Court, the due process inquiry "appropriately begins with an identification of the state interests that a punitive award is designed to serve." So too, the due process inquiry for pain-and-suffering damages must begin with the relevant state interests.

The nature of the tort right finds expression in the core concern of tort law—the protection of individuals from physical harm, a category encompassing harm to the individual interests in bodily integrity, land, and chattels. To protect individuals from physical harm is to make them physically secure with respect to these interests. The tort right accordingly involves the individual interest in security of the body and personal property.

An individual tort right to physical security means that the right-holder's interest in physical security has some type of legal priority over the competing liberty interests, including the economic interest, of the duty-holder. This priority explains why "the law has always

59. The conceptual properties of individual rights are contestable, but an essential attribute of a right is captured by the notion that individual rights serve as "trumps over some background justification for political decisions that states a goal for the community as a whole." Ronald N. Dworkin, Rights as Trumps, in THEORIES OF RIGHTS 153 (Jeremy Waldron ed., 1984). An individual right, in other words, places limits or constraints on the types of reasons that justify governmental actions, including the formulation and enforcement of tort rules. See Jeremy Waldron, Pildes on Dworkin's Theory of Rights, 29 J. LEGAL STUD. 301 (2000) (explaining why this interpretation of Dworkin's formulation of rights as "trumps" is appropriate). An auton-
placed a higher value upon human safety than upon mere rights in property.” The basic idea is that the right-holder’s physical security cannot be compromised merely because doing so would confer greater wealth or welfare on others. One cannot be subjected to the harvest of his or her organs, for example, merely because the transplants in others would somehow make society better off. The tort right protects the individual interest in bodily integrity from these types of forced social redistributions. To provide such protection, the tort right prioritizes the right-holder’s security interest over the conflicting liberty or economic interests of the duty-holder.

Due to the interpersonal priority of the security interest over the economic interest, the individual tort right has no objective monetary equivalent. The “victim’s right not to be harmed” is not “commensurate with money,” since the right-holder’s interest in physical security and the duty-holder’s interest in money “are not conceptually equated as fungible commodities.”

Even though the tort right is not commensurate with money, it is a separate question whether there is an appropriate method for protecting the right with a monetary damages award. The tort right held by an individual both creates and corresponds to an individual duty incurred by another. By breaching this duty, the duty-holder becomes responsible to the right-holder for the injuries caused by the rights-promoting individual right, for example, can exclude any social justification for tort liability that is inconsistent with the concern for autonomy. Within such a rights-based system, the security interest of each individual has priority over the liberty interests of others. See, e.g., Stephen R. Perry, On the Relationship Between Corrective Justice and Distributive Justice, in Oxford Essays on Jurisprudence: Fourth Series 237, 239 (Jeremy Horder ed., 2000); see also Ernest Weinrib, The Idea of Private Law 202 n.73 (1995) (“Under Kantian right, bodily integrity is an innate right and thus prior to acquired rights of property.”). Both security and liberty are important aspects of autonomy, but individuals must be secure in their persons and property before they can meaningfully exercise their liberty, thereby justifying the interpersonal priority of the security interest as a matter of autonomy. As I have argued at length elsewhere, this priority of interests explains the important substantive doctrines of tort law. See generally Geistfeld, supra note 18. But even if this particular priority does not underlie the tort right, the very nature of a right to physical security means that tort law must give some sort of legal priority to that interest over the conflicting liberty interests of the duty-holder. For example, the rule of negligence liability is based upon the interpersonal priority of the right-holder’s security interest over the unreasonable liberty interest of the duty-holder, thereby justifying a duty that burdens the subordinate liberty interests to compensate harms inflicted upon the legally superior security interests.


61. The rationale for the tort right determines the appropriateness of any social redistribution. If the right is formulated to promote individual autonomy, for example, then redistributions are permissible as long as they find justification in the concern for autonomy. See supra note 59.

62. Radin, supra note 5, at 61.

63. See supra note 16 and accompanying text.
violation. The right-duty nexus provides a method for determining the appropriate damages award in a manner that does not pose a problem of due process. This approach is most easily illustrated by product cases, although it generalizes to other tort cases as well.

A. Product Cases

The tort right involves an interpersonal priority of the right-holder's security interest over the conflicting liberty and economic interests of the duty-holder. Such an interpersonal conflict of interests does not arise in most product cases—those involving product sellers and consumers. By selling a product, the manufacturer creates the risk of physical injury to which the consumer is exposed. Any tort burdens incurred by the manufacturer—the cost of safety precautions and injury compensation—are passed onto the consumer in the form of higher prices. Consequently, "it is not a factor . . . that the imposition of liability would have a negative effect on corporate earnings or would reduce employment in a given industry."64 Product cases only implicate an intrapersonal conflict of the consumer's interests in physical security and liberty or money.65

In comparing his or her own security and liberty interests, the consumer gives no special priority to either one. The consumer prefers to pay for product safety only if the benefit of risk reduction (borne by the consumer) exceeds the cost of the safety investment (also borne by the consumer via the associated price increase). Consumers reasonably expect product safety decisions to be governed by a cost-ben-

64. RESTATEMENT (THIRD) OF TORTS: PROD. LIAB. § 2 cmt. f (1998).
65. To be sure, tort liability will increase costs, which in turn will affect price, aggregate demand, and the net profits of product sellers. These impacts on the interests of product sellers are not relevant to the analysis, however. The equilibrium price must cover all of the seller's costs, including liability costs. At this baseline, the consumer pays for the full cost of tort liability. Another baseline could alter the conclusion. Given a baseline of no liability, the adoption of tort liability would increase cost and price, which in turn could decrease aggregate demand and thereby reduce price. The price reduction induced by the reduction in demand means that from a baseline of no liability, consumers need not bear the full cost of tort liability, depending on the relevant elasticities. See Richard Craswell, Passing On the Costs of Legal Rules: Efficiency and Distribution in Buyer-Seller Relationships, 43 STAN. L. REV. 361 (1991). The appropriate baseline accordingly determines whether or not consumers incur the full cost of tort liability. The appropriate baseline cannot be determined by economic analysis, since cost-benefit analysis depends on prices which in turn depend on the initial allocation of property rights. See Lewis A. Kornhauser, Wealth Maximization, in 3 THE NEW PALGRAVE DICTIONARY OF ECONOMICS AND THE LAW 679 (Peter Newman ed., 1998). The initial allocation of property rights must instead depend upon normative justification, and so the normatively justified tort rule defines the appropriate baseline for evaluating the distributive impact of tort liability. At this baseline, the consumer pays for the full cost of tort liability, since the equilibrium price must cover all of the seller's costs, including its liability costs. The normatively justified tort rule accordingly only depends upon consideration of these consumer interests.
efit calculus because that decisional rule maximizes consumer well-being or welfare. The adequate protection of a consumer's tort right therefore depends upon cost-benefit analysis, even though the tort right is not commensurate with money.

In product cases, the tort system relies upon a cost-benefit liability rule commonly called the risk-utility test. This rule gives the product seller a duty to make any safety investment having a total cost, disutility, or burden $B$ that is less than the risk the consumer would face if the safety investment were not made. The consumer reasonably evaluates the risk in terms of the expected injury costs created by the risk, an amount determined by the probability of accident $P$ multiplied by the magnitude of loss $L$. To focus on pain and suffering, we can decompose the loss into the constituent parts involving physical harms, emotional harms, and economic harms. So defined, the risk-utility test gives product sellers the duty to make any safety investments satisfying the following condition:

$$B < P \cdot (L_{\text{Physical}} + L_{\text{Emotional}} + L_{\text{Economic}})$$

This duty can be enforced by the courts only if the injury costs for the pain and suffering (the term $L_{\text{Emotional}}$) are somehow monetized (like the associated terms $L_{\text{Physical}}$ and $L_{\text{Economic}}$). Without a monetary amount for the pain and suffering, the court and the product seller cannot determine the safety expenditures required by the duty of care. The liability rule would not maximize consumer welfare or provide the best protection for consumer interests as required by the tort right, nor would the liability rule give constitutionally adequate notice to the product seller as duty-holder.

This attribute of the right or duty can be determined by the reasonable safety preferences of the consumer as right-holder. To see why, suppose there is a 1-in-10,000 chance of suffering the nonmonetary injury (the term $P$). The safety decision requires a monetary valuation of the nonmonetary injury (the term $L_{\text{Emotional}}$). That amount depends upon the consumer's subjective preference for spending money to eliminate this particular risk of experiencing the pain and suffering. Suppose the consumer honestly says he or she is willing to pay no more than $10 to eliminate the risk. Since $10 is the most the consumer would pay to eliminate the risk, he or she must be indifferent

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66. See generally Mark A. Geistfeld, Principles of Products Liability (2006) (explaining why the ordinary consumer reasonably expects the amount of product safety required by cost-benefit analysis and showing how this principle explains the important substantive doctrines of products liability).

between incurring the cost of $10 or otherwise incurring the expected injury cost of the pain and suffering:

\[ \$10 = P \cdot L_{\text{Emotional}} \]
\[ \$10 = (1/10,000) \cdot L_{\text{Emotional}} \]
\[ \$100,000 = L_{\text{Emotional}} \]

In making the safety decision defined by the duty of care, the consumer would prefer that this particular pain-and-suffering injury be monetized at $100,000. A different injury (or even a different probability of injury) would yield a different number. The monetization of the pain-and-suffering injury does not represent the "value" of the injury or the amount of money the consumer would accept in exchange for suffering the injury with certainty. When framed in those terms, the consumer could be willing to spend everything to avoid the most severe nonmonetary injury—the loss of life's pleasures due to wrongful death. The value of the injury, however, is not relevant to the safety issue in this particular case. The issue is one of determining the appropriate amount of safety expenditures for eliminating a 1-in-10,000 chance of suffering the nonmonetary injury, and for this purpose the consumer would reasonably prefer that the pain and suffering be monetized at $100,000.68

This method for monetizing the pain-and-suffering injury is based upon established economic methodology commonly employed by regulatory agencies, such as the Environmental Protection Agency, in devising regulations for the protection of human health and safety.69 The method also satisfies the relevant tort requirements.

Tort damages depend upon compensation for an existing injury and not merely the risk of suffering a future injury.70 This fundamental tort requirement does not make the risk of injury irrelevant, however. The jury cannot base the damages award for an existing injury on the amount of money the victim would require to accept the certainty of

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68. For further explanation of these points, including formal demonstration, see Mark Geistfeld, *Placing a Price on Pain and Suffering: A Method for Helping Juries Determine Tort Damages for Nonmonetary Injuries*, 83 Cal. L. Rev. 773 (1995).


70. For example, the plaintiff in a negligence claim must prove "[a]ctual loss or damage. . . . The threat of future harm, not yet realized, is not enough." Keeton et al., supra note 60, § 30, at 165.
suffering the injury.\textsuperscript{71} Tort compensation for existing injuries must somehow depend upon risk rather than certainty. In the foregoing example, the damages remedy of $100,000 is based upon the linkage between the injury and its underlying risk. The $100,000 compensates the plaintiff for the actual injury and not merely the risk, but does so in the manner required by the tort rule that the damages award cannot be based upon the certainty of injury.

For this same reason, the damages award can be fully compensatory even though it does not make the plaintiff "whole." A straight exchange of money for the injury in question would make the plaintiff "whole" in the sense that the money required by the plaintiff would restore his welfare to the level he had enjoyed prior to the injury. Tort law does not permit the damages award to be based upon such an exchange. This prohibition explains why monetary damages for pain and suffering are not supposed to "restore the person to his previous position," but should instead "give to the injured person some pecuniary return for what he has suffered or is likely to suffer."\textsuperscript{72} Any amount of money would provide "some pecuniary return" and would appear to satisfy this requirement, but presumably tort law is more demanding in this respect. Tort damages are supposed to be fully compensatory. The damages award of $100,000 is fully compensatory from the perspective of the plaintiff at the time of the risk exposure. At that time, the plaintiff would have reasonably monetized the injury at $100,000, and so the damages award fully compensates the plaintiff for the injury in this sense.

The same conclusion holds if the damages award is conceptualized as a means of redressing the violation of the plaintiff's tort right. The

\textsuperscript{71} Courts do not let jurors determine the award by asking themselves how much money they or anyone else would want in exchange for experiencing the plaintiff's injury. See generally L. R. James, Annotation, Instructions in a Personal Injury Action Which, in Effect, Tell Jurors That in Assessing Damages They Should Put Themselves in Injured Person's Place, 96 A.L.R.2d 760 (1964); see also 4 Fowler V. Harper et al., The Law of Torts § 25.10, at 563–64 (2d ed. 1986) ("All agree that [full compensation for pain and suffering] does not mean the sum that the plaintiff—or anyone else—would be willing to suffer the injury for."). The courts have rejected this method for determining damages because it invites sympathy or bias by the jurors. James, supra, at 761. The source of the sympathy or bias must involve neglect of the underlying risk of injury for reasons that can be illustrated by a severely disabling physical injury. An individual may not be willing to accept any amount of money to suffer this injury with certainty, whereas he or she would be willing to accept a finite amount of money to face a low risk of suffering the injury. A damages award based upon the certainty of injury therefore can vastly exceed an award based upon the actual risk of injury faced by the plaintiff, so jury instructions framed in terms of the certainty of injury clearly bias the determination of damages for physical injury. The only way to eliminate the bias is to somehow base the damages award on the underlying risk of injury.

\textsuperscript{72} Restatement (Second) of Torts § 903 cmt. a (1977).
DUE PROCESS

rights-violation involves the defendant-product-seller's breach of the duty of care owed to the plaintiff-consumer that caused the injuries for which the plaintiff seeks compensation. The duty of care monetized the pain-and-suffering injury at $100,000, and so a breach of that duty can be redressed by obligating the defendant to pay the plaintiff $100,000 for this aspect of the rights-violation.

The damages award does not represent the monetary equivalent of the tort right or even the injury itself. A manufacturer that willfully disregards the plaintiff's tort right does not fully satisfy its obligations by paying compensatory damages. In such cases, the plaintiff can receive punitive damages to punish and deter the defendant manufacturer from the wrongdoing. An award of compensatory damages therefore does not represent the monetary equivalent of the tort right or the "price" the duty-holder can choose to pay in exchange for willfully taking the right. The $100,000 also does not represent the value of the injury, since the plaintiff presumably would not accept that amount in exchange for the certainty of experiencing the pain and suffering. The damages award only represents the "price" or monetization of the injury in the particular circumstances of the case—the amount of money that is required to redress this aspect of the way in which the defendant violated the plaintiff's tort right. The nature of the rights-violation in product cases therefore translates into a specific method for determining pain-and-suffering damages.

To implement this approach, the jury could first be informed about the methodology and its rationale. The jury could then be provided with a specific probability, such as 1-in-10,000, that the defect would cause the particular pain-and-suffering injury in question. (The specific probability need only be based upon the best available evidence in order to satisfy the evidentiary standard governing damage determinations.) The jury could also be given information about how to conceptualize a probability of this magnitude. For example, the jury might benefit from learning that there is an average risk of 1-in-10,000 that an individual will die in a commercial plane crash over the course

73. See supra Part II.

74. As the Court has held in a different context, the plaintiff faces less demanding evidentiary requirements "[w]here the tort itself is of such a nature as to preclude the ascertainment of the amount of damages with certainty . . . ." Story Parchment Co. v. Paterson Parchment Paper Co., 282 U.S. 555, 563 (1931). If ordinary evidentiary requirements were applied in these cases, "it would be a perversion of fundamental principles of justice to deny all relief to the injured person, and thereby relieve the wrongdoer from making any amend for his acts." Id. To achieve justice, the evidence required of the plaintiff in the damages phase must fairly account for the factual uncertainty created by the defendant's tortious conduct, resulting in a legal standard requiring proof with the evidence that is reasonably available given the limitations created by the defendant's tortious misconduct.
of one hundred flights. The jury also receives evidence about the injury in question, making it relatively well informed about the nature and severity of the pain and suffering. On the basis of all this information, the jury is likely to provide a reasonably good determination of the damages award.

Under this approach, the jury's determination of pain-and-suffering damages is also appropriately characterized as a finding of fact. In effect, the jury is deciding how much money a well-informed consumer in the plaintiff's position would have been willing to pay for the particular safety precaution at issue in the case. The issue depends upon consumer preferences, making it the type of issue that is most defensibly determined by members of the community (the jury) rather than judges. Hence the jury’s damages determination should be given the maximal amount of deference from judges, the result attained by characterizing the damages determination as a finding of fact.

Unlike current tort practice, this approach does not pose any significant problems of due process. Rather than telling juries to award pain-and-suffering damages that are “just and reasonable,” this approach would enable judges to provide more precise guidance about what justice or fairness requires in these cases. In product cases not involving bystanders, the fair tort rule provides the best protection of consumer interests, making it appropriate for jurors to determine the maximum amount of money the plaintiff consumer would have been willing to pay to eliminate the relevant risk (such as 1-in-10,000) of experiencing only this particular pain-and-suffering injury.


76. See Geistfeld, supra note 68, at 832–40. To be sure, the jury will make mistakes, and so one can usefully criticize the method in this respect. See Ronen Avraham, Putting a Price on Pain-and-Suffering Damages: A Critique of the Current Approaches and a Preliminary Proposal for Change, 100 Nw. U. L. Rev. 87, 106–08 (2005) (identifying various reasons why jurors are likely to make mistakes in calculating damage awards based on risk measures). The problem of jury mistake highlights the importance of formulating jury instructions to overcome heuristics and biases that might otherwise plague the jury's decisionmaking. These jury mistakes do not sufficiently justify alternative methods for calculating the award, however, because the jury must make the same type of decision in order to apply the risk-utility test or otherwise determine the precautions required of the duty-holder. The jury could not appropriately make this decision by relying on a damages schedule or some other method for determining pain-and-suffering damages that does not base the award on the underlying right-duty nexus. As long as the right-duty nexus requires the jury to monetize nonmonetary injuries, this type of jury mistake is inevitable. Once the problem is conceptualized in these terms, the approach described in the text might even reduce jury mistakes insofar as it improves upon jury decisionmaking with respect to the risk-utility test and similar safety inquiries required by the duty of care.

77. To keep the jury from double-counting damages, the jury instructions must explain that the pain-and-suffering damages depend upon the plaintiff's willingness to pay to eliminate only the risk of the pain and suffering. The risk must exclude the other injuries suffered by the
method of calculating the damages award is just and reasonable because it monetizes the injury in the manner that adequately protects the plaintiff’s tort right. Under this approach, the damages award would no longer be the mystical result of some process of “guesstimation,” but instead would defensibly provide redress for the rights-violation suffered by the plaintiff consumer.

B. Tort Cases in Noncontractual Settings

When the parties to a tort suit have no preexisting contractual relationship, any tort costs incurred by the duty-holder cannot be passed onto the right-holder via increased contractual prices. The tort obligations incurred by automobile drivers, for example, are not directly borne by pedestrians. These cases involve an interpersonal conflict of interests between the duty-holder and right-holder, a conflict that can justify liability rules requiring more than the cost-benefit amount of safety.\(^{78}\) But even if the liability rule is not formulated in cost-benefit terms, the standard of care requires some comparison of the cost of precaution and the associated risk of injury that would be eliminated by the precaution. A rights-based liability rule must equally respect the right-holder and duty-holder. For example, a tort right based on the concern for individual autonomy must give equal respect to the autonomy of the right-holder and duty-holder. Since the rights-based tort rule cannot ignore the duty-holder’s interests, the standard of reasonable care must somehow compare the duty-holder’s burden of taking a precaution \(B\) with the associated threat to the right-holder’s security interest \(PL\). Therein lies the method for determining pain-and-suffering damages.

Suppose the standard of care requires precautions imposing a burden \(B\) on the duty-holder that is not disproportionately greater (denoted \(>>\)) than the risk in question:

\[
B >> P_1 \cdot (L_{\text{Physical}} + L_{\text{Emotional}} + L_{\text{Economic}})
\]

plaintiff. Inclusion of these other injuries would increase the maximum amount of money that the plaintiff would be willing to pay, thereby increasing the damages award in a manner that includes compensation for both these injuries and the pain and suffering. Alternatively, the jury could determine the plaintiff’s willingness to pay to eliminate the entire risk of injury. The resultant damages award would include compensation for both monetary and nonmonetary injuries. The monetary component could then be subtracted from the total award (assuming that the other forms of proof for monetary damages are more reliable), and the remainder would involve the jury’s implicit determination of the award for pain-and-suffering. Under this latter approach, the jury’s decision with respect to the safety issue in the case would exactly correspond to its decision on damages.

\(^{78}\) See Geistfeld, supra note 18, at 602-08. For a brief explanation of the reasons behind this conclusion, see infra note 79.
By requiring safety investments above the cost-benefit amount, this standard of care gives the right-holder’s security interest priority over the duty-holder’s liberty interest, while also enabling the duty-holder to engage in the activity in order to promote his or her autonomy. Even if it is not based upon cost-benefit analysis, the standard of care requires some method for comparing the cost of a precaution with the risk reduction. Presumably, that method should reasonably protect the right in question.

Suppose there is a 1-in-10,000 chance of suffering the nonmonetary injury (the term $P$). The standard of care requires a monetary valuation of the nonmonetary injury (the term $L_{\text{Emotional}}$). That amount depends upon the right-holder’s reasonable preferences for determining how much money should be spent to reduce this particular risk of injury. Suppose the right-holder honestly says that he or she is willing to accept at least $12 to face the risk. Since $12$ is the lowest amount the right-holder requires in order to face the risk, he or she must be indifferent between receiving the $12$ or otherwise incurring the expected injury cost of the pain and suffering:

$$12 = P \cdot L_{\text{Emotional}}$$

$$12 = (1/10,000) \cdot L_{\text{Emotional}}$$

$$120,000 = L_{\text{Emotional}}$$

In making the safety decision defined by the duty of care, the right-holder is willing to monetize this particular pain-and-suffering injury at $120,000$. A different injury (or even a different probability of injury) would yield a different number. As before, the monetization of the pain-and-suffering injury does not represent the “value” of the injury or the amount of money the right-holder would accept in exchange for suffering the injury with certainty. When framed in those terms, the amount could be infinite for the most severe nonmonetary injury—the loss of life’s pleasures due to wrongful death. The substantive requirements of the tort duty do not depend upon the value of the injury, however. The issue is one of determining the appropriate amount of safety for eliminating a 1-in-10,000 risk of suffering the nonmonetary injury, and for this purpose the right-holder would reasonably monetize the pain and suffering at $120,000$.

This method for determining damages has some important differences with the analogous method for product cases, but the damages award still provides the appropriate redress for the rights-violation.79

79. When the monetization of the injury depends upon the right-holder’s willingness to pay to reduce risk as in most product cases, the right-holder, by definition, is not entitled to receive any
As in product cases, the award for pain and suffering can be defined in terms of the defendant's duty of care. To violate the plaintiff's tort right, the defendant must have breached the duty of care in a manner that caused injury to the plaintiff. The fact of breach is not sufficient, nor is the fact of injury. The rights-violation necessarily requires consideration of both the standard of care and the resultant injury. The rights-violation therefore can be defensibly redressed by a damages remedy based upon the manner in which the standard of care accounts for the injury in question.80

With respect to the issue of due process, the approach is entirely analogous to product cases. When jury instructions are formulated in these terms, the damages determination no longer suffers from the inherent indeterminacy or vagueness that now plagues this important form of tort liability.

VI. Conclusion

Regardless of what one thinks about the U.S. Supreme Court's foray into tort reform, its emphasis on due process requires one to think hard about the problem of vague and uncertain tort rules. As a consequence of the due process challenge to tort law, it may no longer be sufficient to justify indeterminate pain-and-suffering damages as means of recognizing the inappropriateness of equating money with money prior to the risk exposure. But when the monetization of the injury depends upon the right-holder's willingness to accept money in exchange for facing the risk of injury, then the right-holder is entitled to receive the risk proceeds, making her ability to receive the money of critical importance. (Absent the receipt of money, why face the risk?) In noncontractual settings, the right-holder could receive the risk proceeds in the form of a damages payment as per the damages method proposed in text. But if the injury reduces the right-holder's ability to enjoy the money (premature death being the extreme example), then tort damages cannot be fully compensatory in this sense. In my view, this compensatory problem explains why tort law does not ordinarily define the standard of care in cost-benefit terms. When the standard of care requires more than the cost-benefit amount of safety, the duty-holder is forced to spend the money on injury prevention rather than damages compensation, producing a more fair outcome between the parties. See generally Geistfeld, supra note 18. The resultant emphasis on the standard of care further underscores the importance of tailoring the damages award to the standard of care.

80. Damages for the intentional torts and the strict liability torts can also be determined in this manner. If the defendant intentionally commits the harm, then there is no reason why the jury cannot determine damages by asking how much money the victim would require in exchange for suffering the injury. The defendant intentionally took the victim's health and can be made to pay accordingly. When the liability is strict, the damages no longer depend upon the certainty of injury, and instead require resorting to the underlying risk of injury as in the cases involving negligence liability. See supra note 71; see also Mark A. Geistfeld, Necessity and the Logic of Strict Liability, ISSUES IN LEGAL SCHOLARSHIP (2005), available at http://www.bepress.com/ils (explaining why the rules of strict liability critically depend upon the magnitude of the underlying risk).
the right to bodily security. As the Court has held, "[T]he Due Process Clause does not permit a State to classify arbitrariness as a virtue." 

Even if this damages practice passes constitutional muster, the ideal of due process does not disappear. As compared to current practice, the tort system could adopt a more constitutionally defensible method for determining pain-and-suffering damages by being more true to the constitutional values of notice, predictability, and reasoned decision-making. Such a tort system may also be more secure from legislative reforms like the tort-reform bill passed by the U.S. House of Representatives in March 1995, which capped pain-and-suffering damages in a section of the bill entitled "Limitation on Speculative and Arbitrary Damage Awards." 

As the issue of pain-and-suffering damages illustrates, the tort system can be guided by the ideal of due process without abandoning its reliance on fairness and individual rights. In a rights-based tort system, damages for pain and suffering provide redress for rights-violations. Money is not equivalent with the right, nor can money represent the value of the pain and suffering. These characteristics of the tort right do not imply that there is no method for determining the appropriate form of redress for a rights-violation. A tort right creates a corresponding duty of care for the duty-holder. To determine the safety precautions required of the duty-holder, the standard of care must monetize pain-and-suffering injuries. To violate the plaintiff's right, the defendant must have breached the duty of care in a manner that caused injury to the plaintiff, making it appropriate to redress the rights-violation by relying on the way in which the standard of care monetizes the injury. Not only does the nature of the tort right provide a method for determining the amount of damages, it also provides the foundation for a tort award that can be securely defended from constitutional attack.
