

ESSAY

AWARDS FOR PAIN AND SUFFERING: THE IRRATIONAL CENTERPIECE OF OUR TORT SYSTEM*

Paul V. Niemeyer[†]

WHEN a petit jury in a civil tort action awards damages for pain and suffering, it does not award damages that compensate, or that indemnify, or that provide restitution to the injured party—the traditional functions of damage awards.¹ Damages that are awarded for pain and suffering are probably intended as a pecuniary bonus or gift in an amount thought roughly to reference the pain suffered or expected to be suffered. But there seem to be no rational, predictable criteria for measuring these damages. For that reason, there are also no criteria for reviewing pain and suffering awards by the presiding judge or by an appellate court. Without rational criteria for measuring damages for pain and suffering, awarding such damages undermines the tort law’s rationality and predictability—two essential values of the rule of law. Yet it is this irrationality in awarding money for pain and suffering that provides the grist for the mill of our tort industry, which is now estimated to have grown to \$200 billion.² It is difficult to dismiss an industry of this size as a small pocket of tolerable irrationality when it exceeds the entire economy of Turkey, or Austria, or Denmark.³

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[†] United States Circuit Judge, Fourth Circuit.

¹ See Restatement (Second) of Torts § 903 cmt. a (1979); see also *Cooper Indus. v. Leatherman Tool Group*, 532 U.S. 424, 432 (2001) (observing that compensatory damages are designed “to redress the *concrete loss* that the plaintiff has suffered”) (emphasis added).

² See Center for Legal Policy, Manhattan Institute, Trial Lawyers, Inc.: A Report on the Lawsuit Industry in America 5, 2003, at <http://www.manhattan-institute.org/trial-lawyersinc.pdf> (on file with the Virginia Law Review Association).

³ Turkey had a 2003 GDP of \$199 billion; Austria, \$189 billion; and Denmark \$162 billion. The Economist Pocket World in Figures 24 (2003 ed.).

Pain is real, and, of course, the suffering it causes is real. And pain and suffering are part of any genuine personal injury caused by a tort. The community holds a widespread desire to provide a “compensatory” sum for pain and suffering, even though the sum will neither remove nor mitigate the pain and suffering. Indeed, for hundreds of years, courts have tolerated such awards in tort cases as a justified aberration to the standing theory of damages, which is to compensate and indemnify economic loss with monetary awards.

This Essay addresses the tension between the community’s desire, through the rule of law, to compensate injured victims for pain and suffering and the problems that have arisen in authorizing awards of damages that are irrationally quantified.

In his famous essay, “The Path of the Law,” Oliver Wendell Holmes, Jr., referred to law as a “systematized prediction,” a “body of dogma enclosed within definite lines.”⁴ In an effort to analyze law as a science, Holmes sought to separate law from morality—an effort in which he may not have been successful. But whether one agrees with Holmes’s thesis, it is apparent that he had his finger on the pulse of law as a product of reason, at least in its process. Holmes explained that in law, “we should be interested[,] . . . with a view to prediction, in discovering some order, some rational explanation, and some principle of growth for the rules.”⁵ Yet, when we provide awards for pain and suffering without the context of rational norms to guide quantification, we abandon the essential traits of the rule of law: predictability, order, and rationality.

An extreme example will bring the issue into focus. In November 2001, a Brooklyn jury, confronted with a case involving devastating injuries resulting from medical malpractice, awarded the plaintiff \$100 million to “compensate” her for past and future pain and suffering—\$30 million for past pain and suffering and \$70 million for future pain and suffering.⁶ The jury was undoubtedly authorized to award an amount for pain and suffering without regard to any evidence of what that amount should be, except for evi-

⁴ Oliver Wendell Holmes, *The Path of the Law*, 10 *Harv. L. Rev.* 457, 458–59 (1897).

⁵ *Id.* at 465.

⁶ *Evans v. St. Mary’s Hosp. of Brooklyn*, 766 N.Y.S.2d 577, 577 (App. Div. 2003).

dence of the degree of the pain and suffering that the plaintiff experienced. Because the jury was given no rule nor any rational criteria to apply in setting the amount of such an award, but told simply to do what it thought best, the jury responded with a perceived “measurement” of the pain, which essentially amounted to an emotional response. Because the pain and suffering were extraordinary in the jury’s collective experience, it concluded that the right amount for an award was \$100 million—ten times the amount that the plaintiff’s attorney requested.⁷

While jury awards have traditionally been evaluated for whether they are supported by substantial evidence, the question in reviewing this amount of damages for pain and suffering cannot be answered by consulting the evidence, which suggests only that the pain was severe. *Severe* pain and suffering are thus translated into a *large* award, with the correlation no more refined than that. Certainly the dollar amount, or even a dollar range, could never be the product of proof because pain is not susceptible to quantitative measurement. The Brooklyn jury did what it thought was right with the tools it was given; it awarded a large amount of money because the pain and the suffering were severe and will continue to be severe. Although we assume that the jury was not given a precautionary instruction that punishment may not enter its consideration of the amount of damages, the size of the jury’s award may indicate that it wanted to punish the defendant for carelessly causing such pain and suffering.

Without evidence or a norm, how might a presiding judge or appellate court review such an award to determine whether the jury was reasonable? Obviously, the judge could not. Upon reviewing the Brooklyn jury’s award on the defendants’ motion to set aside the verdict, the judge could point to no violation of law that the jury committed or to the absence of any fact from the record. Yet the trial court reduced the award as excessive, finding \$3.5 million to be the proper amount, and the Appellate Division affirmed, say-

⁷ *Evans v. St. Mary’s Hosp. of Brooklyn*, No. 4038/91, slip op. at 5 n.4 (N.Y. Sup. Ct. July 8, 2002), aff’d, 766 N.Y.S.2d 577 (App. Div. 2003).

ing only that the reduced award did not “deviate materially from what would be reasonable compensation.”⁸

The functions performed by both the jury and the judge, I submit, were irrational acts. Unguided by any rule of law, the jury was authorized to award “damages” for pain and suffering in an amount that it believed best, and the judge reviewed the award for excessiveness, based on undisclosed, and presumably subjective, standards. Because no rational norm was provided to guide the jury, the jury’s award was understandably unpredicted and, indeed, unpredictable. And because the amount indicated excessiveness to the judge, without regard to a standard for excessiveness, the judge dramatically reduced the award. We can suppose that the judge acted on his general knowledge of other verdicts for pain and suffering. Perhaps, therefore, we can say that a “norm” of relativism was applied to review the jury’s award: a conclusion that juries have never given \$100 million for pain and suffering, and therefore, in comparison to other awards, the amount was excessive. Such a rule, however, is not an adequate substitute for rationality; it enables bootstrapping because it is non-binding and because it allows each permissibly larger award to become the new standard against which the next award will be compared, justifying increasingly large awards.

Because extremely large awards for pain and suffering are generally mitigated by remittitur, this pocket of irrationality in the rule of law has been disguised or has remained unremarkable, as though it were a small nuisance tax. This nuisance tax, however, has been steadily growing in size, and its application is increasing in regularity. As is now commonly known, even for a fender-bender or slip-and-fall that causes \$1000 in out-of-pocket expenses, the settlement includes irrational “blue sky damages.” These cases settle routinely for \$3500 to \$5000, with the difference (\$2500 to \$4000) apparently compensation for pain and suffering. When these settlements are multiplied by the thousands of accidents that inevitably occur, the cost imposed by the tort system becomes considerable. The total cost of the tort system to society has grown to

⁸ *Evans*, 766 N.Y.S.2d at 577.

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an estimated \$205 billion, an amount that is puffed up principally by the inclusion of irrational jury awards for pain and suffering.⁹

When an entrepreneurial lawyer examines this state of affairs and recognizes that he or she could, by practicing in the tort field, receive a percentage of unlimited awards for pain and suffering—say 25% to 40%—the seduction becomes irresistible. It is this casino-type opportunity that drives and amplifies the irrationality of pain and suffering awards, and understandably so. The Manhattan Institute's Center for Legal Policy maintains that trial lawyers are currently being paid \$40 billion annually.¹⁰ At this point, I must make clear that I am not suggesting abandoning awards for pain and suffering. Rather, because the size of such awards has grown without any rational basis, if we wish to continue to embrace a rule of law whose fabric is rationality and predictability, we should be concerned by this pocket of irrationality. Addressing the irrationality of civil awards for pain and suffering must, therefore, be at the heart of any tort reform—tort reform not in the common political sense of competition between plaintiffs' lawyers and corporations, but in the sense that a growing irrationality exists within the tort system that threatens the system's rational method of redressing torts. Those who can shape the system must conscientiously rise above their self-interests to address this aspect of tort law for the public good.

To address a problem that is so widely tolerated might be daunting, but I submit that the appropriate response need not be invented from scratch. There is a model from an analogous problem that can be explored and adopted in material respects. This model is shaped by the actions of the several States that have responded to the rise of punitive damages during the last fifty years. As with awards for pain and suffering, punitive damages are not damages that compensate, indemnify, or provide restitution to the injured party; rather, they are made to punish the defendant for egregious conduct and to deter others from such conduct.¹¹ Indeed, the history of punitive damages can be traced to the same common law

⁹ See Center for Legal Policy, Manhattan Institute, *supra* note 2, at 2.

¹⁰ *Id.*

¹¹ See Restatement (Second) of Torts § 908 (1979).

phenomenon that gave rise to awards for pain and suffering. Their common history suggests that methods for addressing pain and suffering awards might be learned from methods already used in addressing punitive damages.

While the history of money awards for pain and suffering is not clearly defined, historically juries have held the exclusive power to award damages. It was not until the seventeenth century that some judges found it appropriate to exercise supervision over jury awards by ordering new trials.¹² Yet as juries began to inflate damage award when they found that a plaintiff experienced severe pain and suffering,¹³ judges nevertheless refused to order new trials. The practice that developed became a matter of custom, of tolerating such awards when they were expanded by modest amounts.¹⁴ The recognition of awards for pain and suffering continued even though courts recognized that compensatory damages were designed only to compensate and indemnify for concrete losses.¹⁵ In short, modest awards for pain and suffering were traditionally permitted as minor aberrations to the general theory of damages.

Just as damages for pain and suffering were not compensatory but were given where the plaintiff experienced unusual pain and suffering, awards to punish—punitive damages—were granted as exceptions to the general theory of damages when the defendant's tortious conduct was egregious. Again, judges tolerated punitive damage awards in small amounts—usually up to the amount of the compensatory damages and sometimes in small multiples of com-

¹² See Dorsey D. Ellis, Jr., *Fairness and Efficiency in the Law of Punitive Damages*, 56 S. Cal. L. Rev. 1, 12–13 (1982).

¹³ See, e.g., *Scott v. Sheperd*, 95 Eng. Rep. 1124 (K.B. 1773).

¹⁴ See Jeffrey O'Connell & Theodore M. Bailey, *A History of Payment for Pain & Suffering*, Appendix to Jeffrey O'Connell & Rita J. Simon, *Recovery for Pain & Suffering: Who Wants What, When, and Why?*, 1972 Ill. L.F. 1 app. v at 93–94 (1972); Jeffrey O'Connell & Keith Carpenter, *Payment for Pain and Suffering Through History*, 50 Ins. Counsel J. 411, 413 (1983).

¹⁵ See, e.g., *Cooper Indus. v. Leatherman Tool Group*, 532 U.S. 424, 432 (2001) (noting that compensatory damages are designed “to redress the concrete loss that plaintiff has suffered”); *Milwaukee & St. Paul Ry. v. Arms*, 91 U.S. 489, 492 (1875) (noting that it would be “a great departure from the principle on which damages in civil suits are awarded” to award “any thing more than an adequate pecuniary indemnity for a wrong suffered”).

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pensatory damages.¹⁶ These aberrations were a haphazard response to community needs that were not addressed by the theory of damages, namely, the need to recognize non-economic injury and the need to punish in a particular factual context.

In the nineteenth century, the Supreme Court addressed these departures from rationality, recognizing that they were justified by custom:

It is undoubtedly true that the allowance of any thing more than an adequate pecuniary indemnity for a wrong suffered is a great departure from the principle on which damages in civil suits are awarded. But although, as a *general rule*, the plaintiff recovers merely such indemnity, yet the doctrine is too well settled now to be shaken, that exemplary damages may in certain cases be assessed.

. . . [A]lthough some text-writers and courts have questioned its soundness, it has been accepted as the general rule in England and in most of the States of this country.¹⁷

These awards for punishment, given in modest amounts, accordingly continued to be recognized as a matter of custom, supported

¹⁶ Although the Court in *Day v. Woodworth*, 54 U.S. (13 How.) 363, 371 (1851), observed that the amount of punitive damages “has been always left to the discretion of the jury,” it has been noted that before the 1960s, “punitive damages awards only slightly exceeded compensatory damages awards, if at all.” Victor E. Schwartz et al., *Reining in Punitive Damages “Run Wild”*: Proposals for Reform by Courts and Legislatures, 65 *Brook. L. Rev.* 1003, 1007–08 (1999); see also *TXO Prod. Corp. v. Alliance Res. Corp.*, 509 U.S. 443, 500 (1993) (O’Connor, J., dissenting) (observing that “[a]s little as 30 years ago, punitive damages were ‘rarely assessed’ and usually ‘small in amount’” (citing Ellis, *Fairness and Efficiency in the Law of Punitive Damages*, 56 *S. Cal. L. Rev.* 1, 2 (1982))); cf. *BMW of N. Am. v. Gore*, 517 U.S. 559, 581 (1996) (noting that “[s]ome 65 different enactments during the period between 1275 and 1753 provided for double, treble, or quadruple damages”) (footnote omitted).

¹⁷ *Milwaukee & St. Paul Ry.*, 91 U.S. at 492–93; see also *Lake Shore & Mich. S. Ry. v. Prentice*, 147 U.S. 101, 107 (1893) (“[T]he doctrine is well settled, that in actions of tort the jury . . . may award exemplary, punitive, or vindictive damages”); *Mo. Pac. Ry. v. Humes*, 115 U.S. 512, 521 (1885) (“[I]n England and in this country, [damages] have been allowed in excess of compensation, whenever malice, gross neglect, or oppression has caused or accompanied the commission of the injury complained of.”); *Day*, 54 U.S. (13 How.) at 371 (“It is a well-established principle of the common law, that . . . a jury may inflict what are called exemplary, punitive, or vindictive damages upon a defendant”).

by the judgment of courts that they did not offend the dominating rationality of compensatory damage awards.

Beginning, however, in the middle of the twentieth century, punitive damage awards began to grow in amount as attorneys focused the attention of juries on the unlimited possibilities in making awards for punishment, and such awards began to receive attention.¹⁸ As punitive damage awards became more than the minor aberrations to rationality that historically had been tolerated, courts found it necessary to discover a principled way to rationalize their continuance, at least in modest amounts. This new awareness was revealed as recently as the 1980s, when Justice O'Connor observed: "As recently as a decade ago, the largest award of punitive damages affirmed by an appellate court in a products liability case was \$250,000. Since then, awards more than 30 times as high have been sustained on appeal."¹⁹ Justice O'Connor concluded that, precisely because of the unprincipled pedigree of such awards, a question of due process arises when such awards become large.²⁰

As with awards for pain and suffering, awards for punitive damages were not quantified by facts that a jury could find, and therefore they were not well-suited for jury determination. While there has been a limiting aspect provided by the defined purpose of punitive damages—that is, to punish and to deter—punitive damage awards still suffered from a lack of quantifying norms. Accordingly, when their amounts regularly increased into the millions, even billions, of dollars, their irrationality could no longer be overlooked simply as a modest additur to compensatory damages, akin to a nuisance tax. One example of an extremely large punitive damage award makes the point.

¹⁸ See, e.g., *TXO Prod. Corp.*, 509 U.S. at 500 (O'Connor, J., dissenting); Ellis, *supra* note 12, at 1–3; Schwartz, *supra* note 16, at 1008–10.

¹⁹ *Browning-Ferris Indus. v. Kelco Disposal, Inc.* 492 U.S. 257, 282 (1989) (O'Connor, J., concurring in part and dissenting in part) (citations omitted); see also John Kircher & Christine Wiseman, *Punitive Damages: Law & Practice* § 21:01, at 21-2 (2d ed. 2000) (characterizing the growth of punitive damage awards in recent years as "explosive"); Ellis, *supra* note 12, at 2 (noting that while in the past, punitive damages "were rarely assessed and likely to be small in amount," today they "are being sought and awarded in a growing number of cases, often for substantial amounts") (footnote omitted).

²⁰ *Browning-Ferris Indus.*, 492 U.S. at 283 (O'Connor, J., concurring in part and dissenting in part).

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In 2002, a Los Angeles jury awarded an individual lifetime cigarette smoker stricken with lung cancer \$28 billion in punitive damages against a cigarette manufacturer.²¹ This award was the product of the jury's determination to punish the manufacturer for its deceptive marketing of cigarettes over the years. In making such an award, the jury reacted to its perception of the magnitude of the wrong committed in the individual case without a contextual regard to other cases or other penalties and without instruction as to a limit or to proportionality. The jury responded to the particular facts of the cigarette manufacturer's deceit and vented its anger, based on its judgment of the offensiveness of the conduct and the wealth of the manufacturer. Yet only emotion, not a rule of law, could justify imposing an award of \$28 billion. To confirm this, one need only consider the "mind" of a legislative body developing a *prospective* rule of law to punish similar conduct.

For one thing, what level of fine would the legislative body rationally set for the violation—even a criminal violation? More importantly, what criteria would enter the debate on fixing the range of applicable fines? There would undoubtedly be a discussion of context, relatedness to other crimes, proportionality, harm to the community, deterrence, and the accurate reflection of the strength of the policy being implemented. The discussion would be moved by what would be an appropriate response for a just rule of law to be applied prospectively to all citizens. And once in place, such a law would in fact apply equally to all citizens in the community within the parameters governing any law enacted by a legislative body.

When one compares the potential legislative response of fixing a fine for deceptive advertising with the jury's response in the Los Angeles case, the contrast is striking. The California legislature has fixed the maximum fine for false advertising at \$2500.²² And Congress has fixed the maximum fine for corporations' violations of federal offenses at \$500,000 or twice the defendant's gain or the victim's loss.²³ Indeed, it would be difficult to conceive of a rule of

²¹ *Bullock v. Philip Morris*, No. BC249171, 2002 WL 31833905, at *2 (Cal. App. Dep't Super. Ct. Dec. 18, 2002).

²² Cal. Bus. & Prof'l. Code § 17500 (West Supp. 2004).

²³ 18 U.S.C. § 3571(c), (d) (2000).

law that would prospectively punish a corporation with a fine of \$28 billion for deceptive advertising even if it causes personal injury.

While this example involves an extreme award, other smaller awards of punitive damages nonetheless suffer from the same lack of rationality. Imposition of lesser awards has historically resulted in indifference to an ongoing and growing problem. The irrationality shown by this example nevertheless remains valid as a theoretical matter for all punitive damage awards entered without rational criteria or limitations.

The history of the community's response to growing punitive damage awards is more mature than its response to awards for pain and suffering. First, courts attempted to impose rationality in individual cases where punitive damages were awarded. Factors were developed for juries to consider, and courts established criteria for measuring the judicial response. Of greatest import were those cases suggesting that fines for criminal conduct were analogous and could be consulted when measuring awards for punitive damages.²⁴ This development was significant because the reference to criminal fines recognized implicitly that the regulation of punitive damages might best be accomplished by our legislatures, where fines are fixed by law.

But even as courts made an effort to introduce rationality in punitive damage awards, the awards continued to soar. By the 1980s, the courts began to raise questions about whether these awards constituted excessive fines under the Eighth Amendment, which prohibits the imposition of "excessive fines," or whether they denied a defendant due process of law under the Fourteenth Amendment. As these theories were more frequently pressed in courts, the U.S. Supreme Court finally addressed punitive damages under the U.S. Constitution through a pentad of cases beginning in

²⁴ See, e.g., *BMW of N. Am. v. Gore*, 517 U.S. 559, 583 (1996) (noting that when evaluating a punitive damage award for excessiveness, the award can be compared to "the civil or criminal penalties that could be imposed for comparable misconduct"); *Bowden v. Caldor, Inc.*, 710 A.2d 267, 280 (2d Cir. 1998) (noting that in reviewing a punitive damage award for excessiveness, a "court may consider, *inter alia*, the legislative policy reflected in statutes setting criminal fines" for similar misconduct (quoting *Ellerin v. Fairfax Sav.*, 652 A.2d 1117, 1130 n.13 (Md. 1995))).

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1989. These cases concluded that the irrationality of punitive damage awards presented a constitutional issue insofar as they undermined the rule of law. A brief look at these five decisions reveals the limits of irrationality that the rule of law can tolerate.

First, in 1989, the Supreme Court held in *Browning-Ferris Industries v. Kelco Disposal* that a Vermont state court punitive damage award of \$6 million did not violate the Eighth Amendment of the U.S. Constitution because the Eighth Amendment does not limit jury awards in *civil* cases.²⁵ The Court declined to address the due process argument raised by the defendant because that argument had not been presented to the district and circuit courts.²⁶ But in a concurring opinion, Justice Brennan focused on the heart of the punitive damage award problem, forecasting the Court's later response:

Without statutory (or at least common-law) standards for the determination of how large an award of punitive damages is appropriate in a given case, juries are left largely to themselves in making this important, and potentially devastating, decision.²⁷

Delving into the fundamental irrationality of punitive damage law, he pointed out:

I do not suggest that the [state judge's] instruction itself was in error; indeed, it appears to have been a correct statement of Vermont law. The point is, rather, that the instruction reveals a deeper flaw: the fact that punitive damages are imposed by juries guided by little more than an admonition to do what they think is best.²⁸

In a separate opinion, Justice O'Connor also acknowledged the potential implication of the Due Process Clause.²⁹ Indeed, even before the *Browning-Ferris Industries* decision, Justice O'Connor had begun to focus on the due process implications of large punitive damage awards, stating in a separate opinion in a 1988 case:

²⁵ 492 U.S. 257, 260 (1989).

²⁶ *Id.* at 277.

²⁷ *Id.* at 281 (Brennan, J., concurring).

²⁸ *Id.* (Brennan, J., concurring).

²⁹ *Id.* at 283 (O'Connor, J., concurring in part and dissenting in part).

Mississippi law gives juries discretion to award any amount of punitive damages in any tort case in which a defendant acts with a certain mental state. In my view, because of the punitive character of such awards, there is reason to think that this may violate the Due Process Clause.³⁰

Two years after *Browning-Ferris Industries*, the Supreme Court first recognized that state court awards of punitive damages indeed implicate the Due Process Clause of the Fourteenth Amendment in *Pacific Mutual Life Insurance Co. v. Haslip*.³¹ But in *Haslip*, the Court upheld an Alabama state court punitive damage award that was four times greater in amount than the compensatory damage award because the award was subject to Alabama State Supreme Court review that included a comparative analysis of such awards and a review of the standard for their application.³²

Two years later, in *TXO Production Corp. v. Alliance Resources Corp.*, the Court again upheld the constitutionality of a punitive damage award, finding constitutional an award in West Virginia of \$10 million in a case in which the compensatory award was \$19,000.³³ Noting that state courts “have long held that ‘exemplary damages . . . should bear some proportion to the real damage sustained,’” the Court accepted that proposition as a criterion of rationality.³⁴ But in the case before it, the Court observed that the award was indeed proportional because the *potential* damage to the plaintiffs was in the millions of dollars and therefore the disparity between the punitive damage award and the compensatory damage award did not “‘jar one’s constitutional sensibilities.’”³⁵

The Court finally identified the outer limit of rationality of punitive damage awards in *BMW of North America v. Gore*, where it struck down, for the first time, a punitive damage award that it found grossly excessive.³⁶ The Court held unconstitutional a \$2 mil-

³⁰ *Bankers Life & Cas. v. Crenshaw*, 486 U.S. 71, 87 (1988) (O’Connor, J., concurring in part and concurring in the judgment).

³¹ 499 U.S. 1, 18–24 (1991).

³² *Id.* at 21–24.

³³ 509 U.S. 443, 443, 466 (1993).

³⁴ *Id.* at 459 (quoting *Grant v. McDonogh*, 7 La. Ann. 477, 448 (1852)).

³⁵ *Id.* at 462 (quoting *Haslip*, 499 U.S. at 18).

³⁶ 517 U.S. 559, 585–86 (1996).

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lion punitive damage award, where the compensatory damages were \$4000, stating that the punitive damage award “must bear a ‘reasonable relationship’ to compensatory damages” to meet the requirements of the Due Process Clause.³⁷ The Court fortified the use of this criterion by pointing to a long history in English law that authorized double, treble, or quadruple damages.³⁸ And in a concurring opinion, Justice Breyer resurrected the fundamental due process deficiency that Justice Brennan had identified earlier in *Browning-Ferris Industries*. Justice Breyer stated: “Requiring the application of law, rather than a decisionmaker’s caprice, does more than simply provide citizens notice of what actions may subject them to punishment; it also helps to assure the uniform general treatment of similarly situated persons that is the essence of law itself.”³⁹

Finally, in 2003, the Court applied *BMW of North America* in *State Farm Mutual Automobile Insurance v. Campbell*, finding unconstitutional a punitive damage award that was 145 times the \$1 million compensatory damage award.⁴⁰ This time, however, the Court’s opinion itself went to the heart of the due process deficiency:

The Due Process Clause of the Fourteenth Amendment prohibits the imposition of grossly excessive or arbitrary punishments on a tortfeasor . . . [because] “[e]lementary notions of fairness enshrined in our constitutional jurisprudence dictate that a person receive fair notice not only of the conduct that will subject him to punishment, but also of the severity of the penalty that a State may impose.”⁴¹

Accordingly, awarding punitive damages without such fair notice was held to deprive the defendant of property arbitrarily and without due process.⁴² The Court in *Campbell* then did the extraordi-

³⁷ Id. at 580–81.

³⁸ Id.

³⁹ Id. at 587 (Breyer, J., concurring).

⁴⁰ 538 U.S. 408, 428 (2003).

⁴¹ Id. at 416-17 (quoting *BMW of North America*, 517 U.S. at 574) (second alteration in original).

⁴² Id.

nary. It hinted at a non-legislative rule that would provide notice and enable punitive damage awards to be made in a constitutional manner. The Court stated: “[F]ew awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process.”⁴³

In these five cases, the Court articulated the limits of irrationality that state tort law can tolerate while remaining within the bounds of the U.S. Constitution. In the end, the Supreme Court reluctantly intervened in what was traditionally the domain of state law to articulate as part of due process the principle that punitive damage awards can be made only under previously established rational principles.

The relevant lesson to be learned from the punitive damage experience is that when the tort system becomes infected by a growing pocket of irrationality, state legislatures must step forward and act to establish rational rules. For some eight years, the Supreme Court had wrestled with the failure of state legislatures to act to rationalize punitive damage awards and had suggested that at some point the constitutional limits would be reached. In 1996, as held in *BMW of North America*, they were.

Of course, the Supreme Court’s recent jurisprudence on punitive damages is difficult for the States to accept. Punitive damages fall principally within the States’ domain. But having defaulted on their responsibility, States became subject to the regulation of a Supreme Court holding. As a consequence, the States can now expect that cases tried in their courts will carry the seed of a federal question when punitive damages are demanded or awarded. This threatens the federalism principles that favor cooperation among sovereigns.

All had not been lost for the States. By acting affirmatively, state legislatures began to regain control of the regulation of punitive damages, even though their responses are diverse. A large number of States have now limited punitive damage awards to a multiple of compensatory damages or to an absolute dollar amount, or to

⁴³ Id. at 425.

both.⁴⁴ Some States have raised the burden of proof either to “clear and convincing”⁴⁵ or even to “beyond a reasonable doubt.”⁴⁶ Some States have authorized split recoveries, providing that a portion of a punitive damage award must be paid to the State.⁴⁷ And some States have limited punitive damage awards to particular types of cases or have abolished them altogether.⁴⁸

Surely during the legislative debates leading to these enactments, the rational concerns of context, relatedness to crimes, proportionality, harm to the community, and deterrence entered the discussions. The emerging variation of approaches now not only addresses the irrationality of punitive damages, but also demonstrates the advantages of a constitutional design in which the States participate individually in the experiment of democracy.

This dramatic story of the jurisprudence relating to punitive damage awards is equally applicable to awards for pain and suffering. Indeed, awards for pain and suffering are even more vulnerable to constitutional attack.

While punitive damages are given the specific purpose of punishing the defendant and deterring future conduct, thereby providing a jury with some objective standard against which to measure the award, awards for pain and suffering are given no purpose, no

⁴⁴ See, e.g., Colo. Rev. Stat. § 13-21-102(1)(a) (2003) (requiring that exemplary damages in civil actions “not exceed an amount which is equal to the amount of the actual damages awarded”); Fla. Stat. Ann. § 768.73(1)(a) (West Supp. 2004) (limiting punitive damages, subject to two exceptions, to the greater of three times the compensatory damages awarded to each claimant, or \$500,000); Tex. Civ. Prac. & Rem. Code Ann. § 41.008(b) (Vernon Supp. 2003) (limiting exemplary damages to two times the amount of economic damages plus an amount equal to any noneconomic damages found by the jury, not to exceed \$750,000; or \$200,000); Va. Code Ann. § 8.01-38.1 (Michie 2000) (limiting punitive damages to \$350,000).

⁴⁵ See, e.g., Cal. Civ. Code § 3294(a) (West 1997); Ind. Code Ann. § 34-51-3-2 (Michie 1998); N.J. Stat. Ann. § 2A:15-5.12 (West 2000).

⁴⁶ See, e.g., Colo. Rev. Stat. § 13-25-127(2) (2003).

⁴⁷ See, e.g., Ga. Code Ann. § 51-12-5.1(e)(2) (2000) (requiring 75% of punitive damages awarded in products liability tort actions be paid to the state).

⁴⁸ See, e.g., Ala. Code § 6-11-27(a) (1993) (outlawing, in certain cases, punitive damages against a principal or employer based on acts or omissions of an agent or employee); 735 Ill. Comp. Stat. Ann. 5/2-1115 (West 2003) (outlawing punitive damages in all “healing art” and legal malpractice cases); N.H. Rev. Stat. Ann. § 507:16 (1997) (outlawing punitive damages in all actions unless otherwise provided by statute); Or. Rev. Stat. § 30.927(1) (2003) (outlawing punitive damages in actions against drug manufacturers where the drug product causes the harm under certain conditions).

definition, nor any limitation. Even though pain is a real injury caused by the tort, a separate pecuniary award for pain and suffering has no defined purpose, and a reviewing court cannot say that in entering an award a jury fulfilled a defined purpose. No one claims that such awards compensate, indemnify, or provide restitution, which are the purposes of compensatory damages.⁴⁹ And courts have neither attempted to define a purpose nor given the juries a limit. As was noted with regard to punitive damages, juries are essentially allowed to do simply “what they think is best.”⁵⁰

At least one well-known text advances the proposition that awards for pain and suffering, although not compensatory, are given as a practical matter to fund the plaintiff’s attorneys’ fees.⁵¹ Recognizing that such a ground is “hard to justify on pure principle,” the text continues, “[a] principled reason for allowing damages for non-pecuniary loss is the importance of providing a sense of public sympathy and fellow-feeling for a grievously injured person.”⁵²

The better explanation is probably that pain and suffering are recognized as genuine injuries, and even if such an injury is noneconomic, it causes a depreciation in the quality of the plaintiff’s life. With extra money unrelated to the demands of indemnity for the injury, the plaintiff can attempt to improve the quality of his life by purchasing benefits, entertainments, and other distractions unrelated to his injury.⁵³ But there has been no real effort to define a purpose for a pain and suffering award, and certainly there is no agreement on any purpose. Thus, the justification of such awards is far more indeterminate than the justification of punitive damage awards, which have always had the defined economic purpose of punishing a particular defendant.

If juries are authorized to award “damages” for pain and suffering in any amount without a well-defined purpose, how does a de-

⁴⁹ See, e.g., Restatement (Second) of Torts § 903 (1979).

⁵⁰ *Browning-Ferris Indus.*, 492 U.S. at 281 (Brennan, J., concurring).

⁵¹ Dan B. Dobbs, *Law of Remedies* § 3.1, at 282 (2d ed. 1993).

⁵² *Id.*

⁵³ See, e.g., *Seffert v. Los Angeles Transit Lines*, 364 P.2d 337, 345 (Cal. 1961) (Traynor, J., dissenting) (expressing the view that pain and suffering awards are designed “to ease plaintiffs’ discomfort”); see also Restatement (Second) of Torts § 903 cmt. a (1979).

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pendant have notice of the scope of a potential verdict? Obviously, when damages are meant to compensate for “concrete loss,”⁵⁴ those damages can be predicted with some degree of accuracy. But without rational criteria or defined limits, the pain and suffering award becomes the same arbitrary deprivation of property as were punitive damage awards before cases like *BMW of North America* and *Campbell*.⁵⁵

The proof of this conclusion requires no study of pain and suffering verdicts. A collection of such verdicts awarded in past cases would reveal nothing rational about how the amount of such awards were determined. Nor would they provide a prediction of future awards. Recent scholarship has examined these large awards for pain and suffering and, because of their amount, has suggested only through speculation that punishment might improperly be creeping into their calculus, giving as some examples: a \$41 million award to the driver of a car injured by a defective tire; a \$17 million award in an asbestos-related disease case; and six \$25 million awards for asbestos exposure.⁵⁶ But it is difficult to draw empirical conclusions from such a collection.

At bottom, we are left with the following abstract observation. When a tortfeasor wrongfully causes a plaintiff to suffer pain from a seriously broken leg and a jury awards the plaintiff \$50,000 for pain and suffering, can it be said that the award was against the facts, that it was inappropriate, or that it was in any way illegal or wrong? And when another jury returns an award for the same pain and suffering in an amount of \$350,000, could any rational analysis lead to the conclusion that the second jury acted against the facts, acted inappropriately, or reached an illegal or wrong verdict? Yet one verdict is seven times the other, and the irrationality of the awards is made manifest.

Rather than repeat the history of prosecuting constitutional test cases that, in the case of punitive damages, ultimately constitutionalized them, I submit that state legislatures should act to bring or-

⁵⁴ See *Cooper Indus. v. Leatherman Tool Group*, 532 U.S. 424, 432 (2001).

⁵⁵ See *Campbell*, 538 U.S. at 417.

⁵⁶ See Victor E. Schwartz & Leah Lorber, *Twisting the Purpose of Pain and Suffering Awards: Turning Compensation into “Punishment,”* 54 S.C. L. Rev. 47, 64–65 (2002).

der to the chaos that is spreading in tort awards for pain and suffering. And it is, I would argue, their inherent duty to do so. This idea does not arise for the first time with the ratification of our Constitution and from eighteenth-century concepts of due process. It reaches to ancient origins. St. Thomas Aquinas observed: "As the Philosopher [Aristotle] says, it is better that all things be regulated by law, than left to be decided by judges: and this for three reasons."⁵⁷ His third reason is significant: "Thirdly, because lawgivers judge in the abstract and of future events; whereas those who sit in judgment judge of things present, towards which they are affected by love, hatred, or some kind of cupidity; wherefore their judgment is perverted."⁵⁸

Legislatures seeking to prevent just such an injustice should follow the models they developed for addressing punitive damages. Indeed, the root cause of the irrationality in both punitive damages awards and pain and suffering awards is the same, and as it stands, awards for pain and suffering are less rational than punitive damages awards were in their most unregulated era. As noted earlier, punitive damages always had the limiting constraint that they be awarded for the purpose of punishing and deterring, but there is no corresponding rationale for awarding damages for pain and suffering.

Thus, legislatures must first identify specifically the goal to be served in authorizing pain and suffering awards. Although the specifics of such an articulation would be important for developing criteria for determining their amount, it can be intuited at a general level that such awards would be authorized to provide the plaintiff spending money, not to restore economic losses, but to improve the plaintiff's quality of life. They would be given to ease the plaintiff's pain and suffering through the purchase of benefits, entertainments, and other distractions unrelated to his injuries. But it would be important to distinguish their purpose from the purpose of punitive damages, making clear that awards for pain and suffering are not to be made to punish the defendant; they are to be

⁵⁷ St. Thomas Aquinas, *Summa Theologica*, Question 95: Of Human Law, First Article, Reply to Objection 2, *in* St. Thomas Aquinas on Law and Justice: Excerpts from *Summa Theologica* 1013, 1014 (Legal Classics Library 1988) (citation omitted).

⁵⁸ *Id.*

made exclusively to ameliorate the effects on the plaintiff's life that pain and suffering has caused or will cause. Once such a purpose is defined, then the legislature can begin the task of quantifying pain and suffering awards.

When deciding on a monetary reference, the same problem would arise as existed for punitive damages. In quantifying pain and suffering awards, the legislature would have to identify those unrelated benefits, entertainments, and other distractions that would appropriately help the plaintiff and then make some assumption about their costs. Moreover, the legislature surely would want to define limits. As legislatures consider these matters, as in the area of punitive damages, they would engage in a debate about the range of the relevant subjects, including the costs of unrelated benefits that a pain and suffering award should provide, and the outer limits of awards. In the end, they would probably authorize a fixed amount either in the absolute, or in relation to the time-duration of pain found, or in relation to the amount of compensatory damages found.

For example, they might conclude on a rational basis that juries be authorized to award up to two times the amount of compensatory damages for past pain and suffering and up to three times for pain and suffering that will continue into the future. Or they might place pain and suffering in an absolute range from which the jury would be authorized to select arbitrarily the desired amount in a given case. Or they might consider per annum allowances limited to the length of time during which the plaintiff suffered and will suffer pain. At bottom, the identification of relevant factors and the imposition of limitations would introduce rationality and predictability into the calculus, providing notice and fairness to defendants.

State legislatures *have* capped damages on noneconomic losses in certain types of lawsuits. For instance, in order to protect the medical profession from the effects of skyrocketing malpractice insurance costs, many States have passed legislation capping noneconomic damages in malpractice cases.⁵⁹ While these measures are

⁵⁹ See, e.g., Cal. Civ. Code § 3333.2 (West 1997) (capping noneconomic damages at \$250,000 in medical malpractice cases); La. Rev. Stat. Ann. § 40:1299.42(B)(1) (West

admirable insofar as they introduce a limit to an irrational component of damages, they reflect a concern about a particular profession, not necessarily an understanding that noneconomic damages suffer from a pervasive and inherent irrationality and unpredictability. But some state legislatures have indeed begun enacting broader legislation that limits noneconomic damages in all tort cases. For example, Kansas and Maryland have imposed \$250,000 caps on noneconomic damages that can be exceeded in specific circumstances.⁶⁰

If this effort does not continue, however, the States' failure to introduce rationality into the awards of pain and suffering will present the same risk of federal judicial oversight as did their failure in addressing punitive damages. Indeed, the constitutional infirmities of punitive damages found by the Supreme Court can be applied with even greater force to awards for pain and suffering. Applying the Supreme Court's statements about punitive damages, we could say that pain and suffering awards "are imposed by juries guided by little more than an admonition to do what they think is best."⁶¹ Because there are no rational factors governing their entry, they do not provide "fair notice" of the amount of such an award and do not allow potential defendants to "order their behavior."⁶² "The Due Process Clause . . . prohibits the imposition of grossly excessive or arbitrary punishments on a tortfeasor."⁶³ Such punishments do not "bear a 'reasonable relationship' to compensatory damages."⁶⁴ "[F]ew awards exceeding a single digit ratio [with respect to] compensatory damages . . . will satisfy due process."⁶⁵

2001) (capping all damages except medical expenses at \$500,000 in medical malpractice cases); Ohio Rev. Code Ann. § 2323.43(A) (Anderson Supp. 2004) (providing limitations on noneconomic damages in medical malpractice cases that depend on the type of injury and the amount of economic losses); S.D. Codified Laws § 21-3-11 (Michie 1997) (capping total general damages at \$1,000,000 in medical malpractice cases).

⁶⁰ See, e.g., Kan. Stat. Ann. § 60-19a02(b) (1994) (capping personal injury noneconomic damages at \$250,000); Md. Code Ann., Cts. & Jud. Proc. § 11-108(b) (2002) (capping noneconomic damages in personal injury cases at \$500,000, to be increased by a fixed annual sum of \$15,000, and in wrongful death at 150% of that amount).

⁶¹ *Browning-Ferris Indus.*, 492 U.S. at 281 (Brennan, J., concurring).

⁶² *Campbell*, 538 U.S. at 417-18.

⁶³ *Id.* at 416.

⁶⁴ *BMW of N. Am.*, 517 U.S. at 580.

⁶⁵ *Campbell*, 538 U.S. at 425.

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I respectfully warn, let us not tempt the Court. Rather, let us seduce our legislatures with an appeal to their sense of the public good, to do what is right for both plaintiffs and defendants when they come to our courts to resolve their tort disputes.