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## Loss

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# LOSS\*

## HEIDI LI FELDMAN\*\*

### I. INTRODUCTION

Within Republican political circles,<sup>1</sup> numerous state legislatures,<sup>2</sup> and even the U.S. Congress,<sup>3</sup> advocating caps on “noneconomic” damages in tort suits is in vogue, as part of the ongoing politics of “tort reform.”<sup>4</sup> Yet, the distinction between “economic” and “noneconomic” damages is nonsensical. It does not originate in the discipline of economics,<sup>5</sup> but seems instead to be purely a rhetorical invention of those who wish to limit damages by any means politically possible.<sup>6</sup> But law reform based on sheer rhetoric should be shunned; unprincipled rhetoric is no substitute for justificatory reasons, and to make laws without reasons exemplifies arbitrariness and injustice.<sup>7</sup>

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\*\* Professor of Law and Associate Professor of Philosophy, Georgetown University. A.B. Brown University 1986; J.D. University of Michigan 1990; Ph.D. (philosophy) University of Michigan 1993. For helpful conversation, the author thanks Kathy Zeiler and Jitendra Subramanyam. For first-rate research assistance, the author thanks Blayne Miley.

1. See generally Anthony J. Sebok & John C.P. Goldberg, *The Coming Tort Reform Juggernaut: Are There Constitutional Limits on How Much the President and Congress Can Do in This Area?*, FINDLAW, May 19, 2003, at <http://writ.corporate.findlaw.com/sebok/20030519.html>. President George W. Bush’s 2003 plan to reform medical malpractice tort law included a \$250,000 cap on “‘pain and suffering’ damages in any state medical malpractice award.” Anthony J. Sebok, *With Medical Malpractice on the President’s Agenda, What Kind of Bill Should Congress Pass?*, FINDLAW, Jan. 27, 2003, at <http://writ.corporate.findlaw.com/sebok/20030127.html>. For a general survey of medical malpractice damage caps as of the spring of 2003, see Jeanine Freeman, *Tort Reform—What About Caps?*, at [http://www.iowamedical.org/ola/2003\\_IAMed3/marchapril.htm](http://www.iowamedical.org/ola/2003_IAMed3/marchapril.htm) (last visited May 8, 2005).

2. In Colorado and Kansas, courts have upheld limits on “noneconomic” damages in products liability suits. See *Niemet v. Gen. Elec. Co.*, 843 P.2d 87 (Colo. Ct. App. 1992), *aff’d*, 866 P.2d 1361 (Colo. 1994); *Cott v. Peppermint Twist Mgmt. Co.*, 856 P.2d 906 (Kan. 1993). Advocates for caps push especially hard for caps on noneconomic damages in medical malpractice cases. States that have instituted such measures include Michigan and California. See MICH. COMP. LAWS ANN. § 600.1483 (West 1996); CAL. CIV. CODE § 3333.2 (West 1997); see also Sebok, *supra* note 1. Overall, more than twenty states have passed bills capping damages, although some state courts have ruled that these bills violate state constitutional equal protection or due process clauses, or both. *Id.*

3. The current Republican administration is attempting to weave its policy of caps on noneconomic damages into legislation involving personal injuries arising from terrorist acts or anti-terrorist measures. See 6 U.S.C.A. § 442 (b)(2)(A) (West Supp. 2005).

4. See Anthony J. Sebok, *The Corrosive Effect of the Politicization of Tort Reform: What Newsweek’s “Lawsuit Hell” Didn’t Tell You*, FINDLAW, Dec. 15, 2003, at <http://writ.corporate.findlaw.com/sebok/20031215.html>. Professor Sebok explains the larger phenomenon:

“Tort reform” was not discussed in the American media until the mid-1970’s. Since then, various interest groups have organized themselves into coalitions who have adopted polarized position [sic] towards the question of whether there is a “liability crisis” in America.

On one side, there are groups that are associated with corporate America and the Republican Party, such as the American Tort Reform Association, the Manhattan Institute, and the American Medical Association. On the other side, there are groups associated with trial lawyers and the Democratic Party, such as the Naderite Group Public Citizen and the American Trial Lawyers Association. In the middle, there is not very much—just the Rand Institute’s Institute for Civil Justice and perhaps a handful of academic commentators.

*Id.*

5. See *infra* Part III.

6. See *infra* Part V.

7. See Mark R. Brown, *De-Federalizing Common Law Torts: Empathy for Parratt, Hudson and Daniels*,

A senseless distinction between “economic” and “noneconomic” damages cannot provide the basis for differentiating damages and capping one category rather than the other. Such a distinction serves only to misleadingly trivialize certain claims of loss on the basis of a meaningless pair of labels. To bring this out, let us imagine that a group of people opposed to the colors aqua, silver, and green decided to label these as “noneconomic” colors and to label all other colors as “economic” ones, because by referring to certain colors as “noneconomic” they would gain a polemical advantage in advocating that these colors not be used. The circularity lies in the decision to assign a trivializing label and then to assume it follows from this label that the colors in question are indeed trivial; the meaninglessness lies in the fact that colors simply cannot be understood as either “economic” or “non-economic.” I make the same claim about tort damages.

However it may be labeled, any injury to welfare that is not *de minimis* is just that, an injury to welfare. If somebody inflicts injury by committing a tort, our law requires the tortfeasor to compensate the victim according to the very particularized pre- and post-accident status of the victim’s welfare. It is disingenuous, misguided, or both to classify some losses in welfare as “noneconomic,” especially when this term is used as a way of implying that these losses automatically merit limited damages because they somehow matter less than others and should, therefore, be subject to a damage cap.<sup>8</sup>

One might suppose that advocates of reducing tort awards by capping recovery for so-called “noneconomic” damages borrow the distinction from the discipline of economics itself. But nowhere in the entire history of modern economics, starting with the classical economists of the eighteenth century, does one find economists arguing that some reductions in welfare are peculiarly economic and others are not.<sup>9</sup> While economics has struggled with central dilemmas related to its concerns with human welfare, the most central of these has not been over which losses count as economic. As with the debates that have traditionally dominated the moral and political heritage from which modern economics emerged, welfare economists have differed over whether social policy should be broadly utilitarian—concerned with maximizing aggregate welfare (minimizing aggregate loss)—or whether social policy should attend to the distribution of losses and gains in society’s welfare (resource allocation).<sup>10</sup> But these classic disagreements over whether distributional

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28 B.C. L. REV. 813, 875 (1987) (“Where the state inflicts the injury for no plausible reason, substantive due process is violated.”); Michael J. Saks, *Merlin and Solomon: Lessons from the Law’s Formative Encounters with Forensic Identification Science*, 49 HASTINGS L.J. 1069, 1134 (1998) (“Absent reasons, the law is rendered arbitrary and courts surrender their authority.”) (relying on STEVEN J. BURTON, AN INTRODUCTION TO LAW AND LEGAL REASONING 167–71 (1985) and KARL N. LLEWELYN, THE COMMON LAW TRADITION: DECIDING APPEALS 26 (1960)); see also *Chevron U.S.A., Inc. v. Natural Res. Def. Council*, 467 U.S. 837, 844 (1984) (holding that agency action is valid unless it is “arbitrary, capricious, or manifestly contrary to the statute”); *Jackson v. State*, 17 P.3d 998, 1000 (Nev. 2001) (stating that the standard for abuse of discretion is “if the district court’s decision is arbitrary or capricious or if it exceeds the bounds of law or reason”); *State v. Jones*, 44 N.M. 623, 631, 107 P.2d 324, 329 (1940) (“The plainest principles of justice demand that it should and there is respectable authority, based on sound reason, which affirms our right in a case of this kind, so to order.”).

8. Whether it would be socially advantageous to cap tort damage awards in general remains a separate question, largely outside the scope of this article.

9. See *infra* Part III.

10. For a helpful survey of the difference between the views of early modern classical economists on this

concerns ought to matter to modern economics, and if so, how, have never involved distinguishing between economic and noneconomic loss. Unlike the self-proclaimed tort reformers of our day, modern economists have always agreed that individual human welfare can be enhanced or diminished in a variety of ways,<sup>11</sup> and that *any* diminution in individual welfare constitutes a loss to that individual.<sup>12</sup>

Within the law itself, the economic/noneconomic distinction between types of damages has yet to make significant inroads, although some courts, commentators, and legislatures have begun to use the terminology.<sup>13</sup> Typically, courts continue to use categories derived from the common law and from jury instructions to structure jury deliberation about how a personal injury can lead to different kinds of loss.<sup>14</sup> For purposes of this article, I neither challenge nor defend the proposition that these doctrines and procedures capture all legally relevant loss to tortiously injured persons. My claim is only that the division of damages into economic and noneconomic is literally senseless, and that a senseless distinction, by definition, cannot be a rational or just basis for legal decisions or policies pertaining to tort damages. A related point pursued in this Article is that labeling damages as economic or noneconomic estranges the factfinder from a vivid appreciation of the extent and significance of losses tortiously inflicted upon a victim. Modern economics, no less than law, is committed to a genuine, full accounting of all such losses. For tort reformers to use the terms “economic” and “noneconomic” to undermine this commitment demonstrates at best a failure to understand the discipline of economics and at worst a rather sinister exercise in semantic sophistry aimed at achieving an otherwise undefended objective—a wholesale limit on compensation for certain kinds of loss that both the fields of law and of economics have regarded as essentially related to an individual’s well-being.

While the focus of this article is relatively narrow—restricted primarily to revealing the incoherence of a purported distinction between economic and noneconomic harms or losses—my pursuit of this point reveals, along the way, certain similarities between the common law of tort and the main ideas of modern economics. Quite often, those who defend the common law approach to torts contrast it with an economic interpretation of this area of law. While there may be areas where economics and tort law conflict, understanding loss is not one of them.

## II. LIBERALISM, INDIVIDUAL WELFARE, ECONOMICS, AND TORT LAW

Both tort law and modern economics share an emphasis on the individual and her or his state of being. This makes both disciplines distinctively “liberal,” not in the sense of the political rhetoric of our times, but in the sense of the political

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question and the position of the later “neo-classical economics” that emerged in the mid-twentieth century, see JÜRIG NIEHANS, *A HISTORY OF ECONOMIC THEORY: CLASSIC CONTRIBUTIONS, 1720–1980*, at 60–72, 86–104, 417–19 (1990).

11. *Id.*

12. *Id.*

13. *Id.*

14. See *infra* notes 48–77 and accompanying text.

philosophy founded on the idea that each human person enjoys a dignity and welfare that ought to count from both moral and political viewpoints.

Philosophers still debate whether dignity or welfare should count more, and precisely what it means to account seriously for either or both. In contrast, questions about the relative value of dignity and welfare matter less to both economics and the law of tort damages. Modern economics focuses on welfare;<sup>15</sup> by the damages stage in tort litigation, the factfinder has already determined that the defendant wrongly injured the plaintiff and has identified the injuries suffered, including dignitary harms, if any. The factfinder deciding damages in a tort case differs from the economist, not because the factfinder must consider the plaintiff's individual welfare, both prior to and after the accident, but because the factfinder must make a particularistic decision about the monetary damages needed to repair loss of well-being.<sup>16</sup>

Although economists have generally not evaluated the well-being of particular persons, early modern economists did indeed make the individual central to the discipline and not the individual isolated from context, nor the discipline unconcerned with the institutions and practices surrounding the individual.<sup>17</sup> Indeed, the centrality of the individual to both social and individual welfare distinguishes modern economics from previous iterations of the discipline, which focused, for example, on the power and needs of the sovereign or the state, or oppressive institutions favored by the state.<sup>18</sup> Tort law, too, takes the individual's well-being as central to the field's *raison d'être*. Particularly at the damages stage, the common

15. See *infra* Part III.

16. Economists—unless asked to provide evidence in a tort suit—rarely concern themselves with specific cases. Economists and actuaries do indeed serve as expert witnesses on such issues as lost wages and ongoing medical expenses in tort litigation. See Turner W. Branch, *Misdiagnosis of Cancer and Loss of Chance*, 30 AM. JUR. TRIALS 237, § 30, at 299 (1983) (footnotes omitted), which states:

Another useful expert witness is an economist who will testify as to the loss of economic benefit to the decedent's spouse or surviving children. The economist can also testify as to the wages lost by the decedent and the value of household services performed by him. The economist can also project expected salary increases and future fringe benefits.

See also Kenneth R. Feinberg, *Mediation—A Preferred Method of Dispute Resolution*, 16 PEPP. L. REV. S5, S26 (1989) (mentioning the role of economists as neutral experts in alternatives to tort litigation); Richard T. Stilwell, *Kumho Tire: The Battle of the Experts Continues*, 19 REV. LITIG. 193, 227–28 (2000) (discussing the use of economists in a battle of the experts in post-*Daubert* litigation).

17. According to economic historian Emma Rothschild, Adam Smith himself paid special attention to the situated individual. She notes that Smith objected to the plethora of eighteenth-century institutions and circumstances that constrained individual persons from freely engaging in commerce. EMMA ROTHSCHILD, *ECONOMIC SENTIMENTS: ADAM SMITH, CONDORCET, AND THE ENLIGHTENMENT* 68 (2001). “He was critical of religious establishments, of war, of poverty, and of the privileges of the rich.” *Id.* at 71.

18. Rothschild regards this concern as central to Smith's synthetic invention of modern economics.

Freedom consisted, for Smith, in not being interfered with by others: in any of the sides of one's life, and by any outside forces (churches, parish overseers, corporations, customs inspectors, national governments, masters, proprietors). Interference, or oppression, is itself an extraordinarily extensive notion; Smith at times talks of inequality as a form of oppression, and of low wages as a form of inequity.

*Id.* (footnote omitted).

Rothschild points out that both Smith and the early classical French economist Condorcet were acutely aware of the “archaic” background conditions under which people conducted commerce in England and France, respectively. *Id.* at 41. Smith, for example, noted laws that made the export of sheep, lamb, or rams punishable by mutilation and death; Condorcet discussed the use in France of death and deportation to the galleys to regulate trade in salt. *Id.* at 41–42.

law of tort attends to the precise individual whose injuries propelled the litigation. Tort law requires the factfinder to evaluate how and whether that particular person has been (and may continue to be) impaired relative to the specific circumstances she occupied before suffering a tortious injury. To that end, the common law uses a surprisingly wide variety of terms to guide the factfinder in identifying damages. The terms echo the vocabulary and concepts early modern economists employed when analyzing human nature and welfare.<sup>19</sup>

The foregoing discussion highlights a commonality between tort law and modern economics. While the focus plays out slightly differently in the practices of each field, both tort law and modern economics centrally address the issue of individual well-being. Tort law and modern economics may differ in techniques or even reasons for valuing and attending to the issue, but neither field seeks to solve the problem of identifying losses by rhetorical fiat.

### III. ECONOMICS AND INDIVIDUAL WELFARE

To deepen my point about the meaninglessness of distinguishing losses to well-being by labeling some such losses “economic” and others “noneconomic,” I turn now to a brief and selective history of the development of modern economics and the role that an expansive notion of loss (and gain) in individual welfare has played in making modern economics distinctively modern. What was distinctively radical and progressive about the emergence of modern economics was precisely its attention to the wide variety in the kinds of pain and pleasure individuals can experience. Indeed, modern economics and the utilitarian philosophical tradition inaugurated in the eighteenth century related closely to one another because the early utilitarians, like the early economists, acknowledged the diversity of human sentiments that can give rise to qualitatively distinct satisfactions and dissatisfactions related to a person’s welfare. Some who defend the common law of tort shun any suggestion of affinity with economics, and overlook this intersection between utilitarianism, modern economics, and traditional tort law. But once one appreciates that adherents and practitioners in each of these disciplines made the individual’s well-being central to their respective fields, one can see that, conceptually speaking, philosophical utilitarians and modern economists acknowledge that welfare or well-being is inherently varietal. In fact, I submit that any school of thought that claims to concern itself centrally with individual well-being must acknowledge at the psychological or phenomenological level that people differ in how and what they experience as loss or gain.<sup>20</sup> For present purposes, I need only argue the point that nothing in economics dictates that some losses are peculiarly economic and others not.

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19. See *supra* notes 17–18 (identifying the wealth of sentiments, attitudes, feelings, and emotions Smith associated with human nature).

20. To pursue this claim further is beyond the scope of this Article.

Modern economics, as I use the term, starts with the classical period.<sup>21</sup> With some variation,<sup>22</sup> scholars date the appearance of classical economic theory to the middle of the eighteenth century.<sup>23</sup> Some consider Adam Smith to be the father of classical economic thought,<sup>24</sup> but others note that he built on the work of others whose work had distinctively classical components.<sup>25</sup> Regardless, many of the traits of classical economics popularized by Smith characterize western economic theories to this day.<sup>26</sup> To that extent, all modern economics is classical. Chronologically, classical economics displaced mercantilist theory as the dominant European approach to matters having to do with individual welfare, commerce, and the state.<sup>27</sup> Broadly painted, mercantilists understood commerce primarily as a vehicle for enhancing the state's power.<sup>28</sup> Commerce, according to mercantilism, should—and properly controlled by the state and other social, civic, and religious institutions would—serve to enhance the power of the nation-state relative to other nation-states. This end trumped any concerns about individual welfare a mercantilist might have held. Generally, mercantilists would not have regarded the welfare of the individual people subject to the authority of the nation-state as a matter of concern for the field of economics.

In marked contrast, classical economists understood commerce as quintessential-ly a vehicle for bettering the lot of individuals and thereby empowering individuals

21. One can define the "classical period" in this context in a number of ways. I find particularly helpful Jürg Niehans' characterization: "Though the economics of the classical era was not united by a distinctive doctrine or method, it nevertheless had a common leitmotiv. This was the conception of a circular flow of income, of the economy as an interdependent system." NIEHANS, *supra* note 10, at 12. What makes this "leitmotiv" modern is its recognition of the interconnectedness of economic activity, both within particular nation-states, and also across national borders, and the recognition that such activity constituted a distinctive practice that could be distinguished from politics, religion, diplomacy, and war, although those other practices certainly bore on economic activity itself. *Id.* at 13. Emma Rothschild describes what Niehans calls the leitmotiv of classical economics in terms of the "economic dispositions" central to the thought of eighteenth-century classical economic thought. Of these, Rothschild singles out "[t]he discursive, reflective, self-conscious disposition," ROTHSCHILD, *supra* note 17, at 9, a disposition that leads people to social interchange, commercial and otherwise. *Id.* at 8. Rothschild also explicitly identifies the emergence of classical economics with the spirit of the enlightenment, whereby people's thought became unfettered by superstition, open to reason and persuasion. *Id.* at 12–15.

22. For example, Karl Marx dated classical economics to 1680 and regarded David Ricardo's work as marking the end of the period at around 1820. NIEHANS, *supra* note 10, at 10. But one can easily argue that Marx belonged to the classical tradition. Marx himself introduced both the concepts of classical economics and capitalism. *Id.* at 9–11, 154. Like the classical economists Smith and John Stuart Mill, Marx questioned the relationship between political and legal institutions and economic matters, such as the relationship between legislation and income distribution. *Id.* at 154.

23. See, e.g., ROTHSCHILD, *supra* note 17, at 10.

24. One basis for this title is Smith's synthesis of prior classical ideas that had not previously been brought together as a school of thought. NIEHANS, *supra* note 10, at 72. To do this, Smith introduced the contrast between classical economic thought and mercantilism. *Id.* at 70.

25. See *id.* at 70–71. Rothschild regards Adam Smith and Condorcet as the seminal figures in the classical tradition, ROTHSCHILD, *supra* note 17, at 2, but other economic historians note that Smith used the work of earlier thinkers such as Richard Cantillon, John Law, and David Hume. NIEHANS, *supra* note 10, at 48–56.

26. NIEHANS, *supra* note 10, at 72.

27. See D.P. O'BRIEN, *THE CLASSICAL ECONOMISTS REVISITED* 27 (2004) (describing "the mercantilists" as among the precursors of "Classical economics").

28. The leading features of mercantilism, most of which would be under the control of the state, included "bullion and treasure as the key to wealth; regulation of foreign trade to produce a specie inflow; promotion of industry by inducing cheap raw-material imports; protection against imported manufactures; export encouragement; [and] trade viewed as a zero-sum game." *Id.* at 32–33. O'Brien notes that "the mercantilist system was the complete antithesis of Classical economics." *Id.* at 33.

relative to the state.<sup>29</sup> Indeed, a hallmark of classical economics is its emphasis on individual welfare.<sup>30</sup> In keeping with a turn toward the individual, the early classical economists developed and relied upon a robust view of human sentiment and psychology.<sup>31</sup> Rather than seeing individuals as cogs in the service of making the state more powerful, the first classical economists noticed individuals qua individuals and regarded them as fully intentional persons who carried with them into the realm of trade all the attitudes, ideas, sentiments, beliefs, and wishes people can have.<sup>32</sup> Realizing that people are creatures possessed of complex psychologies enabled the early classical economists to also recognize that such creatures would have the capacity to experience more or less, and different kinds of, well-being or lack thereof. Classical economists concluded that were the state to permit individuals to pursue their singular conceptions of their own well-being, one side effect would be an overall increase in the wealth of the polity. But that end simply did not have the prominence it had to mercantilists. Since one hallmark of liberalism is its emphasis on the dignity and welfare of the individual person—the significance of each individual as opposed to the state or other powerful institutions—part of the modernity of classical economics lies in its attention to individual qua individual.

To appreciate modern economics, one must understand, as Adam Smith himself did,<sup>33</sup> that welfare differs from wealth.<sup>34</sup> Wealth, as in purchasing power, can, for some people, enhance well-being, but the relationship between purchasing power and well-being varies from individual to individual, even if most people would prefer some degree of wealth. Classical economics assumed that having more or less personal wealth related to personal welfare only contingently and in different ways for different people. Since the first aim of classical economics was to permit people

29. This betterment comes about, on the classical view, because when people are free to specialize in their labors, they gravitate to those tasks for which they are best suited. Ultimately, this extends to entire nations. Whether at the national or individual level, the result is the lowering of the cost of production of goods that are desired by those not necessarily best suited to produce them. However, free trade allows people to take advantage of the lower prices of production due to the specialization of labor. Thus, through trade, people can obtain more of what they want. Trade is the vehicle, but meeting wants is the upshot, and a desirable one, according to classical economic theory. See generally MILLICENT GARRETT FAWCETT, *POLITICAL ECONOMY FOR BEGINNERS* § 4, ch. 1 (Barnes & Noble 2004) (1870).

30. Smith introduced to economic literature the famous image of individuals such as “the butcher, the brewer or the baker,” each seeking his own advantage. ADAM SMITH, *AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS* 7 (Encyclopedia Britannica, Inc. 1952) (1776) [hereinafter SMITH, *WEALTH OF NATIONS*].

31. Adam Smith, for example, drew greatly upon the work of David Hume, Frances Hutcheson, and Shaftesbury, all of whom argued for the centrality of “moral sentiments” in human psychology, judgments, and actions. O’BRIEN, *supra* note 27, at 28–29.

32. Smith begins the second chapter of *The Wealth of Nations* by noting the human “propensity to truck, barter, and exchange one thing for another.” SMITH, *WEALTH OF NATIONS*, *supra* note 30, at 6. He goes on to note that people do act in the economic sphere from other dispositions, such as benevolence (upon which beggars rely, even if they use the fruits of charity to exercise their own propensities to truck, barter, and exchange). *Id.* Another sentiment Smith identifies in this discussion is “self-love.” *Id.*

33. Millicent Garret Fawcett, an early explicator of Smithean ideas, defines “wealth” as anything that has an exchange value. FAWCETT, *supra* note 29, at 1. She identifies various goods that she takes to lack exchange value, although they certainly contribute to welfare, goods such as air and sun. *Id.* Nowadays, we have in fact developed markets that give clean air an exchange value, but that is beside the point. The point is that things that possess exchange value are not identical with welfare or well-being. The amount and distribution of these things might affect people’s welfare, but welfare is a separate matter from wealth.

34. See *supra* notes 29–32 and accompanying text.



the freedom to enhance their own individual welfare, loss of welfare mattered in and of itself to classical economics, not because it always correlated to a decline in personal spending power. So it makes sense that those modern economists (including Smith himself) who focused on the field's fundamental internal logic drew no distinction between economic and noneconomic harms. Harms that diminish well-being are harms. From its inception, modern economics eschews any such distinction.

Take Smith as an example of a modern economist. Nowhere in his two great books, *The Theory of Moral Sentiments*<sup>35</sup> and *The Wealth of Nations*,<sup>36</sup> does Smith distinguish between economic loss and noneconomic loss. In the earlier work, *The Theory of Moral Sentiments*, Smith examines human nature and its relationship to well-being.<sup>37</sup> In *The Wealth of Nations*, Smith narrows his focus to the study of wealth and its promotion.<sup>38</sup> He considers political and legal institutions, not to argue for their removal from commercial life, but to assess which sorts of institutions foster the commercial life that enables individuals to produce commodities.<sup>39</sup> Smith believed that people like commodities, but he did not identify the possession of commodities with welfare.<sup>40</sup> Nor does it seem likely that Smith, who highlighted the distinction between the value of a commodity and its market price and perceived a difficulty in reconciling the two,<sup>41</sup> would be nonplussed by the idea that it is difficult to price welfare in monetary terms, even if, for convenience, a legal system chose to use money as the tool for repairing diminutions in well-being. Smith understood that money was a proxy even in the market, let alone in the courtroom.<sup>42</sup> Furthermore, Smith regarded commercial life not as an end, but as a means, primarily to freedom from oppression.<sup>43</sup> Trade in commodities increases wealth for a community.<sup>44</sup> But whether wealth for a community translates into improved individual welfare depends upon variables outside the realm of pure economics as Smith understood the discipline.<sup>45</sup> Individual well-being is affected by a variety of

35. ADAM SMITH, *THE THEORY OF MORAL SENTIMENTS* (D.D. Raphael & A.L. Macfie eds., Liberty Fund 1984) (1759) [hereinafter SMITH, MORAL SENTIMENTS].

36. SMITH, *WEALTH OF NATIONS*, *supra* note 30.

37. SMITH, *MORAL SENTIMENTS*, *supra* note 35.

38. SMITH, *WEALTH OF NATIONS*, *supra* note 30.

39. See ROTHSCHILD, *supra* note 17, at 72–76 (explaining that Smith believed that the state's role in commerce should vary according to the needs of the situation, to promote the greatest plenty for each person; in some situations, therefore, Smith opposed government intervention in commerce, while in others he regarded it as normatively required).

40. Smith believed that people cared about justice and liberty, for example, more than commodities, even if they sought justice and used their liberty to produce and exchange commodities. *Id.* at 68, 70–71.

41. See SMITH, *WEALTH OF NATIONS*, *supra* note 30, at 23–24; see also FAWCETT, *supra* note 29, at 45–48.

42. Smith distinguished between a commodity's value and its market price. See SMITH, *WEALTH OF NATIONS*, *supra* note 30, at 23–27. An explication of Smith's own theory of value, price, and the relationship between the two lies beyond the scope of this Article. What is important for present purposes is that the issue continues to animate modern economics today.

43. See ROTHSCHILD, *supra* note 17, at 27 (“Freedom of commerce, in the *Wealth of Nations*, is an emancipation from personal, political, and sometimes physical oppression.”).

44. According to Smith, the division of labor both causes and is caused by commerce; as individuals (or nations) specialize and then trade the goods they produce, the overall aggregate level of wealth rises, because more individuals are motivated to meet the wants, needs, and demands of others, and in turn more people have their wants, needs, and demands met. SMITH, *WEALTH OF NATIONS*, *supra* note 30, at 6–8.

45. Economics, for Smith, was the science of studying how nations might increase their wealth. But

sentiments and circumstances in which overall social wealth or individual personal wealth could play any number of roles.<sup>46</sup>

At various points in *The Theory of Moral Sentiments*, Smith attributes to people the capacity for many different emotions, passions, sentiments, and attitudes.<sup>47</sup> Here is a partial and unordered list: selfishness, pity, compassion, pain, distress, sorrow, misery, horror, joy, happiness, grief, curiosity, anguish, love, melancholy, mortification, mirth, vivacity, amusement, resentment, shock, approbation, disapprobation, admiration, animosity, indignation, affliction.<sup>48</sup> Smith mentions these states in the course of explaining moral psychology.<sup>49</sup> Smith concerns himself with human psychology because he concerns himself with human welfare; never does he say that the range, variety, and specificity of the emotions, passions, sentiments, and attitudes relevant to human welfare are all sensitive to wealth, purchasing power, or just plain money.

Once we recognize classical economic theory as a reaction against mercantilism and as a subset of liberal thought, it becomes apparent that early economists might be likely to operate with a rich conception of individuals and their welfare. If you stop scrutinizing the sovereign, and start noticing people, you will quickly see that people are quite complicated creatures, both as individuals and as a species. Of course, since classical economists aspired to generalize about the relationship between individual psychology, individual conduct, commerce, and individual well-being, they did rely on what they took to be relevant generalizations about each of these variables. In contrast to at least some of their successors, however, the early classical economists worked with a general, but nuanced, conception of human nature, and therefore of human welfare.<sup>50</sup> Classical economists noticed that persons possessed a wide variety of sentiments, dispositions, and characteristics.<sup>51</sup> They did generalize about these, but the generalizations added up to a textured, detailed psychology.<sup>52</sup>

#### IV. TORT LAW AND LOSS: THE REAL STORY

Among fields of law, tort already includes a tool-kit well stocked with doctrines, jury instructions, and procedural mechanisms to acknowledge loss and the issues related to redressing it with money. I am not confident that the public at large or elected officials understand that courts already direct juries to distinguish between

individual well-being varies according to "vexation," something Smith understood as the use of abusive power. Vexation resulted, according to Smith, from particular interrelationships between the "dominions of government and of commerce." ROTHSCCHILD, *supra* note 17, at 33. Vexation was a sentiment experienced by the whole person, not just his or her "economic side." *Id.*

46. Again, Smith scholars note this point. See, e.g., SMITH, *MORAL SENTIMENTS*, *supra* note 35, at 14. ("Smith took it as established by Hutcheson and Hume that morals depend on 'sentiment' or feeling. He differed from them, however, in insisting upon the plurality of moral feelings.")

47. See *id. passim*.

48. *Id.* This assortment is representative of what one Smith scholar calls "a dizzying sequence of nouns" used by Smith "to denote psychological conditions." ROTHSCCHILD, *supra* note 17, at 43. Smith's approach was not unusual for one writing in the eighteenth-century tradition regarding the "science of the mind." *Id.*

49. See generally SMITH, *MORAL SENTIMENTS*, *supra* note 35.

50. See *supra* notes 10, 21, 30–33 and accompanying text.

51. See *supra* notes 17, 31–33 and accompanying text.

52. See *supra* notes 17, 31–33 and accompanying text.

different kinds of loss and attend to whether evidence adduced supports a plaintiff's claim to any particular type. Nor am I confident that those who do not spend time reading case law appreciate the sensitivity that courts generally display as they use the tools at their disposal to instruct juries, develop doctrine and procedures to aid trial judges and juries in handling the complexity of using money to redress loss sensibly, and consider when to permit compensation for loss.

Jury instructions reflect the way the law approaches damages at the trial stage. Appellate opinions, on which the instructions are based, further evidence tort law's rich conception of loss. In one of the most cited cases of the later twentieth century, *Capelouto v. Kaiser Foundation Hospitals*,<sup>53</sup> the esteemed and influential Justice Tobriner captured the range of sentiments that higher courts acknowledge and expect juries to consider when assessing damages for "pain and suffering."

In general, courts have not attempted to draw distinctions between the elements of "pain" on the one hand, and "suffering" on the other; rather, the unitary concept of "pain and suffering" has served as a convenient label under which a plaintiff may recover not only for physical pain but for fright, nervousness, grief, anxiety, worry, mortification, shock, humiliation, indignity, embarrassment, apprehension, terror or ordeal.<sup>54</sup>

Justice Tobriner recognized, as have generations of economists and lawyers, that "subjective states [such as those listed above] represent[] a detriment which can be translated into monetary loss only with great difficulty."<sup>55</sup> Justice Tobriner does not, however, pretend that what is difficult to "translate" into monetary terms is not a loss: "But the detriment, nevertheless, is a genuine one that requires compensation and the issue generally must be resolved by the 'impartial conscience and judgment of jurors who may be expected to act reasonably, intelligently and in harmony with the evidence.'"<sup>56</sup> Moreover, when Justice Tobriner wrote this opinion, California had not yet enacted its caps on noneconomic damages in medical malpractice cases.<sup>57</sup> The facts of *Capelouto* highlight the way in which such caps trivialize the detriments encompassed by "fright, nervousness, grief, anxiety, worry, mortification, shock, humiliation, indignity, embarrassment, apprehension, terror or ordeal."<sup>58</sup>

*Capelouto* arose from the negligent treatment of a newborn who contracted salmonella as a result of an epidemic in the Kaiser hospital maternity unit where she

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53. 500 P.2d 880 (Cal. 1972).

54. *Id.* at 883 (citations omitted).

55. *Id.* (citations omitted).

56. *Id.* (quoting *Beagle v. Vasold*, 471 P.2d 673 (Cal. 1966)) (citations omitted).

57. California passed a statute with a cap on noneconomic damages for medical malpractice cases in 1975. CAL. CIV. CODE § 3333.2 (West 1997). Noneconomic damages, defined as compensation for pain, suffering, inconvenience, physical impairment, disfigurement, and other non-pecuniary injury, are limited to \$250,000. *Id.* The cap applies whether the case is for injury or death, and it allows only one \$250,000 recovery in a wrongful death case. *Yates v. Pollock*, 239 Cal. Rptr. 383 (1987). There is authority, however, for allowing separate caps for the patient and a spouse claiming loss of consortium. *Atkins v. Strayhorn*, 273 Cal. Rptr. 231 (1990). The cap on noneconomic damages has been held to be constitutional under California's state constitution. *Fein v. Permanente Med. Group*, 695 P.2d 665 (Cal. 1985).

58. *Capelouto*, 500 P.2d at 883.

was born.<sup>59</sup> The infection led Kim, the infant, to suffer severe gastrointestinal problems for the first year of her life, although she suffered no permanent physical injury.<sup>60</sup> Justice Tobriner summarized the baby's experience:

At various times she suffered from projectile vomiting, severe diarrhea, dehydration, cramps and shock. At times the dehydration was severe enough to require the introduction of intravenous feeding devices, and in the fifth month of her life the attending physician concluded that her condition had so deteriorated as to endanger her life. She was hospitalized six times during her first year, the initial hospitalization occurring on August 5 when she was barely one week old. Laboratory tests of Kim's stools indicated the presence of the bacteria salmonella Newport, C-2, and her physician eventually decided that the salmonella infection was the primary cause of her symptoms. Following treatment for salmonellosis Kim's condition gradually improved. Ultimately she recovered completely; she suffered no permanent disability.<sup>61</sup>

The trial court issued jury instructions that precluded awarding the infant any damages for pain and suffering.<sup>62</sup> The intermediate appellate court endorsed this outcome on the ground that infants could not recover for pain and suffering because (a) they are not aware of their experience and (b) they are unable to speak about their suffering.<sup>63</sup> Justice Tobriner dismissed this reasoning, quickly clarifying the confusion involved in the lower court's inference that a baby does not suffer because she cannot discuss it or comprehend it in the terms that an adult might.<sup>64</sup> Again, Justice Tobriner's own words display the sensitivity to the human condition shared by the earliest modern economists:

The infant's inability to explain the cause of pain or to describe the extent of it does not affect the sting of it. Indeed, the infant's cry of hurt is as poignant as the most detailed exposition. The moan of the injured child, who may even be unconscious, needs no elaboration in descriptive language. Communication flows from all manner of sounds and gestures; it is not confined to brittle or inadequate words. The inarticulate anguish of the infant serves as much a ground for recovery as the adult's most sophisticated description.<sup>65</sup>

In granting the plaintiff's request for a new trial on the damages issue, Justice Tobriner emphasized the detailed evidence presented at trial, evidence that would permit a jury to reach a sensible view of the losses suffered by Kim due to pain and suffering.

Medical witnesses repeatedly testified that Kim experienced severe diarrhea and vomiting of a projectile nature, that she suffered shock and dehydration, and that she became listless and lethargic during these attacks. Plaintiff's private physician, a pediatrician who treated the child from the age of two and one-half weeks, summarized her condition in a hospital report that was read to the jury:

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59. *Id.* at 881-82.

60. *Id.*

61. *Id.* at 882.

62. *Id.*

63. *Id.* at 883-84.

64. *Id.* at 884.

65. *Id.*

“At two months of age the patient began the first of many episodes which eventually resulted in marked dehydration and necessitated numerous hospitalizations (at least five or six). Each episode would begin in characteristic fashion with nausea, vomiting and repeated retching which would last for a period of one to four hours. This would be followed by the passage of three to four white, mushy slightly frothy stool. A copious green watery diarrhea would then ensue and last for a period of two–four days. Stools could number up to 20 per day. Weight loss would initially be great consisting of twelve ounces to a pound or two. The initial episode suggested a shock-like state with a listless infant, a soft, non-tender abdomen with hyperactive bowel sounds.”

The pediatrician’s description of Kim’s symptoms was repeated in various forms by a number of witnesses; Mrs. Capelouto indeed described the screaming of the child during severe attacks. Thus we do not face a situation in which the jury was given only the cold medical diagnosis of salmonellosis; we have here, instead, detailed descriptions of symptoms from which the jury would be impelled to infer some pain and suffering. We therefore conclude that it is more probable than not that the erroneous instruction produced a result less favorable to plaintiff Kim than would otherwise have occurred.<sup>66</sup>

Justice Tobriner’s language is graphic. But he is trying to capture in words evidence representing pain and suffering. The term “noneconomic loss” would seem unlikely to lend itself to the sort of description appropriate for the situation. To appreciate Kim’s experience, one must realize that she suffered, that she felt pain—not that some of her losses were not billable to anybody.

As *Capelouto* demonstrates so aptly, the traditional common law directive to the factfinder to make the victim whole must be understood as a metaphor. This presumably accounts for the fact that trial courts supplement this abstract, metaphorical instruction with more refined ones. As stated earlier, tort law’s basic and historically earliest approach to damages is to leave to the factfinder the fundamental question of what dollar amount represents the plaintiff’s losses arising from tortiously inflicted injuries.<sup>67</sup> Turning from appellate discussion of the nature of pain and suffering, a close look at jury instructions used at trial reveals that tort law asks the factfinder to operationalize a careful, nuanced approach to identifying and assessing tortiously inflicted loss.

A typical charge to the jury reads:

My charge to you on the law of damages must not be taken as a suggestion that you should find for the plaintiff. It is for you to decide on the evidence presented and the rules of law I have given you whether the plaintiff is entitled to recover from the defendant. If you decide that the plaintiff is not entitled to recover from the defendant, you need not consider damages. Only if you decide that the plaintiff is entitled to recover will you consider the measure of damages.

If you find that the plaintiff is entitled to recover from the defendant, you must render a verdict in a sum of money that will justly and fairly compensate the plaintiff for all losses resulting from the injuries (he, she) sustained.<sup>68</sup>

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66. *Id.* at 885.

67. *See supra* text accompanying note 16.

68. N.Y. PATTERN JURY INSTRUCTIONS CIVIL 2:277 (2004). The Comment accompanying these pattern instructions makes it clear that “[t]he charge is transitional and introductory.” *Id.*, cmt. The Comment also makes

But more specific jury instructions, usually combined with this illustrative basic one, flesh out how courts characterize different kinds of loss. For example, today courts quite often give an instruction specifically identifying “pain and suffering” as a loss to be covered in a damage award: “If you decide that defendant is liable, plaintiff is entitled to recover a sum of money which will justly and fairly compensate (him, her) for any injury and conscious pain and suffering to date caused by defendant.”<sup>69</sup> Note that this pattern jury instruction from New York distinguishes injury and “conscious pain and suffering.” Presumably the authors wanted to emphasize that pain and suffering constitutes loss, just as other injury does. Moreover, the term “injury” covers a wide spectrum, and New York pattern jury instructions reflect this diversity by further refining the concept, as the instructions discussed next demonstrate.

Courts also use instructions related to other categories of loss, such as lost earnings<sup>70</sup> and medical expenses.<sup>71</sup> Depending upon the facts of the case, these

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it clear that the instruction is rooted in a long line of authority. See *In re Estate of Rothko*, 372 N.E.2d 291 (N.Y. 1977); *Menzel v. List*, 246 N.E.2d 742 (N.Y. 1969); *Steitz v. Gifford*, 19 N.E.2d 661 (N.Y. 1939); *N.Y. State Thruway Auth. v. John Civetta Constr. Corp.*, 405 N.Y.S.2d 778 (App. Div. 1978); *Linden v. Nat'l City Bank*, 208 N.Y.S.2d 182 (App. Div. 1960); *Hogan v. Franken*, 223 N.Y.S. 1 (App. Div. 1927).

69. N.Y. PATTERN JURY INSTRUCTIONS CIVIL 2:280 (2004).

70. See, e.g., *id.* at 2:290. These read, in part:

Plaintiff AB is entitled to be reimbursed for any earnings lost as a result of (his, her) injuries caused by Defendant CD's negligence from the time of the accident to today. Moreover, if you find that as a result of those injuries AB has suffered a reduction in (his, her) capacity to earn money in the future, then AB is also entitled to be reimbursed for loss of future earnings.

Any award you make for earnings lost to date must not be the result of speculation; any award must be calculated from the number of days that you find AB was disabled from working by the injuries and the amount that you find AB would have earned had (he, she) not been disabled.

Any award you make for reduction of AB's earning capacity in the future should be determined on the basis of AB's earnings before the accident, the condition of AB's health, (his, her) prospects for advancement and the probabilities with respect to future earnings before the accident, the extent to which you find that those prospects or probabilities have been reduced by the injuries, the length of time that you find AB would reasonably be expected to work had (he, she) not been injured, the nature and hazards of AB's employment and any other circumstances which would have an effect on AB's earning capacity.

AB is now [insert number] years of age and has a (life expectancy according to the mortality tables, work life expectancy according to the work life expectancy tables in evidence) of [insert number] more years. Such tables are, of course, nothing more than statistical averages. They neither assure that AB will have the span of (working) life I have given you nor assure that AB's span will not be greater. The figures I have given you are not binding upon you, but may be considered by you together with your own experience and the evidence you have heard in determining what AB's (life, work life) expectancy is. If you find that AB is entitled to an award for reduction in earning capacity in the future, you will fix the dollar amount of such reduction over the entire period that you find AB will suffer such reduction and include that amount in your verdict. In your verdict you will state separately the amount awarded for loss of earnings to date, if any, and, if you make an award for loss of future earnings, you will state in your verdict the amount awarded and the period of years over which such award is intended to provide compensation. Do not state an amount per year but only a total amount for the entire period.

*Id.*

71. See, e.g., *id.* at 2:285:

Plaintiff AB is entitled to recover the amount of reasonable expenditures for medical (and dental) services and medicines, including physician's charges, nursing charges, hospital expenses, diagnostic expenses and X-ray charges. If you decide for AB on the question of liability, you will include in your verdict the amount that you find from the evidence to be the

categories may become even more refined. For example, suppose the plaintiff had been training to become a concert pianist when the defendant negligently caused the plaintiff's hands to be destroyed. In New York, some form of these pattern instructions might be given:

Plaintiff AB has offered evidence that (he, she) has been studying for a career (*state career, e.g.:* in opera, the theatre, music) for which (he, she) has special talent. A person who has special talents is entitled to recover damages for wrongful injury to the development of those talents. AB's recovery is not necessarily limited by the amount (he, she) actually earned before the injury. However, in deciding the amount of damage, you must consider the training already received by AB, the additional training necessary, the success and recognition already realized, the opportunities likely to be available to AB in the future, the risk and contingencies involved in achieving success, and the overall probability of success in the chosen field. In short, what is being valued is the probability that AB would have in fact realized future earnings from (his, her) special talent.<sup>72</sup>

Or, if the plaintiff owns and operates a small business and can no longer run the business due to injuries, a New York court can use this sample instruction:

A plaintiff who is in a business that depends upon (his/her) personal supervision or effort may recover damages to reimburse (him, her) for profits lost as a direct result of (his/her) inability, because of injuries, to devote (his, her) personal skill, talent or ability to the business. Such damages do not, however, include profits resulting from plaintiff's capital investment or profits derived from the work of others employed in the business. If you find that plaintiff is entitled to recover, you will make a separate award for the amount of business profits lost by plaintiff as a direct result of plaintiff's inability, because of the injuries, to attend to the business.<sup>73</sup>

Drafters of current pattern jury instructions use language meant to be accessible to today's juries. But the current language in pattern instructions synthesizes over a hundred years of case law. Going back to the middle of the nineteenth century, American courts have recognized that "mental anguish" or "mental suffering" constitutes a discrete blow to a person's well-being, one that should be considered separately for purposes of evaluating damages, taking into account the

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fair and reasonable amount of the medical (and dental) expenses necessarily incurred as a result of AB's injuries. If you find that AB will need medical, hospital or nursing expenses in the future, you will include in your verdict an amount for those anticipated medical, hospital and nursing expenses which are reasonably certain to be incurred in the future and that were necessitated by plaintiff's injuries. If you find that AB is entitled to an award for medical (and dental) expenses to be incurred in the future, you will fix the dollar amount of expenses over the entire period that you find AB will incur such expenses and include that amount in your verdict. In your verdict you will state separately the amount awarded for medical (and dental) expenses to date, if any, and, if you make an award for future medical (and dental expenses), you will state in your verdict the amount awarded and the period of years over which such award is intended to provide compensation. Do not state an amount per year but only a total amount for the entire period.

72. *Id.* at 2:292.

73. *Id.* at 2:295.

circumstances of the particular case.<sup>74</sup> Under the heading of mental suffering or anguish falls a range of human sentiments. Horror and disgust when confronted unexpectedly with a badly decomposed corpse differs from sheer fright at the prospect of being killed. Nineteenth- and early twentieth-century judges left it to juries to decide the extent of loss due to experiencing these reactions and to identify a monetary sum to represent redress.<sup>75</sup> Fright for one's life, anger at the careless delivery of an important message, distress over the negligent failure to deliver a telegram informing one that a relative is seriously ill: all these experiences take a toll.<sup>76</sup> Courts, like modern economists, have realized this for over one hundred years.

## V. CONCLUSION

Within economics, debates continue as to how best to measure welfare, and how best to assess changes in an individual's welfare.<sup>77</sup> But economists have not resorted to classifying some losses as "noneconomic" and therefore lesser losses.<sup>78</sup>

Tort law, too, has grappled with finding an apt methodology for measuring loss, specifically confronting the problem of assessing losses in welfare relative to a person's pre-accident state of well-being.<sup>79</sup> But traditionally, law has not designated some blows to welfare as noneconomic and therefore less eligible for full valuation.<sup>80</sup>

It is in contemporary politics where we find the movement toward reducing loss into a taxonomy of two categories, "economic" and "noneconomic." Tucked into Homeland Security legislation, the distinction appears, as usual, as a way of limiting personal injury damages. The legislation in question creates a cause of action "for claims arising out of, relating to, or resulting from an act of terrorism when qualified anti-terrorism technologies have been deployed in defense against or response or recovery from such act and such claims result or may result in loss to the Seller."<sup>81</sup> The statute explicitly defines a wide range and variety of loss as "noneconomic": "For purposes of subparagraph (A), the term 'noneconomic damages' means damages for *losses for physical and emotional pain, suffering, inconvenience, physical impairment, mental anguish, disfigurement, loss of*

74. Examples of situations causing "mental anguish" or "mental suffering" include breach of a contract to prepare a corpse for shipment where the undertaker's negligence led to an advanced state of decomposition, *Hall v. Jackson*, 134 P. 151, 152 (Colo. Ct. App. 1913), the failure of a telegraph company to deliver a message regarding a relative's serious illness, *Reese v. W. Union Tel. Co.*, 24 N.E. 163, 166 (Ind. 1890), damage by a blasting company to plaintiffs' property, putting them in fear for their lives, *Wyman v. Leavitt*, 71 Me. 227, 230 (1880), a bridge failure putting plaintiff in fear for his life, *Canning v. Inhabitants of Williamstown*, 55 Mass. (1 Cush.) 451, 452 (1848), the reckless travel by a train that struck plaintiff's mule and narrowly avoided killing plaintiff, *Mack v. South-Bound R. Co.*, 29 S.E. 905, 909 (S.C. 1898), and the failure of a telegraph company to deliver a message of great importance, *Summerfield v. W. Union Tel. Co.*, 57 N.W. 973, 973-74 (Wis. 1894).

75. See *supra* note 74 and accompanying text.

76. See *supra* note 74 and accompanying text.

77. See *supra* Part III.

78. See *supra* Part III.

79. See *supra* Part IV.

80. See *supra* Part IV.

81. 6 U.S.C.A. § 442(a)(1) (West Supp. 2005).



*enjoyment of life, loss of society and companionship, loss of consortium, hedonic damages, injury to reputation, and any other nonpecuniary losses.*"<sup>82</sup>

This blanket treatment of loss serves to limit recovery by an injured party. Note the explicit limitation on noneconomic damages: "Noneconomic damages may be awarded against a defendant only in an amount directly proportional to the percentage of responsibility of such defendant for the harm to the plaintiff, and no plaintiff may recover noneconomic damages unless the plaintiff suffered physical harm."<sup>83</sup> One can raise any number of concerns about these clauses, from the relatively nitpicky question of why "disfigurement" is not itself a "physical impairment," to the more significant question of whether, in an action arising from terrorism, it is sensible or appropriate to make damage recovery totally parasitic on physical harm.<sup>84</sup>

For present purposes, however, let me underscore that this is the only reference to "noneconomic" damages in the U.S. Code. That the distinction wound its way into a small part of a larger statutory scheme whose primary purpose has nothing to do with tort law deserves comment.

One way to legitimize a distinction that is, at its core, quite literally senseless is to use it casually, without fanfare or debate. Importing the language of "noneconomic" damages into a Homeland Security bill makes it seem that the terms and concept are natural, as if the distinction between "economic" and "noneconomic" damages grows from pedigreed roots, which, if examined, would explain why the drafters of this bill used it here. But, as I have argued, the economic/noneconomic distinction has no pedigree and no point in either law or economics. It is a political invention, designed to serve political ends and to substitute rhetoric for argument and terminology for reasons.

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82. *Id.* § 442(b)(2)(B) (emphasis added).

83. *Id.* § 442(b)(2)(A).

84. *See id.*