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Harm and Money: Against the Insurance Theory of Tort Compensation

Heidi Li Feldman*

Since the 1980s, tort damages for pain and suffering have excited hue and cry. Twenty-three states currently place statutory limitations on tort damages for pain and suffering: seven states cap damages in general tort cases,¹ an additional sixteen states limit awards solely in medical malpractice cases.² Several states also have provisions limiting damages in

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1. See ALASKA STAT. § 09.17.010(b) (Michie 1996) (\$500,000 limit on noneconomic damages); COLO. REV. STAT. ANN. § 13-21-102.5(3) (West 1989) (\$250,000 limit on noneconomic damages unless the court finds justification through clear and convincing evidence, thereby increasing the limit to \$500,000); HAW. REV. STAT. ANN. § 663-8.7 (Michie 1995) (\$375,000 limit on pain and suffering damages with certain classes of torts excepted); IDAHO CODE § 6-1603(1) (1990) (\$400,000 cap on noneconomic damages); 735 ILL. COMP. STAT. ANN. 5/2-1115.1(a) (West Supp. 1997) (\$500,000 limit on noneconomic damages; complete ban on hedonic damages); MD. CODE ANN., CTS. & JUD. PROC. § 11-108 (1995) (\$500,000 limit on nonpunitive noneconomic damages); OR. REV. STAT. § 18.560(1) (1995) (\$500,000 limit on noneconomic damages). In addition to its general limit, Colorado has also enacted a separate limitation for medical malpractice cases. See COLO. REV. STAT. ANN. § 13-64-302 (West 1989) (\$250,000 limit on noneconomic damages; \$1,000,000 limit on total damages).

Four states have constitutional provisions, adopted around the turn of the century for reasons which are not entirely clear, forbidding statutory limitations on tort damages. ARIZ. CONST. art. II, § 31 (adopted 1910) (death or injury); KY. CONST. § 54 (adopted 1891) (death or injury); UTAH CONST. art. XVI, § 5 (adopted 1896) (capping recovery only for torts resulting in death); WYO. CONST. art. 10, § 4 (adopted 1890) (death or injury).

2. See CAL. CIV. CODE § 3333.2(b) (West Supp. 1997) (\$250,000 limit on noneconomic damages); IND. CODE ANN. § 27-12-14-3(a) (West Supp. 1996) (\$750,000 limit on total damages); KAN. STAT. ANN. § 60-3407(a)(1) (1994) (\$250,000 limit on noneconomic damages). *But cf.* LA. REV. STAT. ANN. § 40:1299.42(B)(1) (West 1992) (\$500,000 limit on total damages); MASS. GEN. LAWS ANN. ch. 231, § 60H (West Supp. 1997) (\$500,000 limit on noneconomic damages with exceptions allowed for special circumstances); MICH. COMP. LAWS ANN. § 600.1483 (West 1996) (\$280,000 limit on noneconomic damages with exceptions); MO. ANN. STAT. § 538.210(1) (West 1988) (\$350,000 cap on noneconomic damages); NEB. REV. STAT. § 44-2825(1) (1993) (\$1,250,000 limit on total damages); N.M. STAT. ANN. § 41-5-6(A) (Michie 1996) (\$600,000 limit on total damages except for punitive damages and medical expenses); N.D. CENT. CODE § 32-42-02 (1996) (\$500,000 limit on noneconomic damages); Kansas Malpractice Victims Coalition v. Bell, 757 P.2d 251, 263-64 (Kan. 1988) (holding that a provision of the same statute limiting total recovery to \$1,000,000 violates the state constitutional right to remedy by due course of law). *But see* S.C. CODE ANN. § 15-78-

other, very specific types of tort cases.³ While some statutes have been invalidated on state constitutional grounds,⁴ others have survived judicial scrutiny.⁵ At the federal level, both the House of Representatives⁶ and

120(a)(3)-(4) (Law Co-op. Supp. 1996) (\$1,000,000 limit on damages in claims against doctors employed by any government entity); S.D. CODIFIED LAWS § 21-3-11 (Michie 1987) (\$500,000 cap on noneconomic damages); Arneson v. Olson, 270 N.W.2d 125, 136 (N.D. 1978) (holding that a \$300,000 limit on total damages violates state and federal equal protection guarantees); cf. UTAH CODE ANN. § 78-14-7.1 (1996) (\$250,000 limit on nonpunitive noneconomic damages); VA. CODE ANN. § 8.01-581.15 (Michie 1992) (\$1,000,000 cap on total damages); W. VA. CODE § 55-7B-8 (1994) (\$1,000,000 limit on noneconomic damages); Wis. STAT. ANN. § 893.55(4)(d) (West 1997) (\$350,000 cap on noneconomic damages); Knowles v. United States, 544 N.W.2d 183, 199 (S.D. 1996) (striking an amended version of this statute limiting total damages to \$1,000,000 under state substantive due process and reinstating prior version).

Illinois's \$500,000 cap on damages in medical malpractice cases, see 70 ILL. REV. STAT. 101 (West 1975) was found to violate the equal protection provision of the state constitution in *Wright v. Central Du Page Hosp. Ass'n*, 347 N.E.2d 736 (Ill. 1976). Other courts have upheld the constitutionality of caps on damages for medical malpractice. See, e.g., *Fein v. Permanente Med. Group*, 695 P.2d 665, 682-83 (Cal. 1985), *appeal dismissed*, 474 U.S. 892 (1985); *Scholz v. Metropolitan Pathologists, P.C.*, 851 P.2d 901, 905-07 (Colo. 1993); *Johnson v. St. Vincent Hosp., Inc.*, 404 N.E.2d 585, 598-602 (Ind. 1980); *Samsel v. Wheeler Transp. Servs., Inc.*, 789 P.2d 541 (Kan. 1990); *Butler v. Flint Goodrich Hosp.*, 607 So. 2d 517, 521 (La. 1992); *Adama v. Children's Mercy Hosp.*, 832 S.W.2d 898 (Mo. 1992); *Prendergast v. Nelson*, 256 N.W.2d 657, 668-69 (Neb. 1977); *Etheridge v. Medical Ctr. Hosps.*, 376 S.E.2d 525 (Va. 1989); *Robinson v. Charleston Area Med. Ctr., Inc.*, 414 S.E.2d 877 (W. Va. 1991).

3. See, e.g., COLO. REV. STAT. ANN. § 33-44-113 (West Supp. 1996) (\$1,000,000 limit on total damages, \$250,000 for noneconomic damages, in claims against ski areas); GA. CODE ANN. § 51-12-6 (Supp. 1996) (no punitive damages in claims solely for emotional distress); KAN. STAT. ANN. § 60-1903(a) (Harrison 1994) (\$100,000 limit on nonpecuniary damages in a wrongful death suit); MONT. CODE ANN. § 39-2-905(3) (1995) (no pain and suffering damages in wrongful discharge cases); N.Y. INS. LAW § 5104 (McKinney 1985) (no pain and suffering damages for negligent operation of an automobile if there is no serious injury).

4. In at least six states, statutory-damage limitation provisions are no longer in force because the courts have found them unconstitutional. See *Ray v. Anesthesia Assocs.*, 674 So. 2d 525, 526 (Ala. 1995) (holding that a \$1,000,000 limit in an action for wrongful death of a minor and medical malpractice violates the equal protection guarantee of the Alabama Constitution); *Smith v. Department of Ins.*, 507 So. 2d 1080, 1088-89 (Fla. 1987) (holding that a \$450,000 cap on noneconomic damages violates the right to access to courts); *Brannigan v. Usitalo*, 587 A.2d 1232 (N.H. 1991) (finding that an \$875,000 cap on noneconomic damages violates equal protection); *Carson v. Maurer*, 424 A.2d 825, 836-38 (N.H. 1980) (declaring a cap of \$250,000 on noneconomic damages in medical malpractice cases violates equal protection under the New Hampshire Constitution); *Morris v. Savoy*, 576 N.E.2d 765, 770-71 (Ohio 1991) (holding that a \$200,000 cap on damages in medical malpractice cases not involving death violates due process under the Ohio Constitution); *Jeanne v. Hawkes Hosp.*, 598 N.E.2d 1174, 1178-80 (Ohio Ct. App. 1991) (finding that the same cap violates both state and federal guarantees of equal protection); *Lucas v. United States*, 757 S.W.2d 687, 691 (Tex. 1988) (declaring that a \$500,000 limit on general damages, not including medical expenses, in medical malpractice cases violates the right to a remedy by due course of law under the Texas Constitution); *Sofie v. Fibreboard Corp.*, 771 P.2d 711, 719-23 (Wash. 1989) (holding that a limitation of noneconomic damages to the product of .43 multiplied by the average annual wage and by the life expectancy of not less than fifteen years of the claimant violates the Washington Constitution), *amended by* 780 P.2d 260 (Wash. 1989).

5. See, e.g., *Edmonds v. Murphy*, 573 A.2d 853, 861-68 (Md. Ct. Spec. App. 1990) (upholding a limit on noneconomic damages of \$350,000), *aff'd*, 601 A.2d 102 (Md. 1992); *Greist v. Phillips*, 906 P.2d 789 (Or. 1995) (validating a \$500,000 cap on noneconomic damages).

6. See Common Sense Products Liability and Legal Reform Act of 1995, H.R. 956, 104th Cong. (vetoed).

the Senate⁷ have passed tort-reform bills. Although no compromise legislation has been enacted, this is the first time that both chambers of Congress have passed bills limiting recovery for pain and suffering.⁸

Against this political backdrop, a number of leading legal economists have advanced the "insurance theory" of tort compensation⁹ to justify the elimination of tort damages for pain and suffering. The insurance theory's roots lie in neoclassical economics, and it adopts the broader discipline's guiding normative principle of economic rationality to decide the sorts of injuries for which a victim ought to be able to recover damages in tort. The insurance theory's central premise is that accident victims should not recover damages for injuries against which it would not have been economically rational to insure.¹⁰ In other words, if an economically rational

7. See Civil Justice Fairness Act of 1995, S. 672, 104th Cong.

8. The 104th Congress has examined a number of measures in the area of tort reform generally, and tort compensation specifically. See, e.g., H.R. 10, 104th Cong. § 103 (1995); S. 11, 104th Cong. §§ 201-207 (1995); S. 121, 104th Cong. §§ 401-411 (1995); S. 672, 104th Cong. §§ 101-103, 201-202, 401-404. These bills would have reformed tort law, including the award of noneconomic and punitive damages, in three different areas: products liability, see H.R. 10, § 103, medical malpractice, see S.11, §§ 203, 207; S.121, §§ 403, 405, 410; S.672, § 401, and punitive and noneconomic damages in general tort cases, see S.672, §§ 103, 200-202. Although Congress did not enact any of these bills, parts of them did coalesce into the Common Sense Products Liability and Legal Reform Act of 1995, H.R. 956 which passed both houses, see 142 CONG. REC. H3206 (daily ed. Mar. 29, 1996); 142 CONG. REC. S2591 (daily ed. Mar. 21, 1996), but was vetoed by President Clinton, see 142 CONG. REC. D420 (daily ed. May 3, 1996); 142 CONG. REC. H4764 (daily ed. May 9, 1996) (sustaining the president's veto).

The Act would have significantly overhauled products liability law. It would have limited non-manufacturer liability to cases involving negligence, H.R. 956, § 102(a)(1), express warranties, § 102(a)(2), and intentional wrongdoing, § 102(a)(3). It would also have changed the law respecting noneconomic, § 202, and punitive, § 201, damages in products liability actions.

The Act also would have amended the common law relating to noneconomic damages. § 202(b). It would have made liability for noneconomic damages several but not joint. § 202(a). Under the Act, courts would have been directed to apportion liability for noneconomic damages according to the percentage of responsibility of the various responsible parties. *Id.*

The Act would have severely limited the availability of punitive damages in products liability cases. § 201. First, it would have required the plaintiff to demonstrate by clear and convincing evidence that the defendant's conduct manifested either a "specific intent to cause harm," or a "conscious, flagrant indifference to the rights or safety of others." § 201(a). Furthermore, it would have limited punitive damages to the greater of three times the amount of economic damages awarded or \$250,000. § 201(b).

9. See, e.g., PAUL H. RUBIN, TORT REFORM BY CONTRACT (1993); STEVEN SHAVELL, ECONOMIC ANALYSIS OF ACCIDENT LAW (1987); John E. Calfee & Paul H. Rubin, *Some Implications of Damage Payments for Nonpecuniary Losses*, 21 J. LEGAL STUD. 371 (1992); Philip J. Cook & Daniel A. Graham, *The Demand for Insurance and Protection: The Case of Irreplaceable Commodities*, 91 Q.J. ECON. 143 (1977); Robert Cooter, *Towards a Market in Unmatured Tort Claims*, 75 VA. L. REV. 383 (1989); David Friedman, *What is 'Fair Compensation' for Death or Injury?*, 2 INT'L REV. OF L. & ECON. 81 (1982); Alan Schwartz, *Proposals for Products Liability Reform: A Theoretical Synthesis*, 97 YALE L.J. 353 (1988). The appellation "insurance theory" was coined by a critic of the view, Ellen Smith Pryor, in *The Tort Law Debate, Efficiency, and the Kingdom of the Ill: A Critique of the Insurance Theory of Compensation*, 79 VA. L. REV. 91 (1993).

10. See RUBIN, *supra* note 9, at 3-5; Calfee & Rubin, *supra* note 9, at 372; Cook & Graham, *supra* note 9, at 143-44; Cooter, *supra* note 9, at 384-85; Friedman, *supra* note 9, at 81-85; Schwartz,

agent would not purchase first-party insurance for a certain type of injury, tortfeasors should not be required to pay damages for it. Insurance theorists conclude that rational actors would not insure against non-pecuniary losses, and therefore accident victims should not be able to recover tort damages for them.

At first blush, these results seem to fly in the face of two traditional goals of tort law: making tort victims whole and discouraging excessively dangerous conduct or products by requiring injurers to internalize the full costs of their behavior or goods. Insurance theorists concede that eliminating damages for pain and suffering would compromise deterrence, so they urge other measures be taken to restrain inefficient risk-taking.¹¹ But the insurance theorists deny that a bar on damages for pain and suffering would undermine the aim of making tort victims whole. According to the insurance theory a single system, such as tort law, cannot simultaneously provide satisfactory insurance and deterrence.¹² Optimal insurance coverage for accident victims and optimal internalization of accident costs diverge, because rational economic actors would not insure against all the harms they nonetheless would rather avoid.¹³ If we restrict tort's function to insurance, therefore, we must take other steps to deter undesirable activity.¹⁴

Legal economists relegate deterrence to other domains¹⁵ and equate tort compensation with insurance,¹⁶ because damages, like insurance

supra note 9, at 361; *see also* SHAVELL, *supra* note 9, at 192-99 (describing insurance theory in general).

11. *See* RUBIN, *supra* note 9, at 50-55 (advocating the value of safety statutes as deterrence mechanisms); SHAVELL, *supra* note 9, at 277-86 (identifying state-initiated approaches to controlling risks, including statutes, injunctions, taxes, fines, and criminal sanctions); Cooter, *supra* note 9, at 384-87, 398-405 (asserting that competitive pricing of unmatured tort claims will deter potential tortfeasors).

12. *See* RUBIN, *supra* note 9, at 70-71 (arguing that large payments for pain and suffering are not necessary for deterrence and provide unwanted insurance).

13. *See id.* at 60-64; Calfee & Rubin, *supra* note 9, at 372-73, 390; Cooter, *supra* note 9, at 388; Schwartz, *supra* note 9, at 414.

14. Oddly, the insurance theorists do not address the point that, presumably, providers of goods and services would pass along to consumers the costs imposed by any system of deterrence, so it is not clear that severing the deterrence function from the tort system would decrease the price of goods and services. Legal economists might respond that tort awards are particularly prone to excess or unpredictability, thereby forcing prices higher than would be appropriate under a regime of efficient deterrence. But it is not obvious that a regulatory or penal system would impose only efficient sanctions. Furthermore, providers of goods and services would presumably be held answerable for risky behavior on a more regular basis than in the tort system; thus, even if a scheme reduced the price of risky instances, it might charge more often, even to the point of imposing greater costs on providers than the tort system does.

15. *See* RUBIN, *supra* note 9, at 49-51 (asserting that governmental regulatory systems provide a measure of deterrence that lessens the need for tortfeasors to pay all the costs of an injury).

16. *See* RUBIN, *supra* note 9, at 29-30, 34 (arguing that consumers who are free to contract for levels of damage awards would make choices using the same reasoning they currently apply to insurance decisions); Calfee & Rubin, *supra* note 9, at 371; Cooter, *supra* note 9, at 396.

payments, spread the cost of providing financial resources for accident victims.¹⁷ Given that tort damages and insurance share this function, legal economists maintain that the desirable types of tort damages mirror the desirable kinds of insurance. Applying their basic normative principle, insurance theorists claim that appropriate insurance is that which would be desired by a rational economic actor. They conclude that tort damages are suitable when they provide the same payment that would be yielded by optimal first-party insurance.

Insurance theorists advance both theoretical and empirical arguments on behalf of their contention that payment for pain and suffering is nonoptimal. Their empirical arguments, canvassed thoroughly by Steve Croley and Jon Hanson,¹⁸ depend on the premise that actual consumers do not want insurance for pain and suffering. The insurance theorists maintain that actual consumer preferences for insurance are basically rational, so lack of demand for pain and suffering coverage demonstrates the nonoptimality of this type of insurance. Croley and Hanson argue that empirical evidence does not support the insurance theorists' view of consumers' insurance preferences. They adduce data that indicates that consumers do want payments for pain and suffering.¹⁹

This Paper does not enter the empirical debate over actual consumers' desires for insurance. Rather, my argument denies that first party preferences for insurance have any relevance to the sorts of tort damages that ought to be available. Perhaps we should allow individuals to purchase whatever traditional insurance policies they desire, but we should not use individual preferences for first-party insurance as a benchmark for tort compensation. While tort damages and insurance payments both provide money to accident victims, their availability and kind should not be governed by the same norms.

This Paper critiques the normative premises that underlie the insurance theory of tort compensation. Once we pinpoint the inadequacies of the theory as an approach to damages for pain and suffering, we can begin to sketch a more satisfactory alternative. This Paper develops an approach rooted in the traditional common law of tort damages for pain and suffering. I aim primarily to suggest an intellectual framework within which to think fruitfully about the relationship between pain and suffering awards and the goals of tort compensation. To this end, the Paper advances a conception of harm and a view of tort compensation free from the normative weaknesses that plague the insurance theory. I make an

17. See RUBIN, *supra* note 9, at 49-51; Calfee & Rubin, *supra* note 9, at 371.

18. See Steven P. Croley & Jon D. Hanson, *The Nonpecuniary Costs of Accidents: Pain-and-Suffering Damages in Tort Law*, 108 HARV. L. REV. 1787 (1995).

19. See *id.* at 1803.

occasional suggestion about how to implement this conception in the courts, but I do not attempt to develop a complete operational vocabulary for the intellectual framework outlined here.

Synergy between political forces and scholarly argument has worked changes in the tort system in the past, most notably in the shift from a negligence standard to a version of strict liability for product-related personal injuries.²⁰ Insurance theorists know this. Now, they have spotted a chance to further their cause.²¹ We should resist any coalescence of political activists urging statutory elimination or restriction of noneconomic damages and legal economists pressing for the abolition of pain and suffering awards. Unlike the scholarship that originally advanced strict products liability, the academic arguments for eliminating damages for pain and suffering cannot withstand scrutiny.

I. The Insurance Theory of Tort Compensation

Advocates of the insurance theory of compensation contend that tort damages should reflect an economically rational actor's pre-accident preferences for post-accident wealth, and they argue that such an actor does not want post-accident payment for pain and suffering if the promise of such payments increases pre-accident costs. Robert Cooter claims that "rational people insure against certain accidents and not others, and . . . the current tort system distorts their choices."²²

To prove their claim that rational consumers would not want payments for post-accident pain and suffering at the expense of pre-accident income, insurance theorists start by dividing injuries into two categories: those that increase the need for wealth (raise the marginal utility of money) and those that do not (lower or do not change the marginal utility of money).²³ They conceptualize insurance as a device for equalizing the value of money—its marginal utility—across possible states of the world, specifically the pre-injury and post-injury states.²⁴ The first-party insurance purchaser spends dollars now to get dollars later in the event of an accident. Since the purchaser wants dollars now as well as later, she should shift present

20. See generally George L. Priest, *The Invention of Enterprise Liability: A Critical History of the Intellectual Foundations of Modern Tort Law*, 14 J. LEGAL STUD. 461, 461 (1985) (explaining the "conceptual revolution" in tort law since 1960).

21. See RUBIN, *supra* note 9, at 14-15 (citing statutory damage caps as evidence of political support for completely eliminating nonpecuniary damages).

22. Cooter, *supra* note 9, at 388.

23. See RUBIN, *supra* note 9, at 330-31; Calfee & Rubin, *supra* note 9, at 371; Schwartz, *supra* note 9, at 361; cf. SHAVELL, *supra* note 9, at 133-34 (distinguishing pecuniary losses from nonpecuniary losses by stating that nonpecuniary losses are losses of irreplaceable goods).

24. See RUBIN, *supra* note 9, at 35; Cooter, *supra* note 9, at 391-92; Friedman, *supra* note 9, at 82; Schwartz, *supra* note 9, at 362; cf. SHAVELL, *supra* note 9, at 228-32 (discussing marginal utility with respect to nonpecuniary losses).

dollars to future states of the world only to the point where the gain in utility from future dollars in the event of an accident exceeds any decrease in current utility due to the sacrifice of dollars now. If a certain type of injury does not increase one's need for dollars, it does not make sense for the purchaser to forego present dollars for the promise of money in the future.

Next, insurance theorists argue that nonpecuniary loss does not increase the need for wealth.²⁵ Following economic convention, they define pecuniary losses as those that can literally be replaced dollar for dollar. They deem lost wages and medical expenses as clear examples of pecuniary loss. In contrast, nonpecuniary losses cannot literally be replaced with dollars: money is not a perfect substitute for the lost good. Insurance theorists regard pain and suffering as exemplars of nonpecuniary loss. If a loss does not increase the need for wealth, a rational economic actor would not insure against it. As Alan Schwartz puts it, "[C]onsumers will not insure against harms that reduce, or do not affect, the marginal utility of money. This implication has considerable normative significance because some theorists claim that pain and suffering and emotional distress exemplify such harms."²⁶ According to Paul Rubin, "[p]ain and suffering is a nonpecuniary loss."²⁷ Rubin then describes the following relationship between loss, marginal utility of wealth, and insurance:

Pecuniary losses shift the consumer downward along a utility function and thus increase the marginal utility of wealth. It is therefore desirable to insure against pecuniary losses

Nonpecuniary losses, conversely, do not increase the marginal utility of wealth. Some losses leave it unchanged, but many of those involved in product liability cases reduce the marginal utility of wealth.²⁸

Alan Schwartz sums up:

[Rational] consumers who maximize expected utility will attempt to equalize the marginal utility of money in all possible states of the world [T]he optimal contract concerning product-related risks would pay firms to provide insurance against . . . core pecuniary losses [and not] against . . . pain and suffering and emotional

25. See RUBIN, *supra* note 9, at 32-34; Calfee & Rubin, *supra* note 9, at 371-72; Cooter, *supra* note 9, at 389; Schwartz, *supra* note 9, at 364; cf. Cook & Graham, *supra* note 9, at 148 ("A risk-averse individual . . . will buy less than full coverage for a normal irreplaceable commodity if he can buy insurance at actuarially fair rates.")

26. Schwartz, *supra* note 9, at 364 (citing Patricia M. Danzon, *Tort Reform and the Role of Government in Private Insurance Markets*, 13 J. LEGAL STUD. 517 (1984) and Samuel A. Rea, Jr., *Nonpecuniary Loss and Breach of Contract*, 11 J. LEGAL STUD. 35 (1982)).

27. RUBIN, *supra* note 9, at 30.

28. *Id.* at 36.

distress. . . . [I]f the animating norm is consumer sovereignty . . . , the aspect of strict liability that prohibits firms from shifting the risk of incurring nonpecuniary harm to consumers cannot be justified by reference to the goal of compensating consumers for harm.²⁹

At this point, we can see that the insurance theory's argument against tort damages for pain and suffering depends on the claim that pain and suffering do not increase one's need for, or the marginal utility of, money. This question might seem to be exclusively empirical (and difficult to research). Some legal economists, such as Patricia Danzon, adopt this view.³⁰ But others assume away the empirical question or offer an a priori argument that purports to establish that pain and suffering actually decrease one's need for wealth.

Robert Cooter suggests that nonpecuniary losses do not impair access to activities and pleasures nor do they directly destroy a victim's wealth.³¹ On this basis, Cooter presumes that nonpecuniary losses do not increase the need for wealth.³² Alan Schwartz attempts to justify this inference, claiming that "income effects" reduce the marginal utility of money in the face of nonpecuniary loss.³³ He summarizes the argument as follows:

The demand for most goods and services has positive income elasticity; people increase their consumption as their incomes rise. Because accidents make people poorer in a utility sense, people will purchase lesser amounts of substitute activities in "accident states" than they would have purchased if they had not been injured but instead had to give up goods that they then valued as much as they valued not suffering. Informed consumers will anticipate wanting lesser amounts of substitute activities in accident states than they would otherwise want, and so will make provision to buy less. In other words, consumers will not purchase full insurance.³⁴

According to Schwartz, pain and suffering, like nonpecuniary losses generally, decrease one's overall utility—a person now experiencing pain and suffering is less happy or well off than when he was not.³⁵ Schwartz claims that a drop in total utility increases the marginal utility of money because one needs fewer dollars than a person with higher overall utility

29. Schwartz, *supra* note 9, at 362, 367.

30. See Danzon, *supra* note 26, at 522 ("Theory cannot tell us whether disability lowers or raises the utility of wealth, so cannot tell us whether optimal compensation is less or greater than monetary loss."). Danzon concludes that full compensation for pain and suffering is unlikely to maximize the utility of wealth. See *id.* at 524. For a rival view, see Croley & Hanson, *supra* note 18, at 1791.

31. See Cooter, *supra* note 9, at 389-91.

32. See *id.*

33. See Schwartz, *supra* note 9, at 365-66.

34. *Id.* at 366 (footnote omitted).

35. See *id.*

to get the same utility boost per dollar.³⁶ In other words, compared to the better off, the less well off get more bang for the buck, and therefore need fewer bucks. From this, Schwartz concludes that the rational insurance purchaser, anticipating lower overall utility in the accident state of the world, would not fully insure, that is, would not purchase coverage that would yield all the dollars she would now need to enhance her utility to the level she wants, because, in the event of an accident, she will not need all those dollars for the same measure of enhancement.³⁷ Better for her to hang on to her dollars presently, when she really needs them to lift her overall utility level.

The traditional tort system requires a tortfeasor to pay damages for pain and suffering as well as for lost wages and medical expenses. If, however, rational purchasers of first-party insurance would not seek coverage for pain and suffering, then, say the insurance theorists, the tort system overinsures accident victims, permitting them recovery for a type of loss against which it is irrational to insure.³⁸ To serve its insurance function properly, the tort system should not permit recovery for pain and suffering.

The insurance theorists admit that while it may be economically irrational to insure against pain and suffering, it is not irrational to avoid it.³⁹ It is important to inhibit people from imposing pain and suffering on others. Somehow, then, actors must internalize, and know they will internalize, any pain and suffering they cause others. Tort damages for pain and suffering serve this purpose. But, say the insurance theorists, they provide an undeserved benefit to accident victims, who would not themselves purchase insurance to cover pain and suffering. Hence, we should abandon damages for pain and suffering as a tool for internalization in favor of a method that does not overinsure accident victims but still deters people from externalizing the costs of pain and suffering they impose.

Though critics have raised serious objections to the insurance theory of compensation, they often accept the central normative premises of the insurance theory, disputing only the way insurance theorists interpret or apply them. I have already mentioned Steve Croley and Jon Hanson's work, which endorses the normative framework of the insurance theory⁴⁰ but criticizes its empirical dimension. Ellen Smith Pryor also questions the theory's empirical claims. She argues that insurance theorists make far-

36. *See id.*

37. *See id.*

38. *See* RUBIN, *supra* note 9, at 29-40; Calfee & Rubin, *supra* note 9, at 371, 380; Cooter, *supra* note 9, at 388; Friedman, *supra* note 9, at 81-84; Schwartz, *supra* note 9, at 367.

39. *See* Cooter, *supra* note 9, at 396.

40. *See* Croley & Hanson, *supra* note 18, at 1791 (building on the basic assumptions of the insurance theory to conclude that demand in fact exists for pain and suffering insurance).

fetched assumptions about the utility money has for injured or disabled people, but otherwise she seems to accept the idea that if we could accurately gauge pre-accident preferences for post-accident wealth, these preferences should decide what sorts of compensation are awarded.⁴¹ Margaret Jane Radin faults the insurance theory for overlooking the symbolism of money damages, which, she maintains, can signal respect for the injured plaintiff.⁴² However, along with the insurance theorists, Radin maintains that money cannot make a tort victim whole.⁴³

We, too, can register additional complaints against the insurance theory from within the theory's own framework. The insurance theorists define nonpecuniary loss circularly. If we stipulate that money cannot alleviate an injury, it is *prima facie* unreasonable to expect money if one suffers that injury (notwithstanding other justifications for transferring wealth to the injured even if it does not alleviate their suffering). But if we have only stipulated the relationship between money and alleviation, there is no reason to think it unreasonable for people to expect money in the case of injury. For any given type of loss, the legal economist must demonstrate that money cannot relieve its sting; he cannot simply label that type of loss nonpecuniary, and then maintain that money cannot restore the loss.

It is even uncertain whether any loss is clearly and solely pecuniary or nonpecuniary. For example, lost earnings involve the loss of the experience of earning those wages. Many people would prefer the satisfaction of earning their income rather than simply having it replaced. Classifying lost earnings as perfectly fungible with monetary damages begs the question of whether this supposedly paradigmatic pecuniary loss is indeed pecuniary in the requisite sense. Likewise, to the extent that gaining money—through whatever means—brings pleasure, monetary damages may quite literally relieve pain. Again, classifying pain and suffering as nonpecuniary, without further argument, begs the question of the relationship between money and happiness or contentment.

Furthermore, Alan Schwartz's thesis about "income effects" depends upon doubtful psychological premises about the connections between nonpecuniary loss, total utility, and the marginal utility of money.⁴⁴ If these are empirically implausible or demonstrably false, Schwartz cannot sustain the charge of economic irrationality against insurance for nonpecuniary loss. Suppose, in contradiction to Schwartz, that to increase their overall utility, injured or ill people need more money, not less, than uninjured, healthy people do. This would be true if it takes more financial

41. See Pryor, *supra* note 9, at 95, 98.

42. See MARGARET JANE RADIN, *CONTESTED COMMODITIES* 185-89, 195 (1996).

43. See *id.* at 193.

44. See Schwartz, *supra* note 9, at 364-66 (arguing that nonpecuniary losses do not increase the marginal utility of money).

resources to escalate the utility of an injured person rather than fewer, as Schwartz assumes. Schwartz's assumption rests on the idea that the lower one's initial utility level, the more utility one will derive from any given incremental increase. If, however, injury or illness depresses a person, it may be extremely hard to add that increment to his overall utility. If cash infusions can reduce or eliminate this difficulty, then dollars are more valuable when one is injured than when one enjoys good health.

Despite their force, these objections do not attack the insurance theory of compensation at its foundations. The insurance theory centrally equates well-being with preference satisfaction and contends that money cannot genuinely repair pain and suffering. These propositions enjoy widespread intuitive appeal. Nevertheless, they are wrong.

II. Making Sense of Making Whole

Courts have traditionally stated the purpose of tort damages this way: to make the victim whole.⁴⁵ How ought we understand this aphorism? Not, in my opinion, through economic analysis. Ideally, we need instead an account that vindicates the normative force of compensation for tortious injury and explains the doctrinal intricacy of the law of tort damages. The insurance theory of tort compensation fares poorly on both counts.

Doctrinal discussion of damages in general, and tort damages in particular, is a relatively recent phenomenon. For much of the history of the common law, the amount of damages was closely linked to the traditional causes of action.⁴⁶ Discussion of damages arose in the context of a particular cause of action. Various authorities in this period referred to damages as "compensation," without defining that term as the goal of damages.⁴⁷ In the late eighteenth century, the first general text on damages appeared.⁴⁸ However, it still focused on the cause of action at issue as the measure of damages.⁴⁹

45. The concept of "making the victim whole" plays an important, if confused, part in the doctrine of tort damages. Around the turn of the nineteenth century, discussions of tort damages began to focus on the aims of awarding damages in tort cases, frequently referring to compensation. By mid-century, debate centered on the meaning of compensation. Since then, courts have frequently referred to tort awards as an attempt to "make the victim whole." See *infra* text accompanying notes 46-54.

46. See THEODORE SEDGWICK, A TREATISE ON THE MEASURE OF DAMAGES 33-34 (New York, John S. Voorhies 1847) ("[I]n cases like these, in which the right to relief depends upon the amount of injury, we may be said to approach a vanishing point, where all distinctions between the cause of action and the rule of compensation are confounded and lost.").

47. See 2 WILLIAM BLACKSTONE, COMMENTARIES *438 (stating that damages are "compensation for some injury sustained"); SEDGWICK, *supra* note 46, at 28-29 (quoting Blackstone, Coke, and other authorities who tautologically equate compensation with the amount recoverable under a given cause of action).

48. See generally JOSEPH SAYER, THE LAW OF DAMAGES (Dublin, J. Moore 1792).

49. See *id.*

By the mid-nineteenth century, scholars and courts began to focus on more general principles for awarding damages. The first American treatise discussed general principles at greater length, although it still divided its discussion of damages by cause of action.⁵⁰ Courts applied these principles, examining the elements of damages in specific cases.⁵¹ Courts also started referring to the idea of "mak[ing] the plaintiff whole."⁵²

Modern courts have wholeheartedly adopted the formulation "making the victim whole" across the spectrum of tort cases.⁵³ Some cases simply refer to making the victim whole.⁵⁴ Other courts write in terms of returning the victim to the position she was in prior to the accident,⁵⁵ placing the victim as nearly as possible to the position she would have been

50. See SEDGWICK, *supra* note 46, at 33-34. Sedgwick, quoting Blackstone, Coke, and Holt, noted that these scholars had frequently referred to damages as "compensation." *Id.* at 28-29. Sedgwick attempted to define compensation by dividing it into six items of damages, including "actual pecuniary loss directly sustained," "actual expenses," and others. *Id.* at 35 (emphasis omitted); see also 2 SIMON GREENLEAF, A TREATISE ON THE LAW OF EVIDENCE § 267 (16th ed. 1899) ("[T]he jury . . . in the estimation of damages, [is] to consider not only the direct expenses incurred by the plaintiff, but the loss of his time, his bodily sufferings . . .").

51. See, e.g., *Smith v. Overby*, 30 Ga. 241, 247-48 (1860); *Freidenheit v. Edmundson*, 36 Mo. 226, 230 (1865) (both citing Sedgwick and Greenleaf and holding that while damages may extend beyond the value of goods damaged for compensatory purposes, they may not be used to punish the defendant).

52. See, e.g., *McInroy v. Dyer*, 47 Pa. 119, 121 (1864); see also *Freidenheit*, 36 Mo. at 230 (stating that the issue in damages is "how much damage the plaintiff had suffered by the whole injury, and not merely the actual loss in the value of the goods taken").

53. See, e.g., *Salsbury Lab., Inc. v. Merieux Lab., Inc.* 735 F. Supp. 1555, 1578 (M.D. Ga. 1989) (misappropriation of trade secrets), *modified and aff'd*, 908 F.2d 706 (11th Cir. 1990); *Hall v. Schulte*, 836 P.2d 989, 994 (Ariz. Ct. App. 1991) (negligence arising from sexual improprieties by a psychologist); *Northern Ill. Gas Co. v. Vincent DiVito Constr.*, 573 N.E.2d 243, 251 (Ill. App. Ct. 1991) (trespass and property damage); *Exxon Corp. v. Yarema*, 516 A.2d 990, 997 (Md. Ct. Spec. App. 1986) (interference with property rights); *Caldwell v. Haynes*, 643 A.2d 564, 570 (N.J. 1994) (car accident); *Sorrell v. Thevenir*, 633 N.E.2d 504, 510 (Ohio 1994) (battery); *Aker Verdal A/S v. Neil F. Lampson, Inc.*, 828 P.2d 610, 613 (Wash. Ct. App. 1992) (property damage); see also 22 AM. JUR. 2D *Damages* § 26 (1988). A few cases refer, instead, to "making good" the victim's loss, although it is not clear how this differs from "making the victim whole." See, e.g., *Curtis v. Firth*, 850 P.2d 749, 760 (Idaho 1993); *Horsch v. Termimix Int'l Co.*, 865 P.2d 1044, 1049 (Kan. 1994); see also 25 C.J.S. *Damages* § 17 (1996); BLACK'S LAW DICTIONARY 390 (6th ed. 1990).

54. See, e.g., *Carlack v. SWC Caribbean, Inc.*, 550 F.2d 171, 178 (3d Cir. 1977); *Baldowski v. United States*, 111 F. Supp. 653, 656 (E.D.S.C. 1953); *Cope v. Vermeer Sales & Serv.*, 650 P.2d 1307, 1309 (Colo. Ct. App. 1982).

55. See, e.g., *Big Rock Mountain Corp. v. Stearns-Roger Corp.*, 388 F.2d 165, 169 (8th Cir. 1968); *Harris v. Peters*, 653 N.E.2d 1274, 1275 (Ill. App. Ct. 1995); *Cerretti v. Flint Hills Rural Elec. Coop. Ass'n*, 837 P.2d 330, 341 (Kan. 1992); *Moulton v. Groveton Papers Co.*, 323 A.2d 906, 909 (N.H. 1974); see also RESTATEMENT (SECOND) OF TORTS § 901 cmt. a (1977) ("[T]he law of torts attempts primarily to put an injured person in a position as nearly as possible equivalent to his position prior to the tort."); 25 C.J.S. *Damages* § 2 (1996) (stating that compensation should "put the injured party in the position in which he was before he was injured"); 4 B.E. WITKIN, SUMMARY OF CALIFORNIA LAW *Torts* § 842 (8th ed. 1974) ("In tort actions, damages are usually awarded for the purpose of *compensating* the plaintiff for the injury suffered, i.e., restoring him as nearly as possible to his former position . . ." (emphasis in original)).

in had the wrong not been committed,⁵⁶ or putting the victim in the position she would have been in "had there been no injury."⁵⁷ Modern jury instructions follow caselaw, directing the jury to award damages that will make the victim whole⁵⁸ or return her to the position in which she would have been had the accident not occurred.⁵⁹

Whatever the judicial gloss, making the victim whole is clearly a metaphorical aspiration, not a literal one. A plaintiff who receives damages for a tortiously amputated arm does not actually regain the lost limb. He receives money, which he may use to pay his bills and rehabilitate himself. He could use his damage award for a prosthesis, perhaps the closest approximation to literal wholeness. But he need not. Tort victims may use their damages as they choose. The state does not require their use to restore lost abilities—let alone purchase artificial limbs in place of real

56. See, e.g., *Hutton v. Essex Group, Inc.*, 885 F. Supp. 331, 333 (D.N.H. 1994); *Turpin v. Sortini*, 643 P.2d 954, 961 (Cal. 1982); *Moreland v. Columbia Mut. Ins. Co.*, 842 S.W.2d 215, 227 (Mo. Ct. App. 1992); cf. *Freeport Sulphur Co. v. S/S Hermosa*, 526 F.2d 300, 304 (5th Cir. 1976) (stating that the purpose of compensation is "to place the injured person as nearly as possible in the condition he would have occupied if the wrong had not occurred"); RESTATEMENT (SECOND) OF TORTS § 903 cmt. a (1977) ("[C]ompensatory damages are designed to place [the victim] in a position substantially equivalent in a pecuniary way to that which he would have occupied had no tort been committed.").

57. *Roberts v. Sears, Roebuck & Co.*, 471 F. Supp. 372, 381 (N.D. Ill. 1979), *vacated on other grounds*, 617 F.2d 460 (7th Cir. 1980); see also *Domeracki v. Humble Oil & Ref. Co.*, 443 F.2d 1245, 1249 (3d Cir. 1971) (compensation is for losses the victim would not have suffered "had he not been injured"); *Gowdy v. United States*, 271 F. Supp. 733, 748 (W.D. Mich. 1967) (propounding that fair compensation "puts the plaintiff in as good a condition as he would have been if the injuries had not occurred"), *rev'd on other grounds*, 412 F.2d 525 (6th Cir. 1969); *Olivier v. Houghton County St. Ry.*, 96 N.W. 434, 435 (Mich. 1903) (ruling that wrongful death damages should be determined by what would have happened "had [the victim] not been injured"); *Mazza v. Huffaker*, 300 S.E.2d 833, 844 (N.C. Ct. App. 1983) (stating that compensation puts the victim in the position she would have been in if the injury had not occurred); *Reaugh v. McCollum Exploration Co.*, 163 S.W.2d 620, 621 (Tex. 1942) (stating that the fundamental purpose of damages is to place the victim "in the position that he would have occupied but for the injury in question").

58. See 3 LEONARD B. SAND ET AL., MODERN FEDERAL JURY INSTRUCTIONS (Civil) ¶ 77.01, at 77-7 (1993).

59. See RONALD W. EADES, JURY INSTRUCTIONS ON DAMAGES IN TORT ACTIONS 3 (1990 & Supp. 1995) ("The object of an award of damages is to place the plaintiff, as far as money can do it, in the situation he/she would have occupied if the wrong had not been committed."); PATTERN JURY INSTRUCTIONS—CIVIL CASES INSTRUCTION 164 (11th Cir. 1990) (describing compensatory damages as an attempt "to make [the victim] whole or as he was immediately prior to his injuries"). But see 3 SAND ET AL., *supra* note 58, ¶ 77.01, at 77-8 to -9 (MB 1993) (recommending against use of an instruction that referred to "restoring the plaintiff 'as he was immediately prior to his injuries'" (quoting *Murphy v. Eaton, Yale & Towne, Inc.*, 444 F.2d 317, 328 (6th Cir. 1971) (holding that it was reversible error to instruct the jury that "nothing can fairly be termed compensation which does not put the injured party in as good a condition as he would have been if the injury had not occurred"))). According to the court, the problem with the instruction in *Murphy* was that "it might not be possible ever to restore plaintiff to a condition as good as he was prior to the accident, and no amount of money can accomplish this purpose." *Murphy*, 444 F.2d at 328; see also 3 SAND ET AL., *supra* note 58, ¶ 77.01, at 77-9 (criticizing the *Murphy* instruction for "carrying the 'wholeness' concept too far").

arms and legs. Even when a tort victim uses his recovery to finance rehabilitation he does not literally make himself whole. A fake arm, an assistant, or any other surrogate for the victim's lost limb is just that—a substitute, not a return to the actual status quo ante.

If we cannot read "making whole" literally, we need a suitable interpretation. The insurance theory of compensation exploits this vacuum and translates the metaphor of making the victim whole into the economic objective of satisfying individual preferences. Yet rather than clarifying the metaphor, the economic construction of wholeness as preference satisfaction voids its meaning.

The fundamental riddle of tort compensation is, how could money ever be thought to make any personal injury victim whole? To solve it, we need to know whether any harms suffered because of personal injury admit of monetary repair. If money can erase these harms, the metaphor of making the victim whole is apt; if it cannot, then we should discard the metaphor and its implicit objective.

A. *Well-being and Preferences*

A tortfeasor infringes on the well-being of her victim, thereby harming him. This highly general description of tortious injury expresses the interdependence between well-being and harm. To ascertain what counts as a harm, we can consult what counts as well-being; to decide if money genuinely compensates for harm, we should determine whether money restores disrupted well-being.

Like neoclassical economic theory in general, the insurance theory of tort compensation presupposes that preference satisfaction constitutes, or reflects, well-being. Individuals fare according to how many of their preferences are satisfied. From a social perspective, we should try to satisfy as many individual preferences as possible. For example, if all or most people would genuinely prefer lower-priced goods to compensation for pain and suffering in the event of a product-related injury, then we should institute a products liability regime that denies damages for pain and suffering, if this will reduce prices. In this scenario, it is downright harmful to require tortfeasors to compensate for pain and suffering because this minimizes overall preference satisfaction, making more people worse off than they would otherwise be.

The common law has never held, however, that we award tort damages in order to maximize the satisfaction of preferences for accident insurance. Instead, courts assign tort damages a restorative task—a job courts understand to be distinct from satisfying preferences. The *Restatement (Second) of Torts* explains:

While the law of contracts gives to a party to a contract as damages for its breach an amount equal to the benefit he would have received

had the contract been performed, the law of torts attempts primarily to put an injured person in a position as nearly possible equivalent to his position prior to the tort. . . . This first purpose of tort law leads to compensatory damages.⁶⁰

According to the *Restatement*, "damages given for pain and humiliation . . . give to the injured person some pecuniary return for what he has suffered or is likely to suffer."⁶¹ When instructing juries, courts have emphasized the reparative aspect of tort awards for pain and suffering. For example, early in this century, the Supreme Court of Massachusetts upheld the following instruction:

If it is your conclusion that a case has been made out in behalf of the plaintiff, then there is a right to damages for the conscious suffering of Dr. Barney in the 11 days that he lived after the accident, and that includes both physical pain or hurt that was felt by the injuries to the body, and it also includes mental solicitude, anxiety or anguish, that were in your judgment suffered by the man during the 11 days that he lived.

Physical pain is hurt to the body; the suffering that is endured by reason of bodily injury. The law recognizes as a legitimate subject of recovery the anguish of mind that a man may go through, accompanying an injury; solicitude; anxiety as to whether he will recover; and you will be mindful of the situation that the ease presents. The feelings, mental in their character, apart from the bodily hurt; thoughts for friends, immediate relatives, arising from the feeling that life may come to an end, are matters for your consideration, and for such allowance by way of money compensation as you feel should be given. It is compensation, gentlemen, that you award.⁶²

More recent decisions affirm this commitment to the restorative nature of tort damages. In a recent airline crash case, Judge Jack Weinstein wrote: "There is a rich history in American law of compensating those injured for the full harm suffered, whether physical injury alone or in combination with mental anguish. . . . The plaintiff who receives damages for pain and suffering gains redress for the actual harm caused."⁶³ Similarly, the Ohio Supreme Court states:

The fundamental rule of the law of damages is that the injured party shall have compensation for all of the injuries sustained.

60. RESTATEMENT (SECOND) OF TORTS § 901 cmt. a (1977) (citation omitted).

61. *Id.* § 903 cmt. a.

62. *Barney v. Magenis*, 135 N.E. 142, 143 (Mass. 1922).

63. *In re Inflight Explosion on Trans World Airlines, Inc. Aircraft Approaching Athens, Greece* on April 2, 1986, 778 F.Supp. 625, 636 (E.D.N.Y. 1991), *rev'd on other grounds sub nom. Ospina v. Trans World Airlines, Inc.*, 975 F.2d 35 (2d Cir. 1992).

Compensatory damages are intended to make whole the plaintiff for the wrong done to him or her by the defendant. Compensatory damages are defined as those which measure the actual loss, and are allowed as amends therefor. For example, compensatory damages may, among other allowable elements, encompass direct pecuniary loss, such as hospital and other medical expenses immediately resulting from the injury, or loss of time or money from the injury, loss due to the permanency of the injuries, disabilities or disfigurement, and physical and mental pain and suffering.⁶⁴

Common-law authorities make no mention of preferences when explaining the function of tort awards. If satisfied preferences and well-being are not necessarily equivalent, and courts intend tort damages to repair the defendant's encroachment on the victim's well-being, then preferences should not determine tort awards.

Certainly, getting what one wants can contribute to one's well-being. Someone might want things that comprise her well-being, for their own sake or because she desires her well-being. Furthermore, simply having one's desires met may afford some well-being, regardless of the content of those desires. But well-being and satisfied preferences are not necessarily coincident. What is good for people is not always what they want; likewise, what people want is not always good for them.

Imagine someone whose every preference is satisfied. We could still ask sensibly, is he doing well or as well as possible? The question remains cogent because well-being and preference satisfaction can differ and even diverge: a person may not prefer what is in fact good for him. The most ready example is the drug addict. Having just gotten her fix, a heroin junkie's desires may be completely sated, at least for the moment, but nevertheless she is not faring particularly well, even right then. For fans of equating or measuring welfare with preference satisfaction, cases like the foregoing prompt resort to idealized preferences—typically, the preferences a person would have were she fully informed and rational.⁶⁵ This move allows criticism of actual preferences—such as for heroin or nicotine—while preserving a connection between well-being and satisfying preferences, albeit counterfactual ones.

The equation of well-being and preference satisfaction seems to assume that ideally one cannot or will not prefer anything other than what is best for oneself. On this approach, whatever people would prefer, if

64. *Fantozzi v. Sandusky Cement Prods. Co.*, 597 N.E.2d 474, 482 (Ohio 1992) (citations omitted).

65. For an example of the effects of making this sort of move, see Allan Gibbard, *Interpersonal Comparisons: Preference, Good, and the Intrinsic Reward of a Life*, in FOUNDATIONS OF SOCIAL CHOICE THEORY 165, 170-72 (Jon Elster & Aanund Hylland eds., 1986) (arguing that antipaternalism involves satisfying actual preferences as opposed to ideally informed preferences).

they were fully informed and rational, composes their actual well-being, by definition or by psychological necessity. This approach eliminates any possible deviation between well-being and ideal-preference satisfaction—at the cost, however, of circularity or empirical implausibility. If the relation between well-being and ideal-preference satisfaction is simply definitional, then this approach begs the question of the makeup of actual well-being. If the relationship is not just stipulated but claimed, it is implausible.⁶⁶ We can imagine cases in which all of a person's ideal preferences have been satisfied, yet the person actually remains quite miserable. Even if actual happiness is not identical with well-being, it seems odd to insist that this person enjoys tremendous well-being because the preferences she would have were she fully informed and rational have been satisfied. It also seems wrong to assert that people would never ideally prefer anything other than their own well-being, unless we simply assert that whatever someone ideally prefers comprises his actual well-being. This assertion again risks circularity or implausibility. It is possible that a fully informed, rational person might prefer to sacrifice some of his own well-being in return for another good, such as art, environmental conservation, or others' well-being.

For various reasons, then, preferences do not necessarily indicate well-being. Despite this untrustworthiness, however, legal economists assert that tort rules based on other considerations wrongly interfere with "consumer sovereignty."⁶⁷ Alan Schwartz, for example, rests his analysis on a "consumer sovereignty norm"⁶⁸ that "holds that the law should reflect the preferences of competent, informed consumers regarding risk allocation."⁶⁹ Schwartz argues that the preservation of individual autonomy requires complete obedience to these preferences.⁷⁰ To deviate from their satisfaction in the name of enhancing well-being is dangerously paternalistic.

But paternalism itself is not always objectionable. Often, precisely for the sake of their well-being, we override the preferences of those we believe incapable of correctly judging their own good. Even the consumer-sovereignty norm acknowledges this, by specifying adherence only to those preferences held by competent and informed consumers. Moreover, the insurance theory of compensation requires that tort awards conform to the

66. See *id.* at 173-75 (arguing that ideally informed preferences are not necessarily identical to, and may conflict with, superior considerations of welfare).

67. See Croley & Hanson, *supra* note 18, at 1792-93 (claiming that tort rules must respect the preferences of the "sovereign consumer").

68. Schwartz, *supra* note 9, at 357.

69. *Id.* at 355.

70. See *id.* at 357-60 (stressing the consistency of the consumer-sovereignty norm with the ends of corrective justice).

preferences of rational economic actors even if these preferences differ from those of actual people.

It is not even necessarily troubling to assess someone's well-being with reference to factors other than the preferences he would have were he informed and competent. When we lack any reliable evidence of what those preferences would be, we substitute our own judgments. Guardians of the severely incapacitated consult their own ideas when deciding what would be good for their charges. The guardian's views might differ from those the charge would have were she competent and informed. But this does not mean the guardian's views are automatically wrong. Likewise, even when someone is actually relatively informed and competent, someone else can coherently dispute that his preferences correctly indicate his well-being. Nor do all such disagreements stem from the first person's lack of information or less than perfect competence. Sometimes they arise because that individual has preferences that mistake or conflict with his good.

Even if it is always somewhat damaging to someone's well-being to override the preferences he would have if competent and informed—itsself a debatable proposition—it might still do that person good to do so. Jules Coleman nicely summarizes the contingency of the connection between autonomy and well-being. He explains that, "it is at least plausible that some individuals acting freely make themselves worse off; freedom does not necessarily ensure increased happiness. This much we know."⁷¹ If a person is sufficiently mistaken about her well-being, outside interference may harm her less than simply satisfying her misguided preferences would. While it may be paternalistic to disregard people's preferences when assessing their well-being, doing so may also benefit them.

An observer can question somebody else's well-being, even if that person reports feeling jolly or fulfilled. Dramatic examples of happy slaves aside, we ordinarily say things like, "Maybe Alf is happy writing copy for that ad agency—but it really isn't good for him." Here the observer feels that despite Alf's happiness, working as an adman impairs his well-being—perhaps by making him shallow or materialistic.

This sort of judgment reflects the nonexperiential aspect of well-being. The judgment rests on the thought that whatever Alf's feelings, it is not good for Alf to be greedy for luxury items or superficial. The outside observer appeals to criteria of well-being that are independent of both Alf's feelings and preferences. She considers instead whether Alf lives a good or worthwhile life, and whether his occupation permits him to do so.

71. JULES L. COLEMAN, *MARKETS, MORALS AND THE LAW* 123 (1988). On a variety of issues other than tort damages, Coleman criticizes legal economists for asserting that consent-based arguments justify legal measures intended to maximize welfare. See *id.* at 115-30, 133-39; see also JULES L. COLEMAN, *RISKS AND WRONGS* 166-82 (1992) (suggesting that economically efficient ex post rules do not reliably reflect what parties would have bargained for ex parte).

For any given person, satisfying his preferences and establishing his well-being may be identical, overlapping, or wholly at odds. If we aim to foster an individual's welfare, it makes sense to consult his desires, but to respond to them only insofar as this would actually contribute to his well-being, which has both experiential and non-experiential aspects. Getting what one wants may feel quite good, but it does not necessarily indicate or constitute faring well. We can question the well-being of someone who feels quite merry; likewise, we can conclude an unhappy person nonetheless enjoys a considerable degree of well-being. Any acceptable analysis must account both for well-being's connection to, and its detachment from, subjective experience.

B. *Well-being and Flourishing*

Focusing on what counts as a good life, and what is required to have one, suggests a far different conception of well-being than one based on preference-satisfaction. The conception I recommend rests upon the ideal of flourishing, or *eudaimonia*, most famously associated with Aristotle.⁷²

Despite the somewhat exalted ring of the term, flourishing is not itself a particularly rarified notion. Flourishing—or lack of it—pertains to the

72. See ARISTOTLE, *Nicomachean Ethics*, Bk. 1, chs. 7-12, Bk. 10, chs. 6-8 (J.E.C. Welldon trans., MacMillan & Co., 1912). *Eudaimonia* has sometimes been misleadingly translated as happiness rather than, more properly, as flourishing. See MARTHA NUSSBAUM, *The Fragility of Goodness* 6 n.† (1986) (explaining the mistake in equating *eudaimonia* with pleasure). Some contemporary utilitarians and neo-classical economists advocate that their own disciplines should replace their focus on utility with concerns for something like flourishing or the capacity to flourish. See, e.g., AMARTYA SEN, *Inequality Reexamined* 4-5, 31-34, 36-55 (1992) (arguing that welfare economics should focus on “capabilities and functionings”); Gibbard, *supra* note 65, at 183-92 (adopting “intrinsic reward of a life” as the alternative to utility). Philosophers continue to debate how best to interpret Aristotle's own treatment of *eudaimonia*. The search for a textually faithful, philosophically defensible understanding often focuses on Aristotle's apparent vacillation between the exercise of virtue and rational contemplation as the primary exemplar of *eudaimonia*. Throughout the first nine books of the *Nicomachean Ethics*, Aristotle apparently takes the exercise of virtue as the main component of *eudaimonia*. Then, in the tenth book, he seems to specify rational contemplation as the best activity for man. For philosophical treatment of this tension, see, for example, J.L. Ackrill, *Aristotle on Eudaimonia*, in *ESSAYS ON ARISTOTLE'S ETHICS* 15 (Amélie Oksenberg Rorty ed., 1980); John McDowell, *The Role of Eudaimonia in Aristotle's Ethics*, in *ESSAYS ON ARISTOTLE'S ETHICS*, *supra*, at 359; Thomas Nagel, *Aristotle on Eudaimonia*, in *ESSAYS ON ARISTOTLE'S ETHICS*, *supra*, at 7; Kathleen V. Wilkes, *The Good Man and the Good Man in Aristotle's Ethics*, in *ESSAYS ON ARISTOTLE'S ETHICS*, *supra*, at 341.

This issue need not concern us here because I am not attempting an explication of Aristotle. For my purposes, we need only a thin conception of flourishing, one that captures the intuition that people can lead more and less excellent or worthy lives. At least one scholar of Aristotle, John McDowell, maintains that Aristotle himself drew a distinction between a thin conception of *eudaimonia* and any particular substantive position on its precise specifics. See McDowell, *supra*, at 367. In any event, the current project need not decide the complete details of what constitutes excellence or worth in a life, although eventually I will address the role that money can play in advancing a life's excellence or worth, at least in this society.

quality of a person's life. Even if one is pessimistic or cynical about one's own chances for flourishing, most of us would object if someone else carelessly dashed our opportunities to lead lives of worth.

One way to introduce the idea of human flourishing is to contrast flourishing with pleasure and utility and with preference satisfaction. Economists turned their attention from pleasure and utility to preference satisfaction because they found it easier to count satisfied preferences and compare totals than to make interpersonal assessments of pleasure or utility.⁷³ Careful economists have never suggested an identity between preference satisfaction and pleasure or utility. Rather, they rely on satisfied preferences to gauge pleasure or utility, assuming a strong correlation between getting what we want and feeling good. An objector might doubt this correlation, and, even within economics, some have questioned whether it holds.⁷⁴ Yet even if one defends a correlation between preference-satisfaction and pleasure or utility, coherence does not demand equating them. Likewise, regardless of whether one suspects or concludes that flourishing correlates closely with either preference satisfaction or pleasure or utility, flourishing may be distinct from both. For present purposes, what matters is whether its distinctiveness, if it possesses any, bears on the appropriate approach to tort damages.

Aristotle himself advanced a highly general idea of flourishing. He wanted to answer the question, what is the good life for all human beings?⁷⁵ This is not my question. Rather, I assume that we already have some uncontroversial ideas about the variety of ways in which people can flourish and the sort of resources and circumstances required. As this formulation suggests, I assume pluralism about flourishing. Not only can there be more than one form of flourishing, there is usually more than one form available to any given person. This is not to say that anything counts—we rule out certain possibilities both for persons generally and for particular people—but we allow for, and expect, variation in human flourishing.

Unlike preference satisfaction, pleasure, or utility, flourishing involves both experiential and nonexperiential elements. This dual nature distinguishes flourishing as a conception of well-being. We can appreciate the nonexperiential side of flourishing by noting that nonfeeling organisms and even inanimate entities may flourish more or less. We can assess whether a houseplant, a rain forest, a city, or a business flourishes, although none

73. See generally Gibbard, *supra* note 65, at 165-68 (discussing economists' replacement of "pleasure with preference satisfaction as the standard of intrinsic value in utilitarian theory").

74. See SEN, *supra* note 72, at 39-72 (questioning this correlation, especially among the poor, and proposing an alternative approach to assessing welfare).

75. See BERNARD WILLIAMS, *ETHICS AND THE LIMITS OF PHILOSOPHY* 34, 40 (1985) (defining *eudaimonia* and interpreting it pluralistically).

of these feel. When we apply the idea of flourishing to creatures that do feel, however, we can take their subjective states into our reckoning. Thus, flourishing can have a definite subjective element, too.

To appreciate money's role in flourishing, we must carefully distinguish the capacity to flourish from flourishing itself. Consider a flourishing potted begonia. A mischief-maker could injure the plant in two different ways. She could spill acid on some leaves, causing the plant to lose its hardiness but not its capacity to flourish again. Or, she might transplant the begonia to insufficiently rich soil. Deprived of nourishment, the plant would wither, unable to thrive again. The repotting would have destroyed the plant's capacity to flourish. Finally, if the begonia wilts immediately upon transplantation and proceeds to languish, the mischief-maker has impaired both the plant's current flourishing and its capacity to do so.

Understanding well-being in terms of flourishing, we can reexamine the legal metaphor of making the victim whole. Injury interferes with the victim's flourishing—by directly diminishing it, by stunting his capacity to flourish, or both. Tort damages repair the victim's capacity to flourish, and he may use them to flourish anew. I say "may" quite deliberately. Tort law has never regulated how prevailing plaintiffs spend their damages, nor should it. Just as the state does not—and ought not—specify precisely how uninjured people should utilize their capacity for flourishing, neither should the state dictate how a tort victim exercises his capacity for flourishing, even if the state has facilitated its restoration.

Personal injury—physical or not—can interfere with someone's flourishing, just as malicious or careless gardening can wreck a begonia's. If a person loses his arm, for example, the injury will almost certainly detract from his immediate flourishing. His capacity for flourishing is also likely to suffer. He will be unable to perform his usual activities or to perform them as he once did. Presumably, at least some of these activities enhanced his life, making it good. Until or unless the injured person learns new skills or activities, or both, the loss of his arm reduces both his current flourishing and his capacity to flourish.

Nonphysical injury can interfere with flourishing in precisely the same ways. Suppose the person who lost his arm suffered tremendous agony in the accident. Clearly, the agony directly diminished his flourishing at that time. Further pain or emotional anguish due to the amputation would continue to reduce directly the victim's flourishing. Perhaps less obviously, pain and suffering can also stunt the capacity to flourish. Feeling well, physically and emotionally, not only can comprise flourishing, it can enable it. Feeling well feeds on itself, simultaneously contributing to current flourishing and strengthening the capacity to flourish. Feeling well also

makes it easier to perform other activities that can result in flourishing, experientially or otherwise. Those that feel well often have more energy than those that do not. Physically and emotionally robust people can devote themselves to political activism, challenging jobs, child rearing, friendships, and other valuable pastimes. When injury leaves someone grief-stricken or depressed, it deprives him of the capacity to engage in many of the activities that make a life worthwhile. Because personal injury diminishes flourishing or the capacity to flourish, or both, tort awards intended to make the victim whole should restore flourishing or the capacity to flourish, or both.

Flourishing sounds lofty, money mundane. Yet money fosters flourishing. Money is extremely versatile. Not only can we use it for purely hedonistic purposes, but we can also use it for philanthropy, to capitalize a new business, to send a child to college, and so forth. If money does not—or even could not—produce pleasure or happiness in its possessor, it can still be used to fund causes that can give one's life worth. Thus, money can facilitate both the experiential and the nonexperiential dimensions of human flourishing.

Furthermore, money can aid many species of human flourishing. If circumstances put one form beyond an injured person's grasp, money places other forms within reach. With a damages award, the amputee unable to continue playing the violin might start a school for aspiring musicians or endow the local symphony. Of course, he might succeed in using the money to restore his previous form of flourishing in all respects, but he need not manage this in order to flourish again.

Before, I claimed that to be an adequate part of a theory of tort damages, an account of well-being had to make sense of the traditional doctrinal goal of making the tort victim whole. The conception of well-being as flourishing satisfies this criterion: tortious injury interferes with flourishing; damages restore flourishing or the capacity for it, or both. What tort awards make whole, therefore, is the injured party's capacity for flourishing and in some cases his flourishing itself. Tort compensation can achieve this because an individual can flourish in more than one way. If injury forecloses one possibility, money can open others. Admittedly, different forms of flourishing may not be comparable or commensurable, restricting our confidence in how fine-grained tort awards can be. Still, we can tell when someone's capacity for flourishing has been impaired, and we can see how to enhance it. Monetary recovery can make a tort victim whole at least in rough terms.

In addition to making sense of making whole, wholeness understood as flourishing can account for significant, specific doctrinal features of the

law of tort damages.⁷⁶ Wholeness as flourishing makes sense of the usual classification of tort damages, the legal evolution toward allowing tort recovery for wrongful death, and judicial disagreement over allowing tort damages for loss of enjoyment of life. If wholeness as flourishing can explain basic doctrine and help analyze more tendentious issues, we can feel confident that it captures and appropriately refines the ideas implicit in the common law of tort damages.

Courts often hone broad doctrinal concepts when instructing juries in their application. For example, when instructing a jury on how to decide whether a defendant has breached the general duty of care, a court explains the general concept of acting as a reasonable person under like circumstances. The judge directs the jurors to employ more specific guides to reasonable conduct such as the Learned Hand test and customary or statutory standards. These subsidiary ideas give content to the broader ideal of the reasonable person. Similarly, in some jurisdictions, courts do not simply tell juries to award a plaintiff whatever monetary sum would make him whole; rather, these courts direct juries to consider lost wages, medical expenses, and pain and suffering when assessing compensation.

As noted before, money awarded under these categories does not erase injury and its effects. Rather, these doctrinal measures gauge the degree to which a personal injury has undermined the plaintiff's capacity to flourish. Income, health, and peace of mind partially comprise and enable flourishing. Any worthwhile human life is likely to include some degree of each. When personal injury deprives somebody of wages, vigor, or serenity, it impairs his pre-existing capacity to flourish in these respects or in ways that they advance. Assigning damages on these grounds targets these important components and means of flourishing.

The trend toward allowing tort suits for wrongful death might appear contrary to wholeness as flourishing. Traditionally, the common law barred tort recovery for wrongful death due to judicial reluctance to allow damages when the nominal recipient could not experience the fruits of recovery.⁷⁷ Yet courts and legislatures expressed discomfort at denying

76. Rather than survey every doctrinal twist and turn, I restrict my discussion to the basic categories of tort damages: lost wages, medical expenses, and pain and suffering; and to two pockets of doctrinal controversy: damage actions for wrongful death and damages for loss of enjoyment of life.

77. *See, e.g.*, *Donaldson v. Mississippi & Mo. R.R.*, 18 Iowa 280, 283-84 (1865); *McCarthy v. Chicago, Rock Island & Pac. R.R.*, 18 Kan. 46, 48 (1877); *Carey v. Berkshire R.R.*, 55 Mass. (1 Cush.) 475, 478-80 (1848); *Hyatt v. Adams*, 16 Mich. 179, 191-92 (1867); *Wyatt v. Williams*, 43 N.H. 102, 107 (1861); *Green v. Hudson River R.R.*, 28 Barb. 9 (N.Y. App. Div. 1858); *Worley v. Cincinnati, H. & D.R.R.*, 1 Handy 481, 485-86 (Ohio Super. Ct. 1855); *Hall v. Nashville & Chattanooga R.R.*, THOM. TENN. CAS. 204, 206 (Tenn. 1859) (unofficial reporter); *Baker v. Bolton*, 170 Eng. Rep. 1033 (K.B. 1808). *But see* *Plummer v. Webb*, 19 F. Cas. 894 (D. Me. 1825) (No. 11,234); *Cross v. Guthery*, 2 Root 90 (Conn. 1794); *Shields v. Yonge*, 15 Ga. 349, 356-58 (1854); *James v. Christy*, 18 Mo. 162, 164 (1853); *Ford v. Monroe*, 20 Wend. 210 (N.Y. Sup. Ct. 1838) (all

recovery for death—the most grievous injury possible.⁷⁸ Barring recovery for wrongful death certainly produces paradoxical deterrence effects. This undoubtedly explains some of the judicial and legislative unease. Presumably, though, expanding recovery for affected survivors could have adjusted incentives so as to discourage tortfeasors from opting for activities more likely to lead to deaths than to less drastic injury. So allowing actions for wrongful death cannot be explained entirely by considerations of deterrence. Wholeness as flourishing supplies a more complete solution.

Depending upon the wording of the statute creating the cause of action, in a suit for wrongful death the victim's estate may seek damages for loss of contribution to the financial upkeep of the decedent's dependents or for the financial loss to the estate.⁷⁹ If the tortious injury did not kill the decedent immediately, the estate may also recover for pain and suffering.⁸⁰ I have already discussed the relationship between awards

allowing the common law action for wrongful death). See generally Wex S. Malone, *The Genesis of Wrongful Death*, 17 STAN. L. REV. 1043 (1965) (discussing the origins and development of the wrongful death action in both England and America).

78. See, e.g., *Major v. Burlington C.R. & N. Ry.*, 88 N.W. 815 (Iowa 1902); *Bedore v. Newton*, 54 N.H. 117, 118-19 (1873); *Green*, 28 Barb. at 22; *Clark v. London Gen. Omnibus Co.*, 2 K.B. 648, 659 (Eng. 1906). A number of courts have recently overturned older decisions and allowed common law actions for wrongful death. See, e.g., *Moragne v. States Marine Lines, Inc.*, 398 U.S. 375, 405-08 (1970) (overruling *The Harrisburg*, 119 U.S. 199 (1886), which had held that there was no action under general maritime law for death caused by violation of maritime duties); *Barnette v. Butler Aviation Int'l*, 391 N.Y.S.2d 348, 350 (Sup. Ct. 1977) (overruling *Green* to allow extrastatutory wrongful death claims); *Gaudette v. Webb*, 284 N.E.2d 222, 227-29 (Mass. 1972) (overruling *Carey* to allow a common-law cause of action for wrongful death); cf. *Sumnerfield v. Superior Ct.*, 698 P.2d 712, 718 (Ariz. 1985) ("[S]tatute and precedent have combined to produce a wrongful death cause of action with common law attributes."). But see *Beninati v. Oldsmobile Div. of Gen. Motors*, 405 N.Y.S.2d 917, 919-20 (Sup. Ct. 1978) (disavowing *Barnette*). On the other hand, several courts have recently reaffirmed that one cannot bring a common law wrongful death claim. See, e.g., *Lompre v. Venetjoki*, 234 N.W.2d 664, 666 (Mich. Ct. App. 1975); *Bregant v. Fink*, 724 S.W.2d 337 (Mo. Ct. App. 1987); *Alfone v. Sarno*, 432 A.2d 857, 860 (N.J. 1981); *Cockinos v. GAF Corp.*, 611 A.2d 1154, 1155 (N.J. Super. Ct. 1992); *Taylor v. Black & Decker Mfg. Co.*, 486 N.E.2d 1173 (Ohio Ct. App. 1984). The courts that reject the common law cause of action generally base their rejection on the existence of a statutory action for wrongful death, which exists in most states. See, e.g., ALASKA STAT. § 09.55.580 (Michie 1996) (originally enacted in 1949); CAL. CIV. PROC. CODE § 377.60-.62 (West Supp. 1996) (California wrongful death statute dates back to 1851); FLA. STAT. ANN. § 768.16-.27 (West 1996 & Supp. 1997); LA. CIV. CODE ANN. art. 2315.2 (West Supp. 1997); MASS. GEN. LAWS ANN. ch. 229, § 2 (West Supp. 1997) (dates back to 1840); MICH. COMP. LAWS ANN. § 600.2922 (West 1986) (dates back to 1848); MO. REV. STAT. § 537.080 (1987) (dates back to 1855); N.J. STAT. ANN. § 2A:31-1 to -6 (West 1987) (dates back to 1877); OHIO REV. CODE ANN. § 2125.01 (Banks-Baldwin Supp. 1997); S.C. CODE ANN. § 15-51-10 (Law Co-op. 1976) (dates back to 1859); TEX. CIV. PRAC. & REM. CODE ANN. § 71.001-.010 (West 1996) (dates back to 1860); Lord Campbell's Act (Fatal Accidents Act), 1846, 9 & 10 Vict., ch. 93 (Eng.) (forming the basis of many American wrongful death statutes).

79. See RESTATEMENT (SECOND) OF TORTS § 925 cmt. b(1) (1977) (stating that the majority of states determine damages by the present worth of the contributions that would have been made to survivors).

80. See *id.* § 925, cmt. b(3). In some jurisdictions, the estate must bring a separate survival of tort action to recover damages for pain and suffering. See *id.* § 926.

based on these grounds and the capacity for flourishing. Although death may seem to foreclose all opportunities for flourishing, negating any reason for awarding damages to the decedent via his estate, this conclusion is unwarranted. Flourishing is not entirely a matter of subjective experience; indeed, some aspects of flourishing are completely nonexperiential. A person's inability to experience the uses of damages awarded him need not preclude their appropriateness, at least not if a damage award still contributes to the victim's capacity to flourish or to his flourishing itself. Monetary damages to the deceased can perform this function.

One common component of people's flourishing is their legacy. When we consider whether a dead person led a worthwhile life, we naturally examine what she left behind. Artistic creations, scholarly works, children and grandchildren—these represent a person's enduring mark. A flourishing life may qualify as such precisely because of its aftermath. Provision for one's heirs can be an important part of a meaningful legacy. A bequest of material resources increases the beneficiaries' capacity for flourishing by augmenting their financial fortunes. From an objective, nonexperiential point of view, such bequests can enhance the worth of the testator's own life. When a tortfeasor kills his victim, the only effect he can have upon the decedent's flourishing is through her legacy. Monetary damages paid to an estate increase the beneficiaries' inheritance. Since their inheritance bears on the worth of the tort victim's own life, these damages contribute meaningfully to the victim's own flourishing, even though the damages cannot afford the decedent experiential rewards. A bar against tort recovery for wrongful death forestalls the only available avenue for making the victim whole.

The nonexperiential aspects of flourishing also illuminate the award of damages for loss of enjoyment of life to tort victims left comatose by personal injury.⁸¹ As far as we know, a coma victim experiences nothing, neither pain nor pleasure nor anything else. This condition generally limits his tort recovery compared to a victim who experiences ongoing pain and anguish. Some courts have allowed comatose plaintiffs to recover for their continuing inability to enjoy their lives.⁸² Others have

81. See, e.g., *Akers v. Kelley Co.*, 219 Cal. Rptr. 513 (Ct. App. 1986); *Leiker v. Gafford*, 778 P.2d 823 (Kan. 1989); *Wise v. Kaye*, 1 Q.B. 638, 652 (Eng. C.A. 1962).

82. See, e.g., *Rufino v. United States*, 829 F.2d 354, 362 (2d Cir. 1987); *Holston v. Sisters of the Third Order of St. Francis*, 618 N.E.2d 334, 347 (Ill. App. Ct. 1993), *aff'd*, 650 N.E.2d 985 (Ill. 1995); *Moore v. Kroger Co.*, 800 F. Supp. 429 (N.D. Miss. 1992), *aff'd*, 18 F.3d 936 (5th Cir. 1994); *Eyoma v. Falco*, 589 A.2d 653 (N.J. Super. Ct. App. Div. 1983); *Flannery v. United States*, 297 S.E.2d 433, 438 (W. Va. 1982); see also *Florida Patient's Comp. Fund v. Von Stetina*, 474 So. 2d 783, 792 (Fla. 1985) (Overton, J., concurring and dissenting) ("I am unable to accept the proposition that a comatose patient may not, as a matter of law, recover compensatory damages for the loss of capacity for the enjoyment of life."); *McDougald v. Garber*, 536 N.E.2d 372 (N.Y. 1989) (Titone, J., dissenting) (arguing that "loss of enjoyment of life is an objective damage item,

denied this type of damages,⁸³ arguing that the same lack of awareness that precludes enjoyment of life precludes enjoyment of damages for this loss.⁸⁴ They find it incoherent to award damages designed to repair an experiential loss to a victim who no longer experiences. Understanding injury to well-being as interference with flourishing enables us to diagnose the source of the conflict among courts deciding whether to permit damages for loss of enjoyment of life.

Enjoyment of life might comprise part of someone's flourishing. Second-order pleasure in her experiences could give a person's life depth. Such second-order pleasure is not, however, a necessary condition of human flourishing. It may not even be a particularly common component. Some flourishing people never appreciate their lives. Consider a very simple person in good health, with fine friends and family, doing satisfying work. He may never consciously enjoy this worthwhile life. Or picture an angry, unhappy artist who channels her rage and despair into her masterpieces. Even if she herself takes no pleasure in her work or her life, she flourishes—at least to some degree.

In these examples, I assume that both the simple soul and the bitter creator have certain basic instruments of flourishing, specifically income and reasonable health. These people's flourishing does not depend upon their enjoying their lives, because they flourish in ways that do not require this. In this respect, the coma victim resembles the simple person and the angry artist. When selecting the grounds for damages for comatose tort victims, we should consider how their injury affects their capacity for

conceptually distinct from conscious pain and suffering"); Note, *Damages—Loss of Enjoyment of Life—New York Court of Appeals Denies Loss-of-Enjoyment Damages to Comatose Plaintiffs*, 103 HARV. L. REV. 811, 814-17 (1990) (arguing that *McDougald* should have taken a more ad hoc approach and awarded separate damages for loss of enjoyment of life); cf. *Laing v. American Honda Motor Co.*, 628 So. 2d 196, 207 (La. Ct. App. 1994) (allowing damages for loss of enjoyment of life for plaintiff who was temporarily comatose).

83. See, e.g., *Molzof v. United States*, 911 F.2d 18, 22 (7th Cir. 1990), *rev'd on other grounds*, 502 U.S. 301 (1992); *Flannery v. United States*, 718 F.2d 108, 111 (4th Cir. 1983); *McDougald*, 536 N.E.2d at 372.

84. See, e.g., *McDougald*, 536 N.E.2d at 372; cf. *Wheeler Tarpeh-Doe v. United States*, 771 F. Supp. 427, 457 (D.D.C. 1991), *rev'd on other grounds*, 28 F.3d 120 (D.C. Cir. 1994) (disallowing damages for loss of enjoyment of life for a blind, brain-damaged child who required long-term care, because he could not make use of the award); *Gregory v. Carey*, 791 P.2d 1329, 1336 (Kan. 1990) (allowing damages only for conscious pain and suffering and considering loss of enjoyment of life as part of pain and suffering); *Chausse v. Southland Corp.*, 400 So. 2d 1199, 1203-04 (La. Ct. App. 1981) (denying damages for pain and suffering in a wrongful death action when decedent did not regain consciousness after the accident); *Willinger v. Mercy Catholic Med. Ctr.*, 362 A.2d 280, 286 (Pa. Super. Ct. 1976) (denying damages for loss of life's amenities, as distinguished from loss of life, in a wrongful death action), *aff'd*, 393 A.2d 1188 (Pa. 1978). Note that in *Flannery* and *Molzof* the courts denied the comatose plaintiffs damages for loss of enjoyment of life because such damages would be punitive, and the Federal Tort Claims Act, under which the plaintiffs sued, generally does not allow recovery of punitive damages. See *Molzof*, 911 F.2d at 22; *Flannery*, 718 F.2d at 111.

flourishing. A person who is comatose can be nourished, cleaned, and protected from further ills. Tort damages for medical expenses and lost wages can pay for this care. Damages for lost income can also substitute for the support the victim would have provided his dependents and beneficiaries. Nobody objects to awarding these types of damages to tort plaintiffs left comatose by their injuries. Yet a coma victim suffers more than the loss of bodily health and wage earnings.

Many people feel more sorry for someone languishing in a permanent coma than for someone killed outright. We feel sad about a person who is deeply unconscious, wasting away, nourished by machine, and so forth. We are not sad simply for such a person's family and friends—we are sad for the person himself. Our sorrow responds to the comatose individual's profound loss of flourishing and capacity for flourishing. A coma prevents almost all forms of human flourishing. Breathing, absorbing nutrients, and remaining clean are among the most minimal elements of flourishing. Almost any human life includes others. The coma victim has lost the opportunity to pursue any of these. Aside from supplying money for medical expenses and wage replacement, the only way in which a tort award can affect the comatose plaintiff's capacity for flourishing is through his estate. When courts permit juries to award such plaintiffs an additional class of damages, they allow juries to increase these plaintiffs' estates. By at least potentially enhancing their legacy, this additional award does contribute, however imperfectly, to these plaintiffs' capacity to flourish. Yet such an award does not restore the capacity for a certain element of some people's flourishing—enjoyment of one's life or the capacity for such enjoyment. It is misleading to call damages for comatose plaintiffs damages for loss of enjoyment of life. The label improperly suggests that some sum of money can instill in a coma victim the capacity to enjoy his life or inspire in him enjoyment itself. Courts that deny the award of damages for loss of enjoyment of life bridle at this incongruity.

An award of damages for loss of enjoyment of life can be appropriately understood as an effort to repair capacity to flourish in the only way available to someone whose injuries have left her comatose. A prohibition of such awards can appropriately be understood as a recognition that enjoyment of her life will never comprise any part of a comatose person's flourishing. These two positions are not inconsistent. If courts made explicit the goal of enhancing the comatose tort victim's capacity for flourishing and framed a class of tort damages accordingly, courts could dissolve the doctrinal conflict over awards for loss of enjoyment of life. By expressly directing juries to consider what sum of money, if any, could add meaningfully to a comatose plaintiff's legacy, courts would direct jurors' attention toward the attainable goal of enhancing the victim's capacity for flourishing and away from the hopeless end of giving her an opportunity to enjoy life.

Its treatment of damages for permanently comatose tort victims establishes the honesty and pragmatism implicit in wholeness as flourishing. This conception of wholeness does not pretend that tort damages literally return plaintiffs to their pre-accident conditions. Instead, it focuses on how the injury inflicted by the defendant has impaired the plaintiff's pre-accident capacity to flourish and directs our attention to the ways in which financial compensation can restore it. While personal injury may preclude a tort victim from flourishing precisely as she did before, money damages can afford her the capacity to flourish in whatever ways remain possible.

III. The Insurance Theory of Compensation and Products Liability

Insurance theorists devote particular attention to products liability.⁸⁵ There are both historical and intuitive reasons that account for this focus. Historically, the most prominent justifications for strict products liability have compared products manufacturers to insurers. Intuitively, it is perhaps most natural to appeal to people's preferences as a guide to their well-being in commercial contexts, where we rather readily think of consumers allocating their dollars to achieve maximal satisfaction.

From the mid-1940s to the mid-1960s, many American jurisdictions followed California and the *Restatement of Torts* in shifting from negligence to a form of strict liability in product-related personal injury cases.⁸⁶ The new liability standard fell far short of imposing absolute liability on manufacturers for injuries caused by their products,⁸⁷ but it did eliminate the requirement that the plaintiff establish manufacturer fault as a prerequisite to recovery.⁸⁸ Also, the new approach expanded the range of persons permitted to sue a manufacturer, allowing any consumer—and eventually, any foreseeable user or bystander—injured by a product to bring suit against its maker.⁸⁹ Finally, in its original form, strict products liability restricted the affirmative defenses available to manufacturers.⁹⁰

85. See RUBIN, *supra* note 9, at 1-3; Calfee & Rubin, *supra* note 9, at 373; Schwartz, *supra* note 9, at 354-57.

86. See *Greenman v. Yuba Power Prods., Inc.*, 377 P.2d 897 (Cal. 1962); *Escola v. Coca-Cola Bottling Co.*, 150 P.2d 436, 440-44 (Cal. 1944) (Traynor, J., concurring); RESTATEMENT (SECOND) OF TORTS § 402A cmt. b (1965).

87. For example, § 402A does not allow recovery unless an "unreasonably dangerous" product causes the injury. RESTATEMENT (SECOND) OF TORTS § 402A(1) cmt. i (1965). It does not allow recovery if the injury results from "abnormal handling" of the product. *Id.* § 402A cmt. h. Nor does it allow recovery if the product bears warning and direction labels. *Id.* § 402A cmt. j. Even a seller of a product that is "unavoidably dangerous" will not be liable under § 402A if the product is "properly prepared and accompanied by proper directions and warning." *Id.* § 402A cmt. k.

88. *Id.* § 402A(2)(a).

89. *Id.* § 402A(2)(b) cmt. l.

90. *Id.* § 402A cmt. n.

In combination, these measures widened the scope of manufacturer liability. The originators of strict products liability fully intended this result.⁹¹ The reasons they advanced in favor of the new regime demonstrate their intent. Justifications cited the superior deterrence and compensation afforded by strict products liability.⁹² By making manufacturers more vulnerable to suit, the tort system increased pressure on them to market safer products. With reduced prerequisites for recovery, more plaintiffs could win damages for the costs of their injuries. Furthermore, advocates of strict products liability noted that manufacturers were in a more superior position than victims to finance compensation: manufacturers could spread the cost of compensating injured consumers across all consumers by charging every purchaser somewhat more per product unit.⁹³ This cost spreading would eliminate the imposition of the oppressive burdens of a product-related injury on the victim; it would also protect manufacturer profit margins. It was fair to consumers because any one of them could be unlucky enough to incur injury from a defective product⁹⁴—hence the appropriateness of having each consumer chip in to create a source of compensation for those actually hurt.

As I noted earlier, insurance theorists usually characterize the functions of tort liability as insurance and deterrence. We can trace the pedigree of this untraditional characterization to the foundations of strict products liability—even though the originators of this regime, unlike the insurance theorists, sought to expand, not constrict, manufacturer liability. As my explication indicates, the early advocates of strict products liability did portray manufacturers as the functional equivalent of insurers, that is, as parties well positioned to create a risk pool and pass along the costs of injuries to all members of the pool.

Thus, it was natural for a later generation of legal economists to view strict products liability—even tort liability generally—as an insurance mechanism. The insurance theorists, however, have not retained the focus on other goals emphasized in strict products liability. They urge delegating the deterrence function to mechanisms other than the tort system, and they have discarded entirely the corrective justice goal of requiring tortfeasors to restore their victims to the pre-accident state as fully as possible. Furthermore, the insurance theorists' treatment of the insurance-like

91. See *Escola*, 150 P.2d at 440 (Traynor, J., concurring); *Greenman*, 377 P.2d at 900-01. See generally William L. Prosser, *The Assault upon the Citadel (Strict Liability to the Consumer)*, 69 YALE L.J. 1099 (1960).

92. See *Escola*, 150 P.2d at 441 (Traynor, J., concurring); *Greenman*, 377 P.2d at 901; Prosser, *supra* note 91, at 1122-23.

93. See *Escola*, 150 P.2d at 441 (Traynor, J., concurring); Prosser, *supra* note 91, at 1120-21; RESTATEMENT (SECOND) OF TORTS § 402A cmt. c (1965).

94. See *Escola*, 150 P.2d at 441 (Traynor, J., concurring); Prosser, *supra* note 91, at 1121-22.

qualities of tort awards differs markedly from the analogy to insurance drawn by the initial proponents of strict products liability.

While these early advocates clearly did analogize manufacturers to insurers, they did not extend this analogy by comparing consumers to purchasers of first-party insurance. Their arguments for shifting to a form of strict liability concentrated on the need to adequately compensate victims of product-related injuries. They understood adequate compensation in traditional terms: restoring the victim's losses. Thus, for the original defenders of strict products liability, achieving adequate compensation coincided with deterrence because requiring traditional tort damages from producers of defective goods forced producers to internalize all the costs of their manufacturing activities.

In contrast, the insurance theorists do not understand tort compensation as it has traditionally been understood. Insurance theorists base their conception of appropriate tort compensation on individual demand for first-party insurance. If individuals do not—or would not, if they acted like economically rational actors—prefer a level of insurance equal to traditional tort compensation, then traditional tort compensation is inappropriately high.

This approach to compensation flows naturally from the insurance theorists' avowed commitment to principles of contract rather than tort. Generally speaking, damages for breach of contract rest on the first-party preferences reflected in the terms of the contract itself. The contractual agreement specifies what each party desires from the other. In the event of breach, the defaulting party must pay the other the cost of satisfying the unfulfilled desire. This cost may be lower than the cost of performance by the defaulter. The party in breach pays only this lower amount. In contracts, this result is acceptable because it achieves the basic purpose of the agreement, the satisfaction of the contracting plaintiff's desires.

The insurance theorists do not propose that we adopt a full-fledged return to contracts for allocating products liability. But they do urge that we model tort damages after a contracts oriented conception of compensation. We can recap their argument against damages for pain and suffering in these terms: assuming an economically rational actor would not contract with a products manufacturer for damages for nonpecuniary loss in the event of a product-related personal injury, the tort system should not award damages for such loss.

Tort damages, however, are not usually taken to rest on first-party preferences. Rather, tort liability arises from a failure to respect a socially mandated level of care or safety, and compensation depends on the costs of redressing resultant injuries, rather than the costs of supplying the victim with goods or services specified by prior agreement.

IV. Preferences, Flourishing, and the Demands of Justice

Consumers could bring tort actions against manufacturers prior to the advent of strict products liability. But before the demise of the privity limitation, a person injured by a product could recover against the manufacturer only if the victim and the producer had been in a contractual relationship. The shift from contract to tort signaled more than a decision to rectify market failure by substituting tort rules for the contractual rational consumers would have demanded if they could have. In striking the privity limitation on manufacturer's tort liability in *MacPherson v. Buick Motor Co.*,⁹⁵ Justice Cardozo wrote: "We have put aside the notion that the duty to safeguard life and limb, when the consequences of negligence may be foreseen, grows out of contract and nothing else. We have put the source of the obligation where it ought to be. We have put its source in the law."⁹⁶

Throughout his landmark opinion, Cardozo reiterates the distinctive character of tort's duty of care, specifically its independence from contract.⁹⁷ *MacPherson* itself was a products liability suit in which the injured purchaser of a defective automobile sued the car's maker. The manufacturer tried to disclaim any duty of care to the car owner, arguing that its general duty of care extended only to the automobile dealer with whom the manufacturer had contracted to supply salable cars. Cardozo rejected this position, insisting that the duty of care identified by tort extends to all those foreseeably affected by one's conduct.⁹⁸ He applied this principle to manufacturers, squarely placing producers' liability for personal injury in tort rather than contract.⁹⁹

Sometimes we feel it is fair for people to have their preferences satisfied, whatever their preferences are. Commercial contracts provide a perfect example. Contracting commits the parties to satisfying the

95. 111 N.E. 1050 (N.Y. 1916).

96. *Id.* at 1053.

97. *Id.* at 1052-54.

98. *Id.* at 1053.

99. Cardozo wrote:

The defendant knew the danger. It knew also that the car would be used by persons other than the buyer. . . . The maker of this car supplied it for the use of purchasers from the dealer just as plainly as the contractor in *Devlin v. Smith* supplied the scaffold for use by the servants of the owner. The dealer was indeed the one person of whom it might be said with some approach to certainty that by him the car would not be used. Yet the defendant would have us say that he was the one person whom it was under a legal duty to protect. The law does not lead us to so inconsequent a conclusion. Precedents drawn from the days of travel by stagecoach do not fit the conditions of travel to-day. The principle that the danger must be imminent does not change, but the things subject to the principle do change. They are whatever the needs of life in a developing civilization require them to be.

Id.

preferences reflected in their agreement. Smith wants to sell widgets, and Jones wants to buy them. They possess roughly equal bargaining power, and the market for widgets is reasonably perfect. Smith and Jones make a deal for Smith to supply Jones with a number of widgets at a given price and time. Suppose Smith breaches. She fails to deliver the widgets to Jones, whose preference for that agreed-upon shipment goes unsatisfied. We readily feel that Smith has worked an injustice against Jones. Moreover, we think it just for the state to enforce the contract at Jones's behest.

Various elements of the situation inspire these typical intuitions, though for present purposes, we need not itemize them. What matters here is that simple preference satisfaction would not be among them. In other words, neither the rightness of fulfilling contractual obligations nor the justness of state intervention upon breach springs straight from the fact of the preferences that moved the parties to contract in the first place. Smith's failure to supply the widgets would not have been unjust if Smith and Jones had not contracted to satisfy their respective desires for profit and widgets. Neither would it have been unjust if, in the absence of a contract, the state ignored Smith's preference for profit and Jones's for widgets. Under the conditions I sketched, however, a contract invests otherwise morally irrelevant private preference with moral import.

Personal injuries have no such effect. Unlike contract, tort law does not concern private preference. Rather, tort doctrine stipulates a legally defined, socially oriented standard of care, independent of particular individuals' preferences for creating or experiencing the risk of injury. Tort law aims to bring about a socially acceptable level of risky activity.

Just as individual private preference does not dictate the tort standard of care, neither should it govern the types or quantity of tort compensation. In fact, whenever we allocate resources among strangers, the recipients' private preferences rarely control what we give or how much. Except perhaps in gift-giving,¹⁰⁰ norms of appropriateness and need—rather than the receiver's preferences—regulate what we assign others. What qualifies as appropriate or necessary varies across contexts, depending primarily on the reasons for transferring resources.

Imagine the oddity of a tort suit in which the plaintiff's evidence of damages consisted of her testifying to her personal preferences for money or what it can buy. The plaintiff's desire for a certain sum or for particular goods and services carries little or no normative force. Even if jurors heard the plaintiff testify on this point, most likely they would be

100. *But see* WILLIAM IAN MILLER, HUMILIATION 47-52 (1993) (showing how appropriate gift-giving involves considering more than just the recipient's preferences, including issues of reciprocity, status, and obligation).

unmoved. This reaction would be entirely appropriate. In fact, a judge might well disallow plaintiff's recitation of her preferences for wealth, on grounds of irrelevance. A tort plaintiff's desires do not necessarily coincide with her due. Were it otherwise, courts would have to instruct juries to award tort victims whatever the jurors conclude the victim wants or perhaps whatever economists would consider it rational for tort victims to want. The insurance theory of compensation apparently calls for precisely this sort of fantastic jury instruction.

We can now apprehend the true misguidedness of the insurance theory. Its major failing does not lie in how its advocates apply its premises. The insurance theorists' basic mistake is not their misconception of the preferences of injured people, their misunderstanding of money's uses, or their misplaced distinction between pecuniary and nonpecuniary loss. The insurance theory's fatal flaw is that it makes the kinds and amount of tort recovery depend upon individual preferences for insurance, rather than communally-agreed-upon normative judgments about the impact of a personal injury upon the victim's overall well-being. Tort law protects our interest in our overall well-being rather than our well-being *qua* bargainers or landowners, interests safeguarded by contract and property law, respectively. When a jury assesses the harm inflicted on a tort victim, they ought to consider what he needs to flourish as readily or well as he did before stricken by the defendant's conduct.

The insurance theorists do mention need in their arguments. Robert Cooter has written:

I first define the two basic types of accidents and provide a vocabulary that classifies accidents according to their effect on the need for wealth. . . . Tortious accidents may be divided into two types—those that increase the need for wealth and those that do not.¹⁰¹

Alan Schwartz maintains:

The amount of satisfaction a dollar yields is a function of the importance of the needs it satisfies: A dollar that helps buy a meal for a poor and hungry person yields greater satisfaction than a dollar that would help the same person buy a yacht if he were rich. Since the satisfaction dollars bring changes with the significance of the needs dollars meet, the marginal utility of money varies with income.¹⁰²

101. Cooter, *supra* note 9, at 388.

102. Schwartz, *supra* note 9, at 362. Substantively, Schwartz's claim seems especially counterintuitive since he wrote as if poor people are less in need of money than wealthy people.

It is surprising to find writers within an economics tradition casting their arguments in terms of needs. Modern neoclassical economists generally talk in terms of preferences, and quite deliberately so.

Neoclassical economics broke with its predecessor, classical utilitarianism, when economists substituted preference-satisfaction for utility-maximization as the goal of social welfare policy. The switch was motivated by a desire to escape the evaluations latent in interpersonal utility comparisons. Because pleasure is a purely experiential state, an outsider comparing two others' pleasure must evaluate both the quality and quantity of their respective experience, placing the others' pleasure on a single scale devised by the outsider. Observing the choices others make is, in contrast, primarily a descriptive enterprise. If an economist wants to assess how well-satisfied someone's preference for oranges is, for example, basically she need only note how many oranges the consumer buys in a given pricing scheme. If she wishes to compare this consumer's preference-satisfaction with someone else's, she can investigate how much the second buyer is willing to spend for the same number of oranges. The economist need not consider who really experiences greater or more meaningful pleasure in purchasing, possessing, or eating oranges. This would land her squarely in the evaluative realm, requiring her to judge the consumer's subjective experience.

Judging what people need is similarly evaluative. Why, then, do the insurance theorists, who embrace the methods of neo-classical economics, revert to arguing in terms of people's needs rather than their preferences?

Claims of need possess a moral authority claims of preference do not. In fact, one of the definitive characteristics of a need, as opposed to a want, is that we have strong *prima facie* obligations to meet others' needs. No similar duty to satisfy wants exists. It may be benevolent, even admirably so, to satisfy someone's desires, but generally it is not morally obligatory. Yet we usually regard tort damages as morally compulsory: a tortfeasor has a duty to compensate his victim.¹⁰³ A theory of tort damages that overlooks the obligatory character of tort compensation cannot make sense of the practice. This is, I surmise, what drives the insurance theorists to urge that pain and suffering does not create a need for wealth. No need, no reason for the law to enforce plaintiff's demand for compensation.

While I understand—and endorse—the impetus for rooting tort damages in judgments of need, I insist that we reject the insurance theory's method for identifying tort victims' needs. Regardless of whether people really do or do not need less money when they are injured, we cannot rely

103. For a rich discussion of why corrective justice requires that a tortfeasor rather than some other party pay the victim's compensation, see COLEMAN, *RISKS & WRONGS*, *supra* note 71, at 303-60.

upon the insurance theory's approach to answer this question because the insurance theory misplaces authority for determining the needs of a tort victim.

The insurance theory vests authority for identifying tort victims' needs with the counterfactual, hypothetical fully informed, economically rational actor contemplating her relative desires for pre-accident and post-accident wealth. Tort law locates this authority with a factfinder—usually a jury—concentrating on a particular plaintiff's injuries and comparing his current situation to the one he would have been in had the defendant not harmed him. This process preserves tort's distinctive commitment to the ideal of corrective justice. I cannot fully defend this ideal here; rather, I aim to show how an a posteriori, case specific procedure that relies upon jury judgment furthers corrective justice while a priori, counterfactual economic analysis of preferences for insurance does not.

According to corrective justice, a tortfeasor incurs an obligation to pay compensation to her victim. Abstracting from administrative expenses of the tort system, corrective justice is entirely compatible with achieving efficient levels of risk-taking, because by fulfilling her obligation in corrective justice, the tortfeasor internalizes the full costs of unduly risky conduct and actors are deterred from unprofitable risk-taking. But in demanding that the tortfeasor's payment go to the tort victim—rather than the state, for example—corrective justice remains distinct from deterrence.

Corrective justice is something of an oddity. On one hand, we warm easily to the image of a careless or inappropriately risky actor restoring the balance in well-being disturbed when he injured someone else. On the other hand, we can also easily question the rightness of ever allocating money to somebody who happened to get hurt and basing the award on fortuities such as the income she happened to have been earning or an idiosyncratic medical reaction she happened to have. The second reaction arises from the tug of distributive justice, which concerns the overall distribution of wealth in a society. While theories of distributive justice differ over the significance of preexisting distributions for future ones, all theories of distributive justice address the allocation of wealth among the entire community. Thus, from the perspective of distributive justice, it seems odd to have a wealth-shifting mechanism that concerns the narrow question of what, if anything, a risk-creator owes someone he injures. This seems less odd, however, if we remember that tort compensation is far from the only method of wealth allocation used in this society. We rely on other mechanisms—including the market, taxation, and government spending—to secure distributive justice. Furthermore, tort law itself has distinctive features that address distributive justice. Liability standards are the chief example. Different liability rules distribute the costs and benefits of risky activity differently. Insofar as tort rules affect the flourishing of

people other than parties to any particular suit, they do so by creating incentives for care and activity; shifts in liability standards change these incentives. Those who object to the incentives created under any given liability rule should propose a different one, rather than urging the elimination of damages for pain and suffering.

The proper relationship between corrective and distributive justice poses an important, complex question, albeit one I do not seek to answer here. Certainly the demands of distributive justice and the demands of corrective justice may clash, at least on some occasions. Corrective justice and distributive justice may also complement one another. For example, suppose a state decides as a matter of distributive justice to completely socialize the provision of medical care. If that state also has a tort system like our own, corrective justice may not require a defendant to pay any damages for medical expenses to the plaintiff, who did not have to pay for treatment. It is a further matter, of both justice and social policy, whether the state should require the defendant to compensate the welfare fund for the expense of the victim's medical care.

Markets peopled by rational economic actors have long been championed as a mechanism for achieving distributive justice. Regardless of whether one favors markets for this purpose, a free and open market is at least a plausible candidate for a fair way of allocating wealth. In principle, the market is open to all and treats people's preferences for wealth similarly—two sensible prerequisites to distributive justice. A tort action, in contrast, is neither open to all comers nor does it treat parties similarly. Although we could seize tort suits as chances to do a little distributive justice—perhaps by having the jury inspect the relative wealth of the plaintiff and defendant and reallocate according to whatever distributive principles the law or the jury itself favors—it would be a strange and haphazard way to implement a society-wide allocation of wealth. If we are not using tort suits for this purpose, however, then it comes as no surprise that tort doctrine does not turn on factors plausibly important to distributive justice, such as responding to people's preferences for wealth.

People become parties to a tort action either because they have allegedly suffered injury or because they have allegedly caused it by inordinately risky activity. If a factfinder concludes that these allegations are true, the narrow question of corrective justice presents itself: what will it take for the tortfeasor to fix, as far as possible, the problems he has caused? To answer this query, it makes sense for the jury to focus on how the injury has affected the victim and to consider how money can ameliorate its impact on the victim's life. These inquiries can proceed independently of the victim's pre-accident preferences for wealth across different states of the world or for economically rational preferences for the same. Looking to either type of preference is likely to yield compensation awards inappropriate in a system of corrective justice.

Corrective justice focuses on what the tortfeasor did to the victim and how that can be fixed. This does not vary with preferences for pre-accident and post-accident wealth. This holds for lost income and medical expenses as well as pain and suffering. Granting Alan Schwartz's argument from "income effects," it may well not be economically rational to insure completely against these losses. If dollars gain in marginal utility after an injury, this is as true of dollars for livelihood and health care as it is for any other dollars. Regardless of the precise respect in which an injury impoverishes someone, the thesis of income effects holds that a poorer person needs fewer dollars than someone who is better off. Yet insurance theorists do not advocate—nor would they be likely to garner much support for—reducing tort awards for lost income or medical expenses on the ground that any money the accident victim now receives is worth more to her, on the margin, than money was before she was injured. This proposition is not made less preposterous by restricting its application only to those who chose to purchase insurance policies that promise less than full wage replacement or reimbursement for medical expenses or chose to forego such insurance entirely, even if such first-party insurance purchasers chose on grounds of their comparative desires for pre-accident and post-accident wealth. We have no problem calling upon a tortfeasor to correct her intrusion upon someone's income stream or budget for medical expenses whatever the current marginal utility of money to the injured person, her pre-accident insurance preferences, or even the pre-accident insurance preferences it would arguably have been economically rational for her to have. Requiring a tortfeasor to correct her intrusion on a victim's serenity should be equally indisputable.

If we suspect that juries in tort suits sometimes improperly take into account criteria of distributive justice—for example, by basing damage awards on the comparative wealth of defendant and plaintiff—courts can fashion specific instructions admonishing against this. If we think that lost income, medical expenses, and pain and suffering are not all and always the dimensions of human flourishing implicated by personal injury, courts can develop additional damage classifications, and trial judges can selectively instruct juries on the categories relevant to the case at hand. Making sure that tort awards are aimed clearly at restoring tort victims' capacity to flourish does not, however, demand the elimination of damages for pain and suffering; indeed, it prohibits their extinction.

