PERSPECTIVES ON THE FUTURE OF TORT DAMAGES: THE LAW SHOULD REFLECT REALITY

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I. INTRODUCTION

Damages are the engine that drives tort law. Whereas tort liability rules determine whether an actor may be held legally responsible for a harm, the law of damages determines how much that harm may be worth in terms of economic and noneconomic compensation, or other types of damages such as punitive damages.[1] The aggregation of different types of damages to arrive at some expected total dollar amount, or range, can and often does determine whether a tort action will be brought and its likelihood for resolution via a settlement or judgment.[2]

Many tort damage rules are deeply ingrained in American law, dating back to the nation's founding and incorporation of English common law.[3] During the past half century though, the clear trend in the law, often facilitated by skilled and imaginative plaintiffs' lawyers, has been to expand the scope of claimants who may recover damages, the types of damages that may be recovered, and the size of damage awards.[4] This shift in the law of damages has led to criticisms that the current system enables unsound "nuclear verdicts," widespread "social inflation" costs, unsupported punitive awards, and other windfall damages that demonstrate a civil justice system out of balance.[5]

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1. This Article uses the phrase "noneconomic damages" as opposed to other terminology such as nonpecuniary damages because noneconomic damage is how courts and legislatures routinely refer to damages lacking objective economic measurement (e.g. pain and suffering, emotional distress).

2. *See generally* David A. Hyman et al., *The Economics of Plaintiff-Side Personal Injury Practice*, 2015 U. ILL. L. REV. 1563 (examining economic factors that weigh on decision to pursue litigation); Marc A. Franklin et al., *Accidents, Money, and the Law: A Study of the Economics of Personal Injury Litigation*, 61 COLUM. L. REV. 1 (1961).

3. *See, e.g.*, Exxon Shipping Co. v. Baker, 554 U.S. 471, 491 (2008) (discussing eighteenth-century English law origins of modern Anglo-American punitive damages, which became "widely accepted in American courts by the middle of the [nineteen]th century"); Dimick v. Schiedt, 293 U.S. 474, 482–84 (1935) (reviewing the history of the doctrine of remittitur).

4. *See* discussion *infra* Section II.B.1, Part III.

5. *See, e.g.*, CARY SILVERMAN & CHRISTOPHER E. APPEL, U.S. CHAMBER OF COM. INST. FOR LEGAL REFORM, NUCLEAR VERDICTS: TREND, CAUSES, AND SOLUTIONS 34–38 (2022), https://instituteforlegalreform.com/wp-content/uploads/2022/09/1365_NuclearVerdicts_RGB_FINAL.pdf [https://perma.cc/Y5Z4-A44G] (analyzing jury verdicts of $10 million or more in the United States between 2010 and 2019); Shawn Rice, *Nuclear Verdicts Drive Need for Insurers' Litigation Change*, LAW360: INS. AUTH. (Sept. 8, 2021, 12:30 PM), https://www.law360.com/insurance-authority/articles/1418518/nuclear-verdicts-drive-need-for-insurers-litigation-change [https://perma.cc/8LZU-TXEE] (reporting that, between 2010 and 2018, the average size of verdicts exceeding $1 million rose nearly 1,000% from $2.3 million to $22.3 million and that nuclear verdicts "encompass awards where the noneconomic damages are extremely disproportionate" to other awarded damages); Telis Demos, *The Specter of Social Inflation Haunts Insurers*, WALL ST. J., Dec. 28,

This Article provides a renewed perspective on tort damages, namely how the law of damages should develop to improve fairness in the civil justice system. A guiding principle in this regard is to promote damages that reflect reality, not an exaggerated, highly subjective, or hypothetical alternate reality. The Article is intended to assist judges, and in appropriate situations, state legislatures, in developing balanced modern tort remedies.

This Article coincides with the development by the American Law Institute (ALI) of two treatises comprising final parts of the *Third Restatement of Torts*, a "Remedies" *Restatement* focusing on tort damages and a "Concluding Provisions" *Restatement* addressing tort topics not covered in previous restatements.[6] The proposed *Restatement of Torts, Third: Remedies* represents the first time the ALI has analyzed and given its imprimatur to a number of modern tort damage rules and related principles.[7] The project overlaps in certain areas with the proposed *Restatement of Torts, Third: Concluding Provisions* because some of the proposed "concluding provisions" endorse tort liability rules that most courts have not adopted, and these tort theories may expand the scope of recoverable damages if adopted more widely.[8]

This Article focuses on a subset of rules where the law of damages can and should be improved. Part II discusses five issues regarding economic compensatory damages and five issues regarding noneconomic compensatory damages. It then discusses the importance of mitigation of damages as an overarching public policy to support sound compensatory awards. Part III offers some perspectives on punitive damage awards.

II. COMPENSATORY DAMAGES

Compensatory damages are the most common tort remedy. They propose to return a claimant to his or her "rightful position" had the tort not occurred

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2019, at B14 (reporting a 300% rise in the frequency of verdicts $20 million or over in 2019 from the annual average from 2001 to 2010), https://global.factiva.com/hp/printsavews.aspx?pp=Save&hc=Publication [https://perma.cc/787K-Q2EF]; SCOTT M. SEAMAN & JASON R. SCHULZE, ALLOCATION OF LOSSES IN COMPLEX INSURANCE COVERAGE CLAIMS § 19:2 (2021) (describing "traditional components of social inflation").

6. The American Law Institute publishes Restatements of the Law, which are legal treatises addressed to judges to assist their development of state common law. *See About ALI*, AM. L. INST., https://www.ali.org/about-ali/ [https://perma.cc/KLL4-925J]. The ALI describes itself as "the leading independent organization in the United States producing scholarly work to clarify, modernize, and otherwise improve the law." *Id.*

7. *See* RESTATEMENT (THIRD) OF TORTS: REMEDIES Reporters' Memorandum at xvi (AM. L. INST., Tentative Draft No. 1, 2022) [hereinafter REMEDIES RESTATEMENT].

8. *See* RESTATEMENT (THIRD) OF TORTS: CONCLUDING PROVISIONS (AM. L. INST., Tentative Draft No. 1, 2022) [hereinafter CONCLUDING PROVISIONS RESTATEMENT].

or to otherwise make the individual "whole" as nearly as practicable by compensating for the injury.[9] Compensatory damages involve two very different concepts: economic and noneconomic damages. Economic damages are often capable of reasonably precise measurement, although they can include some speculation, such as a jury determination of future economic damages.[10] In comparison, noneconomic damages, such as pain and suffering or emotional distress, are almost entirely speculative.[11] Over time, the speculative aspects of compensatory damage awards have also increased in significant ways.[12]

A. Economic Damages

Economic damages aim to compensate for what an injury cost the claimant in actuality. For example, where an individual has died, what has that death caused—in pure economic terms—a member of the decedent's family or other person entitled to bring a wrongful death claim? Although it might sound straightforward to total an injured or deceased person's economic interests, such as lost wages or the value of other services no longer performed, and add to it any medical expenses caused by the relevant tort, the reality is that a number of key economic items are not easily measured.[13] Also, even if they are easily measured, other legal doctrines may interfere with their use in calculating economic damages.

1. "Phantom Damages" and the Collateral Source Rule

Determining economic damages for past medical expenses should be an easy task. After all, these are medical costs for services already rendered by a heath care provider, and there is a record of what was paid for them. A significant cost discrepancy, however, often exists in the provision of modern health care between amounts a health care provider bills for medical services and what is actually paid to settle that bill.[14] This difference is due to private

9. *See* REMEDIES RESTATEMENT, *supra* note 7, § 2 cmt. b; *see also* State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408, 416 (2003) ("Compensatory damages 'are intended to redress the concrete loss that the plaintiff has suffered by reason of the defendant's wrongful conduct.'" (quoting Cooper Indus. Inc. v. Leatherman Tool Grp. Inc., 532 U.S. 424, 432 (2001))).

10. *See infra* Section II.A.3.

11. *See infra* Section II.B.

12. *See, e.g.*, discussion *infra* Section II.A.4.

13. *See, e.g.*, Michael T. Brody, *Inflation, Productivity, and the Total Offset Method of Calculating Damages for Lost Future Earnings*, 49 U. CHI. L. REV. 1003, 1003–06 (1982) (describing the complexity of calculating lost future earnings).

14. Todd R. Lyle, *Phantom Damages and the Collateral Source Rule: How Recent Hyperinflation in Medical Costs Disturbs South Carolina's Application of the Collateral Source*

health insurance or government-sponsored insurance programs such as Medicare or Medicaid, which are able to negotiate discounted rates for patient care.[15] Consequently, a recipient of health care services may receive an invoice for some "list" or "sticker" price of medical costs even though that price is illusory and the insurer will pay some discounted amount.

These cost differences can be substantial and have increased over time.[16] For example, a hospital might bill $40,000 in health care expenses and expect to collect only a fraction, say $10,000, from a patient's insurer. Because the inflated amount does not reflect—and is often far afield from—the money that actually changes hands, the inflated amounts have been called "phantom damages."[17]

In most jurisdictions, a tort plaintiff is not prohibited from recovering phantom damages based on courts' interpretations of the collateral source rule.[18] The collateral source rule generally bars the admission of evidence that the plaintiff received compensation from some source other than the tortfeasor as a means of assuring the tortfeasor fully pays for the injury it caused.[19] It is questionable, though, whether the collateral source rule should be implicated at all in the recovery of past medical expenses because the amount paid by the insurer would appear to be the most reliable evidence of what the tortfeasor

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Rule, 65 S.C. L. REV. 853, 853 (2014); Andrew S. Bolin, *Amounts Billed vs. Amounts Paid Limiting the Presentation of Past Medical Expenses by Plaintiffs at Trial*, 30 TRIAL ADVOC. Q. 24, 24 (2011); Summer H. Stevens, *"Phantom" Damages: Collateral Source Benefits or Windfall for Plaintiffs?*, 47 FOR DEF. 53, 53 (2006).

15. *See* Stevens, *supra* note 14.

16. *See* Lauren M. Martin, *Who's Swallowing The "Bitter Pill"?: Reforming Write-Offs in the State of Washington*, 37 SEATTLE U. L. REV. 1371, 1390 (2014) (discussing the rise of managed care organizations and health care costs generally); Mark A. Hall & Carl E. Schneider, *Patients As Consumers: Courts, Contracts, and the New Medical Marketplace*, 106 MICH. L. REV. 643, 663 (2008) ("In 1960, '[t]here were no discounts; everyone paid the same rates'—usually cost plus ten percent.").

17. Goble v. Frohman, 901 So. 2d 830, 832 (Fla. 2005) ("[F]orcing an insurer to pay for damages that have not been incurred, would result in a windfall to the injured party. The allowance of a windfall would undermine the legislative purpose of controlling liability insurance rates because 'insurers will be sure to pass the cost for these phantom damages on to Floridians.'" (quoting Goble v. Frohman, 848 So. 2d 406, 410 (Fla. Dist. Ct. App. 2003) (citation omitted)).

18. *See, e.g.*, Wal-Mart Stores, Inc. v. Crossgrove, 276 P.3d 562, 567 (Colo. 2012) (en banc) (holding collateral source rule "bar[s] the admission of the amounts paid for medical services"); Bynum v. Magno, 101 P.3d 1149, 1159–60 (Haw. 2004) ("[T]he collateral source rule applies to prevent the reduction of a plaintiff's award of damages to the discounted amount paid by Medicare/Medicaid."); Acuar v. Letourneau, 531 S.E.2d 316, 323 (Va. 2000) (finding collateral source rule allows plaintiff to "present evidence . . . of full amount of his reasonable medical expenses without any reduction for the amounts written off by his health care providers").

19. *See* RESTATEMENT (SECOND) OF TORTS § 920A(2) (AM. L. INST. 1977) (restating traditional collateral source rule).

owes in economic compensatory damages.[20] Nevertheless, some courts have invoked the collateral source rule to bar evidence of amounts paid for medical care on the basis that a plaintiff paid for the benefit of private health insurance or was permitted to take advantage of government-sponsored insurance programs such as Medicare or Medicaid.[21] In doing so, these courts have allowed only evidence of amounts billed for medical expenses, which no one, including the health care provider, reasonably expects to be paid and, in fact, no one pays.[22]

Around one-third of states, in comparison, bar or limit recovery of phantom damages through court rulings or legislation.[23] For example, the California Supreme Court held that phantom damages could not be recovered "for the simple reason that the injured plaintiff did not suffer any economic loss in that amount."[24] In 2003, Texas became the first state to adopt legislation to limit recovery of incurred medical expenses to the amount actually paid by or on behalf of a claimant.[25] Other state legislatures have adopted similar approaches[26] or established a set-off to reduce a damages award by the amount of write-offs or negotiated discounts.[27]

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20. *See* Robinson v. Bates, 857 N.E.2d 1195, 1200 (Ohio 2006) (recognizing that "[b]ecause no one pays the negotiated reduction, admitting evidence of [discounts] does not violate the purpose behind the collateral-source rule"); Stanley v. Walker, 906 N.E.2d 852, 858 (Ind. 2009) ("The collateral source statute does not bar evidence of discounted amounts in order to determine the reasonable value of medical services.").

21. *See* Montgomery Ward & Co., Inc. v. Anderson, 976 S.W.2d 382, 385 (Ark. 1998) ("[D]iscounted medical services are a collateral source not to be considered in assessing the damages due a personal-injury plaintiff."); Hardi v. Mezzanotte, 818 A.2d 974, 985 (D.C. 2003) ("Because any write-offs conferred would have been a byproduct of the insurance contract secured by [the plaintiff], even those amounts should be counted as damages."); Leitinger v. DBart, Inc., 736 N.W.2d 1, 4, 19 (Wis. 2007) ("[T]he collateral source rule prohibits parties in a personal injury action from introducing evidence of the amount actually paid by a collateral source for medical treatment rendered to prove the reasonable value of the medical treatment.").

22. *See, e.g.*, *Stanley*, 906 N.E.2d at 856–57 ("[I]nsurers generally pay about forty cents per dollar of billed charges and that hospitals accept such amounts in full satisfaction of the billed charges.").

23. *See* RESTATEMENT (THIRD) OF TORTS: REMEDIES § 20 reporters' note e (AM. L. INST., Preliminary Draft No. 2, 2021) [hereinafter REMEDIES RESTATEMENT Preliminary Draft] (surveying case law on different approaches to discounted medical billing and collateral source rule).

24. Howell v. Hamilton Meats & Provisions, Inc., 257 P.3d 1130, 1133 (Cal. 2011).

25. *See* TEX. CIV. PRAC. & REM. § 41.0105 (West 2003); *see also* Haygood v. De Escabedo, 356 S.W.3d 390, 398–99 (Tex. 2011) (applying statute to preclude admission of billed amounts that do not reflect actual costs as evidence at trial).

26. *See* MD. CTS. & JUD. PROC. CODE ANN. § 3-2A-09(d)(1) (LexisNexis 2020); MICH. COMP. LAWS ANN. § 600.1482 (West 2017) (medical malpractice actions); N.J. STAT. ANN. § 2A:15-97 (West 2015 & Supp. 2022); N.C. GEN. STAT. ANN. § 8C-1, 414 (West 2011); OKLA. STAT. ANN. tit. 12, § 3009.1(A) (West 2015); W. VA. CODE ANN. § 55-7B-9d (West 2015).

27. *See* CONN. GEN. STAT. ANN. §§ 52-225a to 225b (West 2014); FLA. STAT. ANN. § 768.76(1) (West 2021); IDAHO CODE ANN. § 6-1606 (West 2010); MASS. GEN. LAWS ANN.

In other jurisdictions, courts have taken the approach of allowing both evidence of amounts billed and amounts paid to be presented to a jury, so the jury can decide what amount of medical expenses is "reasonable."[28] This approach, however, carries a potential to mislead jurors by giving undue weight to claimed medical expenses that are untethered to reality. Also, in jurisdictions adopting a set-off approach, the set-off is applied post-verdict by the court, meaning the jury only hears evidence of inflated medical costs.[29] This approach may similarly mislead jurors to believe a plaintiff has incurred higher medical costs, which may prompt jurors to inflate other types of damages such as pain and suffering or other noneconomic damages.[30]

When courts allow evidence of phantom damages, while either barring evidence of medical expenses actually paid or allowing amounts billed and amounts paid to be considered together, it undermines the basic purpose of economic compensatory damages.[31] They are embracing a fiction that either blindfolds or misleads jurors, when the economic damages are readily capable of precise measurement.[32] Indeed, some courts have recognized that actual amounts paid for medical services by programs such as Medicare are not just evidence for a factfinder to consider, but rather are "dispositive of the reasonable value of healthcare provider services."[33] Some legislatures have also addressed concerns about appropriately valuing a plaintiff's decision to procure the health insurance that allows for discounted medical expenses by permitting a credit for premiums paid.[34]

Courts and legislatures should work towards more accurately measuring the reasonable value of incurred medical expenses instead of adhering to

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ch. 231, § 60G(e) (West 2020) (medical malpractice actions); MICH. COMP. LAWS ANN. § 600.6303(1) (West 1986); MINN. STAT. ANN. § 548.251 (West 2008); MO. ANN. STAT. § 490.715(1)–(3) (West 2017); N.Y. C.P.L.R. 4545(a) (MCKINNEY 2009).

28. *See* Patchett v. Lee, 60 N.E.3d 1025, 1029–32 (Ind. 2016); Pexa v. Auto Owners Ins. Co., 686 N.W.2d 150, 156–57 (Iowa 2004); Martinez v. Milburn Enterprises, Inc., 233 P.3d 205, 222–23 (Kan. 2010) (holding amount accepted as full payment by a health care provider is admissible in court as evidence of the reasonable value of the medical services); *see also* ALA. CODE § 12-21-45(a) (2022) (authorizing introduction of evidence of actual medical expenses paid); OHIO REV. CODE ANN. § 2315.20 (West 2021) (authorizing introduction of limited types of evidence of actual medical expenses paid).

29. *See, e.g.*, Candler Hosp., Inc. v. Dent, 491 S.E.2d 868, 869 (Ga. Ct. App. 1997) (explaining that a plaintiff is entitled to present the full amount billed, after which the court can reduce the verdict amount based on write-offs).

30. *See* Steven B. Hantler et al., *Moving Toward the Fully Informed Jury*, 3 GEO. J. L. & PUB. POL'Y 21, 26–30 (2005) (discussing problems with collateral source rule, including potential for duplicative or inflated recoveries).

31. *See supra* Section II.A.1.

32. *See* Hantler et al., *supra* note 30, at 30–31.

33. Stayton v. Del. Health Corp., 117 A.3d 521, 533 (Del. 2015).

34. *See, e.g.*, MICH. COMP. LAWS SERV. § 600.6303(2) (LexisNexis 2016); MASS. GEN. LAWS ANN. ch. 231, § 60G(b) (West 2020); N.Y. C.P.L.R. 4545(a) (MCKINNEY 2009).

conventions such as the collateral source rule that make no sense in the provision of modern health care. As the United States moves towards a healthcare system in which everyone has some form of insurance, the actual amount of medical expenses paid will necessarily reflect *the* reasonable value of those services. No one reasonably expects to pay the "sticker" price to buy a car; it is time to stop pretending a "sticker" price matters for the provision of health care.

2. Judgment Interest

Another area where economic compensatory damages depart from reality is where pre- and post-judgment interest rates are set at a fixed amount that does not reflect the actual time value of money. Judgment interest, similar to other types of compensatory damages, proposes to make a claimant "whole" by compensating for the time it takes to litigate a matter.[35] These interest awards embody the adage that "a dollar today is worth more than a dollar tomorrow" (even though that is not always true with the remote possibility of deflation). The objective of purely compensatory interest breaks down, however, where the interest award bears little or no resemblance to prevailing market interest rates. Claimants are overcompensated if an interest rate is set too high and undercompensated if it is set too low.

More than half of states employ a fixed interest rate on some types of damages.[36] This may include pre- or post-judgment interest (or both) on all damage awards or discrete categories of damages such as "liquidated" or "ascertainable" damages.[37] In three states, the generally applicable pre- and

35. Becker Holding Corp. v. Becker, 78 F.3d 514, 516 (11th Cir. 1996).

36. *See* ALA. CODE §§ 8-8-1, -10(a) (2017); ARK. CODE ANN. § 16-65-114(a) (West 2020); CAL. CONST. art. XV § 1; CAL. CIV. CODE §§ 3287(c), 3289(b), 3291 (West 2016); CAL. CIV. PROC. CODE § 685.010(a) (West 2009); COLO. REV. STAT. §§ 5-12-101, -102(1)(b), (2), (4)(b) (2022); CONN. GEN. STAT. §§ 37-1(a), 37-3a, 37-3b(a), 52-192a(c) (2021); D.C. CODE § 28-3302 (2013); HAW. REV. STAT. ANN. § 478-3 (LexisNexis 2020); 735 ILL. COMP. STAT. 5/2-1303 (2003 & Supp. 2022); IND. CODE §§ 24-4.6-1-101 (2021); KAN. STAT. ANN. § 16-201 (2007 & Supp. 2021); KY. REV. STAT. ANN. §§ 360.010(1), 360.040 (West 2022); MD. CTS. & JUD. PROC. CODE ANN. § 11-107 (LexisNexis 2020); MASS. GEN. LAWS ch. 231, §§ 6B, 6C (2020); MINN. STAT. ANN. § 549.09(c)(2) (Supp. 2020); NEB. REV. STAT. § 45-104 (2021); N.M. STAT. ANN. § 56-8-4(A) (2021); N.Y. C.P.L.R. 5004 (MCKINNEY 2007); N.C. GEN. STAT. §§ 24-1, -5 (2021); OR. REV. STAT. § 82.010 (2021); 42 PA. STAT. AND CONS. STAT. ANN. § 8101 (West 2017); 41 PA. STAT. AND CONS. STAT. ANN. § 202 (West 2014); R.I. GEN. LAWS §§ 9-21-8, -10 (2021); S.C. CODE ANN. § 34-31-20 (2020); S.D. CODIFIED LAWS §§ 21-1-13.1 (2004), 54-3-16 (2017); TENN. CODE ANN. § 47-14-123 (2018 & Supp. 2020); VT. STAT. ANN. tit. 12 § 2903(c) (West 2022); VT. STAT. ANN. tit. 9, § 41a(a) (West 2022); VA. CODE ANN. §§ 6.2-302, 8.01-382 (2021); WYO. STAT. ANN. § 1-16-102(a) (2003); WYO. STAT. ANN. § 40-14-106(e) (2019).

37. *See* REMEDIES RESTATEMENT, *supra* note 7, § 14, at cmt. c (discussing doctrinal evolution of interest awards).

post-judgment interest rate is fixed at 12%.[38] New Mexico sets its post-judgment interest rate at 15% for judgments based on tortious conduct.[39] At least seven states set a judgment interest rate of 10%.[40] Several other states apply a fixed interest rate of 8% or 9%.[41]

By way of comparison, the market yield on U.S. Treasury Securities at one-year constant maturity, which is the rate used to calculate post-judgment interest in federal court,[42] has been below 1% for most of the past decade and has not exceeded 2.75% over that period.[43] Interest rates that exceed this rate, or a comparable market rate, multiple times over—or possibly by double digits—go far beyond compensating plaintiffs for the time value of money and effectively penalize civil defendants for choosing to exercise their right to defend themselves in lawsuits. As courts have recognized, a high interest rate and corresponding interest award can "transform[] . . . a compensatory damage award to a punitive one."[44] It may violate a defendant's due process rights.[45] In addition, the threat of a large interest penalty unrelated to the merits of a case may enable claimants to exert undue leverage against defendants to settle cases for higher amounts.

In many instances, fixed interest rates that greatly exceed prevailing market rates represent the product of very different times. Interest rates

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38. Massachusetts, Rhode Island, and Vermont have 12% pre- and post-judgment interest rates. MASS. GEN. LAWS ch. 231, §§ 6B, 6C (2020); R.I. GEN. LAWS §§ 9-21-8, -10 (2021); VT. STAT. ANN. tit. 12 § 2903(c) (West 2022).

39. N.M. STAT. ANN. § 56-8-4(A)(2) (2021).

40. States with 10% judgment interest rates include California, Connecticut, Hawaii, Maryland, Minnesota (for judgments over $50,000), South Dakota, and Wyoming. *See* CAL. CIV. CODE §§ 3289(b), 3291 (West 2016); CAL. CIV. PROC. CODE § 685.010(a) (West 2009); CONN. GEN. STAT. § 37-3b(a) (2021); HAW. REV. STAT. ANN. § 478-3 (LexisNexis 2020); MD. CTS. & JUD. PROC. CODE ANN. § 11-107 (LexisNexis 2020); MINN. STAT. ANN. § 549.09(c)(2) (Supp. 2020); S.D. CODIFIED LAWS §§ 21-1-13.1 (2004), 54-3-16 (2017); WYO. STAT. ANN. § 1-16-102(a) (2003).

41. Colorado, Illinois, Oregon, and New York have 8% or 9% judgment interest rates in some cases. COLO. REV. STAT. §§ 5-12-101, -102(1)(b), (2), (4)(b) (2022); 735 ILL. COMP. STAT. 5/2-1303(a) (2003 & Supp. 2022); N.Y. C.P.L.R. 5004(a) (MCKINNEY 2007); OR. REV. STAT. § 82.010(2) (2021).

42. 28 U.S.C. § 1961(a).

43. *See Market Yield on U.S. Treasury Securities at 1-Year Constant Maturity, Quoted on an Investment Basis*, FED. RSRV. BANK OF ST. LOUIS, https://fred.stlouisfed.org/series/WGS1YR [https://perma.cc/ZC7C-LLKS].

44. Ford v. Uniroyal Pension Plan, 154 F.3d 613, 618 (6th Cir. 1998); *see also* Rochow v. Life Ins. Co. of N. Am., 780 F.3d 364, 376 (6th Cir. 2015) ("Prejudgment interest cannot be awarded . . . at a rate so high that the award amounts to punitive damages.").

45. *See, e.g.*, Brief for Appellant at 48–53, Greene v. Philip Morris USA Inc., No. 2021-P-0738 (Mass. App. Ct. Feb. 15, 2022) (challenging constitutionality of Massachusetts's statutory 12% rate of interest on judgments); *cf.* Boddie v. Connecticut, 401 U.S. 371, 377 (1971) ("[D]ue process requires, at a minimum, that absent a countervailing state interest of overriding significance, persons forced to settle their claims of right and duty through the judicial process must be given a meaningful opportunity to be heard.").

skyrocketed in the 1970s and 1980s, triggered by rampant inflation stemming from factors such as the oil crisis of that era, increased government spending, and changes in monetary policy.[46] Rates also became more volatile, which created a natural desire to provide predictability through fixed rates. For example, the prime rate, which is a widely used benchmark of American lending institutions, typically ranged between 3% and 7% during the 1950s through the early 1970s.[47] The rate spiked to 12% in 1974 and hit its all-time high of 21.5% in 1980.[48]

Over the last several decades, interest rates have been far more stable.[49] Fixed rates are no longer needed to promote consistency in compensatory interest calculations, especially where these rates are now far more likely to serve a punitive—not a compensatory—function. A solution to promote fair compensatory interest awards is straightforward; a state legislature need only replace a fixed judgment interest rate with an interest rate tied to a variable market rate.

Numerous state legislatures have updated their judgment interest statutes to reflect the reality of the twenty-first century. Often, they have done so by using a variable rate in combination with a modest cushion or buffer to err on the side of overcompensating a claimant versus potentially undercompensating. For example, Wisconsin eliminated its 12% fixed post-judgment interest rate and replaced it with the prime rate plus an additional 1%;[50] Arizona replaced its 10% fixed rate with a rate set at the lesser of the prime rate plus 1% or 10%;[51] and Tennessee replaced its 10% fixed rate with the prime rate minus 2%.[52] Other states, in comparison, have lowered their fixed rate to another fixed rate that more closely reflects current interest rates, but this halfway measure leaves open the potential for overcompensation or under-compensation as interests rates invariably creep up or down over time.[53]

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46. *See* Allan H. Meltzer, *Origins of the Great Inflation*, 87 FED. RSRV. BANK ST. LOUIS REV. 145, 145, 159, 167 (2005).

47. *See Prime Rate History*, FEDPRIMERATE.COM, http://www.fedprimerate.com/wall_street_journal_prime_rate_history.htm [https://perma.cc/AP5K-7BAC].

48. *Id.*

49. *See id.*

50. *See* S.B. 14, 100th Leg., Spec. Sess. (Wis. 2011) (amending WIS. STAT. ANN. §§ 807.01(4) (2011), 814.04(4) (2021), and 815.05(8) (2011)).

51. *See* S.B. 1212, 50th Leg., 1st Reg. Sess. (Ariz. 2011) (amending ARIZ. REV. STAT. ANN. § 44-1201 (2011)).

52. *See* H.B. 2982, 107th Gen. Assemb., 2d Reg. Sess. (Tenn. 2012) (codified at TENN. CODE ANN. § 47-14-121 (West 2013)); *see also* TENN. CODE ANN. §§ 47-14-102(7), 47-14-105 (West 2013).

53. *See, e.g.*, H.B. 223, 2017 Gen. Assemb., Reg. Sess. (Ky. 2017) (amending KY. REV. STAT. ANN. § 360.040 (2017) to reduce 12% fixed rate to 6%); S.B. 72, 102d Gen. Assemb., 1st Reg. Sess. (Ill. 2021) (amending 735 ILL. COMP. STAT. 5/2-1303 (2003) to reduce prejudgment interest rate for personal injury and wrongful death actions from 9% to 6% and limit prejudgment interest recovery to no more than 5 years).

Legislatures in states with a fixed judgment interest rate should act to restore the compensatory purpose of judgment interest so that it does not penalize defendants who choose to assert their right to defend a lawsuit.[54] Courts, for their part, can apply a prevailing market interest rate where the judgment interest rate is discretionary.[55] These commonsense measures promote more accurate compensatory awards that do not unfairly distort litigation dynamics.

3. Future Economic Losses

Future economic loss represents perhaps the most speculative type of economic compensatory damages.[56] Calculating future loss often requires consideration of numerous variables and assumptions, especially if trying to project the course of a person's life in the absence of a tort over many years or decades.[57] Even in the relatively straightforward situation of a person wrongfully denied a job, that person may collect lower wages for the rest of his or her work life, or that person might end up securing an even better job they otherwise would not have obtained. It is hard to predict with confidence. People also decide to enter or exit the workforce, or change occupations, at different times for myriad reasons, such as to raise children, take care of sick parents, travel, relocate, reduce stress, or because they have lost interest in a specific job or in working altogether. Modeling all of the realistic economic possibilities and their timing, along with the curveballs life throws along the way, to arrive at some future amount of economic loss is inherently incapable of precise measurement.

Some jurisdictions, recognizing that damages for future economic loss are simply too speculative and uncertain, do not allow their recovery for certain disputes.[58] In most jurisdictions, however, evidence of future economic loss

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54. The same compensatory goal would apply to a fixed judgment interest rate set well below market rates, but there do not appear to be any examples where that is the case.

55. *See* REMEDIES RESTATEMENT, *supra* note 7, § 14(a) (endorsing award to prevailing plaintiff of "prejudgment interest at a reasonable market rate").

56. *See* Brody, *supra* note 13, at 1003 (recognizing challenges in "having to predict events yet to occur" with respect to lost future earnings).

57. *See id.* at 1007–10 (discussing economic factors affecting awards for lost future earnings).

58. *See, e.g.*, REMEDIES RESTATEMENT, *supra* note 7, § 5, at cmt. g ("One area in which plaintiffs have had special difficulty proving damages with reasonable certainty is when defendant's tortious conduct has interfered with plaintiff's new business or a new job."); Maddaloni v. W. Mass. Bus Lines, Inc., 438 N.E.2d 351, 356 (Mass. 1982) (no recovery of "lost wages and fringe benefits unrelated to past services" for breach of good-faith covenant); Lewis v. Loyola Univ. of Chi., 500 N.E.2d 47, 51 (Ill. App. Ct. 1986) (rejecting future economic damages in tenure denial case and stating Illinois disallows such damages because they are "too speculative and uncertain").

may be presented in the form of expert evidence, a practice that may produce results as dependent on an expert's demeanor or attractive personality as any reasonably certain mathematical computation.[59] Nevertheless, there are steps courts can take to help improve accuracy and fairness in this inherently speculative exercise.

A vital factor in assessing reasonable future economic loss is whether a judge acts as a faithful "gatekeeper" in screening highly speculative expert evidence or other testimony that lacks reliability.[60] For instance, projections of future lost or reduced wages, or future medical expenses (especially if based on inflated phantom damage amounts never paid), over a lifetime require careful scrutiny of the underlying assumptions because modest changes in those assumptions will likely lead to dramatically different totals based on the projected time frame alone. Simply allowing jurors to "hear everything" and make up their own minds carries a significant risk that jurors will be misled by unreliable expert evidence.[61] Even objective evidence, such as employment statistics or actuarial data, may only provide a reliable assessment of a decedent's expected future earnings or economic life if used in a proper context. For instance, the information might be more likely to mislead jurors if used for a future damages calculation where the claimant vowed never to work that long or made plans to change careers.

Similarly, a judge should act as a gatekeeper against biased and unhelpful assessments by family members or relatives of an injured or deceased person's abilities. Many parents, for example, earnestly believe their injured or deceased child would have gone on to lead an extraordinary life and enjoy a lucrative career, but that assessment is unlikely to be based on anything concrete or truly predictive.[62] There is simply too much uncertainty, and too

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59. *See, e.g.*, Mukhtar v. Cal. State Univ., Hayward, 299 F.3d 1053, 1063–64 (9th Cir. 2002) (referring to "the aura of authority experts often exude, which can lead juries to give more weight to their testimony").

60. As the U.S. Supreme Court recognized, expert testimony "can be both powerful and quite misleading" because juries have difficulty evaluating competing experts. Daubert v. Merrell Dow Pharms., Inc., 509 U.S. 575, 595 (1993). As a result, the Court charged district courts with being gatekeepers, stating "the trial judge must ensure that any and all scientific testimony or evidence admitted is not only relevant, but reliable." *Id.* at 589. Amendments to Rule 702 reinforced this commitment to reliable evidence. *See* FED. R. EVID. 702 advisory committee's note to 2000 amendment.

61. *See* Robert J. Shaughnessy, Daubert *After a Decade*, 30 LIT. 19, 19–20 (2003) (explaining that prior to *Daubert*, jurors could "hear everything from unimpeachable analysis to junk science," thereby risking the jury's reliance on potentially unreliable expert evidence when reaching a verdict).

62. *See* REMEDIES RESTATEMENT Preliminary Draft, *supra* note 23, § 19, at cmt. d ("Predicting lifetime future earnings of a young child is essentially impossible, but courts necessarily attempt the task.").

little information, off of which to work.[63] Some courts, though, will allow a jury to hear such assessments on the justification the assessment remains subject to a defendant's cross-examination.[64] Doing so, however, may turn a blind eye to obvious prejudice. Understandable juror sympathy can lead to future economic damage awards based more on wishful thinking than fact, and can inflame jurors' passions where an innocent person has been disabled or killed so that jurors take out their anger on a defendant made to challenge a loved one's glowing-yet-arbitrary assessment.[65]

Another way to improve the reliability of future economic loss calculations is to drill down on the economic reality of *that* individual who is tortiously injured, not some selectively fabricated composite. Analyzing a person's economic opportunity on an individual level may carry a risk that inappropriate characteristics—namely race, ethnicity, or sex—enter calculations, but individualized attention can be accomplished in ways that do not risk perpetuating existing socioeconomic disparities.[66] Individualized characteristics such as age and health, for example, are almost uniformly looked at in calculating future economic loss.

A more controversial application with which courts have grappled is whether an individual's immigration status should be considered in calculating future economic damages.[67] On one hand, whether a person can legally work in a country, or is at risk of deportation, appears highly relevant to their job prospects and future earning capacity.[68] On the other hand, immigration policies are subject to change, and allowing a jury to hear "evidence of undocumented or irregular status" may be overly prejudicial.[69] Yet, if the goal is fair compensation through improved accuracy of a future damages calculation, courts should consider this information (perhaps by embedding it into assumptions or projections to protect against possible prejudicial effects). Ignoring this type of information entirely, though, risks overcompensation by ignoring reality.

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63. *See Daubert*, 509 U.S. at 597 (explaining that "[c]onjectures that are probably wrong are of little use" to the courts).

64. *See* REMEDIES RESTATEMENT Preliminary Draft, *supra* note 23, § 19, at reporters' note d (discussing challenges and different approaches courts apply in assessing compensatory damages for permanently disabled child).

65. *See* David P. Sklar, Editorial, *Changing the Medical Malpractice System to Align with What We Know About Patient Safety and Quality Improvement*, 92 ACAD. MED. 891, 891 (2017) (explaining juries may seek to "find someone to blame" to compensate a sympathetic plaintiff).

66. *See* REMEDIES RESTATEMENT Preliminary Draft, *supra* note 23, § 19, at cmt. e ("Courts should not allow expert testimony or other evidence that a plaintiff's earning capacity is higher or lower because of the plaintiff's race, ethnicity, or gender.").

67. *See id.* at cmt. f.

68. *Id.*

69. *Id.*

A final perspective on awards of future economic loss relates to discounting these damages to their present value. The same reasoning supporting use of a variable market interest rate to calculate judgment interest—namely, that a variable interest rate better reflects reality—applies to calculating the present value of future damages.[70] A key difference, of course, is that applicable market rates are known when calculating pre- or post-judgment interest, whereas future market rates that determine the relative value of future money are unknown and difficult to predict. The speculative nature of projecting what interest rates will do many years or decades into the future, due to inflation or other factors, leaves courts with little to go on. Treatises such as the proposed *Restatement of Torts, Third: Remedies* suggest courts use a variable market rate that would apply to historically "safe investments" to discount future economic damages (as with many judgment interest statutes), and that may be the best option given the lack of good alternatives.[71]

4. Loss of Chance

The speculative aspects of assessing future economic damages where a tortfeasor causes an injury or death take a step forward into the unknown where jurisdictions recognize recovery under a loss of chance theory. Loss of chance refers to a situation in which a tortious act reduces an individual's chance of recovery or some better medical outcome than occurred, even though it cannot be shown the tortfeasor caused the injury or death that did occur.[72] These claims are most commonly brought in the medical liability context where a doctor's failure to timely diagnose a patient delays treatment and reduces the patient's odds of a complete or partial recovery.[73]

For example, if a doctor's delay in diagnosing a patient's cancer reduced that patient's 40% chance of survival to 10%, loss of chance doctrine would generally permit a compensatory damages award if the patient died from that disease. Damages would be allowed, even though the claim would fail under traditional tort law principles, because the patient was more likely than not to die regardless of the diagnosis.[74]

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70. *See, e.g.*, REMEDIES RESTATEMENT, *supra* note 7, § 15, at cmt. f (discussing rates to discount future economic damages).

71. *See id.* at cmts. d, f.

72. *See id.* at cmt. b ("Recognition of a claim for loss of chance in *Restatement Third, Torts: Concluding Provisions*, is premised upon the idea that the loss of the chance for survival is itself compensable, even if the eventual death would not be compensable because the plaintiffs could not prove by a preponderance of the evidence that the doctor's negligence caused the death.").

73. *See id*.

74. *See id*.

Around half of states recognize some form of recovery for loss of chance in the medical malpractice context.[75] For example, a state may limit recovery only for the lost chance of survival (as compared to improvement of condition) or deprivation of a "significant chance" for recovery.[76] Other states have rejected loss of chance doctrine, both in and beyond medical malpractice, as incompatible with basic tort causation principles.[77] The proposed *Restatement of Torts, Third: Concluding Provisions* follows the approach of courts recognizing a tort claim for loss of chance arising from medical malpractice but takes no position on other contexts and leaves the issue to further development by courts.[78]

In 2020, the Hawaii Supreme Court became the latest state high court to reject loss of chance doctrine.[79] In doing so, the court observed that "[a]lthough nearly all the states have now considered the loss of chance doctrine, there is not a clear consensus on its merit; nor, among those states that have adopted it, is there agreement on what form it should take."[80]

The proposed *Restatement of Torts, Third: Remedies*, which builds upon the *Concluding Provisions* project's endorsement of loss of chance doctrine, states that courts have taken three different approaches to calculating damages for loss of chance.[81] One approach is to award the full amount of compensatory damages for the injury or death that occurred, with no accounting for the fact the injury or death may have been more likely than not to occur in any scenario.[82] Another approach is to permit a jury to award damages on a discretionary basis, which creates an obvious potential for

75. *See* Lauren Guest et al., *The 'Loss of Chance' Rule as a Special Category of Damages in Medical Malpractice: A State-by-State Analysis*, 21 J. LEGAL ECON. 53, 58–59 (2015) (reporting, as of July 2014, that twenty-four states had adopted loss of chance doctrine in the medical malpractice context, seventeen had rejected it, four had deferred an opinion on it, and five had yet to consider it at the level of their highest state court).

76. Mayhue v. Sparkman, 653 N.E.2d 1384, 1389 (Ind. 1995); DeBurkarte v. Louvar, 393 N.W.2d 131, 137 (Iowa 1986) (en banc).

77. *See, e.g.*, McAfee *ex rel.* McAfee v. Baptist Med. Ctr., 641 So. 2d 265, 267 (Ala. 1994) (declining to recognize loss of chance doctrine because "Alabama law requires that a recovery not be based upon a mere possibility" of injury); Smith v. Parrott, 833 A.2d 843, 848 (Vt. 2003) ("The loss of chance theory of recovery is thus fundamentally at odds with the settled common law standard . . . for establishing a causal link between the plaintiff's injury and the defendant's tortious conduct."); Kramer v. Lewisville Mem'l Hosp., 858 S.W.2d 397, 407 (Tex. 1993) (declining to recognize the loss of chance doctrine in Texas); Jones v. Owings, 456 S.E.2d 371, 374 (S.C. 1995) (declining to recognize the loss of chance doctrine in South Carolina).

78. REMEDIES RESTATEMENT Preliminary Draft, *supra* note 23, § 11, at cmt. a.

79. *See* Estate of Frey v. Mastroianni, 463 P.3d 1197, 1211 (Haw. 2020).

80. *Id.* at 1209.

81. REMEDIES RESTATEMENT Preliminary Draft, *supra* note 23, § 11, at cmt. b.

82. *Id*.

inconsistent and unpredictable valuations of a person's loss of chance.[83] The *Remedies Restatement* adopts the approach followed in most jurisdictions that allow recovery for loss of chance, which computes damages using a "proportional method."[84] This approach permits recovery of the reduced percentage for a better medical outcome. In the example discussed previously, in which a deceased patient's 40% chance of survival decreased to 10% as a result of a doctor's misdiagnosis, the recovery would be 30% of the damages that could have been awarded if the doctor's malpractice had proximately caused the death.

Allowing a tort recovery for theoretical assessments of an individual's reduction in percentage chance of some alleged "better medical outcome" is a controversial expansion of tort law. Although it may be said to prevent occurrences of medical malpractice from going uncompensated, loss of chance doctrine also enables compensation where no amount of medical care would have prevented injury or death. Recognition of a tort claim, therefore, implicates competing public policies which may be more suited for a state legislature to address.[85] Nevertheless, where loss of chance doctrine is recognized, no sound rationale exists for applying a non-proportional valuation method.[86] Full tort damages provide a windfall recovery based on illusory causation, and discretionary damages lack any standard for reliably compensating a reduced chance of recovery that never occurred and more likely than not was never going to occur.

5. Medical Monitoring Where No Injury Has Occurred

A final topic regarding economic compensatory damages involves the situation where a claimant with no present injury nonetheless seeks a tort recovery. Here, the claimant's liability theory is that a defendant's tortious conduct created an increased risk of sustaining a future injury, so the claimant should be permitted to recover economic costs to monitor for possible future

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83. *Id.*; *see also* Pipe v. Hamilton, 56 P.3d 823, 827 (Kan. 2002) (expressing concerns with loss of chance valuation methods that would allow "an arbitrary amount awarded by the jury or for the total damages sustained").

84. *See* REMEDIES RESTATEMENT Preliminary Draft, *supra* note 23, § 11, at cmt. b.; Matsuyama v. Birnbaum, 890 N.E.2d 819, 839 (Mass. 2008) (stating proportional damages method for valuing loss of chance is the "most widely adopted" method), *abrogated on other grounds by* Doull v. Foster, 163 N.E.3d 976 (Mass. 2021).

85. *See* Smith v. Parrott, 833 A.2d 843, 848 (Vt. 2003) (stating that loss of chance theory "'involves significant and far-reaching policy concerns' more properly left to the Legislature." (quoting Crosby v. United States, 48 F. Supp. 2d 924, 931 (D. Alaska 1999))). In some states, the legislature has made this determination. *See* N.H. REV. STAT. ANN. § 507-E:2(III) (2010); S.D. CODIFIED LAWS § 20-9-1.1 (2016).

86. *See* REMEDIES RESTATEMENT Preliminary Draft, *supra* note 23, § 11, at cmt.b.

injury regardless of whether that injury materializes. This theory of recovery is generally referred to as "medical monitoring."[87]

The case law addressing medical monitoring is divided. Roughly one-third of states allow, or appear to allow, recovery of medical monitoring costs for unimpaired claimants in some form, while at least one-third of states reject or appear to reject it.[88] The remaining states have either unclear or no case law on point, a fact that could suggest the unavailability of medical monitoring, given that such claims have been pursued for around forty years and never adopted.[89]

States rejecting medical monitoring often reason that permitting such a recovery would jettison the basic requirement that a claimant demonstrate an existing physical injury, which has traditionally provided the linchpin for tort liability.[90] Many courts, including the U.S. Supreme Court, have also said "no" to medical monitoring because of serious public policy implications, including the potential for "unlimited and unpredictable liability" and the potential for unimpaired claimants to exhaust the resources available for those who become sick.[91] For example, the bankruptcy of more than 140 companies in the asbestos litigation illustrates the problem of scarcity of assets in mass exposure cases.[92]

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87. *See* RESTATEMENT (THIRD) OF TORTS: CONCLUDING PROVISIONS 291 (AM. L. INST., Council Draft No. 2, 2021) [hereinafter CONCLUDING PROVISIONS RESTATEMENT Council Draft] (unnumbered section).

88. *See id.* at 319–23 tbls.; Mark A. Behrens & Christopher E. Appel, *American Law Institute Proposes Controversial Medical Monitoring Rule in Final Part of Torts Restatement*, DEF. COUNS. J., Oct. 2020, at 1, 10 tbl. (2020) (providing state law survey).

89. *See* Behrens & Appel, *supra* note 88, at 4–5.

90. *See, e.g.*, Wood v. Wyeth-Ayerst Lab'ys, Div. of Am. Home Prods., 82 S.W.3d 849, 855 (Ky. 2002) ("With no injury there can be no cause of action, and with no cause of action there can be no recovery. It is not the remedy that supports the cause of action, but rather the cause of action that supports a remedy.").

91. Metro-N. Commuter R.R. Co. v. Buckley, 521 U.S. 424, 433 (1997) (quoting Consol. Rail Corp. v. Gottshall, 512 U.S. 532, 557 (1994)) (evaluating claim brought under Federal Employers' Liability Act); *see also* Henry v. Dow Chem. Co., 701 N.W.2d 684, 694 (Mich. 2005) ("[R]ecognizing a cause of action based solely on exposure—one without a requirement of a present injury—would create a potentially limitless pool of plaintiffs.") (emphasis omitted); *Wood*, 82 S.W.3d at 857 (stating that "defendants do not have an endless supply of financial resources" and that, in the absence of an injury, medical monitoring "remedies are economically inefficient, and are of questionable long term public benefit").

92. *See History of Asbestos Bankruptcies, Chart 1: List of Asbestos Bankruptcy Cases (Chronological Order)*, CROWELL, https://www.crowell.com/files/20220504-List-of-Asbestos-Bankruptcy-Cases-Chronological-Order.pdf [https://perma.cc/W965-QWY9] (revised Apr. 24, 2022); Mark A. Behrens, *What's New in Asbestos Litigation?*, 28 REV. LITIG. 501, 504–13 (2009); *see generally* Victor E. Schwartz et al., *Defining the Edge of Tort Law in Asbestos Bankruptcies: Addressing Claims Filed by the Non-Sick*, 14 J. BANKR. L. & PRAC. 61 (2005) (discussing mass filings by unimpaired claimants that contributed to bankruptcies of asbestos defendants, and various legislative and judicial reforms).

In 2020, the Illinois Supreme Court became the latest state high court to reject a medical monitoring recovery for unimpaired claimants.[93] The court did so in the context of a class action against the City of Chicago on behalf of all city residents seeking the establishment of a trust fund to monitor for potential injuries related to lead exposure from the city's antiquated water lines.[94] The court rejected the claim on the basis "an increased risk of harm is not an injury."[95] It also explained that "there are practical reasons for requiring a showing of actual or realized harm before permitting recovery in tort," including that "such a requirement establishes a workable standard for judges and juries who must determine liability, protects court dockets from becoming clogged with comparatively unimportant or trivial claims, and reduces the threat of unlimited and unpredictable liability."[96]

In comparison, courts allowing medical monitoring have adopted varying rationales and approaches. The main policy justification is that "medical monitoring fosters access to beneficial diagnostic testing," which can promote "early detection and timely treatment of disease," and that these costs are most appropriately placed on the entity that created an increased risk of harm.[97] Courts have deviated, though, in articulating the underlying tort theory. Some courts have recognized medical monitoring as an independent tort cause of action for unimpaired claimants,[98] while others have viewed medical monitoring costs as an item of recoverable economic damages for an existing tort (and existing torts generally require an injury).[99]

Courts have also adopted different approaches regarding the elements of a medical monitoring claim and scope of recovery. Some states require a tortious act that exposes a person to a "substantially increased . . . risk of

93. *See* Berry v. City of Chicago, 181 N.E.3d 679, 689 (Ill. 2020).

94. *See id.* at 681, 684.

95. *Id.* at 689.

96. *Id.* at 688.

97. *See* CONCLUDING PROVISIONS RESTATEMENT Council Draft, *supra* note 87, at 292–93 reporters' note cmt. b (unnumbered section).

98. *See* Donovan v. Philip Morris USA, Inc., 914 N.E.2d 891, 902 (Mass. 2009); Petito v. A.H. Robins Co., 750 So. 2d 103, 106 (Fla. Dist. Ct. App. 1999); Redland Soccer Club, Inc., v. Dep't of the Army, 696 A.2d 137, 145–46 (Pa. 1997); Hansen v. Mountain Fuel Supply Co., 858 P.2d 970, 979 (Utah 1993); Bower v. Westinghouse Elec. Corp., 522 S.E.2d 424, 432–33 (W. Va. 1999).

99. *See, e.g.*, Potter v. Firestone Tire & Rubber Co., 863 P.2d 795, 824 (Cal. 1993) ("[W]e hold that the cost of medical monitoring is a compensable item of damages . . . ."); Meyer *ex rel*. Coplin v. Fluor Corp., 220 S.W.3d 712, 717 (Mo. 2007) (en banc) ("[M]edical monitoring does not create a new tort. It is simply a compensable item of damage when liability is established under traditional tort theories . . . ."); Elmer v. S.H. Bell Co., 127 F. Supp. 3d 812, 825 (N.D. Ohio 2015) ("Although medical monitoring is not a cause of action, under Ohio law, it is a form of damages for an underlying tort claim." (citing Wilson v. Brush Wellman, Inc., 817 N.E.2d 59, 63 (Ohio 2004))).

serious disease"[100] or "a reasonably certain and significant increased risk,"[101] while others require a "significantly increased risk"[102] or only an "increased" risk of contracting latent disease.[103] In addition, courts recognizing medical monitoring generally permit recovery of only "reasonable and necessary" monitoring costs but qualify that recovery in different ways.[104] For instance, some courts include as express elements of the claim that a medical test for early detection of disease exists, is capable of altering the course of illness, and would be recommended by a physician in addition to normal periodic diagnostic medical examinations,[105] while others omit precise limitations.[106]

Jurisdictions additionally vary on the distribution of medical monitoring awards. A few states require that any amounts recovered for medical monitoring be distributed pursuant to a court-supervised fund to ensure the money is actually spent for monitoring purposes.[107] This approach contrasts

100. *Donovan*, 914 N.E.2d at 902.

101. Exxon Mobil Corp. v. Albright, 71 A.3d 30, 81 (Md. 2013).

102. *Meyer*, 220 S.W.3d at 718 (quoting *Bower*, 522 S.E.2d at 433); *Redland*, 696 A.2d at 145.

103. *Bower*, 522 S.E.2d at 432; *Hansen*, 858 P.2d at 979.

104. Ayers v. Twp. of Jackson, 525 A.2d 287, 312 (N.J. 1987); *see also* CONCLUDING PROVISIONS RESTATEMENT Council Draft, *supra* note 87, at 296 cmt. g (unnumbered section) (stating that reasonable and necessary monitoring expenses require proof that "a reasonably reliable medical test for early detection exists; the medical test is generally within the standard of care and advisable for the exposed individual; early detection and treatment will increase the probability of beneficial medical intervention; and the specific monitoring regime is beyond what would have been prescribed for the individual in the absence of the exposure in question").

105. *See Albright*, 71 A.3d at 81–82 (requiring that "monitoring and testing procedures exist which make the early detection and treatment of the disease possible and beneficial"); *Donovan*, 914 N.E.2d at 902 (requiring that "an effective medical test for reliable early detection exists . . . and [that] early detection, combined with prompt and effective treatment, will significantly decrease the risk of death or the severity of the disease, illness or injury"); *Hansen*, 858 P.2d at 979 (requiring that "a medical test for early detection exists . . . and for which early detection is beneficial, meaning that a treatment exists that can alter the course of the illness . . . and which test has been prescribed by a qualified physician according to contemporary scientific principles"); Sadler v. PacifiCare of Nev., Inc., 340 P.3d 1264, 1272 (Nev. 2014) (requiring that plaintiff "undergo medical monitoring beyond what would have been recommended had the plaintiff not been exposed to the negligent act of the defendant").

106. Potter v. Firestone Tire & Rubber Co., 863 P.2d 795, 824–25 (Cal. 1993) (stating reasonable and necessary monitoring costs should consider "the clinical value of early detection and diagnosis"); *Meyer*, 220 S.W.3d at 718 ("[M]edical monitoring damages compensate the plaintiff for the quantifiable costs of periodic medical examinations reasonably necessary for the early detection and treatment of latent injuries caused by the plaintiff's exposure to toxic substances."); *Ayers*, 525 A.2d at 312 (stipulating that medical surveillance must be "reasonable and necessary" for the purpose of "monitor[ing] the effect of exposure to toxic chemicals").

107. *See Albright*, 71 A.3d at 82 ("[W]here a plaintiff sustains his or her burden of proof in recovering this form of relief, the court should award medical monitoring costs ordinarily by establishing equitably a fund, administered by a trustee, at the expense of the defendant."); *Redland*, 696 A.2d at 147 (stating that citizen suit under Pennsylvania's Hazardous Sites Cleanup Act "encompasses a medical monitoring trust fund"); *Ayers*, 525 A.2d at 314 ("In

with courts allowing "lump sum" damage awards for medical monitoring in which there may be no oversight for how awards are spent.[108]

Allowing unimpaired claimants to recover medical monitoring costs, similar to allowing a recovery based on loss of chance doctrine, is a controversial expansion of tort law.[109] It implicates competing public policies and appears to be a topic of increasing interest to state legislatures.[110] For example, in 2022, West Virginia was on the cusp of adopting legislation to overturn the state high court's recognition of a medical monitoring cause of action, which represents one of the most permissive medical monitoring approaches among states.[111] Around the same time, Vermont adopted legislation with the opposite objective of establishing a medical monitoring cause of action against certain "large" industrial facilities that release a toxic substance.[112]

Should a jurisdiction resolve to abandon the traditional tort law requirement of an injury and allow a medical monitoring remedy, it should at least take steps to cabin the claim to avoid the potential for unbounded liability and windfall recoveries that deplete the available resources for those who become sick in the future. Some reasonable steps include limiting claims to tortious exposures or conduct that substantially increases a person's risk of contracting serious latent disease, requiring the existence of diagnostic testing for reliable early detection, which combined with prompt and effective treatment, *will* significantly decrease the risk of death or severity of disease, and providing that such periodic monitoring be materially different from what

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litigation involving public-entity defendants, we conclude that the use of a fund to administer medical-surveillance payments should be the general rule, in the absence of factors that render it impractical or inappropriate.").

108. *See* Victor E. Schwartz et al., *Medical Monitoring: The Right Way and the Wrong Way*, 70 MO. L. REV. 349, 369 (2005) ("Lump sum awards are starkly at odds with the traditional scientific goal of medical monitoring and surveillance: detecting the onset of disease.").

109. *Compare* Mark A. Behrens & Monica G. Parham, *Stewardship for the Sick: Preserving Assets for Asbestos Victims Through Inactive Docket Programs*, 33 TEX. TECH L. REV. 1, 11–12 (2001), *with* Remington Slama, *So You're Telling Me There's a Chance: An Examination of the Loss of Chance Doctrine Under Nebraska Law*, 99 NEB. L. REV. 1014, 1016–17 (2021) (detailing the debate that each topic has sparked as an expansion of tort law).

110. *Cf.* Henry v. Dow Chem. Co., 701 N.W.2d 684, 696 n.15 (finding it "a reality of modern society that we are all exposed to a wide range of chemicals and other environmental influences on a daily basis" and that creating a medical monitoring cause of action "in light of both the essentially limitless number of such exposures and the limited resource pool from which such exposures can be compensated, a 'cutoff' line would . . . inevitably need to be drawn," for which the legislature is "better suited to draw").

111. *See* S.B. 7, 2022 Leg., Reg. Sess. (W. Va. 2022).

112. *See* S. 113, 2021 Leg., Reg. Sess. (Vt. 2021) (authorizing remedy of medical monitoring costs against an owner or operator of a "large facility," defined as having ten or more full-time workers at any time at the facility or five hundred employees at any one time across all facilities).

would be prescribed in the absence of the tortious conduct. In addition, any proposed medical monitoring program should be subject to an analysis of whether its purported benefits are outweighed by the costs or risks inherent in the monitoring procedure itself. For example, a costly experimental test with inherent risks that offers only marginal improved ability to detect disease should be avoided even if a claimant could identify a medical professional willing to sign off on it.

Finally, recoveries should not be administered through "lump sum" awards that abandon any measure of oversight over whether funds are used for purposes other than the intended monitoring. Medical monitoring through a court-supervised program imposes substantial burdens on a state's judiciary, but a program managed by an appointed medical professional with expertise in the disease at issue (who assumes a fiduciary responsibility) can at least help ensure proper disbursements. This approach may also prove helpful in actions involving multiple claimants, given the highly individualized nature of medical monitoring, including where claimants have different access to medical care, underlying health conditions, and monitoring needs. Each of the approaches discussed can promote greater reliability and fairness in economic damage awards untethered to any actual injury.

B. Noneconomic Damages

The challenges in attempting to accurately measure and fairly award compensatory damages are generally far greater with respect to awarding noneconomic damages than economic damages.[113] Noneconomic damages also propose to make a person "whole" but do so by compensating for intangible loss that lacks objective valuation or measurement.[114] The principal form of noneconomic damages falls under the label "pain and suffering," although there are other potential types of noneconomic damages such as emotional distress, loss of consortium, and loss of enjoyment of life (i.e., hedonic damages).[115] It is arguably an impossible task to entrust juries with

113. *See* Arbino v. Johnson & Johnson, 880 N.E.2d 420, 437 (Ohio 2007) ("One cannot deny that noneconomic-damages awards are inherently subjective and difficult to evaluate."); DAN B. DOBBS & CAPRICE L. ROBERTS, LAW OF REMEDIES § 8.1(4), at 683 (3d ed. 2018) ("[V]erdicts vary enormously, raising substantial doubts as to whether the law is evenhanded in the administration of damage awards or whether it merely invites the administration of biases for or against individual parties.").

114. *See* DOBBS & ROBERTS, *supra* note 113, at 215–17, 674; Harry Zavos, *Monetary Damages for Nonmonetary Losses: An Integrated Answer to the Problem of The Meaning, Function, and Calculation of Noneconomic Damages*, 43 LOY. L.A. L. REV. 193, 193 (2009) ("Noneconomic damages are awarded for losses that have no market value or monetary equivalent.").

115. *See* Herbert M. Kritzer et al., *An Exploration of "Noneconomic" Damages in Civil Jury Awards*, 55 WM. & MARY L. REV. 971, 974 (2014) (listing types of noneconomic damages

quantifying noneconomic damages in a rational way,[116] yet it is one "courts have tolerated . . . in tort cases as a justified aberration."[117] While there may be no complete way to fix the "profound, longstanding, and seemingly intractable problem in the civil justice system" of quantifying noneconomic damages,[118] there are clear ways to improve predictability and fairness.

1. Pain and Suffering

In the words of one federal appellate court judge, pain and suffering awards represent "the irrational centerpiece of our tort system."[119] They require a valuation of another's pain and suffering in the absence of rational criteria for measuring pain and suffering and lack the clear function of other damage awards.[120] Unlike economic damages that function to compensate for actual economic losses, pain and suffering awards are nonfunctional in that they do not eliminate or reduce pain and suffering.[121] Juries struggle in being tasked to give function to these awards (beyond the generalized notion of compensation); it should come as little surprise that juries look at similar evidence and reach widely different pain and suffering valuations.[122]

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including "pain and suffering, loss of society, emotional distress, loss of consortium, disfigurement, loss of child-bearing capacity, loss of parental guidance, and loss of enjoyment of life"); Joseph H. King, Jr., *Pain and Suffering, Noneconomic Damages, and the Goals of Tort Law*, 57 SMU L. REV. 163, 168 (2004) ("Noneconomic consequences of personal injuries include the whole array of mental suffering or other compensable mental responses to a personal injury.").

116. *See* King, *supra* note 115, at 165 ("The problem is that damages for pain and suffering do not accomplish that immediate end [of making a plaintiff whole]—they do not and never can return the injured person to his pre-injury position."); Richard L. Abel, *A Critique of Torts*, 37 UCLA L. REV. 785, 802 (1990) (explaining that "money is a poor equivalent for non-pecuniary loss" because it "cannot restore victims to their status quo before the accident").

117. Paul V. Niemeyer, *Awards for Pain and Suffering: The Irrational Centerpiece of Our Tort System*, 90 VA. L. REV. 1401, 1402 (2004).

118. David M. Studdert et al., *Rationalizing Noneconomic Damages: A Health-Utilities Approach*, 74 L. & CONTEMP. PROBS. 57, 57 (2011) ("For the most part, courts and legal scholars have thrown their hands up and surrendered to the view that the magnitude of human suffering is essentially unknowable in any objective sense.").

119. Niemeyer, *supra* note 117, at 1401.

120. *See* RESTATEMENT (SECOND) OF TORTS § 903 cmt. a (AM. L. INST. 1979) ("There is no scale by which the detriment caused by suffering can be measured and hence there can be only a very rough correspondence between the amount awarded as damages and the extent of the suffering.").

121. *See* King, *supra* note 115, at 170 ("Damages for pain and suffering are like vestigial appendages that once arguably had some minor function, but have since lost any defensible purpose.").

122. *See* Richard Abel, *General Damages Are Incoherent, Incalculable, Incommensurable, and Inegalitarian (but Otherwise a Great Idea)*, 55 DEPAUL L. REV. 253, 291–303 (2006) (describing variation of general-damages amounts in specific contexts and reviewing a wide range of calculability problems); James F. Blumstein, *Making the System Work*

For much of American history, the irrational nature of valuing pain and suffering presented a relatively minor concern. Prior to the mid-twentieth century, tort actions for personal injury "were not very numerous and verdicts were not large."[123] Also, if a jury returned a large noneconomic damages award, courts often reversed the award.[124] The average size of pain and suffering awards took its first leap after World War II, as personal injury lawyers became adept at finding ways to enlarge these awards.[125] For example, plaintiff's lawyer Melvin Belli pioneered the use of emotional "day in the life" videos to showcase a plaintiff's struggles and play to juror sympathy and then present reasonable sounding "per diem" or other "unit of time" damage arguments that readily added up to substantial sums.[126]

By the late 1950s and 1960s, these and other plaintiff lawyer "anchoring" tactics, in which they suggested to juries an extraordinary pain and suffering amount or a mathematical formula designed (and in a sense disguised) to result in an enormous sum, became more widespread.[127] The anchor establishes "an arbitrary, but psychologically powerful, baseline for jurors" to accept or negotiate upward or downward.[128] By the 1970s, such tactics had

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Better: Improving the Process for Determination of Noneconomic Loss, 35 N.M. L. REV. 401, 405, 410 (2005) (citing evidence that noneconomic components of damages awards are the most variable).

123. Philip L. Merkel, *Pain and Suffering Damages at Mid-Twentieth Century: A Retrospective View of the Problem and the Legal Academy's First Responses*, 34 CAP. U. L. REV. 545, 560 (2006).

124. *See* Ronald J. Allen & Alexia Brunet, *The Judicial Treatment of Noneconomic Compensatory Damages in the 19th Century*, 4 J. EMPIRICAL LEGAL STUD. 365, 369 (2007) (finding "literally no cases affirmed on appeal prior to 1900 that plausibly involved noneconomic compensatory damages in which the total damages (noneconomic and economic combined) exceeded $450,000" in 2007 dollars (about $610,000 today)).

125. *See* Melvin M. Belli, *The Adequate Award*, 39 CALIF. L. REV. 1, 37 (1951) (presenting, in the mid-twentieth century, a strong argument in support of increasing personal injury awards); Merkel, *supra* note 123, at 564–65 (examining post-war expansion of pain and suffering awards). The rise in noneconomic damages has been attributed to (1) the availability of future pain and suffering damages; (2) the rise in automobile ownership and personal injuries resulting from automobile accidents; (3) the greater availability of insurance and willingness of plaintiffs' attorneys to take on lower-value cases; (4) the rise in affluence of the public and a change in public attitude that "someone should be made to pay"; and (5) better organization by the plaintiffs' bar. *Id.* at 553, 560–65; *see also* King, *supra* note 115, at 170.

126. *See* A. RUSSELL SMITH, AMERICAN LAW OF PRODUCTS LIABILITY § 76:38 (3d ed. 2022) ("The per diem closing was developed by the late Melvin Belli . . . ."); 3 MELVIN M. BELLI, MODERN TRIALS § 55.16, at 779 (2d ed. 1982) ("The jury must be made to appreciate what pain and suffering is, what ridicule is, what embarrassment is, day by day, hour by hour, minute by minute, second by second.").

127. *See* Joseph H. King, Jr., *Counting Angels and Weighing Anchors: Per Diem Arguments for Noneconomic Personal Injury Tort Damages*, 71 TENN. L. REV. 1, 13, 35 (2003).

128. Mark A. Behrens et al., *Summation Anchoring: Is it Time to Cast Away Inflated Requests for Noneconomic Damages?*, 44 AM. J. TRIAL ADVOC. 321, 322 (2021); *see also* King,

proven extremely effective, as pain and suffering damages constituted the largest single item of recovery, "exceeding by far" economic compensatory damages such as lost wages or medical expenses.[129]

This trend has continued to the modern era. Pain and suffering awards in the United States "are often more than ten times . . . those in even the most generous of the other nations."[130] The size of "nuclear verdicts," which are generally defined as "awards of $10 million or more" that often include noneconomic damages, are also rising in both amount and frequency.[131]

a. Ending Summation Anchoring

One clear approach courts can take to curb arbitrarily inflated pain and suffering awards is to prohibit the plaintiff-lawyer anchoring tactics that often help generate such awards.[132] Research indicates that anchoring "dramatically increases" noneconomic damage awards such as pain and suffering,[133] and that "the more you ask for, the more you'll get."[134] There are numerous examples of a plaintiff lawyer simply picking a multi-million dollar figure out of the air, or recommending a calculation method based on the lawyer's imagination, and the jury going along with it.[135]

Only about one-third of states prohibit or restrict the use of anchoring tactics.[136] They have done so for various reasons, including finding anchoring arguments intrude into the jury's domain, are not founded upon admissible

supra note 127, at 37–40 (explaining why per diem arguments are effective anchoring techniques).

129. Nelson v. Keefer, 451 F.2d 289, 294 (3d Cir. 1971).

130. Stephen D. Sugarman, *A Comparative Law Look at Pain and Suffering Awards*, 55 DEPAUL L. REV. 399, 399 (2006).

131. *See* SILVERMAN & APPEL, *supra* note 5; Rice, *supra* note 5.

132. *See* Behrens et al., *supra* note 128, at 337 ("Courts and legislatures should prohibit the practice of anchoring to allow jurors to decide appropriate compensation for noneconomic damages without manipulation by counsel.").

133. John Campbell et al., *Time is Money: An Empirical Assessment of Non-Economic Damages Arguments*, 95 WASH. U. L. REV. 1, 28 (2017).

134. Gretchen B. Chapman & Brian H. Bornstein, *The More You Ask for, the More You Get: Anchoring in Personal Injury Verdicts*, 10 APPLIED COGNITIVE PSYCH. 519, 522, 526 (1996).

135. *See* Behrens et al., *supra* note 128, at 327–29 (providing examples of multimillion-dollar noneconomic damage awards in premises liability, product liability, medical liability, and toxic tort litigation).

136. *Id.* at 330; *see also* Campbell et al., *supra* note 133, at 33–48 (providing state law survey); Thomas J. Vesper & Richard Orr, *Make Time Palpable by Using Per Diem Arguments*, TRIAL, Oct. 2002, at 59, 59 ("Only 37 states and the District of Columbia allow plaintiff lawyers to either present a bottom-line amount for noneconomic damages or suggest that a specific time unit be used to calculate them.").

evidence, and create an illusion of certainty even though they are arbitrary.[137] Most states, in comparison, continue to allow these arguments, either with or without an accompanying judicial explanation that these recommendations are merely argument, not evidence.[138] The proposed *Remedies Restatement* similarly suggests that "it is acceptable for lawyers to offer per diem arguments or lump-sum figures" so long as an accompanying admonition states that these damage amounts are arguments and not evidence.[139]

Courts should reject this masquerade. They should recognize that allowing completely baseless arguments, which have a demonstrated effect of arbitrarily inflating pain and suffering awards, are overly prejudicial to civil defendants and detrimental to a well-functioning civil justice system. One need not be a jury expert or psychologist to appreciate that any admonition or a curative instruction in this setting is unlikely to cancel out a recommended pain and suffering award once the seed of some baseline amount or calculation has been planted.[140] If pain and suffering awards are to have any hope of predictability and fairness, this abusive tactic needs to end.

b. Separating Pain and Suffering from Punishment

Another commonly employed means of inflating a pain and suffering award is to focus jurors' attention on the notion of punishment instead of fair compensation.[141] This tactic is often accomplished through the introduction of evidence directed at punishing or "sending a message" to a defendant, or inflaming jurors' sense of outrage, where such evidence is not relevant to compensatory damages. By convincing a jury to mete out punishment through

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137. *See* Campbell et al., *supra* note 133, at 42 n.138; Vesper & Orr, *supra* note 136, at 61; James O. Pearson, Jr., Annotation, *Per Diem or Similar Mathematical Basis for Fixing Damages for Pain and Suffering*, 3 A.L.R.4th 940, §§ 5, 10a (1981).

138. *See* King, *supra* note 127, at 14–15; *see also, e.g.*, Wilson v. Williams, 933 P.2d 757, 760 (Kan. 1997) ("This state also allows argument as to the total amount desired for unliquidated damages such as pain and suffering. The jury is instructed that counsel's argument is not evidence.").

139. REMEDIES RESTATEMENT Preliminary Draft, *supra* note 23, § 21, at cmt. f.

140. The unfair effect of anchoring is not lost on the plaintiffs' bar. *See* Sonia Chopra, *The Psychology of Asking a Jury for a Damage Award*, PLAINTIFF, Mar. 2013, at 1, 1 ("[O]nce an anchor number has been provided, the number exerts undue influence on the final figure . . . and can sway decisions even when the anchor provided is completely arbitrary."); Patricia Kuehn, *Translating Pain and Suffering Damages*, 56 TRIAL, Nov. 2020, at 26, 27 ("It is well recognized that a numerical anchor influences jurors' judgment about damages even if they do not recognize that the anchor affected their decision.").

141. *See, e.g.*, Bruce Braley, *5 Tips for Keeping Damages Front & Center*, 58 TRIAL, Apr. 2022, at 40, 42 (advocating that plaintiffs' lawyers "[a]t every stage, look for facts that will make the jurors angry" to "motivate them to find the defendant liable and award the damages you ask for"); Victor E. Schwartz & Leah Lorber, *Twisting the Purpose of Pain and Suffering Awards: Turning Compensation into "Punishment,"* 54 S.C. L. REV. 47, 49 (2002).

an inflated pain and suffering award, a plaintiff lawyer may successfully avoid constitutional and, where applicable, statutory limitations on punitive damage awards.[142] The tactic may also enable a portion of the compensatory award to duplicate any punitive damages awarded and provide a double recovery.[143] Alternatively, this strategy may enable an inflated compensatory award where a claimant cannot satisfy a jurisdiction's higher standard for recovery of punitive damages, or where punitive damages are not authorized.[144]

Although courts widely acknowledge the separate purposes of compensatory damages that compensate for an injury and punitive damages that punish and deter misconduct, separation can be difficult to achieve in practice. Judges' first line of defense against conflation of compensatory and punitive damages resembles their "gatekeeper" role to screen unsound evidence, except here the standard is whether the likely prejudicial effect of the unsavory evidence outweighs its value in assisting the jury to reach a fair verdict. Judges' second line of defense requires clear jury instructions that any evidence of wrongful conduct can be considered only in determining whether the defendant is subject to liability, not in deciding the amount of pain and suffering (or other noneconomic damage) that occurred.

State legislatures, for their part, can and should codify the separation of noneconomic damages, such as pain and suffering, and punitive damages. For example, the Ohio Legislature, cognizant of misuse of noneconomic damage awards, enacted legislation that expressly prohibits a trier of fact from considering evidence of wrongdoing, misconduct, or guilt, or other evidence offered for the purpose of punishing a defendant when determining noneconomic loss in a tort action.[145] Other states should consider similar approaches to provide clearer lines and curb unjust and potentially duplicative awards.

2. Hedonic Damages

Hedonic damages purport to compensate a claimant for the "loss of enjoyment of life" and represent one of the more controversial proposed

142. *See infra* Part III.

143. *See* State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408, 426 (2003) (discussing how compensatory damages "likely were based on a component which was duplicated in the punitive award").

144. *See* Punitive Damages, *50 State Statutory Surveys*, 0020 SURVEYS 25 (updated Apr. 2021) (providing state evidentiary standards for awarding punitive damages), https://1.next.westlaw.com/Document/Iec6bd55c5b0411de9b8c850332338889/View/FullText.html [https://perma.cc/7Q7V-7QA7]; *see also infra* note 268 (identifying states that generally do not allow punitive damages).

145. *See* OHIO REV. CODE ANN. § 2315.18(C) (West 2021).

categories of noneconomic damages.[146] The controversy arises not in courts' lack of understanding that a seriously injured person may be unable or less able to engage in the same pleasurable activities post-injury, and therefore may be said to "enjoy life less," but rather that compensation for such harm is already provided through a damages award for pain and suffering.[147] Accordingly, recognition of hedonic damages as a separate category of noneconomic damages, to be awarded in addition to pain and suffering, proposes to authorize duplicative recoveries of what are already the largest, most speculative part of compensatory awards.[148]

The label "hedonic damages" originated in the 1980s and is credited to an economist who testified as an expert witness in a wrongful death case.[149] Courts around the time, though, recognized that "[w]hile this term is new to our jurisprudence, the concept is not."[150] Indeed, courts have long considered a claimants' disability, disfigurement, and loss of gratification or intellectual or physical enjoyment in awarding general damages, the noneconomic component of which is commonly expressed by the label "pain and suffering."[151]

Nevertheless, proponents of hedonic damages argue these damages "go beyond traditional pain and suffering or mental anguish" so as to justify separate categorization.[152] They distinguish pain and suffering as compensation limited to the physical discomfort and emotional response to the sensation of pain caused by the injury itself, with hedonic damages that compensate for resulting limitations on that "person's ability to participate in and derive pleasure from the normal activities of daily life."[153] A number of

146. *See generally* Victor E. Schwartz & Cary Silverman, *Hedonic Damages: The Bubbling Cauldron*, 69 BROOKLYN L. REV. 1037 (2004) (discussing controversial nature of hedonic damages and recommending courts reject them as a separate element of a damages award).

147. *See id.* at 1040–41 (explaining that, prior to the 1980s, damages for loss of enjoyment of life "were usually part of damages for pain and suffering or a general damage award").

148. *See supra* notes 119–31 and accompanying text.

149. Schwartz & Silverman, *supra* note 146, at 1041–42 (crediting economist Dr. Stanley V. Smith as coining the phrase "hedonic damages"); REMEDIES RESTATEMENT Preliminary Draft, *supra* note 23, § 21, at cmt. i.

150. Foster v. Trafalgar House Oil & Gas, 603 So. 2d 284, 285 (La. Ct. App. 1992); *see also* Gary A. Magnarini & Stan V. Smith, *Hedonic Damages*, WIS. LAW., Feb. 1991, at 17, 17 ("Hedonic damages, a provocative phrase, is a new label for an established concept . . . .").

151. *See Foster*, 603 So. 2d at 285; Magnarini & Smith, *supra* note 150, at 17; Schwartz & Silverman, *supra* note 146, at 1044 ("[M]ost states permit the jury to consider hedonic damages, but only as a component of general damages, pain and suffering, or disability.").

152. Samuel R. Bagenstos & Margo Schlanger, *Hedonic Damages, Hedonic Adaptation, and Disability*, 60 VAND. L. REV. 745, 748 (2007).

153. *See id.*; McGee v. A C & S, Inc., 933 So. 2d 770, 775 (La. 2006) ("[L]oss of enjoyment of life is conceptually distinct from other components of general damages, including pain and suffering. Pain and suffering . . . refers to the pain, discomfort, inconvenience, anguish,

states have agreed with this argument and recognized hedonic damages as a separate category of noneconomic damages.[154]

Most jurisdictions, in comparison, either expressly or impliedly reject hedonic damages as a separate category of noneconomic damages assessed independently of general damages for pain and suffering.[155] The proposed *Restatement of Torts, Third: Remedies* similarly rejects the label hedonic damages, finding the phrase "misleading, because all [pain and suffering] damages . . . are intended to redress loss of pleasure in some form."[156] The *Restatement*'s authors (called Reporters) assert that the "better approach is to give the jury a single opportunity to choose an amount of 'noneconomic' damages, encompassing all elements of pain, suffering, emotional harm, and related concepts."[157] They reason that "[l]awyers can conceptually divide these damages into many distinct categories, but there is little reason to believe that jurors can keep the categories meaningfully distinct and place a separate value on each one."[158]

Courts debating whether to recognize hedonic damages as a separate, standalone category of noneconomic damages should follow the majority approach, reflected in the proposed *Restatement*, which avoids the serious potential for duplicative recoveries. The dramatic rise in pain and suffering awards over the past half century[159] strongly suggests that jurors do not limit these awards by somehow omitting consideration of a claimant's disfigurement, disability, and loss of capacity to enjoy life such that a separate noneconomic damage award is warranted to provide fair compensation.[160] Incorporating the various components of noneconomic damages in a single pain and suffering award also greatly simplifies the jury's role with respect to

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and emotional trauma that accompanies an injury. Loss of enjoyment of life . . . refers to detrimental alterations of the person's life or lifestyle.").

154. *See* 2 JACOB A. STEIN, STEIN ON PERSONAL INJURY DAMAGES §§ 8:37, 8:38 n.23 (3d ed. 2022) (citing jurisdictions that recognize pain and suffering as distinct from hedonic loss, since they "represent different types of loss which require separate . . . assessment by the jury"); Bagenstos & Schlanger, *supra* note 152, at 748 n.13.

155. *See* Schwartz & Silverman, *supra* note 146, at 1042; *see also* 3 STEIN, *supra* note 154, § 22:16 (reporting "the overwhelming majority of jurisdictions do not permit" hedonic damages in wrongful death actions); 3 DAVID G. OWEN & MARY J. DAVIS, OWEN & DAVIS ON PRODUCTS LIABILITY § 25:4 (4th ed. 2022); 7 CLIFFORD S. FISHMAN & ANNE TOOMEY MCKENNA, JONES ON EVIDENCE § 53:32 (7th ed. 2022) ("[E]xpert testimony on hedonic damages is not generally permitted . . . because the jury does not require expert assistance in valuing the loss of enjoyment. Such testimony may also be excluded under *Daubert* as unreliable . . . .").

156. REMEDIES RESTATEMENT Preliminary Draft, *supra* note 23, § 21, at cmt. i.

157. *Id.* at reporters' note i.

158. *Id.*

159. *See supra* Section II.B.1.

160. *See* discussion *supra* Section II.B.1.; *cf.* Golnick v. Callender, 860 N.W.2d 180, 195 (Neb. 2015) ("[H]edonic damages are subsumed within a plaintiff's damages for pain and suffering. They are not a separate category of damages.").

its difficult task of quantifying noneconomic compensatory damages.[161] The law should move toward cabining speculative awards where possible, not creating new categories far more likely to exacerbate speculation and result in unjust awards.

3. Loss of Consortium

Loss of consortium presents another category of damages that may readily lead to inflated noneconomic awards. Whereas pain and suffering damages propose to compensate for the physical and mental distress of an injury, loss of consortium aims to compensate an immediate family member of an injured person for the loss of affection, companionship, comfort, and support.[162] Loss of consortium damages can include economic components, such as the lost value of services the injured person is no longer able to provide to his or her spouse, but these damages are typically capable of reasonably precise measurement similar to lost wages or other economic loss. Compensating a loved one's loss of companionship, on the other hand, defies objective valuation.

Almost all states recognize a spousal consortium claim where a tortious injury occurs.[163] Around one-third of states, in comparison, have extended consortium claims to allow parents to recover for injury to their minor child (i.e., child consortium),[164] and a similar minority of states permit children to recover for injury to their parent (i.e., parental consortium).[165] Importantly, such a claim is distinct from a remedy that may be available to a family member pursuant to a state's wrongful death statute where a death occurs.[166]

The trend among courts over the past half century has been to expand the scope of loss of consortium claims.[167] The proposed *Restatement of Torts,*

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161. *See* Gretchen L. Valentine, Comment, *Hedonic Damages: Emerging Issue in Personal Injury and Wrongful Death Claims*, 10 N. ILL. U. L. REV. 543, 547 (1990) ("Hedonic damages are a form of general damages closely related to disability or pain and suffering in personal injury claims; they may be effectively argued to the jury as a subcomponent of disability or pain and suffering, and no separate jury instruction need be given.").

162. *See* CONCLUDING PROVISIONS RESTATEMENT, *supra* note 8, at ch. 8, Intro. Note (discussing historical evolution of loss of consortium claims).

163. *Id.* at ch. 8, § 48A reporters' note cmt. a (reporting Virginia as the only state that does not recognize a spousal consortium claim under either statutory or common law).

164. *See id.* at ch. 8 § 48B reporters' note cmt. a ("[A]pproximately 17 jurisdictions permit parents to recover for loss of consortium stemming from injuries to their minor child while 26 do not.").

165. *See id.* at ch. 8 § 48C cmt. b. ("[A]t least 19 states have case law and two have statutes permitting parental consortium claims."); Campos v. Coleman, 123 A.3d 854, 864 (Conn. 2015) ("Twenty jurisdictions have recognized, in some form, a cause of action for loss of parental consortium arising from a parent's injury.").

166. *See* CONCLUDING PROVISIONS RESTATEMENT, *supra* note 8, § 48C cmt. h.

167. *See id.* § 48C cmt. a.

Third: Concluding Provisions follows this trend and endorses a broad remedy for "loss of society" that includes "loss of affection, comfort, companionship, love, and support," as well as services where a spouse, parent, or child sustains physical or emotional harm caused by their respective family member's physical or emotional harm.[168] This *Restatement*, though, also recognizes that many jurisdictions have resisted allowing child and parental consortium claims "based on concerns about cabining the scope of tort liability, reducing pressure on liability insurance premiums, and finding a workable line" for eligible claims.[169] A number of courts have declined recognition of a claim in favor of deferring to the state legislature on this public policy issue.[170]

Where a jurisdiction authorizes consortium claims arising from the marital or parent-child relationship, a key objective should be to avoid duplicative recoveries. Jurors already face a daunting task in valuing noneconomic damages such as pain and suffering in the absence of meaningful criteria; adding damages for amorphous concepts such as "loss of companionship," "loss of comfort," and "loss of society" can understandably result in confusion and difficulty distinguishing appropriate damages. Courts can and should assist jurors by simplifying what they need to decide.

One approach, which also promotes judicial efficiency, is to require joinder of any consortium claim with the claim of the person who sustained direct bodily injury.[171] Required joinder ensures that a jury sees the whole damages picture and determines valuations accordingly and without guesswork.[172] For example, in the absence of joinder, a jury might inflate an injured spouse's noneconomic damages based on an erroneous belief that the other spouse's emotional harm was not adequately taken into account, which would result in a double recovery if a jury in a subsequent loss of consortium suit awarded damages.[173]

Properly instructing a jury on loss of consortium is another vital way to help avoid inflated or duplicative recoveries. Juries should be warned specifically against "double dipping" or potentially overlapping awards. They should also be instructed not only on what may be included in a determination of loss of consortium, but what is excluded.[174] For instance, jury instructions

168. *Id.* §§ 48A, 48B, 48C.

169. *Id.* § 48C cmt. a.

170. *See id.* § 48C reporters' note cmt. b (listing cases).

171. *See* Schreiner v. Fruit, 519 P.2d 462, 466 (Alaska 1974) ("The principal advantage to a rule of required joinder is that it reduces the chances of double recovery.").

172. *See id.*

173. *See* CONCLUDING PROVISIONS RESTATEMENT, *supra* note 8, § 48A reporters' note cmt. h (stating most courts adhere to a joinder requirement).

174. *See, e.g.*, CACI No. 3920 (JUD. COUNCIL OF CAL. 2022) (instructing jury not to include specific items in noneconomic damage award); *cf.* State Through Dep't of Soc. Servs. *ex rel.* Harden v. S. Baptist Hosp., 663 So. 2d 443, 451 (La. Ct. App. 1995) ("The first item of

can expressly provide that loss of consortium cannot include any compensation the person claiming direct bodily injury may be entitled to recover.[175] Instructions might also distinguish between noneconomic and economic components of loss of consortium and clarify with respect to the noneconomic component that the jury must exclude economic items and provide examples of excluded items.[176] Finally, jury instructions should make clear that any noneconomic component of loss of consortium is intended to be treated as a singular item of damages, not separate line items for loss of society, loss of companionship, loss of comfort, etc.[177] While many judges provide such basic clarifying instructions, practices vary among jurisdictions such that greater standardization appears warranted.[178]

4. Dignitary Harm

The proposed *Restatement of Torts, Third: Remedies* includes a new section setting forth tort damage rules for so-called "Dignitary Harm."[179] It defines dignitary harms as "those that interfere with the liberty or personal autonomy of the plaintiff, or that embarrass, humiliate or show blatant disrespect for the plaintiff, potentially leading to emotional distress or reputational harm."[180] The *Restatement* endorses recovery of compensatory damages for "harm to reputation, such as loss of social standing or relations, and for emotional distress."[181] It also endorses recovery of presumed damages

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damages—the $415,000 award—is obviously a loss of consortium award, despite the fact the title given by the trial court contains the phrase 'loss of enjoyment of life.'").

175. *Compare* ALASKA CIV. PATTERN JURY INSTRUCTIONS § 20.08, 20.09 (CIV. PATTERN JURY INSTRUCTIONS COMM. 2018) (cautioning, for loss of spousal and parental consortium, against awarding "any amount that duplicates any awards to (name of principal plaintiff)"), *and* BAJI No. 14.40 (WEST'S COMM. ON CAL. CIV. JURY INSTRUCTIONS 2022) (instructing jury to "not include . . . any compensation for losses that the plaintiff (spouse claiming the direct physical injury) may be entitled to recover"), *with* 3 DOUGLAS DANNER ET AL., PATTERN DISCOVERY: TORT ACTIONS § 26:22 (3d ed. 2022) (listing types of recoverable damages without providing limitations), *and* 9 DE WITT C. BLASHFIELD, BLASHFIELD AUTOMOBILE LAW AND PRACTICE § 381:52 (2021) (jury instruction on loss of consortium).

176. *See* CACI No. 3920, *supra* note 174.

177. *Cf. supra* notes 119–31 and accompanying text.

178. *See, e.g.,* FLA. STANDARD JURY INSTRUCTION § 501.2(d) (FLA. SUPREME CT. STANDARD JURY INSTRUCTIONS COMMITTEE—CIVIL CASES 2018) (jury instruction on damages from loss of consortium and services); CHARLES W. ADAMS ET AL., OKLAHOMA UNIFORM JURY INSTRUCTIONS §§ 4.6, 4.8 (2d ed. 2018) (measure of damages for loss of spousal and parental consortium); T.P.I.—CIVIL 14.20 (TENN. COMM. ON PATTERN JURY INSTRUCTIONS 2021) (general instruction to award "reasonable value of the spouse's companionship and acts of love and affection this plaintiff has lost . . . but would have received in the usual course of the parties' married life").

179. REMEDIES RESTATEMENT Preliminary Draft, *supra* note 23, § 23.

180. *Id.* § 23 cmt. b.

181. *Id.* § 23(b)(1).

in lieu of compensatory damages "if the nature of the harm makes it unlikely that plaintiff using reasonable diligence can prove the amount of compensatory damages."[182]

Several significant questions and potential concerns arise should courts embrace the category of dignitary harm as defined by this proposed *Restatement*. A threshold consideration is whether such a broadly defined tort remedy is too speculative and open-ended where any alleged tortious act that embarrasses or disrespects another may be grounds for a recovery of emotional distress or presumed damages. This consideration may be especially important in an age of social media where countless daily exchanges may involve a disparaging, careless, or simply untrue post that could be said to harm another's reputation or social standing or otherwise cause embarrassment. Allowing recovery of presumed damages in cases where demonstrating emotional distress proves too difficult could usher in a new era of comparatively trivial tort litigation.[183]

The *Restatement* acknowledges that dignitary harm inflicted through speech raises significant questions and potential limitations under the First Amendment.[184] The proposed damages rule, however, adopts a one-size-fits-all approach to any tortious activity. For instance, the *Restatement* sets forth a non-exclusive list of the "typical torts" in which plaintiffs may suffer dignitary losses to include defamation, invasion of privacy, assault, battery, false imprisonment, malicious prosecution, and intentional or negligent infliction of emotional distress.[185] The *Restatement* adopts this approach in spite of recognition that the "use of presumed damages has decreased over time"[186] and that another part of the *Third Restatement of Torts*, namely the proposed *Restatement of Torts, Third: Defamation and Privacy*, supports abolishing presumed damages in defamation actions.[187]

Another basic concern regarding recovery of either emotional harm or presumed damages for an intrusion upon a "dignitary interest," which the *Restatement*'s Reporters acknowledge, is that these damages "are necessarily difficult to value."[188] The *Restatement* recognizes that emotional harm "varies over an enormous range" and that many aspects of emotional distress unaccompanied by bodily harm, including the severity of harm permitting

182. *Id.* § 23(b)(2).

183. *Cf. id.* § 18 cmt. b ("[S]ome courts and commentators have criticized presumed damages as unnecessary, arbitrary, and especially in defamation, chilling of speech.").

184. *Id.* § 23 cmt. g.

185. *Id.* § 23 cmt. b.

186. *Id.* § 18 cmt. b.

187. *Id.* § 18 cmt. a (stating *Restatement of the Law Third, Torts: Defamation and Privacy* "proposes to abolish presumed damages that exceed nominal amounts in defamation cases").

188. *Id.* § 23 reporters' note cmt. b.

recovery, remain "ill-defined" by courts.[189] With respect to presumed damages, the *Restatement* recognizes that "[c]ourts allowing presumed damages sometimes give juries wide discretion and little guidance in setting the amount of the award, occasionally leading to large verdicts that may not reflect the actual damages suffered by plaintiffs."[190] "Such awards," the *Restatement* continues, "increase the controversy over presumed damages."[191]

As with other types of noneconomic damages discussed in this Article, allowing presumed damages for a loosely-defined array of dignitary harms risks enabling duplicative recoveries. As the proposed *Restatement* concedes, "it is generally recognized that the reasonable-certainty standard cannot meaningfully be applied to emotional-distress damages, making somewhat elusive the distinction between normal compensatory damages for emotional distress . . . and presumed damages for the same injury."[192] The *Restatement* posits a scenario in which a jury "award[s] presumed damages for harm to [a person's] reputation and actual damages for emotional distress," which would effectively remedy the same harm.[193] It acknowledges that, were a court to allow presumed damages for one component of noneconomic damages and emotional distress for another in the same case, "the two awards will often be overlapping or entirely duplicative."[194]

Courts debating whether to adopt the proposed *Restatement*'s approach to recovery for dignitary harm, or a similar approach, should exercise caution and healthy skepticism. While the concept of a tortious invasion upon another's dignitary interest warrants a remedy in certain situations, such as an intentional infliction of emotional distress, a remedy of emotional harm or presumed damages for an unbounded array of torts, and an accompanying risk of duplicative recoveries, may be overbroad. Such an approach also may be challenging for courts to administer fairly and efficiently, especially if the broad damages rule acts as an engine to drive a greater number of tort claims over comparatively less significant slights or personal offenses that result in alleged embarrassment or diminished social standing. Tort law does not, and should not, provide a remedy for every speech misstep or personal attack with words that causes emotional distress (presumed or otherwise) to another. The *Restatement*'s amalgamation of dignitary harm includes various cautions and caveats, yet it also may provide a slippery slope to far broader and potentially unsound tort recoveries in the future if adopted by courts.

189. *Id.* § 22 cmts. d, e.
190. *Id.* § 18 cmt. b.
191. *Id.*
192. *Id.*
193. *Id.*
194. *Id.*

5. Statutory Limits on Noneconomic Damages

A final topic regarding noneconomic compensatory damages involves efforts by state legislatures to place reasonable upper limits on awards. The inherently subjective nature of pain and suffering, as well as other types of noneconomic damages discussed, has prompted most states to statutorily limit noneconomic damages in some way.[195] Legislatures have adopted this public policy approach to provide greater predictability in the most unpredictable component of compensatory damages, recognizing the established maximum represents a pure legislative judgment call.[196]

As with many public policy issues, state legislatures have taken varying approaches. Some states limit noneconomic damages in all personal injury cases,[197] while many others specifically limit noneconomic damages in medical negligence cases.[198] A few states limit noneconomic awards in other contexts, such as product liability actions,[199] motor vehicle accident cases,[200]

195. *See* Tort Reform, *50 State Statutory Surveys*, 0100 SURVEYS 45 (updated October 2021) (providing survey of state laws on the limitation of recovery on non-economic damages), https://1.next.westlaw.com/Document/I904cd0125afa11de9b8c850332338889/View/FullText.html [https://perma.cc/48EN-YDXB]; 3 DAN B. DOBBS ET AL., DOBBS' LAW OF TORTS § 486 (2d ed. 2022) ("Well over half the states have enacted some kind of cap on damages recoverable.").

196. *See* DOBBS ET AL., *supra* note 195.

197. *See, e.g.*, ALASKA STAT. § 09.17.010 (2020); COLO. REV. STAT. § 13-21-102.5 (2021); HAW. REV. STAT. § 663-8.7 (LexisNexis 2018); IDAHO CODE § 6-1603 (2010); MD. CTS. & JUD. PROC. CODE ANN. § 11-108 (LexisNexis 2020); MISS. CODE ANN. § 11-1-60(2)(b) (West, Westlaw through 2022 Reg. Sess. effective through June 30, 2022); OHIO REV. CODE ANN. § 2315.18 (2017); TENN. CODE ANN. § 29-39-102 (2012).

198. *See, e.g.*, ALASKA STAT. § 09.55.549 (2020); CAL. CIV. CODE § 3333.2 (West 2016); COLO. REV. STAT. § 13-64-302 (2021); IOWA CODE § 147.136A (2021); ME. STAT. tit. 24-A, § 4313(9) (Supp. 2022); MD. CTS. & JUD. PROC. CODE ANN. § 3-2A-09 (LexisNexis 2020); MASS. GEN. LAWS ANN. ch. 231, § 60H (2020); MICH. COMP. LAWS ANN. § 600.1483 (West 2015); MONT. CODE ANN. § 25-9-411 (2021); MO. REV. STAT. § 538.210 (2016 & Supp. 2021); NEV. REV. STAT. § 41A.035 (2021); N.C. GEN. STAT. § 90-21.19 (2021); N.D. CENT. CODE § 32-42-02 (Lexis Advance through 67th Legis. Assemb. Spec. 2021 Sess.); OHIO REV. CODE ANN. § 2323.43 (2017); S.C. CODE ANN. § 15-32-220 (Supp. 2021); S.D. CODIFIED LAWS § 21-3-11 (2017); TEX. CIV. PRAC. & REM. CODE ANN. § 74.301 (West 2017); UTAH CODE ANN. § 78B-3-410 (West 2009); W. VA. CODE ANN. § 55-7B-8 (West 2022); WIS. STAT. § 893.55 (2019–20). A few states cap total damages in medical negligence cases. *See, e.g.*, IND. CODE ANN. § 34-18-14-3 (West 2021); LA. STAT. ANN. § 1231.2 (LexisNexis, Lexis Advance through 2022 Act 400); NEB. REV. STAT. § 44-2825 (2021); VA. CODE ANN. § 8.01-581.15 (2015); *see also* N.M. STAT. ANN. § 41-5-6 (2021) (limiting total damages in medical liability actions except damages for medical care or punitive damages).

199. *See, e.g.*, MICH. COMP. LAWS SERV. § 600.2946a (LexisNexis, Lexis Advance through 2022 Act 188).

200. *See, e.g.*, IOWA CODE § 613.20 (2021) (precluding recovery of noneconomic damages for injuries to a person sustained in automobile crash caused during commission of a felony by that person); OR. REV. STAT. § 31.715 (2021) (precluding uninsured or intoxicated drivers from

and suits against sellers of alcoholic beverages.[201] Amounts of noneconomic damage limits also vary significantly, ranging from $250,000 in medical negligence actions in around half a dozen states[202] to upwards of $1 million (or more) in personal injury actions in others.[203] A number of states additionally set conditions to increase or excuse statutory limits in cases involving especially severe or catastrophic injury.[204] Other states condition or excuse limits where injury results from a defendant's reckless or intentional misconduct,[205] where a court finds justification by clear and convincing evidence, or where a jury finds special circumstances exist.[206] Further, numerous states increase annually the upper limit of noneconomic damage

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recovering noneconomic damages for injuries sustained in action arising out of operation of motor vehicle).

201. *See, e.g.*, ME. STAT. tit. 28-A, § 2509 (Supp. 2022).

202. *See* ALASKA STAT. § 09.55.549 (2020); FLA. STAT. § 766.207(7)(b) (2021) (limiting noneconomic damages to $250,000 when the parties proceed to voluntary binding arbitration); IOWA CODE § 147.136A (2021); MONT. CODE ANN. § 25-9-411 (2021); TEX. CIV. PRAC. & REM. CODE ANN. § 74.301 (West 2017). In 2022, California increased its $250,000 noneconomic damages cap established by the Medical Injury Compensation Reform Act of 1975 (MICRA) to $500,000 for wrongful death actions, with a $50,000 increase until the cap reaches $1 million. *See* Act of May 23, 2022, ch. 17, 2022 Cal. Legis. Serv. A.B. 35 (amending CAL. CIV. CODE § 3333.2 (West 2016)). For medical malpractice actions without a wrongful death claim, the noneconomic damages cap is raised from $250,000 to $350,000 and increases by $40,000 annually up to $750,000. After the upper limits are reached, a 2% annual inflationary adjustment will apply beginning January 1, 2034. The amended MICRA law also changes the maximum contingency fee attorneys can charge for medical malpractice claims, depending on the stage of litigation. *See id.*

203. *See, e.g.,* IDAHO CODE § 6-1603 (2010) (initial noneconomic damages limit of $250,000 increased annually since 2004 based on the state's average annual wage adjustments); MD. CTS. & JUD. PROC. CODE ANN. § 11-108 (LexisNexis 2020) (amended 2022) (limiting noneconomic damages to $920,000 as of October 2022 and increasing by $15,000 each year); MISS. CODE ANN. § 11-1-60(2)(b) (West, Westlaw through 2022 Reg. Sess. effective through June 30, 2022) (limiting noneconomic damages to $1 million).

204. *See, e.g.*, ALASKA STAT. § 09.17.010 (2020) (increasing personal injury noneconomic damage limit in cases of "severe permanent physical impairment or severe disfigurement" to greater of $1 million or injured person's life expectancy in years multiplied by $25,000); MICH. COMP. LAWS ANN. § 600.1482 (West 2015) (increasing $280,000 medical malpractice noneconomic damages limit to $500,000 in certain permanent impairment contexts); TENN. CODE ANN. § 29-39-102 (2012) (increasing $750,000 personal injury noneconomic damage limit to $1 million in cases meeting criteria for "catastrophic loss or injury"); *see also* MD. CTS. & JUD. PROC. CODE ANN. § 11-108 (LexisNexis 2020) (increasing personal injury noneconomic damages limit only in wrongful death cases).

205. *See, e.g.*, ALASKA STAT. § 09.55.549 (2020); IDAHO CODE § 6-1603 (2010); IOWA CODE ANN. § 147.136A (2021); N.C. GEN. STAT. § 90-21.19 (2021).

206. *See, e.g.*, COLO. REV. STAT. § 13-21-102.5(3)(a) (2021) (increasing $250,000 medical malpractice noneconomic damages to $500,000 if "court finds justification by clear and convincing evidence"); MASS. GEN. LAWS ANN. ch. 231, § 60H (2020) (excusing $500,000 medical liability noneconomic damages limit where jury determines "special circumstances" warrant).

awards in an effort to keep pace with inflation or other economic considerations.[207]

Whatever approach a jurisdiction takes, the underlying rationale appears the same, namely that limiting noneconomic damages represents a rational response to an increasingly irrational civil justice system.[208] A generally applicable limit on noneconomic damages significantly reduces the potential for runaway verdicts and unreasonable settlement demands. In the medical liability context, where most statutory limits exist, a significant body of literature shows that noneconomic damage limits lead to lower insurance premiums,[209] higher physician supply,[210] and a greater focus on the quality of care over the practice of defensive medicine that merely increases the quantity of care.[211]

Arguments against noneconomic damage limits often suggest that caps represent a blunt tool for addressing excessive verdicts that can deprive

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207. *See, e.g.*, COLO. REV. STAT. § 13-21-102.5(3)(c) (2021); IDAHO CODE § 6-1603 (2010); MD. CTS. & JUD. PROC. CODE ANN. § 11-108 (LexisNexis 2020); N.C. GEN. STAT. § 90-21.19 (2021); W. VA. CODE ANN. § 55-7B-8 (West 2022).

208. *See supra* notes 119–31 and accompanying text (discussing rise of pain and suffering damages).

209. *See, e.g.*, Mark A. Behrens, *Medical Liability Reform: A Case Study of Mississippi*, 118 OBSTETRICS & GYNECOLOGY 335, 338–39 (2011) (documenting medical liability insurance premium reductions and refunds following Mississippi's adoption of a $500,000 noneconomic damage limit in most medical liability cases); Ronen Avraham, *An Empirical Study of the Impact of Tort Reforms on Medical Malpractice Settlement Payments*, 36 J. LEGAL STUD. S183, S221 (2007) (showing, based on study of more than 100,000 settled cases, that caps on noneconomic damages "do in fact have an impact on settlement payments"); MICHELLE M. MELLO, ROBERT WOOD FOUND., MEDICAL MALPRACTICE: IMPACT OF THE CRISIS AND EFFECT OF STATE TORT REFORMS 12 (RSCH. SYNTHESIS REP. NO. 10, 2006) ("[T]he most recent controlled studies show that caps moderately constrain the growth of premiums."); Meredith L. Kilgore et al., *Tort Law and Medical Malpractice Insurance Premiums*, 43 INQUIRY 255, 268 (2006) (finding physicians in general surgery and obstetrics/gynecology experienced 20.7% and 25.5% lower insurance premiums, respectively, in states with damage caps compared to states without them); U.S. DEP'T OF HEALTH & HUM. SERVS., CONFRONTING THE NEW HEALTH CARE CRISIS: IMPROVING HEALTH CARE QUALITY AND LOWERING COSTS BY FIXING OUR MEDICAL LIABILITY SYSTEM 15 (2002) ("[T]here is a substantial difference in the level of medical malpractice premiums in states with meaningful caps . . . and states without meaningful caps.").

210. *See, e.g.*, Ronald M. Stewart et al., *Tort Reform is Associated with Significant Increases in Texas Physicians Relative to the Texas Population*, 17 J. GASTROINTEST. SURGERY 168, 168 (2013); William E. Encinosa & Fred J. Hellinger, *Have State Caps on Malpractice Awards Increased the Supply of Physicians?*, 24 HEALTH AFFS. 250, 255 (2005); *see also* Robert L. Barbieri, *Professional Liability Payments in Obstetrics and Gynecology*, 107 OBSTETRICS & GYNECOLOGY 578, 578 (2006) ("Many studies demonstrate that professional liability exposure has an important effect on recruitment of medical students to the field and retention of physicians within the field and within a particular state.").

211. *See, e.g.*, Steven A. Farmer et al., *Association of Medical Liability Reform with Clinician Approach to Coronary Artery Disease Management*, 3 JAMA CARDIOLOGY 609, 616 (2018) (finding that, after adoption of damage limits, healthcare providers engaged in less invasive testing when treating coronary artery disease).

deserving plaintiffs of fair compensation.[212] For example, the proposed *Restatement of Torts, Third: Remedies* states that "the typical statutory cap has no way to distinguish between a just award for a catastrophic injury and an egregiously excessive verdict," with the result "that caps disproportionately affect the most seriously injured plaintiffs and the youngest plaintiffs, who face the most years of pain and suffering."[213] As indicated, though, a number of state legislatures have responded to such concerns by including caveats designed to provide fair compensation in comparatively more deserving situations while balancing other public interests.[214]

The adoption of noneconomic damage caps may be an imperfect solution to reining in excessive awards, but it is a rational one. It is also a public policy approach courts across the nation have generally respected.[215] Courts have upheld limits on noneconomic damages that apply to most civil claims[216] and those that apply specifically to medical liability cases.[217] They have also upheld laws that limit a plaintiff's total recovery against healthcare

212. *See, e.g.,* REMEDIES RESTATEMENT Preliminary Draft, *supra* note 23, § 23, at cmt. g.

213. *Id.*

214. *See supra* notes 204–06 and accompanying text.

215. *See* Carly N. Kelly & Michelle M. Mello, *Are Medical Malpractice Damages Caps Constitutional? An Overview of State Litigation*, 33 J.L. MED. & ETHICS 515, 527 (2005) ("Over the years, the scales in state courts have increasingly tipped toward upholding noneconomic damages caps.").

216. *See, e.g.*, C.J. v. State, Dep't of Corr., 151 P.3d 373, 382 (Alaska 2006); Evans *ex rel.* Kutch v. State, 56 P.3d 1046, 1070 (Alaska 2002); Scharrel v. Wal-Mart Stores, Inc., 949 P.2d 89, 95 (Colo. App. 1997); Kirkland v. Blaine Cnty. Med. Ctr., 4 P.3d 1115, 1121 (Idaho 2000); DRD Pool Serv., Inc. v. Freed, 5 A.3d 45, 59 (Md. 2010); Green v. N.B.S., Inc., 976 A.2d 279, 286 (Md. 2009); Murphy v. Edmonds, 601 A.2d 102, 115–16 (Md. 1992); Wessels v. Garden Way, Inc., 689 N.W.2d 526, 530–31 (Mich. Ct. App. 2004) (product liability actions); Arbino v. Johnson & Johnson, 880 N.E.2d 420 (Ohio 2007).

217. *See, e.g.*, Fein v. Permanente Med. Grp., 695 P.2d 665, 683 (Cal. 1985); Garhart *ex rel.* Tinsman v. Columbia/HealthONE, L.L.C., 95 P.3d 571, 584 (Colo. 2004); Scholz v. Metro. Pathologists, P.C., 851 P.2d 901, 906–07 (Colo. 1993) (en banc); Zdrojewski v. Murphy, 657 N.W.2d 721, 735–39 (Mich. Ct. App. 2002); Ordinola v. Univ. Physician Assocs., 625 S.W.3d 445, 448–51 (Mo. 2021) (en banc); Tam v. Eighth Jud. Dist. Ct., 358 P.3d 234, 242 (Nev. 2015); Condon v. St. Alexius Med. Ctr., 926 N.W.2d 136, 143 (N.D. 2019); Knowles *ex rel.* Knowles v. United States (*In re* Certification of Questions of L. from U.S. Ct. of Appeals for the Eighth Cir.), 544 N.W.2d 183, 204–05 (S.D. 1996) (1997), *as recognized in* Peterson *ex rel.* Peterson v. Burns, 635 N.W.2d 556, 570 (S.D. 2001); Judd v. Drezga, 103 P.3d 135, 143 (Utah 2004); MacDonald v. City Hosp., Inc., 715 S.E.2d 405, 420–21 (W. Va. 2011); Estate of Verba v. Ghaphery, 552 S.E.2d 406, 413 (W. Va. 2001); Robinson v. Charleston Area Med. Ctr., Inc., 414 S.E.2d 877, 888 (W. Va. 1991); Mayo v. Wis. Injured Patients & Fams. Comp. Fund, 914 N.W.2d 678, 695 (Wis. 2018).

providers,[218] as well as damage limits that apply to various other types of claims or entities.[219]

In comparison, relatively few state high courts have invalidated limits on noneconomic damages.[220] Notably, none have done so pursuant to due process or other provisions of the U.S. Constitution.[221] Rather, plaintiffs' attorneys have endeavored to nullify legislatively imposed limits on noneconomic damages pursuant to disparate, sometimes ambiguous, state constitutional provisions.[222] Trial lawyer lobbying groups have likewise engaged in coordinated efforts "to roll back caps" since the 1980s.[223]

Both legislatures and courts should recognize that the broader public good is served when liability remains predictable and when noneconomic damage awards are not improperly inflated. Noneconomic damage limits provide a backstop which represents legislators' judgment call that some amount of subjective noneconomic damages is "enough" to reflect the reality of a serious injury in a more dispassionate manner than may be exercised by some juries.[224] Accordingly, a ceiling can reduce the potential for arbitrariness in

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218. *See, e.g.*, *Garhart*, 95 P.3d at 584; Oliver v. Magnolia Clinic, 85 So. 3d 39, 50 (La. 2012); Butler v. Flint Goodrich Hosp. of Dillard Univ., 607 So. 2d 517, 521 (La. 1992); Gourley *ex rel.* Gourley v. Neb. Methodist Health Sys., Inc., 663 N.W.2d 43, 73 (Neb. 2003); Siebert v. Okun, 485 P.3d 1265, 1269 (N.M. 2021); Pulliam v. Coastal Emer. Servs. Of Richmond, Inc., 509 S.E.2d 307, 310 (Va. 1999); Etheridge v. Med. Ctr. Hosps., 376 S.E.2d 525, 536 (Va. 1989); Ind. Patient's Comp. Fund v. Wolfe, 735 N.E.2d 1187, 1191–94 (Ind. Ct. App. 2000); Bova v. Roig, 604 N.E.2d 1, 3 (Ind. Ct. App. 1992); Johnson v. St. Vincent Hosp., Inc., 404 N.E.2d 585, 598, 602 (Ind. 1980), *overruled on other grounds by In re* Stephens, 867 N.E.2d 148, 156 (Ind. 2007); Rose v. Drs. Hosp., 801 S.W.2d 841, 846 (Tex. 1990).

219. *See, e.g.*, Quackenbush v. Super. Ct. of S.F., 70 Cal. Rptr. 2d 271, 280–81 (Cal. Ct. App. 1997) (uninsured motorists, intoxicated drivers, and fleeing felons); Peters v. Saft, 597 A.2d 50, 54 (Me. 1991) (servers of alcohol); Phillips v. Mirac, Inc., 685 N.W.2d 174, 187 (Mich. 2004) (lessors of motor vehicles); Wessels v. Garden Way, Inc., 689 N.W.2d 526, 530–31 (Mich. Ct. App. 2004) (noneconomic damages in product liability actions); Schweich v. Ziegler, Inc., 463 N.W.2d 722, 734 (Minn. 1990) (loss of consortium damages); Oliver v. Cleveland Indians Baseball Co., 915 N.E.2d 1205, 1209–10 (Ohio 2009) (political subdivisions).

220. *See, e.g.,* N. Broward Hosp. Dist. v. Kalitan*,* 219 So. 3d 49, 59 (Fla. 2017); Hilburn v. Enerpipe Ltd., 442 P.3d 509, 524 (Kan. 2019); Watts v. Lester E. Cox Med. Ctrs., 376 S.W.3d 633, 636 (Mo. 2012) (en banc); Beason v. I.E. Miller Servs., Inc., 441 P.3d 1107, 1113 (Okla. 2019); Busch v. McInnis Waste Sys., Inc., 468 P.3d 419, 433 (Or. 2020).

221. *See, e.g.*, *Kalitan*, 219 So. 3d at 59 (Florida Constitution); *Hilburn*, 442 P.3d at 524 (Kansas Constitution); *Watts*, 376 S.W.3d at 636 (Missouri Constitution); *Beason*, 441 P.3d at 1113 (Oklahoma Constitution); *Busch*, 468 P.3d at 433 (Oregon Constitution).

222. *See* Victor E. Schwartz & Leah Lorber, *Judicial Nullification of Civil Justice Reform Violates the Fundamental Federal Constitutional Principle of Separation of Powers: How to Restore the Right Balance*, 32 RUTGERS L.J. 907, 917–19, 919 n.32 (2001) (discussing efforts by organized plaintiffs' bar to assert challenges under state constitutions to invalidate limits on noneconomic damages).

223. Navan Ward Jr., *An Urgent Need*, TRIAL, June 2022, at 6, 6.

224. *See, e.g.*, Y. Peter Kang, *The Biggest Personal Injury Decisions and Verdicts of 2020*, LAW360 (Dec. 18, 2020, 7:44 PM), https://www.law360.com/articles/1338104/the-biggest-

awards that may raise due process concerns for defendants[225] and may deleteriously impact the provision of health care or other important activities within a state.[226]

C. Mitigation of Damages

A commonsense public policy and legal concept applicable to all types of compensatory damages is that, when a tort occurs, the injured person bears responsibility for taking reasonable measures to mitigate that injury.[227] For example, a person who sustains a serious leg injury in a car accident caused by a negligent driver generally cannot forego any form of medical treatment, sit back, and watch the injury worsen, only to recover greater pain and suffering damages in a subsequent tort action.[228] Similarly, if the injured motorist's failure to seek medical attention or follow through with doctor-recommended physical therapy resulted in missing several additional weeks of work to recuperate, the motorist should not be permitted to recover those readily avoidable economic losses. Under state common law, this damages concept is often referred to as the doctrine of "avoidable consequences."[229]

Perhaps surprisingly, significant disagreement exists among some courts and torts scholars regarding the continued viability and application of avoidable consequences or mitigation of damage rules.[230] This disagreement has played out recently in the development of the proposed *Restatement of Torts, Third: Remedies*, which includes a provision restating the common law

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personal-injury-decisions-and-verdicts-of-2020 [https://perma.cc/35ZC-TYYK] (reporting on Florida case in which jury awarded injured motorist "approximately $410 million, with about $371 million earmarked for future pain and suffering").

225. *See* Gilbert v. DaimlerChrysler Corp., 685 N.W.2d 391, 400 n.22 (Mich. 2004) ("A grossly excessive award for pain and suffering may violate the Due Process Clause even if it is not labeled 'punitive.'").

226. *Cf.* Niemeyer, *supra* note 117, at 1414 ("The relevant lesson learned from the punitive damage experience is that when the tort system becomes infected by a growing pocket of irrationality, state legislatures must step forward and act to establish rational rules.").

227. *See* REMEDIES RESTATEMENT, *supra* note 7, § 8.

228. There may be circumstances, such as a tort plaintiff's refusal to obtain medical treatment on religious grounds, where full recovery of compensatory damages would be permitted; however, that is because a defendant may be said to take a plaintiff "as he or she is found" such that it would be unreasonable to require a plaintiff to obtain medical treatment against his or her religious beliefs. *Cf. id.* § 7 cmt. b (restating so-called thin-skull-plaintiff rule).

229. *Id.* § 8; DAN B. DOBBS & CAPRICE L. ROBERTS, LAW OF REMEDIES: DAMAGES-EQUITY-RESTITUTION § 3.9, at 273 (3d ed. 2018) (stating that avoidable consequences rules represent "cardinal instruments of damages measurement").

230. Courts often use "avoidable consequences" and "mitigation of damages" interchangeably to refer to a plaintiff's post-accident conduct. *See* REMEDIES RESTATEMENT, *supra* note 7, § 8.

rule of avoidable consequences.[231] This *Restatement* states that a plaintiff generally cannot recover damages if, after the commission of a tort and becoming aware of the incurred (or impending) harm, the plaintiff could have avoided that harm "by reasonable effort or expenditure and without undue risk, difficulty, or embarrassment."[232] The *Restatement*'s survey of the case law also demonstrates that the "great majority of courts continue to apply the common-law rule of avoidable consequences."[233]

Disagreement regarding mitigation of damage rules centers on whether the common law doctrine of avoidable consequences has been "folded into the law of comparative responsibility" and no longer represents a separate post-injury analysis.[234] Interestingly, one of the Reporters of the proposed *Restatement of Torts, Third: Concluding Provisions* is a leading advocate of the view that the widespread adoption by states of comparative fault beginning in the late 1960s, to replace contributory negligence, effectively subsumed or obviated avoidable consequences rules.[235] Another part of the *Third Restatement of Torts* addressing "Apportionment of Liability," which was completed in 2000 and co-authored by the same Reporter, also suggested eliminating the common law rule of avoidable consequences in light of the transition by forty-six states from contributory negligence to comparative fault.[236] Under this proposed approach, courts would evaluate a plaintiff's post-injury conduct that failed to minimize, or worse, exacerbated, the injury as part of the overall apportionment of comparative fault among the parties.[237]

The proposed *Remedies Restatement* rejects this "revolutionary proposition,"[238] which it asserts "has drawn little judicial attention and less judicial support" in the ensuing two decades, as inconsistent with the

231. *See id.*

232. *Id.*

233. RESTATEMENT (THIRD) OF TORTS: REMEDIES § 8 cmt. a (AM. L. INST., Council Draft No. 1, 2021) [hereinafter REMEDIES RESTATEMENT Council Draft]; *see also* REMEDIES RESTATEMENT, *supra* note 7, § 8 cmt. y ("A large body of case law can be restated under the majority rule. There is value in restating this law, because many courts, probably most courts, will adhere to the traditional rule for the foreseeable future.").

234. REMEDIES RESTATEMENT, *supra* note 7, § 8 cmt. a.

235. *See* Michael D. Green & James Sprague, *Rescuing Avoidable Consequences from the Clutches of Remedies and Placing It in Apportionment of Liability, Where It Belongs*, 80 MD. L. REV. 380, 381, 408 (2021).

236. REMEDIES RESTATEMENT, *supra* note 7, § 8 cmts. a, p; *see also* MATTHIESEN, WICKERT & LEHRER, S.C., CONTRIBUTORY NEGLIGENCE / COMPARATIVE FAULT LAW IN ALL 50 STATES (2022), https://www.mwl-law.com/wp-content/uploads/2018/02/COMPARATIVE-FAULT-SYSTEMS-CHART.pdf [https://perma.cc/25CX-QLUP] (reporting that forty-six states have transitioned to a comparative fault system).

237. *See* Green & Sprague, *supra* note 235, at 416.

238. REMEDIES RESTATEMENT, *supra* note 7, § 8 cmt. p (quoting Yehuda Adar, *Comparative Negligence and Mitigation of Damages: Two Sister Doctrines in Search of Reunion*, 31 QUINNIPIAC L. REV. 783, 785 (2013)).

"overwhelming majority rule."[239] The *Remedies Restatement* explains that the widespread adoption by states of comparative fault regimes did not disturb or usurp the doctrine of avoidable consequences because the two examine different things.[240] Comparative fault determines who bears responsibility for a tortious act, and therefore, as applied to a plaintiff, evaluates the plaintiff's conduct *before* or simultaneously with the tort.[241] The doctrine of avoidable consequences instead evaluates a plaintiff's conduct *after* the commission of a tort to determine whether additional harm could have been reasonably avoided.[242]

Before an injury occurs, both plaintiff and defendant have the ability to control their own conduct that contributes to the injury. Comparative fault rules apportion responsibility based on this pre-injury conduct. After an injury, only the plaintiff controls, or has the ability to influence, what steps are taken to reasonably mitigate damages. Because there is nothing to compare, the plaintiff's failure to avoid consequences is not relevant to apportioning responsibility.[243] In this regard, avoidable consequences is properly understood as a separate remedies doctrine that addresses the appropriate measurement of damages, not whether a plaintiff caused or contributed to the tort.

Maintaining the distinction and doctrinal independence of avoidable consequences is important to the future of tort law for several reasons. First, folding mitigation of damages rules into a comparative fault analysis would make the analysis far more complex and needlessly so. As the proposed *Restatement* explains:

> There is a conceptual difficulty, and a potential for jury confusion, in trying to combine comparative responsibility for the plaintiff's failure to act reasonably to avoid a particular consequence of the tort, and the usually quite different comparative responsibility for causing the accident, into a single overall assessment of comparative responsibility for the particular harm that should have been avoided.[244]

For example, under a comparative fault regime that subsumed the doctrine of avoidable consequences, a jury finding a motorist 75% at fault for a car accident and the injured plaintiff 25% at fault would need to incorporate

239. REMEDIES RESTATEMENT Council Draft, *supra* note 233, § 8 cmt. a.
240. *See id.* § 8 cmts. b, c.
241. *See id.* § 8 cmt. c.
242. *See id.*
243. *See id.*
244. *See* REMEDIES RESTATEMENT, *supra* note 7, § 8 cmt. v.

another, overlapping comparative fault assessment if the plaintiff unreasonably chose to ignore medical advice which resulted in more serious injury. Presumably, the plaintiff would be 100% responsible for failing to mitigate the injury, meaning the jury would need to accurately adjust its overall assignment of a percentage of the fault to the plaintiff to factor in this post-accident conduct—and only as it pertains to the greater harm sustained, not the injury itself. This analysis would become even more difficult if the plaintiff was somehow less than 100% responsible for failing to reasonably mitigate the injury. The simpler, more exacting approach in this situation would be to have a jury apportion fault for the car accident and then separately subtract those additional damages that should have been avoided.

Second, it is fairer to plaintiffs to separately apply the doctrine of avoidable consequences because most jurisdictions adopt a modified comparative fault system that bars a plaintiff from recovery if they are deemed 50% or 51% at fault for their injury.[245] Requiring a jury to apportion fault in a manner that incorporates a plaintiff's post-accident failure to mitigate damages would in most, if not all, cases result in an increased assignment of percentage fault to the plaintiff, which in cases at the margin could push otherwise-deserving plaintiffs over the 50% or 51% fault threshold so that they recover nothing. The better approach is to focus comparative fault apportionment on the cause(s) of the tort, not tacking on a plaintiff's fault for improper post-accident behavior.

Third, an assessment of "reasonable" conduct post-injury for purposes of avoidable consequences may involve different, more accommodating considerations than reasonable conduct for purposes of a comparative fault analysis, which further supports separate analyses. For example, a plaintiff who foregoes post-injury medical treatment based on strongly held religious beliefs may be viewed as acting reasonably under the circumstances.[246] That plaintiff, however, would not be excused from the application of comparative fault for refusing on religious grounds to wear a seat belt, engage some other safety device, or take other injury precautions.[247] Nor could the plaintiff cite religion to avoid the application of comparative fault if engaged in some religious-based activity that played a role in causing the tort. Similarly, an impoverished plaintiff might successfully assert lack of resources to pay to see a doctor as a reasonable justification for failing to mitigate damages, but

245. *See* MATTHIESEN, WICKERT & LEHRER, S.C., *supra* note 236, at 3 (reporting that 33 states adopt a modified comparative fault system).

246. *See* REMEDIES RESTATEMENT, *supra* note 7, § 8 cmt. i.

247. *See id.* § 8 cmt. j.

that plaintiff could not cite poverty as a means to avoid the application of comparative fault in a tort action.[248]

Stated plainly, what constitutes reasonable conduct appears more forgiving post-injury than pre-injury. This may be a reflection of the tort principle that defendants generally take plaintiffs as they find them and a desire to avoid placing greater burdens on those who have sustained a tortious injury.[249] In any event, including these distinct notions of reasonableness into a single, multi-layered comparative fault analysis risks ignoring or undervaluing this reality. It also may exacerbate concerns regarding juror confusion.

Courts applying mitigation of damage rules should follow the overwhelming majority approach that evaluates avoidable consequences independent of comparative fault. The doctrine of avoidable consequences promotes a simpler, fairer, and more precise determination of compensatory damages in the aftermath of a tort.

III. PUNITIVE DAMAGES

Punitive damages are an entirely separate category of tort damages with a clear function: to punish the wrongdoer and deter that person and others from future wrongdoing.[250] Unlike compensatory damages aimed at making a tortiously injured individual "whole" as near as practicable, punitive damages impose societal retribution for exceptionally egregious wrongs, such as intentional misconduct. While such malicious acts are comparatively rare, punitive damages often play an outsized role in modern tort litigation due to the subjective nature of determining adequate, constitutionally permissible punishment, unpredictability in the amount of punitive awards, and varying standards and procedures that impact the likelihood and frequency of punitive awards.[251]

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248. *See id.* § 8 cmts. e, g (discussing plaintiffs' inability to pay for reasonable post-injury treatment).

249. *Id.* § 7 cmt. b ("A defendant takes the plaintiff as defendant finds the plaintiff."); *id.* § 8 cmt. n.

250. *See* Exxon Shipping Co. v. Baker, 554 U.S. 471, 492 (2008) ("[T]he consensus today is that punitives are aimed not at compensation but principally at retribution and deterring harmful conduct."); Cooper Indus., Inc. v. Leatherman Tool Grp., Inc., 532 U.S. 424, 432 (2001) ("[Punitive damages are] intended to punish the defendant and to deter future wrongdoing."); State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408, 416 (2003) ("[P]unitive damages . . . are aimed at deterrence and retribution.").

251. *See* Victor E. Schwartz et al., *The Supreme Court's Common Law Approach to Excessive Punitive Damage Awards: A Guide for the Development of State Law*, 60 S.C. L. REV. 881, 883–94 (2009) (discussing ineffective state standards, evolution of constitutional standards, and continued court struggles).

Thirty years ago, the U.S. Supreme Court expressed serious concern that punitive damages had "run wild" in America.[252] The Court issued a series of decisions to place procedural due process safeguards[253] and substantive due process restrictions on excessive punitive awards.[254] In particular, the Court, in *BMW of North America, Inc. v. Gore,* established three now-familiar "guideposts" for determining whether a punitive damages award is unconstitutionally excessive: (1) the degree of reprehensibility of the defendant's conduct; (2) the ratio between the compensatory damages and the punitive damages award; and (3) the comparable civil and criminal sanctions for the conduct.[255] A few years later, the Court, in *State Farm Mutual Automobile Insurance Co. v. Campbell,* cautioned, "in practice, few awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process."[256]

The Court, in *Exxon Shipping Co. v. Baker*, subsequently offered non-binding guidance from a common law perspective regarding "the real problem" of "the stark unpredictability of punitive damages" and "outlier cases."[257] The Court established a one-to-one ratio as an upper limit for punitive damages in maritime law cases.[258] In reaching this decision, the Court surveyed the law and recognized substantial variation in states' treatment and regulation of punitive damages.[259] The Court also acknowledged the efforts by many states to place reasonable upper limits on punitive damages or maximum ratios of punitive to compensatory damages but noted that "[d]espite these limitations, punitive damages overall are higher and more frequent in the United States than they are anywhere else."[260]

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252. Pac. Mut. Life Ins. Co. v. Haslip, 499 U.S. 1, 18 (1991); *see also* TXO Prod. Corp. v. Alliance Res. Corp., 509 U.S. 443, 500 (1993) (O'Connor, J., dissenting) ("Recently, . . . the frequency and size of such awards have been skyrocketing. . . . And it appears that the upward trajectory continues unabated."); Victor E. Schwartz et al., *Reining In Punitive Damages "Run Wild": Proposals for Reform by Courts And Legislatures*, 65 BROOK. L. REV. 1003, 1003, 1008–10 (1999).

253. *See Cooper Indus., Inc.*, 532 U.S. at 431, 433, 440 (requiring de novo appellate review of punitive damage awards); Honda Motor Co. v. Oberg, 512 U.S. 415, 430–32 (1994) (finding that due process requires judicial review of the size of a punitive damages award).

254. *See* Philip Morris USA v. Williams, 549 U.S. 346, 353 (2007) ("[T]he Constitution's Due Process Clause forbids a State to use a punitive damages award to punish a defendant for injury that it inflicts upon nonparties or those whom they directly represent . . . ."); *Campbell*, 538 U.S. at 416; BMW of N. Am., Inc. v. Gore, 517 U.S. 559, 562, 571–73 (1996).

255. *Gore*, 517 U.S. at 574–75.

256. *Campbell*, 538 U.S. at 425.

257. Exxon Shipping Co. v. Baker, 554 U.S. 471, 499–500 (2008).

258. *Id.* at 513. The Court said higher ratios may be appropriate for exceptionally malicious conduct. *Id*.

259. *See id.* at 495–97.

260. *Id.* at 496.

Punitive damages, similar to noneconomic compensatory damages, developed from modest origins.[261] Historically, punitive damages "merited scant attention," because they "were rarely assessed and likely to be small in amount."[262] Typically, punitive damages awards only slightly exceeded compensatory damages awards, if at all.[263] Beginning in the late 1960s, however, courts began to allow punitive damages in unintentional tort cases, such as in product liability actions.[264] By the "late 1970s and 1980s, the size of punitive damages awards 'increased dramatically,'[265] and 'unprecedented numbers of punitive awards . . . began to surface.'"[266] The continued growth in the size and frequency of awards led the U.S. Supreme Court, in the 1990s and 2000s, to take up the issue of excessive punitive damages on multiple occasions and set forth constitutional limits.[267]

The dramatic rise in frequency and amount of punitive damage awards has additionally led most states to limit punitive damages.[268] These limits are in addition to a handful of states that bar punitive damages.[269] The public

261. *See* discussion *supra* Section II.B.1.

262. Dorsey Ellis, Jr., *Fairness and Efficiency in the Law of Punitive Damages*, 56 S. CAL. L. REV. 1, 2 (1982).

263. *See* TXO Prod. Corp. v. Alliance Res. Corp., 509 U.S. 443, 500 (1993) (O'Connor, J., dissenting) ("As little as 30 years ago, punitive damages awards were 'rarely assessed' and usually 'small in amount.'").

264. *See* Toole v. Richardson-Merrell Inc., 60 Cal. Rptr. 398, 418 (Ct. App. 1967) (holding for the first time that punitive damages were recoverable in a strict product liability action); *see also* Schwartz et al., *supra* note 252, at 1008.

265. George L. Priest, *Punitive Damages and Enterprise Liability*, 56 S. CAL. L. REV. 123, 123 (1982).

266. Schwartz et al., *supra* note 251, at 1009 (quoting John Calvin Jeffries, Jr., *A Comment on the Constitutionality of Punitive Damages*, 72 VA. L. REV. 139, 142 (1986)).

267. *See supra* text accompanying notes 252–60.

268. *See* ALA. CODE § 6-11-21 (2014); ALASKA STAT. § 9.17.020(f) (2020); COLO. REV. STAT. § 13-21-102(3) (2021); CONN. GEN. STAT. § 52-240b (2021) (products liability); FLA. STAT. § 768.73 (2021); GA. CODE ANN. § 51-12-5.1(g) (2017); IDAHO CODE § 6-1604(3) (2010); IND. CODE § 34-51-3-4 (2021); KAN. STAT. ANN. § 60-3702(e) (2005 & Supp. 2021); ME. STAT. tit. 18-C, § 2-807(2) (2020) (wrongful death); MISS. CODE ANN. § 11-1-65(3) (2019); MONT. CODE ANN. § 27-1-220(3) (2021); NEV. REV. STAT. § 42-005 (2021); N.J. STAT. ANN. § 2A:15-5.14 (West 2015 & Supp. 2022); N.C. GEN. STAT. § 1D-25(b) (2021); N.D. CENT. CODE § 32-03.2-11(4) (2022); OHIO REV. CODE ANN. § 2315.21(D)(2) (West 2017 & Supp. 2021); OKLA. STAT. tit. 23, § 9.1(C) (2021); S.C. CODE ANN. § 15-32-530(A) (Supp. 2021); TEX. CIV. PRAC. & REM. CODE ANN. § 41.008(b) (West 2015 & Supp. 2021); VA. CODE ANN. § 8.01-38.1 (2015); W. VA. CODE § 55-7-29(c) (West, Westlaw through legislation of 2022 4th Spec. Sess.); WIS. STAT. § 895.043(6) (2006 & Supp. 2021); *see also* Punitive Damages, *supra* note 144.

269. Exxon Shipping Co. v. Baker, 554 U.S. 471, 495 (2008) presents a survey of states that bar punitive damages:

> Nebraska bars punitive damages entirely, on state constitutional grounds. See, *e.g.*, *Distinctive Printing & Packaging Co. v. Cox*, 32 Neb. 846, 857, 443 N.W.2d 566, 74 (1989) (*per curiam*). Four others permit punitive damages only when authorized by statute: Louisiana, Massachusetts, and Washington as a matter of common law, and

policy approach of establishing a statutory upper limit on punitive damages is also one courts have generally upheld, again paralleling the treatment of statutory limits on noneconomic compensatory damages.[270]

The foregoing raises the question of what judges and state legislators can and should do moving forward to address unsound punitive damage awards. After all, in spite of incremental procedural and substantive due process limits and state-specific limits, concerns regarding excessive punitive damages have not abated. Outlier punitive damage awards of hundreds of millions of dollars that comprise the bulk of awarded damages remain an all too common occurrence,[271] triggering appeals that stretch judicial resources and add further delay and costs even where an unsupportable punitive award is ultimately reduced to a just amount. Judges and legislators, though, can take meaningful steps to facilitate appropriate punitive damage awards.

First, with respect to judges, it is incumbent to faithfully apply each of the Supreme Court's due process safeguards and avoid "[s]elective [d]ue [p]rocess."[272] Judges reviewing a punitive award often focus on the "degree of reprehensibility of the defendant's conduct," following the Court's message that it may represent the "most important indicium of the reasonableness of a punitive damages award,"[273] and the ratio of punitive to compensatory damages as the "most commonly cited indicium of an unreasonable or excessive punitive damages award,"[274] and disregard or reduce to an afterthought the third *Gore* requirement to consider comparable

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New Hampshire by statute codifying common law tradition. See *Ross v. Conoco, Inc.*, 02–0299, p. 14 (La.10/15/02), 828 So.2d 546, 555; *Flesner v. Technical Communications Corp.*, 410 Mass. 805, 813, 575 N.E.2d 1107, 1112 (1991); *Fisher Properties, Inc. v. Arden–Mayfair, Inc.*, 106 Wash.2d 826, 852, 726 P.2d 8, 23 (1986); N.H.Rev.Stat. Ann. § 507:16 (1997); see also *Fay v. Parker*, 53 N.H. 342, 382 (1872). Michigan courts recognize only exemplary damages supportable as compensatory, rather than truly punitive, see *Peisner v. Detroit Free Press, Inc.*, 104 Mich.App. 59, 68, 304 N.W.2d 814, 817 (1981), while Connecticut courts have limited what they call punitive recovery to the "expenses of bringing the legal action, including attorney's fees, less taxable costs," *Larsen Chelsey Realty Co. v. Larsen*, 232 Conn. 480, 517, n. 38, 656 A.2d 1009, 1029, n. 38 (1995).

270. *See* Kristine Cordier Karnezis, Annotation, *Validity of State Statutory Cap on Punitive Damages*, 103 A.L.R. 5th 379 § 2[a] (2002) (surveying case law); *see also* discussion *supra* Section II.B.5.

271. *See* Y. Peter Kang, *The Biggest Personal Injury Decisions and Verdicts of 2021*, LAW360 (Dec. 21, 2021, 7:08 PM), https://www.law360.com/articles/1439405 [https://perma.cc/L99W-U5WR] (reporting on several cases in which a jury awarded more than $100 million in punitive damages, which comprised most of the damages award).

272. Victor E. Schwartz et al., *Selective Due Process: The United States Supreme Court Has Said that Punitive Damages Awards Must Be Reviewed for Excessiveness, but Many Courts Are Failing to Follow the Letter and Spirit of the Law*, 82 OR. L. REV. 33, 33, 35, 50–51 (2003) (describing the problems lower courts face when applying the *Gore* factors).

273. BMW of N. Am., Inc. v. Gore, 517 U.S. 559, 575 (1996).

274. *Id.* at 580.

civil and criminal sanctions.[275] For instance, some courts have treated this factor as akin to a mere "notice" requirement that punishment may be imposed for certain misconduct instead of a benchmark for what constitutes a reasonable punitive award.[276]

Second, and relatedly, judges should keep in mind that constitutional limits establish the absolute outer limit on punitive damages. Imposing the maximum level of punishment permissible by law should be reserved for the most exceptional circumstances of intentional misconduct committed with malice; it should never represent a norm for awarding damages. Many judges, reluctant to wade too far into adjusting a jury's excessive punitive damage award, settle on a constitutionally defensible maximum award instead of a punishment that reflects the defendant's comparatively unexceptional level of misconduct. Judges should exercise their discretion to curb excessive punitive damage awards, not simply to slip under the constitutional radar, but to mete out the most appropriate punishment. This practice, as part of a judge's initial review, can reduce the need for an appeal, or multiple appeals, that exhaust time and resources to chisel away an improper punitive damages award.

Third, judges typically are best positioned to safeguard against duplicative punishment in the form of punitive damages and inflated noneconomic damages.[277] As discussed, judicial gatekeeping and clear jury instructions can curb overlapping awards that inappropriately blur compensation and punishment.[278] Judges can also promote greater fairness by rejecting duplicative punishment in the form of multiple punitive damage awards for the same course of conduct across cases.[279] As courts have appreciated, the imposition of multiple punitive awards arising from the same conduct raises serious due process concerns.[280]

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275. *See* Schwartz et al., *supra* note 272, at 51–54.

276. *See id.* at 55–56.

277. *See* discussion *supra* Section II.B.1.b.

278. *See* discussion *supra* Section II.B.1.b.

279. *See* Victor E. Schwartz & Leah Lorber, *Death by a Thousand Cuts: How to Stop Multiple Imposition of Punitive Damages*, BRIEFLY, Dec. 2003, at 1, 6–9 (discussing the problems posed to both plaintiffs and defendants by multiple punitive damages awards). *But see id.* at 11 (discussing the difficulties state and lower federal courts face regarding multiple punitive damages because "[t]hey do not have the power or authority to prohibit subsequent awards outside of their jurisdiction").

280. *See* Owens-Corning Fiberglas Corp. v. Malone, 972 S.W.2d 35, 49 (Tex. 1998) ("[W]hen engaging in a substantive due process analysis of multiple punitive damage awards for the same conduct, courts should focus on the defendant's due process rights and whether the twin aims of punishment and deterrence have been adequately served rather than on plaintiffs' remedies."); Racich v. Celotex Corp., 887 F.2d 393, 398 (2d Cir. 1989) ("We agree that the multiple imposition of punitive damages for the same course of conduct may raise serious constitutional concerns, in the absence of any limiting principle."); Sch. Dist. of Lancaster v. Lake Asbestos of Quebec, Ltd. (*In re* Sch. Asbestos Litig.), 789 F.2d 996, 1005 (3d Cir. 1986) ("[P]owerful arguments have been made that, as a matter of constitutional law or of substantive

State legislatures can play a more proactive role than judges in tailoring appropriate punishment in future tort cases. First, legislatures can benefit from the varied approaches and experiences of those jurisdictions that have adopted an upper limit on punitive damages or a maximum ratio of punitive to compensatory damages. They can place more exacting limits than those set forth in the U.S. Supreme Court's punitive damages jurisprudence, such as establishing separate limits based on different amounts of compensatory damages[281] or different degrees of severity of misconduct.[282]

Second, legislatures can directly address concerns about duplicative punishment by codifying the non-overlapping nature of punitive and noneconomic compensatory damages[283] and eliminating the potential for multiple impositions of punitive damages for the same conduct. For example, Florida statutory law bars multiple punitive damage awards in actions "alleging harm from the same act or single course of conduct for which the claimant seeks compensatory damages" unless the court finds by clear and convincing evidence that the prior award was insufficient to punish the defendant.[284]

Third, legislatures can better circumscribe when punitive damages may be imposed. A number of states codify a demanding standard for awarding punitive damages to reserve punishment only for extraordinary misconduct, such as fraud, malice, oppression, or willful or deliberate acts.[285] Most states, either by statute or court rule, additionally require claimants to prove punitive

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tort law, the courts shoulder some responsibility for preventing repeated awards of punitive damages for the same acts or series of acts."); State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408, 410 (2003) (rejecting imposition of punitive damages for dissimilar hypothetical claims of nonparties because "[p]unishment on these bases creates the possibility of multiple punitive damages awards for the same conduct").

281. *See, e.g.*, NEV. REV. STAT. § 42.005(1) (2021) (punitive damages limited to three times compensatory damages if the amount of compensatory damages is $100,000 or more; and $300,000 if the amount of compensatory damages is less than $100,000).

282. *See, e.g.*, ALASKA STAT. § 9.17.020(f)–(g) (2020) (punitive damages limited to greater of three times compensatory damages or $500,000; however, in cases of actual malice, punitive damage limited to greater of four times compensatory damages or four times aggregate amount of financial gain that defendant received as a result of its conduct or $7 million).

283. *See supra* note 145 and accompanying text.

284. FLA. STAT. § 768.73(2) (2021).

285. *See, e.g.*, CAL. CIV. CODE § 3294(a) (West 2016) (allowing exemplary damages where "defendant has been guilty of oppression, fraud, or malice"); IDAHO CODE § 6-1604(1) (2010) (allowing punitive damages where claimant proves "oppressive, fraudulent, malicious or outrageous conduct"); MINN. STAT. § 549.20(1)(a) (2020) (allowing punitive damages where "acts of the defendant show deliberate disregard for the rights or safety of others"); MONT. CODE ANN. § 27-1-221(1) (2021) (allowing punitive damages "when the defendant has been found guilty of actual fraud or actual malice"); N.J. STAT. ANN. § 2A:15-5.12(a) (West 2015) (allowing punitive damages where "acts or omissions were actuated by actual malice or accompanied by a wanton and willful disregard of persons").

damages by "clear and convincing evidence."[286] These efforts help counteract the watering down of punitive damages standards that fueled the dramatic rise of awards for comparatively less egregious misconduct over the past half century, which was underscored in the Supreme Court's observation that punitive awards have "run wild."[287]

Several states have also adopted laws to address punishment in tort cases indirectly. For instance, some states accord weight to a defendant's compliance with applicable government safety regulations in bringing a product to market, such as a prescription drug approved by the Food and Drug Administration (FDA), a determination that can preclude punitive awards by indicating a defendant did not engage in malicious conduct warranting punishment.[288] A number of states have also enacted laws requiring a trial court, upon request, to bifurcate a jury's consideration of compensatory and punitive damage claims so that evidence supporting a punitive award does not taint, and inflate, the compensatory award and result in punishment beyond a punitive damage award.[289]

As with other types of damages, such as noneconomic damages, there is no single solution to address concerns and safeguard against improper punitive damage awards (unless a jurisdiction took the unprecedented approach of jettisoning its existing law and following those states that do not

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286. *See* ALA. CODE § 6-11-20(a) (2014); ALASKA STAT. § 09.17.020(b) (2020); ARK. CODE ANN. § 16-55-207 (2005); CAL. CIV. CODE § 3294(a) (West 2016); FLA. STAT. § 768.725 (2021); GA. CODE ANN. § 51-12-5.1(b) (2017); IDAHO CODE § 6-1604(1) (2010); IOWA CODE § 668A.1(1)(a) (2021); KAN. STAT. ANN. § 60-3701(c) (2005 & Supp. 2021); MINN. STAT. § 549.20 (2020); MISS. CODE ANN. § 11-1-65 (2019); MONT. CODE ANN. § 27-1-221(5) (2021); NEV. REV. STAT. § 42.005(1) (2021); N.J. STAT. ANN. § 2A:15-5.12(a) (West 2015); N.C. GEN. STAT. § 1D-15(b) (2021); N.D. CENT. CODE § 32-03.2-11 (2022); OHIO REV. CODE ANN. § 2307.80(A) (LexisNexis 2017); OKLA. STAT. tit. 23, § 9.1 (2021); OR. REV. STAT. § 31.730(1) (2021); S.C. CODE ANN. § 15-33-135 (2005); S.C. CODE ANN. § 15-32-520 (Supp. 2021); S.D. CODIFIED LAWS § 21-1-4.1 (2004); TEX. CIV. PRAC. & REM. CODE ANN. § 41.003(a) (West 2015); UTAH CODE ANN. § 78B-8-201(1)(a) (West 2009); *cf.* COLO. REV. STAT. § 13-25-127(2) (2021) (requiring proof "beyond a reasonable doubt").

287. *See supra* text accompanying note 252.

288. *See* VICTOR E. SCHWARTZ & CARY SILVERMAN, NAT'L LEGAL CTR. FOR THE PUB. INT., PUNITIVE DAMAGES AND COMPLIANCE WITH REGULATORY STANDARDS: SHOULD A MANUFACTURER OR SERVICE PROVIDER BE PUNISHED WHEN IT FOLLOWS THE LAW? 1, 7–9 (2005) (discussing various state approaches); 2 AM. L. INST., ENTERPRISE RESPONSIBILITY FOR PERSONAL INJURY 110 (1991) ("At a minimum, such regulatory compliance should preclude the award of any punitive damages (where compensation of the victim is not at issue) and should entitle the defendant to an explicit instruction to the jury that compliance with a regulatory standard creates either a rebuttable presumption or strong and substantial evidence that the defendant's actions or its products were not at fault.").

289. *See, e.g.*, MO. REV. STAT. § 510.263 (2016 & Supp. 2021); N.C. GEN. STAT. § 1D-30 (2021); OHIO REV. CODE ANN. § 2315.21(B) (2017); TEX. CIV. PRAC. & REM. CODE ANN. § 41.009(a) (West 2015).

allow punitive damages).[290] A holistic approach that tightens standards, circumstances, and upper limits on punitive awards represents the most pragmatic approach to provide greater clarity, consistency, and overall fairness in these awards. Although many states have endeavored to more carefully define the circumstances for awarding punitive damages, a significant number of other states continue to take permissive approaches, creating a fragmented legal landscape.[291] Improving consistency and fairness in punitive awards is important for the future of tort law to adhere to the U.S. Supreme Court's due process requirement that entities receive "fair notice" of conduct that may subject them to punishment in order to properly order themselves. It is also important to maintaining public confidence in a fair judicial system and shaking public perceptions of tort damages as a lottery-like system that produces massive headline-grabbing awards (many of which do not withstand appellate court review).[292] Finally, a more unified approach to curbing excessive or outlier punitive damage awards takes on added importance as more actors take part in an increasingly connected global economy. The status quo of widely disparate punitive damage regimes appears unmanageable and in need of change.

IV. CONCLUSION

Tort damage rules will always play a major role in driving tort litigation. Over time, the combination of creative lawyering and ambiguity in many aspects of economic and noneconomic compensatory damage awards, as well as punitive damage awards, has created a system in which tort damages often stray far from their intended purposes. This Article identifies a number of areas where modern tort damages appear inflated, unjustified, or otherwise untethered from reality. By examining these different areas or components of a total damages award together, this Article provides a "big picture" perspective on tort damages and ways that judges and legislatures might

290. Some torts scholars have argued for the elimination of punitive damage awards at least in certain contexts. *See, e.g.,* W. Kip Viscusi, *Why There Is No Defense of Punitive Damages*, 87 GEO. L.J. 381, 381 (1998) (concluding that, for environmental and products liability cases, "abolishing punitive damages would improve social welfare"); W. Kip Viscusi, *The Social Costs of Punitive Damages Against Corporations in Environmental and Safety Torts*, 87 GEO. L.J. 285, 336 (1998) (advocating for the abolishment of punitive damages in corporate safety and environmental cases).

291. *See* Schwartz et al., *supra* note 252, at 1014–29 (discussing specific punitive damage reforms).

292. *See, e.g.*, SILVERMAN & APPEL, *supra* note 5, at 38 (discussing how excessive awards undermine confidence in the rule of law); Theodore B. Olson, *The Parasitic Destruction of America's Civil Justice System*, 47 SMU L. REV. 359, 361–63, 366 (1994) ("Punitive damages combine the worst elements of a lottery and a plague by combining little rhyme or reason for who is rewarded and who is punished.").

improve the law in the future. Tort damages can and should become more consistent, predictable, and fair over time, not less, and the time is long overdue for reasonable course corrections.