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# An External Perspective on the Nature of Noneconomic Compensatory Damages and Their Regulation

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# AN EXTERNAL PERSPECTIVE ON THE NATURE OF NONECONOMIC COMPENSATORY DAMAGES AND THEIR REGULATION

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## THE EMPEROR'S CLOTHES AND THE VALUE OF NONECONOMIC HARMS

We are not torts scholars. Our scholarly interests, while somewhat different, intersect over epistemological questions, both analytical and empirical.[1] We were attracted to noneconomic compensatory damages as an object of inquiry for reasons related to our own research interests. The American legal system has long claimed that all compensatory damages, including noneconomic compensatory damages, are matters of fact. We were puzzled as to what the "fact of the matter" of noneconomic damages might be, and thus interested in the implications of such damages being "facts."[2] We were equally puzzled by the constant refrain that juries have great discretion in finding facts.[3] The courts in the nineteenth century tightly controlled jury

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1. *See, e.g.*, Ronald J. Allen & Alexia Brunet, *The Judicial Treatment of Non-economic Compensatory Damages in the Nineteenth Century*, 4 J. EMPIRICAL LEGAL STUD. (forthcoming 2007); Ronald J. Allen & M. Kristin Mace, *The Self-Incrimination Clause Explained and Its Future Predicted*, 94 J. CRIM. L. & CRIMINOLOGY 243 (2004); Ronald J. Allen & Michael S. Pardo, *The Myth of the Law-Fact Distinction*, 97 NW. U. L. REV. 1769 (2003).

2. *See infra* Part II.

3. Brad Snyder, *Protecting the Media from Excessive Damages: The Nineteenth-Century Origins of Remittitur and Its Modern Application in* Food Lion, 24 VT. L. REV. 299 (2000) (providing an excellent review of cases expressing this opinion); *see also* Piotrowski v. Southworth Prods. Corp., 15 F.3d 748, 754 (8th Cir. 1994) (holding that damage determinations will not be reversed by a reviewing court "except for a manifest abuse of discretion"); Peoples Bank & Trust Co. of Mountain Home v. Globe Int'l Publ'g, Inc., 978 F.2d 1065, 1070 (8th Cir. 1992) (stating that appellate courts have an "extremely narrow" scope of review and "may not reverse except for a manifest abuse of discretion"); THEODORE SEDGWICK, A TREATISE ON THE MEASURE OF DAM-

factfinding, despite substantial political efforts to reduce the power of their grip.[4] We found it implausible that courts would now relinquish control over the critical determination of damages. Finally, we were puzzled by the proposals for damage caps as a solution to the problem of noneconomic compensatory damages; no plausible understanding of noneconomic damages as facts would lead one to conclude that a responsive reform would involve caps. If there is a problem with findings of fact, whether by a judge or a jury, it lies in their inaccuracy—not their excessiveness. For these reasons, we began a project that resulted in this Article and a companion piece.[5] Together, these articles examine the nature and means of regulating noneconomic compensatory damages.

The puzzle can be summed up as follows: To us, a "fact" involves a proposition with truth value that is either analytically or empirically verifiable. Noneconomic compensatory damages either do or do not involve facts with such attributes. If they do not, then they are analytically identical to punitive damages, and the constitutional regime constructed by the Supreme Court to constrain punitive damages applies perforce to them.[6] This seems clear.[7] But if noneconomic compensatory damages involve facts—in *our* sense of the word—then the

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AGES 20 (New York, John S. Voorhies 3d ed. 1858) ("The quantum of damages being in most cases intimately blended with the questions of fact, must have been from the outset generally left with the jury.").

4. Ronald J. Allen, *Presumptions in Civil Actions Reconsidered*, 66 IOWA L. REV. 843 (1981); Allen & Brunet, *supra* note 1.

5. Allen & Brunet, *supra* note 1.

6. Noneconomic compensatory damages are conventionally distinguished from punitive damages in that noneconomic compensatory damages involve factual determinations, while punitive damages do not. *See* Cooper Indus., Inc. v. Leatherman Tool Group, Inc., 532 U.S. 424, 431 (2001) (holding that the appropriate standard of review applicable to punitive damage awards is a de novo standard).

7. Jury instructions strongly suggest the similarity between noneconomic compensatory and punitive damages. For example, according to the New York Pattern Jury Instructions, in a case where damages for pain and suffering are at issue, juries are instructed in the following manner:

> If you decide for the plaintiff on the question of liability, you may include in your verdict an award for past and future pain and suffering. That award should include the amount, if any, for the injuries suffered and for future pain and suffering. If you award damages for future pain and suffering, that amount will be in one lump sum for the entire future period. In addition, you will state the number of years for which the award is made.

COMM. ON PATTERN JURY INSTRUCTIONS, ASS'N OF SUPREME COURT JUSTICES, NEW YORK PATTERN JURY INSTRUCTIONS—CIVIL § 2:151A(1) (2006). It is clear that these instructions carry no substantive content. If there is no substantive content, they also do not, as presently administered, involve the rule of law, and as suggested by the Supreme Court in *State Farm Mutual Automobile Insurance Co. v. Campbell* (which held that the process for assessing punitive damages violated due process), any juridical event that departs from the rule of law violates due process. 538 U.S. 408, 429 (2003).

Due Process Clause applies and mandates an accurate and reliable determination of those facts, unless history speaks to the contrary.

The life of the law truly has been experience rather than logic, and a long-standing practice can compromise the most rigorous analytical implications.[8] The initial question is how the American legal system historically treated noneconomic compensatory damages. In a companion article, we present the results of an empirical inquiry into the treatment of noneconomic compensatory damages by courts from the founding of the country through the end of the nineteenth century.[9] We found that, despite the constant refrain that juries have discretion over damages, courts tightly controlled awards of noneconomic compensatory damages. Large awards were uniformly reversed, and damages were compressed towards the mean. Additionally, there was evidence of a strong, positive correlation between the size of the award and the probability of reversal for cases awarding noneconomic compensatory damages. Indeed, we could not find a single case affirmed on appeal that plausibly involved noneconomic compensatory damages in which the total damages exceeded the modern equivalent of $450,000.

This is significant for two reasons. First, the Seventh Amendment could be viewed as imposing constraints on the review of jury verdicts involving noneconomic compensatory damages, or limiting federal authority over them in some other way.[10] But our empirical data include some of the earliest documented American tort cases; they provide strong evidence for the proposition that judicial oversight of jury-determined damage awards was in fact common, and they provide essentially indisputable evidence as to what the founding generation and judges in the nineteenth century believed the command of the "com-

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8. *See* O.W. HOLMES, JR., THE COMMON LAW 1 (Boston, Little, Brown & Co. 1881); *see, e.g.*, Michael H. v. Gerald D., 491 U.S. 110, 122–23 (1989). The Court commented on its attempts to define the Due Process Clause:

> In an attempt to limit and guide interpretation of the Clause, we have insisted not merely that the interest denominated as a "liberty" be "fundamental" (a concept that, in isolation, is hard to objectify), but also that it be an interest traditionally protected by our society. As we have put it, the Due Process Clause affords only those protections "so rooted in the traditions and conscience of our people as to be ranked as fundamental." Our cases reflect "continual insistence upon respect for the teachings of history [and] solid recognition of the basic values that underlie our society. . . ."

*Id.* (alterations in original) (citations omitted).

9. *See* Allen & Brunet, *supra* note 1.

10. U.S. CONST. amend. VII ("In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.").

mon law" to be.[11] They were, after all, living it.[12] Second, this long-standing tradition of judicial oversight bears on the meaning of due process. A critical component of due process analysis is the "traditions and conscience of our people,"[13] which is best exemplified by what people actually do. Thus, our empirical analysis suggests that the Seventh Amendment does not bar regulation of noneconomic

11. The Supreme Court has suggested that a court should look to the status of the claim at "common law" in order to determine whether the Seventh Amendment right to a jury trial attaches in any given case. "Common law" refers to the laws of eighteenth-century England. *See, e.g.*, Chauffeurs, Teamsters and Helpers Local No. 391 v. Terry, 494 U.S. 558 (1990). Nonetheless, the Court has just as often wandered off that path. *See, e.g.*, Gasperini v. Ctr. for Humanities, Inc., 518 U.S. 415 (1996); Markman v. Westview Instruments, Inc., 517 U.S. 370 (1996); Galloway v. United States, 319 U.S. 372 (1943). For a review of the complex history of the Court's treatment of the issue, see RICHARD L. MARCUS, MARTIN H. REDISH & EDWARD F. SHERMAN, CIVIL PROCEDURE: A MODERN APPROACH 529–606 (4th ed. 2005). For a critical comparison of what the Court has done to the English common law, see Suja A. Thomas, *The Seventh Amendment, Modern Procedure, and the English Common Law*, 82 WASH. U. L.Q. 687 (2004). In any event, the best measure of what the common law meant to the founding generation was how they implemented it. *See, e.g.*, Paul DeCamp, *Beyond* State Farm*: Due Process Constraints on Noneconomic Compensatory Damages*, 27 HARV. J.L. & PUB. POL'Y 231, 248 (2003).

12. There is a curious dispute in the civil procedure literature about the implications of the Seventh Amendment for remittiturs, in particular as to what dollar amount the court should actually remit the excessive damage award. The arguments center on either the minimum or maximum amount a jury might have awarded, or "the amount the court itself believes should have been awarded." MARCUS, REDISH & SHERMAN, *supra* note 11, at 669. This Article suggests another possibility, the one the nineteenth-century courts seemed to have followed: keeping awards close to means and medians. The absence of empirical work like ours is what has led distinguished commentators to suggest that the maximum recovery rule is the only one that "has any reasonable claim of being consistent with the Seventh Amendment." *Id.* at 670 (internal quotation marks omitted) (quoting 11 CHARLES ALAN WRIGHT, ARTHUR R. MILLER & MARY KAY KANE, FEDERAL PRACTICE AND PROCEDURE § 2815 (2d ed. 1995)). This is plainly contradicted by what the courts did, regardless of what the opinions said. The same confusion is found in numerous Supreme Court opinions. For example, dissenting in *Gasperini*, Justice John Paul Stevens uttered the conventional legal dogma that "[c]ommon-law courts were hesitant to disturb jury awards, but less so in cases in which 'a reasonably certain measure of damages is afforded.'" 518 U.S. at 446 (Stevens, J., dissenting) (citing 1 DAVID GRAHAM ET AL., A TREATISE ON THE LAW OF NEW TRIALS IN CASES CIVIL AND CRIMINAL 452 (2d ed. 1855) and George T. Washington, *Damages in Contract at Common Law* (pt. 1), 47 LAW Q. REV. 345, 363–64 (1931)). Both points are false. First, throughout the nineteenth century, courts reversed jury verdicts at a very steady rate of about 47%, which hardly constitutes a hesitancy to reverse. *See* Allen & Brunet, *supra* note 1, tbl.4. Second, in cases involving noneconomic compensatory damages, the reversal rate was approximately 50%, and in cases involving economic damages with no noneconomic damages the reversal rate was about 51%, which does not demonstrate much of a difference in the two sets. *Id.* Where one cannot tell from the opinion whether noneconomic damages were awarded, the reversal rate was about 39%, but these cases simply do not deal with damages, and thus do not pertain to the question Justice Stevens was addressing. *Id.* In addition, as the amount of noneconomic compensatory damages goes up, the probability of reversal goes up to essentially 1.0. *Id.* fig.5. By contrast, there is no relationship between the amount of economic damages and the rate of reversal. *Id.*

13. *Michael H.*, 491 U.S. at 122 (quoting Snyder v. Massachusetts, 291 U.S. 97, 105 (1934)).

compensatory damages, and supports the conclusion that the Due Process Clause demands it.

Given these historical findings, we turned to modern case law and the literature discussing the regulation of noneconomic compensatory damages, including the wonderful symposium published in this journal.[14] From our external perspective, we predicted that the argument over noneconomic compensatory damages would involve a straightforward articulation of the actual "facts" involved, coupled with an analysis of which procedures would best promote accuracy in factfinding. To our surprise, modern cases focus largely on the issues of excessiveness and comparability among verdicts; they offer no explanation why either patrolling awards for excessiveness or ensuring comparability is needed.[15]

The academic literature is similar in this way. Like case law, articles focus on excessiveness and comparability without explaining why, except in terms of economic disruption.[16] Other articles advocate abolishing these damages because they are difficult to calculate[17] and tend

14. Symposium, *Who Feels Their Pain? The Challenge of Noneconomic Damages in Civil Litigation*, 55 DEPAUL L. REV. 249 (2006).

15. *See, e.g.*, Tisdel v. Barber, 968 F. Supp. 957, 960 (S.D.N.Y. 1997). There are many cases that address a court's ability to look to comparable cases in determining whether a jury's damage assessment is excessive. *See, e.g.*, Scala v. Moore McCormack Lines, Inc., 985 F.2d 680, 684 (2d Cir. 1993) ("In determining whether a particular award is excessive, courts have reviewed awards in other cases involving similar injuries, 'bearing in mind that any given judgment depends on a unique set of facts and circumstances.'" (quoting Nairn v. Nat'l R.R. Passenger Corp., 837 F.2d 565, 568 (2d Cir. 1988))); Shaw v. United States, 741 F.2d 1202, 1209 (9th Cir. 1984) ("Under the law of Washington, awards are considered excessive only if the amount shocks the court's sense of justice or sound judgment. The circumstances must indicate that the trial judge was swayed by passion or prejudice. We make this determination by comparing the sum to other awards in similar cases within the jurisdiction." (citation omitted)); Joan W. v. City of Chicago, 771 F.2d 1020, 1025 (7th Cir. 1985); Haley v. Pan Am. World Airways, Inc., 746 F.2d 311, 318 (5th Cir. 1984); Thompson v. Nat'l R.R. Passenger Corp., 621 F.2d 814, 827 (6th Cir. 1980); Morrow v. Greyhound Lines, Inc., 541 F.2d 713, 722 (8th Cir. 1976).

16. *See, e.g.*, DeCamp, *supra* note 11; *see also* David Baldus et al., *Improving Judicial Oversight of Jury Damages Assessments: A Proposal for the Comparative Additur/Remittitur Review of Awards for Nonpecuniary Harms and Punitive Damages*, 80 IOWA L. REV. 1109, 1115 (1995); Oscar G. Chase, *Helping Jurors Determine Pain and Suffering Awards*, 23 HOFSTRA L. REV. 763, 777 (1995); JoEllen Lind, *The End of Trial on Damages? Intangible Losses and Comparability Review*, 51 BUFF. L. REV. 251, 252 (2003); Jennifer K. Robbennolt, *Determining Punitive Damages: Empirical Insights and Implications for Reform*, 50 BUFF. L. REV. 103, 198 (2002) (discussing the potential for providing jurors with comparable verdicts to determine compensatory damages); Roselle L. Wissler et al., *Decisionmaking About General Damages: A Comparison of Jurors, Judges, and Lawyers*, 98 MICH. L. REV. 751, 754–55 (1999); Roselle L. Wissler et al., *Instructing Jurors on General Damages in Personal Injury Cases: Problems and Possibilities*, 6 PSYCHOL. PUB. POL'Y & L. 712, 718 (2000).

17. *See, e.g.*, Robert L. Rabin, *Pain and Suffering and Beyond: Some Thoughts on Recovery for Intangible Loss*, 55 DEPAUL L. REV. 359 (2006). In support of noneconomic damages, and specifically pain and suffering awards, Professor Rabin emphasizes the importance of the "make-

to vary substantially.[18] Still others propose solutions to assessing noneconomic damages, particularly damages for pain and suffering,[19] ranging from providing various types of aid to jurors in determining awards for pain and suffering,[20] to providing a mechanistic response to

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whole" concept in tort law. But he also recognizes an inherent difficulty in assessing intangible losses, rendering the "make-whole" principle a misplaced metric for awarding these damages. *Id.* at 361–62; *see also* Richard Abel, *General Damages Are Incoherent, Incalculable, Incommensurable, and Inegalitarian (But Otherwise a Great Idea)*, 55 DEPAUL L. REV. 253 (2006) (exposing the inherently aberrant nature of any assessment of intangible damages, and discussing the difficulty in calculability); Richard L. Abel, *Should Tort Law Protect Property Against Accidental Loss?*, 23 SAN DIEGO L. REV. 79 (1986) (discussing the utility of damages for pain and suffering, arguing that money damages are inadequate, and suggesting that courts should cease to recognize a cause of action in tort for merely accidental property damage); Joseph H. King, Jr., *Pain and Suffering, Noneconomic Damages, and the Goals of Tort Law*, 57 SMU L. REV. 163 (2004) (arguing, in the context of opposing noneconomic damages, that damages for pain and suffering should be completely eliminated as recoverable); Louis L. Jaffe, *Damages for Personal Injury: The Impact of Insurance*, 18 LAW & CONTEMP. PROBS., Spring 1953, at 219. Citing the difficulty inherent in placing a monetary value on pain and suffering, Professor King references Professor Jaffe's article to expose the reality that "[t]he real problem is that suffering and money are incommensurable." King, *supra*, at 178. King argues that "[p]ain and suffering damages and the policy goals of modern tort law are conceptually and operationally incompatible," noting all the while that pain and suffering simply cannot be "monetized and spread." *Id.* at 164, 178. He presents a three-pronged proposal: the elimination of damages for pain and suffering, a broad conception of economic damages to include comprehensive medical and rehabilitative treatments to help alleviate pain and suffering, and the award of attorney's fees to prevailing plaintiffs in personal injury suits. *Id.* at 164–65.

18. AUDREY CHIN & MARK A. PETERSON, RAND INST., DEEP POCKETS, EMPTY POCKETS: WHO WINS IN COOK COUNTY JURY TRIALS (1985); Randall R. Bovbjerg et al., *Valuing Life and Limb in Tort: Scheduling "Pain and Suffering,"* 83 NW. U. L. REV. 908 (1989) (exposing variation in injury valuation even for similar or same injury); Corinne Cather et al., *Plaintiff Injury and Defendant Reprehensibility: Implications for Compensatory and Punitive Damage Awards*, 20 LAW & HUM. BEHAV. 189 (1996); W. Kip Viscusi, *Pain and Suffering in Product Liability Cases: Systematic Compensation or Capricious Awards?*, 8 INT'L REV. L. & ECON. 203 (1988); Edward J. McCaffery et al., *Framing the Jury: Cognitive Perspectives on Pain and Suffering Awards*, 81 VA. L. REV. 1341 (1995); Michael J. Saks et al., *Reducing Variability in Civil Jury Awards*, 21 LAW & HUM. BEHAV. 243 (1997); Victor E. Schwartz & Cary Silverman, *Hedonic Damages: The Rapidly Bubbling Cauldron*, 69 BROOK. L. REV. 1037 (2004) (favoring noneconomic compensatory damages, but arguing that hedonic damages should not exist as a separate category of potential damages); Frank A. Sloan & Chee Ruey Hsieh, *Variability in Medical Malpractice Payments: Is the Compensation Fair?*, 24 LAW & SOC'Y REV. 997 (1990); Roselle L. Wissler et al., *Explaining "Pain and Suffering" Awards: The Role of Injury Characteristics and Fault Attributions*, 21 LAW & HUM. BEHAV. 181 (1997).

19. *See* Bovbjerg et al., *supra* note 18 (presenting a variety of methods for assessing pain and suffering damages, all attempting to improve the accuracy and fairness of awards for noneconomic damages, aiming to control the growth rate of these damages over time); *see also* James F. Blumstein et al., *Beyond Tort Reform: Developing Better Tools for Assessing Damages for Personal Injury*, 8 YALE J. ON REG. 171, 190 (1991) (providing a "solution" consistent with the recommendations of this Article, advocating the creation of a "common law" for damages using a reporting system that would have precedential effect for future awards, and proposing a plan to pay for future services by "fund[ing] an insurance contract").

20. *See, e.g.*, Chase, *supra* note 16, at 775–77 (cataloguing efforts to aid jurors in determining awards for pain and suffering and citing two commissions, the ABA Action Commission to Im-

limiting damages.[21] Interestingly, one study comes close to advocating that information be provided to juries to help them deliver more consistent verdicts—just as judges did in the nineteenth century. But this proposal does not make the connection between reliable factfinding and due process that is at the heart of our argument.[22]

To our knowledge, the literature nowhere recognizes the obvious: if noneconomic compensatory damages involve facts, one must be able to articulate and establish those facts in a reliable way. Indeed, it appears to us that the entire debate over noneconomic damages is premised on the unstated belief that there really is no fact of the matter that allows for accurate determinations of the value of noneconomic harms; the issue is either one of economics (e.g., whether verdicts put industries out of business) or morality (e.g., whether "outrageous" behavior should be penalized under the guise of noneconomic compensatory damages). The only exception to this is the segment of the academic literature that calls for legislative schedules or rigorous comparability review. These mechanisms create the fact of the matter, thus resolving the dilemma. But legislative schedules and rigorous comparability review are not just sensible policies; they, or some other fact of the matter, are required before the assets of one person may be transferred to another.

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prove the Tort Liability System (ABA) and the ALI Reporters' Study on Enterprise Liability for Personal Injury (ALI) designed to address this concern). The ABA Commission made three proposals. First, the Commission urged that judges should make greater use of additur and remittitur to "set aside verdicts that are 'clearly disproportionate to community expectations,'" without advocating caps on damage awards. *Id.* at 775. Second, the Commission suggested that "tort award commissions" be "established to gather and report information" on damage awards for incorporation into jury instructions, for use in damage additur and remittitur review, and for use in the settlement process. *Id.* Finally, the Commission suggested that methods should be imposed to guide jurors in the assessment of damages, without making a specific proposal. *Id.* The ALI Commission took a different approach by urging the "adoption of a floor or threshold" of the severity of illness that must be met before an individual could receive damages for pain and suffering in a particular case and recommending the adoption of "'meaningful guidelines' to aid juries" in damage assessment. *Id.* at 776.

21. *See, e.g.*, Ronen Avraham, *Putting a Price on Pain-and-Suffering Damages: A Critique of the Current Approaches and a Preliminary Proposal for Change*, 100 NW. U. L. REV. 87 (2006) (proposing a mathematical test designed to ease the difficulty inherent in assessing noneconomic compensatory damages by adding an age-adjusted multiplier that would be assigned to the medical costs of the plaintiff in order to calculate the pain and suffering damages in an individual case, and by allowing for an adjustment of this formula where justice so requires).

22. *See, e.g.*, Chase, *supra* note 16, at 777 (proposing a solution to the "problem" of noneconomic compensatory damages that parallels our recommendations). Professor Chase recommends providing jurors with a chart summarizing similar awards in cases of similarly situated plaintiffs. *Id.* This chart would be available during deliberations, and attorneys could refer to it during closing arguments. *Id.* Unlike our position, Chase urges that the information should not be binding on jurors, but rather would provide a mechanism for juries to determine what constitutes a "reasonable" award. *Id.*

This literature is peculiar. It is, as Professor Joseph King suggests, reminiscent of the classic story of *The Emperor's New Clothes*,[23] in that a vast debate has proceeded in complete disregard of a necessary component. One would think that the first step in analyzing noneconomic compensatory damages is to articulate what the fact of the matter is. Without tying liability to facts, any form of "compensation" is simply an open-ended invitation to transfer wealth from one person to another, which we need not defend for it would be both inappropriate and unconstitutional. Imagine a statute that says, "Get together a group of neighbors and transfer as much of the net worth of Microsoft to one of your friends as you would like." It is not worth discussing whether such a statute would be constitutional.

A defender of the status quo might retort, however, that there is a fact of the matter—pain, or loss of companionship, or the like. We agree, but the question is whether there is a fact of the matter of its value. A simple example will make the point. Compare a pain and suffering award to an award of expectational loss under a contract. The legal wrongs are, in the first case, inflicting pain and suffering, and in the second, violating the contract. Once a legal wrong is found, the next step is to appraise the consequences. In the contract case, it is a straightforward factfinding matter, although it may be difficult and contested in individual cases. One looks to what the contract called for and what the parties did and did not do, and then estimates the real economic consequences of the relevant events. What, by comparison, is the factfinding in the case of pain and suffering? The question answers itself. Without a statutory or common-law articulation of the fact of the matter, factfinders are left entirely to their own devices to choose the amount of the award. Some jurors or judges will think that loss of consortium is worth $10 a day, others $1000. So how can this difference be bridged rationally? To emphasize the significance of this point, imagine a statute that said, "Upon finding a breach of a contract, award as much in damages as you like." Such a statute would be laughed out of court; yet in the absence of a fact of the matter that is reliably determined, that is precisely what factfinders do when they award noneconomic compensatory damages.

This does not mean that awards for noneconomic harms could never be provided. Indeed, the debate over comparability points to a

23. King, *supra* note 17, at 164 (citing HANS CHRISTIAN ANDERSON, THE EMPEROR'S NEW CLOTHES (1836), *reprinted in* THE COMPLETE FAIRYTALES AND STORIES 77 (Erik Christian Haugaard trans., 1974)). In this tale, a young boy courageously revealed to the king that the suit he (the king) was wearing was not made of priceless invisible thread, as he and his followers believed, but rather that he was standing before his kingdom with no clothes at all.

solution to the dilemma of noneconomic compensatory damages that reflects the judicial practices of the nineteenth century. During that period, the fact of the matter of noneconomic compensatory damages was community consensus as reflected in jury verdicts over time, just as with negligence, and judges essentially kept damage results clustered around the means and medians of jury findings in general.[24] This was perfectly sensible. Juries are effective sampling mechanisms that, like most statistical sampling mechanisms, generate results clustering around the means and medians, with predictable outliers. But if the fact of the matter of the value of noneconomic compensatory damages is community consensus in the sense we use the term, excessiveness review and damage caps are not proper control mechanisms. The problem is not that noneconomic damages might exceed some arbitrary limit; the problem is that results will deviate from the means and medians in any statistical sampling. The solution is not to put a cap on overly excessive deviations from the norm, but to insist on verdicts remaining close to the means and medians. The obvious corrective mechanisms are either legislative schedules or rigorous comparability review, although there may be other possibilities as well. In other words, the solution to the problem is simply to *create* a fact of the matter.[25]

Legislative schedules or damage tables involve something similar to statutory compensation systems such as the workers' compensation system. If the fact of the matter is community consensus over the value of such things as pain and suffering, then legislatures are in the best position to determine the appropriate value of such things. Damage tables are modeled, in part, after sentencing guidelines used in the states and "may prescribe for the jury either the exact amount of the

24. *See* Allen & Brunet, *supra* note 1. This is true of the contemporary meaning of negligence as well. Ronald J. Allen & Ross M. Rosenberg, *Legal Phenomena, Knowledge, and Theory: A Cautionary Tale of Hedgehogs and Foxes*, 77 CHI.-KENT L. REV. 683 (2002). To be clear, all we mean by "consensus" here is the means and medians of the results of verdicts over time. Whether there is such a thing as "community consensus" in any other sense is irrelevant to us. Regardless of what any individual judge said or did, the activity of the nineteenth-century judges can be characterized as treating jury verdicts as a statistical sampling problem in which deviations from the norm largely, but not exclusively, go in one direction (higher). The judges eliminated virtually all verdicts that went noticeably above the norm, and compressed damages on both sides of the norm (including reversing cases that were too low, although that process is less dramatic for obvious reasons). Thus, cases with noneconomic compensatory damages that were affirmed had lower means and smaller standard deviations and semi-standard deviations (on both sides of the mean) than cases that were reversed.

25. *See* DeCamp, *supra* note 11; Kathryn Zeiler, *Medical Malpractice and Contract Disclosure: An Equilibrium Model of the Effects of Legal Rules on Behavior in Health Care Markets* (Georgetown University Law Ctr., Working Paper No. 539224 (2004)), *available at* http://ssrn.com/abstract=539224 (offering mandatory disclosure as a way to curb pain and suffering damages).

award for each subcategory or . . . a range of permissible awards."[26] Damage tables define subcategories of comparable cases based on things "such as injury severity level and the plaintiff's age."[27] Scaling is another mechanism in which the court presents the jury with "upper and lower dollar limits for different injury types."[28] Scaling differs from damage tables in that juries are permitted to consider all of the characteristics relevant to an assessment of the plaintiff's harm.[29]

Comparability review involves comparing the present case to decisions rendered in similar cases. As attorney Paul DeCamp notes, this approach originated in a 1758 decision, *Wilford v. Berkeley*,[30] and continued through *Goldsmith v. Lord Sefton*[31] in 1796, *Blunt v. Little*[32] in 1822, *Clapp v. Hudson River Rail Road*[33] in 1854, and *Murray v. Hudson River Railroad*[34] in 1871. Currently, comparability review finds some support in the courts;[35] interestingly, some case law suggests that parties may have a right to present evidence of comparable cases to juries.[36]

Both comparability review and legislative tables can capture community consensus in the way we use the term, and thus ensure that noneconomic compensatory damages may be reliably determined. We suggest that some such mechanism—or some other alternative that articulates the fact of the matter and permits reliable factfinding—is constitutionally required. It should be clear, though, that our point is distinct from current comparability review, which determines whether a particular damage award reflects passion or prejudice or

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26. Baldus et al., *supra* note 16, at 1124.

27. *Id.* at 1123–24.

28. *Id.* at 1123.

29. *Id.*; *see also* Bovbjerg et al., *supra* note 18. Obviously, legislative determination of damages may pose its own due process issues. *See* Blaine Evanson, *Due Process in Statutory Damages*, 3 GEO. J.L. & PUB. POL'Y 601 (2005).

30. 1 Burr. 609, 97 Eng. Rep. 472 (K.B. 1758) (cited in DeCamp, *supra* note 11, at 248).

31. 3 Anst. 808, 145 Eng. Rep. 1046 (Ex. 1796) (cited in DeCamp, *supra* note 11, at 248).

32. 3 F. Cas. 760 (C.C.D. Mass. 1822) (No. 1578) (cited in DeCamp, *supra* note 11, at 248).

33. 19 Barb. 461 (N.Y. Gen. Term 1854) (cited in DeCamp, *supra* note 11, at 248).

34. 47 Barb. 196 (N.Y. Gen. Term 1866), *aff'd*, 48 N.Y. 655 (1871) (cited in DeCamp, *supra* note 11, at 248).

35. There are many cases that address a court's ability to look to comparable cases in determining whether or not a jury damage assessment is excessive. *See, e.g.*, *supra* note 15. But it seems that the idea of giving this information directly to the jury is more of an academic construct at the present time. *See, e.g.*, Chase, *supra* note 16, at 777; DeCamp, *supra* note 11, at 292–94; Wissler et al., *supra* note 16, at 754–55, 816–17.

36. *See, e.g.*, Jutzi-Johnson v. United States, 263 F.3d 753, 759 (7th Cir. 2001) ("To minimize the arbitrary variance in awards bound to result from such a throw-up-the-hands approach, the trier of fact should, as is done routinely in England, be informed of the amounts of pain and suffering damages awarded in similar cases." (citations omitted)). We think it is more than good policy; it is actually constitutionally required.

"shock[s] the conscience."[37] Again, notwithstanding its currency, the problem does not manifest itself in shocking verdicts; the problem manifests itself in a lack of accurate factfinding, of which shockingly high or low verdicts are just a part.

These points, taken together with the findings discussed in our companion article, demonstrate that the Seventh Amendment allows, and the Due Process Clause demands, limits on noneconomic compensatory damages by requiring an articulation of the verifiable facts upon which liability rests.[38] Judges in the nineteenth century kept damages remarkably constrained, and due process requires accurate factfinding, which *a fortiori* requires a fact to find. All of this seems straightforward to us, but as the symposium in the *DePaul Law Review* and an avalanche of other writing demonstrates, our view is apparently not shared by a large portion of the legal system or academia. Perhaps our outsider perspective blinds us to subtle aspects of the problem. We can think of two possible attacks on the logic of our position. First, perhaps we are taking too simplistic a view of what a "fact" is. Maybe a "fact," for purposes of the Seventh Amendment, means something other than a proposition with truth value, and thus entails significantly unconstrained reallocation of wealth by judges or juries. Second, perhaps the Due Process Clause is less concerned about factual accuracy than we naïvely assume. The remainder of this Article addresses these two points.

We proceed first to an analytical and historical discussion of the nature of "facts" and of noneconomic compensatory damages. We then examine the relationship between due process and accurate outcomes. These two analyses solidify rather than threaten the foundations of our logic. "Facts," from the founding era through the nineteenth century, meant precisely what the term means in conventional discourse today: verifiable propositions with truth value. Moreover, the evidence makes clear that the deepest and most fundamental value of the Due Process Clause has historically been factual accuracy, which is pursued, to be sure, through procedures ancillary to that result.

The Emperor, then, really has no clothes. Permitting noneconomic compensatory damages in the absence of a clearly articulated fact of the matter established by reliable evidence is nothing more than an open invitation to judges or jurors to transfer the assets of one party

37. *See, e.g.*, Tisdel v. Barber, 968 F. Supp. 957, 960 (S.D.N.Y. 1997). *See generally* DeCamp, *supra* note 11.

38. Congress could impose a solution under the Commerce Clause, as briefly discussed *infra* Part IV.

to another. This is the antithesis of the rule of law. If compensation for noneconomic harms is to be allowed in a manner consistent with our deepest commitments, someone—judges or legislators—will need to articulate the fact of the matter that permits specific recoveries.

## II. NONECONOMIC COMPENSATORY DAMAGES AS FACTS AND THE IMPLICATIONS THEREOF

The law in the United States has uniformly claimed that the determination of compensatory damages involves factfinding.[39] It is clear that damages for which there is an economic measure, such as expectational loss under a contract, involve factfinding. The expectations of the parties are plainly facts, as are both their behavior and contractual language. The actual loss incurred might be difficult to determine from time to time, as it may involve ambiguities like price estimates and the parties' subjective expectations and assumptions, but reasonable ranges can be readily determined. Suppose, for example, that a party breaches a contract to sell a herd of cattle that was to be fattened and taken to market. A host of ambiguous questions surround the determination of the cost of the breach: How many of the cattle would have died before being delivered to market? How would they have fattened up? No one can give precise answers to counterfactual questions like these, and that is why the law has also uniformly claimed that juries have "discretion" in the determination of damages. Discretion, however, is a misnomer. What discretion really means is that the inability to make a highly precise calculation of

39. *See, e.g.*, Cooper Indus., Inc. v. Leatherman Tool Group, Inc., 532 U.S. 424, 432 (2001) ("A jury's assessment of the extent of a plaintiff's injury is essentially a factual determination, whereas its imposition of punitive damages is an expression of its moral condemnation."); St. Louis, Iron Mountain & S. Ry. Co. v. Craft, 237 U.S. 648, 661 (1915); Trull v. Volkswagen of Am., Inc., 320 F.3d 1, 9 (1st Cir. 2002) ("Translating legal damage into money damages is a matter 'peculiarly within a jury's ken,' especially in cases involving intangible, non-economic losses."); Lakin v. Senco Prods., Inc., 987 P.2d 463, 475 (Or. 1999) ("The determination of damages in a personal injury case is a question of fact."); RONALD W. EADES, JURY INSTRUCTIONS ON DAMAGES IN TORT ACTIONS § 3.01[1] (5th ed. 2003) ("The determination of the amount to be awarded for compensatory damages is a matter resting primarily in the discretion of the jury, in that it involves the credibility of witnesses and the weight and value to be given their testimony on a fact issue."). Again, if noneconomic compensatory damages are not facts, they should be treated as punitive damages and could constitute due process violations. In this Article, we assume that, as the courts have held, compensatory damages are factual determinations for the jury.

To our knowledge, the only potential recognition of the problems posed by noneconomic compensatory damages is in a concurring and dissenting opinion of Justice Harry Blackmun: "Arguably, damages for pain and suffering are themselves not truly compensatory. Certainly, such awards are of a different character. They are inherently noneconomic and are established through the subjective discretion of the jury." Monessen S.W. Ry. Co. v. Morgan, 486 U.S. 330, 348 n.5 (1988) (Blackmun, J., concurring in part and dissenting in part) (citations omitted).

the loss caused by a party will not insulate that party from liability for its actions. Factfinders thus have discretion in estimating plausible consequences of the parties' actions.

The nature of this factfinding, and thus what constitutes a "fact," is obvious. A disinterested factfinder hears evidence of real and counterfactual states of the universe—of matters external to the mind of the factfinder itself—and approximates the way that the universe was "in fact." The ontology here is naïve realism coupled with a straightforward understanding of counterfactuals operating within a correspondence theory of truth. What this means is that the legal system operates on the assumption that there is an external world capable of being known through observation, and that we can approximate the effects that causal variables have on that world.

There are various esoteric theoretical perspectives on "facts" and the "real world" but, as far as we can tell, none of them have significantly influenced the structure of the legal system or any of its precursors.[40] Under the Roman canon system, a precursor to English common law, a "fact" entailed a human action or event even if that event was not directly observed.[41] This early conception of a "fact," as something separate and apart from the subjective notions of the factfinder, leads directly to the common understanding of the concept in the formative era of the United States.

Professor Barbara Shapiro's erudite historical examination of jury factfinding in seventeenth-century through nineteenth-century England reaches the unsurprising conclusion, among many others, that "[j]uries . . . arrived at findings of fact guided by common sense and common knowledge,"[42] which entail the world being independent of the mind. Moreover, as the complexity of cases increased and juror familiarity with the facts of a particular case decreased, jurors began to rely on witnesses and documents, evaluating that information for both "truthfulness and accuracy."[43] In order to evaluate information for truthfulness and accuracy, the information must be either true or false, accurate or inaccurate. Those judgments, in turn, can be rendered only if the information exists and a juror can bring knowledge to bear upon those determinations of truthfulness and accuracy. "In-

40. This is not surprising, as it would be difficult to operate a legal system in thrall to skeptical theories of knowledge.

41. BARBARA J. SHAPIRO, A CULTURE OF FACT: ENGLAND, 1550–1720 (2000).

42. Barbara J. Shapiro, *"To a Moral Certainty": Theories of Knowledge and Anglo-American Juries 1600–1850*, 38 HASTINGS L.J. 153, 155 (1986). Although Shapiro focuses on criminal law matters, she nevertheless provides useful insight and background into the philosophical and legal thinking about jury factfinding in common-law England.

43. *Id.* at 155–56.

formation" that exists only in the mind of the factfinder is incapable of being accurate or true.

Shapiro also discusses the language employed in English cases from 1700 to 1750, demonstrating that references to "conscience" in jury decisionmaking became more rare over time,[44] and instead "[t]he most common directives employed 'belief' based on evidence."[45] In the latter half of the eighteenth century, the language became even more secularized, replacing the word "believe" with "think,"[46] which emphasizes that jurors find "facts" that exist in the real world and not in the confines of their subjective understandings. An eighteenth-century American legal scholar stated that although legal proceedings "'must judge on probability,' nothing less than the 'highest degree of probability must govern' the courts."[47] Shapiro summarized the eighteenth-century understanding:

> When one had reached a judgment based on "the honesty and integrity of credible and disinterested witnesses" the mind had no choice but to "acquiesce therein as if a knowledge by demonstration." The mind "ought not any longer to doubt but, to be nearly if not as perfectly well-satisfied as if we of ourselves knew the fact."[48]

The decision, in other words, should correspond as closely as possible to the external reality to which it refers.

Perhaps most telling is the definition of the term "fact" from Samuel Johnson's 1773 *A Dictionary of the English Language*, published just prior to the signing of the Declaration of Independence in 1776: "1. A thing done; an effect produced; something not barely supposed or suspected, but really done. 2. Reality; not supposition; not speculation. 3. Action; deed."[49] Parsing this definition makes it readily apparent that, at the time of the Framers, a "fact" was something that existed independent from the mind of an individual. "Facts" are concerned with an objective reality and not with a subjective state of mind.[50]

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44. *Id.* at 168.

45. *Id.* & n.50 (citing a variety of eighteenth-century English cases).

46. *Id.* at 169.

47. *Id.* at 177 (quoting 1 JOHN MORGAN, ESSAYS UPON THE LAW OF EVIDENCE (London 1789)).

48. Shapiro, *supra* note 42, at 177 (quoting MORGAN, *supra* note 47).

49. SAMUEL JOHNSON, A DICTIONARY OF THE ENGLISH LANGUAGE 705–06 (4th ed. 1773); *accord* JOSEPH TOWERS, AN ENQUIRY INTO THE QUESTION, WHETHER JURIES ARE, OR ARE NOT, JUDGES OF LAW, AS WELL AS OF FACT; WITH A PARTICULAR REFERENCE TO THE CASE OF LIBELS (1764).

50. For those who are not fluent in these epistemological discussions, there can plainly be facts about the mind, such as whether a person intended or knew something. Our point is that a "fact" in conventional discourse requires a correspondence between the belief of a person and a real state, not just a subjective opinion about whatever the matter in question happens to be.

This conventional understanding of a "fact" as something that exists in reality is common throughout legal materials of the nineteenth century. An 1854 legal dictionary defines "fact" as "[a]n action; a thing done."[51] An 1873 treatise entitled *A Treatise on Facts as Subjects of Inquiry by a Jury*[52] defined the word "fact" in the following manner:

> If a thing be perceived by any sense of the body or faculty of the mind, the perception is a fact. If any thing is seen or heard, the seeing or hearing of it is a fact. If any emotion of the mind is felt, as joy, grief, anger, the feeling of it is a fact. If the operation of the mind is productive of an effect, as intention, knowledge, skill, the possession of this effect is a fact. If any proposition be true, whatever is affirmed or denied in it is a fact. A. said this or that, or did this or that: if these propositions be true, then that A. did so say or did so do, is a fact.[53]

In another treatise on trial by jury, John Proffatt discussed the difference between law and fact as understood in 1877, stating that "[f]acts must precede law; for law governs them in their relation or effect."[54] For facts to be able to "precede" anything, they must first exist and be independent of subjective states of mind. Finally, in his treatise discussing the difference between questions of law and fact, J.C. Wells stated that juries look to evidence for facts.[55]

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51. 1 JOHN BOUVIER, A LAW DICTIONARY 506 (Philadelphia, Childs & Peterson 10th ed. 1860).

52. JAMES RAM, A TREATISE ON FACTS AS SUBJECTS OF INQUIRY BY A JURY (Fred B. Rothman & Co. 1982) (1873).

53. *Id.* at 17–19.

54. JOHN PROFFATT, A TREATISE ON TRIAL BY JURY, INCLUDING QUESTIONS OF LAW AND FACT, WITH AN INTRODUCTORY CHAPTER ON THE ORIGIN AND HISTORY OF JURY TRIAL 319 (1877). Another nineteenth-century scholar discussed two types of reasoning: the demonstrative and the moral. This scholar relied on a "'common sense school,' which would dominate Anglo-American epistemological discussion and moral philosophy in the late eighteenth and early nineteenth centuries." Shapiro, *supra* note 42, at 178. Moral evidence dealt with "real but contingent truths and connections which take place among things actually existing." *Id.* (internal quotation marks omitted) (citing 1 THE WORKS OF JAMES WILSON 505, 518 (James DeWitt Andrews ed., 1896). This is, of course, exactly our point—facts were believed to actually exist in the real world.

55. J.C. WELLS, A TREATISE ON QUESTIONS OF LAW AND FACT, INSTRUCTIONS TO JURIES AND BILLS OF EXCEPTIONS 10 (Des Moines, Mills & Co. rev. ed. 1879). The modern cases embrace the notion that a "fact" is something external to the mind of the observer, which is not surprising as just about everybody so employs the concept. For example, in *In re Silicon Graphics Inc. Securities Litigation*, the Ninth Circuit defined "fact" as "an 'event or circumstance,' or 'a truth known by actual experience or observation.'" 183 F.3d 970, 983–84 (9th Cir. 1999) (quoting BLACK'S LAW DICTIONARY 591 (6th ed. 1990) and THE RANDOM HOUSE COLLEGE DICTIONARY 473 (rev. ed. 1980)). An Eleventh Circuit case similarly defined a fact as something that must exist independent of the mind of the observer: "A factual proposition is typically something capable in principle of falsification (or possibly even verification) by some empirical inquiry . . . ." Johnson v. United States, 340 F.3d 1219, 1223 (11th Cir. 2003). Something that is capable of falsification or verification must exist independent of the mind of the observer, for it must be available to be falsified or verified. John Wigmore also expressed the opinion that a fact

It may seem that we are grappling to prove an obvious point from which no one in the legal system would dissent—that "facts" entail an external world and that the job of the factfinder is to find those facts accurately. Noneconomic compensatory damages are also facts, according to the universal view, but what constitutes the fact of the matter? Take pain and suffering as an example. There are plainly some facts of the matter in many instances; for example, whether a third degree burn is more painful than a battery involving little more than an unwanted push. What is each injury worth? One may be worth more than the other, but an absolute rather than a relative scale is needed. That scale, in turn, must be determined by objective evidence that can be processed and evaluated to generate a true answer, an answer that gets the state of the universe right. The value of pain cannot be defined by a factfinder's subjective belief. That is the exact opposite of what it means to be a "fact." Discretion here can mean only that there is some play in the joints, not that the "facts" are not what actually happened in the real world, but instead are simply what reside in the brains of factfinders. To conclude that the "facts" are simply what factfinders believe, rather than assessments of truth about matters external to the minds of factfinders, would eliminate the rule of law.

Eliminating the rule of law, however, would violate due process. We now have another commonplace observation to establish: the central concern of the Due Process Clause is factual accuracy. As with the definition of a "fact," this is something that is universally believed but not always clearly spoken. Nonetheless, it is true.

## III. THE DUE PROCESS CLAUSE AND FACTUAL ACCURACY

### *A. The Cases*

There is a misconception in American legal scholarship that the fundamental political insight of the Enlightenment, and the strongest

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is something external to a mind in his evidence law textbook, stating that "[a] fact is any event or act or condition of things, assumed (for the moment) as happening or existing." JOHN H. WIGMORE, A STUDENTS' TEXTBOOK OF THE LAW OF EVIDENCE 7 (1935) (emphasis omitted). For a fact to be an act or condition of things, and for a fact to be assumed to exist, it must, at least for the moment, exist somewhere outside of the mind of the juror or perceiver. Examples could be proliferated endlessly. In addition, case law from the same time period reinforces the point that damages are factual determinations to be assessed by a jury. One 1797 case states that "it will be agreed to be a general and favorite practice, to allot the assessment of damages to a jury." Brown v. Van Braam, 3 U.S. (3 Dall.) 344, 349 (1797). Another case states that "nothing is better settled than that, in such cases as the present, and other actions for torts where no precise rule of law fixes the recoverable damages, it is the peculiar function of the jury to determine the amount by their verdict." Barry v. Edmunds, 116 U.S. 550, 565 (1886).

plank supporting modern Western governments, has something to do with rights and obligations. The abundant citations to Hobbes, Locke, and Rousseau underscore this point. While rights and obligations are important, the truly fundamental insight of the Enlightenment is that there is a world external to our minds that may be known through objective evidence. But citations to the epistemological work of Locke, Berkley, Hume, and Kant for this proposition are few and far between.[56] This reverses the actual relationship of facts and rights or obligations; facts are prior to and determinative of rights and obligations. Without accurate factfinding, rights and obligations are meaningless. Consider the simple case of ownership of the clothes you, the reader, are wearing as you read this. Your ownership of those clothes allows you the "right" to possess, consume, and dispose of those assets, but suppose we approach and demand that you return "our" clothes. You will appeal to a decisionmaker to whom you will present evidence that you bought, made, found, or were given the clothes in question, and, if successful, the decisionmaker will accord you those rights and impose upon us reciprocal obligations. The key point, though, is that those rights and obligations are dependent upon what facts are found and are derivative of them. The significance of this point cannot be overstated. Tying the rule of law to truth about the real world anchors rights and obligations in things that can be known and are independent of whim and caprice.

The Framers of the Constitution knew the importance of this; they embraced it and adopted it in various provisions of the Constitution—the most important of which is the Due Process Clause.[57] The Court's most definitive reading of the Due Process Clause is in *Mathews v. Eldridge*,[58] where it concluded that whether a particular procedure violated due process involved a balancing of three factors:

> First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.[59]

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56. For an excellent—although brief—review, see Crane Brinton, *Enlightenment*, *in* 1 THE ENCYCLOPEDIA OF PHILOSOPHY 519 (Paul Edwards ed., 1967) and Shapiro, *supra* note 42.

57. The Takings Clause and the Ex Post Facto Clause are other examples of the importance of tying legal outcomes to the real-world state of events.

58. 424 U.S. 319, 334–35 (1976).

59. *Id.* at 335.

A deprivation can be erroneous only if it is based on inaccurate factfinding.[60] Thus, scholars have recognized that the *Mathews* test is essentially concerned with accuracy,[61] and have even coined it the "accuracy approach."[62] In an influential article, Professors Martin Redish and Lawrence Marshall concluded that the Supreme Court focuses almost "exclusively on instrumental concerns,"[63] and that "[a]ccording to the instrumental conception of due process, the purpose of the clause is to ensure the most accurate decision possible."[64] In *City of Los Angeles v. David*, the Court said that "[t]he second *Eldridge* factor [is a] concern for accuracy."[65]

Even when the Court is not directly stating that factual accuracy is the central concern of due process, a multitude of cases boil down to a concern for accurate outcomes. We have been unable to identify any significant set of cases extolling the virtues of some competitor that is not reducible to accuracy. For example, *Fuentes v. Shevin* involved the constitutionality of statutes authorizing the summary seizure of personal property by a writ of replevin without providing a hearing.[66] The Court, however, underscored the importance of such a hearing:

> The constitutional right to be heard is a basic aspect of the duty of government to follow a fair process of decisionmaking when it acts to deprive a person of his possessions. The purpose of this requirement is not only to ensure abstract fair play to the individual. Its purpose, more particularly, is to protect his use and possession of property from arbitrary encroachment—to minimize substantively unfair or *mistaken* deprivations of property, a danger that is especially great when the State seizes goods simply upon the application of and for the benefit of a private party.[67]

A deprivation of property is "mistaken" if that deprivation is wrong on the facts; there is simply no other meaning that can be ascribed to such a statement.

In his concurrence in *O'Bannon v. Town Court Nursing Center*, Justice Harry Blackmun stated that "[p]rocedural due process seeks to

60. One might object that an erroneous application of the law to the facts is equally obnoxious, but an erroneous application of the law means that the law requires certain facts to be true that are not. At the end of the day, it all comes back to accurate factfinding.

61. *See, e.g.*, Harvey Rochman, Note, *Due Process: Accuracy or Opportunity?*, 65 S. CAL. L. REV. 2705, 2732 (1992).

62. Gerald L. Neuman, *The Constitutional Requirement of "Some Evidence,"* 25 SAN DIEGO L. REV. 631, 699 (1988).

63. Martin H. Redish & Lawrence C. Marshall, *Adjudicatory Independence and the Values of Procedural Due Process*, 95 YALE L.J. 455, 476 (1986).

64. *Id.*

65. 538 U.S. 715, 718 (2003).

66. 407 U.S. 67, 69–70 (1972).

67. *Id.* at 80–81 (emphasis added).

ensure the accurate determination of decisional facts."[68] Decisional facts are, of course, those facts that will directly affect the outcome; accuracy in the determination of decisional facts must correspond to accuracy in the final outcome. In *Lassiter v. Department of Social Services*, the Court analyzed accuracy in the context of a parental rights proceeding:

> A parent's interest in the accuracy and justice of the decision to terminate his or her parental status is, therefore, a commanding one.
>
> . . . If, as our adversary system presupposes, accurate and just results are most likely to be obtained through the equal contest of opposed interests, the State's interest in the child's welfare may perhaps best be served by a hearing in which both the parent and the State acting for the child are represented by counsel, without whom the contest of interests may become unwholesomely unequal.[69]

The Supreme Court has also distinguished between the value of accuracy and the value of a favorable result, pointing out that accuracy dominates. In *Heller v. Doe*, the Court stated that "[a]t least to the extent protected by the Due Process Clause, the interest of a person subject to governmental action is in the accurate determination of the matters before the court, not in a result more favorable to him."[70] *Heller* is interesting for another reason. The issue before the Court was determining the standards for committing mentally retarded and mentally ill persons to institutions, and whether family members and legal guardians could intervene in commitment proceedings: "So long as the accuracy of the adjudication is unaffected . . . the Due Process Clause does not prevent a State from allowing the intervention of immediate family members and legal guardians . . . . Neither respondents nor their *amici* have suggested that accuracy would suffer from the intervention allowed by Kentucky law . . . ."[71] One can see the right to intervene in the commitment of a family member as a matter of fundamental fairness, but the Court understood fundamental fairness to consist most importantly of accurate adjudication.[72]

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68. 447 U.S. 773, 797 (1980) (Blackmun, J., concurring).

69. 452 U.S. 18, 27–28 (1981).

70. 509 U.S. 312, 332 (1993).

71. *Id.* at 332–33.

72. Justice William Rehnquist made a similar suggestion in his dissent in *Santosky v. Kramer*, involving a challenge to the "fair preponderance" of the evidence standard of proof applicable in New York parental termination proceedings. 455 U.S. 745 (1982). In a footnote, Justice Rehnquist points out that, although the standard cannot escape due process scrutiny based simply on other procedures in place to ensure overall accuracy in the proceeding, it is constitutionally relevant that "additional assurances of accuracy attend the application of the standard in New York termination proceedings." *Id.* at 785 n.12 (Rehnquist, J., dissenting). This suggests that these additional guarantees of accuracy, though they would not insulate a particular practice from a

In addition to the cases that explicitly use language of "accuracy" when analyzing due process claims, there are a number of cases that employ "arbitrary deprivation" of property interests as synonymous with the basic concern for accurate outcomes. In discussing the "arbitrary deprivation" of life, liberty, or property, courts refer to the importance of the interest at issue and the degree of harm such deprivation would cause. At the heart of this reasoning, however, is the idea that a deprivation is arbitrary if it lacks a reasonable basis—that is, if it lacks accuracy. The concern with potentially arbitrary or inaccurate deprivations of property pervades modern jurisprudence. The crucial point is that the concern about arbitrary outcomes can be reduced to a desire to ensure accurate outcomes.[73]

In *United States v. James Daniel Good Real Property*, for example, the Court found that a civil forfeiture statute that allowed for an "*ex parte* seizure . . . creat[ed] an unacceptable risk of error" notwithstanding the important issues at stake:[74]

> Although Congress designed the drug forfeiture statute to be a powerful instrument in enforcement of the drug laws, it did not intend to deprive innocent owners of their property. The affirmative defense of innocent ownership is allowed by statute.
>
> The *ex parte* preseizure proceeding affords little or no protection to the innocent owner.[75]

In *Connecticut v. Doehr*, the Court held that a statute allowing attachment to satisfy an impending judgment before the resolution of

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due process challenge, would nevertheless decrease the likelihood of success of such a challenge. This is yet another example indicating that the central tenet of due process is a guarantee of factual accuracy.

73. Perhaps the earliest example of the Supreme Court's concern with arbitrary deprivation of property dates back to the Marshall Court. The landmark decision in *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87 (1810), held that a conveyance of land that occurred under a legislative act procured by fraud is nevertheless a valid conveyance and is protected by the Contract Clause. Justice John Marshall wrote the opinion for the Court:

> Conveyances have been made, those conveyances have vested legal estates, and, if those estates may be seized by the sovereign authority, still, that they originally vested is a fact, and cannot cease to be a fact.
>
> When, then, a law is in its nature a contract, when absolute rights have vested under that contract, a repeal of the law cannot devest those rights . . . .

*Id.* at 135. Justice Marshall went on to conclude that the land grant at issue was, in fact, a contract, and thus was protected by the Contract Clause. The Supreme Court has subsequently cited to *Fletcher* for the proposition that the Contract Clause prevents states from regulating contracts between private parties. *See* U.S. Trust Co. of N.Y. v. New Jersey, 431 U.S. 1, 17 (1977). The holding in *Fletcher* demonstrates the value the early Supreme Court placed on curtailing the arbitrary deprivation of these interests, and it also demonstrates that what the Court meant by an arbitrary deprivation was a disregard of the actual facts. Reconsider, in this light, our hypothetical statutes permitting citizens to reallocate wealth.

74. 510 U.S. 43, 55 (1993).

75. *Id.* (citation omitted).

the case similarly created an insurmountable risk of erroneous deprivation.[76] Although the statute was ambiguous, the Court concluded that it was unconstitutional under any reading:

> We need not resolve this confusion since the statute presents too great a risk of erroneous deprivation under any of these interpretations. If the statute demands inquiry into the sufficiency of the complaint, or, still less, the plaintiff's good-faith belief that the complaint is sufficient, requirement of a complaint and a factual affidavit would permit a court to make these minimal determinations. But neither inquiry adequately reduces the risk of erroneous deprivation. Permitting a court to authorize attachment merely because the plaintiff believes the defendant is liable, or because the plaintiff can make out a facially valid complaint, would permit the deprivation of the defendant's property when the claim would fail to convince a jury, when it rested on factual allegations that were sufficient to state a cause of action but which the defendant would dispute, or in the case of a mere good-faith standard, even when the complaint failed to state a claim upon which relief could be granted. The potential for unwarranted attachment in these situations is self-evident and too great to satisfy the requirements of due process absent any countervailing consideration.[77]

In sum, the cases emphasizing the importance of accuracy are legion; they compel the conclusion that the central concern of the Due

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76. 501 U.S. 1, 12–14 (1991).

77. *Id.* at 13–14. The lower courts have taken their cue from the Supreme Court, and a large number of cases recognize the fundamental importance of accuracy. In *Davis v. Page*, the court held that the Florida statute at issue has various provisions that are "designed to ensure a correct decision." 714 F.2d 512, 516 (5th Cir. 1983). The Fifth Circuit acknowledged the fact that an inaccurate determination could render the statute unconstitutional for failing to provide due process of law, but held that the procedures in place eviscerated this concern. *Id.* at 516–17. In another case, the Eleventh Circuit examined a condemnation and resulting eviction under an Orlando ordinance. Grayden v. Rhodes, 345 F.3d 1225, 1227 (11th Cir. 2003). Although the court determined that the risk of erroneous deprivation was low, it nevertheless discussed the fact that a condemnation and resulting eviction could be erroneous if "a code enforcement officer . . . evicts tenants from a building that actually is fit for human occupancy." *Id.* at 1234. This court interpreted the second prong in the *Mathews* balancing test as condemning any deprivation of property that is inaccurate, and admitted that, if the code allowed the enforcement officer to falsely evict tenants, it would be problematic from a due process perspective. The D.C. Circuit engaged in a similar type of analysis in the context of the termination of teachers due to low rankings in routine evaluations. These rankings included objective facts such as length of service, whether the teacher is a district resident, and the principal's subjective rankings. Wash. Teachers' Union Local No. 6, Am. Fed'n of Teachers v. Board of Educ. of D.C., 109 F.3d 774, 780–81 (D.C. Cir. 1997). Although the court eventually determined that the risk of erroneous rankings was small, such rankings could have amounted to a due process violation were the risk more significant. *Id.* The Union argued "that factual errors, such as attributing disciplinary proceedings to the wrong teachers, could produce erroneous terminations." *Id.* at 780. The D.C. Circuit determined that this risk was low, and thus it did not weigh heavily in the *Mathews* balance. The court did acknowledge that, were these errors more prevalent, or if the risk of such errors was significant, the result would have been different. There are endless examples.

Process Clause is factual accuracy. There are other values but, as far as we can tell, they pale in significance to factual accuracy.[78]

### B. The Scholars

A veritable mountain of scholarship concerning the Due Process Clauses exists, but most of it is orthogonal to our concern. It is largely normative, whereas our concern is about the fact of the matter and how the Due Process Clause relates to factual accuracy. Nonetheless, the pull of factual accuracy, even if not explicitly recognized by the scholars themselves, exerts an enormous influence on this literature.

The writings of Professor Jerry Mashaw exemplify our point. Mashaw equates accuracy with fairness and highlights its importance.[79] In his analysis of due process and social welfare claims,[80] Mashaw argues that social welfare adjudications require accurate determinations to produce a minimally sufficient level of fairness. Yet accuracy is a "substantive ideal; [it is] approachable but never fully attainable."[81] Where accuracy is unattainable, consistency in adjudication is required. Consistency in adjudication, however, is impossible unless the adjudication is accurate, as its demand is to treat like cases alike. What makes cases alike, of course, are their constituent facts.

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78. Professor Lawrence Solum marshals the data indicating that values other than accuracy matter to due process. Lawrence B. Solum, *Procedural Justice*, 78 S. CAL. L. REV. 181, 183–84 (2004). The strongest case that Solum identifies as resting on some other value is *Richards v. Jefferson County*, 517 U.S. 793 (1996), where the Court determined that due process was violated by an Alabama rule giving claim-preclusive effect to a prior judgment in which the adversely affected party was not represented. Solum points out that the Court did not engage in *Mathews* interest balancing, but plainly the case is of that mold. Solum, *supra*, at 255–56. A contrary ruling would have permitted wide-ranging preclusion rules disenfranchising interested parties from protecting their interests. Even if this violates a participatory norm, it also will tend to be truth defeating. To be clear, we do not assert that there are not any other values, but only that truth determination is overwhelmingly important, and the weakness of the data supporting argument in favor of other values as central to due process tends to confirm our point.

79. Jerry L. Mashaw, *The Management Side of Due Process: Some Theoretical and Litigation Notes on the Assurance of Accuracy, Fairness, and Timelines in the Adjudication of Social Welfare Claims*, 59 CORNELL L. REV. 772, 775 (1974).

80. *Id.*; *see also* Jerry L. Mashaw, *Administrative Due Process: The Quest for a Dignitary Theory*, 61 B.U. L. REV. 885, 886 (1981). Mashaw contends that due process of law ought to vindicate an individual's right to participate in those decisions that affect that person in important ways without necessitating any sort of positive entitlement. This runs contrary to the Supreme Court's holding in *Board of Regents v. Roth*, 408 U.S. 564 (1972). In *Roth*, the Court held that where a state seeks to bar an individual from public employment, makes a charge of "dishonesty," or attaches a "stigma" to an employment decision, it must afford due process when making that determination. *Id.* at 573. Though Mashaw does not make the "accuracy" point as forcefully, plainly a litigant's participation in decisions affecting that person in important ways affects the accuracy of the outcome.

81. Mashaw, *supra* note 79, at 774–75.

There is substantial discussion in the academic literature of due process as freedom from arbitrary power.[82] The mention of arbitrary power is instructive; it is yet another way in which authors refer to the importance of accuracy in adjudication. *The American Heritage Dictionary* defines "arbitrary" as "[d]etermined by chance, whim, or impulse, and not by necessity, reason, or principle."[83] Something that is determined by chance, whim, or impulse is precisely something that is not grounded in the world external to the mind of the decisionmaker—in other words, in the facts. Rather, that which is arbitrary is unpredictable and variable, and the authors who discuss due process as guaranteeing freedom from arbitrary adjudication are necessarily concerned with accuracy. At times this is explicit, as with the scholar who refers to due process protections from arbitrariness as those necessary to ensure a "correct outcome."[84] Another notable constitutional scholar, William Van Alstyne, argues that "freedom from arbitrary adjudicative procedures [should be] a substantive element of one's liberty."[85] Freedom from arbitrary adjudication means, most fundamentally, accurate adjudication.

In the wake of *Mathews*, numerous scholars have articulated accuracy as the central component of due process. We have already mentioned the description of *Mathews* as "the accuracy approach,"[86] which is echoed throughout the literature.[87] Perhaps the strongest recognition of the value of accuracy comes from Redish and Marshall's magisterial review of the interests that inform due process adjudication. Their central claim is that the key command of due process is an independent adjudicator, without which the protections of the Due Process Clause are illusory.[88] Underlying their argument, and underlying all arguments about rights and obligations, is a concern about factually accurate outcomes. Redish and Marshall exhaustively analyze both "instrumental" and "noninstrumental" conceptions of due process. They demonstrate that all but one of the supposedly noninstrumental conceptions of due process relate directly to factually accurate outcomes (the exception being the demand that justice

82. T.M. Scanlon, *Due Process*, *in* DUE PROCESS: NOMOS XVIII 93, 97 (J. Roland Pennock & John W. Chapman eds., 1977). This issue of *Nomos* was the result of a flurry of publication centering on the requirements of due process.

83. THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 91 (4th ed. 2000).

84. Scanlon, *supra* note 82, at 100.

85. William Van Alstyne, *Cracks in "The New Property": Adjudicative Due Process in the Administrative State*, 62 CORNELL L. REV. 445, 487 (1977) (emphasis omitted).

86. *See supra* note 62 and accompanying text.

87. *See, e.g.*, Rochman, *supra* note 61, at 2732.

88. Redish & Marshall, *supra* note 63, at 457.

should meet the appearance of justice).[89] They further argue that the presence of an independent adjudicator is the best insurance that outcomes will be sufficiently accurate so as to not violate a litigant's due process rights.

Not surprisingly, a few scholars argue that due process is not just about the outcome of a particular case, but also about process.[90] Professor Robert Summers's seminal piece on "process values" argued that a process can be good in itself, even if the results it produces are not "good"; one goal of due process is good process itself, regardless of outcome.[91] This is not to say that Summers is not interested in outcomes, but rather that he and like-minded scholars value process itself as an integral aspect of according a litigant due process rights. As noted above, Redish and Marshall substantially reorient this argument by demonstrating that the concerns underlying the supposed process values involve factual accuracy in all cases but one. Similarly, Professor Laurence Tribe demonstrates through myriad examples that process values themselves reduce to substantive measures, and that it is impossible to separate process from substance. He shows that "unjust" determinations invariably flow not from a flawed process, but rather from the underlying substantive outcome.[92] Perhaps in recognition of the difficulty of elevating values other than factual accuracy very high in the pantheon, when Summers returned to the topic he inspired twenty-five years earlier, his support for process values apart from the pursuit of truth seemed to have waned considerably. As he summarized, "in my view, the burden of persuasion should always be on those designers of the system who wish to justify the recognition of any factor that may lead to divergence" from substantively accurate adjudication.[93]

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89. *Id.* at 476; *see also* Thomas C. Grey, *Procedural Fairness and Substantive Rights*, *in* DUE PROCESS: NOMOS XVIII, *supra* note 82, at 182, 201.

90. Of course, our claim is not that factual accuracy is the only due process value; our claim is that it is the most significant.

91. Robert S. Summers, *Evaluating and Improving Legal Processes—A Plea for "Process Values,"* 60 CORNELL L. REV. 1, 3 (1974); *see also* Richard B. Saphire, *Specifying Due Process Values: Toward a More Responsive Approach to Procedural Protection*, 127 U. PA. L. REV. 111 (1978).

92. Laurence H. Tribe, *The Puzzling Persistence of Process-Based Constitutional Theories*, 89 YALE L.J. 1063, 1077 (1980).

93. Robert S. Summers, *Formal Legal Truth and Substantive Truth in Judicial Fact-Finding—Their Justified Divergence in Some Particular Cases*, 18 LAW & PHIL. 497, 509 (1999). In a gesture to his prior work, Summers asserts that "[i]t is simply not so that the exclusive business of a trial court in all disputed cases is to find the actual truth." *Id.* at 500. Testing any human institution by whether it has an "exclusive" policy or goal will almost surely lead to a negative answer. Solum applies this approach in his exhaustive review of procedural justice, and not surprisingly concludes that there are variables other than factual accuracy that influence the structure of the

By no means do we intend to claim that a concern for accuracy explains all aspects of the legal system. Rather, the point is that the aspiration to achieve factually accurate outcomes is the single most important variable, although other values are at stake. When factual accuracy and other values conflict, the other values tend to give way.[94] Put more simply, though a wide variety of values are at play in any given due process determination, these concerns boil down to a concern for accuracy.[95]

In fact, many scholars have chastised the current mode of noneconomic damage assessment as plagued with "arbitrary indeter-

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legal system. Solum, *supra* note 78. That he has to work so hard to bring the significance of other values to the surface indicates how submerged they are by the pursuit of factually accurate decisions. Indeed, reflecting the general consensus, Solum notes the undeveloped nature of theories of procedural justice. *Id.* at 183. Exactly so, because the focus of due process is largely on factually accurate outcomes. We want to give an accurate description of how due process is viewed today; whether this view is right or wrong is not our concern.

94. Interestingly, this is true in the criminal arena as well, which is not our concern in this Article. To be sure, there are some criminal doctrines that sacrifice factual accuracy at the altar of other social interests. *See, e.g.*, Mapp v. Ohio, 367 U.S. 643 (1961). But most, such as the confession rule and most of the provisions of the Bill of Rights, are designed to guarantee factually accurate outcomes. Moreover, on a few occasions when the Court has rendered a truth-defeating decision, it has quickly limited the damage. A perfect example is the controversial right to proceed pro se found in *Faretta v. California*, 422 U.S. 806 (1975). This is truly truth-defeating, but the Court soon held that standby counsel could be appointed, and could actively participate in proceedings outside the view of the jury. McKaskle v. Wiggins, 465 U.S. 168 (1984). The Court also found no right to appear pro se on appeal. Martinez v. Court of Appeal of Cal., 528 U.S. 152 (2000).

95. Our concern about the arbitrary nature of pain and suffering awards is not original, but previous authors, indeed the entire legal community, has neglected the connection between the present state of affairs, the absence of a relevant fact of the matter, and due process. For example, Fourth Circuit Judge Paul Niemeyer complained about the irrationality of pain and suffering awards. Paul V. Niemeyer, *Awards for Pain and Suffering: The Irrational Centerpiece of Our Tort System*, 90 VA. L. REV. 1401 (2004). Consistent with our fundamental premise, Judge Niemeyer argues that "[w]ithout rational criteria for measuring damages for pain and suffering, awarding such damages undermines the tort law's rationality and predictability—two essential values of the rule of law." *Id.* at 1401. He proceeds to argue that the irrational nature of damages for pain and suffering makes them virtually identical to punitive damages, and goes so far as to argue that noneconomic compensatory damages "are even more vulnerable to constitutional attack." *Id.* at 1415. Damages for pain and suffering, he urges, effect the same arbitrary deprivation of property as punitive damages do. *Id.* at 1417. We think this is close, but not quite right. Pain and suffering either does or does not involve factfinding. If it does, the fact of the matter needs articulation; if it does not, then Judge Niemeyer is correct.

Justices Antonin Scalia and Clarence Thomas disagreed with the Court's finding in *BMW of North America, Inc. v. Gore* that an excessive award of punitive damages could result in a due process violation. 517 U.S. 559 (1996). They argued that "if the Court is correct, it must be that every claim that a state jury's award of *compensatory* damages is 'unreasonable' (because not supported by the evidence) amounts to an assertion of constitutional injury." *Id.* at 607 (Scalia, J., dissenting). Why they object to this conclusion is unclear. Arbitrary deprivation of property is perhaps the central concern of the Due Process Clause. They apparently believe the Emperor is fully clothed, but he is not.

minateness."[96] Professor Mark Geitsfeld makes an argument consistent with ours. He contends that damages for pain and suffering do not involve exclusive factfinding by the jury, and instead are analogous to punitive damages and should be treated as such.[97] Our argument simply takes the point one step further; we argue that if noneconomic damages *are* facts, as the Supreme Court has held,[98] then they must have some reasonable basis in fact.

## IV. CONCLUSION

Pain and suffering and other intangible harms are quite real, and there is widespread belief that those who suffer wrongly should be compensated (and a less widespread belief that individuals should internalize the true cost of their actions, which also cannot be accomplished without accurate factfinding). Nonetheless, if noneconomic compensatory damages involve "facts," and facts involve true states of an external reality, then due process requires that these facts be found using reasonably reliable methods. Moreover, there must be a measure by which the accuracy of adjudication can be judged; that measure is largely absent in the contemporary legal system.

One way to address the problem of determining a reliable damage figure is to conceive of it as a sampling issue, where the central concern is the deviation from the norm rather than the production of outliers. A system that relies on juries (or judges) as a sampling procedure must take into account that a large number of cases will inevitably produce outliers. A mechanism is needed to bring verdicts close to the means or medians of similar cases. Courts implicitly recognized this point from the founding era up until the twentieth century; during that time, the courts kept tight control over jury damage awards, notwithstanding the oft-stated proposition that juries had significant discretion.[99] Modern courts have pursued a different path, with the predictable result of unpredictable damage assessments that challenge the core concept of the rule of law. The solution to this problem lies in taking seriously the claim that noneconomic damages involve factfinding—or, alternatively, extending the rules governing punitive damages—which in turn requires a reliable determination of

96. Mark A. Geistfeld, *Due Process and the Determination of Pain and Suffering Tort Damages*, 55 DEPAUL L. REV. 331, 338 (2006) (citing Jaffe, *supra* note 17, at 224–25).

97. *Id.* at 346.

98. *See* Cooper Indus., Inc. v. Leatherman Tool Group, Inc., 532 U.S. 424, 432 (2001) ("A jury's assessment of the extent of a plaintiff's injury is essentially a factual determination, whereas its imposition of punitive damages is an expression of its moral condemnation."); St. Louis, Iron Mountain & S. Ry. Co. v. Craft, 237 U.S. 648, 661 (1915).

99. *See* Allen & Brunet, *supra* note 1.

the value of harm as reflected in decisions over time or some equally objective substitute. The critical facts at stake are matters external to the mind of the factfinders, not simply subjective assessments of their own perceptions. Their own perceptions matter only to the extent they are a reliable gauge of more widespread community consensus or accurately appraise the relevant facts of the matter.

Damage caps and excessiveness review have been offered as solutions to the problem with noneconomic compensatory damages, yet neither truly solves the problem. Damage caps merely cut off the extremely inappropriate outlier rather than bring it back toward the mean and median of general verdicts over time. Again, the problem is not to limit damages under some arbitrary figure, but instead to ensure that they are rationally determined. Excessiveness review does nothing to address the irrational nature by which these damages are determined, nor does it respond to the demands of the Due Process Clause for accurate adjudication. Under excessiveness review, damage verdicts are deemed to be excessive if they shock the conscience or reflect passion and prejudice on the part of the jurors.[100] Excessive verdicts can result in remittiturs, reversals, and new trials. Again, the difficulty with determinations of noneconomic damages is their lack of rationality, not their excessiveness. Determinations of damages have to get the matter right rather than simply avoiding "shocking the conscience" of reviewing judges. Thus, neither remittiturs, which reduce damages to an amount that does not shock the conscience, nor review for excessiveness, which has the same effect, respond to the demands of due process for accurate adjudication.

Consistent, predictable decisionmaking can be achieved through legislative schedules or trial and appellate mechanisms that produce consistent results that accurately reflect community decisions over time. At trial, comparability could be litigated directly and a robust system of comparability review could also help ensure that verdicts reflect widely held community views.[101]

The legislative schedules could come from state legislatures or from Congress, but they must come from somewhere if the rule of law is to be maintained. State control over tort liability is unproblematic for the most part, but it seems fairly plain to us that Congress could regulate noneconomic compensatory damages as well (although we are largely indifferent to this matter, and our argument does not turn on it). Recall our opening example. Unconstrained damages are an open

100. *See, e.g.*, Tisdel v. Barber, 968 F. Supp. 957, 960 (S.D.N.Y. 1997). *See generally* DeCamp, *supra* note 11.

101. *See generally* Baldus et al., *supra* note 16.

invitation for the citizens of one state to transfer the assets of other citizens—frequently citizens of other states or foreign entities—to their own neighbors. This has a direct effect on the costs of doing business; it amounts to one part of the country seeking rents from another. The Supreme Court has announced a three-part test to determine whether a particular activity may be regulated under the Commerce Clause. Congress can regulate channels of interstate commerce, the instrumentalities of interstate commerce, and whatever has a substantial effect on interstate commerce.[102] The Supreme Court spoke on this issue most recently in *Gonzales v. Raich*.[103] In *Raich*, the Court held that "[o]ur case law firmly establishes Congress' power to regulate purely local activities that are part of an economic 'class of activities' that have a substantial effect on interstate commerce,"[104] and that only a rational basis is needed for concluding that a particular activity substantially affects interstate commerce.[105] Damage actions against entities doing business across state lines plainly meet this test.[106] In any event, the point remains that the transfer of assets without a factual basis violates due process, and the articulation of the factual basis must come from somewhere if the practice of awarding noneconomic compensatory damages can be justified.

The Seventh Amendment is no bar to this process. Comparability review existed at common law, and thus does not violate the right to a jury trial.[107] As our empirical study has shown, there was a widespread practice of reversal and remittitur of jury assessments of noneconomic damage awards, demonstrating that this practice is one deeply rooted in history and tradition. Importantly, the demand for rational decisionmaking reflected in the tight control over damages exercised by judges is also deeply rooted in history and tradition. Most importantly, unreliable determinations of damages eviscerate

102. United States v. Lopez, 514 U.S. 549, 558 (1995); *see also* United States v. Morrison, 529 U.S. 598 (2000) (finding the Violence Against Women Act unconstitutional because it did not regulate economic activity).

103. 545 U.S. 1, 16–17 (2005).

104. *Id.* at 17.

105. *Id.* at 22.

106. *See, e.g.*, Patrick Hoopes, Note, *Tort Reform in the Wake of* United States v. Lopez, 24 HASTINGS CONST. L.Q. 785, 785–86 (1997). After the Court's decision in *Lopez*, some worried that Congress's power to enact far-reaching tort reform was significantly reduced. But *Raich*, the Supreme Court's most recent Commerce Clause decision, almost surely resolves that the Clause is not a bar to tort reform legislation *See* John C.P. Goldberg, *The Constitutional Status of Tort Law: Due Process and the Right to a Law for the Redress of Wrongs*, 115 YALE L.J. 524, 624 (2005) ("Today Congress looms much larger in our political system, and Article I has been interpreted expansively. Even under *United States v. Lopez*, it seems highly unlikely, for example, that a court would deny Congress the power to enact national products liability law.").

107. DeCamp, *supra* note 11, at 248; *see also supra* notes 30–36.

the core of the Due Process Clause's commitment to the rule of law. The solution is simple and pragmatic: articulate the fact of the matter that can reliably be determined by evidence. The Seventh Amendment would not be offended. The common law, state legislatures, or Congress could articulate the pertinent facts that the Due Process Clause requires before the assets of one person are given over to another.