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Regarding Pained Sympathy and Sympathy Pains: Reason, Morality, and Empathy in the Civil Adjudication of Pain

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REGARDING PAINED SYMPATHY AND SYMPATHY PAINS: REASON, MORALITY, AND EMPATHY IN THE CIVIL ADJUDICATION OF PAIN

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I. INTRODUCTION

> Drop, drop—in our sleep, upon the heart
> sorrow falls, memory's pain,
> and to us, though against our very will,
> even in our own despite,
> comes wisdom
> by the awful grace of God.
> –Aeschylus[1]

These words from Aeschylus' play *Agamemnon* were quoted by Robert F. Kennedy in his extemporaneous eulogy of Martin Luther King, Jr., on April 4, 1968,[2] the evening of King's assassination, and are inscribed upon Robert F. Kennedy's memorial at Arlington National Cemetery in Washington, D.C.[3] At the time of their utterance, King's assassination had just torn a wound in the nation's side, producing a devastatingly visceral cultural and political rend through which drained hope of interracial equality and understanding. To this day, despite civil rights advances, the sorrow of King's legacy is one of unfulfilled promise, and so his death remains an open sore over which national memory pauses annually in contemplation of the pain of loss and the pleasure of progress.

Pain, whether embodied within the corpus of cultural memory or the skin of a human body, is unforgetful and unforgettable by both those who experience it and those who witness its experience. It is a lesson that raises awareness of human vulnerability and strength; it tests the receptivity of sensory capacity and compassion. Another consequence of pain is so obvious that it may seem trite: one becomes a sufferer. The conferral of a suffering identity, however, not only describes the person who is suffering, but contextualizes the sufferer within the phenomenological life world and determines others' responses to that individual.

Suffering epitomizes the unknown; it is the land of the "maybe . . . but not sure," the "perhaps . . . but then again not," the "I think . . . but what if." It is an unstable state, situated between wellness and death, in which improvement and decline are grounded in bodily mysteries over which we may have no influence. In effect, it suddenly whisks the lampshade off the proverbial elephant in the living room, illuminating the vulnerability of the sufferer and of others around him. Suffering hits humanity in its weak point—the body—affecting not only that body but also the social relations and contexts in which that body is embedded. To suffer is to lose control to an extent over one's body, and so sufferers become more emotionally and physically vulnerable, delicate and passive, recipients of care and concern. This vulnerability is interpersonally infectious, independent of whether the

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1. Aeschylus, *Agamemnon*, *in* THREE GREEK PLAYS 162, 170 (Edith Hamilton trans., 1937).

2. RESPECTFULLY QUOTED: A DICTIONARY OF QUOTATIONS 373–74 (Suzy Platt ed., 1989).

3. *Id.* The inscription upon Kennedy's memorial states, "In our sleep, pain that cannot forget falls drop by drop upon the heart and in our despair, against our will, comes wisdom through the awful grace of God." *Id.*

agent of suffering is itself contagious, and others may find this vulnerability threatening and regard the sufferer as being "tainted" by debilitation. Suffering also forces reorganization and reprioritization as others must carry on without the sufferer, in his stead. Additional moral obligations are incurred; commiseration and aid must be offered. Caregivers, too, may suffer, becoming exhausted and distraught that they cannot alleviate another's suffering. All this serves to remind us of suffering's consequences, of human vulnerability, the temporality of peace, interdependence upon others, the limits of human endeavor, and most frighteningly, of mortality.

In the process of coping with such uncertainty, it is tempting to evade contingencies and stick to apparent sureties, forsaking the subjective—what is said to be—and clinging to the objective—what appears to be. After all, doctors' advice becomes the defining word on a medical condition. People are said to die of AIDS and not the infection that invades a decrepit immune system. It is cancer that renders a relative gaunt and not the pain that accompanies its growth, robbing the patient of appetite. The objective simplifies; the subjective complicates. But the subjective cannot be left behind because the two are really two sides of the same coin. Even physical symptoms are subject to alternative medical interpretations; therein lies the hope of getting a "second medical opinion."

Perhaps another, more fitting mechanism of coping with suffering's subjectivity is to understand how suffering triggers an empathic response in others, becoming an emotive mechanism for bringing humans together in times of crisis when interpersonal bonds are especially in need of affirmation. In social interaction, the conferral of empathy is not normally controversial or called into question. In the legal context of personal injury litigation, however, when citizens must adjudicate the consequences of suffering together with tortious causation and damages, an emotive response is perceived to imperil jurors' ability to arrive at a reasoned judgment based on the evidence. The judgments of the head are distinguished from those of the heart, and reason and emotion are cast as binary opposites.

As a site of conflict resolution, then, law must wrestle with the subjective—what is said to be—and the objective—what appears to be. In this struggle for the "truth," law places its bets on what is objectively known and provable, although the interpretation of such factors is undeniably subjective. In personal injury litigation, courts confronted with the presence of a vulnerable, suffering plaintiff and the belief that this plaintiff may spark an emotional (and irrational) response attempt to adjudicate a pain-full complaint by speaking of the object of their inquiry in objective terms, purporting to focus on pain as it is embodied, when in reality they are working through and with the subjective concept of pain as it is expressed. This bait-and-switch is unnecessary, however, for empathy and other emotions can be both a reasoned and moral response to pain and suffering.

This Essay considers the legal propriety of the empathic responses of jurors to suffering plaintiffs.[4] To that end, Part II first explicates the legal contours of a tension between what is experiential or physical (objective) and what is expressionistic or non-physical (subjective). This tension is a foundational jurisprudential concern in personal injury litigation because the subjective is seen to threaten the "rule of law": the perceived primacy of reason and logic. Thus, this tension is also what the parties' attorneys seek to exploit and what the court seeks to constrain. Part III explores why an empathic identification is indeed a reasoned *and* moral response to pain, although it is this subjective response to pain that courts find most threatening. Not only do emotions such as empathy have cognitive and social roots, the anti-empathic Stoic philosophical tradition which informed the conception of the rule of law is incompatible with contemporary social conceptions of "justice." Part IV shows how law incorporates subjectivity into personal injury litigation by creating an intensely moral consequence for plaintiffs who falsely claim to be in pain: the assignment of a malingering label. This Essay concludes in Part V that recognizing the relational connections made possible through the expression of pain is essential in a disjointed cultural present that is suffused by pain-full imagery.

II. EXPLORING SUBJECTIVE/OBJECTIVE TENSIONS

The narrative construction of pain is undoubtedly affected by its subjective nature—that element of pain that, as Scarry states, inspires doubt[5]—as well as how

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4. It is widely accepted that jurors utilize empathy or a similar emotion in making decisions, though relatively little research has been done on how such an emotive response affects decision-making in civil adjudication. NEAL FEIGENSON, LEGAL BLAME: HOW JURORS THINK AND TALK ABOUT ACCIDENTS 78 (2000) (discussing numerous studies on this issue). Experiments show that sympathy mediates mock jurors' responsibility judgments. The greater their sympathy for a plaintiff cast as a victim of a large corporation, the more likely they were to find the defendant liable, leading one researcher, Brian Bornstein, to conclude that the urge to compensate may encourage a finding of liability. Brian H. Bornstein, *David, Goliath, and Reverend Bayes: Prior Beliefs About Defendants' Status in Personal Injury Cases*, 8 APPLIED COGNITIVE PSYCHOL. 233, 243 (1994); *see also* Sally M. Lloyd-Bostock, *Common Sense Morality and Accident Compensation*, *in* PSYCHOLOGY, LAW AND LEGAL PROCESSES 93, 107–08 (David P. Farrington et al. eds., 1979) (discussing the systemic capacity of the contemporary tort system to grapple with attributing liability in the face of normative desires to give and receive compensation); Sally M. Lloyd-Bostock, *Fault and Liability for Accidents: The Accident Victim's Perspective*, *in* COMPENSATION AND SUPPORT FOR ILLNESS AND INJURY 139, 159–61 (Donald Harris et al. eds., 1984) (arguing that the fault principle as it relates to compensation is a reflection of, rather than reflected in, the law, and justifying abandonment of dysfunctional norms on the strength of cited empirical data). But other studies indicate that sympathy is less important. A survey of trial judges revealed the "sympathy for the defendant was a reason for judge-jury verdict disagreement in about 4% of all criminal cases," and other research has revealed an anti-plaintiff bias in civil litigation. FEIGENSON, *supra*, at 78–79.

5. ELAINE SCARRY, THE BODY IN PAIN: THE MAKING AND UNMAKING OF THE WORLD 4 (1985). An experiment conducted by Neil Feigenson and others that exposed participants to a variety of scenarios manipulating severity of outcome and the degree of the plaintiff's culpability revealed that the severity of the injury increased the degree of fault that participants attributed to the plaintiff; that participants reduced gross damages for highly blameworthy plaintiffs, resulting in a double-discounted

jurisprudence has negotiated these ramifications. Pain as it is expressed objectifies pain as it is embodied within the sufferer in the sense of bringing its meaning forth from the suffering body and "fixing" it for interpretation like a microscopic slide,[6] but it is also subjective in that it is (a) a specific instantiation of pain particular to that sufferer, (b) structured according to a chosen frame and context, one of myriad possible expressions, and (c) subject to multiple interpretations. Like other social constructions, pain as it expressed, particularly in narrative form, is also *inherently* subjective because it is always constructed from a specific perspective and is shaped by that orientation. A narrative lacks the capacity to be objective because its author always makes key constructive choices that effect a certain interpretation. Thus, a narrative about a subjective topic, such as pain from a tennis injury, is no more subjective than a narrative about an apparently objective topic such as an eerie, decrepit brick building across the street; each is a narrative evolved from numerous expressive choices. Significantly, then, narrative subjectivity is always in the interpretive background and so necessarily comprises part of the subjectivity of pain expressed. Therefore, pain expressed through language must necessarily be expressed from a particular narrative position or context. Of course, pain as a subject matter is also subjective in that it is an interior, personal sensation; this Essay discusses how the subjectivity(ies) of pain are different from narrative subjectivity.

From this point forward in the analysis, this Essay will refer frequently to case law and to practitioners' texts such as *American Jurisprudence* and *Corpus Juris Secundum* that advise lawyers on how to "show" or "prove" pain in personal injury litigation. This Essay approaches these authorities, and in particular the *American Jurisprudence* articles, from the perspective that such texts provide a glimpse of how pain is lived in and through the law, and does not cite them for the truth of their practical advice. These texts provide easily accessible and essential evidence of how pain is constructed for the benefit of the trier of fact.

A textual analysis of such authorities demonstrates that the trial strategies of both the plaintiff and defendant evolve in response to the tension between pain's inherent subjectivity and a countervailing perceived need for objective (or sensorily) perceptible evidence that arises in response.[7] In attempting to create an image of pain, the plaintiff's attorney is overtly advised of the need to counter its abstractness and invisibility by making pain more "real," by specifically and vividly describing the impact of the injury on the plaintiff's life, elaborating tasks which

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recovery; and that the more severe the injury, the greater the rate participants discounted the award. FEIGENSON, *supra* note 4, at 79–80. Together, these conclusions reflect an anti-plaintiff bias, leading Feigenson to suggest that, though the participants felt sympathy, "something else overcame the expected effects of that sympathy." *Id.* at 80.

6. For a discussion of pain embodied and pain expressed, see Jody Lyneé Madeira, *Recognizing Odysseus' Scar: Reconceptualizing Pain and Its Empathic Role in Civil Adjudication*, 34 FLA. ST. U. L. REV. (forthcoming Dec. 2006).

7. *See generally* 5 AM. JUR. *Trials* 921 § 59 (1966) (discussing the advantages and disadvantages of different methods for presenting testimony and evidence regarding pain).

the plaintiff cannot perform or can only do so with great effort,[8] and summoning forth interpersonal responses by stressing that the defense unnaturally advocates the suppression of the natural human desire to cure pain.[9] In response, the defense must exploit the inascertainability of the plaintiff's pain, the defense's Achilles heel.[10]

A. The Role of Subjectivity in Defining Pain

Pain expressed becomes subjective through the act of expression because it is socially constructed and thus is enunciated from a certain narrative position or subjective bias, such as that of the sufferer. Pain is also subjective in the sense that its meaning and expression are historically and culturally specific; its experience is also "not timeless but changing, the product of specific periods and particular cultures" and "cannot be reduced to a mere transaction of the nervous system."[11] Pain "has not had the same significance throughout the ages nor in the various different civilisations; even within the framework of Western civilisation, . . . the collective memory recalls various episodes or circumstances where the limits of endurance were strangely removed, or virtually obliterated."[12] Anthropological research has documented "culturally stipulated responses to pain—for example, the tendency of one population to vocalize cries; the tendency of another to suppress them . . . ."[13]

Such theories were born out of wartime research on wounded soldiers. Just after World War II, Lieutenant Colonel Henry Beecher found that 25% of seriously wounded soldiers questioned within twelve hours of receiving wounds reported slight pain, while 32% reported no pain at all; even more surprising, 75% felt so little pain that they did not wish to take pain medication.[14] Beecher posited that "[s]trong emotion can block pain"; the soldier's "wound suddenly releases him from an exceedingly dangerous environment," prompting the soldier to "overcompensate[] and become[] euphoric."[15] Research by Mark Zborowski conducted among male veterans in San Francisco in the late 1960s revealed that Jewish and Italian veterans "tended to be uninhibited and expressive in their response to pain," but that Irish and white Anglo-Saxon veterans "tended to hide their pain, to avoid company, [and] to engage in strategies of silence and denial."[16] Fascinatingly, even *American Jurisprudence* gets into the cultural act, positing that due to learned communal experiences a wounded French soldier is "conditioned to scream and thrash about" to receive gentler treatment from surgeons and nurses,

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8. *Id.* § 67.
9. *See id.* § 88.
10. *See id.* § 66.
11. DAVID B. MORRIS, THE CULTURE OF PAIN 4, 20 (1991).
12. ROSELYNE REY, THE HISTORY OF PAIN 2 (Louise Elliott Wallace et al. trans., 1995).
13. SCARRY, *supra* note 5, at 5.
14. MORRIS, *supra* note 11, at 42–43 (discussing Henry K. Beecher, *Pain in Men Wounded in Battle*, 5 BULL. U.S. ARMY MED. DEP'T 445, 448 (1946)).
15. Beecher, *supra* note 14, at 448, *quoted in* MORRIS, *supra* note 11, at 43.
16. MORRIS, *supra* note 11, at 52 (citing MARK ZBOROWSKI, PEOPLE IN PAIN 31 (1969)).

while an English soldier is "conditioned to be stoic" and to "'bite the bullet'" in the face of pain.[17] Soldiers with very extensive wounds who are elated to have escaped from a battlefield alive may be so ecstatic that they report feeling no pain at all.[18]

But pain embodied is also subjective in the sense that social positioning and similar factors affect physical awareness and experience of pain. On an individual level, reaction to pain is conditioned upon psychological and emotional factors; demographic factors such as age,[19] gender,[20] cultural ethnicity,[21] religion,[22] and education;[23] physical factors such as activity level;[24] social factors such as employment status[25] and litigation;[26] and elements of family history such as family behavioral patterns that rewarded or punished dependency and how one was taught to react to pain.[27] In addition, pain embodied is also "reinforced—and sometimes created—by psychological and emotional states such as guilt, fear, anger, grief, and depression."[28] It has also been postulated that the physical stimuli sent to the brain are tempered by an individual's anxiety level, past experience of pain, emotional conditioning, and the perceived gain or loss from the injury.[29] Recollections are also important because past experiences add additional color to a sufferer's experience: "Earlier experiences of similar pains, the influence of memory which . . . attenuates or amplifies, or the state of mind when the pain actually occurs are all factors that modify the way we perceive and tolerate pain."[30]

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17. 23 AM. JUR. 2D *Proof of Facts* 1 § 3 (1980) (citing V.C. Medvei, Letter , *Understanding Pain*, LANCET, July 3, 1971, at 43).

18. *Id.* (quoting Albert L. Fisher, *A Correlative Study of Pain and Its Alternatives*, 12 HEADACHE 105, 116 (1972)).

19. Saad Z. Nagi et al., *A Social Epidemiology of Back Pain in a General Population*, 26 J. CHRONIC DISEASES 769, 776 (1973).

20. COMM. ON PAIN, DISABILITY, & CHRONIC ILLNESS BEHAVIOR, INST. OF MED., PAIN AND DISABILITY: CLINICAL, BEHAVIORAL, AND PUBLIC POLICY PERSPECTIVES 133 (Marian Osterweis et al. eds., 1987).

21. *Cf.* B. Berthold Wolff, *Ethnocultural Factors Influencing Pain and Illness Behavior*, 1 CLINICAL J. PAIN 23, 27 (1985) (discussing the differences in pain responses between ethnocultural groups and noting that they can most likely be traced to cultural factors).

22. *See generally* BRENA, PAIN AND RELIGION (1972) (describing the experience of pain and discussing how various religious systems may influence the human response to pain).

23. Nagi et al., *supra* note 19, at 776; *see also* HUMPHREY TAYLOR & NANCY MORENCY CURRAN, L. HARRIS & ASSOCS., THE NUPRIN PAIN REPORT (1985).

24. FRANK T. VERTOSICK, JR., WHY WE HURT: THE NATURAL HISTORY OF PAIN 87 (2000).

25. Harold Carron et al., *A Comparison of Low Back Pain Patients in the United States and New Zealand: Psychosocial and Economic Factors Affecting Severity of Disability*, 21 PAIN 77, 88 (1985); Robert H. Dworkin et al., *Unraveling the Effects of Compensation, Litigation, and Employment on Treatment Response in Chronic Pain*, 23 PAIN 49, 56–57 (1985); Nagi et al., *supra* note 19, at 776.

26. Dworkin et al., *supra* note 25, at 56–57.

27. Patrick W. Edwards et al., *Familial Pain Models: The Relationship Between Family History of Pain and Current Pain Experience*, 21 PAIN 379, 382–83 (1985).

28. MORRIS, *supra* note 11, at 20.

29. *See id.* at 42–45 (discussing factors that impact the perception of pain).

30. REY, *supra* note 12, at 5.

B. Legal Perceptions of Pain's Subjectivity

Legal authorities fully acknowledge pain's elusive nature and the difficulty of defining its boundaries and contours.[31] There is a legal recognition that this subjectivity renders pain and suffering very difficult to quantify when assessing damages. As one court acknowledged, "Plaintiffs differ. Some are more susceptible to pain than others. Some may be younger, perhaps more deserving in the jury's view, or more vulnerable, or may have led a more difficult life or an easier one. There is an infinite variety of people and reactions to tragedy . . . ."[32] But this does not prevent the law from forging forward on the premise that pain is wholly subjective, or hopelessly so. According to the late Pennsylvania Supreme Court Justice Michael Musmanno, the subjectivity of pain is not even always a given:

> [T]here is no authoritative medical work which asserts that pain is wholly and *always* subjective. . . . [T]he fact *is* that pain can be very objective and it can be detected by persons other than the one who states he feels it. There are symptoms of pain that write their story on one's countenance as clearly as lightning scribbles in the sky its fiery message of nature's discomfiture.[33]

Nonetheless, the law is sufficiently uneasy with pain's subjectivity to maintain that pain's actuality is conveyed not through pain as it is expressed but through pain as it is embodied and to cling to physiological descriptions of how pain sensations are received and transmitted through the nervous system. The law defers to medical officials—bodily experts adept at reading pain's physical manifestations—for guidance on how to detect and convey the presence of pain.[34] There is a perception that medical evidence and terminology objectify pain, even though such evidence either requires interpretation (as in "reading" an x-ray or test before informing others of its "meaning") or constitutes an act of interpretation itself (as in the act of diagnosis). Thus, *American Jurisprudence* posits that pain may be described as deep, superficial, or referred, or may be defined according to its location and distribution as localized, projected, or transmitted (along a nerve), referred, reflex, or psychogenic.[35] At the same time, however, *American Jurisprudence* also acknowledges that pain's allegedly objective physiological reality is itself invaded by subjectivity because the psychological can impact the physiological: "Pain

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31. *See* 5 AM. JUR. *Trials*, *supra* note 7, at 927, § 3 n.2 (quoting Louis Lasagna, *The Clinical Measurement of Pain*, 86 ANNALS N.Y. ACAD. SCI. 28, 28 (1960) ("[P]ain is difficult to define and its quality almost impossible to describe . . . .")).

32. Geressy v. Digital Equip. Corp., 980 F. Supp. 640, 656 (E.D.N.Y. 1997), *aff'd sub nom.* Madden v. Digital Equip. Corp., 152 F.3d 919 (2d Cir. 1998).

33. City of Philadelphia v. Shapiro, 206 A.2d 308, 311 (Pa. 1965).

34. *See* 5 AM. JUR. *Trials*, *supra* note 7, § 75 ("[T]he physcian, because of his medical knowledge and his experience with techniques of therapy and treatment, can give an illuminating medical or physiological explanation of why the pain was experienced.").

35. *Id.* § 12.

impulses are perceived or appreciated in certain regions of the brain where, by *psychological forces of attention* and physiological mechanisms, the brain becomes the interpreter of pain impulses and the pain experience is sometimes modified."[36] It is ironic that, due to the intrusion of unpredictable factors such as these "psychological forces of attention," pain-embodied's subjectivity is actually grounded in objective physiological processes. Nonetheless, the plaintiff's attorney must still fight against subjectivity on two fronts: first in establishing that pain exists, or that pain as it is expressed is tied to a palpable and present pain as it is embodied, and second in precisely defining the contours, causation, and consequences of that pain.

Ultimately, the law resolves the tension between subjectivity and objectivity by considering subjective indicia of pain and suffering to the extent that they are not contradicted by objective evidence and by crediting narrative constructions of pain to the extent that they do not conflict with medical evidence or other objective indicia of disability. A wonderful (and frequent) example of this may be found in Social Security disability appeals where claimants assert that the administrative law judge has erred by not crediting their subjective complaints of pain. Any such case will discuss the various means by which objective evidence (or lack thereof) can undermine subjective credibility, even if it has little or no relation to pain and suffering. Such objective factors include a lack of medical evidence that fully corroborates the complaint,[37] a lack of desire to heal evidenced by a failure to follow prescribed treatment,[38] a record containing no physician opinion of disability,[39] daily activities that are inconsistent with a disabling impairment,[40] evidence that the plaintiff was working while claiming to be disabled,[41] a lack of candidness in supplying information to Social Security Administration officials,[42] and a poor work record prior to the injury.[43] These factors are objective in the dual sense that they are both obvious from a review of the record, as opposed to asking the sufferer, and in that the law has imposed an objective meaning upon them by identifying them as the most significant factors in the disability inquiry. Ironically,

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36. *Id.* § 4 (emphasis added).

37. *See, e.g.*, Jones v. Chater, 86 F.3d 823, 826 (8th Cir. 1996) (citing Nunn v. Heckler, 732 F.2d 645, 648 (8th Cir. 1984)) (finding that an administrative law judge cannot reject subjective complaints of pain based solely on lack of support from objective medical evidence).

38. *See, e.g.*, Benskin v. Bowen, 830 F.2d 878, 884 (8th Cir. 1987) (finding that the claimant's failure to use her back brace and orthopedic pillows following an operation was inconsistent with her claim of severe pain.)

39. *See, e.g.*, Edwards v. Sec'y of Health & Human Servs., 809 F.2d 506, 508 (8th Cir. 1987) (describing the absence of medical records to support the individual's complaint of pain).

40. *See, e.g.*, Murphy v. Sullivan, 953 F.2d 383, 386 (8th Cir. 1992) (agreeing with the administrative law judge's decision that the individual's testimony about pain was not credible due to the description of daily activities performed).

41. *See, e.g.*, Dixon v. Sullivan, 905 F.2d 237, 238 (8th Cir. 1990) (disallowing an individual's claim that his impairments were disabling when his work history indicated otherwise).

42. *See, e.g.*, Fitzsimmons v. Mathews, 647 F.2d 862, 863 (8th Cir. 1981) (finding that an individual's lack of candor in reporting his work activities and earnings diminished his credibility).

43. *See, e.g.*, Ownbey v. Shalala, 5 F.3d 342, 345 (8th Cir. 1993) (noting that the claimant's past work record did not reveal motivation to return to work).

however, these objective indicia are enmeshed with subjective concerns. There is no fixed standard as to what constitutes a "poor work record," and the inclusion and weight of these factors in the balancing of evidence of disability is discretionary. Moreover, the very act of delineating these factors is an act of subjective interpretation, a decision as to what import certain information should have.

C. Dimensions of Subjectivity and Rationality

In discussing and documenting the subjective nature of pain, this Essay has considered multiple subjectivities: narrative subjectivity, subjectivity of pain as an internal physical sensation, and subjectivity of pain as a socially constructed phenomenon. It is readily apparent that the term *subjectivity* is used to refer to a great many states. The time has come to problematize both this concept as well as that of rationality. Subjectivity writ broad denotes the realm of the emotional which inhabits the realm of the interior, of the self, and which is thought to lack a material reality.[44] It focuses on intrinsic attributes that are difficult to ascertain or verify, such as a state of mind or feelings.[45] This section will focus on the ways in which subjectivity intersects with characteristics such as the visibility of physical symptoms and the logical or emotional reactivity of our responses to pain, as well as the impact that these myriad varieties of subjectivity have upon efforts to describe pain.

1. Subjectivity as Visibility

References to what is subjective often concern the visibility of a painful condition. Pain and suffering are historically and culturally specific; not everyone suffers from the same condition in the same manner or expresses it in the same terms, thus making it difficult for others to ascertain through their own interpretive schemas whether another is truly suffering. Thus, whether a painful condition is subjective or objective correlates to a degree with whether it is visibly ascertainable; for example, while a stomachache would be subjective, a broken arm would be objective. Similarly, whether *evidence* of that condition is subjective or objective depends on whether it assumes a form which allows others to ascertain the presence or absence of that condition. While a sufferer's claim of suffering is subjective, x-rays of a broken limb are objective, although, as medical evidence, they must first be interpreted. The degree to which visibility is thought to add surety to a pain-full claim is illustrated by legal reliance upon medical evidence. Predictably, the strongest judicial tie between medical evidence and objectivity lies in attempts to establish the most invisible painful condition. Establishing emotional

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44. WEBSTER'S NEW WORLD DICTIONARY OF THE AMERICAN LANGUAGE 1442 (David B. Guralnick ed., 2d College ed. 1976) (defining sympathy in part as "sameness of feeling; affinity between persons or of one person for another").

45. *Id.*

distress demands "some objective proof of severe emotional distress," which must be supported by "competent medical evidence."[46]

2. *Logical or Emotional Reactivity*

Subjectivity can also be associated with our response to pain, which can be described as logical or emotional, with a subjective reaction being an emotional reaction. One who sees a relative collapse upon the ground can either "lose her mind," run to him, and collapse by his side to cry over his body, or she can "keep her wits about her" and first call emergency authorities. Thus, pain expressed must position the sufferer as a stable and coherent individual, because a hysterical plaintiff will have great difficulty showing liability. This reactive dimension of subjectivity is tied not to visible indicia of injury or suffering, but to reason. Therefore, the absolute distinction between subjective and objective is lost, thus becoming a matter of degree of being *more* or *less* subjective. This reactive subjectivity is of paramount legal concern in voir dire with respect to identifying candidates who will have a particular reaction to the plaintiff's injury; in distinguishing probative from prejudicial evidence, with prejudicial evidence inducing an improper, sympathetic reaction; and in determining whether a jury verdict was excessive, which is perceived to result from an improper, sympathetic reaction for which there is no *reason*able basis.

3. *The Import of Multiple Subjectivities*

These forms of subjectivity, in particular subjectivity as visibility, help to substantiate the illusion that there is a clear distinction between what is subjective and what is objective, and that the two are pure, non-overlapping categories. At so many stages of the personal injury trial, the lines between these dimensions of subjectivity blur, resulting not only in an overlap among different forms of subjectivity, but in overlap between subjectivity and objectivity as larger classifications. Unfortunately, many find this overlap troubling.[47]

The conflation of emotion with irrationality and of reason with rationality also leads to several conclusions that are either incomplete or entirely false: that "emotions have no rational content," that an emotive response is too rapid for reflection, that an emotional state "interferes with rational deliberation," and that emotions are irrational because they arise from subconscious and not cognitive processes.[48] Each of these will be examined in turn.

First, while it is true that emotive processes may arise subconsciously at first, they are not mere urges or preferences. Because many emotions are "cognitive appraisals of changes" in one's environment, including beliefs and appraisals, the

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46. Kazatsky v. King David Mem. Park, Inc., 527 A.2d 988, 995 (Pa. 1987).

47. *See generally* FEIGENSON, *supra* note 4, at 71–73 (explaining how multiple experts have attempted to utilize widely varying theories and understandings to explain emotions).

48. *Id.* at 71.

emotions routinely are revised by cognitive processes that reveal the emotions to be proper or improper.[49] According to Feigenson, sympathy, which he defines as involving interpersonal identification, is a highly cognitive emotion and thus more subject to conscious modification.[50] Cognitive processes of revision also indicate that emotion does not necessarily undermine reasoned deliberation. While certain emotions are more intuitive and reactive and prepare an individual for immediate action, more thoughtful ones such as sympathy or empathy are themselves processes, not immediate gut reactions, and so may be modified over time.[51] Similarly, an emotive response's potential interference with reasoned deliberation depends upon the emotion's intensity, or valence. "A typically less strongly valenced (less strongly felt as positive or negative) emotion such as sympathy [or empathy], which tends to produce less arousal than many other emotions, may interfere less than do other emotions that play a role in legal judgment, such as anger."[52] This is particularly likely when the processes of decision-making are as attenuated as they are in litigation. Ultimately, then, one is likely to revise the conclusions of the heart on the advice of the head.

III. THE MORAL IMPLICATIONS OF SUBJECTIVITY AND ITS EMPATHIC RESPONSE

A. Empathy as a Moral and Rational Response

Though it is crucial to understand pain's multiple subjectivities, it is not these subjectivities themselves with which the law is mostly concerned. Rather, it is the response that pain engenders—empathy for a suffering individual—which seeds uneasiness. But pain's subjectivity does not mean that it necessarily induces an irrational response. Rather, it induces a *moral* response. Here, morality refers to a tenet that human ills, such as pain and suffering, ought not to occur. This implies a prima facie duty to respond, which in turn spurs empathic identification: "The prevention of suffering is our way of honoring the pre-existing appeal for its cancellation. The appeal for the cancellation of suffering is an appeal for whatever causal sequence will prevent it from happening."[53] When we speak in terms of the morality of suffering, then, we emphasize not suffering itself, but the responsive empathy that it engenders in others.

Moral principles both enunciate and frame what is acceptable in our relations with others; as such, they define the proper response to pain and the consequences

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49. *Id.* at 72.

50. *Id.* at 73–74. Feigenson speaks in terms of sympathy but uses that term to refer to empathy-like identification with the suffering person that compels the identifier to take action. He refers to sympathy as "a heightened awareness of the suffering of another and the urge to alleviate that suffering." *Id.* at 74 (citations omitted). He does not use the term empathy because he contends that it does not include the appraisal that the sufferer does not deserve to experience suffering and the desire to help relieve that suffering. *Id.* at 75 n.2.

51. *Id.* at 72.

52. *Id.* (citations omitted).

53. JAMIE MAYERFELD, SUFFERING AND MORAL RESPONSIBILITY 112 (1999).

for one who falsely claims to be in pain. Yet this introduces a conundrum: the law often purports to be predicated on morality, and yet it attempts to constrict empathy's exercise, constructing empathy (which it often terms *sympathy*) as something that is always irrational and undesirable, and contrasts empathy to a reasoned moral judgment. Unraveling this conundrum entails examining the emotive and moral dimensions of empathy and of morality itself, and then elucidating how courts attempt to thwart empathy's exercise and effects in principle and yet how they must and do incorporate empathy into legal practice by charging juries to engage evaluatively with the parties to a lawsuit.

1. How Empathy Is Thoughtful

Empathy is an emotive and psychological norm: "typically we will be right to find a person without empathy frightening and psychopathic."[54] Research suggests the cognitive processes that give rise to empathy also play key roles in human affairs. Empathy does not arise out of self-interest; there is a proven link between even the lesser response of compassion, which lacks empathy's depth of identification, and altruistic behavior, demonstrating that the motivation to help another does not arise solely from egoistic motivations.[55] Empathy and other altruistic behaviors may even have played a role in human evolution by influencing group selection.[56]

A review of historical and contemporary thought reveals that empathy is not an irrational emotion in the sense that it is not the product of thought. As Martha Nussbaum notes, inquiry into the cognitive formation of empathy[57] has been a "ubiquitous human phenomenon."[58] Aristotle's analysis of this emotion[59] in the

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54. MARTHA C. NUSSBAUM, UPHEAVALS OF THOUGHT: THE INTELLIGENCE OF EMOTIONS 334 (2001). "We will suspect this person of an incapacity to recognize humanity." *Id.*

55. *See generally* C. DANIEL BATSON, THE ALTRUISM QUESTION: TOWARD A SOCIAL-PSYCHOLOGICAL ANSWER 74 (1991) (investigating empathy-induced altruism using a three-path model).

56. *See generally* ELLIOTT SOBER & DAVID SLOAN WILSON, UNTO OTHERS: THE EVOLUTION AND PSYCHOLOGY OF UNSELFISH BEHAVIOR 30–31 (1998) (discussing altruism as an evolutionary and biological concept).

57. NUSSBAUM, *supra* note 54, at 304.

58. *Id.* at 301, 304.

59. Nussbaum uses *compassion* to refer to what this Essay terms *empathy*. She defines compassion as "a painful emotion occasioned by the awareness of another person's undeserved misfortune" and empathy as the "imaginative reconstruction of another person's experience, without any particular evaluation of that experience." *Id.* at 301–02. Together, these two emotions encapsulate an emotion which consists of "some combination of imaginative reconstruction with the judgment that the person is in distress and that this distress is bad." *Id.* at 302. Nussbaum further notes that psychologists refer to the combined emotion as empathy. *Id.* Adam Smith describes empathy perfectly when he states that "[t]he compassion of the spectator must arise altogether from the consideration of what he himself would feel if he was reduced to the same unhappy situation, and, what perhaps is impossible, was at the same time able to regard it with his present reason and judgment." ADAM SMITH, THE THEORY OF MORAL SENTIMENTS 8 (Arlington House 1969) (1759). This description is necessarily qualified by the realization that empathy "involves a participatory enactment of the situation of the sufferer, but is always combined with the awareness that one is not oneself the sufferer." NUSSBAUM, *supra* note 54, at 327.

Rhetoric has "guided the subsequent philosophical tradition."[60] According to Aristotle, three beliefs are a prerequisite to the formation of empathy: that the cause of suffering is serious and not trivial, that the sufferer does not deserve to suffer, and that the sufferer is similar to the observer of suffering.[61] Each of these merits examination in turn.

To accord gravitas to one's experience of suffering is to recognize "that the situation matters for the flourishing of the person in question," that it has "size."[62] The vast majority of the experiences that we see as sizeable are timeless, tragic events: "death, bodily assault or ill-treatment, old age, illness, lack of food, lack of friends, separation from friends, physical weakness, disfigurement, immobility, reversals of expectations, [and] absence of good prospects."[63] Size is most often assessed from the perspective of the one confronted by suffering, not by the sufferer,[64] and is gauged by whether it affects a major human need—what Nussbaum refers to as "major constituents of human flourishing."[65]

In addition to suffering from a tragedy that has size, sufferers must be held blameless for their suffering. Our empathy is awakened "either because we believe the person to be without blame for her plight or because, though there is an element of fault, we believe that her suffering is out of proportion to the fault."[66] These judgments are "profoundly influenced by prevailing social attitudes."[67] In her study of the contemporary American understanding of empathy,[68] Candace Clark notes that there is a perception that the tragic event must emerge from nowhere and that an event meriting empathy befell, besieged, or struck the unwitting sufferer.[69]

Finally, the suffering individual must be thought to be similarly situated to the onlooker. Not only must the cause of suffering be an event from which anyone may

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60. NUSSBAUM, *supra* note 54, at 305. Nussbaum notes that Aristotle's conception of this emotion is consistent with less thorough treatments in Homer and Plato, and that it is the analysis to which both proponents of empathy such as Rousseau, Schopenhauer, and Adam Smith, as well as the opponents, such as the Stoics, Spinoza, Kant, and Nietzsche, respond. *Id.* at 306.

61. *Id.*; *see also* ARISTOTLE, *Rhetoric*, *in* ARISTOTLE'S RHETORIC AND POETICS 1, 113 (W. Rhys Roberts trans., 1954) ("Pity may be defined as a feeling of pain caused by the sight of some evil, destructive or painful, which befalls one who does not deserve it, and which we might expect to befall ourselves or some friend of ours, and moreover to befall us soon.").

62. NUSSBAUM, *supra* note 54, at 307; *cf.* ARISTOTLE, *supra* note 61, at 114 (translating Aristotle's word choice as *serious*).

63. NUSSBAUM, *supra* note 54, at 307; *see also* ARISTOTLE, *supra* note 61, at 114 ("The painful and destructive evils are: death in its various forms, bodily injuries and afflictions, old age, diseases, lack of food. The evils due to chance are: friendlessness, scarcity of friends . . ., deformity, weakness, mutilation; evil coming from a source from which good ought to have come; and the frequent repetition of such misfortunes."); CANDACE CLARK, MISERY AND COMPANY: SYMPATHY IN EVERYDAY LIFE 83 (1997) (listing dozens of life-altering moments that triggered sympathy).

64. *See* NUSSBAUM, *supra* note 54, at 311. According to Nussbaum, a sufferer's special need, love for the sufferer, or an inability to estimate the suffering of another can prompt an observer to adopt the sufferer's perspective on his own suffering. *Id.*

65. *Id.*

66. *Id.*

67. *Id.* at 313.

68. CLARK, *supra* note 63, at 34 (referring to this broad emotion as sympathy).

69. *See id.* at 84.

be expected to suffer, but the sufferer must also share socially meaningful characteristics with the observer so that there is a sense of community between the two.[70] This is why, according to Nussbaum, jurors in criminal sentencing proceedings often see themselves as more similar to someone who gives victim impact testimony than to the criminal defendant.[71] Such similarity likely leads the observer to regard the suffering of another as "a significant part of his or her own scheme of goals and ends," so that it impacts upon her own well-being.[72] Personal injury lawyers are advised to favor potential jurors who are "'like' the client and witnesses in education, occupation, family situation, organizational and recreational activities, manner, and dress," because "[t]he more each juror has in common with the plaintiff, the more favorable the result."[73] This awareness awakens the observer to her own vulnerability and renders her even more vulnerable to the sufferer's position.[74] Empathic identification plays a key role in enabling this awareness.[75] Empathy, then, directs our attention, and therefore our thoughts, toward a sufferer.[76] This, together with the recognition that empathy entails thought, makes the empathic object "an intentional object."[77]

The development of empathy is assisted by external cultural and social occurrences. The performing arts writ broad, from icons of tragic drama up through current Hollywood box office hits, inform our understandings of what circumstances engender empathy and when a sufferer merits empathy, and presents us with new targets for empathic identification by bringing cultural strangers into the circle of our acquaintance.[78] More importantly, such representations have taught and encouraged us to seek pleasure in others' vulnerability, and thus in our own.[79] The sense of whether and to what extent a tragedy merits empathy can also be influenced by "sympathy entrepreneurs" such as the media and politicians.[80] Presumably, personal injury lawyers also fall into this category.

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70. As Nussbaum explains, "One makes sense of the suffering by recognizing that one might oneself encounter such a reversal; one estimates its meaning in part by thinking what it would mean to encounter that oneself; and one sees oneself, in the process, as one to whom such things might in fact happen." NUSSBAUM, *supra* note 54, at 316.

71. *Id.* at 317.

72. *Id.* at 319.

73. OHIO PERSONAL INJURY PRACTICE § 8.15 (2006).

74. NUSSBAUM, *supra* note 54, at 319.

75. *Id.* at 330.

76. As Nussbaum states,

> [C]ompassion makes thought attend to certain human facts, and in a certain way, with concern to make the lot of the suffering person as good, other things being equal, as it can be—because that person is an object of one's concern. Often that concern is motivated or supported by the thought that one might oneself be, one day, in that person's position. Often, again, it is motivated or supported by the imaginative exercise of putting oneself in that person's place.

Id. at 342.

77. *Id.* at 310.

78. *See id.* at 351.

79. *Id.* at 352–53.

80. *Id.* at 314.

2. *Why Empathy Is Rational*

The realization that empathy entails thought does not necessarily lead to the conclusion that it is rational. In contemporary American culture, what is rational is associated with the head and what is emotive is associated with the heart. Overshadowing that dichotomy is the assumption that "the thought on which [emotions such as] compassion [are] based is in some normative sense bad or false thought."[81] This tension between reason and emotion, head and heart, is especially prevalent in the law, which separates a reasoned moral response from mere sympathy in the context of criminal sentencing,[82] and identifies sympathy as an improper basis for decision-making in personal injury litigation. Emotion, in the form of sympathy, is construed as "an invitation to let into the law whatever brutish and undiscriminating forces happen to be around."[83]

Not only is empathy legally controversial, it "is [philosophically] controversial. . . . [I]t has found both ardent defenders, who consider it to be the bedrock of the ethical life, and equally determined opponents, who denounce it as 'irrational' and a bad guide to action."[84] Yet, the contemporary subordination of emotion to reason is the product of a bastardized interpretation of the classical Stoic philosophical tradition. Classical Stoic philosophers acknowledged that emotions, including empathy, involved thought, but deplored sentiment on the basis that the thought processes it engendered were irrational in the sense that emotion "latches onto false beliefs."[85] As we shall see, those who now decry emotion are not the standard-bearers of the Stoic legacy; they fail to "distinguish clearly between the claim that emotion is noncognitive and the claim that it is irrational in the Stoic sense," but exploit "the long philosophical tradition that opposes emotion to reason, relying on the authority of this tradition rather than on argument."[86] Thus, this Essay has already surmounted much of the criticism from contemporary opponents of empathy by showing that empathic identification is very much a deliberate cognitive process. Examining and responding to the classical Stoic understanding of pain will complete this analysis of how, and in what circumstances, empathy is rational.

The classical opposition to empathy, championed by Socrates, Plato, Greek and Roman Stoics, and later Kant, posits that it is only man's moral faculties that make him virtuous; worldly objects and emotions inhibit virtue.[87] Man's capacity for dignity is tied only to his moral faculties, faculties that render all men equal.[88] Thus, a Stoically moral person cannot be harmed by the worldly events to which suffering

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81. *Id.* at 356.
82. *Id.* at 354–55 (quoting California v. Brown, 479 U.S. 538, 545 (1987) (O'Connor, J., concurring)).
83. *Id.* at 356.
84. *Id.* at 354.
85. *Id.* at 369–70.
86. *Id.* at 370.
87. *Id.* at 356–57.
88. *Id.*

is attributed.[89] To feel compassion for another actually implies that the other is not virtuous, but morally unworthy in that he requires worldly objects and sentiments.[90] For Stoics, empathy is "partial and narrow" and is based upon imagination, whose products are "subject to distortion."[91] In addition, empathy binds us to the very worldly elements that we should forsake, thereby undermining our dignity and encouraging more insidious emotions, from fear to vengeance.[92] Cicero's writings conveyed to the West the Stoic opposition to empathy, where it influenced philosophers such as Grotious and Kant, and dominated the Western philosophical tradition for centuries.[93] This classical opposition to empathy exemplifies "great continuity and unity of argument"[94] and profoundly shapes current perspectives on the emotion.

Contrary to the classical anti-empathic perspective, the opposing pro-empathic perspective lacked unity and even at times an internal awareness of its own advances in thought.[95] Nonetheless, the pro-empathic perspective has been effective in discounting many of the classical arguments against empathy.[96] Proponents of empathy approach human dignity very differently, seeing it as inclusive of, not incompatible with, weakness. Empathy is merited when a "person possessed of basic human dignity has been injured by life on a grand scale."[97] Thus, empathic compassion engenders a community-enabled conception of dignity, in which "human beings are both dignified and needy, and in which dignity and neediness interact in complex ways."[98] Essentially, one can both be agent and victim.[99] If dignity is inclusive of weakness, there is no need to force a choice between feeling an empathic connection to a sufferer and respecting that sufferer's dignity, for it is *disrespectful* of intrinsic human virtue to ignore others' needs for basic resources or to expect those in need to reach their full potential.[100] It is the *absence*, then, not the *presence* of basic worldly goods that affects one's capacity for virtue; empathy enables equality by restoring the basic needs of the suffering.[101] As Nussbaum contends, the Stoic abhorrence for all things worldly is inconsistent, for an ethical theory by its nature assumes that there is value attached to some external good.[102]

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89. *Id.* at 356.
90. *Id.* at 357.
91. *Id.* at 360.
92. *Id.* at 361–62.
93. *Id.* at 369.
94. *Id.*
95. The movement is "more scattered, including novelists as well as political theorists, psychologists as well as philosophers; its members are not on the whole clearly aware of one another's arguments." *Id.*
96. *Id.*
97. *Id.* at 405.
98. *Id.*
99. *Id.* at 406.
100. *Id.* at 370–71.
101. *Id.* at 372.
102. *Id.* at 373.

"[M]orality seems to be all about arranging for the appropriate distribution of those things," rendering "[c]ourage, justice, [and] moderation" all in need of objects.[103]

Surveying the current American political scene, we see a country where welfare and public housing are available for those living below the poverty line (albeit with conditions to thwart continued reliance), where Medicare and Social Security are available for the elderly, where the bankrupt can discharge their debts, and where the judicial system hears the claims of those who have been wronged and deprived of their worldly goods. Although Enlightenment free will and responsibility and the Puritan work ethic remain profound cultural forces, the state structure reflects an assumption that there are basic entitlements necessary to secure human dignity, and that certain worldly interests, including freedom of speech and property rights, must be protected for the greater good.[104] Compassion and empathy, then, are "ubiquitously" accepted as "a reasonably reliable guide to the presence of real value."[105] And because Stoicism and pro-empathic models of morality are mutually exclusive due to the Stoic intolerance of need, the latter must be *the* model organizing contemporary American culture. Empathy does not constitute a moral code in its own right, but it nonetheless directs us toward an understanding that lies at the heart of morality. As such, empathy informs our behaviors and life decisions and thus must be incorporated into a theory of rationality. As Amartya Sen argues, even an economic theory of rationality cannot afford to omit sympathy[106] due to the impossibility of formulating a "predictive account of human action or a correct normative theory of rationality without mentioning the sympathetic concern people have for the good of others."[107] The only nagging issue of openly acknowledging empathy as a rational part of public life thus lies in ensuring that we normatively value suffering properly.

B. Incorporating Rational Empathy into the Civil Adjudication of Pain

Normatively valuing suffering introduces a conundrum, for like other emotions, empathy is norm-driven, not rule-based, and is animated by imaginative processes that are informed by social practice.[108] As such, it is necessarily fallible and imperfect,[109] introducing the question of "[h]ow, then, is it possible to promote appropriate compassion in . . . a society, and what would a compassionate society look like?"[110] This Essay endeavors to answer that question in the context of the civil adjudication of pain. As previously discussed, empathy is not irrational in the

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103. *Id.*

104. *Id.* at 407.

105. *Id.* at 374.

106. AMARTYA SEN, CHOICE, WELFARE AND MEASUREMENT 84–106 (1982).

107. *Id.* at 391 (citing SEN, *supra* note 106).

108. *Id.* at 390–91 (discussing a literary example that provides an analogy for the problems of rule-based morality and imagination).

109. *See id.* at 390 (analogizing a literary character's failure with the idea that empathy in general is flawed).

110. *Id.* at 403.

sense of being based on impulse or lacking in thought, because it is a judgment, "[n]or . . . is it normatively irrational in the sense of being based on bad thought."[111] Therefore, the proper response to empathy is not outright exclusion: "The fallibility of compassion should not induce us to omit it entirely from legal deliberation, any more than the fallibility of belief should cause us to omit all beliefs."[112]

A prefecatory observation may be made about the role of morality in personal injury litigation. The Stoic emphasis on intrinsic dignity devoid of weakness and reliance on external resources has no place in the personal injury context, for in allowing such suits to be brought, the law encourages suffering individuals to seek recompense for undeserved injury, endorsing the propriety of safeguarding very real—and external—interests in well-being and property. In addition, it is impossible to see (assumably honest) personal injury plaintiffs in any role other than that of supplicants seeking restoration of dignity through a verdict in their favor that enables them to regain integrity by righting a wrong, by paying for additional medical treatment, or both. In essence, then, personal injury litigation may be seen as a sort of morality play in which lawyers are actors hired by parties to adopt certain philosophical creeds and to advocate for or against empathy's exercise.[113]

Empathy has profound ramifications at the institutional level as well. Institutional and personal exercises of empathy are mutually constructive, for "compassionate individuals construct institutions that embody what they imagine; and institutions, in turn, influence the development of compassion in individuals."[114] For instance, institutions construct social attitudes toward individuals, establishing similarity or difference on the basis of certain characteristics, and thus encouraging or discouraging empathy. Law is no exception to this rule because "a regime that makes people equal before the law and that empowers all citizens in certain basic ways will encourage compassion to turn its sights outward."[115] Thus, if empathy is to have any role in law, it must be built into the judicial system at both the institutional and individual levels because actors in that system, namely judges and jurors, enjoy civic roles that require broad discretion, thus necessitating compassion.[116]

Law pursues justice, which is a state or attribute (in the sense of "being just") and not an emotion. Empathy must go hand-in-hand with justice, for a "just" response is also a reasoned moral response, and a reasoned moral response incorporates empathic identification. Empathy also, however, allows a court to respond to tragedies with consequences that lie beyond justice, such as "death,

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111. *Id.* at 441.

112. *Id.*

113. Feigenson too sees the process of "doing justice" in an accident case as a morality play in which "jurors seek a right result by adjusting the fates of the parties to correspond to what the jurors believe each party merits." FEIGENSON, *supra* note 4, at 104 (citations omitted).

114. NUSSBAUM, *supra* note 54, at 405.

115. *Id.* at 421.

116. *Id.* at 404.

accident, [and] loss of love."[117] Such uncompensable tragedies mandate empathy "as an appropriate response, and as a motive to attend with concern to the needs of our fellows."[118]

The propriety of empathic identification with the parties changes according to the context and subject matter of the litigation. As Nussbaum comments, "In American society today, . . . we often hear that we have a stark and binary choice, between regarding people as agents and regarding them as victims."[119] Criminal prosecutions stress the defendant's free will and thus his responsibility for his crime, making punishment the only means by which to demonstrate respect for not only the crime victim but also for the defendant himself. Thus, in the criminal sentencing context, "we are urged to think that any sympathy shown to a criminal defendant on account of a deprived social background or other misfortune . . . [is] a denial of the defendant's human dignity."[120] Yet, personal injury litigation is very different from criminal prosecution, where an empathic response might very well retard the state's ability to hold a defendant accountable for his actions. In personal injury suits, plaintiffs assert their suffering is undeserved, and thus empathy should be encouraged. Moreover, unlike a criminal defendant upon whom courts must *impose* an appropriate punishment (and thus suffering) to uphold dignity, in other forms of adjudication, courts must *alleviate* suffering in order to uphold dignity. The role of the plaintiff in personal injury litigation involves both an active and passive dignity—the dignity required to admit personal weakness, and the dignity to seek institutional means of relief. The plaintiff is therefore simultaneously deserving of respect and empathy; "[s]eeing his basic human capacities, we are led to admire the dignity with which he confronts the ills that beset him, and to notice the yearning for full activity that he displays even in the most acute misery."[121]

The normative valuation of injury and suffering—the assessment of size—is governed by social enculturation, judicial precedent, and the adversarial model of litigation, each of which is self-regulating. Common sense, or an awareness of social norms, may prompt an injured person to not bring suit over a matter that society would perceive as trivial or for which he is not blameless. If this sense of propriety fails, however, judicial precedent and the adversarial model of litigation must serve this function. While precedent outlines the types of injuries that have previously merited compensation, the adversarial model ensures that these relevant authorities will be applied or distinguished from a particular set of facts. These safeguards ensure that the judiciary and judicial actors respond with empathy when they are justified in doing so—when its exercise is informed by evidence.

Because empathy is rational in the dual sense of arising from deliberative thought and being capable of appropriate exercise, Nussbaum concludes that "[f]rom both judges and jurors, then, we should demand both empathy and an

117. *Id.* at 404.
118. *Id.* at 405.
119. *Id.* at 406.
120. *Id.*
121. *Id.* at 408.

appropriate compassion as ingredients in the mastery of the human facts before them. This compassion must be tethered to the evidence and constrained by institutional factors."[122] Ideally, the model judge or juror

> would have been encouraged to imagine situations of hierarchy and to appreciate their human meaning. She would have no tendency to suppose that this pursuit of fairness requires her to stand at a lofty distance from the social realities of the case before her. Indeed, she takes true neutrality to require a searching examination of those realities, with imaginative participation . . . .[123]

This ideal exemplifies many of the characteristics of what Adam Smith terms the "impartial spectator": "reason, principle, conscience, the inhabitant of the breast, the man within, the great judge and arbiter of our conduct"—essentially, a neutral personification of our awareness of social propriety and our guide to emotive exercise.[124]

IV. SUBJECTIVITY'S MORAL CONSEQUENCES: THE LABEL OF MALINGERER

Malingering motivates concern over both morality and subjectivity since an expressive subject must possess moral authority for a pain-full expression to be successful, lest the subject acquire an immoral identity. The term *malingerer* refers to individuals who are distrusted because they seek to abuse the subjective potential of expressive structures, such as by exploiting the momentum of a powerful narrative to induce belief in a false account. Essentially, the drawback of pain's subjectivity is that expressive indicia may be abused. Following the leads of Plato and C.S. Lewis, Frank Vertosick refers to malingering sufferers as inhabitants of the "Shadowlands," a realm in which "we see a projection of things, not their true nature."[125] These Shadowlands are inhabited by people who appear to suffer greatly

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122. *Id.* at 445.

123. *Id.*

124. SMITH, *supra* note 59, at 193–94. As Smith explains,

> When I endeavour to examine my own conduct, when I endeavour to pass sentence upon it, and either to approve or condemn it, it is evident that, in all such cases, I divide myself, as it were, into two persons; and that I, the examiner and judge, represent a different character from that other I, the person whose conduct is examined into and judged of. The first is the spectator, whose sentiments with regard to my own conduct I endeavour to enter into, by placing myself in his situation, and by considering how it would appear to me, when seen from that particular point of view. The second is the agent, the person whom I properly call myself, and of whose conduct, under the character of a spectator, I was endeavouring to form some opinion. The first is the judge; the second the person judged of.

Id. at 164–65.

125. FRANK T. VERTOSICK, JR., WHY WE HURT: THE NATURAL HISTORY OF PAIN 223 (2000).

for some unknown reason, experiencing "pain out of proportion to any apparent ailment or injury."[126] Such shadows seem to lurk everywhere, for as Vertosick notes, we "cannot see, feel, smell, or touch pain felt by other people. We see only the shadow that pain casts upon their lives."[127] This directly implicates Scarry's thesis that pain is a matter of doubt, and further complicates it by suggesting that pain's shadow can appear to be genuine even when the condition that casts it is itself an illusion, such as in a haunting artistic representation.[128]

American Jurisprudence's commentary on malingerers is illuminating precisely because it acknowledges the ways that subjectivity can weaken claims of pain and that legal proceedings can be improperly invoked. Lawyers are advised that the promise of monetary gain, escape from responsibility, or yearning for sympathy or attention motivates malingering plaintiffs[129] to "consciously feign illness or disability."[130] Of chief concern here is the motivation to feign pain for economic gain. This concern is certainly understandable; in civil personal injury suits, "pain becomes a tangible commodity that can be bought and sold in the marketplace."[131] Vertosick refers to this situation as a "Reverse Inquisition" where pain is used to "leverage something of value from authority figures" (not to extract something of value from victims as in historical Inquisitions).[132]

American Jurisprudence takes special care to school lawyers on the intricacies of malingering so that advocates for the plaintiff and defendant can best assay the opposing party or construct a solid defense. According to *American Jurisprudence*, malingerers feign pain through invention, exaggeration, or perpetuation.[133] Malingerers who invent conditions altogether are quite detectable because they are unlikely to know the physiological mechanisms involved in the claimed condition.[134] Exaggerating malingerers actually have the claimed painful condition to some degree and therefore may possess some knowledge of its physiological dimensions.[135] Perpetuating malingerers previously suffered from the condition but now do not.[136] Observers must take care, however, with respect to assuming the degree of pain experienced by exaggerating and perpetuating malingerers, for the exaggerating plaintiff "is only a malingerer to the extent that he exaggerates; and the perpetuator is a malingerer only if there is conscious deceit."[137]

Again, *American Jurisprudence* advises lawyers to enlist the aid of medical practitioners when devising artful means of detecting malingering plaintiffs. Medical examination may detect malingering plaintiffs in several ways: through the

126. *Id.*
127. *Id.*
128. *Id.*
129. 5 AM. JUR. *Trials*, *supra* note 7, §§ 19–30.
130. *Id.* § 19.
131. VERTOSICK, *supra* note 125, at 224.
132. *Id.*
133. 5 AM. JUR. *Trials*, *supra* note 7, § 19.
134. *Id.*
135. *Id.*
136. *Id.*
137. *Id.* § 20.

use of "variations of manipulative or percussion techniques" that are likely unfamiliar to the false plaintiff; through close scrutiny to determine whether the malingerer inflicts pain on himself during the examination by biting the tongue, squinting the eyes, or by some other means; and by observing whether the suspected malingerer consistently exhibits realistic symptoms or impediments while undressing and dressing, getting on and off the examining table, or through some unguarded movement.[138] In addition, an examining physician may attempt to confuse or disorient the suspected malingerer through the use of mirrors or by testing areas of the body that he is unable to see.[139]

As an act, malingering problematizes the subjective doubt inherent in pain. Thanks to the malingerer, all persons who claim to suffer pain but who are free of documented disease or have afflictions disproportionate to the asserted pain are viewed with skepticism, even though there is a very real possibility that such pain is psychic and is actually experienced at the claimed intensity. Applying the malingering label becomes a shorthand way of invoking a "moral conclusion" based on the plaintiff's pattern of behavior.[140] This doubt underscores the fact that issues related to malingering, such as whether the sufferer is involved in litigation, cannot be ignored due to their undeniable impact on the diagnosis and management of pain. Such considerations raise ethical questions, such as whether physicians should offer litigious patients certain treatments at all for fear that, in undergoing a treatment that will be less successful or is entirely unnecessary, the patient could be hurt more than by foregoing treatment altogether.[141] For instance, while over 90% of nonlitigating patients benefit from spinal surgery, only 40% to 50% of plaintiffs involved in workers' compensation lawsuits at the time of their surgery experience the same rate of success.[142] In such cases, "a patient's legal status becomes a prognostic factor for outcome equal to such medical factors as diabetes or a bad heart."[143]

Ironically, pain is saved from this trap by the same subjectivity that springs it in the first place because subjectivity means that one must credit the possibility that the plaintiff may *not* be malingering. Legal authorities recognize that no single factor is decisive in either establishing or overcoming an inference of malingering, for pain is always, as Scarry notes, a matter for doubt.[144] Judge Posner effectively describes this ineradicable doubt in a recent opinion holding that an administrative law judge committed reversible error by altogether ignoring a disability claimant's subjective claim of back pain:

> Maybe [the plaintiff] is exaggerating her pain. Maybe we are naïve in doubting Carradine's thespian capabilities or the

138. *Id.* § 21.
139. *Id.*
140. *Id.* § 20.
141. VERTOSICK, *supra* note 125, at 226.
142. *Id.*
143. *Id.* at 226–27.
144. SCARRY, *supra* note 5, at 4.

> willingness of physicians to perform intrusive, even dangerous, therapies on patients whom they believe to be fakers. Maybe even severe pain is not much of a distraction for people at Carradine's vocational level.[145]

Thus, it is not surprising that legal authorities also are quick to caution that a lack of objective confirmation does not mean that an alleged sufferer is necessarily malingering. Unlike the malingerer, for whom pain is pretend, a person suffering from other legitimate forms of pain with psychological or psychiatric roots actually experiences pain.[146] Several conditions, while equally as psychological and subjective as the pain of the malingerer, may be differentiated from and escape the moral onus of malingering in the sense that they do not involve the conscious effort to deceive others. These conditions include a heightened sensitivity to pain,[147] a high degree of attention to indicia of pain,[148] pain produced by the power of

145. Carradine v. Barnhart, 360 F.3d 751, 756 (7th Cir. 2004).

146. 5 AM. JUR. *Trials*, *supra* note 7, § 20.

147. Frustratingly for legal practitioners, people differ in their sensitivity to pain and may have low or high thresholds of pain, making it even more difficult to effectively assess the amount of pain produced by a given injury. An interesting and humorous example of the difficulty in assessing pain is an out-of-date but still "on-the-books" *American Jurisprudence* article advising lawyers how to show pain and suffering that posits several illuminating, if now slightly silly, theories. According to this article, certain personal tendencies of the plaintiff are determinative of one's susceptibility to pain. Athletic types are declared to be indifferent to pain, fat types are complacent about pain, and tall, thin types are hypersensitive to pain. 5 AM. JUR. *Trials*, *supra* note 7, § 6 (citing W.H. SHELDON, THE VARIETIES OF TEMPERAMENT 61–62 (1942)). One wonders whether a fat athlete would be indifferent or complacent. In addition, persons who lack social stimulation may have increased sensitivity to pain. *Id.* (citing Jack Vernon & Thomas E. McGill, *Sensory Deprivation and Pain Thresholds*, 133 SCIENCE 330, 331 (1961)). Even family size may be thrown into the equation; people who consistently complain of pain tend to have significantly more siblings than noncomplainers. *Id.* (citing Thomas A. Gonda, *The Relation Between Complaints of Persistent Pain and Family Size*, 25 J. NEUROLOGY, NEUROSURGERY & PSYCHIATRY 277, 279 (1962)). A second, more recent *American Jurisprudence* article on pain and suffering advises practitioners that as recently as the early 1970s pain tolerance was perceived to decrease with age and be tolerated more by men than by women, and it was thought that Caucasians had the highest level of pain tolerance, followed by "Negroes" and "Orientals." 23 AM. JUR. PROOF OF FACTS 2D *Pain and Suffering* § 3 (citing Woodrow et al., *Pain Tolerance: Differences According to Age, Sex and Race*, 34 PSYCHOSOMATIC MED. 548, 549–50 (1972)).

148. The perception of pain, and of observable bodily manifestation of injuries, is also accorded weight as a subjective component of pain. Distracting attention from pain-producing stimuli can dilute or entirely diminish pain perceptions. 5 AM. JUR. *Trials*, *supra* note 7, § 8. Anxiety or stress may be a prerequisite to experiencing pain. *Id.* § 9. Surprisingly, the mere presence of a wound does not guarantee the perception of pain as such. *Id.* There is "no simple, direct relationship between the wound itself and the pain experienced," since other factors largely determine the experiences of pain and suffering. *Id.* § 10. Of primary importance is a wound's personal significance and that person's reaction to the wound. *Id.* The reaction may be one of relief, thankfulness for a live escape from a traumatic situation, or even euphoria. *Id.* Or the reaction may be more dismal where the wound is seen as evidence of a depressing and calamitous event. *Id.*

suggestion,[149] psychogenic or symbolic pain,[150] fight or flight pain,[151] and phantom limb pain.[152]

Of course, the potential for dishonesty is the central focal point of pain expressed in the personal injury trial, where emphasis is placed on "hard" evidence. Not surprisingly, *American Jurisprudence* advises plaintiffs' attorneys to always anticipate that malingering will be an issue at trial when the plaintiff's primary claims of pain lack substantiation through objective evidence.[153] Claims of malingering are often countered by corroborating the plaintiff's claims of pain with medical testimony.[154] Such testimony is most likely to revolve around the presence of any number of visible or ascertainable indicia of pain.[155] The plaintiff's attorney can also establish that the client is not malingering through direct examination of the plaintiff's physician who can testify to indicia of pain obtained from a thorough medical examination, with emphasis placed upon conveying that such an examination is routine procedure and was not based on a suspicion of deceit.[156]

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149. Sufferers may even be unwittingly open to the power of suggestion if another attempts to persuade them that their pain is greater than it is. Power of suggestion is apparently greatest when pain levels are high, and decreases with anxiety. *Id.* § 11 (citing HENRY K. BEECHER, MEASUREMENT OF SUBJECTIVE RESPONSES 170 (1959)).

150. Psychogenic pain, ostensibly a form of neurosis that is also known as "hysterical" pain or "conversion reaction," occurs when psychic elements are major factors in the experience of pain and often follows a traumatic event. *Id.* § 14. Psychogenic factors can trigger additional pain when they prompt the muscles to tense and become painful, such as in a tension headache. *Id.* Symbolic pain, on the other hand, describes pain that represents a mental hurt. *Id.* Finally, pain induced by other physical causes may be perpetuated or prolonged by psychological factors after the physical reasons for the pain have diminished. *Id.* § 15. Plaintiffs who exhibit an obsession with the pain, those focusing attention on the site of injury, and those relishing the care and concern displayed by friends, family, and medical (or legal) experts are particularly susceptible to psychologically perpetuated pain. *Id.*

151. The "fight or flight" instinct, arising in the face of injury or threat of injury, produces a number of physical stimuli, such as an accelerating pulse, widening of the respiratory passages, sweating, and releasing of adrenalin and sugar into the blood stream. *Id.* § 16. A failure to act on this instinct means that these stimuli are not relieved, and consequently that "the physiological harmony of the nervous system is disrupted," possibly producing pain. *Id.*

152. A majority of amputees report experiencing a "phantom pain" following amputation that is localized in the amputated extremity. *Id.* § 17 (citing W.R. Henderson & G.E. Smyth, *Phantom Limbs*, 11 J. NEUROLOGY, NEUROSURGERY & PSYCHIATRY 111 (1948)). Notwithstanding its ghostly and evanescent name, courts long ago determined that phantom pain is a real enough phenomenon to be compensated in personal injury actions. *See* S. Pac. Co. v. Guthrie, 180 F.2d 295, 303 (9th Cir. 1949); Hickenbottom v. Del. L. & W. R. Co., 25 N.E. 279, 279–80 (N.Y. 1890).

153. 5 AM. JUR. *Trials*, *supra* note 7, § 23.

154. *Id.*

155. Such signs may include "Redness, Swelling, Bleeding, Bruising, Hematoma, Muscle spasm, High pulse, High blood pressure, Tears, Perspiration, Dilated pupils, Moaning, Trembling, Wincing or other distorted facial expressions, . . . Objective signs of pain" even when under surreptitious observation, abnormal reflexes, consistent laboratory tests, and the cessation of pain upon receiving analgesic drugs. *Id.*

156. *Id.* § 78.

V. CONCLUSION

Ultimately, this jurisprudential concern over sympathy is symptomatic of a deeper legal distrust of subjectivity—both the subjectivity inherent in pain and the subjectivity inherent in the interpersonal relations that expressions of pain facilitate. Attempts to marginalize empathic influences seem a last-minute brake, applied as a hasty final effort to direct the impact of pain's interpersonal strength. While law accepts that it must grapple with a degree of subjectivity since subjectivity is inherently part of pain's nature, it attempts to limit other collateral forms of subjectivity that stem from how humans deal with pain, endeavoring to render predictable the sources of the unpredictabilities which the law must manage. But that the law does so at all indicates its distrust of sympathy and explains why it equates empathy to emotion, and emotion to irrationality.

The law's reaction may just be the institutionalization of a deep-set psychological need to place limits upon the unpleasantness of others' suffering so that it is not overwhelming. Pain and suffering affect us most when their expression is at its most artistic, and therefore arousing to our sensibilities. We are most likely to ruminate on a painful experience when that experience is aesthetically pleasing. Suffering that is not sublime is awarded only passing interest, and we may find reasons to minimize it by allotting blame to the sufferer, by raising the interpersonal barrier of difference, or by moving on to the more engaging (and heroic) response to suffering. It did not take long in the wake of Hurricane Katrina for media coverage to move from its victims to others' responses to the disaster—apportioning blame and decrying the ineptness and prejudice among city, state, and national officials and emphasizing the overwhelming public response to calls for relief. But the law need not—and must not—be so fearful. The urge to deny, minimize, or constrain awareness of suffering and others' ensuing responses erects a barrier to the very moral understanding that the law aspires to reach.[157] Such obstinacy "leads us to underrate the evilness of suffering, and consequently the urgency of eliminating it. We go about oblivious, blindfolded as it were, to the true moral state of the world and the response that its state requires of us."[158] Seen in this light, it is not an empathic response to pain that is irrational, but a *fear* of that response.

This Essay has begun to weaken the foundation of this fear by showing that emotion, including empathic engagement, is not opposed to thought but is highly cognitive. Empiricism has always equated itself with what is rational and opposed itself to the emotional. Perhaps out of a dread of the unknown, empiricism perpetually fears that emotion pools its (improper) influence not from a drop but from a deluge. But emotion, like pain, is a part of the human condition. To wrest emotion away from its association with irrationality, we must delve into the myriad layers of emotion and irrationality that appear to overlap, examining in particular the roots of such distinctions as that between subjectivity and objectivity and

157. *See* MAYERFELD, *supra* note 53, at 105.
158. *Id.*

closely analyzing the areas of overlap that are thus laid bare. In doing so, we have found that emotions are not irrational in the sense that they are unreasonable, since "they are very much bound up with thought, including thoughts about what matters most to us in the world."[159] The Supreme Court has even stated that compassion itself has a close relationship to thought, being based on evidence, and that "it can be 'tethered' to limit its purview to the evidence presented" at trial.[160] Nor can emotion be tied to any other variations on this definition of irrationality that are more open to the potential for thought. For instance, irrationality may "also be defined in terms of thought that is *bad thought* in some normative sense," or thought based on "beliefs that are false and ungrounded."[161] Emotional beliefs may be perceived as ungrounded when they are not bolstered by empirical reason, but again this implies neither that they are false, nor that they will hijack legal adjudication.

Ultimately, the law involves confrontations with the Other, and so it must necessarily be informed by all grounds upon which humans engage one another—whether they are rational or relational. It is the relational dimension of law that encourages us to be humane, to act within certain normative bounds of decency, and to hold each other responsible for violations of these normative boundaries. These elements cannot render law irrational, grounded as they are in very necessary—and logical—interpersonal considerations. We must not forget that this is what enables law to be flexible, evolvable, and human—in essence, capable of individualized justice. And so we must recognize that, because we may not turn empathic compassion on and off, we must instead evaluate whether its exercise is reasonable and appropriate in each situation where others would argue for its application or avoidance.

Crucially, the recognition that the expression of pain makes relational connections possible is essential in the disjointed cultural here and now, which is confronted daily with a painful pastiche of images. The sight of suffering suffuses our environs to the point that we now "simply gaze with numbed fascination at a meaningless set of actions we cannot comprehend—then shift our attention elsewhere."[162] We humans are adaptable creatures, and "[a]s one can become habituated to horror in real life, one can become habituated to the horror of certain images."[163] Suffering so saturates us that we may call forth with ease any number of iconic images of the Trail of Tears, the Civil War, World War I, the Spanish Civil War, World War II and the Holocaust, Vietnam, Rwanda, Mogadishu, Serbia, and nameless and numerous international sites of atrocity, or of terrorism on our own soil in the 1993 World Trade Center bombing, the Oklahoma City bombing, and the 2001 terrorist attacks. The flood of images seems so omnipresent that it

159. MARTHA C. NUSSBAUM, HIDING FROM HUMANITY: DISGUST, SHAME, AND THE LAW 10 (2004).

160. *Id.* at 22 (discussing California v. Brown, 479 U.S. 538, 548 (1987)).

161. *Id.* at 11.

162. MORRIS, *supra* note 11, at 256.

163. SUSAN SONTAG, REGARDING THE PAIN OF OTHERS 82 (2003).

drains the terror from suffering and erodes the shock value that excites empathy. One might even say that suffering has become sublime, generating interest and curiosity.

However, coverage of suffering does not cease by focusing on the sufferer. Instead, attention moves on to others' responses to the suffering and their moral and heroic dimensions. So it is in personal injury trials, which after explicating pain's presence and origins, demand a response. Appreciating that empathic processes do not work to the exclusion of rational deliberation recognizes the depth of the contribution that such an empathic response can contribute. Such trials offer local opportunities for us to recover our potential to care, providing occasions for empathic work. As Sontag notes,

> Compassion is an unstable emotion. It needs to be translated into action, or it withers. The question is what to do with the feelings that have been aroused, the knowledge that has been communicated. If one feels that there is nothing "we" can do . . . and nothing "they" can do either . . . then one starts to get bored, cynical, apathetic.[164]

That personal injury trials present opportunities to care should not be taken to mean that we should not still rely on healthy skepticism when the facts call for it, for the legal adjudication of injury requires a party to meet its burden of persuasion. But the fact that parties choose to litigate claims in and of itself should not bias us toward them before we even hear what they have to say.

164. *Id.* at 101.