PAIN AND SUFFERING GUIDELINES: A CURE FOR DAMAGES MEASUREMENT "ANOMIE"

Frederick S. Levin*

The current process for measuring pain and suffering damages fails to serve the compensation and the accident avoidance goals of tort law. The lack of standards for juries to apply produces widely varying pain and suffering awards that leave observers wondering what differences in the cases justify the disparity. Disparate awards send confused signals concerning the appropriate levels of accident avoidance. Overdeterrence of socially productive activities and subsidization of socially undesirable activities are the unfortunate results.

This Note argues that adapting the criminal sentencing guidelines systems in use in several states[1] to the personal injury context would provide appropriate standards for measuring pain and suffering damages. Part I explores why present methods for measuring pain and suffering are objectionable. A description of the proposed method for developing guidelines is provided in

* Law Clerk to Hon. John Feikens, United States District Court, Eastern District of Michigan. Contributing Editor, 21 U. Mich. J.L. Ref. (1988); A.B. Princeton University, 1985; J.D., University of Michigan, 1988.

In addition to the many *Journal* staff members who have worked on this Note, I would like to thank Professor Janet Findlater of Wayne State University Law School; James E. Lieber, M.A., The Kennedy School of Government; Harvard University, and Melissa Roderick, Ph.D. candidate, The Kennedy School of Government, Harvard University. Of course, all errors remain my own.

1. At least ten states have adopted sentencing guidelines systems: Florida, Maryland, Massachusetts, Michigan, Minnesota, New Jersey, Pennsylvania, Rhode Island, Utah, and Washington. Four other states, Nebraska, South Carolina, Vermont, and Wisconsin have studied the possibility of adopting guidelines. J. HAWES, DEVELOPMENT OF SENTENCING GUIDELINES AND IMPACT ON PLEA NEGOTIATIONS (National Center for State Courts, Reference No. RIS 84.007) (1984) [hereinafter HAWES].

See generally S. SHANE-DUBOW, A. BROWN & E. OLSON, SENTENCING REFORM IN THE UNITED STATES: HISTORY, CONTENT AND EFFECT (1985). Congress authorized sentencing guidelines as part of the Crime Control Act of 1984. The Federal Sentencing Guideline Commission promulgated the guidelines in the fall of 1987 and the guidelines took effect as of November 1, 1987. Block & Rhodes, *The Impact of the Federal Sentencing Guidelines*, NAT'L INST. OF JUSTICE REPORTS (No. 205) (1987). The Supreme Court recently upheld the validity of federal sentencing guidelines. Mistretta v. United States, 57 U.S.L.W. 4102 (U.S.Mo. Jan. 18, 1989) (No. 87-7028).

Part II. Part II explores the use of guidelines in criminal sentencing and the analogy between sentencing decisions and assessment of damages for nonpecuniary loss. Part II also describes how to develop and implement guidelines for assessing pain and suffering damages. Part III examines why the proposed guidelines are a solution to the problems identified in Part I. Finally, Part IV responds to possible criticisms of the proposed reform.

I. PAIN AND SUFFERING ANOMIE: AN ABSENCE OF NORMS

Many tort reform proposals and commentaries focus on pain and suffering damages. Some commentators call for the elimination of pain and suffering damages altogether.[2] Others suggest limiting recovery for pain and suffering losses to the pecuniary manifestations of those losses.[3] Several states have enacted legislative limitations, or caps, on pain and suffering recoveries.[4]

Despite the push for reform of pain and suffering damages, proposals to eliminate them, rather than merely limit them, have not been adopted. Pain and suffering damages are the driving force behind most personal injury litigation[5] and "will likely

---

2. O'Connell, *A Proposal to Abolish Defendants' Payment for Pain and Suffering in Return for Payment of Claimants' Attorneys' Fees*, 1981 U. ILL. L. REV. 333.

3. Ingber, *Rethinking Intangible Injuries: A Focus on Remedy*, 73 CALIF. L. REV. 772, 809-10 (1985); Morris, *Liability for Pain and Suffering*, 59 COLUM. L. REV. 476, 476-477 (1959).

4. *E.g.*, Act of June 10, 1986, ch. 139, 1986 Alaska Sess. Laws (to be codified as ALASKA STAT. § 09.17010 (1986)); FLA. STAT. ANN. § 768.80 (West Supp. 1987), *but see* Smith v. Department of Ins., 507 So.2d 1080 (Fla. 1987) (holding unconstitutional a $450,000 cap on noneconomic damages); MD. CTS. & JUD. PROC. CODE ANN § 11-108 (Supp. 1987); MICH. COMP. LAWS ANN. § 600.1483 (West Supp. 1988) (limitation applies only to medical malpractice suits); N.H. REV. STAT. ANN. § 508:4-d (Supp. 1988); Act of April 4, 1986, ch. 305, 1986 Wash. Laws (to be codified as WASH. REV. CODE § 4.24 (1987).

5. The prospect of obtaining pain and suffering damages is a major dynamic in personal injury litigation. Pain and suffering damages often eclipse other types of damage awards. They also provide an incentive to bring suits which otherwise would not be brought. Research and industry settlement practices have shown that recovery for pain and suffering comprises the lion's share of all recovery for personal injuries. O'Connell & Simon, *Payment for Pain and Suffering: Who Wants What, When & Why?*, 1972 U. ILL. L.F. 1, 9-10; *see also* JURY VERDICT RESEARCH, INC., HOW TO USE THE PERSONAL INJURY VALUATION HANDBOOKS TO EVALUATE PERSONAL INJURY CASES 8 (1987) (indicating that special damages (medical expenses and lost earnings) are exceeded by general damages (pain and suffering and lost future earning capacity) by up to a factor of 10).

Commentators have suggested that pain and suffering damages are a clumsy substitute for attorney's fees. Jaffe, *Damages for Personal Injury*, 18 LAW & CONTEMP. PROBS. 219, 234-35 (1953); Morris, *supra* note 3, at 477; O'Connell, *supra* note 2, at 351. If pain and

continue to dominate the personal injury recovery."[6] The proper allocation of pain and suffering damages is thus the area of tort law in which reform is most necessary. To accomplish proper allocation of pain and suffering damages, one first must determine why the present system fails to fulfill the goals of tort law.

A. Poor Compensation, Inequitable Allocation, and Inefficient Accident Avoidance

Compensation has long been a primary goal of tort law.[7] The meaning of just or proper compensation differs when applied to pain and suffering damages than to other items of damage recognized by tort law. Just compensation in the context of pain and suffering represents society's measurement of the gravity of plaintiffs' physical pain and accompanying mental suffering attributable to the wrongfully inflicted injury.

The standard measure of just compensation in personal injury cases is the amount necessary to place the injured party in the position that would have been obtained had the wrong not been committed.[8] A plaintiff's recovery ordinarily consists of two components: economic damages and noneconomic damages. Economic damages may consist of medical expenses, lost wages, and lost earning capacity.[9] Noneconomic damages consist primarily of plaintiff's pain and suffering, and damages for the fear of death associated with shortened life expectancy caused by the injury in some cases. In certain circumstances, a plaintiff may also recover punitive damages.[10]

Restoration of the *status quo ante,* the professed goal of tort compensation, cannot provide a basis for pain and suffering damages. Almost by definition, money awarded for pain and mental anguish can do little to alleviate the condition of suffering. As one professor has noted: "damages for pain and suffering are not compensation in any ordinary sense . . . ."[11] Several commentators have gone as far as to suggest that pain and suf-

---

suffering damages are a substitute for attorneys' fees, then the prospect of pain and suffering damages invites suits which would not otherwise be brought.

6. D. DOBBS, REMEDIES, § 8.1, at 551 (1973).
7. Ingber, *supra* note 3, at 775.
8. D. DOBBS, *supra* note 6, § 8.1, at 540.
9. *Id.*
10. *Id.* § 3.9.
11. *Id.* § 8.1, at 545.

fering damages serve no compensatory function.[12] Instead, these damages are economically inefficient because they create two losses where only one existed previously. Plaintiff continues to experience pain, and the defendant experiences economic loss as well.[13] It has also been suggested that the true function of pain and suffering damages is as a source for financing the costs of litigation.[14] The most defensible compensatory function of pain and suffering damages is that they provide solace to the victim by according public recognition to the degree of emotional and physical indignity associated with wrongfully inflicted injury.[15]

This formulation of the compensatory function of pain and suffering damages emphasizes the normative aspect of assessing pain and suffering damages. The question presented when determining compensation is less factual than normative. Given a wrongfully inflicted injury, to what extent and in what fashion should the law take account of the resulting human suffering?

The jury's answers to the normative questions implicate value and policy choices more than most cases of damage assessment; therefore, the standards for assessment should be influenced to a greater extent by concerns of public policy and consistency. The focus of inquiry is less upon the degree of plaintiff's pain as a result of injury (as would be the case if money could serve as a substitute for pain and suffering loss) and more upon the amount that is necessary to indicate society's view of the gravity of the pain and indignity associated with the injury inflicted.[16]

---

12. Ingber, *supra* note 3, at 775-86; Jaffe, *supra* note 5, at 221-27; Morris, *supra* note 3, at 477-78.

13. Ingber, *supra* note 3, at 780.

14. D. DOBBS, *supra* note 6, § 8.1 at 550-51.

15. P. ATIYAH, ACCIDENTS, COMPENSATION AND THE LAW, 537 (3d ed. 1980); D. DOBBS, *supra* note 6, § 8.1, at 550; Jaffe, *supra* note 5, at 224.

16. The focus on social perception of plaintiff's suffering, rather than plaintiff's perception, flows from the objective nature of defendant's liability. The use of an objective measure for pain and suffering damages is consistent with the treatment accorded all other types of tort damage. Damages are measured according to liability rules as opposed to property rules. *See* Calabresi & Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089 (1972). Under a liability rule the value of an item is determined by the value attached to it by the law's "reasonable person." A property rule measures recovery according to subjective valuation of the party. Conceptual difficulty accompanies items of damage, such as pain and suffering, where the difference between the application of property rules and liability rules is obscured by the absence of a market for the item of damage. Where a market does not exist, the amount the plaintiff would demand to part with an item (the subjective measure contemplated by a property rule) is very often the most probative evidence of what the item is worth objectively (the damages allowed under a liability rule). Even in these cases, the proper measure of damages is the objective measure. The fact that a violinist would accept no amount of money to part with the last Stradivarius is of no legal consequence. The violin's uniqueness, however, will affect the price others would be willing to

The present process for measuring pain and suffering damages does not establish properly the social value of the mental anguish suffered by a plaintiff. The process is capricious and inequitable, often providing the least injured with windfall recoveries, while leaving the most seriously injured far short of even a minimally appropriate award.[17] Presently, pain and suffering awards say little about the degree of plaintiff's suffering or how society values it. The message is so muddled that the award has scarcely any meaning at all.

The failure to compensate properly for dignatory injuries may be attributed to the difficulties of "evaluating the imponderable."[18] Although jurors may be motivated by shared values, the translation of those values into consistent monetary awards is befuddled by their differing conceptions of the value of money.

In most instances of tort loss, the nexus between the dollar amount awarded as damages and the value of plaintiff's actual loss is provided by the market. If plaintiff's automobile is destroyed, the market value of that vehicle determines the measure of recovery.[19] Similarly, when plaintiff suffers personal injury, a market provides guidance for her recovery.[20] The basis for reliance on the market mechanism is that it provides an impartial and objective measure of the value that society places on a particular item of damage. When a jury, as fact finder, departs radically from the market measure, where the appropriate market is plain, it is suspected of acting upon unknowable biases or prejudices.

---

pay for it. Similarly, it is not how one individual values suffering endured that matters, but how society as a whole would value that suffering.

17. J. O'CONNELL, THE INJURY INDUSTRY 35 (1971), *cited in* O'Connell & Simon, *supra* note 5, at 7.

18. Jaffe, *supra* note 5, at 224.

19. *See* D. DOBBS, *supra* note 6, § 5.10, at 375. The use of the market measure is complicated by the need to select a market when the relevant market does not exist at the place where the property was damaged or destroyed. It is also made more complex by the need to take depreciation into account for cases where property is damaged but not destroyed; *see also* United States v. Hatahley, 257 F.2d 920 (10th Cir. 1958), *cert. denied*, 358 U.S. 899 (1958).

20. The reasonable value of doctors' services, the medication, and the cost of hospitalization generally would be measured by the price charged for these services. D. DOBBS, *supra* note 6, § 8.1, at 543. Similarly, the value of wages lost while recuperating is mediated by the market in the sense that the wage for the particular form of labor is determined by the forces of supply and demand.

Lost earning capacity, or lost future earnings, present a more complicated problem. The appropriate measure of damages, however, is still provided by the market for plaintiff's form of labor. D. DOBBS, *supra* note 6, § 8.1, at 541. The difficulty occurs in divining the type of job, and thus the wage, plaintiff would have had absent injury.

No market for pain and suffering exists because a market is composed of willing buyers and sellers and very few persons voluntarily endure pain and suffering for a price. The failure to compensate properly is attributable to the lack of a market, and thus a lack of norms, for measuring pain and suffering. As Professor Ingber has noted:

> [W]ithout some basis for calculating loss, damage awards are apt in many cases to be unfair to one or the other of the parties. But no such standards have been developed. Juries are left with nothing but their consciences to guide them. Consequently, wide variations in monetary awards result, and there remains the danger that juries may be responding to irrelevant or even illegitimate distinctions in the cases.[21]

One professor has also charged that in design defect cases "juries are free to, and do with regularity, react purely out of whim."[22] A plaintiff's lawyer suggests that when considering a demand for pain and suffering damages lawyers should "just pluck a figure out of the sky and hope it's high enough."[23]

Similarly, the absence of norms for pain and suffering measurement fosters arbitrary awards in the context of negotiated settlements. To determine the pain and suffering component of a settlement, the parties typically employ a rule of thumb based on the claimant's medical bills. Insurers will pay three to ten times plaintiff's medical expenses, depending upon the severity of the injury, for pain and suffering. Awareness of this practice has encouraged bill padding,[24] which is particularly hard to detect with minor injuries.[25]

The current process for measuring pain and suffering damages impairs proper compensation, equitable allocation, and efficient accident avoidance in part because jurors entertain differing conceptions of the economic value of pain and suffering. In most cases involving pecuniary losses, the jury determines the extent

---

21. Ingber, *supra* note 3, at 778-79.

22. Sugarman, *Doing Away with Tort Law*, 73 CALIF. L. REV. 558, 566 n.35 (1985) (quoting *Product Liability Reform: Hearings Before the Subcomm. for Consumers of the Senate Comm. of Commerce, Science and Transportation*, 97th Cong., 2d Sess. 22 (1982) (statement of J. Henderson).

23. Ingber, *supra* note 3, at 778 n.27 (citing Galante, *When the Mind is Hurt*, Nat'l L. J., May 28, 1984, at 28, col. 2.).

24. *Id.* at 779; O'Connell & Simon, *supra* note 5, at 6. A startling example of bill padding is reported in a series of articles in the Chicago Sun Times and quoted in O'Connell, *supra* note 2, at 334-35.

25. O'Connell & Simon, *supra* note 5, at 6.

of the loss and then applies the market value (with some flexibility) to those losses. In the case of pain and suffering damages, however, the jury not only determines the extent of the loss, but also the value of that loss. Because juries are guided by the particular values of its constituent members, different juries apply different notions of the monetary value to assess pain and suffering damages. Awards may vary because of the difficulty of expressing conceptions of the value of suffering in a consistent way, not because the jury believed one plaintiff to have suffered more.

For example, suppose that pain could be segregated into equal units. Jury "1" determines that plaintiff "A" has suffered "X" units of pain and is therefore entitled to "N" dollars. Jury "2" concludes that plaintiff "B" also suffered "X" units of pain, but instead of "N" dollars, it could give "2N" or "½ N" dollars because there is no shared idea of the monetary value of "X" units of pain and suffering. This lack of consensus regarding the monetary value of pain and suffering can be termed pain and suffering "anomie."[26] All else held constant, one jury may value the pain associated with loss of "A's" leg at $5,000, while another may find the same harm to be worth $10,000.[27] The results are the skewed compensation patterns and distorted accident avoidance signals described above.

The fact that differences in awards for pain and suffering cannot be attributed confidently to actual differences in the merits of a plaintiff's case raises equity considerations. Like cases should be treated similarly, suggesting that awards should vary only when real differences exist in the extent and severity of injury. When variance is attributable to the biases and predilections of the decision maker, this principle is violated.

Pain and suffering anomie also undermines the accident avoidance goal of tort law. Tort liability reduces accident-causing behavior by publicly indicating the types of conduct that will be sanctioned and the severity of the sanction. The public, re-

---

26. Anomie means an absence of natural or legal organization. The term was used by the French sociologist Emile Durkheim to describe social disorder caused by the breakdown in shared community values. *See* E. DURKHEIM, THE DIVISION OF LABOR IN SOCIETY (1933). The term is used here to convey a sense of the disruption caused by the absence of norms for determining pain and suffering damages.

27. Professor Patrick Atiyah recognizes this problem when he suggests that a difficulty in awarding "full compensation" for pain and suffering is that the plaintiffs also work with different conceptions of value. He writes: "To award £5,000 for a lost leg to a wealthy man may seem derisory; a similar sum to a poor man may be untold riches." P. ATIYAH, *supra* note 15, at 214 (1970); *see also* Ingber, *supra* note 3, at 778 n.27.

acting to the threat of liability, takes care to avoid accident-causing behavior.

A more sophisticated view of the deterrence function of tort law emphasizes efficient allocation of accident costs.[28] Tort law does not seek to eliminate all accidents. Rather, its purpose is to assure that each accident-causing activity bears the costs of the accidents attributable to it. Market forces select the efficient level of accident-producing activity.[29] To the extent that the aggregate of damages awarded for a particular injury understates or overstates the social consensus concerning the cost of that injury, the activity producing the injury is subsidized or taxed inefficiently.

A deterrence theory of accident law requires that amounts awarded for a particular injury reflect social consensus concerning the cost of that injury, including pain and suffering. If the "price" signals sent by such awards are to have their intended effect on behavior, the same price signal must be sent for similar injuries. As suggested above, the present system for assessing pain and suffering satisfies neither of these requirements.

Pain and suffering guidelines offer a uniform standard for valuing pain. The guidelines would inform juries of the value for pain and suffering assigned by a large number of juries to injuries similar to those before the factfinder. Although guidelines based on the decisions of many juries would not replicate a market for pain and suffering, it would have some of the advantages of market pricing because of the greater number of persons participating in the value assessment. The guidelines provide the jury with a benchmark to focus on in determining whether the circumstances of the case before it warrant departure from the standard. Discretion is not taken away from the jury, but the guidelines help the jury exercise its discretion in an informed manner.

---

28. *See generally*, G. CALABRESI, THE COST OF ACCIDENTS (1970) (presenting a framework for evaluating systems of accident law).

29. The efficient level of accident-producing activity is influenced by the costs associated with accidents produced by that activity. Where an activity must bear the accident costs it produces, including noneconomic costs such as pain and suffering, industry revenues are reduced by the costs of accidents that it must pay for. Therefore, the industry would be willing to spend the amount of revenues lost to accident costs to avoid future accidents either by investing in accident avoidance technologies or by reducing production.

The "price" attached to the pain and suffering endured by plaintiffs indicates, in part, how much an industry should spend to avoid the injury. If accident avoidance is to be efficient, the statement must reflect social consensus concerning the value of avoiding particular injuries. Thus, efficient accident avoidance also requires objective measurement of pain and suffering awards.

II. PAIN AND SUFFERING GUIDELINES

This part provides a detailed explanation of the history of guidelines, their development, and their function. The first part explores the use of guidelines in criminal sentencing and early evidence of success in reducing sentencing disparity. The similarities between sentencing and pain and suffering damages measurement suggest that a system styled after sentencing guidelines is appropriate for measuring pain and suffering damages. The second part describes three steps necessary to develop and use pain and suffering guidelines: initial research and promulgation, jury implementation, and data feedback.

A. The Criminal Sentencing Analog

The proposed method for developing schedules for pain and suffering damages is drawn from a recent innovation in the field of criminal sentencing—sentencing guidelines. The guidelines arose from widespread concern, beginning in the late 1960s, over sentencing disparity, the practice of sentencing offenders convicted of the same offense to different prison terms. Disparity violates principles of horizontal equity and undermines confidence in the justice system by making sentencing appear arbitrary.[30] Sentencing guidelines structure judicial discretion to lessen the injustices of disparity while permitting judges to tailor sentences to the needs of both the offender and society.[31]

To establish guidelines, most states create an administrative agency, often referred to as the sentencing guidelines commission, to conduct initial research and to promulgate the guidelines. Once promulgated, the guidelines are distributed to sentencing judges.

When applying the guidelines to actual cases the judge is permitted to exercise discretion by choosing any sentence within the guidelines, or in exceptional cases, by departing from the

---

30. *See, e.g.*, M. FRANKEL, CRIMINAL SENTENCES: LAW WITHOUT ORDER 8 (1973).

31. The guidelines usually consist of either a single matrix or a series of two axis matrices. A score representing the seriousness of the offense is usually plotted along one axis while a score representing the gravity of an offender's criminal history is plotted along the other. At the intersection of the two points is the presumptive sentence. Presumptive sentences are indicated in ranges with roughly a 15 to 30 percent differential between the minimum presumptive sentence and the maximum presumptive sentence.

For an illustration of state sentencing guidelines, see Appendix, Tables 1 and 2.

guidelines. In cases in which the judge departs, he may be required to place his reasons for departure on the record.

An essential component of the guidelines is that particular guidelines are not permanently established. The guidelines are monitored and altered periodically to maintain the desired sentencing policy. Usually, the guidelines commission is authorized to conduct the monitoring and updating process.[32]

Sentencing guidelines have been successful in reducing sentence disparity. For example, Minnesota, the first state to introduce guidelines, reported that sentence uniformity in 1981, 1982, and 1983 increased fifty-two percent, forty-four percent, and thirty-eight percent respectively over preguidelines sentencing.[33]

Criminal sentencing reforms are transferable to the tort context because criminal sentencing and pain and suffering damages allocation have common attributes. Once liability is established, the judge or jury has, without guidelines, virtually unlimited discretion because little objective information exists upon which to

---

32. Judges' departures are an essential part of the guidelines system. Recording departures in the guidelines data base serves to fine tune the guidelines by correcting, over time, any miscalculation or error made by the Commission in promulgating the guidelines. Additionally, the feedback system provides a convenient and efficient mechanism for assuring that sentencing practices conform to changing perceptions of proper sentencing policy as reflected by the decisions of the sitting trial judges. Finally, sentencing guidelines contemplate that the appellate judiciary will be used to police the guidelines.

33. MINNESOTA SENTENCING GUIDELINES COMMISSION, THE IMPACT OF MINNESOTA SENTENCING GUIDELINES: THREE YEAR EVALUATION 34, 39, 41 (1984) [hereinafter MINNESOTA GUIDELINES COMMISSION].

It should be noted that the Minnesota guidelines depended in large part upon a prescriptive approach to guidelines development rather than the descriptive approach advocated in this Note. *See infra* text accompanying notes 37-38.

The Minnesota Guidelines Commission adopted a prescriptive approach because a purely descriptive approach would serve only to institutionalize the disparity-producing practices that the Commission was trying to eliminate. Disparity in sentencing resulted primarily from each judge sentencing on the basis of his own sentencing philosophy. Some judges emphasized deterrence, others emphasized retribution, and still others emphasized rehabilitation. In many cases, these different philosophies call for vastly different sentences, given the same offense and the same offender. A statistical description of past sentences, therefore, would not reveal a sentencing policy. The Commission was required to choose between competing sentencing philosophies. MINNESOTA GUIDELINES COMMISSION, at 10-12. Telephone interview with Dr. Kay Knapp, Director of the United States Sentencing Guidelines Commission Research Staff, formerly Director of the Minnesota Guidelines Commission Staff (Fall 1986).

In contrast to criminal sentencing, the theoretical bases for pain and suffering awards are not incompatible with each other. The two principle bases are compensation and efficient accident avoidance. Efficient accident avoidance is achieved when the award equals the cost to plaintiff of the injury incurred, including an amount sufficient to recognize the gravity of his pain and suffering injury. *See supra* note 27 and accompanying text (discussing the confusion regarding costs to the plaintiff). Setting damages for pain and suffering, unlike fixing prison sentences, does not require a choice between competing remedial theories.

base a decision. The criminal court is informed of an offender's criminal history, the offense he committed, and the statutory minimum and maximum sentences. Within the statutorily permitted term, the trial judge is practically a law unto herself.[34] Similarly, the jury is given only minimal guidance in determining nonpecuniary damages;[35] its decisions regarding damages usually remain unreviewed by the appellate courts.[36] If guidelines are effective in reducing disparity in sentencing, they may be effective in increasing uniformity in damage awards.

B. The Plan

The proposed guidelines approach has three phases: initial research and promulgation, jury implementation, and data feedback.

1. Initial research and promulgation—The initial research and promulgation of the guidelines should occur under the direction of an administrative agency, the pain and suffering damages guidelines commission (the commission), similar in function to existing sentencing guidelines commissions.[37] The guidelines commission must resolve two threshold problems before guidelines development can begin. First, the commission, or the legislation authorizing the creation of guidelines for pain and suffering, must determine the methods to be used to develop guidelines. The primary choice is whether to develop "descriptive" or "prescriptive" guidelines. Second, the commission must establish the categories upon which to base guidelines development.

---

34. *See* M. FRANKEL, *supra* note 30, at 8-9. Limited appellate review of judicial sentencing decisions is available in most states. The standard of review, however, is quite narrow, usually a variant on the abuse of discretion standard. For instance, in People v. Coles, 417 Mich. 523, 339 N.W.2d 440 (1983), the Michigan Supreme Court held that an appellate court may grant sentencing relief only when it is convinced that the trial court "abused its discretion to the extent that it shocks the conscience of the appellate court." *Id.* at 550, 339 N.W.2d at 453.

35. Juries are instructed to provide "fair compensation" or a "reasonable amount." *See* Botta v. Brunner, 26 N.J. 82, 95, 138 A.2d 713, 720 (1958); D. DOBBS, *supra* note 6, § 8.1 at 545 n.41; Zelermyer, *Damages for Pain and Suffering*, 6 SYRACUSE L. REV. 27, 30-31 (1955).

36. For a discussion of the reluctance of appellate courts to review damage awards, see *infra* note 78.

37. For a discussion of the advantages and disadvantages of previously established sentencing guidelines commissions and how the composition of the commissions affect their credibility, see Tonry, *The Sentencing Commission in Sentencing Reform*, 7 HOFSTRA L. REV. 315 (1978).

Descriptive guidelines model existing practices.[38] The premise is that through research of past cases, models can be designed to predict the "average" result that would be reached in subsequent cases.[39] Descriptive sentencing guidelines, therefore, purport to represent the sentence typically imposed given a specific crime and offender.[40]

Prescriptive guidelines are designed with particular policy objectives in mind. The Minnesota sentencing guidelines are essentially prescriptive.[41] The Minnesota Commission's decision to adopt retribution as the primary sentencing philosophy of its guidelines is an example of an essentially prescriptive policy choice made during guidelines development.[42] Moreover, the Minnesota Commission was statutorily required to account for the effect of any changes in sentencing policy upon overall prison population and available jail space.[43] The Pennsylvania legislature required that guidelines increase penalties for offenders with prior criminal histories or for offenders using deadly weapons to commit their crimes.[44] Similarly, prescriptive damage award guidelines might emphasize the need to increase awards for injuries presently thought to be undercompensated and to decrease awards for injuries thought to be overcompensated.[45]

Pain and suffering damage guidelines should emphasize[46] the descriptive technique because the resulting guidelines will be

---

38. MINNESOTA GUIDELINES COMMISSION, *supra* note 33, at 8.

39. NATIONAL INST. OF LAW ENFORCEMENT AND CRIMINAL JUSTICE, LAW ENFORCEMENT ASSISTANCE ADMINISTRATION, U.S. DEP'T OF JUSTICE, SENTENCING GUIDELINES: STRUCTURING JUDICIAL DISCRETION 10 (1978) [hereinafter SENTENCING GUIDELINES: STRUCTURING JUDICIAL DISCRETION].

40. *Id.*

41. MINNESOTA GUIDELINES COMMISSION, *supra* note 33, at 8.

42. *Id.* at 9-10.

43. *Id.* at 7.

44. HAWES, *supra* note 1, at 12.

45. *See generally* sources cited *supra* note 15.

46. Most of the sentencing guidelines are neither wholly prescriptive nor wholly descriptive of prior sentencing practices in their jurisdictions. Rather, the guidelines tend both to describe and prescribe sentencing practices, with some guidelines emphasizing description of past practices and others emphasizing prescription of desired changes. Descriptive guidelines contain prescriptive elements in that guidelines development begins with assumptions made by the researchers that imply value choices. Moreover, the legislature or the commission members may use the guidelines to prescribe changes in specific problem areas without abandoning the overall descriptive approach. Finally, even descriptive guidelines tend to become prescriptive once they are placed in operation because they define how decisions should be made in the future. Conversely, even guidelines developed with emphasis on a prescriptive approach have employed some modeling techniques associated with primarily descriptive guidelines. *See* MINNESOTA GUIDELINES COMMISSION, *supra* note 33, at 9.

more representative of community values than prescriptive guidelines. The primary compensatory function of pain and suffering damages is to express society's view of the gravity of the dignatory harm wrongfully inflicted upon the victim. To the extent that the guidelines rely upon judgments made by actual jurors as opposed to judgments made by legislators or guidelines commission members, the guidelines will more likely reflect community sentiment concerning the monetary value of particular pain and suffering injuries.

The potential disadvantages of descriptive guidelines are twofold. First, if existing practices are fundamentally flawed, descriptive guidelines risk institutionalizing the flawed practices.[47] Second, an underlying premise of descriptive guidelines is that research will reveal coherent behavior patterns by the decision makers.[48] If research reveals no pattern of behavior, then development of descriptive guidelines would either be impossible or the guidelines developed would have little descriptive power.[49]

A premise of this Note, and indeed of society's reliance upon the jury system, is that juries respond coherently and consistently to evidence of plaintiff's injury. This Note argues, however, that the present incoherence of amounts awarded for pain and suffering is attributable to the lack of standards for evaluating pain and suffering.

Descriptive guidelines rely on multiple linear regression analysis.[50] Multiple Linear Regression Analysis is the process of identifying the relationship, in the form of an equation, which best explains the variation in a dependent variable caused by manipulation of independent variables.[51]

In sentencing guidelines, bivariate regression analysis is used to determine which of many suspected factors, independent variables, have a statistically relevant impact on the sentence imposed. For instance, if it is thought that an offender's criminal history influences judges' sentencing decisions, regression analy-

---

47. *Id.* at 8.

48. *See* SENTENCING GUIDELINES: STRUCTURING JUDICIAL DISCRETION, *supra* note 39, at 7, 10.

49. *See id.*

50. Discussion of regression analysis and the Albany method of guidelines development is intended only to identify a technique which may be useful in establishing a better scheme for awarding pain and suffering damages. The discussion should not be read to prescribe the specifics of how this technique will be applied to the task of predicting future jury behavior from past jury behavior. Designing the specific research plan is a highly complex task which is well beyond the scope of this Note, and is best left to econometricians, particularly those skilled in the field of forecasting.

51. L. SCHROEDER, D. SJOQUIST & P. STEPHANS, UNDERSTANDING REGRESSION ANALYSIS: AN INTRODUCTORY GUIDE 11-12, 29 (1986).

sis based on data consisting of actual sentencing decisions is used to determine the extent to which variation in offender's criminal history produces changes in the sentence. Linear regression analysis is used to determine whether any of a number of factors thought to be relevant exert a statistically significant influence on a judge's sentencing decision.

Multiple regression analysis attempts to determine the relative importance of each factor to the sentencing decision while identifying the group of quantifiable factors that best accounts for or explains the sentence imposed. Based on observation of the relationship among the factors, researchers use these relationships to predict future behavior of judges. Guidelines then may be issued expressing predictions that will inform judges of the central tendencies in sentencing of numerous judges given a particular set of facts.[52]

Assuming that a descriptive approach is feasible, initial research, development, and promulgation of pain and suffering awards guidelines will occur along lines similar to those pursued by the researchers who conducted the initial feasibility study for sentencing guidelines.[53] In the initial stage of guidelines development, the commission compiles a catalogue of the factors believed to be most influential in determining pain and suffering awards.[54] Records from litigated personal injury suits are ex-

---

52. *See generally* SENTENCING GUIDELINES: STRUCTURING JUDICIAL DISCRETION, *supra* note 39.

53. *Id.* The descriptive method of developing guidelines is also called, after these researchers, the "Albany Approach." MINNESOTA GUIDELINES COMMISSION, *supra* note 33, at 8.

54. In their initial guidelines project, the Albany researchers compiled the catalogue of factors from the legal and social science literature and from the input of trial judges. Ultimately, the catalogue consisted of 205 suspected factors. Researchers developing the Florida sentencing guidelines tested 220 factors, and those developing Michigan's guidelines tested 400 factors. HAWES, *supra* note 1, at 6, 24. The Albany researchers reviewed 400 previous sentencing decisions for the catalogued factors. Multiple regression analysis was used to determine the weight of the factors. Guidelines were then developed according to this research. *See* SENTENCING GUIDELINES: STRUCTURING JUDICIAL DISCRETION, *supra* note 39 at xiv.

The Albany researchers posited that their research would reveal a pattern in judicial decision making. They discovered that a handful of factors such as the severity of the offense and the offender's prior record accounted for a significant portion of the variation in sentences. *Id.* at 26-27.

It is conceivable that research will reveal no such pattern with respect to jury decisions concerning pain and suffering damages. If this were the case, little could be gained from formulating the guidelines according to the Albany technique.

The absence of a pattern would indicate that awards for pain and suffering are heavily dependent upon the random biases of the jurors in a given case. Equitable considerations, as well as considerations of efficient accident avoidance, suggest that if the Albany technique fails, either prescriptive guidelines or legislatively enacted base figures should be employed. Such guidelines may be less representative of community values concern-

amined for the presence or absence of suspected factors.[55] The researchers identify the suspected factors that, in fact, had a statistically relevant influence on pain and suffering awards.

Factors found to be statistically relevant are analyzed to determine the relative weight of each factor on the amount awarded. Once the relative weight of each factor is determined, researchers combine this knowledge with their knowledge of amounts previously awarded to predict the dollar amount that a typical jury would award for a particular category of pain and suffering injury. These models can then be used to formulate guidelines to inform future juries of the amount that the typical jury is likely to award in a given fact situation.

The creation of pain and suffering guidelines requires the definition of the categories of injuries. Defining the categories presents political, philosophical, and policy choices rather than issues for statistical analysis.

The difficulties attending categorization can be illustrated by considering pain and suffering damages for hand and leg injuries. Should separate guidelines be developed for arms and legs, or should there be a single set of guidelines for appendages? If separate guidelines are developed for arms and legs, should separate guidelines for hands and fingers or feet and toes be promulgated? Perhaps an equally defensible arrangement might be to treat fingers and toes as one category, hands and feet as a second, and injury to the whole arm or leg as a third. Statistical research may be helpful in determining general trends, but is unlikely to be conclusive. Thus, either the legislature or, more

---

ing pain and suffering loss than the Albany guidelines, but they would be an improvement over essentially arbitrary decisions.

55. Data collection is prone to be somewhat more complicated for civil damages than for criminal sentencing. One problem results from the use of lump sum verdicts. Researchers encountering lump sum verdicts will be unable to determine which portion of the verdict was attributable to pain and suffering.

This problem can be remedied, however, by requiring juries to indicate the amount awarded for pain and suffering. Some jurisdictions, particularly those employing caps on noneconomic loss, now require juries to identify the amount awarded for non-economic loss. *See* MD. CTS. & JUD. PROC. CODE ANN. § 11-109 (Supp. 1988); MICH. COMP. LAWS ANN. § 600.1483 (West Supp. 1988); N.H. REV. STAT. ANN. § 508:4-d (Supp. 1988).

A potentially more difficult problem lies in the data collection stage. In developing sentencing guidelines, researchers could review pre-sentencing reports for the presence or absence of the catalogued factors. Juries, however, are rarely required to reveal the factors that influenced their decisions.

One possible solution is to question jurors after they have rendered their verdict. Each juror could be asked to fill out a confidential and anonymous questionaire. The researchers could then cull the information supplied by individual jurors and compile a summary that represents the jury's decision.

likely, the guidelines commission will have to decide these questions.

The categories chosen will influence the presumptive awards even with purely descriptive guidelines because research may reveal one presumptive award if the category is appendages and another if arms and legs are treated separately. The implications of this fact are twofold. First, to the extent that the guidelines reflect community values, they do so given the categories defined in the guidelines. The second implication, which follows from the first, is that the guidelines will tend to define community standards as much as they tend to reflect them. This is no more or less desirable in guidelines than in other legislation, all of which tends to exert similar pressures on social mores. Not infrequently, latent community values are finally recognized during the process of debating proposed legislation.

2. *Jury implementation*— Once liability is established, the jury should be instructed to consult the guidelines and determine which cell, within the appropriate matrix,[56] best describes the case before it.[57] The jury should be informed that the dollar figure listed at that point represents the presumptive award. If the jury determines that the best match possible under the grid inadequately describes the case before it, it should consider departing from the presumptive award in either direction. Because departures are important to the "fine-tuning" of the guidelines, it is important, at least initially, that juries be allowed to depart from the guidelines at will.

3. *Data feedback*— All jury verdicts and decisions concerning awards for nonpecuniary damages should be recorded by the guidelines commission. This information can be fed into the data base and new guidelines would be issued periodically to reflect changes in juries' consensuses concerning presumptive awards.

Over time, this feedback process should result in presumptive awards that reflect closely jury sentiment on the appropriate award for a particular loss. When the juries' determination of the appropriate award for a type of injury becomes sufficiently

---

56. The description provided here presumes that pain and suffering guidelines, like criminal sentencing guidelines, will take shape in the form of matrices. There is no reason why pain and suffering guidelines could not take shape in some other way.

57. The guidelines provide a means of comparing the case at hand with those that preceded it. The combination of factors listed on the x and y axis for each cell describes the attributes of the previous cases. The jury is asked to score the guidelines grid by looking at the appropriate matrix and by comparing the factors describing the matrix to the factors present in the actual case before it. The jury determines the presumptive award by deciding which matrix cell best describes the attributes of the case before it.

particularized, it takes on attributes of law. It then would be appropriate for the judiciary to police the standard.

Once a jury determined that a particular grid cell best described the case before it, a presumption would arise that the cell adequately describes the case before the jury. The trial judge would have the authority to order remittitur, additur, or a new trial on damages based on the jury's improper departure from the presumptive award.

III. THE ARTICULATION OF NORMS FOR DAMAGE MEASUREMENT

Pain and suffering guidelines promote more uniform awards, further appropriate compensation, and increase efficient accident avoidance. They also have the potential to better achieve both the compensation and the deterrence goals of the tort law because the scheduled awards will more nearly approximate a consensus on the appropriate objective measure of a particular pain and suffering loss. Moreover, the guidelines are sufficiently flexible to allow the parties to receive personalized justice.

A. More Uniform Awards

Pain and suffering guidelines provide for more uniform jury verdicts. The importance of uniformity is twofold. First, uniform awards for pain and suffering damages promote internal consistency. If some, or perhaps most, of the variations in awards for apparently similar injuries cannot be attributed confidently to actual differences in the severity of the victim's pain and suffering injury, then it is more equitable to emphasize consistency and proportionality over individualized justice. As stated by Professor Patrick Atiyah:

> If we cannot say what a leg or an arm is worth [in terms of pain and suffering], we can at least say that a leg today is worth the same as a leg tomorrow, and we can also say that an arm must be worth more than a hand . . . .[58]

58. P. ATIYAH, *supra* note 15, at 215.

Second, uniformity increases predictability, which in turn facilitates negotiated settlements.[59]

The advantages of uniformity have led some commentators to favor legislatively enacted schedules for pain and suffering.[60] Professor Atiyah, a British commentator, notes that English judges, who are charged with fixing pain and suffering awards, have begun to employ an informal tariff for assessing such damages.[61]

B. Compensation and Accident Avoidance

Guidelines will improve compensation for pain and suffering by providing a standard to eliminate the effect of jurors' differing conceptions of the value of money. Regression analysis has the potential to make explicit latent value judgments about the monetary value of specific categories of pain and suffering injuries. The guidelines award would be the amount that a typical jury would most likely award given the combinations of facts and circumstances described in the guidelines for that award. If jury value judgments are accepted as representations of community values, the guidelines award can be said to reflect commu-

---

59. *Id.* at 216; *see also* Ingber, *supra* note 3 at 813; O'Connell & Simon, *supra* note 5, at 5-6.

60. *See* G. CALABRESI, *supra* note 28, at 222-24; Ingber, *supra* note 3, at 803 n.150; Zelermyer, *supra* note 35 at 41-42.

Although Zelermyer offered his reform long before sentencing guidelines had been conceived, his proposal is similar to that offered in this Note. Zelermyer suggested the use of a commission of doctors, lawyers and other experts to study the nature of pain and suffering injuries in relation to the policies supporting recovery for such injuries. He proposed that the commission provide a listing of the various types of injuries giving rise to compensable pain and suffering, and a base figure to be used for "the compilation of a schedule of graduated values arrived at through a study of comparative severity." Zelermyer, *supra* note 38, at 42.

The key difference between the Zelermyer plan and the plan presented in this Note is that the former would take the pain and suffering issue from the jury entirely. In contrast, the emphasis here is on promulgating guidelines according to social values by carefully studying jury behavior. The Zelermyer guidelines would be based primarily on the values of the commission. The plan discussed in this Note would also give a large role to the commission, but the commission would be directed to promulgate guidelines based, to a significant extent, on the latent values of countless jurors who have decided pain and suffering questions before. The promulgation of guidelines based on jury behavior is important not only from the perspective of political accountability, but also from the perspective of efficient accident avoidance. The latter depends upon an accurate assessment of the communal perception of an injury's cost. Moreover, under this plan, juries would continue to allocate pain and suffering awards in each case, but with the aid of the guidelines.

61. P. ATIYAH, *supra* note 15, at 216.

nity values.[62] As a result, differences in awards between apparently similar injuries might be attributed more confidently to differences in the merits of the cases.

In addition to jurors' differing conceptions of the monetary value of pain and suffering,[63] jury decision making is subject to the influence of extralegal facts (factors not legally relevant) such as the race,[64] sex,[65] and the social[66] and physical attractiveness[67] of the parties. It is hard to know if, when, and to what extent extra-legal factors control the result in any particular case.[68]

Multiple regression analysis can be used to lessen the influence of extralegal factors such as race and sex bias. Even if re-

---

62. The assertion that the guidelines awards will approximate community values concerning the appropriate award for particular pain and suffering injuries is subject to two qualifications.

First, the guidelines award will reflect jury consensus only to the extent that the equation on which the guidelines are based actually explains the variance between awards within the particular categories of injuries comprising the sample data base. Thus, if the injury category is back injury, and the regression equation accounts for 90% of the variation in amounts awarded for pain and suffering in previously decided back injury cases studied by the guidelines commission, then the amount predicted by the equation should represent community values concerning appropriate pain and suffering awards 90% of the time. Presumably, the jury, as the community's representative, will choose to depart from the guidelines in the 10% of the cases where the award does not reflect community sentiment.

Second, an efficient market will reflect the value judgments of willing buyers and sellers. Jurors, being neither the defendant, the "buyer," nor the injured party, the "seller," of a pain and suffering loss, have no incentive to reveal in their awards the amount that they as individuals would demand to incur a similar injury. Thus, jury price valuations are not of the same quality as a market valuation. Yet juries' pain and suffering awards do reflect a judgment about what an injury "ought" to be worth, its reasonable worth. This "ought" valuation is sufficient for efficient accident avoidance purposes. The purpose of this Note is to suggest a means to clarify and make consistent this "ought" valuation.

63. *See supra* text accompanying notes 18-28.

64. *See* Ugwuegbu, *Black Juror's Personality Trait Attribution to a Rape Case Defendant*, 4 SOC. BEHAV. & PERSONALITY 194, 197-200; *see also* sources cited in McCleskey v. Kemp, 481 U.S. 279, 316-17, nn. 40-44.

65. Stephan & Tully, *The Influence of Physical Attractiveness of a Plaintiff on the Decisions of Simulated Jurors*, 101 J. SOC. PSYCHOLOGY 149, 149-50 (1977); *see also* sources cited in *McCleskey*, *supra* note 64.

66. Izzett & Fishman, *Defendant Sentences as a Function of Attractiveness and Justifications for Actions*, 100 J. SOC. PSYCHOLOGY 285, 287-289 (1976); *see also* sources cited in *McCleskey*, *supra* note 64.

67. Kukla & Kessler, *Is Justice Really Blind? — The Influence of Litigant Physical Attractiveness on Juridical Judgment*, 8 J. APPLIED SOC. PSYCHOLOGY 336, 374-77 (1978); *see also* Izzett & Fishman, *supra* note 66, at 287-89.

68. Both intuition and inferences drawn from general knowledge about jury behavior suggest that extralegal factors, including those listed above, control a great many pain and suffering awards. Empirical research on jury behavior confirms that jury decisions will be more influenced by extralegal factors when the legally relevant evidence is most ambiguous. *See* Kaplan & Miller, *A Model of Cognitive Processes in Jurors*, 10 REPRE-

search reveals that such factors as these are statistically relevant to explain variations in pain and suffering awards, the guidelines commission can elect, as a matter of policy, not to use these factors in formulating the guidelines. To the extent that such factors are eliminated, the guidelines awards will be less influenced by extralegal factors.[69] The guidelines, however, will have less predictive power to the extent of the strength of the correlation between extralegal factors and variations in pain and suffering awards.[70]

C. *Flexibility*

Departures from the guidelines are permitted, and even encouraged, under appropriate circumstances. This feedback component of the guidelines is significant in three ways: (1) it assures that each plaintiff is given ample opportunity to receive individualized consideration of her case; (2) it provides a check on the "correctness" of newly issued guidelines; and (3) it permits the guidelines to respond quickly to changes in public policy, the cost of living, or the consensus value of an injury.

The objective of the guidelines is to focus attention on the facts of each case by solving, to a certain extent, the valuation

---

SENTATIVE RES. IN SOC. PSYCHOLOGY 48, 49 (1979); *see also* H. KALVEN & H. ZEISEL, THE AMERICAN JURY 50-51 (1966).

Evidence of the value of an item of damage is most ambiguous when there is no market from which to infer reasonable levels of damages. Because there is no market for pain and suffering, and because no other standards exist for assessing such damages, the opportunity for legally irrelevant considerations to control jury decisions is at its height. To the extent that scheduled damages can be said to be less influenced by legally irrelevant factors, the more likely it is that differences in amounts awarded can be attributed to legitimate differences in the merits of the cases.

69. Even if such biases are eliminated, *see infra* note 70, it is still possible for extralegal biases to operate when juries score the guidelines or when they decide to depart from them. Judicial review of pain and suffering awards under the guidelines offers the best opportunity to lessen the influences of juror bias.

70. The researchers probably will not be able to remove ethically obnoxious factors which are found to influence jury awards without reducing the predictive power of the guidelines. Researchers will more likely be forced to decide whether to promulgate a standard which includes the bias, one that does not, or some intermediate position.

If research reveals that white victims with a particular injury receive on the average 20% more for pain and suffering than do black victims with the same injury, the guidelines commission will have to decide whether to give everyone 20% more, 20% less, or some amount in between. *See* NATIONAL INST. OF JUSTICE, U.S. DEP'T OF JUSTICE, RESEARCH ON SENTENCING: THE SEARCH FOR REFORM 23 (1983).

The need to make this policy choice demonstrates that the use of descriptive guidelines does not eliminate the necessity of making essentially prescriptive policy choices in guidelines formulation. *Id.* at 23-25.

problem. This does not necessarily mean that factual issues are taken from the jury. Factors that a particular plaintiff might deem important to his case will not always have been included in the data used to determine the guidelines. Nonetheless, the parties will have ample opportunity to highlight these factors for the jury.

The guidelines encourage the lawyers to argue about the aspects of the case that distinguish it from the typical case described in the guidelines. The arguments should focus on factors that either aggravate or mitigate the degree of injury, and call for a greater or lesser award.[71] If the jury is convinced that aggravating or mitigating factors are present, it should depart from the guidelines. In this way, jury discretion is guided but not determined by the schedules; the plaintiff is given sufficient opportunity to make the argument that her case is special.

Allowing the jury to depart from guidelines also provides a check on the commission's work. When promulgating the initial guidelines, or when updating the guidelines, the possibility exists that scheduled awards have missed the mark and bear too little relation to what the typical jury would in fact do in the average case. This fact would be made plain to the commission if juries began systematically departing from the guidelines. The commission would then correct its guidelines.

A flexible departure policy also permits the commission to respond to changes in community values that should be reflected in the jury decisions. For example, feedback data may reveal that juries are consistently valuing the pain and suffering associated with a particular injury at an amount fifteen percent greater than called for in the schedules. New schedules increasing the relevant awards by fifteen percent could then be issued.

IV. PERSONALIZED JUSTICE AND JURY AUTONOMY

Pain and suffering guidelines may be perceived to challenge two key precepts of the American justice system: the idea of personalized justice and the idea of jury autonomy. Fidelity to personalized justice requires that private legal disputes be determined in a vacuum, as though only the litigants bore an interest in the outcome. The guidelines challenge this idea by limiting the factors that juries may consider in awarding pain and suffer-

71. These factors should not already have been taken into account by the guidelines nor should they have been factors expressly excluded from the guidelines.

ing damages. This limitation is a by-product of guidelines based on categories of factors deemed relevant in the typical case. Similarly, the categorization process intrudes upon jury autonomy by moving discretion now exercised by it to the political entities responsible for the creation and maintenance of the guidelines. The guidelines, however, do not unduly curtail personalized justice or jury autonomy. Rather, the guidelines force a considered approach to the policy questions obscured by the present system while better focusing jury decision making.

A. Personalized Justice

Opponents of scheduling for pain and suffering damages suggest it is deindividualizing because it deprives the plaintiff of his right to an award based on his individual suffering. Professors Walter Blum and Harry Kalven Jr. articulate this concern:

> A decision to include a significant dignitary component makes the scheduling of damages a complex task. Let us return again to our victim who has lost a leg and consider the problem of scheduling appropriate damages which will reflect the indignity to him. How many distinctions would we wish to recognize? The differences between men and women? Between adults and children? Between old and young? Urban and rural? Athletic and sedentary? As we spin out these questions, we become aware that in scheduling, one tends to decide against giving any substantial weight to dignitary harm, without really confronting the underlying policy issue. It is doubtful whether, compensation plans apart, anyone would urge making this change in damage law for its own sake.[72]

Blum and Kalven oppose scheduled damages because the latter imposes closure upon the universe of information considered in determining a damage award. Yet, the process of imposing clo-

---

72. W. BLUM & H. KALVEN, PUBLIC LAW PERSPECTIVES ON A PRIVATE LAW PROBLEM: AUTO COMPENSATION PLANS 36 (1965). It is important to place the professors' comments in proper context. Their book is largely devoted to a discussion of tort theory in the content of no-fault auto conpensation plans. Thus, when Professors Blum and Kalven referred to scheduling, they may have had in mind schedules which would include damages for both pecuniary and nonpecuniary losses, the latter being referred to in the quoted passage as "dignitary" harms. Nonetheless, the passage is referred to because it states well both the practical and political arguments against scheduling pain and suffering damages.

sure is significant because it requires that the most important question be answered: what are the relevant factors that may be used in determining damage awards?

If the guidelines are to have their intended effect, they cannot take account of factors idiosyncratic to particular cases. Otherwise, the "guidelines" will not be guidelines at all, but a series of prescriptions for the resolution of particular cases. The object of the salient factor analysis, to be conducted during the initial research component of guidelines development, is to identify statistically the factors that exert the most influence on jury decision making. For the purpose of guideline development, these are the relevant factors.

To the extent that the guidelines discourage jury consideration of factors which might be relevant in a particular case, the parties are denied personalized justice. This loss of personalized justice in some cases may be a price worth paying to receive the benefits of the guidelines.[73] The system of guidelines proposed in this Note, however, does not force an all or nothing choice between personalized justice and the benefits of guidelines. Where legitimately relevant factors in a particular case have been excluded from the guidelines, the jury may depart from the guidelines and provide an appropriate award.

The process of guidelines development also compels a direct response to an important normative question: which of the statistically relevant factors may be taken legitimately into account by the guidelines? It is possible that initial research will reveal that sex,[74] race,[75] physical attractiveness of the parties or their attorneys,[76] and judicial forum,[77] exert a significant, statistically independent influence on jury awards, controlling for other characteristics of the case. A choice to exclude those factors from consideration in guidelines formulation would sacrifice some of the expected benefits, in terms of efficient accident avoidance, to other public policies.

An objective of the guidelines, and part of their advantage, is to force a considered approach to value conflicts arising during the course of guidelines development. Research can provide only

---

73. G. CALABRESI, *supra* note 28, at 307. Professor Calabresi would use "base" or "average" awards to schedule damages for pain and suffering. Beyond that point, the victim would bear the most "highly individualized" losses. *Id.* at 224.

74. *See* sources cited *supra* note 65.

75. *See* sources cited *supra* note 64.

76. *See* sources cited *supra* note 67.

77. It is well known that urban juries tend to give more generous awards than rural juries. *See* Blum, *What's A Leg Worth? It Depends.* Nat'l L. J., Aug. 1, 1988, at 1, 34.

part of the answer, raw data; it does not suggest the proper use of that data. The formation of categories and the choice of relevant factors is a matter of policy. Which factors should be relevant, as opposed to which factors are relevant, presents questions that must be confronted directly and openly.

B. Jury Autonomy

Blum and Kalven also raise implicitly the political question that the choices necessitated by guidelines are better made exclusively by the jury. The jury serves three purposes in American political life: to act as a credible fact finder; to inspire allegiance to the political system by permitting citizens to participate directly in government; and to provide a check against the excesses of institutionalized power.

The proposed system does not greatly interfere with these purposes. First, a large role is maintained for the jury. The jury retains its position as fact finder and is given authority to depart from the guidelines. Moreover, its preferences will be influential in determining the initial guidelines.

Second, the normative aspects of the categorization problem raise issues that the jury is not presently asked to resolve. Issues relating to evenhandedness across cases are traditionally within the competence of other political institutions, namely the legislature and the judiciary. If evenhandedness is valued in the administration of justice, it is important that the issues raised by it be addressed systematically.

If juries are permitted to depart from the guidelines at will, the value of the guidelines will be lost. If, in contrast, juries are never permitted to depart, a significant loss of personalized justice and jury autonomy will occur. The key role in balancing these competing values belongs to the appellate courts.[78]

---

78. In many jurisdictions, trial courts deciding motions for judgment notwithstanding the verdict have the authority to order remittitur or additur when awards are grossly excessive or unreasonably inadequate. *See* J. FRIEDENTHAL, M. KANE & A. MILLER, CIVIL PROCEDURE 556-57 (1985). Generally, the courts have been quite reluctant to review damage awards. When undertaken, the standard of review is narrow. As in criminal sentencing, an award will be overturned if it is deemed "monstrous" or if it "shocks the conscience." *See* cases cited in Jaffe, *supra* note 5, at 232-33 nn.47 & 53.

The reluctance of courts to review damage average awards has been attributed to the need to respect jury autonomy. Damages present factual questions, and judicial review of jury findings would usurp the jury's proper authority. The sense that the inquiry necessitated by review of jury awards is somehow unjudicial may spring from the realization that judges have no principled bases for distinguishing between excessive or inadequate

Appellate courts will have two functions when hearing appeals from pain and suffering awards. One function will be to determine whether the jury properly scored the guidelines and thus applied the correct presumptive award. A second function will be to determine standards for departure from the guidelines.

At some point, departures from the guidelines should be subject to appellate review. The questions before the courts will be (1) whether the reasons for departure[79] are legally sufficient,[80] and (2) given that the departure is justified, the extent to which juries may depart. This latter question contemplates setting parameters. For instance, in the context of sentencing guidelines, the Minnesota Supreme Court has determined that, except in extraordinary cases, the maximum sentence that Minnesota trial judges may impose in cases of extreme aggravation is twice the presumptive sentence provided in the guidelines.[81]

A collateral benefit of adopting guidelines is the opportunity for further development of the law of damages. The use of appellate courts to police jury damage awards might be a departure from past conceptions of jury autonomy. In some cases, the legal and factual questions presented will be hard to separate, and to that extent appellate courts will be exercising new authority. The guidelines system purposely engages three separate decision makers—the jury, the commission, and the judiciary—in constant dialogue; each has an opportunity to shape the debate and influence the outcome.

---

awards and reasonable awards. As Professor Dobbs has suggested, and Professor Zelermyer has shown, courts ordering additur and remittitur are embarrassed to provide satisfying reasons for their decisions. D. DOBBS, *supra* note 6, § 8.1, at 545; Zelermyer, *supra* note 35, 31-33. Guidelines provide a norm for judges to apply. If guidance is provided, the role for appellate review outlined below may seem more judicial. *See* Jaffe, *supra* note 5, at 221-22.

79. The need to have in the record the reasons for a departure raises the complicated question of how to learn the reasons without chilling jury deliberation. One possible solution is to require juries to provide the reasons on the jury verdict form. Many jurisdictions already provide juries with forms giving step-by-step guidelines to the deliberation process. In the part of the form where juries indicate the amount of damages given for pain and suffering, a second blank would be provided for juries departing from the guidelines to give the reasons for so doing.

80. The appellate court would not inquire into the correctness of the jury's determination that particular factors exist or are absent. The sole question is whether the presence or absence of the factors provides a legally sufficient basis to allow departure.

81. State v. Evans, 311 N.W.2d 481, 483 (Minn. 1981).

V. CONCLUSION

The current process for measuring pain and suffering damages is seriously wanting; it is unprincipled both in theory and in practice. The root difficulty with the present system is the lack of a market for intangible losses such as pain and suffering; this creates an opening for random factors, particularly inconsistent conceptions of value, to distort damage awards. As a result, horizontal equity, appropriate compensation, and efficient accident avoidance are undermined.

This Note proposes a guideline system which emphasizes the use of analytic techniques to predict or approximate the value of particular injuries. The guidelines' departure and feedback system permits sufficient flexibility to assure each plaintiff ample opportunity to prove the special merits of her case. The guidelines and the departure policy also serve to facilitate appellate review, looking toward the development of a systematic law of damage measurement.

APPENDIX*
TABLE 1
Sentencing Grid

SERIOUSNESS SCORE	OFFENDER SCORE				
	0	1	2	3	4
XIV	Life Sentence without Parole/Death Penalty				
XIII	23y 4 m 240 - 320	24y 4m 250 - 333	25y 4m 261 - 347	26y 4m 271 -361	27y 4m 281 - 374
XII	12y 123 - 164	13y 134 - 178	14y 144 - 192	15y 154 - 205	16y 165 - 219
XI	6y 62 - 82	6y 9m 69 - 92	7y 6m 77 - 102	8y 3m 85 - 113	9y 93 - 123
X	5y 51 - 68	5y 6m 57 - 75	6y 62 - 82	6y 6m 67 - 89	7y 72 - 96
IX	3y 31 - 41	3y 6m 36 - 48	4y 41 - 54	4y 6m 46-61	5y 51 - 68
VIII	2y 21 - 27	2y 6m 26 - 34	3y 31 - 41	3y 6m 36 -48	47 41 - 54
VII	18m 15 - 20	2y 21 - 27	2y 6m 26 - 34	3y 31 - 41	3y 6m 36 - 48
VI	13m 12+ - 14	18m 15 - 20	2y 21 - 27	2y 6m 26 - 34	3y 31 - 41
V	9m 6 - 12	13m 12+ - 14	15m 13 - 17	18m 15 - 20	2y 2m 22 - 29
IV	6m 3 - 9	9m 6 - 12	13m 12+ - 14	15m 13 - 17	18m 15 - 20
III	2m 1 - 3	5m 3 - 8	8m 4 - 12	11m 9 - 12	14m 12+ - 16
II	0 - 90 Days	4m 2 - 6	6m 3 - 9	8m 4 - 12	13m 12+ - 14
I	0 - 60 Days	0 - 90 Days	3m 2 - 5	4m 2 - 6	5m 3 - 8

SERIOUSNESS SCORE	OFFENDER SCORE				
	5	6	7	8	9 or more
XIV					
XIII	28y 4m 291 - 388	30y 4m 312 - 416	32y 10m 338 - 450	36y 370 - 493	40y 411 - 548
XII	17y 175 - 233	19y 195 - 260	21y 216 - 288	25y 257 - 342	29y 298 - 397
XI	9y 9m 100 - 133	12y 6m 129 - 171	13y 6m 139 - 185	15y 6m 159 - 212	17y 6m 180 - 240
X	7y 6m 77 - 102	9y 6m 98 - 130	10y 6m 108 - 144	12y 6m 129 - 171	14y 6m 149 - 198
IX	5y 6m 57 - 75	7y 6m 77 - 102	8y 6m 87 - 116	10y 6m 108 - 144	12y 6m 129 - 171
VIII	4y 6m 46 - 61	6y 6m 67 - 89	7y 6m 77 - 102	8y 6m 87 - 116	10y 6m 108 - 144
VII	4y 41 - 54	5y 6m 57 - 75	6y 6m 67 - 89	7y 6m 77 - 102	8y 6m 87 - 116
VI	3y 6m 36 - 48	4y 6m 46 - 61	5y 6m 57 - 75	6y 6m 67 - 89	7y 6m 77 - 102
V	3y 2m 33 - 43	4y 41 - 54	5y 51 - 68	6y 62 - 82	7y 72 - 96
IV	2y 2m 22 - 29	3y 2m 33 - 43	4y 2m 43 - 57	5y 2m 53 - 70	6y 2m 63 - 84
III	20m 17 - 22	2y 2m 22 - 29	3y 2m 33 - 43	4y 2m 43 - 57	5y 51 - 68
II	16m 14 - 18	20m 17 - 22	2y 2m 22 - 29	3y 2m 33 - 43	4y 2m 43 - 57
I	8m 4 - 12	13m 12+ - 14	16m 14 - 18	20m 17 - 22	2y 2m 22 - 29

NOTE: Numbers represent presumptive sentence ranges in months. Midpoints are in bold type (y = years, m = months). 12+ equals one years and one day. For a few crimes, the presumptive sentences in the high offender score columns exceed the statutory maximums. In these cases, the statutory maximum applies.

Additional time added to the presumptive sentence if the offender was armed with a deadly weapon:

24 months (Rape 1, Robbery 1, Kidnapping 1)
18 months (Burglarly 1)
12 months (Assault 2, Escape, 1, Kidnapping 2, Commercial Burglarly 2)

* Tables reproduced from **State of Washington Sentencing Guidelines Commission, Report to the Legislature** 7-10 (1983).

TABLE 2

CRIMES INCLUDED WITHIN EACH SERIOUSNESS LEVEL

XIV Aggravated Murder 1

XIII Murder 1 (v)

v=violent offense (as defined by RCW 9.94A)

XII Murder 2 (v)

XI Assault 1 (v)

X Kidnapping 1 (v)
Rape 1 (v)

IX Robery 1 (v)
Manslaughter 1 (v)
Statutory Rape 1 (v)

VIII Arson 1 (v)
Rape 2 (v)
Promoting Prostitution 1

VII Burglary 1 (v)
Negligent Homicide
Introducing Contraband 1

VI Bribery
Manslaughter 2 (v)
Intimidating a Juror/Witness

V Statutory Rape 2
Kidnapping 2 (v)
Extortion 1 (v)
Indecent Liberties (v)

IV Robbery 2 (v)
Assault 2 (v)
Escape 1
Arson 2 (v)
Bribing a Witness/Bribe Received by Witness
Malicious Harassment
Willful Failure to Return from Furlough
Incest 1

III Rape 3
Statutory Rape 3
Incest 2
Extortion 2
Unlawful Imprisonment
Assault 3
Promoting Prostitution 2
Introducing Contraband 2
Communicating with a Minor for
Immoral Purposes
Escape 2
Perjury 2
Intimidating a Public Servant
Tampering with a Witness

II Malicious Mischief 1
Possession of Stolen Property 1
Theft 1
Welfare Fraud
Burglary 2

I Theft 2
Possession of Stolen Property 2
Forgery
Auto Theft (Taking and Riding)
Vehicle Prowl 1
Eluding a Police Vehicle
Malicious Mischief 2
Reckless Burning
Unlawful Issuance of Bank Checks

NOTE: Drug crimes are not ranked at this time because they are still under consideration by the Commission.