

RECOGNIZING ODYSSEUS' SCAR:
RECONCEPTUALIZING PAIN AND ITS EMPATHIC
ROLE IN CIVIL ADJUDICATION

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ABSTRACT

This Article proffers a consideration of how the expression of pain impacts the interpersonal dimensions of personal injury proceedings, contesting through philosophical logic and textual analyses of case law and legal practitioners' texts the conclusion of scholars such as Elaine Scarry and Robert Cover that pain unmakes both the word and the world. Seeing pain as something that can and must be communicated, albeit in a different form than pain embodied, makes pain a much more profound force, comports with our understanding of pain as a physical yet interpersonally meaningful sensation, and has many evidentiary ramifications.

Taking as its premise the perspective that legal constructions of pain are intrinsically relational and empathic, this Article proposes a reformulation of pain as a dual construct, at once experiential and expressionistic, that is supported by both semiotic theory and by Wittgenstein's refutation of the private language argument associated with Cartesian dualism. Pain as a dual construct is the most appropriate model for the legal construction of pain in personal injury litigation. This Article then turns to the implications of reformulating pain as a dual construct, examining how its grounding in social practice demands a more complex analysis than the existing model put forth by Elaine Scarry, who posits that imagination enables nonsufferers to access another's suffering; this model is inadequate because pain-full phenomena must instead be grounded in social practice and structured by and through language. Only then is it possible to elucidate the development of an empathic connection between a sufferer and another and the legal consequences of that relation. This Article concludes by describing how the model of pain that law currently adopts in principle (but not in practice) extinguishes pain's interactive potential, demonstrating the necessity of a conscious recognition of interpersonal pain-full reality.

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I. INTRODUCTION

*For what is story if not relief from the pain
of the inconclusive, from dread of the meaningless?*

Mona Van Duyn, *Endings*

In Book 19 of the Homeric epic *The Odyssey*, when the weary hero Odysseus at last returns home from Troy to the island of Ithaca disguised as a beggar, he wins the good will of his wife Penelope by giving her news of her husband. Ignorant of the hero's identity but eager to show her gratitude, Queen Penelope asks Euryclea, Odysseus' former nurse who now serves as royal housekeeper, to wash the "stranger's" feet. As Euryclea takes the hero's foot upon her lap to wash his leg, she touches a scar upon Odysseus' thigh incurred long ago in a boar hunt on Mt. Parnassus and instantly recognizes him.

Euryclea's recognition of Odysseus is sparked not by the bond that she shares with her former charge, but by the recognition of a familiar scar—one that she helped to heal and for which she felt compassion.

One millennium later, we, too, see others with various "scars" or injuries upon them (albeit ones that are incurred in contemporary activities considerably more plebian than boar hunting) that are familiar to us from personal experience or cultural knowledge. These scars convey identity, allowing us to recognize another as a sufferer. And from time to time, we are called to sit in judgment upon such injuries; to weigh their existence, extent, and incurrence; and to determine what response they merit—in essence, to recognize another as an authentic sufferer whose injury merits compensation.

Whether in social interaction or in personal injury litigation, a suffering identity is always a contested identity. It is an identity that entitles its bearers to a wide variety of interpersonal and institutional reactions and remunerations, from compassion to punitive damages to disability checks. Thus, before he can be accorded that status, one who claims to be suffering must establish both that his suffering is authentic and that he should be held harmless for its cause. This aura of legitimacy becomes harder to establish as the stakes of suffering are raised. One need only recall many Americans' disgusted reaction to Stella Liebeck, the elderly plaintiff in the McDonald's coffee burn case, to realize that it is likely that someone suffering from an injury reputed to be "everyday" may not be considered deserving of a 2.9-million-dollar verdict.¹ That lawsuit prompted the evolution of the so-called Stella Awards, allocated to the year's most "wild, outrageous, or ridiculous" lawsuits.² Clearly, the efficacy with which we may trust our recognition of scarred others is imperiled: "American tort law has become politically controversial because for many citizens it seems to have lost its moral resonance."³ This is so despite the fact that "most tort claims are morally uncontroversial and that juries often regard plaintiffs' claims with skepticism."⁴

Pain is at once one of life's great tragedies and greatest triumphs; "[p]ain on occasion becomes the site of encounters we can do nothing except witness in respect."⁵ Encounters with pain are often the subject of courtroom proceedings; personal injury trials provide jurors

1. See *Liebeck v. McDonald's Restaurants, P.T.S., Inc.*, No. CV-93-02419, 1995 WL 360309, at *1 (D.N.M. Aug. 18, 1994) (unpublished); JAY M. FEINMAN, *LAW 101: EVERYTHING YOU NEED TO KNOW ABOUT THE AMERICAN LEGAL SYSTEM* 133 (2000).

2. See *The True Stella Awards*, <http://www.stellaawards.com> (last visited Nov. 13, 2006).

3. ROBERT A. KAGAN, *ADVERSARIAL LEGALISM: THE AMERICAN WAY OF LAW* 144 (2001).

4. *Id.* at 145.

5. DAVID B. MORRIS, *THE CULTURE OF PAIN* 255 (1993) [hereinafter MORRIS, *CULTURE*].

with the chance to witness another's pain—pain as it is embodied—by understanding and crediting expressions of pain. It also demands that jurors potentially go far beyond witnessing, even though they of course cannot actually experience another's suffering. Yet, surprisingly few legal scholars have chosen “to explore the intimate connections among pain, death, and the law” as they relate to personal injury litigation, instead focusing upon such issues in the context of criminal punishment.⁶ Perhaps this is because “the languages of pain through which social sciences could gaze at, touch, or become textual bodies on which this pain is written often elude” us.⁷ Yet, because bodies and their sensations are constantly the subjects of adjudication, there is a need to “highlight[] the way law imagines the body in pain as well as the way pain and death become jurisprudential facts.”⁸

As a means of constructing bodies and their circumstances, law discursively constructs both bodies and pain as “facts of legal life.”⁹ And it does so in ways that have definite consequences for the ways in which others respond to a body that claims to be suffering from pain. What this Article proffers is a consideration of how the expression of pain impacts the interpersonal dimensions of personal injury proceedings, contesting through philosophical tools and a textual analysis of case law and legal practitioners' texts the conclusion of scholars such as Elaine Scarry and Robert Cover that pain unmakes both the word and the world. Though such scholars recognize that attempts at the expression of pain exist, recognizing that pain as expressed builds interpersonal relations instead of destroying them necessarily changes the consequences of its expression. Seeing pain as something that can and must be communicated, albeit in a different form than pain embodied, makes pain a much more profound force, aligns with our understanding of pain as a physical yet interpersonally meaningful sensation, and has many evidentiary ramifications.

Such an analysis brings to the fore many questions which are at the heart of this Article. How do the unique demands of the legal forum impact upon and alter the expression of pain? What dimensions does pain assume when expressed? What prompts an adjudicator to *listen* to another's pain and suffering?¹⁰ What is the legal *dialogue* in

6. See Austin Sarat, *Introduction: On Pain and Death as Facts of Legal Life*, in PAIN, DEATH, AND THE LAW 1, 1 (Austin Sarat ed., 2001).

7. Veena Das, *Language and Body: Transactions in the Construction of Pain*, in SOCIAL SUFFERING 67, 67 (Arthur Kleinman et al. eds., 1997).

8. Sarat, *supra* note 6, at 2.

9. See *id.* at 4.

10. As David Morris states, listening is a moral act: “The decision not to listen contains an implicit judgment about . . . the value that you attribute to the person you judge not worth listening to.” DAVID B. MORRIS, *ILLNESS AND CULTURE IN THE POSTMODERN AGE* 263 (1998) [hereinafter MORRIS, *ILLNESS*]. A refusal of the adjudicator to listen to the

which attorneys invite others to experience the suffering of another by imagining their pain and persuade these others that a given response is necessary? How does the trier of fact weigh the painful experiences of the body that hangs in the balance?

Taking as its premise the perspective that legal constructions of pain are intrinsically relational and empathic, this Article resolves these questions in two separate steps. In Part II, it probes current theories on the relationship of pain to language and on the impact of pain-full¹¹ expressions on interpersonal relations to demonstrate the need to push beyond existing conceptualizations of pain as solely physical and experiential. This Article then proposes a reformulation of pain as a dual construct, at once experiential and expressionistic, and demonstrates how this reconstruction is supported by both semiotic theory and by Wittgenstein's refutation of the private language argument associated with Cartesian dualism. Part III of this Article explains how pain as a dual construct is the most appropriate model for the legal construction of pain in personal injury litigation, exploring how the expression of pain is accomplished through a narrative structure that is morally authoritative, prompting jurors to desire interpersonal identification with the plaintiff's experience of pain.

In Part IV, this Article builds upon the implications of reformulating pain as a dual construct, examining how its grounding in social practice demands a more complex analysis than the existing model put forth by Elaine Scarry, who posits that imagination enables non-sufferers to access another's suffering. The inadequacy of the imaginative model stems from the fact that pain-full phenomena must instead be grounded in social practice and structured by and through language. This Article then elucidates the development of an empathic connection between a sufferer and another to whom suffering is expressed and the natural consequences of that interpersonal relationship. It concludes by describing how the model of pain that law currently adopts in principle (but not in practice) extinguishes pain's interactive potential, demonstrating the necessity of a conscious recognition of interpersonal pain-full reality.

Recent legal scholarship makes ample use of interdisciplinary efforts.¹² In the context of law and narrative, there is a consensus that "scholarship reasonably should be interested both in how narratives,

plaintiff's claims is fatal, for "[w]hen we turn a deaf ear to someone, we reject any claim upon us, we sever communion, we eliminate the speaker from our field of action." *Id.*

11. This spelling of "painful" is used intentionally to refer to the state of being not merely in pain but "full" of pain.

12. "Law no longer can be studied or practiced as if it were a discipline referenced by its own norms. . . . [L]aw is a derivative discipline, one which draws on other disciplines to explain how rules have developed and should develop." *The Spirit of Renaissance*, N.Y.U. L. SCH. MAG., Spring 1993, at 44, 45-46.

in general, tend to ‘work’ (persuade), and in which ones, in particular, succeed.”¹³ I approach pain as legal subject matter from the perspective of narrative jurisprudence, an interdisciplinary perspective that has become quite familiar to law, particularly in the last quarter-century.¹⁴ Such a perspective devolves from investigating what can be called the phenomenology of law, or how law is constructed as a life world through narrative. Through such a lens, law is “not merely a system of rules to be observed, but a world in which we live.”¹⁵ Such perspectives “have become a focal interest in contemporary jurisprudence.”¹⁶

In this Article, I explicate several legal authorities through textual analysis, a cousin of content analysis, which is a qualitative communication research methodology.¹⁷ This textual analysis exam-

13. Toni M. Massaro, *Empathy, Legal Storytelling, and the Rule of Law: New Words, Old Wounds?*, 87 MICH. L. REV. 2099, 2105 (1989).

14. For exemplary instances of narrative jurisprudential analysis, see ANTHONY G. AMSTERDAM & JEROME BRUNER, *MINDING THE LAW* (2000) (chronicling the role of narrative in law and judicial rulemaking); LAW’S STORIES: NARRATIVE AND RHETORIC IN THE LAW (Peter Brooks & Paul Gerwitz eds., 1996) (examining law as narrative and rhetoric); MARTHA C. NUSSBAUM, *POETIC JUSTICE: THE LITERARY IMAGINATION AND PUBLIC LIFE* (1995) (exploring the intersection between narrative literature and law); ROBIN WEST, *NARRATIVE, AUTHORITY, AND LAW* 346-439 (1993) (discussing jurisprudence as narrative and relating a decline in judicial grants of habeas relief in death penalty cases to narrative factors); Robert M. Cover, *Forward: Nomos and Narrative*, 97 HARV. L. REV. 4 (1983) (investigating the intersection between legal normativity and narrative); Richard Delgado, *Storytelling for Oppositionists and Others: A Plea for Narrative*, 87 MICH. L. REV. 2411 (1989) (describing law as storytelling and counter-storytelling); Kim Lane Scheppelle, *Foreword: Telling Stories*, 87 MICH. L. REV. 2073 (1989) (discussing the implications of a narrative approach to law and concluding that this approach allows for greater pluralism in legal reasoning); Robin West, *Jurisprudence as Narrative: An Aesthetic Analysis of Modern Legal Theory*, 60 N.Y.U. L. REV. 145 (1985) (advocating the reading of legal theory as a form of narrative).

15. Cover, *supra* note 14, at 5.

16. James R. Elkins, *Reading/Teaching Lawyer Films*, 28 VT. L. REV. 813, 826 n.67 (2004).

17. Although some recent articles purport to use content analysis, they may not define exactly its methodological contours. See, e.g., Henry F. Fradella, *A Content Analysis of Federal Judicial Views of the Social Science “Researcher’s Black Arts,”* 35 RUTGERS L.J. 103, 116-18 (2003) (conducting a content analysis of all published federal decisions to gauge the federal judiciary’s use of social science research). But other articles do effectively define this technique. See, e.g., Vicki Lens, *Supreme Court Narratives on Equality and Gender Discrimination in Employment: 1971-2002*, 10 CARDOZO WOMEN’S L.J. 501, 517-23 (2004) (applying a constructionist content analysis to forty-one U.S. Supreme Court opinions regarding gender discrimination to ascertain how the Court defined gender and equality). Communication scholars have defined content analysis in a rather specialized sense as a systematic method of compressing text into a few content-driven categories. See generally KLAUS KRIPPENDORFF, *CONTENT ANALYSIS: AN INTRODUCTION TO ITS METHODOLOGY* (1980) (discussing the epistemology, logic, and methodology of content analysis). I, however, refer to content analysis in its broader form, which refers to “any technique for making inferences by objectively and systematically identifying specified characteristics of messages.” OLE R. HOLSTI, *CONTENT ANALYSIS FOR THE SOCIAL SCIENCES AND HUMANITIES* 14 (1969). Such a technique involves surveying text for manifest (as opposed to latent) content, rendering data comparable across many different sources. In researching this Article,

ines practitioners' texts, such as *American Jurisprudence* and *Corpus Juris Secundum*, as well as case law on the understanding that such sources constitute authoritative statements in their own right, revealing how lawyers see pain as a sensation and what arguments (or narrative constructions of pain) are most successful.¹⁸ This textual analysis is oriented towards the perspective of the social construction of reality, which posits that there is never one "truth," since "truth" is largely a matter of one's social epistemology, such that our opinions are formed or constructed by social factors, including culture, upbringing, and life experiences.¹⁹ As such, this analysis is not just a playful exercise in interdisciplinarity, but one that deconstructs and thereby informs the processes by which pain is expressed in personal injury litigation.

II. PAIN, LANGUAGE, AND THE LAW

A. Existing Perspectives on the Relationship of Pain to Language

There is certainly a difference of scholarly opinion on what relationship pain may have to language. Scholars such as Robert Cover and Elaine Scarry insist that constructions of pain are *destructive*, destroying language and undermining interpersonal relations, thereby demolishing the foundation for the self in society (and thus the inner self as well, from a social constructionist perspective).²⁰ Others such as Veena Das and Alan Hyde emphasize that pain is *constructive*, summoning empathy²¹ and building relations between

my own categories emerged from preexisting divisions within practitioners' texts, and I then filtered the text of all sources and case law through this categorical list.

18. Short of interviewing trial lawyers, there is no easier way to acquire or compile such information.

19. For a discussion of the social construction of reality as a research perspective, see PETER L. BERGER & THOMAS LUCKMANN, *THE SOCIAL CONSTRUCTION OF REALITY: A TREATISE IN THE SOCIOLOGY OF KNOWLEDGE* (1966). Berger and Luckmann posit that social order is a human product and that when we participate in the social we engage in a continuous intrapersonal maintenance cycle of self-incorporation, negotiation, and reflection, so that one's subjective reality undergoes perpetual modification. *Id.* at 149-53. Thus, Berger and Luckmann tie the formation of the self in society to the formation of one's private (or nonpublic) self.

20. See ELAINE SCARRY, *THE BODY IN PAIN: THE MAKING AND UNMAKING OF THE WORLD* 172 (1985) ("Physical pain is not only itself resistant to language but also actively destroys language . . ."); Sarat, *supra* note 6, at 7 (stating that Cover separated "pain and language; pain exists outside of language, it has a materiality that language lacks. It is destructive of language itself").

21. I use the term empathy because I believe that it most closely approximates mental engagement with the pain and suffering of another, what Max Weber has called "verstehen," or "understanding," and what George Herbert Mead has termed "taking the attitude of the other." MAX WEBER, *THE THEORY OF SOCIAL AND ECONOMIC ORGANIZATION* 87 (A. M. Henderson & Talcott Parsons trans., 1947); GEORGE H. MEAD, *MIND, SELF, AND SOCIETY: FROM THE STANDPOINT OF A SOCIAL BEHAVIORIST* 299 (Charles W. Morris ed., 1967) (1934). This necessarily encapsulates sympathy and compassion but goes farther than each of those in recognizing the interpersonal demands made by comprehension of

bodies, thereby strengthening the foundations for both the social and inner selves. It is necessary to summarize each perspective before evaluating their respective merits.

1. *The Expression of Pain as Destruction*

Those who claim that expressions of pain are but hollow echoes of pain itself argue that pain cannot shed its physicality, that it is so profoundly interior a state that it can never be apprehended by another. Scarry recognizes that language, “the power of verbal objectification,” is “a major source of our self-extension” and “a vehicle through which . . . pain could be lifted out into the world and eliminated.”²² This occurs through a process in which a sufferer initially relies primarily on language to assert pain before eventually regressing to a prelinguistic communicative state.²³ But pain is unsuited to linguistic expression since, unlike language, it is a “primary physical act.”²⁴

Scarry theorizes that this physicality renders pain unsharable in two ways. First, pain is embodied in the sufferer and not in others who encounter the sufferer; nonsufferers confront only claims of embodied pain, not that pain itself. Pain, then, inspires doubt, since it is “that which cannot be denied and that which cannot be confirmed.”²⁵ Claims of embodied pain may also be inaccessible because their sheer physicality seems too unreal or unmanifested, because they seem too tenuous based on lack of visible indicia,²⁶ or because they are too horrific to lie within the realm of lived experience. For Scarry, then, the unsharability of pain stems from its unique, stark physicality—a condition with the linguistic ramification of lacking an object in the

another’s pain and suffering. Clark notes that Mead as well as John Dewey, William James, and Charles Horton Cooley all believed that the ability to empathize was the “unique human capacity that made sociation possible.” CANDACE CLARK, MISERY AND COMPANY: SYMPATHY IN EVERYDAY LIFE 35 (1997). Empathy was not conceived of as a “monolithic” experience but consisted of “solo” or “joint” engagement with others. *Id.* On the solo level, one mentally engages from a distance, focusing “attention on the self and experienc[ing] oneself primarily as separate from the other actors in an encounter.” *Id.* On the joint level, “the awareness of self fades, and one experiences intersubjectivity, a sense of merger with the group.” *Id.* I do not distinguish between these two levels in this Article but assume that a juror encountering a plaintiff in pain is moved to engage with this individual on one or both levels.

I specifically avoid the use of the term “sympathy” to avoid confusing the emotion to which I refer with the pejorative implications of “sympathy” in the judicial sense as a counterpart to reason and an improper basis for decisionmaking.

22. SCARRY, *supra* note 20, at 54.

23. According to Scarry, pain at first “monopolizes language” through the act of complaint, which “becomes the exclusive mode of speech.” *Id.* However, she continues, ultimately pain “actively destroys [language]” and in fact “bring[s] about an immediate reversion to a state anterior to language, to the sounds and cries a human being makes before language is learned.” *Id.* at 4.

24. *Id.* at 52 (stating that “[p]ain is a pure physical experience of negation”).

25. *Id.* at 4.

26. *Id.* at 3-4.

anterior world. Scarry maintains that pain as an interior state is different from other interior states such as loving, fearing, and hungering in that, while these other interior states have objects in the outside world, physical pain has no such referential content and “is not *of* or *for* anything.”²⁷ Thus, for Scarry, the physical embodiment of pain confirms an “absolute split between one’s sense of one’s own reality and the reality of other persons,” thereby rendering the pain of others less plausible.²⁸

With respect to pain’s impact upon social relations, Scarry places primary communicative emphasis on embodied pain, positing that “whatever pain achieves, it achieves in part through its unsharability, and it ensures this unsharability through its resistance to language.”²⁹ The same physical materiality which renders embodied pain too rich for language also renders it an isolating experience that is very visible in its intensity, “an almost obscene conflation of private and public” that “brings with it all the solitude of absolute privacy with none of its safety, all the self-exposure of the utterly public with none of its possibility for camaraderie or shared experience.”³⁰ Artistic representations of pain’s experience, such as those in Ingmar Bergman films, illuminate the simultaneity of isolationistic exposure, “repeatedly coupl[ing] physical pain with intense moments of humiliation.”³¹

Scarry does not, however, contend that every attempt to express pain lacks purpose. Instead, she asserts that such efforts are forceful endeavors that are accompanied by a great deal of risk since one who attempts to express and thereby objectify pain fundamentally changes it. Thus, she cautions, “the human attempt to reverse the de-objectifying work of pain by forcing *pain itself* into avenues of objectification is a project laden with practical and ethical consequence.”³² For Scarry, then, the languaging of pain objectifies embodied pain, forever changing it into a shadow of its former self. This contrasts with understanding the languaging process as merely a transformation of physical pain into a different form that is an authentic construction in its own right. Ultimately, then, Scarry interprets pain as a *physical* sensation embodied in the sufferer, foreclosing the possibility that it is also an interpersonally meaningful expression.

Robert Cover, too, sees pain and language as apposite in the sense that pain lies outside of language and has a materiality that lan-

27. *Id.* at 5.

28. *Id.* at 4. As Scarry states, “[S]o incontestably and unnegotiably present is it [for the person in pain] that ‘having pain’ may come to be thought of as the most vibrant example of what it is to ‘have certainty,’ while for the other [unsuffering] person it is so elusive that ‘hearing about pain’ may exist as the primary model of what it is ‘to have doubt.’” *Id.*

29. *Id.*

30. *Id.* at 53.

31. *Id.*

32. *Id.* at 6.

guage cannot have.³³ An inability to language pain entails a social and cultural inability to recognize and accept another's pain or to share one's own pain. This of necessity means that law as an interpretive project is apposite to the experience of pain, since the act of " 'interpretation' suggests a social construction of an interpersonal reality through language. . . . [B]ut pain and death destroy the world that 'interpretation' calls up."³⁴ Like Scarry, Cover posits that pain is destructive of social relations and not conducive to them. Because pain destroys the "normative world of a community,"³⁵ it threatens to defeat the ability to invent, communicate, strengthen, and reinvent the legal constructions that form such a critical part of the foundation for that normative world.

Nonetheless, Cover also recognizes that legal confrontations with bodies in pain are inevitable and unavoidable since the law cannot simply shove aside the question of bodies and their pain as being too tricky for its interpretive schemas. Law is an intrinsic part of "normative world-building," and so it cannot shrink from handling the bodies whose affairs it adjudicates without undermining its authoritative basis, for "[a] legal world is built only to the extent that there are commitments that place bodies on the line."³⁶ The "interpretive commitments of a community," whether they follow or resist the law, "[are] realized in the flesh."³⁷ Cover also sees legal hermeneutics as acts of power over bodies, evoking Scarry's assertion that expressing pain involves asserting power over and *forcing* pain into paths of objectification.³⁸ The exercise of this interpretive power is accompanied by high stakes and should accordingly be granted gravity and significance.³⁹ Like Scarry, then, Cover sees pain as an embodied physical sensation.

2. *The Expression of Pain as Construction*

Others, however, do not envision pain as condemned to silence through its physicality, reasoning that pain assumes interpersonal

33. ROBERT COVER, *Violence and the Word*, in NARRATIVE, VIOLENCE, AND THE LAW: THE ESSAYS OF ROBERT COVER 203, 205 (Martha Minow et al. eds., 1995).

34. *Id.*

35. *Id.* at 206.

36. *Id.* at 208.

37. *Id.*

38. Indeed, in a passage that goes more toward the context of punishment than that of personal injury, Cover asserts that "the relationship between legal interpretation and the infliction of pain remains operative even in the most routine of legal acts." *Id.* at 210.

39. Cover aptly illustrates this by pointing to the signing of the Declaration of Independence as an example of a momentous interpretive occasion—the rebellious interpretive act asserting independence from Great Britain in which signers " 'mutually pledge[d] to each other [their] Lives, [their] Fortunes, and [their] sacred Honour' "—and thus a prime opportunity in which to "incorporate[] an awareness of the risk of pain and death." *Id.* at 209 (quoting THE DECLARATION OF INDEPENDENCE para. 32 (U.S. 1776)).

reality through language, that “[l]anguage is how we live ‘in’ pain, not in some fantasy of community divorced from it.”⁴⁰ Instead, expressions of pain are what enable us to both communicate and memorialize these “transactions between language and body . . . by which the antiphony of language and silence recreates the world in the face of tragic loss.”⁴¹ Das equates the enunciation of pain with a reconstruction of the life world, “an articulation of the world in which the strangeness of the world revealed by [pain], by its noninhabitability, can be transformed into a world in which one can dwell again, in full awareness of a life that has to be lived in loss.”⁴² While pain as an unsharable entity condemns a body to dumb solitude, pain as a sharable entity defeats loneliness and reaffirms life. In order to express pain, one must acknowledge that there is an interested audience, necessitating an emergence from one’s self into the world to encounter the other. Communication is creation, and creation invites cure. Even expressions of incurable pain give the sufferer control over its experience, for articulation implies a degree of mastery of or power over the articulated entity. Speaking truth to power necessitates first that one *speak*. And control presumes a care for one’s life, for there is no need to assert control over matters without concern for the outcome of events.

According to Das, the expressibility of pain, a transaction between body and language, is also a transaction between self and other, a “movement between bodies” through which “the sentence ‘I am in pain’ becomes the conduit through which I may move out of an inexpressible privacy and suffocation of my pain.”⁴³ Pain thus triggers a claim for acknowledgement, not merely a “referential statement,” and so it is not an “inexpressible something that destroys communication or marks an exit from one’s existence in language.”⁴⁴ Crucially, the difficulty of languaging pain does not lead to the demise of communication and community but illustrates the human struggle to come to terms with a language perpetually inadequate for accurately delineating intensities such as love or suffering.⁴⁵ Part of the human burden is to respond “to the sense of loss when language seems to fail.”⁴⁶ Hence, the struggle to construct pain is the struggle to con-

40. PETER FITZPATRICK, *Why the Law is Also Nonviolent*, in LAW, VIOLENCE, AND THE POSSIBILITY OF JUSTICE 142, 162 (Austin Sarat ed., 2001).

41. Das, *supra* note 7, at 68.

42. *Id.* at 68-69.

43. *Id.* at 70.

44. *Id.*

45. As Das queries, “[I]f the language for the inexpressibility of pain is always falling short of my need for its plenitude, then is this not the sense of disappointment that human beings have with themselves and the language that is given to them?” *Id.* at 70.

46. *Id.*

struct the self, “to free the self that has become frozen in language.”⁴⁷ Das, then, grounds her analysis of pain and its interpersonal potential in the same understanding of pain as Scarry and Cover—pain as *one* physical entity, albeit one that is communicable.

3. *Towards a Reconceptualization of Pain*

Both of these competing perspectives accept that pain *is* constructed; they differ, however, as to what the consequences of that construction may be. This division is largely predicated not only on whether embodied pain is seen as being distinct from pain as expressed but also on which of the two is the primary source of interpersonal meaning—a factor that is in turn contingent upon the degree to which pain is seen as a necessarily physical entity.

Scarry and Cover perceive only one conceptualization of pain—a physical embodiment that can never shed its corporeal anchor through linguistic or metalinguistic expression. To attempt to express physical pain, then, is to attempt to call an apple an orange—to make pain into something it is not and can never be. From this perspective, pain has authentic meaning only for the suffering body it inhabits and no positive meaning-making occurs on an interpersonal level. Additionally, meaning is primarily generated by embodied, corporeal pain and not by pain expressed, which is meaningful only in that it points to the existence of physical embodied pain.

Debating the nature of pain when pain is seen only as a physical entity is a zero-sum game. The theory that pain is world-destroying is distinctly unsettling, for after all, if we must still suffer in silence even after we have attempted to language pain, then both language and the human bond have failed us. This position, then, cannot account for our awareness that pain elicits meaningful compassion. Similarly, Das’ perspective seems intuitively correct but does not adequately explain what about pain is meaningful and why or how the incommunicability of physical experience hinders the production of pain-full meaning, what physical pain withholds from the expressive act. It is necessary, then, to move beyond both conceptualizations of pain as such. Moving beyond these existing conceptions will require working backward, refining fundamental notions of human communicative processes and constraints until we rediscover what is sensible to include in such a reformulation.

The first step towards an effective reconceptualization of pain is to examine in more detail what is implied by “creation” and “destruction.” This terminology has rather unfortunate and exclusionary positive and negative connotations; either a process is one of crea-

47. *Id.* at 71.

tion, enjoying fertile associations and ushering in life, or it is a process of destruction, infused with the fetid stench of rot, inviting doom and decay. In addition, the terms are imprecise; creation is essentially nothing more than a neutral force which simply refers to the evolution of new meaning that may bode either good or ill. Thus, even destructive changes are creative, rendering such terms virtually useless for our purposes. Instead, we must seek to explore whether pain facilitates or hinders the formation of interpersonal relations.

The second step towards an effective reconceptualization of pain, ironically, lies in acknowledging the human inability to refrain from communicating. As humans, we cannot be silent but ceaselessly communicate vast information about our inner selves, consciously and unconsciously, to others around us. Emotions, psychological frames, and physical states all distill into bodily mannerisms such as posture and expression. We know that these bodily mannerisms are sense-making cues for others, and so to an extent we care about and may attempt to control these perceptions. Once others observe us acting in a certain manner, that manner becomes a key component of our current makeup—either we are happy or sad, tired or energetic, feeling fit or in pain.

The third and perhaps most difficult step towards an effective reconceptualization of pain involves confronting directly the backbone of Scarry and Cover's proposition that pain destroys interpersonal relations—its inevitable physicality, what cannot be communicated to others. This pessimistic communicational picture seems to derive its fearful imagery from the fact that one's pain is never perfectly comprehensible to another. While neither perspective advocates that pain is perfectly translatable into language, both acknowledge the difficulties and tensions implicit in this translation, since pain has an inherent quality of *silence*. The term *silence* simply refers to the verbal and nonverbal impossibility of conveying experience itself—a universal failing of all languages. Narrative, for example, describes and does not constitute experience. One can experience a narrative only through its linguistic textures—an experience of syntax and semantics, not of the narrative subject matter in the life world. The profundity of this silence differs according to the narrative subject matter; a failure to communicate pain can carry severe interpersonal consequences when pain renders it difficult to be civil and to complete essential tasks.

Yet, pain is a condition that exists to be shared since it cries out for diagnosis and commiseration. Even severe pain that cannot be languaged is expressible; patients in pain are often asked to select a number or facial expression associated with the severity of pain experience, a selection which in turn prompts a doctor or other interpretive actor to term that pain, among other things, “moderate” or

“severe.” In other cases, “pain overflows speech with a florid growth of metonymical and metaphorical terms, captured, for example, on the McGill Pain Questionnaire,”⁴⁸ which asks sufferers to select descriptive terms from a predetermined list.⁴⁹

Silence is always implicated in and by expressions of pain, in our awareness that, however much we might know about the suffering person, we will never (and can never) know all.⁵⁰ Because the physical sensation of pain is only accessible through pain as communicated, it is a profoundly social phenomenon; but because it is distinct from and inherently more physical than any expressive medium, “[t]here is no completely pure or innocent account of pain untouched by the constraints of writing.”⁵¹ However, *no* narrative account is “pure” or “innocent.” Silence is present in every narrative; there is always that which lies beyond language. Suffering merely implicates, but does not always result in, “practical breakdowns of speech”;⁵² it “is not ultimately ungraspable but merely resistant to description.”⁵³ Linguaging suffering may even be symptomatic of the enduring human struggle to describe extreme emotional and physical states. Thus, even when it isolates, “silence is not simply an experience of the solitary individual but a social consequence almost built in to the interpersonal structure within which suffering occurs.”⁵⁴ Interpersonal isolation, then, is not an inherent feature of pain itself, but of a social construction and response to pain that evolves over time.⁵⁵

48. Robert Kugelmann, *Pain as Symptom, Pain as Sign*, 7 HEALTH: INTERDISC. J. FOR SOC. STUD. HEALTH, ILLNESS, & MED. 29, 37 (2003).

49. The McGill Pain Questionnaire may ask subjects to choose from terms describing sensory qualities such as as “throbbing,” “shooting,” “stabbing,” “sharp,” “cramping,” “gnawing,” “hot,” “burning,” “aching,” “heavy,” “tender,” and “splitting”; affective qualities such as “tiring,” “exhausting,” “sickening,” “fearful,” “punishing,” and “cruel”; and evaluative words such as “mild,” “discomforting,” “distressing,” “horrible,” and “excruciating.” See Ronald Melzack, *The McGill Pain Questionnaire: Major Properties and Scoring Methods*, 1 PAIN 277, 279 (1975).

50. “[S]uffering encompasses an irreducible nonverbal dimension that we cannot know . . . because it happens in [this] realm beyond language.” MORRIS, ILLNESS, *supra* note 10, at 196.

51. MORRIS, CULTURE, *supra* note 5, at 3.

52. MORRIS, ILLNESS, *supra* note 10, at 196.

53. *Id.* at 195.

54. *Id.* at 197. It is true that pain can isolate the sufferer more in some interpersonal situations than in others, such as when the sufferer is afflicted with chronic pain. Significantly, however, narratives of chronic pain are not testimony of the *inevitable* failure of language, but of a specific communicative inability to consistently take account of and maintain high interpersonal attention to pain.

55. This is exemplified by examining a context in which pain apparently destroys language. The silence of suffering grows more profound as pain and suffering increase and become a more frequent subject of discourse. As Morris states, in public discourse, the silence of suffering is now “something of a cliché—despite the contrary evidence of an almost interminable discourse of contemporary complaint, lament, litigation, symptom mongering, and public confession.” *Id.* at 196. There is indeed a danger that suffering may culminate in silence when it grows discursively wearisome for chronic sufferers and those around

There are undoubtedly other dimensions, such as the distinction between a modernist and postmodernist orientation toward pain, that would be useful to explore in order to further explicate pain's potential for altering interpersonal relations.⁵⁶ But in the end, the awareness of how pain should be conceptualized comes from our own profound experience as continual communicators. In light of our ceaseless communicative endeavors, we can accept that someone who is suffering from pain is bound to express it sooner or later. Even if one attempts to conceal his pain from others, it will gradually manifest itself somehow, even if as irritability or merely a grimace or grunt. An awareness that another is in pain summons a response so natural that it is visceral—a change in the interpersonal connection that we share with the suffering person. Our universal response (assuming that we are not attempting to inflict the pain ourselves) is to respond to symptoms of suffering with compassion. This, then, is the change that expressions of pain wrought—a change that enhances interpersonal relations, adding new empathic depth, encouraging us to feel for another.

Pain becomes interpersonally meaningful when its presence becomes apparent to others, whether one learns about it by sight,

them, when months of complaint “exhaust care-givers and even family.” *Id.* at 197. Through the onslaught of silence, Morris posits, chronic pain can isolate since it “breaks down understanding” and “places people in utterly different worlds of feeling.” MORRIS, CULTURE, *supra* note 5, at 73. Sufferers can “learn[] their own helplessness” when others cease to listen and “withdraw into an uncommunicative isolation constructed in response to an environment where effective aid has all but vanished.” MORRIS, ILLNESS, *supra* note 10, at 197. Incurable pain thus “becomes an experience about which there is increasingly nothing to say, nothing to hope, nothing to do” and “constitutes a radical assault on language and on human communication.” MORRIS, CULTURE, *supra* note 5, at 73, 78.

56. It is possible that disbelief over whether pain can be authentically expressed in a constructive manner may stem from a particular, modernist narrative orientation, one of two very different cultural attitudes towards narrative, pain and suffering, and the body. According to modernists, “suffering is a quintessentially private act.” MORRIS, ILLNESS, *supra* note 10, at 197. Nonsufferers occupy a certain communicational position not from “moral failure” or from “a lapse of . . . charity or courage” but from an “aversion or detachment” that accompanies “a structural position we cannot help but occupy.” *Id.* Thus, we are never in “direct relation to another’s suffering.” *See id.* Suffering instead “forc[es] us to recognize and to contemplate our fated detachment as each person . . . inevitably suffers alone.” *See id.* at 197. Postmodernism accepts that suffering is an intrinsically interior experience, as it acknowledges that it is impossible to offload a portion of the suffering onto another. However, postmodernism recognizes the duality of signifier and signified—experience and expression—and thus that another’s suffering may become palpable when communicated to those around them, allowing a voice to emerge. *See id.* at 199. Detachment here, then, stems from a failure to communicate and is not an inevitable interactional position. Thus, a postmodern orientation towards the expression of pain offers “a potential to readjust the ‘human position’ of suffering” from modernist separation and detachment to postmodernist engagement. *See id.* at 200. Through communication, the “affliction has broken through into language,” and “[w]e are brought into the presence of words that cross over, imperfectly, from the other side of torment.” *Id.* Thus, suffering is infused with an emotive, interpersonally moving power to compel a response, altering and improving our difficult relation to suffering. *Id.* at 200.

sound, or statement. A verbal assertion of suffering is little different from a grimace, hunched body posture, or limp—a range of expressive behaviors can indicate a pain that has meaning, that needs to be alleviated. Each is a communicative act that facilitates and deepens interactive potential. It is the absence of such cues that would be world-destructive, terminating as it would any possibility of developing an informed basis for interpersonal engagement.

Moving away from the models of Scarry, Cover, and Das, we encounter a reconstruction of pain that, building upon Das' vision of pain as world-creating, is at once embodied and expressed, physical experience and communicative construction. This new conceptualization is above all a reformulation of pain based on the semiotic signifier and signified, on the sensibilia and sensation found in the social construction of reality, and on Wittgenstein's theory that interior sensations are nonetheless public. Instead of being a unified concept, perpetually rooted in a suffering body, pain is instead best conceptualized as a dual construct—pain embodied and pain expressed. Physical pain—pain embodied—is distinct from, yet tied inextricably to, pain as expressed, its communicable counterpart. Seeing pain as a dual construct acknowledges that pain can be perceived on both intrapersonal and interpersonal levels (although some elements of embodied pain can never be languaged) and thus that pain as expressed may nonetheless illuminate many contours of embodied pain. As a category, pain expressed is quite broad, entailing everything that needs to be interpreted that is not self-evident. This encompasses verbal declarations and nonverbal gestures that communicate pain and even extends to artifacts such as medical evidence that must be evaluated.

Notwithstanding the fact that it is not essential that there be a perfect correlation between a physical sensation and an expression of that sensation,⁵⁷ pain as a dual construct also effectively accounts for silence, acknowledging that only physical behaviors that are perfor-

57. As Adam Smith argues,

There may be some correspondence of sentiments between the spectator and the person principally concerned, the spectator must, first of all, endeavor, as much as he can, to put himself in the situation of the other After all this, however, the emotions of the spectator will still be very apt to fall short of the violence of what is felt by the sufferer. Mankind, though naturally sympathetic, never conceive, for what has befallen another, that degree of passion which naturally animates the person principally concerned. . . . The thought of their own safety, the thought that they themselves are not really the sufferers, continually intrudes itself upon them; and though it does not hinder them from conceiving a passion somewhat analogous to what is felt by the sufferer, hinders them from conceiving any thing that approaches to the same degree of violence. . . . These two sentiments, however, may, it is evident, have such a correspondence with one another, as is sufficient for the harmony of society. Though they will never be unisons, they may be concords, and this is all that is wanted or required.

ADAM SMITH, *THE THEORY OF MORAL SENTIMENTS* 21-22 (1969).

mative utterances—vows, promises, and the like—can be truly experienced or accomplished through language. Pain as a physical experience is performed on two levels—the intrapersonal interior and the interpersonal anterior—and therefore can be perceived on both levels as well, as pain embodied and pain expressed. Thus, the authentic meaning of pain involves a coproduction of meaning, entailing the sufferer's expression and another's perception of and response to this expression. The difficulties of constructing pain and the semantic tensions that inevitably accompany the interpretive act only enhance the crucial role these communicative constructions play in the human condition and for human connectedness. While the entirety of pain persistently eludes expression, so does ecstatic jubilation or morbid depression. Language exists to express interior states such as pain whether or not they have anterior objects. Accordingly, pain should not be seen as "that inexpressible something that destroys communication or marks an exit from one's existence in language," but as that which "makes a claim asking for acknowledgment, which may be given or denied."⁵⁸

Pain embodied is the seed out of which pain expressed grows; it also is its presumed anchor. Pain embodied, however, is not what is "real" in an interpersonal sense. The significance of pain embodied lies in its *presence*. Pain expressed, then, bears not only a descriptive but also a persuasive function, facilitating knowledge as well as belief.⁵⁹ This introduces something of a Catch-22; pain embodied is only interpersonally realizable through pain expressed, but pain expressed is an imperfect index of the actuality and nature of pain embodied. That is why the existence of pain involves a coproduction of meaning; the expression alone cannot satisfy the inquiry but must be supplemented. The recipient must perform interpretive work.

Recognizing that pain expressed performs the brunt of the communicative legwork has profound ramifications for pain as a social construction. As a concept, pain expressed transforms "suffering from a static condition—a changeless and thus inherently undramatic state of being—into an event . . . enfolded within the context of a larger, surrounding action."⁶⁰ Even in its most tragic incarnations, emplotted suffering loses its "debilitating passivity" and "holds the promise of cognitive clarifications that may lead to personal or social

58. Das, *supra* note 7, at 70.

59. Rey posits that "[t]he very act of proclaiming one's pain . . . has a direct effect on the reality of the experience without our being able to fully determine whether the actual expression brings relief by liberating, or perhaps amplifies the feeling through an echoing phenomenon." ROSELYNE REY, *THE HISTORY OF PAIN* 4-5 (Louise Elliot Wallace et al. trans., 1995).

60. See MORRIS, *ILLNESS*, *supra* note 10, at 207-08.

change.”⁶¹ Suffering is once more *social*, “a status that we extend or withhold” depending on “whether the sufferer falls within our narratives of moral community.”⁶²

While pain embodied satisfies the need to see pain partially as an interior, physical experience, pain expressed acknowledges the interdependency of pain and language, the most infamous and highly structured expressive medium. Language facilitates corporeal exploration, organizing the ways in which we may know ourselves.⁶³ It also plays an essential role in the memory and “recollection” of pain and thus in formulating and interpreting pain expressed.⁶⁴ And, paradoxically, expressing pain is the only way to communicate the difficulty of its expression.⁶⁵ As “a message composed, sent, and delivered by illness,”⁶⁶ pain itself even resembles language.⁶⁷ Certain behaviors are associated with suffering, and so pain expressed “always has a specific language, whether it is a cry, a sob, or a tensing of the features.”⁶⁸ Finally, like language, pain is a product of one’s interior and exterior experiences; “the manner in which pain is expressed . . . has a direct relation to the way in which pain is actually borne and . . . to what is actually felt.”⁶⁹

Although it has spiritual and empathic dimensions, however, we cannot forget that pain expressed is also bound up with pain embodied. It is the duality of expression and experience that explains how compensating pain constitutes a relief of that pain. While the law cannot eliminate pain’s physical roots, it can eliminate a degree of the fear and anxiety caused by that pain, in that an award of dam-

61. *Id.* at 208.

62. *Id.* at 216.

63. As Professor Alan Hyde states, “[T]he multiple, competing constructions of the body in American law show the impossibility of knowledge of the body unmediated by discourse.” ALAN HYDE, *BODIES OF LAW* 6 (1997).

64. Of particular import is deconstructing the “symbolic representation of pain; the patient uses it to understand his present condition in the light of his past experience and what he knows about the pain suffered by others, of his cultural background, and of the social conventions of his day.” REY, *supra* note 59, at 335.

65. One scholar has even advocated the need for a vocabulary of pain: “[W]e should perhaps discuss pain as Eskimos discuss snow, assigning a separate word to each of the forms in which snow may be found but dispensing with a single word encompassing all of its forms.” Cornelius J. Peck, *Compensation for Pain: A Reappraisal in Light of New Medical Evidence*, 72 MICH. L. REV. 1355, 1356-57 (1974) (citing THOMAS S. SZASZ, *PAIN AND PLEASURE: A STUDY OF BODILY FEELINGS* 10 (1957) (describing the Eskimo system for referring to snow)).

66. MORRIS, *CULTURE*, *supra* note 5, at 74.

67. Like language, pain is a “codified form of social behaviour which sets the parameters of allowable overt manifestations and regulates the expression of such innermost personal experiences” and is “defined by society’s standards of permissiveness or its notions of transgression” according to norms that “depend upon the cultural foundations of the societies in which they arise.” REY, *supra* note 59, at 4.

68. *Id.* at 4.

69. *Id.*

ages is recognition not only that pain is present but also that something can and should be done to remedy it. Damages may also have very material consequences, such as paying for needed medical treatment and alleviating financial burdens occasioned by the injury.

Thus, pain as a dual construct paves the way for the economic to impact upon the physical (and thus mental), so that damages may be therapeutic⁷⁰ even when pain embodied is incurable.⁷¹ Seen in this light, legal remedies do indeed appear to be alternative forms of healing, a “psychoactive” therapy that relieves “concurrent emotional dysfunctions that may interfere negatively with the perception of true physical pain,” such as depression or “neurological fear responses,”⁷² by providing the psychological release of knowing that one is not suffering alone. As Vertosick remarks, “[T]he source of suffering lies in humanity, [and] the cure for suffering may be found in our humanity as well”; recognizing the communicability of pain and the shared nature of suffering illustrates the possibility of companionship and the positive potential of human relations.⁷³

Thus, Scarry and Cover stop unnecessarily short of a properly robust conception of pain. In its most pragmatic, everyday context, pain as expressed is what can terminate the physicality of embodied pain altogether. Helpless sufferers—whether children suffering from a headache or a patient seeking a doctor’s advice concerning an unknown malady—must first tell another what hurts, how it hurts, and perhaps what caused that pain in order to bring an end to their physical sufferings. Thus, pain as expressed routinely offers salvation from physical suffering and, by proffering such relief, is certainly interpersonally meaningful.

B. Evidence for Pain as a Dual Construct

1. A Semiotic Analysis of Pain

Pain is a matter of interpretation. But to what semantic processes do we refer when we say that pain *means*? How does pain come to mean, both personally and interpersonally? Such questions can be readily answered through applying a semiotic analysis. In this discussion, I will discuss the concept of a semiotic sign as formulated by both Ferdinand de Saussure and Charles Peirce, for it is accepted that the Saussurian formulation of the sign is simply a more basic

70. FRANK T. VERTOSICK JR., WHY WE HURT: THE NATURAL HISTORY OF PAIN 44 (2000).

71. *Id.*

72. *Id.* at 263, 268.

73. *Id.* at 270.

variant of that developed by Peirce, although the two evolved their conceptions of semiotics separately.⁷⁴

A discussion of semiotics, or the study of signs, implicates as well semiotic phenomenology, or sign relations in the life world—the world as experienced and as engaged in by ourselves, by others, and by ourselves with others. Pain arises in the life world not as an abstract entity but as a physical sensation: a twinge, a burn, a tear. It is impossible to comprehend the meaning of a sign without simultaneously realizing that meaning arises primarily from the relationships between signs, not merely the comprehension of one sign as the sum of its individual parts. In this vein, pain as sign is embedded in interpretive schemas.⁷⁵ Once named, painful sensations emerge into the life world,⁷⁶ where “pain re-organises our lived space and time, our relations with others and with ourselves.”⁷⁷

The sign, the preeminent semiotic unit of meaning, consists of “everything that, on the grounds of a previously established social convention, can be taken as something standing for something else.”⁷⁸ According to Saussure, signs consist of a signifier, the component of a sign that is visible or somehow ascertainably present, and the signified, the component of the sign that is absent but invoked by reference.⁷⁹ Thus, pain expressed would be the signifier because words and gestures are ascertainably pregnant with meaning, while pain embodied would be the signified—invisible yet invoked through pain expressed. Unlike Saussure’s formulation of the sign as dyad, Peirce’s conception of the sign consists of a relational triad comprised of the representamen (comparable to Saussure’s signifier), the “something” that “addresses somebody” and “which stands to somebody for something in some respect or capacity”; the object to which the representamen refers; and the interpretant, the “equivalent sign” created by the representamen in the mind of the other addressed.⁸⁰ For Peirce, the representamen and the object together form a sign, and it is that

74. WENDY LEEDS-HURWITZ, SEMIOTICS AND COMMUNICATION: SIGNS, CODES, CULTURES 23 (1993).

75. As Mark Sullivan suggests, “[H]uman pain is defined more in terms of its relations than its inherent qualities.” Mark D. Sullivan, *Finding Pain Between Minds and Bodies*, 17 CLINICAL J. PAIN 146, 151 (2001).

76. See Kugelmann, *supra* note 48, at 31 (stating that “medical signs” such as high blood pressure become “part of the lifeworld” once they are “named and appropriated by the patient”).

77. Gillian A. Bendelow & Simon J. Williams, *Transcending the Dualisms: Towards a Sociology of Pain*, 17 SOC. HEALTH & ILLNESS 139, 148 (1995).

78. UMBERTO ECO, A THEORY OF SEMIOTICS 16 (1976) (emphasis omitted).

79. For additional information on the relationship between the signifier and signified, see ROLAND BARTHES, ELEMENTS OF SEMIOLOGY 35-57 (1964) (discussing signifier and signified); Terrence Hawkes, *A Science of Signs*, in STRUCTURALISM AND SEMIOTICS 123-50 (1977) (same); WINFRIED NÖTH, HANDBOOK OF SEMIOTICS (1995) (same).

80. 2 CHARLES SANDERS PEIRCE, COLLECTED PAPERS OF CHARLES SANDERS PEIRCE ¶ 228 (Charles Hartshorne & Paul Weiss eds., 1932).

sign to which the interpretant refers. In Peirce's model, pain expressed would be the representamen, pain embodied would be the object, and another's understanding of pain as sign would be the interpretant.

The inclusion of the interpretant allows Peirce's triadic model to directly account for another's understanding of an expression. Thus, the interpretant paves the way for an understanding of semiotics grounded in interpersonal expression. We can then comprehend how "a sign relates" and how it comes to have "implications for both social relationships and for narrative and other discursive forms."⁸¹ Pain, like discourse, is "semiotic activity insofar as the representamens give an account (the interpretant) of something for some reason (the object) within a community of relevance."⁸²

A sign may have three types of discursively determined relations with its object, of which pain expressed evinces two. Pain expressed in the form of an artifact such as an x-ray⁸³ can be iconic, being "a sign which refers to the Object that it denotes merely by virtue of characters of its own, and which it possesses, just the same, whether any such Object actually exists or not."⁸⁴ And as the public meaning assigned to a private sensation, such as a throbbing in an infected finger, pain expressed can also be indexical, being "a sign which refers to the Object that it denotes by virtue of being really affected by that Object."⁸⁵ The final sign-object relationship is that of symbol, an arbitrary relationship in which "a sign . . . refers to the Object that it denotes by virtue of a law, usually an association of general ideas, which operates to cause the Symbol to be interpreted as referring to that Object."⁸⁶ Objects that become associated with pain or that cause pain in a certain instance may be symbolic forms of conveying pain expressed—leading us to cower when looking down the barrel of a loaded gun or cringe at the sight of a bloody knife.

In addition, a sign may have three relationships with its interpretant, all of which constitute different discursive ways of understanding pain. An interpretant can be emotional, "a feeling,"⁸⁷ as in the thrill of an empathic connection that we form with a sufferer; it can be energetic, involving effort,⁸⁸ as in attempts to comprehend the significance of an expression of pain; or it can be logical in the sense of

81. Kugelmann, *supra* note 48, at 34.

82. *Id.* at 35.

83. *See id.*

84. PEIRCE, *supra* note 80, at ¶ 247.

85. *Id.* at ¶ 248.

86. *Id.* at ¶ 249.

87. 5 CHARLES SANDERS PEIRCE, COLLECTED PAPERS OF CHARLES SANDERS PEIRCE ¶ 475 (Charles Hartshorne & Paul Weiss eds., 1932).

88. *Id.*; Kugelmann, *supra* note 48, at 36.

invoking future implications,⁸⁹ as in gauging how the long-term consequences of an injury may affect an award of damages.

Signs themselves, however, are the minimal, not the preeminent, units of semiotic meaning. Groupings of signs together with the rules for their use constitute sign systems known as codes, which, joined into systems, form subcultures and cultures.⁹⁰ It is through codes that signs acquire meaning in the life world. Codes offer ways to “socially construct (produce, maintain, repair, transform) reality”⁹¹ and “permit[] ordered human interaction.”⁹² Through communication, we encode, or engage in semiosis—the active “process of making and using signs.”⁹³ This is the most profound link between semiotics and the social construction of reality; the social becomes constructive not only in the sense that codes build meaning, conveying “meaning derived from the agreement among and shared cultural experience of their users,” but also in that codes themselves are continuously under construction, being “full of gaps and inconsistencies and subject to constant change.”⁹⁴

Thus, semiotics not only furthers the concept of pain as a dual construct but also strengthens its analytic power. Current medical and legal perspectives limit the enunciative possibilities of pain, distorting the public, social nature of pain and rendering the perspectives of researchers such as Scarry and Cover more logical than they actually are. Kugelmann laments the fact that pain is subject to the same dichotomies—“subjective and objective, mental and physical”—that pain is subject to in medical terminology.⁹⁵ Legal conceptualizations of pain embrace the same dichotomies, in which pain itself is “physical” while suffering is “mental” and claims of pain are “subjective” while medical evidence of pain is “objective.” Although law superficially acknowledges the distinction between physical pain and mental suffering, pain and suffering are most often treated as a “unitary concept.”⁹⁶ This is an implicit recognition that pain is not limited

89. PEIRCE, *supra* note 87, at ¶ 482.

90. LEEDS-HURWITZ, *supra* note 74, at 15-17.

91. *Id.* at 15.

92. *See id.*

93. DAVID SLESS, IN SEARCH OF SEMIOTICS 2 (1986).

94. LEEDS-HURWITZ, *supra* note 74, at 53 (quoting TIM O’SULLIVAN ET AL., KEY CONCEPTS IN COMMUNICATION AND CULTURAL STUDIES 44 (1st ed. 1983) (emphasis omitted)).

95. Kugelmann, *supra* note 48, at 31.

96. Law distinguishes physical pain as a different painful state than mental suffering but technically treats those differences as superficial in awarding damages for pain and suffering:

[C]ourts have not attempted to draw distinctions between the elements of “pain” on the one hand, and “suffering” on the other; rather, the unitary concept of “pain and suffering” has served as a convenient label under which a plaintiff may recover not only for physical pain but for fright, nervousness,

to the realm of physical sensation and that one must regard mental suffering as a form of pain despite its difficulty of proof. By respecting this complexity, law takes an important first step towards understanding and applying a semiotic model to pain. According to such a model, because pain has interpersonal significance, the semiotics of mental suffering must inspire empathy just as the semiotics of physical pain. To deny the existence of mental suffering would be to ignore its interpersonal empathic implications.

In illuminating the interpersonal capabilities of pain and the co-production of meaning, Peirce's semiotic triad offers the same boons to legal understandings of pain as it does to those in critical health psychology, "enabl[ing] specification of how a symptom like pain is a mode of being-in-the-world with others," "enabl[ing] us to concentrate attention on the actual significance of interpretive schemas in praxis," and "show[ing] the interweaving of culturally defined conceptions of the self (as a man, as self-controlled) with ways of interpreting pain."⁹⁷

2. Wittgenstein's Conceptualization of Pain as a Public Sensation

As does semiotic analysis, Wittgenstein's conceptualization of pain emphasizes how pain is not a private sensation but one saturated with public meaning. This directly contrasts with Scarry's conception, which essentially posits that pain is private due to an "absolute split between one's sense of one's own reality and the reality of other persons."⁹⁸ As she conceives of it, expressing pain necessitates the "reversing of . . . bodily linings," "the making of what is originally interior and private into something exterior and sharable" as well as the "reabsorption of what is now exterior and sharable into the intimate recesses of individual consciousness."⁹⁹ Thus, another way of ascertaining whether pain—as embodied and as expressed—facilitates or hinders the formation of interpersonal relations is to ask whether pain is private in an interpersonal sense (as distinct from a sufferer's inability to share its embodied experience with another) or whether, as expressed, it is publicly meaningful.

Philosophers have made so-called private language arguments when attempting to "carry out a philosophical analysis starting from

grief, anxiety, worry, mortification, shock, humiliation, indignity, embarrassment, apprehension, terror or ordeal.

Capelouto v. Kaiser Found. Hosps., 500 P.2d 880, 883 (Cal. 1972) (citing *Crisci v. Sec. Ins. Co.*, 426 P.2d 173, 178 (Cal. 1967) (citations and footnote omitted)). See also I. Alfred Brecker, *Pain and Suffering*, in 23 AM. JUR. PROOF OF FACTS 2D 1, § 2 (1980).

97. Kugelmann, *supra* note 48, at 44-45.

98. SCARRY, *supra* note 20, at 4.

99. *Id.* at 284.

private or personal experiences.”¹⁰⁰ Such arguments evolve from the perspective that, as Hume states, “ ‘nothing is ever present to the mind but perceptions.’ ”¹⁰¹ Following this logic, “we are certain only about the existence and nature of our private impressions,” and “[i]f individual impressions are the sole basis for philosophical inferences, then each person’s language is developed . . . and knowledge is . . . inferred from private impressions and only from these data.”¹⁰² Others cannot ascertain whether one’s use of the word “pain” follows or departs from their use of “pain,” and so a language composed of references to such concepts might “be a private language, comprehensible only to its speaker.”¹⁰³

That language itself, and not only sensations, could be private at first seems strange, since we have been well-schooled in the proposition that languages are inherently social constructs that exist to facilitate interpersonal communication.¹⁰⁴ But it is also obvious that not everything can be encompassed in or be communicated through language—the “silence” of pain being akin to “feelings, intentions, ideas, dreams, and even images that are felt, perceived, or experienced by ourselves alone.”¹⁰⁵ Incommunicability is an aspect of pain’s nature according to Scarry and Cover. And though words referring to or describing these personal experiences are comprehensible to others, it seems as if the experiences themselves are, indeed, private, accessible intrapersonally and not interpersonally. Hence, the act of translating personal experiences into language seems to withhold or eradicate part of their meaning. But how far does the privacy of pain extend? Are such experiences entirely private, apart from the sense that they arise physically in one body and cannot be shared, like a bag of popcorn, with another person? And what about the language that we use to express such ostensibly private experiences—is it private as well, in the sense that we privately invest meaning in it, diminishing others’ ability to apprehend the full import of our sensation-oriented statements?

A number of philosophers, including Ludwig Wittgenstein, have cultivated arguments to explain why a private language is impossible in the process of developing a critique of Cartesian dualism, which distinguishes direct and certain knowledge of the “private” contents of one’s own mind from the fallible inferential knowledge that it has of others’ minds. In other words, Wittgenstein sets out to prove that

100. PATRICIA H. WERHANE, *SKEPTICISM, RULES, AND PRIVATE LANGUAGES* 1-2 (1992).

101. DAVID HUME, *A TREATISE OF HUMAN NATURE* 67 (L.A. Selby-Bigge ed., 1964) (1888).

102. *Id.*

103. *Id.*

104. *Id.*

105. *Id.* at 1.

ostensibly private sensations such as pain are not necessarily private at all, save for when they are unexpressed, and that it does not follow from the proposition that some (unexpressed) pains are private that all pains are private.¹⁰⁶

In his *Philosophical Investigations*, Wittgenstein describes a private language in the following manner: “The individual words of this language are to refer to what can only be known to the person speaking; to his immediate private sensations. So another person cannot understand the language.”¹⁰⁷ Wittgenstein’s refutation of the private language argument has specific implications not only for establishing pain as a dual construct comprised of pain embodied and expressed but also for ascertaining how pain is more public than private. By “private,” Wittgenstein is not referring to pain in its instantiation—whether “each person possesses his own exemplar” of pain—but to pain in its actuality, pain as a matter of doubt: “nobody knows whether other people also have *this* or something else.”¹⁰⁸ Thus, “private” refers to what is known only to one’s self (unshared meaning), while “public” refers to what is known or can be made known to others (shared or sharable meaning).

Wittgenstein begins with the premise that pain is a human trait¹⁰⁹ and that the human *self* experiences pain, not the *body*,¹¹⁰ so that the proper subject of pain is the suffering *person*—an early intimation that pain is not entirely private.¹¹¹ Pain thus enables an interpersonal connection between the sufferer and another, which that other experiences as “pity.”¹¹² Having established that pain is a *human* sensation, Wittgenstein is thus free to explain its role in human relations as a “public” sensation. Introducing the concept of a “gram-

106. See LUDWIG WITTGENSTEIN, *PHILOSOPHICAL INVESTIGATIONS* §§ 246-248, at 89-90, (G.E.M. Anscombe trans., 1972) [hereinafter WITTGENSTEIN, *INVESTIGATIONS*].

107. *Id.* § 243, at 88-89.

108. *Id.* § 271, at 95.

109. As Wittgenstein states, “[O]nly of what behaves like a human being can one say that it *has* pains.” *Id.* § 283, at 98.

110. This is related to the meaning of “I” and the distinction between the self and the body: “[T]hat which has pains or sees or thinks is of a mental nature is only, that the word ‘I’ in ‘I have pains’ does not denote a particular body, for we can’t substitute for ‘I’ a description of a body.” LUDWIG WITTGENSTEIN, *PRELIMINARY STUDIES FOR THE “PHILOSOPHICAL INVESTIGATIONS”* 74 (1958).

111. Commenting on the absurdity of stating that the *body* has pain, Wittgenstein explains that it is possible to state that it is not the body that feels pain because “if someone has a pain in his hand, then the hand does not say so (unless it writes it) and one does not comfort the hand, but the sufferer: one looks into his face.” WITTGENSTEIN, *INVESTIGATIONS*, *supra* note 106, § 286, at 98. He also notes that “[p]ain-behaviour can point to a painful place—but the subject of pain is the person who gives it expression.” *Id.* § 302, at 101.

112. As Wittgenstein states, “Pity, one may say, is a form of conviction that someone else is in pain.” *Id.* § 287, at 98.

mar"¹¹³ (a structuring principle comprised of arbitrary rules¹¹⁴ that, like languages and language rules, are "social conventions derived from, and dependent upon, social practices"),¹¹⁵ he posits that there is a "grammar of pain," or rules for formulating pain-full expressions.¹¹⁶ Pain, through its grammar, becomes a part of social practice: "'sensation' is a word of our common language, not of one intelligible to me alone. So the use of this word stands in need of a justification which everybody understands."¹¹⁷ As a part of social practice, pain is interpersonally visible; as Wittgenstein claims, "I can exhibit pain, as I exhibit red, and as I exhibit straight and crooked and trees and stones."¹¹⁸

But how does pain become part of social practice; "how is the connexion between the name and the thing named set up? This question is the same as: how does a human being learn the meaning of the names of sensations?—of the word 'pain' for example."¹¹⁹ In other words, what is the relationship between a sensation and its expression? Wittgenstein's refutation of the private language argument is predicated heavily on his understanding of naming processes. According to Wittgenstein,

[W]ords are connected with the primitive, the natural, expressions of the sensation and used in their place. A child has hurt himself and he cries; and then adults talk to him and teach him exclamations and, later, sentences. They teach the child new pain-behaviour.

"So you are saying that the word 'pain' really means crying?"—
On the contrary: the verbal expression of pain replaces crying and does not describe it.¹²⁰

The proposition that we, as children, learn to substitute words for "natural" physical expressions that sensations induce does not nullify the physical presence of a sensation such as an itch or tickle in a body or undermine the idea that a human being experiences that bodily sensation. It does, however, emphasize that the sensation is

113. Wittgenstein states of grammar that "[e]ssence is expressed by grammar" and that "[g]rammar tells us what kind of object anything is." *Id.* §§ 371, 373, at 116.

114. "The rules of grammar are arbitrary in the sense that the rules of a game are arbitrary. We can make them differently. But then it is a different game." LUDWIG WITGENSTEIN, *WITGENSTEIN'S LECTURES 57* (Desmond Lee ed., 1980).

115. See WERHANE, *supra* note 100, at 4. See also WITGENSTEIN, *INVESTIGATIONS*, *supra* note 106, §§ 257, 261, at 92-93.

116. "[A] great deal of stage-setting in the language is presupposed if the mere act of naming is to make sense. And when we speak of someone's having given a name to pain . . . it shews the post where the new word is stationed." WITGENSTEIN, *INVESTIGATIONS*, *supra* note 106, § 257, at 92.

117. *Id.* § 261, at 93.

118. *Id.* § 313, at 104.

119. *Id.* § 244, at 89.

120. *Id.*

public in the sense that its meaning and import are public constructions—that its meaning is imposed publicly and not evolved privately.

While the public imposition of meaning is demonstrated through Wittgenstein's explanation of the naming process, the relationship of the physical sensation to its expression as well as the linguistic footprint of that physical sensation are elucidated through the famous "beetle in the box" example, designed to demonstrate the absurdity of the private language argument:

Suppose everyone had a box with something in it: we call it a "beetle." No one can look into anyone else's box, and everyone says he knows what a beetle is only by looking at *his* beetle.—Here it would be quite possible for everyone to have something different in his box. One might even imagine such a thing constantly changing.—But suppose the word "beetle" had a use in these people's language?—If so it would not be used as the name of a thing. The thing in the box has no place in the language-game at all; not even as a *something*: for the box might even be empty.—No, one can 'divide through' by the thing in the box; it cancels out, whatever it is.

That is to say: if we construe the grammar of the expression of sensation on the model of 'object and designation' the object drops out of consideration as irrelevant.¹²¹

This passage reveals the relationship of the physical sensation to its expression; it is readily apparent that this analogy gives credence to the idea of pain as a dual construct. The beetle, or sensation, in the box, or body, is an interior and unshared experience, while the word for that sensation, a different incarnation, is a distinct and shared social experience. But the fact that sensation has its locus in the body does not mean that it is private, for the meaning of an interior experience can be externally imposed. Pain expressed is how pain embodied enters into the language-game. Other passages from Wittgenstein further underscore the distinction between pain embodied and pain expressed by indicating that the former is the foundation for the latter. Wittgenstein acknowledges that "there is *something* there accompanying my cry of pain. And it is on account of that that I utter it. And this something is what is important—and frightful."¹²² And as he posits in another example, "I tell someone I am in pain. His attitude to me will then be that of belief; disbelief; suspicion; and so on. Let us assume [the person told of pain] says: 'It's not so bad.'—Doesn't that prove that he believes in something behind the outward expression of pain?"¹²³ Significantly, however, pain ex-

121. *Id.* § 293, at 100.

122. *Id.* § 296, at 101.

123. *Id.* § 310, at 103.

pressed does not insert pain embodied into the language-game in the form of a “picture” of pain, but introduces it in some other form.¹²⁴

Regarding the degree to which this example disproves the private language argument, one might think that this passage indicates Wittgenstein’s belief that “beetles,” or sensations, have no place in the language-game.¹²⁵ As stated previously, he posits that there is no private language of sensations, asking us to imagine a language “in which a person could write down or give vocal expression to his inner experiences . . . for his private use” in which “[t]he individual words . . . are to refer to what can only be known to the person speaking; to his immediate private sensations. So another person cannot understand the language.”¹²⁶ Wittgenstein then attacks the possibility of such a private language, stating that if we use words to stand for sensations like we ordinarily do, our words for sensations are tied up with our natural expressions of sensation and the “language is not a ‘private’ one.”¹²⁷ Thus, the example of the beetle in the box stands not for the proposition that sensation is irrelevant within the language-game, but instead points to the absurdity of claiming such sensations are private. Sensations must play some part in the language-game since we understand them as a part of social practice, intimating that they are meaningful. If sensations had “‘no place in the language-game,’ ” but “drop[ped] out [of consideration] as irrelevant,” then “it [would be] impossible to give any account of the actual (that is, the ‘public’) use of sensation words,” which “we must, if we are to

124. As Wittgenstein states,

It is a misunderstanding to say “The picture of pain enters into the language-game with the word ‘pain’.” The image of pain is not a picture and *this* image is not replaceable in the language-game by anything that we should call a picture.—The image of pain certainly enters into the language-game in a sense; only not as a picture.

Id. § 300, at 101.

125. At this point, a discussion of what Wittgenstein means by “language-game” might be helpful. The “Language-Game Thesis” has three parts:

(1) “[L]anguage games [are] the basic semantical links between language and reality.”

(2) “Language-games are truly the measure of all things,” i.e. language-games are the “bedrock” or form(s) of life underlying all human activities.

It follows from these two conclusions that

(3) Language-games are the grounds for, and constitutive of, rules, rule-following, community agreements, and social practices.

WERHANE, *supra* note 100, at 116 (quoting MERRILL B. HINTIKKA & JAAKKO HINTIKKA, INVESTIGATING WITTGENSTEIN 196, 212 (1986)). Thus, Wittgenstein uses the term as “how a word or expression is used in a family of contexts” with respect to both specific and general practices. *Id.* at 116-17.

126. WITTGENSTEIN, INVESTIGATIONS, *supra* note 106, § 243, at 88-89.

127. *Id.* § 256, at 91.

give an account of that language game," leading us to "reject the view that sensations are private."¹²⁸

How is it, then, that the notion that sensations such as pain are private and not public seems eminently logical? Wittgenstein posits that the idea that sensations are private results from confusing the grammar of sensation words with that of the grammar of words for physical objects through processes of analogy, leading us to think that the names of sensations get their names from private, ostensive definitions. However, he asserts that because we learn at an early age that words replace the natural expressions for sensations, we know that the names of sensations are not privately derived but publicly imposed.

An illustrative example involves comparing the usages of the verbs "to feel" and "to know."¹²⁹ If asked "how I know that there is a stone in my shoe," I can answer "I know [it] because I feel it"; this illustrates the perceptual sense of the verb "to feel."¹³⁰ Logically, it also intimates "that I can know that I am in pain because I can feel my pain."¹³¹ But in the sentence "I feel a slight pain in my knee when I bend it," the verb "to feel" is not being used in its perceptual sense because "I feel" may be replaced by either "I have" or "there is."¹³² Such substitutions are not possible in the sentence "I feel a stone in my shoe"; that sentence does not have the same meaning as "There is a stone in my shoe," since there could be stone in a shoe that the wearer did not feel.¹³³ In addition, "There was a stone in my shoe, but I didn't feel it" makes sense, whereas "There was a pain in my knee, but I didn't feel it" does not.¹³⁴ We therefore see that it does not make sense to say "I know that I am in pain because I feel it," because "sensation words cannot be the objects of verbs of perception in first-person sentences."¹³⁵ Terming something a "sensation" implies an awareness that one is experiencing that sensation. Thus, it cannot be said that "[a]nother person can know that I am in pain only if he feels it."¹³⁶ "[So] whereas it makes sense to speak of ignorance and knowledge, doubt and certainty, in the case of the stone in the shoe, it does not make sense to speak this way in the case of the man in pain. . . . [T]he moves that are part of the one language game are not part of the other."¹³⁷

128. John W. Cook, *Wittgenstein on Privacy*, in *ESSAYS ON WITTGENSTEIN* 270-71 (E.D. Klemke ed., 1971).

129. This example comes from John W. Cook. *Id.* at 248.

130. *Id.*

131. *Id.* (emphasis omitted).

132. *Id.*

133. *Id.*

134. *Id.*

135. *Id.*

136. *Id.*

137. *Id.* at 247.

All this is to say that, while there are plenty of reasons for those who wish to doubt that another is in pain, those reasons emerge not from ordinary language usage but from a specialized, philosophical usage. Doubting that another is in pain, therefore, requires one to switch from a language-game characterized by ordinary usage to a philosophical language-game in which usage is twisted, has no real meaning, and therefore is solipsistic.¹³⁸

We see “how very queer is the idea that sensations are essentially private” when we examine how our fluency in social practice informs our knowledge of what behaviors are commonly associated with pain.¹³⁹

Could it be that the child who comes crying with a bumped head and who screams when it is touched is giving his peculiar expression to an itching scalp? Or that the giggling child who comes wriggling back for more tickling is really a grotesque creature coming back for more pain? . . . No, the idea of the private object is not one that turns up in our common thought and practice; it turns up only in those odd moments when we are under the influence of a false grammatical analogy.¹⁴⁰

Thus, the conclusion that sensation is publicly meaningful has profound implications for the degree to which sensations can be interpersonally meaningful. That knowledge of other minds is not, at best, inferential and highly dubious, frees our attempts to ascertain others' states from certain failure. Neither pain embodied nor pain expressed are necessarily private. Instead, the fact that the expressions can be immediately understood as signifying pain implies that there is a shared convention, deeply embedded in linguistic usage, that there is an internal and “natural” (in the sense of norm-driven) relation between expression and pain. This convention means that each instantiation of pain is public: pain embodied in that it is understood and made meaningfully in public and not private space, and pain expressed in that it is a manifestly public acknowledgement of a sensation predetermined to be publicly meaningful.

138. See WITTGENSTEIN, INVESTIGATIONS, *supra* note 106, § 303, at 102. As Wittgenstein states,

“I can only believe that someone else is in pain, but I know it if I am.”—Yes: one can make the decision to say “I believe he is in pain” instead of “He is in pain.” But that is all.—What looks like an explanation here, or like a statement about a mental process, is in truth an exchange of one expression for another which, while we are doing philosophy, seems the more appropriate one.

Just try—in a real case—to doubt someone else's fear or pain.

Id.

139. Cook, *supra* note 128, at 271.

140. *Id.* at 271-72.

III. THE IMPACT OF PAIN AS A DUAL CONSTRUCT ON PERSONAL INJURY LITIGATION

A. *Why Pain as a Dual Construct is an Appropriate Model for Personal Injury Litigation*

As the mechanism for evaluating competing expressions to comprehend a particular instance of embodied pain, law is a forum for addressing claims of pain, “a domain in which the meanings of pain and death are contested, and constituted in the contest.”¹⁴¹ Although pain expressed can take both linguistic and metalinguistic forms, narrative is the most conscious, precise, rigorous, and objectifying medium. It is also the preeminent medium for legal adjudication. However else pain is effectively communicated, the law has punished plaintiffs who fail to language complaints of pain, even if that failure is the result of the plaintiff’s mental condition.¹⁴² Finally, considerable research, such as Pennington and Hastie’s “story model,” “indicates that jurors typically organize complex evidence into narrative form, and that their judgments and the confidence with which they hold them depend in part on the ease with which they can generate acceptable stories from the data.”¹⁴³ Under the story model, jurors make sense of evidence by ordering it into story form during trial before learning the legal elements which will guide their verdict; they then match the accepted story to the legal elements and determine if there is an adequate fit.¹⁴⁴

If the consequences of pain expressed were destruction and the degeneration of interpersonal relations, then it would be difficult indeed to justify the purpose or curative potential of the personal injury trial. Law is predicated on the assumption that the physical experience of pain can somehow be meaningfully expressed in a creative way. The purpose of the legal institution is to resolve narrative claims that bring about changes to the established order that may alter the status quo. Though “chronic pain threatens to unravel the self,” in order to successfully pursue a personal injury claim that suffering self must be pulled together through enunciation.¹⁴⁵ This entails that pain as a cause of action must be remediable, alterable, and

141. Sarat, *supra* note 6, at 9.

142. *See, e.g., Soto v. State*, 286 N.Y.S.2d 993, 1000-01 (N.Y. Ct. Cl. 1968) (denying pain and suffering claim brought on behalf of a catatonic schizophrenic who died at a state mental hospital), *rev'd on other grounds*, 333 N.Y.S.2d 588 (N.Y. App. Div. 1972).

143. NEAL FEIGENSON, *LEGAL BLAME: HOW JURORS THINK AND TALK ABOUT ACCIDENTS* 117 (2001).

144. *Id.*; *see generally* Nancy Pennington & Reid Hastie, *The Story Model for Juror Decision Making*, in *INSIDE THE JUROR: THE PSYCHOLOGY OF JUROR DECISION MAKING* 192, 194-201, 206-09 (Reid Hastie ed., 1993) (stating that jurors construct stories, learn decision alternatives, and match a chosen story to a decision alternative).

145. MORRIS, *CULTURE*, *supra* note 5, at 73.

not static and that the adjudicator to whom pain is expressed must see its role as active and not passive, so that a verdict could potentially be an agent of change. Amsterdam and Hertz discuss how attorneys in a criminal trial can lead jurors to frame their role as passive or active decisionmakers through linguistic cues, likely altering their verdicts.¹⁴⁶ Jurors who assume an active role may “feel empowered to provide the closure that the accident case lacks.”¹⁴⁷ This possibility of revision is not a mere narrative construction but a cultural tenet and a foundational assumption of legal culture as well.¹⁴⁸ Predicated on this adjudicatory understanding, a courtroom becomes a scene of expressive contestation and negotiation not only because there are two competing narratives¹⁴⁹ but because adjudicators must navigate the differences between muteness and voice, reservation and engagement, detachment and investiture, literality and imagination, dumbness and creativity, and, ultimately, nonrelation and relation.

B. The Social Organization of Pain Expressed Within the Personal Injury Trial

There is an ironic disconnect between legal language and legal practice in terms of how the presence of pain is established in a personal injury trial. While law itself defines pain embodied as its object of inquiry, legal practices rely upon pain expressed as the primary source of pain-full meaning. The paradoxical narrative construction of pain at trial actually proves the viability of pain as a dual construct. Pain embodied—that which is physical and experiential—must be lifted out of the body and proven through pain expressed. Therefore, it is pain expressed that actually generates meaning since the asserted meaning of the painful physical experience necessarily stands in for the experience itself. Moreover, once the presence of pain embodied is established, what is legally meaningful is something *more* than its presence: the evolution of that pain, which is within the province of pain expressed. It is pain expressed that tells

146. See generally Anthony G. Amsterdam & Randy Hertz, *An Analysis of Closing Arguments to a Jury*, 37 N.Y.L. SCH. L. REV. 55, 75-110 (1992) (examining prosecution and defense arguments in a murder trial as dialogic structures). Such techniques include using verbs and active metaphors in describing the events leading to the accident and the evidence, using present tense to discuss crucial points in the story, and strategically deploying rhetorical questions. FEIGENSON, *supra* note 143, at 121.

147. *Id.*

148. “This belief in the counterfactual is on one level shared by everyone present in the courtroom, all of whom, by their participation in a civilization that conducts such trials, credit the possibility that this *may*, in this particular case, be the appropriate legal outcome.” SCARRY, *supra* note 20, at 299.

149. See ROBERT P. BURNS, *A THEORY OF THE TRIAL* 148-49, 164-67 (1999). Burns states that the two narratives “become rival suitors for the jury’s imagination” and “reflect[] an aspect of ordinary moral experience, in which we often construct competing narratives.” *Id.* at 164.

much of the liability tale—where that body was located and how it now lives in the world as a sufferer. The evolution of embodied pain is negotiated through adjudicating the opposing parties' narratives. The competing accounts of pain expressed—told through language, image, and metalanguage—are treated as meaningful constructions in their own right.¹⁵⁰

Because pain expressed brings pain embodied into the field of public meaning, externalizing it from the suffering body, it attains its meaning not through its relationship to the inner world of the sufferer but, as Wittgenstein suggests, through its embeddedness in patterns of cultural relation. In order to be publicly meaningful, expressions must be circumscribed by or embedded within larger cultural patterns, and as a constituent of larger interactive processes, pain expressed is part and product of a specific chain of events, interpreted and ordered so as to excite interpersonal empathy. In the context of a personal injury trial, in which pain expressed is supposed to facilitate the conclusion that another is liable for pain embodied, pain expressed is socially organized and heavily saturated with valuative cues, suffused as it is with subjective bias. Expressions of pain attain the height of desirability in a legal sense when the meaning of the pain whose tale they tell is particularly upsetting—that is, when it is most culturally undesirable.

Because embodied pain is distinct from pain expressed, legal practitioners must establish the justice of an empathic unity with a body in pain by constructing pain as a sign in its own right, not as a sensation afflicting the suffering body. In order for pain expressed as signifier and pain embodied as signified to be united together as a sign, the plaintiff's body must undergo two different constructive processes, achieving a distinct representative effect in each. The existence of pain embodied must first be successfully established through pain expressed. For this to happen, legal practitioners must construct pain expressed as a clinical concept, a "legal diagnosis," in an attempt to divorce the consequences of the pain from the body it afflicts so that that pain might attain its own interpersonal reality.¹⁵¹ In this formulation of pain expressed, the plaintiff's body becomes an interpretive and inspected object, as it might in a doctor's visit; suffering is only significant in so far as it is a symptom. As this is a stage of inquiry, jurors align themselves analytically, not empathically.

150. In discussing what he refers to as "total justice," Feigenson states that jurors see their duty as being the "balancing" of these competing accounts and conceptualize "doing justice as reaching a result that is complete, neat, with no loose ends." FEIGENSON, *supra* note 143, at 104.

151. Pain embodied can of course be literally alienated from the body by technological or physical methods that illuminate invisible internal bodily workings, penetrating the skin by techniques such as x-ray images or tissue removal.

cally, with the suffering plaintiff. And as in a doctor's visit, the moral obligation to assist the sufferer or to alleviate the pain is temporarily suspended; after all, the object of inquiry is a body or body part, and as Wittgenstein states, it is the human that suffers.¹⁵²

After pain embodied is established, however, the context changes from one of confirmation to compassion. The effect of authenticating pain enables it to transcend from an unreachable and inexpressible state into one that is interpersonally accessible and subject to remedy or reduction. The focus on the plaintiff's body now widens to encompass not only a body in pain but a person, including not only the interpretation of the physical symptoms of pain but also its causation and consequences. Thus, pain expressed is again tied back to the suffering body that it afflicts so that it may be "cured" through compensation. This is borne out by legal practice; *American Jurisprudence* advises practitioners "to identify those elements of damages resulting from the impairment of the plaintiff's ability to live a normal life free from pain and distress."¹⁵³ What constitutes a "normal life" is a highly personalized inquiry, underscoring the need to see the plaintiff as a person with unique requirements. At this point, having established the interpersonal reality of pain, the moral obligation to respond to another's suffering once again rears its head, and we are free to shed analytical indifference and reassume a mantle of compassion. Thus, as Peter Brooks argues in a different context, "we can think back to, or invent, such unity [of pain and body] only through our present consciousness of division"¹⁵⁴

Pain expressed, then, creates value in the process of creating meaning and thus necessarily fosters the evolution of identity—positioning and repositioning as interdependent and interactional actors the sufferer, the agent of suffering, and the trier of fact. In this respect, it is identical to other means of self-expression that are used in everyday social milieus to create or sustain social and moral value. Law itself is a value-allocating enterprise; courtrooms are venues where identity is on trial because parties are unwilling to fulfill assigned roles. Such expressions construct the moral identity of their authors, shaping an image of a worthy and acceptable individual whose interior state, though pain-full, is stable and coherent but

152. For a description of the analytical stance taken by the doctor in a diagnostic appointment, see Christian Heath, *Pain Talk: The Expression of Suffering in the Medical Consultation*, 52 SOC. PSYCHOL. Q. 116, 119 (1989). As Heath states, "[T]he practitioner's analytic orientation towards the suffering of the patient, and her license to inflict pain and to remain insensitive to the other's discomfort is strictly embedded within the accomplishment of [professional] diagnostic activity and in her professional obligation to assess and treat illness and disability." *Id.* at 119.

153. Jack H. Olender, *Showing Pain and Suffering*, in 5 AM. JUR. TRIALS 921, § 31 (1966).

154. PETER BROOKS, *BODY WORK: OBJECTS OF DESIRE IN MODERN NARRATIVE* 5 (1993).

helpless and who accordingly must seek aid in combating against earlier undeserved injuries and ongoing suffering. Similarly, pain expressed seeks to position the trier of fact as a potential care provider who can “cure” pain embodied by recognizing and compensating it.

C. *How Pain Expressed Works Through Narrative*

The conclusion that pain expressed is a distinct form of pain compels us to consider its expressive processes, how representation occurs through language. As we have seen, pain is an inherently communicative subject matter; it not only invites interpretation, it mandates an explanation. Law adjudicates the existence of embodied pain through an inquiry into the plaintiff's credibility.¹⁵⁵ Within this inquiry, truth and authenticity must be established in large part through narrative, along with other verbal and nonverbal modes of expression. In personal injury trials, it is pain embodied that is the basis for bringing suit, but it is pain expressed that wins those suits. Each construction of pain in this context is a subjective expression; even medical evidence has a latent meaning that must be made manifest to an audience. Thus, narrative and other expressive mediums are the origins of meaning-making in the personal injury trial.¹⁵⁶

What makes a narrative resonate with its audience? Comprehensible narratives exhibit continuity, which is created through temporal junctures between clauses that must be conveyed in a particular

155. *Corpus Juris Secundum* notes that “the existence of compensable physical pain is an issue of credibility and the jury must believe that plaintiff suffered physical pain before it compensates him or her for such pain.” 25 C.J.S. *Damages* § 92 (2002).

156. This is not a novel statement. Storytelling certainly plays a role in the construction of identities on all levels of social organization. In making sense of our own experiences, which we must do before we relate such accounts to others, “[w]e tell stories to describe ourselves not only so others can understand who we are but also so we can understand ourselves.” ROGER C. SCHANK, *TELL ME A STORY: A NEW LOOK AT REAL AND ARTIFICIAL MEMORY* 44 (1990). Constructing a narrative around a fragmentary series of experiences and impressions vivifies their actuality. As Schank notes, “It’s as if nothing has happened until an event is made explicit in language.” *Id.* at 114. If there is no one else with whom to share a narrative, we are likely to develop one for ourselves, perhaps in anticipation of telling others at some future point. *Id.* at 117. We may even construct narratives prior to deciding upon a course of action, in order to make decisions that seem rational and justified. *Id.* at 160. Consequently, “people have difficulty making decisions if they know that they will have trouble constructing a coherent story to explain their decision.” *Id.* at 159. Narratives are part of social practice and are inherently relational, enabling meaningful interaction. PAUL CONNERTON, *HOW SOCIETIES REMEMBER* 21 (1989) (stating that “we all come to know each other by asking for accounts, by giving accounts, by believing or disbelieving stories about each other’s pasts and identities. . . . The narrative of one life is part of an interconnecting set of narratives; it is embedded in the story of those groups from which individuals derive their identity.”). Such accounts help us to evolve social contexts for ourselves and others in life histories situated within a “history of . . . social settings.” *Id.*

order to make sense.¹⁵⁷ Narrative continuity establishes narrative lucidity and credibility—and practitioners' texts warn lawyers that these elements are established very quickly.¹⁵⁸ Pragmatically, narrative continuity not only confirms that a life is progressing and changing but helps to explain those changes. Such developments take on special significance in the transition between what came before and what is to come, the fulcrum of which is found in life's turning points—moments that usher in new life directions, for better or for worse. The goal of a legal construction of pain expressed is not only to make real the presence of pain but also to chronicle it (as in a pain diary)¹⁵⁹ by effectively organizing these turning points so as to render comprehensible in a cause-and-effect sense the series of mishaps in which it arose. Effective organization is essential to the cause and thus to the establishment of pain embodied; as *Corpus Juris Secundum* states, "although a person may suffer pain which he or she attributes to a cause, this belief, however well-founded in his or her mind, is not the cause *until it finds acceptance in the minds of the trier of fact.*"¹⁶⁰ Narrative continuity, then, is a thread connecting a series of pins, or turning points, in a meaningful order. A narrative resolution is merely a sensible arrangement of events around such turning points, what Henry James refers to as the "distribution at the last of prizes, pensions, husbands, wives, babies, millions, appended paragraphs, and cheerful remarks."¹⁶¹

Pain-full events in which a body is injured, together with the circumstances which initiate that pain, are undeniably narrative turning points.¹⁶² Narrative lends the structure and reflects the shared ef-

157. WILLIAM LABOV & DAVID FANSEL, THERAPEUTIC DISCOURSE: PSYCHOTHERAPY AS CONVERSATION 109 (1977). Justin Lewis refers to this particular feature of narrative as its "code of sequence" and states that "part of the storyteller's skill is the use of the code of sequence to control and direct that growth [of ideas, themes, or characters in our consciousness]." Justin Lewis, *The Absence of Narrative: Boredom and the Residual Power of Television News*, 4 J. NARRATIVE & LIFE HIST. 25, 27 (1994).

158. Legal skills publications place storytelling high on the list of priorities in jury trials, for if a narrative is not supplied for them, "jurors will begin a mental search for a story they know that fits the first facts they hear. . . . Once they have found a story that matches up with what they have heard, they will stop listening . . ." Rodney Jew, *Tell It to the Jury: The Role of Storytelling in Litigation*, in 2 ATLA ANNUAL CONVENTION REFERENCE MATERIALS 1407, Part III (2003).

159. Pain diaries are considered to be part of the plaintiff's medical record and most often fall into the hearsay exception for statements made for purposes of medical diagnoses or treatment. See, e.g., *Reed v. Abrahamson*, 423 S.E.2d 491, 495 (N.C. Ct. App. 1992) (finding that a pain diary was not inadmissible hearsay but a part of the plaintiff's medical record admissible under the Fed. R. Evid. 803(4) hearsay exception for Statements for Purposes of Medical Diagnosis or Treatment).

160. 25 C.J.S. *Damages* § 310 (2002) (emphasis added).

161. HENRY JAMES, *Art of Fiction*, in LITERARY CRITICISM: VOLUME I 44, 48 (1984).

162. According to Austin Sarat, "The history of narrative is, in part, a record of the way humans respond to the violence and pain that can threaten to tear down our carefully con-

fort that is needed to hold on to meaning in the face of suffering. Pain and suffering in turn advance narrative, summoning forth “the related processes of moral reflection and of personal change” that enable a “becoming.”¹⁶³ Pain-full narratives are thus “compelling stories,” stories that “we seek . . . and as lawyers become involved in and must learn to tell . . . because we are pushed, shoved, and dragged into an unfolding future that can be claimed only as we confront obstacles and endure arduous struggles.”¹⁶⁴ Narrative continuity and coherence is essential for others to make sense of pain and suffering; research suggests that it is the internal structure of a story that people credit, not its correspondence to external evidence; “the more ambiguities and gaps at crucial junctures, the less credible the story is.”¹⁶⁵ Moreover, narrative form assists jurors in “feel[ing] right about their decisions,” producing the sense of “emotional completion and satisfaction provided by a well-resolved story.”¹⁶⁶

Such completeness and satisfaction are likely realized by portraying the contest between the plaintiff and the defendant in melodramatic terms. Successful personal injury narratives often incorporate aspects of melodrama—in which human agency is the cause of events, in which actions are derived from character traits, and in which there is a polarization of good and evil.¹⁶⁷ A melodramatic characterization not only explains behavior and simplifies its causes and complications, but it also focuses upon victims and their suffering, focusing the jurors’ emotional participation upon the plaintiff and portraying the victim as someone who needs a hero (that is, the jury) to “win.”¹⁶⁸ This is not to say that a melodramatic characteriza-

structed but fragile webs of signification and structures of meaning.” AUSTIN SARAT, *WHEN THE STATE KILLS* 161 (2001).

163. As Morris states,

This moral process of “becoming” applies both to the teller and to the listener. Telling the stories of their illness constitutes a moral action by which the ill negotiate the reshaping of their own lives. Listening to such stories and responding to them with empathy constitutes for the listener an equally important moral act that also contains a possibility for significant life changes.

MORRIS, *ILLNESS*, *supra* note 5, at 257 (discussing ARTHUR W. FRANK, *THE WOUNDED STORYTELLER: BODY, ILLNESS, AND ETHICS* (1995)).

164. See Elkins, *supra* note 16, at 827.

165. FEIGENSON, *supra* note 143, at 117 (citing W. LANCE BENNETT & MARTHA S. FELDMAN, *RECONSTRUCTING REALITY IN THE COURTROOM* (1981)).

166. *Id.* at 106 (emphasis omitted).

167. Feigenson defines melodrama as

a narrative in which (a) events, such as accidents, are caused by individual human agency; (b) the acts of individuals are explicable in terms of their characters; (c) the agents involved in the accident can be divided into “good guys” and “bad guys”; (d) the focus of the narrative is the accident victim and his or her suffering; and (e) the good guy wins (at trial) and the bad guy gets his or her comeuppance.

Id. at 89.

168. *Id.* at 90.

tion is always imposed or that it even is especially likely to bring about the happy ending in which the “good guy” is victorious; advocacy is constrained by rules governing procedure and evidentiary presentation, which limits “the range of both the emotions likely to be evoked and the plot devices available for evoking them.”¹⁶⁹ However, the use of melodrama does not thwart the rule of law in the sense that drama endangers reason, for “[t]he dramatic form of the trial deepens the general tension between involvement and distance” in that it “allows for some sympathetic identification with those aspects of common sense invoked . . . by each lawyer, while distancing the audience from each vision, in order to allow some limited transcendence of commonsense judgment.”¹⁷⁰ Research conducted by Neal Feigenson in a mock trial setting suggested that jurors in comparative negligence cases have no difficulty apportioning fault and the presence of melodrama does not significantly affect jurors’ apportionments of fault or damage awards.¹⁷¹ The melodramatic characterization is useful, however, because it evokes a system of roles that is likely part and parcel of jurors’ social and cultural schemas.

Acts of legal adjudication—events which force the choice between two narratives of turning points—are also themselves potential turning points, forcing resolution of a legal conflict.¹⁷² Legally successful narratives make law and thus affirmatively embed a particular construction of the parties involved and of the broader community. Hence, in the act of adjudication, “[a] juror’s decision between competing narratives is . . . a definition of public identity. Because he is tak-

169. *Id.* at 91. An experiment conducted by Neil Feigenson and others that exposed participants to a variety of scenarios, manipulating the severity of the scenario outcome and the degree of the plaintiff’s culpability, revealed that mock jurors were more emotionally involved with plaintiffs when only one party was highly blameworthy (and attributions of blame were unambiguous) even though the plaintiff himself might have been the culpable party, leading Feigenson to conclude that mock jurors’ emotive responses were both simplified and dichotomized. *Id.* at 94. This suggests “that jurors respond emotionally to accident cases as if they expect accidents to take melodramatic form”—in other words, that expected narrative form primes emotive responses. *Id.* at 94-95 (emphasis omitted). See also Neal Feigenson et al., *The Role of Emotions in Comparative Negligence Judgments*, 31 J. APPLIED SOC. PSYCHOL. 576 (2001) (detailing the methodology and the results of the experiment).

170. BURNS, *supra* note 149, at 138.

171. See FEIGENSON, *supra* note 143, at 97.

172. Indeed, practitioners are advised to plan their legal narratives around the idea of a conflict. An Association of Trial Lawyers of America publication on advocacy skills instructs members of the bar that

[t]he start of your story should involve such a conflict—a change, decision, or dispute. It should raise a question in jurors’ minds that leads them on a path to the desired juror takeaway The ending of the story should resolve the conflict and answer the question raised for jurors in the opening scene.

Jew, *supra* note 158, at Part IV.

ing public action through public institutions, his judgment is inevitably determination, in a strong sense, of the nature of his community."¹⁷³

D. Interpretive Dimensions of Pain Expressed

As a narrative, pain expressed in a legal forum must perform three tasks: it must establish the existence of embodied pain in its own right, it must connect the existence of that embodied pain to a believable chronicle of events involving the suffering body, and it must position the sufferer as a sentimentalized body and the trier of fact as a potential care provider.

1. Pain Expressed, the Body, and Desire

Expressive constructions of pain inevitably invoke the body. It is not a new proposition to suggest that bodies, their actions, and their reactions are always at the heart of legal narratives. Nor is it novel to suggest that effective legal interpretations act upon bodies, constructing them and directing them in the enunciation of legal judgments. Narrative continuity itself demands that bodies be positioned and repositioned. As the central characters in criminal legal narratives, for instance, bodies maintain an inherently unstable position between two asserted extremes of guilt and innocence, culpability and nonculpability. Similarly, pain expressed creates and seeds new bodily identity; that is, it is a "sign imprint[ing] the body, making it part of the signifying process."¹⁷⁴

Legal expressions of pain invoke not one but three bodies. As a matter of course, such expressions refer to the body that is presently suffering the pain. In order to effectively construct pain expressed, however, it is necessary to invoke the specters of two other bodies as well: the preinjury body and the posttrial body, whose pain is diminished at least symbolically through recognition and compensation. These ghosts—of pain past, present, and future—weave themselves in and out of legal narratives of pain, trailing with them the sadness of a past beyond reach and the hope of a future which may yet be attained.

As it is in other interpersonal contexts, pain expressed is an attempt to arouse the natural human desire to know the body in an intimate but not in an overtly erotic sense, to not only recognize it as the bearer of signs but to penetrate beneath those signs. We appreciate the profundity of imaginatively stepping into another's shoes, particularly when that person is in a uniquely desirable or deplorable position; this anticipation is akin to the "pleasure of flinching" at a

173. BURNS, *supra* note 149, at 173.

174. BROOKS, *supra* note 154, at 3.

painful image.¹⁷⁵ In a strange twist for the ever-smiling American culture, “[p]eople want to weep. Pathos, in the form of a narrative, does not wear out.”¹⁷⁶ This drive to empathize is seen in the popularity of media which delves beneath the skins of its characters; “stor[ies] of success or failure in gaining access to the body—and the story of the fulfillment or disillusionment that this brings”—mirror attempts in our own life to “pierce the mysteries of life that are so often subsumed for us in the otherness of other people.”¹⁷⁷ Acknowledging this desire even privately makes one feel silly, sullied, or shameful. But it is none of these.

Sontag writes how the erotic theorist Georges Bataille kept on his desk a photograph taken in China in 1910 of a tortured prisoner undergoing the death of a thousand cuts, and she notes that for Bataille looking at the photo was both a “mortification of the feelings and a liberation of tabooed erotic knowledge.”¹⁷⁸ It is a form of intimacy to have the power to empathically reach out to others and to act on the basis of that empathy. Though such connections are certainly capable of invoking darker sensations and longings, there is something manifestly redeeming in establishing a connection with others, something enervating and hopeful.¹⁷⁹

The attraction of the empathic connection, the trigger of desire, is difference. The power of pain expressed lives in its ability to enunciate a “sentimentalized body,” which is simultaneously a sign of difference and a summons of empathy.¹⁸⁰ A body in pain is by its nature a different body, distinct from a population that by and large does not suffer from pain, and yet a body that because of the horrible reason for its difference invites others to attempt to recognize and comprehend that pain. The sentimentalized body thus sparks pangs of empathy, allowing pain expressed to temporarily overcome interpersonal discontinuities.

But heralding the existence of an empathic connection and trumpeting its meaning ultimately repositions the bodies involved. Articulating pain’s dimensions necessarily repositions the sufferer; it is dif-

175. SUSAN SONTAG, REGARDING THE PAIN OF OTHERS 41 (2003).

176. *Id.* at 83.

177. BROOKS, *supra* note 154, at 8.

178. SONTAG, *supra* note 175, at 98. As Sontag notes,

Suffering [is] something more than just suffering, [it is] a kind of transfiguration. It is a view of suffering, of the pain of others, that is rooted in religious thinking, which links pain to sacrifice, sacrifice to exaltation—a view that could not be more alien to a modern sensibility, which regards suffering as something that is a mistake or an accident or a crime. Something to be fixed. Something to be refused. Something that makes one feel powerless.

Id. at 99.

179. *Id.* at 99.

180. HYDE, *supra* note 63, at 192-93.

difficult to say that we are subject to pain when pain itself is one's subject. Expressing pain, then, moves one from passive suffering to active lamenting and onwards. Similarly, if suffering has the potential to destroy, then those who respond to it have the power to create and to cure, repositioning responders as potential caregivers and sufferers as the objects of care.

Law is certainly not a stranger to such empathic positionings or, for that matter, to emotion in general. As Martha Nussbaum concludes, it is impossible to have law without emotion since the rationales behind many legal practices take emotion into account and since our need for law itself is predicated on our "vulnerab[ility] to harm and damage" and thus on the emotions by which we respond to those vulnerabilities.¹⁸¹ Thus, the expression of pain "provides a bridge between the body constructed in legal discourse and others standing, at least for a moment, beyond the reach of law" and therefore "figures prominently as a device through which law builds solidarity."¹⁸²

Hence, when pain is on trial, desire is on trial as well. Legal proceedings in which constructions of pain enable the alleviation or compensation of that pain thus end in a very real human pleasure, and not just for the plaintiff. This pleasure is all the more real because jurors are invited to involve themselves in the act of representation and not merely to spectate. Plaintiffs thus place jurors in a very particular position. Jurors know of their role within the court forum where claims of pain and suffering will be heard and judged. They know that within that forum there awaits a person who claims to be suffering. Confronted with both a narrative of pain expressed and an image of the one who suffers, jurors can and must craft their own representations, choosing the ending they feel is most fitting to this particular story.

2. *Pain Expressed, the Body, and Moral Authority*

The moral authority of pain expressed comes from the manner in which it positions the sufferer and the person to whom suffering is expressed in an interactional dyad. Pain expressed focuses empathic attention more on the self than on the body; it "seems more to refer to the subject while pain seems more the objectification of this suffering."¹⁸³ According to Wittgenstein, it is the suffering individual, and not his pain or the pain-full body part, that confronts us, inducing an interpersonal reaction. As such, the empathic reaction engendered by pain expressed is an ethical response, a consequence of effective nar-

181. MARTHA C. NUSSBAUM, *HIDING FROM HUMANITY: DISGUST, SHAME, AND THE LAW* 6 (2004).

182. Sarat, *supra* note 6, at 5 (discussing HYDE, *supra* note 63).

183. REY, *supra* note 59, at 3.

rative positioning, enabling interpersonal communion, the joining of a healthy body with a body in pain. This empathy allows us to agonize over pain that is experienced by others, to compare it to pain that we ourselves experienced in the past or believe we will experience in the future, to become captivated, horrified, and haunted by artistic representations of pain. Pain expressed renders another's agony empathically appreciable and thus part of the human condition, connecting us one to another.¹⁸⁴ But this bridge between self and other is also profusely "moral."¹⁸⁵ To *not* suffer, to not be pained by the pain of others, would be the reaction of a "moral monster."¹⁸⁶ These moral dimensions are what prompted C.S. Lewis to note in *The Problem of Pain* that pain is the means by which God calls humans to him, so that pain becomes a "Divine Megaphone" summoning us to spiritual attention. To continue this metaphor, pain expressed and the public meaning that it imputes constitutes the prick that wakes us to the presence and needs of others—and inevitably to the hope that is to be found in that interpersonal awareness.

The moralities of this interactional positioning are made possible in the first place by emplotting pain in the body, which in turn necessitates charting its anterior origins, including establishing its authenticity. In addition, the counterpart to bodily constructions of identity is the process of verifying that these identities are accurate and therefore legitimate. As a forum for evaluating two competing constructions of pain expressed, a personal injury trial is a means of assessing a body's identity, of ascertaining who is a legitimate plaintiff, of recognizing the legitimate sufferer as Odysseus was recognized by his scar.

Truth is thus a central concern of legal adjudication in personal injury litigation. Concern for truth is natural; suffering is only meaningful when we may ascertain for ourselves that it is genuine. The authenticity required of expressions of pain in a personal injury trial parallel the moral authority demanded of photographic representations of suffering¹⁸⁷—frozen images of the very same linguistic and metalinguistic cues that assist jurors to evaluate visual evidence of suffering. Bodies necessarily belong in photographs, as they do in law, because their characteristics both cry out for understanding and boundary the understandings that evolve. In both representational forums, pain as expressed *must* be accompanied by actual embodied pain; the difference between the two contexts is that the sufferer asserting pain expressed *must prove* the physical pain at trial, whereas

184. "Because we can think and show empathy, the scope of our pain extends far beyond the here and now of our own bodies." VERTOSICK, *supra* note 70, at 7.

185. REY, *supra* note 59, at 2.

186. SONTAG, *supra* note 175, at 8.

187. *Id.* at 57.

photographic depictions of pain are taken to be authentic until they are proven false. Viewers hate to be betrayed by images; our experience of viewing is wounded when, for example, we realize that “many of the canonical images of early war photography turn out to have been staged, or to have had their subjects tampered with.”¹⁸⁸ The thrill of connecting with another’s suffering is diminished by the discovery that the image was posed, that the suffering is an illusion. Our pleasure in such images vanishes when we learn that they were composed precisely to exploit that pleasure.¹⁸⁹ Instead, we demand an authentic witness; “we want the photographer to be a spy in the house of love and of death, and those being photographed to be unaware of the camera.”¹⁹⁰ Only authentic, unposed, unstrategized images carry moral authority.¹⁹¹

Thus, the adversarial narratives whose merit is litigated in court must rely upon the body to establish the authenticity of pain embodied and the credibility of pain expressed. In so doing, advocates not only assign meaning to a past event, but necessarily construct “a specifically *moral* meaning.”¹⁹² Because even medical evidence of pain embodied attains lay significance only through an explanation of what it is and how it is pain-full, pain expressed becomes the vehicle for pain embodied. A persuasive legal narrative of pain expressed is the preface to all other legal determinations. If an adjudicator is persuaded that pain embodied is present, then it may move on to consider whether the incident in which the plaintiff claims to have incurred the pain is legally actionable, whether the pain is compensable, and who, if anyone, is liable. In a successful personal injury suit, pain expressed is equated with pain embodied; signifier and signified unite to form the sign. Conversely, if the adjudicator determines that the plaintiff is a malingerer and that consequently there is only a pretense of pain embodied, then there is no basis for compensation and the requisite chain of events to establish liability need never be set in motion.

3. *The Interpretive Consequences of Pain Expressed*

A jury verdict for or against the plaintiff is not merely a series of words, but a judgment, a speech act “remaking reality by so ordering it,” “placing bodies on one side or the other of the line.”¹⁹³ Constructing as they do two pain-full realities—the bodily impact of interior

188. *Id.* at 53.

189. Sontag posits that such images “lose all value should the falling soldier turn out to have been performing for [the] camera.” *Id.* at 55.

190. *Id.*

191. *See id.* at 57.

192. BURNS, *supra* note 149, at 161.

193. BROOKS, *supra* note 154, at 56.

sensations upon anterior reality—legal expressions of pain are creative attempts to “make the body mean” at a time when crisis renders semantic potential essential so as to ensure that a suffering body is not lost to meaning altogether.¹⁹⁴ Essentially, then, a successful narrative of pain is, in Barthes’ words, a striptease “which works toward a progressive solution of preliminary enigmas, toward a full prediction of the narrative ‘sentence,’ toward a plenitude of meaning.”¹⁹⁵ Pain is provocative; as in the striptease, the desire to reach the end is the desire to see truth unveiled.

Ultimately, litigation—a narrative occupation—is also a creative one, as it seeks to author a new narrative, to effect change in the status quo in accordance with precedent. As emplotted stages of a narrative in pursuit of progression, the processes of gauging the actuality of pain, feeling for the sufferer, and ultimately compensating pain fulfill the human desire to *do* something and not remain inert and unmoved. Thus, “[t]rials are one of the ways in which we determine and perform our story of justice,” and “[t]he structured telling and contesting of stories that takes place in trials . . . and that lies at the heart of law is an ongoing performance of our story of justice.”¹⁹⁶ Expressions of pain, playing as they do a crucial role in the formation of new legal narratives, therefore fulfill an important sociolegal outlet in that they “provide[] a vehicle of law’s renewal and regeneration since it is in stories that the aspiration to justice is maintained and revitalized in narrative.”¹⁹⁷

This, of course, heavily impacts legal hermeneutics because “[l]egal interpretation takes place in a field of pain and death.”¹⁹⁸ Legal interpretation in the context of personal injury litigation is explicitly designed to recognize and compensate credible allegations of pain caused by actual deeds of violence (even if those deeds were unintentional) in an effective way.¹⁹⁹ While triers of fact do not have the authority to impose pain and suffering directly in the context of personal injury trials as they do when allocating criminal sanctions,

194. *Id.* at 22.

195. *Id.* at 19.

196. Milner S. Ball, *Just Stories*, 12 *CARDOZO STUD. L. & LITERATURE* 37, 41-42 (2000).

197. Austin Sarat, *Narrative Strategy and Death Penalty Advocacy*, 31 *HARV. C.R.-C.L. L. REV.* 353, 356 (1996).

198. COVER, *supra* note 33, at 203.

199. In his essay *Violence and the Word*, Cover explores the relationship between legal interpretation, pain, and violence in the context of criminal law, positing that the acts of judges and the violence inherent in these adjudicative acts compel the “consideration of three characteristics of the interpretive dimension of judicial behavior.” *Id.* at 214. According to Cover, “Legal interpretation is (1) a practical activity, (2) designed to generate credible threats and actual deeds of violence, (3) in an effective way.” *Id.* This same framework can be used to analyze the relationship between legal interpretation and pain in the personal injury trial by slightly modifying the second element of Cover’s definition of legal interpretation.

they do have the authority to recognize pain and suffering as such, to hold that pain and suffering were wrongly forced upon a plaintiff in a legally cognizable and compensable sense, and to compensate that plaintiff accordingly. By holding pain and suffering compensable, an adjudicator in effect states that the conduct which produced the pain and suffering is unjustified and impermissible and thus cannot be condoned. Similarly, by failing to find alleged pain and suffering on the basis that it could not be credibly established, an adjudicator commits a form of violence upon the person of the plaintiff in denying the pain that she claims to embody. If the trier of fact mistakes an authentic sufferer for an inauthentic sufferer, however, such a denial of pain effectively silences an attempted expression of a seemingly inexpressible force and thereby becomes a denial of feeling and human worth as well. Moreover, this denial of pain is a manifestly public denial and serves to label the plaintiff as a malingerer or liar, a moral incompetent unworthy of trust or one willing to violate moral strictures for the prospect of economic gain. The adjudicator does not perceive such a determination as violence, however, since for him there is no pain, and without pain there seemingly is no violence perpetrated by the trier of fact who announces a verdict for the defendant. In this way, “[t]he judicial word is a mandate for the deeds of others.”²⁰⁰

IV. CREATING PAIN-FULL COMPREHENSION THROUGH SOCIAL PRACTICE

A. *Expression, Imagination, and Adjudication*

With an understanding of how a pain-full reality is grounded in and constructed by social practice, we may now consider more precisely the processes whereby pain expressed conveys interpersonal understanding of pain. How exactly is a jury persuaded to believe one party's narrative over that of the opposing party? How does legal practice transform pain expressed into empathic realization of another's pain that may trigger compensation, an activation of the passive wish to banish suffering?

Answering these queries necessitates that we reconsider Scarry's assertion that, to the extent that it can be expressed, interpersonal understanding of pain is conveyed by imagination. This insight, though a critical contribution to the evolution of pain scholarship, can be greatly furthered by acknowledging that the communication of pain is not a particularly imaginative process, for that would intimate that pain itself is private and rooted in inner imaginative experience. Instead, the meaning of pain—and thus its expression—is

200. *Id.* at 216.

grounded in publicly negotiated and imposed meaning, in social practice. Crucially, acknowledging the role of social context also naturally accounts for the formation of empathic engagement. To contextualize this new issue in terms of the prior discussion, we are now addressing by what processes pain expressed fosters the creation of pain as a sign, how the relationship between pain embodied and pain expressed is exploited or made meaningful through social practice.

1. *Imagination*

Imagination, according to Scarry, constitutes a substitute for experience, allowing jurors, who were not privy to the occasion of injury, to resolve a narrative conflict, permitting self-extension into other realms but not through the experiential sentience upon which such engagement is ordinarily premised.²⁰¹ Lawyers then become “imagineers,” to borrow a term from Disney, helping us to construct the external world and enunciate its boundaries.

According to Scarry, “[P]ain and the imagination are each other’s missing intentional counterpart”;²⁰² on the one hand we have pain, the ultimate suffusion of feeling; on the other, imagination, a confrontation with a feeling or sensation that one is unable to experientially access and which it cannot feel. And what imagination creates, pain destroys. Imagination, then, grants access to impalpable pain.

2. *Reconceptualizing Imagination as Expression-Induced Empathy*

Stepping back from Scarry’s commentary on imaginative processes, we see that other constitutive processes precede the imagination, necessitating that we recognize what lies before and beyond imagination if we are to realize fully how pain is constructed and structured. Pain is not only a matter of or for the imagination. Both the intrapersonal and interpersonal meaning of pain are publicly derived. In fact, pain is accessible through the imagination only after it

201. SCARRY, *supra* note 20, at 162. This is necessary because memories of those events are “not *passively* available as an already existing ‘given.’” *Id.* at 167. The legal effort to transform the experience of pain into the activity of working to cure it is an endeavor of the imagination. Legal expressions must strive to objectify pain by making it subjectively (or interpersonally) real (or ascertainable)—to render vivid the inaccessible pain that the plaintiff suffers, to err on the right side of the thin (but legally distinct) line between the morally deficient malingerer and the plaintiff with psychosomatic symptoms—all this while acknowledging the subjective components that threaten to send the entire imaginary process into a tailspin. Summoned by the referentiality of pain, imagination arrives to fulfill our need to invent a world into which to extend ourselves.

202. *Id.* at 169. For Scarry, physical pain “is an intentional state without an intentional object” (we have problematized this notion), while “imagining is an intentional object without an experienceable intentional state.” *Id.* at 164. She posits “that ‘pain’ and ‘imagining’ constitute extreme conditions of, on the one hand, intentionality as a state and, on the other, intentionality as self-objectification” and are the “‘framing events’ within whose boundaries all other perceptual, somatic, and emotional events occur.” *Id.* at 164-65.

is accessible through social practice. Pain creates the need for language, but language creates "pain." To grasp the impropriety of relying on imagination alone, we must account for the gap between the imagining of pain that establishes its presence and the expression-induced empathy that prompts one to progress from imagining to interpersonal engagement and, eventually, response. As we shall see, to transition from one to the other requires the vehicle of social practice.

(a) How Pain is Different from Other Imaginings

In considering the relationship of pain to imagination, it is readily apparent that the imagining of pain is different from other imaginings in that we accord it a type of material reality. Unless we suffer from anhidrosis,²⁰³ we come to know pain from experiencing it. Pain can be myth, but not mythic; its experience can be legendary, but not merely a legend. In addition, in order for something to be imaginable as pain, it must find some link in our repertoire of direct and indirect experience. We imagine pain knowing that our imaginings might become tangible at any time; we realize through shared cultural knowledge that we may soon have to apply our pain-full imaginings to the material realities of our own experience or to that of another. Our ability to imagine pain is an evolved coping mechanism, allowing us to play with "what if" before the "if" becomes "is." This is similar to our imaginings of death; we know that we must experience it one day and likely know others who have. Thus we imagine it fearfully, realizing that we know not when it will become real for us or our loved ones.

This potential to "become real" at any time necessitates a different correspondence between fiction and fact. To illustrate, we know that unicorns are creatures of fairy tale and we know that no serious adult is going to ask us to find one because we know from our social practice that unicorns do not actually exist. In contrast, though we may not have encountered the pain of being in a car hit by a tractor trailer, such experiences *are* part of our social practice in that we see such accidents on the road or watch reports of them on the evening news. Through such experiences we realize that we or someone we know could be involved in them, inviting us to place ourselves in the bandages of one who has. Thus, we accord this tragic experience a reality that we do not grant to the unicorn, since there but for the grace of God go we. As Nussbaum states, "[C]ompassion typically involves the thought that we ourselves are vulnerable in similar ways," thereby "connect[ing] the suffering person to the sympathizer's own

203. Anhidrosis is a rare congenital disorder affecting nerve endings that renders those who have it insensitive to pain. See Philippe Sanseau & Karen Lewis, *Genetics of Pain*, in PAIN: CURRENT UNDERSTANDING, EMERGING THERAPIES, AND NOVEL APPROACHES TO DRUG DISCOVERY 365, 368 (Chas Bountra et al. eds., 2003).

possibilities and vulnerabilities.”²⁰⁴ Finally, the imagining of pain is also different in that when we place ourselves in a sufferer’s shoes, we attempt to access not an image but an experience and aspire to connect to the physical through the expressionistic. This reverses the communicable relation of pain expressed to pain embodied in which the expressionistic allows us to connect to the physical.

(b) *What Imagination Lacks*

Because pain, unlike other imaginings, resounds in our social practice, imagination alone is ill-equipped to handle it. As the fanciful connotations of “imaginary” imply, imagination is not necessarily anchored in social practice or the life world. The power of imagination lies in the fact that it expands the horizons of our conscious awareness, enabling us to apprehend so much more than is apparent from our immediate experience. In addition, imagination, by its nature, is ungrounded; there is no requirement that our imaginings be tethered to any asserted reality. Thus, as in expressing pain, there is always a profound gap between our ability to imagine and our ability to reconstruct what is imagined for another. Language hampers our ability to communicate to another exactly what we are imagining and so we must be satisfied with approximation. Therefore, imagination—like language—is incomplete. We cannot separate imagination into imagination embodied and imagination expressed because the very nature of an imaginary construct means that it is disembodied. Thus we need something to tie our imaginings into a specific context, to boundary them in some way so that we may determine whether an imagined construction is reasonable or appropriate—the critical question in the personal injury trial.

We all have a sense of whether an imagined construction is “proper” in a given situation—a sense formed and *informed* by our cultural memory, which serves an experiential warehouse in which we may comparison shop to determine if something is the “real deal.” This sense is informed by social practice, however, not by imagination. When imagined pain is situated within a narrative context, for example, it is the social practice in which this narrative context is embedded that triggers cultural memory, allowing us to evaluate the pain alongside other recollected (contextualized) pain-full images to which we have been directly or indirectly exposed. Thus, we need social practice to organize our imaginings so that they may resound within us, enabling us to attain a level of familiarity and comfort with another’s claims of pain.

Moreover, our imaginings of pain require a structure for purposes

204. NUSSBAUM, *supra* note 181, at 50.

of contextualization, and this structure can be derived only from expressions that draw upon ways of meaning-making familiar to our social practice. Unlike the unicorn, which we may invent on impulse, we need detail to conjure pain. Thus, attempts to access another's pain are inherently bound up with and bounded by the circumstances of which that pain is a consequence. Pain is always contextualized; Scarry acknowledges that "inferences about the nature of the activity that produced the objects will follow from and be limited by the attributes of the chosen objects."²⁰⁵

Yet this is not the whole picture; it is not the actual attributes of objects that delimit but the (publicly derived) meanings of those attributes. Without a socially-defined meaning, the attributes themselves lack significance. Stating that we must know the context before imagining the pain simply means that our prior experiences with the external world unquestionably impact our construction of the imagined interior state of another. Just as we, as sufferers, must extend ourselves into the world to express our painful states, so must we, as interpreters of suffering, take the external world with us on our plunge into the dark, agonizing abyss of another's interior. We call forth memories of our own pain when attempting to extend ourselves into another's suffering, invoking past ties to external reality which boundary our current experiences.²⁰⁶ When others report that they find another's expressions of pain incredible, this simply means that that particular experience of pain is inaccessible in their social practice as it is currently constructed, thus rendering it imaginatively unavailable since it has no accessible parallel in the life world.

Therefore, as Wittgenstein argues, the interior states of the self are interdependent upon social practices in the life world. And the life world has intrapersonal repercussions as well; an inability to extend oneself into another's pain means that pain is interpersonally unrecognizable and therefore unreal, truly a matter of doubt. We can effectively imagine only so far as our social, experiential tether stretches. Scarry asserts that imagination is "the ground of last resort"; when the "world fails to provide an object, the imagination is there, almost on an emergency stand-by basis, as a last resource for the generation of objects."²⁰⁷ Moreover, it "seems to provide a standard for judging the acceptability of objects in the naturally given world."²⁰⁸ Here again, however, it is social practice and not imagination that is the "ground of last resort"; objects cannot be generated unless they are accorded social meaning that cannot be evolved

205. SCARRY, *supra* note 20, at 163.

206. *Id.*

207. *Id.* at 166.

208. *Id.* at 168.

through private imaginings. It is social practice, not imagination, that provides the baseline comparison standard.

B. *The Narrative Contribution*

1. *What Narrative Contributes to Imagination*

Having seen what imagination lacks as compared to social practice as a grounding site for constructions of pain, we can explore what the most familiar and highly structured form of expressive social practice—language—adds to imaginative attempts to access another's pain. The narrative context is necessary to make pain both real and meaningful. Narratives are the "trajectories plotted upon material reality by our imagination,"²⁰⁹ structuring the communication of these pain-full constructs so as to enable the empathic engagement between jury and plaintiff.

Narrative processes entail the formation of an empathic, not sympathetic, connection between jury and plaintiff. Though it denotes an affinity or accord,²¹⁰ a sympathetic identification does not *penetrate* as deeply as an empathic connection must, and it is not reciprocal in the sense of compelling a response. In contrast, empathy involves an identification that so intensely resounds in social practice that it invites the projection of the self into another's experience.²¹¹

2. *The Trajectory of Pain*

"Feeling" another's pain, the personalization of pain's full implications as construed by and through social practice, is not simply the result of throwing some empathic switch. Rather, it may be seen as a structural form of narrative continuity—a temporal continuum or trajectory of realization, the extremes of which are both states of pain. At one end of the trajectory, one is confronted with an expression that another is suffering from pain. Progress along the trajectory is made by trying to access or imagine this pain. Halfway along the continuum, if this expression indeed resonates within the nonsufferer's social practice, pain becomes comprehensible, and one may accept that the other is indeed in pain. But this realization is merely the halfway point; reaching the other end requires not only understanding but engagement.

If the utmost extremity of the continuum is reached, then one not only realizes that another is in pain but empathically recognizes that pain to such a degree that she herself is in pain from the need to react and respond to it. Here, another's physical pain has become so

209. COVER, *supra* note 33, at 5.

210. WEBSTER'S NEW WORLD DICTIONARY 1356 (3d College ed. 1994).

211. *Id.* at 445.

real that it induces a corresponding, yet very different, pain in one's self. This responsive pain is not a matter of bodily sensation but of relational identification and self-projection. It is also pain with an object, because empathy always is a response to the other, a projection of the self into another. At this state—when empathy is achieved—pain becomes an *emotion*. Its status as an emotion necessitates that it acquire an object since “emotions involve a focus on an intentional object and evaluative beliefs about that object.”²¹² Empathic pain takes as the intentional object of its focus the body of the sufferer and evaluates that object as being deserving of empathy and ultimately of compensation. We feel empathic pain *for* someone, just as we may express our fear, hatred, or loathing *of* something; realize that we are angry *with* someone; or become hungry or desirous *for* something.

To cure this empathic pain, the empathic sufferer must actually reach out to the suffering object of its empathy to communicate recognition of this pain and most likely to attempt to alleviate it as well. This is the pragmatic consequence of the narrative construction of the recipient of pain expressed as a potential care provider. Empathic pain is relieved only by the knowledge that one has done all one can, in which case pain might even turn into pleasure. This object-fulfillment is analogous to that which, according to Scarry, occurs from the satisfaction of other interior states besides pain.²¹³

This empathic continuum runs parallel to another, more obvious narrative continuum discussed earlier, an emplotted trajectory of pain and its experience comprised of a succession of occurrences temporally ordered so as to establish a legally significant relationship between them.²¹⁴ This continuum is the proffered explanation of the physical circumstances which caused the injury, the viability of which must be tied to the experience of pain for the expression of pain to flourish. It is this continuum which establishes the triangle between the evidence of pain (pain expressed), the object that caused the pain, and the agent who wielded that object to produce that pain.²¹⁵ This chronology captures the invocation of an asserted narra-

212. NUSSBAUM, *supra* note 181, at 31.

213. As Scarry states, “A state of consciousness other than pain—such as hunger or desire—will, if deprived of its object, begin to approach the neighborhood of pain, as in acute unsatisfied hunger or prolonged, objectless longing; conversely, when such a state is given an object, it is itself experienced as a pleasurable and self-eliminating (or more precisely, pleasurable because self-eliminating) physical occurrence.” SCARRY, *supra* note 20, at 166.

214. See *supra* notes 157-61 and accompanying text.

215. Scarry describes this connection in terms of imagination and creativity instead of narrative, breaking it down into three “overarching statements” of creation or “making.” *Id.* at 280. First, creating as a phenomenon “resides in and arises out of the framing intentional relation between physical pain on the one hand and imagined objects on the other, a framing relation that as it enters the visible world from the privacy of the human interior becomes work and its worked object.” *Id.* Second, this “now freestanding made object [the weapon or tool] is a projection of the live body that itself reciprocates the live body,” which

tive positioning of parties into the roles so meaningful to a legal chronology. Our familiarity with legal practice and trials, obtained through direct experience and/or mediated experiences through television or print mediums, informs us that these narrative roles exist and that they are pivotal even before we can posit who or what may fill them. Thus, principle tenets of social practice, such as legal theories of culpability, must be established prior to the narrative positioning of actual parties and objects, creating a chronology in which a certain wound is inflicted by a particular object guided by an identified agent. Only after the jury has accepted the overlay of a specified legal relationship upon a chronology of events—and thus accepted the presence of pain, the culpability for pain, and the compensability of that pain—may the imaginary constructions be embodied in actual material entities and the narrative of agency come alive. Seen another way, legal practices—rules of culpability, courtroom actors and their roles—are signs within a sign system of personal injury litigation. The specific assertion of embodied pain is but another sign that, if successfully constructed, effects an interpretation that activates all of that code's potential.

It is the goal of the plaintiff's counsel to construct such continuums, to persuade jurors that another is suffering pain, that something can and must be done about that pain, and that another person should accept responsibility for and compensate that pain. One might say that, although pain usually has no object, the task of law is not merely to express pain, but to construct for pain an appropriate, empathic object. To these ends, law must seize upon the distinction between a state of being and an object, where the importance of the object stems from its ability to eliminate the state of being.²¹⁶ Here is where pain expressed enters into the picture; it is the key object-making component. This explains why the experience of pain is first separated from the plaintiff's body so that it might be recognized in its own right, then reunited with that body to induce empathy, which makes the suffering body an object and creates in turn a corresponding empathic pain. Through pain expressed, bodies as analytic *objects* are constructed before a suffering *person* as an empathic vessel is produced and proffered to the jury as the product of that inter-

“regardless of the peculiarities of the object's size, shape, or color, and regardless of the ground on which it is broken open . . . will be found to contain within its interior a material record of the nature of human sentience out of which it in turn derives its power to act on sentience and recreate it.” *Id.* Thus, ladder as tool becomes ladder as weapon, tied into the legal chronology with the wound and the wielder, to the ends of culpability and compensability. Third and finally, “the created object itself [must] take[] two different forms, the imagined object and the materialized object: that is, ‘making’ entails the two conceptually distinct stages of ‘making-up’ and ‘making-real,’ ” in that “the imagination first ‘makes a fictional object’ and then ‘makes a fictional object into a nonfictional object.’ ” *Id.*

216. *Id.* at 167.

personal state to convey the potential for alleviating or eliminating the painful condition.²¹⁷ Once the existence of pain is established, the fit between the pain and its empathic object establishes the “justice” of a particular legal solution.

Legal constructions that successfully communicate pain—instances where signifier is united with signified to form sign—may be confident of earning a favorable response. Expression is never without communicative purpose, and in this context responses to legal expressions of pain are so indelibly “natural” and “humane”—so ingrained in the moralities accessible through social practice—that they seem implied. Scarry, too, posits that the very thought of seeing another in pain entails wishing that person to be relieved of that pain.²¹⁸

But while Scarry binds this wish to the imagination of pain,²¹⁹ we have seen that this wish is dependent upon social practice, since imagination is not inherently communicative, and that it is bounded by the narrative context in which pain is constructed. After all, this curative urge is not inherent in imagination but is the logical result of a perceived, encultured moral obligation triggered by effective narrative structure and continuity. We know this because this trigger is contextually specific and is not present in all pain-full instances. One may imagine pain yet not wish it gone; we may feel that the sufferer deserves to feel the same pain he inflicted on others. And pain is sometimes expressed to effect pleasure, as the writings of the Marquis de Sade and many forms of media attest.

Martha Nussbaum, too, suggests that this wish fulfillment is triggered by explicit narrative elements. In discussing the role of compassion in criminal sentencing, Nussbaum identifies numerous factors related to the formation of this merciful emotion. First, the exercise of compassion “necessitates the thought that another person is undergoing something seriously bad.”²²⁰ Nussbaum emphasizes that, in evaluating another’s situation, we assume the position of “judicious spectator” and thus “withhold compassion from people if we think that they are just ‘spoiled,’ moaning and groaning over something that is not really so bad.”²²¹ We must also believe “that the per-

217. *Id.* at 168.

218. The perception of pain is never a static perception, but always implies a narrative evolution, a transformation from painful to painless. It is “not just a perception of an actuality (the second person’s pain) but an alteration of that actuality (for embedded in the perception is the sorrow that it is so, the wish that it were otherwise).” *Id.* at 289.

219. One cannot see pain without wishing it gone, and so the perception and the response to that perception are bound together, again through the cause-and-effect potential of narrative. “[I]f the person does not perceive the distress, neither will he wish it gone; conversely, if he does not wish it gone, he cannot have perceived the pain itself.” *Id.* at 290.

220. NUSSBAUM, *supra* note 181, at 49.

221. *Id.* at 50.

son is not fully to blame for his or her plight.”²²² Finally, it is helpful if we appraise the sufferer for whom we feel compassion as being similar in some sense to ourselves, so that “we put ourselves in the other person’s own shoes.”²²³ This identification is likely related to the formation of a “eudaimonistic judgment,” the “thought that the person in question is important to the person who has the emotion,” requiring that we care for the sufferer.²²⁴

3. *Narrative Positioning and Power*

All of these social practice “triggers” are established by effective narrative positioning. Therefore, once empathy has been achieved, social practice tells us that certain mandatory considerations follow: the recognition of another’s culpability and material responsibility for that pain, damages for suffering, payment of medical expenses. It is a lawyer’s job to create a fit between pain as sign and one or more of these compensatory methods. Lawyers hold in their hands the reins of narrative construction—emplotment, positioning, and invocation of moral authority—and if they can bridle the trier of fact, may persuade it to hurdle over a succession of continual realizations, traveling along the continuums discussed previously, until it arrives at the appropriate empathic response. But the jury, as trier of fact, is actually the entity that must choose which interpretive project to accept or must negotiate between the two.

The ability to narratively construct another’s pain is a form of political power, just as the ability to effectively construct the needs and goals of others is the key to both successful politics and the successful encoding of perceptions into law. Adjudication is also an exercise of political power, since it necessitates the wielding of descriptive and actualizing powers. The trier of fact responds differently to the exercise of adjudicative power according to the legal context in which it is asked to wield it. Issues of responsibility present in capital sentencing proceedings, for instance, do not exist in the context of civil litigation, which does not involve the literal choice between life and death and in which jury determinations of culpability allocate resources and do not take lives. Nonetheless, the jury’s role in a personal injury trial cannot be underemphasized. The jury is at once a politically powerful and vulnerable entity; while its power is granted by the mantle of jury duty, its weaknesses emerge by virtue of its human composition, since an innately human “instability of perception” renders all jurors “susceptib[le] to the prevailing description.”²²⁵ In civil personal

222. *Id.*

223. *Id.*

224. *Id.*

225. SCARRY, *supra* note 20, at 279.

injury litigation, the jury's power to arrive at and enforce a particular description of another's self is ultimately an act of construction.

V. CONCLUSION

In this Article, we have encountered two ideal models of pain. The first, which purports to see pain as a unitary concept that is entirely physical, has been adopted by the law in principal but not in practice, and this model is the same model that other fields such as critical health psychology have criticized. According to the unitary model of pain, pain as an embodied physical sensation is meaningful in its embodiment and thus is subjective or "private," ascertainable only by the sufferer. This model's dimensions lend themselves best to descriptive dichotomies such as presence or absence and physical or mental, not to myriad semantic interpretations. Favored methods of communicating meaning are those that yield tangible evidence of a pain-full condition, including medical technologies such as x-rays and testing that objectify pain through its associated bodily causes. Indeed, the communication of pain is conceived of through the metaphor of "translation," in which one attempts to translate or distill pain as a physical experience into language, with unsatisfactory results. Thus, this model is quick to hone in on the insurmountable gap between experience and expression, labeling all communicative constructions of physical pain as incomplete and inferior constructions and paying little heed to the public meaning of the "private" experience. Taking a page from Wittgenstein,²²⁶ the attractiveness of the unitary pain model stems perhaps from the fact that it grants to pain the attributes of a physical object, albeit one that is "privately" acquired and embodied, seeing it as something that results from a predictable cause and has certain ascertainable characteristics. Such a model necessarily focuses on the "private" meaning of pain, since it posits that the meaning of pain comes from pain itself and not from the sufferer. Meaning is therefore regarded as something that springs from pain's very presence, instead of that which is co-produced or negotiated. Pain is a state and not a construct.

Such a model, however, greatly diminishes the power of pain as an expressive entity and unnecessarily excludes the cast of characters in and for which pain is played. There is no real place for moral identity and interactive positioning in a dichotomy which reduces the potential for and implications of being and nonbeing to two opposite polar states. Because empathy is a largely a product of interactionally constitutive processes and not of presence or absence, this model

226. Recall Wittgenstein's theory that the illusion that we privately "feel" pain comes from the confusion of language-games, the incorrect application of linguistic rules relating to physical objects to sensations. See *supra* Part II.B.2.

reduces interpersonal identification to inauthentic, simplistic terms. In addition, it fails to account for how pain's presence and contours are apprehended—how pain comes to be a state, how we come to credit claims of pain. Such a conceptualization robs essential interpersonal connections of their spark, effectively stating that empathy is fostered by objectively ascertainable evidence.

We have also encountered, however, another conceptualization of pain as a dual construct comprised of a physical sensation and an expressionistic construct that are both made meaningful through processes of contestation and negotiation informed by social practice. This revisionary model posits that it is the expressionistic dimensions of pain, not the experiential, that is the primary source of meaning, enabling the consideration of a plurality of presences and effects. Pain is seen as a sign enmeshed in a social system of sign relations, one that demands a complex response that is simultaneously logical and instinctual, rational and intuitive. Meaning does not evolve from pain itself, but from pain's embeddedness in social practice. Such a model also acknowledges that all forms of evidence—even those that are realizable through sight and sound or those enabled by medical technologies—evolve meaning and are assigned particularized meaning through social, not private, practices of sense-making. Thus, this model focuses on how public meaning is assigned and on deconstructing those processes that structure meaning—such as boundarying, positioning, and ordering—as well as on what informs these structural choices.

From this vantage point, constructing pain is an inherently subjective process, grounded in social practice and informed by an experiential context, but one open to endless constructive and perceptual permutations. Pain as a dual construct anticipates a language-game, encouraging both the sufferer and the one to whom suffering is expressed to take advantage of its flexible layerings. It also facilitates the evolution of moral and interactional identities, allowing communicative participants to construct pain and to construct themselves in relation to pain. In addition, it accounts for and incorporates the idea of evolution—how pain changes and how we can both adapt to and alter pain. Not surprisingly, then, this perspective is uniquely equipped to exploit expressive potentials, to mold and meld that which simultaneously touches both the head and the heart.

If pain evolves through interpretation, then conscious attention must be paid to how we assist others to draw the conclusions we wish them to draw. Pain as a dual construct awakens us to these potentials. The least we can do for the sufferer is to see her pain not as an unascertainable condition locked away from our understanding in her physical body but as a condition that we can publicly recognize, probe, and perhaps cure. Significantly, the process of curing requires

a willingness to construct—which again demonstrates the propriety of pain as a dual construct.

And so we come full circle, returning once again to the mythic scene in which the disguised Odysseus is recognized by his former nurse, Euryclea, and to the parallels between the power of that recognition and the processes by which we are awakened to an empathic connection that moves us to not only accord another the status of an authentic sufferer but also to assume a caring role in which we attempt to somehow ameliorate that pain. Recognizing the communicative potential of pain and suffering by acting on empathy is a necessary first step to not only acknowledging the authenticity of these experiences but to respecting the human needs and relationships that underlie that empathy. An honest response is the least we owe to others on whose experiences we sit in judgment and offers the only means by which to recognize and reward those who, like Odysseus, seek to bring their burdens home, be accorded their due, and lay their suffering to rest.