

# It's a Wonderful Life: The Case for Hedonic Damages in Wrongful Death Cases

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## I. INTRODUCTION

What is a human life worth? The obvious answer, echoed in literature throughout the ages,<sup>1</sup> is that life is priceless. Ask people how much money they would demand to surrender their lives and the replies would be predictable and uniform. No amount would suffice.

In practical application, this view of life as priceless is reflected in the monumental efforts society is willing to undertake to save identifiable persons from immediate peril. Without hesitation, we marshal all available resources to save the coal miners trapped in a collapsed mine shaft or the shipwreck survivors lost at sea. Consider the paradigmatic plight of Jessica McClure, the little girl who became trapped in the Texas water well in 1987. Extraordinary rescue efforts were undertaken to rescue her, at great cost.<sup>2</sup> It is doubtful, however, that anyone was overheard suggesting that Jessica be left to die because the attempts to rescue her were too costly. In that situation, society deemed Jessica's life to be priceless.<sup>3</sup>

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1 "So precious life is! Even to the old/The hours are as a miser's coins . . . ." T. ALDRICH, *Broken Music*, 2 THE WRITINGS OF THOMAS BAILEY ALDRICH 90 (1907) (Ponkapog ed.); "There's no Wealth but life." J. RUSKIN, UNTO THIS LAST § 77 (1979); "Someone will give away all he has to save his life." *Job* 2:4 (New Jerusalem); "The loss of honest and industrious men's lives cannot be valued at any price." Angel, *Federal Court OKs "Hedonic" Damages for Death of Boy*, L.A. Daily J., Sept. 15, 1987, at 1, col. 2 (quoting William Bradford writing about the losses suffered during the crossing of the Mayflower).

2 No cost figures for the rescue are available, but it took 400 workers with heavy equipment 58 hours to drill a parallel shaft through hard rock to extricate Jessica. For an account of the rescue, see Applebome, *Toddler Is Rescued After 2 1/2 Days in a Texas Well*, N.Y. Times, Oct. 17, 1987, at 1, col. 2.

3 Where the issue becomes one of saving some number of abstract lives in the future, rather than an immediate decision to save a known name and face, the sky is no longer the limit. Suppose, for example, that in the wake of the Jessica McClure incident the United States Department of Agriculture begins considering whether to require farmers to install grates on top of all water wells. If society truly believes life is priceless, the economic burden of requiring the grates should be irrelevant. But, of course, the burden is not irrelevant. In a world of finite resources, rational decisions have to be made regarding how those resources should be distributed.

This is reflected quite dramatically in the way the federal government decides whether to impose safety regulations on industries. Under a 1981 Reagan Administration executive order, federal agencies are required to weigh the cost of implementing any new safety regulation against the benefits to be derived in terms of the number of deaths the regulation can be expected to prevent. Exec. Order No. 12,291, 3 C.F.R. 127 (1982), *reprinted in* 5 U.S.C. § 601 (1988). To accomplish this, agencies are required to place a value on human life. The result in many instances is that life becomes less precious. Federal agency cost-benefit analysis has resulted in the value of a human life

Suppose, however, that Jessica McClure had died and that her death was attributable to some act of negligence by a party with the wherewithal to pay a tort judgment. No longer would her life be viewed as priceless. To the contrary, a wrongful death suit brought by Jessica's survivors historically would result in a judicial determination that Jessica's life had little or no worth. This is because the traditional standard for measuring damages in wrongful death actions is the pecuniary loss rule, which looks at the monetary value of benefits the decedent could have been expected to contribute to his<sup>4</sup> survivors had he lived. For a child, this is usually calculated by determining the pecuniary benefits the child would have contributed to the family minus the costs of

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being placed as low as \$70,000. Lavelle, *Placing a Price on Human Life*, Nat'l L.J., Oct. 10, 1988, at 28, col. 2 (\$70,000 value assigned by Consumer Product Safety Commission).

The reason for distinguishing between preventing the loss of statistical lives and rescuing identifiable persons is complex. Charles Fried, in a thoughtful 1969 article, discussed the economic perspective that immediate peril should be put on an exact parity with statistical peril for purposes of investing in life saving. Fried, *The Value of Life*, 82 HARV. L. REV. 1415 (1969). Rational economic decisions dictate that society should undertake individual rescue efforts only where consistent with the theory of maximizing society's welfare. Resources should not be spent on rescuing one life if doing so takes away resources which could be used to prevent the loss of a greater number of lives. Fried asserts that society's preference for rescuing persons in immediate peril can be harmonized with this maximizing strategy in most situations. *Id.* at 1419. However, he recognizes that this preference persists even where the rescue is contrary to welfare maximization. *Id.* at 1428.

One plausible explanation for this is what Fried calls the "personalist argument," which "holds that some preference for known over statistical lives is justified because it is with known lives that we enter into relations of love and friendship, while to the abstract statistical lives we stand in relations defined by justice and fairness." *Id.* at 1428-29. The fairness dictate of maximizing society's welfare becomes overshadowed when we are dealing with persons with whom we have concrete, emotional contacts. Fried's other explanation is that the circumstance of facing certain, imminent death is a special kind of suffering, one that is appropriate for society to consider in its allocation of resources. *Id.* at 1433-37.

Media accounts of life and death struggles extend the impact of this phenomenon considerably. Where we lack the personal relation of love and friendship with the victim, the media nevertheless allows us, indeed commands us, to become vicarious mothers and fathers to suffering victims everywhere. They do not even have to be human. Consider the recent whale rescue off the coast of Barrow, Alaska. Thousands of whales are slaughtered each year for commercial purposes, generating the ire of only a small segment of environmentally minded people. Nevertheless, a Cable News Network call-in survey showed that 89 percent of the 7,500 respondents believed the whale rescue effort was worth the one million dollar cost. Stanfield, *Nature's Ways*, Nat'l J. Inc., Nov. 12, 1988, at 2912.

4 When practicable, gender-neutral language is used throughout this article. Occasionally, however, it is necessary to use single-sex pronouns such as "his" and "her." Such pronouns are intended to be generic.

raising the child.<sup>5</sup> Since child-raising costs usually far outdistance pecuniary benefits bestowed by a child, the result is that children usually have a negative net worth.<sup>6</sup>

Under the pecuniary loss rule, followed in almost every state, life has no intrinsic value—no value per se. This seems to be a peculiar result in a society that refuses, at least for some purposes, to place any price tag on human life. Of course, an obvious distinction can be drawn between the cost of saving a life not yet lost and allowing tort recovery for one that is gone. Since no amount of money can bring the decedent back, she cannot be compensated in any meaningful way for the loss of her life.<sup>7</sup> However, while this may justify a difference in the monetary values society attaches to lives that can be saved and those already lost, it does not support the traditional legal notion that a lost life has no cognizable value apart from the lost economic benefits the decedent would have conferred upon her survivors.

The primary thesis of this Article is that life *does* have an independent value. There is value to working at one's chosen occupation, to loving, to laughing, to walking on the beach, to watching the sun set. Part II defends the thesis that recovery for this value, popularly known as "hedonic damages,"<sup>8</sup> should be recognized<sup>9</sup> as an element of damages in wrongful death act-

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5 See generally 3 M. MINZER, J. NATES, C. KIMBALL, D. AXELROD & R. GOLDSTEIN, DAMAGES IN TORT ACTIONS § 24.00 (1988) [hereinafter MINZER]. Some jurisdictions have alleviated the harshness of the pecuniary loss rule in child death cases by extending the concept of pecuniary loss to include loss of companionship and society (see *infra* note 32) or by expressly recognizing non-economic damages for such losses. See generally *id.* at § 24.20.

6 "To limit damages for the death of a child to the monetary value of the services which the next of kin could reasonably have expected to receive during his minority less the reasonable expense of maintaining and educating him stamps almost all modern children as worthless in the eyes of the law. In fact, if the rule was literally followed, the average child would have a negative worth." *Selders v. Armentrout*, 190 Neb. 275, 279, 207 N.W.2d 686, 688-89 (1973).

7 For a discussion of how money damages for the lost value of life relate to the compensatory function of tort law, see *infra* notes 34-41 and accompanying text.

8 "Hedonic damages" is the term commonly used to describe the damages which are the subject of this article. While that label is used occasionally herein, the author prefers the terms "value of lost life," "lost life damages," or "damages for the intrinsic value of life," since they avoid the possible negative association of hedonic damages with "hedonism," the Epicurean philosophy that pleasure is the sole good in life.

9 This article is about the relatively new concept of awarding damages for the value of lost life where a tortfeasor's conduct has caused the death of the tort victim. This concept is distinct from the more firmly established practice of allowing damages for non-fatal injuries that infringe upon plaintiff's ability to participate in the amenities of life. The latter are usually referred to as damages for the "lost enjoyment of life." See generally MINZER, *supra* note 5, at §§ 8.00-8.39 (1989); Hermes, *Loss of Enjoyment of*

ions.<sup>10</sup> Part III discusses the extent to which such recoveries are or may be recognized under current law. Part IV evaluates how the value of lost life should be determined. Part V, the conclusion, briefly summarizes the Article.

## II. RECOGNIZING THE VALUE OF LOST LIFE

### A. *The Perverse Pecuniary Loss Rule*

Given the general maxim that tort victims are entitled to recover damages for all injuries caused by a tortfeasor,<sup>11</sup> oppo-

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*Life—Duplication of Damages Versus Full Compensation*, 63 N.D.L. REV. 561 (1987); Note, *Loss of Enjoyment of Life as a Separate Element of Damages*, 12 PAC. L.J. 965 (1981); Annotation, *Loss of Enjoyment of Life as a Distinct Element or Factor in Awarding Damages for Bodily Injury*, 34 A.L.R. 4th 293 (1984).

Lost enjoyment of life damages in non-death cases are limited only by the range of human activities. See, e.g., *Wells v. Colorado College*, 478 F.2d 158, 160-62 (10th Cir. 1973) (skiing); *Early v. United States*, 474 F.2d 756, 758 (9th Cir. 1973) (loss of ability to enjoy sex); *Titus v. Smith*, 330 F. Supp. 1192, 1194 (E.D. Pa. 1970) (painting); *Frankel v. United States*, 321 F. Supp. 1331, 1339 (E.D. Pa. 1970) (inability to engage in normal family activities), *aff'd*, 466 F.2d 1226 (3d Cir. 1972); *Gowdy v. United States*, 271 F. Supp. 733, 751 (W.D. Mich. 1967) (reading), *rev'd on other grounds*, 412 F.2d 525 (6th Cir. 1969); *Wry v. Dial*, 18 Ariz. App. 503, 506, 503 P.2d 979, 982 (1972) (hiking); *Fruit v. Schreiner*, 502 P.2d 133, 145 (Alaska 1972) (hunting, fishing); *Packard v. Whitten*, 274 A.2d 169, 177 (Me. 1971) (dancing); *Bailey v. Bradford*, 247 Ark. 1048, 1049, 449 S.W.2d 180 (1970) (cheerleading); *Scally v. W.T. Garratt & Co.*, 11 Cal. App. 138, 142, 104 P. 325, 327 (1909) (inability to pursue musical studies); *Powell v. Hegney*, 239 So. 2d 599 (Fla. Dist. Ct. App. 1970) (swimming, bowling); *Collier v. Fireman's Fund Ins. Co.*, 225 So. 2d 9, 10 (La. Ct. App. 1969) (horseback riding); *Conchola v. Kraft*, 575 S.W.2d 792, 795 (Mo. Ct. App. 1978) (basketball).

Most jurisdictions permit such damages, but disagree as to whether they should be awarded only as a component of damages for pain and suffering or permanent impairment, or whether they constitute an independent element of damages. Compare *Poyzer v. McGraw*, 360 N.W.2d 748, 753 (Iowa 1985) (separate awards for lost enjoyment of life and pain and suffering are duplicative) and *Blodgett v. Olympic Sav. & Loan Ass'n*, 32 Wash. App. 116, 125, 646 P.2d 139, 146 (1982) (error to give separate jury instruction on lost enjoyment of life damages) and *Huff v. Tracy*, 57 Cal. App. 3d 939, 944, 129 Cal. Rptr. 551, 553 (1976) (loss of enjoyment of life not a separate element of damages) with *Thompson v. Nat'l R.R. Passenger Corp.*, 621 F.2d 814, 824 (6th Cir. 1980) (pain and suffering, permanent impairment, and lost enjoyment of life are separate elements of damages) and *Mariner v. Marsden*, 610 P.2d 6, 12 (Wyo. 1980) (allowing lost enjoyment of life as a separate element of damages) and *Swiler v. Baker's Super Mkt., Inc.*, 203 Neb. 183, 187-88, 277 N.W.2d 697, 700 (1979) (upholding jury instruction treating lost enjoyment of life as a separate element of damages).

10 In addition to wrongful death statutes, most states have survival statutes which provide for the continuation of claims the decedent would have been able to bring had he lived. See *infra* notes 145-48 and accompanying text for a discussion of why survival statutes do not constitute an appropriate vehicle for recovering damages for the value of lost life.

11 "One injured by the tort of another is entitled to recover damages from the other for all harm, past, present and prospective, legally caused by the tort." RESTATE-

nents of damages for the value of lost life logically should bear the burden of establishing why such damages are improper. The historical development of wrongful death law, however, weighs heavily against the award of lost life damages.

At common law, death actions were not recognized at all, stemming from Lord Ellenborough's infamous dictum in *Baker v. Bolton*<sup>12</sup> that "[i]n a civil court, the death of a human being could not be complained of as an injury."<sup>13</sup> Lord Ellenborough offered neither reasoning nor authority for this pronouncement; according to Professor Malone, it lacked historical support at the time.<sup>14</sup> Nevertheless, the dictum "became a magical intoned incantation recited by rote, without any critical examination, by hundreds of decisions in the various courts throughout the length and breadth of the United States."<sup>15</sup>

In 1846, the English Parliament passed what became known as Lord Campbell's Act,<sup>16</sup> which created a right of action for wrongful death on behalf of the decedent's immediate family. The adoption of Lord Campbell's Act in America was as sweeping as the earlier transformation of the law wrought by *Baker v. Bolton*.<sup>17</sup> All American states adopted the Act in some form. Lord Campbell's Act broadly empowered juries to award survivors "such damages as they may think proportioned to the injury,"<sup>18</sup> yet courts in both England and America interpreted it to authorize recovery of the survivors' pecuniary losses only.<sup>19</sup>

This is the law in America today. Most jurisdictions, often

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MENT (SECOND) OF TORTS § 910 (1979).

12 1 Campbell 493, 170 Eng. Rep. 1033 (1808).

13 *Id.*

14 Malone, *The Genesis of Wrongful Death*, 17 STAN. L. REV. 1043, 1067 (1965).

15 1 S. SPEISER, RECOVERY FOR WRONGFUL DEATH § 1.1 (2d ed. 1975). The felony-merger doctrine is the explanation most commonly offered for the rule. According to this doctrine, when an act constituted both a tort and a felony, recovery was not allowed for the tort because it was deemed less important than the offense against the Crown. *Moragne v. States Marine Lines, Inc.*, 398 U.S. 375, 382 (1970). American courts picked up and followed Lord Ellenborough's pronouncement despite the fact that the felony-merger doctrine never applied to bar civil suits in this country. *Id.*

16 Fatal Accident Act, 9 & 10 Vict., ch. 93 (1846) [hereinafter Lord Campbell's Act].

17 1 S. SPEISER, *supra* note 15, at § 1:9.

18 Lord Campbell's Act, *supra* note 16.

19 1 S. SPEISER, *supra* note 15, at § 3:1. American courts rejected the notion that life has an intrinsic value apart from economic productivity. *See, e.g., Chase v. Fitzgerald*, 132 Conn. 461, 467-68, 45 A.2d 789, 792 (1946) ("As regards death, damages for it cannot be based upon the value which a man would place upon his own life or upon any sentimental considerations.").

pursuant to express statutory provisions,<sup>20</sup> follow the "loss-to-the-survivors" rule, according to which damages in wrongful death actions are limited to the pecuniary loss sustained by the decedent's beneficiaries.<sup>21</sup> "Pecuniary loss" generally means the financial contributions the decedent would have been expected to make to his beneficiaries had he lived, calculated as the present value of the victim's expected earnings minus his personal consumption expenses.<sup>22</sup>

As a practical matter, however, the pecuniary loss rule equates the value of life with the amount of money or services the decedent would have contributed to his family.<sup>23</sup> The pecuniary loss rule corresponds relatively well with the idea of compensating the survivors for *their* losses when combined with damages for the survivors' loss of society and companionship (which most states now recognize<sup>24</sup>) and/or mental anguish (which some states recognize<sup>25</sup>). But the rule fails to account for the value of the decedent's life in its own right. While supporting one's family is an important social and moral obligation, few would consider their success in fulfilling that responsibility to be the sole determinant of their worth. As a result, existing damage rules in wrongful death actions undervalue human life. As lamented by William Landes and Richard Posner:

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20 See *infra* note 174.

21 A minority of states follow the "loss-to-the-estate" rule, which also measures damages by pecuniary losses, but focuses upon losses suffered by the decedent's estate as a result of his premature death, rather than losses suffered directly by the survivors. The results, in many cases, are similar. See *infra* notes 155-70 and accompanying text for discussion of the loss-to-the-estate jurisdictions.

22 W. KEETON, D. DOBBS, R. KEETON & D. OWEN, PROSSER & KEETON ON THE LAW OF TORTS § 127, 949-50 (5th ed. 1984) [hereinafter KEETON]. In most jurisdictions, pecuniary losses also include the value of services the decedent would have rendered to the beneficiaries. *Id.* at 951.

23 Nowhere has this ugly rule been stated more starkly than in *Gannon v. Lawler*, 34 Pa. D. & C. 571, 581 (1939), where the court said:

Decedent's life is of value to his creditors, at least, but the only measure of the monetary value of a human life is what the life would have produced in money if it had not terminated in death . . . . In our opinion, damages for the economic value of a life and for loss of earning power are the same.

24 See cases and statutes collected in MINZER, *supra* note 5, § 22.43(1)(a). The law of wrongful death varies tremendously from state to state. It is not the purpose of this Article to catalog the different rules of each state. Accordingly, when discussing general wrongful death principles, the reader will be referred to authoritative treatises on the subject, rather than to cases and statutes of individual states.

25 An increasing number of states, though still a minority, allow survivors to recover for mental anguish caused by the death. See *id.* at § 22.32.

The limitation of damages to survivors' pecuniary loss is very peculiar. It implicitly assumes—if, as we generally believe to be the case, tort law seeks to internalize the costs of accidents—that the average person derives no utility from living. He does not work for himself, he works solely for his family. This cannot be right, and it results in a systematic underestimation of damages in wrongful-death cases.<sup>26</sup>

The unfairness of the pecuniary loss rule in underestimating wrongful death damages is demonstrated most acutely in classes of cases involving decedents who are not expected to make any substantial pecuniary contributions to their survivors. Application of the pecuniary loss rule in death cases involving minor children, as noted,<sup>27</sup> traditionally resulted in a determination that a child's life has a negative net worth. Similarly, the lives of adult children caught in the window of life between emancipation and the creation of their own families have little value under the pecuniary loss rule because their death causes no one to experience a significant economic loss. An adult child has no legal obligation to contribute to the support of her parents,<sup>28</sup> and, until she has married, has acquired no dependents of her own.<sup>29</sup> At the other end of life's continuum, elderly people have already used up most of their economic productivity. Consequently, their lives may not be worth much in pecuniary terms. Finally, and perhaps most significantly, the pecuniary loss rule promotes a kind of caste system by branding entire classes of no- or low-wage earners in our society as worth less than their wealthier counterparts. Is a lawyer's life really worth several times more than that of his secretary's? A doctor's more than her nurse's? Broader comparisons have even worse implications for society. Whites earn significantly more than blacks.<sup>30</sup> Are their lives worth more? The pecuniary loss rule

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26 W. LANDES & R. POSNER, *THE ECONOMIC STRUCTURE OF TORT LAW* 187 (1987).

27 See *supra* notes 4-5 and accompanying text.

28 *Gilbert v. Root*, 294 N.W.2d 431, 433 (S.D. 1980). Parents are not precluded from attempting to prove that, even though the child was emancipated, they had a reasonable expectation of receiving economic benefits in the form of either money or services. See, e.g., *Halvorsen v. Dunlap*, 495 F.2d 817 (8th Cir. 1974) (testimony that decedent had planned to return to Norway upon completing his education and develop parents' farm into a resort); *Weast v. Festus Flying Serv., Inc.*, 680 S.W.2d 262 (Mo. Ct. App. 1984) (evidence showed plaintiff's married adult child had assisted family in a variety of ways, including rendering nursing services to disabled grandmother).

29 This is just one aspect of the broader rule that, unless a decedent leaves behind dependent survivors, there can be no recovery for wrongful death. *Webster v. Norwegian Min. Co.*, 137 Cal. 399, 70 P. 276 (1902); *VanderWegen v. Great N. Ry. Co.*, 114 Minn. 118, 119-22, 130 N.W. 70, 70-71 (1911) (applying Montana law).

30 According to the 1990 STATISTICAL ABSTRACT OF THE UNITED STATES, the 1988



would say "yes." The same holds true as to the comparative value of men versus women—men earn more.<sup>31</sup>

In some of these problem cases judges<sup>32</sup> and juries<sup>33</sup> have found ways to avoid the harshness of the pecuniary loss rule and allowed substantial damages, but this fact in no way supports the soundness of the rule. To the contrary, it shows that some of the decision-makers in our tort system appreciate that the pecuniary

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median yearly income for white men employed full-time was \$28,262, while it was only \$20,716 for black men. U.S. DEP'T OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES 453 (1990). Moreover, the 1988 unemployment rate for whites was 4.7 percent, compared to 11.7 percent for blacks. *Id.* at 380.

31 The 1988 median yearly income for males was \$27,342, compared to only \$18,545 for females. *Id.* at 453.

32 A classic example of how judges have reacted to the rigidity of the pecuniary loss rule is *Wycko v. Gnodtke*, 361 Mich. 331, 105 N.W.2d 118 (1960), a wrongful death action involving the death of a fourteen-year-old boy. A jury awarded the plaintiff \$15,000, but the trial judge ordered a remittitur to half that amount reasoning that the death of a fourteen-year-old could not constitute a \$15,000 pecuniary loss to his parents. The Supreme Court of Michigan castigated the "barbarous concept" that the child-labor measure of damages under the pecuniary loss rule should be used to measure the loss suffered by parents from the death of a child. The court's solution was to redefine the "pecuniary value" of a life to include "the value of mutual society and protection, in a word, companionship." *Id.* at 339-40, 105 N.W.2d at 121-22. See also *Green v. Bittner*, 85 N.J. 1, 2, 424 A.2d 210, 211 (1980) (in response to the jury's finding that the life of a high school senior was "worthless to others, in a pecuniary sense," the court rejected pecuniary loss limitation and held that damages for parents' loss of a child includes damages for loss of companionship); *Anderson v. Lale*, 88 S.D. 111, 121, 216 N.W.2d 152, 158 (1974) (stating that any court allowing more than nominal damages for death of a minor "must have tacitly accepted" recovery for loss of companionship because under the pecuniary loss rule, "except in rare cases, never would a child's earnings be more than his cost of upbringing"). For general discussion of *Wycko* and the legal fictions designed to avoid the harshness of the pecuniary loss rule in child death cases, see Johnson, *Wrongful Death and Intellectual Dishonesty*, 16 S.D.L. REV. 36 (1971). Today, most jurisdictions allow recovery for the loss of a child's society and companionship or for mental anguish suffered as a result of a child's death, making possible the recovery of substantial damages in many cases. See cases and statutes collected in F. HARPER, F. JAMES & O. GRAY, *THE LAW OF TORTS* § 25.14 (2d ed. 1986) [hereinafter HARPER].

33 See *Gonzales v. Union Carbide Corp.*, 580 F. Supp. 249, 253-54 (N.D. Ind. 1983) (upholding \$3 million compensatory award for death of truck driver, although plaintiff's expert estimated present value of lost earnings to be only \$1.5 million); *Southern Pac. Transp. Co. v. Lueck*, 111 Ariz. 560, 576, 535 P.2d 599, 610 (1975) (upholding jury award of \$2 million in compensatory damages to survivors of 30-year-old man even though decedent had never earned more than \$6,000 in any one year and economist testified that the present value of the pecuniary loss to his beneficiaries was \$281,863), *cert. denied*, 425 U.S. 913 (1976); *Fedt v. Oak Lawn Lodge*, 132 Ill. App. 3d 1061, 1072, 478 N.E.2d 469, 478 (Ill. App. Ct. 1985) (upholding \$1 million award for death of window washer, noting: "There is no fixed monetary standard for evaluating a human life, and the award of damages greatly depends on the sound judgment of the jury."); *Monsanto Co. v. Johnson*, 675 S.W.2d 305, 312 (Tex. Ct. App. 1984) (upholding \$710,000 award for pecuniary loss and loss of consortium for death of 63-year-old man, relying upon jury's discretion).

loss rule fails to accurately account for all the losses inflicted by wrongful death. No one, not even defense lawyers or insurance company executives, would argue that life is without value apart from economic productivity. Rather, the arguments against hedonic damages implicitly assume the following concessionary form: "Even granting that life has intrinsic value, damages for the value of lost life should be disallowed because . . . ," followed by objections. This undeniable conclusion—that life has value not recognized under existing wrongful death remedies—should stack the deck against the objectors to damages for lost life.

### *B. Refuting the Arguments Against Damages for the Value of Lost Life*

The arguments against damages for the value of lost life are twofold: (1) awarding such damages does not fulfill the compensatory function of tort law; and (2) valuing life is too speculative to form a basis for computing damages. Neither of these arguments justifies denying recovery for lost life.

#### 1. The "Inability to Make Whole" Argument.

"The cardinal principle of damages in Anglo-American law is that of *compensation* for the injury caused to plaintiff by defendant's breach of duty."<sup>34</sup> This compensatory function of tort law finds more specific expression in the "make whole" principle, according to which the object of tort damages is to restore the tort victim as nearly as possible to the position he would have been in had the injury not occurred.<sup>35</sup> The "make whole" principle furnishes a ready and seemingly completely logical refutation of the notion that damages should be awarded for the value of lost life. A dead person cannot be compensated for his lost life. A trillion dollars would contribute nothing toward making him whole again. Restoration in this setting is simply beyond the capacity of the tort system.<sup>36</sup>

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34 HARPER, *supra* note 32, § 25.1, at 490 (emphasis in original).

35 *Id.* See generally ABA SPECIAL COMM. ON THE TORT LIABILITY SYSTEM, TOWARDS A JURISPRUDENCE OF INJURY: THE CONTINUING CREATION OF A SYSTEM OF SUBSTANTIVE JUSTICE IN AMERICAN TORT LAW 4-29 to 4-32 (1984) [hereinafter TOWARDS A JURISPRUDENCE OF INJURY].

36 In one of the few state cases to address the issue of lost life damages, the Supreme Court of Pennsylvania rejected them as "contrary to the compensatory objective of awarding damages to tort victims." *Willinger v. Mercy Catholic Med. Center*, 482 Pa. 441, 446, 393 A.2d 1188, 1190 (1978). See also Barrett, *Price of Pleasure: New Legal Theorists Attach a Dollar Value To the Joys of Living*, Wall St. J., Dec. 12, 1988, at A-4, col. 3 (Ohio attorney Neil F. Freund, asking: "Why should there be any separate award for lost

But this facile argument ignores the fact that the American tort system relies upon money damages to compensate several types of intangible injuries which are not translatable into dollars and cents. Money in no way, for example, eases physical pain and mental suffering. A bountiful award for pain and suffering may enable the quadriplegic to motor around a new mansion in a sterling silver wheelchair,<sup>37</sup> but it does not reduce the suffering he encounters each time he attempts to perform any of the myriad tasks of daily life the rest of us take for granted. Hedonic damages may not restore the dead, but neither do pain and suffering damages restore feeling and movement to the quadriplegic's body.

The predictable response to this is that, while damages for intangible physical and mental injuries cannot make injured persons whole, they do presumably provide some solace and perhaps even a degree of happiness to the victim. To the contrary, the dead get no benefit at all from money damages for their lost life. Even assuming that lesser degrees of doctrinal fiction have more virtue than greater degrees of the same fiction, this response would not account for damage awards in survival actions for the decedent's conscious pain and suffering prior to death. A majority of states allow the decedent's estate to recover damages for the pain and suffering experienced by the decedent between the time of injury and time of death, yet such damages obviously serve no compensatory function.<sup>38</sup> The fact that they are awarded for pain and suffering actually experienced by the decedent,<sup>39</sup> whereas the decedent does not consciously experience any loss from death itself,<sup>40</sup> does nothing to enhance their compensatory effect.<sup>41</sup>

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pleasure to someone who is already dead?"); Tapp, *Lawyers Pushing for an Expansion of 'Hedonic' Damages*, Chicago Daily L. Bull., Aug. 26, 1988, at 1, col. 6 (Illinois attorney William W. Kurnik, stating: "It's not rational. You cannot compensate a person who is dead.").

37 Cf. *Borer v. American Airlines, Inc.*, 19 Cal. 3d 441, 447, 563 P.2d 858, 862, 138 Cal. Rptr. 302, 306 (1977) ("[M]onetary compensation will not enable plaintiffs to regain the companionship and guidance of a mother; it will simply establish a fund so that upon reaching adulthood . . . they will be unusually wealthy men and women."). In truth, pain and suffering awards probably serve more to finance the American contingency fee system, rather than to pad the pockets of tort victims.

38 See cases collected in MINZER, *supra* note 5, at § 21.11.

39 Damages are available only where evidence shows the decedent consciously experienced pain and suffering. See, e.g., *Complaint of Farrell Lines, Inc.*, 389 F. Supp. 194, 205 (D. Ga. 1975) (insufficient evidence regarding conscious pain and suffering of children who drowned); *Searcy v. Porter*, 381 So. 2d 540, 544 (La. Ct. App. 1980) (\$8,000 adequate for deceased child's pain and suffering where record showed child was only semi-conscious for one-and-one-half hours following accident and comatose for the remaining period prior to death).

40 An injured person whose prognosis is death may, of course, experience great

## 2. The "Too Speculative" Argument.

Related to the argument that hedonic damages fail to serve the compensatory function of tort law is the objection that such damages are too speculative because no meaningful formula exists for valuing human life.<sup>42</sup> As with the "failure to make whole" argument, this argument sweeps too broadly. Valuing life surely is a speculative venture, but so is the task of valuing other intangible injuries such as pain and suffering, loss of consortium and mental distress. These are no more susceptible to accurate measurement than the value of life.

The only standardized method yet developed for computing pain and suffering damages is the *per diem* approach by which plaintiff's counsel asks the jury to multiply the period of time during which plaintiff can be expected to experience the pain and suffering (broken down into seconds, minutes, hours, days, months or years) by an economic value assigned for each unit of time. The product is the suggested pain and suffering award.<sup>43</sup> While the conclusion is reached by a mathematical process, it is completely arbitrary because of the lack of any method for determining the all important value assigned to the pain and suffering experienced during each time unit.

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suffering because of this prospect, which may be compensable as one aspect of pre-death pain and suffering. *See, e.g., Juiditta v. Bethlehem Steel Corp.*, 75 A.D.2d 126, 138, 428 N.Y.S.2d 535, 543 (1980) (apprehension of impending death is among the elements to be considered in assessing damages for conscious pain and suffering during the period between injury and death).

41 Damages for conscious pain and suffering preceding death have been criticized on the same basis as damages for the value of lost life. Livingston, *Survival of Tort Actions: A Proposal for California Legislation*, 37 CALIF. L. REV. 63, 74 (1949) ("The deceased bore the pain and suffering and he is the only one who should be compensated. He can't take it with him.")

42 Blum, *More. Suing Over Lost Joy of Life*, Nat'l L. J., Apr. 17, 1989, at 24, col. 3 (Virginia defense attorney James Morris, III, characterizing hedonic damages as offensive because "[y]ou can never put a price on a person for what they gave up. It can't be evaluated."); Barrett, *supra* note 36, at A-4, col. 3 (Illinois defense attorney William W. Kurnik lamenting that "life is particular to every person: what it's worth to smell a rose or eat a steak.").

43 *See generally* Werchick, *Unmeasurable Damages and a Yardstick*, 17 HASTINGS L.J. 263, 273-85 (1965). Taking a simplified example, suppose the evidence showed the quadriplegic plaintiff had a life expectancy of forty more years. It is not difficult to convince a jury that a quadriplegic's suffering is worth *at least* 10 cents per minute. Multiplying that amount by the number of minutes in a 16 hour day (since the plaintiff is not entitled to pain and suffering damages during the hours he is asleep), multiplied by 365 days per year, multiplied by 40 years, yields a lifetime award of \$1.4 million for pain and suffering.

In the most notable rejection of *per diem* arguments, the New Jersey Supreme Court exposed the speculative nature of computing money damages for pain and suffering awards:

[P]ain and suffering have no known dimensions, mathematical or financial . . . . For this reason, the only standard for evaluation is such amount as reasonable persons estimate to be fair compensation . . . .

. . . .  
Neither the plaintiff in the case nor anyone else in the world has ever established a standard of value for these ills . . . . [Jurors] are instructed to allow a reasonable sum as compensation, and in determining what is reasonable under the evidence to be guided by their observation, experience and sense of fairness and right.<sup>44</sup>

Just because we *say* jurors can reasonably gauge the monetary value of pain and suffering by their “observation, experience and sense of fairness and right” does not mean it is true. It is not. Even with the benefit of plaintiff’s testimony supplemented by that of experts, the extent of an individual’s pain and suffering remains largely unknowable to jurors. It is doubtful, for example, that jurors can understand and appreciate the pain caused by a crushed vertebra simply by listening to the plaintiff and his experts tell them about it. Unless one has experienced a similar injury, he probably has little sense of what it is like to suffer the injury. Even then, people have different mental fortitudes and pain thresholds such that probably no two people experience the same injury in the same way. In this sense, damages for the value of lost life are less speculative than damages for other types of intangible injuries because the full nature of the injury—death—is always known and certain. Moreover, even if jurors could be made to understand fully the nature and extent of pain and suffering occasioned by an injury, they are still left with the fundamental problem that no common denominator exists allowing the injury to be translated into dollars and cents. Despite these shortcomings, courts have consistently rejected the argument that damages for pain and suffering and other intangible injuries are too speculative.<sup>45</sup>

If certainty were the standard for recovering tort damages,

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44 Botta v. Brunner, 26 N.J. 82, 95, 138 A.2d 713, 720 (1958) (citations omitted).

45 See, e.g., Sea-Land Serv., Inc. v. Gaudet, 414 U.S. 573, 588-89 (1974) (loss of society); D’Ambra v. United States, 518 F.2d 275, 277-78 (1st Cir. 1975) (mental anguish); Nelson v. Jacobsen, 669 P.2d 1207, 1214-19 (Utah 1983) (alienation of affections).

the only damages a plaintiff could collect would be past medical expenses and lost wages. Not only would damages for intangible, non-economic injuries be precluded, but also future damages for tangible, economic injuries, including future pecuniary loss. Though future pecuniary loss is often viewed as a concrete loss that can be assessed with some degree of precision, it is subject to several critical variables which are incapable of being resolved with any certainty.<sup>46</sup> Even ignoring the virtually insurmountable difficulties of assessing the pecuniary value of items such as lost household services and companionship, and focusing upon the most certain component in the pecuniary loss damage equation—lost future earnings—jurors are left largely to guesswork.<sup>47</sup> How long would the decedent have lived? How long would he have worked at the same job? In the same occupation? How much would he have spent on personal consumption? The jury must speculate as to each of these issues.

Therefore, speculativeness is not an adequate basis for rejecting damages for the value of lost life, unless one is prepared to jettison damages for all types of intangible injuries and for all future losses. The United States District Court for the Northern District of Illinois agreed in *Sherrod v. Berry*,<sup>48</sup> the leading case recognizing damages for the value of lost life. To the defendants' argument that hedonic damages are too speculative, the court responded:

The rule against recovery of 'speculative damages' is generally directed against uncertainty as to cause rather than uncertainty as to measure or extent. That is, if it is uncertain whether the defendant caused the damages, or whether the damages proved flowed from his act, there may be no recovery of such

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46 See Ingber, *Rethinking Intangible Injuries: A Focus On Remedy*, 73 CALIF. L. REV. 772, 780 (1985) ("Damages for intangible injuries, although admittedly difficult to quantify, appear no less justifiable on that basis alone than damages for loss of future wages.").

47 The "too speculative" argument against lost future earnings has been made and rejected. *E.g.*, *Taylor v. Paul O. Abbe, Inc.*, 380 F. Supp. 601, 606 (E.D. Pa. 1974) ("The law does not require the jury's estimation of damages to be completely free of all elements of speculation."), *rev'd on other grounds*, 516 F.2d 145 (3d Cir. 1975).

48 629 F. Supp. 159 (N.D. Ill. 1985), *aff'd*, 827 F.2d 195 (7th Cir. 1987), *rev'd on other grounds*, 856 F.2d 802 (1988) (en banc).

uncertain damages; whereas, uncertainty which affects merely the measure or extent of the injury suffered does not bar a recovery.<sup>49</sup>

To demonstrate that monetary awards for other intangible injuries are subject to the same objections advanced against damages for the value of lost life does not, by itself, establish the propriety of such damages. It does, however, substantially dilute the arguments against damages for the value of lost life. The two-pronged argument that hedonic damages are improper because they fail to compensate and are too speculative commits the logical fallacy of *ignoratio elenchi*—that is, it proves a different conclusion than the one sought to be proved.<sup>50</sup> Rather than establish the impropriety of hedonic damages, the arguments support only the much broader proposition that intangible injuries of any kind cannot be meaningfully measured in money. This, of course, calls into question basic assumptions underlying our entire tort scheme. Consequently, while these arguments may be effective weapons on a much wider battlefield, they fail to make out a persuasive case for discriminating against recovery for the ultimate injury of deprivation of life.<sup>51</sup>

### C. *Damages for the Value of Lost Life and the Deterrent Function of Tort Law*

Though compensation is often thought of as the primary function of tort law, deterrence of behavior that causes injuries is also an important goal.<sup>52</sup> Reduced to its starkest form, the deter-

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49 629 F. Supp at 164. *Sherrod* is discussed *infra* at notes 124-34 and accompanying text.

50 The fallacy of *ignoratio elenchi*, one of the original thirteen fallacies recognized by Aristotle in *Sophistical Refutations*, amounts to "missing the point." It occurs when an argument purporting to establish one conclusion is misdirected, either intentionally or accidentally, toward proving a different conclusion that is not in dispute. See I. COPI, INTRODUCTION TO LOGIC 85-87 (4th ed. 1972); C.L. HAMBLIN, FALLACIES 31-32 (1970).

51 Harper, James and Gray make a similar point in discussing the desirability of limitations upon damages in death cases generally:

Much can be said, for instance, for rules that tend to restrict damages to those that represent pecuniary loss. Then, too, the times may call for restraint upon the broad discretion of juries. But these needs, if they exist, warrant a broad reevaluation of our whole system of damages. Discrimination against death actions can be justified, if at all, only on the basis that reforms that are equally needed in the field of personal injury may be more difficult of accomplishment there.

HARPER, *supra* note 32, § 25.13 at 597.

52 See generally, TOWARDS A JURISPRUDENCE OF INJURY, *supra* note 35, at 4-13 to 4-25.

rent concept is very simple: if *A* knows he will have to compensate *B* for injuries he inflicts upon *B*, *A* will take steps to try to prevent injury to *B* to the point where the cost of prevention exceeds the cost of compensation. Deterrence is an old idea,<sup>53</sup> but has achieved new prominence in the last twenty years under the stewardship of law and economics scholars.<sup>54</sup>

The general deterrence model of tort law is grounded on the notion that tort law should promote the efficient allocation of resources. Under this view, the policy of tort law is not to eliminate accidents, or even to minimize them. It is, rather, to *optimize* the number of accidents. To accomplish this, the deterrent model holds that tort liability rules are (or should be)<sup>55</sup> designed to induce actors to expend resources on safer behavior up to the point where the marginal cost of increased safety exceeds the marginal reduction in accident costs.<sup>56</sup> If liability rules are fashioned in this way, people will invest in safety at the optimal level because they know it will cost them more if they fail to do so.<sup>57</sup> Put more simply, economically efficient tort rules *deter* risky behavior that is not cost-justified.

The extent to which tort liability rules actually operate this way is hotly debated. Even assuming existing tort liability rules are

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53 *E.g.*, *Louisville & N.R. Co. v. Lansford*, 102 F. 62, 64 (5th Cir. 1900) (construing purpose of Alabama wrongful death statute to be "to prevent homicides").

54 Law and economics has generated a tremendous amount of literature. Major works with relevance to tort law include: G. CALABRESI, *THE COST OF ACCIDENTS: A LEGAL AND ECONOMIC ANALYSIS* (1970); R. EPSTEIN, *A THEORY OF STRICT LIABILITY* (1980); W. LANDES & R. POSNER, *supra* note 26; Brown, *Toward an Economic Theory of Liability*, 2 J. LEGAL STUD. 323 (1973); Calabresi & Hirschhoff, *Toward a Test for Strict Liability in Torts*, 81 YALE L.J. 1055 (1972); Landes & Posner, *A Positive Economic Analysis of Products Liability*, 14 J. LEGAL STUD. 535 (1985); Landes & Posner, *The Positive Economic Theory of Tort Law*, 15 GA. L. REV. 851 (1981) [hereinafter *The Positive Economic Theory of Tort Law*]; Posner, *A Theory of Negligence*, 1 J. LEGAL STUD. 29 (1972); Shavell, *An Analysis of Causation and the Scope of Liability in the Law of Torts*, 9 J. LEGAL STUD. 463 (1980).

55 Landes and Posner are the primary exponents of the positive economic theory of tort law, which is that "the common law is best explained as if the judges who created the law through decisions operating as precedents in subsequent cases were trying to promote efficient resource allocation." *The Positive Economic Theory of Tort Law*, *supra* note 54, at 851. In other words, Landes and Posner assert that the existing structure of tort law is built upon rules designed to promote economic efficiency. Other scholars, such as Calabresi, write about how an ideal economically efficient tort regime *should* be structured, declining to accept that the current system operates efficiently. *See, e.g.*, Calabresi, *Some Thoughts on Risk Distribution and the Law of Torts*, 70 YALE L.J. 499 (1961).

56 *See The Positive Economic Theory of Tort Law*, *supra* note 54, at 865-72;

57 This is grounded on the basic assumption that people are motivated by a desire to maximize their wealth. *See W. LANDES & R. POSNER*, *supra* note 26, at 16-17.



efficiently designed, critics reject as fanciful the notion that people are completely rational beings who alter their behavior in response to tort liability rules. Professor Stephen Sugarman, in a thoughtful indictment of the tort system, argues that the general deterrence approach does not work because: (1) most people lack adequate information concerning tort liability rules to guide them in their behavior;<sup>58</sup> (2) some people, even if adequately informed, are simply incapable because of incompetence to act safely;<sup>59</sup> (3) people discount the threat of tort liability both economically, by rationally assuming some victims with bona fide claims will not sue, and psychologically, by simply disregarding the risk of harm their conduct presents;<sup>60</sup> (4) some people act dangerously because there are high stakes involved for them in doing so;<sup>61</sup> and (5) few tortfeasors are required to absorb a substantial penalty for their behavior.<sup>62</sup>

Although these criticisms of the behavioral assumptions upon which the deterrent approach depends are sound,<sup>63</sup> they show only that the economic model is imperfect. As Professor Howard Latin wrote in response to Sugarman's article: "A balanced analysis must ask, 'Imperfect compared to what?'"<sup>64</sup> Since no system can achieve perfect deterrence, the real issue is whether tort liability creates more effective deterrence than would exist in the absence of tort liability.<sup>65</sup>

The answer is that it probably does. While most individuals probably do not make decisions based upon anticipated tort liability, many professionals and businesses undoubtedly do. Thus, an automobile driver's decision to pass a car in front of him is probably tempered more by an instinct for self-preservation than a concern about being sued, but a doctor is very likely to be influenced by the threat of tort liability in deciding whether to per-

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58 "The model of general deterrence requires knowledge. Yet many people seem to be ignorant of the threat of tort liability before the first sting." Sugarman, *Doing Away with Tort Law*, 73 CALIF. L. REV. 555, 565 (1985).

59 *Id.* at 568-69.

60 *Id.* at 569.

61 *Id.* at 570.

62 *Id.* at 570-73.

63 For further critique of the behavioral assumptions involved in the general deterrence analysis, see G.E. WHITE, *TORT LAW IN AMERICA: AN INTELLECTUAL HISTORY* 220-23 (1980); Smith, *The Critics and the "Crisis": A Reassessment of Current Conceptions of Tort Law*, 72 CORNELL L. REV. 765, 772-75 (1987).

64 Latin, *Problem-Solving Behavior and Theories of Tort Liability*, 73 CALIF. L. REV. 677, 739 (1985).

65 *Id.* at 740.

form a particular diagnostic test.<sup>66</sup> This is amply supported by surveys of physicians in which overwhelming majorities reported that they have increased diagnostic procedures, monitoring and documentation of their activities because of the rise in malpractice suits.<sup>67</sup> Manufacturers are another prominent group of potential injurers likely to consider tort liability in making safety decisions. While empirical evidence concerning the deterrent impact of products liability rules is conflicting,<sup>68</sup> one can intuit that if a manufacturer gets hit over the head with a million dollar judgment hammer several times for failing to take a cost-efficient safety measure, the manufacturer will take steps to correct the defect or go out of business.<sup>69</sup>

Assuming that tort law does have a deterrent effect, everyone agrees that the general deterrence approach works *only if the actors are required to bear the full cost of their injury-causing activities.*<sup>70</sup>

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66 See Fujii, *On the Compensation of Victims of Torts*, 5 VICTIMOLOGY: AN INTERNATIONAL JOURNAL 42 (1980) ("[S]afety steps such as sponge counts, instrument counts, electrical grounding of anesthesia machines, and the avoidance of colorless sterilizing solutions in spinal anesthesia became widely used only after the successful prosecution of medical negligence cases.").

67 See Bell, *Legislative Intrusions Into the Common Law of Medical Malpractice: Thoughts About the Deterrent Effect of Tort Liability*, 35 SYRACUSE L. REV. 939, 966-69 (1984) (discussing these surveys).

68 George L. Priest, of the Brookings Institution, evaluating product-oriented death and injury statistics, found "no evidence that the expansion of [products liability] litigation has affected the injury or death rate." Priest, *Product Liability Law and the Accident Rate*, in LIABILITY: PERSPECTIVES AND POLICY 185, 194 (1988). The injury and death rates are probably not reliable indicators of the deterrent effect of law, since other factors, such as increased product use, could offset the impact of safer products. For purposes of the general deterrence model, it is more meaningful to look at how the law has made businesses change their behavior. A study of 232 major U.S. corporations revealed that 35% improved the labeling of their products and 30% improved the safety design of products in response to products liability law. N. WEBER, *PRODUCT LIABILITY: THE CORPORATE RESPONSE* 4-7 (1987).

69 Most courts now apply some form of risk-utility balancing in defective design cases for determining whether a product was in a defective condition unreasonably dangerous. Priest, *supra* note 68, at 212. Under this test, a product is defective only if the risk of the product as designed outweighs the utility of the product as designed. Utility is often analyzed in terms of feasible alternative designs. Feasibility focuses upon whether other designs would impair either the cost-utility or the use-utility of the product. See, e.g., *Wilson v. Piper Aircraft Corp.*, 282 Or. 61, 65-69, 577 P.2d 1322, 1326-28 (1978). See generally KEETON, *supra* note 22, at 699-700. Risk-utility balancing in products cases promotes efficient accident reduction by holding manufacturers responsible only for failing to take feasible, cost-efficient safety measures. See Priest, *supra* note 68, at 212.

70 See, e.g., Litan, Swire & Winston, *The U.S. Liability System: Background and Trends*, in LIABILITY: PERSPECTIVES AND POLICY 1, 3 (1988) ("[I]f producers and other participants in the economy are not charged for the costs they impose on others through accidents and injuries, resources will be mis-allocated toward activities that create or perpetuate risks."); Ingber, *supra* note 46, at 799 ("Unless the full costs of physical and

Unless this occurs, actors have insufficient incentive to invest in safer behavior. As a result, there will be too many accidents because actors will not be required to pay as much for exposing people to risks as they would have to pay to avoid those risks.

This furnishes courts with a basis upon which to recognize damages for the value of lost life. By focusing upon pecuniary loss to the survivors and ignoring the value of life itself, existing law systematically undervalues the harm caused by wrongful death. Because they are not required to internalize the value of life as a cost of their activity, would-be tortfeasors are not adequately deterred from engaging in behavior which presents a risk of death.<sup>71</sup> Professor Sugarman targeted this deficiency in the damage rules for wrongful death in his critique of the economic model:

The "law and economics" model requires the correct threat in order to produce the appropriate safety-minded response. Ordinary tort damages are an inaccurate and confused measure of our desire to deter, however. For example, torts sends out the economic message that one may take less precaution to avoid killing someone than to avoid permanently injuring them

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emotional distress are properly internalized through tort law, the price of the activities that generated such injuries will insufficiently reflect their actual costs."); Smith, *supra* note 63, at 773 ("Optimal levels would be achieved only if *all* actual injury costs—and no more than actual costs—were allocated to the injury-causing activities.").

71 Other factors also work against optimal efficiency by insulating the tortfeasor from the costs of injuries he inflicts. Many claims for injury are never brought. Pierce, *Encouraging Safety: The Limits of Tort Law and Government Regulation*, 33 VAND. L. REV. 1281, 1296 (1980) ("Only a small fraction of personal injuries . . . actually yield a claim for compensation."). Where claims are pursued, liability insurance often serves to externalize at least part of the cost. See Bell, *supra* note 67, at 954-65 (discussing the immunizing effect of malpractice insurance upon physicians). Landes and Posner dispute the argument that liability insurance externalizes the costs of accidents:

A persistent fallacy is that liability insurance externalizes the costs of accidents and hence reduces the deterrent effect of tort law. It does reduce deterrence, but it does not necessarily create an externality and thus need not reduce the efficiency of the tort law as a method of social control—always bearing in mind that the economic function of tort law is to optimize rather than minimize the number of accidents. If injurers are fully liable for accidents owing to their negligence and if they persuade others (liability insurers) to bear a part of the burden of this tort liability, there is no externality. Victims are by definition fully compensated for any extra accidents that occur, and liability insurers are fully compensated *ex ante* for the payments they make to the injurers whom they insure.

W. LANDES & R. POSNER, *supra* note 26, at 13. See also James, *Accident Liability Reconsidered: The Impact of Liability Insurance*, 57 YALE L.J. 549, 559-63 (1948) (asserting that liability insurance has had a positive effect on safety).

since, by the way damages are measured, it is cheaper to kill than to disable. Similarly, torts tells the rational would-be injurer that he may take less precaution to avoid killing a child than a working adult. Tort law creates these implicit priorities because it awards damages to compensate rather than to deter. But from the perspective of accident avoidance, these priorities do not reflect our social values.<sup>72</sup>

The general deterrence model concentrates largely on the efficiency of *liability* rules, but its validity depends as well upon efficient *damage* rules that account for the full cost of injury. In cases involving death, this requires that the tortfeasor be responsible for the value of the life lost.<sup>73</sup> The pecuniary loss rule fails to impose this cost and, therefore, results in under-deterrence. The Supreme Court of New Mexico recognized this in a wrongful death case involving a nun who was killed when a tire blew out on her rental car.<sup>74</sup> Catherine Lavan had taken a vow of poverty when she became a nun. This fact arguably barred any recovery since the New Mexico wrongful death statute seemed to limit damages to the pecuniary loss suffered by the decedent's beneficiaries.<sup>75</sup> The Supreme Court of New Mexico, however, recognized a right to recovery on a deterrence basis:

The statutes allowing damages for wrongful act or neglect causing death have for their purpose more than compensation. It is intended by them, also, to promote safety of life and limb by making negligence that causes death costly to the wrongdoer . . . .

. . . .

. . . [S]ubstantial damages are recoverable without proof

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<sup>72</sup> Sugarman, *supra* note 58, at 572-73.

<sup>73</sup> See Cohen, *Toward an Economic Theory of the Measurement of Damages in a Wrongful Death Action*, 34 EMORY L.J. 295, 295-96 (1985); Note, *An Economic Analysis of Tort Damages for Wrongful Death*, 60 N.Y.U. L. REV. 1113, 1113-14 (1985).

<sup>74</sup> *Stang v. Hertz Corp.*, 81 N.M. 348, 467 P.2d 14 (1970), *aff'g* 81 N.M. 69, 463 P.2d 45 (Ct. App. 1969).

<sup>75</sup> When *Stang* was decided, the New Mexico wrongful death statute provided as follows:

Every such action as mentioned in section 1821 [22-20-1] shall be brought in the name of the personal representative or representatives of such deceased person, and the jury in every such action may give such damages, compensatory and exemplary, as they shall deem fair and just, *taking into consideration the pecuniary injury or injuries resulting from such death to the surviving party or parties entitled to the judgment, or any interest therein*, recovered in such action, and also having regard to the mitigating or aggravating circumstances attending such wrongful act, neglect or default.

N.M. STAT. ANN. § 22-30-3 (1953) (recodified at § 41-2-3 (1989)) (emphasis added).

of pecuniary loss.<sup>76</sup>

Of course, the problem with awarding damages for the value of lost life for the purpose of deterrence is computing an economically efficient amount. In any mathematical sense, this problem is insoluble, and no doubt there are those with a longing for precision who would reject lost life damages for this reason.

However, the argument that lost life damages should be denied because they cannot be formulaically inserted into the deterrence equation again proves too much, for the argument would apply with equal force to all kinds of intangible damages. If we accept that the deterrence model has any validity, we must also accept, as even opponents of the theory assert, that the defendant should be forced to internalize the cost of *all* injuries. This requires that some value, however imperfect, be attached to human life. What that value should be is discussed in Part III of this Article.

#### *D. Damages for the Value of Lost Life and Symbolic Justice*

Perhaps the justification for lost life damages ultimately transcends economic analysis and finds root in the more fundamental principle of symbolic justice. Life, which Blackstone called "the immediate gift of God, a right inherent by nature in every individual,"<sup>77</sup> is valuable. But existing wrongful death schemes treat only some lives as valuable. If a statistical study were performed, it would no doubt show that the most valuable lives in America for purposes of tort law are, as a class, white businessmen. To the extent life is recognized as valuable only as to those already suspected of loading the fortune wheels of justice, an appearance of indifference and injustice to less-favored victims is fostered.

The right to life is the preeminent entitlement in a system of rights premised upon personal security and autonomy. Without it, all other entitlements become meaningless. The tort system serves to protect entitlements by performing "corrective justice" when entitlements are wrongfully infringed.<sup>78</sup> However, a refusal to grant damages for loss of life not only fails to protect our entitlement to life. In effect, it bestows a kind of entitlement upon the

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<sup>76</sup> *Stang*, 81 N.M. at 350, 351, 467 P.2d at 16-17 (citations omitted).

<sup>77</sup> W. BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 129 (Cooley, 3d ed. 1884).

<sup>78</sup> Rosenberg, *The Causal Connection in Mass Exposure Cases: A "Public Law" Vision of the Tort System*, 97 HARV. L. REV. 851, 877 (1984).

tortfeasor to take the life.<sup>79</sup> When society allows tortious losses to rest where they fall, it makes an implicit determination that the injurer was entitled to impose those losses.<sup>80</sup> With respect to damages for wrongful death, the entitlement is by no means complete because some recovery usually is available. Nevertheless, by not recognizing any recovery for the loss of life itself, the right to life—the most precious of all entitlements in a rights-oriented system—is depreciated.

We can test current wrongful death damage rules by considering them in the context of Professor John Rawls' model for assessing principles of justice. Rawls suggests that we imagine a group of persons who meet for the purpose of forming a new society. Their initial goals are to select the basic principles for assigning rights and obligations among members of the society and to determine how social benefits are to be divided.<sup>81</sup> They are, in other words, to agree in advance upon a just social contract.

Men are to decide in advance how they are to regulate their claims against one another and what is to be the foundation charter of their society. Just as each person must decide by rational reflection what constitutes his good, that is the system of ends which it is rational for him to pursue, so a group of persons must decide once and for all what is to count among them as just and unjust. The choice which rational men would make in this hypothetical situation of equal liberty, assuming for the present that this choice problem has a solution, determines the principles of justice.<sup>82</sup>

One of the essential requirements of this hypothetical is that the

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<sup>79</sup> See Ingber, *supra* note 46, at 781-82 (making this argument as to intangible losses, generally).

<sup>80</sup> *Id.* at 781. Professor Ingber found support for his position in the following description of entitlement:

When a loss is left where it falls . . . it is not because God so ordained it. Rather it is because the state has granted the injurer an entitlement to be free of liability and will intervene to prevent the victim's friends, if they are stronger, from taking compensation from the injurer. The loss is shifted in other cases because the state has granted an entitlement to compensation and will intervene to prevent the stronger injurer from rebuffing the victim's requests for compensation.

Calabresi & Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089, 1091 (1972), quoted in Ingber, *supra* note 46, at 781 n.45.

<sup>81</sup> J. RAWLS, A THEORY OF JUSTICE 11 (1971).

<sup>82</sup> *Id.* at 11-12.

society-formers have no knowledge of their own station or situation in life.<sup>83</sup> This is Rawls' "veil of ignorance,"<sup>84</sup> which ensures that principles of justice are chosen neutrally, with no one having an opportunity to act in their own interest.

Picture our imaginary founding fathers and mothers as they are nearing completion of their list of principles for a just society:

Founding Father: I note that the first principle on our list is that all persons have a right to life. As I recall, we put that first because we felt it was the most important. But suppose someone interferes with that right. It seems like there should be some principle about what the consequences of that will be.

Founding Mother: We have already covered that. Look at principle No. 124. That's where we imposed severe criminal penalties for wrongfully taking another's life. And if you turn over to principle No. 239, you see there that we have provided for a system of tort law that allows for the recovery of money damages when someone wrongfully takes the life of another.

Founding Father: Yes, I see those. But we haven't specified any principles of justice to govern the amount of those damages. I have an idea about that.

Founding Mother: Great. Let's hear it.

Founding Father: I propose that we create a principle of justice that treats all lives differently for purposes of awarding damages. If you take the life of a wealthy person, you have to pay a whole lot of money. But if you take the life of a poor person, you don't have to pay very much.

[silence]

Also, it seems just to me that we should treat the lives of elderly people as not being worth very much.

[more silence]

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83 *Id.* at 12.

84 *Id.*

And finally—this is perfect—we should treat the lives of children as having no worth at all.

[oppressive silence]

The proposals are greeted with shock and disbelief. The other founders cannot comprehend how what are supposed to be neutral principles of justice, relating to the foremost entitlement in the new society, could be so blatantly unfair and discriminatory. Yet, in our own society, we have accepted almost without question a system that essentially incorporates these proposals insofar as it effectively values life almost exclusively in terms of the decedent's economic station. By providing no recovery for the loss of life itself, we operate under a system that is contrary to fundamental justice. Therefore, as a matter of symbolic justice and apart from the traditional purposes underlying the tort system, damages for lost life should be recognized.

### III. DAMAGES FOR THE VALUE OF LOST LIFE UNDER CURRENT LAW

Damages for the value of lost life face an uphill battle to achieve widespread recognition. While several federal courts have discovered a basis for awarding them in civil rights death actions,<sup>85</sup> only one state has applied its death remedies to authorize such damages.<sup>86</sup> The following Section discusses the federal civil rights cases and the opportunities for and obstacles to recovering damages for lost life under existing state survival and wrongful death statutes.

#### A. *Federal Civil Rights Actions*

By far, the warmest reception for lost life damages has been in federal courts entertaining actions under 42 U.S.C. § 1983.<sup>87</sup> The availability of damages for the value of lost life in section

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85 See *infra* note 113.

86 See *infra* notes 161-63 and accompanying text.

87 42 U.S.C. § 1983 (1988) provides in pertinent part:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.



1983 cases alleging unconstitutional deprivation of life turns upon the interplay between federal law and state death remedies called for by 42 U.S.C. § 1988.<sup>88</sup> Section 1988 directs courts to apply state law where the federal civil rights statutes are “deficient in the provisions necessary to furnish suitable remedies,”<sup>89</sup> unless state law is “inconsistent with the Constitution and laws of the United States.”<sup>90</sup> The Seventh Circuit, in upholding a \$100,000 damage award for the value of lost life, described three steps involved in the process of selecting the appropriate rule of substantive law:

First, the court must decide whether the civil rights acts are “deficient” in furnishing a particular rule. If this inquiry is answered affirmatively, state law is examined to fill the interstices in the federal provisions . . . . [F]inally, the state law must be disregarded in favor of the federal law if the state law is inconsistent with the meaning and purpose of federal statutory and constitutional law.<sup>91</sup>

Section 1983, consisting of only a single operative sentence, is “deficient” as to many issues of substantive law, including damage issues. Consequently, selection of the correct rule of law usually depends upon an examination of state law and a determination of whether state law is inconsistent with federal law.

The threshold challenge in section 1983 death cases is to discover a substantive basis for maintaining the action after death. This issue is inextricably intertwined with ascertaining the relief to be afforded. Because section 1983 is silent as to any death reme-

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88 42 U.S.C. § 1988 (1988) provides in pertinent part:

The jurisdiction in civil and criminal matters conferred on the district courts by . . . [section 1983] for the protection of all persons in the United States in their civil rights, and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause . . . .

89 *Id.*

90 *Id.*

91 *Bell v. City of Milwaukee*, 746 F.2d 1205, 1234 (7th Cir. 1984) (citing *Robertson v. Wegmann*, 436 U.S. 584, 587 (1978) and *Heath v. City of Hialeah*, 560 F. Supp. 840, 841 (S.D. Fla. 1983). The *Bell* court synthesized this tripartite test from the Supreme Court's decision in *Robertson v. Wegmann*, 436 U.S. 584, 587-90 (1978).

dy, courts must first look to state law to determine whether the decedent's claim survives and/or whether the decedent's survivors are able to recover their own losses through a wrongful death claim.<sup>92</sup>

Where the action is cast as one on behalf of the estate in the nature of a survival action, courts will borrow and apply the state survival statute. Difficulties arise only where state law would preclude survival of the federal claim. In that situation, most federal courts have relied upon a pair of inapposite Supreme Court cases and allowed the claim to survive on an independent federal basis.<sup>93</sup>

In *Robertson v. Wegmann*,<sup>94</sup> the Supreme Court held that a Louisiana statute could abate a section 1983 claim upon the plaintiff's death where the death was unconnected to the alleged constitutional deprivation. Clay Shaw died from an unrelated cause while his section 1983 action based upon malicious prosecution was pending. Under Louisiana law, Shaw's claim would survive only in favor of a spouse, children or siblings, of which Shaw had none. The lower courts found the Louisiana law to be inconsistent with federal law, and avoided it by creating a federal common law right of survival in civil rights actions.<sup>95</sup>

The Supreme Court disagreed. The Court recognized that in evaluating asserted inconsistencies between state and federal law courts must look not only at positive federal law but also at the policies underlying it.<sup>96</sup> Nevertheless, the Court found no inconsistency between the policies behind section 1983—compensation and deterrence—and the Louisiana statute precluding survival of Shaw's claim. The interest in compensating those injured by a

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92 S. STEINGLASS, SECTION 1983 LITIGATION IN STATE COURTS § 21 (1989). The law regarding section 1983 death cases is in disarray—in part because plaintiffs fail to specify the theory upon which they are proceeding. For example, in *Bass v. Wallenstein*, 769 F.2d 1173 (7th Cir. 1985), the Seventh Circuit reversed a \$250,000 award to the estate of a prisoner who died because of improper medical treatment on the basis that the district court had improperly instructed the jury that it could measure damages in accordance with Illinois wrongful death law. The amended complaint showed that the plaintiff was asserting the decedent's claim and was not suing on behalf of the decedent's survivors. *Id.* at 1188. Therefore, since the action was more in the nature of a survival action, wrongful death damages were improper.

93 See, e.g., *Guyton v. Phillips*, 532 F. Supp. 1154, 1166 (N.D. Cal. 1981) (“[C]laims arising under §1983 survive as a principle of federal common law without regard to state law.”).

94 436 U.S. 584 (1978).

95 *Shaw v. Garrison*, 391 F. Supp. 1353, 1368 (E.D. La. 1975), *aff'd*, 545 F.2d 980, 987 (5th Cir. 1977), *rev'd sub nom. Robertson v. Wegmann*, 436 U.S. 584 (1978).

96 *Robertson*, 436 U.S. at 590.

deprivation of constitutional rights, the Court said, is not served by compensating the executor of a deceased's estate.<sup>97</sup> With regard to deterrence, the Court observed:

[T]o find even a marginal influence on behavior as a result of Louisiana's survivorship provisions, one would have to make the rather farfetched assumptions that a state official had both the desire and the ability deliberately to select as victims only those persons who would die before conclusion of the § 1983 suit (for reasons entirely unconnected with the official illegality) and who would not be survived by any close relatives.<sup>98</sup>

The Court then implied that the deterrence consideration would weigh differently where death results from the alleged constitutional violation.<sup>99</sup>

The Court's decision a year later in *Carlson v. Green*<sup>100</sup> substantially bolstered this inference. In *Carlson*, the Court held that Indiana survival and wrongful death law should not be applied to bar a *Bivens* action<sup>101</sup> against federal officials arising from the death of a federal prisoner. *Robertson* was not seen as posing an obstacle because "the plaintiff's death [in *Robertson*] was not caused by the acts of the defendant upon which the suit was based."<sup>102</sup> Part of the Court's reasoning in support of a uniform rule of survivorship for *Bivens* actions was that *Bivens* actions are completely federal in nature.<sup>103</sup> Nevertheless, the Court also emphasized that such a rule is necessary to deter federal officials from infringing constitutional rights.<sup>104</sup> Most courts which have subsequently addressed the issue in section 1983 cases have construed *Carlson* as mandating the survival of section 1983 claims as a means of deterring unconstitutional deprivations of life.<sup>105</sup>

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97 *Id.* at 592.

98 *Id.* at 592, 593 n.10.

99 The Court emphasized that its holding was "a narrow one," stating it was expressing no opinion "about whether abatement based on state law could be allowed in a situation in which deprivation of federal rights caused death." *Id.* at 594.

100 446 U.S. 14 (1979).

101 In *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971), the Court created a right of action for money damages against federal officials for unconstitutional conduct that is analogous to the right of action created by § 1983 against state and local officials.

102 *Carlson*, 446 U.S. at 24.

103 *Id.* at 23-24, 24 n.11.

104 *Id.* at 23.

105 *See, e.g.*, *Weeks v. Benton*, 649 F. Supp. 1297, 1308-09 (S.D. Ala. 1986); *Guyton v. Phillips*, 532 F. Supp. 1154, 1166 (N.D. Cal. 1981); *O'Connor v. Several Unknown Correctional Officers*, 523 F. Supp. 1345, 1348 (E.D. Va. 1981). Justices Powell and

Related to the survival issue is whether section 1983 allows the decedent's survivors to sue for damages in their own right in the nature of a wrongful death action. The Supreme Court has not addressed this issue, although Justice Marshall noted in *Robertson* that the Court's holding did not "preclude recovery by survivors who are suing under § 1983 for injury to their own interests."<sup>106</sup> Justice Marshall also cited with apparent approval the Fifth Circuit's decision in *Brazier v. Cherry*,<sup>107</sup> the seminal decision recognizing the borrowing of state wrongful death remedies in section 1983 actions.<sup>108</sup> Despite the absence of clear Supreme Court direction on the issue, a number of lower federal courts have borrowed state wrongful death remedies in section 1983 cases to allow survivors to recover damages for harm caused to them on account of the death of a loved one.<sup>109</sup>

In *Robertson* and *Carlson*, the Supreme Court reasoned that the survival of civil rights claims would help deter unconstitutional deprivations of life. But borrowing state survival or wrongful death statutes alone does not promote deterrence. If the damages available under those remedial schemes are insubstantial, which is often the case, simply recognizing the cause of action will have little deterrent effect. Under survival statutes, damages generally are limited to the decedent's lost wages, medical expenses, and pain and suffering occurring from the date of injury until death.<sup>110</sup> Where death is the near instantaneous result of a police officer's bullet (a common fact pattern in section 1983 death actions),<sup>111</sup> there may be no cognizable damages under state sur-

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Stewart stated in their concurring opinions in *Carlson* that they would reach the same result in § 1983 cases. *Carlson*, 446 U.S. at 29.

106 *Robertson*, 436 U.S. at 592 n.9.

107 293 F.2d 401, 409 (5th Cir.), *cert. denied*, 368 U.S. 921 (1961), *cited with approval in Robertson*, 436 U.S. at 594.

108 The Supreme Court also favorably cited *Brazier* in *Moor v. County of Alameda*, 411 U.S. 693, 703 n.14 (1973), and *Sullivan v. Little Hunting Park, Inc.*, 396 U.S. 229, 240 (1969).

109 *See, e.g.*, *Smith v. Wickline*, 396 F. Supp. 555, 560 (W.D. Okla. 1975) (applying Oklahoma wrongful death statute); *Pollard v. United States*, 384 F. Supp. 304, 306 (M.D. Ala. 1974) (applying Alabama wrongful death statute); *Galindo v. Brownell*, 255 F. Supp. 930, 931 (S.D. Cal. 1966) (applying California wrongful death statute).

110 KEETON, *supra* note 22, § 126, at 943.

111 The Supreme Court revamped the standards governing excessive force claims in 1989, rejecting the widely adopted substantive due process analysis, and holding that analysis must proceed under some specific constitutional provision. *Graham v. Connor*, 109 S. Ct. 1865, 1870 (1989). In most instances, that will be either the fourth amendment's proscription against unreasonable seizures or the eighth amendment's prohibition of cruel and unusual punishment. *Id.*

vival law. Wrongful death damages often are inadequate as well. The victims in wrongful killing cases are often minors and/or minority members, both of whom are discriminated against by the traditional pecuniary loss rule for wrongful death damages.<sup>112</sup>

In recognition of this, a handful of federal courts have relied upon the deterrence rationale not only as a justification for fashioning a substantive death remedy in 1983 actions, but also as a basis for allowing damages for the value of lost life.<sup>113</sup> These federal courts have ruled that state law precluding compensation for lost life is inconsistent with federal law. The courts reasoned that, absent recognition of damages for the value of lost life, public officers will not be sufficiently deterred from engaging in unconstitutional conduct causing death. The most straightforward statement of this reasoning is found in *Roman v. City of Richmond*,<sup>114</sup> where the federal district court stated:

[W]here damages permitted by state law do not sufficiently fulfill the purposes of section 1983, the state law is inconsistent with the Constitution and laws of the United States, and state remedies are not exclusive. In such a case the court may fashion an appropriate remedy that will fulfill the purposes of section 1983 . . . .

. . . Actual damages where a death has resulted from the use of excessive force is generally quite limited. However,

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• 112 See *supra* notes 30-31 and accompanying text.

113 *Bass v. Wallenstein*, 769 F.2d 1173 (7th Cir. 1985); *Bell v. City of Milwaukee*, 746 F.2d 1205 (7th Cir. 1984); *Linzie v. City of Columbia, Mo.*, 651 F. Supp. 740 (W.D. Mont. 1986); *Sherrod v. Berry*, 629 F. Supp. 159 (N.D. Ill. 1985), *aff'd* 827 F.2d 195 (7th Cir. 1987), *rev'd on other grounds* 856 F.2d 802 (1988) (en banc); *Roman v. City of Richmond*, 570 F. Supp. 1554 (N.D. Cal. 1983); *Guyton v. Phillips*, 532 F. Supp. 1154 (N.D. Cal. 1981). See also *O'Connor v. Several Unknown Correctional Officers*, 523 F. Supp. 1345 (E.D. Va. 1981) (although not specifically mentioning damages for loss of life, the court rejected damage limitations of Virginia's wrongful death statute and said recovery could be obtained for the deprivation of the decedent's civil rights).

114 570 F. Supp. 1554 (N.D. Cal. 1983). *Roman* was a police shooting case in which the jury awarded the plaintiffs \$1.5 million in damages. Defendants filed motions for judgment notwithstanding the verdict, asserting that plaintiffs' recoveries were barred by *Parratt v. Taylor*, 451 U.S. 527 (1981). In *Parratt*, a Nebraska prisoner filed a § 1983 action alleging he was deprived of property without due process when jail officials negligently lost his hobby kit valued at \$23.50. The Supreme Court rejected the claim, holding that procedural due process is satisfied where state law furnishes an adequate post-deprivation remedy. *Id.* at 543-44. The defendants in *Roman* argued that California's wrongful death statute constituted an adequate post-deprivation remedy. 570 F. Supp. at 1555. The court initially expressed doubt whether *Parratt* applies to excessive force cases. Then, assuming it did, the court held that the California wrongful death remedy was inadequate because it failed to provide for injunctive relief and did not fulfill the deterrent purposes of § 1983. *Id.* at 1556.

where the use of excessive force results only in injury, actual damages can be great because of the need for medical treatment and rehabilitation. Where a defendant is required to bear a greater economic loss where he injures a person by the use of excessive force than when he kills the person, the result is a tacit authorization that the actor should inflict excessive force to the point of death. Life is the greatest and most cherished of all rights, and therefore such a result cannot be countenanced. Thus, courts must fashion a remedy to prevent this result; an award of damages to deter such an unconstitutional use of force is appropriate.<sup>115</sup>

This pure deterrence rationale is difficult to reconcile with the Supreme Court's increasingly clear pronouncements that only damages intended to compensate for actual harm are proper under section 1983. While the Court has recognized the deterrent function of remedies under section 1983, it said in *Carey v. Piphus*<sup>116</sup> that "[t]o the extent that Congress intended that awards under § 1983 should deter the deprivation of constitutional rights, there is no evidence that it meant to establish a deterrent more formidable than that inherent in the award of compensatory damages."<sup>117</sup>

More recently, in *Memphis Community School District v. Stachura*,<sup>118</sup> the Court again emphasized that "[s]ection 1983 presupposes that damages that compensate for actual harm ordinarily suffice to deter constitutional violations."<sup>119</sup> *Stachura* was a section 1983 suit brought by a school teacher suspended for teaching reproductive science to his seventh grade students. The district court instructed the jury that it could award the plaintiff damages based upon the value or importance of the constitutional rights that the defendant violated.<sup>120</sup> The Supreme Court found error in this, holding that compensatory damages cannot be awarded in

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115 *Roman*, 570 F. Supp. at 1557 (citation omitted).

116 435 U.S. 247 (1978). In *Carey*, the Court rejected the argument that elementary and secondary school students, suspended without procedural due process, were entitled to recover substantial damages without proof of actual injury. The students had argued that substantial damages were appropriate both because constitutional rights are valuable in themselves, and because of the need to deter constitutional violations. *Id.* at 254.

117 *Id.* at 256. The Court recognized that punitive or exemplary damages might be justified in particular cases. *Id.* at 257 n.11. But this is not the issue in cases involving damages for lost life. Though they are rooted in the policy of deterrence, no court has treated them as punitive damages.

118 477 U.S. 299 (1986).

119 *Id.* at 310 (citing *Carey*, 435 U.S. at 256-57).

120 *Id.* at 302-03.

section 1983 cases based upon the abstract value of constitutional rights.<sup>121</sup>

As a result of *Carey* and *Stachura*, damages for lost life in section 1983 cases probably need to undergo a judicial facelift to survive. Although some courts have emphasized the compensatory function of lost life damages,<sup>122</sup> others have focused exclusively upon the deterrence rationale.<sup>123</sup> With *Carey* and *Stachura* suggesting that pure deterrent damages are improper, courts need to redefine the rationale for lost life damages in terms of their compensatory purpose.

That should not be difficult to do. On appeal of the verdict for hedonic damages in *Sherrod v. Berry*,<sup>124</sup> the Seventh Circuit panel rejected the argument that *Stachura* required reversal of the award.<sup>125</sup> *Sherrod* was an excessive force case in which a nineteen-year-old black man was shot in the head at point-blank range by a police officer who believed the victim was reaching in his jacket for a weapon.<sup>126</sup> Apparently, he was reaching only for his driver's license.<sup>127</sup> Unlike *Stachura*, the court reasoned, *Sherrod* did not require the jury to award damages based upon its subjective evaluation of the importance of particular constitutional rights.<sup>128</sup> Rather, damages were awarded *to compensate* the decedent's father both in his capacity as administrator of his son's estate and in his individual capacity.<sup>129</sup> No explanation was offered as to how damages for lost life actually serve a compensatory purpose.

Once it is understood that damages for lost life are to be

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121 *Id.* at 310.

122 *E.g.*, *Guyton v. Phillips*, 532 F. Supp. 1154, 1167-68 (N.D. Cal. 1981) ("The decedent's loss of life, which is the deprivation here, is a compensable injury that survives and is recoverable by his estate.")

123 *E.g.*, *Roman v. City of Richmond*, 570 F. Supp. 1554, 1557 (N.D. Cal. 1983). In *Roman*, which was decided after *Carey* but before *Stachura*, the court instructed the jury that "it could consider the need to deter and prevent abuses by municipal officers that cause deprivations of constitutional rights in awarding damages." *Id.* at 1556. Unless the court also made it clear that damages could be awarded only to compensate for loss of the decedent's life, the instructions would appear to be defective under *Carey* and *Stachura*.

124 629 F. Supp. 159 (N.D. Ill. 1985), *aff'd*, 827 F.2d 195 (7th Cir. 1987), *rev'd on other grounds*, 856 F.2d 802 (1988) (en banc).

125 *Sherrod v. Berry*, 827 F.2d 195, 208-09 (7th Cir. 1987), *rev'd on other grounds*, 856 F.2d 802 (1988) (en banc).

126 *Id.* at 199.

127 *Id.*

128 *Id.* at 208-09.

129 *Id.* at 209.

treated as compensatory damages in section 1983 actions, the value of a human life becomes the obvious bench-mark for measuring such damages. This was the approach adopted in *Sherrod*.<sup>130</sup> The trial court allowed the plaintiff to call an economist as an expert witness to testify as to the "hedonic" value of human life. The expert defined this term as follows:

It derives from the word pleasing or pleasure. I believe it is a Greek word. It is distinct from the word economic. So it refers to the larger value of life, the life at the pleasure of society, if you will, the life—the value including economic, including moral, including philosophical, including all the value with which you might hold life, is the meaning of the expression "hedonic value."<sup>131</sup>

The jury returned a verdict awarding \$850,000 for the value of the decedent's life.<sup>132</sup> The Seventh Circuit panel affirmed the admissibility of the expert's testimony, holding that "[i]t is therefore axiomatic that plaintiffs seeking to recover the value of a decedent's life must be entitled to submit expert testimony to help guide the jury in reaching an appropriate damages award."<sup>133</sup> On rehearing en banc, the Seventh Circuit ultimately reversed on other grounds.<sup>134</sup>

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130 *Sherrod* has generated considerable attention to the issue of damages for the value of lost life. See Marcotte, *Hedonic Update: Case Reversed on Other Grounds*, 75 A.B.A. J. 29 (1989), Blodgett, *Hedonic Damages OK: Court Upholds New Award*, 73 A.B.A. J. 21 (1987); Blodgett, *Hedonic Damages: A Price on the Pleasure of Life*, 71 A.B.A. J. 25 (1985); Blum, *supra* note 42; Barrett, *supra* note 36; Tapp, *supra* note 36; Angel, *supra* note 1, at 1, col. 2; *Centerpiece: Expert Testimony is Admissible to Enable the Jury to Consider the "Hedonic" Value of Life in a Wrongful Death Case*, 30 A.T.L.A. L. Rptr. 408 (1987); Staller, *Hedonic Damages: How to Assess 'Life's Pleasures'*, Penn. L. J.-Rptr., Jan. 7, 1985, at 1, col. 1; Tarr, *Illinois Jury Awards 'Hedonic' Damages*, Nat'l L. J., Nov. 24, 1984, at 3, col. 1; Kaberon, *\$1.6 Million Award has 'Hedonic' Value*, Chi. Daily L. Bull., Nov. 5, 1984, at 1, col. 7.

131 629 F. Supp. at 163. Prior to *Sherrod*, courts considering lost-life damages in section 1983 actions usually ignored the method by which they should be computed. The only effort at analysis was a feeble one. In *Guyton v. Phillips*, 532 F. Supp. 1154 (N.D. Cal. 1981), the court, after rejecting the argument that fixing damages for lost life is too speculative, concluded that "it is appropriate to look at damages in other deprivation cases and arrive at an amount that fairly represents the loss of human life." *Id.* at 1168. Surveying cases in which damage awards for liberty deprivations ranged from \$750 to \$10,000, the court determined that \$100,000 was a reasonable amount. *Id.*

132 *Sherrod*, 629 F. Supp. at 160.

133 *Sherrod*, 827 F.2d at 205.

134 *Sherrod v. Berry*, 856 F.2d 802 (7th Cir. 1988) (en banc). The court held that the trial court erred by admitting evidence that the plaintiff's decedent, Ronald Sherrod, was unarmed. Defendant Berry, who shot Sherrod, was unaware of this fact, and the court noted: "The reception of evidence . . . beyond that which Officer Berry had . . . is improper, irrelevant, and prejudicial . . ." *Id.* at 805. The court specifically relied on



The Supreme Court has not addressed the propriety of awarding damages for the value of lost life. While the Court indicated in *Carey v. Piphus*<sup>135</sup> that common law tort rules may not always provide a complete solution to damage issues in section 1983 cases,<sup>136</sup> it has never expressly approved bypassing damage limitations in state death remedies to effectuate policies underlying the civil rights statutes. It passed up the opportunity to do so in *Jones v. Hildebrant*.<sup>137</sup> In *Jones*, a mother brought a section 1983 action in her own name arising from the fatal shooting of her fifteen-year-old son by a Denver police officer. A trial court ruling, which was affirmed by the Supreme Court of Colorado, effectively limited any possible recovery to the \$45,000 maximum authorized by the Colorado wrongful death statute.<sup>138</sup>

The Supreme Court granted certiorari to consider "whether a state's limitation on damages in a wrongful death statute would control in an action brought pursuant to section 1983."<sup>139</sup> However, the Court subsequently dismissed the certiorari petition after counsel for the mother redefined her claim at oral argument to be a personal constitutional liberty claim, rather than a property-based, wrongful-death-type claim arising from the harm inflicted upon her son.<sup>140</sup> Because this newly delineated claim was not set forth in her complaint or mentioned in her briefs,<sup>141</sup> the Court declined to rule upon the issue of whether state wrongful death damage limitations are binding in section 1983 wrongful death cases.<sup>142</sup>

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a "Sioux Indian[] . . . prayer that asks for this wisdom: 'Grant that I may not judge another until I have walked a mile in his moccasins.'" *Id.* at 807.

135 435 U.S. 247 (1978).

136 *Id.* at 258.

137 191 Colo. 1, 550 P.2d 339 (1976), *cert. granted*, 429 U.S. 1061, *cert. dismissed*, 432 U.S. 183 (1977) (overruled by *Espinoza v. O'Dell*, 633 P.2d 455 (Colo.), *cert. granted*, 454 U.S. 1122 (1981), *cert. dismissed*, 456 U.S. 430 (1982)).

138 *Id.* at 7-8, 550 P.2d at 341. The mother asserted three claims: battery, negligence and deprivation of federal constitutional rights. She conceded that her first two claims, grounded in state law, were controlled by the Colorado wrongful death statute. The trial court, however, ruled that the mother's § 1983 claim merged with her first claim and dismissed it, the effect of which was to limit her to a maximum possible recovery of \$45,000. *Id.*

139 432 U.S. at 185.

140 *Id.* The mother's counsel described her claim at oral argument "as a constitutional right to raise her child without interference from the State." *Id.*

141 *Id.* at 186.

142 *Id.* at 187-88. Without addressing the merits of the mother's personal liberty interest claim, the Court did observe that "it would not seem logically to be subject to a damages limitation contained in the statute permitting survivors to recover for wrongs

Accordingly, the ultimate fate of damages for the value of lost life in section 1983 cases remains uncertain. Section 1983 actions currently offer the best opportunity for recovering these damages. This may not remain true for long, however, given the current Court's bent toward limiting civil rights remedies.<sup>143</sup>

*B. Damages for the Value of Lost Life Under State Law*

Damages for the value of lost life are the missing link in death remedies afforded under state law. Survival statutes allow recovery for injuries incurred by the decedent, but only up to the point of death. At that time, wrongful death statutes kick in to furnish the decedent's survivors a remedy for their losses arising from the death. The decedent's loss of life, which goes uncompensated, is lost in a kind of legal limbo. Absent legislative action, advocates of lost-life damages will be required to use existing state survival statutes or wrongful death statutes as their vehicles for recovery. Both are leaky vessels for this journey. However, while true survival statutes<sup>144</sup> are unsuited for recovery of lost-life damages, the wrongful death statutes of a substantial minority of

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done to a property interest of theirs." *Id.* at 188.

143 This change dramatically appeared during the 1988 term, when the Court decided a number of cases restricting or refusing to expand civil rights remedies: *Independent Fed'n of Flight Attendants v. Zipes*, 109 S. Ct. 2732 (1989) (no attorney's fees to prevailing civil rights plaintiff against intervenor who delayed plaintiff's settlement agreement for three years and cost plaintiff an additional \$200,000 in litigation expenses); *Patterson v. McLean Credit Union*, 109 S. Ct. 2363 (1989) (42 U.S.C. § 1981 provides no remedy for private racial harassment on the job); *Will v. Mich. Dep't of State Police*, 109 S. Ct. 2304 (1989) (neither states nor state officials acting in their official capacity are "persons" under 42 U.S.C. § 1983); *Lorance v. AT&T Technologies*, 109 S. Ct. 2261 (1989) (female employees time-barred from challenging seniority system even though the system did not operate to penalize them until three years after it took effect); *Martin v. Wilks*, 109 S. Ct. 2180 (1989) (white firefighters who failed to intervene in Title VII suit by black firefighters that was settled by consent decree permitted to later challenge actions taken pursuant to the decree as reverse discrimination); *Wards Cove Packing Co.*, 109 S. Ct. 2115 (1989) (Title VII plaintiff must demonstrate that employment practices resulting in racial imbalance are not justified by business necessity); *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989) (alleviating employer's burden of proof in discrimination cases).

For an explanation of the argument that hedonic damages should not be treated separately, see Murray, *Hedonic Damages: Properly a Factor Within Pain and Suffering Under 42 U.S.C. Section 1983*, 10 N. ILL. U.L. REV. 37 (1989) (concluding that "[h]edonic damages are best left as factors to be considered in the jury's pain and suffering award. To remove hedonic damages and set them up as a separate element in the damage calculus violates the compensatory purpose of Section 1983." *Id.* at 67).

144 Some states have hybrid statutes that provide for survival of the decedent's claims, but enlarge the survival action to include damages for wrongful death. See *infra* note 156 and accompanying text.

states are subject to a construction allowing such recovery.

### 1. Recovery Under Survival Statutes.

At common law, personal tort actions did not survive the death of either the plaintiff or the defendant. Today, virtually all states have enacted survival statutes which have modified this rule.<sup>145</sup> These statutes provide for the continuation of the decedent's claims after death, and hence, superficially appear to provide a basis for recovering damages for loss of life on the decedent's behalf. Survival actions, however, are not based upon the decedent's death, and survival statutes do not create any new claim arising from the event of death.<sup>146</sup> They merely keep the preexisting injury claim alive after death as an asset of the decedent's estate, and limit damages to those that occurred from the time of injury until death.<sup>147</sup>

Hedonic damage claims do not fit within this statutory scheme because they are predicated upon the death itself: the decedent's estate seeks damages for the harm inflicted by death—the loss of life. Survival statutes merely authorize the damages to which the decedent would have been entitled had he lived.<sup>148</sup> *Had he lived*, however, the decedent would have had no claim for lost life. Accordingly, lost-life damages are unavailable under true survival statutes.

At least one court considering this issue has reached the

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145 These statutes are collected in MINZER, *supra* note 5, at ch. 29 (appendix on statutes).

146 "[U]nder the survival statute the cause of action arises out of *the injury*. The injury may manifest itself in the loss of life instantly or subsequently, but the loss of life is not what gives rise to the cause of action." *Rohlfing v. Moses Akiona, Ltd.*, 45 Haw. 373, 383, 369 P.2d 96, 101 (1962) (emphasis added).

147 For a general discussion of the nature of a survival claim, see MINZER, *supra* note 5, at § 20.12; KEETON, *supra* note 22, at § 126; SPEISER, *supra* note 15, § 14:1. Several states expressly impose this limitation by statute. *See, e.g.*, NEV. REV. STAT. ANN. § 41.100(3) (Michie 1986 & Supp. 1989) ("the damages . . . include all losses or damages which the decedent incurred or sustained before his death"); N.J. REV. STAT. § 2A:15-3 (1987) ("the executor or administrator may recover all reasonable funeral and burial expenses in addition to damages accrued during the lifetime of the deceased"); N.Y. EST. POWERS & TRUST LAW § 11-3.3 (McKinney 1967) ("damages recoverable for such injury are limited to those accruing before death and shall not include damages for or by reason of death").

148 MINZER, *supra* note 5, § 20.12, at 20-26 ("A survival statute permits recovery by the representatives of the deceased for damages the deceased could have recovered had he or she lived."); SPEISER, *supra* note 15, § 14:1, at 408 ("Survival statutes . . . permit recovery by the decedent's personal representative . . . for damages which the *decedent* could have recovered had he lived.").

same conclusion, but not necessarily for the right reason. In *Willinger v. Mercy Catholic Medical Center*,<sup>149</sup> the Supreme Court of Pennsylvania disapproved a jury instruction which provided that damages could be awarded under the state survival statute to the father of a deceased five-year-old victim of medical malpractice for "loss that may have been sustained as a result of the loss of amenities or pleasures of life."<sup>150</sup> In support of its conclusion that this instruction was erroneous, the court offered only the *ipse dixit* that damages for the lost pleasure of life are improper because they are akin to damages for the loss of life itself, which are also improper. The court failed to further justify its holding.<sup>151</sup>

The Pennsylvania survival statute would have been a better basis for the *Willinger* decision. The statute provided that "any right or liability which survives a decedent may be brought by . . . his personal representative . . . as though the decedent were alive."<sup>152</sup> The court could have denied damages for the lost pleasure of life based on this language. This would have been consistent with the historical basis for survival actions—to provide only for the continuation of a claim the decedent would have been able to maintain had he not died. To recognize damages for loss of the ability to enjoy the amenities of life would be contrary to the statutory limitation that survival claims may be brought "as though the decedent were alive."<sup>153</sup>

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149 482 Pa. 441, 393 A.2d 1188 (1978).

150 *Id.* at 446, 393 A.2d at 1190.

151 The court stated:

We discern little or no distinction between seeking to calculate the value of "life itself" and the value of experiencing life's pleasures. Were we to permit compensation for loss of "life itself," undoubtedly this intangible item would have to be measured in terms of the loss of those very opportunities to enjoy family, work, and recreation the trial court directed the jury to consider in measuring the loss of life's pleasures. Thus, to permit a jury to award damages to the estate for the decedent's loss of life's pleasures in effect authorizes a type of recovery expressly repudiated in *Incollingo [v. Ewing]*.

*Id.* at 447, 393 A.2d at 1191. In *Incollingo v. Ewing*, 444 Pa. 299, 308, 282 A.2d 206, 229 (1971), the court had stated, without analysis, that: "It has never been the law in Pennsylvania . . . to hold that the loss of life itself is compensable." See also *Wooldridge v. Woolett*, 96 Wash. 2d 659, 638 P.2d 566 (1981) (rejecting damages for "shortened life expectancy" under Washington survival statute).

152 Act of April 18, 1949 (P.L. 512), § 603 (emphasis added) (current version at 20 PA. CONS. STAT. § 3373 (Purdon 1975)).

153 *Id.*

## 2. Recovery Under Wrongful Death Statutes.

Unlike survival statutes, wrongful death statutes create a new cause of action based upon the event of death. In most states, however, the cause of action for wrongful death inures to the decedent's survivors. Although often brought in the name of the decedent's personal representative, the wrongful death action is for the benefit of the statutorily designated survivors. The object is to compensate survivors for the losses they suffer because of the death of a loved one.<sup>154</sup> The damages that are available—lost pecuniary contributions of the decedent supplemented in most states by damages for loss of society and/or mental anguish—correspond with this purpose.

The conceptual underpinning of wrongful death remedies in these “loss-to-the-survivors” states presents an obstacle to the recovery of damages for the value of lost life. Since it is the decedent who suffers the loss of life, damages for that loss do not neatly comport with the theory of compensating the survivors for their losses. This roadblock is diminished in the minority of states that measure damages in death actions based upon the “loss to the estate.” But, as argued below, even in loss-to-the-survivors jurisdictions, courts should be willing to overlook this conceptual difficulty when the state wrongful death statute can be construed to allow damages for the value of lost life.

(a) *Loss-to-the-Estate Jurisdictions.*—There are four different types of statutes under which damages, in whole or in part, are measured by the loss to the decedent's estate, rather than by the loss to the survivors:<sup>155</sup> (1) hybrid survival-death statutes, which are essentially survival actions enlarged by statute or judicial decision to include damages in the same action for wrongful death;<sup>156</sup> (2) true wrongful death statutes, construed to measure damages by loss to the estate;<sup>157</sup> (3) wrongful death statutes which measure damages by the loss to the survivors, except where

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154 For general discussion of the nature of wrongful death claims, see KEETON, *supra* note 22, § 127; MINZER, *supra* note 5, § 20.12; SPEISER, *supra* note 15, § 14:1.

155 See generally MINZER, *supra* note 5, § 23.00; SPEISER, *supra* note 15, § 3:2.

156 *E.g.*, CONN. GEN. STAT. § 52-555 (1989); N.H. REV. STAT. ANN. §§ 556:9, 556:12 (1974 & Supp. 1988); IOWA CODE §§ 611.20 and 633.336 (1989).

157 *E.g.* GA. CODE ANN. §§ 51-4-1, 51-4-2 (1982 & Supp. 1989), construed in *Western & A.R.R. Co. v. Michael*, 175 Ga. 1, 10, 165 S.E. 37, 41 (1932) (measure of recovery is full value of decedent's life regardless of its real value to the survivors).

the decedent is not survived by any statutory beneficiary, in which case damages are measured by the loss to the estate;<sup>158</sup> and (4) wrongful death statutes which measure damages by the loss to the survivors, but allow the decedent's personal representative to recover specified items of damages such as medical and funeral expenses on behalf of the estate.<sup>159</sup>

In practice, damage calculations in loss-to-the-estate jurisdictions often resemble those in loss-to-the-survivors jurisdictions because both methods focus primarily upon pecuniary losses resulting from the decedent's death.<sup>160</sup> The critical difference between the two standards with respect to lost-life damages lies in their theoretical underpinnings. As the label tells, in "loss-to-the-estate" jurisdictions, the inquiry is directed towards assessing the injury that the death has caused to the decedent's estate, not the harm caused to the survivors. This allows room for arguing that losses to the decedent's estate resulting from the death logically should encompass all losses suffered by the *decedent* from the death—including the value of his life.

So far, only Connecticut has construed its death remedy to allow compensation for the value of lost life. The Connecticut statute authorizes the decedent's personal representative to recover "just damages" for injuries causing death.<sup>161</sup> Though recognizing that the statute is essentially a survival statute aimed at remedying the injury to the decedent rather than to the survivors, the Connecticut Supreme Court has enlarged the statute to include death damages as well.<sup>162</sup> This hybrid approach has allowed the court to recognize compensation not only for traditional survival damages and pecuniary losses to the decedent's estate, but also for "the destruction of . . . [the decedent's] capacity to carry on

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158 *E.g.*, ARIZ. REV. STAT. ANN. § 12-612 (1982 & Supp. 1988), *construed in* *Salinas v. Kahn*, 2 Ariz. App. 181, 194, 407 P.2d 120, 133 (1965), *reh'g denied and opinion modified*, 2 Ariz. App. 348, 409 P.2d 64 (1965). Several states have provisions authorizing recovery on behalf of the estate where no designated beneficiaries survive the decedent. *See, e.g.*, MISS. CODE ANN. § 11-7-13 (Supp. 1988); N.M. STAT. ANN. § 41-2-1 (1978).

159 *E.g.*, ME. REV. STAT. ANN. tit. 18-A, § 2-804 (1981 & Supp. 1988); MICH. COMP. LAWS ANN. § 600.2922(6) (West 1989).

160 The most prevalent method for calculating pecuniary loss to the estate involves determining the present value of the decedent's future net earnings; that is, probable future earnings diminished by what the decedent would have spent for his own living expenses, reduced to present value. This is quite similar to computing the amount the decedent would have contributed to the survivors in loss-to-the-survivors states. *See* SPEISER, *supra* note 15, § 3:62.

161 CONN. GEN. STAT. § 52-555 (1989).

162 *Chase v. Fitzgerald*, 132 Conn. 461, 467, 45 A.2d 789, 791-92 (1946) (characterizing death as "one of the consequences of the wrong inflicted upon the decedent").

and enjoy life's activities . . . ."<sup>163</sup> Valuing the lost capacity to enjoy life is equivalent to valuing life itself.<sup>164</sup>

The wrongful death statutes of other loss-to-the-estate states are also amenable to damage awards for the value of lost life, though most would require judicial reconstruction jettisoning pecuniary loss as the principal measure of damages. The Georgia wrongful death statute, for example, authorizes recovery for "the full value of the life of the decedent,"<sup>165</sup> which could reasonably be interpreted to include the value of life itself.<sup>166</sup> The language of Kentucky's wrongful death statute also furnishes a strong basis for damages for lost life, providing that "damages may be recovered *for the death* from the person who caused it . . . ."<sup>167</sup> Damages "for the death" could be read to mean damages for the death itself, and not merely damages for the pecuniary injury to the estate resulting from death.<sup>168</sup> Likewise, the statutes of New Hampshire, Iowa and New Mexico are subject to a construction allowing damages for the value of lost life.<sup>169</sup> Among the loss-to-the-estate states, only the Tennessee statute appears to absolutely preclude the recovery of hedonic damages.<sup>170</sup>

(b) *Loss-to-the-Survivors Jurisdictions.*—Like the statutes of most

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163 *Katsetos v. Nolan*, 170 Conn. 637, 657, 368 A.2d 172, 183 (1976).

164 *Cf. Willinger v. Mercy Catholic Medical Center*, 482 Pa. 441, 447, 393 A.2d 1188, 1191 (1978) (in rejecting damages for loss of life's pleasures, the court, having previously rejected compensation for the loss of life itself, stated: "We discern little or no distinction between seeking to calculate the value of 'life itself' and the value of experiencing life's pleasures.").

165 GA. CODE ANN. § 51-4-2 (Supp. 1988).

166 The Georgia Supreme Court would have to be persuaded to modify prior law confining recovery under its statute to pecuniary loss. *Bulloch County Hosp. Auth. v. Fowler*, 124 Ga. App. 242, 248, 183 S.E.2d 586, 591 (1971) (overruled by *Gilson v Mitchell*, 131 Ga. App. 321, 205 S.E.2d 421 (1974), *aff'd*, 233 Ga. 453, 211 S.E.2d 744 (1975)).

167 KY. REV. STAT. ANN. § 411.130(1) (*Michie/Bobbs-Merrill* 1972 & Supp. 1988) (emphasis added).

168 Current Kentucky law measures damages by the loss to the estate resulting from the destruction of the decedent's power to earn money. *Department of Educ. v. Blevins*, 707 S.W.2d 782, 783 (Ky. 1986); *Wilkins v. Hopkins*, 278 Ky. 280, 287, 128 S.W.2d 772, 775 (1939).

169 N.H. REV. STAT. ANN. § 556:12 (1974 & Supp. 1989) (including as an "element" of damages "the probable duration of . . . [the decedent's] life but for the injury"); IOWA CODE §§ 611.20, 633.336 (1989) (no express limitation upon the damages to be recovered); N.M. STAT. ANN. § 41-2-3 (1978) (provides for "fair and just" damages "taking into consideration" pecuniary losses).

170 TENN. CODE ANN. § 20-5-113 (1980 & Supp. 1989) (sets forth an exclusive list of elements of recoverable damages, which does not include damages for lost life).

of the loss-to-the-estate jurisdictions, the wrongful death statutes in many of the loss-to-the-survivors states are subject to a construction allowing damages for the value of lost life. However, since the history of these statutes clearly establishes that their purpose is to compensate the decedent's survivors for their own losses, a successful claim for lost-life damages depends upon a judicial willingness to reconstruct the wrongful death statute.

Wrongful death statutes in loss-to-the-survivors jurisdictions come in five basic varieties with respect to the damages that are available: (1) those providing only in general terms for fair and just damages;<sup>171</sup> (2) those including a nonexclusive list of available types of damages;<sup>172</sup> (3) those including an exclusive list of available types of damages;<sup>173</sup> (4) those specifically limiting damages to pecuniary losses of the survivors;<sup>174</sup> and (5) those which otherwise make clear that the damages are for injuries suffered by the survivors because of the death.<sup>175</sup> Statutes falling into the

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171 *E.g.*, IDAHO CODE § 5-311 (1990) ("such damages may be given as under all the circumstances of the case as may be just"); MISS. CODE ANN. § 11-7-13 (Supp. 1990) ("such damages as the jury may determine to be just, taking into consideration all the damages of every kind to the decedent and all damages of every kind to any and all parties interested in the suit"); MONT. CODE ANN. § 27-1-323 (1988) ("such damages may be given as under all the circumstances of the case may be just"); UTAH CODE ANN. § 78-11-7 (1987) ("such damages may be given as under all the circumstances of the case may be just").

172 *E.g.*, IND. CODE ANN. § 34-1-1-2 (Burns 1986 & Supp. 1990) ("damages shall be in such an amount as may be determined by the court or jury, including, but not limited to [listing items of damages]"); MICH. COMP. LAWS § 600.2922(6) (1986) ("the court or jury may award damages as the court or jury shall consider fair and equitable, under all the circumstances, including [list of items of damages]"); VA. CODE ANN. § 8.01-52 (1984) ("The verdict or judgment . . . shall include, but may not be limited to, damages for the following: [list of items of damages]."); W. VA. CODE § 55-7-6 (1981 & Supp. 1990) ("The verdict of the jury shall include, but may not be limited to, damages for the following: [list of items of damages].").

173 *E.g.*, FLA. STAT. ANN. § 768.21 (West 1986); OHIO REV. CODE ANN. § 2125.02(B) (Anderson 1990); OKLA. STAT. ANN. tit. 12, § 1053 (West 1988).

174 *E.g.*, ILL. REV. STAT. ch. 70, ¶ 2 (1989) ("fair and just compensation with reference to the pecuniary injuries resulting from such death, to the surviving spouse and next of kin of such deceased person"); ME. REV. STAT. ANN. tit. 18-A, § 2-804(b) (1981 & Supp. 1990) ("fair and just compensation with reference to the pecuniary injuries resulting from such death to the person for whose benefit the action is brought"); WIS. STAT. ANN. § 895.04 (West 1983 & Supp. 1990) ("Judgment for damages for pecuniary injury from wrongful death may be awarded to any person entitled to bring a wrongful death action."); WYO. STAT. § 1-38-102 (1988) ("such damages, pecuniary and exemplary, as shall be deemed fair and just").

175 *E.g.*, ARIZ. REV. STAT. ANN. § 12-613 (1982) ("jury shall give such damages as it deems fair and just with reference to the injury resulting from the death to the surviving parties who may be entitled to recover"); COLO. REV. STAT. § 13-21-203 (Supp. 1990) ("jury may give such damages as they may deem fair and just, with reference to the necessary injury resulting from such death . . . to the surviving parties who may be



first two groups do not preclude judicial recognition of damages for the value of lost life; whereas those falling within the last three categories do.

Among the statutes falling in the first two groups, some are more susceptible to a construction allowing recovery for lost-life damages than others. For example, the Mississippi wrongful death statute furnishes a basis for a strong argument in favor of lost-life damages by providing for recovery of "such damages as the jury may determine to be just, *taking into consideration all the damages of every kind to the decedent* and all damages of every kind to any and all parties interested in the suit."<sup>176</sup> Loss of life is certainly a kind of damage to the decedent. Similarly, the Pennsylvania wrongful death statute provides that "[a]n action may be brought . . . to recover damages *for the death* of an individual caused by [a] wrongful act."<sup>177</sup> "Damages for the death" could be construed to include damages for the loss of life.<sup>178</sup>

It will no doubt take a bold and progressive court to reconstruct such a wrongful death statute to allow recovery for lost-life damages. In addition to the general objections to such awards addressed in Part II of this Article,<sup>179</sup> proponents of lost-life damages will have to overcome the argument that the only appropriate damages under wrongful death statutes are those intended to compensate the survivors for their losses, which do not include damages for the value of the decedent's life. As noted, this problem is minimized in states that measure wrongful death damages by the loss resulting to the estate, rather than by the loss to the survivors. Compensating the decedent's estate for all losses inflicted by the wrongful death could logically include compensation for the decedent's loss of life itself.

However, this conceptual obstacle should not be insurmountable even in loss-to-the-survivors jurisdictions. Decisions in wrongful death cases demonstrate that judges and juries recognize that human life has value beyond pecuniary loss and often manipulate

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entitled to sue"); NEB. REV. STAT. § 30-810 (1989) ("The verdict or judgment should be for the amount of damages which the persons in whose behalf the action is brought have sustained.").

176 MISS. CODE ANN. § 11-7-13 (Supp. 1990) (emphasis added).

177 42 PA. CONS. STAT. ANN. § 8301 (Purdon 1982 & Supp. 1990) (emphasis added).

178 *But see* Willinger v. Mercy Catholic Medical Center, 482 Pa. 441, 446, 393 A.2d 1188, 1190 (1978) (rejecting lost-life damages under Pennsylvania survival statute on the basis that loss of life has never been compensable in Pennsylvania).

179 *See supra* notes 34-51 and accompanying text.

the rule to reflect this recognition.<sup>180</sup> The harder judges and juries strain to get around the pecuniary loss limitations on wrongful death damages, the stronger the justification for modifying the law.

The history of tort law is rife with instances where judges have acted to harmonize the written law with the reality of law. Justice Traynor's watershed concurring opinion in *Escola v. Coca Cola Bottling Co. of Fresno*,<sup>181</sup> where he urged adoption of strict liability in tort for injuries caused by defective products, criticized the "fictions" developed by courts to achieve the same result.<sup>182</sup> The Florida Supreme Court, considering whether to recognize intentional infliction of emotional distress as an independent tort, took note of the "strong current of opinion" that such action was warranted "in lieu of the strained reasoning so often apparent when liability for such injury is predicated upon one or another of several traditional tort theories."<sup>183</sup> Courts have an obligation to correct the law to keep it in step with how it is being applied in practice. This is such a case.

Courts should not feel overly constrained by either the conceptual difficulty of allowing survivors to recover for the loss of the decedent's life, or by prior interpretations of their wrongful death statutes. As for the conceptual problem, the Supreme Court of California was correct when, in holding that comparative fault principles apply to strict liability claims for defective products, it rejected conceptual and semantic consistency in favor of "the attainment of a just and equitable result."<sup>184</sup> Similarly, with re-

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180 See *supra* notes 32-33 and accompanying text.

181 24 Cal. 2d 453, 150 P.2d 436 (1944).

182 *Id.* at 463-68, 150 P.2d at 440-44 (Traynor, J., concurring). Justice Traynor's view prevailed in *Greenman v. Yuba Power Products*, 59 Cal. 2d 57, 377 P.2d 897, 27 Cal. Rptr. 697 (1963), where he indicated that the court was simply making explicit what had been implicit since the recognition of implied warranties and abandonment of the privity limitation in warranty actions:

Although in these cases strict liability has usually been based on the theory of an express or implied warranty running from the manufacturer to the plaintiff, the abandonment of the requirement of a contract between them, the recognition that the liability is not assumed by agreement but imposed by law, and the refusal to permit the manufacturer to define the scope of its own responsibility for defective products . . . make clear that the liability is not one governed by the law of contract warranties but by the law of strict liability in tort.

*Id.* at 63, 377 P.2d at 901, 27 Cal. Rptr. at 701.

183 *Slocum v. Food Fair Stores*, 100 So. 2d 396, 397 (Fla. 1958).

184 *Daly v. General Motors Corp.*, 20 Cal. 3d 725, 736, 575 P.2d 1162, 1168, 144 Cal. Rptr. 380, 386 (1978). Conceptually and semantically, comparative fault principles should have no application to claims predicated upon strict liability because there is no

gard to the effect of road-blocking precedent, the Supreme Court of Pennsylvania reasoned in abrogating the doctrine of local governmental immunity: "The controlling principle which emerges . . . is clear—the doctrine of *stare decisis* is not a vehicle for perpetuating error, but rather a legal concept that responds to the demands of justice and, thus, permits the orderly growth processes of the law to flourish."<sup>185</sup>

There is no inconsistency in awarding to the survivors of the deceased the value of his lost life in addition to their own losses. The loss has occurred, the defendant has inflicted it and the deterrence rationale and principles of symbolic justice warrant awarding damages for it. The survivors are logical recipients of these damages. The difference between awarding the damages to the survivors as opposed to the estate of the decedent is simply one of form. Some courts undoubtedly will feel this is a matter appropriately left to the legislature, and that may well be the preferable course. Wrongful death statutes could easily be amended to authorize lost-life damages. Precisely how this should be accomplished is discussed in Part IV.<sup>186</sup>

#### IV. VALUING HUMAN LIFE

It is time to revisit the opening sentence of this Article: "What is a human life worth?" Once one determines that life has a hedonic value which is improperly ignored under current damages rules in wrongful death cases, the inevitable question is how that value should be fixed. One response might be that since life is priceless, any effort to value life denigrates its sanctity by equating human life with ordinary commodities. Nevertheless, while such a response may be appealing from a moral standpoint, it ignores reality. In wrongful death actions, we do not have the luxury of simply saying that life is too precious to be valued; instead, we treat it as worthless. The law recognizes a right to recovery when a defendant wrongfully takes the life of another. Having critiqued the existing method for valuing that life (*i.e.*, the pecuniary loss rule), the purpose of this Part is to consider alter-

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fault on the defendant's side against which to compare the plaintiff's fault.

185 *Ayala v. Philadelphia Bd. of Pub. Educ.*, 453 Pa. 584, 606, 305 A.2d 877, 888 (1973) (superseded by 42 PA. CONS. STAT. §§ 8541-64 (1978)). *See also* *Barden v. Northern Pac. R.R. Co.*, 154 U.S. 288, 321 (1894) ("It is more important that the court should be right upon later and more elaborate consideration of the cases than consistent with previous declarations.").

186 *See infra* notes 217-48 and accompanying text.

natives.

Perhaps surprising to some, the development of methodologies to place a value on human life is not a new science. Economists have written reams about the issue, principally with reference to the costs and benefits of risk reduction in the work and market places. They have come up with two basic approaches for valuing human life: the human capital approach and the willingness-to-pay approach. Federal agencies employ these methods on a regular basis in their efforts to comply with the Reagan Administration's executive order requiring agencies to weigh the costs and benefits of new safety regulations.<sup>187</sup> Both approaches were developed to value life *ex ante*—before it is lost. For reasons set forth below, neither is satisfactory for use in tort actions.

#### A. *Human Capital Approach*

The human capital approach parallels the pecuniary loss rule used in wrongful death cases, and thus, suffers from the same defects. This method measures the value of life by calculating what the death of the person has cost society in terms of lost economic productivity.<sup>188</sup> It equates lost human economic productivity with the loss of goods that would result from the premature destruction of productive physical capital. Specifically, the human capital approach measures the value of human life by the amount of lost future earnings discounted to present value.<sup>189</sup>

In light of what has been said about the pecuniary loss rule, no extended discussion of the deficiencies in the human capital approach is necessary. By focusing only upon the loss to the national income, the human capital approach, like its cousin the pecuniary loss rule,<sup>190</sup> systematically undervalues life by failing to take into account variables such as the pleasure of living and the desire to live.<sup>191</sup> People live for reasons other than econom-

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187 See *supra* note 3. An excellent analysis of this agency process is found in C. GILLETTE & T. HOPKINS, FEDERAL AGENCY VALUATIONS OF HUMAN LIFE: A REPORT TO THE ADMINISTRATIVE CONFERENCE OF THE UNITED STATES (Dec. 1988) (unpublished).

188 *Id.* at 34.

189 Linnerooth, *The Value of Human Life: A Review of the Models*, 17 *ECON. INQUIRY* 52 (1979).

190 See *supra* notes 11-33 and accompanying text.

191 "The obvious weakness of this approach is that it measures only the economic importance of an individual to society. It excludes the emotional value of an individual to himself and to those around him, which surely can be a substantial consideration." Howard & Antilla, *What Price Safety? The "Zero-Risk" Debate*, *DUN'S REVIEW*, Sept. 1979, at 48, 51.

ic production. The extra-judicial reasoning offered by a federal district judge in support of his decision to allow hedonic damages to go to the jury in *Sherrod v. Berry*<sup>192</sup> is revealing. He told a reporter after the trial that he found hedonic damages "appropriate because I know enough about life to know it's enjoyable."<sup>193</sup> One would be hard-pressed to disagree.

Also like the pecuniary loss rule,<sup>194</sup> the human capital approach discriminates against groups of low- or no-wage earners such as women, minorities, minors and the elderly.<sup>195</sup> We may not all be commensurate as money-making machines, but it is doubtful anyone would concede that his life is worth less than his banker's merely because the banker is more economically productive. Indeed, many of the great figures in history—artists, writers, composers—would be worth little under the human capital approach. Though productive as enrichers and experiencers of life, they did little to boost the gross national product in their day.

About the only thing to be said in favor of the human capital approach is that, like the pecuniary loss rule,<sup>196</sup> it can be applied with relative ease because of the availability of data on earnings. As economist E.J. Mishan observed: "Recourse to [the human capital approach] by the practicing economist does not . . . rest on the clear recognition of the desirability of maximizing GNP but rather, obviously on the fact that it lends itself easily to quantification."<sup>197</sup>

Administrative convenience is not a sufficient justification for retaining what are otherwise unsound and incomplete approaches to valuing human life. As Mishan commented in another work, "there is more to be said for rough estimates of the precise concept than precise estimates of economically irrelevant concepts."<sup>198</sup> Valuing life based upon lost economic productivity,

192 629 F. Supp. 159 (N.D. Ill. 1985), *aff'd*, 827 F.2d 195 (7th Cir. 1987), *rev'd on other grounds*, 856 F.2d 802 (1988) (en banc).

193 Tapp, *supra* note 36, at 1, col. 6 (quoting Honorable George N. Leighton).

194 See *supra* notes 23-31 and accompanying text.

195 "This method is criticized because it sets low values for the lives of the poor, handicapped, and elderly." Tafler, *Cost-Benefit Analysis Proves a Tough Task*, HIGH TECH., July/Aug. 1982, at 76.

196 But see *supra* notes 46-47 and accompanying text for discussion of problems involved in calculating pecuniary losses.

197 E.J. MISHAN, *COST-BENEFIT ANALYSIS* 156 (1971). See also Cook, *The Value of Human Life in the Demand for Safety: Comment*, 68 AM. ECON. REV. 710 (1978) (author offers ease of application as the explanation for continued use of the human capital approach).

198 Mishan, *Evaluation of Life and Limb: A Theoretical Approach*, 79 J. POL. ECON. 687,

while perhaps not irrelevant, is incomplete and therefore inadequate as a basis for calculating damages in wrongful death actions.

### B. *Willingness-To-Pay Approach*

The valuation approach most highly touted for including the full value of human life in wrongful death actions is the willingness-to-pay method.<sup>199</sup> This is the approach economist Stanley Smith successfully employed to persuade the jury to award \$850,000 in hedonic damages to the plaintiff in *Sherrod*.

Cast in its simplest form, the value of a human life under the willingness-to-pay approach "is the amount members of society are willing to pay to save one."<sup>200</sup> This can be determined, so the theory holds, by analyzing either production or consumption behavior with respect to risk reduction or avoidance. Most willingness-to-pay studies examine the production behavior of people in terms of their willingness to be exposed to risks of fatality in the workplace. Life values are determined by analyzing wage premiums paid to workers in high-risk industries.<sup>201</sup> The idea is that the value workers place on their own lives can be determined by looking at how much of a wage premium they demand to work in enterprises that expose them to enhanced risks of fatality. It is not a completely new idea. Adam Smith suggested two hundred years ago that workers must be induced to take risky jobs by receiving higher pay for them.<sup>202</sup>

Some willingness-to-pay studies are based upon observed consumption behavior rather than production behavior. Here, the question is what a person will voluntarily pay to reduce or avoid a particular risk of death.<sup>203</sup> Assume, for example, there are two

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705 (1971).

199 The basic theory was derived from a 1968 article by Thomas Schelling. Schelling, *The Life You Save May Be Your Own*, reprinted in T. SCHELLING, CHOICE AND CONSEQUENCE 113 (1984). Detailed discussion of the economic analyses involved in applying the willingness-to-pay approach is beyond the scope of this article. Those interested in the methodologies employed should consult the works cited herein.

200 Thaler & Rosen, *The Value of Saving a Life: Evidence from the Labor Market*, in MARKET AND NONMARKET ASPECTS OF REAL EARNINGS 265 (National Bureau of Economic Research 1973).

201 E.g., Olson, *An Analysis of Wage Differentials Received by Workers on Dangerous Jobs*, 16 J. HUM. RESOURCES 167 (1981) (concluding that the estimated value of a life implied by the risk premium paid to workers in dangerous jobs is \$3.2 million).

202 Thaler & Rosen, *supra* note 200, at 266.

203 E.g., Blomquist, *Value of Life Saving: Implications of Consumer Activity*, 87 J. POL. ECON. 540 (1979) (by analyzing automobile seatbelt use, author arrives at a value of

products that are identical except that one of them has a safety feature that the other lacks. Assume further that the product with the safety feature costs ten dollars more than the one without the safety feature. Finally, assume it can be calculated that this safety feature will reduce the probability of death resulting from use of the product from ten in a million to five in a million. If a consumer voluntarily purchases the product with the safety feature for ten dollars more, the implied value of his life from his observed consumptive behavior can be computed as follows:  $\$10/.000005 = \$2 \text{ million}$ .<sup>204</sup>

The theoretical advantage of the willingness-to-pay model is that it takes into account the intrinsic value of life which is ignored by the human capital approach and the pecuniary loss rule. It assumes that individuals take into account their enjoyment of life when they make employment or consumption decisions that will expose them to a risk of dying. Another advantage is that, because the willingness-to-pay approach involves an objective analysis of market data rather than a subjective analysis of the particular victim's life,<sup>205</sup> application of the approach in wrongful death actions would avoid the discriminatory effect of the human capital and pecuniary loss approaches. All lives, be they bankers' or factory workers', are worth the same under a willingness-to-pay approach.

Hence, the willingness-to-pay model theoretically has great potential in wrongful death cases to assist the fact finder in attaching a complete value to the decedent's life. However, the validity of the willingness-to-pay theory depends upon assumptions that people have freedom of choice in deciding whether to con-

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\$370,000 per human life).

204 See C. GILLETTE & T. HOPKINS, *supra* note 187, at 41-42. Some willingness-to-pay studies are based upon hypothetical rather than observed behavior. These studies rely upon questionnaires that ask consumers how much they would be willing to pay for safety measures that would reduce a particular risk, or how much they would require as compensation for increased risks. For discussion of the questionnaire method, see Jones-Lee, Hammerton & Philips, *The Value of Safety: Results of a National Sample Survey*, 95 *ECON. J.* 49 (1985). The principal advantage of the questionnaire method is that the survey can be tailored to obtain precisely the information sought. *Id.* at 51. By contrast, it is difficult to isolate the wealth/risk tradeoff with respect to observed behavior because so many other factors influence consumer decisions. *Id.* The major disadvantage of the questionnaire method, however, is that it deals with hypothetical rather than real life choices. *Id.*

205 Stanley Smith, the economist who testified in the *Sherrod* case, told the Wall Street Journal that he does not study the particular joys and sorrows of the victim. "I'm not an expert on any one person's pleasures," he said. Barrett, *supra* note 36, at A-4, col. 1.

front risks, and that they perceive those risks accurately.<sup>206</sup> Unfortunately, both of these assumptions are probably false.

Most willingness-to-pay studies attempt to value human life by looking at the relationship between risky jobs and the wages paid to workers in those jobs.<sup>207</sup> These studies necessarily assume that workers in high-risk industries choose to be exposed to those risks in order to receive a wage premium. This, in turn, requires the broader assumption that people accept particular jobs out of free choice, rather than because of external factors. This is a dubious proposition. Diverse barriers—geographic, educational, language and racial, to name but a few—preclude free choice in employment decisions for many groups of people. For example, we cannot say that residents of Appalachian coal mining regions freely choose to be exposed to the risks of coal mining in return for a wage risk-premium. For many, coal mining is the only choice because of their lack of mobility.

Even if one were to assume that workers have the mobility necessary to make truly voluntary job choices, the willingness-to-pay theory still fails unless it can also be shown that the workers fully understand the hazards involved. This is also true of willingness-to-pay studies that focus upon consumptive behavior. One cannot express a preference to be exposed to a particular risk unless one knows and appreciates the risk. This requires that one accurately perceive both the probability that the risk will materialize and the losses that will occur if it does.<sup>208</sup> This is rarely the case.

Professors Gillette and Hopkins note that appreciation of the risk is particularly unlikely for “single- or infrequent-play players,”<sup>209</sup> that is, individuals who will not confront the risk on a regular basis. Consumers are unlikely to exert the effort necessary to acquire information about the risks involved with many kinds of products because the search for that information is too costly given the infrequent use of the product.<sup>210</sup> Repeat players—usually workers—are more likely to acquire information regarding risks that they will regularly encounter, but they may not acquire this information until after spending some time on the

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206 See Linnerooth, *supra* note 189, at 53.

207 See Blomquist, *The Value of Human Life: An Empirical Perspective*, 19 *ECON. INQUIRY* 157 (1981) (discussing numerous studies).

208 C. GILLETTE & T. HOPKINS, *supra* note 187, at 43-44.

209 *Id.* at 44.

210 *See id.*



job. By then, other practicalities may influence the worker's decision to stay in that occupation. This calls into question whether the worker is exposing herself to the risk as a matter of preference. The worker may have moved her family to the location to take the job; her financial obligations may have grown commensurate to her higher earnings, locking the worker into the job; or the worker may not want to admit to herself that she made a bad decision.

The most basic flaw in the willingness-to-pay theory, however, is that it simply does not comport with the reality of how people behave. The truth is that we often fail to avoid risks even when they involve little cost. This is probably because we believe in our own immortality, sharing a kind of "that only happens to other people" mentality. Presumably, most drivers know that the failure to wear a seatbelt substantially increases their chances of dying in a serious auto accident, yet most drivers still do not wear seatbelts.<sup>211</sup> Does their failure to accept a small inconvenience to avoid a significant risk of death mean that people do not value their lives highly,<sup>212</sup> or does it mean only that, regardless of the existence of the risk, they do not think it will happen to them?

People accept risks not because they are willing to gamble on losing their lives in order to save or make a little money, but because they do not think the risk will ever materialize. To permit a realistic appraisal of a person's willingness to trade risk for wealth, we would have to confront the person with a known, substantial and imminent risk of death. For example, how much would a person demand to play Russian Roulette with a six-chamber revolver loaded with one bullet? The risk is easily computed as a one-in-six chance of death. To know the amount people would demand to confront this risk would allow us to calculate with accuracy the value people attach to their lives. We can predict with confidence that the amounts would be tremendous, and

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211 As Machol notes:

It is well known . . . that about one American in 5,000 will die each year in automobile accidents, and many more will be severely injured; yet people routinely accept this hazard by traveling in autos (and even frequently refuse to reduce it by the simple expedient of fastening seat belts). It is equally well known that people will not generally spend a large amount of money to reduce an already small probability of death—for example, very few Americans were willing to spend a few hundred dollars extra to buy air bags for their cars.

Machol, *How Much Safety?*, 16 INTERFACES 50, 54 (1986).

212 Blomquist's study of seatbelt use came up with a life valuation of only \$370,000 per life. Blomquist, *supra* note 203, at 540.

that they probably would not vary widely between those who wear seat belts and those who do not.

Calculations of life values from willingness-to-pay studies vary wildly, even though they convey an aura of reliability. Economist Glenn Blomquist's 1981 article surveying nine studies reveals a range from \$50,000 to \$8.9 million per life.<sup>213</sup> Although they do not always reveal their methodologies, federal agencies have set life values as low as \$70,000 and as high as \$132 million per life.<sup>214</sup> Figures provided by hedonic damages expert Stanley Smith vary from \$66,000 to \$11.8 million per life.<sup>215</sup>

Given the flaws of the willingness-to-pay theory and the wide-ranging values it generates, the extent to which willingness-to-pay evidence meaningfully assists a jury in calculating damages for the intrinsic value of life is suspect at best. The fact is that there is no reliable way to evaluate the intrinsic value of a person's life. As discussed above,<sup>216</sup> this is not a sufficient reason to refuse to attach a value to life, but it does call for a different approach.

### C. *English Law and a Proposed Legislative Solution*

English courts have long awarded damages for what they termed the "loss of expectation of life."<sup>217</sup> The first case recognizing such a recovery was *Flint v. Lovell*,<sup>218</sup> where the trial court awarded £4,000 to a seventy-year-old man injured in an auto accident, based upon the judge's conclusion that he had "lost the prospect of an enjoyable, vigorous and happy old age which I am satisfied on the medical testimony might have gone on for a number of years if this unhappy accident had not occurred."<sup>219</sup> The evidence showed the accident reduced the plaintiff's life expectancy by eight or nine years.<sup>220</sup>

In *Rose v. Ford*,<sup>221</sup> the House of Lords extended the reasoning of *Flint* to a wrongful death situation, holding that the right

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213 Blomquist, *supra* note 207, at 158.

214 C. GILLETTE & T. HOPKINS, *supra* note 187, at 2. The \$70,000 figure was set in 1980 in connection with a Consumer Product Safety Commission regulation governing space heaters. The \$132 million value came from a 1979 regulation by the Food and Drug Administration banning DES in cattle feed. *Id.*

215 Barrett, *supra* note 36, at A-4, col. 2-3.

216 See *supra* notes 42-51 and accompanying text.

217 See generally Note, *Damages for Lost Years*, 97 L.Q. REV. 353 (1981).

218 [1935] 1 K.B. 354.

219 *Id.* at 355.

220 *Id.* at 357.

221 [1937] App. Cas. 826.

to recover damages for the loss of expectation of life passes upon death to the decedent's personal representative.<sup>222</sup> However, the House of Lords avoided the issue of how such damages should be measured, stating only that "[h]ow the damages are to be calculated is a question which this House has not to decide, for there has been no quarrel with the amount fixed by the Court of Appeal in this case of £1,000."<sup>223</sup>

The House of Lords grappled, quite unsatisfactorily, with the valuation issue in *Benham v. Gambling*.<sup>224</sup> The trial court awarded £1,200 for the loss of expectation of life of a two-and-one-half-year-old child, which the court of appeals affirmed. The House of Lords ruled that £1,200 was an excessive award for a child's lost expectation of life, and reduced the award to £200.<sup>225</sup> Viscount Simon's opinion for the House of Lords recognized that the Lords were faced with "the difficult task of indicating what are the main considerations to be borne in mind in assessing damages" for loss of the expectation of life.<sup>226</sup> Unfortunately, the opinion did little more than eliminate certain factors from consideration, and in the end offered only an amorphous general principle as a standard. The House of Lords began by opining that the victim's life expectancy, while of some relevance, was not of primary importance in measuring damages:

[T]he thing to be valued is not the prospect of length of days, but the prospect of a predominantly happy life . . . . It would be fallacious to assume, for this purpose, that all human life is continuously an enjoyable thing, so that the shortening of it calls for compensation, to be paid to the deceased's estate, on a quantitative basis. The ups and downs of life, its pains and sorrows as well as its joys and pleasures—all that makes up "life's fitful fever"—have to be allowed for in the estimate. In

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222 Lord Atkin, concurring in the unanimous judgment of the House of Lords, explained the decision as follows:

I am of opinion, therefore, that a living person can claim damages for loss of expectation of life. If he can I think that right is vested in him in life, and on his death passes under the Act of 1934 to his personal representative. I do not see any reason why the fact that the expectation is realized, i.e., that death comes at the time anticipated, or sooner, should make any difference.

*Id.* at 834. These damages are separate from damages recoverable by the survivors of the decedent in their own right. *Id.* at 835.

223 *Id.* at 834.

224 [1941] App. Cas. 157.

225 *Id.* at 168.

226 *Id.* at 165.

assessing damages for shortening of life, therefore, such damages should not be calculated solely, or even mainly, on the basis of the length of life which is lost.<sup>227</sup>

Instead, the question "resolves itself into that of fixing a reasonable figure to be paid by way of damages for the loss of a measure of prospective happiness."<sup>228</sup> This requires a determination of what the victim's prospects for happiness were prior to death.<sup>229</sup> The claim on behalf of the child victim in *Benham* failed on this count. Viscount Simon believed that because of her immaturity, "there [was] necessarily so much uncertainty about the child's future that no confident estimate of prospective happiness [could] be made."<sup>230</sup> Based upon this, the House of Lords agreed that £200 was a proper figure for lost-expectation-of-life damages.<sup>231</sup> In doing so, it emphasized that because a dead person cannot be compensated and because putting a money value on lost life necessitates an effort to "equate incommensurables," damages in all such cases should be "very moderate."<sup>232</sup> Strangely, after offering this general guidance, the House of Lords acted as if it had instilled great certainty into the damage calculation process, confidently stating it was "approving a standard of measurement which, had it been applied in [earlier] cases, would have led . . . to reduced awards."<sup>233</sup>

After *Benham*, English courts began awarding nominal, standardized sums for lost expectation of life. Thus, in *Gammell v. Wilson*,<sup>234</sup> the court of appeals held that an award of £1,250 was proper for a decedent's lost expectation of life in all cases, to be changed only to take account of inflation. The court reasoned as follows:

This figure has to be a conventional figure. It is important that there should be uniformity. Accordingly, when the question of the amount is raised in this court, we must do our

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227 *Id.* at 166.

228 *Id.* The House of Lords stated that lost future earnings play no part in calculating damages for loss of expectation of life because wealth does not contribute to human happiness. *Id.* at 167.

229 *Id.* at 166-67. If evidence shows that the person was destined for a life of unhappiness, then no damages, or at least much smaller damages, should be awarded. *Id.* at 167.

230 *Id.*

231 *Id.* at 168. The House of Lords commented that "even this amount would be excessive if it were not that the circumstances of the infant were most favourable." *Id.*

232 *Id.*

233 *Id.*

234 [1980] 2 All E.R. 557 (C.A.).

best to give guidance. It is not one of those cases where this court can properly say: "This is a matter for the trial judge. We will not interfere."<sup>235</sup>

The law has since changed in England. In the appeal of *Gammell*, the House of Lords expressed dissatisfaction with damages for the lost expectation of life and called upon Parliament to take action to clarify the amount of damages that should be awarded in wrongful death cases.<sup>236</sup> In the Administration of Justice Act of 1982, Parliament responded to this call and abolished damages for lost expectation of life.<sup>237</sup>

While the haphazard development of English law in this area is not something to be emulated, the English approach of fixing an arbitrary sum to be awarded for lost life is a fitting one, which should be adopted in this country by legislation. Endorsement of this approach is demanded by two indisputable premises: (1) life has a substantial intrinsic value, which is currently ignored by positive law in American death cases; and (2) there is no way of calculating this value in any meaningful way.

Acceptance of the second premise does not defeat the force of the first one. The argument that damages for the lost value of life are too speculative has already been addressed in this Article.<sup>238</sup> When a tortfeasor wrongfully takes a life, an injury has occurred which warrants compensation, whether for deterrent purposes<sup>239</sup> or for symbolic justice.<sup>240</sup>

The deterrence theory works only if the tortfeasor is required to pay the full costs of his injury-causing activity.<sup>241</sup> Otherwise, the actor will lack adequate incentive to invest in safer behavior. Failure to attach value to human life undermines the deterrence model because the tort system does not account for the full cost of injury.

The author believes that the general deterrence model of tort law works, though only in a "rough and ready way."<sup>242</sup> No

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235 *Id.* at 568.

236 *Gammell v. Wilson*, [1982] App. Cas. 27, 74.

237 Administration of Justice Act, 1982, ch. 53, § 1(1). The Act provides that the decedent's awareness of impending death be considered as an element of pain and suffering. *Id.*

238 *See supra* notes 42-51 and accompanying text.

239 *See supra* notes 52-76 and accompanying text.

240 *See supra* notes 77-84 and accompanying text.

241 *See supra* notes 70-73 and accompanying text.

242 "The difficulty of calculating social costs, of evaluating non-economic costs and benefits, [and] of allocating different costs to different activities . . . are such that

doubt, any effort at computing an economically efficient value to human life in order to achieve optimization of the number of wrongful deaths would be imperfect at best. But imperfect as compared to what? Concededly, the cost of a life cannot be mathematically determined for the purpose of inserting it into an economic formula, but the general proposition remains that *certain and severe* sanctions would give actors a strong disincentive to engage in unsafe behavior that presents a risk of death. Deterrence would be furthered if would-be tortfeasors knew that in every case the consequence of wrongfully taking another's life would be exacting. This has long been a fundamental emphasis of deterrence literature.<sup>243</sup>

To accomplish such deterrence, state legislatures should pass statutes providing for a substantial, fixed, minimum award in wrongful death cases. This amount need not represent society's determination of the actual value of human life, because human life is indeed priceless. Instead, it would represent the less profound recognition that life is valuable and that a substantial cost should be imposed on those who wrongfully take it away.

The wrongful death statute of one state, Rhode Island, furnishes a workable model. Rhode Island has statutory provisions providing for the award of pecuniary losses<sup>244</sup> and loss of spousal or parental society and companionship<sup>245</sup> in wrongful death actions. In addition, a separate section provides: "Whenever any person or corporation is found liable under §§ 10-7-1 [to] 10-7-4, inclusive, *he or she or it shall be liable in damages in the sum of not less than one hundred thousand dollars (\$100,000).*"<sup>246</sup> This section implicitly recognizes that life has intrinsic value apart from the economic contributions and society that the decedent's survivors will lose as a result of the death; even if other cognizable losses are missing, this statute recognizes that life has value.

The Rhode Island statute offers a simple means of solving a complex problem. States could rectify the current deficiency in their wrongful death remedies simply by adding a section providing for a minimum recovery in all death actions, thus providing

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general deterrence can usually only operate in a rough and ready way at best." P.S. ATIYAH, ACCIDENTS, COMPENSATION AND THE LAW 612 (3d ed. 1980).

243 See, e.g., Geerken & Gove, *Deterrence: Some Theoretical Considerations*, 9 LAW & SOC'Y REV. 497, 498-99 (1975); Grasmick & Bryjack, *The Deterrent Effect of Perceived Severity of Punishment*, 59 SOC. FORCES 471, 485, 486 (1980).

244 R.I. GEN. LAWS § 10-7-1.1 (Supp. 1990).

245 R.I. GEN. LAWS § 10-7-1.2 (1985).

246 R.I. GEN. LAWS § 10-7-2 (Supp. 1990) (emphasis added).

recovery for the value of lost life. Such a statute would set a damage floor. The statute would become operative when pecuniary and other recognized elements of damages do not exceed the minimum recovery amount. The following model could be used:

*Wrongful death—minimum recovery.*

In every wrongful death action in which the plaintiff is the prevailing party, the plaintiff's recovery shall be in an amount not less than \$\_\_\_\_\_.

The amount of this minimum recovery should be determined by the legislatures of each state. The amount should be substantial enough both to promote deterrence and to symbolically demonstrate the state's commitment to human life. Whatever amount is adopted, legislatures should, of course, be cognizant of the necessity of increasing it as inflation takes its toll on the value of money.

As stated, the amount need not be looked upon as establishing what the elected representatives of the state believe life to be worth. The fact that State A sets its minimum recovery at \$100,000 and State B establishes the amount to be \$500,000 does not mean that State A does not value life as much as State B. Moral and philosophical concerns regarding this could be dealt with by an accompanying declaration of legislative purpose along the following lines:

*Declaration of Purpose.*

It is the view of the legislature that human life is priceless in that each life is unique and can never be replaced. The current method of awarding damages for the tortious taking of a life in this state is inadequate because it fails to recognize that the life itself has any value. This statute cures that deficiency by recognizing that in all wrongful death cases, regardless of the plaintiff's ability to prove pecuniary or other losses, there shall be a minimum recovery in an amount set by the statute. This does not represent the view of the legislature that a human life is worth only that amount. As stated, human life is priceless. Instead, the minimum recovery serves the purpose of deterring tortious conduct likely to result in death, while at the same time demonstrating the state's dedication to the principle that all lives have intrinsic value.

Broader or more elaborate statutory schemes are possible. Statutes could, for example, set different recovery values depending upon the age of the victim. An argument could be made that a child's life is worth more than the life of an adult because of

the larger quantity of life taken away. A reverse argument, however, is that a child's prospects are less certain than an adult's because a child must face the risks and uncertainties of childhood.<sup>247</sup> This fact arguably justifies larger awards for adults than for children. To avoid these questions, as well as the moral dilemma of making relative life value determinations, a single sum applicable to all seems preferable.

States might also choose to allow recovery for the lost value of life as an extra element of damages, to be added to other damages such as pecuniary losses. Under the proposed minimum recovery solution, if the amount of pecuniary and other damages exceeds the minimum statutory amount, the statute would have no effect. To come closer to achieving full valuation of the losses from death, it would be desirable to treat the recovery for lost life as an additional amount. However, in the current tort reform climate it is unlikely that most state legislatures could be persuaded to adopt an approach that would increase what some already consider to be outrageous tort awards. The minimum recovery statute is sufficient to further the deterrent function of tort law, while also serving the principle of symbolic justice. Providing for a substantial minimum recovery in all cases where liability is established would significantly diminish the discriminatory impact of the pecuniary loss rule.

Rather than prescribe a minimum amount, states might opt for a statute that merely authorizes lost-life damages as a recoverable element of damages, leaving to juries the task of determining the proper amount. Letting the jury decide whether to award such damages and in what amount would lack the certainty of sanction inherent in a minimum recovery statute. Nonetheless, because juries could be expected to award amounts substantially higher than states would be willing to set as minimum recoveries, this approach probably would have a greater deterrent impact. Indeed, the impact may be too great. Just as a failure to include a loss can distort the deterrence model, so can valuing it too highly.

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<sup>247</sup> The English courts made a similar argument in justifying a lower award for a child's lost expectation of life:

When an individual has reached an age to have settled prospects, having passed the risks and uncertainties of childhood, and having in some degree attained to an established character and to firmer hopes, his or her future becomes more definite, and the extent to which good fortune may probably attend him at any rate becomes less incalculable.

Benham v. Gambling, [1941] 1 All E.R. 7, 13.



Overdeterrence may result.<sup>248</sup> Given the speculative nature of valuing human life and the danger that jurors, conditioned to believe that life is priceless, may overcompensate for the loss, a fixed-amount approach seems preferable.

On balance, the proposed minimum recovery statute is the most reasonable means of recognizing the value of human life in tort actions. It promotes the rationales underlying awards for such damages in a way that is not unduly oppressive to defendants.

## V. CONCLUSION

No one would dispute that a human life has intrinsic value apart from its economic productivity. Indeed, most people, if asked to place a value on human life, would quickly answer that it is priceless. Yet our tort system ignores this intrinsic value of life in actions arising from wrongful death. Instead, we effectively value human life by focusing upon the pecuniary value of the contributions the deceased tort victim could have been expected to make to his dependents during his life. In so doing, we discriminate against children, elderly persons, emancipated adults who have not yet acquired their own dependents, and entire classes of low- or no-wage earners. The societal implications of this are tremendous. Under the pecuniary loss rule, the lives of blacks and women are worth less than those of white males, because, as classes, blacks and women earn less than white males.

The thesis of this Article has been that life has intrinsic value that should be recognized in tort law. The arguments against awarding such damages are twofold: (1) they fail to fulfill the compensatory function of tort law, and (2) they are too speculative. But, as demonstrated, these arguments paint with too broad a brush, for they succeed only in calling into question a much wider array of tort rules that allow recovery for other intangible losses.

Awarding damages for the lost value of life in wrongful death actions has two justifications. First, such damages serve to fulfill the deterrent function of tort law. Optimization of tortiously caused accidents can be achieved only if the tort system takes full account of all injuries caused by a tortfeasor. To the extent a tortfeasor is not required to bear the full costs of his unsafe con-

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248 See Smith, *supra* note 63, at 773 ("If injurers are liable for *less* than actual costs, their incentive to adopt safety measures is insufficient; if they are liable for *more* than the actual costs of injuries, they overinvest in safety.").

duct, he is insufficiently motivated to invest in safer behavior. Loss of life is a very real cost which is currently excluded from the deterrence calculus.

The second justification for lost-life damages—symbolic justice—transcends the traditional theories underlying tort law. Life is the premier entitlement in a system of rights based upon personal security and autonomy. Without it, other entitlements mean nothing. Yet we operate under a system that gives no formal recognition to the value of life, while effectively treating some lives as worth more than others. As a symbolic reflection of society's commitment to life, the tort system should recognize that *all* lives have substantial value.

Thus far, lost-life damages have obtained their strongest foothold in federal civil rights actions under 42 U.S.C. § 1983. Several federal courts have recognized damages for the lost value of life in section 1983 wrongful death cases based upon the need to deter unconstitutional deprivations of life. Among state courts, only Connecticut has recognized a general right to recover for the lost value of life in a death action. Under existing state remedies, the most likely opportunities for persuading courts to recognize lost-life damages exist in those states that measure damages in wrongful death actions by the loss to the estate, rather than by the loss to the survivors. In loss-to-the-estate jurisdictions, it is logically and doctrinally consistent to include the intrinsic value of the decedent's life as one of his estate's recoverable losses.

It is more difficult to reconcile recovery for lost-life damages in the majority of states which measure wrongful death damages by the loss to the survivors. The language of the wrongful death statutes of some states precludes such damages, but the statutes of many states are amenable to a construction allowing recovery for the value of lost life. In all states, however, a conceptual obstacle stands in the way of recovering lost-life damages in wrongful death actions. As opposed to the pecuniary losses, loss of society, or mental anguish resulting from death, the intrinsic value of the decedent's life is not a loss suffered by the survivors. Thus, a formalistic argument exists that the survivors should not be awarded damages for this injury which they have not experienced.

However, this should not prevent courts from correcting the injustice of current damage rules in wrongful death cases, particularly since, in practice, judges and juries currently strain to find ways to grant just awards despite the rules. In the past, courts have demonstrated a willingness to hurdle conceptual obstacles in tort cases and refuse to be strait-jacketed by precedent in order

to do the right thing. If we are to recognize damages for lost life, someone must recover them, and the survivors are logical recipients. Mechanically, it may be more appropriate for lost-life damages to be recovered by the decedent's estate, but to make this technical distinction outcome-determinative would exalt form over substance. Substantively, courts should be willing to reinterpret wrongful death statutes where the language so permits to allow damages for the value of lost life.

The issue of how much a life is worth is a vexing one. Economists rely principally upon the "willingness-to-pay" method to determine the value of life. That method looks alternatively at what people demand to be paid in order to be exposed to an increased risk of death and what they are willing to pay to avoid being exposed to a risk of death. The willingness-to-pay method is defective because it wrongly assumes that people exercise free choice with respect to exposure to risks, and that they decide to be exposed to a risk with full appreciation of the nature and extent of the risk. Moreover, the human life values established by economists in willingness-to-pay studies vary so widely that they are of little worth to fact finders in wrongful death litigation.

Accepting both that life has intrinsic value that should be recognized in tort actions and that there is no meaningful way to compute that value, the author asserts that a solution can be found in the English experience. English courts long recognized recovery for what they called the "lost expectation of life" in a fixed, arbitrary amount. The simplest way for states to recognize lost-life damages would be to adopt legislation providing for a fixed, minimum recovery in all wrongful death actions in which the plaintiff is the prevailing party. This would not reflect a societal determination that life is worth only the minimum amount the statute provides; rather, it would simply recognize that, to further both the deterrent function of tort law and symbolic justice, a certain and severe sanction should be imposed whenever one wrongfully takes a life.

For those who are not convinced by this case for hedonic damages, the author poses a parting challenge—to defend the status quo in the context of the following hypothetical. A drunk driver runs a red light. His automobile collides with a Mercedes Benz driven by a wealthy lawyer in his mid-thirties. In the automobile with the lawyer are his maid, whom he is driving home to her family, and his two-year-old daughter. The lawyer, the maid and the child are all killed. All three of these victims were happy,

vibrant people with a fervent zest for living.

Yet, as a formal matter in the ensuing wrongful death actions, the smashed Mercedes will be treated as worth more than the lives of all three tort victims since the law recognizes no independent value for lost life. Indeed, one tail light of the automobile is technically worth more than the lives of the lawyer, his maid and his child. To the extent the law recognizes, in the form of the pecuniary loss rule, that life is valuable *to others*, it would treat the lawyer's life as being worth  $x$  times that of the maid and the maid's life as being worth  $y$  times that of the child's.

How can this result be defended in a system which purports to be built upon equality and justice? The joy of life—what makes it worth living—is not the earning of money to give to others. The pleasure of living lies in the thrills and exhilaration of a first date, a first love, getting a driver's license, graduating from high school and other rites of passage. It lies in the ups and downs of marriage, family and career. It lies in the ordinary day: waking up on a fresh, clear morning; drinking a cup of hot coffee and reading a favorite newspaper section; dressing a child in mismatched clothes that she insists on wearing and sending her off to school; walking to the bus stop or subway in the brisk air; accomplishing a job well done at work; listening to the soothing jabber of dinner-table talk with family; telling a bedtime story to a sleepy little girl; turning the pages of a good mystery that you cannot put down; and finally, enjoying the feel of cool sheets and warm blankets in the peace and solitude of darkness, while mulling over the day's events and contemplating the morrow. This is life. This is what we live for. This is what is valuable.