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DEAD SORROW: A STORY ABOUT LOSS AND A NEW THEORY OF WRONGFUL DEATH DAMAGES

Andrew Jay McClurg
University of Memphis – School of Law

ARTICLES

DEAD SORROW: A STORY ABOUT LOSS AND A NEW THEORY OF WRONGFUL DEATH DAMAGES

ANDREW J. MCCLURG*

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INTRODUCTION

A law professor's life is an agreeable one, especially in the summer, and the late afternoon of June 23, 1998 was no exception. It was a Tuesday. I sat in the sunroom of my Little Rock[1] home in front of a laptop computer, ensconced in air-conditioning, overlooking Allsop Park. The blazing Arkansas sun was starting to dip below the treetops. A glass of wine sweated on a coaster next to the computer. Tranquil music played on the CD player in the background. I was ready to type the opening words of a long-planned book project: a twisted parody of legal education.[2]

* Member of the founding faculty at Florida International University College of Law. I am indebted to Dr. Vickie Logan, for generously sharing recollections and documents concerning the death of her daughter, Kody. Dr. Logan read a draft of this article and approved its contents. My thanks also to Professors Thomas E. Baker, Margaret Taylor, and Mary Pat Treuthart and to lawyer Julie P. Shelton for their helpful suggestions and support of this somewhat unusual "scholarative" combining personal narrative and traditional scholarship. My research assistants, Douglas Giuliano, Bernadette Lopez, and Norma Lorenzo, did outstanding work. Email: McClurg@fiu.edu.

[1] For many years, I was a professor at the University of Arkansas at Little Rock School of Law.

[2] The book made it to completion. *See* ANDREW J. MCCLURG, THE LAW SCHOOL TRIP (AN INSIDER'S GUIDE TO LAW SCHOOL) (2001). It became a minor cult favorite among some

Before starting, I called Kody Logan, my fiancée and best friend. Two weeks earlier, we celebrated our third anniversary as a couple. Always supportive, Kody had been encouraging me for months to start the humor book.[3] Her job as a pharmaceutical representative had taken her on another overnight trip across Arkansas' dangerous Interstate highways.[4] She was due back from Forrest City, a small Arkansas town near Memphis, sometime that afternoon. The answering machine picked up. I left a message:

> Loganight, where are you? You should be getting home soon. Call me when you get home and let me know you made it home safe. Sure do love you, Kody Logan. I'm getting ready to start my humor book – right now. So look out. Bye-bye.[5]

I put the phone down, sank back in my chair and concentrated on trying to write clever lines about law school. At some point, perhaps as I was thinking it might be amusing to begin the book with a product warning parody, Kody's friend and neighbor, June, left a message on Kody's machine saying, "I'm on my way to Memphis and you should be on your way back in,"[6] that she hoped Kody had a good trip and would see her that weekend.

An hour later I had dashed off a page-and-a-half that wasn't completely

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law students and lawyers. *See, e.g.*, Amazon.com, *Customer Reviews, The Law School Trip (The Insider's Guide to Law School)*, *at* http://www.amazon.com/gp/product/customer-reviews/1552126463/103-8529657-4353461?%5Fencoding=UTF8 (last visited February 25, 2004).

[3] I'd been writing a monthly humor column in the *American Bar Association Journal* and wanted to try my hand at something more substantially frivolous. *See* Andrew J. McClurg, *Harmless Error: A Truly Minority View of the Law*, A.B.A. J., (Sept. 1997-Dec. 2001) (humor column that ran fifty-one months).

[4] In 1998, Arkansas had an automobile fatality rate of 2.2 persons per 100 million miles driven. Only four states had a higher automobile fatality rate in 1998: Louisiana: 2.3; Mississippi: 2.8; Montana: 2.5; and South Carolina: 2.3. NAT'L CENTER FOR STATISTICS & ANALYSIS, NAT'L HIGHWAY TRANSP. SAFETY ADMIN., FATALITY ANALYSIS REPORTING SYSTEM (FARS) WEB-BASED ENCYCLOPEDIA, *at* http://www.fars.nhtsa.dot.gov/finalreport.cfm?title=States&stateid=0&year=2002&title2=Fatalities_and_Fatality_Rates (last visited Feb. 27, 2004). That year, 625 people died in auto accidents in Arkansas, compared to 640 in 2002, the most recent year for which official data are available. *Id.*

[5] Audio tape: Messages from Kody Logan's answering machine (June 23, 1998) (on file with author) [hereinafter *Messages*]. Kody's mother preserved the audio tape of the messages left on Kody's answering machine that afternoon. Revealing personal details about relationships is uncomfortable. *See infra* text accompanying note 40 (offering a rationale for this personal narrative). Certainly, it is tempting to rewrite history at least to the extent of omitting goofy pet names and correcting bad grammar, but I tried to make this a faithful account of the events described herein. As for the messages themselves, the mounting sense of dread in this sequence of last phone calls is just one of the many ghosts from that day that haunt Kody's survivors.

[6] *Messages, supra* note 5.

wretched. A couple lines made me laugh, possibly as Kody's mother was leaving another message:

> Kod, it's about six o'clock. I certainly hope you're okay. Grand-mama just called and scared me to death. She said the police were looking for you and for me, that they're trying to identify somebody. [Noise in background] Hold on just a minute. [Call ends][7]

The sun settled lower, sending fragmented shadows across the sunroom. The chardonnay tasted cool and refreshing. Kody's grandmother left the final message:

> Kody, I was just calling to see if you're alright, honey. The state police called Kash and they're on the way over to his house and said they were trying to find you and mama, and I called mama and mama's alright, so we're waiting to hear from you. That's all.[8]

A knock startled me. Visitors rarely came uninvited to the secluded house. When I opened the door and stood facing Kody's brother, Kash, and her father, Bob, there was that momentary sense of being suspended out of place and time when you encounter someone in an unexpected setting. Kash and Bob never visited except with Kody, but they were alone. Much of what happened next is blurry, but I can still "hear" the first two sentences spoken:

"Kody's been in an accident," Bob said flatly. Stricken, I stood waiting for the words that were sure to follow: "We need to go to the hospital." But those weren't the words. "Andy," Kash said, "Kody's dead."[9]

As it turned out, Kody Linn Logan, age 28 – former high school honor student, cheerleader, Outstanding Graduate in her undergraduate program, magna cum laude graduate of her master's program, psychotherapist for sexually abused children, lover of animals, generous community volunteer, winner of more than fifty beauty and talent competitions, and the deepest-

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[7] *Id.* The background noise was a knock on the door from an Arkansas State Trooper. *See infra* note 9.

[8] *Messages, supra* note 5.

[9] Learning of Kody's death is a moment imprinted on all who loved her. Kody's mother related her recollection of the visit from the Arkansas State Trooper who interrupted her phone message to Kody, *id.* (discussing the interruption during the phone message):

> I was in the middle of leaving that message when there was a knock on the door. It was a state trooper. He said, "Ma'am, are you Dr. Logan?" I said "Yes." He said, "Is there someone here with you?" I said, "No. What's wrong?" He said, "Ma'am, I'm sorry to have to inform you that there's been a serious accident involving your daughter." "And?" I said. He said, "And I'm so sorry. She was killed." I don't know why, but one of the first thoughts that occurred to me was that Kody always wanted to donate her organs. I asked the trooper about it, but he didn't have any information about the accident. He was just sent out to tell me Kody was dead. He put me on the phone with the coroner and I raised the issue of organ donation. The coroner said, "Are you not aware of the fire?" "What?" I said. He said, "I'm so sorry. There was a terrible fire. It would not be possible to donate anything."

Telephone Interview with Vickie Logan, mother of Kody Logan (Mar. 4, 2004).

hearted person I ever knew – was already dead when I left the first phone message.

According to the Arkansas State Crime Laboratory report, "[a] burned watch with the hands at 2:20 was present on her left wrist."[10] It may have stopped the instant a truck driver rammed his tractor-trailer into the back of her Ford Taurus in a fourteen-vehicle chain reaction accident on Interstate 40 at mile marker 161 near the Galloway exit. But it may have ticked extra seconds, as the truck driver escaped his vehicle while it gushed diesel fuel on top of and into Kody's car, before the Taurus exploded. The accident started when wind drove smoke from a brush fire in the median north across the westbound Interstate lanes, obscuring drivers' vision. A witness estimated the truck driver's speed heading into the blanket of smoke engulfing the highway to be in excess of 70 mph.[11]

Kody was the only fatality. She died horrifically. According to the Pulaski County Coroner's Investigation Report, "the decedent was burned beyond recognition."[12] It took several days for the coroner to make a positive identification of her body. The distribution of her "Non fatal wounds" appear on the coroner's report as:[13] "Scalp: Y Chest: Y Face: Y Neck: Y Arms: Y Back: Y Abdomen: Y Legs: Y. Other Location: Entire."[14] The "Fatal wounds" are listed as follows: "Size/shape[:] CHARRED REMAINS . . .

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[10] CONCLUSIONS, ARKANSAS STATE CRIME LABORATORY, MEDICAL EXAMINER DIVISION, CASE NO. ME-496-98, at 2 (June 24, 1998) (on file with author). The Pulaski County Prosecuting Attorney opened a file to consider criminal charges against the truck driver. Reviewing the file with the prosecutor's permission, it didn't take long to understand why no charges could be brought. The file was too thin. The state police had performed very little accident investigation, probably due more to budget and staffing constraints than lack of concern.

[11] A witness statement making this assertion was contained in the criminal file. *See id.* The subsequently filed wrongful death suit against the truck driver and his employer was settled. The proceedings are confidential pursuant to standard settlement agreement terms.

[12] CORONER'S INVESTIGATION REPORT, PULASKI COUNTY CORONER, CASE NO. 98-1000, at 4 (on file with author).

[13] "Y" stands for "YES." The gruesome details of Kody's wounds won't be repeated here. However, insight into the manner of death is important to this article. Research shows that violent death, especially from human causes, is more likely to cause more intense grief characterized by Posttraumatic Stress Disorder (PTSD) symptoms than death from other causes. *See* APHRODITE MATSAKIS, I CAN'T GET OVER IT: A HANDBOOK FOR TRAUMA SURVIVORS 320 (2d ed. 1996) (stating that it is commonly believed that survivors of trauma caused by humans suffer more psychological devastation than survivors of natural catastrophes); C. Allen Haney et al., *Spontaneous Memorialization: Violent Death and Emerging Mourning Ritual*, 35 OMEGA 159, 160 (1997) (stating that violent death complicates the mourning process for survivors); *see also infra* notes 51, 93 and accompanying text (citing sources indicating that sudden violent death exacerbates trauma for survivors).

[14] CORONER'S INVESTIGATION REPORT, *supra* note 12, at 3.

Location[:] ENTIRE."[15] All that survived were the watch, one earring, a portion of a sandal, a patch of her brown print dress[16] and her engagement ring.[17]

I. RECONCEPTUALIZING WRONGFUL DEATH DAMAGES

As a torts professor for many years, I spend nearly every day immersed in reading, writing and talking about accidents and accident lawsuits. Hopefully, that explains why in the shock and grief following the accident my thoughts kept returning, involuntarily, to tort law. Almost immediately, I advised Kody's mother to contact an expert personal injury lawyer. As distressing as it was to be thinking about such matters, Kody's family needed to know[18] that with each passing day, evidence from an already complex and chaotic accident scene was disappearing.[19] At the same time I was recommending legal

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[15] *Id.*

[16] Kody bought the dress for a wedding we attended in Hot Springs, Arkansas on Saturday, June 20, 1998, four days before the accident. She's wearing it in the last picture ever taken of her.

[17] The ring, which Kody designed, led a charmed life. After the accident, Vickie, Kody's mother, knowing how important the ring was to Kody, persistently inquired to the coroner about locating the ring. Her inquiries led to the following notation being entered on the crime laboratory's death report: "left fingers burned away, no rings present." CAUSE OF DEATH, ARKANSAS STATE CRIME LABORATORY, CASE NO. ME-496-98 (June 24, 1998) (on file with author). A few weeks later, Vickie and Dave, Vickie's partner, went to the impound lot where Kody's car had been transported on a flatbed truck. Searching through the charred wreckage for anything belonging to Kody, they made an odd discovery. Vickie described what happened:

> Inside where you would assume the dashboard used to be was covered with deep ash and glass. We had on rubber gloves and were just feeling around. Dave was on the opposite side, sifting through the ash and glass, on the passenger side. This went on for about an hour. Finally, I said, "Dave, I just can't do this anymore." All of a sudden, Dave gasped. "Vick," he said. "I think you need to look at this." I was afraid he had found something bad. I thought it was going to be a charred piece of Kody or something. He held up a little blackened piece of metal and said, "Isn't this the ring?"

Telephone Interview with Vickie Logan, *supra* note 9. The ring survived. After being cleaned by the same jeweler who made it, it looks eerily brand new.

[18] In addition to helping Kody's family, perhaps a less noble part of me wanted to see the person responsible be made to pay some price, although my rational side was fully aware that, in the end, any price paid would come from the deep pockets of a remote insurance company. *See* BROOK NOEL & PAMELA D. BLAIR, I WASN'T READY TO SAY GOODBYE: SURVIVING, COPING & HEALING AFTER THE SUDDEN DEATH OF A LOVED ONE 33-34 (2000) (stating that the need to blame someone and have them be held accountable is a common grief reaction to sudden death).

[19] Laypersons sometimes misconstrue the motives behind filing lawsuits so quickly in the wake of tragedy. They don't realize that the need to preserve evidence from calamitous events often requires immediate legal action. Physical evidence easily gets lost or destroyed. Witness memories fade rapidly. As any trial lawyer will attest, the best case in

representation, I struggled with how to explain wrongful death damages. How do you explain to a mother who has just lost her only daughter that the value of her life under the law is literally *zero*? In one telephone conversation, in the middle of a convoluted attempt to expand on our perverse wrongful death system, I awkwardly defaulted to the bottom line, "Vickie, it's hard to explain, but her life just isn't worth very much under the tort system."

When a tortiously caused death occurs, five losses result: (1) the decedent's life itself; (2) the trauma and bereavement suffered by the decedent's survivors, collectively referred to in this article as "grief;"[20] (3) the pecuniary value of financial and service contributions that the decedent could have been expected to make to his or her dependents; (4) the loss of the decedent's society and companionship, which in some states is considered a type of pecuniary loss under the fiction that society and companionship are lost "services" of the decedent with an ascertainable monetary value (placing them in category 3), but which in other states is viewed as an intangible or noneconomic loss;[21] and (5) the direct costs associated with the death, such as funeral expenses.

The wrongful death system fails to account for the first two elements. Current law attaches no monetary value to life itself. We consider life priceless,[22] so we treat it as worthless. The dominant rule for measuring damages in wrongful death cases is the "pecuniary loss rule," which effectively values human life solely in terms of the monetary benefits the decedent could have been expected to bestow upon his or her dependents.[23] The pecuniary loss

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the world becomes the worst one if you can't prove it.

[20] Trauma and bereavement from death traditionally have been the subjects of separate fields of study, with trauma being treated by traumatologists and bereavement falling under the auspices of thanatologists. *See* Therese A. Rando, *Foreword* to DEATH AND TRAUMA: THE TRAUMATOLOGY OF GRIEVING, at xv, xv-xvi (Charles R. Figley et al. eds., 1997) [hereinafter DEATH AND TRAUMA] (making this distinction). Some modern researchers have made efforts to build a bridge between the two fields in recognition that they are closely aligned and lead to the same type of PTSD symptoms. *See* Charles R. Figley, *Preface* to DEATH AND TRAUMA, *supra*, at xxi, xxii-xxiii (stating that one of the editors' purposes in compiling the book was to provide a theoretical bridge between the two fields); *see also* S. Janet Johnson, *Traumatic Stress Reactions in the Crew of the* Herald of Free Enterprise, *in* INTERNATIONAL HANDBOOK OF TRAUMATIC STRESS SYNDROMES 479, 482 (John P. Wilson & Beverly Raphael eds., 1993) (stating that, because loss is itself a part of trauma, trauma and grief reactions are "two inextricably intertwined strands" that are "ultimately inseparable"). As used in this article, the term "grief" includes both the trauma and loss from the sudden, violent death of a loved one.

[21] It is questionable whether, in practice, damages for loss of society and companionship are something truly separate and distinct from damages for grief. *See infra* note 139 and accompanying text (discussing the unlikelihood of jurors making the distinction between loss of companionship and mental anguish or grief).

[22] *See, e.g.*, *Job* 2:4 (New Revised Standard version) ("All that the man has he will give for his life.").

[23] *See infra* notes 106-117 and accompanying text for a discussion of the pecuniary loss

rule views humans as economic units, not as sentient beings who live for purpose and pleasure. The rule discriminates against large classes of people, including children, the elderly, women, minorities, and, relevant to this article, young, emancipated adults such as Kody with no dependents of their own.[24] In 1990, I argued for recognition of damages for the intrinsic value of life, in part as a way to offset the discriminatory impact of the pecuniary loss rule.[25] The theory of "hedonic damages" (as damages for lost life are frequently called[26]) though often discussed,[27] has made only incremental progress since that time.[28]

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rule.

[24] *See infra* notes 103-117 and accompanying text.

[25] *See generally* Andrew Jay McClurg, *It's a Wonderful Life: The Case for Hedonic Damages in Wrongful Death Cases*, 66 NOTRE DAME L. REV. 57 (1990) [hereinafter McClurg, *It's a Wonderful Life*].

[26] The terminology courts and commentators use to describe damages for the lost value of life in wrongful death cases is confused and confusing. In addition to "hedonic damages," such damages have been variously referred to as "damages for loss of enjoyment of life, value of lost life, lost life damages, damages for the intrinsic value of life, damages for the lost expectation of life, and compensation for the destruction of life's enjoyment." Choctaw Maid Farms, Inc. v. Hailey, 822 So. 2d 911, 925 n.4 (Miss. 2002) (Cobb, J., concurring in part and dissenting in part). In 1990, I used the term "hedonic damages" to describe compensation for the value of life and living in wrongful death cases. *See* McClurg, *It's a Wonderful Life*, *supra* note 25. Since then, courts and commentators have used the term to describe three distinct kinds of damages: (1) damages for the lost value of life in wrongful death cases; (2) survival action damages for pre-death loss of the ability to enjoy life in the interval between injury and death when the victim has been rendered comatose; and (3) damages in personal injury cases brought by living plaintiffs for loss of the ability to enjoy one or more aspects of life (*e.g.*, loss of the ability to taste food or have sexual intercourse). Given the multiple meanings that have been ascribed to "hedonic damages," the term is not used in this article. Instead, the terms "lost life damages" or "damages for the lost value of life" are used to describe compensation for the decedent's life in wrongful death cases.

[27] *See generally* John Dwight Ingram, *Damages for Loss of the Enjoyment of Life*, 24 J. MARSHALL L. REV. 423 (1991) (proposing that full compensation for the enjoyment of life be treated separately from pain and suffering in damage calculations); McClurg, *It's a Wonderful Life*, *supra* note 25 (arguing that damages in wrongful death actions should include hedonic damages); Patrick B. 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 hedonic damages should be included in pain and suffering awards in section 1983 deprivation of life cases); Douglas L. Price, *Hedonic Damages: To Value a Life or Not to Value a Life?*, 95 W. VA. L. REV. 1055 (1993) (examining the use of hedonic damages in case law and assessing the problems of quantifying hedonic damages); Reuben E. Slesinger, *The Demise of Hedonic Damages Claims in Tort Litigation*, 6 J. LEGAL ECON. 17 (1996) (suggesting that "the various attempts by economists . . . to introduce hedonic damages into testimony has run the course"); Lori A. Nicholson, Note, *Hedonic Damages in Wrongful Death and Survival Actions: The Impact of Alzheimer's Disease*, 2 ELDER L.J. 249 (1994) (exploring the possibility of factoring Alzheimer's Disease into hedonic damages); Erin A. O'Hara, Note, *Hedonic Damages for Wrongful Death: Are Tortfeasors Getting*

The second item, grief, traditionally has been the invisible injury from wrongful death,[29] perhaps due in part to our cultural discomfort with how to respond to grieving people.[30] Only a minority of states authorize the recovery of damages for grief or mental anguish for wrongful death,[31] and even in states that allow them the class of statutorily defined beneficiaries is far too narrow to encompass grief's long reach in the wake of a sudden accidental or intentional death.[32] Best friends, lovers, cohabitants, and many close family members are excluded.[33] In several of the states that do recognize grief damages in death cases, even parents and siblings are barred from recovering such damages if the decedent left behind a spouse or children.[34] And yet, though these omissions may be unfair, it is impractical to attempt to compensate with individualized money damages all the persons who suffer anguish from a wrongful death.

This article proposes a legislative reconceptualization of wrongful death damages that addresses both of the deficiencies described above – for one price. Specifically, it argues that life has independent value apart from what we earn and give to others and that this value should be recognized in the form of "lost life" damages. Departing from the orthodox view that such damages should be allocated to the decedent's estate or to the survivors,[35] this article

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Away with Murder?, 78 GEO. L.J. 1687 (1990) (arguing that tortfeasors should be held liable for hedonic damages); Tina M. Tabacchi, Note, *Hedonic Damages: A New Trend in Compensation*, 52 OHIO ST. L.J. 331 (1991) (discussing various aspects of hedonic damages and approaches by the courts in dealing with such damages); Gretchen L. Valentin, Comment, *Hedonic Damages: Emerging Issue in Personal Injury and Wrongful Death Claims*, 10 N. ILL. U. L. REV. 543 (1990) (reviewing previous applications of hedonic damages, the manner in which such damages have been measured, and the common objections to hedonic damages as a means of recovery).

[28] *See infra* note 154 and accompanying text (listing five states that recognize lost life damages); *see generally infra* notes 154-168 and accompanying text (discussing damages for the lost value of life).

[29] *See* Elizabeth M. Schneider, *Grief, Procedure, and Justice: The September 11th Victim Compensation Fund*, 53 DEPAUL L. REV. 457, 465 (2003-2004) ("In the legal system, individual or collective grief and trauma become almost invisible; they are the necessary context that is never mentioned or emphasized.").

[30] *See infra* note 200 and accompanying text (highlighting societal reactions to death that may include ignoring or downplaying grief and loss).

[31] Arkansas is one of those states. *See* ARK. CODE ANN. § 16-62-102(f)(1) (Michie 1987 & Supp. 2003) (providing that juries may award damages for mental anguish to statutorily defined beneficiaries in wrongful death cases).

[32] *See infra* notes 133-138 and accompanying text for discussion of grief damages in wrongful death cases.

[33] *See infra* notes 136-138 and accompanying text (discussing statutory limitations on awards of damages for grief and mental anguish in wrongful death actions).

[34] *See infra* note 138 (citing statutes that exclude parents and/or siblings from recovery under certain circumstances).

[35] *See* McClurg, *It's a Wonderful Life*, *supra* note 25, at 90-99 (discussing the different

suggests that damages for the lost value of life be used for the exclusive purpose of establishing a lasting memorial to the decedent. Such a solution would promote both the economic deterrence[36] and corrective justice models[37] of tort law and serve, albeit indirectly, to compensate the decedent by continuing his or her memory and place in this earthly world. Additionally, the memorial established with the lost life damages would, at no additional cost, provide a proven grief-healing instrument for all persons who mourn the decedent's passing.[38] Finally, because it is recommended that memorials created with lost life damages be required to serve a utilitarian function,[39] another unique aspect of the proposal is that it would allocate tort damages in ways that benefit society in addition to tort victims, enhancing the net social benefit of the tort system.

Before elaborating on this proposal, I offer some insights about the person and circumstances that led to it and a critique of our current wrongful death damages regime. Why so personal a tale in, of all places, a law review article? Readers might be surprised to learn I'm intensely private, so much so that colleagues sometimes tease me about my hypersensitive views regarding individual privacy, including information privacy, as reflected in my writings on the issue.[40] Before Kody's death, I had no insight into grief and was clueless overall about how a violent death can shred the fabric of life for those left behind. I assume the same is true of most persons who have not experienced such an event, and so I decided that my proposal would lack impact and credibility without some explanation about where it came from. Accordingly, below is my meager attempt to put a human face on grief.

II. DEATH BLOW: A GRIEF ANALYSIS

Grief is a readily foreseeable and very real consequence of wrongful death. It can kill a human spirit as effectively as a motor vehicle crash can still a beating heart. Survivors of persons lost to sudden violent death suffer not only

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methods of allocating damages in wrongful death cases).

[36] *See infra* notes 159-161 and accompanying text (explaining the deterrent effect of including lost life damages in tort actions).

[37] *See infra* notes 162-163 and accompanying text (describing life as our most precious asset and suggesting that awarding damages for lost life in wrongful death actions would promote the corrective justice function of tort law).

[38] Sociological, psychological, and historical evidence all demonstrate the therapeutic power memorials have on the living. *See infra* notes 199-234 and accompanying text (highlighting the importance of memorials in perpetuating life and healing loss).

[39] *See infra* notes 181-184 and accompanying text.

[40] Andrew J. McClurg, *A Thousand Words Are Worth a Picture: A Privacy Tort Response to Consumer Data Profiling*, 98 NW. U. L. REV. 63 (2003) (advocating a privacy tort cause of action to address invasive consumer data profiling); Andrew Jay McClurg, *Bringing Privacy Law Out of the Closet: A Tort Theory of Liability for Intrusion in Public Places*, 73 N.C. L. REV. 989 (1994-1995) (arguing for a limited right to "public privacy" under tort law).

the lifetime loss of their loved one, but trauma induced by the loss and the manner in which it occurred.[41] While these injuries are largely intangible, in many cases they result in clinically diagnosable Posttraumatic Stress Disorder ("PTSD").[42] A growing body of evidence links violent death by accident, suicide, or homicide to PTSD symptoms in grieving survivors. In one of the first studies of the long-term affects of grief, researchers found that losing a spouse in a motor vehicle crash is associated with long-term psychological dysfunction.[43] Four to seven years after the event, such spouses suffered greater depression, lower social functioning, reduced psychological well-being, and other psychological symptoms than matched controls.[44] Another study of adults two months after the death of their spouses found that the criteria for PTSD were satisfied in more than one-third of those whose spouses died of suicide or accident compared to ten percent of those whose spouses died of natural causes (regardless of whether the death was expected or not).[45] A 2003

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[41] *See supra* note 20 and accompanying text (discussing the trauma and bereavement resulting from the tragic loss of another).

[42] *See* AM. PSYCHIATRIC ASS'N, DIAGNOSTIC & STATISTICAL MANUAL OF MENTAL DISORDERS § 309.81, at 463 (4th ed. 2000) [hereinafter DSM-IV] (stating that learning of the sudden unexpected death of a family member or close friend can lead to the development of PTSD symptoms); Stacey Kaltman & George A. Bonanno, *Trauma and Bereavement: Examining the Impact of Sudden and Violent Deaths*, 17 J. ANXIETY DISORDERS 131, 132 (2003) (stating that the death of another person was added as a possible traumatic stressor in the criteria for PTSD in the DSM-IV). The essential diagnostic features of PTSD are: (1) the person is exposed to a traumatic event involving the actual or threatened death or serious injury to self or others and responded with intense fear, helplessness, or horror; (2) the traumatic event is persistently re-experienced (through recurrent and intrusive recollections of the event, intense psychological distress at exposure to cues symbolizing or resembling an aspect of event or in other ways); (3) the person persistently avoids stimuli associated with the trauma and experiences a numbing of general responsiveness (through efforts to avoid people and activities that arouse recollections of the trauma, a feeling of detachment or estrangement from others, restricted range of affect, or in other ways); (4) the person experiences persistent symptoms of increased arousal (through difficulties in sleeping, difficulties concentrating, hypervigilance, or in other ways); (5) the symptoms last longer than one month; and (6) the disturbance causes clinically significant distress or impairment in social, occupational, or other important areas of functioning. DSM-IV, *supra*, § 309.81, at 467-68 (setting forth diagnostic criteria for PTSD); *see also* Isely v. Capuchin Province, 877 F. Supp. 1055, 1062 (E.D. Mich. 1995) (holding that expert testimony regarding PTSD is grounded in valid science and passes scrutiny for admissibility under the U.S. Supreme Court's holding in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993)); Fortes v. Ramos, No. 96-5663, 2002 R.I. Super. LEXIS 35, at *13 n.3 (Mar. 12, 2002) (describing PTSD as "medically supported by specifically defined diagnostic criteria").

[43] Darrin R. Lehman et al., *Long-term Effects of Losing A Spouse or Child in a Motor Vehicle Crash*, 52 J. PERSONALITY & SOC. PSYCHOL. 218, 227 (1987).

[44] *Id.*

[45] Sidney Zistook et al., *PTSD Following Bereavement*, 10 ANNALS CLINICAL

study of persons who had lost a spouse found "violent death results in the presence of PTSD symptoms over and above the normal grief response."[46] A study of bereaved parents found that, five years after the death, three times as many mothers and twice as many fathers met the diagnostic criteria for PTSD compared with normative samples.[47] One researcher states that "[t]he similarities between typical features of normal grief and PTSD are striking."[48]

Persons grieving the sudden death of a loved one tend to think their experience is unique,[49] but in researching this article I was surprised to learn that my experience[50] following Kody's death, as mirrored in the footnotes

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PSYCHIATRY 157, 159-61 (1998). The thirty-six percent PTSD rate found in the study for those who lost a spouse to sudden, violent death is in the same or greater range than the PTSD rate reported for victims of assaultive violence and serious injuries. *Id.* at 161.

[46] *See* Kaltman & Bonanno, *supra* note 42, at 142.

[47] Shirley A. Murphy et al., *The Prevalence of PTSD Following the Violent Death of a Child and Predictors of Change 5 Years Later*, 16 J. TRAUMATIC STRESS 17, 20-21 (2003).

[48] Michael A. Simpson, *Traumatic Bereavements and Death-Related PTSD, in* DEATH AND TRAUMA, *supra* note 20, at 3, 10-11.

[49] *See* NOEL & BLAIR, *supra* note 18, at 20 (stating that "those grieving often think they are the only ones to feel that way or that their feelings are wrong").

[50] This grief narrative is just one footnote to the day Kody died. Kody's mother and father will never be the same. How could they be? How could anyone recover from losing a child, especially in such a ghastly manner? Kody's brother, Kash, worshiped his big sister his whole life. Like most good Arkansans, Kody also had strong ties to her extended family: grandparents, aunts, uncles and cousins, almost all of whom lived in the Little Rock area and enjoyed regular contact with her. Then there was poor little Noah, Kash's newborn son and Kody's nephew, who will never know what he lost. Watching Kody holding and fussing over him days after he was born and only three months before she died, I remember smiling and thinking, "We should all be so lucky to have someone like Kody Logan love us when we're born." Her family members have not recovered from their grief. They've simply learned to cope with it.

Her friends also suffered irrevocable loss. Kody was widely loved and admired. As her mother once joked, "Everybody wanted to be Kody's friend." One friend underwent a breakdown. Another named her son "Kody Logan." Others continue to visit her grave regularly six years after her death.

However, the impact of Kody's life and early death extended beyond family and even close friends. Among the more than five hundred people in the crowd that overflowed into the church parking lot at her funeral service were former employers, co-workers, teachers, coaches and ministers. Little Rock novelist and civil rights historian Grif Stockley commented that what struck him most about the funeral was the racial diversity of the mourners. Kody's bright spirit reached easily across boundaries that keep some people apart.

Waiting in the limousine to leave the church for the cemetery, a man approached and knocked on the window. He turned out to be the small-town Mississippi Delta doctor Kody called on the morning of her accident in Forrest City. In their ten-minute exchange, Kody made an impression that caused the man to drive ninety-three miles to Little Rock, passing over the spot where Kody's car burned three days earlier, to attend the funeral.

below, followed an almost textbook-perfect pattern of reactions to sudden death. First came shock.[51] In the time it takes to flip a light switch, every dream, plan and assumption about the future, everything we take for granted when we go to sleep at night will still be there in the morning, vanished.[52] For weeks after the accident, I plodded through days trance-like, detached, as if present and absent at the same time.[53] At night, I fell asleep praying for Kody to visit me in my dreams, which she occasionally did.[54] I talked to Kody – talked to the ceiling – constantly, apologizing out of irrational guilt for not being there to protect her.[55] Sometimes it felt like madness.[56] The hope that comes with faith collapsed. For three years, I'd prayed every night for Kody to

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[51] Several studies have found that grief is more severe in situations where survivors have little or no forewarning of the loss. *See* Lehman et al., *supra* note 43, at 219 (citing studies). Interestingly, one study found that the violent nature of accidental death aggravates trauma even more than the suddenness of it. *See* Kaltman & Bonanno, *supra* note 42, at 142.

[52] *See* NOEL & BLAIR, *supra* note 18, at 37 (stating that a sudden loss requires persons to reassess assumptions about themselves and the world around them); George A. Bonanno & Stacey Kaltman, *Toward an Integrative Perspective on Bereavement*, 125 PSYCHOL. BULL. 760, 767 (1999) (stating that unusually disturbing events, including the loss of a loved one, "challenge or even shatter individuals' core assumptions about themselves, the world around them, and other people").

[53] Survivors of loved ones lost to traumatic deaths often report lapsing into a dreamlike state, as if they are floating. They describe it as "slogging through molasses, a slow motion movie, a feeling like they are not in their body." NOEL & BLAIR, *supra* note 18, at 30. "The ten-day syndrome" also occurred, a phenomenon in which in the days immediately following a sudden death, friends and even strangers barrage the survivors with sympathy, condolences, meals and other acts of kindness until it becomes overwhelming. *See id.* at 79-80 (describing the ten-day syndrome). Then it abruptly stops and the person is all alone. *See id.*; *see also infra* note 200 and accompanying text (discussing the proposition that support for bereaved persons tends to dissipate quickly).

[54] *See* NOEL & BLAIR, *supra* note 18, at 26 ("Many people believe that dreams following closely after death are the deceased making contact."); *id.* at 145-46 (stating that approximately one-third of conjugally bereaved persons experience dreams in which their partner is still living).

[55] Guilt is a common grief reaction to sudden death. *See id.* at 72 (stating that of all the mental and emotional blocks arising from grief associated with sudden death, "guilt may be the strongest of them all").

[56] Bereaved persons frequently experience the feeling that they are going crazy. *See id.* at 20 (stating that a common reaction to tragic loss "is the feeling of going crazy"); *id.* at 149 (quoting Helen Hayes after the death of her husband: "'For two years – I was just as crazy as you can be and still be at large'"); *id.* at 147 (quoting Marilyn Houston, whose husband died suddenly of a brain aneurysm: "'I thought I was losing my mind'"). My first encounter with this feeling began only minutes after learning the news of Kody's death. On the car trip with Kody's father and brother from my house to the house where Kody grew up and where mourners would gather on the night of her death, I began lapsing into a foggy state of shock and denial, repeating: "Is this a joke? Is this a joke?" Bob, Kody's father, responded calmly, "No, Andy, it's not a joke."

be protected, so what was the point of prayer? And if the praying part wasn't true, did that mean there was no afterlife either?[57] Then where was Kody? This could not be *the end* of Kody. That was the worst thought of all. I fruitlessly rehashed "*if only* she had . . . [left Forrest City ten minutes later that morning, stopped to eat lunch on the way home, not taken the job as a pharmaceutical rep]."[58] I tormented myself worse with "if only *I* had . . . [always been nicer to her, never broken a promise, never been selfish]." More guilt.[59] I developed an aversion to driving on highways, perhaps a PTSD-type reaction in which persons who experience a traumatic loss strive to persistently avoid stimuli associated with the event.[60]

As months passed, mourning replaced shock. As years passed, social isolation took over.[61] I talked to a therapist, attended a grief group, looked for help on the Internet, didn't eat enough and slept poorly.[62] Although they never said so directly, it was clear friends expected me to "get over it."[63] Who could blame them? But I couldn't let Kody's memory die.[64] That's all that was left.

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[57] *See id.* at 38 (stating that it is common to question faith in response to the sudden death of a loved one); *id.* at 60-61 (stating that anger at God is an important, albeit uncomfortable, emotion to express in response to sudden death).

[58] *See id.* at 79-80 (discussing the common, "if only," mind game of guilt).

[59] *See supra* note 55 and accompanying text (discussing the common reaction of guilt after a sudden tragic loss).

[60] *See* DSM-IV, *supra* note 42, § 309.81, at 464 (stating that one of the diagnostic criteria for PTSD is the persistent avoidance of stimuli associated with the traumatic event); NOEL & BLAIR, *supra* note 18, at 35 (stating that fear generated by grief can be debilitating and listing common fears as including "any situation that remotely resembles how the loved one died"). Kody's mother makes a similar association with fire:

> We have two fireplaces in our house and we never use either one of them and never will. Dave and I don't go to places like *The After Thought* [cozy Little Rock jazz club with large fireplace] anymore because when I hear the crackling and especially smell the smell, I break down. The smell is the worst part. Kash [Kody's brother] is the same way. Do you remember when his house on Arch Street caught fire and burned down? When he got there, he said, "I just sat on the sidewalk and cried, mom. But it didn't have anything to do with my house. All I could think of was Kody."

Telephone Interview with Vickie Logan, mother of Kody Logan (June 27, 2004).

[61] *See* Kjell Kallenberg & Bjorn Soderfeldt, *Three Years Later: Grief, View of Life, and Personal Crisis After the Death of a Family Member*, 8 J. PALLIATIVE CARE 13, 16 (1992) (stating that loneliness and loss of social contacts may mark persons suffering from "boundless grief").

[62] *See* NOEL & BLAIR, *supra* note 18, at 24 (listing sleep difficulties and poor appetite as among the commonly reported physical symptoms of grief).

[63] *See infra* note 200 and accompanying text (discussing cultural phenomenon of quickly dissipating support for grieving persons).

[64] Grief studies recognize the importance of bereaved persons discussing their losses with others, both as a way to work through and relinquish the attachment and also to promote cognitive integration of the loss. *See* Bonanno & Kaltman, *supra* note 52, at 767 (making this point and citing studies). Not surprisingly, however, there is also evidence that

She *deserved* to be remembered. Not every day was bad, but they were always unpredictable. A perfectly good day could be unfolding when a trigger, something as benign as hearing a song on the radio, would bring on an undertow that seemed to drag me back to the beginning.[65] Four years after the accident, I moved to Florida, in part to find a place with fewer reminders of what was missing. Grief experts commonly discuss the "five stages of grief:" denial, anger, bargaining, depression and acceptance.[66] Like all persons mourning a sudden death, I went through most of the stages several times and back again,[67] only recently arriving at "acceptance."[68]

"We grieve what we value. We grieve in proportion to our affection."[69] If that's true, perhaps it helps explain the "complicated grief"[70] reactions to

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repeated communication of negative feelings such as sadness and distress can overwhelm and drive away people who would otherwise be supportive. *See id.* (making this point and citing studies).

[65] *See* NOEL & BLAIR, *supra* note 18, at 23-24, 55 (describing this common "ambush" phenomenon among bereaved persons).

[66] The stages were first categorized by Elizabeth Kubler-Ross in her famous work, *On Death and Dying*. *See* ELIZABETH KUBLER-ROSS, ON DEATH AND DYING 34-99 (1969) (discussing the five stages of coping in terminally ill patients). Kubler-Ross focused on grief stages in dying people, but the same multiple-stage analysis is frequently applied to survivors of lost loved ones. *See* NOEL & BLAIR, *supra* note 18, at 47-57 (discussing the grief stages in people who have lost loved ones to sudden death and attributing the analysis to Kubler-Ross).

[67] *See* NOEL & BLAIR, *supra* note 18, at 64 (observing that persons bereaved by sudden death frequently make the mistake of believing they will progress through the grief stages in a linear fashion, when, in reality, "[i]t is more like a maze where you go forward a bit, move back a few steps, cover the same ground again and find yourself at the beginning"). Consider Michael Simpson's blunt assessment of the five-stage model as applied to persons grieving the death of another: "I propose[ ] the more valid 2-stage model: a stage in which you believe there must be 5 stages, and the stage when you realize there are not." Simpson, *supra* note 48, at 6 (critiquing the five-stage model as being emotionally appealing, but unsupported by data).

[68] "Acceptance" may not be an apt descriptor. *See* NOEL & BLAIR, *supra* note 18, at 51-52 (quoting one of the author's counseling clients as stating about the death of her husband: "'Why do you keep saying acceptance is the final phase of my recovery? The word acceptance feels like a permission giving word. It feels like I've said the death is okay with me, that I have given my approval. I have *not* given my approval. The death of my husband will *never* be okay with me . . . .'"). The authors suggest that "acknowledgment" would be a better term for this stage. *Id.* at 52. "Transcendence" of the event is perhaps the goal people are truly seeking.

[69] GLENN R. SCHIRALDI, THE POST-TRAUMATIC STRESS DISORDER SOURCEBOOK: A GUIDE TO HEALING, RECOVERY, AND GROWTH 236 (2000) (paraphrasing a memorial to Jane Austen at Winchester Cathedral).

[70] "Complicated grief" is a term used by psychologists to describe mourning that is unusual in its duration, intensity or both. *See id.* at 241 (defining complicated grief as being similar to uncomplicated grief, except that the symptoms are more prolonged and intense);

Kody's death. By any objective measure, Kody was a person to be valued. The obituary that appeared in the state's largest newspaper, alongside a picture of her smiling face, offers a snapshot of her achievements during her too-short stay here:[71]

KODY LINN LOGAN, 28, of Little Rock began a new life on June 23, 1998. Daughter of Dr. Vickie Ballos Logan and Bob J. Logan of Little Rock, she had been among the nation's top sales representatives for Zeneca Pharmaceuticals. She received her B.A. from UALR in 1991 and was voted Outstanding Graduate by the Speech Communication Department. She was also the recipient of the Alumni Association Award for Academic Achievement. She completed her Master's Degree in Social Work in 1994, graduating magna cum laude.



Kody was a former psychiatric assessment supervisor at Pinnacle Point Hospital and had been an L.C.S.W. psychotherapist specializing in child sexual abuse at Psychiatric Associates of Arkansas. She had served as neonatal intensive care social worker with emphasis on grief and bereavement counseling at Arkansas Children's Hospital. Kody had completed internships at the Arkansas Genetics Program at UAMS and Centers for Youth and Families. Prior to her career as a social worker, she was assistant to the General Manager of the American Red Cross and had worked at Baptist Medical Center Emergency Room serving families of trauma patients.

She was well known by health care professionals for her presentations at seminars across the state and for her publications in numerous journals. She was a member of Calvary Baptist Church and the National Association of Social Workers. Volunteer activities included the American Red Cross Crisis Intervention Team, Friends of the Animals, the Pulaski County Humane Society, Pfeifer Camp, Arkansas Children's Hospital Fetal Alcohol Screening Project, the Social Program Curriculum Committee at UALR, Planned Parenthood and Alcoholics Anonymous. Kody had won numerous awards in both talent and beauty competitions.

She is survived by her parents; grandparents, Harold and Bettye Ballos and Clara Logan; brother, Kash Logan; sister-in-law, Maliaka Logan; nephew, Noah Logan; beloved fiancee, Andrew McClurg; all of Little Rock; and a host of other relatives and friends who will miss her radiant presence.

A celebration of her life will be held on Saturday, 10 a.m. at Calvary Baptist Church with pastors Ross Burton, Johnny Jackson and Dr. Randal O'Brien leading. Burial will be at Forest Hills Cemetery by Roller-Chenal Funeral Home. Memorials may be made to the Pulaski County Humane Society.

see generally George A. Bonanno & Stacey Kaltman, *The Varieties of Grief Experience*, 21 CLINICAL PSYCHOL. REV. 705, 707-09 (2001) (describing the taxonomy of complicated grief in bereavement literature).

[71] *Obituaries*, ARK. DEMOCRAT-GAZETTE, June 26, 1998, at B8.

As impressive as they were, it wasn't Kody's resume accomplishments that made her so special. It was her heart.[72] Kody loved purely and completely. We all search for different things in this world to make us happy: money, good jobs, nice homes, power, recognition – the list is limited only by human desire. But if there is a common goal to life, a universal key to happiness, the search for a true love seems to be it.[73] Love is "[a]ll-conquering,"[74] "covers all offenses,"[75] "makes the world go round,"[76] "moves the sun and the other stars"[77] and even "rules the gods."[78] Finding and losing it may be the greatest loss of all, worse in some ways than not finding it.

As I once wrote to her, Kody was "the best thing that ever happened to me."[79] She was my best friend,[80] most loyal ally[81] and accepted me "as is,"

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[72] Friends and family have many "Kody stories" showing her generous heart. The one that will always stand out to me was my birthday in 1995, which arrived four months after we began dating. Kody lived with her mother at the time and invited me over to have dinner with Vickie and Dave, her mother's partner. Upon arrival, thirty of my closest friends shouted "Surprise!" Staging and pulling off a surprise party is always a labor of love, but that was only the beginning. Gaping at the hooting throng, who obviously had been doing a bit of pre-party celebrating, someone tapped me on the shoulder. Imagine the surprise when I turned and saw my daughter, Caitlin – nine-year-old Caitlin who was supposed to be at home with her mother in Jacksonville, Florida, 900 miles away. Not only did Kody take the time and effort to organize a surprise party, contact all the guests (most of whom she barely knew) and buy lavish luau-themed food, drinks and decorations – she contacted Caitlin's mother in Florida (to whom she had never spoken), persuaded her to allow Caitlin to miss school and make the journey to Little Rock alone, bought Caitlin a plane ticket, and took the day off from work to drive more than 200 miles round-trip to Memphis (the closest direct flight) to pick her up. It was the same dangerous stretch of highway she drove the day of her accident.

[73] "There is only one happiness in life, to love and be loved." *Women's Voices: Quotations by Women* (quote collection assembled by Jone Johnson Lewis), http://womenshistory.about.com/library/qu/blqusand.htm (last visited June 28, 2004) (quoting French Romantic writer George Sand, pseudonym for Armandine Aurore Lucille Dupin Dudevant).

[74] VIRGIL, THE ECLOGUES OF VIRGIL 46 (C. Day Lewis trans., Jonathon Cape ed. 1963).

[75] *Proverbs* 10:12 (New Revised Standard Version).

[76] William S. Gilbert & Arthur Sullivan, *He Who Shies at Such a Prize* (quoting a Gilbert & Sullivan song from *Iolanthe*), http://math.boisestate.edu/gas/iolanthe/html/hewhoshi.html (last visited June 28, 2004).

[77] Dante Alighieri, *Paradiso XXXIII*, 228 THE ATLANTIC MONTHLY 84, 85 (W. S. Merwin Trans. Dec. 2001), *available at* http://www.theatlantic.com/issues/2001/12/dante.htm (last visited June 28, 2004).

[78] Richard Claverhouse Jebb, *The Genius of Sophocles*, THOEMMES CONTINUUM (quoting from Sophocles' *Traciniae*), *at* http://www.thoemmes.com/classics/jebb_soph.htm (last visited June 28, 2004).

[79] Correspondence (undated) (all correspondence quoted herein is on file with author). Kody expressed a similar sentiment in a letter: "You are the best thing I've ever had in my whole life and you are my best friend in the whole world." Correspondence(Nov. 11, 1995).

with all faults.[82] We shared deep respect, admiration and appreciation for each other,[83] so much so that each of us believed the other to be a spiritual gift.[84] Beatifying the dead is a tempting luxury of the living, but Kody's angelic qualities did not go unnoticed while she was alive.[85]

This grief story is neither unique nor remarkable, which is part of the point of attempting to tell it. In 2002, 42,815 people were killed in vehicle crashes,[86] amounting to one traffic fatality every twelve minutes.[87] Thousands more die

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We saved each other's correspondence. After her death, her mother found and returned the cards and letters I had written to Kody. Kody, being the diligent person she was, dated most of her correspondence, something I failed to do. Following the teaching of my undergraduate journalism professors that it's more effective to "show" than "tell," a few excerpts from our correspondence are included in the footnotes to this discussion. Correspondence may or may not be reliable, but at least it's tangible and has the benefit of having been recorded contemporaneously.

[80] As I wrote to Kody: "Thank you for being my best friend and soulmate." Correspondence (undated). As Kody wrote: "I have never had a boyfriend and a best friend be the same person before. I would never have thought it possible before now. I love my best friend – you." Correspondence (Jan. 5, 1997).

[81] As she once wrote: "Andy, I will always stand by you no matter what our future holds for us." Correspondence (July 7, 1997).

[82] Kody not only put up with my quirks – quirks that have perplexed and no doubt greatly annoyed others – she found them "endearing"! How lucky is that? As she wrote in a card: "You have all that 'quirky stuff,' but it's because of those things rather than in spite of them that makes you so endearing and angelic to me." Correspondence (Mar. 5, 1997). Everyone wants to be accepted for who they are, but it seldom seems to really happen. *See* Joe DiPietro & Jimmy Roberts, *I Love You, You're Perfect, Now Change* (1996) (long-running musical revue poking fun at the dynamics of relationships).

[83] As I wrote to Kody: "You're a precious gift. I'm so proud of you in so many ways." Correspondence (undated). As she wrote to me: "I can't think of any one else ever in my life that I respected and trusted as much as you." Correspondence (Jan. 5, 1997).

[84] As I wrote to Kody: "You really are a blessing to me, Kody . . . . [S]ometimes I feel like God brought us together." Letter from Andrew J. McClurg to Kody Logan (undated) (on file with author). As Kody wrote: "You and your love and your trust in me, your honesty, your realness and your emotional ability are a gift to me from God." Letter from Kody Logan to Andrew J. McClurg (Mar. 5, 1997) (on file with author).

[85] In a card, I wrote: "I know I am a very lucky person, or maybe even blessed, because sometimes you seem like an angel to me." Card from Andrew J. McClurg to Kody Logan (undated) (on file with author). In an art class, I made a ceramic angel for Kody with a grossly disproportionate head. Kody called it the "encephalic angel," but displayed it in her office. When Kody died, Diane Doherty, a former co-worker and close friend, told a newspaper reporter that Kody "was an angel, even then." Larry Ault, *Kody Linn Logan: At 28 She was Already Known in Her Field of Care*, ARK. DEMOCRAT-GAZETTE, June 26, 1998, at B9.

[86] NAT'L CENTER FOR STATISTICS AND ANALYSIS OF THE NAT'L HIGHWAY TRAFFIC SAFETY ADMIN., TRAFFIC SAFETY FACTS 2002: OVERVIEW 1, *at* http://www-nrd.nhtsa.dot.gov/pdf/nrd-30/NCSA/TSF2002/2002ovrfacts.pdf (last visited Mar. 31, 2004).

[87] *Id.* at 2.

in other types of accidents each year. In 2001, 3,745 people died in fires,[88] 971 in railroad accidents,[89] 562 in general aviation accidents[90] and 962 in work-related equipment or falling object accidents.[91] People die using consumer products, machinery, electricity, and toxic substances. They die mining, farming, boating, biking, hunting, and through a variety of other industrial and recreational activities. Overall, roughly 100,000 Americans die in accidents every year.[92] Each fatal accident leaves behind a trail of broken hearts and dreams never accounted for. Although some people enjoy the luxury of being loved more strongly and widely than others, one blessing of this world is that nearly everyone – no matter how small, downtrodden or alone – has someone who loves them and who suffers when they die.

Some untold number of accidental deaths that occur each year are caused by the negligent or reckless conduct of others.[93] When that is the case, the wrongful death statutes of all fifty states provide a tort remedy.[94] Despite more than 150 years of legislative and common law development, however, the American wrongful death system remains an illogical and discriminatory one that systematically undervalues human life and the far-reaching grief consequences to those left behind.

III. AMERICA'S EMBARRASSING WRONGFUL DEATH SYSTEM

If one were to employ a road metaphor to describe the development of our nation's regime for compensating persons for wrongful death, the usual descriptors intended to convey confused or faulty legal development, such as "winding"[95] or "rocky,"[96] would be euphemistically inadequate. A more

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[88] U.S. CENSUS BUREAU, U.S. DEP'T OF COMMERCE, STATISTICAL ABSTRACT OF THE U.S. 222 tbl.358 (123d ed. 2003) [hereinafter STATISTICAL ABSTRACT OF THE U.S.] (this number does not include the 2,451 deaths from the September 11 terror attacks).

[89] *Id.* at 711 tbl.1112.

[90] *Id.* at 685 tbl.1065.

[91] *Id.* at 429 tbl.653.

[92] *See* NAT'L SAFETY COUNCIL, INJURY FACTS 8 (2003) (citing 99,500 deaths from all unintentional injuries in 2002).

[93] Many thousands of people also are killed intentionally each year. This discussion and my proposal would apply to their survivors with equal or stronger force. It is thought that intentionally caused death is the type of fatality most likely to cause long-lasting PTSD symptoms in survivors, followed by deaths attributable to accidental human causes, followed by violent natural causes. *See* SCHIRALDI, *supra* note 69, at 4.

[94] *See infra* notes 129-131 (listing the wrongful death statutes of all fifty states and the District of Columbia).

[95] *See, e.g.*, United States v. Bachiero, 969 F.2d 733, 734 (9th Cir. 1992) ("We continue down the long and winding road toward uniform sentencing under the federal Sentencing Guidelines."); Jenkins v. Rockwood, 820 So. 2d 426, 427 (Fla. Dist. Ct. App. 2002) ("This appeal takes us on a journey down the long and winding road through the jungle of conflict of laws.")

[96] *See, e.g.*, Rohr v. Henderson, 483 P.2d 1089, 1095 (Kan. 1971) (Fatzer, J., concurring

accurate road analogy might be to driving in Miami. The trip would begin with a shut-down of Interstate 95 during morning traffic, resume only to be derailed by road construction leading one onto another street that, due to more construction, funnels three lanes of traffic into one, resulting in yet another standstill that, when finally cleared, opens to a stretch of highway extending perhaps fifty feet before stalling in congestion caused by city workers who decided rush hour was the best time to repaint lines on the road. All the while, everyone, from angry letter-to-the-editor-writing citizens to hand-wringing politicians, bemoans the intolerable situation and agrees it's a complete mess. City planners tinker with this road and that road, but in the end, due to the flawed infrastructure already in place, nothing ever really improves.

Such has been the judicial and legislative life of our civil compensation system for wrongful death. The initial decision was to build no road at all. At common law, killing a human being was not viewed as an actionable wrong.[97] This position stemmed from Lord Ellenborough's infamous dictum in *Baker v. Bolton*[98] that "[i]n a civil court, the death of a human being could not be complained of as an injury."[99] Although Lord Ellenborough's pronouncement lacked both reasoning and historical support,[100] it "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."[101] Under this regime, if a tortfeasor chopped off the tip of a person's finger, an action could be pursued and a full recovery enjoyed, but if he chopped off the person's head, no civil action would lie.[102]

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in part and dissenting in part) ("This case is an excellent example of the classical statement that '. . . the history of special verdicts is a rocky road strewn with innumerable wrecks.'" (quoting FLEMING JAMES, CIVIL PROCEDURE §7.15, at 294 (1965)); Paul M. Hubbard, Comment, *Auto Search: The Rocky Road from Carroll to Coolidge*, 17 S.D. L. REV. 98, 98 (1972) (describing the convoluted development of the auto search exception to the fourth amendment warrant requirement).

[97] *See infra* notes 98-107.

[98] 1 Campbell 493, 170 Eng. Rep. 1033, 1033 (K.B. 1808).

[99] *Id.*

[100] Wex S. Malone, *The Genesis of Wrongful Death*, 17 STAN. L. REV. 1043, 1067 (1965) ("[I]t can be observed that Ellenborough's blunt announcement that no civil action can be grounded upon the death of a human being not only lacked historical support at the time but was consistently ignored in America until 1848 . . . .").

[101] STUART M. SPEISER ET AL., RECOVERY FOR WRONGFUL DEATH AND INJURY § 1:1 (3d ed. 1992).

[102] *See id.* § 1:5 (identifying the common critique "that as a result of the adoption of *Baker v Bolton*, 'it was cheaper for the defendant to kill the plaintiff than to injure him'" (internal citations omitted)). The same point has been made in modern times with regard to the failure to recognize damages for the value of lost life. *See* Jones v. Shaffer, 573 So. 2d 740, 746 (Miss. 1990) (Robertson, J., concurring) (stating that the failure to recognize lost life damages "invite[s] the tortfeasor who runs over a pedestrian to back up and do it again and be sure his victim is dead").

The situation improved when, in 1846, the English Parliament passed Lord Campbell's Act,[103] creating a right of action for wrongful death on behalf of the decedent's immediate survivors.[104] All fifty American states subsequently adopted wrongful death acts, many of them patterned directly after Lord Campbell's Act.[105] Most states, however, also followed the English interpretation of Lord Campbell's Act limiting recoverable damages by the "pecuniary loss rule."[106] Under this rule, wrongful death damages are measured by the financial contributions, both direct and in the form of services, that the decedent could have been expected to make to his survivors had he lived, minus his personal consumption expenses.[107]

Many bizarre and discriminatory results flow from faithful application of the pecuniary loss rule. Under a literal application of the rule, the lives of children have a negative net worth because child-rearing costs exceed the value of monetary and service contributions that children make to their family households.[108] The lives of elderly people similarly have little value because

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

[104] *See id.*

[105] *See* SPEISER ET AL., *supra* note 101, § 1:9 (stating that Lord Campbell's Act was the progenitor for wrongful death statutes in America and that many U.S. wrongful death statutes substantially incorporate its provisions).

[106] Nothing in Lord Campbell's Act required such a limited interpretation of damages. To the contrary, the damages provision in the act is extremely broad, empowering jurors to award survivors "such damages as they may think proportioned to the Injury . . . ." Lord Campbell's Act, *supra* note 103. Shortly after the act was adopted, the Queen's Bench interpreted it as not allowing recovery for non-pecuniary damages. *See* Blake v. Midland Ry. Co., 18 Q.B. 93, 118 Eng. Rep. 35 (1852); *see generally* Stuart M. Speiser & Stuart S. Malawer, *An American Tragedy: Damages for Mental Anguish of Bereaved Relatives in Wrongful Death Actions*, 51 TUL. L. REV. 1, 5-8 (1976) (tracing the history and interpretation of Lord Campbell's Act).

[107] W. PAGE KEETON ET AL., PROSSER & KEETON ON TORTS § 127, at 949-50 (5th ed. 1984) [hereinafter PROSSER & KEETON ON TORTS] (discussing the common measure of damages in wrongful death actions).

[108] As stated by the Nebraska Supreme Court in *Selders v. Armentrout*, 207 N.W.2d 686, 688-89 (Neb. 1973):

> 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.

A dissenting New Hampshire Supreme Court justice described the origins of the pecuniary loss rule as applied to children in a case that refused to recognize a right of parents to recover for the lost society and companionship of a deceased child:

> The origins of the pecuniary loss limitation "are rooted in Charles Dickens' England, . . . an era when ample work could be found for the agile bodies and nimble fingers of small children." The damages in these actions were limited to pecuniary loss because "children during minority were generally regarded as an economic asset to

they have used up most of their economic productivity[109] and, in any event, usually lack dependents. The broader societal implications of applying the pecuniary loss rule are equally perverse. The lives of men (as a class, obviously subject to many exceptions) are "worth more" under our wrongful death system than the lives of women because men continue to earn more in our society.[110] Similarly, the lives of whites, generically, have more economic value than the lives of minorities because whites continue to earn more than most persons of color.[111] Because the pecuniary loss rule is rooted in expected lifetime earnings,[112] the lives of lawyers, doctors, corporate officers, real estate developers, accountants, and other financially successful people are worth much more than the lives of paralegals, nurses, clerical staff, domestic help, and other workers they employ.

Then there are people like Kody. Her problem under the wrongful death system was not that her life lacked "pecuniary value." Rather, as an unmarried adult without children, she fell through a different gap in the wrongful death damages calculus. The pecuniary loss rule is not based simply on the

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parents." During this time, children began working on the family farm or appeared at the minehead or factory gate as early as age 10.

Siciliano v. Capitol City Shows, Inc., 475 A.2d 19, 26 (N.H. 1984) (Douglas, J., dissenting) (internal citations omitted).

[109] *See, e.g.*, McGowan v. Estate of Wright, 524 So. 2d 308, 309 (Miss. 1988) (upholding a wrongful death verdict for $1,959.50, "the exact amount of the [decedent's] funeral expenses and ambulance fees," for the death of a 67-year-old man with a life expectancy of 13.6 years, whose personal support expenses consumed his $409 monthly income from Social Security and Veteran's Administration benefits).

[110] *See* STATISTICAL ABSTRACT OF THE U.S., *supra* note 88, at 462 tbl.694 (showing that in 2001, the median income of men for all races was $29,101, compared to $16,614 for women); Genaro C. Armas, *In Most Jobs, It Pays to be a Man*, MIAMI HERALD, June 4, 2004, at F1, *available at* 2004 WL 79853670 (reporting findings from 2000 census data that, out of 505 job categories, women earned as much as, or more than, men in only five job categories; reporting that women on average earn seventy-four cents for every dollar men earn; and reporting the median annual income for women compared to men in the following job categories: lawyers ($66,000 for women compared to $95,000 for men), doctors ($88,000 for women compared to $140,000 for men); chief executives ($60,000 for women compared to $95,000 for men)).

[111] *See* STATISTICAL ABSTRACT OF THE U.S., *supra* note 88, 462 tbl.694 (showing the median income for persons of different races for 2001 as follows: white males: $30,240; African-American males $21,466; Hispanic males: $20,189; Asian and Pacific Islander males: $31,096; white females: $16,652; African-American females: $16,282; Hispanic females: $12,583; Asian and Pacific Islander females: $18,525); *see also* Chaka Ferguson, *Report Finds Big Economic Gaps Between Races*, MIAMI HERALD, Mar. 24, 2004, at 10A (stating that African-Americans possess only 73 percent of the earning power of whites; and that 75 percent of whites own their homes, compared to 48 percent of African-Americans and Hispanics, and 54 percent of Asian-Americans).

[112] *See supra* note 107 and accompanying text (describing the monetary premise of the pecuniary loss rule).

pecuniary value of a life. As the name suggests, it requires that someone suffered a monetary loss from the death. The rule allows recovery only by those who received and could expect to continue receiving financial benefits from the decedent.[113]

The cruel effect of the pecuniary loss rule as applied to young adults without dependents was reflected in a 1998 Nebraska case in which a jury, applying the pecuniary loss rule, returned a "$0" wrongful death verdict on behalf of a legally emancipated 18-year-old negligently killed in an automobile accident.[114] The Nebraska Supreme Court reversed the verdict on the ground that it "shock[ed] the conscience,"[115] ruling that under Nebraska law the "money value" of a child to the parents was no longer limited to the child's monetary contributions.[116] Rather, it included the pecuniary value of "services" such as loss of society, comfort and companionship.[117]

This approach – flagrantly manipulating the plain meaning of the pecuniary loss rule by classifying human companionship as a "service" with a monetary value – represents the preeminent band-aid fix courts and legislatures have applied to make up for the gross shortcomings of wrongful death damages. The leading case adopting this approach was *Wycko v. Gnodtke*,[118] decided in 1960. A jury returned a verdict for $14,000, plus funeral and burial expenses, on behalf of a father suing for the loss of his fourteen-year-old son, who was negligently killed in an auto accident.[119] Applying the pecuniary loss rule, the trial judge set aside the verdict as excessive since no child that age "could have had the earning capacity indicated by this verdict."[120] In reversing, the

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[113] *See* PROSSER & KEETON ON TORTS, *supra* note 107, § 127, at 949 (stating that most statutory wrongful death actions "proceed[ ] on the theory of compensating the individual beneficiaries for loss of the economic benefit which they might reasonably have expected to receive from the decedent in the form of support, services or contributions during the remainder of his lifetime if he had not been killed").

[114] *See* Reiser v. Coburn, 587 N.W.2d 336, 338-39 (Neb. 1998); *see also* Green v. Bittner, 424 A.2d 210, 211 (N.J. 1980) (reversing the trial court's instructions that wrongful death damages are limited to pecuniary losses of survivors, which resulted in the jury returning a zero-dollar verdict for the wrongful death of an eighteen-year-old high school senior). In *Green*, the trial judge denied a motion for a new trial, concluding that "'it would be reasonable for this jury to come to [the] conclusion that the value of her [decedent's] services to babysit or to dry dishes was far exceeded by the cost to the family of feeding, clothing and educating her.'" *Id.* at 212. On appeal, the New Jersey Supreme Court took issue with the fact that the victim's "life was adjudicated worthless to others, in a pecuniary sense," and reversed, holding that the plaintiffs were entitled to recover the pecuniary value, excluding emotional loss, of the decedent's lost companionship. *Id.* at 211.

[115] *Reiser*, 587 N.W.2d at 342.

[116] *Id.* at 341.

[117] *Id.* at 341-42.

[118] 105 N.W.2d 118 (Mich. 1960).

[119] *Id.* at 119.

[120] *Id.* (internal quotation marks omitted).

Michigan Supreme Court traced the history of the pecuniary loss rule, observing that it arose in an era in which it was common for children to work in factories and contribute financially to the household.[121] "Loss" in that era "meant only money loss," said the court.[122] All other losses from wrongful death were viewed as "imaginary."[123]

Stuck with the pecuniary loss rule, but also struck by the injustice of its application to children, the court decided to greatly expand the meaning of pecuniary loss.[124] The court said that the pecuniary loss suffered by the death of a child is not simply probable wages less child-raising expenses, but rather, "[i]t is the pecuniary value of the life,"[125] which is comprised of many elements, including companionship:[126]

> [J]ust as an item of machinery forming part of a functioning industrial plant has a value over and above that of a similar item in a showroom, awaiting purchase, so an individual member of a family has a value to others as part of a functioning social and economic unit. This value is the value of mutual society and protection, in a word, companionship. The human companionship thus afforded has a definite, substantial, and ascertainable pecuniary value . . . .[127]

Although analogizing the companionship of a child to "an item of machinery forming part of a functioning industrial plant"[128] does not sound like much of an advancement in thinking, the court's manipulation of the pecuniary loss rule paved the way for other courts and legislatures to follow suit and expand wrongful death damages. Courts in twenty-one states and the District of Columbia have now interpreted their wrongful death statutes to allow for the recovery of loss of society and companionship-type damages, although the statutes do not expressly provide for such recovery.[129] Wrongful

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[121] *Id.* at 121. The court observed that the apprenticeship of child factory workers had been likened to "slave traffic." *Id.* at 120.

[122] *Id.* at 121.

[123] *Id.*

[124] *Id.* at 122-23

[125] *Id.* at 122.

[126] *Id.* at 122-23 (discussing the value of companionship).

[127] *Id.*

[128] *Id.* at 122.

[129] ARIZ. REV. STAT. ANN. § 12-613 (West 2003) (interpreted in *Arizona Mullen v. Posada Del Sol Health Care Ctr.*, 819 P.2d 985, 986 (Ariz. Ct. App. 1991), as allowing damages for "loss of love, affection, companionship, consortium, personal anguish and suffering"); CAL. CIV. PROC. CODE § 377.61 (West 2004) (interpreted in *Garcia v. Superior Court*, 49 Cal. Rptr. 2d 580, 586 (Cal. Ct. App. 1996), as allowing damages for the loss of decedent's "society and comfort"); D.C. CODE ANN. § 16-2701 (2001) (interpreted in *Herbert v. District of Columbia*, 808 A.2d 776, 778 n.2 (D.C. 2002), as allowing damages for "lost services," which include decedent's "care, education, training, and personal advice"); GA. CODE ANN. § 51-4-1 (2000) (interpreted in *South Fulton Med. Ctr. v. Poe*, 480

S.E.2d 40, 45 (Ga. Ct. App. 1996), as allowing damages for "loss of services," including "society, advice, example and counsel"); IDAHO CODE § 5-311 (Michie 2004) (interpreted in *Hepp v. Ader*, 130 P.2d 859, 862 (Idaho 1942), as allowing damages for "loss of society, companionship, comfort, protection, guidance, advice, intellectual training, etc"); 740 ILL. COMP. STAT. ANN. 180/2 (West 2002) (the term "pecuniary injuries" found in the statute was interpreted in *Bullard v. Barnes*, 468 N.E.2d 1228, 1232 (Ill. 1984), as supporting damages related to the "deprivation of support as well as deprivation of the companionship, guidance, advice, love and affection of the deceased"); KY. REV. STAT. ANN. § 411.130 (Michie 1992) (interpreted in *Giuliani v. Guiler*, 951 S.W.2d 318, 319 (Ky. 1997), as allowing parents to recover damages for "loss of the child's affection and companionship"); LA. CIV. CODE ANN. art. 2315.2 (West Supp. 2004) (interpreted in *Turner v. Lyons*, 867 So. 2d 13, 21 (La. Ct. App. 2004), as allowing damages for "loss of consortium," which includes "loss of the aid, assistance and companionship of the child, or loss of affection, society, and service"); MINN. STAT. ANN. § 573.02 (West Supp. 2004) (interpreted in *Fussner v. Andert*, 113 N.W.2d 355, 356 (Minn. 1961), as allowing damages for "loss of aid, comfort, and society of the decedent"); MISS. CODE ANN. § 11-7-13 (Supp. 2003) (interpreted in *Choctaw Maid Farms, Inc. v. Hailey*, 822 So. 2d 911, 929 (Miss. 2002), as allowing damages for the "loss of the companionship and society of the decedent"); MONT. CODE ANN. § 27-1-323 (2003) (interpreted in *Payne v. Eighth Judicial Dist. Court*, 60 P.3d 469, 472 (Mont. 2002), as allowing damages for the "loss of consortium; loss of comfort and society; and the reasonable value of the contributions in money that the decedent would reasonably have provided for the support, education, training, and care" suffered by the heirs of the decedent); NEB. REV. STAT. § 30-809 (1995) (interpreted in *Reiser v. Coburn*, 587 N.W.2d 336, 340 (Neb. 1998), as allowing damages for "loss of the deceased's society, comfort, and companionship"); N.J. REV. STAT. ANN. § 2A:31-5 (West 2000) (interpreted in *Green v. Bittner*, 424 A.2d 210, 215 (N.J. 1980), as allowing parents to recover damages for the loss of companionship, advice, and guidance stemming from a child's death); N.M. STAT. ANN. § 41-2-1 (Michie 2003) (interpreted in *Romero v. Byers*, 872 P.2d 840, 842 (N.M. 1994), as allowing damages for "loss of guidance and counseling" of decedent); N.D. CENT. CODE § 32-21-01 (1996) (interpreted in *Hopkins v. McBane*, 427 N.W.2d 85 (N.D. 1988), as allowing damages for "loss of society, comfort, and companionship"); 42 PA. CONS. STAT. § 8301 (1998) (interpreted in *Machado v. Kunkel*, 804 A.2d 1238, 1245 (Pa. Super. Ct. 2002), as allowing children to recover damages for "loss of companionship, comfort, society, . . . guidance of a parent, . . . tutelage, and moral upbringing" stemming from a parent's death); R.I. GEN. LAWS § 10-7-1 (1997) (interpreted in *Hall v. Knudsen*, No. 82-169, 1985 R.I. Super. LEXIS 96, at *2 (Feb. 5, 1985), as allowing damages for "loss of consortium and loss of society and companionship" of decedent); S.C. CODE ANN. § 15-51-10 (Law. Co-op 2003) (interpreted in *Self v. Goodrich*, 387 S.E.2d 713, 714 (S.C. Ct. App. 1989), as allowing damages for "loss of companionship" and "deprivation of the use and comfort of the intestate's society, including the loss of his experience, knowledge, and judgment"); S.D. CODIFIED LAWS § 21-5-7 (Michie 1987) (interpreted in *Anderson v. Lale*, 216 N.W.2d 152, 155 (S.D. 1974), as allowing damages for "loss of society, comfort, and care" of the decedent); TENN. CODE ANN. § 20-5-113 (1994) (interpreted in *Jordan v. Baptist Three Rivers Hosp.*, 984 S.W.2d 593, 601-02 (Tenn. 1999), as allowing "consortium-type" damages that include "attention, guidance, care, protection, training, companionship, cooperation, affection, love, and in the case of a spouse, sexual relations"); TEX. CIV. PRAC. & REM. CODE ANN. § 71.002 (Vernon 2002) (interpreted in *Sanchez v. Schindlern*, 651 S.W.2d 249, 252 (Tex. 1983), as allowing parents to recover damages for

death statutes in twenty-seven other states expressly allow for the recovery of such damages.[130] Thus, every American jurisdiction, except two,[131] recognizes

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"loss of companionship and society" related to their child's death); UTAH CODE ANN. § 78-11-6 (2002 & Supp. 2004) (interpreted in *Jones v. Carvell*, 641 P.2d 105, 108 (Utah 1982), as allowing damages for loss of society, love, companionship, protection, affection, counsel, advice, care, solicitude, comfort, and pleasure).

[130] ALASKA STAT. § 09.55.580 (Michie 2002) (allowing damages for "loss of consortium"); ARK. CODE ANN. § 16-62-102 (Michie 1997 & Supp. 2003) (allowing spouses to recover damages for "loss of the services and companionship" of decedent); COLO. REV. STAT. § 13-21-203 (2003) (allowing damages for "loss of companionship"); CONN. GEN. STAT. § 52-555a (1991) (recognizing causes of action for "loss of consortium" by surviving spouses, but provides that such damages are separate from damages for wrongful death); DEL. CODE ANN. tit. 10, § 3724 (1999) (allowing damages for "[l]oss of parental, marital and household services"); FLA. STAT. ch. 768.21 (1997 & Supp. 2004) (allowing children to recover damages for "lost parental companionship, instruction, and guidance"); HAW. REV. STAT. ANN. § 663-3 (Michie 2002) (allowing recovery for "loss of society, companionship, comfort, consortium, or protection, . . . marital care, attention, advice, or counsel, guidance, and education"); IND. CODE ANN. § 34-23-1-2 (Michie 1999) (allowing damages stemming from the "loss of the adult person's love and companionship"); IOWA CODE § 633.336 (2003) (allowing damages for "loss of services and support" of decedent); KAN. STAT. ANN. § 60-1904 (1994) (allowing recovery for loss of society, companionship, comfort, protection, marital care, attention, advice, counsel, training, guidance, and education); ME. REV. STAT. ANN. tit. 18-A, § 2-804 (West 1998 & Supp.) (providing for damages stemming from the "loss of comfort, society and companionship" of the deceased); MD. CODE ANN., CTS. & JUD. PROC. § 3-904 (2002) (allowing damages for "loss of society, companionship, comfort, protection, marital care, parental care, filial care, attention, advice, counsel, training, guidance, or education"); MASS. GEN. LAWS ch. 229, § 2 (2000) (allowing damages for the "loss of the . . . services, protection, care, assistance, society, companionship, comfort, guidance, counsel, and advice" of the decedent); MICH. COMP. LAWS § 600.2922 (2000) (allowing damages for the "loss of the society and companionship" of the deceased); MO. REV. STAT. § 537.090 (2000) (allowing damages for the "reasonable value of the services, consortium, companionship, comfort, instruction, guidance, counsel, training, and support" of decedent); NEV. REV. STAT. 41.085 (2003) (allowing damages for "loss of probable support, companionship, society, comfort and consortium"); N.H. REV. STAT. ANN. § 556:12 (1997 & Supp. 2003) (allowing spouses to sue for "loss of the comfort, society, and companionship of the deceased"; allows children to sue for "loss of the comfort, society, affection, guidance, and companionship of the deceased"); N.C. GEN. STAT. § 28A-18-2 (2003) (allowing damages for the "loss of the . . . services, protection, care, . . . assistance, . . . society, companionship, comfort, guidance, kindly offices and advice" of the decedent); OHIO REV. CODE ANN. § 2125.02 (West 2002) (allowing recovery for "loss of services, . . . society, . . . companionship, consortium, care, assistance, attention, protection, advice, guidance, counsel, instruction, training, and education"); OKLA. STAT. tit. 12, § 1053 (2000) (allowing spouse to recover for "loss of consortium"; allowing children and parents of decedent to recover for "loss of companionship"); OR. REV. STAT. § 30.020 (2003) (allowing spouse, children, stepchildren, stepparents, and parents to recover for the "loss of the society, companionship and services of the decedent"); VT. STAT. ANN. tit. 14, § 1492 (2002) (allowing parents to recover for "loss of love and companionship of the child"); VA. CODE ANN. § 8.01-52 (Michie 2000) (allowing damages for "loss of society,

loss of society and companionship-type damages in wrongful death cases. Note the need to include the qualifier "*-type* damages" because neither courts nor legislatures can agree on exactly what it is they're trying to compensate for. The cases and statutes variously describe the lost services from death deserving of monetary compensation as including: society, companionship, love, affection, consortium, marital services, marital care, aid, tutelage, support, moral upbringing, experience, knowledge, cooperation, solicitude, comfort, pleasure, household services, guidance, advice, counsel, kindly offices, training, education, cooperation, assistance, attention, care, and protection.[132]

Contrarily, while nearly all states allow society and companionship-type damages, only a minority of states allow recovery for grief or mental anguish. The wrongful death statutes of twelve states expressly provide for grief or mental anguish damages,[133] while courts in eleven other states have interpreted

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companionship, comfort, guidance, advice, services, protection, care, and assistance"); WASH. REV. CODE § 4.24.010 (1988) (allowing parents to recover for "loss of services . . . support, . . . love, and companionship"); W. VA. CODE § 55-7-6 (2000) (allowing damages for loss of "society, companionship, comfort, guidance, kindly offices, . . . advice, . . . services, protection, care, and assistance"); WIS. STAT. § 895.04 (Supp. 2004) (allowing damages for "loss of society and companionship"); WYO. STAT. ANN. § 1-38-102 (Michie 2003) (allowing damages for "loss of probable future companionship, society and comfort").

[131] Alabama and New York are the only two states that deny companionship-type damages. ALA. CODE § 6-5-410 (1993) (interpreted in *Estes Health Care Ctrs., Inc. v. Bannerman*, 411 So. 2d 109, 112 (Ala. 1982), as allowing only punitive damages in wrongful death cases); N.Y. EST. POWERS & TRUSTS LAW § 5-4.3 (McKinney 2002) (interpreted in *Bell v. Cox*, 388 N.Y.S.2d 118, 118 (N.Y. App. Div. 1976), as not allowing damages for "grief, loss of society or loss of companionship").

[132] *See supra* notes 129 and 130 (quoting each of these terms in parentheticals categorizing the status of society and companionship-type damages in state case law and wrongful death statutes, respectively). Some of the terms apply only to surviving spouses (e.g., consortium, marital relations), while some (e.g., training, education) apply to children of a deceased parent.

[133] ARK. CODE ANN. § 16-62-102 (allowing damages for "mental anguish resulting from the death to the surviving spouse and beneficiaries"); COLO. REV. STAT. § 13-21-203 (allowing damages for "grief [,]. . . pain and suffering, and emotional stress"); DEL. CODE ANN. tit. 10, § 3724 (allowing damages for "[m]ental anguish resulting from such death to the surviving spouse and next-of-kin"); FLA. STAT. ch. 768.21 (allowing spouses, minor children (or all children if no surviving spouse), and parents of deceased minor children (or parents of adult child if no other survivors) to recover for "mental pain and suffering"); KAN. STAT. ANN. § 60-1904 (allowing damages for "mental anguish, suffering or bereavement"); ME. REV. STAT. ANN. tit. 18-A, § 2-804 (allowing a jury to award damages for "emotional distress"); MD. CODE ANN., CTS. & JUD. PROC. § 3-904 (allowing damages for "mental anguish" and "emotional pain and suffering"); NEV. REV. STAT. § 41.085 (allowing heirs to recover damages for their "grief or sorrow"); OHIO REV. CODE ANN. § 2125.02 (allowing spouse, minor children, parents, or next of kin to recover damages for

their wrongful death statutes to allow such damages.[134] Twenty-eight states and the District of Columbia appear to have rejected grief damages in wrongful death cases.[135]

"mental anguish"); OKLA. STAT. tit. 12, § 1053 (allows spouse, children, and parents of decedent to recover damages for "grief"); VA. CODE ANN. § 8.01-52 (allowing damages for "sorrow, mental anguish, and solace"); W. VA. CODE § 55-7-6 (allowing damages for "sorrow, mental anguish, and solace").

[134] ALASKA STAT. § 09.55.580 (interpreted in *Tommy's Elbow Room, Inc. v. Kavorkian*, 727 P.2d 1038, 1047 (Alaska 1986), as allowing "spouses, children, and other dependents of the decedent . . . [to] recover for their anguish, grief, and suffering resulting from the wrongful death"); ARIZ. REV. STAT. § 12-613 (interpreted in *Arizona Mullen*, 819 P.2d at 986, as allowing damages for "personal anguish and suffering"); HAW. REV. STAT. ANN. § 663-3 (interpreted in *Ozaki v. Ass'n of Apartment Owners*, 954 P.2d 652, 671 (Haw. Ct. App. 1998), as allowing recovery for "emotional distress and mental suffering"); LA. CIV. CODE ANN. art. 2315.2 (interpreted in *Le Jeune v. Rayne Branch Hosp.*, 539 So. 2d 849, 851 (La. Ct. App. 1989), as supporting "mental anguish [damages] . . . in a wrongful death action"); MONT. CODE ANN. § 27-1-323 (interpreted in *Gibson v. Western Fire Ins. Co.*, 682 P.2d 725, 739 (Mont. 1984), as allowing "recovery of damages for mental anguish"); N.D. CENT. CODE § 32-21-01 (interpreted in *Hopkins*, 427 N.W.2d at 93, as permitting "damages for mental anguish . . . in a wrongful death action"); S.C. CODE ANN. § 15-51-10 (interpreted in *Self*, 387 S.E.2d at 714, as allowing damages for "mental shock and suffering" and "grief and sorrow"); TEX. CIV. PRAC. & REM. CODE ANN. § 71.002 (interpreted in *Sanchez*, 651 S.W.2d at 251, as allowing "plaintiff to recover damages for . . . mental anguish for the death of his or her child"); UTAH CODE ANN. § 78-11-6 (apparently would allow grief damages, as in *Jones*, 641 P.2d at 107-08, where the court stated that "Utah statutory law does not limit damages to economic or 'pecuniary' losses resulting from a child's death" and that damages can be awarded for such things as "love" and "companionship"); VT. STAT. ANN. 14, § 1492 (interpreted in *Hartnett v. Union Mutual Fire Ins. Co.*, 569 A.2d 486, 488 (Vt. 1989), as allowing parents to recover for "grief, mental anguish and suffering" stemming from the death of a child); WASH. REV. CODE § 4.24.010 (interpreted in *Moen v. Hanson*, 537 P.2d 266, 267 (Wash. 1975), as permitting parents to recover for "anguish and sorrow" resulting from the wrongful death of a child).

[135] ALA. CODE § 6-5-410 (2003) (interpreted in *Cherokee Elec. Coop. v. Cochran*, 706 So. 2d 1188, 1193 (Ala. 1998), as "authoriz[ing] punitive damages but . . . not . . . compensatory damages"); CAL. CIV. PROC. CODE § 377.61 (West 2004) (interpreted in *Nelson v. County of Los Angeles*, 6 Cal. Rptr. 3d 650, 659 (Cal. Ct. App. 2003), as not allowing a plaintiff to recover for "such things as the grief or sorrow attendant upon the death of a loved one, or for his sad emotions, or for the sentimental value of the loss"); CONN. GEN. STAT. § 52-555 (interpreted in *Lengel v. New Haven Gas Light Co.*, 111 A.2d 547, 551 (Conn. 1954), as not allowing damages "based on sentimental values or upon the loss caused to the family or relatives of the decedent"); D.C. CODE ANN. § 16-2701 (2001) (interpreted in *Saunders v. Air Florida, Inc.*, 558 F. Supp. 1233, 1235 (D.D.C. 1983), as not allowing "recovery by the decedent's survivors for mental suffering, grief, or anguish"); GA. CODE ANN. § 51-4-1 (2000) (interpreted in *Ob-Gyn Assocs. v. Littleton*, 386 S.E.2d 146, 147 (Ga. 1989), *overruled on other grounds* by *Lee v. State Farm Mutual Ins. Co.*, 533 S.E.2d 82 (Ga. 2000), as "not includ[ing] recovery for mental anguish or emotional distress"); IDAHO CODE § 5-311 (Michie 2004) (interpreted in *Volk v. Baldazo*, 651 P.2d 11, 14 (Idaho 1982), as not supporting damages for "grief and mental anguish"); 740 ILL. COMP. STAT.

ANN. 180/2 (West 2002) (interpreted in *Bullard v. Barnes*, 468 N.E.2d 1228, 1233 (Ill. 1984), as not "authoriz[ing] recovery for mental anguish [damages]"); IND. CODE ANN. § 34-23-1-2 (excluding "damages awarded for a person's grief"); IOWA CODE § 633.336 (interpreted in *Iowa-Des Moines Nat'l Bank v. Schwerman Trucking Co.*, 288 N.W.2d 198, 204 (Iowa 1980), as not allowing damages for "grief, mental anguish, or suffering"); KY. REV. STAT. ANN. § 411.130 (Michie 1992) (interpreted in *Birkenshaw v. Union Light, Heat & Power Co.*, 889 S.W.2d 804, 806 (Ky. 1994), as requiring damages to be measured according to "the value of the destruction of the power of the decedent to earn money . . . [, with t]he existence and status of survivors ha[ving] no bearing on the calculation . . . ."); MASS. GEN. LAWS ch. 229, § 2 (2000) (interpreted in *MacCuish v. Volkswagenwerk A. G.*, 494 N.E.2d 390, 401 (Mass. App. Ct. 1986), as "exclu[ding damages for] . . . grief, anguish, and bereavement of the survivors"); MICH. COMP. LAWS § 600.2922 (interpreted in *Haupt v. Yale Rubber Co.*, 185 N.W.2d 161, 163 (Mich. Ct. App. 1970), as not allowing damages to "be awarded on the basis of the grief endured by the surviving dependents"); MINN. STAT. § 573.02 (West 2004) (interpreted in *Fussner v. Andert*, 113 N.W.2d 355, 357 (Minn. 1962), as not allowing damages "for the [plaintiff's] grief, sorrow, or mental anguish" stemming from decedent's death); MISS. CODE ANN. § 11-7-13 (2003) (interpreted in *Gatlin v. Methodist Med. Ctr., Inc.*, 772 So. 2d 1023, 1031 (Miss. 2000), as allowing damages for "the pain and suffering experienced by the deceased between the time of the injury and the subsequent demise," but not for survivors); MO. REV. STAT. § 537.090 (interpreted in *Price v. Schnitker*, 239 S.W.2d 296, 300 (Mo. 1951), as not allowing jury to "[take into] account . . . the pain, anguish or bereavement which may have been suffered by the [family]" of a decedent); NEB. REV. STAT. § 30-809 (1995) (interpreted in *Reiser v. Coburn*, 587 N.W.2d 336, 340 (Neb. 1998), as not allowing "recovery . . . for damages for mental suffering or bereavement or as solace on account of the death"); N.H. REV. STAT. ANN. § 556:12 (interpreted in *Siciliano v. Capitol City Shows*, 475 A.2d 19, 24 (N.H. 1984), as not allowing "damages . . . [to be] assessed based on the loss suffered by surviving relatives"); N.J. REV. STAT. ANN. § 2A:31-5 (West 2000) (interpreted in *Green v. Bittner*, 424 A.2d 210, 215 (N.J. 1980), as not "allow[ing] compensation, directly or indirectly, for emotional loss"); N.M. STAT. ANN. § 41-2-1 (Michie 2003) (interpreted in *Folz v. State*, 797 P.2d 246 (N.M. Ct. App. 1990), as not allowing damages "for grief or sorrow normally attending the death of a family member"); N.Y. EST. POWERS & TRUSTS LAW § 5-4.3 (interpreted in *Bell*, 388 N.Y.S.2d at 118, as not allowing "recovery . . . for grief, loss of society or loss of companionship"); N.C. GEN. STAT. § 28A-18-2 (although in *Keys v. Duke Univ.*, 435 S.E.2d 820, 822 (N.C. Ct. App. 1993), it was said that "the law in North Carolina is unclear as to whether a plaintiff may recover for mental anguish in an action for loss of consortium [under the wrongful death statute]," in *DiDonato v. Wortman*, 358 S.E.2d 489, 494 n.3 (N.C. 1987), the court stated that "[a] mother's mental anguish at having lost her child presumably will be available in a personal injury action brought in her own right," suggesting that such damages would not be supported under a wrongful death claim); OR. REV. STAT. § 30.020 (interpreted in *Demars v. Erde*, 640 P.2d 635, 637 (Or. Ct. App. 1982), as "not includ[ing] compensation for mental suffering of surviving parents or relatives"); 42 PA. CONS. STAT. § 8301 (2004) (the court in *Smith v. Smith*, 4 Pa. D. & C.4th 643, 649 (Adams County Ct. 1989), wrote that "[n]o claim for mental anguish has been recognized in Pennsylvania in wrongful death actions"); R.I. GEN. LAWS § 10-7-1 (1997) (the court in *Fortes v. Ramos*, No. 96-5663, 2002 R.I. Super. LEXIS 35, at *41 (Mar. 12, 2002), wrote that "[t]he Wrongful Death Act does not provide for a beneficiary to recover mental anguish or emotional distress"); S.D. CODIFIED LAWS § 21-5-7 (Michie 1987) (the court in *Anderson*

Even in the states that recognize grief damages, the statutory classifications of those entitled to recover them are incomplete and arbitrary. People who are not closely related to the decedent by blood or marriage cannot recover, and while this may make sense in terms of line-drawing, it routinely excludes many close loved ones who do not fit within the statutory categories. Embittered persons who were scheduled to file for divorce the day after the accident can recover, while optimistic couples scheduled to get married the same day cannot.[136] For gay and lesbian couples in marriage-like relationships, unable in most states to legally qualify for wrongful death benefits, this exclusion amounts to discrimination.[137] Statutory rules on who can recover wrongful death damages discriminate even within closely related families. In several states, even parents and siblings are barred from recovering grief damages if the decedent left behind a surviving spouse or children.[138]

The incongruity between widely allowing damages for loss of society and companionship while widely rejecting remedies for grief is somewhat amusing when one takes note that the primary reason for denying grief damages is that they are considered too speculative and that we do not trust juries to assess them.[139] The fiction that society and companionship-type losses are "services"

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v. Lale, 216 N.W.2d 152, 157 (S.D. 1974), wrote that the jury should not give "any consideration for grief, mental anguish or suffering of the parents by reason of such child's wrongful death"); TENN. CODE ANN. § 20-5-113 (1994) (the court in *Thurmon v. Sellers*, 62 S.W.3d 145, 161 (Tenn. Ct. App. 2001), wrote that "parents cannot recover for the sorrow and anguish endured as a result of the child's death"); WIS. STAT. § 895.04 (the court in *Stabenow v. Jacobsen*, 610 N.W.2d 512, No. 99-0732, 2000 Wisc. App. LEXIS 348, at *22 (Wis. Ct. App. 2000) (unpublished opinion), approved jury instructions that excluded from recovery "[damages for] grief and mental suffering cased [sic] by the child's death"); WYO. STAT. ANN. § 1-38-102 (the court in *Knowles v. Corkill*, 51 P.3d 859, 863 (Wyo. 2002), wrote that "Wyoming . . . does not allow damages for mental anguish").

[136] *But see* Dunphy v. Gregor, 642 A.2d 372 (N.J. 1994) (holding that a woman who was engaged to and cohabitating with an auto accident victim could pursue a bystander action for emotional distress damages).

[137] *See generally* John G. Culhane, *A "Clanging Silence": Same-Sex Couples and Tort Law*, 89 KY. L.J. 911 (2000-2001) (discussing the obstacles to recovery for relational injuries with regard to both same-sex and opposite-sex unmarried couples).

[138] *See, e.g.*, DEL. CODE ANN. tit. 10, § 3724(d)(5) (allowing mental anguish damages, but excluding parents and siblings from recovering them unless there is no surviving spouse or children of the decedent); FLA. STAT. ANN. § 768.21 (allowing mental anguish damages to spouses, children and parents, but excluding siblings); LA. CIV. CODE ANN. art. 2315.2 (allowing parents to recover wrongful death damages). Louisiana courts have construed the statute to include grief damages only if there is no surviving spouse or children and to allow siblings to recover only if there is no surviving spouse, child or parent. *See Le Jeune*, 539 So. 2d at 851.

[139] Speiser & Malawer, *supra* note 106, at 1 (stating that refusal to allow mental anguish damages in wrongful death cases "is based upon nothing more substantial than the nineteenth-century distrust of jurors' ability to assess emotional injuries fairly"). In practice, the disparity in the recognition of society and companionship damages versus grief

with measurable money value may stand one of the most tortured judicial analyses in all of law. Picture a jury deliberating:

Foreperson: Okay, next we have "companionship." How much is that worth in hard dollars?

Juror Clunkhead: A lot. One night I paid a hundred bucks for a single hour of it.

Foreperson: No, no, no, that's already covered by "consortium."[140] We're talking *companionship*. You know, a friend. Someone you trust, someone you can talk to, who makes you feel safe, someone you look forward to coming home to see, who stands beside you in good times and bad, someone who –

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damages may not be as large as it appears because many jurors, being wiser than 150 years of carefully considered legislative and common law development, no doubt use society and companionship damages to compensate for grief. The theoretical "positive vs. negative benefits" distinction between the two types of injury was articulated by the U.S. Supreme Court in *Sea-Land Servs., Inc. v. Gaudet*, 414 U.S. 573 (1974), where the Court held that spouses can recover damages for loss of society and companionship in maritime wrongful death actions. *Id.* at 585-90. In a footnote, Justice Brennan wrote:

> Loss of society must not be confused with mental anguish or grief, which is not compensable . . . . The former entails the loss of positive benefits, while the latter represents an emotional response to the wrongful death. The difference between the two is well expressed as follows:
>
> > When we speak of recovery for the beneficiaries' mental anguish, we are primarily concerned, not with the benefits they have lost, but with the issue of compensating them for their harrowing experience resulting from the death of a loved one. This requires a somewhat negative approach. The fundamental question in this area of damages is what deleterious effect has the death, as such, had upon the claimants? In other areas of damage, we focus on more positive aspects of the injury such as what would the decedent, had he lived, have *contributed* in terms of support, assistance, training, comfort, consortium, etc.

Id. at 585 n.17 (quoting 1 STUART M. SPEISER, RECOVERY FOR WRONGFUL DEATH § 3:45 (1st ed. 1966) (emphasis in original) (internal citations omitted)). That jurors make such a finespun distinction seems unlikely. As the Prosser hornbook observes, loss of companionship claims "clearly include many intangible forms of loss . . . and . . . [a] juror may find it quite difficult indeed to distinguish a spouse's loss of love from the forbidden 'mental anguish.'" PROSSER & KEETON ON TORTS, *supra* note 99, § 127, at 952. At least one court also has recognized this truth. *See, e.g.*, Ozaki v. Ass'n Apartment Owners of Discovery Bay, 954 P.2d 652, 669 (Haw. Ct. App. 1998) (recognizing that emotional distress and mental anguish are encompassed within claims for loss of society and companionship).

[140] These remarks are intended to illuminate the absurdity of the law's focus on lost "services" in calculating intangible damages in death cases. Historically, a primary focus of consortium claims has been the loss of a spouse's sexual "services." *See* MARC C. FRANKLIN & ROBERT RABIN, TORT LAW AND ALTERNATIVES 297-99 (7th ed. 2001) (explaining that the emphasis of modern consortium claims is on loss of society and impairment of sexual relations); Twila L. Perry, *The "Essentials of Marriage": Reconsidering the Duty of Support and Services*, 15 YALE J. L. & FEMINISM 1, 30 (2003) (stating that the elements of a claim for loss of consortium traditionally have included compensation for loss of sexual services).

Juror Clunkhead: You can't hire people to do that stuff! Just having someone put up with me for a day is worth a fortune. This is ridiculous.

Foreperson: I'm only going by what the judge said, so help me out. We still have a long way to go. After companionship, we have to calculate the replacement value of "protection, care, assistance, society, comfort, guidance, advice" and . . . what the heck are "kindly offices"?[141]

Juror Smith: It's going to be a long night.

While family and household services involving physical labor, such as doing the laundry or performing household repairs, can perhaps be meaningfully reduced to a pecuniary value, human love and companionship cannot. While grief is not necessarily easier to value in money damages than society and companionship, it is at least subject to more objective evaluative criteria, either in the form of expert testimony concerning PTSD[142] or other psychiatric disorders that may flow from grief, or in judicially prescribed lists of factors to be considered in evaluating grief.[143] Moreover, it has the benefit of focusing jurors' attention on one monolithic injury, rather than making them guess at the meaning and value of the more than twenty-five labels courts and legislatures fumble with to define society and companionship-type damages.[144] Although it is not the primary thesis of this article, clarity and coherence could be added to the wrongful death damages equation by replacing society and

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[141] These examples of compensable loss of society and companionship-type damages are found in the North Carolina wrongful death statute. *See* N.C. GEN. STAT. § 28A-18-2 (2003) (providing that a decedent's personal representative may recover for loss of "[s]ociety, companionship, comfort, guidance, kindly offices and advice").

[142] *See supra* notes 42-48 and accompanying text (discussing studies of grief and PTSD).

[143] For example, the Arkansas Supreme Court lists these factors for evaluating the excessiveness of mental anguish awards in wrongful death cases:

(1) The duration and intimacy of their relationship and the ties of affection between decedent and survivor.
(2) Frequency of association and communication between an adult decedent and an adult survivor.
(3) The attitude of the decedent toward the survivor, and of the survivor toward the decedent.
(4) The duration and intensity of the sorrow and grief.
(5) Maturity or immaturity of survivor.
(6) The violence and suddenness of the death.
(7) Sleeplessness or troubled sleep over an extended period.
(8) Obvious extreme or unusual nervous reaction to the death.
(9) Crying spells over an extended period of time.
(10) Adverse effect on survivor's work or school.
(11) Change of personality of the survivor.
(12) Loss of weight by survivor and other physical symptoms.
(13) Age and life expectancy of the decedent.

Wal-Mart Stores, Inc. v. Tucker, 120 S.W. 3d 61, 69-70 (Ark. 2003).

[144] *See supra* note 132 and accompanying text (discussing the variety of labels that courts and legislatures use to define society and companionship-type damages).

companionship damages with grief damages.

Recognition of the inequity and illogic of denying grief remedies in wrongful death cases is not a new insight. In 1976, Speiser and Malawer argued, by analogy, in favor of grief damages, focusing on inconsistencies in tort law with regard to mental distress awards based on harm to a loved one.[145] Their central thesis was that it is illogical to allow juries to routinely award damages for mental and physical pain and suffering, as all jurisdictions do, while distrusting them to calculate damages for grief and mental anguish to survivors from wrongful death.[146] The general rule is that there is no duty under negligence law to protect one from purely emotional distress.[147] One prominent exception are the so-called "bystander cases" for negligent infliction of emotional distress; cases in which close family members are permitted to recover mental distress damages for contemporaneously witnessing the death or serious injury of a loved one.[148] When the claim involves death, as most

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[145] Speiser & Malawer, *supra* note 106, at 2-8 (discussing the inconsistency of prohibiting recovery of damages for mental anguish in wrongful death actions while permitting recovery of mental anguish damages in personal injury actions); *see also id.* at 21-32 (arguing to eliminate the inconsistency in wrongful death law by recognizing mental anguish damages).

[146] *Id.* at 2-5 (discussing the resistance of courts to permit a decedent's personal representative to recover damages for mental anguish in wrongful death actions); *see also In re* Sincere Navigation Corp., 329 F. Supp. 652, 656 (E.D. La. 1971) ("Human experience, as well as the literature of psychiatry and psychology bear abundant evidence of the debilitating effect of grief and the resultant depression. It is certainly no less real, and no more difficult to appraise, than the 'mental and physical pain and suffering' attendant upon personal injury that is awarded those who survive, or the pain and suffering prior to death that is recoverable as part of the death action here.").

[147] PROSSER & KEETON ON TORTS, *supra* note 107, § 54, at 361 (stating that where the defendant's conduct causes only mental disturbance, the majority of courts deny recovery). Most jurisdictions do allow recovery for intentionally inflicted emotional distress if the defendant's conduct rises to the level of "extreme and outrageous." *See, e.g.*, RESTATEMENT (SECOND) OF TORTS § 46 (1965) (adopting a provision establishing liability for one who, through extreme and outrageous conduct, intentionally or recklessly causes severe emotional distress to another).

[148] In the landmark case of *Dillon v. Legg*, 441 P.2d 912 (Cal. 1968), the California Supreme Court recognized that bystanders can recover for their emotional harm resulting from experiencing the tortious injury of a loved one where such emotional harm was foreseeable, even if the bystander was outside the zone of physical danger created by the defendant's conduct (the previous rule). *Id.* at 915. Recognizing, however, that a pure foreseeability analysis could lead to expansive liability, the court offered three "factors" for assessing foreseeability: (1) whether the plaintiff was located near the scene of the accident; (2) whether the shock resulted from direct contemporary witnessing of the accident, as opposed to learning about it later; and (3) whether the plaintiff was closely related to the accident victim. *Id.* at 920. In *Thing v. La Chusa*, 771 P.2d 814 (Cal. 1989), the court transformed these factors into fixed rules, holding that a bystander plaintiff can recover for emotional harm from the negligent infliction of physical injury to a third person only if the

successful bystander claims do, the cases end up looking like wrongful death-grief claims dressed up as personal injury cases.[149] While the trauma of witnessing the violent death of a loved one is no doubt extreme, the trauma of learning about the violent death shortly afterwards is, I believe, different only quantitatively. And in any event, the largest loss – the lifelong deprivation of the loved one – is the same in either situation. When the case involves witnessing injury only, the logic becomes even more strained. Witnessing the injury of a loved one brings recovery;[150] suffering their death does not.[151] Welcome to the topsy-turvy world of wrongful death law.

IV. THE PROPOSAL: VALUING THE DEAD TO HELP THE LIVING

This article has detailed two distinct deficiencies in the law of wrongful death damages: (1) the refusal to assign any value to lost life; and (2) the failure to provide remedies to the decedent's survivors for the grief caused by the death. My idea to repair both defects is a relatively frugal "two for the price of one" proposal that emphasizes honoring the decedent's life over

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plaintiff: (1) is closely related to the victim; (2) is present at the scene and contemporaneously perceives the injury to the victim; and (3) suffers emotional distress beyond that which could be expected in a disinterested witness. *Id.* at 829-30. Although the details vary from state to state, most jurisdictions now follow the basic precept of *Dillon* in allowing emotional distress claims by bystanders. DAN B. DOBBS, THE LAW OF TORTS § 309, at 840 (2000) (asserting that most states have followed *Dillon* in rejecting a mechanical "zone of danger" analysis).

[149] *See* Speiser & Malawer, *supra* note 106, at 2-5 ("It is evident that most states are at least a hundred years behind the times in their treatment of emotional injuries suffered by relatives in wrongful death victims; form is favored over substance by allowing the labeling of a cause of action to govern the substantive right to recover damages.").

[150] *See, e.g.*, Hermann Hosp. v. Martinez, 990 S.W.2d 476, 478-80 (Tex. Ct. App. 1999) (holding that a mother and daughter in a car with the son had valid bystander claims for emotional distress when the son was physically injured in an accident); Heldreth v. Marrs, 425 S.E.2d 157, 169-70 (W. Va. 1992) (finding that the victim's husband who was near the scene of the accident was entitled to recover for emotional distress due to the physical injuries suffered by his wife).

[151] Speiser and Malawer also took aim at the odd discrepancy in the law relating to mistaken or delayed death notices, one of the oldest exemptions to the general "no-duty" rule with regard to negligently caused emotional distress. They characterized a New York case awarding mental distress damages to a daughter who received a telegram erroneously notifying her of her mother's death as the "*reductio ad absurdum*" of the anomaly vis-a-vis denying wrongful death grief damages, stating with more than a hint of sarcasm that the "court approved an award of damages for mental anguish to a daughter whose mother did *not* die, *because* the mother did not die, even though the daughter would not have been entitled to such damages if her mother had died." Speiser & Malawer, *supra* note 106, at 4; *see also* David F. Partlett, *Tort Liability and the American Way: Reflections on Liability for Emotional Distress*, 45 AM. J. COMP. L. 171, 190 n.91 (1997) (citing several cases in which telegraph companies were held liable for emotional harm that resulted from their negligent transmission of death announcements and noting it as a "minority rule").

paying additional money to individuals. Specifically, I argue below that state legislatures should amend their wrongful death statutes to establish a category of damages for the value of lost life.[152] Rather than allocate these damages to the decedent's estate or survivors, however, I assert that they should be used for the exclusive purpose of establishing a socially useful memorial to the decedent. This approach would magnify the net social benefit of the tort system, advance both the economic deterrence and corrective justice functions of tort law, and serve a compensatory function to the decedent. Most significantly in terms of the focus of this article, the memorial funded by the lost life damages would serve the additional purpose – at no additional cost – of helping to heal grief in the decedent's survivors.

A. *Recognizing Lost Life Damages and Using Them to "Compensate" the Dead Through the Establishment of Memorials*

In 1990, when I first advocated lost life damages, only one state – Connecticut – recognized them;[153] that number has since grown to five.[154]

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[152] Lost life damages would be in addition to, not in lieu of, existing wrongful death damages.

[153] *See* McClurg, *It's a Wonderful Life*, *supra* note 25, at 94-95 (recognizing that in 1990 Connecticut was the only state to allow compensation for the lost value of life).

[154] *See* Katsetos v. Nolan, 368 A.2d 172, 183 (Conn. 1976) (interpreting the "just damages" provision of a survival statute to include damages for "the destruction of . . . [the decedent's] capacity to carry on and enjoy life's activities in a way she would have done had she lived"); Ozaki v. Ass'n of Apartment Owners by Discovery Bay, 954 P.2d 652, 667-68 (Haw. Ct. App. 1998), *rev'd on other grounds*, 954 P.2d 644 (Haw. 1998) (holding that damages for decedent's loss of enjoyment of life are recoverable by decedent's estate); Choctaw Maid Farms, Inc. v. Hailey, 822 So. 2d 911, 922-23 (Miss. 2002) (approving an award for "hedonic damages" under Mississippi's broadly worded wrongful death statute); Marcotte v. Timberlane/Hampstead Sch. Dist., 733 A.2d 394, 399 (N.H. 1999) (holding that damages for loss of life are recoverable under the state's wrongful death statute); Romero v. Byers, 872 P.2d 840, 846 (N.M. 1994) (concluding that "fair and just" damages under the state's wrongful death statute include "reasonably expected nonpecuniary rewards the deceased would have reaped from life").

Because wrongful death actions are creatures of statute, the availability of damages for lost life depends largely on the form and wording of the state's wrongful death and/or survival statutes. For a thorough discussion of the different types of wrongful death and survival statutes, see McClurg, *It's a Wonderful Life*, *supra* note 25, at 90-99. In short, state statutes that provide for recovery by the decedent's estate ("loss-to-the-estate" jurisdictions) are more easily amenable to an interpretation that they include damages for the value of the decedent's life than are statutes that provide for recovery directly by the decedent's survivors ("loss-to-the-survivors" jurisdictions). *See id.* This is so because in loss-to-the-estate jurisdictions the inquiry is directed at harm suffered by the decedent, whereas in loss-to-the-survivor jurisdictions the focus is the harm suffered by the survivors. *See id.* The loss of life itself fits more easily within the former category than the latter. *See id.* Consistent with this observation, of the five states listed above that have recognized lost life damages, four are loss-to-the-estate jurisdictions (Connecticut, Hawaii, New Hampshire and

Since that time, several other commentators have discussed the arguments in favor of lost life damages.[155] Accordingly, no useful purpose would be served by reanalyzing them in great detail here. From a wide-angle perspective, the most compelling argument for lost life damages is the unusual circumstance that they promote both competing functions of the tort system: economic deterrence and corrective justice.

The deterrence model is grounded in the theory that tort liability and damages rules are or should be constructed to achieve economically efficient results.[156] The corrective justice model holds that tort rules should be constructed to achieve just and moral results, even when it may be economically inefficient to do so.[157] The two theories generally are considered to be mutually exclusive, as scholars in the corrective justice camp disparage the deterrence model and deterrence scholars find little value in the corrective justice model.[158] But in lost life damages, we enjoy the rare, happy coincidence of a damages proposal that serves both models.

Regarding deterrence, it is generally agreed that wrongful death damages severely underestimate the cost of tortiously taking a life.[159] Because wrongful death defendants are not required to internalize the full value of the losses they cause, they have insufficient incentives to invest in safer behavior to avoid causing wrongful death.[160] Optimal levels of investment in safety can be reached only if actors are required to absorb *all* costs of their injury-causing behavior.[161] The loss of life is the largest cost from wrongful death.

Lost life damages also serve the corrective justice function of tort law. The

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New Mexico), while only one (Mississippi) is a loss-to-the-survivors jurisdiction.

[155] *See supra* note 27 (citing several articles on the topic of lost life damages).

[156] *See* Gary T. Schwartz, *Mixed Theories of Tort Law: Affirming Both Deterrence and Corrective Justice*, 75 TEX. L. REV. 1801, 1803-06 (1997) (discussing the development of the deterrent theory of tort law and its basis in economics).

[157] *See id.* at 1801.

[158] *See id.* at 1806-11 (making this point and articulating several examples supporting it).

[159] As explained by William M. Landes and Richard A. Posner:

> 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.

WILLIAM M. LANDES & RICHARD A. POSNER, THE ECONOMIC STRUCTURE OF TORT LAW 187 (1987).

[160] *See, e.g.*, Steven D. Smith, *The Critics and the "Crisis": A Reassessment of Current Conceptions of Tort Law*, 72 CORNELL L. REV. 765, 772-73 (1987) (explaining the deterrent model philosophy that "if the system holds injurers responsible for [all of] the injury costs which they generate, it will motivate them to adopt cost-justified safety measures.")

[161] *See, e.g., id.* 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."). *See generally* McClurg, *It's a Wonderful Life*, *supra* note 25, at 71-77 (explaining how lost life damages would further the general deterrence model of tort law).

tort system operates under the general maxim that "[o]ne 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."[162] Life is our most precious asset, and taking it away is the supreme harm one can inflict on another.[163] Given this rather obvious observation, rather than ask why damages should be awarded for the value of lost life, the more appropriate question is "Why not?" Two arguments are routinely advanced against lost life damages: they are too speculative and they do not serve the compensatory function of tort law.[164]

The argument that damages for the lost value of life are speculative, while true, proves too much because it applies with equal force to all types of intangible damages. Valuing life is admittedly speculative (although many life-valuing expert economists exist willing to give it a go[165]). But, is it any more speculative than evaluating the mental suffering endured by a tort victim who has been grossly disfigured? Or who has lost an arm or a leg? Or who has watched her child get run over by a car? All intangible damages are speculative precisely because they're intangible, yet every day we trust juries to assess them in personal injury cases.

Moreover, the "too speculative" argument applies with force even to relatively concrete economic injuries such as lost earning capacity and future medical expenses. In cases involving death or any type of permanent disability, we rely on juries to assess the plaintiff's future earnings and medical expenses over a lifetime. Assume an infant suffers severe permanent disabling injuries from a fire caused by a faulty space heater, but retains a normal life expectancy of seventy-five years.[166] The jury will be required to assess not

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[162] RESTATEMENT (SECOND) OF TORTS § 910 (1979).

[163] Blackstone called life "the immediate gift of God, a right inherent by nature in every individual." 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAW OF ENGLAND 129 (Thomas M. Cooley ed., 3d rev. ed. 1884).

[164] *See* Maurice B. Graham & Michael D. Murphy, *Hedonic Damages – Where Are We?*, 51 J. MO. BAR 265, 268 (1995) (recognizing that the primary arguments for denying lost life damages are that they are too speculative and do not serve the compensation function of tort law); Choctaw Maid Farms, Inc. v. Hailey, 822 So. 2d 911, 934 (Miss. 2002) (Cobb, J., concurring in part and dissenting in part) (arguing that awarding lost life damages "would be totally at odds with the compensatory nature of our tort system" and expressing concern that such damages are "highly speculative").

[165] The predominant methods for valuing human life through expert testimony analyze productive and consumptive behavior, either real behavior or behavior preferences expressed in response to questionnaires, to determine either how much people demand in additional salary to be exposed to higher risks of death (productive behavior) or how much they're willing to pay to reduce a risk of death (consumptive behavior). *See generally* Graham & Murphy, *supra* note 164, at 268 (describing various valuation methods, including the expert testimony of economists); McClurg, *It's a Wonderful Life*, *supra* note 25, at 99-106 (describing and critiquing valuation methods); Slesinger, *supra* note 27, at 17-23 (surveying and critiquing expert testimony on lost life damages in various cases).

[166] Anderson v. Sears, Roebuck & Co., 377 F. Supp. 136, 139-41 (D. La. 1974)

only the child's intangible losses for pain and suffering and disability and disfigurement, but her lost earnings during her work-life expectancy of more than six decades, with no reliable information (because it doesn't exist) regarding employment or inflation trends during that period. Worse, the jury will have no meaningful evidence as to whether the child would have grown up to be a surgeon or a convenience store clerk, even though millions of dollars in potential lifetime earnings rest on the unknowable answer to that question. The jurors also will be expected to determine the nature, frequency, and cost of required future medical treatment over the child's expected lifetime. For both of these supposedly "tangible" economic damages calculations, the jury will be required to factor in inflation and then reduce the amounts to present value, a complex accounting procedure.[167]

Although it is en vogue in the "tort reform" era to criticize juries, they carry out their many difficult assignments admirably. There is no reason to believe they would be unable to arrive at reasonable life valuations in wrongful death cases. If they return excessive verdicts, adequate mechanisms are in place to correct the error.[168] Alternatively, since my proposal will require legislation to

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(analyzing, in a tragic case with these facts, each element of the plaintiff's economic and noneconomic damages in denying defendant's motion for remittitur).

[167] Typically, juries receive only a cursory present-value instruction. In Florida, for example, jurors get this minimal guidance from the court regarding the sophisticated accounting task of reducing amounts for future damages to present value:

> Any amount of damages which you allow for [future medical expenses], [loss of ability to earn money in the future], [or] [(describe any other future economic loss which is subject to reduction to present value)] should be reduced to its present money value [and only the present money value of these future economic damages should be included in your verdict] [and both the amount of such future economic damages and their present money value should be stated in your verdict].
>
> The present money value of future economic damages is the sum of money needed now which, together with what that sum will earn in the future, will compensate (claimant) for these losses as they are actually experienced in future years.

FLA. STANDARD JURY INSTRUCTIONS IN CIV. CASES 6.10 (2003).

[168] It is disturbing that so many politicians, through their votes on tort reform measures that frequently severely limit jury discretion, have such little faith in the jury system. Juries serve well and with distinction in most cases. *See* Shari Seidman Diamond, *Panel III: Truth, the Jury and the Adversarial System*, 26 HARV. J.L. & PUB. POL'Y 143, 155 (2003) (discussing several studies regarding jury behavior and concluding that "systematic studies of jury decision-making reveal that the jury generally is a competent decision-maker"). Unfortunately, the only cases that get attention are those in which the jury arguably made a mistake. *See* Jean Hellwege et al., *Slay the Beast of 'Reform' Rhetoric*, 40 TRIAL 24, 26 (2004) (stating that "the media feeds the belief that extraordinary cases are the norm"). In such cases, which frequently involve large monetary verdicts that some view as excessive or otherwise unreasonable, post-verdict judicial review usually results in the award being reduced or eliminated. There are many examples to choose from. In the infamous and grossly misreported McDonald's coffee spill case, the trial judge reduced the jury's punitive damages award to plaintiff Stella Liebeck from $2.7 million to $480,000. *See* Diamond, *supra*, at 145-47 (giving factual details of the McDonald's coffee spill case and stating that

implement, any concern regarding excessive verdicts could be addressed by providing a statutory cap on amounts that could be awarded for lost life damages.

The second argument – that damages for the lost value of life do not serve the compensatory function of tort law – is more problematic because it is an accurate assessment of the law as it is currently structured. No amount of money in the world can restore the decedent's life. Accordingly, lost life damages, as heretofore characterized, do not in any way further the "make whole" purpose of compensatory tort damages.[169] Of course, similar arguments can be, and frequently are, made against damages for other types of intangible injuries.[170] Awards for mental and physical pain and suffering do not take away a personal injury victim's pain and suffering.[171] We can give a blinded tort victim a million dollars for her suffering, but she still has to live in a world of darkness. There is a difference, however, between intangible damages awarded to the living and those awarded to the dead.[172] While it is true that pain and suffering damages do not make tort victims whole again, they presumably provide solace and perhaps an easier life than would otherwise be available to the injured person.[173] A quadriplegic's life is going to be wretchedly difficult, but it might be somewhat less so if the person is able to enjoy other amenities of life that can be purchased with money.[174] The same

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the media attention to exceptional cases skews the public's perception of the jury system). The "$2 million paint job" in *BMW v. Gore* did not withstand review in the Supreme Court. BMW of N. Am., Inc. v. Gore, 517 U.S. 559, 585-86 (1996) (reversing a $2 million punitive damages award against an auto maker that sold damaged automobiles as new without disclosing damage as unconstitutionally excessive). The $600,000 verdict to a psychic who allegedly lost her psychic powers because of a CAT scan was thrown out and a new trial granted. Haimes v. Temple Univ., 39 Pa. D. & C.3d 381, 392-93 (1986) (ordering a new trial despite the fact that the trial judge explicitly instructed the jury that it could not consider the plaintiff's alleged loss of psychic powers in calculating damages). And the largest punitive damages award in U.S. history – $145 billion in a Florida class action lawsuit against the tobacco industry – was jettisoned in its entirety on appeal. Liggett Group, Inc. v. Engle, 853 So. 2d 434, 450 (Fla. Dist. Ct. App. 2003) (reversing the jury verdict and decertifying the class on the basis that the case involved too many individual issues of law and fact for class action treatment). The verdicts in atypical cases such as these receive substantial, mostly negative, media coverage, whereas little attention is given to the post-verdict proceedings that demonstrate the tort system does, in fact, have adequate mechanisms in place to correct acts of alleged jury extravagance. *See* Diamond, *supra*, at 145-47 (discussing the "incomplete and potentially misleading" news coverage of jury verdicts).

[169] *See* McClurg, *It's a Wonderful Life*, *supra* note 25, at 66-67 (recognizing the criticism that lost life damages fail to compensate the victim for the injury suffered).

[170] *See id.* at 67.

[171] *See id.*

[172] *See id.*

[173] *See id.*

[174] *See id.*

cannot be said about the dead.[175]

This observation leads to the essential argument of this article that lost life damages should be awarded for the exclusive purpose of funding a permanent memorial to the deceased. Under existing law, damages for lost life would go either to the decedent's estate or directly to the survivors, which would serve no compensatory purpose.[176] To the contrary, requiring that such damages be used to establish a memorial to the deceased, rather than allocating them to the estate or the survivors, fulfills a compensatory function of sorts to the decedent by recognizing and continuing his or her place in and contributions to this earthly world.[177] Most people want to be remembered when they die.[178] Proof can be found in the large number of living charitable donors who seek legacy and naming rights in connection with their philanthropic contributions.[179]

Memorials can take many forms, tangible or intangible. Physical memorials have the benefit of providing a place that tangibly represents the decedent's life, which survivors can visit in search of connection and comfort.[180] Intangible memorials, such as scholarships, suffer a disadvantage in this regard,[181] yet may carry other benefits in the form of perpetual gifts to the living from the dead. Among physical memorials, purely symbolic physical memorials such as plaques and monuments serve strong remembrance functions, but offer no utility to society. "Living memorials," such as community or charitable buildings, libraries, auditoriums, parks, playgrounds, gardens, or arboreta, offer the dual advantages of fulfilling utilitarian functions and providing an enduring physical testament to the worth of the decedent's life.[182] Most survivors probably would choose to establish socially useful

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[175] *See id.*

[176] *See id.*

[177] *See* THOMAS S. LANGNER, CHOICES FOR LIVING: COPING WITH FEAR OF DYING 134 (2000) (suggesting that many of the memorials and ceremonies of death arise from a desire to extend life and establish immortality).

[178] *See* Jeffry J. Andresen, *Wish to be Remembered and Clinical and Linguistic Significance of Being Forgotten: Implications for the Development of Mental Disorders*, 11 PSYCHIATRIC F. 14 (1982) (discussing the wish to be remembered).

[179] *See* LANGNER, *supra* note 177, at 10 (stating that the establishment of endowed chairs, charitable trusts and wills are ways "of extending one's life, and one's control, beyond the grave"); *id.* at 133 (stating that establishing charitable monuments with the stipulation that one's name appear on them is a way of achieving immortality); *id.* at 146 (offering examples of how wealthy people are able to keep their memory alive in perpetuity by establishing living memorials after their deaths).

[180] *See infra* notes 202-208 (discussing the emotional impact of the World War II and Vietnam memorials on the survivors of those killed during the conflicts).

[181] *See* Bernard Barber, *Place, Symbol, and Utilitarian Function in War Memorials*, 28 SOC. FORCES 64, 65 (1949) (remarking that war memorial scholarships, for example, operate at a disadvantage because they cannot provide a space for the "ceremonial coming together" of those who wish to remember).

[182] *See id.* at 64 (defining "living memorials" as memorials with present utilitarian

memorials with lost life damages, rather than solely symbolic physical monuments.[183] It might, however, be desirable to go further and require by legislation that all memorials established with lost life damages serve a utilitarian function, which would add a unique side benefit to my proposal. Rather than provide a "windfall" to tort victims, as intangible damages are sometimes accused of perpetrating,[184] lost life damages used to build utilitarian memorials would provide a windfall to society.

The goal would be to select the type of memorial the decedent would have chosen had she been given the opportunity to do so. What good work was important to her? What would she like to be remembered for? How did she or would she have left her imprint on the world?[185] People should be permitted to make advanced directives regarding such memorials in a will or other document. Absent such a directive, the statutory wrongful death beneficiaries, in consultation with others who loved and were loved by the deceased, would exercise substituted judgment for the decedent. In the event they could not agree, the statutory beneficiaries would decide.

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functions); *id.* at 66 (offering the examples quoted in the text, as well as other examples, of living memorials).

[183] *See* Gerald L. Euster, *Memorial Contributions: Remembering the Elderly Deceased and Supporting the Bereaved*, 23 OMEGA 169, 177 (1991) (describing a study of "In Memoriam" donations specified in obituaries of elderly persons in South Carolina, which found that preferred recipients were religious institutions, national charitable societies and foundations for research and education pertaining to cancer and heart disease, other charitable medical institutions, and child welfare organizations). It might be desirable to mandate by legislation that memorials established with lost life damages have social utility of some sort.

[184] *See* Paul A. Crotty, Letter to the Editor, *Cities Also Need Limits on Lawsuits*, N.Y. TIMES, Apr. 28, 1995, at A32 (arguing in favor of congressional tort reform measures in medical malpractice cases and equating noneconomic damages with "windfall payments" to plaintiffs).

[185] A perfect example is a memorial to a South Florida high school girl named Rebecca Kirtman, who died in a car accident on August 20, 2003. Mary Ellen Flannery, *Dream Alive in Prom-Dress Charity*, MIAMI HERALD, Apr. 10, 2004, at 3B. As a student at Nova High School in Davie, Florida, Rebecca started a "dress bin" to distribute used prom dresses to girls who could not afford new ones. *Id.* After her death, family, friends, and a businessman who heard about her accident on television worked together to continue her service project in the form of "Becca's Closet," a rent-free storefront and warehouse where high school girls can get donated prom dresses without payment. *Id.* Rebecca's pretty face looks out from the "O" in "Closet" on the storefront's sign. *Id.* Becca's Closet is now gaining worldwide attention, with high schools on both coasts starting their own chapters. *Id.*; *see also* Becca's Closet, Inc., *at* http://www.beccascloset.org (last visited Oct. 8, 2004) (official website). The healing power of this memorial and its ability to allow people who loved Rebecca to stay connected to her is evident from the comments of her former classmates: "'We know she's looking down at us and laughing, saying, This is insane! My face is on billboards and benches,'" said Blair Salzman. *Id.* "'It keeps her memory alive.'" *Id.* Added classmate Chelsea Koff: "'And it keeps us in touch with her.'" *Id.*

Some might point out that people can and often do go to great lengths to establish memorials to their loved ones even in the absence of a damages award to fund them,[186] but this fact supports rather than detracts from the proposal of this article because it demonstrates the importance of memorials to survivors. More substantial and permanent memorials could be established for more people if a source of funding existed for them. Significant memorials to the deceased should not be reserved to persons of means.[187] The poor grieve as much as the well-off.[188]

It has been suggested thus far that damages for the lost value of life earmarked for the establishment of memorials to decedents would serve several valuable functions: (1) accident deterrence by making the cost of causing wrongful death more accurately correlate with the true losses that result;[189] (2) corrective justice by giving official recognition to the universal belief that life has value;[190] and (3) overall social welfare derived from the fact that most memorials established with lost life damages, or all, if mandated by legislation, would be utilitarian in nature.[191] Any one of these is a goal worthy of vigorous pursuit. But in the words of the classic television ad pitch: "Wait, there's more."

B. *"Free" Grief Compensation*

In addition to the benefits described above, the memorials called for herein would serve as powerful grief-healing tools for the decedent's survivors at no additional cost. Grief is an authentic injury deserving of consideration in our

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[186] Kody was memorialized in a fitting way. She was a devoted animal lover. *See* Ault, *supra* note 85 (quoting Kody's mother as stating: "'She loved animals. She would stop in a strange town on the side of the road to help an injured animal'"). In lieu of flowers at her funeral, her family requested that donations be sent to the Pulaski County Humane Society, where Kody washed stray dogs on Saturday mornings as a volunteer. The generous response led the Humane Society to name an adoption room in its new facility after Kody. A plaque with her name and picture hangs there. Her mother also started the Kody Linn Logan Memorial Scholarship in the graduate school of social work at the University of Arkansas at Little Rock, where Kody obtained her master's degree. Her employer, AstraZeneca Pharmaceuticals, established an annual Zeneca-Logan Cup race at Oaklawn Park, a horse-racing track in Hot Springs, Arkansas.

[187] *See* William M. Kephart, *Status After Death*, 15 AM. SOC. REV. 635, 635 (1950) (stating that available historical evidence suggests that the lavishness of a funeral is directly correlated with social class).

[188] *See id.* at 639 (reporting a study of historical funeral practices that found that it was not uncommon for families of low socioeconomic status to spend their entire savings on funeral).

[189] *See supra* text accompanying notes 160-161 (arguing that lost life damages promote the deterrence rationale of tort law).

[190] *See supra* text accompanying notes 162-163 (asserting that lost life damages further the corrective justice function of tort law).

[191] *See supra* text accompanying notes 180-184 (discussing socially useful memorials).

wrongful death system, yet remedies for grief continue to be rejected by a majority of states.[192] The primary arguments against grief damages are identical to those asserted against lost life damages and other forms of intangible damages: (1) grief damages are speculative; and (2) they do not well serve the compensatory function of tort law because money cannot take away grief (although the compensation argument against grief damages is not as strong as the argument against lost life damages because bereaved survivors of wrongful death, like living personal injury victims, presumably enjoy some compensatory benefit from money damages).[193] The refutations of these arguments also are identical and need not be repeated.[194]

A third argument against grief damages warrants brief discussion. Some courts have argued against extending emotional distress damages, which would include grief, for torts committed against loved ones on the ground that distress from sorrow is a natural part of life experienced by everyone at some point. The California Supreme Court spoke on the subject in *Thing v. La Chusa*,[195] where the court tightened up the rules for recovery for the negligent infliction of emotional distress in bystander cases:

> Emotional distress is an intangible condition experienced by most persons, even absent negligence, at some point during their lives. Close relatives suffer serious, even debilitating, emotional reactions to the injury, death, serious illness, and evident suffering of loved ones. These reactions occur regardless of the cause of the loved one's illness, injury, or death. That relatives will have severe emotional distress is an unavoidable aspect of the "human condition."[196]

True, but so what? The same point can be made regarding every injury of every kind that people suffer in life, both tangible and intangible. If genuine harm is caused by the intentional or negligent act of a third party, tort law generally provides a remedy. If the harm results from the injured party's own negligence, natural causes or from a true "accident" with no responsible cause, no remedy is afforded. This is as true for a broken arm as it is for a broken

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[192] *See supra* note 135 and accompanying text.

[193] *See supra* text accompanying note 164 (identifying the two principal arguments against the creation of damages for the value of lost life).

[194] *See supra* text accompanying notes 164-191 (addressing and refuting the arguments that lost life damages are too speculative and that they fail to satisfy the compensatory function of tort law).

[195] 771 P.2d 814 (Cal. 1989). *See supra* note 148 for additional discussion of *Thing v. La Chusa*.

[196] *Thing*, 771 P.2d at 828-29. *See also* Tobin v. Grossman, 249 N.E.2d 419, 424 (N.Y. 1969) (denying recovery for mental distress to a mother whose two-year-old child suffered serious injuries in a car accident, and stating that: "The risks of indirect harm from the loss or injury of loved ones is pervasive and inevitably realized at one time or another. Only a very small part of that risk is brought about by the culpable act of others. This is the risk of living and bearing children.").

psyche. For example, borrowing the court's quotation and substituting the universally recognized intangible harm of mental and physical pain and suffering in a personal injury case, we can make the identical point in nearly identical language:

> [Mental and physical pain and suffering from injury] is an intangible condition experienced by most persons, even absent negligence, at some point during their lives. [Many persons] suffer serious, even debilitating reactions [to injury]. These reactions occur regardless of [the cause of the injury]. That [people will suffer severe pain and suffering] is an unavoidable aspect of the "human condition."[197]

In short, the arguments against providing a remedy for grief do not withstand scrutiny because they apply with equal force to other types of injuries for which the tort system allows compensation. The consistency argument, however, carries us only so far. Through dissimilar treatment of similar injuries, the law of wrongful death tolerates an unjust anomaly that is long overdue for a remedy. *But what remedy?* The tort system's narrow focus on individualized money damages assessments obscures our vision. The policy choices are wider than the black or white decision of either paying money to all grieving individuals or providing no remedy at all.

The ripples of grief extend far and in many directions. Identifying worthy claimants beyond close family members for direct monetary grief compensation on a case-by-case basis would be difficult and expensive. Moreover, it is quite true that grief damages, like damages for other intangible harms, serve the compensatory function of tort law less than ideally. As such, it is neither feasible nor desirable for the tort system to attempt to compensate with money all the people who grieve from a wrongful death.[198] But that should only be the beginning, rather than the end, of the inquiry. The fact that traditional individualized money damages awards may not be the optimal course for this injury in this context should not foreclose thinking about other avenues of relief. To the contrary, it should open us to considering alternatives. Specifically, where a large number of people suffer indeterminate harm from a tortious act, policy-makers should consider the possibility that alternative "group remedies" may be available that serve the goals of the tort system more effectively and efficiently than traditional individualized damages awards.

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[197] *See Thing*, 771 P.2d at 828-29 (substituting language to highlight application of the quotation to mental and physical pain and suffering).

[198] It does not follow from this argument that existing grief damages should be eliminated. The reality, which is usually swept under the rug, is that recovery for noneconomic injuries is relied on under our system to offset the fact that prevailing plaintiffs in tort cases must pay their own attorney's fees. With thirty to forty percent of the plaintiff's recovery going to the attorneys, the strongest practical argument for noneconomic damages is that they allow plaintiffs to pay their attorneys and retain a larger portion of their economic damages.

Enter again the memorial called for in this article. Memorials have been the dominant means for dignifying and perpetuating life for more than three thousand years.[199] Memorials are particularly important to survivors in a society like ours in which open grieving is discouraged and where those not directly affected by a death seek to bury the memory of the decedent almost as quickly as burying the decedent herself.[200] As one grief expert wrote, a memorial "gives grief a place to reside, wrapped in dignity, respect, and love, and gives us a way to stay connected. It says, 'I love you, I always will; this gives me a way to remember you while continuing on with my life. I will not forget you.'"[201]

Testaments to the symbolism and healing power of memorials abound. Within days after the dedication of the World War II memorial in Washington, D.C., on Memorial Day 2004, people began leaving personal mementos they had saved and protected for more than sixty years,[202] including cherished items such as old photographs, dog tags, ribbons and even medals.[203] The phenomenon replicates what has been occurring at the Vietnam Veteran's Memorial for two decades.[204] The U.S. Park Service has collected some

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[199] *See* LANGNER, *supra* note 177, at 133-57 (discussing the centuries-long tradition of memorials).

[200] Bestselling self-help writer Richard Carlson tells this tale, which has been experienced in one form or another by every bereaved person:

> Sadly, I met a man whose brother had died in a skiing accident. The two brothers had worked in the same building. The surviving brother said that in the first day or two after the accident, he received a great deal of support in the way of cards, flowers, and condolences.
>
> When he returned to work after a three-day weekend, however, virtually all the compassion stopped abruptly. His coworkers seemed uncomfortable with what had happened and clearly didn't want to talk about it any further. There was an almost irrational rush to fill the dead brother's office with a new person. There was massive denial – almost a conspiracy – to pretend that everything was just fine.

RICHARD CARLSON, WHAT ABOUT THE BIG STUFF? 25 (2002). *See also* Euster, *supra* note 183, at 171 (stating that social support for the bereaved often dissipates quickly following commemoration, such as a funeral, and that our society sends message to the bereaved that their losses are not of profound concern); Haney et al., *supra* note 13, at 168 (stating that in American society permissible grieving is governed by corporate rules establishing limited leaves of absence due to a death in the family, that non-family members are not expected to display signs of mourning, and that psychiatric care may be recommended for those who fail to contain their grieving within these societal norms).

[201] SCHIRALDI, *supra* note 69, at 242-44; *see also* NOEL & BLAIR, *supra* note 18, at 69 (suggesting that grieving persons erect a memorial to the deceased as "an anchor for our grief").

[202] Jennifer Kerr, *Mementos of Fallen are Left as a Shrine*, MIAMI HERALD, June 5, 2004, at 3A (describing the mementoes left at the World War II memorial and the National Park Service's decision to save and store the items).

[203] *Id.*

[204] *Id.*

80,000 personal items left at the memorial.[205] Much has been written about the healing power of the Vietnam memorial in particular.[206] It is generally recognized to be one of the most effective and evocative of all memorials in the emotional power and outlet for release it provides to both intimate and stranger-mourners alike.[207] The memorial's power derives in large part from the fact that it includes the names of all who died, converting the memorial from being simply a symbol of abstract national loss to something that represents and helps perpetuate memories of the victims as individuals.[208]

Other recent evidence of an ingrained societal belief in memorials as a preeminent means to honor life and heal grief from death can be found in the memorials to the victims of mass tragedies such as the September 11, 2001 terror attack on the World Trade Center[209] and the 1995 bombing of the Alfred P. Murrah Federal Building in Oklahoma City.[210] The "Reflecting Absence" memorial to the World Trade Center victims is estimated to cost more than $350 million.[211]

Opportunities for non-affluent persons to extend the memory of their loved

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[205] *Id.*

[206] *See* Joan Cox, *I'll Meet You at The Wall* (quoting the daughter of a Vietnam veteran killed in action, who wrote: "The Wall is a good thing . . . it Honors . . . it Remembers . . . The Wall shows Respect. The Wall Heals . . . ." (ellipses in original)), *at* http://thewall-usa.com/literary/joancox.html (last visited April 8, 2004); *see also* Adrienne Gans, *The War and Peace of the Vietnam Memorials*, 44 AM. IMAGO 315, 321, 323 (1988) (stating that the Vietnam memorial "is effective in its potential to heal" and that it provides "a direct source of consolation"); Michael Rowlands, *Trauma, Memory and Memorials*, 15 BRITISH J. PSYCHOTHERAPY 54, 61 (1998) (stating "[t]here are many indications that the Vietnam memorial is an extremely successful site for the expression of grief").

[207] *See* Rico Franses, *Monuments and Melancholia*, 6 J. PSYCHOANALYSIS OF CULTURE & SOC'Y 97, 99 (2001) (stating that the Vietnam memorial is "almost universally acknowledged" to be an effective, emotionally moving monument); *see also supra* note 206.

[208] *See* Franses, *supra* note 207, at 97 (discussing the evocative power of names in memorials).

[209] *See, e.g.*, Glenn Collins, *Design Selected For a Memorial At Ground Zero*, N.Y. TIMES, Jan. 7, 2004, at A1 (discussing the process of selecting a design for a memorial to victims of September 11 attack on World Trade Center); Glenn Collins & David W. Dunlap, *Unveiling of Memorial Reveals a Wealth of New Details*, N.Y. TIMES, Jan. 15, 2004, at B4 (reporting on the public unveiling of the design for the September 11 memorial).

[210] *See, e.g.*, Lois Romano, *Turning Point For Survivors in Oklahoma: Gore Breaks Ground At Bombing Site*, WASH. POST, Oct. 26, 1998, at A4 (describing the memorial to those who died in the bombing of the Alfred P. Murrah Federal Building in Oklahoma City); Holly Selby, *Chaos, Remembrance, Healing and Hope: Oklahoma City's New Memorial Raises Questions About the Role Such Venues Play*, BALT. SUN, Mar. 4, 2001, at 5F (describing the "learning center" attached to the memorial and its significance for the evolving concept of memorials in American society).

[211] William Neuman & Stefan Friedman, *Price Tag of Sorrow: Cost of WTC Memorial Will Top $350 Million*, N.Y. POST, Jan. 15, 2004, at 4, *available at* 2004 WL 56369625.

ones lost to violent accidents are extremely limited.[212] Unlike war dead or other victims of mass tragedy who are eulogized and remembered with reverence, individual accident victims remain largely hidden casualties in our society even though the death toll for accident victims in a single year exceeds that of most wars.[213] Accidents are random, commonplace and usually involve only one or at most a few victims in a single occurrence.[214] Accident victims don't die "'in the spirit of sacrifice,'" but rather in a moment of "'unthinking carelessness.'"[215] Their deaths are seen as ordinary, not glorious or noble.[216] They become easily forgettable to all but those directly affected by the death, making memorials all the more important to their survivors.[217]

The deeply rooted[218] and increasingly widespread practice[219] of erecting roadside memorials at fatal accident scenes (often called "*descansos*," Spanish for resting places[220]) attests to the almost desperate need individuals have to

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[212] *See supra* notes 186-188 and accompanying text (recognizing the financial inability of many survivors to adequately memorialize lost loved ones).

[213] *See* Jennifer Clark & Majella Franzmann, *"A Father, a Son, My Only Daughter": Memorialising Road Trauma*, 13 ROADWISE 4, 8 (2002) (stating that "[d]uring the years 1939-1945 there were more people killed and injured on Australian roads (160,000) than as a result of war (96,000) and yet no memorialisation of their deaths took place outside of a private headstone in a cemetery").

[214] *See id.* at 8 ("The yearly total [of road deaths] may be large but any given crash was usually small, random and commonplace, affecting few individuals at any one time.").

[215] *See id.* (quoting statements from Clive Stoneham, Victorian Minister for Transport, in 1948).

[216] *See id.* (distinguishing between "hidden" road trauma and "glorious" war death).

[217] *See id.* (explaining that because road deaths "remained devoid of redeeming features" and "outside of the definition of 'disaster,'" road deaths do "not fit the accepted pattern for memorialisation" and thus are generally, "lost to memory").

[218] *See id.* at 5 (stating that roadside memorials have a long international history and tracing the origins of these memorials in Australia to thirty years earlier); Jon K. Reid & Cynthia L. Reid, *A Cross Marks the Spot: A Study of Roadside Death Memorials in Texas and Oklahoma*, 25 DEATH STUDIES 341, 343 (2001) (tracing the practice of memorializing accident sites in England back to 1901).

[219] Clark & Franzmann, *supra* note 213, at 9 (stating that the practice of erecting roadside memorials is widespread and increasing); Mike Johnson & Peter Maller, *DOT Allows Roadside Memorials for One Year,* MILWAUKEE J. SENTINEL, Aug. 13, 2003, at 1B (citing a "dramatic increase" in roadside memorials in recent years); *see also* Ana Veciana-Suarez, *Roadside Markers Serve as Reminders to the Living*, MIAMI HERALD, May 30, 2004, at A1 (stating that there are more than 220 memorials along state roads in Miami-Dade County and 308 in Broward County, Florida, as well as "[c]ountless others" on county roads).

[220] *Descansos* have deep roots in the Latino culture of the southwestern United States. Originally, *descansos* marked the place where funeral processions would stop to rest on the journey from the church to the burial place. With this road association formed, the advent of automobiles transformed *descansos* into memorials marking the place where people died in accidents. *Descansos: Roadside Memorials on the American Highway, at* http://webpages.charter.net/dnance/descansos/index-thum.htm#aboutdescansos (last visited

memorialize their lost loved ones. Entering "roadside memorial" in an Internet search brings up hundreds of websites devoted to the tradition, many of them photographic collections. Roadside memorials are humble, hand-made monuments, often consisting of a small painted cross, sometimes decorated with flowers, pictures, or other personal items.[221] The practice is surprisingly controversial. Several states regulate roadside memorials,[222] and a few ban them completely[223] on grounds that they are distracting to drivers,[224] create a safety hazard for those who visit or maintain the memorials, and raise religious establishment questions because the memorials often contain religious symbols.[225] Survivors often react passionately and angrily to attempts to

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June 8, 2004) (providing a history of *descansos*).

[221] A study of seventy-eight roadside memorials in Texas and Oklahoma found that a cross was featured prominently in seventy-three of the sites. Reid & Reid, *supra* note 218, at 349. Other items found at the sites and number of sites where the items appeared included: ribbons and/or bows (30 of the 78 sites); wreaths (22); message to deceased (20); hearts (15); angels (12); crucifix (10); photo of deceased (7); stuffed animals (7); candle (6); U.S. flag (5); butterfly (4); dove (at least 3); necklace (at least 3); praying hands (at least 3); unsmoked cigarettes (at least 3); beer (at least 3); baseball cap (2). *Id.* at 349-50. A variety of more unique items appeared at only one site, including a TWIX candy bar, a Maraschino cherry, a waitress' apron and a fishing lure. *Id.* at 349. The authors hypothesized that the artifacts serve the purpose of making or sharing a "toast" to or with the deceased. *Id.* (stating that "sharing a drink and sharing a smoke are rituals that serve to build a sense of comradeship and solidify friendships"). The name of the victim appeared at fifty-three of the sites, while the names of the bereaved appeared at thirteen sites. *Id.* at 350.

[222] Michael D. Shear, *Roadside Memorial Banned by VDOT: Agency Calls Shrines Hazardous to Safety*, WASH. POST, Feb. 21, 2003, at B1 (stating that twelve states regulate roadside memorials). Florida, for example, began regulating roadside memorials in 1997 by imposing an unobtrusive uniform design consisting of a small circle mounted on a pole bearing the legend: "Drive Safely in Memory of . . . ." Veciana-Suarez, *supra* note 219. Although the memorials are not supposed to be decorated in any way, it is common to spot memorials bearing flowers, photographs, poems, American flags or even teddy bears. *Id.*

[223] J.R. Ross, *States Draw the Line on Roadside Memorials*, PHILA. INQUIRER, July 14, 2003, at A2 (stating that Wisconsin, Colorado and Massachusetts ban roadside memorials). *But see* Johnson & Maller, *supra* note 219 (reporting that in response to demands from grieving families, the Wisconsin Department of Transportation decided to allow memorials for one year, followed by a program that would allow friends and family members to adopt two-mile segments of highway, which they would keep clean in return for a sign bearing the crash victim's name).

[224] Distraction of drivers, the reason most frequently given for banning roadside memorials, seems to be a specious argument in a society where gigantic billboards purposely calculated to distract drivers loom at every turn and drivers are permitted to talk on cell phones and play DVDs in their cars. *See* Opinion, *Let Survivors Post Roadside Memorials*, WIS. ST. J., July 13, 2003, at B3 (calling safety concerns regarding roadside memorials "bogus" and urging repeal of Wisconsin's ban on roadside memorials).

[225] *See Roadsideamerica.com* (providing information regarding the tradition and controversy pertaining to roadside memorials), *at* http://www.roadsideamerica.com/pile/200111.html (last visited May 31, 2004); Al

regulate or remove the memorials.[226] Their statements in response to the controversy capture the consolation grieving persons find in even modest memorials:

"'It's not just a cross and a some flowers, (Justin) was a real person.'"[227]

"'I almost can't put it into words. It marks that my wife lost her life here.'"[228]

"'It's a way to help us heal.'"[229]

"'I want others to know that the names on these markers belonged to human beings who had lives, homes and families that loved them.'"[230]

"'That's all we have is the memorial markers for Jane and Britten.'"[231]

"'[I]t gives me comfort.'"[232]

"'It's just a good feeling to drive by and see people are remembering, that they're not forgotten.'"[233]

"'This is all we have.'"[234]

Tompkins, *Thursday Edition: Roadside Memorials Growing Safety Hazards?*, POYNTERONLINE (providing information regarding controversy surrounding roadside memorials), *at* http://www.poynter.org/column.asp?id=2&aid=38408 (last visited May 31, 2004). For hostile reactions to roadside memorials, see Editorial & Comment, *Cross Examination: Roadside Memorials Honor the Dead But Endanger the Living*, COLUMBUS DISPATCH, July 23, 2003, at 10A (editorializing against roadside memorials); Magda Liszewska & Rita Freeman, *Personal Grief, Public Safety: Roadside Memorials Can Be Therapeutic for the Grieving, But Some are also Seen as a Traffic Hazard by Officials*, ORANGE COUNTY REGISTER, Apr. 13, 2004 (quoting California resident stating: "'I don't think they should allow memorials on the street. That's what memorial services are for'"), *available at* 2004 WL 59825231; Carol Rock, *Roadside Memorials are Repositories of Hope: Anguished Families Erect Crosses, Build Gardens to Loved Ones Taken Away by Tragedy*, L.A. DAILY NEWS, June 8, 2003, at SC1 (quoting Santa Clarita, California city official stating: "'We get phone calls from people who don't want to give us their names, but they tell us they're tired of seeing the memorials when they drive by and ask if we can't do something about taking them down'").

[226] *See, e.g.*, Ross, *supra* note 223 (stating that the removal of a roadside memorial to victims at a crash site by Wisconsin officials angered the victims' families); Johnson & Maller, *supra* note 219 (stating that Wisconsin officials "infuriated family members" by removing roadside memorial at a crash site).

[227] Liszewska & Freeman, *supra* note 225 (quoting the mother of a 19-year-old accident victim).

[228] Dan Cortez, *Life Marker: Roadside Memorials Bring Comfort to Survivors Whose Loved Ones Have Been Killed in Vehicular Accidents*, FORT WAYNE NEWS SENTINEL, May 29, 2004 (quoting the husband of an accident victim), *available at* 2004 WL 57465523.

[229] *Id.* (quoting a co-worker of an accident victim).

[230] Veciana-Suarez, *supra* note 219 (quoting the wife of man killed in an accident).

[231] Jay Cridlin, *Some Signs of Conflict Over County Policy*, ST. PETERSBURG TIMES, Nov. 9, 2003, at 1B (quoting a friend of a mother and son who died in accident).

[232] Rock, *supra* note 225 (quoting the mother of an accident victim).

[233] Ross, *supra* note 223 (quoting a man who lost his brother and father in an accident).

[234] Rock, *supra* note 225 (quoting the mother of an accident victim).

Memorials honor and pay tribute to life. They tell the world that this was a person who made a difference, who loved and was loved, and who will never be forgotten. They possess compelling emotional-healing power to survivors by providing an outlet and avenue for grief, remembrance, closure, pilgrimage, connection, a vehicle for perpetuating the memory and life of the decedent, and a way for survivors to reassert control over life altering circumstances in which they had no control.[235] While memorials do not eliminate or even greatly reduce grief, they fill greater therapeutic and spiritual needs and carry deeper restorative power than money. And unlike erratically allocated individualized money damages awards for grief, memorials serve the interests of everyone who grieves the decedent's loss.

CONCLUSION

This article has sought to shed light on the nature of grief from violent death while proposing a new way of looking at wrongful death damages, one designed to recognize that life has worth while also helping to heal trauma and bereavement in the decedent's survivors. Life is our most valuable asset, yet all but five states continue to ignore that value in calculating death damages. Grief from death is a genuine, often debilitating injury, abundantly supported by scientific and psychological evidence, but a majority of states continue to reject it as a compensable item of damages. The wrongful death damages regime is so badly broken that no serious academic scholarship exists defending it. To the extent courts defend the status quo, they rely on flimsy arguments that apply with equal force to remedies for all types of intangible injuries.

Given that wrongful death remedies are creatures of statute in all fifty states, my proposal to award lost life damages, earmarked for the exclusive purpose of establishing a memorial to the decedent, will require legislative action to implement. Crafting model legislation is not a goal of this article, but the statute should:

1. Include a preamble stating that human life has value that is currently overlooked by the wrongful death compensation system, that the purpose of the legislation is to correct this condition of the law and that the purpose of the memorials created pursuant to the legislation is not to mourn death, but to celebrate and honor life.

2. Establish a new category of wrongful death damages for the value of lost life, specifying that such damages are in addition to, not in lieu of, existing damages for wrongful death.

3. Provide that juries will determine fair and just compensation for the

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[235] *See* Clark & Franzmann, *supra* note 213, at 4 (listing several of these functions as among the purposes of memorials, with specific reference to roadside memorials); *see also* Euster, *supra* note 183, at 176 (describing a study showing that memorial contributions following a death provide comfort and support to survivors, may serve to lessen isolation of mourners, and reduce anguish and sense of desolation for mourners).

value of lost life and address whether to provide guidance to juries in the form of a list of factors to be considered in assessing lost life damages and/or whether to allow expert testimony on generic life valuation.[236]

4. Specify that lost life damages go not to the decedent's estate or to the survivors, but to a fund to be used for the exclusive purpose of establishing an appropriate memorial to the decedent.

5. Provide that such memorial be designed to exist at least as long as the decedent's natural life expectancy before the tortious death.

6. Specify that the statutory wrongful death beneficiaries make a good faith effort to solicit input from those who enjoyed a close relationship with the decedent regarding the most suitable type of memorial, but that in the event of a disagreement, the statutory wrongful death beneficiaries would make the decision.

7. Provide that the statutory wrongful death beneficiaries should attempt to exercise substituted judgment on behalf of the decedent as to the type of memorial the decedent would have wanted for himself or herself.

8. Decide whether to require that memorials established with lost life damages have social utility.

9. Resolve whether an upward cap should be placed on the amount of damages that could be awarded for the lost value of life, and also whether a minimum amount should be prescribed.

10. Decide whether jurors should or should not be instructed that damages for the value of lost life will be used exclusively to establish a memorial to the decedent.[237]

11. Establish procedures for judicial oversight of the memorial fund and

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[236] The question of whether one life is more valuable than another, or whether all lives have equal value, is both intriguing and daunting. One strong reason for adopting lost life damages is to reduce the discrimination inherent in the current system. Accordingly, an argument exists that, in furtherance of this goal, legislatures should set a fixed amount for lost life damages applicable to all cases. On the other hand, it is not altogether clear that all lives have equal value. Is the life of an elderly person who already has enjoyed a long life worth less than that of a healthy child who has yet to experience most of what life offers? Or is it worth more because of the person's library of experiences and longer and deeper emotional ties to a greater number of people? Some people enjoy every moment of life with zest and delight, while others struggle to make it through each day. Are the lives of happy people worth more than the lives of unhappy people? Do physically healthy people enjoy life more than people who suffer physically? One problem with individualized life evaluations based on "enjoyment of life," a popular term in both the scholarly and judicial literature, is that they re-raise the economic discrimination concern. It is easier to enjoy life when one has the financial resources to pay bills, obtain quality health care and afford leisure time and activities. My proposal is not dependent on making a choice between fixed or variable life values. Uniform life values imposed by statute would be acceptable, so long as they are sufficient to fund significant memorials to tort victims.

[237] Informing juries of the purpose of lost life awards carries the risk that they would award damages based on their determination of how much a suitable memorial would cost, rather than based on their assessment of the value of life.

judicial approval of the memorial plans and dispersion of the funds.

In the "tort reform" era, convincing legislators to expand tort damages is a challenging prospect at best. If moral or logical reasoning drove the wrongful death system, changes would be made, but it would be naive to overlook the fact that money is the driving force behind the inertia. In the modern tort arena, money not only matters, it tends to eclipse all other interests.[238] In practice, tort reform has come to stand solely for legislative actions that restrict the remedies of injured persons, by capping or otherwise limiting noneconomic and punitive damages, abrogating joint and several liability and the collateral source rule, limiting retailer liability in products liability actions, imposing statutes of repose that can extinguish a claim before it arises and a host of other measures. Some of these changes are justified. "Reform," however, means "to make better by removing faults and defects."[239] To gain legitimacy as a national movement, tort reform should travel in both directions. While there are aspects of the tort system that need adjusting for the protection of business and medical interests, defects also exist that need repairing for the benefit of tort victims. There is, however, a nearly complete void in policy discourse concerning tort system defects that adversely affect tort victims.

Living, not just earning, matters. Grief is real. Although legal doctrine evolves slowly, two centuries should be long enough to correct some of the most glaring flaws in tort law. As the worst loss of all, death deserves better treatment from legislatures and legislative policy makers.

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[238] Making forced small talk with a Florida lobbyist at a party, I asked, "So what percentage of legislative decisions are made on the merits?" His depressing answer? "Zero." If he is right, there is little hope that my proposal will succeed as a legislative mandate (although parties could certainly pursue memorials as part of wrongful death settlements). But if legislators care about restorative justice and the lives of the ordinary people they represent, the proposal should have appeal.

[239] WEBSTER'S NEW WORLD DICTIONARY 1128 (3d College ed. 1988).