CHILDREN, WRONGFUL DEATH, AND PUNITIVE DAMAGES

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ABSTRACT

Starting in the mid-nineteenth century, state legislatures created wrongful death claims, including claims for bereaved parents against the tortfeasor who killed their child. Legislatures limited recoverable damages to pecuniary damages, meaning parents could recover the lost economic contributions they expected to receive from their child during his minority, minus the costs of raising the child. That pecuniary damage measure still controls today, with most states now also allowing recovery of noneconomic loss-of-relationship damages, although many states also cap the recovery of noneconomic damages. In sum, parents' recovery of damages for their child's death—a personal and cultural tragedy—is limited to pecuniary damages, which today's parents lack, and a possibly capped noneconomic damage award.

The first Part of this Article explores the historical context—the antiquated assumptions about children—that existed when state legislatures adopted the pecuniary measure. Those assumptions rely on two realities of the nineteenth-century child—that he was likely to die in his youth and that he was valued economically. The infant and child mortality rates were high in the nineteenth century, which historians agree caused parents to expect at least one of their children to die and possibly also caused parents to be indifferent to that child's death. Relatedly, parents valued their children economically as the extent of child labor was still increasing even in the late nineteenth century. Under these realities, a pecuniary measure of damages was appropriate. But these realities of the nineteenth-century child faded long ago. Child death is now a personal and cultural tragedy, a reality in which pecuniary damages make no sense.

The second Part of this Article suggests the adoption of a remedy consistent with the current tragedy of child death. That remedy is the exclusive use of punitive damages in wrongful death of children cases—a remedy for parents

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that is actually a substantive response to the death of a child and that could provide parents something significant and meaningful. Private redress punitive damage theory explains that punitive damages empower victims by enabling them to obtain damages for the moral injury suffered. Similarly, parents should recover punitive damages for the moral injury they suffer when their child is tortiously killed. The appreciation that parents suffer a moral injury better encapsulates parents' actual experience—an experience from which parents do not want to be made whole and one that involves much more than grief. Also, punitive damages, unlike compensatory damages, actually express the wrongfulness of the wrongful death of a child.

CONTENTS

INTRODUCTION

A wife who loses a husband is called a widow.
A husband who loses a wife is called a widower.
A child who loses his parents is called an orphan . . . .
[T]here is no word for a parent who loses a child[.]
That's how awful the loss is[.][1]

Psychologists confirm the devastation to parents if forced to bury a child. Not only is grief following the death of a child "the most intense grief experienced,"[2] "[t]he death of a child can destroy the parent's understanding of the world and how to make sense out of it."[3] Part of that destroyed understanding is due to the violation of the natural order. Children will one day have to bury their parents, but parents are not supposed to bury their children.[4] "For many bereaved parents, not only is the death of their child unnatural, it is also inconceivable and incomprehensible."[5]

The tragedy of child death has not been lost on courts—the place parents may turn if their child is killed due to a tort. The Florida Supreme Court once explained that those who have not lost a child "can hardly have an adequate idea of the mental pain and anguish that one undergoes from such a tragedy. No other affliction so tortures and wears down the physical and nervous system."[6] Other courts have even specifically mentioned the violation of the natural order—that "[c]hildren are not supposed to die before their parents"[7] and that "[t]he loss of a child . . . cannot be equated to the loss of a parent. . . . [A] child expects to survive his or her parent," but "no parent ever wants to live to bury his or her child."[8]

But these are just words, words that do not actually govern the law concerning parents' recourse after the tortious, wrongful death of a child. Such recourse did

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[1] JAY NEUGEBOREN, AN ORPHAN'S TALE 154 (1976).

[2] Sherron Valeriote & Marshall Fine, *Bereavement Following the Death of a Child: Implications for Family Therapy*, 9 CONTEMP. FAM. THERAPY 202, 202 (1987); *see also* JOAN HAGAN ARNOLD & PENELOPE BUSCHMAN GEMMA, A CHILD DIES: A PORTRAIT OF FAMILY GRIEF 27 (2d ed. 1994) ("No loss is as significant as the loss of a child to a parent."); RICHARD G. TEDESCHI & LAWRENCE G. CALHOUN, HELPING BEREAVED PARENTS: A CLINICIAN'S GUIDE 7 (2004) ("There is perhaps no greater pain than that experienced by bereaved parents.").

[3] TEDESCHI & CALHOUN, *supra* note 2, at 5.

[4] *Id.* ("The natural order of things is for children to bury their parents, not the other way around.").

[5] *Id.*

[6] Winner v. Sharp, 43 So. 2d 634, 637 (Fla. 1949) (en banc).

[7] Squeo v. Norwalk Hosp. Ass'n, No. FSTCV095012548S, 2013 WL 2278776, at *4 (Conn. Super. Ct. Apr. 30, 2013).

[8] *In re* Air Crash Near Nantucket Island, Mass., on Oct. 31, 1999, 462 F. Supp. 2d 360, 368 (E.D.N.Y. 2006).

not exist under the common law. Starting in the 1850s, state legislatures created wrongful death claims, thus enabling parents to sue the tortfeasor who killed their minor child.[9] The legislatures limited recoverable damages in all wrongful death claims, however, to pecuniary compensatory damages, meaning parents' damages were limited to the lost economic contributions they expected from their child during his or her minority, minus the amount the parents would have spent on raising the child. Although state legislatures and courts have since attempted to reform the pecuniary measure of damages,[10] "[b]ecause of its traditional focus on loss of income, tort law . . . produce[s] low [damage] numbers for the loss of a child's life"[11]—a result inconsistent with the tragedy of child death.

This Article is not the first to criticize the measurement of damages in wrongful death cases, though it is one of only a few that has focused specifically on minor child death. This Article's approaches, however, are novel. The Article proceeds in two parts. It first provides a critical, historical analysis of the context in which state legislatures created wrongful death claims, focusing on the antiquated assumptions about children underlying the pecuniary measure of damages that still governs recovery today. Part II of the Article is normative, suggesting a clean break from the antiquated assumptions underlying compensatory damages in wrongful death of children cases. The Article instead proposes the exclusive use of punitive damages to properly acknowledge the moral injury parents suffer when their child is tortiously killed.

Specific to the critical, historical analysis, the pecuniary measure of damages reflects two realities of the nineteenth-century child—that he faced a high chance of dying in his youth and that his parents valued him economically.[12] Infant and child mortality rates were much higher in the nineteenth century than today.[13] Parents expected at least one of their children to die. Some historians believe that parents were actually indifferent to their child's death because of the high mortality rates. Even if not true, parents believed child death to be inevitable and unpreventable. Related to the possible indifference is the second reality of the nineteenth-century child—that his parents valued him economically, a valuation most apparent in that, if he did survive, he was

[9] *See infra* Section I.A (describing general history of wrongful death claims).

[10] *See infra* Section I.C (explaining that states have adopted various measures to "increase the amount of economic damages awarded for the wrongful death of children").

[11] Eric A. Posner & Cass R. Sunstein, *Dollars and Death*, 72 U. CHI. L. REV. 537, 574 (2005).

[12] *See infra* Section I.B ("Two realities of childhood existed in the mid- and late-nineteenth century—high mortality rates and the likely prospect of child labor for any child lucky enough to survive.").

[13] *See infra* Section I.B.1 (explaining that child deaths constituted large percentage of total deaths in nineteenth century).

expected to contribute financially to his family.[14] The commonality of child labor only increased through the nineteenth century. Children working was not only an economic necessity but was also seen as a moral good to prevent child idleness. If a child is valued economically, then a child's death is an economic loss—a type of loss that is relatively replaceable.

Given these realities, a pecuniary measure of damages for parents after the wrongful death of their child made sense. But neither of these realities has existed for over a century. The United States has made great improvements on infant and child mortality rates in the twentieth century, and parents no longer expect their child to die. Parents also no longer value their children economically or expect economic contributions from them. Sociologist Viviana Zelizer specifically points to these two changes—in mortality rates and the end of child labor—as evidence of the changing valuation of children from economic to sentimental.[15] Child death became both a personal and cultural tragedy. Yet the pecuniary measure that resulted from the antiquated realities of the nineteenth-century child persists.

The pecuniary measure also affects further development of the law of wrongful death of children. Reforms focus on increasing the amount of damages the pecuniary measure produces, still forcing a now-immoral economic valuation of children.[16] Most states also now allow recovery of noneconomic loss-of-relationship damages for the wrongful death of children,[17] a change that Zelizer also points to as evidence that the valuation of children is changing.[18] This reform, however, has been hampered by numerous states since adopting caps on the recovery of noneconomic damages, meaning that parents are awarded only a capped arbitrary amount of noneconomic damages.[19]

After concluding this critical, historical analysis, the focus of the Article turns normative. Other scholars have argued for specific reforms to compensatory damages for wrongful death claims, but this Article criticizes any use of compensatory damages, economic or noneconomic. Professor María Guadalupe

[14] *See infra* Section I.B.2 ("The economic valuation of children is easily evident in the flourishing prevalence of child labor in the mid-nineteenth century . . . .").

[15] *See generally* VIVIANA A. ZELIZER, PRICING THE PRICELESS CHILD: THE CHANGING SOCIAL VALUE OF CHILDREN 22-55, 56-112 (1994) (exploring evidence that shows way in which society values children has changed over time).

[16] *See infra* Section I.C.1 (discussing measures to increase economic damages for death of children).

[17] *See* Hancock v. Chattanooga-Hamilton Cty. Hosp. Auth., 54 S.W.3d 234, 237 n.2 (Tenn. 2001) (noting that thirty-two states allow recovery of filial consortium damages in wrongful death claims); DAN B. DOBBS, THE LAW OF TORTS §§ 294, 297, at 803, 811 (2001); Andrew J. McClurg, *Dead Sorrow: A Story About Loss and a New Theory of Wrongful Death Damages*, 85 B.U. L. REV. 1, 26-27 (2005) (noting that only minority of states allow recovery for "grief or mental anguish" damages).

[18] *See generally* ZELIZER, *supra* note 15, at 22-55, 56-112 (discussing changing valuation of children over time).

[19] *See infra* Section I.C.2 (noting increasing prevalence of caps on noneconomic damages).

Martínez Alles recently suggested that the time is ripe to rethink tort remedies "as substantive responses that are sensitive to the particularities of the context of wrongdoing and their actual significance and meaning for the private parties involved."[20] This Article attempts to do so by suggesting actual dramatic reform to the damages recoverable to parents after the wrongful death of their child—through the exclusive use of punitive damages. The reform is dramatic, as it must be to reflect the current reality of the tragedy of child death, yet it is not unprecedented. For over a century, Alabama has awarded only punitive damages in wrongful death claims,[21] and studies show that juries in other jurisdictions already frequently award punitive damages in wrongful death of children claims.[22]

The use of punitive damages provides parents redress consistent with civil recourse tort law and private redress punitive damage theories.[23] These theories allow more liberal relief than traditional corrective justice tort law theory, which attempts to make plaintiffs whole for their injuries only through compensatory damages. This make-whole concept does not apply well to bereaved parents because they do not want it. They do not want to undo their grief; eradicating their grief disconnects them from their child—the child they want to make sure is not just gone and forgotten. Unlike corrective justice theory, civil-recourse theories and private-redress theories instead attempt to empower victims by enabling them to be punitive—to allow damages based on the significant nature of the wrong the parents are forced to endure and on the moral injury parents suffer when their child is tortiously killed.[24]

This proposal departs from the traditional limitations on the availability of punitive damages—limitations that have themselves evolved relatively dramatically.[25] To justify this expansion, this Article borrows from psychology literature defining "moral injury" and Dr. Ronnie Janoff-Bulman's theory of assumptive world views.[26] Burying a child involves much more than burying a child; a child's death violates the natural order that parents die before their children, helping to violate almost every assumption about life that parents

[20] María Guadalupe Martínez Alles, *Tort Remedies as Meaningful Responses to Wrongdoing*, *in* CIVIL WRONGS AND JUSTICE IN PRIVATE LAW (Paul B. Miller & John Oberdiek eds., forthcoming Mar. 2020) (manuscript at 16) (emphases omitted).

[21] *See infra* notes 240-42 and accompanying text (describing Alabama's policy of awarding only punitive damages in wrongful death claims and effects of this policy).

[22] *See infra* notes 243-45 and accompanying text (highlighting study as "evidence that jurors already commonly award punitive damages in wrongful death of children cases").

[23] *See infra* Section II.A (explaining how punitive damages in wrongful death suits fit in with various private-redress theories).

[24] *See infra* Section II.A (arguing that punitive damages compensate parents for moral wrong and account for severity of wrong).

[25] *See infra* Section II.B.

[26] *See generally* RONNIE JANOFF-BULMAN, SHATTERED ASSUMPTIONS: TOWARDS A NEW PSYCHOLOGY OF TRAUMA (1992).

previously believed to be true. It is the most significant loss a parent can suffer.[27] And these ideas are only heightened for parents whose child is tortiously killed. Recognizing that these parents have suffered a moral injury also enables a more accurate understanding of parents' experience. It is more than grief; it also involves significant anger—an anger that has motivated many parents to activism. Recognizing that parents suffer this moral injury shows that parents should receive punitive damages—a remedy more likely to be significant and meaningful to parents.

The last reason why this Article suggests the exclusive use of punitive damages is due to the damages' expressive function. The expressive function of compensatory damages is limited—only that the plaintiff was wronged and the defendant is responsible for it.[28] Punitive damages have a much broader expressive capability—to express moral condemnation and the personal and cultural tragedy that is child death. Parents should receive punitive damages because punitive damages, unlike compensatory damages, actually express the wrongfulness of a child's wrongful death.

The last Section of Part II acknowledges that the punitive damages-only system is still imperfect. The Part addresses some of those imperfections by suggesting a numeric baseline for determining the amounts of punitive damages to be awarded and explaining the political feasibility and constitutionality of such a system.[29]

The organization of this Article is as follows: Part I provides a brief history on the development of wrongful death law and the recoverable damages. It also includes the important historical argument about the now-antiquated assumptions about children underlying the pecuniary measure of damages and explains how the attempted reforms of this initial measure have also failed. Part II is normative. It uses tort and punitive damage theory and psychology literature to argue for the exclusive recovery of punitive damages in wrongful death of children cases. The Article then briefly concludes.

I. THE DOMINANT COMPENSATORY DAMAGE APPROACH TO WRONGFUL DEATH OF CHILDREN CLAIMS

U.S. state legislatures first began creating wrongful death claims in the mid-1850s—finally allowing a tort claim for the wrongful death of another, including giving parents a claim for the tortious death of their children. State legislatures created the claim but then limited the recovery to only pecuniary damages. When a child was tortiously killed, parents would then have a claim against the

[27] *See infra* Section II.B (comparing loss of child to other damages suffered by parents and compensable in tort).

[28] *See infra* Section II.C (finding that law defines compensatory damages as measure of harm done to tangible interests).

[29] *See infra* Section II.D (suggesting that monetization of loss of life is difficult and that there is political resistance to punitive damages based on overdeterrence).

tortfeasor for their pecuniary damages, meaning the child's lost economic contributions to the parents.

In addition to this brief history of wrongful death of children cases, this Part also presents a historical argument that the pecuniary measure of damages matched the nineteenth-century conception of children. The nineteenth-century child was one that parents expected could die and that they valued economically. The high infant- and child-mortality rates of the nineteenth century made parents relatively indifferent to their child's death, which was an economic loss that could be substituted by having another child. Thus, parents were appropriately compensated for the death of their child with pecuniary damages.

Nothing about this conception of a child holds true today, nor has it for some time. Starting in the late nineteenth century, both parental and cultural attitudes toward children and child death shifted dramatically. These shifts occurred both as parents started to realize infant and child death was not inevitable, but preventable, and as the immorality of child labor was slowly realized. Today, obviously, parents expect their children to live and any child death is personally and culturally tragic. Plus, children are far from an economic benefit, as the costs of raising a child are ever rising.

Still, however, the pecuniary measure of damages for wrongful death of children, a measure dependent on antiquated notions of the nineteenth-century child, persists. This long history and the statutory nature of the claim have made reforms difficult, as evidenced by the failings of the most popular reforms.

A. *History of Wrongful Death Claims Generally*

At common law, no claim existed for the death of another,[30] and a deceased victim's claim extinguished at his death.[31] Thus, family members could not sue for the death of a family member, nor could the deceased person's estate. This created an unfortunate incentive for tortfeasors to kill their victims instead of merely injuring them.[32]

Legislatures stepped in to correct this incentive. England passed Lord Campbell's Act in 1846, which gave defined family members a claim for the death of their spouse, parent, or child.[33] Soon after, state legislatures in the United States also started passing wrongful death statutes modeled after Lord Campbell's Act.[34] Like Lord Campbell's Act, state legislatures defined who

[30] STUART M. SPEISER, RECOVERY FOR WRONGFUL DEATH § 1:1, at 2 (2d ed. 1975) (tracing historical common law denial of recovery for death of another).

[31] Anthony J. Sebok, *The Inauthentic Claim*, 64 VAND. L. REV. 61, 75 (2011) (describing "common law maxim *actio personalis moritur cum persona* ('a personal cause of action dies with the person')").

[32] SPEISER, *supra* note 30, § 1:5, at 15.

[33] *Id.* § 1:8, at 28 (noting that death that resulted from wrongful act or neglect of another created action that could be maintained by relatives).

[34] *Id.* § 1:9, at 29.

could bring a wrongful death claim, usually called "beneficiaries."[35] The first beneficiary is usually a spouse, and if there is no spouse, then parents are able to bring the claim. If no parents are alive, then a dependent child can bring the claim. The wrongful death claim still requires the beneficiary to prove that the defendant committed some actionable tort (that caused the death). But the tort claim is statutory because only the statute enables recovery for damages related to the death.[36]

Because wrongful death claims are statutory, the recoverable damages are also statutorily defined. Lord Campbell's Act enabled recovery of "such damages as [the jury] may think proportioned to the injury," a potentially broad recovery.[37] But six years after its passage, an English court interpreted Lord Campbell's Act to allow recovery only of the beneficiary's pecuniary damages.[38] State legislatures and courts in the United States adopted this limited pecuniary damage recovery.[39]

And thus, the most common measure of recovery for wrongful death claims is the pecuniary-loss-to-dependents measure.[40] Under this measure, "damages are awarded for the present value of probable contributions which the deceased would have made to the survivors had he lived,"[41] minus the "prospective personal expenses of the decedent" had he lived.[42] More practically, "the prospective earning capacity of the victim," minus the victim's own expenses had he lived, controls the measure of damages.[43] Applied to the stereotypical wrongful death of a husband, the widow could recover the economic contributions she would have received from her husband for the rest of his life

[35] DOBBS, *supra* note 17, § 294, at 804 (describing wrongful death claim as statutory claim for "certain beneficiaries who suffer from another's death as a result of a tort").

[36] Legislatures also created a cause of action for damages the deceased suffered. The claim is called a survivorship claim and "provide[s] for the survival of whatever action the deceased himself would have had if he had lived." DAN B. DOBBS, LAW OF REMEDIES: DAMAGES-EQUITY-RESTITUTION, § 8.3(2), at 672 (2d ed. 1993). The damages allowed are usually limited to whatever damages the deceased suffered between the time of injury and the time of death, including lost wages, medical expenses, or pain and suffering. *Id.* § 8.3(2), at 672-73. The survivorship claim is usually brought by the decedent's estate or his personal representative on behalf of the estate. *Id.*

[37] SPEISER, *supra* note 30, § 3:1, at 103.

[38] *Id.*

[39] *Id.* § 3:1, at 104-09.

[40] Other less common measures also exist, including the loss-to-estate measure. This measure is discussed *infra* Section I.C.1.

[41] SPEISER, *supra* note 30, § 3:1, at 112.

[42] *Id.* § 3:6, at 140 (describing how loss of contributions and support would be calculated to include decedent's expenses).

[43] *Id.* § 3:8, at 148-49.

had he lived, minus whatever portion of those contributions would have paid the husband's living expenses.[44]

Eventually, courts and legislatures had to deal with the question of whether noneconomic damages should also be recoverable, such as the loss of society, the loss of companionship, the loss of love, the loss of affection—the relational injuries that result from the death of a family member. Courts were limited in their ability to answer affirmatively because the claim was statutory, often concluding that noneconomic damages were not "pecuniary" and thus not statutorily allowed.[45]

The modern trend, however, is to allow damages for what has become known as loss of consortium.[46] This transformation has been accomplished either through statutes specifically allowing the damages or through courts interpreting the damages to be pecuniary. Less common is recovery for the general mental anguish and grief that results from the death of a loved one. "[T]he reasons for denial of mental anguish damages in death cases have long ago disappeared, but the rule lingers . . . ."[47]

Any recovery of noneconomic damages has been more recently limited, however, due to the current popularity of noneconomic damage caps. Caps on recovery of noneconomic damages have been a focal point for the tort reform agenda started in the late 1970s. Economic damages, like medical expenses and lost wages, have a market value and are presumably easy to measure.[48] Noneconomic damages, on the other hand, have no objective measure.[49] Because of the lack of an objective measure, state legislatures believed that the noneconomic damages posed a greater threat to defendants, including doctors and businesses. Over twenty states have passed some version of a cap on noneconomic damages.[50]

One additional note is necessary to fully describe the history of wrongful death of children claims—the application of the claim to the tortious death of an unborn child. At common law, an injured unborn baby had no claim even if he survived birth.[51] Eventually, this standard evolved, allowing a child a tort claim if injured while in the womb and later born alive.[52] But if the tortious conduct

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[44] *Id.* § 3:5, at 140 (noting that remainder after expenses is considered probable contribution to beneficiaries).

[45] *Id.* § 3:68, at 381.

[46] *Id.* § 3:49, at 313 (finding majority of jurisdictions have construed wrongful death statutes to include "technically non-pecuniary" damages).

[47] *Id.* § 3:55, at 343 (suggesting that rule is "historical anomaly").

[48] Anthony J. Sebok, *Translating the Immeasurable: Thinking About Pain and Suffering Comparatively*, 55 DEPAUL L. REV. 379, 383 (2006).

[49] *Id.*

[50] *See infra* note 226 (listing noneconomic damage caps).

[51] Jonathan Dyer Stanley, Note, *Fetal Surgery and Wrongful Death Actions on Behalf of the Unborn: An Argument for a Social Standard*, 56 VAND. L. REV. 1523, 1533 (2003).

[52] *Id.* at 1534-35.

injured the unborn baby and the unborn baby did not survive, no tort recourse existed.[53] The creation of wrongful death claims did not appear to change this common law, but it did not take long for courts to contemplate applicability. As early as 1916, the Wisconsin Supreme Court suggested that a wrongful death claim could exist for the death of a viable fetus.[54]

By the mid-twentieth century, courts began to apply the claim to children who died before birth. To do so, courts frequently interpreted the deceased "person" in the wrongful death statute to include an unborn child.[55] Later in the century and into the twenty-first century, legislatures started specifically amending wrongful death statutes to apply to unborn children.[56] Today, over forty states allow a wrongful death claim for the death of an unborn child, most of which

[53] *Id.* at 1535.

[54] Lipps v. Milwaukee Elec. Ry. & Light Co., 159 N.W. 916, 917 (Wis. 1916).

[55] *See, e.g.*, Mack v. Carmack, 79 So. 3d 597, 599-611 (Ala. 2011) (per curiam); Summerfield v. Superior Court, 698 P.2d 712, 724 (Ariz. 1985) (in banc); Hatala v. Markiewicz, 224 A.2d 406, 408 (Conn. Super. Ct. 1966); Worgan v. Greggo & Ferrara, Inc., 128 A.2d 557, 558 (Del. Super. Ct. 1956); Greater Se. Cmty. Hosp. v. Williams *ex rel.* Estate of Baby Boy Williams, 482 A.2d 394, 398 (D.C. 1984); Porter v. Lassiter, 87 S.E.2d 100, 102-03 (Ga. Ct. App. 1955); Castro *ex rel.* Estate of Castro v. Melchor, 366 P.3d 1058, 1065-66 (Haw. Ct. App. 2016), *aff'd*, 414 P.3d 53 (Haw. 2018); Volk v. Baldazo, 651 P.2d 11, 12, 15 (Idaho 1982); Dunn *ex rel.* Estate of Dunn v. Rose Way, Inc., 333 N.W.2d 830, 833-34 (Iowa 1983) (en banc); Mitchell v. Couch, 285 S.W.2d 901, 904-06 (Ky. 1955); State *ex rel.* Odham v. Sherman, 198 A.2d 71, 72-73 (Md. 1964); Mone v. Greyhound Lines, Inc., 331 N.E.2d 916, 917 (Mass. 1975); Verkennes v. Corniea, 38 N.W.2d 838, 841 (Minn. 1949); White v. Yup, 458 P.2d 617, 623-24 (Nev. 1969); Poliquin *ex rel.* Estate of Baby Boy Poliquin v. MacDonald, 135 A.2d 249, 249 (N.H. 1957); Salazar *ex rel.* Estate of Her Fetus v. St. Vincent Hosp., 619 P.2d 826, 830 (N.M. Ct. App. 1980); DiDonato *ex rel.* Estate of DiDonato v. Wortman, 358 S.E.2d 489, 490 (N.C. 1987); Hopkins v. McBane, 359 N.W.2d 862, 865 (N.D. 1984); Werling v. Sandy, 476 N.E.2d 1053, 1054 (Ohio 1985); Libbee *ex rel.* Estate of Libbee v. Permanente Clinic, 518 P.2d 636, 638 (Or. 1974) (en banc); Amadio *ex rel.* Estate of Amadio v. Levin, 501 A.2d 1085, 1089 (Pa. 1985); Presley v. Newport Hosp., 365 A.2d 748, 756 (R.I. 1976) (Bevilacqua, C.J., concurring in part and dissenting in part); Fowler *ex rel.* Baby Child Fowler v. Woodward, 138 S.E.2d 42, 44-45 (S.C. 1964); Nelson v. Peterson, 542 P.2d 1075, 1079 (Utah 1975) (Maughan, J., dissenting); Vaillancourt *ex rel.* Estate of Baby Girl Vaillancourt v. Med. Ctr. Hosp. of Vermont, Inc., 425 A.2d 92, 94 (Vt. 1980); Moen *ex rel.* Estate of Meen v. Hanson, 537 P.2d 266, 268 (Wash. 1975) (en banc); Farley *ex rel.* Estate of Baby Farley v. Sartin, 466 S.E.2d 522, 535 (W. Va. 1995); Kwaterski v. State Farm Mut. Auto. Ins. Co., 148 N.W.2d 107, 112 (Wis. 1967).

[56] *See* ARK. CODE ANN. § 16-62-102 (Supp. 2015); 740 ILL. COMP. STAT. ANN. 180 / 2.2 (West 2010); IND. CODE § 34-23-2-1(b)-(c) (2019); KAN. STAT. ANN. § 60-1901(a)-(c) (Supp. 2015); LA. CIV. CODE ANN. art. 26 (2010); MICH. COMP. LAWS ANN. § 600.2922a(1) (West 2017); MISS. CODE ANN. § 11-7-13 (2019); NEB. REV. STAT. § 30-809(1) (2019); OKLA. STAT. ANN. tit. 12, § 1053F (West 2015); S.D. CODIFIED LAWS § 21-5-1 (1984); TENN. CODE ANN. 20-5-106(d) (1992); TEX. CIV. PRAC. & REM. CODE ANN. § 71.003 (West 2008) (excepting that no wrongful death claim exists for death of unborn child against child's mother or as result of medical malpractice under Texas law).

depend on the fetus being viable, meaning able to survive on its own outside of the womb before the death.[57]

Briefly, there were numerous motivations to apply wrongful death claims to the deaths of unborn children. One was to correct the incentive that it was cheaper damages-wise to tortiously kill an unborn child than to injure one, [58] the same reason legislatures created wrongful death statutes. Another was to correct the illogic that a child who survived birth and died a few minutes later had a claim, but a baby who died just before birth did not.[59] Another depended on the unborn baby's viability—if the baby was able to survive on his or her own at the time of death, a wrongful death claim should exist.[60] A last, more modern motivation is opposition to abortion: "[O]ne facet of the long-term, end-game strategy of pro-life forces has included an attempt to have fetuses declared 'children' or 'persons' in as many legal contexts as possible, including . . . civil

[57] *See* Jill Wieber Lens, *Tort Law's Devaluation of Stillbirth*, 19 NEV. L.J. 955, 969 n.97 (2019).

[58] *See* Todd *ex rel.* Estate of Baby Todd v. Sandidge Constr. Co., 341 F.2d 75, 77 (4th Cir. 1964) (noting that "if the trauma is severe enough to kill the child, then there could be no recovery; but if less serious, allowing the child to survive, there might be recovery"); *White*, 458 P.2d at 622 (noting "absurd result that the greater the harm, the better the chance of immunity, and the tort-feasor could foreclose his own liability"); *Kwaterski*, 148 N.W.2d at 110 (noting "absurd result that an unborn child who was badly injured by the tortious acts of another, but who was born alive, could recover while an unborn child, who was more severely injured and died as the result of the tortious acts of another, could recover nothing").

[59] Gorke v. Le Clerc, 181 A.2d 448, 451 (Conn. Super. Ct. 1962) ("In all reason and logic it can make no difference in liability whether the wrongfully inflicted injuries to the viable fetus result in death just prior to birth or in death just after birth."); *Odham*, 198 A.2d at 73 ("The cause of action arose at the time of the injury and we see no more reason why it should be cut off because of the child's death before birth, than if it died thereafter."); Stidam v. Ashmore, 167 N.E.2d 106, 108 (Ohio Ct. App. 1959) ("We are unable to reconcile the two propositions, that if the death occurred after birth there is a cause of action, but that if it occurred before birth there is none.").

[60] *See, e.g.*, *Mitchell*, 285 S.W.2d at 905 ("The most cogent reason, we believe, for holding that a viable unborn child is an entity within the meaning of the general word 'person' is because, biologically speaking, such a child is, in fact, a presently existing person, a living human being."); *Verkennes*, 38 N.W.2d at 841; Rainey v. Horn, 72 So. 2d 434, 439 (Miss. 1954); *Fowler*, 138 S.E.2d at 44 (quoting Hall *ex rel.* Estate of Hall v. Murphy, 113 S.E.2d 790, 793 (S.C. 1960)).

wrongful death actions . . . ."[61] Whatever the motivation, over forty states currently apply wrongful death claims to the tortious deaths of unborn children.[62]

B. *The Antiquated Assumptions About Children Underlying Pecuniary Damages*

Two realities of childhood existed in the mid- and late-nineteenth century—high mortality rates and the likely prospect of child labor for any child lucky enough to survive. Historians and sociologists believe that because of this higher likelihood parents did not get too attached to their children and were indifferent to their deaths.[63] Even if not indifferent, parents expected infant and child death to some extent and believed there was nothing they could do to prevent it. Infant and child death were simply facts of life, and they were necessarily less culturally and personally devastating than they are today, when infant and child death are not facts of life.

Parental indifference is also linked to the second reality of the nineteenth-century child—that parents valued their child economically, as evidenced by the prevalence of child labor throughout the nineteenth and early twentieth centuries.[64] The death of a child was thus an economic loss—a loss that was relatively easy to offset by having another child. However, parents no longer benefit from their child economically; children are instead a large economic burden.

The pecuniary measure of damages for wrongful death of children fit the nineteenth-century child. The antiquated assumptions of the pecuniary measure do not fit today's child, nor even the twentieth-century child. Yet it persists.

1. Infancy and Childhood as a Time to Die

Exact historical infant and child mortality rates in the nineteenth century are unknown. Today, we calculate infant and child mortality by comparing deaths

[61] Kenneth A. De Ville & Loretta M. Kopelman, *Fetal Protection in Wisconsin's Revised Child Abuse Law: Right Goal, Wrong Remedy*, 27 J.L. MED. & ETHICS 332, 335 (1999); *see also* Murphy S. Klasing, *The Death of an Unborn Child: Jurisprudential Inconsistencies in Wrongful Death, Criminal Homicide, and Abortion Cases*, 22 PEPP. L. REV. 933, 978-79 (1995) (suggesting that fighting for reversal of *Roe v. Wade* is likely to be unsuccessful, that abortion opponents should instead focus on "wrongful death law" to "place[] proper value on an unborn child," and that "[t]he emotional power of parents pleading for legal recognition of their unborn children may sway societal views and incite political action").

[62] Lens, *supra* note 57, at 969 n.97. No survivorship claim exists for an unborn child, however. *See* DOBBS, *supra* note 17, § 294, at 804. Survivorship claims are based on the deceased's legal claims surviving his death, allowing for damages suffered between the injury and the death. *See id.* § 295, at 805. An unborn child lacks any such legal claims. *Id.*

[63] *See* Nancy Schrom Dye & Daniel Blake Smith, *Mother Love and Infant Death, 1750-1920*, 73 J. AM. HIST. 329, 343 (1986).

[64] *See* SAMUEL H. PRESTON & MICHAEL R. HAINES, FATAL YEARS: CHILD MORTALITY IN LATE NINETEENTH-CENTURY AMERICA 35 (1991) (noting that "children were sometimes viewed instrumentally, as a source of family income").

relative to the number of children still living. Such information is not available for infant and child deaths in the nineteenth century.[65]

Some death records do exist, however. For instance, the Seventh Census of the United States in 1850 reported a total of 322,845 deaths, almost 54% of which were deaths to minors under the age of twenty.[66] The Twelfth Census, taken in 1900, reported 1,039,034 deaths, 40% of which were deaths of minors under the age of nineteen.[67] This information tells us that a large proportion of deaths were children and infants. In fact, "[i]n nineteenth century America the mortality rate of children under the age of five represented forty percent of the total death rate."[68] At the same time, this proportional data does not accurately represent the problems of infant and child mortality because it "is affected by the age composition of the population being examined";[69] if more children are living than adults, then more child deaths will also occur.

Table 1. Death Records from the Seventh and Twelfth Censuses.

Year	Total Deaths	Infants (<1)	Ages 1-5	Ages 5-10	Ages 10-20
7th Census (1850)[70]	322,845	54,265	68,713	21,721	28,245
12th Census (1900)[71]	1,039,034	317,532		99,357	

Despite the lack of specific statistics, however, historians are able to estimate the rates of infant and child—especially under age five—mortality in the nineteenth century. In short, both were common. Specific to infant mortality, "an informed estimate would be that somewhere between 15 and 20 percent of all American infants born in the second half of the nineteenth century died before they could celebrate their first birthdays."[72] Another estimate is that the infant mortality rate "in 1900 remained as high as 159 per 1000 population under one

[65] ROBERT MORSE WOODBURY, INFANT MORTALITY AND ITS CAUSES 1-2 (1926) (indicating that statistics on births and deaths were not available for most states until twentieth century).

[66] J.D.B. DE BOW, MORTALITY STATISTICS OF THE SEVENTH CENSUS OF THE UNITED STATES, H.R. EXEC. DOC. NO. 33-98, at 12 (1855).

[67] U.S. CENSUS OFFICE, 4 CENSUS REPORTS: TWELFTH CENSUS OF THE UNITED STATES TAKEN IN THE YEAR 1900: VITAL STATISTICS, PART II, STATISTICS OF DEATH 22 (1902).

[68] AMY J. CATALANO, A GLOBAL HISTORY OF CHILD DEATH: MORTALITY, BURIAL, AND PARENTAL ATTITUDES 64 (2015).

[69] RICHARD A. MECKEL, SAVE THE BABIES: AMERICAN PUBLIC HEALTH REFORM AND THE PREVENTION OF INFANT MORTALITY, 1850-1929, at 28 (1990).

[70] DE BOW, *supra* note 66, at 12.

[71] U.S. CENSUS OFFICE, *supra* note 67, at 22.

[72] MECKEL, *supra* note 69, at 1.

year old and soared to as high as 235 per 1000 infant population in some industrial cities."[73] More generally, including the death of children over age one, one historian estimates that smallpox alone "killed one in three children in America"[74] in the early nineteenth century. Whatever the cause, "[n]early two out of every ten children died before reaching their fifth birthday."[75] Another estimate is that "[f]rom 1890 to the early 1900s, in the United States, the child mortality rate for children under the age of five was twenty percent," and "[f]ifty-nine percent of those deaths were infant deaths."[76] Even in the late nineteenth century, when the government had gained ground in combatting epidemic diseases, endemic infectious diseases continued to trouble the population and "took their greatest toll among infants and young children."[77] Little doubt exists that "[f]or the first three centuries of American history, infant death was the central reality of maternal experience."[78]

Historians are also able to provide some statistics specific to accidental (and likely tortious) child death. The infant and child mortality rates of the late nineteenth century included children who died due to accidents, including those killed on the job. The rate of accidental child deaths also increased dramatically in the early 1900s due to the introduction of "[r]ailroads, streetcars, and automobiles," all of which "emerged as fiercer killers of children than communicable diseases."[79] The reason for the increase was simple—children had grown accustomed to playing in the city streets, the same city streets that were now filled with streetcars and automobiles. "By 1910, accidents had become the leading cause of death for children ages five to fourteen."[80] Even as late as 1927, an insurance bulletin reported that "nearly 40 percent of the automobile fatalities are those of children under fifteen, and the mortality is particularly heavy between the ages of five and ten."[81] The high rates of infant and child death did not go unnoticed.

> Indeed, by 1876 it had become almost impossible for any observer of the urban scene not to conclude that whatever else American cities happened to be, they were for infants, and especially for the infants of the immigrant poor, giant abattoirs in which a large proportion of all those born were destined to be slaughtered before they could celebrate their first birthday.[82]

[73] Dye & Smith, *supra* note 63, at 349.

[74] CATALANO, *supra* note 68, at 19.

[75] PRESTON & HAINES, *supra* note 64, at 3.

[76] CATALANO, *supra* note 68, at 19.

[77] PRESTON & HAINES, *supra* note 64, at 3.

[78] Dye & Smith, *supra* note 63, at 352.

[79] ZELIZER, *supra* note 15, at 32-33.

[80] *Id.* at 32.

[81] *Id.* at 35.

[82] MECKEL, *supra* note 69, at 11.

Starting in the 1850s, the *New York Times* periodically lamented that "each summer, with unfailing regularity, an already high urban infant death rate climbed to catastrophic levels."[83] Following a "health department bulletin reporting that each day during the preceding week more than a hundred infants under the age of one year had died in the city," an 1876 *New York Times* editorial stated: "There is no more depressing feature about our American cities than the annual slaughter of little children of which they are the scene."[84]

Noticing, however, didn't mean doing something. "Many doctors were well aware of the fact that infant deaths constituted a very large percentage of total mortality, but medical literature throughout the century devoted strikingly little attention to this problem."[85] Pediatrics did not completely break away from obstetrics and emerge as its own medical specialty until after the turn of the twentieth century.[86] Before then, it appears that doctors' attitudes were resigned to inevitability and futility; even they just accepted that infants and children would die:

> As D. Francis Condie, one of the first writers on pediatrics, explained, "During infancy and childhood, there exists a very strong predisposition to disease. . . . During the first few weeks of existence, the imperfect organization of the body, and the deficiency in vigour of most of its functions, render it particularly liable to the actions of various agents, the impression of which . . . produces in the delicate organs of the infant, the most serious disturbance, resulting in the greater number of cases, in a rapid extinction of life." Infancy, like old age, was a time to die.[87]

This view echoed societal sentiment: "[D]eath in infancy was recognized as commonplace, even expected."[88]

A majority of historians believe that the high chance of death made parents indifferent to their children[89] and that parental "indifference was a direct and inevitable consequence of the demography of the period."[90] This theory is known as the "Ariès thesis," introduced by Philippe Ariès in his book *Centuries*

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[83] *Id.*

[84] *Id.*

[85] Dye & Smith, *supra* note 63, at 344.

[86] MECKEL, *supra* note 69, at 45-46.

[87] Dye & Smith, *supra* note 63, at 344 (omissions in original) (footnote omitted) (quoting D. FRANCIS CONDIE, A PRACTICAL TREATISE ON THE DISEASES OF CHILDREN 85-86 (1844)).

[88] *Id.* at 345.

[89] LINDA A. POLLOCK, FORGOTTEN CHILDREN: PARENT-CHILD RELATIONS FROM 1500-1900, at 51 (1983) ("The majority of authors agree that the high infant mortality rate was the crucial factor in explaining parental indifference to children."); *see also* ZELIZER, *supra* note 15, at 10 (discussing "landmark study of the English family" by Philippe Ariès and Lawrence Stone).

[90] PHILIPPE ARIÈS, CENTURIES OF CHILDHOOD: A SOCIAL HISTORY OF FAMILY LIFE 39 (Robert Baldick trans., 1962) (1960).

of Childhood.[91] High mortality rates meant that "[t]he general feeling was, and for a long time remained, that one had several children in order to keep just a few"[92] and that "[p]eople could not allow themselves to become too attached to something that was regarded as a probable loss."[93] Because the chances of infant and child death were so high, parents found it too distressing to become emotionally attached to their children and therefore remained detached.[94] Ariès was not surprised by the callousness of parents, as "it was only natural in the community conditions of the time."[95] Historian Lawrence Stone agreed. Writing about English families, he explained that high infant- and child-mortality rates were the "crucial factor" to explain indifference in parent-child relations and that "[t]he omnipresence of death coloured affective relations at all levels of society, by reducing the amount of emotional capital available for prudent investment in any single individual, especially in such ephemeral creatures as infants."[96]

Ariès's research was not based on the United States, instead dating as far back as medieval Europe. But his idea of parental indifference applies to any time period and location with high infant mortality rates. Others have specifically found the same in the first centuries of America. In the 1700s, some early colonial parents didn't even name their child until he turned one.[97] In the late seventeenth century, after thousands of children died after a smallpox epidemic in Boston, "parents were cautioned to restrain affection to their children so as not to become too attached to them."[98] "Many eighteenth-century parents . . . referred to their newborn infants as 'it' or the 'little stranger.'"[99] Parents' "fear of childhood death facilitated the aloof nature of parent-child relationships."[100] This aloofness continued in the eighteenth and nineteenth centuries. In the face of high mortality rates, "parents were obliged to limit the degree of emotional involvement with their infant children."[101] Other social historians interpret this attitude of early American parents not as indifference but as "a degree of aloofness and detachment from the child."[102] Others believe that early colonial parents loved their children, "[a]nd yet their sorrow was restrained

[91] *See generally id.* (asserting that the modern conception of childhood is a social construction stemming in part from improved child mortality rates).

[92] *Id.* at 38.

[93] *Id.*

[94] *See id.* at 38-39.

[95] *Id.* at 39.

[96] POLLOCK, *supra* note 89, at 26.

[97] CATALANO, *supra* note 68, at 106 ("If an infant died before this milestone [of one year], his headstone would simply state 'Our Baby'.").

[98] *Id.* at 63.

[99] ZELIZER, *supra* note 15, at 25.

[100] CATALANO, *supra* note 68, at 63.

[101] *Id.* at 4.

[102] ZELIZER, *supra* note 15, at 25.

when a child died."[103] Religion likely played a role in this aloofness and restraint. The belief that "the life of the child was the responsibility of God" helped parents accept their child's death.[104] "[P]arents cared deeply for their children and yet expected neither conscientious care nor the best medical attention to cure their children's illnesses, prevent dangerous accidents, or forestall death. Children were God's temporary gift to parents; what He had freely given, He could just as freely—and suddenly—take away."[105]

Historian Linda Pollock notably disagrees with Ariès's parental indifference theory. She finds it illogical because although many children died, more survived, at least for a few years, making it impossible for parents to not become attached during those years.[106] Pollock also argues that parents' awareness of the high chances of infant and child death would not result in indifference but instead would "heighten [parents'] anxiety during any illness of their offspring, and anguish at their death."[107]

At the same time, after studying diaries left by middle-class parents, while Pollock admits that some parents appeared "unmoved" or possibly "indifferent" to the deaths of their children, "the vast majority of writers through the centuries were extremely distressed at the death of a child."[108] Pollock also concluded that parents' levels of distress varied depending on the child's age.[109] Pollock suggests that grief of an older child includes not just what he could have become, like a deceased baby, but also who the child actually was.[110]

Regardless of whether parents specifically grieved children, however, the dominant cultural view matched the then-dominant medical view that infant and child illness and death were unpreventable. "[N]ineteenth century mothers appeared to regard serious illness as inevitable."[111] Furthermore, every illness, serious or not, included the chance of the child's death. A review of mothers' diaries showed: "As their infants grew, mothers became more anxious and appear to have regarded serious illness as inevitable. Accounts of children's

[103] *Id.* at 31.

[104] CATALANO, *supra* note 68, at 63.

[105] Dye & Smith, *supra* note 63, at 332.

[106] POLLOCK, *supra* note 89, at 51 ("[T]here is no correlation between mortality rates and the supposed development of affection.").

[107] *Id.* at 140; *see also id.* at 51 (stressing that "anthropological research on primitive societies" shows that high mortality rates made parents more attentive instead of indifferent); ZELIZER, *supra* note 15, at 11 ("[I]n seventeenth-century Plymouth a high death rate may have encouraged a special concern for and tenderness toward infants.").

[108] POLLOCK, *supra* note 89, at 141.

[109] *Id.* ("[Y]oung infants were not mourned as deeply as older children.").

[110] *Id.* (asserting that greater degree of mourning for older children—without precisely defining "older"—stemmed from shared experiences between older children and parents instead of only mourning lost potential of dead infants).

[111] PRESTON & HAINES, *supra* note 64, at 30.

illnesses and their treatment consume a significant part of nineteenth-century maternal writings."[112]

Inevitability was accompanied by fatalism, as parents accepted that there was little they could do to prevent their child's death. After working with Irish mothers in New York in 1902, a writer commented that mothers were not "callous" when their babies died but were "horribly fatalistic about it" and thought "[b]abies always died in summer and there was no point in trying to do anything about it."[113] Some accounts from the 1800s, such as diaries, "note that parents appeared to accept child death as an expected milestone of life."[114] Ultimately, the experience of infant and child "death formed a constant backdrop against which mothers' experiences and emotions must be set."[115]

This inevitability and fatalism are apparent in wrongful death of children cases. In an 1859 case, a New York court reversed a $1500 award for the death of a four-year-old.[116] The court explained:

> The child was four years and one month old when he died. For the next ten years, had he lived, it may safely be said that he would have been a burthen in place of a benefit, pecuniarily, to his parents. And for the next seven years after that, if educated to a profession or mercantile calling, or put to a trade, he would have done well—much better than the majority of lads—if he supported himself. During all this time he would be exposed to disease and death, and the other ills that beset human life in all its stages. The life of this little boy, however priceless may have been its value in other aspects, had no pecuniary value which the jury could justly estimate at $1500.[117]

The Iowa Supreme Court specifically disagreed with this case, finding it was proper to allow "substantial damages for the death of such a child."[118] It also admitted, however, that "in the estimation of damages the jury must properly regard all the contingencies which affect the accumulation of an estate."[119] Those contingencies include possible premature death.

Eventually, the common reaction to infant and child death changed from resignation to indignation. Traditional resignation "faltered in the latter part of the nineteenth century, as both death and disease became increasingly perceived as postponable or remediable consequences of inadequate sanitation or other

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[112] Dye & Smith, *supra* note 63, at 340.

[113] PRESTON & HAINES, *supra* note 64, at 31.

[114] CATALANO, *supra* note 68, at 63.

[115] Dye & Smith, *supra* note 63, at 329-30.

[116] Lehman v. City of Brooklyn, 29 Barb. 234, 238 (N.Y. Gen. Term 1859).

[117] *Id.*

[118] Walters v. Chi., Rock Island & Pac. Ry. Co., 41 Iowa 71, 80 (1875) (rejecting defendant's reliance on *Lehman* for proposition that parents can recover only nominal damages after child's death given child's uncertain life expectancy).

[119] *Id.*

technical deficiencies controllable by men,"[120] essentially once society realized that infant and child death were not inevitable but instead preventable.[121]

In this same timeframe, "children had captured the energy and attention of social reformers to a greater extent than during any other period of American history."[122] By the turn of the century, "[p]ublic commitment to child welfare expanded."[123] In 1912, Congress created the Federal Children's Bureau, which, among other things, officially studied infant and child mortality.[124] Its creation "officially certified the conservation of child life as a national concern."[125] Mothers wrote hundreds of thousands of letters to the Bureau.[126] Many mothers who had lost children wanted to know what they could do to prevent their next child from dying,[127] demonstrating the change from resignation to indignation. Similar public concern eventually developed for the accidental death of children; what started as "an isolated, personal tragedy" became "increasingly a matter of public concern."[128]

By the late nineteenth century, "the death of all children—rich and poor—emerged as an intolerable social loss."[129] Both changing attitudes and declining mortality rates meant that death became "an overwhelming tragedy," and "[t]he death of a young child was the worst loss of all."[130] In the 1920s, communities began creating memorials dedicated to children who had died in accidents, which Zelizer argues is further evidence of "the new value of child life and the deepening moral offensiveness of killing children."[131]

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[120] ZELIZER, *supra* note 15, at 43-44. Quoting Ann Douglas, Zelizer observes that a "magnification of mourning" of infant and child death may have started even earlier in the century, between 1820 and 1875. *Id.* at 25.

[121] In 1881, a Pediatric Section of the American Medical Society was created. Soon after, the American Pediatric Society was formed. *Id.* at 27.

[122] PRESTON & HAINES, *supra* note 64, at 31; *see also* ZELIZER, *supra* note 15, at 27 ("The movement to reduce infant and child mortality began in the latter part of the nineteenth century.").

[123] ZELIZER, *supra* note 15, at 28.

[124] WOODBURY, *supra* note 65, at 23-24.

[125] ZELIZER, *supra* note 15, at 29.

[126] Dye & Smith, *supra* note 63, at 351.

[127] *Id.* at 351-52 (collecting letters from mothers asking federal government to remedy inadequate maternal and child medical care and lack of information about preventing child death).

[128] ZELIZER, *supra* note 15, at 43.

[129] *Id.* at 27.

[130] *Id.* at 26. Similar changes in attitude are apparent in reactions to accidental child deaths from railroad, street car, and automobile accidents. *Id.* at 32. A 1927 insurance bulletin reported that "nearly 40 percent of the automobile fatalities are those of children under fifteen, and the mortality is particularly heavy between the ages of five and ten." *Id.* at 35. A child's accidental death gradually changed from a perceived isolated incident to a matter of public concern; special monuments were even constructed for child victims. *Id.* at 43.

[131] *Id.*

Ariès's theory that high mortality rates led parents to detach emotionally from their children would suggest that parental and cultural attitudes changed because mortality rates declined. Finally, after the turn of the century, "the deaths of infants and young children cease[d] to be common events in middle-class families. By the 1920s maternal consciousness was no longer shaped primarily by incessant anxiety that babies might die."[132] Starting from an estimated 100 infant deaths per 1000 live births in the early 1900s, the infant mortality rate declined more than 90% by the end of the century to 7.2 infant deaths per 1000 live births.[133] The infant mortality rate in 2015 was 5.9 deaths per 1000 live births.[134] "[N]o other modern reduction of mortality . . . comes near comparing with the reduction of infant mortality."[135] Still, further improvement is possible. "Although overall rates have plummeted, black infants are more than twice as likely to die as white infants . . . ."[136] Plus, the United States' rate is still high compared to other developed nations; it ranks twenty-fifth in infant mortality.[137]

As with infant mortality, rates of child mortality have also decreased in the United States. Age-adjusted death rates, meaning deaths per 100,000, improved dramatically during the twentieth century. In 1910, the death rate for children aged one to four was 1397.3, aged five to nine was 348.4, aged ten to fourteen was 235.9, and aged fifteen to nineteen was 371.9.[138] In 2000, the death rate for children aged one to four was 32.4, aged five to nine was 15.8, aged ten to fourteen was 20.3, and aged fifteen to nineteen was 67.1.[139]

Parent and social expectations about child death are very different than they were in the mid-nineteenth century:

> Before the turn of the [twentieth] century the death of a child was a common occurrence. . . . [M]ost families had at least one child die before reaching adulthood. In the 1990s, however, not only is the death of a child

[132] Dye & Smith, *supra* note 63, at 353.

[133] *Achievements in Public Health, 1900-1999: Healthier Mothers and Babies*, CTRS. FOR DISEASE CONTROL & PREVENTION MORBIDITY & MORTALITY WKLY. REP. (Oct. 1, 1999), https://www.cdc.gov/mmwr/preview/mmwrhtml/mm4838a2.htm [https://perma.cc/HR6U-QDKS].

[134] Sherry L. Murphy et al., CTRS. FOR DISEASE CONTROL & PREVENTION, *Deaths: Final Data for 2015*, NAT'L VITAL STAT. REP., Nov. 27, 2017, at 1, 1, https://www.cdc.gov/nchs/data/nvsr/nvsr66/nvsr66_06.pdf [https://perma.cc/4ZZ5-4SLM].

[135] MECKEL, *supra* note 69, at 1.

[136] *Achievements in Public Health, 1900-1999: Healthier Mothers and Babies*, *supra* note 133.

[137] *Id.*

[138] *National Center for Health Statistics – Child Mortality Rates*, CTRS. FOR DISEASE CONTROL & PREVENTION (July 14, 2015), https://data.cdc.gov/NCHS/NCHS-Childhood-Mortality-Rates/v6ab-adf5 [https://perma.cc/R3K8-DNVV].

[139] *Id.*

> rare, it is also viewed as an injustice. . . . Shock and disbelief signify the underlying belief that the death of a child is unfair or "unnatural."[140]

Simply due to its reduced frequency, the mid-nineteenth century and today represent two very different cultural ideas of infant and child death: "[I]n a culture where parents are aware of and experience considerable infant mortality in their communities, the death of an infant may be less devastating than in a culture that has very little infant mortality."[141] More practically, "[i]n contrast with earlier years when couples sometimes had several children die, most families today lose none. It is now expected in this country that children will live to adulthood."[142] This dramatic change in infant and child mortality rates is obviously beneficial, but it also means twenty-first century parents are "unprepared to deal with the loss of their children."[143]

Another factor possibly affecting parents' reactions to their child's death is that, at the same time that mortality rates decreased, parents also stopped having as many children. "Between the mid-nineteenth century and 1915, for instance, the annual birthrate for native whites dropped nearly 40 percent, from 42.8 to 26.2 per thousand. Fewer children made each child more precious."[144] The birth rate is even lower today, calculated at 14.4 per one thousand in the year 2000.[145] Because twenty-first century parents both have fewer children and expect those children to survive, parental attitudes toward child death have changed dramatically since state legislatures first created wrongful death statutes.[146]

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[140] Cynthia K. Drenovsky, *Anger and the Desire for Retribution Among Bereaved Parents*, 29 OMEGA J. DEATH & DYING 303, 303 (1994).

[141] JANOFF-BULMAN, *supra* note 26, at 53; *see also* J. Fredrick Frøen et al., *Stillbirths: Why They Matter*, 377 LANCET 1353, 1357 (2011) ("In settings with both high fertility and mortality rates, the death of a baby might be expected, attachment to newborn babies and young children, in general, might be compromised, and there might be more siblings—all factors that could mitigate grieving rituals.").

[142] COMM. FOR THE STUDY OF HEALTH CONSEQUENCES OF THE STRESS OF BEREAVEMENT, INST. OF MED., BEREAVEMENT: REACTIONS, CONSEQUENCES, AND CARE 75 (Marian Osterweis, Fredric Solomon & Morris Green eds., 1984).

[143] Therese A. Rando, *Bereaved Parents: Particular Difficulties, Unique Factors, and Treatment Issues*, 30 SOC. WORK 19, 20 (1985).

[144] ZELIZER, *supra* note 15, at 11.

[145] *National Center for Health Statistics – Births and General Fertility Rates: United States*, CTRS. FOR DISEASE CONTROL & PREVENTION (June 4, 2018), https://data.cdc.gov/NCHS/NCHS-Births-and-General-Fertility-Rates-United-Sta/e6fc-ccez [https://perma.cc/MA5Q-SPG9].

[146] It is difficult to make this same historical argument for stillbirths. Courts started officially interpreting wrongful death statutes to apply to stillbirths around the mid-twentieth century, and most legislative amendments did not occur until this century. Thus, it is difficult to generalize about the rates of stillbirth at the time states started applying wrongful death claims to stillbirth. Moreover, historical stillbirth rates are even harder to come by than infant and child mortality rates. The accuracy of all data on stillbirth, historical and modern, is suspect because states use different definitions of stillbirth, some depending on weight and

some depending on gestational age. *See generally* NAT'L CTR. FOR HEALTH STATISTICS, CTRS. FOR DISEASE CONTROL & PREVENTION, STATE DEFINITIONS AND REPORTING REQUIREMENTS FOR LIVE BIRTHS, FETAL DEATHS, AND INDUCED TERMINATIONS OF PREGNANCY (1997), https://www.cdc.gov/nchs/data/misc/itop97.pdf [https://perma.cc/XHK9-LNHL]. With that caveat, according to a 1922 U.S. vital statistics report, 39.4 stillbirths occurred out of every 1000 live births. U.S. CENSUS BUREAU, *Chapter C: Vital Statistics, Health, and Nutrition*, *in* HISTORICAL STATISTICS OF THE UNITED STATES 39, 46 (1949), https://www2.census.gov/library/publications/1949/compendia/hist_stats_1789-1945/hist_stats_1789-1945-chC.pdf [https://perma.cc/M6QA-VZJ7]. By 1945, 26.6 stillbirths occurred out of every 1000 live births. *Id.* Another estimate is that the rate was 25.0 fetal deaths per 1000 live births in 1942. Marian F. MacDorman & Elizabeth C.W. Gregory, *Fetal and Perinatal Mortality: United States, 2013*, NAT'L VITAL STAT. REP., July 23, 2015, at 1, 1, https://www.cdc.gov/nchs/data/nvsr/nvsr64/nvsr64_08.pdf [https://perma.cc/A494-R69D]. These estimates are much higher than current statistics. In 2013, the United States' rate was 5.96 stillbirths per 1000 live births. *Id.* Notably, although improved, the United States' stillbirth rate has decreased very little in the last twenty years, much slower progress than that made by other developed nations. *See id.* at 4; Jessica M. Page et al., *Potentially Preventable Stillbirth in a Diverse U.S. Cohort*, 131 OBSTETRICS & GYNECOLOGY 336, 337 (2018).

Many courts that applied wrongful death claims to stillbirth thus did so in a time when stillbirth was much more common than it is today, mirroring the experience of states creating wrongful death claims at a time of high infant and child mortality. Ariès's theory of parental indifference should apply to stillbirth as it does to the death of living children. Even if not indifferent to stillbirth, when more frequent, parents likely expected one or more of their children to be stillborn. At the same time, some states did not officially apply wrongful death claims to stillbirth until this century, at the time when the United States' stillbirth rate was also at the lowest it has ever been historically. Given the current low frequency of stillbirth, Ariès's theory of parental indifference likely does not apply to parents in this century.

An interesting parallel exists to child and infant mortality throughout the nineteenth century—a sense of resignation, due to fatalism, that stillbirth is unpreventable. *See generally* Joanne Cacciatore & Jill Wieber Lens, *The Ultimate in Women's Labor: Stillbirth and Grieving*, *in* ROUTLEDGE INTERNATIONAL HANDBOOK OF WOMEN'S SEXUAL AND REPRODUCTIVE HEALTH 311 (Jane M. Ussher, Joan C. Chrisler & Janette Perz eds., 2019). Parents may not expect their child to be stillborn, but they do often feel the stillbirth was unpreventable. This fatalistic sentiment is widespread even today. *See* THE LANCET, ENDING PREVENTABLE STILLBIRTHS: AN EXECUTIVE SUMMARY FOR THE LANCET'S SERIES 5 (2016) [hereinafter THE LANCET, ENDING PREVENTABLE STILLBIRTHS], http://www.thelancet.com/pb/assets/raw/Lancet/stories/series/stillbirths2016-exec-summ.pdf [https://perma.cc/W622-8GNG]. But it is inaccurate. Just as infants and children were not doomed to die in the nineteenth century, stillbirth is not inevitable. Joy E. Lawn et al., *Stillbirths: Rates, Risks Factors, and Acceleration Towards 2030*, 387 LANCET 587, 587 (2016); *see also* THE LANCET, ENDING PREVENTABLE STILLBIRTHS, *supra*, at 4 (explaining that only 7.4% of global annual stillbirths are due to fetal abnormalities). A recent study of stillbirths in the United States concluded, conservatively, that at least one-fourth of stillbirths could be prevented with proper medical care. *See* Page et al., *supra*, at 340. Risk factors for stillbirth are known, and some of those risk factors could be reduced or eliminated with proper medical care. THE LANCET, ENDING PREVENTABLE STILLBIRTHS, *supra*, at 4. The fatalism of stillbirth is an unfortunately pervasive myth.

2. Parents' Economic Valuation of Children

Parental and cultural indifference to child death is related not only to high mortality rates but also to how parents valued their children in the nineteenth century—economically. Something with only economic value is easy to replace. If a child's main contribution to the family was a paycheck, a lost paycheck could be replaced with another child.

The economic valuation of children is easily evident in the flourishing prevalence of child labor in the mid-nineteenth century, the time in which state legislatures started adopting wrongful death statutes. "Child labor outside the home was rising in the late nineteenth century on the heels of new industrial opportunities."[147] The 1870 census reported that "about one out of every eight children was employed."[148] The number of children laborers increased by over one million between 1870 and 1900 because of industrialization.[149] In absolute numbers, child labor peaked in 1900 at 1.75 million children, translating to the gainful employment of "one child out of every six between the ages of ten and fifteen."[150] These numbers show that "the economic value of the working-class child increased, rather than decreased in the nineteenth century."[151] Overall, "[t]he trend shows strong growth from 1870 through 1890, a sustained peak from 1890 through 1910, and a substantial decline thereafter."[152] Common jobs for children included working in "street trades," like delivering newspapers and shining shoes; "industrial homework," essentially factory-like garment-making done at home; working in coal mines and factories; and working on the family farm.[153]

Child labor was an economic necessity for some families: "Working-class urban families in the late nineteenth century depended on the wages of older children and the household assistance of younger ones."[154] But child labor was also seen as morally good. Historically, "the problem was not that children worked, it was that too many children were idle too much of the time."[155] Work "kept children busy and out of mischief."[156] A *Saturday Evening Post* article published around 1924 warned that the United States would become "a nation

[147] PRESTON & HAINES, *supra* note 64, at 31.

[148] ZELIZER, *supra* note 15, at 5-6.

[149] *Id.* at 60.

[150] *Id.* at 56. And this 1900 estimate did not include children under age ten or those who "'help[ed] out' their parents in sweatshops and on farms." *Id.*

[151] *Id.* at 5.

[152] HUGH D. HINDMAN, CHILD LABOR: AN AMERICAN HISTORY 35 (2015).

[153] Gerald Mayer, *Child Labor in America: History, Policy, and Legislative Issues*, *in* CHILD LABOR IN AMERICA 37, 40-41 (Ian C. Rivera & Natasha M. Howard eds., 2010).

[154] ZELIZER, *supra* note 15, at 6.

[155] HINDMAN, *supra* note 152, at 45.

[156] ZELIZER, *supra* note 15, at 68; *see also* PRESTON & HAINES, *supra* note 64, at 31.

of paupers and thieves" if children did not work.[157] Even at the turn of the century, public opinion still strongly supported child labor.[158]

Child labor gradually came to an end in the United States sometime after 1910 and before the 1930s. The end of child labor spelled trouble for the pecuniary measure of damages for wrongful death. If children did not work, they did not contribute to the house economically. The Michigan Supreme Court explained that the pecuniary measure of damages "reflect[s] the philosophy of the times, its ideals, and its social conditions. . . . It was an era when ample work could be found for the agile bodies and nimble fingers of small children" and "a day when employment of children of tender years was the accepted practice and the[i]r pecuniary contributions to the family both substantial and provable."[159] But "[w]hatever the situation may have been in 1846, as the children brought home their wages from plant, mine, and mill, today their gainful employment is an arrant fiction and we know it."[160]

Decades later, the economic valuation of children shifted even further negative. The costs of raising a child have grown "exponentially since the 1960s," and possibly before, but the United States government only began collecting data at that time.[161] "Between 2000 and 2010, the cost shot up by 40%."[162] Economist Lawrence Olson explained "[t]hat so many young couples still decide to have children attests to the nonmonetary benefits they expect to derive from their progeny" because "[i]n purely monetary terms, couples would be better off putting their money in a bank as a way of saving for their old age."[163] Commentators have similarly noted that the pecuniary measure was "adopted in times when a child was an economic asset to a parent."[164] But today, "were the [pecuniary damage measure] rule followed literally, the child would prove to be an economic liability to the parent, and strict adherence to the rule could lead, reductio ad absurdum, to the conclusion that the tortfeasor should be reimbursed for having saved the parent money."[165]

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[157] ZELIZER, *supra* note 15, at 67.

[158] HINDMAN, *supra* note 152, at 48-49.

[159] Wycko *ex rel.* Estate of Wycko v. Gnodtke, 105 N.W.2d 118, 120-21 (Mich. 1960).

[160] *Id.* at 123.

[161] Heidi Steinour, *The Cost of Raising a Child in America Has Soared—It's a Price Tag Fit for a Prince*, MARKETWATCH (Apr. 23, 2018, 9:40 AM), https://www.marketwatch.com/story/these-5-charts-show-how-expensive-it-is-to-raise-children-today-2018-03-29 [https://perma.cc/9YCW-435N].

[162] *Id.*

[163] ZELIZER, *supra* note 15, at 4 (quoting LAWRENCE OLSON, COSTS OF CHILDREN 58 (1983)).

[164] Leonard Decof, *Damages in Actions for Wrongful Death of Children*, 47 NOTRE DAME LAW. 197, 198 (1971).

[165] *Id.*; *see also* Williams *ex rel.* Estate of Williams v. United States, 681 F. Supp. 763, 764 (N.D. Fla. 1988) ("It is generally assumed that in the case of the death of a young child, that the costs of providing for that child until maturity will be far greater than the value of any services to be rendered by the child."); McClurg, *supra* note 17, at 20 ("[T]he lives of children

The end of child labor meant more, however, than the end of the practical ability to apply the pecuniary measure. According to Zelizer, the end of child labor was just one example of something greater—a change in how parents valued their child, originally economically and then sentimentally. "In the first three decades of the twentieth century, the economically useful child became both numerically and culturally an exception."[166] The defeat of child labor helped to "introduce[] a new cultural equation: If children were useful and produced money, they were not being properly loved."[167]

This change in the valuation of children led many to question the morality of the pecuniary measure. As early as 1898, the New Jersey Supreme Court reversed a $5000 damage award for the wrongful death of a child, commenting that "[c]hildren are more often an expense[] than a pecuniary benefit" to their parents.[168] The public was not happy. An editorial opined that the decision was "not only repugnant to human nature" but also "as close to legal immorality as is any opinion that has been expressed."[169] In 1900, a New York appellate court found a six-cent verdict for the wrongful death of a sixteen-year-old who did not work as "shock[ing in] the moral sense."[170] And in 1922, a dissenting justice of the Ohio Supreme Court described the pecuniary damage limitation as "making a business commodity out of the child" and as "so cold and calculating as to be really bloodless."[171] These instances reflect the emerging immorality of economically valuing children. "[T]he legal pricing of a sacred child was to some extent a sacrilege. After all, if parents were expected to forego any immediate material gain from their child's labor, how could a windfall profit at the child's death be justified?"[172] These immorality criticisms can easily apply to wrongful death damages generally because such damages devalue the dead loved one as merely a lost income stream.[173] But the concerns are even more poignant when a child is killed.

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have a negative net worth because child-rearing costs exceed the value of monetary and service contributions that children make to their family households.").

[166] ZELIZER, *supra* note 15, at 6.

[167] *Id.* at 72.

[168] Consol. Traction Co. v. Graham, 40 A. 773, 774 (N.J. 1898). This was actually the second $5000 verdict overturned in the case.

[169] ZELIZER, *supra* note 15, at 147-48.

[170] Morris v. Metro. St. Ry. Co., 51 A.D. 512, 515 (N.Y. App. Div. 1900).

[171] Schendel v. Bradford, 140 N.E. 155, 160 (Ohio 1922) (Wanamaker, J., dissenting).

[172] ZELIZER, *supra* note 15, at 150.

[173] *See, e.g.*, McClurg, *supra* note 17, at 21 (explaining effects of pecuniary measure on compensatory damages, including that "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"); Bonnie Lee Branum, Note, *Alabama's Wrongful Death Act: The Jurisprudence of Accounting*, 55 ALA. L. REV. 883, 891 (2004) (explaining that pecuniary measure of compensatory damages for wrongful death "treat[s] the deceased as a stream of income").

Nineteenth-century American law "put extraordinary weight on the economic worth of children,"[174] which "reflected the social conditions of the [time], when children were valued largely for their capacity to contribute to the family income."[175] But American parents and culture have not valued children economically for almost a century and instead believe that children are sentimentally priceless. However, much of wrongful death law still reflects the nineteenth-century economic valuation of children.

C. *Failed Reforms of the Antiquated Measure*

Despite the antiquated assumptions underlying the pecuniary measure of damages for wrongful death of children cases, the pecuniary measure is alive and well. This long history and the statutory nature of the claim make it difficult to reform the measure of damages.

An example of this is the famous case *Dillon v. Legg*,[176] in which the California Supreme Court allowed a mother to recover damages for the emotional distress she suffered after seeing her daughter killed by a negligent driver.[177] Every torts student learns about *Dillon*, but most miss the point that *Dillon* only happened because of the inadequacy of the mother's wrongful death claim. The mother brought one,[178] but the recoverable damages included only "the pecuniary loss to the parents in being deprived of the services, earnings, society, comfort and protection of the child."[179] Loss-of-relationship damages were not available,[180] nor were damages for mental anguish.[181] Unable to alter the damages for her wrongful death claim, the mother convinced the California Supreme Court to allow her to recover for emotional distress in a negligence claim against her child's killer. *Dillon* is celebrated as properly recognizing the importance and value of the parent-child relationship, but it may be a bit overrated—it did not go so far as to recognize the devastation of the parents' loss even if they had not been in the vicinity of their child's place of death.[182]

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[174] ZELIZER, *supra* note 15, at 143.

[175] Bullard v. Barnes, 468 N.E.2d 1228, 1233 (Ill. 1984).

[176] 441 P.2d 912 (Cal. 1968) (in bank).

[177] *Id.* at 921.

[178] *See* Michael Jay Gorback, Note, *Negligent Infliction of Emotional Distress: Has the Legislative Response to Diane Whipple's Death Rendered the Hard-Line Stance of* Elden *and* Thing *Obsolete?*, 54 HASTINGS L.J. 273, 289 (2002).

[179] *See* Armenta v. Churchill, 258 P.2d 861, 864 (Cal. Dist. Ct. App. 1953), *vacated in bank*, 267 P.2d 303 (Cal. 1954).

[180] *See* Justus v. Atchison, 565 P.2d 122, 126 (Cal. 1977) (in bank) (holding that parents cannot recover "for the deprivation of [a fetus's] society and comfort had it lived"), *abrogated on other grounds by* Ochoa v. Superior Court, 703 P.2d 1 (Cal. 1985) (in bank).

[181] Damages for mental anguish are still not recoverable for wrongful death in California. *See* Mendoza v. City of W. Covina, 141 Cal. Rptr. 3d 553, 568 (Ct. App. 2012).

[182] *See* Martha Chamallas & Linda K. Kerber, *Women, Mothers, and the Law of Fright: A History*, 88 MICH. L. REV. 814, 860 (1990) (explaining that *Dillon* "signifies that the law

Regardless, this common law legal development occurred due to the inflexibility of wrongful death law.

Any reforms to compensatory damages for the wrongful death of children damages are just that—reforms—of an antiquated system. It's difficult to obtain a just system when having to dig out from the hole of history. The difficulty of fixing this measure of compensatory damages becomes clear when examining all of the additional problems created by the most popular reforms.

1. Reformed Measures of Pecuniary Damages

States have adopted measures that attempt to increase the amount of economic damages awarded for the wrongful death of children, sometimes specific to cases involving children and sometimes applicable to all claims. They include the loss-to-estate measure, the extension of the loss-to-dependents measure past the child's age of majority, the loss-of-investment measure, and a parental-income measure.

a. *Loss-to-Estate Measure*

A minority of states use a different method of measuring pecuniary damages in a wrongful death claim—the loss-to-estate measure. The loss-to-estate measure equals "the decedent's probable future earnings, diminished by the amount he would have spent for his own living expenses had he survived."[183] This measure applies to all wrongful death claims, not just to those involving children. But the application of this measure to wrongful death of children cases

regards a mother's anguish at witnessing the death or injury of her child as a harm that qualifies for legal protection" and allowing mother recovery because she was "witness" to accident causing daughter's death).

[183] *See* SPEISER, *supra* note 30, § 3:2, at 122 (stating measure of recovery under loss-to-estate measure should also be reduced to present value). Another method is based on future accumulations, meaning damages equal "the amount which decedent would have earned (by his own efforts) and saved (from the time of his death to the time he probably would have died had he not been wrongfully killed) and left at his death as part of his estate," again reduced to present value. *Id.* § 3:2, at 124. And yet another method is the present worth of the probable gross earnings with no deduction for his own expenses. *See id.* § 3:2, at 125. If a deduction for expenses is required,

> [i]n the usual case, this rule will be productive of a much smaller award. Especially is this so in the case of the child. It is the rare individual who will actually accumulate a large estate over his lifetime. The average man spends most of what he earns. Where the decedent is a child, since plaintiff ordinarily can't prove the child would have gone into a specific highly rewarding profession or would have become an industrialist, he must fall into the category of the average man, be it average high school or college graduate.

Decof, *supra* note 164, at 204. *But see* Thomas R. Ireland & John O. Ward, *The Estate of a Minor Child in a Child Death Case*, J. LEGAL ECON., Winter 2000-01, at 23, 34 (arguing that accumulations by estate damage measure would "allow parents larger damages than are possible under the traditional wrongful death approach to deaths of minor children").

should specifically lead to higher damage awards than the application of the loss to survivors measure because of the irrelevance of dependency.[184]

Although this measure will result in greater damages for wrongful death of children cases, numerous problems exist. First, the loss-to-estate measure has the same morality problems as the loss-to-survivors measure. The parents' loss is still based on the child's expected income stream, which is dependent on what type of education the child was likely to receive, what jobs he was likely to have worked during his life—on the child's economic capabilities before and after the age of majority. Despite all parents suffering an affliction that "so tortures and wears down the physical and nervous system,"[185] parents whose child was likely to be a doctor will automatically receive more money than parents whose child was likely to be a mechanic.

Another problem with the loss-to-estate measure, actually the most often identified problem, is the degree of speculation it requires. The older the decedent, the more we know about him—his career goals, his education, his career thus far. But "[i]n the case of a very young child, the plaintiff cannot reasonably contend that it was intended the child would become a concert pianist or a brain surgeon."[186] This is even more true for an unborn child. The parties will have to present evidence of the child's age, his life expectancy, his "physical and mental qualities and characteristics," his parents' and siblings' occupations, his parents' and siblings' "mental and physical characteristics," the "[p]robabilities of education and other opportunities to be afforded by parents to child," the "[h]istory of accomplishments of siblings," the "[o]pportunities or intentions of entering certain occupations or professions," and the "[e]xpenditures of parents" in raising the deceased child.[187] Additional speculation will be necessary to determine the amount the child would have spent on himself throughout his entire life—whether he would have had a lavish lifestyle or saved more.[188] The use of this generalized type of evidence ignores the possible individual resiliency of the child; as Justice Ginsburg famously likes to say, "the difference between a bookkeeper in the garment district and a Supreme Court Justice" is just "[o]ne generation."[189] It also leaves juries unable to do little more than guess in estimating the amount of damages for the wrongful death of a child, including an unborn child, under a loss-to-estate measure.

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[184] *See* Decof, *supra* note 164, at 202.

[185] Winner v. Sharp, 43 So. 2d 634, 637 (Fla. 1949) (en banc).

[186] *See* SPEISER, *supra* note 30, § 4:27, at 529 ("[E]vidence as to issue of loss of prospective estate of a minor is necessarily going to be somewhat nebulous and speculative . . . ."); Decof, *supra* note 164, at 202-03.

[187] Decof, *supra* note 164, at 202.

[188] *See id.* at 203.

[189] *See* Christina Overton, *Leaders in the Law: Supreme Court Justices Ruth Bader Ginsburg and Sonia Sotomayor*, CITY B. JUST. CTR. (Oct. 27, 2016), https://www.citybarjusticecenter.org/news/leaders-law-supreme-court-justices-ruth-bader-ginsburg-sonia-sotomayor/ [https://perma.cc/SR6Y-J3KC].

The supposed solution to the speculation problem is statistical data: "A fertile area in cases of young children lies in the use of statistical averages. For example, figures can be obtained and presented showing average earnings of grammar school graduates, high school graduates, persons having one year of college, and so on."[190] In an effort to provide the best estimate, "economists acting as expert witnesses frequently resort to gender-based and race-based tables of earnings to estimate future earnings."[191]

The use of gender-based and raced-based statistical data, however, creates a larger problem. As numerous dedicated legal scholars have argued, the use of gender-based and race-based tables is discriminatory:

> Because of wage discrimination and occupational segregation, predictions of future earnings for women and minorities are considerably lower than for white men, even when controlled for such factors as educational attainment. Thus, the projected lifetime earnings, discounted to 1990 present value, of a female college graduate have been estimated to be only sixty-five percent of those of a similarly situated male college graduate. The use of statistics in this context means that current race and gender disparities in wages will be projected into the future, and that bias in the setting of wages will continue to influence personal injury and wrongful death awards.[192]

In 2015, Judge Weinstein of the Eastern District of New York refused to use a race-based table to estimate damages for a four-year-old permanently injured after inhaling lead paint dust.[193] The issue often arises in lead paint cases "because low-income and minority families are more likely to occupy older homes with lead-based paint," meaning "the majority of children poisoned by lead in the United States are poor African-American and Latino children."[194] In the specific case, the defendant's attorney wanted to use expert economic testimony based on race-based data to show the improbability of the Hispanic child "obtaining a Bachelor, Master, or Doctoral degree, and any corresponding elevated income."[195] Judge Weinstein excluded the evidence, finding the use of race-based tables to be discriminatory. Thus far, Judge Weinstein has been the only judge to specifically find the use of race-based statistics unconstitutional.

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[190] Decof, *supra* note 164, at 203 (arguing that use of statistics can alleviate uncertainty of calculating future earnings and living expenses).

[191] Martha Chamallas, *The Architecture of Bias: Deep Structures in Tort Law*, 146 U. PA. L. REV. 463, 482 (1998).

[192] *Id.* (footnote omitted).

[193] G.M.M. *ex rel.* Hernandez-Adams v. Kimpson, 116 F. Supp. 3d 126, 128-29 (E.D.N.Y. 2015) (holding that statistics based on ethnicity of child cannot be relied upon to reduce damages in tort cases).

[194] *Id.* at 130.

[195] *Id.* at 129.

A few dedicated scholars are set out to ensure that he is not the last.[196] The possibility of discrimination is a good reason to be wary of the loss-to-estate measure of economic damages in a wrongful death of a child case.

b. *Expanding the Loss-to-Dependents Measure Past the Child's Age of Majority*

A common reform to increase the amount of economic damages awarded in wrongful death of children cases is to expand the loss-to-dependents measure past the child's age of majority. For example, a Texas court enabled recovery to parents for their "reasonably expected contributions from their daughter after she reached the age of eighteen."[197] The court noted that their daughter could have been "of considerable financial value to her parents in their advanced years or in the event of their disability or economic hardship."[198]

Given the ever-increasing costs of raising a child, it's questionable whether combining expected contributions before and after the age of majority produces an amount higher than the costs of raising the child. Thus again, application of the loss-to-dependents measure, even extended past the child's age of majority, may result in zero liability for the tortfeasor.

Even if counting economic contributions past the age of majority increases the amount of damages, the measure also has the same problems as the loss-of-estate-economic-damages measure applied to deceased children. First, it still immorally treats a child as a stream of income that parents lose when their child dies. Parents whose child would be a doctor likely recover more in damages than parents whose child would be a mechanic, given that the doctor would have more income to contribute. Second, projecting a child's economic contributions to his parents past the age of majority increases the degree of speculation[199]—requiring evaluation of things like the minor child's future earning capacity, "whether or not the child would marry, have dependents of his own, how close his association with the beneficiaries would remain, and so forth."[200] Relatedly, estimating economic damages past the age of majority also increases the chances

[196] *See, e.g.*, Ronen Avraham & Kimberly Yuracko, *Torts and Discrimination*, 78 OHIO ST. L.J. 661, 669 (2017); Martha Chamallas, *Questioning the Use of Race-Specific and Gender-Specific Economic Data in Tort Litigation: A Constitutional Argument*, 63 FORDHAM L. REV. 73, 75 (1994).

[197] Landreth v. Reed *ex rel.* Reed, 570 S.W.2d 486, 491-92 (Tex. App. 1978); *see also, e.g.*, Inspirational Consol. Copper Co. v. Bryan, 276 P. 846, 849 (Ariz. 1929); Lichtenstein v. L. Fish Furniture Co., 111 N.E. 729, 732 (Ill. 1916); Bohrman v. Pa. R. Co., 93 A.2d 190, 194-95 (N.J. Super. Ct. App. Div. 1952); Parkhill Trucking Co. v. Hopper, 256 P.2d 810, 814 (Okla. 1953).

[198] *Landreth*, 570 S.W.2d at 491-92.

[199] *See* SPEISER, *supra* note 30, § 4:26, at 524 (explaining that some courts deny damages for benefits parent would have received after child reached majority because they are too speculative).

[200] Decof, *supra* note 164, at 199.

of discrimination if the parties resort to gender- and/or race-based national statistics to help alleviate the speculative nature of the damage measure.

c. *The Lost-Investment Measure*

In the late 1950s, a fourteen-year-old boy was killed while walking on the side of the road in Michigan.[201] Using the traditional pecuniary loss instruction, the jury awarded around $15,000 in damages, including about $1000 for funeral expenses.[202] The trial court reduced the verdict to $8500, still including the funeral expenses, because "no boy this age 'could have had the earning capacity indicated by this verdict.'"[203] In 1960, the Michigan Supreme Court reversed and created a new measure for the wrongful death of children.

To replace the "barbarous" and "bloodless bookkeeping" of the traditional pecuniary measure, the Michigan Supreme Court adopted the "lost investment" measure, which bases damages on the amount the parents were likely to have invested in raising the child—"the expenses of birth, of food, of clothing, of medicines, of instruction, of nurture and shelter."[204]

The lost-investment measure should produce a larger amount of damages than the loss-to-dependents measure. The financial-dependency measure is so low is because it requires the subtraction of the high costs of raising the child. The lost investment theory instead values damages based just on those high costs. The Michigan Supreme Court could likely not foresee that the lost-investment measure would lead to exponentially growing awards. This is because, as already mentioned, the costs of raising a child have grown exponentially.[205]

Still, problems exist. The main problem is that the lost-investment measure will lead to very different awards based on the parents' economic circumstances because "[a]nnual child-rearing expenses varied considerably by household

[201] Wycko *ex rel.* Estate of Wycko v. Gnodtke, 105 N.W.2d 118, 119 (Mich. 1960).

[202] *Id.*

[203] *Id.* (quoting trial judge).

[204] *Id.* at 121, 124, 122. Lost investment was just the measure of economic damages; noneconomic damages were also available for the loss of human companionship, although claims were still limited to pecuniary loss of human companionship, not recovery for "the sorrow and anguish caused by [the child's] death." *Id.* at 123.

The lost-investment measure matches the measure of damages some states use in wrongful pregnancy cases, meaning cases in which the parent did not want the child and the defendant's negligent conduct caused the pregnancy. A minority of states will allow damages based on the costs of raising the child, although the damages are also offset by the benefit of having a child. DOBBS, *supra* note 17, § 8.2, at 665; *see also, e.g.*, Univ. of Ariz. Health Scis. Ctr. v. Superior Court, 667 P.2d 1294, 1299 (Ariz. 1983) (in banc); Ochs v. Borrelli, 445 A.2d 883, 886 (Conn. 1982). Thus, a possible progressive measure of damages for the wrongful death of a child also matches the measure of damages some states use when the child was not—at least initially—desired.

[205] *See supra* notes 161-65 and accompanying text.

income level."[206] Based on data from 2011 to 2015, the U.S. Department of Agriculture estimated that a low-income couple, defined as having an annual income of less than $59,200, spent just under $175,000 in raising a child; a middle-income couple, defined as having an annual income of over $59,200 but less than $107,400, spent just under $234,000 raising a child; and a high-income couple, defined as having an annual income of over $107,400, spent over $372,000 raising a child.[207] "The aggregate amount spent on a child by families in the highest income group, on average, was more than twice the amount spent by families in the lowest income group."[208] Notably, these figures specifically excluded the costs of sending the child to college, something that high-income parents are more capable of doing, which will only increase the amount of those parents' "investment" in their child.

High-income parents "invest" more in their children than low-income parents do. And thus, using the U.S. Department of Agriculture data and applying the lost-investment measure, parents in the highest income group would likely recover more than twice the amount of damages for the death of their child than parents in the lowest income group. Just as parents' loss after the death of their child doesn't vary based on whether the child would be a doctor or a mechanic, the loss also does not vary based on whether the parents are doctors or mechanics. Low-income parents do not lose any less than high-income parents when their children are killed, but the lost-investment measure will mean low-income parents recover less in damages.

Income differentiation will also likely lead to racial differentiation, as minority parents do not tend to earn as much as white parents. An analysis of 2016 census data showed differing median incomes depending on the race of the head of the household: $98,100 for Asian and Pacific Islander; $84,600 for Non-Hispanic White; $43,400 for Hispanic/Latino; and $38,100 for Black/African American.[209] Parents' race(s) has nothing to do with the loss that they experience when their child dies. But their income varies depending on race, and their income determines how much they would have invested in their child. Race will then play a key part in determining the parents' lost investment damages, despite race having nothing to do with the loss parents experience after the death of their child.[210]

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[206] MARK LINO ET AL., U.S. DEP'T OF AGRIC., MISC. REP. NO. 1528-2015, EXPENDITURES ON CHILDREN BY FAMILIES, 2015, at ii (2017), https://fns-prod.azureedge.net/sites/default/files/crc2015_March2017.pdf [https://perma.cc/7G7J-RNKZ].

[207] *Id.* at 24.

[208] *Id.* at 10.

[209] *Median Family Income Among Households with Children by Race and Ethnicity in the United States*, ANNIE E. CASEY FOUND., https://datacenter.kidscount.org/data/tables/8782-median-family-income-among-households-with-children-by-race-and-ethnicity [https://perma.cc/HTK7-XX6P] (last visited Feb. 11, 2020).

[210] The same problems will result from an approach like the Missouri legislature adopted in 2005—calculating the parents' pecuniary loss "based on the annual income of the deceased's parents," requiring an average of the annual income if both parents worked. MO.

2. Reforms Allowing the Recovery of Loss of Consortium Damages

As already mentioned, states eventually adopted noneconomic damages for all wrongful death claims, a measure that will increase the amount of damages in all wrongful death claims. Courts and commentators have specifically emphasized the use of noneconomic damages in cases involving deceased children, as pecuniary damages are minimal. As an example, in his important work on damages for the wrongful death of children, Leonard Decof explained: "Despite all the lip service paid to so-called pecuniary rules of damages, in the child death cases these often are mere artifacts. Isn't the true damage the bereavement, the suffering, and the loss of the love and affection of the child?"[211] Slowly but surely, many "courts have concluded that the primary value of the child is not the value of the child's services but the society, love, and affection that the child provides."[212]

A 1980 New Jersey Supreme Court case describes this emphasis.[213] The case involved the death of a high school senior.[214] The trial court gave a pecuniary-damage-measure instruction, and the jury awarded no damages.[215] The New Jersey Supreme Court characterized the verdict as "a miscarriage of justice."[216] The court announced the availability of (the pecuniary value of) loss of consortium damages and specifically explained that "[e]xtension of the scope of recovery in cases involving a child's death should reduce the adverse effect the present restrictive rules probably have on juries."[217]

"[E]ither by statute or judicial decision, the majority of jurisdictions permit parental recovery for the loss of their child's society in a wrongful death

REV. STAT. § 537.090 (2005). Presumably, this was an attempt to increase the amount of economic damages and provide some basis for the jury to measure. This approach, though, will mean lower damage awards for lower-income parents, who will in many cases belong to a racial minority.

[211] Decof, *supra* note 164, at 206.

[212] Gary A. Meadows, *Wrongful Death and the Lost Society of the Unborn*, 13 J. LEGAL MED. 99, 108 (1992). Feminist legal scholars suggest that the delay in recognition of the relational injury is due to its association with women—that mothers were the ones really hurt when their children were killed or injured. Chamallas, *supra* note 191, at 500 (explaining that because of categorization as "female" injury, "relational injuries continue to rank at the bottom of the legal hierarchy of injuries. At different historical periods, certain relational claims have gained visibility, but there has never been widespread legal protection for this type of injury"). This Article suggests another nongendered reason—that the loss of children was simply not a relational injury due to the expectation of the loss and the related economic valuation of children. *Id.* at 490.

[213] Green *ex rel.* Estate of Green v. Bittner, 424 A.2d 210, 211 (N.J. 1980).

[214] *Id.* ("In the spring of her senior year at high school, Donna Green was killed in an automobile accident.").

[215] *Id.* at 212.

[216] *Id.* at 211.

[217] *Id.* at 219.

action."[218] Some but not all states allow recovery for parents for their general mental anguish following their child's death.[219] The same availability rules apply to the deaths of unborn children, despite some initial conclusions that "birth is a proper point at which to begin to measure the loss of a child's society."[220] Today though, most courts that allow for recovery of loss of consortium damages also do so in cases of stillbirth.[221]

Viviana Zelizer specifically points to the emphasis on consortium damages for the death of a child as evidence of the changing value of children, from economic to sentimental.[222] "The price of a nineteenth-century child determined its value; however, gradually sentimental value became the determinant of economic price."[223] To her, consortium damages meant that children's lives were no longer valued by their possible economic contributions but by the parents' "inestimable grief."[224]

Increasing use of noneconomic damages has increased damage awards for all wrongful death claims—exponentially increasing the awards for deceased children but also increasing the awards for deceased adults. These increases, however, have been more recently curtailed by tort reform efforts. Recovery of economic damages remains unlimited. But caps on noneconomic damages are a popular focus of tort reform efforts,[225] now existing in some form in over twenty states.[226] Noneconomic damage caps mean parents' recovery of noneconomic

[218] Meadows, *supra* note 212, at 108; *see also* SPEISER, *supra* note 30, § 4:23, at 511 ("Continuing criticism leveled against the refusal to permit compensation for mental anguish and pain and suffering which so often attends the death of a child has led several States in recent years to change their statutes so as to permit recovery for mental anguish and related non-pecuniary damages.").

[219] *See* McClurg, *supra* note 17, at 26-27 (noting that only minority of states allow recovery for "grief or mental anguish" damages).

[220] Hunt v. Chettri, 510 N.E.2d 1324, 1326 (Ill. App. Ct. 1987).

[221] *See, e.g.*, Burnham v. Miller, 972 P.2d 645, 647 (Ariz. Ct. App. 1998) ("[A] parent's loss of a child's expected love and companionship does not vanish simply because the child is lost before birth."); Dunn *ex rel.* Estate of Dunn v. Rose Way, Inc., 333 N.W.2d 830, 833 (Iowa 1983) (en banc) (recognizing that lost parent-child relationship "does not necessarily relate to the child's birth. And the parents' loss certainly does not vanish because the deprivation occurred prior to birth. To the deprived parent the loss is real either way").

[222] ZELIZER, *supra* note 15, at 164.

[223] *Id.*

[224] *Id.* at 165.

[225] Lucinda M. Finley, *The Hidden Victims of Tort Reform: Women, Children, and the Elderly*, 53 EMORY L.J. 1263, 1263 (2004).

[226] *See, e.g.*, MD. CODE ANN., CTS. & JUD. PROC. § 11-108 (West 2013); MICH. COMP. LAWS § 600.1483 (2013); MONT. CODE ANN. § 25-9-411 (1995); NEB. REV. STAT. § 44-2825(1) (2014); NEV. REV. STAT. § 41A.035 (2004); N.M. STAT. ANN. § 41-5-6 (1992); OHIO REV. CODE ANN. § 2323.43 (LexisNexis 2010); S.C. CODE ANN. § 15-32-220 (1976); S.D. CODIFIED LAWS § 21-3-11 (2017).

damages—the only significant damage they have after the death of their child—will be limited to $250,000; $500,000; or whatever arbitrary number the state legislature chose.

Some states created noneconomic damage caps specific to wrongful death claims involving children. For instance, New Hampshire allows $150,000 in consortium damages for a deceased spouse, a case that will likely still involve significant economic damages, but only $50,000 for a deceased child, a case without significant economic damages.[227] Tennessee's noneconomic damage cap is $750,000,[228] but it extends to $1 million for the "[w]rongful death of a parent leaving a surviving minor child or children"[229]—again, despite the likely presence of significant economic damages if a parent is killed. Wisconsin's cap better recognizes the importance of loss of consortium damages to parents, allowing $500,000 noneconomic damages "for loss of society and companionship . . . in the case of a deceased minor" versus $350,000 "in the case of a deceased adult."[230] But only a $150,000 damage boost does little to make up for the fact that parents lack significant economic damages.

Regardless, the now common existence of noneconomic damage caps means that parents' noneconomic damage recovery for the wrongful death of their child will be arbitrarily limited to the same noneconomic award courts emphasized to increase recovery in these cases. Moreover, it is extremely difficult for juries to shift damages to avoid the application of noneconomic caps as some studies have concluded. Professor Catherine Sharkey studied jury verdicts in medical malpractice claims and found that where recovery of noneconomic damages is capped, juries award greater amounts of (uncapped) economic damages.[231] She thus found economic damages to be more malleable than expected.[232] Although I have not done any empirical analysis, economic damages for the wrongful death of a child are likely much less malleable because they're essentially nonexistent. Before the adoption of consortium damages, courts repeatedly reversed substantial economic damage recovery for the wrongful death of a child

Some noneconomic damage caps do not apply to wrongful death claims. *See, e.g.*, MASS. GEN. LAWS ch. 231, § 60H (1986); N.C. GEN. STAT. § 90-21.19(b) (2011); N.D. CENT. CODE § 32-42-02 (2010); OKLA. STAT. ANN. tit. 23, § 61.2(H) (West 2011) (applying noneconomic cap only to cases involving bodily injury); W. VA. CODE ANN. § 55-7B-8 (LexisNexis 2016).

Or some states set a higher cap for wrongful death claims. *See, e.g.*, MO. ANN. STAT. § 538.210 (West 2019) (setting cap on noneconomic damages in medical malpractice claim at $400,000 for cases involving "personal injury" and at $700,000 for cases involving death); TEX. CIV. PRAC. & REM. CODE ANN. §§ 74.301-.303 (West 2017) (setting different monetary caps for medical malpractice claims involving injuries versus wrongful death).

[227] N.H. REV. STAT. ANN. § 556:12 (2019).

[228] TENN. CODE ANN. § 29-39-102(a)(2) (2019).

[229] *Id.* § 29-39-102(c)-(d)(4).

[230] WIS. STAT. § 895.04(4) (2018).

[231] *See* Catherine M. Sharkey, *Unintended Consequences of Medical Malpractice Damages Caps*, 80 N.Y.U. L. REV. 391, 396 (2005).

[232] *Id.* at 429.

because the child was considered economic burden, not an economic benefit. Thus, parents are left only with the capped recovery of noneconomic damages, the one damage that was supposed to fix parents' inadequate damage recovery in wrongful death of children cases.[233]

II. A NEW DAMAGE: PUNITIVE DAMAGES

Numerous respected scholars, including Professors Cass Sunstein and Eric Posner[234] and Professor Sean Hannon Williams,[235] have criticized wrongful death damages—both for adults and children—by focusing on the fact that current damage measures fail to create the proper level of deterrence.[236] They have introduced numerous measures to increase damage amounts, including damages based on evaluating the deceased's willingness to pay to avoid the

[233] Another possible idea to increase the recovery of damages for parents after the wrongful death of children is not to actually increase the amount of damages for the wrongful death claim but to increase damages for the child's survivorship claim. *See* Ireland & Ward, *supra* note 183, at 26-27 (arguing that survivorship claims could be expanded to increase recovery for parents after wrongful death of children). This is just a substitute, however. It does not better recognize the extent of the parents' loss; it instead increases the child's own damages, which the parents are likely to collect as the only beneficiaries.

Plus, the suggested increase in damages awarded to the deceased child is usually via an increase in noneconomic damages, which would also be subject to any noneconomic damage cap. And it is difficult to apply the suggested concepts to children. For instance, Arkansas's survivorship statute allows recovery for "decedent's loss of life." ARK. CODE ANN. § 16-62-101 (2001). The Arkansas Supreme Court has ruled, however, that the decedent's estate must "present *some* evidence[] that the decedent valued his or her life." One Nat'l Bank *ex rel.* Estate of Kaz v. Pope, 272 S.W.3d 98, 102 (Ark. 2008). Professors Posner and Sunstein specifically discussed the difficulty of determining how much a deceased child valued his life:

> The problem with the study is that it does not even purport to show how much children are willing to pay to reduce the risk of death; it shows what adults are willing to pay to reduce the risk of death to their children. The parent's [willingness to pay] for avoiding a child's death is not a good proxy for the child's welfare loss because parents are not pure altruists and are willing to trade off their children's risk of death against other things such as their own utility from consumption. If we wanted to find out how children value mortality risks, we would need to look at the children's own attitudes and behavior. But children do not usually have income, rarely make their own decisions about purchasing safety equipment, and have poor judgment about risks.

Posner & Sunstein, *supra* note 11, at 575-76 (footnote omitted).

[234] Posner & Sunstein, *supra* note 11, at 590.

[235] Sean Hannon Williams, *Dead Children*, 67 ALA. L. REV. 739, 765-66 (2016). *See generally* Joni Hersch & W. Kip Viscusi, *Saving Lives Through Punitive Damages*, 83 S. CAL. L. REV. 229, 230 (2010) (suggesting that administrative law concept of "value of statistical life" be used to determine amount of punitive damages available in wrongful death claim to better achieve deterrence).

[236] If deterrence is the goal, compensatory damages do have an inherently deterrent effect, but their overwhelming purpose is compensatory. Usually, punitive damages are used to achieve deterrence.

risk[237] or an automatic doubling of damages in cases involving child deaths.[238] However, these reform structures still attempt to dig us out of the hole first caused by the traditional pecuniary measure of compensatory damages for the wrongful death of children—a measure based on the nineteenth-century child.

Rather, what this Article suggests is not a reform to the current measures of compensatory damages but the use of a different type of damages—punitive damages, which parents should recover exclusively for the wrongful death of their child. Only a clean break from compensatory damages can enable wrongful death law to truly appreciate today's cultural notions of "child life as uniquely sacred and child death as singularly tragic."[239]

Although all wrongful death law departs from the common law, a punitive-only statutory system also departs from common law limitations making punitive damages available only when the defendant acts intentionally or recklessly. Still, a system of punitive damages for the wrongful death of children is not unprecedented. Since 1877, Alabama has exclusively awarded punitive damages in all wrongful death claims, regardless of the defendant's culpability, even when a defendant is only negligent.[240] Notably, influential voices in

[237] *See* Posner & Sunstein, *supra* note 11, at 587-88 (suggesting juries can determine hedonic loss by "[e]stimat[ing] the amount of money that the victim would have paid to avoid the risk" imposed by tortfeasor).

[238] *See* Williams, *supra* note 235, at 765-66.

[239] ZELIZER, *supra* note 15, at 32 (noting that cultural shifts during twentieth century fostered new views that children were "emotionally priceless assets," regardless of social class).

[240] *See, e.g.*, Savannah & Memphis R.R. Co. v. Shearer, 58 Ala. 672, 680 (1877). Massachusetts previously gave punitive damages exclusively for wrongful death damage recovery as well. *See* Gaudette v. Webb, 284 N.E.2d 222, 226-27 n.4 (Mass. 1972) (discussing history of damages recoverable for wrongful death claims). However, the Massachusetts state legislature amended the statute in 1973 to the traditional compensatory damage measure. MASS. GEN. LAWS ch. 699, § 2 (1974).

Very few have commented specifically on Alabama's punitive-only damages system. University of Alabama law professor Susan Randall says that it "works gross inequities for the dependents of wrongful death victims" and completely ignores "the needs of dependents." Susan Randall, Essay, *Only in Alabama: A Modest Tort Agenda*, 60 ALA. L. REV. 977, 983 (2009). A student note highlighted the "economically inequitable results," explaining that, even "if a physician is killed by the defendant's actions" and the surviving family members suffer a "substantial loss of income," their recovery will not be based on that economic loss. Branum, *supra* note 173, at 893. Another student note similarly argued that compensatory damages must be available to make surviving family members "whole," and yet another argued that punitive damages actually have a "punitive effect" on a plaintiff by "preclud[ing] such a plaintiff from proving and recovering damages relating to lost future earnings of the deceased." Jonathan Toby Dykes, Note, *Alabama's Wrongful Death Act: A Time for Change*, 21 AM. J. TRIAL ADVOC. 617, 648-49 (1998); J.D. Marsh, Note, *Plaintiff's Recovery Limited to Punitive Damages: The Punitive Nature of the Alabama Wrongful Death Statute*, 46 CUMB. L. REV. 255, 261 (2016). Another interesting criticism is that a punitive damage award for wrongful death is more easily reduced by an appellate court than by a compensatory damage

Alabama law have specifically noted the appropriateness of punitive redress for parents in wrongful death of children cases. Birmingham attorney Francis H. Hare, Sr. once explained that "compensatory statutes in other states made no substantial provision for the most hideous wrongful deaths, those of helpless infants and elderly people, perhaps because the pecuniary value of their lives to their survivors was negative or a minus quantity."[241] Similarly, Cumberland School of Law's former Associate Dean and Associate Professor Francis E. McGovern explained that "[t]he death of a minor . . . — even when the death occurred under aggravated circumstances — is worth relatively little in a compensatory jurisdiction. With Alabama's punitive damages those cases can have substantially more value."[242]

Another precedent is the evidence that jurors already commonly award punitive damages in wrongful death of children cases.[243] Interpreting the results

award. *See* Marsh, *supra*, at 266-67. But appellate courts are similarly less deferential to juries' determinations of noneconomic damages, as they, like punitive damage amounts, are not necessarily based entirely in fact.

These criticisms of Alabama's system, however, are focused on damages for the wrongful death of income-producing adults. The concerns about dependents' needs are concerns about the dependents of income-producing adults, such as the doctor who leaves behind a spouse and children who were dependent on his income. These economic inequity arguments are not applicable to the wrongful death of children, who do not leave behind any financial dependents.

[241] LESLIE A. JEFFRIES, WRONGFUL DEATH ACTIONS: THE LAW IN ALABAMA, at v (1979) (quoting Francis H. Hare, Sr.); *see also* Estes Health Care Ctrs., Inc. v. Bannerman *ex rel.* Estate of Cowan, 411 So. 2d 109, 113 (Ala. 1982) (explaining that punitive damages recognize "[d]ivine concept that all human life is precious"); Branum, *supra* note 173, at 887 (explaining that punitive damages recognize that "no one human life is more precious than another").

[242] JEFFRIES, *supra* note 241, at vii (quoting Francis E. McGovern).

[243] The current availability of punitive damages for wrongful death claims—always in addition to compensatory damages if awarded, consistent with the common law—depends on state law. The *Restatement (Second) of Torts* notes that punitive damages are not commonly available for wrongful death claims, likely due to the traditional pecuniary damage limitation. RESTATEMENT (SECOND) OF TORTS § 908 cmt. a (AM. LAW INST. 1977). But numerous states allow the recovery of punitive damages. *See, e.g.*, FLA. STAT. ANN. § 768.72 (West 2019); KY. REV. STAT. ANN. § 411.130(1) (West 2019); ME. REV. STAT. ANN. tit. 18-C, § 2-807(2) (2019); MASS. GEN. LAWS ANN. ch. 229, § 2 (West 2019); MINN. STAT. ANN. § 549.20 subdiv. 1(a) (2019); MO. ANN. STAT. § 537.090 (West 2019); NEV. REV. STAT. ANN. § 42.005 (LexisNexis 2019); N.M. STAT. ANN. § 41-2-3 (2019); N.Y. EST. POWERS & TRUSTS LAW § 5-4.3(b) (McKinney 2019); N.C. GEN. STAT. § 28A-18-2(b)(5) (2019); OKLA. STAT. ANN. tit. 12, § 1053(C) (West 2019); OR. REV. STAT. ANN. § 30.020(2)(e) (West 2019); S.C. CODE ANN. § 15-51-40 (2019); TEX. CIV. PRAC. & REM. CODE ANN. § 71.009 (West 2019); UTAH CODE ANN. § 78B-3-106(4) (LexisNexis 2019); VA. CODE ANN. § 8.01-52(5) (West 2019); WYO. STAT. ANN. § 1-38-102(c) (2019); Koppinger v. Cullen-Schiltz & Assocs., 513 F.2d 901, 909 (8th Cir. 1975); Puppe *ex rel.* Puppe v. A.C. & S., Inc., 733 F. Supp. 1355, 1359 (D.N.D. 1990); Tommy's Elbow Room, Inc. v. Kavorkian *ex rel.* Estate of Kavorkian, 727

of one study of wrongful death damages, Professors Sunstein and Posner noted that the highest awards make it so the "mean [award] for children is higher but the median is lower."[244] The awards included punitive damages, making Sunstein and Posner "suspect that, although on average juries value children less than adults, the deaths of children are more likely to provoke outrage and extreme awards."[245]

Awarding punitive damages would finally afford parents private redress for the death of their child. Compensatory measures are tied to a corrective justice theory of tort law, which focuses on making the parents whole after their loss of a child. However, this make-whole focus wrongly assumes that parents want to be made whole. Rather, what they want is to grieve and to remember their child, not to be made whole as if the child never existed. The make-whole focus also underestimates the moral injury parents suffer when forced to bury a child due to tort. Punitive damages would empower parents, allowing them to obtain redress for the wrong they experience and express their moral outrage. This would be a substantive response that is sensitive to the context of tortious child death, and their recovery would be both significant and meaningful to parents forced to endure the tortious death of their child. Additionally, punitive damages, unlike compensatory damages, have the expressive capability to condemn the personal and cultural tragedy of child death.

Admittedly, although an improvement over compensatory damages, a system of punitive damages for the wrongful death of children is imperfect.[246] To address those imperfections, this Part concludes by suggesting factors and setting an award baseline, explaining the political feasibility of a punitive-damages-only system and explaining the lack of constitutional problems with a punitive-damages-only system.

P.2d 1038, 1048-49 (Alaska 1986); Torres *ex rel.* Torres v. N. Am. Van Lines, Inc., 658 P.2d 835, 839 (Ariz. Ct. App. 1982); Vickery v. Ballentine *ex rel.* Estate of Ballentine, 732 S.W.2d 160, 162 (Ark. 1987); Gionfriddo *ex rel.* Estate of Gionfriddo v. Avis Rent A Car Sys., Inc., 472 A.2d 306, 312 (Conn. 1984); Smith *ex rel.* Smith v. Printup, 938 P.2d 1261, 1272 (Kan. 1997); Sandifer Oil Co. v. Dew, 71 So. 2d 752, 758-59 (Miss. 1954); Olsen v. Mont. Ore Purchasing Co., 89 P. 731, 734 (Mont. 1907); Pratt v. Duck, 191 S.W.2d 562, 564-65 (Tenn. Ct. App. 1945); Behrens *ex rel.* Behrens v. Raleigh Hills Hosp. Inc., 675 P.2d 1179, 1184-86 (Utah 1983); Bond v. City of Huntington, 276 S.E.2d 539, 544-46 (W. Va. 1981).

[244] Posner & Sunstein, *supra* note 11, at 574 n.119.

[245] *Id.*

[246] As discussed, this reform would need to be statutory. This begs the question of why reforms shouldn't create an entirely new damage for bereaved parents instead of relying on punitive damages, which could be politically problematic. *See infra* Section II.D.2. However, if the focus of punitive damages is the plaintiff's moral injury, which is true under a private-redress theory, punitive damages are appropriate in response to a parent losing their child. Plus, a new type of damage would lack the expressive function that punitive damages have built up over centuries. *See infra* Section II.C.

A. *Providing Parents Private Redress*

Most of the legal scholarship on punitive damages of the last few decades has focused on the wrongdoer—how punitive damages may infringe on his constitutional rights and what a constitutional punitive damage award looks like. This focus was due to the constitutional limitations of punitive damages that the Supreme Court first started introducing in the 1990s.[247] While still writing within the confines the constitutionality of punitive damages, a few legal scholars also focused on the victim's role in choosing to pursue and obtain punitive damages. This victim-focused theory has been labeled private-redress theory. The most prominent private-redress theories have been introduced by Professors Anthony Sebok and Benjamin C. Zipursky.[248]

Professor Zipursky started by recounting the double aspect of punitive damages that makes them so controversial: "They are in part like fines collected by the bounty hunters who prosecute tort cases, and they are in part like damages awards in a civil action."[249] He later introduced a distinction that can help define the constitutionality of punitive damages: an unconstitutional public law idea of punitive damages as a "noncompliance sanction conception" and the constitutional private law idea of punitive damages as "the private redress conception" that enables a victim's right to be punitive and inflict an injury on the defendant."[250]

Focusing on the private-redress conception, Professor Zipursky drew from his own created civil recourse theory of tort law, a "model of rights, wrongs, and recourse" that explains tort law as empowering a victim to seek redress through a tort action.[251] The tort action is "literally a legal power to force defendant to pay plaintiff, a legal power to take from the defendant."[252]

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[247] *See, e.g.*, BMW of N. Am., Inc. v. Gore, 517 U.S. 559, 585 (1996).

[248] *See generally* Anthony J. Sebok, *Punitive Damages: From Myth to Theory*, 92 IOWA L. REV. 957 (2007) (arguing that punitive damages are best understood as a form of private retribution); Benjamin C. Zipursky, *A Theory of Punitive Damages*, 84 TEX. L. REV. 105 (2005) [hereinafter Zipursky, *Theory*] (describing heightened constitutional scrutiny as inappropriate where case best understood as plaintiff exercising his or her right to be punitive).

[249] Zipursky, *Theory*, *supra* note 248, at 130.

[250] Benjamin C. Zipursky, Palsgraf*, Punitive Damages, and Preemption*, 125 HARV. L. REV. 1757, 1777 (2012) [hereinafter Zipursky, *Punitive Damages*].

[251] Zipursky, *Theory*, *supra* note 248, at 149. Zipursky first introduced civil recourse theory in a *Vanderbilt Law Review* article. Benjamin C. Zipursky, *Rights, Wrongs, and Recourse in the Law of Torts*, 51 VAND. L. REV. 1, 6 (1998) [hereinafter Zipursky, *Rights*]. He later developed it further with Professor John Goldberg. *See* John C.P. Goldberg & Benjamin C. Zipursky, *Torts as Wrongs*, 88 TEX. L. REV. 917, 972 (2010). Civil recourse theory explains that tort law "is about respecting the rights between the private parties" and enabling "individuals who have been wronged to seek redress through the courts." Zipursky, *Punitive Damages*, *supra* note 250, at 1777-78.

[252] Zipursky, *Theory*, *supra* note 248, at 150.

Consistent with civil recourse theory, in some cases the "plaintiff is entitled to go beyond making whole; she is entitled to *be punitive*."[253] Under the conception of private redress, punitive damages are appropriate because of "the nature of wrong the defendant required the victim . . . to endure."[254] Accordingly, punitive damages empower the victim specifically to "be[] the one who requires the defendant to endure a hardship."[255] Professor Zipursky explained how this conception of punitive damages "meshes" well with the history of punitive damages.[256] Plaintiffs are normally allowed to recover only compensatory damages, but if forced to endure a more culpable wrong, like an intentional tort, then the plaintiff is empowered to seek punitive damages.[257]

Professor Zipursky admits to the possibly distasteful "quality of vengefulness" within this private, civil aspect of punitive damages.[258] He cautions, however, that he is "not alluding to *lex talionis*, an eye for an eye," but instead "a considerably weaker, more civil idea" of punitiveness—that tort law enables "private parties, when a jury so decides, to exact monetary damages that go beyond compensatory damages."[259]

Anthony Sebok also introduced a private-redress theory of punitive damages. He first looked to history, explaining that early English punitive damage cases "focus[ed] on the insulting and humiliating character of the tortfeasor's act."[260] Later American cases similarly imposed punitive damages in cases where the defendant consciously disdained plaintiffs' rights, thereby expressing disrespect "similar to that expressed by an act of insult or humiliation."[261] After discussing this history, Professor Sebok turned to philosopher Jean Hampton's work on moral injuries: "A person behaves wrongfully in a way that effects a moral injury to another when she treats that person in a way that is precluded by that person's value, and/or by representing him as worth far less than his actual value . . . ."[262] Professor Sebok then explains that "[p]unishment is the appropriate response to impermissible exercises of power because it is a form of defeating the

[253] *Id.* at 151.

[254] *Id.* at 154.

[255] *Id.*

[256] *Id.* at 152.

[257] *See id.* at 154 ("The imposition of punitive damages reflects a judgment that a private person is entitled, in light of the wrong done to him or her, to act upon the defendant in a manner that exceeds what is necessary to restore her holdings—to be compensated for the injury done. She is entitled to exact a punitive sanction from the defendant in light of what he did to her and how he did it.").

[258] *Id.* at 154-55.

[259] *Id.* at 155.

[260] Sebok, *supra* note 248, at 1009.

[261] *Id.* at 1013.

[262] *Id.* at 1018 (quoting Jean Hampton, *Correcting Harms Versus Righting Wrongs: The Goal of Retribution*, 39 UCLA L. REV. 1659, 1677 (1992)).

wrongdoer."[263] And that punishment must be within a claim brought by the victim because "[n]o one else can establish the victim's true value but the wrongdoer because nothing can establish the truth except the wrongdoer's own defeat by the victim."[264] Thus, Professor Sebok expressly recharacterized Hampton's retributive idea as one of personal revenge.

Professor Sebok then applied this revenge concept to civil recourse theory, explaining that the right to redress is personal to the injured plaintiff.[265] The plaintiff has a right to her tort claim and to punitive damages when the defendant violates two rights: "The primary private right (to physical security, property, etc.) and the right to be treated as someone deserving to have those primary private rights respected by others (or at least the defendant)."[266] The plaintiff has control and the "right to decide whether and how the wrongdoer will suffer punishment."[267] She "argu[es] for punishment based on reasons that she hopes the court will take as objectively valid," and, if accepted, "[t]he victory of her argument for punishment . . . is her redress."[268]

Professor Martínez Alles recently added an important contribution to a more plaintiff-focused theory of punitive damages through the lenses of cognitive and social psychology. Building from private-redress theories, which do focus on the victim's role, she focuses on the victim's motivations in seeking punitive damages or, in other words, on "the actual significance of the wrongdoing for the victim."[269] She argues that the victim is motivated by her own moral outrage—outrage that "is linked both to the severity of the conduct and to the value attributed by the victim to the interest affected by the defendant's wrongful conduct."[270]

Parents' main redress for the wrongful death of their child is currently made up of compensatory damages, more consistent with the corrective justice theory of tort law rather than civil-recourse or private-redress theory. Corrective justice theory assumes that the purpose of tort law is to make an injured victim whole after her injury. Really, the only remedy permitted by corrective justice theory is compensatory damages. This concept of being made whole does not apply well to parents after the death of their child. Arguably, being made whole is impossible, especially if damages are capped, but that is true for many torts.

But a larger problem exists with any make-whole compensatory damage remedy for bereaved parents—they do not want to be made whole. Parents do not want to undo their grief after the death of their child: "We grieve what we

[263] *Id.* at 1019.

[264] *Id.* at 1020.

[265] *Id.* at 1023-24.

[266] *Id.* at 1014.

[267] *Id.* at 1028.

[268] *Id.* at 1029.

[269] María Guadalupe Martínez Alles, *Moral Outrage and Betrayal Aversion: The Psychology of Punitive Damages*, 11 J. TORT L. 245, 249 (2018) (emphasis omitted).

[270] *Id.* at 268.

value; we grieve in proportion to our affection."[271] Parents want to grieve; eradicating grief would also mean relinquishing the love for that child, an impossible idea.[272] Parents do not want to move on from their deceased child; they instead seek to "make sense of [their] new world while simultaneously incorporating the death of their child into that world."[273] Parents want to ensure that their child is not "gone and forgotten," a task that is even more difficult when the child was young or if death occurred before birth.[274] Compensatory damages attempt to make parents whole, to ease their grief. But erasing grief is erasing the child, the exact thing parents don't want. "[P]arents may not wish to relinquish their grief. The pain is part of the memory—and the memory is precious" and keeps a connection with the deceased child.[275]

Private-redress theory, as an extension of civil recourse theory, provides a new way to evaluate parents' redress after the death of their child. Although neither civil recourse nor private-redress theories purport to determine the type or amount of damages a victim should receive, the theories allow more flexible relief than corrective justice theory.[276] The theories allow tort law to consider the nature of the wrong the defendant required the parents to endure and the possibility that the parents suffered a moral injury deserving of punitive damages. Moreover, using Professor Martínez Alles's language, enabling punitive damages signifies the "significance of the wrongdoing" for the parents and allows them to express their own moral outrage.[277]

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[271] GLENN R. SCHIRALDI, THE POST-TRAUMATIC STRESS DISORDER SOURCEBOOK: A GUIDE TO HEALING, RECOVERY, AND GROWTH 236 (2000); *see also* ARNOLD & GEMMA, *supra* note 2, at 28 ("Grieving becomes a way of keeping connected. Searching and yearning for the child as the means of reuniting and reestablishing a connection continue despite the fact of death.").

[272] JOANNE CACCIATORE, BEARING THE UNBEARABLE: LOVE, LOSS, AND THE HEARTBREAKING PATH OF GRIEF 12 (2017) ("It almost seems that the only way to eradicate our grief would be to relinquish the love we feel—to disassemble our loved one's place in our lives . . . . Grief and love occur in tandem."); TEDESCHI & CALHOUN, *supra* note 2, at 46 (explaining that bereaved parents do not desire "closure" because it means "that their child's death has been put aside, and that there is no longer a recognition or emotional memory of them"); *see also* Joan Arnold & Penelope Buschman Gemma, *The Continuing Process of Parental Grief*, 32 DEATH STUD. 658, 658 (2008) ("The associated lifelong grief for parents becomes the connection between parent and child beyond the child's death.").

[273] Laura T. Matthews & Samuel J. Marwit, *Examining the Assumptive World Views of Parents Bereaved by Accident, Murder, and Illness*, 48 OMEGA J. DEATH & DYING 115, 132 (2004).

[274] TEDESCHI & CALHOUN, *supra* note 2, at 51.

[275] ROBERT J. KASTENBAUM, DEATH, SOCIETY, AND HUMAN EXPERIENCE 338 (7th ed. 2001).

[276] *See* Zipursky, *Rights*, *supra* note 251, at 96 (arguing superiority of civil recourse theory in that it, unlike other theories of tort law like corrective justice, leaves room for remedies like punitive damages that do more than make plaintiff whole).

[277] Martínez Alles, *supra* note 269, at 268.

Additionally, any punitive damage award for parents in wrongful death of children cases also satisfies the original point of private-redress theories—trying to delineate the constitutionality of punitive damage awards. Such an award would be tailored to only the parents' injury and the wrong they experienced, as opposed to some broader public purpose.[278] The more difficult question for private-redress theories and punitive damages in wrongful death of children cases, however, is its departure from the traditional limitations on the availability of punitive damages, which I address next.

B. *Recognizing Parents' Moral Injury*

Both interpretive private-redress theories and Professor Martínez Alles's psychological perspective of punitive damages assume punitive damages are available only for intentional and reckless conduct, the traditional limitations.[279] Private-redress theories explain that punitive damage should be available when the defendant disrespects the plaintiff with his intentional or reckless conduct, a disrespect that Sebok equated to Jean Hampton's idea of "moral injury."[280] Professor Martínez Alles similarly relies on notions of disrespect, exploring how the availability of punitive damages should consider how a plaintiff reacts to a "serious act[] of disrespect."[281] These historical and traditional assumptions pose a problem in applying these theories to my proposal for punitive damages for wrongful death of children claims, as the damages would be available in any case where a parent loses a child, even if the tortfeasor acts less than intentionally or recklessly.

The idea of evolving the theory of moral injury is not itself radical, as the definition has already evolved. Originally, punitive damages were available only when the defendant committed intentional conduct, basically only for intentional torts like battery, assault, false imprisonment, or fraud.[282] Starting around the 1960s, courts and legislatures announced that punitive damages would also be

[278] The fact that a punitive damage award for the defendant's killing a child also reflects societal views of child death does not affect this. The punitive damage award would only reflect the defendant's killing the particular parents' child, meaning the award is consistent with private-redress theories. The punitive damage award, however, just also happens to be consistent with the tragedy of child death.

[279] Private-redress theory is expressly interpretive, so not meant to contemplate changes to punitive damages jurisprudence. *See* Sebok, *supra* note 248, at 1014; Zipursky, *Punitive Damages*, *supra* note 250, at 1777.

[280] Sebok, *supra* note 248, at 1018 (discussing Jean Hampton's idea of moral injury); *see also* Zipursky, *Theory*, *supra* note 248, at 151 (explaining that plaintiff is entitled to be punished "because of the manner in which she was wronged—willfully or maliciously," and that, "[h]aving suffered this insult, the plaintiff is herself entitled to redress at a different level").

[281] Martínez Alles, *supra* note 269, at 268.

[282] Victor E. Schwartz, Mark A. Behrens & Joseph P. Mastrosimone, *Reining in Punitive Damages "Run Wild": Proposals for Reform by Courts and Legislatures*, 65 BROOK. L. REV. 1003, 1007 (1999).

available for the culpability level referred to as both recklessness and gross negligence.[283] Essentially, "punitive damages [became] available . . . for torts utterly unlike those which had characterized punitive damages in the first half of the twentieth century."[284] Private-redress theorists track the idea of "moral injury" with the common law development of the availability of punitive damages despite this dramatic expansion.[285] The current defining line of moral injury is the disrespect the plaintiff feels when she is injured by intentional or reckless conduct, a disrespect so far supposedly not present if she is injured by negligent conduct. The definitiveness of this line is questionable, however, as it is not always so easy to tell the difference between reckless conduct and negligent conduct.[286] Regardless, current availability of punitive damages depends on intentional or reckless conduct unless a statute defines it otherwise, like Alabama's wrongful death statute does—the exact type of statute that would be necessary for this Article's proposal.

The limitations on the availability of punitive damages are defendant-focused, depending on the defendant's level of culpability and assuming disrespect or

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[283] RESTATEMENT (SECOND) OF TORTS § 500 (AM. LAW INST. 1965) (defining recklessness as "knowing or having reason to know of facts which would lead a reasonable man to realize, not only that his conduct creates an unreasonable risk of physical harm to another, but also that such risk is substantially greater than that which is necessary to make his conduct negligent"); Steven B. Hantler et al., *Moving Toward the Fully Informed Jury*, 3 GEO. J.L. & PUB. POL'Y 21, 27 n.19 (2005).

[284] Zipursky, *Punitive Damages*, *supra* note 250, at 1783. Zipursky also seems to be suggesting that the very high punitive damage awards that began to emerge at this time, especially in products liability cases, may be examples of unconstitutional "noncompliance sanctions." *See id.* at 1784.

[285] *See id.* Professor Zipursky specifically posed the question of why tort law requires a "showing of willfulness or wantonness." *Id.* at 1778. His answer was that it is what our legal system does—it "judges the entitlement to some form of action against the defendant in light of what the defendant did to the plaintiff" and "judges that the scope of the response entitlement may reach beyond the self-restorative to the injury-inflicting where the underlying wrong was itself a willful or wanton infliction of injury." *Id.* at 1779. This answer does not go beyond relying on history, nor does it justify the expansion of the availability of punitive damages in the mid-twentieth century.

[286] Taylor v. Superior Court, 598 P.2d 854, 857 (Cal. 1979) (allowing recovery of punitive damages for drunk driving, conduct traditionally categorized as negligence). The court explained:

> One who willfully consumes alcoholic beverages to the point of intoxication, knowing that he thereafter must operate a motor vehicle, thereby combining sharply impaired physical and mental faculties with a vehicle capable of great force and speed, reasonably may be held to exhibit a conscious disregard of the safety of others.

Id. Thus, sufficient culpability existed even though the defendant lacked specific knowledge that would hurt someone. It's easy to see the same analysis being used to conclude that punitive damages should also be available for texting while driving, also conduct traditionally thought of as negligent.

moral injury results for the plaintiff due to that culpability.[287] This limitation is both overinclusive and underinclusive. It assumes moral injury for all cases of intentional and reckless conduct, regardless of what the plaintiff actually experiences. At the same time, the historical limitations deny the possibility of the actual plaintiff suffering moral injury when the defendant's conduct is negligent. Jury instructions tell the jury it can award punitive damages if it finds that the defendant acted intentionally or recklessly but not if it finds that the plaintiff suffered disrespect or moral injury. Even Professor Martínez Alles, who set out to focus on the plaintiff's psychological motivations in seeking punitive damages, describes that punitive damages should be available for the "types of wrongful conducts that are intuitively offensive to our moral sensibilities,"[288] yet she assumes that those wrongful conducts include only reckless and intentional conduct.

Focusing on the underinclusiveness, does moral outrage, either personal or cultural, really only result from intentional and reckless conduct? If tied to historical limitations, a plaintiff's moral outrage based on a defendant's defrauding the plaintiff of $500 is deserving of legal recognition via an award of punitive damages. But a plaintiff parent's moral outrage based on a defendant carelessly texting while driving in a school zone and killing that parent's child is not. The significance of the wrongdoing to the plaintiff differs dramatically in these two scenarios. There is no greater shock to the order of life, expectations about life, and understanding of life than to bury a child. And "the value attributed by the victim to the interest affected by the defendant's wrongful conduct"[289]—the parent-child relationship—is undoubtedly high, if not the parent's highest-valued interest. But the defendant-focused definition of moral injury enables the victim to "express the moral significance of the wrongdoing" only in the case of the defrauded $500.

The same example of (seemingly) negligent conduct can also be applied to Professor Sebok's explanation of the distinction between the ability to seek compensatory damages and the ability to seek punitive damages. He explains that punitive damages are available when the defendant violates two rights: "[t]he primary private right (to physical security, property, etc.) and the right to be treated as someone deserving to have those primary private rights respected by others (or at least the defendant)."[290] Wrongful death law recognizes a parent's primary private right to her parent-child relationship. Again, consider

[287] *See* Martínez Alles, *supra* note 269, at 245, 247 ("Punitive damages have been predominantly studied in the last decades from the one-sided perspective of the wrongdoer . . . [leaving the] tort victim as a *contingent* actor.").

[288] *Id.* at 266.

[289] *Id.* at 268; *see also* Zipursky, *Theory*, *supra* note 248, at 154 (explaining subjective punitiveness of punitive damages, in which he explains it is "not the character of the conduct of the object of the punishment itself that warrants the appropriate degree of permissible punishment, but the nature of the wrong the defendant required the victim . . . to endure").

[290] Sebok, *supra* note 248, at 1014.

the driver texting in the school zone who kills the child. Is that driver really treating the parent as deserving of the parent-child relationship? The lack of a specific relationship between the driver and the parent cannot demonstrate a lack of disrespect, as punitive damages are often imposed despite defendant's lack of specific knowledge of the plaintiff's circumstances.

The development of the idea of moral injury in punitive damages jurisprudence has remained tied to common law development of the availability of punitive damages. But other disciplines have not been similarly held back. Specifically, the idea of "moral injury" has been further developed in psychology literature. Psychologists have introduced theories of how trauma affects an individual's assumptive world views, meaning "the phenomenological assumptions people make about the rules by which the word operates and their place in that world."[291] Dr. Janoff-Bulman defined three categories of worldview assumptions—the benevolence of the world, which involves beliefs related to whether the world is a good and just place and whether people are also good; the meaningfulness of the world, which asks whether an individual has control over whether good or bad things happen to her; and self-worthiness, which asks whether people believe they, themselves, are good people.[292] When trauma challenges these fundamental assumptions, it "do[es] not produce the psychological equivalent of superficial scratches that heal readily, but deep bodily wounds that require far more in the way of restorative efforts. The injury is to the victim's inner world."[293]

Dr. Janoff-Bulman did not expressly define what kinds of trauma challenges these worldviews, but she did identify some characteristics, including some associated with the traditional availability of punitive damages. Those characteristics include trauma that is an out-of-the-ordinary event, trauma that is directly experienced, and trauma that threatens survival.[294] Any intentional tort is hopefully an out-of-the-ordinary event. Obvious examples of direct experience include being the "direct victim of threat or attack," also known as the intentional torts of assault or battery. The same holds true for events that threaten survival—Dr. Janoff-Bulman offers factual examples that would be actionable intentional torts, including battery, assault, false imprisonment, and even trespass.[295] All of these tort victims are forced to recognize the reality of their own mortality.[296]

Dr. Janoff-Bulman did not specifically apply her theories to bereavement, but she did mention child death within her discussion of the relevance of culture to the out-of-the-ordinary characteristic. "[I]n a culture where parents are aware of

[291] Matthews & Marwit, *supra* note 273, at 117.

[292] *See generally* JANOFF-BULMAN, *supra* note 26, at 6-12.

[293] *Id.* at 52.

[294] *Id.* at 52-59.

[295] *Id.* at 57-58 (discussing examples of criminal attacks and "individuals whose homes have been destroyed by fire").

[296] *Id.* at 56.

and experience considerable infant mortality in their communities, the death of an infant may be less devastating than in a culture that has very little infant mortality."[297] And thus, although infant and child death may not have violated any parents' assumptive world views in the nineteenth century, today it would. Dr. Janoff-Bulman also mentions that direct experience can include "a serious threat or harm to people very close to us, particularly close loved ones," because the "emotional attachment to these people essentially makes the traumatic event directly felt."[298] Other researchers have more specifically applied Dr. Janoff-Bulman's worldview assumptions to bereavement.[299] Not all bereavements challenge assumptive world views, such as the death of an elderly person.[300] But bereavement after the loss of a child "constitutes a major violation of the parent's assumptive world, in that it challenges the pre-existing expectation that parents will die before their children."[301] The parent must not only "come to terms with the loss itself" but also come to terms with "the destruction of everything that was once believed to be true and constant."[302] The death of a child really seems to be a much greater moral injury to the plaintiff than being merely fraudulently misrepresented. Any parent would quickly volunteer to be victimized by fraud or reckless conduct over burying her child.

Understanding the parents' injury as a moral injury also allows a better understanding of what parents actually experience after their child is tortiously killed. Grief involves much more than sadness. Numerous researchers have

[297] *Id.* at 53.

[298] *Id.* at 55.

[299] One study looked at bereaved parents' shattered assumptive world views based on the reason for the child's death. One group of parents lost their child to murder; another group lost their child to illness; and a third group of parents lost their child in an accident defined only as "automobile, drowning, bicycle, etc." Matthews & Marwit, *supra* note 273, at 120. This description does not indicate whether someone was at fault for the accident (meaning the death was tortious) or no one is to blame. The study also included a control group of non-bereaved parents. *Id.* at 120-21.

The study found that "[b]ereaved parents, compared with non-bereaved parents, demonstrate significantly more negative views on all" three of the assumptive world views. *Id.* at 129-30. The study also found that parents bereaved by homicide had lower views of benevolence of the world than parents bereaved by accident and illness. *Id.* at 130-31. The authors believe that this is because "the death is completely unjustified and unreasonable to the mourner," a sentiment that can easily also apply to a bereaved parent's thoughts after death due to a texting driver. *Id.* at 130. The study also found that parents bereaved by accident showed more negativity on the meaningless dimension and parents bereaved by homicide showed more negativity on worthiness of self. *Id.*

[300] *Id.* at 129.

[301] *Id.*

[302] *Id.* at 132.

introduced perspectives or theories of grief in bereavement,[303] which includes another emotion commonly associated with punitive damages—anger.[304] "The collapse of the normal order"—that parents die before their children—"is a harsh, painful, and frustrating shock, which sometimes arouses great anger among the parents."[305] Anger is also often present after the death of an unborn child, with research suggesting that anger "may be particularly pronounced in parents of stillbirths."[306]

Parents are likely to experience anger after the tortious killing of their child, regardless of the defendant's level of culpability. Anger is very common if the child's death was unexpected and possibly violent,[307] both of which are likely to be present in any tortious killing. "The experience of rage and desire for revenge are not unique to homicide; for example, they might be expected in cases of accidents or medical malpractice."[308] Human error, including unreasonable conduct, is often the cause of accidents but, even if unintentional, "may be seen as mistakes by bereaved parents that deserve retribution."[309] Parents' "anger is directed at the party most responsible, in the parents' opinions, for the loss of their children and the alteration of the normal order."[310] Anger is often accompanied by blame—blaming the person who killed their child.[311]

[303] *See* TEDESCHI & CALHOUN, *supra* note 2, at 17-25. Researchers now caution against any assumptions that a grieving client will go through expected phases in a specific order. *See id.* at 33-34.

[304] *See id.* at 104; Arnold & Gemma, *supra* note 272, at 670 (discussing that "[d]ifficult emotions like remorse, regret, guilt, shame, sorrow, and anger are inherently present in grief"); Drenovsky, *supra* note 140, at 304 ("Anger, resentment, and depression are common responses delineated in stage theories of bereavement.").

[305] Natti Ronel & Udi Lebel, *When Parents Lay Their Children to Rest: Between Anger and Forgiveness*, 23 J. SOC. & PERS. RELATIONSHIPS 507, 508 (2006).

[306] Elizabeth Kirkley-Best & Kenneth R. Kellner, *The Forgotten Grief: A Review of the Psychology of Stillbirth*, 52 AM. J. ORTHOPSYCHIATRY 420, 422 (1982).

[307] TEDESCHI & CALHOUN, *supra* note 2, at 103; *see also* Ronel & Lebel, *supra* note 305, at 510-11 (finding that "anger was the most dominant response among participants, with the greatest number of subcategories, and was expressed with harsh, assertive language" in study of bereaved Israeli parents whose "sons fell in battle," "were killed in acts of terror by Palestinians," or "were killed in accidents during military service").

[308] TEDESCHI & CALHOUN, *supra* note 2, at 107.

[309] Drenovsky, *supra* note 140, at 305; *see also* Matthews & Marwit, *supra* note 273, at 117 (explaining factors that predispose individual to traumatic grieving, three of which include "sudden, unexpected death"; "loss of a child; and the mourner's perception of the death as preventable").

[310] Ronel & Lebel, *supra* note 305, at 508.

[311] Research suggests that doctors provide inadequate care to parents after stillbirths because of fear of blame. *See* Maureen C. Kelley & Susan B. Trinidad, *Silent Loss and the Clinical Encounter: Parents' and Physicians' Experiences of Stillbirth—A Qualitative Analysis*, BMC PREGNANCY & CHILDBIRTH, Nov. 27, 2012, at 1, 5, https://bmcpregnancychildbirth.biomedcentral.com/articles/10.1186/1471-2393-12-137#citeas [https://perma.cc/S8MV-N64B] ("Several physicians reported that they worry

Researchers advise that professional counselors specifically inform bereaved parents that anger and the desire for retribution are perfectly natural emotions following the death of a child and that "[a]ppropriate counselling techniques for understanding anger and desires for retribution should be developed, especially if the parent is distressed by his or her feelings."[312]

Understanding that parents' experiences are much more than grief and anguish and that they include anger also shows the appropriateness of punitive damages for parents' moral injury. "One objective behind retribution or punishment is to allow victims to judicially vent their anger."[313] Legal philosopher Joel Feinberg best described this function of punitive damages: "What more dramatic way of vindicating his violated right can be imagined than to have a court thus forcibly condemn its violation through the symbolic machinery of punishment?"[314] Compensatory damages lack the ability to vindicate parents' violated rights; they cannot represent this common component of parents' grief after the death of their child. But punitive damages can.[315]

Validating anger as a part of parents' moral injury does not require possibly negative ideas of enabling or embracing private revenge,[316] an idea of punitive damages that is seen by some as similarly distasteful. That is apparent when we separate anger from its negative connotation. The American Psychological Association explains that "[a]nger is a completely normal, usually healthy, human emotion."[317] Similarly, "[a]nger is not always a necessarily bad emotion or expressed in negative ways. Many bereaved parents have directed their anger in positive ways, by working to change laws, build foundations, raise money,

about being blamed for stillbirth, particularly when there is an otherwise healthy pregnancy and then the baby dies for either known (e.g., cord accident, abruption) or unknown reasons.").

[312] Drenovsky, *supra* note 140, at 310 ("The lack of significant relationships between anger or a desire to retribute and depression suggest that these feelings, while perhaps socially unacceptable, are not necessarily injurious to bereaved parents.").

[313] Craig K. Hemphill, Note, *Smoke Screens and Mirrors; Don't Be Fooled Get the Economic Facts Behind Tort Reform and Punitive Damages Limitations*, 23 T. MARSHALL L. REV. 143, 150-51 (1997).

[314] JOEL FEINBERG, *The Expressive Function of Punishment*, *in* DOING AND DESERVING: ESSAYS IN THE THEORY OF RESPONSIBILITY 95, 104 (1970).

[315] *See infra* Section II.C (discussing expressive ability of punitive damages).

[316] Although, private-recourse theory scholars do admit a possible connection between private-redress theory and ideas of private revenge. *See* Thomas B. Colby, *Clearing the Smoke from* Philip Morris v. Williams*: The Past, Present, and Future of Punitive Damages*, 118 YALE L.J. 392, 434 (2008) (explaining that constitutional "punitive damages are legally sanctioned private revenge"); Sebok, *supra* note 248, at 961 (explaining punitive damages as a "form of private retribution" and "a form of revenge, although it is a very stylized form of revenge"); Zipursky, *Theory*, *supra* note 248, at 154 ("There is a quality of vengefulness to punitive damages in its civil aspect . . . .").

[317] *Controlling Anger Before It Controls You*, AM. PSYCHOL. ASS'N, http://www.apa.org/topics/anger/control.aspx (last visited Feb. 11, 2020).

fund scholarships, and other avenues serving as a catalyst for positive change."[318] Numerous examples exist of parents turning to activism after tragedy. A mother whose child was killed by a drunk driver started Mothers Against Drunk Driving.[319] Many parents of the children killed in the Sandy Hook elementary school shooting have actively fought for gun control reforms.[320] Numerous parents also want to set up support groups or organizations to help others who have also lost children. Obviously not all parents are driven to activism, but some are. The attraction to activism is also consistent with the idea of posttraumatic growth, a theory that psychologists introduced in the mid-1990s. Posttraumatic growth means "positive psychological change experienced as a result of the struggle with highly challenging life circumstances."[321] The creators of the theory of posttraumatic growth saw evidence of it in studies of bereaved parents.[322]

Relatedly, researchers interpreting a study of bereaved Israeli parents suggested a connection between anger and the parents' desire to keep their child's memory alive:

> A possible explanation of the research participants' choice to maintain their anger is based on the findings of Klass (1997) regarding the representation of the dead child in the parent's emotional world. It may be claimed that the public activity of the parents, which is nurtured by their anger, externalizes the representation of the child from their inner world to their social world. The anger and the activity that it nurtures preserve the parents' contact with the representation of the child in their everyday world. Being well-known figures in the public arena and the media maintains the social representation of the child. Since their anger contributed considerably to this status, it actually supports the social representation of

[318] *The Grief of Parents When a Child Dies*, COMPASSIONATE FRIENDS, https://www.compassionatefriends.org/grief/ [https://perma.cc/QS3J-YBUZ] (last visited Feb. 11, 2020); *see also* Ronel & Lebel, *supra* note 305, at 508 ("Another tendency of individuals after loss is the effort to find meaning and significance in the painful events. This effort sometimes leads to intensive activity and public or political initiatives, which provide those in crisis with an understanding and a sense of meaning." (citation omitted)).

[319] *History*, MOTHERS AGAINST DRUNK DRIVING, https://www.madd.org/history/ [https://perma.cc/SQZ6-E5YH] (last visited Feb. 11, 2020) (explaining that Candace Lightner began fighting to change drunk driving laws in 1980 after her daughter was killed by drunk driver).

[320] Catherine Thorbecke, *5 Years After Tragedy, Families of Sandy Hook Victims Work to Prevent Gun Violence, Make Lost Loved Ones 'Proud*,*'* ABC NEWS (Dec. 11, 2017, 8:23 AM), https://abcnews.go.com/US/years-tragedy-families-sandy-hook-victims-work-prevent/story?id=51704423 [https://perma.cc/T5GX-9BMM].

[321] Richard G. Tedeschi & Lawrence G. Calhoun, *Posttraumatic Growth: Conceptual Foundations and Empirical Evidence*, 15 PSYCHOL. INQUIRY 1, 1 (2004).

[322] *See* TEDESCHI & CALHOUN, *supra* note 2, at 51 ("Because life as a bereaved parent can seem so devoid of meaning and purpose, recognition of posttraumatic growth can reduce the distress of this existential challenge.").

> the child. By means of their anger, the bereaved parents allow continuation of a social and public life for their deceased children. As Rosenblatt (1993) claims, the tendency of the bereaved to continue the existence of their loved one after death is universal. Among the research participants, in an apparent paradox, the death of the child serves a sort of social immortality, which creates a continued public life for him and thus also perpetuates his representation in the inner world.[323]

Despite anger being healthy and possibly productive, cultural pressure exists to "accept accidents and illnesses as faultless events"[324] and, possibly, to forgive—pressure that "may be most disturbing to the parent."[325] Thus, cultural pressure is inconsistent with the idea of punitive damages for parents; really, this cultural pressure would discourage any litigation after the death of a child, whether for compensatory or punitive redress. This cultural pressure, however, likely does not mirror most parents' experiences. The same study of bereaved Israeli parents reported that the experience of "forgiveness emerged only as a response to direct questioning, and it proved to be a weak category, expressed in a low voice that spontaneously moved back to anger."[326] Researchers suggested that parents were unenthusiastic to forgive because of the connection their anger gave them to their deceased children:

> The parents are still unprepared for the transformation of the internal representation of the child in their inner world, which is required when forgiving the enemy who is guilty for the son's death. The price of such a transformation appears to be the cessation of the social existence of the fallen son with a continual, contemporary meaning.[327]

Some other parents may want to forgive and eventually do so. But no reason exists that forgiveness must happen in lieu of punitive redress; forgiveness may actually be easier for parents following legal validation of their moral injury—validation that only punitive damages can provide.

A possible criticism of characterizing the parent's experience after tortiously losing a child as a "moral injury" is that it shifts noneconomic compensatory damages to punitive damages, to "compensate" parents' noneconomic injury instead with punitive damages. The idea of recategorizing damages is not new to wrongful death jurisprudence, as numerous courts broadly interpret the word "pecuniary" to include damages for the value of a lost relationship. Most would find this recategorization appropriate policy-wise yet not an example of respectful statutory interpretation. Regardless, the recategorization accusation

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[323] Ronel & Lebel, *supra* note 305, at 519.

[324] Drenovsky, *supra* note 140, at 304.

[325] *Id.* ("Anger and the assignment of blame are natural responses to any death, but they are often considered socially unacceptable responses as well.").

[326] Ronel & Lebel, *supra* note 305, at 511; *id.* at 513-14 (explaining that some parents saw forgiveness for their son's death as "tantamount to betraying their son").

[327] *Id.* at 519.

depends on the definition of noneconomic injury. If defined broadly as any emotional injury, then punitive damages have always been used to address emotional injuries—the plaintiff's feelings of disrespect or her emotion of anger. But if "noneconomic" is not so broadly defined, then this proposal instead simply acknowledges the realities and complexities of parents' experiences after child death and argues that punitive damages are a better fit. Similarly, the Supreme Court has noted that punitive damages were once awarded to address noneconomic losses because, supposedly, compensatory damages did not adequately do so.[328] Compensatory damages similarly fail to adequately acknowledge parents' loss of their children, and punitive damages should be an option to help the cure this inadequacy.

A last note is necessary to acknowledge the potential slippery slope that could result from conditioning the availability of punitive damages on what happened to the plaintiff instead of on what the defendant did. Why not award punitive damages when a spouse is killed? Or when the plaintiff suffers permanent and debilitating injury? Any availability of punitive damages for the wrongful death of a child would be statutory, however, immediately defining a bright line. Notably, Alabama has not experienced any increase in the availability of punitive damages despite allowing punitive damages in wrongful death cases for over a century.[329] Moreover, culturally, we agree that there is something especially tragic about the death of a child, a tragedy possibly greater than other deaths or injuries and another basis for a bright line. Regardless, I also point to the more recent plaintiff-focused punitive damages legal scholarship. If the point is to empower the victim and allow her to express her moral outrage, maybe her empowerment should depend on whether she has that moral outrage, as opposed to how the defendant acted.

C. *Expressing the Tragedy of Child Death*

Today, culturally, we agree that infant and child death is tragic. Child deaths are singled out, even when adults also die, suggesting that "child deaths are a

[328] *See* Cooper Indus., Inc. v. Leatherman Tool Grp., Inc., 532 U.S. 424, 438 n.11 (2001) ("Until well into the 19th century, punitive damages frequently operated to compensate for intangible injuries, compensation which was not otherwise available under the narrow conception of compensatory damages prevalent at the time."); Pac. Mut. Life Ins. Co. v. Haslip, 499 U.S. 1, 62 (1991) (O'Connor, J., dissenting) (explaining that "[i]n the past," punitive damages "filled [the] gap" left by unavailability of compensatory damages "for pain, humiliation, and other forms of intangible injury"). *But see* Anthony J. Sebok, *What Did Punitive Damages Do? Why Misunderstanding the History of Punitive Damages Matters Today*, 78 CHI.-KENT L. REV. 163, 184-85 (2003) (explaining that punitive damages were not historically awarded to compensate for intangible injury).

[329] George L. Priest, *Punitive Damages Reform: The Case of Alabama*, 56 LA. L. REV. 825, 825 (1996) (noting that "beginning in the early 1990s, punitive damages verdicts increased in Alabama both in frequency and magnitude").

special tragedy, over and above the tragedy of mere adult death."[330] Yet, legally, we are unable to express that tragedy as long as parents' redress for their child's death is limited to compensatory damages.

The expressive function of compensatory damages—what the law actually says, as opposed to what it does[331]—is limited to recognition of the plaintiff's injury and the defendant's responsibility for it.[332] They communicate recognition that the victim was injured but do not contain any judgment about that injury except for a general enforcement of social norms as reflected in tort law. Further, the amount of compensatory damages is based on the extent of the plaintiff's injury, not on a larger judgment about the injury and its cause. Borrowing again from Professor Martínez Alles's recent work, the use of compensatory damages "prevents us from conveying a clear message of moral condemnation,"[333] preventing wrongful death of children cases from expressing the tragedy of child death.[334]

The awarding of punitive damages, however, enables expression of the wrongness of the wrongful death of a child. The history and justification of punitive damages as an expression of moral condemnation is well-known. "Punitive damages are a conventional device for expressing condemnation";[335] really, punitive damages are "the only manifestation of the law capable of expressing moral condemnation."[336] The Supreme Court described the damages as such,[337] as have numerous scholars.[338] Professor Dan Kahan has extensively

[330] Williams, *supra* note 235, at 746-47; *see also* ARNOLD & GEMMA, *supra* note 2, at 27 ("A child's death seems unnatural and unjust."); *id.* at 99 (explaining that "death of a child is undoubtedly the ultimate tragedy" as "children are not supposed to die").

[331] *See* Cass R. Sunstein, *Conflicting Values in Law*, 62 FORDHAM L. REV. 1661, 1668 (1994).

[332] Scott Hershovitz, *Treating Wrongs as Wrongs: An Expressive Argument for Tort Law*, 10 J. TORT L. 1, 23 (2018) (explaining that award of "compensatory damages mark[s] those injuries as the defendant's responsibility").

[333] Martínez Alles, *supra* note 269, at 278.

[334] Dan M. Kahan, *What Do Alternative Sanctions Mean?*, 63 U. CHI. L. REV. 591, 624 n.134 (1996) ("[P]unitive damages unambiguously express condemnation relative to the alternative of compensatory damages.").

[335] L. Song Richardson, *When Human Experimentation Is Criminal*, 99 J. CRIM. L. & CRIMINOLOGY 89, 114 (2009).

[336] Paul J. Zwier, *The Utility of a Nonconsequentialist Rationale for Civil-Jury-Awarded Punitive Damages*, 54 U. KAN. L. REV. 403, 435 (2006).

[337] Cooper Indus., Inc. v. Leatherman Tool Grp., Inc., 532 U.S. 424, 432 (2001).

[338] *See, e.g.*, Marc Galanter & David Luban, *Poetic Justice: Punitive Damages and Legal Pluralism*, 42 AM. U. L. REV. 1393, 1438 (1993); Cass R. Sunstein, Daniel Kahneman & David Schkade, *Assessing Punitive Damages (with Notes on Cognition and Valuation in Law)*, 107 YALE L.J. 2071, 2075 (1998) (explaining that "punitive damages may have a retributive or expressive function, designed to embody social outrage at the actions of serious wrongdoers"); Roseanna Sommers, Comment, *The Psychology of Punishment and the Puzzle of Why Tortfeasor Death Defeats Liability for Punitive Damages*, 124 YALE L.J. 1295, 1305

described the expressive value of punishment, expressing "moral condemnation."[339] Contemporary legal philosopher Joel Feinberg explains that punishment symbolizes "attitudes of resentment and indignation, and of judgments of disapproval and reprobation."[340] Similarly, "punitive damages proclaim the *importance* that the law attaches to the plaintiff's particular invaded right, and the corresponding *condemnation* that society attaches to its flagrant invasion by the kind of conduct engaged in by the defendant."[341]

Applied to the wrongful death of children, punitive damages are the only remedy capable of expressing the tragedy of the child's death. They proclaim the importance of the child and the parents' devastation after losing their child. Society condemns child death, and "a jury is especially suited to send the community's 'message' through the medium of [punitive] damages."[342] That message is that child death is tragic and intolerable. Awarding only punitive damages for the wrongful death of children will freely enable that expression of outrage and moral condemnation.

D. *Administrative Problems*

Leonard Decof criticized the use of punitive damages for the wrongful death of children. He did not mince words, labeling punitive damages as "inappropriate at best, barbaric at worst."[343] His only criticism of punitive damages specific to children cases, however, was questioning whether punishment is necessary given that "[t]he wrongdoer usually suffers more than enough from having killed a child." [344] He offers no evidence for this, although it seems intuitively correct that the wrongdoer would suffer to some extent. However, neither punitive damages jurisprudence nor criminal law has ever conditioned punishment on the wrongdoer lacking feelings of guilt. And ultimately, even Decof stated that "inappropriate" and "barbaric" punitive damages would be appropriate for "special instances" involving "sophisticated defendants" who would be incentivized to act more carefully, and in cases

(2015) (explaining possible expressive functions of punitive damages, "such as affirmation of the worth of the victim injured by the wrongful conduct or reassertion of the community norms that repudiate such conduct").

[339] Kahan, *supra* note 334, at 598 ("Under the expressive view, the signification of punishment is moral condemnation.").

[340] FEINBERG, *supra* note 314, at 98.

[341] David G. Owen, *A Punitive Damages Overview: Functions, Problems and Reform*, 39 VILL. L. REV. 363, 374 (1994).

[342] Galanter & Luban, *supra* note 338, at 1439.

[343] Decof, *supra* note 164, at 205.

[344] *Id.* ("The possibility of punitive damages as a deterrent is nebulous. Its apparent aim at punishing a wrongdoer rather than compensating a victim is misdirected.").

involving intentional or reckless conduct, the type of cases where punitive damages are normally available.[345]

Many decades have passed since Decof's seminal work, and the potential problems with the use of punitive damages for wrongful death of children have only increased. This Section addresses and alleviates three specific administrative problems with the use of punitive damages in wrongful death of children cases, suggesting a measure for punitive damages, the political feasibility of punitive damages, and the constitutionality of punitive-only damages for the wrongful death of children.

1. Helping Juries Determine the Amount of Punitive Damages

Punitive damages, like noneconomic compensatory damages, lack an objective measure. Jury instructions both for noneconomic compensatory damages and for punitive damages give little guidance as to how to actually measure the damages, and both types of damages are often criticized as unpredictable.

Alabama courts see a difference between the two. They acknowledge that "human life is incapable of translation into a compensatory measurement,"[346] but they believe punitive damages are measurable. Specifically, Alabama law explains that juries are to base punitive damages for wrongful death on "the gravity of the wrong done, the punishment called for by the act of the wrongdoer, and the need to deter similar wrongs in order to preserve human life."[347]

This Article proposes a bit more guidance, mainly factors related to the appropriateness of punitive damages for the wrongful death of children. Specifically, the jury should be instructed to consider the parents' level of indignation, the tragedy of the child's death, the defendant's level of culpability, and the need to deter the killing of children. These factors combine the reasons why punitive damages are appropriate for wrongful death of children cases with the traditional factors for imposing punitive damages.

Even these specific factors, however, are not easily monetizable. This Article thus also proposes that state legislatures define an inflation-adjustable baseline as a starting point for juries, leaving juries discretion to increase the amount.[348]

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[345] *Id.* He clarified, however, that the damages should be available in addition to compensatory damages.

[346] Estes Health Care Ctrs., Inc. v. Bannerman *ex rel.* Estate of Cowan, 411 So. 2d 109, 113 (Ala. 1982).

[347] *Id.* The model jury instructions in Alabama tell juries that "[t]he amount of damages must be directly related to [defendant]'s culpability" which means "how bad [defendant's] wrongful conduct was." 1 ALA. PATTERN JURY INSTR. CIV. 11.28 (3d ed. 2019).

[348] Other mandatory minimums exist or have been suggested in the context of wrongful death (compensatory) damages. Rhode Island's statute mandates a compensatory damage award for wrongful death not less than $250,000. 10 R.I. GEN. LAWS ANN. § 10-7-2 (West 2019). Professor McClurg also suggested minimum statutory recovery values for recovery of loss-of-life hedonic compensatory damages in wrongful death claims. Andrew Jay McClurg,

For instance, juries may choose to increase the amount of the award if the deceased child was very young. This is consistent with administrative law valuation using years left to live[349] and with the cultural idea that the younger the death, the more tragic it is. At the same time, though, another dominant cultural view devalues the loss by believing parents can fix their indignation and loss by just having another child,[350] so maybe the jury would not see the child's age as a reason to increase the amount of damages. Regardless, the jury has the flexibility and discretion to award more damages than the baseline.

Even with the baseline, it is not guaranteed that damages for the wrongful death of children will exceed damages for the wrongful death of adults, consistent with the special tragedy of child death. Depending on the deceased adult's income level, the amount of pecuniary damages awarded for his death can be substantial. The use of punitive damages, especially with a baseline, at least means that the damages for a child would not automatically be lower than the damages for a deceased adult. Plus, because of the differing purposes of the damages and the expressive function of punitive damages, it is possible that two million dollars in punitive damages for the death of a child means something different—carries with it a level of condemnation—than a similar award of compensatory damages for death of an adult.

A last note is necessary on the possibility of overdeterrence. Numerous law and economics scholars have written about the threat of overdeterrence—that the threat of punitive damages may cause actors to avoid socially desirable activity.[351] It is ironic to now worry about overdeterrence when legal scholars agree that the current compensatory damage measures provide insufficient deterrence.[352] Professor Sean Hannon Williams specifically pointed out the underdeterrence implicit in current measures of damages both for injuries to children and for deaths of children.[353] Thus, any increase in damages awarded for the wrongful death of children will likely correct the current underdeterrence instead of causing overdeterrence.

Additionally, it is important to remember that the proposal is for punitive damages only. The absence of compensatory damages should reduce fears of

It's a Wonderful Life: The Case for Hedonic Damages in Wrongful Death Cases, 66 NOTRE DAME L. REV. 57, 110-11 (1990).

[349] *See* Posner & Sunstein, *supra* note 11, at 574-75 (suggesting that if tort law used "value of a statistical life year" in calculating value of life, "a child's life would be valued at a higher amount because the child has a longer life expectancy").

[350] Leslie A. Grout & Bronna D. Romanoff, *The Myth of the Replacement Child: Parents' Stories and Practices After Perinatal Death*, 24 DEATH STUD. 93, 96-97 (2000); Kirkley-Best & Kellner, *supra* note 306, at 423 ("The replacement-child strategy of coping with grief is seen in stillbirth bereavement probably more frequently than in any other case.").

[351] *See* Steve P. Calandrillo, *Penalizing Punitive Damages: Why the Supreme Court Needs a Lesson in Law and Economics*, 78 GEO. WASH. L. REV. 774, 794 (2010).

[352] *See* Posner & Sunstein, *supra* note 11, at 554-57.

[353] Williams, *supra* note 235, at 759-60; *see also* Stephen D. Sugarman, *Doing Away with Tort Law*, 73 CALIF. L. REV. 555, 572 (1985).

overdeterrence. Plus, a baseline makes the damages more predictable. Regardless, if child death is really as tragic as society purports to believe, we should be much more concerned about the current lack of deterrence than about the possibility of overdeterrence.

2. The Political Feasibility

Punitive damages, if ever popular, are not currently a favored remedy. The criticisms are well known, and some have even been the subject of Supreme Court opinions. Supposedly, the frequency of the damages are too high,[354] their amounts are "skyrocketing"[355] and unpredictable,[356] they are "a windfall to plaintiffs,"[357] and defendants could be punished over and over for the same conduct.[358] Many of these criticisms have been empirically proven untrue.[359] But that hasn't seemed to matter. Just like noneconomic damage caps, tort reformers advocate for caps on the recovery of punitive damages[360]—caps that would need to be altered to adopt punitive damages for the wrongful death of children. Another popular reform of punitive damage awards is to require a set proportion of the award be paid to the state[361]—yet another measure that would require alteration under this proposal.

If there ever were an issue for which state legislatures may be inclined to expand the use of punitive damages, however, it's likely the death of children. As Professor Williams explains, "Legislators fall over themselves in races to

[354] Pac. Mut. Life Ins. Co. v. Haslip, 499 U.S. 1, 61-62 (1991) (O'Connor, J., dissenting).

[355] Browning-Ferris Indus. of Vt., Inc. v. Kelco Disposal, Inc., 492 U.S. 257, 282 (1989) (O'Connor, J., concurring in part and dissenting in part).

[356] Exxon Shipping Co. v. Baker, 554 U.S. 471, 513 (2008).

[357] Smith v. Wade, 461 U.S. 30, 59 (1983) (Rehnquist, J., dissenting).

[358] *See generally* Thomas B. Colby, *Beyond the Multiple Punishment Problem: Punitive Damages as Punishment for Individual, Private Wrongs*, 87 MINN. L. REV. 583, 592-602 (2003).

[359] *See, e.g.*, Theodore Eisenberg, Michael Heise & Martin T. Wells, *Variability in Punitive Damages: Empirically Assessing* Exxon Shipping Co. v. Baker, 166 J. INSTITUTIONAL & THEORETICAL ECON. 5, 12-23 (2010) (criticizing Supreme Court's conclusion in *Exxon* that punitive damages are unpredictable); Galanter & Luban, *supra* note 338, at 1411-13 (1993) (discussing several empirical studies that indicate punitive damages are awarded infrequently); Sebok, *supra* note 248, at 962-76 (debunking myth that punitive damages are skyrocketing and awarded with increasing frequency).

[360] *See, e.g.*, ALA. CODE § 6-11-21 (2019); ALASKA STAT. § 09.17.020(f) (2019); COLO. REV. STAT. § 13-21-102 (2019); FLA. STAT. ANN. § 768.73 (West 2019); GA. CODE ANN. § 51-12-5.1 (2019); IDAHO CODE § 6-1604 (2019); IND. CODE ANN. § 34-51-3-4 (West 2019); MISS. CODE ANN. § 11-1-65 (2019); NEV. REV. STAT. ANN. § 42.005 (LexisNexis 2019); N.C. GEN. STAT. § 1D-25 (2019); N.D. CENT. CODE § 32-03.2-11 (2019); TEX. CIV. PRAC. & REM. CODE ANN. § 41.008 (West 2019).

[361] ALASKA STAT. § 09.17.020(j); GA. CODE ANN. § 51-12-5.1(e)(2); IND. CODE ANN. § 34-51-3-6; IOWA CODE ANN. § 668A.1 (West 2019); MO. ANN. STAT. § 537.675 (West 2019); UTAH CODE ANN. § 78B-8-201(3)(a) (LexisNexis 2019).

name bills after dead children."[362] In an eighteen-month period in the late 1990s, state legislatures passed more than fifty laws named after child victims.[363] Media coverage also routinely highlights the special tragedy of child death, a tragedy greater than that of adult death. "Newspaper headlines about war, natural disasters, and mass accidents routinely highlight child deaths and the special tragedies that they create over and above mere adult deaths."[364]

Moreover, state legislatures have sometimes expressly noted the tragedy of child death. Already-discussed examples include the Missouri legislature creating a specific economic damage rule for the death of children[365] and the Wisconsin legislature setting different noneconomic caps for the deaths of children and adults.[366]

The special tragedy of child death means some possibility exists that a state legislature would entertain the idea of punitive damages for the wrongful death of children, even in our current tort reform world. The special tragedy of child death—"that the experience of losing a child is by far the worst"[367]—is also the answer to any slippery-slope concerns about the lack of a stopping point if state legislatures start to expand the use of punitive damages, including allowing recovery for mere negligence. There is no tragedy similar to the death of a child, so differentiation is justified.

3. No Unique Constitutional Problems

Another problem is that punitive damages, unlike compensatory damages, present constitutional issues.[368] Any potential constitutional problem may be tempered by the fact that any punitive damage scheme for the wrongful death of children would have to be statutory. Numerous Supreme Court opinions have noted the propriety of leaving punitive damages issues to state legislatures.[369] The fact that punitive damages would be statutorily authorized for the wrongful death of children should lessen any potential constitutional infirmity.

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[362] Williams, *supra* note 235, at 742.

[363] *Id.* at 747.

[364] *Id.* at 742.

[365] *See supra* note 210 (discussing Missouri's measure of pecuniary damages for wrongful death of child).

[366] *See supra* note 230 and accompanying text (discussing Wisconsin's noneconomic damage cap).

[367] COMM. FOR THE STUDY OF HEALTH CONSEQUENCES OF THE STRESS OF BEREAVEMENT, *supra* note 142, at 75.

[368] Some of the constitutional problems with punitive damages are also applicable to noneconomic-consortium damage awards. *See* Mark A. Geistfeld, *Due Process and the Determination of Pain and Suffering Tort Damages*, 55 DEPAUL L. REV. 331, 333 (2006) (explaining that Court's concerns regarding punitive damages "also appl[y] to pain-and-suffering damages, implying that due process also constrains these tort awards"). The Court has not, however, found any constitutional problems with noneconomic damages thus far.

[369] *See, e.g.*, BMW of N. Am., Inc. v. Gore, 517 U.S. 559, 607 (1996) (Ginsburg, J., dissenting) (arguing that state law control of punitive damages is superior).

But other potential constitutional problems still exist. Punitive damage awards without an underlying compensatory damage award present one potential problem. The Supreme Court has never specifically stated that compensatory damages must accompany punitive damage awards, but it has suggested so.[370] The purpose of requiring underlying compensatory damage awards, however, is to ensure that punitive damages are only awarded for actual injuries.[371] Even if no compensatory damages are awarded, there is no doubt that parents are actually injured when their child is killed. In fact, the lack of an underlying compensatory damage award may actually alleviate constitutionality concerns. The Court has often alluded to the ultimate burden on the defendant—the total of the compensatory and punitive damage awards.[372] A punitive-only damage award would not be burdensome in the way punitive damage awards are normally thought to be when combined with compensatory damages.

Other problems exist in applying the "guideposts" the Supreme Court created in *BMW of North America, Inc. v. Gore*[373] for judging the constitutionality of punitive damage awards to wrongful death of children claims. The most important guidepost is whether the damages are commensurate to the reprehensibility of the defendant's conduct.[374] The second guidepost is whether a reasonable relationship exists between the amount of compensatory damages and the amount of punitive damages.[375] The last guidepost compares the punitive damage award to the civil or criminal penalties imposed for comparable conduct.[376] Courts have attempted to apply these guideposts ever since *BMW*.[377]

These guideposts do not apply easily to a punitive-only damage award for the wrongful death of a child.[378] For instance, the level of reprehensibility may only

[370] *Id.* at 580-81 (majority opinion) (explaining that difference between compensatory and punitive awards is significant factor in judging reasonableness of punitive award).

[371] *Id.* at 580 (explaining that purpose of comparing compensatory awards to punitive awards is to ensure that punitive damages relate to "actual harm inflicted on the plaintiff").

[372] In *State Farm Mutual Automobile Insurance Co. v. Campbell*, the Court expressed concern that the two awards overlapped. 538 U.S. 408, 426 (2003). In *Exxon Shipping Co. v. Baker*, although technically not based in constitutional law, the Court similarly explained that punitive damages should be lower in cases involving extreme compensatory damages. 544 U.S. 471, 512-13 (2008).

[373] 517 U.S. 559, 574-75 (1996) (judging whether punitive damage award is grossly excessive based on reprehensibility of defendant's conduct, disparity between compensatory and punitive damages, and difference between damages and civil penalties imposed in comparable cases).

[374] *Id.* at 575.

[375] *Id.* at 581.

[376] *Id.* at 583.

[377] *See generally* Laura J. Hines & N. William Hines, *Constitutional Constraints on Punitive Damages: Clarity, Consistency, and the Outlier Dilemma*, 66 HASTINGS L.J. 1257, 1273-314 (2015) (presenting empirical evidence of lower courts' applications of guideposts).

[378] *See* Lance, Inc. v. Ramanauskas, 731 So. 2d 1204, 1218 (Ala. 1999) ("[O]ur task in assessing the appropriate punitive damages in a wrongful-death case will remain extremely

be negligence, a level of culpability for which punitive damages are not even normally available. Also, there's no compensatory damage award to compare with the punitive damage award.[379] And no criminal sanction may exist, especially if the death was due to negligence.

But difficulty in applying the guideposts does not necessarily mean an award is unconstitutional, as the Alabama Supreme Court has demonstrated by often upholding punitive damage awards in wrongful death claims.[380] Courts can evaluate the level of reprehensibility, enabling higher awards the greater the defendant's culpability.

Courts can also still compare the punitive damage award to the actual harm incurred. "[A] punitive-damages award in a wrongful-death case may nonetheless be compared and evaluated, though perhaps not in a strictly mathematical sense, by a means of a 'proportional evaluation' of the awarded amount, the conduct of a defendant, and the resulting harm from that conduct."[381] This more general evaluation is likely even more appropriate given that any compensatory damage award for the wrongful death of a child likely does not appropriately represent the actual harm incurred—a dead child.[382]

And courts can also evaluate the criminal or civil sanctions available for comparable conduct. True, no such sanction may exist for the defendant's conduct, especially if the defendant's conduct is negligent. This problem of applying the third guidepost, however, exists for many, many cases.[383] If a punitive damage award was unconstitutional just because of the lack of civil or criminal sanction for comparable conduct, then much more than wrongful death punitive damage awards would be unconstitutional.

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difficult."); Bruce J. McKee, *The Implications of* BMW v. Gore *for Future Punitive Damages Litigation: Observations from a Participant*, 48 ALA. L. REV. 175, 223 (1996) ("The *BMW v. Gore* decision will, apparently, have little effect on Alabama wrongful death cases. For example, there will literally be no ratio comparison because there will be no compensatory damages.").

[379] Courts have this same problem anytime the plaintiff is awarded punitive damages without underlying compensatory damages, a possibility in any state that allows the recovery of punitive damages on top of nominal damages.

[380] *See supra* notes 240-42.

[381] The Alabama Supreme Court has acknowledged this difficulty yet has found wrongful death punitive damage awards constitutional. *See* Boudreaux v. Pettaway *ex rel.* Estate of Pettaway Hall, 108 So. 3d 486, 499 (Ala. 2012), *overruled on other grounds by* Gillis v. Frazier *ex rel.* Estate of Bryant, 214 So. 3d 1127 (Ala. 2014).

[382] *See* State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408, 426 (2003) (altering ratio analysis believing that large amount of noneconomic damages was unrepresentative of "minor economic" injury suffered).

[383] *See* Hines & Hines, *supra* note 377, at 1259 (explaining that "over half of the opinions in our study either omitted analysis of the comparability guidepost altogether or found no relevant sanction with which to compare the punitive damages award at issue"); *id.* at 1309 (discussing difficulty of applying comparable-sanctions guidepost causing guidepost to "diminish[] greatly in importance").

Other suggestive evidence of the constitutionality of a punitive-only damage award for wrongful death is that, even when the Supreme Court was still interested in the constitutionality of punitive damages, the Court "consistently denied certiorari where petitions assert that Alabama's wrongful death scheme [wa]s unconstitutional."[384] And denials of certiorari on any punitive damages case are likely to continue, as the Supreme Court shows no current interest in revisiting its punitive damages jurisprudence.[385]

CONCLUSION

Punitive damages have been described by many as barbaric and distasteful. Today, those words better describe the measure of compensatory damages for parents after the wrongful death of their child—a pecuniary measure that will result in no damages and a (possibly capped) noneconomic damage award.

This measure of compensatory damages is inextricably linked to the time period in which state legislatures created wrongful death claims—the mid-nineteenth century. At that time, parents expected at least one of their children to die, and parents valued their children primarily economically. These related realities are visible in the original pecuniary measure of damages. Numerous states and courts have realized the need for reform, but too many of the reforms are stunted by this history and the very idea of the propriety of pecuniary damages.

Instead of trying to reform an inherently flawed measure, parents should receive a remedy that is meaningful and acts as a substantive response to the fact that they were forced to bury their child. That remedy is punitive damages, the only remedy that accurately reflects the parents' moral injury and expresses the tragedy of child death.

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[384] McKee, *supra* note 378, at 223.

[385] *See* Petition for a Writ of Certiorari at 31, Wyeth LLC v. Scofield, 564 U.S. 1019 (2011) (No. 10-1177), 2011 WL 1155235, at *31 ("Members of this Court have famously expressed divergent views as to the propriety of reviewing the excessiveness of punitive damages."); Jim Gash, *The End of an Era: The Supreme Court (Finally) Butts Out of Punitive Damages for Good*, 63 FLA. L. REV. 525, 584-89 (2011) (suggesting that Court may not be willing to hear future substantive due process claims); Jill Wieber Lens, *Justice Thomas, Civil Asset Forfeitures, and Punitive Damages*, 51 U.C. DAVIS L. REV. ONLINE 33, 43-44 (2017-2018) (explaining that "the Court seems to have lost its interest in the constitutional limitations of punitive damages," possibly "due to the current disarray of that jurisprudence"). The Supreme Court has not addressed the constitutional limitations of punitive damages since *Philip Morris USA v. Williams ex rel. Estate of Williams*, 549 U.S. 346 (2007), despite taking numerous cases on the same issue before then. *See generally, e.g.*, *State Farm Mut. Auto. Ins. Co.*, 538 U.S. 408; BMW of N. Am., Inc. v. Gore, 517 U.S. 559 (1996); TXO Prod. Corp. v. All. Res. Corp., 509 U.S. 443 (1993).