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# HEDONIC DAMAGES: ABOVE AND BEYOND SECTION 1983

## I. INTRODUCTION

Imagine that a person is wrongfully killed. It does not really matter who the victim is or why she lost her life; the only relevant concern is that someone was unjustifiably divested of life. Further imagine that the victim's survivors successfully sue the wrongdoers and leave the computation of damages as the only troubling issue remaining in the case. Yet this determination is extremely complicated because the lost value of life to the decedent is nearly impossible to measure due to the difficulty of quantifying the intangible pleasures of life. To say that a life is worth only a potential income stream or figures on an actuarial table is to forget about the good things that make life worth living. It is especially tragic for someone to be wrongfully deprived of life, and then the estate or loved ones told that, according to the tables, the decedent just wasn't worth that much.

No amount of damages from a tortfeasor<sup>1</sup> can properly compensate the victim or his representatives for the loss of life, but all American states have enacted statutes to try and make up for the victim's loss. Every state provides various statutory remedies for either the loss to the survivors,<sup>2</sup> the loss to

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© 1991 by Jennifer L. Jones. I would like to dedicate this comment, and all of my efforts toward its completion, with love, to my brother, Tom, 9/16/69 - 4/7/90.

1. A tortfeasor is defined as "[a] wrong-doer; one who commits or is guilty of a tort." BLACK'S LAW DICTIONARY 1335 (5th ed. 1979) [hereinafter BLACK'S].

2. These states include: Alaska (ALASKA STAT. § 09.55.580 (1973)); Arizona (ARIZ. REV. STAT. ANN. § 12-612 (1982)); Arkansas (ARK. STAT. ANN. §§ 27-908, 27-909 (1979)); California (CAL. CIV. CODE § 377 (1978)); Colorado (COLO. REV. STAT. §§ 13-21-201, 13-21-203 (1973)); Delaware (DEL. CODE ANN. tit. 10 § 3704 (1982)); District of Columbia (D.C. CODE ANN. §§ 16-2701, 16-2703 (1981)); Hawaii (HAW. REV. STAT. § 663-3 (1985)); Illinois (ILL. ANN. STAT. ch. 70 § 2 (Smith-Hurd 1959)); Kansas (KAN. STAT. ANN. §§ 60-1904, 60-1905 (1976)); Louisiana (LA. REV. STAT. ANN. § 2315 (1983)); Maine (ME. REV. STAT. ANN. tit. 18-A, § 2-804 (1981)); Maryland (MD. CTS. & JUD. PROC. CODE ANN. § 3-904 (1984)); Massachusetts (MASS. GEN. LAWS ANN. ch. 229, § 2 (1985)); Michigan (MICH. COMP. LAWS ANN. § 600.2922 (1982)); Minnesota (MINN. STAT. ANN. § 573.02

the estate,<sup>3</sup> or some combination thereof.<sup>4</sup> Unfortunately, the compensation afforded by such remedies is often inadequate because the only factor given thorough consideration is the economic value<sup>5</sup> of the person. Statutes frequently focus, for instance, on the amount of money the decedent would have earned or contributions she might have made, but not what her life was actually worth to her.

Arising from wrongful death cases,<sup>6</sup> however, courts are

(1984)); Mississippi (MISS. CODE ANN. § 11-7-13 (1982)); Missouri (MO. ANN. STAT. §§ 537.080, 537.090 (1983)); Montana (MONT. CODE ANN. § 27-1-323 (1981)); Nebraska (NEB. REV. STAT. § 30-810 (1979)); Nevada (NEV. REV. STAT. § 41.085 (1979)); New Jersey (N.J. STAT. ANN. §§ 2A:31-4, 2A:31-5 (1982)); New Mexico (N.M. STAT. ANN. § 41-2-3 (1978)); New York (N.Y. CONST. art. I, § 16); North Carolina (N.C. GEN. STAT. § 28A-18-2 (1981)); North Dakota (N.D. CENT. CODE §§ 32-21-01, 32-21-02, 32-21-04 (1976)); Ohio (OHIO REV. CODE ANN. §§ 2125.01, 2125.02 (1984)); Oklahoma (OKLA. STAT. ANN. tit. 12 § 1053 (1982)); Pennsylvania (42 PA. CONS. STAT. § 8301 (1982)); Rhode Island (R.I. GEN. LAWS § 10-7-10 (1971)); South Carolina (S.C. CODE ANN. §§ 15-15-20 - 15-15-40 (1977)); South Dakota (S.D. CODIFIED LAWS ANN. § 21-5-7 (1979)); Texas (TEX. REV. CIV. STAT. ANN. § 71.010 (1984)); Utah (UTAH CONST. art. XVI, § 5); Vermont (VT. STAT. ANN. tit. 14 § 1492 (1982)); Virginia (VA. CODE ANN. §§ 8.01-52, 8.01-54 (1977)); Washington (WASH. REV. CODE ANN. § 4.20.020 (1984)); West Virginia (W. VA. CODE § 55-7-6 (1982)); Wisconsin (WIS. STAT. ANN. § 895.04 (1982)); and Wyoming (WYO. CONST. art. X, § 4).

3. An estate is defined as:

The total property of whatever kind that is owned by a decedent prior to the distribution of that property in accordance with the terms of a will, or, when there is no will, by the laws of inheritance in the state of domicile of the decedent. It means, ordinarily the whole of the property owned by anyone, the realty as well as the personalty.

BLACK'S, *supra* note 1, at 491.

These states include: Connecticut (CONN. GEN. STAT. ANN. § 45-280 (1981)); Georgia (GA. CODE ANN. § 51-4-1 (1981)); Idaho (IDAHO CODE § 5-311 (1990)); and New Hampshire (N.H. REV. STAT. ANN. § 556:12, 556:14 (1974)).

4. Comment, *Wrongful Death Damages in North Carolina*, 44 N.C.L. REV. 402, 405-07 (1966). See also M. BROOKSHIRE & S. SMITH, *ECONOMIC/HEDONIC DAMAGES*, 244-45, 258, for a brief discussion of states using alternative formulations.

5. Although definitions may vary, most economists agree that:

The economic value of life is normally considered the sum of earnings, non-wage income and services one would contribute to the family or household, less the dollar value of any reduction that may occur in personal consumption in death cases. The methodology economists use in estimating the economic value of life is fairly well-established.

Darnell, *Economists Put Price on a Life*, NAT'L L. J., Oct. 16, 1989, at 15.

6. A wrongful death action is a:

[t]ype of lawsuit brought on behalf of a deceased person's beneficiaries that alleges that death was attributable to the willful or negligent act of another. Such action is original and distinct claim for damages

beginning to consider what have been called "hedonic damages."<sup>7</sup> The main goal of these damages is to measure, as a separate category of damages, the loss of the pleasure of being alive to the decedent himself. This measurement is fraught with controversy, for it is impossible to adequately estimate the value of living. Nonetheless, juries in a few recent cases have grappled with the problem and have arrived at conclusions as to the value of life the victim can no longer enjoy. Problems have subsequently arisen, however, as courts struggle to resolve the conflict between traditional legal principles—assessing damages in wrongful death cases based solely on economic worth—and this new and controversial damage theory.

The major discrepancies concern: (1) proof—while mathematically feasible to conclude what a person could have earned during a lifetime, calculations become less certain when attempting to assess the value of losing life itself; (2) excessive verdicts—damage awards are often already considered to be exorbitantly high, without the addition of a new category of damage recovery; and (3) closeness of fit—this discrepancy centers on the question of exactly how well hedonic damages meet the established tort goal of compensation for the victim's losses, rather than the unpermitted purpose of punishing a tortfeasor. Courts now find themselves reconsidering the various principles and purposes of damage theory in order to grant a deserving plaintiff her full share of damage recovery.

This comment analyzes the history of hedonic damages and addresses the issue of whether they should be awarded. Further, given the principles underlying the hedonic damage framework, it will be argued that hedonic damages logically extend from principles of tort recovery and should be granted when the circumstances warrant.

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sustained by statutory beneficiaries and is not derivative of or continuation of claim existing in decedent.

BLACK's *supra* note 1, at 1446.

7. Hedonic damages were defined at trial as "refer[ring] to the larger value of life, the life at the pleasure of society . . . the value including economic, including moral, including philosophical, including all the value with which you might hold life . . . [That] is the meaning of the expression 'hedonic value'." *Sherrod v. Berry*, 629 F. Supp. 159, 163 (N.D. Ill. 1985).

## II. BACKGROUND

The background of hedonic damage theory will be examined in four parts. First, the basic history of British wrongful death awards will be discussed, since that is the area from which loss of enjoyment of life damages originated. The development of hedonic damages in Great Britain will also be reviewed. This background history aids in understanding subsequent changes by United States courts and evolutions in California law. The second step is a similar analysis of U.S. law, with emphasis on the applicable federal statute, 42 U.S.C. § 1983,<sup>8</sup> and a look at cases arising beyond the scope of that particular legislation. Courts in these latter cases have extended the damages originally recoverable under section 1983 to other situations by extrapolating the purposes of hedonic damages beyond federal causes of action. Third, the comment considers the development of wrongful death and loss of enjoyment of life damages in California cases. The fourth step analyzes the extension of loss of enjoyment of life damages into personal injury cases, as plaintiffs try to extend principles of wrongful death recovery to situations where the victim has not died.

### A. *Developments in Great Britain*

#### 1. *Wrongful Death*

In 1808,<sup>9</sup> Lord Ellenborough made the now-famous pronouncement that "[i]n a civil [c]ourt, the death of a human being could not be complained of as an injury."<sup>10</sup> While the opinion has been subsequently criticized,<sup>11</sup> the statement survived and evolved to mean three things. First, if an injured plaintiff died before judgment was entered against the defendant, the cause of action did not survive the death of the plain-

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8. Loss of life's pleasures awards and hedonic damages were first awarded specifically out of a wrongful death action for a violation of that particular statute.

9. *Baker v. Bolton*, 170 Eng. Rep. 1033 (K.B. 1808).

10. *Id.*

11. For example, one such criticism noted that Lord Ellenborough "did not cite authority or give supporting reasoning." *Moragne v. States Marine Lines*, 398 U.S. 375, 383 (1970).

tiff.<sup>12</sup> Second, if a defendant died before judgment was rendered against him, the plaintiff's cause of action expired as well.<sup>13</sup> In other words, a cause of action did not survive the death of either the plaintiff or defendant. Third, the final extension of Lord Ellenborough's statement provides that no separate cause of action exists for the decedent's dependents.<sup>14</sup>

The first two interpretations have been subsequently remedied by so-called "survival statutes,"<sup>15</sup> while the third construction has been reformed by "wrongful death statutes."<sup>16</sup> Survival statutes allow a decedent's estate to bring suit for the recovery of pain and suffering, medical expenses, and lost wages resulting from the act leading to death.<sup>17</sup> Essentially the survival claim extends the decedent's right to sue, and preserves for the estate a cause of action for the infliction of pain, suffering and related damages suffered by the decedent up to the moment of death.

Wrongful death statutes, however, *create* a cause of action for any wrongful act, neglect or default that causes death so as to compensate the survivors for the loss of economic benefit that the decedent would have given them.<sup>18</sup> While originating in the same tortious act, the dissimilar theoretical bases for wrongful death and survival statutes result in a difference between the measure of damages recoverable.<sup>19</sup> Survival statutes

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12. D. DOBBS, TORTS AND COMPENSATION, 394 (1985).

13. *Id.*

14. *Id.*

15. A survival statute is defined as a "[s]tatutory provision for the survival, after death of the injured person, of certain causes of action for injury to the person whether death results from the injury or from some other cause. The cause of action which survives is for the wrong to the injured person." BLACK'S, *supra* note 1, at 1296.

16. Wrongful death statutes are defined as:

[s]uch statutes, which exist in all states, [that] provide a cause of action in favor of the decedent's personal representative for the benefit of certain beneficiaries (*e.g.* spouse, parent, children) against person who negligently caused death of spouse, child, parent, etc. The cause of action for wrongful death permitted under such statutes is for the wrong to the beneficiaries.

BLACK'S, *supra* note 1, at 1446.

17. BARRON'S LAW DICTIONARY 467 (2d ed. 1984).

18. *Id.* at 522.

19. Wrongful death actions intend to compensate the survivors for the loss of the decedent, while survival actions aim at compensating the decedent, albeit through her representative. *See* text accompanying *infra* notes 182-84 for discussion

allow the estate to act in place of the decedent by preserving the decedent's claim; wrongful death statutes create a new cause of action for the estate.<sup>20</sup>

The wrongful death doctrine dates back to 1846, when the British Parliament enacted the Fatal Accident Act, known colloquially as Lord Campbell's Act.<sup>21</sup> The Act provided that if a defendant would have been liable to the decedent if death had not occurred, the defendant would now be liable to the decedent's estate.<sup>22</sup> Yet despite the seemingly broad language

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of the legal fiction of the representative "standing in place of" the decedent.

Logically, given the different purposes of the actions, divergent methods of formulating damages are appropriate. Clearly, in determining the correct amount of damages, an alternative calculation is required to ascertain loss to the decedent than the method employed to determine the loss to the survivors occasioned by the decedent's death.

20. Hedonic damages have sprung from wrongful death statutes, but due to vague drafting of survival and wrongful death statutes, confusion has resulted, often leading to denial of a valid recovery for mislabelled causes of action. For instance, in the case of *Singleton v. Suhr*, the court denied recovery because the jury had found for the defendants and therefore issues of damages were moot. The court noted, however, that even if the issue were relevant, loss of enjoyment of life inappropriately measures damages in a wrongful death action brought for the benefit of decedent's survivors, and should be denied. *Singleton v. Suhr*, 45 Ohio St. 3d 715, 545 N.E.2d 907 (1989). See also *Bass v. Wallenstein*, 769 F.2d 1173 (7th Cir. 1985) (another such case where wrongful death actions were inappropriately labelled as actions under survival statutes). See text accompanying *infra* notes 31-36, for discussion of courts incorrectly calling hedonic damage remedies under wrongful death statutes. The purposes behind hedonic damage theory indicate these remedies are closer in nature to principles behind survival statutes.

21. Act for Compensating the Families of Persons Killed by Accidents, 9 & 19 Vict., ch 93, 1-6 (1846). The Act states in relevant part that:

1. [W]hensoever the death of a person shall be caused by wrongful act, neglect, or default, and the act, neglect, or default is such as would (if death had not ensued) have entitled the party injured to maintain an action and recover damages in respect thereof, then and in every such case the person who would have been liable if death had not ensued shall be liable to an action for damages, notwithstanding the death of the person injured, and although the death shall have been caused under such circumstances as amount in law to a felony.

2. [E]very such action shall be for the benefit of the wife, husband, parent, and child of the person whose death shall have been so caused, and shall be brought by and in the name of the executor or administrator of the person deceased; and in every such action the jury may give such damages as they may think proportioned to the injury resulting from such death to the parties respectively for whom and for whose benefit such action shall be brought.

*Id.*

22. *Id.* Note specifically the first paragraph, wherein language prolonging a

of the Act, English courts restricted the amount of allowable damages. In the subsequent case of *Blake v. Midland Railway Co.*,<sup>23</sup> the court established the standard that only pecuniary<sup>24</sup> losses were compensable in wrongful death cases. This ruling substantially curtailed the role of the jury, as it provided that if strictly pecuniary damages were allowed, only those injuries capable of accurate measurement in monetary terms would be redressed. The restriction prevented juries from becoming unduly creative in formulating damages.

## 2. Hedonic Damages

Although British courts awarded damages of a hedonic nature for a period of time, they now prohibit such recoveries. In the 1937 case of *Rose v. Ford*<sup>25</sup> the House of Lords decided that a wrongfully killed decedent's estate could sue the tortfeasor for loss of expectation of life.<sup>26</sup> Subsequently, however, the English courts limited such damage awards to a nominal amount on the theory that it was too difficult to assess the value of human life.<sup>27</sup> In the case of *Gammell v. Wilson*,<sup>28</sup> the court arrived at a standard figure<sup>29</sup> for use in later situations, thus easing the difficulty of valuing human life on an ad hoc basis. Shortly after *Gammell*, the English Parliament abrogated

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cause of action is contained.

23. 18 Q.B. 93, 118 Eng. Rep. 35 (Q.B. 1852).

24. Pecuniary damages are "such as can be estimated in and compensated by money . . . all such loss, deprivation, or injury as can be made the subject of calculation and of recompense in money." BLACK'S, *supra* note 1, at 353.

25. 1937 A.C. 826.

26. *Id.* The House of Lords decided this by interpreting Section 1 of the Law Reform (Miscellaneous Provisions) Act of 1934. The section states in relevant part that, "subject to the provisions of this section, on the death of any person . . . all causes of action subsisting against or vested in him shall survive against, or, as the case may be, for the benefit of, his estate." Law Reform (Miscellaneous Provisions) Act, 1934, 24 & 25 Geo. 5, ch. 41, section 1, *reprinted in* 17 HALSBURY'S STATUTES OF ENGLAND 312 (4th ed. 1985).

27. *See, e.g.,* *White v. London Transp. Executive*, [1982] 1 All E.R. 410; *Kandalla v. British Airways Bd.*, [1980] 1 All E.R. 341; *Benham v. Gambling*, [1941] 1 All E.R. 7, 12-13.

28. [1980] 2 All E.R. 557.

29. Specifically, the court arrived at a conventional figure of £1250 that would remain constant until inflation and monetary values required another increase. *Id.* at 567-68. Using present day exchange rates of approximately 1.76 British Pound per American Dollar, that would mean that the court was giving the equivalent of \$2,200. This figure is not adjusted for inflation.



the rule allowing damages for loss of expectation of life,<sup>30</sup> and to this day, English plaintiffs cannot claim a separate damage reward for loss of expectation of life.

## B. *Developments in American Law*

### 1. *Wrongful Death*

Towards the end of the Nineteenth Century, American jurisdictions, in fairly quick succession, passed wrongful death acts.<sup>31</sup> Most legislatures based their wrongful death acts on the English model and limited awards to pecuniary damages.<sup>32</sup> Generally, the amount of damages included the present value of probable contributions which the decedent would have made to the survivors. However, other states—a minority of jurisdictions—allowed non-pecuniary damages, including awards for mental anguish, sentimental value, companionship and affection.<sup>33</sup> Almost all states currently base damage calculations on one of two methods. Under the first method, plaintiffs' damages are calculated as the loss to the survivors occasioned by the decedent's death,<sup>34</sup> while under the second method, damages are measured as the loss to the estate.<sup>35</sup> Notably, the first method is more closely akin to the theory behind wrongful death statutes, while the latter formulation is nearer in concept to survival statutes.<sup>36</sup> Theoretical differences aside, both methods have proven to be acceptable standards in formulating damages in wrongful death cases.

Interestingly, hedonic damage cases sprung from wrongful death actions, under the applicable wrongful death statutes. Yet, hedonic damages measure the loss of enjoyment of life to the decedent, leading to the conclusion that they should be

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30. "In an action . . . for damages for personal injuries . . . no damages shall be recoverable in respect of any loss of expectation of life caused to the injured person by the injuries . . ." Administration of Justice Act, 1982, ch. 53, § 1, reprinted in 13 HALSBURY'S STATUTES OF ENGLAND 542 (4th ed. 1985).

31. Such an act now exists in every American state. See Comment, *supra* note 4, at 402-03.

32. Comment, *supra* note 4, at 404-05.

33. Comment, *supra* note 4, at 410-11.

34. Cohen, *Toward an Economic Theory of the Measurement of Damages in a Wrongful Death Action*, 34 EMORY L.J. 295, 299 (1985).

35. *Id.*

36. See *supra* notes 17-20 and accompanying text for background history of wrongful death and survival statutes.

brought under the applicable *survival* statutes. State survival laws properly measure loss to the decedent, whereas wrongful death actions measure loss to the estate. This apparent mistake is not explained in any existing case law, so it can be assumed that courts have been unaware or unconcerned of the error. Despite the fact that hedonic damages would be more accurately characterized as having developed from survival statutes, this fact does not detract from their value.

## 2. Hedonic Damages Under Section 1983

### a. Background of Section 1983

Section 1983 of Title 42 of the United States Code,<sup>37</sup> providing a federal cause of action for violations of protected civil rights, served as the main arena of hedonic damage development.<sup>38</sup> Specifically, section 1983 actions focus on misconduct by a governmental actor,<sup>39</sup> and the provision, a civil rights action, awards damages in order to achieve two main purposes: to compensate an injured plaintiff and to deter further civil rights violations.<sup>40</sup> Although permitting a cause of action for deprivations of constitutionally protected rights of the victim, section 1983 does not provide a cause of action for the benefit of decedent's estate.

To fill in the gaps when section 1983 failed to provide a remedy, Congress enacted section 1988 of United States Code Title 42<sup>41</sup> to provide procedural guidelines for section 1983

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37. 42 U.S.C. § 1983 (1988) [hereinafter section 1983]. Section 1983 provides that:

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

38. In fact, the term hedonic damages was first used in a section 1983 action. See text accompanying *infra* notes 65-71 for a discussion of the first hedonic damage case.

39. Section 1983, *supra* note 37. See also *Gomez v. Toledo*, 446 U.S. 635, 640 (1980), where the Supreme Court held that a plaintiff bringing an action under section 1983 must allege that (1) some person deprived the plaintiff of a federal right, and (2) the person acted under color of state law.

40. See, e.g., *Robertson v. Wegmann*, 436 U.S. 584, 590-91 (1978); *Bell v. City of Milwaukee*, 746 F.2d 1205, 1239 (7th Cir. 1984).

41. 42 U.S.C. § 1988 (1988) [hereinafter section 1988]. Section 1988 in part

actions and to act as a safeguard mechanism. Specifically, section 1988 directs the federal judiciary to apply state law when federal law inadequately protects the section 1983 goals of (1) compensation for the plaintiff, and (2) deterrence of future tortfeasors.<sup>42</sup> Thus, if a federal court hearing a section 1983 action determines that the existing federal law is inadequate, it can apply the state law if such state law compensates for the inadequacy or deficiency in the federal law. Although section 1983 does not specifically address a cause of action by the decedent's estate, section 1988 authorizes a court to extend section 1983 to cover such situations by using state remedies.

In fact, the United States Supreme Court in *Robertson v. Wegmann*,<sup>43</sup> held that when federal law is inadequate to redress section 1983 violations, section 1988 requires federal courts to apply state law, unless those state laws contradict the policies of section 1983. In summary, to properly determine awards in section 1983 actions, federal courts must first study federal law, and then, if federal law is insufficient to adequately compensate plaintiffs, the court must turn to state remedies. Such state remedies have often included the decedent's lost future earnings, pain and suffering, medical and funeral expenses, as well as survivors' loss of companionship and affection. With few exceptions, however, state courts have historically *not* included damages for loss of expectation of life.<sup>44</sup>

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reads:

The jurisdiction in civil and criminal matters conferred on the district courts by the provisions of this [chapter and Title 18], for the protection of all persons in the United States in their civil rights, and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause.

42. *Id. See, e.g., Carey v. Phipps*, 435 U.S. 247, 258 n.13 (1978) (section 1983 allows federal courts to use state law to replace inadequate federal law for section 1983 remedies). The exception to this rule occurs when state law conflicts with the Constitution or federal law. Under the supremacy clause of the Constitution, such inconsistent state law becomes invalid. U.S. CONST. art. VI, § 2.

43. 436 U.S. 584 (1978).

44. *See, e.g., Runyon v. District of Columbia*, 463 F.2d 1319, 1321-22 (D.C.

Thus, as one commentator accurately noted, federal courts "derived . . . existing section 1983 remedies for the unconstitutional deprivation of a person's life from state wrongful death and survival action remedies."<sup>45</sup> This statement is a logical extension from the fact that section 1988 leads a court to possible state remedies for the section 1983 violation. The *Robertson* Court directed federal courts to apply state law if necessary; the same Court in another case, *Carey v. Piphus*,<sup>46</sup> further authorized federal courts to create appropriate remedies for the particular injury in section 1983 actions if neither state nor federal law provided an adequate remedy.<sup>47</sup> The Court emphasized that the basic purpose of section 1983 is compensation for the victims<sup>48</sup> and thus liberal interpretation of statutes is appropriate.

A federal court relied on *Carey* to fashion adequate awards in *Bell v. City of Milwaukee*,<sup>49</sup> which upheld a jury verdict of \$100,000 to the decedent's estate for his loss of life and enjoyment thereof.<sup>50</sup> Agreeing that the Wisconsin state law barring recovery for loss of life acted inconsistently with the policies behind section 1983 and the fourteenth amendment's protection of life,<sup>51</sup> the U.S. Court of Appeals held that section 1983 allowed a claim for loss of enjoyment of life.<sup>52</sup> The court noted that section 1983 "was not intended to incorporate . . . restrictive damage limits"<sup>53</sup> and cited federal cases

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Cir. 1972); *Weaver v. Ford Motor Co.*, 382 F. Supp. 1068, 1076-77 (E.D. Pa. 1974), *aff'd* 515 F.2d 507 (3rd Cir. 1975); *Balmer v. Dilley*, 81 Wash. 2d 367, 370-71, 502 P.2d 456, 458-59 (1972) (these cases discuss recovery for loss of future earnings); *Heffner v. Allstate Ins. Co.*, 265 Pa. Super. 181, 190, 401 A.2d 1160, 1164 (1979) (this case discusses damages for pain and suffering prior to death); *In re Air Crash Disaster at New Orleans, Louisiana*, 795 F.2d 1230, 1236 (5th Cir. 1986); *Platt v. McDonnell Douglas Corp.*, 554 F. Supp. 360, 361 (E.D. Mich. 1983) (cases allowing damages for loss of decedent's love, companionship or affection).

45. Note, *Hedonic Damages in Section 1983 Actions: A Remedy for the Unconstitutional Deprivation of Life*, 44 WASH. & LEE L. REV. 321, 336 (1987).

46. 435 U.S. 247 (1978).

47. *Id.* at 258-59.

48. *Id.* at 254-55.

49. 746 F.2d 1205 (7th Cir. 1984).

50. *Id.* at 1279.

51. *Id.* at 1239-40.

52. *Id.* at 1240. It should be remembered that hedonic damages include loss of enjoyment of life damages as a component part. Thus *Bell* can logically be the first loss of enjoyment of life damages case without being a hedonic damage case.

53. *Id.* at 1240 (discussing *Sanchez v. Marquez*, 457 F. Supp. 359 (D. Colo. 1978)).

where state laws precluding various recoveries were ruled inconsistent with section 1983 policies.<sup>54</sup> The court concluded that laws precluding recovery for loss of enjoyment of life were incompatible with section 1983 goals, and allowed the damage awards.

*Bell* was a notable decision in another aspect as well: Previously, the United States Supreme Court had concluded that municipalities were immune from punitive damage awards in section 1983 actions.<sup>55</sup> Lower courts were therefore cautious when awarding large recoveries to cite the damages as compensatory or deterrent in nature, rather than as punitive.<sup>56</sup> While distinguishing between the deterrent effect of loss of life damages and the punishing effect of punitive damages,<sup>57</sup> the *Bell* court went on to state that punitive damages were in fact awardable in section 1983 actions.<sup>58</sup> Besides allowing for a new type of damage remedy, the maverick *Bell* court also made municipalities prone to punitive awards for their wrongdoings.

Buttressing the *Bell* decision, a later court of appeals in *Bass by Lewis v. Wallenstein*<sup>59</sup> addressed the issue of appropriate damages if state law acted inconsistently with the compensatory and deterrent policies of section 1983. Significantly citing *Bell*, the court concluded that "in a section 1983 action, the estate may recover damages for loss of life,"<sup>60</sup> as well as conscious pain and suffering experienced by the decedent prior to death.<sup>61</sup>

Hedonic damage theory has not yet been presented to the United States Supreme Court, but nevertheless, that Court has previously held that damages held based on the abstract "value" or "importance" of a constitutional right in section 1983

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54. *Id.* at 1237-38. The court discussed a series of cases where courts fashioned remedies to compensate for insufficient state awards. *Accord*, *Carlson v. Green*, 446 U.S. 14 (1980).

55. *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247 (1981).

56. *See, e.g.*, *Roman v. City of Richmond*, 570 F. Supp. 1554 (N.D. Cal. 1983) (court focused on deterrent aspect of the damage award); *Robertson v. Wegmann*, 436 U.S. 584 (1978) (court emphasized the compensation aspect of the award).

57. *Bell v. City of Milwaukee*, 746 F.2d 1205, 1279-80 (7th Cir. 1984).

58. *Id.* at 1241.

59. 769 F.2d 1173 (7th Cir. 1985).

60. *Id.* at 1190.

61. The court, however, denied relief to the plaintiff because damages were erroneously awarded as in a survival action when the action was more properly characterized as one of wrongful death. *Id.*

cases are inappropriate.<sup>62</sup> The concern seems to be that juries will award excessive damage amounts without a proper evidentiary basis. Such damages are inappropriate because they fail to address what harm was actually suffered. The Court has also warned that the "goal of compensating those injured by a deprivation of rights provides no basis for requiring compensation of one who is merely suing as the executor's estate."<sup>63</sup> Clearly the Supreme Court is concerned that the compensation aims will be abused and the estate will receive a windfall. The Court has carefully noted that the purpose of compensation in section 1983 cases is for the individual whose rights were infringed, not for his or her estate.<sup>64</sup>

b. *Sherrod v. Berry—The First Hedonic Damages Case*

A section 1983 case, *Sherrod v. Berry*,<sup>65</sup> was the first to use the term hedonic damages and to allow proffered testimony and evidence to prove that the decedent's life had a value greater than his financial worth. Unlike earlier section 1983 cases, in which plaintiffs had asked for non-pecuniary damages for loss of enjoyment of life, this case introduced hedonic damage theory when the plaintiff specifically requested "hedonic damages."<sup>66</sup> While prior courts struggled to allow loss of enjoyment of life damages in any capacity, *Sherrod* was the first case in which such a remedy was awarded as a completely discrete and insular damage category. The jury awarded \$850,000 of a \$1.6 million verdict for the hedonic value of Sherrod's life.<sup>67</sup> The *Sherrod* district court accepted the definition of hedonic value as compensation for a person's loss of life and pleasures of living.<sup>68</sup> Additionally, the court sustained the

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62. *Memphis Community School Dist. v. Stachura*, 477 U.S. 299 (1986). However, it seems as though the court is considering the value of a right, and not the value of life itself.

63. *Robertson v. Wegmann*, 436 U.S. 584, 592 (1977).

64. *Id.*

65. 629 F. Supp. 159 (N.D. Ill. 1985), *rev'd on other grounds*, 856 F.2d 802 (7th Cir. 1988). The case was originally affirmed at 827 F.2d 195 (7th Cir. 1987), but was later partially reversed at 835 F.2d 1222 (7th Cir. 1988) on grounds not related to the scope of this comment.

66. See *supra* note 7 for a definition of hedonic damages.

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

68. *Id.* at 163. *Sherrod* went beyond previous loss of enjoyment of life cases by asking for the additional component of loss of the pleasures of living.

plaintiff's argument that hedonic value includes the totality of a person's existence, and that such totality includes the economic, moral, and philosophical values that society places on life.<sup>69</sup> Furthermore, since the court added that enjoyment of life and expectations of future pleasures are also elements of a person's hedonic evaluation,<sup>70</sup> a strong nexus was established between the concepts of "loss of enjoyment of life" and "hedonic damages."<sup>71</sup>

### 3. *Fundamental Assumptions Behind Hedonic Damage Theory*

The *Sherrod* jury received assistance from expert witness and economist Stanley Smith, instrumental in creating the formulative process of hedonic damage assessment.<sup>72</sup> Smith claims that in analyzing hedonic value, certain assumptions must be made and explained to the jury.<sup>73</sup> The first presumption states that the hedonic value of life to a person of great wealth does not necessarily prove greater than the hedonic value to a person with little or no income.<sup>74</sup> Elaborating on this proposition, Smith explains that every person's hedonic value is independent of anyone else's hedonic value, and that in calculating the appropriate measure of damages, a person's wealth, social stature, etc., are invalid and irrelevant considerations. Smith's second assumption postulates that a person's hedonic value calculation should be independent of social rank, education, wealth, gender, family position or other similar characteristics.<sup>75</sup> In other words, the hedonic damage considerations are consistent whether the decedent was well-educated and from a prominent family or was a poor, illiterate migrant worker. The third principle posits that a person's hedonic value is related to his life expectancy.<sup>76</sup> Gen-

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69. *Id.*

70. *Id.* at 163-64.

71. In formulating loss of enjoyment of life damages, a plaintiff offers evidence as to how the decedent cannot enjoy the pleasures of life anymore. In hedonic damage formulation, a plaintiff offers expert testimony as to how to value the pleasures of life that can no longer be enjoyed.

72. *Sherrod*, 629 F. Supp. at 162.

73. Smith, *Hedonic Damages in Wrongful Death Cases*, 74 A.B.A. J. 70 (Sept. 1, 1988).

74. *Id.* at 72.

75. *Id.*

76. *Id.*

erally, a person of age twenty has a greater hedonic value than someone of age seventy. Also, any future year of a person's expected life has the same value regardless of the person's actual age. So the hedonic value of a person's twentieth year when she is nineteen is the same as the value of her fiftieth year when she is forty-nine because, it is assumed, people value every year of the future the same.<sup>77</sup> The last assumption states that it is appropriate to value the future years of a person's life with a zero real discount rate.<sup>78</sup>

Once the jury understands these premises, it can evaluate economic evidence as a means of differentiating various methods used by economists to value life. There are three main economic approaches to determine hedonic value: wage differential, consumption behavior, and willingness to pay to avoid risk.<sup>79</sup> Wage differential examines the differences in compensation between hazardous and non-hazardous occupations to determine how much pay people will forego in order to avoid a dangerous job. By use of the second school of thought—consumption or use of life-preserving activities—economists can convert figures about how much a person would pay for a fail-safe seat belt or smoke detector to figure out just how the respondent is really valuing a human life. Other data comes from existing government expenditures, which reflect standards of value of life and from which information can be gathered on what the government spends on safety items. Finally, the last approach, as the name suggests, measures what people will pay to avoid risk. This is the most common type of hedonic damage measurement because surveys can be taken quite easily. For instance, economists can distribute questionnaires, from whose answers the analysts can infer the value respondents place on human life. There is no one firm methodology for determining hedonic value, but from this information, Smith argues, a juror can add his own moral and philosophical views to arrive at a just damage award.<sup>80</sup> Hedonic value, he claims, can range from three to thirty times the financial or economic value of the person.<sup>81</sup>

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77. *Id.*

78. Smith, *Hedonic Damages in Wrongful Death Cases*, 74 A.B.A. J. 70 at 72.

79. Glennie, *Economists Can Assist with Proof*, NAT'L L.J. (Sept. 5, 1988).

80. Smith, *Hedonic Damages in Wrongful Death Cases*, 74 A.B.A. J. 70 at 73.

81. *Id.*



#### 4. *Hedonic Damages Outside Section 1983*

Hedonic damage awards have, until recently, only been tried via civil rights violation cases. "[M]ost states won't accept a demand for hedonic damages unless it is brought under Section 1983,"<sup>82</sup> yet some states have done so: The Connecticut Supreme Court decision of *Katsetos v. Nolan*<sup>83</sup> was a case where a decedent's estate recovered damages for the loss of life's enjoyment in a wrongful death case outside section 1983.<sup>84</sup> In fact, Connecticut was the first state allowing expansive loss of enjoyment of life damages outside section 1983.<sup>85</sup> The court based its reasoning on the theory that the plaintiff in a wrongful death situation is entitled to "just damages, together with the cost of reasonably necessary medical, hospital and nursing services, and including funeral expenses."<sup>86</sup> The court effectively interpreted the state's relevant statutory allowance of "just damages" to include "compensation for the destruction of [the decedent's] capacity to carry on and enjoy life's activities in a way [the decedent] would have done had [the decedent] lived"<sup>87</sup> without limiting these damages to governmental tortfeasors. *Katsetos*, as a state loss of enjoyment of life case, laid the groundwork for later state hedonic damage cases.

The New Jersey federal district court recently addressed the viability of hedonic damages in a case arising outside of section 1983. In *Clement v. Consolidated Rail Co.*,<sup>88</sup> the court noted that allowance of hedonic damages could not be based upon *Sherrod v. Berry*, since the *Sherrod* court based its analysis

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82. *Sherrod* defense attorney Andrew Horwitz, quoted in 73 A.B.A. J. 21 (Nov. 1, 1987).

83. 170 Conn. 637, 368 A.2d 172 (1976).

84. See also *Mather v. Griffin Hosp.*, 207 Conn. 125, 540 A.2d 666 (1988) (loss of enjoyment of life not duplicative of other damage elements); *Kiniry v. Danbury Hosp.*, 183 Conn. 448, 439 A.2d 408 (1981) (jury can consider decedent's loss of life and loss of ability to enjoy life's activities in awarding damages); *Waldron v. Raccio*, 166 Conn. 608, 353 A.2d 770 (1974) (estate can recover for decedent's loss of ability to enjoy life's activities).

85. Previously, decisions were under section 1983, and were decided by federal courts.

86. *Katsetos*, 170 Conn. at 648, 368 A.2d at 183.

87. *Id.* at 648, 368 A.2d at 183.

88. 734 F. Supp. 151 (D.N.J. 1989).

using section 1983 principles.<sup>89</sup> Instead, the court predicted what the New Jersey Supreme Court would do if it were presented with a hedonic damage case and concluded that under the proper circumstances, that court would permit the recovery.<sup>90</sup> The district court observed a "growing trend in jurisdictions across the country to permit juries to consider loss of life's enjoyment in some manner when awarding damages."<sup>91</sup> The court expressly denied that hedonic damages were punitive in nature and instead, directly stated that hedonic damages constituted a measure of compensation.<sup>92</sup> The purpose of this statement may have been to emphasize the positive aspect of compensation inherent in hedonic damages, rather than the negative aspect of punishment. A court would prefer to compensate an injured plaintiff rather than punish the defendant, possibly in deference to the tort goal of compensation.

Highlighting the controversy in the matter, the U.S. district court in Delaware, predicting how that state's supreme court would decide the issue, ruled to the contrary in *Sterner v. Wesley College*.<sup>93</sup> The district court noted that Delaware's highest court had observed that "Pennsylvania's survival act was the source from which Delaware's [survival statute] apparently was taken"<sup>94</sup> and Pennsylvania does not allow hedonic damages.<sup>95</sup> Therefore, the *Sterner* court decided that hedonic damages would be inappropriate under Delaware's relevant statute. Interestingly, however, the court added that the plaintiffs were entitled to "offer evidence of the hedonic value of the decedent's life only to the extent that it is relevant as a measure of the decedent's pain and suffering in the time between the [accident] . . . and decedent's death."<sup>96</sup> This arguably indi-

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89. *Id.* at 153.

90. *Id.* at 153-55.

91. *Id.* at 154.

92. *Id.* at 154-55.

93. 747 F. Supp. 263 (D. Del. 1990).

94. *Id.* at 266.

95. *Id.* (citing *Willinger v. Mercy Catholic Medical Center*, 393 A.2d 1188 (Pa. 1978)).

96. *Id.* at 267. The court reasoned that:

[u]nless we are to equate loss of life's pleasures with loss of life itself, we must view it as something that is compensable only for a living plaintiff who has suffered from that loss. It follows that . . . damages for the pain and suffering that may flow from the loss of life's pleasures should only be recoverable for the period of time between the

cates that the court was not placing a flat ban on hedonic damages, but only prohibiting them as a separate category of recovery.

Another jurisdiction has also denied hedonic damage recovery. The 1990 case of *Gonzales v. City-Wide Insulation*,<sup>97</sup> established the proposition that the Illinois Wrongful Death Act does not provide for recovery of hedonic damages.<sup>98</sup> While the case first allowing hedonic damages was an Illinois case—*Sherrod v. Berry*<sup>99</sup>—the *Gonzales* court interpreted the state's wrongful death statute, while the *Sherrod* court analyzed the state's remedies for a section 1983 violation.

### C. *Developments in California*

#### 1. *Wrongful Death*

The California legislature enacted the state's first wrongful death statute in 1862 and provided for pecuniary and exemplary damages<sup>100</sup> considered fair and just under the circumstances.<sup>101</sup> Although a later amendment removed the words "pecuniary and exemplary," the statute remains the same today, and includes, in part, that "damages may be given as under all the circumstances of the case, may be just."<sup>102</sup>

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accident and the decedent's death."

*Id.*

97. *Gonzales v. City-Wide Insulation, Inc.*, 1991 WL 2532 (N.D. Ill. 1990).

98. *Id.* at 3-4.

99. Further, the court in *Birdsell v. Board of Fire and Police Comm'rs*, No. 85-3371 (C.D. Ill. Oct. 16, 1990), refused to consider *Sherrod* as controlling precedent because the case was remanded. Importantly, however, *Sherrod* was reversed on items entirely unrelated to hedonic testimony.

100. "Damages on an increased scale, awarded to plaintiff over and above what will barely compensate him for his property loss, where wrong done to him was aggravated by circumstances of violence, oppression, malice, fraud, or wanton and wicked conduct on part of defendant." BLACK'S, *supra* note 1, at 513.

101. The Death by Wrongful Act Statute, 1862 Cal. Stat. 447, reprinted in 1 GENERAL LAWS OF THE STATE OF CALIFORNIA 322 (1870). The Act reads in part that "[t]he jury may give such damages, pecuniary and exemplary, as they shall deem fair and just." *Id.*

102. CAL. CIV. PROC. CODE § 377 (West Supp. 1989). The Code provides in part that:

When the death of a person is caused by the wrongful act or neglect of another, his or her heirs or personal representatives on their behalf may maintain an action for damages against the person causing the death of such wrongdoer, against the personal representative of such wrongdoer, whether the wrongdoer dies before or after the

Despite the broad language of California's 1873 amendment removing restrictive award limitations, state courts acted conservatively in awarding damages. Pecuniary loss limitations in the state were firmly established in the seminal case of *Munro v. Pacific Coast Dredging Reclamation Co.*,<sup>103</sup> wherein the court allowed damages for pecuniary loss, the loss of comfort, support, society, and protection of the deceased. However, the court refused to permit recovery for mental anguish, claiming that allowing a jury to find damages for mental anguish and grief would give free rein to return extremely excessive verdicts.<sup>104</sup> Shortly thereafter,<sup>105</sup> the California Supreme Court determined that recovery for comfort, support, society, and protection would also be limited to those damages specifically measurable in monetary terms.<sup>106</sup>

Eventually, however, the California Supreme Court expanded recovery when it concluded that some aspects of wrongful death damage awards were not pecuniary in nature. In *Krouse v. Graham*,<sup>107</sup> the court reflected on the circularity and illogic of limiting the plaintiff's recovery to pecuniary losses, while permitting some compensation for nonpecuniary losses (as in *Lange*) such as society, comfort, and protection of a decedent.<sup>108</sup> The court proceeded to allow some non-pecuniary losses, but specifically denied recovery for mental anguish.<sup>109</sup> Currently, California judges instruct juries to consider damages for "loss of love, companionship, comfort, affection, society, solace or moral support," and if applicable, loss of enjoyment of sexual relations, and loss of enjoyment of assistance in the home, but not for grief or sorrow suffered by wrongful death plaintiffs.<sup>110</sup>

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death of the person injured . . . . In every action under this section, such damages may be given as under all the circumstances of the case may be just, but shall not include damages recoverable under Section 573 of the Probate Code.

103. 84 Cal. 515, 24 P. 303 (1890).

104. *Id.* at 524-25, 24 P. at 305.

105. 115 Cal. 388, 47 P. 139 (1896).

106. *Id.* at 391, 47 P. at 139.

107. 19 Cal. 3d 59, 562 P.2d 1022, 137 Cal. Rptr. 863 (1977).

108. *Id.* at 69, 562 P.2d at 1026, 137 Cal. Rptr. at 867.

109. *Id.* at 70, 72, 562 P.2d at 1027, 1028, 137 Cal. Rptr. at 868, 869.

110. CALIFORNIA JURY INSTRUCTIONS CIVIL 14.50 (7th ed. 1986). The instructions include in part that, "[i]n determining the loss which each heir has suffered,

## 2. Section 1983

The California federal district courts have long debated whether a decedent's loss of enjoyment of life was a compensable injury for the estate under a section 1983 action.<sup>111</sup> Even before the *Bell* court allowed damages for decedent's loss of enjoyment of life, the California court in *Guyton v. Phillips*<sup>112</sup> addressed the issue of whether a decedent's loss of enjoyment of life in a section 1983 action was a viable claim for the estate. The *Guyton* court accepted the reasoning that the deprivation of life epitomizes the most outrageous violation of a person's rights and that therefore, a high damage award is not excessive.<sup>113</sup> Agreeing that federal courts can create remedies in section 1983 actions to promote the aims of compensation and deterrence,<sup>114</sup> the court further concluded that the best method of reducing the lost enjoyment of life to a monetary figure would be to compare awards in other factually similar situations.<sup>115</sup> The *Guyton* court, stressing the compensatory aims of section 1983, was the first in California to allow a remedy for loss of life to the estate of a decedent in a section 1983 action.

Loss of life damages were again awarded in *Roman v. Richmond*.<sup>116</sup> Emphasizing the deterrence aim of section 1983,<sup>117</sup> the court concluded that a loss of enjoyment of life damage would inhibit future deprivations of life.<sup>118</sup> The

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[juries] are not to consider: 1. Any pain or suffering of the decedent; 2. Any grief or sorrow of his heirs; or 3. The poverty or wealth of any heir."

111. However, neither the California state courts nor federal district courts have addressed loss of enjoyment of life damages in cases arising outside section 1983.

112. 532 F. Supp. 1154 (N.D. Cal. 1981).

113. *Id.* at 1167.

114. *Id.* at 1167-68. See also *supra* notes 40-41 and accompanying text for discussion of federal court creation of remedies to promote section 1983 aims.

115. *Id.* at 1168. The court noted that Guyton's future earnings, as a black male, would be less than those of white males similar background and education. "It would be ironic that under the very Act that was intended to protect the rights of black citizens the measure of damages incorporated the proscribed discrimination." *Id.*

116. 570 F. Supp. 1554 (N.D. Cal. 1983).

117. *Id.* at 1557. This is notable since most courts previously stressed the compensation aims of section 1983.

118. *Id.*

court noted the logical inconsistency that an injured plaintiff in a section 1983 action could obtain large damage awards for medical treatments, while a decedent plaintiff could only recover limited damages.<sup>119</sup> Under such a bizarre scheme, a tortfeasor could conceivably be liable for less damages as a result of killing someone as opposed to permanently maiming him. After *Roman* cemented the principles of *Guyton*, California courts had a strong base to allow damages for loss of enjoyment of life's activities.

D. *Loss of Enjoyment of Life in Personal Injury Cases*

The application of enjoyment of life damages has been extended to personal injury cases. In *Leiker v. Gafford*,<sup>120</sup> the Supreme Court of Kansas ruled that loss of life in a personal injury action is not a separate component of nonpecuniary damages, but is properly an element of pain and suffering or disability.<sup>121</sup>

Citing *Leiker* approvingly in a subsequent decision,<sup>122</sup> the Kansas Supreme Court repeated that loss of enjoyment of life is interwoven with disability and pain and suffering.<sup>123</sup> While admitting that, arguably, loss of enjoyment of life is a distinct category of damages deserving of separate consideration, the court "took the more realistic approach" that such an award may result in the duplication of damages.<sup>124</sup>

Similarly, the New York Court of Appeals rejected the notion that loss of enjoyment of life is a separate element of pain and suffering in *McDougald v. Garber*.<sup>125</sup> The court acknowledged that while recovery for loss of enjoyment is a valid damage request, it is subsumed by the pain and suffering award; therefore, the court reasoned, to allow a separate cause of action would permit double recovery.<sup>126</sup> The court concluded that such overpayment fails to satisfy the aim of tort recovery (compensation), and would instead grant a windfall to

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119. *Id.*

120. 245 Kan. 325, 778 P.2d 823 (1989).

121. *Id.* at 340, 778 P.2d at 835.

122. *Gregory v. Carey*, 791 P.2d 1329 (1990).

123. *Id.* at 1336.

124. *Id.*

125. 73 N.Y.2d 246, 536 N.E.2d 372, 538 N.Y.S.2d 937 (1989).

126. *Id.* at 256-57, 536 N.E.2d at 375-77, 538 N.Y.S.2d at 940-41.

the estate. The court also focused on a cost/benefit type analysis, and stated that the true issue of the case is "whether an award of damages for loss of enjoyment of life to a person whose injuries preclude any awareness of the loss serves a compensatory purpose. We conclude that it does not."<sup>127</sup> In *McDougald*, the court determined that an award of damages for loss of life's pleasures serves a punitive rather than compensatory purpose.<sup>128</sup> A companion case, *Nussbaum v. Gibstein*,<sup>129</sup> further held that loss of enjoyment of life is not a separate element of damages deserving of a distinct award, but is, instead, only a factor to be considered by the jury in assessing damages for conscious pain and suffering.<sup>130</sup> This same conclusion was reached in *Leonard v. Parrish*,<sup>131</sup> wherein the Minnesota Appeals Court found a general instruction on damages appropriate, rather than a separate jury instruction on loss of enjoyment of life. Clearly, the extension of loss of enjoyment of life damages to personal injury cases is an uphill battle, although courts appear amenable to allow hedonic testimony as part of the pain and suffering category.

California courts similarly addressed the issue of loss damages in personal injury cases. In *Huff v. Tracy*<sup>132</sup> the Court of Appeals held that separate damages for loss of enjoyment of life were inappropriate. The court focused on elements of general damages in California—permitting recovery for pain, discomfort, fears, anxiety and other mental and emotional distress suffered by the plaintiff<sup>133</sup>—and concluded that loss of enjoyment of life is included in the aforementioned categories. The court emphasized that the issue was "not the propriety of

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127. *Id.* at 254, 536 N.E.2d at 375, 538 N.Y.S.2d at 940.

128. *Id.* at 254, 536 N.E.2d at 375, 538 N.Y.S.2d at 940. *But cf.* *Kelavity v. United States*, 584 F.2d 809, 811 (6th Cir. 1978); *Clement v. Consolidated Rail*, 734 F. Supp. 751 (1989). In these two cases, the courts stressed that hedonic damages were not punitive in nature.

129. 73 N.Y.2d 912, 536 N.E.2d 618, 539 N.Y.S.2d 289 (1989).

130. *Id.* at 914, 536 N.E.2d at 619, 539 N.Y.S.2d at 290.

131. 420 N.W.2d 629 (Minn. Ct. App. 1988), *aff'd* by 435 N.W.2d 842 (Minn. Ct. App. 1989).

132. 57 Cal. App. 3d 939, 129 Cal. Rptr. 551 (1976).

133. California Jury Instructions for measure of damages in personal injury cases includes "[r]easonable compensation for any pain, discomfort, fears, anxiety and other mental and emotional distress suffered by the plaintiff and of which his injury was a legal proximate cause and for similar suffering reasonably certain to be experienced in the future from the same cause." BAJI 14.13 (7th ed.).

awarding damages for such a loss, but whether a court could instruct the jury on loss of enjoyment of life in addition to or distinct from general damages."<sup>134</sup> The court held that jury instructions indicating loss of enjoyment of life were separate and distinct damages from approved general damage categories in California potentially provided plaintiff with a double recovery.<sup>135</sup> *Huff* thus stands for the proposition that loss of enjoyment of life damages should not be awarded as separate recovery in personal injury cases arising in California courts.<sup>136</sup>

*Huff* was accordingly cited by *Akers v. Kelley Co.*,<sup>137</sup> to justify disallowing recovery for loss of enjoyment of life, but the court noted that "it does not appear from the record that the award would have been reduced if the phrase 'loss of enjoyment of life' had been omitted from the instruction."<sup>138</sup> This indicates judicial realization that allowing hedonic testimony will not necessarily result in duplicative awards, a fear well-touted by hedonic damage critics.

### III. ANALYSIS

#### A. Hedonic Damages in the United States

The monumental importance of hedonic damage theory is most evident in two major premises underlying the theory, the first point being that the hedonic value of a rich person is not necessarily greater than that of a poor person.<sup>139</sup> Secondly, a person's hedonic value is independent of factors such as social rank, education and wealth.<sup>140</sup> Hedonic theory fills a gap left open by traditional damage remedies because it treats all human life equally. The traditional methods of evaluating damages consider the reality that a person of a certain

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134. *Hermes, Loss of Enjoyment of Life—Duplication of Damages Versus Full Compensation*, 63 N.D.L. Rev. 561, 572 (1987).

135. *Huff*, 57 Cal. App. 3d at 943, 129 Cal. Rptr. at 553.

136. *Cf. Guyton v. Phillips*, 532 F. Supp. 1154 (N.D. Cal. 1981); *Roman v. Richmond*, 570 F. Supp. 1554 (N.D. Cal. 1983). Both of these cases allowed loss of enjoyment in a section 1983 action. Notably, *Huff* preceded both of these cases.

137. 173 Cal. App. 3d 633, 219 Cal. Rptr. 573 (1985).

138. *Id.* at 655, 219 Cal. Rptr. at 527.

139. *See supra* note 73, at 72 and accompanying text.

140. *See supra* note 73, at 72 and accompanying text.



socio-economic background will earn more money than a person from a more disadvantaged background. As a result of awarding solely economic damages, therefore, a decreased deterrent effect exists on unconstitutional behavior against the poor. Not only do such methods have disparate impact across social lines, these evaluations fall short of addressing other elements of human value. Since hedonic damages are independent of pecuniary losses, a jury can award both economic and loss of enjoyment of life damages,<sup>141</sup> thereby taking both components into account.

Moreover, hedonic values can range from between three to thirty times the economic value of a person.<sup>142</sup> Thus, excluding factors such as gender, wealth, lineage and social stature, and all other relevant factors being equal, hedonic theory suggests that a poor person could have an equal or greater hedonic loss than someone wealthier. The great equalizing function of hedonic damages is that they cut across economic barriers and value human life with a standard formula.

Admittedly, a major problem of hedonic damages lies in the difficulty of assessing a proper recovery amount. Despite this obstacle, courts should not be adverse to expanding hedonic damage remedies out of fear of incorrectly measuring the totality of life. They have discretion under section 1988 to use state law when existing federal law is insufficient<sup>143</sup> and if state law is still inadequate, precedent exists allowing them to fashion their own remedies.<sup>144</sup> Thus, section 1983, under which hedonic damages were first requested, does not preclude federal judges from liberal awards. In fact, the section encourages them: The court in *Bell* created a remedy because, prior to that decision, no recovery for loss of life had traditionally been allowed in the state court.<sup>145</sup> The court fashioned

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141. This is what happened in *Sherrod v. Berry*. The jury awarded \$850,000 in hedonic damages and \$750,000 in pecuniary losses to the estate of the decedent. *Sherrod v. Berry*, 629 F. Supp. 159, 160 (N.D. Ill. 1985).

142. See *supra* note 80 and accompanying text.

143. See § 1988, *supra* note 41. See also *Carey v. Phipus*, 435 U.S. 247, 258 n.13 (1978).

144. See generally, *supra* notes 41-47 (discussion of section 1988).

This seemingly broad endowment of discretion is limited to creating remedies only when corresponding state remedies are inadequate. *Carey v. Phipus*, 435 U.S. 247 (1978).

145. *Bell v. City of Milwaukee*, 746 F.2d 1205, 1236 (7th Cir. 1984).

the award to further both aims of section 1983—"compensation for and deterrence of unconstitutional acts committed under state law."<sup>146</sup> The court correctly acted on its own initiative to create a "federal rule responsive to the need whenever a federal right is impaired."<sup>147</sup> While stressing the deterrence aspect of section 1983 remedies, the court clearly considered both prongs to be important elements of its decision.

Similarly, in *Bass by Lewis v. Wallenstein*, the court recognized the importance of furthering the goals of section 1983.<sup>148</sup> As in *Bell*, the court primarily focused on the deterring effect of loss of enjoyment of life damages on wrongful death,<sup>149</sup> but the court also looked at elements of compensation for the decedent's survivor. Other courts, like that deciding *Roman v. Richmond*,<sup>150</sup> which focused specifically on the deterrence goal of section 1983,<sup>151</sup> have concluded that a damage amount for loss of life would deter unconstitutional deprivations of life.<sup>152</sup>

Likewise, in *Guyton v. Phillips*,<sup>153</sup> the court decided that in a section 1983 action, decedent's loss of enjoyment of life was an injury for which the estate could seek recompense.<sup>154</sup> The court stressed that federal judges should create remedies to advance the policies of section 1983 when existing awards prove insufficient. The *Guyton* court grappled with the inherent difficulty of assessing the value of human life, but arrived at the conclusion that it is possible to reach a monetary figure.<sup>155</sup>

Finally, the court in *Sherrod*<sup>156</sup> incorporated all of these notions of the importance of section 1983 goals and recovery under that section for loss of life. "Emphasizing that the measure or extent of the injury suffered may be uncertain does

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146. *Id.* at 1239.

147. *Id.* (quoting *Sullivan v. Little Hunting Park, Inc.*, 396 U.S. 229, 240 (1969)).

148. *Bass by Lewis v. Wallenstein*, 769 F.2d 1173, 1189-90 (7th Cir. 1985).

149. *Id.* at 1190.

150. 570 F. Supp. 1554 (N.D. Cal. 1983).

151. *Id.* at 1556-58.

152. *Id.* at 1557.

153. 532 F. Supp. 1154 (N.D. Cal. 1981).

154. *Id.* at 1168.

155. *Id.*

156. *Sherrod v. Berry*, 827 F.2d 195, 205 (7th Cir. 1987).

not bar recovery,"<sup>157</sup> the court approved hedonic damages as a valid award element in section 1983 actions.<sup>158</sup>

These cases illustrate the importance courts place on compensating the victims, and further, demonstrate that courts can act on their own initiative to give proper damages under the circumstances of the particular case and/or applicable statutes. Courts should not hesitate to award hedonic damages merely because they are a recent development in tort law and are inherently controversial. Instead, judges should use powers granted to them<sup>159</sup> and their best judgment to award fair and just compensation. Every case that allowed loss of enjoyment of life or hedonic damages stressed the importance of trying to make the victim (possibly through the estate) whole. There is an increasing tendency to broaden the concept of recovery under wrongful death and survivors statutes,<sup>160</sup> appropriately so, considering that wrongful death acts are remedial in nature and therefore should be construed liberally.<sup>161</sup>

Moreover, the argument that evaluation of hedonic value of life is too arbitrary to conclusively prove should not deter the courts from awarding hedonic damages. Although some speculation is inherent in the calculation of a decedent's loss of enjoyment of life, uncertainty also exists in the determination of the well-established future income stream analysis.<sup>162</sup> In other words, although it may be complicated to prove that a decedent's loss of life's enjoyment is worth a certain dollar amount, X, it is also difficult to determine that the decedent's pure economic worth is clearly established as dollar amount, Y. Courts feel more comfortable with the latter figure, undoubtedly because they simply fear creating even more uncertainty in formulating damages.

Yet courts have stressed that while the value of life is diffi-

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157. *Id.* at 206.

158. *Id.*

159. *Carey v. Phipus*, 435 U.S. 247, 258 (1978).

160. *Tarr, Illinois Jury Awards 'Hedonic' Damages*, NAT'L L.J., Nov. 26, 1984, at 30 col. 4 (quoting Arthur J. Sabin).

161. *Fussner v. Andert*, 261 Minn. 347, 113 N.W.2d 355 (1961).

162. Every state court wishes to determine the present value of the future income stream of the decedent, had his life not been shortened as a result of the wrongful killing. Since all courts are comfortable with this figure as a fairly "certain" element of pecuniary loss, it is a "well-established" evidentiary figure.

cult to establish, such a determination is not impossible<sup>163</sup> and the fact that "the measure or extent of the injury suffered may be uncertain does not bar recovery."<sup>164</sup> For instance, the *Guyton* court, while admitting inherent difficulties in ascertaining the value of life, held that loss of enjoyment of life damages were not speculative. Courts are required only to do the best they can, considering that in any "effort to translate such catastrophic . . . loss . . . into money . . . precision is not achievable."<sup>165</sup>

The United States Supreme Court has held<sup>166</sup> that a logical basis is required for awarding damages because "damages based on [an] abstract value . . . are not a permissible element of compensatory damages."<sup>167</sup> The Supreme Court's apparent concern is that juries will allow awards regardless of the existence of an evidentiary basis to justify the amount. However, expert testimony by economists and others can provide a mathematical foundation for hedonic damages, thereby eliminating speculative evidence.<sup>168</sup> The *Sherrod* court found "the testimony of [the] expert economist . . . invaluable to the jury in enabling it to perform its function of determining the most accurate and probable estimate of the damages."<sup>169</sup> The *Stachura* court feared that a jury could give duplicative or otherwise excessive awards,<sup>170</sup> but judges give guidance to juries when assessing awards and jurors can call upon personal knowledge and expert testimony, as well as instructions from the court.<sup>171</sup> Generally, juries award damages using their common sense based on the court's instructions.<sup>172</sup> Thus judges'

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163. *Rose v. Ford*, 1937 App. Cas. 826, 859.

164. *Sherrod v. Berry*, 827 F.2d 195, 206 (7th Cir. 1987).

165. *Frankel v. Heym*, 466 F.2d 1226, 1228 (3d Cir. 1972).

166. *Memphis Community School Dist. v. Stachura*, 477 U.S. 299 (1986).

167. *Id.* at 310.

168. The *Sherrod* court noted that "[t]he fact that the hedonic value of a human life is difficult to measure did not make either [plaintiff's expert witness] Smith's testimony or the damages speculative." *Sherrod v. Berry*, 827 F.2d 195, 206 (7th Cir. 1987), quoting Judge Leighton in *Sherrod v. Berry*, 629 F. Supp. 159, 164 (N.D. Ill. 1985).

169. *Sherrod v. Berry*, 827 F.2d 195, 206 (7th Cir. 1987).

170. *Stachura*, 477 U.S. at 312-13.

171. C. MCCORMICK, DAMAGES, Section 6, at 21, 24-28 (1935) (discussing roles of judge and jury in assessing damages).

172. S. SPEISER, 2 RECOVERY FOR WRONGFUL DEATH § 9:2 (2d ed. 1975) (discussing how juries arrive at damage calculations).

instructions to juries can minimize the risks of excessive verdicts.

Tort law recognizes the well-established principle of providing compensation to the estate for the tortious killing of the decedent.<sup>173</sup> Yet, prior to loss of enjoyment of life cases, tort remedies failed to compensate the estate for decedent's loss of the pleasure of living and this new remedy effectively confronts this inadequacy.<sup>174</sup> To ignore the totality of a person's existence and not compute damages beyond the pecuniary losses leaves the estate insufficiently made whole—to the extent money can possibly replace a person—for the harm suffered by the decedent.<sup>175</sup>

Similarly, the failure to award hedonic damages in section 1983 cases undermines that section's deterrence goal: If tortfeasors do not have to pay the full cost of the victim's life, they are not induced to act with less recklessness or negligence. "To the extent that potential tortfeasors are aware of the judgments that are imposed on actual tortfeasors, they will treat the amount of those judgments as potential costs of their own contemplated and possibly tortious conduct."<sup>176</sup> The *Carey* and *Roman* courts recognized that substantial compensatory damages will have a chilling effect on would-be or actual tortfeasors.<sup>177</sup> According to studies, such damages make governmental actors more aware of their actions, and thus more cautious or risk-averse since a decedent's estate will recover more than previously allowed if states will allow hedonic damage recovery.<sup>178</sup> These same policy reasons extend to situa-

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173. See *supra* notes 2-4 and accompanying text (legislative enactment of statutes to provide compensation).

174. See *supra* note 7 (definition of hedonic damages). See, e.g., *Downie v. United States Line Co.*, 359 F.2d 344, 347-48 (3d Cir. 1966) (tort case disallowing loss of life damages).

175. Significantly, the Association of Trial Lawyers of America, with upwards of 65,000 members, supports hedonic damage theory. Marcotte, *Lost Pleasure Suit: First personal injury case to award hedonic damage settles*, 76 A.B.A. J. 30 (Apr., 1990).

176. Cohen, *supra* note 34, at 295-96.

177. *Carey v. Piphus*, 435 U.S. 247, 256-57 (1978); *Roman v. Richmond*, 570 F. Supp. 1554, 1557 (N.D. Cal. 1983).

178. See Newman, *Suing the Lawbreakers*, 87 YALE L.J. 447, 464-67 (1978) (emphasizing compensation and deterrence policies of section 1983); Project, *Suing the Police in Federal Court*, 88 YALE L.J. 781, 810-17 (deterrence effect of section 1983).

tions outside section 1983 cases as well. State wrongful death statutes should focus on allowing hedonic damages, however, for compensation purposes rather than as deterrence of future tortfeasors.<sup>179</sup>

Most states allow loss of enjoyment of life damages as either a separate category of recovery or as a component of some other type of general damages, such as pain and suffering.<sup>180</sup> Clearly, state legislatures and judiciaries espouse the principles behind hedonic damage theory, but differ on classification. That is, while many courts admit testimony on the lost pleasure of life, they differ on the issue of what kind of damage the evidence goes to prove: separate hedonic damages, a constituent of pain and suffering, or possibly as an element of general damages.

Arguably, damages for a decedent's loss of life as a separate component are a windfall to the estate because the decedent cannot enjoy the benefit of the award,<sup>181</sup> and so the survivors are getting far more recompense than they deserve. However, American jurisprudence accepts the legal fiction that the estate is only the representative of the deceased.<sup>182</sup> Essentially, the estate "stands in" for the decedent. A tortfeasor his-

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179. The clear purpose of hedonic damages is to compensate a decedent's estate for the loss of the pleasures of living. *Sherrod v. Berry*, 629 F. Supp. 159, 162-64 (N.D. Ill. 1985). This is consistent with the purpose of wrongful death statutes, which is to compensate "the wrong to the beneficiaries." See *supra* note 16 for the definition of wrongful death statutes.

180. Courts in the following states allow hedonic recovery as part of the pain and suffering category: Alaska, Arkansas, California, District of Columbia, Georgia, Iowa, Kentucky, Maine, Minnesota, Missouri, Montana, New Jersey, New York, North Dakota, Ohio, Oklahoma, South Dakota, Utah, and Washington.

Courts in the following states allow hedonic damages as a separate element of recovery: Colorado, Connecticut, Florida, Idaho, Illinois, Louisiana, Maryland, Michigan, Nebraska, Pennsylvania, South Carolina, Tennessee, Texas, West Virginia, Wisconsin and Wyoming.

Kansas prohibits any recovery of hedonic damages at all.

Alabama, Arizona, Delaware, Hawaii, Indiana, Massachusetts, Mississippi, New Mexico, North Carolina, Oregon, and Vermont have various hybrid interpretations. M. Brookshire & S. Smith, *ECONOMIC/HEDONIC DAMAGES*, 256-57 (1990).

181. Such was suggested in *Flannery v. United States*, 718 F.2d 108 (4th Cir. 1983). The court, observing how a comatose plaintiff could not enjoy the benefits of the jury award, claimed that the damages would constitute a windfall for the estate. *Id.* at 111. Since the plaintiff could not enjoy the awards, the damages were essentially punitive in nature. *Id.*

182. See SPEISER, *supra* note 172, at § 14.1 (discussing legal fiction of state survival statutes).

torically owes the victim money damages,<sup>183</sup> and no valid reason exists to save the wrongdoer from paying his redresses simply because it is the representative of the decedent and not the decedent himself who will collect the award. The inconsistency in the argument of the "windfall" proponents is that the decedent cannot enjoy the benefit of *any* award. That is, if a decedent cannot enjoy an award for hedonic damages, she also could not enjoy damages for pain and suffering, economic loss, or any other type of damage currently allowed. Yet those awards are routinely given.<sup>184</sup> Surely those commentators advocating this "windfall to the estate" position would not endeavor to claim that the estate is not entitled to anything from the tortfeasor as a result of the decedent being wrongfully killed. The legal fiction of representation exists to make sure the tortfeasor pays his victim, albeit through his estate, some compensation. Given this, hedonic damages do not create a windfall to the survivors any more than do other, more widely accepted, damage remedies.

#### B. *Hedonic Damages in California*

The future of hedonic damages is unclear in California. *Sherrod* was based on the hedonic value of the decedent if he had lived and allowed recovery to the decedent's father in his capacity as executor<sup>185</sup> of the estate.<sup>186</sup> The wrongful death statute in California does not permit a beneficiary to receive those damages which are recoverable by the estate.<sup>187</sup> In states like California where an heir cannot recoup damages obtainable by the estate, the heir must show the hedonic value he would have received from the decedent's life. In California, the survivors maintain an action on their own behalf, but hedonic

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183. See MCCORMICK, *supra* note 171, at 21-24 (discussion of money damages in British law).

184. See *supra* note 180 for list of states and their respective damage recoveries.

185. Executor is defined as "[a] person appointed by a testator to carry out the directions and requests in his will, and to dispose of the property according to his testamentary provisions after his decease." BLACK'S, *supra* note 1, at 511.

186. *Sherrod v. Berry*, 629 F. Supp. 159, 163 (7th Cir. 1985).

187. Section 377, *supra* note 102. Note especially the last sentence, which precludes a beneficiary to receive those damages the estate may recoup. Section 377 clearly states that the decedent's heirs or representatives maintain an action against the tortfeasor *on their own behalf*, not on behalf of the decedent.

damages reflect the loss to the decedent. Thus, to recover hedonic damages, the survivors must show their derivative value of the decedent's hedonic loss. This figure could be calculated in terms of a percentage of decedent's hedonic value or by some other formula.<sup>188</sup> Generally, California has a strong history of judicial control in damage theory, and at least one justice is of the opinion that "nothing in the [damage] statute or its history . . . forbids the evolution of recovery for wrongful death into a universally recognized right of common law status."<sup>189</sup>

If the California legislature will not reform damage statutes, the burden will be on the courts to interpret existing laws so as to expand hedonic remedies to California plaintiffs. The importance of this fact is that courts in this state are generally perceived as leaders in tort law evolution and a California court allowing hedonic damages would likely induce other courts to do the same.<sup>190</sup> Notable too is the fact that California juries are among the most generous juries in the country.<sup>191</sup>

#### IV. PROPOSAL

Appropriately, courts should evaluate closely the actual loss of enjoyment of life suffered by a plaintiff in wrongful death or personal injury cases.<sup>192</sup> An attempt to create an arbitrary ceiling figure or conventional sum, as English courts did, will undermine some of the very principles hedonic damages hopes to promote. If courts create a maximum hedonic damage level, the amount may be insufficient to compensate the plaintiff or estate, which clearly fails to satisfy one of the

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188. Comment, *Wrongful Death Damages in California: On the Brink of Full Compensation*, 24 SAN DIEGO L. REV. 1003, 1020 n.121 (1978).

189. *Justus v. Atchison*, 19 Cal. 3d 564, 586, 565 P.2d 122, 136, 139 Cal. Rptr. 97, 111 (1977) (Tobriner, Acting C.J., concurring).

190. See, e.g., *Dawson v. Hill & Hill Truck Lines*, 671 P.2d 589 (Mont. 1983). Justice Weber, in his dissenting opinion, noted how the Montana Supreme Court should not allow damages for mental anguish because California courts have refused to allow them.

191. Other states where the largest verdicts are typically awarded are New York, Florida, Texas, Michigan, Illinois, and Pennsylvania. Frank, *Trends in Million-Dollar Verdicts*, 70 A.B.A. J. 52, 54 (Sept., 1984).

192. E.g., *Buoy v. ERA Helicopters, Inc.*, 771 P.2d 439 (Alaska 1989). The court denied recovery for loss of enjoyment of life because the plaintiff did not prove that there was a significant loss.



theory's principal goals. It may also undermine the deterrence aspect as well, if a tortfeasor finds the ceiling figure "cheap" compared to altering his actions.

On the other hand, if a jury arbitrarily awards the maximum level allowed without clearly considering the hedonic component suffered, the result is essentially a punitive damage against the defendant. The jury may award an "extra" amount of damages, measured as the difference between the ceiling amount the jury could, and did, award, and the actual hedonic damages that should have been awarded. For instance, suppose a jury is authorized to award hedonic damages up to a figure of \$1 million, and a jury arbitrarily awards that much. Further, if they were conscientious jurors and under the evidentiary basis they possessed, they would have only awarded \$900,000, there is a discrepancy of \$100,000. This amount is really a disguised award for punitive damages, or some other type of windfall, because under relevant evidence, the estate did not deserve that extra \$100,000. If the state allows punitive damages, they will probably award them to the victim. To give the extra amount is to duplicate the punitive damages awarded.

Hedonic damages are a separate remedy not already covered by existing remedies, and they serve no purpose if they do not compensate the estate. Courts act correctly in clearly establishing what was the actual amount suffered, and legislatures act in derogation of hedonic damage principles to allow a ceiling amount that does not require a jury to carefully consider the harm to the decedent.

Legislatures should reconsider wrongful death, survivors' or other damage statutes so as to possibly include hedonic damages. In discussing the issue, legislators will most certainly consider the incentives of restricting government misconduct in section 1983 actions by the passage of hedonic damages as a statutory remedy.<sup>193</sup> Legislative reconsideration has the additional benefit of effectively abolishing any confusion existing in the courts since the judicial branch is restricted by the express pronouncements of the legislatures. Thus, the legislative branch can effectively quiet the controversy by amending state wrongful death statutes.

The state legislatures should act to expand existing stat-

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193. See Cohen, *supra* note 34.

utes and allow for hedonic damage recovery. Some states, like California, allow damages that are "just under the circumstances"<sup>194</sup> and those statutes could be modified to read:

In every action under this section, such damages may be given as under all the circumstances of the case may be just. These damages may be awarded if adequately proved by any relevant evidence.

Any restrictions on damages of a non-pecuniary nature could be removed from statutes as well. These steps could be taken to let the judicial branch know that the legislature approves of less restrictive damage awards.

Some commentators are apparently concerned that the plaintiffs will get a windfall if hedonic damages are allowed, that more than enough money will be given to compensate, and that hedonic damages are little more than a disguised punitive award. This is an issue which the legislatures should also consider, by specifically altering state remedies systems. As it currently stands in California civil cases, what the jury decides to be proper compensation to the estate is the same amount used to punish the defendant.<sup>195</sup> That is, a jury decides on a figure designed to *both* sufficiently compensate the estate *and* punish the wrongdoer. Perhaps juries should be instructed to consider the two amounts separately: How much should the defendant pay so as to be deterred from future misconduct? How much should the decedent, via the estate, receive so as to be compensated for her loss? If the amounts are equal, the judge can direct the entire amount be given to the plaintiffs. If not, the difference between the "deterrence" damages and the "compensation" amount can go to a public welfare fund to be used for designated social programs. To illustrate, suppose a jury decides that \$10 million will compensate the decedent's estate, but that \$15 million is required for the tortfeasor to alter its behavior. The estate will recover \$10 million and the remaining \$5 million will go to a specially designed general fund, almost as a fine. The advantage to this

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194. For the California wrongful death statute, see *supra* note 102.

195. California Jury Instructions Civil read that "[i]f you return a verdict against the defendant, it shall be in a single sum, representing the aggregate of the present cash value of the loss suffered by the heirs of the deceased." BAJI 14.71 (6th ed. 1977).

system is that both aims of section 1983 are well-met: The victim is adequately compensated and the tortfeasor is deterred from this type of behavior in the future. Juries should be allowed to consider the amount necessary to compensate the decedent *independently of punitive considerations*. Thus, hedonic testimony can be introduced without fear that it will lead to a disguised punitive remedy, because the jury will consider the deterrence amounts independently of what enjoyment of life the victim has lost. Further, the court can maintain a rein on juries by instructing whether the evidence goes to a particular well-established damage category—such as pain and suffering—or if it can be evaluated independently as hedonic damages.

## V. CONCLUSION

Clearly, hedonic damage law is far from settled, even in those states with more liberal recovery laws, due to the speculative nature of the theory. Equally obvious is that while courts constrain themselves to only grant damages for pecuniary loss, there is little chance for adoption of hedonic damage theory. It is certainly shocking to juries to now be asked to reach deep into the defendant's pockets and award even greater damages on a new and controversial theory when more million-dollar verdicts are being awarded than ever before. But the history behind hedonic damages suggests that this is a good policy and serves vital functions in society. Greater frequency of cases under section 1983 will lead courts to accept that a person is worth more than purely economic data indicates, and that it will compensate the estate to award this intangible amount. As greater numbers of plaintiffs bring suits under wrongful death cases and personal injury cases, as is happening now, the more enlightened courts will grant recovery in even broader scope. Since loss of enjoyment of life damages are so new, skepticism is only natural, but hopefully, this reticence of the courts will fade with time. As more case law develops, and statutes are reformed by the legislatures, hedonic damage theory should become a staple and welcome addition to tort damages.

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