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# Lost Life and Life Projects

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# Lost Life and Life Projects<sup>†</sup>

SEAN HANNON WILLIAMS<sup>\*</sup>

*This Article provides the first analysis of wrongful death damages from the perspective of individual justice accounts of tort law. There is a widespread belief that wrongful death damages are incoherent. Currently, tort law responds only to the harms of the decedent's living relatives. Drawing on deterrence rationales, Cass Sunstein, Eric Posner, and others have recommended altering these damage awards so that they respond to the harms of the decedent herself by providing "lost life" damages. This Article offers a different and powerful new foundation for lost life damages rooted in corrective justice and its main competitor, civil recourse. At first blush, both corrective justice and civil recourse appear to undercut lost life damages. Once properly understood, however, each theory supports a life-projects approach to lost life damages. The normative underpinnings of these tort theories suggest that tort damages should respect the ends that the victim set for herself and should refrain from valuing the victim only as a means. Our current tort practices do the reverse. The victim is valued only through the effects she had on others—only as a means of her family's flourishing—rather than as an equal person with her own life projects. Lost life damages can respect the victim's ends in several ways. One possibility would be awarding money to her estate. The victim's will or other testamentary instrument would then direct that award to further whatever life projects she felt were important enough to survive her death.*

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### INTRODUCTION

There is a widespread belief that wrongful death damages are flawed. Consider Sally, a single mother of two. She is crushed and then burned to death when her car is struck from behind by an eighteen wheeler.<sup>1</sup> It would be a great understatement to say that Sally is unfortunate. Under current law, her family members can recover damages for *their* losses, but Sally's loss will never be addressed. Now imagine that Sally is multiply unfortunate. Her parents died long ago, she is divorced, and her children die alongside her. In many states, no one will have a wrongful death claim, and Sally's loss will never be addressed within tort law. Had Sally merely sprained her ankle, the negligent driver would have been liable.<sup>2</sup> But by crushing and burning both her and her children, the driver would escape tort liability. This strikes many as incoherent.

There has been renewed interest over the last several years as to when wrongful death damages are warranted and how they should be measured. This renewed interest focuses on the deterrence aim of tort damages and seeks to justify the imposition of "lost life" damages—that is, damages designed to respond to the losses that the decedent herself suffers from death.<sup>3</sup> Similar deterrence arguments have circulated in the legal literature for at least twenty years.<sup>4</sup> Yet they have thus far fallen on deaf ears.<sup>5</sup>

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1. Sadly, this is not a purely fictional account. Andrew J. McClurg, *Dead Sorrow: A Story About Loss and a New Theory of Wrongful Death Damages*, 85 B.U. L. REV. 1, 4 (2005) (describing the death of his fiancée as diesel fuel spilled out of the truck and poured over her car). Thankfully, the miseries that I added are purely hypothetical.

2. For additional loopholes in wrongful death practices, see Meredith A. Wegener, *Purposeful Uniformity: Wrongful Death Damages for Unmarried, Childless Adults*, 51 S. TEX. L. REV. 339, 351 (2009).

3. McClurg, *supra* note 1, at 7 & n.26 (suggesting the term "lost life damages" in lieu of "hedonic damages"); see Joni Hersch & W. Kip Viscusi, *Saving Lives Through Punitive Damages*, 83 S. CAL. L. REV. 229, 239–40 (2010); Frank Cross & Charles Silver, *In Texas, Life Is Cheap*, 59 VAND. L. REV. 1875, 1916–19, 1923 (2006); Eric A. Posner & Cass R. Sunstein, *Dollars and Death*, 72 U. CHI. L. REV. 537, 544 (2005) (referring to lost life damages as "hedonic damages").

4. For an early version of this argument, see Andrew Jay McClurg, *It's a Wonderful Life: The Case for Hedonic Damages in Wrongful Death Cases*, 66 NOTRE DAME L. REV. 57

This Article provides a new and different foundation for awarding lost life damages. This justification for lost life damages is rooted in individual justice accounts of tort law. No one has ever undertaken the project of assessing whether our wrongful death practices cohere with these accounts.<sup>6</sup> This inattention is unfortunate. Although the three dominant justice-based accounts of tort law—allocative corrective justice, relational corrective justice, and civil recourse theory<sup>7</sup>—each appear at first glance to demand our current approach to wrongful death, at least two of the three in fact strongly support lost life damages. They also provide insights into the proper way to measure such damages. These accounts justify an approach to wrongful death damages that seeks to further the victim’s life projects.<sup>8</sup>

Allocative corrective justice accounts focus on welfare setbacks. They impose duties on wrongdoers to annul their victim’s losses.<sup>9</sup> There is one irreducible minimum requirement that must be met before liability can be imposed under allocative corrective justice: damages must be able to benefit the victim. Allocative corrective justice accommodates lost life damages only if the following two conditions are met: death is a harm to the decedent, and events that take place *after she dies* can benefit the decedent. This sounds impossible. Interestingly, many philosophers disagree.<sup>10</sup> The gist of their argument is that we are better off if we satisfy our preferences, that some of our preferences concern states of the world that will occur after our death, and that satisfying those preferences posthumously

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(1990).

5. As Richard Wright has forcefully argued, there is often a vast gulf between the types of arguments that persuade academics and the kinds that persuade courts and legislatures. See Richard W. Wright, *Justice and Reasonable Care in Negligence Law*, 47 AM. J. JURIS. 143, 145 & n.6 (2002) (arguing that the Hand formula for negligence is pervasive in scholarship, classrooms, and the Restatement, yet it is only even “mentioned by a small minority of courts, [and] is almost never used by the courts to decide whether particular conduct was negligent”).

6. Although a few other scholars have commented in passing about corrective justice and wrongful death, they have disagreed about what practices would be consistent with corrective justice. Compare Gary T. Schwartz, *Mixed Theories of Tort Law: Affirming Both Deterrence and Corrective Justice*, 75 TEX. L. REV. 1801, 1823–24 (1997) (“But when the loss is the value of life to the victim himself, there simply is no way in which the defendant can . . . compensate or correct for the tortious harm. . . . Corrective justice . . . explains the limitation on damages in wrongful death actions, a limitation that seems unsound from a deterrence perspective.”), with Glen O. Robinson & Kenneth S. Abraham, *Collective Justice in Tort Law*, 78 VA. L. REV. 1481, 1512 & nn.89–90 (1992) (implying that corrective justice requires lost life damages in coma and wrongful death cases), and McClurg, *supra* note 1, at 41 (arguing that lost life damages would reflect “corrective justice by giving official recognition to the universal belief that life has value”).

7. See Curtis Bridgeman, *Reconciling Strict Liability with Corrective Justice in Contract Law*, 75 FORDHAM L. REV. 3013, 3020 (2007) (discussing two forms of corrective justice: allocative and relational); *Theories of Tort Law*, STAN. ENCYCLOPEDIA PHIL., <http://plato.stanford.edu/entries/tort-theories/#TheTorLawJusRigDut> (discussing corrective justice and civil recourse) (last rev. Aug. 26. 2010).

8. A life project is a stable identity-conferring goal to bring about some objective state of the world. See Part IV.B for further discussion of life projects.

9. Bridgeman, *supra* note 7, at 3021 & n.35.

10. STEVEN LUPER, *THE PHILOSOPHY OF DEATH* 135 (2009).

can benefit the victim. This is not totally inconsistent with common pretheoretic intuitions. For example, a victim's daughter might feel obligated to carry on the business that her father founded. Nonetheless, the uncertainty surrounding the possibility of posthumous benefits undermines the ability of allocative corrective justice to provide a solid rationale for lost life damages.

In contrast to allocative corrective justice, relational accounts of corrective justice conceive of remedies as "undoing the wrong"<sup>11</sup> rather than annulling the victim's loss. In order to undo a wrong, a tort remedy must be "correlatively structured."<sup>12</sup> Although some interpretations of this concept of correlativity require a living plaintiff who can receive a tort award, the best interpretation of it requires much less. Properly understood, relational corrective justice does not preclude lost life damages. In fact, it provides a justification for such damages that does not require making any claims about posthumous benefits. Part of the tragedy of death stems from the way it cuts off our ability to affect the world. This is a tremendous loss because everyone has goals and aims that require affecting the world. These are her life projects. Extending the victim's ability to influence the world after her death is a fitting response to negligently cutting off these abilities. The simplest way to do this is to locate those legal tools that can still convert the victim's means into her ends—namely, wills and other testamentary instruments. These are the last vessels of her autonomy. Providing extra money to Sally's estate makes her testamentary choices more potent and enhances the power of her one final chance to purposefully influence the world. Furthering this last flicker of choice is a fitting response to extinguishing the rest of it.

Civil recourse theory has emerged over the last fifteen years as a powerful challenger to both accounts of corrective justice.<sup>13</sup> This theory argues that the organizing principle of tort law is the concept of redress. Tort law provides victims with a power to seek redress for their injuries. This power of redress is related to concepts of retaliation, vengeance, and "acting against" a wrongdoer.<sup>14</sup>

Because the concept of redress is related to vengeance and retaliation, and these are potentially unsavory foundations on which to build tort law, normative defenses of civil recourse seek to cleanse vengeance of its bad connotations in part by highlighting the systemic benefits of acting against wrongdoers. For example, the process of publically acting against a wrongdoer serves to instantiate a moral order rooted in equal respect and mutual accountability. But these normative defenses are inconsistent with current wrongful death practices. Wrongful death statutes currently ignore the wrongs done to decedents who are not survived by the appropriate statutory beneficiaries.<sup>15</sup> This undermines rather than instantiates a moral order rooted in equal respect. Even if there are some surviving beneficiaries

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11. Ernest J. Weinrib, *Deterrence and Corrective Justice*, 50 UCLA L. REV. 621, 624 (2002).

12. Ernest J. Weinrib, *Corrective Justice in a Nutshell*, 52 U. TORONTO L.J. 349, 350 (2002).

13. See Part II.B for a fuller discussion of civil recourse theory.

14. Jason M. Solomon, *Equal Accountability Through Tort Law*, 103 NW. U. L. REV. 1765, 1770–71 (2009).

15. STUART SPEISER & JAMES ROOKS, *RECOVERY FOR WRONGFUL DEATH* §3:1 (4th ed. 2005).

who can sue, the victim is valued only through the effects she had on others—only as a means of her family’s flourishing—rather than as an equal person with her own life projects. Again, such a system undermines rather than instantiates equal respect. The normative defenses of civil recourse theory support a life-projects approach to lost life damages. Such damages respect the victim’s right to adopt her own ends while affirming the agency of both the victim and the wrongdoer.

The most immediate implications of this Article concern the justifications for lost life damages. After considering the various individual justice accounts of tort law, the case for such damages is strong. Although allocative corrective justice provides only dubious support for lost life damages, other accounts of tort law strongly support them, including relational corrective justice, civil recourse, and deterrence.

This Article will begin in Part I by providing a history of wrongful death law, from medieval English practices to current U.S. practices. Part II introduces individual justice accounts of tort law. It lays out the basic building blocks of corrective justice, differentiates allocative from relational corrective justice, and introduces civil recourse theory. Parts III, IV, and V are the heart of the Article. Part III argues that allocative corrective justice can, in theory, accommodate lost life damages. However, this requires embracing the dubious claim that events in this world can affect the dead. Part IV argues that relational corrective justice supports lost life damages. This Part describes the concept of a life project in more detail and illustrates how furthering the victim’s life projects fits within the confines of relational corrective justice. Part V provides further support for the life-projects view of lost life damages by turning to civil recourse theory. Part VI briefly discusses the implications of this view for our wrongful death practices.

## I. PAST AND PRESENT RESPONSES TO WRONGFUL DEATH

*The way in which remedies for wrongful death have been created and evolved is arguably among the greatest failures of American law.*<sup>16</sup>

### A. Fatal Accidents in England

In early English common law, the maxim *actio personalis moritur cum persona*—personal actions die with the person—created a barrier to wrongful death suits.<sup>17</sup> Lord Coke first announced this doctrine in 1609,<sup>18</sup> but the doctrine had its roots in trespass cases 200 years earlier.<sup>19</sup> The logic of the doctrine stemmed in part from the close relationship between criminal and tort law at the time.<sup>20</sup> Civil

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16. *Id.* § 1:1.

17. Wex S. Malone, *The Genesis of Wrongful Death*, 17 STAN. L. REV. 1043, 1044 (1965).

18. 3 W.S. HOLDSWORTH, A HISTORY OF ENGLISH LAW 576 (3d ed. 1923); see Pinchon’s Case, (1609) 77 Eng. Rep. 859 (K.B.) 860.

19. See Y.B. 11 Hen. 4, fol. 45b, Hil., pl. 20 (1410); Y.B. 19 Hen. 6, fol. 66b, Pasch., pl. 10 (1441).

20. See 2 FREDERICK POLLOCK & FREDERIC MAITLAND, THE HISTORY OF ENGLISH LAW BEFORE THE TIME OF EDWARD I 466 (2d ed. 1898) (describing the common precursor to tort

actions aimed to exact punishment as a form of personal vengeance; the idea that civil damages were compensatory evolved later.<sup>21</sup> When the wrongdoer died, he was beyond punishment, and hence there was no reason to hear the case.<sup>22</sup> When the victim died, she no longer had a need for personal vengeance.<sup>23</sup> The concept of an executor as a personal representative of the deceased had not yet emerged.<sup>24</sup> Rather, the executor was merely a custodian of a set of property.<sup>25</sup> Because the executor was not a personal representative of the deceased, he could neither be sued for the wrongs of the deceased nor sue others based on wrongs done to the deceased.<sup>26</sup> As Blackstone explained:

[T]he rule is that *actio personalis moritur cum persona*; . . . [the decedent's personal right of action] never shall be revived either by or against the executors or other representatives. For neither the executors of the plaintiff have received, nor those of the defendant have committed, in their own personal capacity, any manner of wrong or injury.<sup>27</sup>

The *actio personalis* maxim precluded the estate from suing or being sued.<sup>28</sup> It did not itself prevent relatives of the victim from suing the wrongdoer.<sup>29</sup> Under medieval Anglo-Saxon law, the kinsmen of someone who was intentionally or unintentionally killed could obtain payments from the wrongdoer.<sup>30</sup> The law even provided a list of specified damage amounts based on the social standing of the victim.<sup>31</sup> Despite this medieval tradition, the common law precluded suit even by

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and criminal law in English law); Gustavus Hay, Jr., *Death as a Civil Cause of Action in Massachusetts*, 7 HARV. L. REV. 170, 171 (1893) (noting that all killings, both accidental and intentional, were criminal in England by the thirteenth century); Malone, *supra* note 17, at 1051 (noting the “semicriminal nature of the action for trespass [and] the personal character of the plea of ‘not guilty’”).

21. 2 POLLOCK & MAITLAND, *supra* note 20, at 522–23.

22. See Percy H. Winfield, *Death As Affecting Liability in Tort*, 29 COLUM. L. REV. 239, 244–45 (1929) (“[T]he party cannot be punished when he is dead.”).

23. *Id.* at 249 (“And even if [the wrongdoer] survives, and it is the injured party who has died, surely it is the king and not the representatives who should take up redress.”).

24. Malone, *supra* note 17, at 1045, 1047.

25. *Id.* at 1047.

26. *Id.* at 1045–46. This maxim was also rooted in the technicalities of the forms of action, which could not accommodate the concept of an executor standing in for one of the parties. *Id.*

27. 3 WILLIAM BLACKSTONE, COMMENTARIES \*302. The executor could, however, sue and be sued in contract and based on violations of property rights. Malone, *supra* note 17, at 1053.

28. Malone, *supra* note 17, at 1044.

29. T.A. Smedley, *Wrongful Death—Bases of the Common Law Rules*, 13 VAND. L. REV. 605, 610–11 (1960).

30. GEORGE CRABB, A HISTORY OF ENGLISH LAW 35 (1829); 1 FRANCIS STOUGHTON SULLIVAN, LECTURES ON THE CONSTITUTION AND LAWS OF ENGLAND 117 (Gilbert Stuart ed., 1st Am. Ed. 1805).

31. FREDERIC W. MAITLAND & FRANCIS C. MONTAGUE, A SKETCH OF ENGLISH LEGAL HISTORY 193–99 (James F. Colby ed., 1915).

the victim's relatives.<sup>32</sup> The common law recognized that the head of household had a property right in the services he derived from his wife and children.<sup>33</sup> Thus he was allowed to sue for loss of services, but only when the wife or child was injured.<sup>34</sup> When they died, so too did the head of household's right to recover, even for the loss of their services.<sup>35</sup> This rule was probably the outgrowth of the idea that when a felony caused the death of a person, the civil action merged with—and was superseded by—a criminal action.<sup>36</sup> The criminal conviction would normally result in the forfeiture of the wrongdoer's property to the state.<sup>37</sup> This left nothing to recover in a civil case by the victim's relatives.<sup>38</sup> Although unintentional killings were not felonies, courts extended the logic of this merger doctrine reflexively.<sup>39</sup> Hence in 1808, the judge in *Baker v. Bolton* stated a broad rule: “[i]n a civil court, the death of a human being could not be complained of as an injury.”<sup>40</sup>

The 1846 Fatal Accidents Act (“Lord Campbell’s Act”) altered the rule from *Baker* and created a remedy for the relatives of the deceased.<sup>41</sup> In its most recent form, the act allows the beneficiaries to recover their lost financial support.<sup>42</sup> It also allows those beneficiaries, regardless of their number, to split a fixed £11,800 payment to help offset the pain of bereavement.<sup>43</sup>

#### B. Wrongful Death in the United States

In the American colonies, courts entertained civil suits by relatives of those wrongfully killed. In 1674, a Massachusetts court affirmed such damages: “In the Case of John Foster accidentally dischar[ged] gun[s] at foules on [the] neck thereby

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32. Malone, *supra* note 17, at 1053.

33. *Id.* at 1052.

34. *Id.*

35. *Id.* at 1053.

36. *Id.* at 1055–76; Smedley, *supra* note 29, at 612; see *Smith v. Sykes*, (1677) 89 Eng. Rep. 160 (K.B.); 1 Freeman 224, 224–25; *Higgins v. Butcher*, (1606) 80 Eng. Rep. 61 (K.B.).

37. Smedley, *supra* note 29, at 612.

38. See *id.*

39. See *id.* at 605.

40. *Baker v. Bolton*, (1808) 170 Eng. Rep. 1033 (Nisi Prius); 1 Camp. 493. The U.S. Supreme Court had the opportunity to examine the historical pedigree of *Baker* in the context of an admiralty case. See *Moragne v. States Marine Lines Inc.*, 398 U.S. 375, 382–89 (1970). It noted that the only potential basis for the rule was the merger of the tort action into the criminal one. *Id.* at 383. However, this foundation was absent in the United States because no state adopted the rule that felony punishment included forfeiture of property. *Id.* at 384. In fact, the Court found that there were no persuasive reasons for states to adopt *Baker* and deviated from their example to create a common law wrongful death action in admiralty. *Id.* at 386, 409.

41. 9 & 10 Vict., c. 93, § 2; see SPEISER & ROOKS, *supra* note 15, § 1:10.

42. For a complete discussion of The Fatal Accidents Act of 1976, see NICHOLAS J. MCBRIDE & RODERICK BAGSHAW, *TORT LAW* 631–40 (3d ed. 2008).

43. Fatal Accidents Act, 1976, c. 30 (Eng.). For recent amendments to the Act, see The Damages for Bereavement (Variation of Sum) (England and Wales) Order, 2007, W.S.I 2007/3489, available at <http://www.legislation.gov.uk/uksi/2007/3489/made/data.pdf>.



wounding Samuel Flacks son so as he died the Court sentenct him to pay the father of the boy tenn pounds and to pay tenn more as a like fine to the Country.”<sup>44</sup> Other cases also provided damages to relatives of the deceased.<sup>45</sup>

After 1808, however, the dictum in *Baker v. Bolton* made its way into American courts and became the dominant rule.<sup>46</sup> Like England, U.S. states overturned the rule in *Baker* by statute.<sup>47</sup> They did so by adopting two different types of statutes: survival statutes and wrongful death statutes.<sup>48</sup> Survival statutes authorized the estate of the victim to sue in her name for damages that she could have recovered had she lived; wrongful death statutes authorized the victim’s family to sue in their own names for their own harms.<sup>49</sup>

Survival statutes usually cover the harms that the decedent suffered before her death. They allow the decedent’s estate to pursue those claims that the decedent would have possessed had she survived.<sup>50</sup> Thus, the estate may recover the costs of medical care, pain and suffering, etc.<sup>51</sup> If the victim was doubly unlucky and was injured by one wrongdoer before being killed by another, the estate can pursue an action for the pre-death harm, and the decedent’s relatives can pursue an action for the death itself.<sup>52</sup>

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44. Foster’s Case, 1 Rec’s. Ct. Assistants Mass. Bay 54, 54 (1675).

45. See Lillie’s Case, 1 Rec’s. Ct. Assistants Mass. Bay 358, 358–59 (1691) (twenty-five pounds); Dounton’s Case, 1 Rec’s. Ct. Assistants Mass. Bay 271, 271–72 (1684) (five pounds); Dyar’s Case, 1 Rec’s. Ct. Assistants Mass. Bay 188 (1680) (six pounds for the death of a Native American); Hunting’s Case, 1 Rec’s. Ct. Assistants Mass. Bay 114 (1677) (twenty pounds); Bent’s Case, 1 Rec’s. Ct. Assistants Mass. Bay 86 (1677) (ten pounds); Flynt’s Case, 1 Rec’s. Ct. Assistants Mass. Bay 85, 85 (1677) (twenty pounds); Foord’s Case, 1 Rec’s. Ct. Assistants Mass. Bay 60 (1675) (awarding five pounds for running over child with cart).

46. SPEISER & ROOKS, *supra* note 15, § 1:2 (collecting hundreds of American cases citing *Baker v. Bolton*).

47. *Id.* at app. A.

48. The two types of statutes create independent claims. Spence v. Staras, 507 F.2d 554, 558 (7th Cir. 1974); Barragan v. Superior Court, 470 P.2d 722, 725 (Ariz. Ct. App. 1970).

49. Ronen Perry & Yehuda Adar, *Wrongful Abortion: A Wrong in Search of a Remedy*, 5 YALE J. HEALTH POL’Y L. & ETHICS 507, 530 (2005) (noting that “wrongful death statutes apply to relational losses whereas survival statutes apply to the personal losses of the decedent”). Although there are many subtle variations on this rough dichotomy, SPEISER & ROOKS, *supra* note 15, §§ 1:9, 1:11, 1:15, they are not pertinent to this Article.

50. See, e.g., Ingram v. Howard-Needles-Tammen & Bergendoff, 672 P.2d 1083, 1092 (Kan. 1983) (“[T]he survival action compensates the decedent for the injuries for which he could have recovered had he survived, whereas the wrongful death action compensates the heirs for such things as loss of support, companionship and comfort.” (emphasis omitted)).

51. See, e.g., Clement v. Consol. Rail Corp., 734 F. Supp. 151, 155 (D.N.J. 1989); Smallwood v. Bradford, 720 A.2d 586, 594–95 (Md. 1998). Some survival statutes require the estate to sue but direct the proceeds to specific beneficiaries. SPEISER & ROOKS, *supra* note 15, § 1:13.

52. Some states sensibly allow or require these suits to be consolidated. See, e.g., CAL. CIV. PROC. CODE § 377.62 (West 2004); MONT. CODE ANN. § 27-1-501 (2011); N.Y. EST. POWERS & TRUSTS LAW § 11-3.3 (McKinney 2008); 42 PA. CONS. STAT. ANN. § 213.1 (West 2002).

Wrongful death statutes vary greatly in the details, but the vast majority give a certain class of beneficiaries—normally the spouse and children of the deceased—the right to collect damages.<sup>53</sup> These statutes measure damages by the losses to the beneficiaries, rather than the losses to the decedent herself.<sup>54</sup> Such losses include, for example, the monetary contributions that the decedent would have made to the beneficiaries during her lifetime.<sup>55</sup>

Lost life damages fit in a conceptual space between the damages given in wrongful death and survival actions. They respond to the victim's losses from the death itself, rather than responding to the victim's pre-death suffering or the post-death losses of the victim's relatives.

Five states award a hedonic form of lost life damages to the estate: Connecticut,<sup>56</sup> New Mexico,<sup>57</sup> New Hampshire,<sup>58</sup> Hawaii,<sup>59</sup> and Arkansas.<sup>60</sup> These states conceive of lost life damages as “loss of enjoyment of life.”<sup>61</sup> To award such damages, the estate presents evidence about the decedent's interests, hobbies, close relationships, etc.<sup>62</sup> For example, in 2007, a federal court applying Arkansas law

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53. Every state allows spouses to recover. SPEISER & ROOKS, *supra* note 15, § 3:2. Most states allow children to recover. *Id.* § 3:3. Many states allow parents to recover. *Id.* § 3:7. Some states do not enumerate beneficiaries but instead reference the laws of intestate succession to determine who can recover. *Id.* § 3:1.

54. *Id.* § 6:3. Several states measure the pecuniary harm to the estate, rather than the pecuniary losses of the survivors. *Id.* §§ 6:2, 6:3. But these measures of pecuniary harm approximate one another, *id.* § 6:3, and the court distributes proceeds directly to a set of beneficiaries rather than funneling them through the victim's will or other testamentary instruments. See Jonathan M. Purver, *Damages for Wrongful Death of, or Injury to, Child*, 65 AM. JURISPRUDENCE TRIALS 261, 296 (1997) (noting that under loss to estate systems, “[t]he award is not an asset of the estate, nor subject to claims against the estate. The plaintiff, whether executor, administrator or beneficiary, is merely a conduit, bound to distribute the awards as the statute directs”); see, e.g., ALASKA STAT. § 09.55.580 (2010); *Hales v. Thompson*, 432 S.E.2d 388, 393 (N.C. Ct. App. 1993).

55. For general discussion of categories of damages, see SPEISER & ROOKS, *supra* note 15, § 6 and Perry & Adar, *supra* note 49, at 531–32.

56. See *Mather v. Griffin Hosp.*, 540 A.2d 666, 678 (Conn. 1988); *Estate of Katsetos v. Nolan*, 368 A.2d 172, 183–84 (Conn. 1976).

57. See *Smith v. Ingersoll-Rand Co.*, 214 F.3d 1235, 1244–45 (10th Cir. 2000; *Romero v. Byers*, 872 P.2d 840, 845–46 (N.M. 1994).

58. *Marcotte v. Timberlane/Hampstead Sch. Dist.*, 733 A.2d 394, 399, 405 (N.H. 1999).

59. *Montalvo v. Lapez*, 884 P.2d 345, 364 (Haw. 1994).

60. *Durham v. Marberry*, 156 S.W.3d 242, 248–49 (Ark. 2004).

61. See, e.g., *Fantozzi v. Sandusky Cement Prods. Co.*, 597 N.E.2d 474, 481 (Ohio 1992) (stating that loss of enjoyment of life damages “connote[] the deprivation of certain pleasurable sensations and enjoyment through impairment or destruction of the capacity to engage in activities formerly enjoyed by the injured plaintiff”).

62. See, e.g., *Estate of Katsetos v. Nolan*, 368 A.2d 172, 184 (Conn. 1976) (affirming lost life damage and noting that “[t]here was evidence from which the jury could have found that the decedent was 41 years of age at the time of her death and had a life expectancy of about 32 years. She was happily married and had four children including the child born on the day of her death. She was a very happy person and in good health before the delivery of her last child. She was a dedicated mother and homemaker and active in many outside activities.”).

affirmed a \$600,000 award for lost life damages based on the death of a one-year-old child because “Garret’s parents were not only attentive to his needs; they provided a protective, supportive and loving home. . . . His family was a source of joy and happiness to Garret . . . . Despite his medical problems, he was a happy and responsive child.”<sup>63</sup> In 2005, a Connecticut court affirmed \$575,000 in lost life damages for a sixty-seven-year-old man, noting that he “enjoyed . . . dancing, hiking, walking, gardening, visiting with friends, reading, traveling, and watching movies and television. . . . [He] was well-liked, had a good sense of humor and was intelligent.”<sup>64</sup> In 1999, the New Hampshire Supreme Court affirmed an award of approximately \$200,000 for the lost life damages of an eight-year-old boy based on photographs that “highlighted the decedent’s activities . . . [such as] karate, T-Ball, and football” and his electronic diary, which further “highlighted the activities that the decedent enjoyed.”<sup>65</sup>

## II. AN OVERVIEW OF INDIVIDUAL JUSTICE ACCOUNTS OF TORT LAW

Corrective justice is the dominant noneconomic account of tort law. It has two main versions. Allocative accounts of corrective justice conceive of tort law as annulling losses. Relational accounts conceive of tort law as undoing wrongs. These share many features in common with each other and with the third major individual justice account: civil recourse.

### A. Corrective Justice

Corrective justice originated with Aristotle<sup>66</sup> but remained largely dormant in tort scholarship until the positive economic analysis of tort law became popular.<sup>67</sup> Jules Coleman, Ernest Weinrib, Richard Epstein, Stephen Perry, and others reinvigorated the notion of corrective justice to provide what they thought was a better descriptive account of tort law.<sup>68</sup> Corrective justice provides a direct normative link between the plaintiff and the defendant: their relationship as the doer and sufferer of harm link the two parties.<sup>69</sup> Positive economic analysis can offer an explanation as to why our tort practices proceed on a case-by-case basis

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63. *McMullin v. United States*, 515 F. Supp. 2d 914, 928 (E.D. Ark. 2007).

64. *Osiecki v. Bridgeport Health Care Center, Inc.*, No. CV020080092S, 2005 WL 1331225, at \*7 & n.9 (Conn. Super. Ct. May 12, 2005).

65. *Marcotte v. Timberlane/Hampstead Sch. Dist.*, 733 A.2d 394, 406–07 (N.H. 1999).

66. See ARISTOTLE, *Book V*, in *NICOMACHEAN ETHICS* (Martin Ostwald trans., Prentice Hall 1999).

67. Ernest J. Weinrib, *Corrective Justice*, 77 IOWA L. REV. 403, 403–04 (1992) (noting that corrective justice is used mostly in arguments against instrumental theories of tort law).

68. JULES L. COLEMAN, *RISKS AND WRONGS* 361–85 (1992); ARTHUR RIPSTEIN, *EQUALITY, RESPONSIBILITY, AND THE LAW* 24–47 (1999); ERNEST J. WEINRIB, *THE IDEA OF PRIVATE LAW* 56–83 (1995); Richard A. Epstein, *Nuisance Law: Corrective Justice and Its Utilitarian Constraints*, 8 J. LEGAL STUD. 49 (1979); Stephen R. Perry, *The Moral Foundations of Tort Law*, 77 IOWA L. REV. 449 (1992).

69. WEINRIB, *supra* note 68, at 65.

between the plaintiff and the person who she alleges to have caused her losses.<sup>70</sup> However, the explanation provided by corrective justice accounts was arguably simpler, less contingent on empirical assumptions that may not hold in individual cases, and more reflective of the language that tort law itself uses to describe what it does.<sup>71</sup> The point of reinvigorating the concept of corrective justice was to provide tort practices with a less contingent foundation.

Corrective justice remains the dominant noneconomic account of tort law today.<sup>72</sup> Jules Coleman and Ernest Weinrib are the two leading proponents of corrective justice.<sup>73</sup> Each presented corrective justice as a descriptive account of tort law.<sup>74</sup> They each sought to provide an explanation of what they considered to be the core features of our tort practices.<sup>75</sup> These core elements include: the case-by-case adjudication of claims, the fact that plaintiffs can only sue particular defendants, and the fact that plaintiffs argue that the defendant was responsible for their injuries rather than, for example, that the defendant was the cheapest cost avoider.<sup>76</sup> Coleman favors an allocative account of corrective justice that focuses on annulling losses.<sup>77</sup> Weinrib favors a relational account that focuses on undoing wrongs.<sup>78</sup> Although each proffers corrective justice as a descriptive account of tort law, many scholars have used corrective justice as a normative guide for tort law.<sup>79</sup> This is not surprising given that corrective justice has obvious normative appeal. This Article presumes that if an aspect of tort law is consistent with corrective justice, it is at least *prima facie* normatively desirable.

An account of tort law must have three features to be properly called a corrective justice account: agency, correlativity, and rectification.<sup>80</sup> Agency,

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70. Mark Geistfeld, *Economics, Moral Philosophy, and the Positive Analysis of Tort Law*, in *PHILOSOPHY AND THE LAW OF TORTS* 250, 252–57 (Gerald J. Postema ed., 2001).

71. See COLEMAN, *supra* note 68, at 380–81; Jules Coleman, *Tort Law and Tort Theory: Preliminary Reflections on Method*, in *PHILOSOPHY AND THE LAW OF TORTS*, *supra* note 70, at 183, 184–86; Benjamin C. Zipursky, *Civil Recourse, Not Corrective Justice*, 91 *GEO. L.J.* 695, 707 (2003).

72. *Theories of Tort Law*, *supra* note 7.

73. Gregory C. Keating, *Is Tort a Remedial Institution?* 17 (USC Center in Law, Econ. & Org., Research Paper No. C10-11 and USC Legal Studies, Research Paper No. 10-10, 2010), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1633687](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1633687) (identifying Jules Coleman and Ernest Weinrib as “the leading proponents of corrective justice in our time”).

74. See WEINRIB, *supra* note 68, at 5–6; Coleman, *supra* note 71, at 183–84.

75. COLEMAN, *supra* note 68, at 198; WEINRIB, *supra* note 68, at 9–10

76. COLEMAN, *supra* note 68, at 198; WEINRIB, *supra* note 68, at 9–10.

77. COLEMAN, *supra* note 68, at 318–24; see John C.P. Goldberg & Benjamin C. Zipursky, *Torts as Wrongs*, 88 *TEX. L. REV.* 917, 954 (2010) (“Allocative theories put losses at the center of tort law.”).

78. See WEINRIB, *supra* note 68, at 130–31, 133.

79. See, e.g., Michael Abramowicz, *On the Alienability of Legal Claims*, 114 *YALE L.J.* 697, 712 (2005); Christopher H. Schroeder, *Corrective Justice and Liability for Increasing Risks*, 37 *UCLA L. REV.* 439, 449–51 (1990).

80. Jules L. Coleman, *The Practice of Corrective Justice*, 37 *ARIZ. L. REV.* 15, 26 (1995). Weinrib has endorsed this view, despite the fact that he presents these features slightly differently. Ernest J. Weinrib, *Correlativity, Personality, and the Emerging*

correlativity, and rectification represent a rigorous topography of the familiar moral practices that permeate tort law. Suppose you were involved in a fender-bender that was the other driver's fault. Why should the other driver pay for your repairs? The most natural response is simple: because the accident was his fault. This response relies on the agency of the driver and the connection—or correlativity—between his acts and your injury; it then uses this connection to ground a duty of repair.

### 1. Agency

The concept of agency need not detain us for long. Corrective justice theories only address “messes” that result from human agency.<sup>81</sup> Corrective justice is a theory of the duties that moral agents have to one another.<sup>82</sup> Because hurricanes, floods, or other acts of nature are not moral agents they fall outside of the scope of corrective justice. Involuntary movements, too, fall outside of the domain of corrective justice.<sup>83</sup>

### 2. Correlativity

The concept of correlativity is not as straightforward as the concept of agency. This concept is the central feature of both allocative and relational versions of corrective justice.<sup>84</sup>

Correlativity expresses the idea that there is a unique normative relationship between victims and wrongdoers,<sup>85</sup> or between doers and sufferers.<sup>86</sup> This relationship provides the justification for imposing a duty of repair on the wrongdoer.<sup>87</sup> Many of our tort practices, both structural and doctrinal, embody this feature of corrective justice.<sup>88</sup> The existence of a unique normative link between a particular plaintiff and a particular defendant explains the central structural feature of tort law: the fact that victims sue people who they claim to be responsible for their losses, rather than suing anyone they choose or seeking compensation from the government.<sup>89</sup> This normative link also explains tort doctrines such as causation, duty, and foreseeability.<sup>90</sup> Each of these doctrines illuminates different ways the parties are uniquely linked together by a string of events starting with the defendant's act and ending with the plaintiff's injury.

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*Consensus on Corrective Justice*, 2 THEORETICAL INQUIRIES L. 107, 129 (2001) (expressing approval of the content of Coleman's list, and noting that both understand correlativity in the same way); *id.* at 107 (describing corrective justice as consisting of correlativity and personality).

81. COLEMAN, *supra* note 68, at 479.

82. *See id.* at 261–63.

83. *Id.*

84. Weinrib, *supra* note 80, at 129.

85. These are Coleman's preferred terms. *See* COLEMAN, *supra* note 68, at 370–71.

86. These are Weinrib's preferred terms. *See* WEINRIB, *supra* note 68, at 65.

87. COLEMAN, *supra* note 68, at 367–69; WEINRIB, *supra* note 68, at 142–43.

88. *See* COLEMAN, *supra* note 68, at 304, 367–69; WEINRIB, *supra* note 68, at 134.

89. WEINRIB, *supra* note 68, at 9–10 (calling this normative link that “master feature” of tort law); Coleman, *supra* note 71, at 185.

90. *See* COLEMAN, *supra* note 68, at 346–47; WEINRIB, *supra* note 68, at 169–70.

Explanations of tort practices that focus on correlativity differ from explanations of tort practices that rely on facts external to the relationship between victim and wrongdoer. For example, positive economic analyses of tort law might explain our tort practices as an implicit search for the cheapest cost avoider.<sup>91</sup> This explanation relies on facts external to the relationship between the parties and therefore links the parties together in a lawsuit in ways that are contingent rather than inherent in their relationship to one another.

Consider Coleman's discussion of deterrence, which Weinrib largely echoes.<sup>92</sup> Coleman claims that when the plaintiff and the defendant are linked by something other than the relationship of victim and wrongdoer, tort law is not expressing the correlativity that is essential to corrective justice.<sup>93</sup> Coleman offers an example similar to the following one:<sup>94</sup> Suppose a manufacturer produces a product that is safe for most purposes but should not be used for other purposes. One should not, for example, use a chainsaw to cut metal pipe. The manufacturer included an insufficient warning with its product. A victim is hurt by the product. But this victim never read the warning, and so there is no causal link between the insufficient warning and the harm. In short, the manufacturer's actions did not harm the victim because the victim would have used the product as she did regardless of the content of the warning. The victim would, if anything, be acting as a private attorney general if she sued. The victim and the manufacturer are not in the type of relationship that tort law normally requires to justify liability because the defendant did not cause the harm.<sup>95</sup> There may be reasons to impose liability in such a case—for example, to deter defective warnings—but imposing liability in this case would not express corrective justice.<sup>96</sup> At most, deterrence can only explain why we impose liability on the defendant; it cannot explain why the plaintiff should collect those damages.

### 3. Rectification

The last feature of all corrective justice theories is rectification. All corrective justice accounts impose duties of repair on the wrongdoer.<sup>97</sup> Further, they do so because of the normative link between victim and wrongdoer.<sup>98</sup> This link serves as the justification for imposing duties of repair.

Allocative and relational accounts of corrective justice differ regarding what rectification entails. Allocative accounts of tort remedies focus on rectifying losses.<sup>99</sup> Relational accounts focus on rectifying wrongs.<sup>100</sup>

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91. See COLEMAN, *supra* note 68, at 380–81.

92. For a concise description of Weinrib's views on deterrence, see WEINRIB, *supra* note 68, at 212.

93. See COLEMAN, *supra* note 68, at 386–87.

94. *Id.* at 387.

95. See *id.* at 387, 399.

96. *Id.* at 387–88.

97. Weinrib, *supra* note 80, at 129.

98. *Id.*

99. Coleman, *supra* note 71, at 184.

100. Weinrib, *supra* note 12, at 349; see WEINRIB, *supra* note 68, at 130–31.

Coleman offers a standard allocative account of tort law: “[I]ndividuals who are responsible for the wrongful losses of others have a duty to repair the losses.”<sup>101</sup> This account describes tort law at a high level of generality and leaves a lot unsaid. For example, what losses are “wrongful,” for what losses are people “responsible,” and what must they do to discharge their duty to repair? Coleman’s notion of corrective justice refers to both his general formulation and to the social practices that currently give content to concepts of responsibility, wrongfulness, and duty.<sup>102</sup>

Relational accounts assert that the “point of a tort action is to undo the injustice that the defendant has done to the plaintiff.”<sup>103</sup> Our current tort practices are concrete illustrations of this more abstract formulation.<sup>104</sup> This formulation leaves a lot unsaid as well. When can we attribute the injustice to the defendant? What counts as “undoing an injustice”?

Although both allocative and relational corrective justice accounts developed as accounts of existing tort practice,<sup>105</sup> corrective justice is not synonymous with whatever tort practices happen to be. If it were, then there would be no way to criticize some tort practices as failing to embody corrective justice.<sup>106</sup> Both corrective justice accounts seek to offer a concise and internally coherent explanation of the core of tort practices. To the extent that a tort practice is inconsistent with the core logic of tort law, it does not embody corrective justice.

Disgorgement provides a useful example of how a remedy might be (in)consistent with the core logic of tort law. Suppose your neighbor rents your apartment to vacationers without your permission while you are away, but no harm comes to your apartment. You have suffered no losses—you would not have used the apartment anyway. However, the law allows you to claim the profits that your neighbor made off of his illicit deal.<sup>107</sup> This is disgorgement.<sup>108</sup> Allocative accounts only remedy losses. Therefore, disgorgement remedies do not embody allocative

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101. Coleman, *supra* note 71, at 184 (emphasis omitted). For more information about Coleman’s concept of an “explanation,” see *id.* at 183.

102. *Id.* at 204.

103. Weinrib, *supra* note 80, at 108.

104. Although Coleman uses the term “corrective justice” to refer to the inner logic of a set of societal practices that deal with holding a person responsible for the losses that they cause others, Weinrib uses the term to refer to the core of tort practices, not to the core of some wider set of societal practices. Weinrib, *Correlativity, Personality, and the Emerging Consensus on Corrective Justice*, *supra* note 80, at 132 n.32. This leads them to look to different sets of practices when determining the content of corrective justice. *Id.*

105. See COLEMAN, *supra* note 68, at 8, 198; Weinrib, *supra* note 80, at 112 (noting that a theory of corrective justice “operates by working back from the principles and concepts of private law to the most general ideas latent within them”); *id.* at 114, 121, 129 n.22 (“In both [Coleman’s and my] accounts, corrective justice is extracted from the practice or practices in which it figures. Coleman misses this point about the juridical conception because he thinks, mistakenly, that it is ‘derived’ from some more abstract normative theory.” (citation omitted)).

106. COLEMAN, *supra* note 68, at 386 (arguing that not all tort practices embody corrective justice); Coleman, *supra* note 71, at 204–05

107. 1 DAN B. DOBBS, DOBBS LAW OF REMEDIES: DAMAGES-EQUITY-RESTITUTION § 1.1, at 5 (2d ed. 1993).

108. *Id.*

corrective justice.<sup>109</sup> Relational accounts, on the other hand, focus on rectifying wrongs, rather than losses. Therefore, the fact that the plaintiff suffered no loss is irrelevant. Disgorgement undoes the injustice of, for example, using another's property for personal profit.<sup>110</sup>

Relational theorists use the fact that tort law recognizes disgorgement to undermine allocative accounts that portray tort law as annulling losses. Losses are similarly unnecessary in cases of trespass, battery, false imprisonment, and sexual harassment.<sup>111</sup> In these cases, courts routinely allow nominal damages, punitive damages, and injunctions.<sup>112</sup> Many common remedial doctrines further loosen the connection between tort law and losses. Courts ignore payments to the victim from collateral sources like insurance or gains the victim might receive from selling the rights to her story to a movie studio.<sup>113</sup> In the wrongful death context, courts similarly ignore a plaintiff's remarriage even when the plaintiff claims lost consortium.<sup>114</sup> These offsetting benefits are relevant under a regime that is concerned with returning the victim to her pre-injury level of utility, and yet courts ignore them. Hence, proponents of relational corrective justice argue that wrongs, not losses, are the primary messes addressed by private law.<sup>115</sup>

### B. Civil Recourse

Over the past fifteen years, Benjamin C. Zipursky and John C.P. Goldberg have developed an account of tort law that they believe is more accurate than corrective justice.<sup>116</sup> This account—civil recourse—has powerfully emerged as a potential challenger to corrective justice. The central claim of civil recourse theorists is that tort law is organized around the idea that the victim should have the option to retaliate (in a constrained a legalistic way, of course) against the wrongdoer.

109. Except when the wrongful gain is simply being used as a proxy for the measure of a wrongful loss.

110. WEINRIB, *supra* note 68, at 141–42.

111. See Goldberg & Zipursky, *supra* note 77, at 939; Arthur Ripstein, *As if It Had Never Happened*, 48 WM. & MARY L. REV. 1957, 1970, 1993 (2007).

112. Compare WEINRIB, *supra* note 68, at 130–33, with Jules L. Coleman, *Tort Law and the Demands of Corrective Justice*, 67 IND. L.J. 349, 358 (1992) (“Rectifying wrongful losses is at the heart of tort law in a way in which rectifying wrongful gains is not.”).

113. RESTATEMENT (SECOND) OF TORTS § 920A cmt. B; 2 DAN B. DOBBS, *LAW OF REMEDIES: DAMAGES-EQUITY-RESTITUTION* § 8.6, at 488 (2d ed. 1993).

114. 2 DOBBS, *supra* note 113, § 8.3(7), at 448–49.

115. See WEINRIB, *supra* note 68, at 130–34. For an illuminating history of how courts shifted from righting wrongs to annulling losses during the eighteenth and nineteenth centuries, see John C.P. Goldberg, *Two Conceptions of Tort Damages: Fair v. Full Compensation*, 55 DEPAUL L. REV. 435 (2006).

116. See, e.g., John C.P. Goldberg & Benjamin C. Zipursky, *Accidents of the Great Society*, 64 MD. L. REV. 364 (2005) [hereinafter Goldberg & Zipursky, *Accidents*]; John C.P. Goldberg, *The Constitutional Status of Tort Law: Due Process and the Right to a Law for the Redress of Wrongs*, 115 YALE L.J. 524 (2005); John C.P. Goldberg & Benjamin C. Zipursky, *Unrealized Torts*, 88 VA. L. REV. 1625 (2002) [hereinafter Goldberg & Zipursky, *Unrealized Torts*]; Zipursky, *supra* note 71; Benjamin C. Zipursky, *Rights, Wrongs, and Recourse in the Law of Torts*, 51 VAND. L. REV. 1 (1998).



Civil recourse and relational corrective justice share much in common. For example, both put wrongs rather than losses at the core of tort law,<sup>117</sup> and both view wrongs as relational.<sup>118</sup> There are, however, two key differences for purposes of this Article. First, civil recourse theorists argue that correlative wrongs trigger a plaintiff's power of redress rather than a defendant's duty of repair.<sup>119</sup> Second, civil recourse does not offer a theory of remedies.<sup>120</sup> Instead, it highlights the great diversity of remedies and suggests that they are relatively unconstrained.

### 1. Powers, Not Duties

Civil recourse theorists seek to explain why the plaintiff has the option to sue.<sup>121</sup> Under relational corrective justice, a correlative wrong triggers a duty of repair.<sup>122</sup> One could interpret this as a legal or a moral duty. Each interpretation causes problems for corrective justice theories.

Wrongs do not trigger legal duties of repair.<sup>123</sup> The defendant's legal duty only arises after a successful lawsuit.<sup>124</sup> Before this, the defendant merely has "a form of vulnerability," not a legal duty.<sup>125</sup> Civil recourse theorists therefore argue that the wrong does not trigger a legal duty of repair.

Shifting focus to moral duties of repair presents problems as well. The existence of a moral duty of repair, standing alone, tells us nothing about tort law. We need a theory that connects the moral duty to legal obligations. A functionalist account of tort law creates the needed link. Under such an account, legal duties of repair exist to ensure that wrongdoers fulfill their moral duties of repair. However, corrective justice theorists strive to provide a non-functionalist account of tort law; they aspire to understand what tort law is, rather than what tort law is for.<sup>126</sup> Even if we accept such a functional account of tort law, civil recourse theorists argue that there is a substantial mismatch between legal and moral duties in tort law. Tort law is simultaneously too lax and too harsh. If there is a moral duty of repair, it is unclear why the state would delegate to the plaintiff the decision of whether to enforce it. If enforcing moral duties is a worthwhile goal, then arguably the state should play a

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117. WEINRIB, *supra* note 68, at 131, 134; Goldberg & Zipursky, *supra* note 77, at 918.

118. Goldberg & Zipursky, *supra* note 77, at 945; Zipursky, *supra* note 71, at 744.

119. See H.L.A. HART, *THE CONCEPT OF LAW* 27–33 (2d ed. 1997) (distinguishing between powers and duties).

120. See Goldberg & Zipursky, *supra* note 77, at 962.

121. Zipursky, *supra* note 71, at 733–34.

122. WEINRIB, *supra* note 68 at 135.

123. Zipursky, *supra* note 71, at 718–21.

124. See Goldberg & Zipursky, *Accidents*, *supra* note 116, at 403 (arguing that redress is the "animating idea" of tort law); Goldberg, *supra* note 116, at 605 ("The core claim of redress theory is that tort law's distinctiveness resides in conferring on individuals . . . a power to pursue a legal claim alleging that she . . . has suffered an injury flowing from a legal wrong to her by another.").

125. Benjamin C. Zipursky, *Two Dimensions of Responsibility in Crime, Tort, and Moral Luck*, 9 *THEORETICAL INQUIRIES L.* 97, 110 (2007); see also Zipursky, *supra* note 71, at 720 & n.97.

126. For further discussion of this point, see Zipursky, *supra* note 71, at 724–26.

larger role in ensuring that moral duties of repair are fulfilled.<sup>127</sup> Tort law also imposes legal obligations on tortfeasors who have not committed moral wrongs. For example, tort law provides a remedy for trespass even when the trespasser reasonably believed that she was not trespassing.<sup>128</sup> Tort law also forces defendants to pay large sums of money to make the plaintiff whole, while it is at least debatable whether our moral duties extend this far.<sup>129</sup> To be sure, there might be a set of pragmatic reasons for this mismatch. However, if this is right, the pragmatic concerns rather than the principle of corrective justice would be doing most of the explanatory work. And without a theory to explain these pragmatic constraints, they may appear ad hoc.

Based on the above concerns, civil recourse theorists contend that negligently injuring another triggers a power to seek redress rather than a duty of repair.

## 2. Unconstrained Remedies

Although civil recourse seeks to explain one additional feature of tort law—the plaintiff’s option to sue—it also seeks to explain one fewer feature than corrective justice. Remedies, according to civil recourse theorists, are not constrained by the animating principles of tort law.<sup>130</sup>

Tort law has one set of rules to determine whether a plaintiff has access to redress and another set of rules to determine damages. Corrective justice theories link these two sets of rules. Under allocative accounts, for example, the event that triggered liability—the wrongful loss—also informs the remedy and suggests that losses should be annulled.<sup>131</sup> Civil recourse denies these links and does not offer an alternative theory of tort remedies.<sup>132</sup> Given the vast diversity of remedies, civil recourse theorists view this as a point in favor of civil recourse.<sup>133</sup>

127. Solomon, *supra* note 14, at 1776–77, 1779 n.73 (arguing that corrective justice “does not explain—as civil recourse theory does—why equilibrium is brought about by a private lawsuit initiated at the victim’s discretion, given that this state of affairs leads to underlitigation on certain legitimate claims, leaving much disequilibrium uncorrected”). This argument is not as strong as Solomon believes. As I explained above, corrective justice describes a set of justifications for imposing duties. It does not describe or mandate any particular way of discharging those duties. Obligees generally have the option of waiving the obligation. This plausibly explains why corrective justice is unperturbed by underenforcement, just as it would be unperturbed by selling one’s claim to another. See Michael Abramowicz, *On the Alienability of Legal Claims*, 114 *YALE L.J.* 697, 714–17 (2005) (arguing that alienating tort claims is consistent with corrective justice). For similar critiques of the efforts of civil recourse to differentiate itself from corrective justice, see Ripstein, *supra* note 111, at 1981–82.

128. For further discussion of this and other examples, see Zipursky, *supra* note 71, at 726.

129. *Id.* at 740, 748–49; Goldberg & Zipursky, *supra* note 77, at 966 n.243.

130. See Goldberg & Zipursky, *supra* note 77, at 962; Ripstein, *supra* note 111, at 1963 (discussing and arguing against the way civil recourse treats remedial choices independently from the nature of the wrong); Zipursky, *supra* note 71, at 748–51.

131. Goldberg & Zipursky, *supra* note 77, at 960, 962.

132. *Id.* at 962.

133. See *id.* at 960–963.

Punitive damages provide a simple example. Both allocative and relational accounts of corrective justice reject punitive damages. These damages are not correlatively structured and do not annul losses. Yet our tort practices embrace them in many instances.<sup>134</sup> Civil recourse theorists provide a stronger descriptive account of our tort practices because they contend that remedies might legitimately seek to annul losses, undo wrongs, or even to punish the defendant.<sup>135</sup> The existence of injunctive relief and nominal damages further highlights the diversity of remedies that tort law embraces.<sup>136</sup> According to civil recourse theories, these remedies are constrained by forces outside the inner logic of tort law.<sup>137</sup>

### III. DEATH AND LOSSES: ALLOCATIVE ACCOUNTS OF CORRECTIVE JUSTICE

This Part assesses whether allocative corrective justice can support awards for wrongful death that correspond to the losses to the decedent, rather than the losses to her relatives. This depends on whether death is a loss to the decedent and what it means to repair or annul a loss.

#### *A. Is Death a Loss to The Deceased?*

In the third century B.C., Epicurus argued that death cannot harm us because “[d]eath . . . the most awful of evils, is nothing to us, seeing that, when we *are*, death is not come, and, when death is come, we *are not*.”<sup>138</sup> The question “When does death harm the decedent?” thus presents a puzzle. If death extinguishes the person, then, after her death, there is no longer a subject who can suffer harm. So death cannot harm a person after she dies. It also seems unlikely that death can harm a person before she dies. The most intuitive view—that death harms the victim at the time of her death—is not entirely satisfactory either. If death is an instantaneous event—the moment that a set of vital processes stop, for example—then on one side of this moment one is alive, and not yet harmed by death, and on the other side of this moment there is no longer a subject who can suffer harm.

Since Epicurus first outlined this puzzle, there has been a great deal of philosophical debate regarding whether death harms the decedent, and if so, when it does so. There are proponents of each possible solution to the timing puzzle: death harms the decedent before her death, at the moment of her death, after her death,

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134. 2 DAN DOBBS, *THE LAW OF TORTS* § 381, at 1062–75 (2001).

135. See Goldberg & Zipursky, *supra* note 77, at 955 (discussing the diversity of remedies available in tort law); Anthony J. Sebok, *Punitive Damages: From Myth to Theory*, 92 IOWA L. REV. 957, 957 (2007) (“[T]he theory of punitive damages as ‘private retribution’—which sounds odd to the modern ear—fits surprisingly well with modern theories of the tort system that view tort law as a system of civil recourse for citizens who have suffered wrongs in private law.”).

136. Goldberg & Zipursky, *supra* note 77, at 955; Zipursky, *supra* note 71, at 748.

137. See Goldberg, *supra* note 116, at 602–03 (noting that sometimes an apology is insufficient “satisfaction” for the victim).

138. 2 DIOGENES LAERTIUS, *LIVES OF EMINENT PHILOSOPHERS* 651 (R.D. Hicks trans., Harvard University Press, 1975) (emphasis added).

and death is a type of harm that need not be located in time.<sup>139</sup> The timing puzzle will come up again in the context of whether people can be harmed by events that take place after their death. I will postpone discussion of it until then. I do so for two reasons. First, the intuition that our death would harm us is powerful, enduring, and almost ubiquitous.<sup>140</sup> Despite the philosophical debate, few are likely to argue that death is not a harm to the decedent. But the intuitive case for posthumous harm is much weaker. The more pressing obstacle to applying allocative corrective justice to wrongful death is the issue of whether events after our death can benefit or harm us. Second, the solutions to the timing puzzle discussed below in the context of posthumous harms will also apply to death itself. For example, if posthumous events can harm the victim when they occur, then death can harm her after her death.<sup>141</sup>

*B. What Does It Mean To “Repair” or “Annul” a Loss?*

The duty of repair imposed by allocative corrective justice is the duty to repair or annul the losses that the victim suffers. Annulling a loss is normally thought to make the victim “whole” or to restore her to the position that she would have been in had the wrong not occurred.<sup>142</sup> The make-whole account of tort damages is aspirational only. To truly make someone whole would require undoing the injury. This is rarely possible, even for purely monetary losses. Some psychological remainder is likely to exist even if a wrongdoer steals \$10,000 and repays it in full. It is sometimes possible to offset harms with corresponding gains.<sup>143</sup> For example, pain might be offset or made-up for by a Mediterranean cruise. Even if the cruise cannot fully offset past pain on any cardinal scale of welfare, it could provide some small degree of solace to the sufferer. Although the cruise does not undo the pain, and it may not fully offset it, the cruise can still legitimately be called “compensation” for the pain that goes some way toward making the victim whole.

139. For an overview of each position, see LUPER, *supra* note 10, at 126–139, and BEN BRADLEY, WELL-BEING AND DEATH 84–111 (2009).

140. See John Martin Fischer, *Introduction* to THE METAPHYSICS OF DEATH 3, 16 (John Martin Fischer ed. 1993) (“Most philosophers have wished to resist the Epicurean conclusion.”).

141. Although this may sound odd, it has some intuitive appeal as well. People are harmed when they are deprived of utility, and therefore they are harmed after their death, at the time during which they would have otherwise experienced utility. BRADLEY, *supra* note 139, at 93.

142. 1 DOBBS, *supra* note 107, § 1.1, at 3 (“The damages remedy is a money remedy aimed at making good the plaintiff’s losses.”); 4 FOWLER V. HARPER, FLEMING JAMES, JR. & OSCAR S. GRAY, THE LAW OF TORTS § 25.1, at 493 (2d ed. 1986) (noting that compensation entails “repairing plaintiff’s injury or . . . making him whole”); DOUGLAS LAYCOCK, MODERN AMERICAN REMEDIES: CASES AND MATERIALS 15–16 (2d ed. 1994) (“[T]he essence of compensatory damages” is placing the victim back in her “rightful position.”); Zipursky, *supra* note 71, at 698, 700 (identifying corrective justice accounts with the make whole approach).

143. This would place the victim back on her indifference curve, but not at the some point on that curve that she occupied before the accident.

Death presents a special challenge for the make-whole approach. The idea of offsetting, or making-up for, or providing solace for, death requires that the victim benefit from the posthumous award. The next section, therefore, addresses the possibility that the dead can benefit from events that take place after their death.

### C. Posthumous Benefits

The issue of whether posthumously satisfied desires can benefit their erstwhile holders is a hotly debated one. Some people find it just obvious that the dead can be neither benefitted nor harmed, while others find it equally obvious that lives are capable of retroactive . . . improvement.<sup>144</sup>

Consider Eric Posner and Cass Sunstein's pithy comment: "The dead person cannot be compensated—she is dead."<sup>145</sup> On hedonic accounts of welfare, this is certainly true.<sup>146</sup> On these accounts, welfare is derived from subjective states that one must experience.<sup>147</sup> Since the dead cannot experience the effects of an event, their welfare remains unaffected by those events.<sup>148</sup>

Preference-based accounts of welfare are often thought to be more plausible than hedonic accounts, and preference-based accounts allow for the possibility of posthumous harms and benefits.<sup>149</sup> Consider a betrayed husband.<sup>150</sup> He loves his wife but she secretly despises him and has an ongoing affair with the real father of all of the family's children. Is he harmed by these facts? Relying on preference-based accounts of welfare, many say yes, even though the husband is blissfully unaware of them.<sup>151</sup> He suffers harm because his preference for a loving wife goes unfulfilled.

144. L.W. SUMNER, WELFARE, HAPPINESS, AND ETHICS 127 (1996).

145. Posner & Sunstein, *supra* note 3, at 558. The authors find it equally obvious that death harms the decedent. *Id.* at 576.

146. There are three major accounts of welfare—hedonic, preference-based, and objective-good accounts. Under hedonic accounts, welfare is entirely constituted by subjective experiences. Under preference-based accounts, people are better off when their preferences are satisfied. Under objective good accounts, people are better off if their lives contain more of some pre-determined list of goods like love, education, health, courage, etc. For a general discussion, see MATTHEW D. ADLER & ERIC A. POSNER, NEW FOUNDATIONS OF COST-BENEFIT ANALYSIS 29–32 (2006) and LUPER, *supra* note 10, at 88–97.

147. ADLER & POSNER, *supra* note 146, at 29.

148. See Douglas W. Portmore, *Desire Fulfillment and Posthumous Harm*, 44 AM. PHIL. Q. 27, 27 (2007).

149. John Bronsteen, Christopher Buccafusco & Jonathan S. Masur, *Welfare as Happiness*, 98 GEO. L.J. 1583, 1616–26 (2010) (surveying the arguments in favor of preferentialism and attempting to refute them).

150. This example is a modified version of one given in George Pitcher, *The Misfortunes of the Dead*, 21 AM. PHIL. Q. 183, 186 (1984). For other examples, see 1 JOEL FEINBERG, HARM TO OTHERS: THE MORAL LIMITS OF THE CRIMINAL LAW 90–91 (1984).

151. See, e.g., John Martin Fischer, *Epicureanism About Death and Immortality*, 10 J. ETHICS 355, 373 (2006).

Many proponents of posthumous harm then make an analogy between unknown events and posthumous events.<sup>152</sup> If unknown events can harm someone then so too can posthumous events. Consider a new example. A mother has a young son. The son will die soon from a rare disease. But the family is doubly unlucky and the mother dies first. Is the mother harmed by her son's subsequent death? In each example, someone has a preference for an objective state of the world (for a loving wife, or a son that will grow up happy and healthy). In each example, this preference goes unfulfilled. So perhaps both the betrayed husband and the dead mother suffer harm.<sup>153</sup>

But the analogy between unknown events and posthumous events has weaknesses: the Epicurean timing puzzle problematizes this analogy. If the son's death harmed the mother, when did it do so? The most natural answer is: when *he* died.<sup>154</sup> If death extinguished the person who was the mother, then the harm occurred at a time when the mother was not in existence to suffer harm.<sup>155</sup>

There are several ways to deal with this puzzle. Consider two.<sup>156</sup> First, Joel Feinberg argues that the mother suffers harm before she dies, while she is alive. The harm to her starts when she develops an interest that will ultimately be thwarted by her son's death.<sup>157</sup> The mother is harmed because one of her strong interests was doomed.<sup>158</sup> Feinberg's solution to the timing puzzle is the most widely accepted.<sup>159</sup> Second, Martha Nussbaum argues that the son's death alters the value or significance of the *mother's life*, and it does so when the son dies.<sup>160</sup> The concept of altering the value of the mother's life is not necessarily identical to the concept of harming the mother.<sup>161</sup> Yet Nussbaum suggests that it is at least

152. *See id.* at 359–60, 373.

153. LUPER, *supra* note 10, at 135. *But see* Portmore, *supra* note 148, at 27 (arguing that the best versions of a preference-based account of welfare would exclude preferences for posthumous states of the world).

154. LUPER, *supra* note 10, at 197; Joan Callahan, On Harming the Dead, 97 *ETHICS* 341, 346 (1987).

155. Notice that this problem (the problem of the nonexistent subject) occurs for posthumous harms but not unknown harms.

156. For further solutions to the timing puzzle, see BRADLEY, *supra* note 139, at 84–111; LUPER, *supra* note 10, at 126–39; DANIEL SPERLING, *POSTHUMOUS INTERESTS: LEGAL AND ETHICAL PERSPECTIVES* 25–34 (2008).

157. FEINBERG, *supra* note 150, at 55, 92; *see also* Pitcher, *supra* note 150, at 187.

158. FEINBERG, *supra* note 150, at 55; LUPER, *supra* note 10, at 135 (“Slandorous claims made after I am dead make it true that my reputation is to be sullied, and this harms me all the while I want my reputation to be good after I am gone. It is while alive that I have the desire; while alive that my welfare level is lower.”). For a further discussion of this argument, see BRADLEY, *supra* note 139, at 24, 87.

159. *See* BRADLEY, *supra* note 139, at 23; LUPER, *supra* note 10, at 139 (labeling this “prioritism” and rejecting competing theories of posthumous harm); Portmore, *supra* note 148, at 27 (describing this as the standard account of posthumous harm).

160. Martha Nussbaum, *Replies*, 10 *J. ETHICS* 463, 473–74 (2006).

161. Nussbaum refers to posthumous events as potentially affecting the “person's life” rather than the “person.” *Id.* at 473.

minimally plausible to say that each is (perhaps in its own way) bad for the mother.<sup>162</sup>

Neither of these solutions provides fully satisfactory response to the puzzle. Feinberg's solution appears to require a deterministic universe where the future is already set in stone. The son's death is preordained, and hence "dooms" the mother's interest from the moment she adopts it.<sup>163</sup> But determinism carries with it its own puzzles, and potentially undermines the theory of personal responsibility that undergirds relational corrective justice.<sup>164</sup> Nussbaum's comments were preliminary,<sup>165</sup> and thus she has not yet fully elaborated the potential differences between the son's death being bad for the mother's life and it being bad for the mother. But she remains rightly skeptical that they are each harmful to the mother.<sup>166</sup> The mother's life and the mother are not the same. It seems most natural to say that the mother's life can be made more or less *successful* by posthumous events, while only the mother can potentially be *harmed* by posthumous events. So shifting focus to the mother's life may solve the timing puzzle at the cost of asking the wrong question.

#### *D. Summary of Lost Life Damages Under Allocative Corrective Justice*

Allocative accounts provide a very narrow logical space for lost life damages. Such damages would comport with allocative corrective justice only if death harms the decedent, and the decedent can benefit from posthumous events. The timing puzzle remains a substantial barrier to the possibility of posthumous benefits. Given the current stalemate in the theoretical arguments about posthumous harms,<sup>167</sup> and the impossibility of identifying a fully satisfying solution to the timing puzzle, it is doubtful that allocative corrective justice can provide a solid justification for lost life damages. The remainder of this Article will remain

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162. *Id.* at 473–75; *see also* BRADLEY, *supra* note 139, at 97 ("Perhaps it is true that, given the ordinary meanings of terms like 'harm' and 'bad,' something cannot be bad for a person at a time when that person does not exist. I do not know how to resolve this question about language, but I do not think it is necessary to do so. If it is true that the ordinary meanings of these terms preclude their use in the way I suggest, then we should revise our ordinary use of these terms."); THOMAS NAGEL, *Death*, in MORTAL QUESTIONS 1, 6 (1979) ("A man's life includes much that does not take place within the boundaries of his body and his mind, and what happens to him can include much that does not take place within the boundaries of his life."); Fischer, *supra* note 151, at 373 (arguing that the non-existence of the subject should not matter to determinations of harm).

163. *See* FEINBERG, *supra* note 150, at 91 ("The . . . person was harmed in being the subject of interests that *were going to be defeated* whether he knew it or not.") (emphasis added); LOREN E. LOMASKY, PERSONS, RIGHTS, AND THE MORAL COMMUNITY 219–20 (1987); Julian Lamont, *A Solution to the Puzzle of When Death Harms Its Victims*, 76 AUSTRALASIAN J. PHIL. 198, 202 (1998).

164. *See* Anders Kaye, *Powerful Particulars: The Real Reason the Behavioral Sciences Threaten Criminal Responsibility*, 37 FLA. ST. U. L. REV. 539, 550–51 (2010).

165. *See* Nussbaum, *supra* note 160, at 463.

166. *Id.* at 472 (resisting arguments that attempt to downplay the importance of non-existence for the attribution of harm).

167. Fischer, *supra* note 151, at 370–71.

agnostic about whether the dead can benefit from posthumous events, and explore whether other theories of tort law embrace lost life damages.

#### IV. DEATH AND WRONGS: RELATIONAL ACCOUNTS OF CORRECTIVE JUSTICE

Two aspects of relational accounts appear to point to opposite conclusions about whether awarding lost life damages would be consistent with corrective justice. The required *correlative shape* of the duty of repair highlights several new obstacles. However, the flexibility regarding the *content* of the duty of repair eliminates several old obstacles.

##### A. The Challenge of Correlativity

Under relational corrective justice, the remedy must undo the wrong. In order to understand what might undo the wrong, we need to attend to the structure of the wrong itself,<sup>168</sup> because the relational nature of the wrong has implications for the proper remedy.<sup>169</sup>

The heart of a corrective injustice is that it is relational.<sup>170</sup> Corrective justice concerns situations where, for example, John wrongs Sally. John and Sally's interaction did not create an injustice merely by virtue of what John did, or merely by virtue of what happened to Sally. The relevant injustice exists because of the link between what John did and what Sally suffered.<sup>171</sup> Weinrib describes this link using the terms correlative, relational, and bipolar.<sup>172</sup> One of the central tenants of relational corrective justice is that only relational remedies can undo relational wrongs.<sup>173</sup>

What does it mean for a remedy to be relational? A first-cut response might be that it requires John to give something of value to Sally. Consider for example Weinrib's comments on the role of damages: "[D]amages represent in monetary terms . . . the injustice committed by the defendant upon the plaintiff. Through the mechanism of the damage award, a qualitatively unique moral event (the particular injustice done and suffered) receives the quantitative expression that enables it to be reversed through a monetary transfer."<sup>174</sup> The language of "revers[ing]" the

168. Weinrib, *supra* note 12.

169. *Id.*; WEINRIB, *supra* note 68, at 65; Ernest J. Weinrib, *Two Conceptions of Remedies*, in JUSTIFYING PRIVATE LAW REMEDIES 3, 12 (Charles E.F. Rickett ed., 2008).

170. See WEINRIB, *supra* note 68, at 10; Weinrib, *supra* note 12, at 350.

171. Weinrib, *supra* note 12, at 350 ("[W]hat the defendant has done counts as an injustice only because of what the defendant has suffered . . . . [E]ach party's position is normatively significant only through the position of the other, which is the mirror image of it."). The link between defendant and plaintiff is provided by a theory of legal responsibility that is worked out in its specifics by a series of individual tort cases and may differ from more general theories of moral responsibility. *Id.* at 353.

172. *Id.* at 350–51.

173. Weinrib, *supra* note 169, at 5 ("[T]he remedy has to replicate the structure of the injustice, retracing and reversing the movement between the parties.").

174. Ernest J. Weinrib, *Restitutionary Damages as Corrective Justice*, 1 THEORETICAL INQUIRIES L. 1, 4 (2000).



wrong through a monetary “transfer” implies that the plaintiff must receive whatever courts take from the defendant.<sup>175</sup> Other passages lend further credibility to this claim.<sup>176</sup> This would present problems for lost life damages, where the plaintiff can no longer personally receive the monetary transfer.

Another way to illustrate the potential tension between correlativity and lost life damages is to focus on the relationship between doer and sufferer.<sup>177</sup> Doer and sufferer are locked in a normative relationship. This relationship is integral to the imposition of liability. One might posit that this relationship ceases when the victim dies. By similar reasoning, the relationship would cease when the wrongdoer dies. If either dies, then perhaps there is no longer a justification for imposing liability.

The above arguments misread the requirement of correlativity. To see why, consider tort liability from John’s perspective. Must John pay Sally, or can he purchase insurance, such that the insurance company will pay Sally? The consensus among corrective justice theorists is that insurance contracts do not undermine the correlative structure of standard tort remedies.<sup>178</sup> This is because corrective justice seeks to illuminate a set of *justificatory* practices.<sup>179</sup> It is concerned with the reasons we give to justify making John an obligor and Sally his obligee.<sup>180</sup> It is not

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175. *Id.* Weinrib at times even implies that the plaintiff must be alive to initiate the suit. See Weinrib, *supra* note 169, at 12 (“[T]he remedy must operate not merely on one party or the other but on the relationship between them. Just as the [wrong] directly links the parties as the active and passive poles of an injustice, so the remedy treats the parties as the active and passive poles in the removal of that injustice.”).

176. See, e.g., WEINRIB, *supra* note 68, at 143 (“The origin, destination, and quantum of the damages can be understood together: a particular quantum is taken from a particular defendant because it is paid to a particular plaintiff.”); *id.* at 144 (“Whether the issue is the ground of the claim or the mechanics of processing it, each litigant’s position is the mirror image of the other’s.”).

177. These are Weinrib’s terms. WEINRIB, *supra* note 68, at 65. They map onto Coleman’s terms “wrongdoer” and “victim” respectively. See COLEMAN, *supra* note 68, at 370–71.

178. Allan Beever, *Corrective Justice and Personal Responsibility in Tort Law*, 28 OXFORD J. LEGAL STUD. 475, 498 (2008) (“According to the corrective justice theorist, the reason insurance is irrelevant in tort is not because insurance undermines the defendant’s personal responsibility but because insurance is external to the relationship between the claimant and the defendant. Therefore, though the corrective justice theorist agrees that courts should ignore insurance, she does not hold that liability insurance should be illegal. In fact . . . she can accept the way that liability insurance is treated by Commonwealth law.”); Jeffrey O’Connell & Christopher J. Robinette, “Choice Auto Insurance”: *Do Theories of Justice Require Linkage Between Injurers and the Injured?*, 1997 U. ILL. L. REV. 1109, 1133 (“The source of money paid to the injured does not negate the evaluation of the agent’s actions, a point conceded by Perry in tolerating third-party liability insurance. Deciding whether one’s actions are defensible is an evaluation logically distinct from the question of the source of compensating for the tort.”).

179. Weinrib, *supra* note 12, at 355 (“A corrective justice approach attempts to discern the normative character of liability as a familiar practice within which justification has a pervasive role. A corrective justice approach takes the justificatory ambitions of this practice seriously by focusing on the law’s internal normative dimension.”).

180. WEINRIB, *supra* note 68, at 143–44 (“[T]he justification for *obligating* the defendant to pay is correlative to the justification for *entitling* the plaintiff to be paid. Neither

concerned with how John's obligation is ultimately discharged. As Weinrib notes at the end of a long footnote: "Corrective justice goes to the nature of the obligation; it does not prescribe the mechanism by which the obligation is discharged. Liability insurance presupposes liability, and it is that liability which is intelligible in the light of corrective justice."<sup>181</sup>

Put another way, corrective justice reflects the inner logic of tort law, not the inner logic of the laws regulating debt. The imposition of the duty itself fully satisfies corrective justice. This is not to say that we should be indifferent to whether this duty is discharged. But corrective justice speaks only to the justifications for imposing the duty, other normative concerns regulate the manner in which the defendant discharges his duty. Thus we might rightly ask whether Donald Trump can pay the defendant's debt to the plaintiff,<sup>182</sup> but our answer will not draw upon the principles of corrective justice. Those principles are exhausted when a judge imposes the duty.<sup>183</sup> So while the correlative nature of the injustice has implications for the types of reasons that tort law can use to justify imposing a duty of repair, it does not have implications for the factual sequence of events that serve to discharge that duty.

Just as corrective justice does not require John to personally pay Sally, it does not require Sally to personally receive the payment. Consider a remedy that will be discussed further in Part VI: paying lost life damages to the victim's estate. A duty to pay the victim's estate meets the requirements of correlativity. Just as private insurance contracts can effectively allow the insurance company to stand in the shoes of the obligor, so too can probate codes allow the executor of the estate to stand in the shoes of the obligee. Consider also a suggestion of Andrew McClurg that courts require the defendant to fund a memorial to the victim.<sup>184</sup> This too would be a correlative remedy. The only difference is that here, the defendant owes the estate a specific performance rather than a monetary payment. Correlativity does not require that John and Sally remain alive until the termination of a lawsuit. The relevant relationship commences when John wronged Sally. It is the central importance of this relational wrong that explains why tort law concerns itself with causation, duty, and foreseeability. These concepts link John's action to Sally's harm. It is this link that provides the necessary justification for tort liability, not the continued existence of either John or Sally.

The above analysis starts with concrete examples of bipolar remedies and proceeds by analogy to argue that the plaintiff's death does not foreclose the

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justification is intelligible without the other . . . ." (emphasis added)); *id.* at 143 ("The remedy consists not in two independent operations—one penalizing the defendant and the other benefitting the plaintiff—but in a single operation that joins the parties as *obligee* and *obligor*." (emphasis added)).

181. WEINRIB, *supra* note 68, at 135–136 n.25.

182. Coleman poses this question and concludes that Trump's benevolence would extinguish the debt and therefore remove the defendant's duty. COLEMAN, *supra* note 68, at 327–28, 389.

183. Perhaps the easiest, but most glib, way to see these limitations is to look at tort scholarship and torts teaching generally. It overwhelmingly ignores issues of collecting judgments and focuses on the justifications for imposing liability.

184. McClurg, *supra* note 1, at 39 (arguing that "lost life damages should be awarded for the exclusive purpose of funding a permanent memorial to the deceased").

possibility of imposing a bipolar remedy. We get to the same result when we instead generate and apply a general definition of bipolar remedies.

Recall that only bipolar remedies can undo bipolar wrongs. A remedy is bipolar if it is justified by the combination of agency, legal responsibility, and harm that can be succinctly described as: “John wronged Sally.” It will help to unpack the elements of this injustice into three parts. First, John committed a wrong. Second, Sally suffered a wrong. Third, John committed the wrong that Sally suffered. In order to be correlative, a remedy must reflect each of these elements.

To illustrate the necessity of each element, consider punitive damages, deterrence, and compensation. Punitive damages are not correlative.<sup>185</sup> It will be useful to distinguish between two forms of punitive damages. The first is triggered by some especially outrageous conduct by the defendant.<sup>186</sup> Unless the outrageousness of the defendant’s conduct increases the victim’s harm,<sup>187</sup> this type of liability is not correlative because its justification is indifferent to the bipolar relationship of the parties. Nothing has to be said about the victim to generate these damages.<sup>188</sup> They are justified instead by the idea that John committed a certain type of wrong, or John wronged someone in a certain way. These punitive damages neglect one of the three elements of the wrong: the fact that it was Sally who was wronged. The second form of punitive damages is triggered by the fact that not all victims will sue, and hence we need some multiplier to create adequate deterrence.<sup>189</sup> Nothing has to be said about the victim to generate these damages either. They are justified by the idea that John wronged some set of other people. None of the rationales for punitive damages, nor any deterrence-based rationale, relies on the fact that Sally was the particular person who was wronged.<sup>190</sup> Conversely, compensatory rationales for tort remedies only rely on the fact that Sally was wronged.<sup>191</sup> They ignore the fact that John was the particular person who wronged Sally. Thus, pure compensatory rationales suggest that we should move toward a New Zealand-style accident compensation scheme where anyone who suffers a loss may recover regardless of how the loss occurred. Even if we combine the deterrence rationale with the compensation rationale, we still ignore the third

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185. WEINRIB, *supra* note 68, at 135 n.25.

186. DOBBS, *supra* note 134, § 381, at 1065.

187. This might occur when the outrageousness of the defendant’s behavior creates a dignitary harm to the plaintiff. See 1 ST. THOMAS AQUINAS, COMMENTARY ON THE NICOMACHEAN ETHICS 420 (C.I. Litzinger trans., Henry Regnery Co. 1964) (arguing that “the injury of the deliberate transgressor is greater, for internal contempt is added to the external damage”); Dan Markel, *How Should Punitive Damages Work?*, 157 U. PA. L. REV. 1383, 1414–16 (2009) (discussing the possibility that some conduct can create dignitary harm and noting that commonwealth scholars often rely on “aggravated damages” to account for this harm when it does not fall under traditional compensatory categories).

188. See WEINRIB, *supra* note 68, at 212.

189. A. Mitchell Polinsky & Steven Shavell, *Punitive Damages: An Economic Analysis*, 111 HARV. L. REV. 869, 887–96 (1998) (“[I]f a defendant can sometimes escape liability for the harm for which he is responsible, the proper magnitude of damages is the harm the defendant has caused, multiplied by a factor reflecting the probability of his escaping liability.” (emphasis omitted)).

190. See WEINRIB, *supra* note 68, at 121–22.

191. *Id.* at 121.

element: the relationship between John and Sally. The deterrence rationale relies on the fact that John wronged someone. The compensation rationale relies on the fact that Sally was wronged by someone. Neither relies on the fact that John committed the wrong that Sally suffered. So in a standard case, the combination of deterrence and compensation rationales would justify taking money from John, and giving money to Sally, but it would not explain why Sally should get the money taken from John.<sup>192</sup> A standard tort award is correlative because it can only be explained by reference to all three elements of “John wronged Sally.”

If all three elements of the relationship must play a role in justifying liability, then the obligation imposed by the duty of repair must include a feature that is justified only by reference to the particular sufferer.<sup>193</sup> This can happen without Sally benefiting from, or even being aware of, the remedy. Consider a public apology. We do not need to refer to Sally’s plight to justify forcing the defendant to say, “I regret what happened.” In contrast, we must refer to Sally’s plight in order to justify forcing the defendant to say, “I regret what I did to Sally.” As long as a remedy is justified by all three elements of the injustice, it will be correlative.<sup>194</sup>

Requiring John to pay Sally’s estate is a correlative remedy. Sally’s estate is the legal receptacle for all of Sally’s claims and debts. The estate is her personal representative. The justification for requiring John to pay Sally’s estate is that John owed Sally something. Thus, Sally’s plight is a necessary element in justifying this remedy.<sup>195</sup>

To summarize, imposing a correlative remedy is a necessary condition of undoing a wrong.<sup>196</sup> Any obligation that reflects the correlative structure of the injustice will itself be correlative. An obligation will reflect the correlative structure of the injustice when it is grounded in justifications that are themselves correlatively structured. And that in turn requires that all three elements of “John wronged Sally” serve to justify the obligation imposed on the defendant. Although this can be accomplished by obligating the defendant to pay the plaintiff, this is not the only type of remedy that meets the requirements of correlativity.

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192. *Id.* at 43 (“[T]here is no reason to connect a particular application of deterrence with a particular award of compensation.”); *id.* at 121–22.

193. Of course, it also must include a feature that is justified only by reference to the defendant and a feature that is justified only by reference to the relationship. Normally these features would be, respectively, the fact that the defendant is an obligor and the fact that the defendant’s obligation is to the plaintiff.

194. This interpretation illustrates why Coleman was wrong to suggest that prison sentences might undo the wrong. COLEMAN, *supra* note 68, at 321. A prison sentence would not undo the wrong because it is not correlatively structured. Nor would a fine, or probation, or community service. None of these potential obligations require Sally as part of their justification. They all rely merely on the idea that the defendant wronged someone, rather than that he wronged Sally.

195. Of course, many other remedies would be correlative. Requiring John to pay Sally’s mother is correlative. The fact that this remedy is correlative, however, does not mean that it will undo the wrong. Correlativity is a necessary but not sufficient condition of undoing a wrong. A substantive moral judgment must be made about the fit between the wrong and the remedy. The next section will further address this notion of “fit.”

196. It is not a sufficient condition, however. See *infra* Part IV.B.

*B. The Challenge of Content: The Affirmative Case for Lost Life Damages*

The remedial flexibility of relational accounts comes at a potential cost. It arguably leaves policy makers with no guidance as to which of all the possible correlatively structured remedies tort law should adopt. But not all correlatively structured remedies will equally “undo the injustice.” Consider the simple case where a victim loses a leg and the court awards her fifty cents. This remedy is correlatively structured. Indeed, it would probably involve the simplest case where the defendant pays money directly to the plaintiff. Yet we would probably agree that the award was too small. This example shows two things. First, correlativity is a necessary but not sufficient condition of a remedy that undoes a wrong. Relational corrective justice also requires us to make a substantive judgment about whether a potential remedy *fits* the wrong. Second, there are probably areas of agreement about this substantive judgment even if there are also large gray areas. Even if there are disagreements about which remedy provides the best fit, we can all agree that undoing the wrong of negligently depriving someone of a limb requires more than a fifty cent payment.

In order to get a better sense of the how to assess the fit between wrongs and remedies, first consider one isolated aspect of a wrong: its purely economic effects on the victim. There is a close fit between economic harm and monetary damages. If someone damages your car and forces you to spend \$100 repairing it, damages can replace this \$100 loss. Damages can undo economic injury. Thus, monetary damages are particularly appropriate for economic injuries; there is an obvious fit between the wrong and the remedy. Undoing, or at least mitigating, the harm plays a large role in undoing the wrong.

The fit between monetary remedies and the noneconomic effects of a wrong are less obvious, but just as strong. Monetary damages cannot undo pain felt by the victim. One cannot award anti-pain that will retroactively remove past pain. It is perhaps this sort of observation that has led some academics and legislators to criticize the entire practice of awarding damages for pain and suffering.<sup>197</sup> But despite such attacks, these damages have remained quite resilient. All states recognize pain and suffering as legitimate bases for awarding monetary damages, and such awards are common. Although approximately half of the states cap pain and suffering damages, the caps still allow substantial awards (caps range from \$250,000 to \$500,000).<sup>198</sup> In the language of relational corrective justice, a monetary award can apparently go some way toward undoing the wrong without undoing the pain. This is because literally undoing past pain is not the only way to forge the appropriate fit between pain and monetary damages.

The fit between pain and monetary remedies becomes clear when viewed through the lens of their welfare effects. Both pain and monetary remedies have hedonic welfare effects. To be sure, each is a different dimension of one’s hedonic

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197. See, e.g., Richard Abel, *General Damages Are Incoherent, Incalculable, Incommensurable, and Inegalitarian (but Otherwise a Great Idea)*, 55 DEPAUL L. REV. 253, 258, 323–24 (2006).

198. See Ronen Avraham, *Database of State Tort Law Reforms (DSTLR 4th)* (Univ. Tex. Sch. of Law, Law & Econ. Research Paper No. 184, 2011), available at <http://ssrn.com/abstract=902711>.

welfare. Money does not undo pain, and pain does not make one poorer. But their effects on overall hedonic welfare are clear and important. When viewed in light of these effects, monetary remedies are not intended to undo pain, but rather mitigate one aspect of its negative effects. For example, a Mediterranean cruise might offset or make-up for pain.<sup>199</sup> Even if the cruise cannot fully offset the hedonic welfare effects of past pain, it could provide some small degree of solace to the sufferer.<sup>200</sup> Although the cruise does not undo the pain, and it may not fully offset it, the cruise can improve the victim's hedonic welfare. This mitigates the negative hedonic welfare effects of the injury.

Like pain and suffering damages, the fact that fatal wrongs cannot be undone does not mean that monetary remedies are not an appropriate response. The fit between pain and monetary remedies only became clear when viewed through a welfare lens. The fit between death and monetary remedies will become clear when viewed through the lens of life projects.

Part of the tragedy of death stems from the way it cuts off our ability to affect the world. This is a tremendous loss because everyone has goals and aims that require affecting the world. In order to understand more fully why this is such a tremendous loss, consider the idea of a project. People are project pursuers. Speaking abstractly, people adopt a conception of the good and cannot be indifferent to whether this vision of the good is achieved or not.<sup>201</sup> On a more concrete level, people have goals or ends that relate to their idea of what is worthwhile to pursue in life. Parents, for example, actively work to ensure that their children flourish.

Projects are a subset of one's ends or desires.<sup>202</sup> The boundary between projects and other ends is fuzzy, but it is nonetheless useful and conceptually familiar to distinguish projects as a special class of ends.<sup>203</sup> Roughly speaking, projects are those ends that are relatively well-considered, enduring, and important. People adopt, endorse, or embrace their projects. They are not reflexively or unthinkingly acted upon. The momentary desire to scratch an itch is not a project. Projects tend to be relatively stable and provide durable reasons for us to act. A desire to eat ice cream is not a project. A desire to get into the Guinness book of world records by eating twenty tons of ice cream is a project. The term "projects" also marks off a set of ends that are relatively important to the holder. The desire to see a movie is

199. See Andrew E. Clark & Andrew J. Oswald, *A Simple Statistical Method for Measuring How Life Events Affect Happiness*, 31 INT'L J. EPIDEMIOLOGY 1139, 1140–41 (2002) (measuring the effects of life events on self-reported well-being and concluding that widowhood could be compensated with £170,000). The concept of offsetting welfare losses is what Peter Cane calls called "substitute and solace" compensation. PETER CANE, *ATIYAH'S ACCIDENTS, COMPENSATION AND THE LAW* 413 (7th ed. 2006).

200. CANE, *supra* note 199, at 413.

201. CHARLES TAYLOR, *SOURCES OF THE SELF: THE MAKING OF THE MODERN IDENTITY* 47–48 (1989).

202. LOMASKY, *supra* note 163, at 26.

203. See, e.g., Portmore, *supra* note 148, at 34 (noting that some philosophers distinguish between goals/projects and other desires because "whereas one can desire something and yet not intend to do anything to bring it about, a goal does essentially involve an intention to make efforts toward its achievement").

unlikely to be a project, even if this desire has been relatively stable. The desire that your religion thrive rather than die out is a project. Projects tend to become tied up in one's identity.<sup>204</sup> When asked to describe yourself, you might naturally begin with your name and basic demographic information, but you would also list some of your most identity-conferring projects.

Everyone has projects. For example, most if not all parents consider their children's flourishing to be one of their projects. Others have other types of projects. For some, rooting for the Yankees is a project, or spreading the word of God, or writing a cookbook, or becoming famous, or raising a prize-winning pig, or producing art, or removing graffiti, etc. It is not only a few zealots who have projects.<sup>205</sup> Everyone has projects.

Death removes our ability to pursue our projects. The victim of wrongful death can no longer exercise her autonomy in the world. More concretely, she can no longer work toward giving her children an easier life than her own, ensuring that future Americans are secure from terrorist threats, reducing animal cruelty, keeping children engaged in elementary school, or any other project that she might have.

Extending the victim's ability to influence the world after her death is a fitting response to negligently cutting off this ability. Obviously, no remedy can undo death. But again, tort law does not aspire to such lofty goals. It instead embraces imperfect remedies. Despite the fact that damages cannot undo past pain, tort law provides them. Once we shift focus and see both pain and money in terms of their effects on hedonic welfare, providing monetary damages is a fitting response.<sup>206</sup> The fit between death and lost life damages is similarly revealed by shifting our focus away from perfectly undoing the effects of the wrong. Death is (at least in part) the termination of the victim's ability to influence the world. A tort remedy would fit this aspect of death if it could somehow extend the victim's power to influence the world beyond her death. Fortunately, no magic is required to do this.

The law already provides tools that can extend the victim's reach beyond her own death. Wills allow people to transfer their property upon their death and give them a great deal of dead-hand control over the terms and conditions of those transfers.<sup>207</sup> With the demise of the rule against perpetuities, trusts allow settlors to extend dead-hand control indefinitely into the future. Although public policy concerns set some limits on dead-hand control,<sup>208</sup> people have several powerful tools to extend their influence beyond their own lives.

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204. See LOMASKY, *supra* note 163, at 26–27; BERNARD WILLIAMS, *MORAL LUCK: PHILOSOPHICAL PAPERS 1973–1980*, at 12–14 (1981) (arguing that some projects are identity conferring in that “unless I am propelled forward by [them], it is unclear why I should go on at all”); Daniel Farnham, *A Hegelian Theory of Retribution*, 39 J. SOC. PHIL. 606, 611–13 (2008).

205. LOMASKY, *supra* note 163, at 39, 45.

206. I am not claiming that pain and suffering damages are a good idea all things considered. The practical difficulties of proving and assigning values to pain and suffering count as a strike against them.

207. Mark L. Ascher, *Curtailing Inherited Wealth*, 89 MICH. L. REV. 69, 83 (1990).

208. See, e.g., *Shapira v. Union Nat'l Bank*, 315 N.E.2d 825 (Ohio Misc. 1974) (discussing public policy limitations on testamentary freedom).

Providing money to the estate of the victim is a partial or imperfect way of mitigating at least part of what makes death tragic. Consider Sally again. Her children are her most important project. But her children are not her only project. She is also a member of a religious organization. Therefore, she might well seek to further each of these projects in a will or other testamentary instrument. Providing money to Sally's estate does not, of course, increase the number of ways that Sally's autonomous choices can influence the world after she dies. She always had the power to write a will. But providing extra money to Sally's estate provides her with more resources to wield with this autonomy. It makes her choices more potent and enhances the power of her one final chance to purposefully influence the world.

This analysis of the fit between death and monetary remedies bears a close family resemblance to a broader view of tort remedies provided by Arthur Ripstein. According to Ripstein, tort law is a system of means replacement. The wrongs that tort law addresses reduce the victim's power over the *means* she uses to pursue her projects, namely her body and property.<sup>209</sup> Remedies seek to restore the victim's means by providing her with the most flexible and transferrable type of means: money.

Ideally, providing the victim with money will enable her to put herself back into exactly the same place she was before the accident. That is, she will be able to pursue her original projects to the same degree and in the same manner that she did before the injury. But this is often not possible.

When the victim cannot be put back into her pre-injury position, tort law embraces a series of imperfect responses to injury. Some injuries foreclose a subset of the victim's ends forever. For example, a traumatic brain injury could potentially derail a law student's hopes to be a successful professor, judge, or lawyer. In these cases, tort law might strive for a second-best remedy: to provide her with the means to achieve a *different* set of ends that can be judged as equivalently valuable to her original ends. Under a hedonic welfare metric, for example, the remedy might seek to provide her with the same amount of utility while acknowledging that this falls short of the ideal of putting the victim into the same position she would have been in absent the injury. But even this strategy of welfare equalization is often impossible. The welfare losses of some injuries are so severe, and marginal utilities of money so steep, that money cannot fully offset a welfare setback. In these cases, tort law pursues a third-best remedy: to provide the victim with means to achieve different ends that will provide her with some lesser amount of utility than she had before the accident.

When the victim dies, tort law must pursue a fourth-best remedy. The only way to provide the victim with any means whatsoever is to locate those legal tools that can still convert the victim's means into her ends. These legal tools are wills and other testamentary instruments. These are the last vessels of her autonomy. Furthering this last flicker of choice is a fitting response to extinguishing the rest of it.

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209. Ripstein, *supra* note 111, at 1970 ("To have something as your means is to have it subject to your choice—that is, for you to be the one who decides how it will be used."); *id.* at 1965, 1967, 1968.



The above arguments are not immune to philosophical criticism. According to Lucretius, for example, it is impossible to fulfill the preferences of the dead.<sup>210</sup> Death terminates the subject, and preferences—like harms or rights—arguably must be ascribed to an existing subject. This might imply that fulfilling the desires of the dead is a useless exercise unless it serves some other purpose. We have already seen that similar philosophical puzzles have led to debates without clear resolution. But this stalemate creates a space where it is defensible to respect the preferences of the dead simply because those were their preferences, even if this position can defensibly be rejected as well. In such situations, we can look to our other legal and cultural practices for guidance.

Our current legal and cultural practices appear to favor the view that it is sensible to talk about the preferences of erstwhile people, and that these preferences provide strong reasons for us to act. Testamentary freedom, mortal remains statutes, and the rules of organ donation all seek to effectuate the preferences of deceased concerning post-death states of the world. For example, courts view testator intent as the lodestar of interpreting wills.<sup>211</sup> Of course, one could construct an explanation of testamentary freedom that relies solely on consequentialist concerns for the welfare of the living: testamentary freedom prevents children from becoming disobedient, allows parents to shift assets to their most efficient user, creates incentives for wealth creation, and incentivizes within-family caregiving at the end of life.<sup>212</sup> However, these explanations do not ring true. It is even more implausible that they *fully* explain our testamentary practices. People can decide who gets their property after their death, at least in part because that property belonged to them, and they had a preference that it be disposed of in a certain way. This respect for the dead's preferences extends to the disposition of their corpses as well. The Uniform Anatomical Gift Act, which has been adopted by forty-five states,<sup>213</sup> provides that competent adults' wishes are dispositive of whether their organs can be harvested.<sup>214</sup> "Mortal remains" statutes give people the right to exercise control over their funeral and, for example, whether they are buried or cremated.<sup>215</sup>

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210. Lamont, *supra* note 163, at 206.

211. RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 10.1 cmt. a (2003) ("The organizing principle of the American law of donative transfers is freedom of disposition."). Of course, there are some public policy exceptions to the freedom of testation. *See, e.g.*, *Eyerman v. Mercantile Trust Co.*, 524 S.W.2d 210 (Mo. Ct. App. 1975) (refusing to comply with testators desire that her historic home be destroyed); UNIF. PROBATE CODE §§ 2-301 to -404, 8 U.L.A. 317-37 (2008) (protecting minor children from disinheritance). Nonetheless, testators have a great deal of freedom in disposing of their assets. *See supra* note 188 and accompanying text.

212. *See* Adam J. Hirsch & William K.S. Wang, *A Qualitative Theory of the Dead Hand*, 68 IND. L.J. 1, 6-14 (1992) (surveying arguments in favor of testamentary freedom).

213. REVISED UNIF. ANATOMICAL GIFT ACT (2006), Table of Jurisdictions Wherein Act Has Been Adopted, 8A U.L.A. 42 (Supp. 2011).

214. REVISED UNIF. ANATOMICAL GIFT ACT (2006) §§ 4, 8, 8A U.L.A. 73, 87-88 (Supp. 2011).

215. *See, e.g.*, CONN. GEN. STAT. ANN. § 45a-318 (West 2011); DEL. CODE ANN. tit. 12, § 262 (West 2007); MD. CODE ANN., HEALTH-GEN. § 5-509(a)(1) ("Any individual who is 18 years of age or older may decide the disposition of the individual's own body after that

Even a decedent's hypothetical preferences can carry weight. The idea that some state of affairs is "what the decedent would have wanted" can be a powerful reason to bring that state of affairs about. Again, testator intent is the lodestar of both enforcing and reforming wills.<sup>216</sup> But our respect for erstwhile preferences goes beyond the context of testamentary freedom. When families disagree about how or where to bury a decedent, courts often place great weight on what the decedent herself would have wanted.<sup>217</sup> For example, when a Florida appeals court was called upon to decide the fate of Anna Nicole Smith's remains, it declined to analyze the case in terms of which heir had a legal right to the body, and instead sought to determine Ms. Smith's preferences.<sup>218</sup>

Although the dead's preferences are by no means dispositive in all cases,<sup>219</sup> the above practices suggest that we can sensibly talk about wills as furthering a decedent's projects. Thus, we can say that lost life damages paid to the victim's estate are a way of furthering her projects.

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individual's death without the predeath or post-death consent of another person by executing a document that expresses the individual's wishes regarding disposition of the body or by entering into a pre-need contract.") (LexisNexis Supp. 2011); MINN. STAT. ANN. § 149A.80 (West 2011); OHIO REV. CODE ANN. § 2108.81 (LexisNexis 2011); *see also* CAL. HEALTH & SAFETY CODE § 7100.1(a)(2) (allowing decedent's preferences to control funeral only if she has prepaid for it); N.J. STAT. ANN. § 45:27-22 (West 2011) (allowing decedent to name a proxy decision maker).

216. *Cohen v. Guardianship of Cohen*, 896 So. 2d 950, 954–55 (Fla. Dist. Ct. App. 2005) (disregarding testator's intent to be buried in New York that was expressed in will and enforcing testator's repeated oral statements after executing the will that he wanted to be buried next to his wife); RESTATEMENT (THIRD) OF PROP.: DONATIVE TRANSFERS § 12.1 cmt. b (2003) ("The rationale for modifying a donative document [under this section] is that the donor would have desired the modification to be made if he or she had realized that the desired tax objectives would not be achieved.").

217. *See Sacred Heart of Jesus Polish Nat'l Catholic Church v. Soklowski*, 199 N.W. 81 (Minn. 1924) (weighing decedent's orally stated preference for being buried in one church against his actions of calling a priest from another church to his deathbed); *Burnett v. Surratt*, 67 S.W.2d 1041 (Tex. Civ. App. 1934).

218. For a discussion of Ms. Smith's case, see James T.R. Jones, *Anna Nicole Smith and the Right to Control Disposition of the Dead*, LOUISVILLE BAR BRIEFS, May 2007, at 24, available at <http://ssrn.com/abstract=996496>.

219. We do not invariably respect the preferences of the dead, and the boundaries between where we do and don't may be somewhat arbitrary. Although the dead may have preferences to be remembered fondly, our legal practices do not respect those preferences. *Fasching v. Kallinger*, 510 A.2d 694, 701 (N.J. Super. Ct. App. Div. 1986) ("[T]he right of privacy dies with the individual."); *DOBBS*, *supra* note 134, § 407, 1139–40 ("No action lies for defamation of the dead."). Respecting the dead's preferences in these areas might simply be outweighed by other considerations. Defamation and privacy suits could impede historical research or be administratively cumbersome because of the sheer number of potential plaintiffs who could claim to be harmed by the defamation of, for example, Thomas Jefferson. For a discussion of these and other traditional justifications for the rule that one cannot defame the dead, see Lisa Brown, Note, *Dead but Not Forgotten: Proposals for Imposing Liability for Defamation of the Dead*, 67 TEX. L. REV. 1525, 1529–41 (1989).

*C. Summary of Lost Life Damages Under Relational Corrective Justice*

Relational accounts of corrective justice support the life-projects approach to lost life damages. At first glance, this account's concept of correlativity appeared to foreclose lost life damages. However, the best view of correlativity allows a host of remedies, including monument building and payments to the victim's estate. Among the large set of correlatively structured remedies, those that further the victim's life projects appear particularly likely to undo the wrong. By providing money to the victim's estate, for example, the wrongdoer at least partially or imperfectly provides her with means through which to pursue her projects.

V. DEATH AND RETALIATION: CIVIL RECOURSE

Civil recourse theory strengthens the main claim of this article: individual justice accounts of tort law are consistent with a life-projects approach to lost life damages. Zipursky and Goldberg developed civil recourse as an interpretive theory of what tort law does, rather than a normative theory about what tort law should do.<sup>220</sup> As a descriptive organizing principle, civil recourse is arguably consistent with multiple different predictions about how the tort practices surrounding wrongful death would be set up if these practices were fully consistent with the principle of civil recourse. Civil recourse theorists have yet to fully address the issue. Nonetheless, below I offer several initial possibilities. Because my main focus is normative rather than descriptive, I leave it for civil recourse theorists to ultimately decide whether to endorse one of these views or offer another. Ultimately, it is only the normative defenses of civil recourse that potentially provide reasons to reform tort law. These normative defenses—rooted in fairness, natural rights, equality, and mutual accountability—strongly support lost life damages.

*A. Descriptive Accounts of Civil Recourse*

As a descriptive organizing principle, civil recourse does not make clear predictions about how the tort practices surrounding wrongful death would be set up. Although civil recourse theorists have yet to offer sustained commentary on the issue, I offer two initial possibilities below. First, civil recourse theorists could interpret redress as a personal power that dies with the victim. Second, they could interpret redress to allow for others to sue on behalf of, or in the name of, the victim.

A central feature of civil recourse theory is that the victim has the authority or power to seek redress. In cases of wrongful death, the victim simply cannot use

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220. Goldberg & Zipursky, *Accidents*, *supra* note 116, at 403 (“Our point here is not that such a principle is demanded by principles of justice, or even morally sound, but that it is the animating idea behind our system of tort law.”); Zipursky, *supra* note 71, at 735 (“In what follows, I attempt to explain the principle of civil recourse and to show how it illuminates the structure of tort law. I will not attempt to justify this principle . . . .”); Zipursky, *supra* note 116, at 6 (“The account I offer is intended to be a framework for a theory of tort law that is descriptive, not prescriptive.”).

such a power. Therefore, as a starting point we might suppose that tort law remains consistent with its animating principle of civil recourse when it ignores the harms to deceased victims. In their torts casebook, Goldberg and Zipursky suggest this interpretation, but do not offer a sustained defense of it.<sup>221</sup>

The personal nature of the power to seek redress seems consistent with Goldberg's focus on "satisfaction."<sup>222</sup> A power to seek redress provides victims with the opportunity to obtain satisfaction. Although the concept of satisfaction may not be limited to a one-dimensional measure of pleasure, it has an experiential ring to it. If this is right, then perhaps tort victims must be able to understand that they have been wronged, and be capable of interpreting any resulting award as a response to that wrong. A deceased victim lacks the later capacity. This lends further support for the claim that the power to seek redress dies with the victim.

This initial interpretation has drawbacks. Infants, like the dead, cannot exercise their power to seek redress. Nor can incompetent adults. Yet the idea of a personal representative suing in tort on behalf of infants and incompetent adults is commonplace.<sup>223</sup> An interpretive theory of tort law should be able to accommodate these cases. Infants and some mentally incompetent adults are also arguably incapable of obtaining "satisfaction," at least as defined in the previous paragraph. Infants cannot understand that they have been wronged and cannot understand responses to that wrong. Late stage Alzheimer's patients have many more cognitive facilities than infants, yet still might not understand that a tort award is connected in any way to a now-forgotten wrong. Some of these marginal cases can be addressed by bending the concept of satisfaction. Infants will someday be able to obtain satisfaction by understanding that they were wronged and that tort law responded to that wrong. Mentally incompetent persons might someday have moments of clarity. Persons in a coma might someday wake up and similarly obtain satisfaction. Perhaps this potential-someday satisfaction is sufficient. But these modifications appear ad hoc. This suggests that we should at least explore an alternate interpretation of satisfaction.

Although "satisfaction" has an experiential ring to it, it could be interpreted more broadly. If the victim herself cannot sue, perhaps a personal representative can decide whether to seek redress *in the victim's name*. This would allow for a personal representative to sue when the victim is an infant or a mentally incompetent adult. It could even allow suits in the name of deceased victims. This is what survival statutes currently allow. The causes of action that the deceased victim would have possessed had she survived are essentially inherited by her estate.

Other interpretations of civil recourse are, of course, possible. I will let others explore further these potential interpretations because they tell us only that lost life

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221. JOHN C.P. GOLDBERG, ANTHONY J. SEBOK & BENJAMIN C. ZIPURSKY, *TORT LAW: RESPONSIBILITIES AND REDRESS* 354 (2d ed. 2008) (suggesting that, by focusing on civil recourse, "one can begin to comprehend the common law's seemingly strange prohibition of tort claims on behalf of persons killed by the careless acts of others, as well as against tortfeasors who die prior to judgment").

222. Goldberg, *supra* note 116, at 549.

223. See 42 AM. JUR. 2D *Infants* § 155 (2010) (discussing generally the representation of infants by next friend or guardian ad litem in litigation).

damages would be consistent or inconsistent with a principle of tort law that is itself normatively suspect. It is normatively suspect because it seems rooted in the concepts of retaliation and revenge. Ultimately, the important analysis for purposes of lost life damages is normative, and the current normative defenses of civil recourse theory do not support a system that ignores the wrong done to the decedent.

### *B. Normative Defenses of Civil Recourse*

Civil recourse theorists only recently began to argue that civil recourse is normatively attractive. This recent work is particularly important because the most apparent underpinning of civil recourse—vengeance—appears unsavory.<sup>224</sup> Civil recourse theorists have attempted to cleanse vengeance of its bad name in order to show how a system built upon principles of redress can be morally plausible.<sup>225</sup> Zipursky, Goldberg, and Solomon have each offered powerful normative defenses of civil recourse theory. The most persuasive of these defenses support lost life damages.

#### 1. Fairness

Zipursky proffers the claim that “one should not have to suffer [an] affront passively.”<sup>226</sup> It would simply be unfair to force someone to remain passive when wronged. Zipursky illustrates the pull of his claim by examining our intuitions about familial disputes.<sup>227</sup> A young child might feel aggrieved if his sister hits him, and his parents might be obligated to “provide the child with some . . . way of dealing with having been wronged.”<sup>228</sup> Therefore, fairness requires the state to provide some opportunity for victims to seek redress.<sup>229</sup>

This argument is weaker than it might appear at first. Consider Zipursky’s family analogy again. Suppose the parent punished the sister and did so in a way that substantially reduced the probability that she would hit her brother in the future. In this case the brother would be forced to remain passive in the face of his sister’s wrongful behavior. He would have no power to seek redress or choose to

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224. See George P. Fletcher, *The Place of Victims in the Theory of Retribution*, 3 BUFF. CRIM. L. REV. 51, 52 (1999) (“Of course, one could do that simply by asserting that the purpose of punishment is to gratify the desires of victims to witness the suffering of those who committed crimes against them. This approach would reduce punishment to simple vengeance and would hardly be very appealing, except [sic] perhaps as a surrender to popular emotions.”); Goldberg & Zipursky, *Unrealized Torts*, *supra* note 116, at 1644 (noting that civil recourse reflects ideas of “vengeance or retaliation”); see Zipursky, *supra* note 71, at 750 (“My aim is not to defend the vindictive impulses that I have been describing. . . . Rather, I am pointing out that such a [vindication-oriented] principle is embedded in the law of punitive damages.”).

225. Solomon, *supra* note 14, at 1812.

226. Zipursky, *supra* note 116, at 87.

227. *Id.* at 84.

228. *Id.*

229. *Id.*

forgo it. Yet it is no longer obvious that this would be unfair to the brother. It might be unfair for the parents to force the brother to be passive *and* refuse to punish the sister. But this suggests that the moral force behind providing the brother an opportunity to seek redress is substantially reduced when his parents adequately protect his rights.<sup>230</sup> Extending this analogy back to tort law, it might be “unfair” to deny a power to seek redress only if the state does not have adequate alternate institutions that safeguard individual rights. Of course, no state can hope to completely prevent wrongs. This opens up an important role for civil recourse. When the criminal law fails to address a wrong for whatever reason, tort law can fill in the resulting gap.<sup>231</sup> This is a powerful argument in favor of civil recourse, but it is no longer about “fairness.” Instead it is a functionalist argument about how best to secure individual rights. Although Zipursky eschews functional accounts of private law,<sup>232</sup> it is these functionalist accounts, not the notion of fairness, that provide the strongest normative defense of civil recourse. The next section will argue that this and similar functionalist claims support lost life damages.

## 2. Respecting Natural Rights and Promoting Equality

Goldberg’s normative defense of civil recourse theory focuses on the numerous salutary effects of a system of civil recourse. On his account these are not the “goals” of tort law,<sup>233</sup> but they nonetheless serve as a functionalist defense of it: Tort law (in the mold of civil recourse) is normatively attractive in part because it creates certain salutary effects that “cohere with . . . values and commitments embedded in our Constitution”<sup>234</sup> and have “an important place within a polity such

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230. Zipursky has also talked about victims getting “satisfaction” from exercising their right to sue in tort. John C.P. Goldberg & Benjamin C. Zipursky, *Seeing Tort Law from the Internal Point of View: Holmes and Hart on Legal Duties*, 75 *FORDHAM L. REV.* 1563, 1564 (2006). It is possible that the brother does not obtain sufficient satisfaction when his parents punish his sister. Although this is possible, it is not very plausible. The brother is likely to get a great deal of what we colloquially call “satisfaction” from knowing that his sister was punished for hitting him. See Kenworthy Bilz, *The Puzzle of Delegated Revenge*, 87 *B.U. L. REV.* 1059, 1077, 1089 (2007) (arguing that people may prefer for the state to enforce their claims because this simultaneously protects their rights and signals that the state cares about its citizens).

231. Criminal prosecutions require the actions of a prosecutor; a victim cannot initiate criminal proceedings on her own. By removing this barrier tort law helps ensure that even politically powerful people can be held accountable for their actions. Goldberg, *supra* note 116, at 607–09, 620 (discussing trespassing and concluding that the fact that “fences . . . and police protection are in principle available is arguably insufficient to vindicate the owners’ interest . . . particularly if one presumes that police would not be making it their business to arrest . . . trespassers” (emphasis added)); Goldberg & Zipursky, *supra* note 77, at 981–82.

232. Zipursky is quite clear that he is not offering a functionalist defense of civil recourse theory. Zipursky, *supra* note 71, at 737. The function of private law is simply to be private law. *Id.* But the illustrations and heuristic devices that Zipursky offers have normative appeal precisely because they can be interpreted as functionalist accounts.

233. Goldberg & Zipursky, *Accidents*, *supra* note 116, at 405–06.

234. Goldberg, *supra* note 116, at 596.

as ours.”<sup>235</sup> Providing a right of redress “affirms agency” by treating people as agents who are responsible for their actions,<sup>236</sup> and “recognizes, defines, and protects the right[s] of persons.”<sup>237</sup> Merely offering the power to seek redress (regardless of whether it is exercised) “instantiates a notion of equality,”<sup>238</sup> “affirms [our] status as persons who are entitled not to be mistreated by others,”<sup>239</sup> and “demonstrates to citizens that the government has a certain level of concern for their lives.”<sup>240</sup> These arguments rest in part on empirical claims about human psychology. But sophisticated regression analyses and controlled studies are not required to grasp their plausibility. Nor are such studies required to see how these effects are undermined by our current wrongful death practices.

The above salutary effects are all at least partially undermined by our current wrongful death practices and would be enhanced by providing lost life damages.<sup>241</sup> This is easiest to see in cases like Sally’s where the victim is not survived by any appropriate beneficiaries under the relevant wrongful death statute. (For ease of exposition, I will simply refer to these types of victims as “victims without beneficiaries.”) But it is also apparent in the way our practices value fatal wrongs.

When tort law ignores the wrongs done to victims without beneficiaries, it undermines the salutary effects that Goldberg identifies. Tort law affirms agency by holding tortfeasors accountable for their actions. Yet tort law currently refuses to hold accountable tortfeasors who negligently kill victims without beneficiaries. Tort law therefore misses opportunities to affirm the tortfeasor’s agency and instead appears to ignore that agency. At the same time tort law misses the opportunity to further define and protect rights.<sup>242</sup> But the trouble with our wrongful death practices goes well beyond missed opportunities. A system that immunizes a tortfeasor who, for example, negligently kills someone like Sally hardly seems like a system that is well designed to instantiate a notion of equality. Instead, our tort system appears biased in favor of those who follow the model of a traditional nuclear family by partnering with another adult to raise children. A tort system that fails to address victims without beneficiaries also fails to affirm the victim’s status as a person entitled not to be mistreated, and certainly does not demonstrate to citizens that the government has concern for their lives. In fact, it seems to send just the opposite message.

Even if the victim has beneficiaries who can sue under the relevant wrongful death statute, the way damages are calculated weakens the salutary effects that

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235. *Id.* at 606.

236. *Id.* at 609.

237. *Id.* at 606.

238. *Id.* at 608.

239. *Id.* at 607.

240. *Id.*

241. Recall that our wrongful death practices recognize the harms the decedent suffered before death and recognize the harms to the decedent’s beneficiaries stemming from the death itself. Lost life damages occupy a conceptual space between these two types of wrongs by recognizing the harm to the decedent stemming from death itself.

242. As long as the negligent acts that lead to non-fatal injuries do not systematically differ from the negligent acts that lead to fatal injuries, this will only have minor effects on tort law’s ability to recognize, define, and protect rights.

Goldberg proffers. Wrongful death statutes respond to the harms of the beneficiaries and ignore the tremendous rights violation that befell the victim herself. Although this is a good way to affirm the beneficiaries' status, it reduces the victim's status to that of a wallet. Tort law currently values the victim as if she were solely a means for the flourishing of her family, rather than a person with projects of her own. The vast literature on commodification is built on the reasonable assumption that our legal practices have the capacity to influence our values.<sup>243</sup> Of course, it is unlikely that wrongful death damages serve as the primary source of our notions of equality, agency, and respect. Many other more visible practices influence these ideas. Yet a tort system that is defended on the basis of these salutary effects should be structured so as to support them rather than undermine them. Providing lost life damages is more consistent with the salutary effects that Goldberg identifies than denying such damages.

### 3. Mutual Accountability

Jason Solomon has argued that "acting against" the wrongdoer is morally appropriate.<sup>244</sup> He begins with the Kantian presumption that we are all owed equal respect.<sup>245</sup> Tort law derives its normative force from the fact that it recognizes people as mutually accountable, in accord with the notion of equal respect.<sup>246</sup> The concept of mutual accountability highlights the authority of the victim to make a demand of the wrongdoer. But the victim is not under any obligation to exercise this authority; she is free to forgive the wrongdoer or simply ignore him. Solomon argues that the "authority" of the victim under a concept of mutual accountability is similar to the "power" of the victim under civil recourse theory.<sup>247</sup>

Civil recourse is normatively plausible because it reflects the concept of mutual accountability, which in turn reflects a Kantian notion of equal respect. The state should support a tort system based on civil recourse because doing so would help "achieve or instantiate mutual accountability among equals."<sup>248</sup> This argument provides a case for tort law, even in the absence of any need to protect basic rights. If the state were to perfectly safeguard our basic rights through the criminal law, we would all be answerable to the state, and equal in the eyes of the state. But arguably, being accountable more directly *to each other*, in addition to being accountable to the state, is particularly helpful for instantiating equal respect.<sup>249</sup> Such direct symbolism might send a clearer message than criminal law, even if both underscore that we owe duties to one another arising from notions of equal respect.<sup>250</sup>

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243. See, e.g., MARGARET JANE RADIN, *CONTESTED COMMODITIES* 79, 184–85 (1996).

244. Solomon, *supra* note 14, at 1790–91.

245. See *id.* at 1794 (building on the work of Stephen Darwall, whose work is "heavily Kantian").

246. *Id.* at 1796–97.

247. *Id.*

248. *Id.* at 1818.

249. See *id.* at 1795.

250. *Id.* at 1795, 1808.



Any Kantian defense of civil recourse theory has implications for wrongful death practices. Although a superficial interpretation of Kantian ethics would preclude lost life damages, Kant's comments on human psychology provide strong support for them.

A superficial reading of Kant's ethical theory suggests lost life damages are unjustified. People are owed equal respect because they possess a certain threshold of rationality and autonomy.<sup>251</sup> Our duties to people therefore cease once these abilities vanish, as they do upon death. Although the tortfeasor might still have duties toward the victim's surviving relatives, he would not have duties to the deceased victim herself.<sup>252</sup> In addition to being incomplete, this interpretation of Kant has several potentially unappealing consequences. For example, infants and some mentally incompetent adults have insufficient rationality and therefore are outside of the ambit of equal respect.<sup>253</sup> Additionally, harvesting the organs of the dead (regardless of their former wishes) would not be a violation of equal respect.<sup>254</sup> This interpretation is too simple.

In addition to the duties we owe other rational beings, Kantian ethics support moral responsibilities regarding nonrational things like infants, animals, and potentially even ecosystems.<sup>255</sup> Although we do not owe duties *to* these things, we may owe duties *regarding* them.<sup>256</sup> This moral responsibility stems from the duty we owe to ourselves to perfect our nature,<sup>257</sup> combined with certain empirical assumptions about human psychology.<sup>258</sup> Some common human emotions are useful in that they help us act in morally appropriate ways and assist us in understanding the force of these moral commands.<sup>259</sup> We have a duty to ourselves to cultivate such emotions. For example, Kant understood that we often have

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251. Allen W. Wood & Onora O'Neill, *Kant on Duties Regarding Nonrational Nature*, 72 PROCS. ARISTOTELIAN SOC'Y, SUPPLEMENTARY VOLUMES 189, 189, 198, 229 (1998).

252. Some Kantians dispute even this basic premise and argue that the respect we owe to our rational nature has temporal boundaries that are not purely coextensive with that nature. We may owe respect to children because of the rational nature that they will develop in the future. We may also owe respect to the dead because of the rational nature that they once had. *Id.* at 198 (“[I]t would show contempt for rational nature to be indifferent to its potentiality in children, and to treat children as mere things or as mere means to the ends of those beings in whom rational nature is presently actual.”); *id.* at 198–99 (“[T]he value of rational nature arguably also forbids our treating human corpses as mere lumps of decaying matter to be gotten out of the way or put to whatever use seems most serviceable.”).

253. *Id.* at 198, 229.

254. See John A. Robertson, *The Dead Donor Rule*, 29 HASTINGS CENTER REP. 6, 8 (1999) (noting others' arguments that harvesting tissue from vegetative donors is unproblematic because “ethical concerns about using people as mere means do not apply to persons who due to absence of cortical function lack interests altogether”).

255. Wood & O'Neill, *supra* note 251, at 211, 213, 221.

256. Lara Denis, *Kant's Conception of Duties Regarding Animals: Reconstruction and Reconsideration*, 17 HIST. PHIL. Q. 405, 406 (2000); Wood & O'Neill, *supra* note 251, at 194.

257. IMMANUEL KANT, LECTURES ON ETHICS 434–35 (Peter Heath trans., Peter Heath & J.B. Schneewind eds., 1997); Denis, *supra* note 256, at 406, 409.

258. Denis, *supra* note 256, at 406; Wood & O'Neill, *supra* note 251, at 194, 201–02.

259. Denis, *supra* note 256, at 406.

sympathy for nonrational beings.<sup>260</sup> This is certainly true regarding infants and mentally incompetent adults. But it is also true of animals, as any pet owner will attest to. Kant opined that, if this sympathy for nonrational beings were eroded, so too might our sympathy for rational beings.<sup>261</sup> Thus Kant argued that “violent and cruel treatment of animals . . . dulls [our] shared feeling of their pain and so weakens and gradually uproots a natural predisposition that is very serviceable to morality in one’s relations with other men.”<sup>262</sup> But our duties regarding nonrational beings extend even further than this. Kant argued that even our treatment of *dead* animals dulled our ability to empathize with one another.<sup>263</sup> As such, we would owe duties regarding even such thoroughly nonrational things as animal corpses.

Our treatment of human corpses is particularly likely to impact our ability to empathize with other living persons and therefore is a particularly apt area for legal regulation. Unsurprisingly, American courts assert strong public policy against exhuming bodies.<sup>264</sup> Numerous state and federal laws also prohibit desecration of burial sites and dead bodies. Consider Lewis Howell, an undertaker in Florida who simply staked dead bodies in the woods rather than going through the trouble of cremating or burying them.<sup>265</sup> He was indicted on 787 felony counts.<sup>266</sup> Our respect for the preferences of the dead—through testamentary freedom, mortal remains statutes, and the UAGA—can be defended on similar Kantian grounds.<sup>267</sup>

Based on these types of considerations, a Kantian defense of tort law would favor lost life damages. As Part IV.B argued above, these damages foster respect for the projects of the living by valuing the former projects of the dead. These damages reinforce the idea that people have intrinsic value, and that their projects

260. *Id.* at 407.

261. *Id.* at 406–07; *see also* JOHN LOCKE, *Some Thoughts Concerning Education*, in *SOME THOUGHTS CONCERNING EDUCATION AND OF THE CONDUCT OF THE UNDERSTANDING* § 116, at 90–91 (Ruth W. Grant & Nathan Tarcov eds., 1996) (1693) (“For the custom of tormenting and killing of beasts, will, by degrees, harden their minds even towards men; and they who delight in the suffering and destruction of inferior creatures, will not be apt to be very compassionate or benign to those of their own kind.”). Indeed, there is empirical support for this specific position. Frank R. Ascione, *Enhancing Children’s Attitudes About the Humane Treatment of Animals: Generalization to Human-Directed Empathy*, 5 ANTHROZOOS 176 (1992); Alan R. Felthous & Stephen R. Kellert, *Childhood Cruelty to Animals and Later Aggression Against People: A Review*, 144 AM. J. PSYCHIATRY 710 (1987).

262. IMMANUEL KANT, *THE METAPHYSICS OF MORALS* 238 (Mary Gregor trans., 1991).

263. Denis, *supra* note 256, at 412.

264. *See* NORMAN L. CANTOR, *AFTER WE DIE: THE LIFE AND TIMES OF THE HUMAN CADAVER* 64 (2010).

265. *Id.* at 255.

266. *Id.*

267. *See id.* at 50 (“American morals and practice have similarly upheld prospective autonomy in the disposal of human remains—as an expression of social respect for the self-determination capacity and dignity of human beings . . . .” (emphasis added)); Wood & O’Neill, *supra* note 251, at 198–99 (“[T]he value of rational nature arguably also forbids our treating human corpses as mere lumps of decaying matter . . . . We honour the rational nature that was formerly present there, for example, by making only such use of the organs of dead people as those people consented to when they were alive and exercising their reason.”).

are worthy of respect. Rejecting lost life damages erodes rather than reinforces these ideas. Ignoring the wrongful death of victims without beneficiaries sends a fairly potent message about their worth, and appears well-suited to at least partially erode notions of equal accountability. Even when the victim has surviving beneficiaries, our current wrongful death practices value the victim as a means not an end—victims are valued only as a means of their family’s flourishing rather than being valued as a being with projects of her own. If wrongful death practices draw normative force from Kantian notions of equal respect, then those practices should reinforce that respect by providing lost life damages.

## VI. IMPLICATIONS

### *A. Lost Life Damages: Desirability*

There are multiple arguments supporting the desirability of lost life damages. First, the normative underpinnings of civil recourse suggest that remedies should value the victim’s life for its own sake, rather than solely as an instrument to provide money and solace to others. Awarding money to her estate, to be distributed as she saw fit, is one promising way to vindicate rights and instantiate notions of equal respect and mutual accountability. Second, under relational accounts of corrective justice, awarding money to the decedent’s estate to further her projects is both correlatively structured and serves to mitigate the wrongdoer’s termination of the victim’s power to affect the world. Third, such awards comport with deterrence rationales, which demand that wrongful death damages include a component that represents the losses of the decedent.<sup>268</sup>

Alas, there is not a full consensus. Although allocative corrective justice theories can theoretically support lost life damages, the case for posthumous benefits is too tenuous to provide a solid ground for damages under allocative corrective justice. But given that such damages are supported under deterrence theories, relational accounts of corrective justice, and the normative defenses of civil recourse, there are nonetheless strong reasons to provide lost life damages.

### *B. Lost Life Damages: Feasibility*

A full explication of the optimal way to implement a life-projects approach to lost life damages is beyond the scope of this Article. Nonetheless, this section offers several tentative possibilities. None is perfect, but each goes some way toward outlining simple ways that the tort system might implement a life-projects approach to lost life damages.

As mentioned in previous sections, one plausible way to respond to terminating the victim’s ability to affect the world is to provide money to her estate. In a will or other testamentary instrument, the decedent identifies the projects that she feels are important enough to survive her death, and uses her remaining means to further those projects. Most people, especially parents, will use their remaining means to

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268. Polinsky & Shavell, *supra* note 189, at 873 (“[I]njurers should be made to pay for the harm their conduct generates, not less, not more.”).

further their family's flourishing. But for those without children, or with already grown and thriving children, or simply for those with especially strong commitments to their projects, other devices are possible.<sup>269</sup> Alfred Nobel, for example, sought to set up a foundation to award "prizes to those who, during the preceding year, shall have conferred the greatest benefit on mankind."<sup>270</sup>

Providing money to the victim's estate is an imperfect way of providing her with means that she can use to further her ends. Not everyone has a will or other testamentary instrument. But in these cases, the state's default rules for intestate succession largely track the intuition that our most important projects concern the flourishing of our family and especially our children.<sup>271</sup> These rules represent our best guess at how the victim herself would have used her remaining means. Even if the victim has a detailed will, it still may only be a rough approximation of how they would want lost life damages distributed. As wealth grows, people make different choices about how to dispose of it. If the victim accurately predicted the possibility that a posthumous tort award might increase the value of her estate, then her will is likely to accurately reflect her preferences. But it is unclear whether victims will anticipate this possibility.<sup>272</sup>

There are facially plausible ways to either fully supplant the payment-to-estate system or supplement it by implementing lost life damages differently when the victim has no will. For example, the court might supply the victim's family with a fixed sum of money that had to be donated to some charity in the victim's name. The victim's husband, for example, would have some sense of whether the victim would want the money to go to her alma mater, or her church, or the local food bank.<sup>273</sup> In this way, the state can essentially delegate the decision about how the victim would want her money spent rather than imposing a single default rule.

269. Of course, the state can choose to give the children a forced share or ignore testamentary wishes that are not in society's interest. *See, e.g.*, JESSE DUKEMINIER, STANLEY M. JOHANSON, JAMES LINDGREN & ROBERT H. SITKOFF, *WILLS, TRUSTS, AND ESTATES* 466–68 (7th ed. 2005) (discussing informal resistance among judges to disinheriting children).

270. *Full Text of Alfred Nobel's Will*, NOBELPRIZE.ORG, [http://nobelprize.org/alfred\\_nobel/will/will-full.html](http://nobelprize.org/alfred_nobel/will/will-full.html); *see also* Adrian Sargeant, Toni Hilton & Walter Wymer, *Bequest Motives and Barriers to Giving: The Case of Direct Mail Donors*, 17 *NONPROFIT MGMT. & LEADERSHIP* 49, 58 (2006) ("Yes, my son should have his share, but he realizes that I have my own interests, too. I think he'd expect to have to share the estate. After all [the cause's] need is really far greater than his."); Stephanie Strom, *Helmsley, Dogs' Best Friend, Left Them Up to \$8 Billion*, N.Y. TIMES, July 2, 2008, at A1 (reporting that Leona Helmsley left \$12 million—a small portion of her overall estate—in trust for her dog).

271. DUKEMINIER ET AL., *supra* note 269, at 73 (outlining rules of intestate succession).

272. People are notoriously ignorant of the law. *See generally* Sean Hannon Williams, *Sticky Expectations: Responses to Persistent Over-Optimism in Marriage, Employment Contracts, and Credit Card Use*, 84 *NOTRE DAME L. REV.* 733 (2009).

273. This seems particularly likely given that many households donate to charity. In 2006, for example, 65.5 percent of all households made donations to religious or secular charities. CTR. ON PHILANTHROPY AT IND. UNIV., *OVERVIEW OF OVERALL GIVING: BASED ON DATA COLLECTED IN 2007 ABOUT GIVING IN 2006*, at 5 (2010). This system could be designed to reduce potential infighting among the relatives by setting up a simple hierarchy of relatives who get to choose the charity, perhaps modeled on mortal remains statutes which

Although the versions of lost life damages outlined above are preliminary and tentative, they offer the promise of responding to the termination of the victim's power to affect the world in a way that goes much further toward undoing the wrong than our current wrongful death practices.

### C. Lost Life Damages: Measurability

Although this Article's main focus has been on the desirability of lost life damages, it will be useful to say a few words about the measurability of such damages. There is no obvious formula that can determine how much money to provide to the victim's estate in response to cutting off her ability to affect the world. This problem is common to all forms of noneconomic damages.<sup>274</sup> Although a wide range of valuations are plausible, refusing to value noneconomic harms implicitly assigns them *zero* value. This is perhaps the only valuation that is clearly wrong. We routinely grapple with these issues and often settle on some positive value. For example, the 9/11 Compensation Commission used a base-value of \$300,000 for each life lost.<sup>275</sup> The U.K. responds to the grief felt by the relatives of wrongful death victims by providing them with a fixed £11,800 payment.<sup>276</sup> Several commentators have suggested using the value of a statistical life that federal agencies use in cost-benefit analysis—normally \$6 million to \$9 million—to help value the harm of death.<sup>277</sup> Instead of discussing the appropriateness of particular numbers, this Article has sought to motivate future discussions of this sort by showing that a life-projects approach to lost life damages is consistent with individual justice accounts of tort law.

### CONCLUSION

This Article has provided the first analysis of wrongful death damages from the perspective of individual justice accounts of tort law. These accounts join

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use hierarchical lists to empower a single relative to make decisions about the victim's corpse.

274. Mark Geistfeld, *Placing a Price on Pain and Suffering: A Method for Helping Juries Determine Tort Damages for Nonmonetary Injuries*, 83 CALIF. L. REV. 773, 775 (1995) ("At present, no well-defined legal standards exist for assessing tort damages for nonmonetary injuries such as pain and suffering."); Ronen Avraham, *Putting a Price on Pain-and-Suffering Damages: A Critique of the Current Approaches and a Preliminary Proposal for Change*, 100 NW. U. L. REV. 87, 87 (2006) ("Juries, judges, lawyers, lawmakers, and academics still struggle with the [question]: what is the best way to adequately compensate tort victims for the noneconomic harms they incur?").

275. See September 11th Victim Compensation Fund of 2011, 28 C.F.R. § 104.41 (2011).

276. Fatal Accidents Act, 1976, c. 30. For recent amendments to the Act, see The Damages for Bereavement (Variation of Sum) (England and Wales) Order, 2007, W.S.I 2007/3489, available at <http://www.legislation.gov.uk/uksi/2007/3489/made/data.pdf>.

277. For a brief discussion of these arguments and various counterarguments, see Cross & Silver, *supra* note 3, at 1916–19. For a brief summary of current estimates for the VSL, see OFFICE OF MGMT. & BUDGET, 2011 REPORT TO CONGRESS ON THE BENEFITS AND COSTS OF FEDERAL REGULATIONS AND UNFUNDED MANDATES ON STATE, LOCAL, AND TRIBAL ENTITIES 18 n.20 (2011), available at [http://www.whitehouse.gov/sites/default/files/omb/inforeg/2011\\_cb/2011\\_cba\\_report.pdf](http://www.whitehouse.gov/sites/default/files/omb/inforeg/2011_cb/2011_cba_report.pdf).

deterrence-based accounts of tort law to support the desirability of lost life damages. Such damages respond to the losses of the decedent herself, rather than to the losses of the decedent's relatives. However, these accounts offer a different vision of how tort law should measure such damages. Individual justice accounts strongly support a life-projects approach to lost life damages. The simple act of awarding lost life damages to the victim's estate, for example, to then be distributed according to her will or other testamentary instrument, is consistent with relational corrective justice and the normative accounts of civil recourse theory. If anything, the case for lost life damages is overdetermined. Tort remedies should embrace lost life damages and thereby mitigate the tragedy of cutting off the victim's power to influence the world.