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Hedonic-Loss Damages That Optimally Deter: An Alternative to "Value of a Statistical Life" That Focuses on Both Decedent *and* Tortfeasor

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Plaintiffs in wrongful-death suits typically are unable to recover for the decedent's "hedonic loss"—the loss of happiness (or wellbeing) incurred as a result of the lost life-years themselves. Although this omission might not be a mistake on a backward-looking account of tort law (because the decedent is dead and arguably cannot be compensated), it is problematic on a forward-looking account of tort law, because it results in under-deterrence of activities causing death. Thus, we must provide an answer to the tricky question of what dollar sum should be assigned to the loss of life. The dominant framework among legal theorists for thinking about how tort law should determine the dollar sum is the "value of a statistical life" (VSL). In this Article, however, I argue that the VSL approach is mistaken. I explain why, propose an alternative, and explore the wide-ranging implications of my analysis.

If we are to provide a monetary remedy for the decedent's lost happiness, we need to translate the lost happiness into a monetary sum. The VSL approach does so on the decedent's "utility curve," thus taking the decedent's wealth into account in determining the damages sum, with the potential tortfeasor then internalizing this monetary cost. This is a mistake. For the incentives to be optimal, we want the potential tortfeasor to instead internalize the amount of happiness loss that would be incurred by the decedent. Therefore, my account carries out the happiness-to-money translation on the potential tortfeasor's "utility curve"—thus taking into account the potential tortfeasor's wealth and not the decedent's wealth.

The implications of my analysis extend beyond the context of wrongful death, providing us with important insights about tort law more generally, and, more generally still, about law on the whole. In particular, my analysis casts doubt on foundational assumptions underlying the law-and-economics literature—simultaneously providing a new framework that law-and-economics theorists should employ.

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INTRODUCTION

In almost all states, plaintiffs in wrongful-death suits are unable to recover for the decedent's "hedonic loss"—the loss of happiness[1] incurred as a result of the lost life-years themselves.[2] In those few states in which they can, they often do not, and, even when they do, there is much confusion and non-uniformity in determining damages sums.[3] Because the decedent is dead and cannot be compensated, this omission might not be a mistake on a backward-looking account of tort law, according to which the purpose of tort is to provide just compensation. But Cass Sunstein and Eric Posner[4] have argued that the unavailability of damages for hedonic loss is highly problematic on a *forward*-looking account of tort law, which seeks to bring about optimal incentives for future potential tortfeasors. According to them, because tortfeasors are not now required to internalize all of the costs of their torts, the status quo results in under-deterrence of activities causing death.[5] Indeed, it is often "cheaper for the defendant to kill the plaintiff than to injure him."[6] As an example, between 1984 and 1993 in New York City,[7] the average jury verdict was $1 million in cases of wrongful death, $3 million in cases of brain damage, and $500,000 in cases of a herniated disc.[8] A wrongful death, however, arguably is much more than twice as bad as a herniated disc; but these are the typical relative damages measures—and they have been for at least a century.[9]

I agree with Sunstein and Posner that the unavailability of damages for hedonic loss is highly problematic on a forward-looking account of tort law. The next step, however, is to determine what dollar sum should be assigned to the loss of life. Answering this question is tricky because, while in typical cases of

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1. Throughout this Article, I will frequently use the words "happiness," "utility," and "wellbeing." I intend for all of these words to be synonymous, and I intend for each of them to be understood broadly enough to capture just about any view that the reader might have about the goodness in life that makes life worth living.

2. A small minority of "hedonic-loss states" (Arkansas, Connecticut, Hawaii, New Hampshire, and New Mexico) *do* allow compensation for "hedonic loss" incurred by the decedent as a result of his lost years of life. *See* Durham v. Marberry, 156 S.W.3d 242, 244–46 (Ark. 2004); Katsetos v. Nolan, 368 A.2d 172, 183 (Conn. 1976); Montalvo v. Lapez, 884 P.2d 345, 365 (Haw. 1994); Marcotte v. Timberlane/Hampstead Sch. Dist., 733 A.2d 394, 400–01 (N.H. 1999); N.M. STAT. ANN. § 41-2-1 (2021); Smith v. Ingersoll-Rand Co., 214 F.3d 1235, 1245–46 (10th Cir. 2000) (New Mexico).

3. *See supra* note 2.

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

5. *Id.* at 587, 598. Jennifer Arlen also made this point in her 1985 note, *An Economic Analysis of Tort Damages for Wrongful Death*, 60 N.Y.U. L. REV. 1113, 1116–17 (1985).

6. W. PAGE KEETON, DAN B. DOBBS, ROBERT E. KEETON & DAVID G. OWEN, PROSSER AND KEETON ON THE LAW OF TORTS § 127, at 945 (5th ed. 1984); *see also* Mark A. Geistfeld, *The Principle of Misalignment: Duty, Damages, and the Nature of Tort Liability*, 121 YALE L.J. 142, 159–60 (2011).

7. Although this is not a recent example, it indeed is illustrative of typical relative damages amounts today across jurisdictions in the United States.

8. *See* Edward A. Adams, *Venue Crucial to Tort Awards: Study: City Verdicts Depend on Counties*, N.Y. L.J., Apr. 4, 1994, at 1.

9. *See* Richard A. Posner, *A Theory of Negligence*, 1 J. LEGAL STUD. 29, 84 (1972). Indeed, compensatory damages in wrongful death cases sometimes can be zero. Romo v. Ford Motor Co., 6 Cal. Rptr. 3d 793, 811 (Ct. App. 2003); Geistfeld, *supra* note 6, at 160.

valuing loss we can rely on a plaintiff's willingness to pay/accept, in the context of death we cannot because—leaving aside motivations like altruism—people would not accept any dollar sum in exchange for their lives. Thus, we seemingly must pursue a construct.

Sunstein and Posner argue that tort law should adopt a version (and ideally a more individuated version) of the "value of a statistical life" (VSL), which is employed by regulatory law to value lives for cost-benefit analyses.[10] In short, VSL determines the dollar sum that is the cost of a lost life by extrapolating from labor-force decisions and consumption decisions where people pay/accept certain sums of money to avoid/incur an increased chance of death of 1/10,000.[11] Sunstein and Posner and numerous other legal scholars advocating for the use of VSL in tort law recognize that there are a number of serious concerns about the chain of inferences employed in using VSL.[12] For instance: Do people truly make such labor-force decisions freely? And do they know what the probabilities of death they confront are? Sunstein and Posner argue that these are merely questions of fine-tuning and that, while the numbers can be refined, the general approach is correct.[13] Further, since 2005, Sunstein and many other legal scholars have worked to fine-tune the VSL approach.[14] Thus, the VSL approach is the dominant framework for thinking about how tort law should determine a dollar sum for hedonic loss.

I, however, believe that the VSL approach is mistaken—and for reasons wholly separate from the "fine-tuning" issues that do indeed plague it. In this Article I explain why, and I propose an alternative. I then argue that the implications of my analysis extend beyond the context of wrongful death, providing us with important insights about tort law more generally, and, more generally still, about law on the whole. In particular, my analysis casts doubt on foundational assumptions underlying the law-and-economics literature—

10. See, for example, the National Highway Traffic Safety Administration's regulations regarding motor vehicle safety standards. Federal Motor Vehicle Safety Standards; Roof Crush Resistance, 75 Fed. Reg. 17,605, 17,612 (Apr. 7, 2010) (to be codified at 49 C.F.R. pt. 571).

11. Posner & Sunstein, *supra* note 4, at 551.

12. *See, e.g.*, *id.*; Cass R. Sunstein, *Valuing Life: A Plea for Disaggregation*, 54 DUKE L.J. 385, 417–18 (2004) [hereinafter Sunstein, *Valuing Life: A Plea for Disaggregation*]; Cass R. Sunstein, Essay, *Lives, Life-Years, and Willingness to Pay*, 104 COLUM. L. REV. 205, 211–12 (2004) [hereinafter Sunstein, *Lives, Life-Years, and Willingness to Pay*]; Cass R. Sunstein, *The Value of a Statistical Life: Some Clarifications and Puzzles*, 4 J. BENEFIT-COST ANALYSIS 237, 249–51 (2013) [hereinafter Sunstein, *The Value of a Statistical Life: Some Clarifications and Puzzles*]; CASS R. SUNSTEIN, VALUING LIFE: HUMANIZING THE REGULATORY STATE (2014); Robert Cooter & David DePianto, *Community Versus Market Values of Life*, 57 WM. & MARY L. REV. 713, 760–65 (2016); A. Mitchell Polinsky & Steven Shavell, *Punitive Damages: An Economic Analysis*, 111 HARV. L. REV. 869, 887–96 (1998); Joni Hersch & W. Kip Viscusi, *Saving Lives Through Punitive Damages*, 83 S. CAL. L. REV. 229, 238–42 (2010).

13. Posner & Sunstein, *supra* note 4, at 584.

14. *See, e.g.*, *id.* at 584–92; Sunstein, *Valuing Life: A Plea for Disaggregation*, *supra* note 12, at 404–21; Sunstein, *Lives, Life-Years, and Willingness to Pay*, *supra* note 12, at 226–40; Sunstein, *The Value of a Statistical Life: Some Clarifications and Puzzles*, *supra* note 12, at 238; SUNSTEIN, *supra* note 12; Cooter & DePianto, *supra* note 12, at 755–66; Polinsky & Shavell, *supra* note 12, at 873–76; Hersch & Viscusi, *supra* note 12, at 238–42.

simultaneously providing a new framework that law-and-economics theorists should employ.

If we are to provide a monetary remedy for the loss of happiness to the decedent (as I agree we should, so as to bring about optimal deterrence), we will at some point need to translate the lost happiness into a monetary sum. The VSL approach does so on the decedent's "utility curve,"[15] thus taking the decedent's wealth into account,[16] but this is a mistake. That this is a mistake can be shown in a few ways, one of which is the following:

An individuated VSL approach would give us the result that someone who is very poor might have a VSL of, say, $100, whereas someone who is very rich might have a VSL of, say $1,000,000 (as a result of the differing amounts that they would spend to avoid a 1/10,000 chance of death). This would give us the result that a tortfeasor would incur a cost of only $100 if she kills Poor, but a cost of $1,000,000 if she kills Rich. In addition to it seeming, equitably, that the decedent's wealth should not be relevant to the damages, this disparity is also suboptimal from an efficiency standpoint. Stipulating that the happiness loss to Rich and Poor as a result of their premature deaths is the same, optimal incentives would induce the same care to prevent their deaths. The VSL approach therefore risks greatly under-deterring the killing of Poor and greatly over-deterring the killing of Rich. What this shows us is that the happiness-to-money translation is happening at the incorrect point in the analysis of our topic.

Although the disparity in damages between Rich and Poor could be avoided by employing a uniform VSL sum, I will argue that we should ideally have an individuated tort system, and, crucially, that even a uniform VSL sum would be inefficient because it is the *tortfeasor's* wealth—not the *decedent's*—that is relevant for determining optimal incentives. I will argue that for the incentives to be optimal, we want the potential tortfeasor to internalize the amount of *happiness loss* that would be incurred by the decedent. This means that the tortfeasor should be incentivized to expend up to the amount of happiness that would be lost by the victim (if killed) to prevent this loss of the victim. These incentives would be brought about by having a damages rule that would force the tortfeasor to incur this happiness loss when paying tort damages. Damages thus should be set at the dollar sum that, if paid by the tortfeasor, would bring about a happiness loss to the tortfeasor equal to the happiness loss incurred by the decedent as a result of his premature death. Thus, on my account, the happiness-to-money translation occurs on the tortfeasor's utility curve. This is importantly different from the VSL approach, which carries out the happiness-to-money translation on the decedent's utility curve.

15. *See* Cooter & DePianto, *supra* note 12, at 721; Arlen, *supra* note 5, at 1125. A utility curve is a graph that plots utility on the y-axis as a function of some good (for example, money) on the x-axis, thus (in the case of money) showing how a person's utility level varies as a function of how much money he or she has.

16. *See, e.g.*, Posner & Sunstein, *supra* note 4, at 580.

In addition, I show that even in cases *not* involving loss of life, optimal damages sums (from a forward-looking perspective) should in theory be determined by exploring the defendant's utility curve, and not that of the plaintiff. This is a broad finding that runs counter to the commonly accepted theories underlying the law-and-economics literature, and, in particular, the willingness-to-pay literature, both of which focus on the plaintiff's utility curve.

In practice, however, considering only the plaintiff's utility curve in cases not involving death can often be justified either by its greater administrability or by other practical efficiency benefits that can be effectuated by doing so. In cases of death, however, I argue that, from a forward-looking perspective, the defendant's utility curve should be used *even in practice*.

Although the vast majority of the Article explores these topics exclusively through a forward-looking lens, toward the end I expand my focus to include the backward-looking account of tort law, and I explore how it affects my proposal. I argue that in the context of non-death cases, the backward-looking account provides a strong explanation for why we might, in practice, use the utility curves of plaintiffs. In the context of death cases, however, we seemingly have a situation where compensation is not possible, yet deterrence is. Thus, even if one typically thinks that the forward-looking account and backward-looking accounts of tort are both intrinsically part of the picture, it seems that death cases are unique in that compensation for the hedonic loss arguably is off the table, and all that remains is potential deterrence of activities that might cause hedonic loss. Thus, I conclude that, in death cases, my proposal, couched in the forward-looking account, should indeed be implemented. After coming to this conclusion, I further explore the interesting underlying finding that death cases are uniquely positioned to teach us about the relationship between forward-looking and backward-looking accounts of tort law because death cases enable us to explore the forward-looking account in a rare instance when it arguably is not accompanied by the backward-looking account.

In addition to offering my positive proposal for death cases, I also consider several theoretical and practical issues that arise in implementing it, and I offer a number of proposals for reform. Many of these proposed reforms will aim to learn from the context of punitive damages; there, unlike in most other areas of damages, defendants' wealth is already considered relevant to the determination of damages—as I argue it should be in the context of wrongful death.

In the course of making the Article's arguments against the VSL approach and in favor of my proposed alternative, I argue against current wisdom on the topic, including the views of Sunstein, Posner, Viscusi, Polinsky, Shavell, Arlen, and Geistfeld, among others.

The Article proceeds as follows. In Part I, I provide important background. First, I provide an overview of the current state of the law, which does not allow recovery for a decedent's hedonic loss. Then, I explain the VSL approach to determining the dollar figure to be used as compensation for lost life and argue that common "fine-tuning" criticisms of it are unlikely to be fatal. Next, after

describing a number of specific versions of the VSL approach that have been espoused by various legal theorists, I canvas some alternative approaches to determining such damages and argue none of them is promising. This overview of the literature shows that VSL represents the dominant framework for thinking about how tort law should determine the dollar value for a decedent's hedonic loss.

In Part II, I give my reasons for thinking that the VSL approach is mistaken—reasons that are wholly separate from the "fine-tuning" issues that do indeed plague it. In my view, the problem with the VSL account is that it carries out the happiness-to-money translation on the decedent's utility curve. In Part II, I provide two different ways of showing why this is a problem. The second of these reasons then segues well into an articulation of my own alternative proposal for how to determine the dollar sum to attribute to a decedent's hedonic loss—the key feature of which is that it carries out the happiness-to-money translation on the tortfeasor's utility curve instead of on the decedent's.

Then, in Part III, I describe the various details of my alternative proposal—some details of which are theoretical, and others of which are practical and procedural. Toward the end of Part III, I argue that my analysis provides us with an important insight about tort law more generally (and, even more generally, about law-and-economics approaches to law on the whole): Even in cases not involving death, damages sums (from a forward-looking perspective) should in theory be determined by exploring the tortfeasor's utility curve and not that of the plaintiff.[17] The extension of my theory to areas in tort not involving death—and to areas of the law other than tort—serves not only to provide more general insights, but also to provide further support for my main positive proposal regarding how to determine which dollar sum to attribute to a decedent's hedonic loss in wrongful-death cases.

In Part IV, I raise and respond to a number of objections that one might have in response to my positive proposal. In Part V, I then (1) explain why (from a forward-looking perspective), in death cases, we should not only adopt my account in theory, but also implement it in practice; (2) expand my focus to include consideration of the backward-looking account—both for the purpose of exploring how it affects my proposal and for the purpose of discussing how the death case is uniquely positioned to teach us about the relationship between the two accounts; and (3) I briefly describe concerns that could be raised about

17. Although this Article briefly touches upon the extensions for non-death cases and non-tort cases of this Article's proposal for death cases, these extensions are only summarized and addressed briefly. The full discussion of how this Article's proposal applies in non-death cases can be found in a separate article of mine. *See* Michael Pressman, *The Relevance of Defendants' Wealth for Forward-Looking, Backward-Looking, and Mixed Accounts of Tort Damages*, 95 CHI.-KENT L. REV. 619 (2021). In that article, I provide an in-depth exploration of cases not involving death and explain why, despite prima facie appearances to the contrary, my theory, as discussed in the death context, is both descriptively and normatively plausible in the non-death context—at least in theory, even if not in practice.

whether the use of tort law in the way I propose in this Article is the best legal machinery we have (as opposed to, say, criminal law or punitive damages) for pursuing this Article's goals. Lastly, I bring the Article to a close with a brief conclusion.

I. BACKGROUND

A. OVERVIEW OF THE STATE OF THE LAW AND THE PROBLEMS WITH IT

There are several things plaintiffs can recover for in wrongful death suits in tort—regardless of whether it technically is a "survival action"[18] (brought by the decedent's estate), or a "wrongful-death action"[19] (brought by, for example, a decedent's spouse on behalf of the decedent). Among the things that plaintiffs can recover for in these suits are lost financial support for the surviving spouse (which is a function of the decedent's income, projected consumption, and so on), consortium, and pain and suffering experienced by the decedent himself before his death.[20]

One notable omission from this list, however, is damages for the "hedonic loss" incurred by the decedent by having his life shortened—that is, the loss of happiness (or, said differently, "life's pleasures"[21]) that the decedent would have experienced in his future years of life but for his premature death.[22] Almost no state permits recovery for such losses. A small minority of "hedonic-loss states" *do* allow compensation for "hedonic loss" incurred by the decedent as a result of his lost years of life.[23] But, even in these states, courts do not always provide recovery for the hedonic loss caused by the lost years, and, where they do, there is no clear system for calculating these damages, and the courts' opinions are rife with confusion.[24]

Arguably, the purposes of tort law are both (1) backward-looking (to provide a plaintiff with compensation for the losses he has incurred, thus attempting to make him whole),[25] and (2) forward-looking (for damage awards to provide the optimally efficient incentives for future potential tortfeasors).[26] In

18. *See* Arlen, *supra* note 5, at 1117–18.

19. *Id.*

20. *See, e.g.*, *In re* Delmoro, 48 Misc. 3d 628, 632–33 (Sur. Ct. 2015).

21. Posner & Sunstein, *supra* note 4, at 544.

22. *See id.* at 569–70.

23. *See* cases cited *supra* note 2.

24. *See* cases cited *supra* note 2; *see also* Posner & Sunstein, *supra* note 4, at 545.

25. For examples of well-known articulations of corrective justice theory (a main example of a backward-looking theory), see Ernest J. Weinrib, *Corrective Justice*, 77 IOWA L. REV. 403 (1992); Jules L. Coleman, *The Practice of Corrective Justice*, *in* PHILOSOPHICAL FOUNDATIONS OF TORT LAW 53 (David G. Owen ed., 1995); JULES L. COLEMAN, THE PRACTICE OF PRINCIPLE: IN DEFENSE OF A PRAGMATIST APPROACH TO LEGAL THEORY (2001); ERNEST J. WEINRIB, CORRECTIVE JUSTICE (2012).

26. For examples of well-known articulations of the forward-looking, law-and-economics view, see GUIDO CALABRESI, THE COSTS OF ACCIDENTS: A LEGAL AND ECONOMIC ANALYSIS (1970); Richard A. Posner, *Wealth Maximization and Tort Law: A Philosophical Inquiry*, *in* PHILOSOPHICAL FOUNDATIONS OF TORT LAW, *supra* note 25, at 99.

straightforward cases, these two goals can be brought about by requiring the tortfeasor to compensate the plaintiff for his losses, thus simultaneously: (1) making the plaintiff whole; and (2) bringing it about that future potential tortfeasors internalize the externalities that they would otherwise impose, thus leading to efficient behavior.[27]

It may seem that the current state of the law is defensible from the backward-looking perspective. After all, it is true that the decedent himself cannot be compensated—indeed, he is not even in existence and thus cannot receive money. While perhaps the family could recover these sums, the family is (ideally) already being compensated for ways in which they are harmed, and the focus of this category of damages ("hedonic loss") is on a form of loss that is to the decedent himself—namely for his lost years of life. Awarding sums for the decedent's hedonic losses to the family would constitute a windfall, and it seems that for the limited purpose of this type of loss, there might be no problem (through the backward-looking lens of tort law) with the current state of the law because the decedent indeed cannot be compensated. From a backward-looking perspective, the inability to recover for "hedonic loss" might be right. One might, however, deny that it is right even through a backward-looking lens, and one might say that the decedent's estate should be compensated and its failure to be compensated renders the current state of the law wrong even through a backward-looking lens. After all, a decedent's estate is a legal fiction that survives the decedent's death and perhaps the failure to compensate the decedent's estate for the "hedonic loss" does indeed show the state of the law to be a mistake even through a backward-looking lens. I leave this question aside and simply state that a strong case can be made that with respect to the backward-looking lens, the current state of the law is not making a mistake.

Even if there is no mistake with the current state of the law if looked at through the backward-looking lens, this is not so if looked at through a forward-looking lens. On a forward-looking account, it seems that a failure to require tortfeasors to pay the cost associated with the hedonic loss to the decedent would be a mistake, even if the person who incurred the loss can no longer be compensated. This is because failing to include the cost of the hedonic loss in the damages sum would understate (potentially grossly) the (hedonic) cost of the tortfeasor's behavior. All else equal, happy people do not want to die, and we typically think a person incurs a cost by being killed—even if he cannot be compensated for this. Thus, the current state of the law seemingly under-deters behavior that could result in killing people. Without requiring the tortfeasor to pay any cost capturing the loss to the decedent, the law cannot provide optimal incentives. Consider, for example, the counterintuitive implication of the current state of the law that, all else equal, it could be better for a tortfeasor for his

27. *See* Michael Pressman, *The Compatibility of Forward-Looking and Backward-Looking Accounts of Tort Law*, 15 U.N.H. L. REV. 45, 75 (2016).

behavior to leave a victim dead than to leave the victim injured.[28] Indeed, as mentioned in the Introduction, it *is* often cheaper for the defendant to kill the plaintiff than to injure him, and between 1984 and 1993 in New York City, the average jury verdict was $1 million in cases of wrongful death and $3 million in cases of brain damage (and $500,000 in cases of a herniated disc—which, when compared to the average verdicts for wrongful death, is particularly noteworthy).[29]

In sum, it seems that even if the current state of the law in this domain is not making a mistake from a backward-looking perspective (and an argument could be made that it is making a mistake even from a backward-looking perspective as well), it is making a mistake from a forward-looking perspective. Tort law thus should allow for damages for a decedent's hedonic loss. Regardless of whether the money for "hedonic loss" would go to the family of the decedent, to the state (perhaps into a pool to provide money to future wrongful death plaintiffs who have cases against poor and thus relatively judgment-proof defendants), or to whomever else, what seems necessary is that the tortfeasor be required to pay damages not only for the various other aspects of wrongful death suits that they are currently required to pay damages for, but that they also be required to pay damages for the hedonic loss incurred by the decedent for his lost years of life.

Even if one were on board with this forward-looking claim, if one thinks that there is currently no mistake on a backward-looking account, one might be concerned that bringing about a change to fix the mistake through the forward-looking lens might introduce a mistake (that is, too much compensation) through the backward-looking lens. This concern could be avoided, however, as alluded to above, by various possible ways of requiring tortfeasors to pay for hedonic loss but having these sums get paid not to the family of the decedent but rather to the state. Thus, requiring tortfeasors to pay for a decedent's "hedonic loss" is not problematic from the backward-looking perspective even if it turns out to not be required by it. Conversely, it enables us to fix what is clearly a mistake in the law from the forward-looking perspective.

Before continuing, however, it is worth flagging that although Sunstein and Posner, Arlen, and many authors to be discussed below in Part I.B (for example, Cooter and DePianto and Shavell and Polinsky)[30] agree that there should be recovery for a decedent's loss, so as to avoid under-deterrence, not all theorists agree on this point. Some theorists argue that allowing recovery for a decedent's hedonic loss would make damages sums inefficiently high and thus bring about

28. Of course, punitive damages for intentional behavior and also criminal law could in many cases prevent tortfeasors from actually ever confronting these perverse incentives, but there might be situations where the perverse incentives do, in practice, still remain; further, even if punitive damages and criminal consequences fully mitigated these perverse incentives in practice, it still would be the case that from the narrower perspective of tort law's account of compensation the current state of the law would have this odd counterintuitive feature.

29. *See supra* notes 1–17 and accompanying text.

30. *See infra* Part I.B.

over-deterrence.[31] However, although perhaps reasonable minds can differ on whether there should be recovery for a decedent's hedonic loss in order to bring about optimal incentives, I will not debate this further, and, going forward, I will assume that there indeed should be recovery for a decedent's hedonic loss.

B. THE SUNSTEIN / POSNER SUGGESTION FOR REFORM: USING "VALUE OF A STATISTICAL LIFE" (VSL)

Determining that tort law should allow for damages for the hedonic loss incurred by the decedent is the first key step away from the status quo, and not only do I espouse this, but so too do Cass Sunstein and Eric Posner (hereinafter "S&P") in their 2005 article *Dollars and Death*.[32] They and I are in agreement on this score. The next key step, however, in arguing for this reform, is to address the question of how to determine how much a decedent's hedonic loss should be worth in terms of dollars—that is, the question of how much a tortfeasor should have to pay in damages for causing the decedent's hedonic loss. This is a very tricky question to answer.

As S&P say, some people will say that life is priceless and thus it is demeaning, and cheapens life, to try to put a value on it.[33] But, as S&P note, it seems much more demeaning to stick with the status quo (providing zero dollars for the hedonic loss) than it would be to assign a dollar sum to the hedonic loss.[34] We want the sum to be greater than zero.

Typically, when valuing things, we can either ask or infer from people's actions what they are willing to pay ("WTP") for something (or to avoid something), or, similarly, what they would be willing to accept ("WTA") for

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31. *See* W. Kip Viscusi, *The Flawed Hedonic Damages Measure of Compensation for Wrongful Death and Personal Injury*, 20 J. FORENSIC ECON. 113, 126–27 (2007) [hereinafter Viscusi, *The Flawed Hedonic Damages Measure of Compensation*]. According to Kip Viscusi, the result of allowing recovery for a decedent's hedonic loss will be "an unprecedented level of excessive compensation from the standpoint of both deterrence and insurance." *Id.* at 134. Elaborating on this position, he writes:

> Greater damages levels that arise from the introduction of hedonic damages as a standard compensation component in turn will impose higher costs on insurers and defendants in such cases. These higher costs will boost insurer premiums, raise product prices, lead doctors to undertake additional defensive medicine efforts, and have other adverse economic consequences. If, of course, damages were initially set at too low a level, then such ramifications would be the result of installing a more efficient damages regime. Btu the practical difficulty is that compensation for hedonic losses will not foster optimal damages levels but will instead make damages inefficiently high so that the economic repercussions will be inefficient.

Id. at 129; *see also* W. Kip Viscusi, *Policy Challenges of the Heterogeneity of the Value of Statistical Life*, 6 FOUNDS. & TRENDS MICROECONOMICS 99, 100 (2010) (arguing that damages for hedonic losses in tort would lead to "excessive levels of compensatory damages and would greatly increase damage amounts"). As we will see in Part I.B, *infra*, however, Viscusi seemingly argues elsewhere that we should allow recovery for "hedonic loss" damages—albeit in the form of punitive damages and not compensatory damages.

32. Posner & Sunstein, *supra* note 4.

33. *Id.* at 553.

34. *Id.*

something (or to avoid something).[35] But, when we attempt to use this approach to put a price on an immediate loss of one's life, it does not help us in the way that it would in more typical cases. This is because—leaving aside cases of altruism and other related issues—there is *no* sum of money that a person would accept in return for giving up his life in an immediate death. There is no amount of money that would make a person indifferent between (1) not having one's life end in an immediate death and not receiving a monetary payment, and (2) having one's life end in an immediate death but receiving a monetary payment. Or, said differently, there is no amount of money that could make the person whole after incurring the harm of having his life brought to an immediate end and losing out on his entire future. The amount required to be paid to the decedent to trade away his life would therefore be infinite.

But, as Jennifer Arlen (among others) has discussed, do we really want the tortfeasor who has caused a death to be required to pay every single dollar he owns (even if it is billions of dollars) to pay for causing the decedent's hedonic loss?[36] It seems that the answer is "no," because if this were the law, all sorts of productive activities and behavior in society could come to a standstill out of people's fear that they might negligently cause a death and that they would then be bankrupted.[37] Accordingly, Arlen argues that in determining how to calculate damages in this area of the law, we must take into account the fact that we are all potential involuntary sellers of lives *and* involuntary buyers of lives, and that we thus must come up with a *rule* for how to price hedonic loss that reflects the bilateral nature of the problem, rather than simply coming up with a damages sum.[38] In Part IV.C, I return to Arlen's point and her arguments;[39] suffice it to say here that it does not seem as though pricing the hedonic loss at an infinite number of dollars (which in practice would amount to however much wealth the defendant possesses) is the answer that we want.

Since we want the hedonic loss to be worth neither zero dollars nor an infinite number of dollars, how are we to come up with a reasonable (and non-arbitrary) amount of dollars that will reflect the hedonic loss to the decedent? In light of our seeming inability to use WTP/WTA in these cases, it seems that we must invent some sort of a *construct* that can sidestep the difficulties confronted by WTP/WTA in this context and provide us with a dollar sum to attribute to the lost life. In deciding how to think about these issues, S&P explore regulatory law's treatment of the issue of valuing life, and they argue that tort law should implement a version of the approach that is taken in that domain: the "value of a statistical life" (VSL).[40]

35. *See generally* Sunstein, *The Value of a Statistical Life: Some Clarifications and Puzzles*, *supra* note 12.

36. *See* Arlen, *supra* note 5, at 1116.

37. *Id.* at 1117.

38. *Id.* at 1135.

39. *See infra* Part IV.C.

40. Posner & Sunstein, *supra* note 4, at 553–57.

S&P compare the way in which tort law and regulatory law employ approaches to the question of valuing life that differ in various ways, and they discuss the ways in which each domain can improve by adopting some of the methods employed by the other domain.[41] As they say, some of the differences can be understood because of the different contexts in which regulatory law and tort law operate (and it is perhaps even good that they differ), but both areas have huge omissions of different types and are in serious need of improvement.[42] S&P argue that both frameworks can learn a lot from the other, and thus that both domains are in need of reform to incorporate aspects of the other domain.[43] In this Article, however, I focus merely on tort law's omissions (namely its failure to allow recovery for hedonic loss for lost years of life), and on how tort might be able to learn from how regulatory law handles valuation-of-life issues—thus leaving aside questions of how regulatory law's treatment of valuation-of-life issues might be able to be improved. Further, I focus only on what tort law should do regarding compensating for hedonic loss of the decedent for his lost years of life—thus completely leaving out of the discussion the various other claims included in wrongful death suits (for example, financial support for family members, consortium, and so on). The exclusive question going forward will be the question of how to price the hedonic loss to the decedent (for his lost years of life), such that tort law can provide appropriate incentives and deterrence for future potential tortfeasors.

Unlike tort law, regulatory law does take the hedonic loss to decedents into account (and it has been doing so the since the 1980s).[44] It does so via sums that are uniform across people, and which are called "value of a statistical life" (VSL), and sometimes via sums called "value of statistical life-years" (VSLY).[45] Currently, in today's dollars, the VSL sum is approximately $9 million.[46] The VSL approach works as follows:

VSL infers a price that people put on their own lives based on what people have paid or accepted in consumption and labor-force decisions—with the majority of the data coming from labor-force decisions.[47] More specifically, VSL calculates the dollar value of the loss of life to decedents by seeing how much people (in datasets covering hundreds of thousands of people) are willing to pay or accept for an additional 1/10,000 risk of death (which studies have found, in today's dollars, to be approximately $900).[48] Then, we multiply $900

41. *Id.* at 538–43.

42. *Id.*

43. *Id.* at 542–43.

44. *Id.* at 549.

45. *See id.* at 551; *see, e.g.*, *id.* at 538 n.9.

46. Lisa A. Robinson & James K. Hammitt, *Valuing Reductions in Fatal Illness Risks: Implications of Recent Research*, 25 HEALTH ECON. 1039 (2016); *see also* GLOBAL HEALTH PRIORITY-SETTING: BEYOND COST-EFFECTIVENESS 113 (Ole F. Norheim, Exekiel J. Emanuel & Joseph Millum eds., 2020).

47. Posner & Sunstein, *supra* note 4, at 557.

48. *See id.* at 551; Robinson & Hammitt, *supra* note 46; *see also* GLOBAL HEALTH PRIORITY-SETTING: BEYOND COST-EFFECTIVENESS, *supra* note 46, at 113.

by 10,000 to extrapolate to the dollar value of a whole life. The thought is that if the value of a 1/10,000 chance of death is a certain price, then we can multiply by that percent chance to see what the value of the whole life is.[49]

In my view, there are serious concerns with this approach. It is important to note, though, that in a typical case (that is, a case that does not involve death or the shortening of life), this maneuver would not be creating a "construct" in its attempt to value the bad event of which at first there only is a risk. In the typical case, where the bad event does not involve death or a shortening of a life, the inferred value is not a construct at all; in such cases it indeed represents the cost of the bad event occurring, assuming no risk-aversion or time-value-of-money issues. For example, if a person is willing to pay $1,000 (R) to avoid a ten percent risk of a bad event happening the following month (r), then (given the assumptions I mentioned), we can infer that the harm of the bad event the following month would be R/r (that is, $10,000). Further, given the same assumptions, this inference would be sound *even in a case of non-economic damages*. Hence, in typical cases we can infer the cost of a bad event from what one would pay to avoid a given percentage of risk that this event occurs. In such cases it would be equivalent in terms of deterrence, as S&P say, to either have a tortfeasor pay R to all whom the risk is imposed on, or to pay R/r (that is, the cost of the bad event) but to only those who actually have the bad event happen to them.[50] As S&P say, these two options (the ex ante option and the ex post option) would also be equivalent not only from a deterrence perspective, but also from the perspective of compensation for plaintiffs.[51]

According to S&P, this VSL framework enables us in cases involving loss of life to create a *construct* that takes, as inputs, the amounts people value certain low risks of death, and then provides us with an output that is the dollar value to a person of his whole life.[52] This, of course, is a mere construct, because if asked how much money one would accept for having one's life end immediately, there is no sum that one would accept. But that is precisely why we are in search for a construct—because seemingly without one we are unable to put a dollar sum on losing the entire remainder of one's life.

VSL as a system has various limitations and S&P acknowledge many of these (despite espousing VSL as a system that tort law should use—albeit with some tweaks).[53] I discuss some of these limitations below. All of the following limitations, however, are not necessarily objections that render the theory unworkable; rather they are various problems that could probably be addressed by tweaking the system or perhaps simply recognizing that the VSL approach inherently lacks some accuracy. The following limitations, for the most part, do

49. *See* Posner & Sunstein, *supra* note 4, at 557.
50. *Id.* at 556.
51. *Id.* at 556–57.
52. *Id.* at 557.
53. *Id.*

not really shake the core of the VSL approach. This seems to be why, despite these issues, S&P (and many other authors, too) still endorse the VSL framework.

Before mentioning the main and common objections to VSL, I first mention an objection to VSL and a suggestion for a tweaking of it that S&P themselves raise: S&P argue that tort law should not use a uniform VSL, but it should instead tailor to more specifics of a person.[54] This individuation, they say, could happen in a few ways. It could be more tailored to age and wealth and also other factors that typically might make people's willingness to pay to avoid risks very different across groups.[55] (There is evidence, unsurprisingly, that age and wealth are among the factors that affect how much one's personalized VSL would be.[56])

Leaving aside for the moment this specific suggestion offered by S&P, what follows are some of the many common problems, limitations, and objections that are raised against VSL (and, typically, conceded by proponents of VSL to afflict VSL). Many of these objections are rooted in behavioral economics.

First off, the limitations that are not directly rooted in behavioral economics:

There is a question of whether the studies about choices between jobs in the work force based on salary and risk of death truly establish what they purport to establish. There can be questions of the methodology of these studies and whether they indeed provide plausible support for their results. One might think that they do not actually even support the conclusions about people being willing to pay $900 to avoid an increase of risk of death by 1/10,000. For one, it is unclear whether we can accurately determine that the riskier job increases risk of death by precisely 1/10,000.[57] Second, it is not always clear that people at all know the risks of the different options that they are confronting and purportedly weighing (much less, that they know these risks with accuracy and precision).[58] Third, it is not always clear how much of a choice a person in the labor-force has when confronted with particular job conditions, or, even if there is some choice, how much freedom the person feels that they have in this choice—in light of various constraints in their life.[59] Also, there might be various other risks of death that are not being taken into account but which are part of the equation (for example, higher risks of death associated with having a lower-paying job

54. *Id.* at 566–68.

55. *Id.* at 567.

56. *See, e.g.*, W. Kip Viscusi & Joseph E. Aldy, *The Value of a Statistical Life: A Critical Review of Market Estimates Throughout the World*, 27 J. RISK & UNCERTAINTY 5, 36, 50–51 (2003); Sunstein, *Lives, Life-Years, and Willingness to Pay*, *supra* note 12, at 231–34; Joseph E. Aldy & W. Kip Viscusi, *Age Variations in Workers' Value of Statistical Life* 42 (Nat'l Bureau of Econ. Rsch., Working Paper No. 10199, 2003).

57. *See* Posner & Sunstein, *supra* note 4, at 551, 563–64.

58. *See id.* at 564.

59. *Id.* at 565.

and thus not being able to afford certain consumption items, medical services, or luxuries that might bring about countervailing lowered chances of death).

Now, as for a few of the many limitations more rooted in behavioral economics:

For one, people apparently have different assessments (in terms of what they would pay to avoid an increase in risk of death by 1/10,000) for different levels of baseline risk that they have of death, and what percent risk one would be moving to, so extrapolation does not always give the same numbers (holding steady that the amount of risk is increased by 1/10,000). The sum we get is largely a function of which baseline percent risk we use, because the dollar sum is very different at different points of baseline risk. The curve is non-linear. As a result, it seems arbitrary which percent to use to extrapolate from.[60]

Additionally, even if the curve were linear and the baseline risk level not arbitrary,[61] there still would be a key additional difficulty related to the calculus. Human beings are notorious for being bad at making rational decisions in the context of extremely low probabilities.[62] Be it over-valuing or under-valuing these probabilities (we have been found to exhibit each of these types of mistakes in different contexts), we are bad at using these numbers.[63] As a result, it really is not clear whether we should put any stock at all in the precise sums people are willing to pay or accept as a result of these low risks. Further, since these dollar sums to avoid the 1/10,000 risk (for example, $900) are then multiplied by 10,000 to get the VSL, the VSL could be far off due to a small variance in the dollar sum for accepting the 1/10,000 risk. Thus, when it really might have been somewhat arbitrary and due to non-rational processes that one decides to pay $100 versus $1,000 to avoid the tiny risk, such irrelevant differences would result in the difference between a VSL of $1 million and one of $10 million. This huge difference would be arbitrary and not reflect what we are thinking and hoping that it reflects.[64]

Despite all of these limitations of the VSL approach (and the foregoing only describes some of the limitations), S&P still believe that a version of VSL should be used to put a dollar sum on the hedonic loss incurred by decedents for their lost years of life in wrongful death suits.[65] In their view, these concerns

60. *See id.* at 557.

61. And even if we assume that we can determine that the riskier job increases the risk of death by precisely 1/10,000, which, as I've stated, there could be doubts about.

62. *See, e.g.*, Amos Tversky & Daniel Kahneman, *Rational Choice and the Framing of Decisions*, 59 J. BUS. S251, S272–73 (1986).

63. *See id.* at S274–75.

64. An additional issue involves figuring out details about the behavioral economics associated with the differences between WTP and WTA sums. There is reason to think that our sums differ depending on whether one confronts decisions in a WTP or WTA context, and if the sums indeed are different, there's then a question of which framework to use. For an overview of this literature, see Russell Korobkin, *The Endowment Effect and Legal Analysis*, 97 NW. U. L. REV. 1227 (2002). Further, there are a number of additional concerns for the VSL approach arising out of behavioral economics—even beyond those discussed here.

65. Posner & Sunstein, *supra* note 4, at 587–90.

with VSL are merely fine-tuning types of concerns, and not concerns that shake the core of the VSL approach.[66] Further, as I describe below, a large number of others agree with S&P that VSL is indeed the approach that should be used for hedonic loss in wrongful death suits in tort, and that even if some tweaks are necessary, VSL indeed is the correct general approach to use.[67]

I agree with these authors that the various limitations discussed above probably do not shake the very core of the VSL approach. I disagree, however, with the view that VSL is the correct general approach. To the contrary, I argue that it is mistaken altogether—and for reasons wholly separate from the "fine-tuning" issues that indeed plague the VSL approach. In the following Parts, I explain why the VSL approach is misguided, and propose an alternative. Before doing so, however, I first provide some additional background about approaches that authors have taken to the question of how to assign a dollar figure to a decedent's hedonic loss—both outside of the VSL framework and within the VSL framework.

C. CANVASING OTHER VSL AND NON-VSL APPROACHES

This Subpart provides some additional background regarding the approaches that have been taken to the question of how to assign a dollar figure to a decedent's hedonic loss—both outside of the VSL framework and within the VSL framework. The purpose of this discussion is threefold. First, I aim simply to describe what has been said in the literature on the topic of hedonic-loss damages, both before and after 2005. Second, I aim to show both that the VSL approach is the dominant way of thinking about how to assign a dollar sum to hedonic loss, and that, given the existing alternatives, this is for good reason. The VSL approach is indeed the best proposal that we currently have for how to assign a dollar sum to hedonic loss. It is better than the other accounts that have been articulated. Third, showing that (1) the positive proposal presented here is novel and (2) VSL is not only dominant but also the best of all currently available proposals, paves the way for this Article's main argument. After all, if VSL is better than existing alternatives, I need only show that the positive proposal of this Article is better than VSL to establish that it is the best available approach.

1. Within the VSL Approach

I first consider examples of authors espousing the VSL approach to assigning a dollar sum to a decedent's hedonic loss.

First, Sunstein himself has continued to advocate this general approach, and, in the years since *Dollars and Death*, he has written a number of articles aimed at fine-tuning and improving the VSL approach. In *Valuing Life: A Plea for Disaggregation*, he argued that a uniform VSL measure is not what we

66. *Id.*
67. *See infra* Part I.C.

should use, but rather that we should use a measure that is more individuated in various ways.[68] According to him, a uniform figure to measure the value of a statistical life is a serious mistake: "The very theory that underlies [VSL] calls for far more individuation of the relevant values. According to that theory, VSL should vary across risk. More controversially, VSL should vary across individuals—even or especially if the result would be to produce a lower number for some people than others."[69] Additionally, one of the main specific ways in which Sunstein thinks that there should be greater individuation is that the damages sum for hedonic loss should vary based on how many *years* of life it is expected that the decedent has lost.[70] The thought is that someone who loses more years of life is incurring a more substantial loss than someone who loses fewer years. Thus, all else equal, individuation should occur along the dimension of the decedent's age. Sunstein thus argues that instead of using VSL (value of a statistical life), we should use VSLY ("value of statistical life-years").[71] According to Sunstein, "the hard question involves not whether to undertake this shift, but how to monetize life-years."[72] Sunstein has also addressed a number of other important and interesting questions that arise within the general VSL framework.[73]

Many other authors have also signed on to the VSL approach for assigning a dollar sum to damages for a decedent's hedonic loss. These authors typically argue for a particular version of VSL or for particular tweaks to the way in which it would be used. For instance, in *Community Versus Market Values of Life*,[74] Robert Cooter and David DePianto explore the differences between "community" and "market" VSL. According to them, the VSL framework can derive dollar sums by extrapolating from dollars spent by individuals in their consumption decisions and labor-force decisions reflecting choices regarding risks of death, and it can also carry out these extrapolations by focusing on how "[c]ommunities balance risk and cost through social norms of precaution, which prescribe how much risk people may impose on others and on themselves. For example, social norms dictate that bicyclists should wear helmets and automobile passengers should wear seat belts."[75] According to Cooter and DePianto, there are considerable differences between the average dollar values for VSL derived in the "individual" ("market") context and those derived in the "community" context; they argue we ought to endorse the use of community VSLs in tort.[76]

68. Sunstein, *Valuing Life: A Plea for Disaggregation*, *supra* note 12, at 404–05.

69. *Id.* at 385.

70. Sunstein, *Lives, Life-Years, and Willingness to Pay*, *supra* note 12, at 208–09, 240–41.

71. *Id.* at 206.

72. *Id.* at 205.

73. *See, e.g.*, Sunstein, *The Value of a Statistical Life: Some Clarifications and Puzzles*, *supra* note 12, at 237; SUNSTEIN, *supra* note 12, at 5.

74. Cooter & DePianto, *supra* note 12, at 713–14.

75. *Id.* at 713.

76. *Id.* at 755–58.

Other examples of prominent authors in the VSL camp are A. Mitchell Polinsky and Steven Shavell. According to them, compensatory damages in wrongful death cases should equal the VSL sum.[77]

Also in the camp of proponents of VSL in the context of hedonic-loss damages are Joni Hersch and Kip Viscusi.[78] The account that they offer is somewhat different from those discussed so far here, however, because, while these other accounts have involved the VSL sum being a component of the compensatory damages sum, Hersch and Viscusi argue that the VSL sum should be used in order to determine the punitive damages sum.[79] According to them, the VSL sum should be used to set the *total damages* amount needed for deterrence in wrongful death cases; however, they argue that the compensatory sum should be kept as is, and that the punitive damages sum should be altered to make the total damages sum equal the VSL sum.[80] They write:

> [We] propose[] the following punitive damages formula for wrongful death cases: the total value of punitive damages plus compensatory damages should equal the VSL. To achieve this equality, there should be no change in current practices regarding the value of compensatory damages. Rather, the entire adjustment should be made to punitive damages, which should be set to equal the VSL minus the value of compensatory damages. [We] elaborate[] on this proposal, indicating how it can be modified to account for unusually large economic losses and a low probability of detection.[81]

According to Hersch and Viscusi, it would be misguided for the full VSL sum to represent compensatory damages, because this would "undermine[] the current function of compensatory damages,"[82] which, they argue, is compensation and insurance.[83] Despite the differences between Hersch and Viscusi's account and the other VSL accounts mentioned so far, however, Hersch and Viscusi are nevertheless indeed proponents of the VSL account as well.

As these examples illustrate, many prominent authors defend various versions of VSL; other versions of VSL exist as well.

77. Polinsky & Shavell, *supra* note 12, at 889–91, 941–42 (arguing that, in wrongful death cases, compensatory damages should equal the VSL, regardless of whether the damages measure also includes punitive damages).

78. Hersch & Viscusi, *supra* note 12, at 229.

79. *Id.* at 230–31.

80. *Id.* at 231.

81. *Id.*

82. *Id.*

83. *Id.* at 229.

2. *Non-VSL Approaches to Determining Damages Sums for a Decedent's Hedonic Loss*

While some authors have argued that there should not be compensation at all for a decedent's hedonic loss,[84] not all authors who argue that there should be compensation for a decedent's hedonic loss are proponents of the VSL approach. I note here a few such examples.

First, Andrew Jay McClurg argued that we should provide damages for a decedent's hedonic loss even before S&P's article.[85] According to him, any attempt to put a dollar sum on the lost life is problematic, and the best solution is simply for legislatures to determine an arbitrary but uniform sum.[86]

Frank Cross and Charles Silver similarly argue for the adoption of a "presumptive minimum award" in wrongful death cases, to correct for under-compensation and associated under-deterrence.[87] Like McClurg, they espouse the use of an arbitrary sum to be assigned to a decedent's hedonic loss.[88]

While these authors are right to argue that there should be damages recoverable for a decedent's hedonic loss, that it is difficult to come up with a principled account of what the appropriate damages sum should be, and that an arbitrary sum would be better than no damages sum, the VSL approach does better than the "arbitrary sum" approach. This is because VSL at least is attempting to provide a principled basis for the particular damages sum to be assigned to the decedent's hedonic loss. Even if one thinks (as I do) that the VSL approach is mistaken, it still, at the very worst, is on a par with the "arbitrary sum" approach, because at the very worst, VSL would turn out to be an "arbitrary sum." VSL is either a superior approach or it itself is an arbitrary sum. Thus, while the McClurg and Cross and Silver points are not bad, we can do better (be it with the VSL approach or with something else).

Some other non-VSL approaches have been taken as well, but, as with the McClurg and Cross and Silver approaches, they do not seem to provide ways to assign a non-arbitrary damages sum to a decedent's hedonic loss.[89]

3. *Summary Regarding VSL and Non-VSL Approaches to Determining Damages Sums for a Decedent's Hedonic Loss*

In sum, the VSL approach is currently the dominant way of thinking about how tort law should assign a dollar sum to a decedent's hedonic loss. Other

84. *See, e.g.*, Viscusi, *The Flawed Hedonic Damages Measure of Compensation*, *supra* note 31, at 126, 130–31.

85. Andrew J. McClurg, *It's a Wonderful Life: The Case for Hedonic Damages in Wrongful Death Cases*, 66 NOTRE DAME L. REV. 57, 60–61 (1990).

86. *Id.* at 110.

87. Frank Cross & Charles Silver, *In Texas, Life Is Cheap*, 59 VAND. L. REV. 1873, 1921–22 (2006).

88. *Id.*

89. Though not attempting to put a dollar sum on hedonic loss, for a discussion of the topic, see, for example, Gregory C. Keating, *Irreparable Injury and Extraordinary Precaution: The Safety and Feasibility Norms in American Accident Law*, 4 THEORETICAL INQ. L. 1 (2003).

approaches exist (for example, those of McClurg and Cross and Silver), but, as I have argued, it seems that they are not promising. Further, the VSL approach, at the very worst, is on a par with these other approaches. The VSL approach is a valiant attempt to do better than the accounts that espouse the use of an arbitrary damages sum, and in some ways it indeed is better. VSL is a good step forward because, at the very least, it is trying to provide a non-arbitrary way of assigning a damages sum to the hedonic loss. Thus, there seems to be good reason for the VSL approach being the dominant approach; it is the most promising currently available approach. Thus, in the remainder of this Article I focus on the VSL approach rather than on any of the other accounts. As I will show, however, even though VSL is a better approach than the others that currently exist, it too has serious flaws. As I will show, we not only can do better than the non-VSL accounts, but we can also do better than the VSL account.

4. Other Considerations Regarding Whether We Want, and If So Whether Monetary Damages Can Effectuate, "Full Compensation"

Before continuing, I briefly flag considerations and strategies raised by two other authors, which will be returned to later in this Article. These considerations, raised by Jennifer Arlen and Mark Geistfeld, both pertain not to the question of whether VSL is the appropriate measure for determining full compensation, but, rather, to broader questions regarding the notion of full compensation itself: questions of whether (1) full compensation is something we even want (that is, whether we should instead have less than full compensation); and (2) whether compensatory damages are capable of being fully compensatory, and, if not, how we can remedy this shortfall to provide full compensation.

First, Arlen's points about full compensation: Arlen argues that while damages should be recoverable for the hedonic loss of the decedent, we would not want a rule that provides full compensation for a decedent's hedonic loss.[90] Instead, she argues that we would prefer to live in a society where there is less than full compensation for hedonic loss because the prospect of having to be an involuntary *payer* of full compensation for someone else's life would be too burdensome, and this is not something that we would want.[91] I flag Arlen's approach here, but I will consider her arguments separately, in Part IV.C.

Next, Geistfeld's different point about full compensation: According to him, in cases of irreparable harm (of which death is one example), there is a "compensatory shortfall"—that is, compensatory damages do not fully or sufficiently compensate.[92] As a result, in order to bring about greater

90. *See* Arlen, *supra* note 5, at 1127–28, 1135–36; *see also* Jennifer H. Arlen, *Reconsidering Efficient Tort Rules for Personal Injury: The Case of Single Activity Accidents*, 32 WM. & MARY L. REV. 41, 86–87 (1990).

91. Arlen, *supra* note 90, at 86–87.

92. *See* Geistfeld, *supra* note 6, at 142; *see also* Mark A. Geistfeld, *The Tort Entitlement to Physical Security as the Distributive Basis for Environmental, Health, and Safety Regulations*, 15 THEORETICAL INQ. L. 387, 407 (2014) [hereinafter Geistfeld, *The Tort Entitlement to Physical Security*]; Mark Geistfeld, *Placing a*

compensation and more optimal incentives, we should pursue other avenues—such as increasing the amount of expenditure on care that we require of potential tortfeasors in cases that would result in irreparable harm.[93] This expenditure of wealth by potential tortfeasors, which would redound to the benefit of potential plaintiffs, would, according to Geistfeld, help minimize the "compensatory shortfall."[94] Further, and relatedly, Geistfeld argues that, as a result of this "compensatory shortfall," punitive damages play an instrumental role in protecting potential plaintiffs' security and bodily integrity in cases of irreparable harms, and thus punitive damages constitute a crucial component of our tort system.[95]

In addition to these broader questions raised about full compensation by Arlen and Geistfeld, recall also that despite being proponents of the VSL account, Hersch and Viscusi also articulated views regarding broader questions about the notion of full compensation.[96] According to them, hedonic loss is not something that should be a component of full compensation, and they think that we would want recovery in wrongful death suits to be equal to the VSL sum, much of which would fall in the category of punitive damages.[97] Thus, according to them, the appropriate damages measure for wrongful death would be a sum that is in excess of full compensation.[98]

In sum, in the context of wrongful death, Arlen argues that we should have a damages sum that is less than full compensation, Hersch and Viscusi argue that we should have a damages sum that is more than full compensation, and Geistfeld argues that we should have full compensation, but that a damages sum, alone, will not enable us to bring about full compensation, and thus we must heighten the amount of care we require of potential tortfeasors so as to lessen the compensatory shortfall.

As will become clear in this Article, I think that all of these authors are mistaken. I will show that in the wrongful death context, fully compensatory damages, *when understood in the correct way*,[99] (1) contra Arlen, are not too high of a damages sum, (2) contra Hersch and Viscusi, are not too low of a damages sum, and (3) contra Geistfeld, do not give rise to a "compensatory shortfall" that requires us to pursue other avenues to supplement damages to get

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Price on Pain and Suffering: A Method for Helping Juries Determine Tort Damages for Nonmonetary Injuries, 83 CALIF. L. REV. 773, 796–803 (1995) (arguing against the reduction of pain-and-suffering damages); Mark Geistfeld, *Reconciling Cost-Benefit Analysis with the Principle That Safety Matters More than Money*, 76 N.Y.U. L. REV. 114, 141–42 (2001).

93. Geistfeld, *supra* note 6, at 142; Geistfeld, *The Tort Entitlement to Physical Security*, *supra* note 92, at 407.

94. *See* Geistfeld, *The Tort Entitlement to Physical Security*, *supra* note 92, at 407.

95. Geistfeld, *supra* note 6, at 145–46.

96. Hersch & Viscusi, *supra* note 12.

97. *Id.* at 231.

98. *Id.* at 232.

99. For an explanation of how to understand compensatory damages in the wrongful death context in the right way, see *infra* Part II.B.

closer to providing full compensation. Accordingly, in my view, it also is not the case that the wrongful death context (or, more generally, the irreparable harm context) uniquely[100] requires punitive damages.[101]

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With these additional considerations in mind, I now return to a discussion of VSL. As I have shown, the VSL approach is the dominant approach to thinking about how tort law should assign a dollar sum to a decedent's hedonic loss. In what follows, I explain why, in my view, the VSL approach to pricing hedonic loss is *not* the approach we should use.

II. MY CONCERNS WITH THE VSL APPROACH

A. INITIAL INTUITIVE CONCERNS

The limitations of VSL discussed in Part I.B arguably do not strike the very core of the VSL approach. In other words, one might think that these issues do not cast doubt on the use of VSL but, rather, that they just point to various ways in which we need to tweak or fine-tune VSL. I think that this might be right. I do, however, also think that, especially when all of these limitations are taken as a whole, the fine-tuning concerns discussed above might indeed be significant enough that there is reason to look for something new. I also think, however, that even if they are not terrible problems for VSL in and of themselves, they might be symptomatic of a more significant problem with the VSL approach: the arbitrariness of it—in the sense that what we are measuring is not really what we are after. It seems that there is a disconnect between what we are measuring and what we are saying that the output is: the dollar value of the 100% chance of death. Yes, one could say that by definition there is a gap, because the whole point is that we are trying to make a construct because we have a gap that we are

100. I'm not suggesting that there aren't reasons for there to be punitive damages in the wrongful death context. Indeed, punitive damages might be appropriate in the wrongful death context for the typical reasons that punitive damages might be appropriate (for example, the need for extra deterrence because of a non-100% detection rate, expressing moral disapproval and blame, and the like). Instead, my point is that the context of wrongful death (and of irreparable harm, more generally) does not *uniquely* require punitive damages, despite the arguments of Hersch and Viscusi and of Geistfeld to the contrary.

101. Contra Geistfeld, in my view, compensatory damages can indeed avoid a compensatory shortfall. Even though they cannot compensate the dead person himself, punitive damages cannot either, and whether the decedent himself can be compensated is not the only workable litmus test for whether there is a compensatory shortfall. Additionally, appropriately priced compensatory damages can indeed bring about the optimal incentives—inducing a sufficient expenditure on care by the potential tortfeasor. Having compensatory damages be correctly priced, indeed, would bring about the optimal expenditure on care by the potential tortfeasor, and bringing about the optimal expenditure on care is what Geistfeld thinks is needed to supplement compensatory damages. In my view, however, this is *brought about by* having correctly priced compensatory damages. As stated in note 100, *supra*, however, it could be that the typical rationales for punitive damages, if applicable to a particular case of wrongful death (or, more generally, irreparable harm) could make it appropriate for there to also be punitive damages. This, however, would not be for reasons unique to wrongful death (or, more generally, irreparable harm).

trying to bridge. But it seems to me that we must be able to do better than this. The system seems too arbitrary.

What is counterintuitive about the problem that we are trying to solve (that is, what dollar sum to attribute to the decedent's hedonic loss) is that people would not actually view the extrapolated sum (that is, $9 million) as a sum that they would accept for the occurrence of the future bad event. This is unlike the case of extrapolation that we do in a typical case where the bad event is something other than death. As discussed earlier, in that case we indeed would view the extrapolated dollar value as the value one attributes to the future bad event; there, we would be indifferent between the bad event occurring but being compensated for it, and the bad event not occurring (and thus also not being paid any compensation). Not so in the death case. We would prefer to not die than to die and have the tortfeasor pay $9 million. This all, of course, is just restating the nature of the task that confronts us here, however. Any dollar sum that we attribute to the hedonic loss will suffer from this objection. Thus, these comments in and of themselves do not show that the VSL account is afflicted by a problem that would not also plague any other account. These comments do hint at something, though: the seeming arbitrariness of VSL. This arbitrariness on its own would not itself be a sufficient reason to reject the VSL approach, though, if all possible accounts in this domain would also suffer from the arbitrariness concern. It might just be that some arbitrariness in setting the dollar sum is a necessary feature of this problem. If, however, I can show that another approach does not suffer from arbitrariness, then that would be a reason to prefer the other approach to the VSL approach.[102]

B. TWO WAYS OF SEEING THAT VSL IS CARRYING OUT THE HAPPINESS-TO-MONEY TRANSLATION AT THE WRONG JUNCTURE

Having stated that, intuitively, something seems a bit off and a bit unsatisfying about the VSL approach, I now explain more concretely what I take to be the problem with the VSL approach.

If we are to provide a monetary remedy for the loss of happiness to the decedent (as I agree we should, so as to bring about optimal deterrence), we will at some juncture need to translate the lost happiness into a monetary sum. The VSL approach does this, but I think that it does so at the wrong juncture in the analysis—namely on the decedent's utility curve. The following discussions will: (1) explain further what I mean by this claim; and (2) explain why I think I am right to think that VSL's translation from happiness to money is occurring in the wrong place. I then offer an alternative approach—which carries out the happiness-to-money translation on the *tortfeasor's* utility curve rather than on

102. Importantly, however, S&P do not think that the VSL approach is arbitrary. They think that it is a principled approach to the topic and that there is good reason to use this as a way to quantify the dollar sum to be attributed to the lost life. *See* Posner & Sunstein, *supra* note 4, at 587–92.

the decedent's—and I argue that it is not afflicted by the problems plaguing the VSL approach.[103]

In what follows, I provide two separate arguments to show that the VSL approach is mistaken to carry out the happiness-to-money translation on the decedent's utility curve. First, I show that the phrase "the monetary loss to the decedent" (like its closely related variants) has *no meaning* and therefore cannot be the basis for a non-arbitrary answer to the question at hand. Second, I argue that the decedent's wealth is irrelevant to the determination of damages for hedonic loss. Using the decedent's wealth for this calculation is problematic from both the backward-looking and the forward-looking perspectives. As will become clear, this second point also lays the groundwork for the positive proposal that I will present in Part III.

1. Point 1: The Term "The Monetary Amount of the Loss to the Decedent" and Its Variants Lack Meaning

I have already stated that it does not make sense to speak about the amount of money to attribute to the loss to the decedent. And the proponent of VSL might likely agree that it sounds a bit odd, since people would not be indifferent between dying and being compensated or not dying and not being compensated. Although this was more a statement of the problem that VSL seeks to solve than a problem with the VSL approach as an attempt to solve it, it does point us to a problem with VSL.

The problem with VSL is not (1) that the person would not be indifferent between (a) death and compensation, and (b) no death and no compensation; or (2) that the decedent cannot be made whole with the money because he is dead, although both of these statements are true and are what make our topic a tricky one. Rather, the problem is that it is not even clear that "the monetary amount of the loss to the decedent" has a meaning or makes any sense. Contrast this, however, with a different notion: "the happiness amount of the loss." The decedent, being dead, of course cannot be compensated either for his loss in happiness or his loss in money, but the notion in the context of happiness makes sense in a way that the monetary version does not. We can indeed make sense of the idea that the decedent, as a result of his death, incurred a loss of happiness. He did not, however, incur a loss of money. Thus, the point here is that the phrase "the monetary amount of the loss to the decedent" simply does not have a meaning. It does not make sense to ask how much of a monetary loss was brought about to the decedent by losing out on the years of life that he would have had in his future. There simply is no such monetary loss.

Thus, it seems that part of the problem with the VSL approach is that it attempts to put a dollar sum on a concept that has no referent. The seeming

103. For a discussion of various issues regarding the relevance of defendants' wealth and whether it should be taken into account in determining either the level of due care or the compensatory damage award, see Jennifer H. Arlen, *Should Defendants' Wealth Matter?*, 21 J. LEGAL STUD. 413 (1992).

arbitrariness and difficulty in finding a satisfying and plausible answer to the question of how much that sum should be thus likely is due to a difficulty in even articulating the question itself.

To attempt to articulate these same points but from a slightly different angle, there is another (related) way of showing that the VSL approach is carrying out the happiness-to-money translation at the wrong juncture (and thus the following is another way of pointing to the meaninglessness of "the monetary amount of the loss to the decedent"): The decedent lacks a utility curve. He has no utility function—in other words, he has no function illustrating the amounts of happiness that various amounts of money provide him with. Thus, there is no function for him anymore that provides a means to translate monetary sums into happiness sums (or which provides us with insight about how to perform that translation). And using the utility curve from when he was alive seems arbitrary at best.[104] Thus, as a result (and to preview the solution I offer below, in Part III), we will need to use someone else's utility curve.

a. Some Possible Objections (and Responses to the Objections)

Objection Number 1. One might respond to me as follows, arguing that indeed the decedent *did* incur a loss of money: Perhaps, one might say, the decedent has a monetary loss in the sense that he would have accepted money in a VSL-type sense in the labor force to incur this risk of death, and, thus, his failure to get paid that amount of money for incurring the risk is a way in which he was not compensated and in which he incurred a loss. In other words, perhaps it would have been a fair deal for him if he had received the $900 and then incurred the risk of death, and then had had the death indeed happen. But he did not get paid the $900, so he thus had a monetary loss.

I offer two points in response to this point: First, even if the general point just articulated is correct in broad strokes, it still does not give us the result that the VSL approach purports to give us. The VSL approach states that the dollar value of the loss to attribute to the death is $9 million, but the foregoing thought experiment shows, at best, that the decedent's loss is equal to $900, and not $9 million. Second, the argument does not even follow with respect to the $900, because whether or not the death in fact came to fruition for this decedent is a question orthogonal to whether or not he was paid. It might very well be that he was already paid $900. If so, then even on this theory he would not be owed anything. Further, conversely, if the decedent was exposed to the risk for which he should be paid $900, then he should have been paid $900 regardless of whether the risk materialized into an actual death for him. Accordingly, the $900 is not in any sense the monetary loss to the decedent that is brought about by his death. This is a second way in which the argument I am responding to here is seemingly not a particularly strong one.

104. See Objection Number 3, below, for further discussion of whether using the utility function from when the decedent was alive would be arbitrary.

Objection Number 2. Perhaps the VSL proponent could respond that we need not refer to the term, "the amount of monetary loss to the decedent," and that we instead could simply refer to the monetary sum as the amount that would bring about the correct incentives for future tortfeasors. Thus, the VSL proponent might say that I am attacking a straw man, and that he is simply trying to find the correct monetary amount for the damages sum. He can say that he can just talk about this in more neutral terms, without changing the substance of what is being said, and he thus would be able to be immune to the points I make here, which he might call "definitional."

But it does not seem as though this strategy would work, because it likely turns out to be a circular argumentative maneuver. This is because, while we could just refer to the monetary sum that would bring about the correct incentives for future tortfeasors, it seems that in trying to cash out what that amount should be, we would need to say "the amount by which the decedent was harmed"—or something along these lines. And when we try to say something like that, it seems that we then run into the very problems that we were trying to avoid: the problem of being clear about what we even mean by that phrase, and the seeming difficulty of providing an understanding of that phrase that makes sense. Thus, it seems that the VSL proponent's attempted response does not get him off the hook.

Thus, to reiterate what I stated above, it seems that part of the problem with the VSL approach is that it attempts to put a dollar sum on a concept that has no referent (and thus does not even make sense), and the seeming arbitrariness and difficulty in finding a satisfying and plausible answer to the question of how much that sum should be might be due to a difficulty in even articulating the question itself.

Objection Number 3. In response to my claim that it would be "arbitrary at best" to use the utility function that the decedent had when he was alive, one might deny this, instead arguing that using the utility function from when the decedent was alive would not be arbitrary at all, and that this would indeed be a reasonable option. Further, one possible example of how one might say we could use the decedent's utility curve to determine a damages sum is the following: Suppose that, using one of the "happiness-aggregation functions" that I introduce in Part III, we have a metric for determining the overall amount of happiness experienced in a particular life. Perhaps the damages sum (which uses the decedent's utility function) could be the sum of money, which, if, counterfactually, had been distributed throughout the years of the shortened life, would have resulted in a lifetime that would have contained the same amount of happiness as the lifetime without the premature death (and thus without any compensation). Or, said differently, suppose that the damages sum is the sum of money that a person would accept at the outset of his life (or if choosing between possible lives for oneself before one is born) in order to be indifferent between the shorter life and the longer life.

While this is indeed a way in which we could come up with a damages sum, it still does not seem to avoid the concerns that I have been raising. It is true that it is not completely arbitrary—after all, the strategy I just laid out does follow a formula for determining how to arrive at the appropriate sum—but the VSL approach follows a formula as well, and I have argued that it is arbitrary in a relevant way. The way in which VSL and the strategy I just laid out are arbitrary is that *they still do not capture what the loss really is to the decedent, yet they purport to be doing so*. While it indeed might be true that the sum in the strategy I just laid out could be what makes a person indifferent between the two possible lives from the start, it still does not seem to speak to how much the decedent is harmed by the death.[105]

b. Summary Regarding Point 1

Taking stock: The loss *to the decedent* can only be quantified in terms of happiness and not in terms of money. Thus, it just does not make sense to quantify the loss to the decedent in monetary terms; the loss to the decedent is not a monetary loss—it is a happiness loss. We cannot translate the loss of happiness to a loss of money on his utility curve.

This does not, however, mean that money cannot be affixed to that hedonic sum. (After all, the whole purpose of this Article—and, more generally, the debate about hedonic-loss damages—is to figure out how to ultimately fix a monetary sum to this happiness sum, so if it were not *ever* possible, then this inquiry would be a failure.) It just means that at this juncture in the analysis there

105. I here offer an additional objection and response:

Objection Number 4. Somewhat related to Objection Number 3, suppose one argues as follows: What VSL really is is a way of approaching the question of how a person trades off having additional money during the years he lives versus having additional years of life. The VSL approach takes as inputs the trades between money and an increase of chance of immediate death by 1/10,000 (which thus amounts to an expected life expectancy of 9,999/10,000 of the length of what he would otherwise have expected). Similarly, one could ask a person how much he would have to be paid to give up a *certain* loss of 1/10,000 of his remaining life expectancy. Or, similarly, one might ask how much he would have to be paid to give up a certain loss of one year of life. Thus, there seems to be nothing wrong with there being evidence (obtained either by asking hypothetical questions or by observing decisions that are made) that shows what dollar sum a person would put on, say, a year of his life. Perhaps, one might say, even if it does not follow that extrapolating from the dollar sum one would accept for one year of life, and multiplying by, say, twenty (if one has twenty years of life left) would constitute the loss to the decedent who loses out on his last twenty years of life, perhaps this is the best we can do.

If one recognizes the acknowledged limitations of this (that is, that it does not actually capture the loss to the decedent and is, at best, "the best we can do"), then I do not disagree. And, as I will explain in Part III, I agree that data about how people trade off dollars for years of their life is indeed data that we can and should use, and I employ a version of this in my positive proposal. I, however, will use this type of data for comparisons between dollars and portions of a person's life *that do not constitute the entire remainder of his life*. When this data is used to put a dollar sum on a loss that is incurred by a decedent by a premature death (that is, when the dollar sum is meant to represent the dollar value of a portion of a person's life *that constitutes the entire remainder of his life*), then I think that a mistake is being made. (If, however, one acknowledges the limitations I raise and qualifies this maneuver by saying it's just "the best we can do," then I wouldn't object to this as at least a reasonable attempt to make the best of a difficult problem—although, as I will argue in this Article, it does *not* turn out to be even "the best we can do.").

is no grounds for picking any *particular* sum and for referring to the decedent's loss in monetary terms. At this point, monetary sums could be affixed to the happiness loss, but the choice of dollar sum would be arbitrary. His loss must, at least at this juncture of the analysis, remain in happiness terms.

2. *Point 2: The Decedent's Wealth Is Irrelevant for Determining the Damages Sum—Both for Backward-Looking and Forward-Looking Accounts of Tort Law*

There is a second way in which we can see that the VSL account is carrying out the translation from happiness to money at the wrong juncture. Further, it is this second way that is the most important one for my purposes. This is because it will show more clearly what the precise problem with the location of VSL's carrying out the translation is, and, as a result, will directly lead into my positive proposal for an alternative to VSL (which will offer an alternative location for the happiness-to-money translation to be carried out).

The VSL approach derives the value of a statistical life by seeing what people pay to avoid risks of death. In regulatory law, it simply comes up with one non-individuated VSL sum (for example, approximately $9 million in today's dollars) by averaging across all people in a population (or, rather, the sample size of the population that was used for data in any particular study).[106] The regulatory law domain thus makes no attempt to individuate. As S&P say, and I agree, a good feature of tort law is that it typically tries to individuate remedies to a particular case and its parties.[107] Thus, if tort law were to provide damages for hedonic loss, it seems that it should individuate in this domain, just as in the other domains that tort encounters, and provide an individuated VSL, specific to the particular case. In Part IV.B, below, I explore whether we indeed would want individuation for hedonic loss, and I explore some related issues.[108] For now, however, I simply assume that, as with other areas of tort law, we want the remedies in the context of hedonic loss to be individuated and tailored to the parties.

The way the VSL approach derives the value of the statistical life, of course, is by seeing what a person pays or would pay to avoid a risk of death and then by extrapolating to arrive at a dollar sum for the entire life. What this means is that the dollar sum to be affixed to a particular decedent's life will be a function of many things, but, most notably here, it will be drastically affected by the wealth of the decedent. How much money one has will play a huge role in determining how much one would be willing to pay (or accept) to avoid (or incur) a risk of death.[109] At one extreme, someone who is very poor will barely be willing to spend anything (and perhaps he will not be willing to spend

106. Posner & Sunstein, *supra* note 4, at 538.

107. *Id.* at 540.

108. *See infra* Part IV.B.

109. Sunstein, *Lives, Life-Years, and Willingness to Pay*, *supra* note 12, at 229.

anything) to avoid the small risk of death (and if he has no money at all, he might be *unable* to spend anything to avoid the small risk of death).[110] At the other extreme, a billionaire might be willing to spend a million dollars (and not a mere $900) to avoid a 1/10,000 risk of death.[111]

Thus, using the VSL approach gives us the result that someone who is very poor ("Poor") might have a VSL of, say, $100, whereas someone who is very rich ("Rich") might have a VSL of, say, $10 billion. If we have a tort system with an individuated approach (as I will argue we should), this would give us the result that a potential tortfeasor would only have a cost of $100 if he kills Poor, but would have a cost of $10 billion if he kills Rich.

This is problematic for two reasons: for a backward-looking reason and a forward-looking reason. While this Article is focused primarily on the forward-looking account, I will still briefly discuss the backward-looking reason here. And I will also mention the backward-looking reason first, because it is likely the one that jumps out to readers first when considering the above example.

To many readers, the fact that the tortfeasor would only have to pay $100 if he kills Poor but would have to pay $10 billion if he kills Rich is very unfair. It seems that the wealth of the decedent should not be relevant to the compensation sum on a backward-looking account. Furthermore, even if we are careful in how we describe the sum of money and we make it clear that we are *not* saying that the dollar sum is attempting to put a value or worth on the life and thus saying that the values of Rich's and Poor's lives differ in some deeper sense, it still seems as though the huge disparity in the monetary sum that the tortfeasor would have to pay for Rich and Poor would appear unfair. Whether or not one thinks that, from the backward-looking perspective, compensation for a decedent's hedonic loss to his estate is desirable, it seems clear that the decedent's wealth is and should be irrelevant to the amount of such compensation. If the happiness loss of Rich and Poor was the same, and if the purpose of "hedonic loss" damages is to provide compensation to the estates of Rich and Poor for their loss of happiness (at least from the perspective of the backward-looking lens), then it seems perverse to have the amounts made to the two estates to differ—much less for one of the amounts to be $100 and the other amount to be $10 billion dollars. On a backward-looking account, the wealth of the decedent does not seem relevant to the determination of how much the monetary remedy should be for hedonic loss. And this sums up what for many readers might be a gut reaction to the unfairness of differing damages sum that would be paid to the estates of Rich and Poor for their respective deaths.

As I have stated, however, the main purpose of this Article is to consider the question of damages for hedonic loss through the lens of a "forward-looking" approach to tort law. Thus, I now leave aside concerns of equity and focus purely on the question from an efficiency standpoint.

110. *Id.*
111. *Id.*

But this disparity between sums paid to Rich and Poor is also bad from an efficiency standpoint. The happiness loss to Rich and Poor (we could stipulate) is the same (due perhaps to the same number of expected future years that were forgone, with each of the years in Rich's future containing the same amount of happiness as each of the years in Poor's future), and thus the optimal incentives should make it that the same amount of effort is expended by the potential tortfeasor to prevent the respective deaths of Rich and Poor. Thus, with the VSL approach, according to which the damages to be paid are a function of the decedent's wealth, the killing of Poor might be enormously under-deterred and the killing of Rich might be enormously over-deterred.

In terms of the forward-looking account, what the foregoing shows us is that the happiness-to-money translation is happening at the incorrect juncture in the investigation of our topic. For the incentives to be optimal, we want the potential tortfeasor to internalize the amount of happiness loss that would be incurred by the victim. Thus, what we need is for the happiness-loss cost to the victim to be borne by the tortfeasor (so that it will be taken into account in the tortfeasor's actions). What this then means is that the tortfeasor should be incentivized to expend up to the amount of happiness that would be lost by the victim (if he is killed) to prevent this loss of the victim (and these incentives would be brought about by forcing the tortfeasor to pay this sum in damages in tort). Up to what sum of money would this require the tortfeasor to expend? This sum of money would be the sum of money, which, if expended by the tortfeasor would cause him to have the happiness loss in question. Thus, what we see here is that the happiness-to-money translation should be occurring on the tortfeasor's utility curve. This is importantly different from the VSL approach, which uses the victim's utility curve to translate happiness into money. I will return to this in greater depth below.

In sum, it seems to be a mistake *both on a backward-looking account and on a forward-looking account* for the dollar sum paid by a tortfeasor for the decedent's hedonic loss to at all be a function of the decedent's wealth. The underlying mistake is the same from both perspectives: carrying out the happiness-to-money translation on the decedent's utility curve. This renders the compensation dependent on the decedent's wealth. But the decedent's wealth cannot be relevant to an articulation of her loss from *any* perspective, because (1) the *actual* loss is in happiness rather than wealth and (2) it cannot be translated from happiness to wealth if this translation is carried out on the decedent's utility curve. From the backward-looking perspective, the result is an injustice: gross under-compensation of Poor. From the forward-looking perspective, it is inefficient: the cost internalized by potential tortfeasors is rendered arbitrary and therefore cannot provide optimal incentives. Both problems can be avoided by switching to a monetary-loss calculation on the tortfeasor's utility curve.

C. SUMMARY

The proponent of the VSL approach would not deny that happiness is what the decedent has lost. He would agree. And then, he would say, he is trying to find a way to quantify that loss in terms of dollars. I, too, agree that we need to carry out a translation from happiness to dollars. After all, figuring out how best to do so indeed is the entire purpose of this Article. In my view, however, the problem with the VSL approach is that it carries out the happiness-to-money translation at the wrong juncture of the analysis. Instead of carrying out this translation on the utility curve of the decedent, we instead should carry out the translation somewhere else—namely on the utility curve of the tortfeasor.

Having identified the problem and alluded to the solution, I now turn to offering my proposed alternative to VSL. As I will argue, this proposal is not afflicted by the same difficulties that afflict the VSL approach.

III. MY ALTERNATIVE PROPOSAL

This Part elaborates on my proposal, and it further explains how it is not afflicted by the problems that I have argued afflict the VSL approach. In particular, as I will argue, this proposal is better than the VSL account in *two* key ways—related to the two arguments against VSL raised above. First, and most importantly: My account brings about optimal incentives for future potential tortfeasors whereas the VSL account brings about suboptimal incentives for future potential tortfeasors. Second, talking about the "monetary loss of the decedent" in the way that the VSL approach speaks about it does not even make theoretical sense, but my account avoids this problem and enables us, coherently, to provide a solution to the "infinity problem."[112]

I first elaborate on how my proposal works in theory, and I then explain how it works in practice.

A. MY ACCOUNT

1. Overview

As stated above, we can stipulate that the happiness loss to Rich and Poor is the same, and thus the optimal incentives should make it that the same amount of effort is expended by the potential tortfeasor to prevent the respective deaths of Rich and Poor. More specifically, we want the potential tortfeasor to internalize the amount of happiness loss that would be incurred by the victim. What this then means is that the tortfeasor should be incentivized to expend up to the amount of happiness that would be lost by the victim (if he is killed) to prevent this loss of the victim, and these incentives would be brought about by forcing the tortfeasor to pay this cost as damages in tort. What sum of money would this happiness sum amount to? This sum of money would be the sum,

112. *See supra* Part I.B.

which, expended by the tortfeasor, would cause him to have the happiness loss in question. Thus, the happiness-to-money translation occurs on the tortfeasor's utility curve.

The alternative approach proposed in this Article is outlined as follows:

Step 1: Determining what the relevant amount of happiness loss is.
- (A): Determining who the correct person or group of people are for determining happiness loss, and determining whether to use expected or actual loss.
  - (i): Determining who the correct person or group of people are for determining happiness loss.
  - (ii): Determining whether to use expected or actual loss.
- (B): Determining how much happiness the relevant person or group of people lost.
  - (i): The empirical questions about the relevant person's (or group of people's) expected future(s).
  - (ii): The theoretical question about which aggregation mechanism to espouse.

Step 2: Translating the happiness loss into a dollar-sum loss on the tortfeasor's utility curve.

2. Details

The first step in carrying out my theory is to determine what the relevant amount of happiness loss of the decedent is (be it (1) an "actual" loss or an "expected" loss, and (2) be it a loss to the decedent or a loss to a larger group of possible or foreseeable decedents). The second step is to translate this amount of happiness loss into a dollar sum of loss on the tortfeasor's utility curve. Both steps will involve a number of sub-steps.

Step 1: Determining what the relevant amount of happiness loss is. The first step is to determine what the relevant amount of happiness loss is. This step has a few subsections. The first subsection involves, first, the theoretical step of determining whether we want to focus on expected loss or actual loss, and second, the empirical step of identifying who the correct person or group of people are for determining the happiness loss. The second subsection involves identifying how much happiness this person or group of people lost.

Step 1A: Determining who the correct person or group of people are for determining happiness loss, and determining whether to use expected or actual loss.

Step 1.A.i: Since we are considering a forward-looking account, which focuses on bringing about optimal incentives for potential tortfeasors, the question is whom the tortfeasor knew or had reason to know that he was risking harming. In some cases, it might be that there was reason to know that only the particular decedent was the one who was being exposed to the risk. If so, then the analysis would be about what the loss (be it *actual* loss or *expected* loss) was

to this specific decedent. If, however, the risk were to a broader group of people, then the appropriate determination would be about what the expected happiness loss to this broader group of possible victims would be—be it that whole population or be it some narrower subset of the population (for example, people who fly on planes). (If we are considering a group of people and not just the decedent, then we would certainly be using expected loss and not actual loss, because there was no actual loss to anyone in the group other than the decedent.) Thus, the first task is to determine the relevant person or people to consider the happiness loss of. This inquiry will be case-specific and empirical.

Step 1.A.ii: Next, we must answer the question of whether to use actual or expected losses of happiness. In other words, actual loss is the loss of happiness that the decedent actually incurred, and the expected loss is the happiness loss that the tortfeasor would have had reason to foresee that the decedent would incur if he were to die. The determination of whether to use actual or expected losses seems to be a theoretical question that, for the most part, is not case-specific (but, rather, which would be a question of law[113]), and which involves precisifying my account—not resolving specific applications of my account in certain cases. As stated above, this question would only arise if we are considering only the loss to the victim himself, because if we were considering a broader group of "possible victims," then we would necessarily be taking an expected-loss approach and not an actual-loss approach.

Reasonable minds could differ regarding whether we should use actual loss or expected loss. And, furthermore, there might be intermediate positions according to which a hybrid position is used. This type of a question arises elsewhere in tort law as well: According to the eggshell skull rule, tort defendants are typically liable for the amount of actual losses (and not merely foreseeable losses) even if the extent of the damages are much greater than expected (that is, because the victim has an "eggshell skull"), but in order for the defendant to be liable for the actual losses, the *type* of injury must have been foreseeable.[114] The context here in this Article could import a type of distinction similar to that which is used in the eggshell skull rule, but other options are possible as well.

It seems to me that, consistent with the notion of basing damages on facts about the tortfeasor (for example, his financial position, his mental state, his incentives and cost-benefit analyses, and so on), we should probably focus on

113. *See generally* Benn v. Thomas, 512 N.W.2d 537 (Iowa 1994).
114. *See, e.g.*, *id.* at 539–40.

expected losses and not on actual losses.[115] And, going forward, this will be the assumption I make (though I will often refer, simply, to "losses").[116]

Step 1B: Determining how much happiness the relevant person or group of people lost. Having determined which person or group of people are the relevant ones for determining the happiness loss and having determined whether to use expected or actual loss, the next question is to determine how great the happiness loss (or expected happiness loss) would be for this person (or group of people). This task itself involves a few nested subsections. Step 1Bi addresses empirical questions and Step 1Bii addresses a theoretical question.

Step 1Bi: The empirical questions about the relevant person's (or group of people's) expected future(s). First, we need to make empirical estimates about the person's future. We need to estimate both how many years of life the person would have lived if not for the tort, and we need to estimate how happy these years would have been for the person.

For the former question, we can rely on information about the person's age and data on life expectancies in the population. This analysis can then be tailored more specifically to this person, first by considering generic categories such as whether the person is male or female, but also by considering information about his health that we might know, and so on.

With respect to this question of determining how many years of life the decedent would have lived if not for the premature death, my view is that courts should employ a *rebuttable presumption* that the number of years that the decedent would have lived is equal to the life expectancy in the United States for a person of the decedent's sex minus his or her current age. This estimate could then be rebutted by evidence that the parties introduce. In implementing my proposal there will then be questions that would need to get ironed out by courts regarding how demanding of an evidentiary burden parties would be required to meet in their attempts to rebut the presumption.[117]

As for the question of how happy these years would have been, we can explore (1) data about how happy this particular individual had been, (2) data on typical trajectories of people's happiness over various ages, and then (3) any information about how and why we could expect this person's future happiness to conform or not conform to that typical trajectory. Further, if we are going to

115. It's important to note that even though I have distinguished between actual loss and expected loss, in reality both are types of expected loss, because we cannot know the future. Notwithstanding this wrinkle, I will still refer to these two as "actual loss" and "expected loss."

116. This approach has the further benefit that the same approach can be used in the context of focusing on just the decedent as well as focusing on a broader group of possible victims for the determination of happiness loss—whereas were we to use actual losses in the context of just the decedent, we would still have to use the expected losses approach if we were focusing on a group of possible victims.

117. Though the question of how demanding of a burden should be employed by the courts for rebutting the presumption is an important one and also an interesting one, I do not address this question here.

attempt to quantify a person's happiness, based on the type of information just described, we will of course need to articulate a metric, or a unit, of happiness. I have discussed this topic at length elsewhere,[118] but my view is that the seeming difficulty of quantifying happiness, and also the lack of a particular metric that we currently use, does not pose a problem here. We could use a variety of possible measures that could do the work we need it to, and certain measures, such as the "quality-adjusted life-year" (QALY), have been suggested.[119]

With respect to this "future wellbeing quantification" prong of the analysis, my view is that here, too, the courts can make use of a rebuttable presumption. In particular, one way to administer this prong of my proposal would be to use a wellbeing quantification scale according to which one's wellbeing ranges anywhere from a "1" to a "5," where "1" means "having an extremely small amount of happiness," "2" means "having a smaller than average amount of happiness," "3" means "having an average amount of happiness," "4" means "having a larger than average amount of happiness," and "5" means "having an extremely large amount of happiness." As for the rebuttable presumption, it would be that the decedent's future years would have been at a level 3. As was the case for the rebuttable presumption in the context of life expectancy, this estimate could then be rebutted by evidence that the parties introduce. In implementing my proposal, there will then be questions that would need to get ironed out by courts regarding how demanding of an evidentiary burden parties would be required to meet in their attempts to rebut the presumption.[120]

Step 1Bii: The theoretical question about which aggregation mechanism to espouse. After having established how many years the person was expected to have lost and how much happiness was expected to be contained in those years, the next key step in determining how much happiness was lost by the person is to determine which "aggregation function" (or "aggregation mechanism") we think is the relevant one for determining what the happiness amount is for that whole chunk of years, given the inputs that we have already determined quantities for. While some might think that the value of the happiness of the

118. *See* Michael Pressman, *Calculating Compensation Sums for Private Law Wrongs: Underlying Imprecisions, Necessary Questions, and Toward a Plausible Account of Damages for Lost Years of Life*, 53 U. MICH. J.L. REFORM 597 (2020).

119. The QALY is a measure of quality and quantity of life. For early proponents of the measure, see, for example, Herbert E. Klarman, John O'S. Francis & Gerald D. Rosenthal, *Cost Effectiveness Analysis Applied to the Treatment of Chronic Renal Disease*, 6 MED. CARE 48 (1968); Sol Fanshel & J.W. Bush, *A Health-Status Index and Its Application to Health-Services Outcomes*, 18 OPERATIONS RSCH. 1021 (1970); George W. Torrance, Warren H. Thomas & David L. Sackett, *A Utility Maximization Model for Evaluation of Health Care Programs*, 7 HEALTH SERVS. RSCH. 118 (1972); Richard Zeckhauser & Donald Shepard, *Where Now for Saving Lives?*, 40 LAW & CONTEMP. PROBS. 5 (1976).

120. Similarly, in the case of this rebuttable presumption, though the question of how demanding of a burden should be employed by the courts for rebutting the presumption is an important one and also an interesting one, I do not address this question here.

whole future equals the sum of the value of each year in the future, thus espousing a sum-aggregative aggregation mechanism, this is not the only possible approach. On the other end of the spectrum would be an averaging view according to which, for example, the happiness of the future is equal to the average happiness of each of the future years. Additionally, one could espouse hybrid views that give some weight to quantity of years and to quality of years. Determining which aggregation mechanism to espouse is a challenging task, which I explore in depth elsewhere,[121] and there are strong reasons for and against the various possible views. Choosing an aggregation mechanism to espouse, however, whichever it might be, is a crucial step in determining how much expected happiness the person lost. It might seem prima facie, however, as though it does not matter which aggregation mechanism we choose because it might appear that the different accounts would simply be different ways of describing the same data and that they would not result in different prescriptions. As we will see, this indeed might be the case if the expected number of years lost by the decedent were equal to the expected number of years that the tortfeasor has left to live, but if this is not the case, then the different aggregation mechanisms would indeed result in different prescriptions on my account.[122] Further, since in most cases the expected loss of years of the decedent will not be identical to the expected number of years remaining in the tortfeasor's life, the choice of aggregation mechanism will almost always affect the prescriptions on my account. Thus, it indeed is crucial to articulate which aggregation mechanism is most plausible.

Step 2: Translating the happiness loss into a dollar-sum loss on the tortfeasor's utility curve. At this point we will have come to a determination of how much happiness was lost. The next step is to determine how much of a monetary loss to the tortfeasor would bring about a happiness loss of this amount to him.

I first address how, in theory, this might work. Next, I provide more details about how we could carry this out in practice.

As for how, in theory, we should strive to arrive at the correct dollar sum: To consider this question, we will explore questions similar to those that we explored in attempting to determine the decedent's happiness loss. For one, we will import our determination of which aggregation mechanism we find most

121. *See* Michael Pressman, *Aggregating Happiness: A Framework for Exploring Compensation for Lost Years of Life*, 69 DEPAUL L. REV. 875 (2020).

122. The reason for this is that that if the expected length of the forgone future of the decedent is a different from the expected length of the remaining life of the tortfeasor, then this is an example of what I call a "different-numbers case." For detailed discussions of "different-numbers cases" and the difficulties associated with satisfactorily resolving them, see Pressman, *supra* note 118, and Pressman, *supra* note 121.

plausible.[123] Next, we will explore the same types of information about the tortfeasor as we did about the decedent in our inquiry into determining the amount of his happiness loss. For example, for one, we will consider how many years left we expect the tortfeasor to have in his life. Thus, suppose, for example, that we espouse a sum-aggregative aggregation function and that we determined that the decedent's expected loss was sixty units of happiness (twenty years of life of a happiness level of 3). Now suppose that the tortfeasor's expected future is fifty years long. If so, we would want to distribute the sixty-unit loss across those fifty years, and we thus would strive to impose on the tortfeasor a loss of 1.2 units of happiness per year. If, on the other hand, we espoused an averaging view in a case with these same facts, we then, instead, might strive to lower the tortfeasor's happiness level by three units per year.[124]

The next key task in exploring information about the tortfeasor is to infer what his utility curve would look like. In other words, we attempt to determine how much of a monetary loss would bring about the particular happiness loss we are striving to inflict on him. In order to determine this, various things could be relevant—most importantly, the tortfeasor's wealth. This is because people typically have diminishing marginal utility of wealth[125] and we can make generalizations about the person's utility function (for example, what the slope of the curve is at the current moment) based on his wealth. We could thus create a master function, based on empirical studies, which could serve as a default utility-to-money translation table. This essentially would amount to a typical function of this sort across all people in the population (that is, averaging across all possible dispositions (note that this is not averaging across different wealth levels[126])).

This, in theory, is what we should be attempting to do. As for how, in practice, to carry this out, I propose the following. And, as with my suggestion for how to carry out the determination of how much happiness was lost by the decedent, the following determination involves the use of rebuttable presumptions. Also, the reader should be forewarned that, in the following explanation, it will seem as though I am employing VSL—the very notion that I have been decrying the use of! Bear with me for a few short paragraphs and I

123. In my view, this is something that should remain constant in our analysis and should not be person-specific. One could, however, argue that this too should be person-specific, but I will assume for our purposes that it is held constant.

124. Note that, as I discuss elsewhere, *see* Pressman, *supra* note 121, there are different versions of averaging views.

125. For an early discussion of this phenomenon, see JOHN STUART MILL, PRINCIPLES OF POLITICAL ECONOMY WITH SOME OF THEIR APPLICATIONS TO SOCIAL PHILOSOPHY 804 (W.J. Ashley ed., Longmans, Green & Co. 1909) (1848).

126. Note that this is not averaging across different wealth levels in the population. Different wealth levels constitute different points on the x-axis. Rather, the curve that I'm suggesting we use would be one that averages across the utility curves of all people, where each person's utility curve shows what their utility would be for each possible wealth amount that they might have. Thus, for the purposes of creating this averaging curve, it is not relevant what amount of wealth any particular person actually has.

will then explain why my usage of VSL in this context (when exploring the tortfeasor) is not problematic. (Also, as I will show, there also is an additional version of the below approach that I think is slightly better and that also does not rely on the same data.)

The question here is what dollar sum would bring about a loss to the tortfeasor of the "happiness amount" that was lost by the decedent. Here I suggest we use as a benchmark an individuated VSL sum for the tortfeasor: We currently have a VSL sum (circa $9 million) that averages across the whole population. Using the same data, if we took note of wealth and, say, age of people in the studies, we could obtain more fine-grained VSL data that is a function of wealth and age. Then, in order to determine which portion of the data corresponds to this tortfeasor, we could have presumptions that (1) the number of years of life that the tortfeasor has left is equal to typical life expectancy for a person of his or her sex in the United States minus his or her age, and that (2) he or she is of average happiness (that is, at a level 3). Again, these presumptions would be rebuttable. Then, suppose that, using the individuated VSL data, we were to get the result that the tortfeasor's VSL is, say, $20 million. Suppose further that the presumptions are un-rebutted and we have the finding that he has twenty years of average happiness left. We then can attribute a dollar sum to a year of average happiness: $1 million. If the decedent lost, say, thirty such years, we can then arrive at a dollar sum to be paid by the tortfeasor for the hedonic loss: $30 million.[127]

Here, however, the reader might be surprised to see my suggestion that we use the VSL framework, since I have been arguing against this framework. Despite appearances to the contrary, however, my usage of the VSL framework in this context does not run afoul of the points that I have made in this Article up until now. Here is why:

In the context of the usage of VSL on the decedent's utility curve, those who espouse the VSL approach take as an input what people would pay/accept to avoid/incur an increased chance of death of 1/10,000, and then they infer a dollar sum to be attributed to the full loss of life. What I have objected to is the inference that a dollar sum can be attributed to the full life. In the context here, however, I am instead using the VSL data to make inferences from the dollar sum attributable to an increased chance of death of 1/10,000 *to the dollar sum attributable to the loss of, say, 1/20 of one's future twenty years of life*. (I did refer to the VSL of $20 million, but what I was really doing was going from a dollar valuation of a risk to a dollar valuation of a finite portion of one's expected future, and I was referring to the VSL as shorthand to help make the calculation

127. If the presumption of a happiness level of 3 is rebutted and shown to be, say, a 4, there certainly will be questions about how much of a dollar shift this would entail. This type of imprecision, however, does not seem to be different in kind from types of determinations that get made in compensating for non-economic harms in cases that do not involve death. Thus, although there would not be perfect precision, I think that this does constitute a tractable framework.

clearer.) Although the various "non-fatal" and "fine-tuning" concerns with the VSL approach apply here, the gripes that I myself raised do not afflict this type of an inference about trading money for life-years (when the life-years do not constitute one's entire future). Thus, I do think that this approach can be used to develop a benchmark for trading off money for life-years.

Despite the fact that, in my view, this type of usage of the VSL framework is workable for establishing a benchmark in this context, I think that we can do better. The VSL strategy that uses as data what people are willing to accept/pay for the incurring/avoiding the increased chance of death of 1/10,000 is susceptible to the various fine-tuning concerns addressed in Part I.B.[128] Many of these can be avoided if we instead use the following approach to this data: A better benchmark can be reached on the tortfeasor's utility curve by, instead of using labor force and consumption decision data about what people would pay/accept to avoid/incur an increased chance of death of 1/10,000, instead using the results of surveys of what people (of various ages and with various amounts of wealth, and so on) would pay/accept for an increase or decrease of one's life by one year, and then extrapolate from this sum to determine the benchmark on the tortfeasor's utility curve. Although this would be dealing with hypotheticals rather than seeing how people indeed make decisions in these situations, this data would be better because it would directly address cases of certain loss of a period of one's future, rather than cases of a percent risk of a full loss of life. This approach would thus much more directly and accurately help us determine (or estimate) how much money a person would accept for the loss of happiness of a year of life. To be clear, however, this questionnaire-based suggestion of mine would still amount to an exploration of how people trade off dollars versus life-years (quality versus quantity of life), and it thus is of the same general type of approach as the VSL-based approach to getting a benchmark, and thus this just amounts to a way of tweaking the benchmark. But I do think that this would be an improvement over the VSL-based benchmark. And, further, even the VSL-based benchmark discussed here does not, in my view, fall prey to the arguments against the standard usage of VSL that I have made throughout the Article up until here.

In sum, using the framework articulated here and making the presumptions described—unless successfully rebutted by the parties—would enable us to determine what dollar sum in damages would bring about a loss in wellbeing to the tortfeasor that would equal the wellbeing loss that the decedent incurred as a result of his or her premature death. To the extent that any of the presumptions

128. *See supra* Part I.B.

are successfully rebutted by evidence introduced by the parties, the appropriate dollar sum for damages should then be adjusted accordingly.[129][130]

This is the sketch of how my proposal works. There are of course additional questions about aspects of how this will be implemented. I address some of these questions below in Part IV.[131]

B. MORE IMPLEMENTATION DETAILS AND SOME BLUEPRINTS FROM OTHER AREAS OF THE LAW

This Subpart further addresses the question of what reforms I am advocating for in order to implement my account. The main general reform I am advocating for, of course, is that the damages sum for decedents' hedonic losses be determined in the way that I have articulated. But this will involve changes to how a few different topics are handled by the legal system, and then, within each topic, there will be a variety of specific reforms needed.

As for which topics will need to be handled differently, the two main ones, which are described separately in what follows, are: (1) the relevance of, and inquiry into, the defendant's wealth; and (2) the relevance of, and inquiry into, facts about the happiness and mental life of both parties (and often of broader groups of individuals in society, be it the entire population or some smaller subset thereof).

Although changes will indeed need to be made in both domains, in neither domain are the new procedures ones that are entirely new to the law as a whole. In both contexts, there are other areas of the law to which we can turn for guidance and for a blueprint of how to carry out reform in this area of the law. This is particularly the case in the context of the relevance of the defendant's wealth to damages. Here we can learn a lot from the treatment of this issue in the context of punitive damages. In the context of inquiring into happiness, although there is not a single analogous domain that currently implements the changes I advocate for, we can learn somewhat from a number of areas, including our current treatment in tort of cases of non-economic damages.

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129. To the extent the reader is concerned about the lack of perfect precision in translating wellbeing loss into a dollar sum, the reader should note that this is not a concern that uniquely afflicts my approach here. This precision is also lacking in any award of non-economic damages—even in cases that do not involve death: Similarly, in non-death cases of non-economic damages, there is far from a precise science about how translate lost wellbeing into money, and we simply try to determine what sum of money would bring about the particular gain or loss of wellbeing (which in a non-death non-economic damages case would be trying to put the plaintiff back on his original indifference curve).

130. Further information could also perhaps be introduced in order to depart from the calculation described, though there could perhaps be limitations on additional data to be introduced, and even if additional data could be introduced, there could perhaps be a demanding standard making it difficult to rebut the standard presumptions.

131. There are also, however, some theoretical objections that one might have. For one, one might think that the happiness of one person cannot be compared to that of another. While I think that it's hard to make comparisons in this domain with precision, I do think that the endeavor is still a workable one. I consider this topic further elsewhere. *See* Pressman, *supra* note 118.

This is not to say that novel and complex issues of implementation and administration will not arise in the current context, but it does mean that in implementing these changes we will not be starting from scratch.

Within the contexts of (1) the relevance of, and inquiry into, the defendant's wealth; and (2) the relevance of, and inquiry into, the happiness and mental life of both parties and possibly people in the broader population, various specific changes will need to be made. Although these proposals for changes will take various forms, the vast majority of them will be directed at judges. In the vast majority of cases, the place for the changes to be made is likely in jury instructions—with various additions and subtractions being needed. This is because in most of these instances, the relevant changes are within the judge's discretion. In other instances, however, it might be less clear whether a change is within the judge's discretion, and the change might require prior conclusions as a matter of law. In some (though not all) of even these instances, however, the appropriate conclusion as a matter of law might be a function of the judge's determinations about the merits of my account. In some situations, however, the implementation of aspects of my account might require changes to be made by actors other than judges. For example, these changes could take the form of a change to a rule of evidence. Furthermore, in some instances, legislative changes might either be required or, even if not required, it might be the best option so as to bring about greater uniformity in the practices of individual judges.

For all of these considerations of what gear in the legal machinery must carry out a particular change, and whether a particular change is required, the answers will, of course, often vary by jurisdiction.

1. The Relevance of, and Inquiry into, a Defendant's Wealth

My account introduces a few moving parts, and one of these is the relevance of a defendant's wealth for the damages sum representing the decedent's hedonic loss. This, however, is not a completely new type of concept that the courts would have to adopt. (And, importantly, note that it is also the case that on an individuated VSL account, one party's wealth would be relevant as well—albeit the wealth of the decedent rather than that of the defendant—so it too would have this feature.) Although a defendant's wealth typically is not admissible for the determination of damages, there is a context in which the defendant's wealth typically is admissible for the determination of damages: punitive damages award determinations.

Further, and as I will also mention in Part IV.C, below, there are also various ways in which states place certain restrictions on punitive damages sums.[132] For instance, some states place limits on the size of the punitive damages award, and in California, for example, some courts have limited punitive damages so that they are not greater than ten percent of a defendant's

132. *See infra* Part IV.C.

net worth.[133] There is, however, an ongoing debate about whether punitive damages calculations *should* consider the wealth of the defendant, and about various related sub-issues.[134] In addition, the Supreme Court of the United States has required punitive damages sums to bear certain relationships to compensatory damages sums—requiring, as a general rule (though there indeed are exceptions), that the punitive damages sum not be greater than nine times the compensatory damages sum, and holding that punitive damages sums exceeding this ratio violate due process.[135]

In sum, both because a defendant's wealth can be relevant in the context of punitive damages, and because of the various details about how courts have addressed various restrictions on the size of punitive damages awards and other details about what sums for punitive damages can be proper, the context of punitive damages can be used as a blueprint for how a defendant's wealth can be used in the context of damages awards for a decedent's hedonic loss. Further, and as I will also address in Part IV.C, because in the context of punitive damages there have been restrictions on the amount of damages, if we were to determine that in the hedonic-loss context we similarly would want to have certain reductions and restrictions on damages, this is another way in which the punitive damages context could be helpful in providing a blueprint for the context of hedonic-loss damages.

Thus, in determining the procedures and practices regarding how to have the damages sum be a function of the defendant's wealth (and also in considering various concerns that might arise in doing so[136]), we can look to the punitive-damages context for guidance.

133. Storage Servs. v. Oosterbaan, 262 Cal. Rptr. 689, 700–01 (Ct. App. 1989); Michelson v. Hamada, 36 Cal. Rptr. 2d 343, 359 (Ct. App. 1994).

134. *See* Leila C. Orr, *Making a Case for Wealth-Calibrated Punitive Damages*, 37 LOY. L.A. L. REV. 1739, 1770 (2004); Keith N. Hylton, *A Theory of Wealth and Punitive Damages*, 17 WIDENER L.J. 927, 928–29 (2008). *But see* Kenneth S. Abraham & John C. Jeffries, Jr., *Punitive Damages and the Rule of Law: The Role of Defendant's Wealth*, 18 J. LEGAL STUD. 415, 415–16 (1989) (arguing that defendant's wealth is irrelevant to the goal of deterring socially undesirable conduct and thus should not be considered in assessing punitive damages).

135. *See* State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408, 424–25 (2003); *see also* BMW of N. Am., Inc. v. Gore, 517 U.S. 559, 581–82 (1996); Philip Morris USA v. Williams, 549 U.S. 346, 352–53 (2007).

136. While various potential problems could arise when courts (and juries) consider a defendant's wealth to be relevant for the determination of damages, once such potential problem is the concern that juries might use information about defendants' wealth in impermissible ways. For example, juries might be tempted to make the deep-pocketed defendant pay a large sum in damages just because he can, and the jury might be seeking to do what in their view might be furthering distributive justice in society. This concern and a variety of related ones are serious and must be carefully guarded against. There are, however, ways in which the law deals with these types of concerns, and in my view, these are probably sufficient. Once again, we can look to the context of punitive damages for guidance both regarding possible problems to watch out for and, also, regarding possible solutions to these problems.

2. *Relevance of, and Inquiry into, the Happiness and Mental Life of the Parties (and Possibly of Others)*

The second key area of change required by my account in order for the appropriate analysis to be carried out is for various forms of happiness data to be taken into account in determining the damages sum—and thus for this data to be introduced into evidence. We will need to obtain data in some cases about the expected future happiness of the specific decedent, and in other cases this same data for broader groups of the population. Similar data will need to be obtained for the tortfeasor.

Additionally, determinations will need to be made about which aggregation mechanism (for aggregating happiness across years of a life) is the most plausible, and there are various ways in which juries or courts can come to determinations about this. First of all, this determination could be left to the judge. Second, it could be left for the jury to determine, and, if so, there could be a wide range of guidance or non-guidance that they could receive in jury instructions (not only in terms of how restrictive or non-restrictive the jury instructions are regarding requiring certain conclusions about the aggregation mechanism, but also in terms of how much or little non-binding and simply helpful guidance the court provides in the jury instructions). Additionally, questions arise about the details of what aspects of these topics can be testified to by expert witnesses.

While ironing out the details of how courts can and should determine the answers to a number of these procedural questions is beyond the scope of this Article,[137] the key areas of change here, as with the topic of the defendant's wealth, are areas that are largely within the discretion of the judge, and thus the reform proposals are primarily directed to judges. As with the topic of the defendant's wealth, however, there might be some reform proposals directed toward those writing the rules of evidence and, in some cases, the target of the proposals might be the legislature—either because this would be necessary or because the uniformity it would effectuate would be desirable.

C. SUMMARY

The VSL approach carries out the happiness-to-money translation on the decedent's utility function. My account, on the other hand, which this Part has provided a sketch of, carries out the happiness-to-money translation on the tortfeasor's utility function. Arguing for the shift of the happiness-to-money translation onto the tortfeasor's utility curve is the key move of this Article. In my view, the proposal that I offer has two key advantages over the VSL approach (and avoids falling prey to the problems I raised for the VSL approach): (1) It brings about optimal incentives for potential tortfeasors, since it forces them to

137. I tackle these and related questions in my article, *The Relevance of Defendants' Wealth for Forward-Looking, Backward-Looking, and Mixed Accounts of Tort Damages*. *See* Pressman, *supra* note 17.

internalize the actual loss to the decedent; and (2) it avoids the incoherence problem faced by the VSL account, which must rely on the meaningless concept of "monetary loss to the decedent."

Note, however, that at this point it would be premature to declare that my proposal is superior to the VSL approach. This is for two reasons. First, I have not yet engaged with Arlen's arguments (mentioned in Part I.C)[138], and I have not yet explained how and why my proposal is immune to her important points. Second, I have not yet raised and considered a variety of other possible considerations and objections that probe the plausibility and viability of my proposal. In Part IV, I will carry out both of these tasks—thus providing further clarification of my proposal and providing a more robust defense of my proposal.

Before doing so, however, I first briefly explain that my proposal has implications that extend far beyond the context of cases involving death. Indeed, my proposal has implications for all of tort law, more generally, and even for various areas of the law outside of tort law. In particular, my arguments here, if persuasive, threaten some of the foundational assumptions of the law-and-economics literature and the willingness-to-pay literature. I address these extensions in detail elsewhere,[139] but here I just briefly mention the broader implications that my proposal in this Article has:

Up until now, I have been discussing my positive proposal in the context of providing a remedy to wrongful-death plaintiffs for decedents' hedonic loss. While this context indeed is my primary focus in this Article, my positive proposal's claims about (1) optimal (forward-looking) incentives being brought about by damages rules that require tortfeasors to internalize the *happiness* cost that their activities impose on others; and (2) the relevance of using the tortfeasor's utility curve, are also intended to apply, much more broadly, to tort law on the whole (and beyond tort to other areas of the law). In order for tort law to bring about optimal incentives, tort damages should always require tortfeasors to internalize the *happiness* costs that their activities impose on others, and translating happiness to money on the *defendant's* utility curve is of key importance in doing so. This is a normative claim. The law, I argue, should do this if it wants to bring about optimal incentives going forward for potential tortfeasors. I also, however, in part provide a descriptive version of this claim: I argue that in most—though, not in all—non-death situations, the damages measure in tort that is currently used is indeed both consistent with and ultimately rooted in the rationales behind these arguments of mine.

This descriptive claim may seem surprising, and that is because, as I show elsewhere,[140] in most cases it seems that tort law does not use the defendant's utility curve, and it instead typically uses the plaintiff's utility curve. (Indeed,

138. *See supra* Part I.C.
139. *See* Pressman, *supra* note 17.
140. *Id.*

the ubiquity of using the plaintiff's utility curve is the reason why it was assumed by proponents of VSL, and seemingly everyone else, that we must use the plaintiff's utility curve in our attempt to determine the damages sum to attribute to plaintiffs' hedonic loss in wrongful death suits.) I show why it is that we typically use the plaintiff's utility function in determining a damages sum, and why this common way of determining damages is not inconsistent with my theory. I also, however, show that there are some situations in which using the plaintiff's utility function is *not* consistent with my theory, and I argue that in these situations it is our practices that should be revised.

Thus, interestingly, while I had set out to provide a plausible account of what dollar sum for hedonic-loss damages in wrongful-death suits would provide optimal incentives going forward for future potential tortfeasors, it turns out that exploring this context enables us to learn something more fundamental about tort law on the whole (as well as about other areas of the law, and about core principles underlying law-and-economics theory). This more fundamental insight was previously obscured in non-death contexts.[141]

IV. A CLARIFICATION AND CONSIDERING FOUR OBJECTIONS

This Part considers and responds to a number of objections to my proposal (that is, my main proposal for damages in *death cases*). First, however, I discuss a key point of clarification. This point of clarification will tie into aspects of a number of the objections I raise in this Part, and it will serve as a preemptive partial response to aspects of these objections.

Although my account in theory states that the most efficient results will be brought about by calculating compensation for decedents' hedonic loss in wrongful-death cases by using the defendant's utility curve, there will likely be various efficiency considerations in practice that cut in other directions. We must take into account people's tastes for fairness (which could be at odds with the prescriptions of the Hand Theorem[142]) and other preferences that people might have and take these at face value and treat them as fixed; we must consider various considerations of administrability; and we must consider various incentive effects. All of these factors might render it more efficient in certain cases to employ a VSL account that makes the happiness-to-money translation on the decedent's utility curve, or to employ something wholly different from the account that I have proposed. Thus, even on my account, there might be good

141. If my arguments on non-death cases are successful, they not only provide support for my claims about tort law on the whole, but they will also reinforce my arguments specifically in the context of death. After all, support for my theory broadly construed is also support for one of its specific applications—namely, the context of hedonic-loss damages in wrongful-death suits.

142. *See* United States v. Carroll Towing Co., 159 F.2d 169, 173 (2d Cir. 1947). According to Learned Hand's famous formula ("The Hand Theorem"), a party has breached his duty of reasonable care when the burden of taking a precaution to prevent a loss is less than the loss multiplied by the probability of the loss occurring absent the precaution being taken. Hence, Hand's Theorem is represented mathematically as B = P * L, where the duty has been breached when the precaution is not taken, and B is less than P * L. *Id.*

reason to adopt VSL in some (or possibly, it could turn out, even in *all*) cases. This will not render my proposal less correct, and it likely would not even reduce its value much.[143] Thus, regardless of how the theoretical and practical efficiency considerations end up weighing against each other on net, my proposal and arguments will still remain valuable. Although I have not said here whether I think my account is still efficient *in practice*—and although an empirical analysis of that question is beyond the scope of this Article—I will argue, in Part V, that my account is almost certainly more efficient in practice than the alternatives, just as it is in theory.

As we will see, a number of the objections I will raise in this Part will be related to this pre-emptive clarification.

A. OBJECTION 1: WHY SHOULD WE INDIVIDUATE?

Objection 1 comes in two subparts: 1a and 1b.

Objection 1a: Why do we want individuation? In arguing that there was a problem with the VSL approach, one of your main points was to argue that VSL was bad because damages awards for hedonic loss would vary dramatically based on the wealth of the decedent, potentially enabling Rich to receive billions of dollars from a tortfeasor while Poor might receive one hundred dollars from the tortfeasor, while we could stipulate that the hedonic loss to both Rich and Poor was the same. Why is the solution not simply to use a *uniform VSL sum*, which takes the average VSL value in the population as a whole and uses that for all decedents regardless of how wealthy or poor they are? Since this resolves one of your primary criticisms of VSL, perhaps we need not abandon it after all.

Objection 1b: Relatedly, but more generally: Why do we want individuation in the tort system in the first place?

Before addressing this objection, I first mention a key point to keep in mind: This objection is about what would *in theory* be efficient. Thus, it does not matter here whether, for considerations of administrability or other practical reasons, we want an individuated tort system or not. For the reasons stated in the clarification at the beginning of Part IV, it is consistent with my account that we would in some situations—or even in *all* situations—ultimately determine it maximally efficient, in practice, to *not* individuate. The question here, however, instead is about whether individuation is theoretically desirable.

Having said this, I now answer Objections 1a and 1b (in reverse order).

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143. If it turns out that even in practice, my account should be implemented in all or most cases, that is extremely valuable. But even if it turns out to only be in a very small number of cases that it should, in practice, be implemented, this too would still be valuable. Further, even if it turns out that my proposal should never, in practice, be implemented, the proposal is still valuable. This is for two reasons: (1) It might turn out there are other sub-areas in the law where applying my proposal would indeed prescribe changes, so it is useful to become clear on it in theory even in the context I discussed; and (2) even if there were no other areas where my account would prescribe change, it still would be valuable to arrive at an accurate understanding of why it is that the current state of the law is what it is, and according to my proposal, we have at the very least been operating under a misunderstanding regarding the rationale for the current state of the law.

Response to Objection 1b: In my view, the ideal indeed is for the results of a case to be perfectly tailored to the litigants in the case. Why? This is a notion that sits at the core of tort law. And for good reason. Leaving aside questions of administrability, why would we ignore more information that could bring about a better result—one that is more tailored to the specific case? We do not want to just smooth over relevant facts. Notably, this is the case from both backward-looking and forward-looking perspectives of tort law.

Response to Objection 1a: It is true that in identifying problems with the VSL approach, I pointed to the fact that it seemed mistaken for the damages sum for a decedent's hedonic loss to be a function of the decedent's wealth, and I pointed to how an individuated version of VSL could yield enormous discrepancies between what a tortfeasor would pay for killing Rich and for killing Poor—and how this seemed to be a mistake according to both backward-looking and forward-looking accounts of tort.

But, for the reasons given in response to Objection 1b, we do (at least in theory) want an individuated account. Thus, even if a uniform VSL would indeed be better than an individuated VSL in a certain way (namely, that the damages sum paid for killing a person would not be a function of the particular decedent's wealth), this would simply be curing a symptom associated with an individuated VSL account rather than curing the underlying problem. VSL would continue to mistakenly base the damages sum on the wealth of victims (even if it is based on an average across the whole population). It carries out the happiness-to-money translation in the wrong place whether or not we individuate. Instead, in my view, while the damages sum should be a function of the decedent's *happiness loss* (be it decedent-specific or be it an average across the whole population or a subset thereof), it should not be a function of the wealth of any decedent, individual or average. Rather, the person whose *wealth* should be relevant for the determination of the damages sum is the tortfeasor.

Thus, if the numbers strike us as mistaken after individuation, this is because there is something wrong with the underlying theory that is getting us those numbers, not with the individuation. It is the VSL approach's location of the happiness-to-money translation that causes the problem, not its individuation.

B. OBJECTION 2: IS IT NOT BAD THAT, ON YOUR PROPOSAL, HEDONIC LOSS DAMAGES WOULD VARY WILDLY DEPENDING ON THE TORTFEASOR'S WEALTH?

Objection 2: You articulated a concern with an individuated VSL that it would make the damages sum be a function of a decedent's wealth and that the resulting discrepancies between damages sums for the hedonic loss of poor and rich decedents would be a bad result. But if we have an individuated account that carries out the happiness-to-money translation on the tortfeasor's utility

curve, as your account advocates for, it seems that we would get a result that is similar in the sense that the damages sums could vary just as drastically (due here to the wealth differences between very poor and very rich *defendants*—as opposed to being due to the wealth differences between very poor and very rich *decedents*). But this seems to be problematic for the same reasons as in the case of the damages discrepancy due to the discrepancy between decedents' wealth, namely: (1) It seems that the happiness loss to the decedents is the same (as we could stipulate), and thus the damages sum should be the same; and (2) relatedly, even if we are just looking at any particular case and there thus were no "discrepancy" between the results in two different cases (and thus no horizontal equity concerns), it seems that the damages sum for the decedent's hedonic loss would be so much a function of the defendant's wealth that the damages sum would feel arbitrary (and, seemingly, due to luck) from the perspective of the plaintiff. And we seemingly do not want this type of luck to be playing such a significant role in our tort system.

Response to Objection 2: First, with respect to the second aspect of this objection, that the monetary amount the plaintiff receives seems arbitrary and due too much to luck: It absolutely is not arbitrary. Yes, it might seem slightly odd at first that the monetary loss is not fully determined by facts specific to the decedent (as opposed to having the defendant's wealth play a role), but, as I have argued above: (1) It actually is incoherent to attempt to carry out the happiness-to-money translation on the decedent's utility curve because he no longer is alive and there is no financial equivalent for the lost years that can be derived on his utility curve, which does not exist; and (2) even if the happiness-to-money translation *could* be carried out on the decedent's utility curve, the optimally efficient incentives would be produced by carrying out the translation on the defendant's utility curve. Thus, this method is not arbitrary; it is principled, and it is efficient (at least in theory). Further, as stated above, it does crucially take as an input the amount of happiness lost by the decedent; it thus fashions a remedy that hypothetically compensates for this loss and makes the tortfeasor internalize it in his decision-making.

Second, there indeed is truth to the concern that the damages sum is in part a function of luck. The damages sum could vary widely and it might seem like the plaintiff gets a windfall benefit if the tortfeasor is very rich and the plaintiff gets a huge damages sum, and that the plaintiff gets very unlucky if it turns out that the defendant is very poor and the plaintiff thus receives very little in damages.

It is worth noting, however, that an individualized VSL system, though it does not involve "luck" in the same sense, would involve an apparently irrelevant factor in its determination of damages *to the exact same degree*, namely, the wealth of the decedent. Thus, there is a sense in which both views have this common. Furthermore, if we view the individuated VSL account from the perspective of the *tortfeasor*, the *exact same* type of "luck" would be present, because the damages sum would be highly affected by the wealth of the other

party, and here the tortfeasor might have had no reason to know, in advance, what the wealth of the person turning out to be the decedent would have been. Of course, in my view, the decedent's wealth indeed is irrelevant to the damages sum, but the defendant's wealth is *not* irrelevant, since considering it is necessary to create optimal incentives. My point, though, is just that we must live with some variability, so long as this variability is related to a relevant consideration. And if it is, then that variation must, in theory at least, be accepted.

This all leaves open the possibility that a system which appears to the public to be too luck-based could cause disutility for that reason. To the extent people find it unfair that compensation is a function of defendant's wealth (and the way in which the sum could thus also vary widely from being very high to very low),[144] and to the extent that our intuitions and tastes are that we think it should be (1) more tied to the plaintiff's situation, or, perhaps (2) be more uniform, regardless of whether or how much it looks to the plaintiff's situation versus the defendant's situation, then the answer here about what we should do thus ties in to the clarification with which I began this Part: We indeed must fully take into account the utility and disutility caused by my proposal *in practice*, and then these results must be weighed together with what I argue are the efficiency benefits that are brought about more generally, *in theory*, by my proposal. How these various effects weigh against each other on net is an empirical question that I have not yet attempted to answer.

Lastly, the objection stated that the discrepancy between the sums paid to two similarly situated decedents would be problematic in the same sense that it would be for discrepancies arising when using an individuated VSL account because the damages should be the same if the happiness loss is the same. For my answer to this concern, however, refer to my answer to Objection 1, which covers this point.

C. OBJECTION 3: WOULD DAMAGES SUMS PRESCRIBED BY YOUR PROPOSAL NOT BE UNPALATABLY HIGH TOO?

At this point it is important to speak to one proposal/argument that I have not yet addressed head-on: the proposal/argument offered by Jennifer Arlen that I mentioned in Part I.C, but which I have not yet addressed. This Subpart (1) quickly reminds the reader of what her proposal/argument is, (2) provides a first pass at an explanation of how my account avoids her concerns, (3) provides an objection she might raise in response to my comments, and (4) provides a response to her potential response to my comments.

1. Arlen's proposal/argument. Arlen argues that a damages sum that is fully compensatory to the decedent would be an infinite number of dollars and

144. Of course, the damages sum is not a function *only* of the defendant's wealth. It is also a function of the happiness loss incurred by the decedent.

thus that full compensation to the decedent is not possible.[145] Relatedly, if the damages sum were infinite, this would amount to requiring the defendant to pay all his money to wrongful-death plaintiffs. According to Arlen, however, we should not seek a compensatory sum, because we would not want to live in a world where the damages sum were indeed fully compensatory.[146] She argues that we need to take into account that we are all not only involuntary sellers of our lives but also involuntary buyers of the lives of others.[147] In light of this, she argues, instead of focusing on what a fully compensatory damages sum would be, we should seek to articulate a damages *rule*, which would be less than fully compensatory, and which we would want for our society to implement.[148] According to her, a rule of full compensation would result in most productive activities grinding to a halt because people would fear being bankrupted in the event that the risk of their causing someone else's death comes to fruition.[149] Thus, she argues, we would prefer to live in a world in which wrongful-death plaintiffs receive (and wrongful-death defendants pay) less than full compensation.[150] She leaves open the question of what less-than-fully-compensatory sum would be best.

2. My first explanation of how my account avoids Arlen's concerns. In my view, my solution enables us to avoid Arlen's objection/suggestion. She was operating under the assumption that full compensation would be infinite (or, in practice, equal in any particular case to however much money the tortfeasor has). I have argued, though, that the appropriate way to articulate the loss to the decedent is in terms of a happiness sum and not a monetary sum. This happiness sum, representing the amount of happiness lost by the decedent, thus is equal to the "compensatory happiness sum." Then, I argued that we translate the happiness sum into a monetary sum on the defendant's utility curve. Thus, this amount is the compensatory monetary sum, and this monetary sum is finite. Thus, according to my account, we indeed are able to identify a *finite* compensatory damages sum and we thus avoid the problem that Arlen envisions. Accordingly, on my view, we need not do what Arlen argues that we must do: We need not abandon a "fully compensatory sum" in favor of espousing a rule that articulates a damages sum that is less than fully compensatory.

3. An objection Arlen might raise in response to my comments. Arlen might respond as follows: Is your proposal not *relevantly similar to* the type of an account where we charge the tortfeasor an infinite amount of money? An infinite amount, or even any finite amount that equals a defendant's full monetary wealth, would be too high of a damages sum because it would stunt our ability to carry out activities in life. Your proposal may still stunt such activities, even

145. Arlen, *supra* note 5, at 1124.
146. *Id.* at 1136.
147. *Id.* at 1135.
148. *Id.*
149. *Id.* at 1136.
150. *Id.*

though it does not require infinite damages. If the finite sum it prescribes is equal to or greater than a defendant's net worth, then the situation will be identical to the one I decry, and even if it is somewhat less than the defendant's net worth, it still might be a sum that we think is too high and which will stunt activities to some degree. Or, said differently, we would prefer to live in a world where the damages sums for these cases are lower—where plaintiffs would receive less and defendants would pay less. Thus, Arlen might say that even if we use what my account calls the compensatory sum rather than the compensatory sum she considered, a rule that provides *less* than full compensation might still be better. Thus, in sum, Arlen might say that the general gist of her discussion would apply almost as much to my proposal and that I thus do not successfully avoid her objection.

4. My response to Arlen's potential response to my comments. These indeed are fair points. But I think that my position succeeds, and here is why.

First of all, I think that employing the damages sum that my proposal prescribes would indeed bring about the socially optimal amount of care—it is efficient for the potential tortfeasor to internalize the expected happiness loss of the victim in his decision making (that is, the probability of happiness loss multiplied by the amount of happiness loss that the victim would incur if the loss occurs). Any lower of a damages sum would (by definition) result in sub-optimal under-deterrence of the potential tortfeasor's risky activity. This is the case even if the damages sum would be so high as to bankrupt the potential tortfeasor if his risky activity ends up causing harm and if he incurs liability. If the damages sum that my account prescribes deters the (rational and non-risk-averse) potential tortfeasor from engaging in this activity, then (by definition) this just implies that it is socially optimal for the potential tortfeasor to not engage in the activity in this case.

Second, consider activities where the potential tortfeasor's activity indeed is socially beneficial on net—where we thus do not want the potential tortfeasor's internalization of harm incurred to deter him from engaging in the activity. In a case of this type, my account's damages measure, by definition, does not result in so high of a happiness cost internalized that the (rational and non-risk-averse) tortfeasor does not engage in the activity. Properly calculated, this damages sum will not over-deter the potential tortfeasor, and the potential tortfeasor will still engage in the activity. As for how this point squares with Arlen's potential rejoinder, my point here amounts to denying that (rational and non-risk-averse) potential tortfeasors would actually be deterred from engaging in the socially beneficial activities that she is concerned that they would be deterred from engaging in, and, thus, in my view, in these situations, socially beneficial activities will not actually grind to a halt—contrary to the scenario she envisions. As for why I do not think that the potential tortfeasor typically would be deterred in cases like this, it is because, typically, the probability of the harm coming to fruition is sufficiently low that the expected liability costs are quite low. I think that Arlen's potential rejoinder is not sufficiently taking

into consideration the extent to which the low probability of the harm coming to fruition lowers the expected happiness cost being internalized.

In addition to this potential source of the disagreement between my position and Arlen's potential position (that is, in cases where it is socially optimal for the potential tortfeasor to engage in the activity), there is one other potential source of the disagreement, and it arises out of one remaining scenario I have yet to consider: cases in which it is socially optimal for the tortfeasor to engage in the activity (and where a rational and non-risk-averse potential tortfeasor thus would still engage in the activity despite there being a risk of liability), but where the potential tortfeasor is risk-averse, and sufficiently so that the expected liability costs deter him from engaging in the activity that it is socially optimal to engage in.

In this last type of case, the inefficient result (of the potential tortfeasor failing to engage in the activity that it is socially optimal to engage in) indeed might be brought about by the damages sum prescribed by my account. In cases like this, however, the solution is not to alter the damages sum. After all, for the reasons I have articulated, my account does prescribe the correct amount of internalization. The problem in the context of the risk-averse potential tortfeasor lies elsewhere—with the potential tortfeasor's risk aversion. And this problem thus can be solved in the same way as the problem of risk aversion gets addressed in other contexts: with the purchase of insurance (or with the development of a market for insurance). Accordingly, in order to guard against a "bankrupting" tort payout, what we want—and could expect—is for the potential tortfeasor to purchase insurance (and for an insurance market to develop if a market for it does not already exist). Thus, having bought insurance, the potential tortfeasor would not be deterred from engaging in the socially optimal behavior, and the efficient outcome will result.

In my view, as long as the internalization-of-expected-happiness-loss calculus is carried out correctly, we will get the damages sum that provides optimal deterrence (neither over-deterring nor under-deterring)—even if the sum appears high. In some cases, however, risk-aversion combined with the lack of insurance might result in this damages sum causing over-deterrence. The solution to this problem, however, does not involve changing the damages sum (which indeed is optimal); the solution to this problem—which is simply a risk-aversion problem that is not specific to the wrongful death context, but, rather, is much more general—is the same as in other contexts: the purchase of insurance.[151]

151. In light of the points I make here about insurance, one might wonder whether purchasing insurance also could have prevented net-socially-beneficial activities from grinding to a halt even if the damages sum were higher than the sum prescribed by my account (and closer to the "infinite compensatory sum" considered by Arlen). *See supra* notes 145–147 and accompanying text. This depends on what the insurance premiums cost and on how much of a benefit would be derived from engaging in the activity. (Of course, practically speaking, even if a damages sum were used that were higher than that which my account prescribes, it could not literally be an infinite sum.) For my purposes, however, we need not explore whether insurance would prevent society

D. OBJECTION 4: HOW DOES YOUR PROPOSAL WORK IN THE CONTEXT OF CORPORATE PARTIES?

Objection 4: You argue that the happiness-to-money translation should occur on the defendant's utility curve and thus that the defendant's wealth is relevant to determining the damages sum. But many parties in litigation are corporations or other entities that do not in any straightforward sense have a utility function, a happiness level, or a disposition, and for which the measure of wealth might be less straightforward than it would be for a person as well.

Response to Objection 4: This is an important question, and it can be responded to in various ways, each of which would be consistent with my account. It seems that the most plausible response will be to use the average values among all members of the group (shareholders, for example, if the entity is a corporation) for all of the various categories (for example, utility curves, happiness sums, dispositions, wealth levels, and so on). Of course, there will always be a question about how precise we want the data to be and whether we can simply take averages at a high level of abstraction without determining the various details for all of the relevant individuals. This, however, is a question that is not unique to the context of this objection (that is, corporate parties). The question of averaging among members of groups was addressed in Part III,[152] and the analysis there applies here as well. Additionally, as stated there, the level of detail of data sought could differ in different cases, and there is no single answer, in the abstract, about how much detail should be sought.

V. OUTLOOK

In this Part, I first explain why, from a forward-looking perspective, in death cases, we should not only adopt my account in theory, but also implement it in practice. Next, I expand the Article's focus to include consideration of the backward-looking account of tort law and I explore if and how it affects my proposal. Relatedly, I explain an interesting benefit to exploring the death case: I show how the death case is uniquely positioned to teach us about the relationship between forward-looking and backward-looking accounts of tort law. I then very briefly describe concerns that could be raised about whether my proposed use of tort law is the best legal machinery we have (as opposed to, say, criminal law or punitive damages) for pursuing this Article's goals.

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from grinding to a halt if the damages sum employed were higher than that which my account prescribes; it is sufficient to explore how insurance could interact with a regime employing the damages sum that I argue indeed provides optimal deterrence.

152. *See supra* Part III.

A. FROM A FORWARD-LOOKING PERSPECTIVE, WHY, IN DEATH CASES, WE SHOULD NOT ONLY ADOPT MY PROPOSAL IN THEORY, BUT ALSO IMPLEMENT IT IN PRACTICE

In Part IV.A, I noted that while my view is that my account provides incentives that are optimal in theory, it is consistent with my account that it could bring about disutility in various forms when implemented in practice. Thus, it becomes an empirical project both (1) to determine what the effects of my proposal are in practice, and (2) to determine how to weigh the efficiency benefits of my account against any disutility that it causes in practice. Thus, as I said in Part IV.A, it could be that it turns out, at one extreme, that either there is never any disutility brought about by my account or that the disutility it creates is always outweighed by its benefits. If so, we should always adopt what my account prescribes in theory that we do. At the other extreme, it could be that the disutility caused by my theory always outweighs the benefits it would provide, and we thus should never implement my account in practice. Instead, it could be that my account prescribes that we always use the VSL approach, or some third option. Likewise, it could be that in practice the account would prescribe that we use a non-individuated rule.[153]

Although these questions are empirical in nature and working them out is beyond the scope of this Article, I will here hazard a guess about how these various considerations might weigh out on net, and thus what my estimation is of how tort law ideally should treat damages for a decedent's hedonic loss. "Ideally" thus does not mean "in theory." "Ideally" takes into account the practicalities of the world in terms of, for example, tastes of fairness, particular preferences, incentive effects, and the like.

My estimate is that it is likely best even in practice to implement my proposal to determine damages for decedents' hedonic loss. In short, I think that any disutility brought about by my proposal in this context would be minimal. There are a few reasons for this.

For one, consider the potential disutility of my proposal when compared to the disutility of the current state of the law, to the potential disutility caused by a VSL approach (an individuated version and a non-individuated version), and also when compared to the potential disutility caused by a non-individuated version of my account.

The status quo does not allow for any damages whatsoever for hedonic loss (in the vast majority of jurisdictions). Despite this omission in the law, however, there does not appear to be much public outcry or disutility being incurred as a result. Part of this, perhaps, is due to the fact that there are various other things

153. Recall that, as I have already argued, my proposal is of value for a variety of reasons even if it turns out that my proposal, in practice, prescribes that the proposal *never be used at all*. Thus, whether or not my proposal has value does not depend on the outcome of this discussion. At stake in this section's discussion is only *how prevalent* the cases are where we should bring about reform.

that wrongful-death plaintiffs can recover for (for example, financial support for the spouse, consortium, and so on). This is relevant for three reasons.

First, plaintiffs typically are not ending up empty-handed and thus perhaps they are not left upset about the damages sum; additionally, the fact that there are various things that can be recovered for might, perhaps, make it the case that people are not inspecting too closely what dollar sums are for what. Further, given that consortium or other non-economic damages claims require the use of exchange rates between happiness and money, and given that it is always difficult to have strong intuitions about what sums of money are appropriate for what sums of happiness, there will be a certain sense of arbitrariness present that will make it difficult for a plaintiff to feel strongly that a particular dollar sum would have been more appropriate than that which was awarded. Now, if we also throw in additional monetary damages for hedonic loss (as calculated by my proposal), it seems as though this (1) would be for the most part a welcome addition from the perspective of plaintiffs, and (2) for all of the reasons just described in the context of the current state of the law, it seems as though the damages sum for this particular component of the overall damages award might get somewhat lost track of and thus not cause great disutility. Hence my proposal would represent, in theory *and* in practice, an improvement over the status quo.

Second, the same is true when we compare my view to the individuated VSL approach. Similar concerns—for example, the seeming arbitrariness of damages being a function of level of wealth of one of the parties—would be considerably more significant with the individuated VSL approach than with mine. For instance, differing awards for decedents with different levels of wealth would surely rouse greater intuitions of inequity than differences among defendants, because it would appear to be attributing differing "values" to a life in some deeper sense, even if that is not in fact the actual rationale for the individuated VSL approach. Thus, there is reason to think that the disutility associated with my account, if present, would be less than the disutility associated with an individuated VSL approach.

Third, the same is true for disutility of my approach as compared to that associated with a non-individuated VSL approach and a non-individuated version of my approach, I think that my account would indeed bring about greater initial disutility than both of these approaches, but that this disutility would be outweighed by the efficiency benefits of my account. This is particularly the case when my account is compared to the non-individuated VSL account, because of what I take to be the substantial benefits of carrying out the happiness-to-money translation on the defendant's utility curve rather than that of the plaintiff. But I think that the benefits of my account would also outweigh the disutility as compared to a non-individuated version of my account—even if less starkly.

Leaving aside these comparisons between the disutility caused by my account and by others, there is an additional strong reason to think that the disutility of my account would not be great enough to outweigh its benefits:

considering the context of punitive damages. As I have stated, punitive damages typically do take into account the wealth of defendants. This is a key test case. Just as with my proposal, the particular damages sum in question with punitive damages is a function of the defendant's wealth. Further, as with my proposal, the damages sum for punitive damages does not constitute the full damages award, but, rather, it is merely a part of it (in my context, there can still be awards for spousal financial support and consortium, for example, and in the punitive-damages context there are also compensatory damages). In light of the similarity between these contexts, we can look to the punitive-damages context to see whether there is public outcry or whether there appears to be disutility incurred as a result of taking the wealth of the defendant in a case into account, and it does not appear that this disutility exists. A key feature of both contexts is the fact there are also other components to the damages award, as stated above. This likely is key in avoiding disutility, because a party that otherwise might be displeased can at least feel as though there is still the standard part of the damages award that does not employ the feature that he dislikes. Then, the aspect that he dislikes is just part of the award, and this might minimize the disutility incurred by this displeased party. Further, it could then more easily be rationalized that "x" is the part of damages award that does "w" (for example, appropriately compensates the plaintiff), whereas "y" is the part of the damages award that does "z" (for example, provides optimal deterrence for future potential tortfeasors). This split could result in less disutility to the displeased party.

Lastly, while there indeed might be concerns about the administrability of my account, we deal with similar administrability issues in various ways successfully when we consider the defendant's wealth in the context of punitive damages. As for the questions of happiness quantification, these indeed might present issues that are new in certain ways, but these questions could be appropriately dealt with as well if proper procedures are employed, thus enabling my proposal to be implemented.

In sum, the question of whether or not practical considerations might result in it being better to not employ my proposal in some or all cases, despite my proposal being better in theory, remains an empirical question that I do not resolve here. Despite this, however, the foregoing considerations provide strong reason to think that, *even in practice*, we should use my account to determine damages sums for decedents' hedonic loss.[154]

154. Even if my empirical estimate is correct, however, and even if we employ my proposal, we still, going forward, must keep our eyes open and see if the account appears to cause disutility. If it does (and even if the disutility does not outweigh the benefits of my account as compared to one of the other candidate accounts), it could be that it would at that point be wise to make some changes to the rule (even if only minor tweaks) to reduce this disutility if this can be done without losing too many of the utility benefits of my proposal.

B. HOW EXPANDING FOCUS TO INCLUDE THE BACKWARD-LOOKING ACCOUNT OF TORT LAW AFFECTS MY PROPOSAL, AND HOW THE DEATH CASE IS UNIQUELY POSITIONED TO TEACH US ABOUT THE RELATIONSHIP BETWEEN FORWARD-LOOKING AND BACKWARD-LOOKING ACCOUNTS OF TORT

1. The Implications for My Proposal of Taking Both Backward-Looking and Forward-Looking Views into Account Intrinsically

Throughout the Article up until this point, I have been talking almost entirely about the forward-looking account of tort law—according to which the purpose of tort law is optimal deterrence (bringing about optimal incentives for future potential tortfeasors).[155] Although I have referred to the backward-looking account (the account focused on *compensation of the plaintiff*), I have only been discussing this account in a particular and circumscribed way. More specifically, when I have discussed the backward-looking, plaintiff-compensation-focused account, I have only been doing so *instrumentally, within the context of a forward-looking account*. In other words, I have been considering the backward-looking account only for the purpose of considering the fact that people often have intuitions of fairness[156] that comport with a backward-looking account, and thus that a forward-looking account must take these intuitions at face value and treat any disutility caused by a legal system that conflicts with these intuitions as real disutility to be included in the calculus of determining what rule is optimal.

But this is not the whole picture. The backward-looking view is not merely a view that is relevant instrumentally because of how it plugs into the forward-looking view. Indeed, the backward-looking view is the view that many, if not most, people would say intrinsically describes the main purpose (or perhaps *only appropriate* purpose) of tort law.[157] And, while perhaps some would think that tort law is or should be viewed (intrinsically) only through a forward-looking lens and while perhaps some would think that tort law is or should be viewed (intrinsically) only through a backward-looking lens, many people would recognize that both lenses are and should be viewed as (intrinsically) relevant to tort law. Thus, most people would think that viewing tort law through a backward-looking lens is *at least part of* the picture. And because up until now I have only been considering a forward-looking account, I have not been taking into account the whole picture. But now I broaden my view and briefly consider the full picture.

Intrinsically valuing the backward-looking view of tort law (be it either as the full picture or as part of the picture alongside a forward-looking view) could

155. *See supra* Part I.A.

156. *See* Pressman, *supra* note 17.

157. *See, e.g.*, Weinrib, *supra* note 25; Coleman, *supra* note 25; COLEMAN, *supra* note 25; WEINRIB, *supra* note 25; Pressman, *supra* note 27.

be a strong reason why in non-death cases we typically might want to use the plaintiff's utility curve. See my discussion elsewhere[158] for in-depth consideration of non-death cases and how the theory I propose in this Article applies in non-death cases. Interestingly, however, death cases are importantly different from non-death cases with respect to these issues. Absent one thinking that the estate should be *compensated* for the decedent's hedonic loss, the death case seemingly provides us with a case where compensation is not possible, yet deterrence is. Thus, even if one typically thinks that the forward-looking and backward-looking accounts of tort are both intrinsically part of the picture, death cases are unique in that compensation for (a backward-looking approach to) the hedonic loss is off the table, and all that remains is deterrence of (a forward-looking approach to) hedonic loss.

As a result of the fact that, in the death cases, deterrence seems to be the only game in town, my discussion in Part V.A (about how, according to the forward-looking view, my account likely should not only be implemented in theory but also in practice, pending confirmation of my empirical estimates) indeed seems to be the full picture. And, as a result, my view is that, pending those empirical estimates, we should indeed implement my account both in theory and also in practice in death cases.

2. General Upshots About What the Death Case Enables Us to Learn About the Interaction Between the Forward-Looking and Backward-Looking Accounts

Although I originally had set out to provide a solution for the death case, it turns out that the death case is also an interesting case because of what it enables us to learn about tort theory more generally. This is because it is unique in that (1) there is a loss incurred by a person that we can quantify (albeit in terms of happiness and not money), we can calculate "hypothetical compensation," and thus we can aim to deter, but (2) our purpose is *not* also compensation because the person to whom the compensation would be due no longer exists. As a result, in determining the damages sum, we can focus on deterrence exclusively. I have argued, contra the various authors who are proponents of VSL, that when we focus on deterrence exclusively, it should be the *defendant's* utility curve that we focus on. On the other hand, in cases where the victim is not dead, the backward-looking account of tort law would typically keep us thinking in terms of the plaintiff's utility curve (due both to intrinsic backward-looking considerations and instrumental ones). As a result, in typical (non-death) cases, we fail to see that the deterrence aspect of the issue is actually something that should involve analysis of the defendant's utility curve.

It is the death case, however, that helps separate the moving parts and thus helps us arrive at these conclusions. But even once this separation occurs, the

158. *See supra* Part III.C; Pressman, *supra* note 17.

authors who are proponents of VSL simply assume that we should be using the plaintiff's utility curve, and this is because we seemingly always use the plaintiff's utility curve. But this is a mistake. Once we are focused only on deterrence, as we are in the death case, we no longer are constrained by the compensation norm, and we must recognize this and realize that we must then shift our focus to the defendant's utility curve.

These insights are important not only for the purpose of bringing about the best rules in the context of death. In addition, these insights help us to better understand what is relevant for the purposes of deterrence, more generally. To the extent that one thinks that deterrence is at least one relevant part of the picture in cases where compensation is possible, the considerations I discuss here should inform ways of thinking about how to fashion remedies that in varying degrees, in different cases, further both a backward-looking goal *and* a forward-looking goal.

C. IS MY PROPOSED USE OF TORT LAW THE BEST LEGAL MACHINERY FOR PURSUING THIS ARTICLE'S GOALS?

Here I only briefly raise the concern that some might have about whether my proposed use of tort law is the best legal machinery we have for pursuing this Article's goals.

For someone who does not believe that tort law should care about forward-looking considerations at all, then it certainly would seem as though tort law is not the correct machinery to use. However, even for someone who does think that forward-looking considerations can be appropriate for tort law, he might still think that, in this context, other machinery might be better.

For example, one thought might be that criminal law could or should address this. After all, in many (though not all) of these cases, the risk of death that the tortfeasor is causing is one that is diffuse and that risks harming large segments of the population. To the extent that this is the case, one might think this renders it ripe for criminal law.

There might be compelling reasons in both directions, and I will not further explore these here. Suffice it to say, though, that if the criminal punishment were a fine, then the considerations explored in this Article would still be of prime importance. If non-monetary punishments were considered for this in the criminal law, then a wide range of other considerations would come into play.

Another thought one might have would be that punitive damages could satisfactorily bring about appropriate deterrence for hedonic loss. After all, a key function of punitive damages is deterrence.

First of all, however, the mental-state requirements that typically bring matters into the domain of punitive damages need not be present in cases of death and hedonic loss. Thus, the cases lacking these features seemingly would not be reached by punitive damages. Or, even if we were to make exceptions and say that all cases of hedonic loss are potentially subject to punitive damages,

it seems that this would amount to making a change to punitive-damages doctrine rather than it being the case that all cases of hedonic loss can be addressed by current punitive-damages doctrine.

Either way, though, this seemingly amounts to somewhat of a definitional question. In my view, we should not try to get the desired result in these cases by squeezing them into the punitive-damages domain. Rather, we could coin a term for a third area of damages that is neither punitive damages nor compensatory damages: "death damages" or "hedonic loss damages." There seemingly is no need to squeeze a new category of damages into one of the existing categories if the fit is not good and if there is no need to do so.

Leaving aside the question of how to classify these awards, however, there still remains the all-important question of *what the damages sum should be*. That is the important question, and that is the question that this Article has been addressing. What specific classification we attribute to these damages is of less importance.

Suffice it to say there are various interesting questions here that merit further probing. At the very least, however, it does not seem that there is a clear reason that the tort framework addressed here is not a viable candidate for handling these issues.[159]

CONCLUSION

Having one's life brought to a premature end is seemingly one of the greatest harms that one can incur, and this is attributable to the decedent's hedonic loss, which in most cases probably is immense. This harm, of course, is irreparable, with no damages sum being able to restore the decedent's life, but this does not mean that wrongful-death plaintiffs should not be able to recover damages for the decedent's hedonic loss. Whether wrongful-death plaintiffs should recover for the decedent's hedonic loss according to a backward-looking account of tort law is debatable; but what, in my view, is not debatable is that defendants should be required to pay hedonic-loss damages so that future potential tortfeasors are optimally deterred when engaging in activities that risk causing death. If we value our lives and those of others, then this conclusion, I think, is clear.

How to determine the dollar sum to assign to loss of life, however, is considerably less clear, and reasonable minds can differ as to which approach to take. The VSL approach, which is by far the dominant approach, in my view is

159. Another thought that one might have, however, is that there is not even any need for any new treatment of these cases, because it is a mistake to even think that there currently is under-deterrence of activities that risk causing death and hedonic loss. Perhaps, one might say, punitive damages for intentional behavior and also criminal law in many cases sufficiently deter potential tortfeasors. For the reasons discussed in this Subpart, however, it seems unlikely that criminal law and punitive damages reach all or even most cases of hedonic loss, and thus it seems unlikely that the current level of deterrence is optimal. Perhaps there are also other avenues that work to contribute to the amount of deterrence of activities causing death, but, even taking everything into account, it seems unlikely to me that the current level of deterrence is sufficiently high.

mistaken for a variety of reasons, three of which are its failings in terms of (1) theoretical coherence, (2) equity, and (3) efficiency. In its place, I have proposed an alternative approach that I think fares better on all three of these scores. What I have presented here is only a sketch, however, and further questions are likely to arise if it is implemented; but, in my view, there are reasons to be optimistic that—both theoretically and in practice—the account I have provided will constitute a step in the right direction.

How will things be different if my approach is implemented? As compared to the status quo, damages sums in wrongful death cases would surely increase dramatically. As compared to damages sums prescribed by the VSL approach (be it individuated or non-individuated), it is not completely clear which approach would give rise to higher damages sums on average. While there are many moving parts that affect this, perhaps none would have a larger effect than the determination made—be it by judges, the jury, legislators, or other decisionmakers—about which happiness aggregation function is the most plausible. Other theoretical details remain to be worked out too, however, and many empirical results and effects remain to be seen. Additionally, if this account were implemented, it would also remain to be seen how various industries—such as the insurance industry—would be affected and how parties would act (and transact) in the shadow of the law.

Despite these many uncertainties, I hope to have re-oriented the conversation toward a more fruitful path forward.