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Valuing Relationships: The Role of Damages for Loss of Society

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VALUING RELATIONSHIPS: THE ROLE OF DAMAGES FOR LOSS OF SOCIETY

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I. INTRODUCTION

Currently the "spectrum"[1] of damages for intangible losses presents itself as a problem of quantity. How much are these damages? How much *should* they be? Critics imply that compensation for nonpecuniary harms[2] such as pain and suffering should be assessed in market amounts,[3] and, if they cannot be, these critics suggest that they be scheduled,[4] like workers' compensation awards, or subjected to more rigorous appellate review,[5] or even capped at some arbitrary figure.[6] What lies behind this criticism is the worry that damages for intangible harms are too "large" simply because they cannot be easily factored into the cost-benefit analysis that increasingly dominates torts jurisprudence.[7] But a more subtle effect of this quantitative approach is to group all forms of "noneconomic"[8] loss together as if

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1. I borrow this term from the title of this Symposium issue. *See* Symposium, *Civil Numbers: Examining the Spectrum of Noneconomic Harm*, 35 N.M. L. REV. vii (2005). In addition, I want to acknowledge the major contribution to the entire field of remedies and damages made by certain commentators. Their exhaustive coverage of topics bearing on issues discussed here helped to clarify my thinking and alerted me to a number of cases and other authorities that proved particularly relevant. They include DAN B. DOBBS, HANDBOOK ON THE LAW OF REMEDIES: DAMAGES, EQUITY, RESTITUTION (1973); W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS (5th ed. 1984); CHARLES T. MCCORMICK, HANDBOOK ON THE LAW OF DAMAGES (1935); and STUART M. SPEISER ET AL., RECOVERY FOR WRONGFUL DEATH (3d ed. 1992). In addition, I have taken the liberty of citing my own work when it relates to this topic, particularly JoEllen Lind, *The End of Trial on Damages? Intangible Losses and Comparability Review*, 51 BUFF. L. REV. 251 (2003) [hereinafter Lind, *Damages*].

2. Some theorists and the RESTATEMENT (SECOND) OF TORTS (1965) distinguish between the concept of "injury," which is defined as the violation of a "legally protectible interest," and "harm," which is defined in terms of "loss or detriment in fact" regardless of whether that loss or detriment is legally recognized:

> (1) The word "injury" is used throughout the RESTATEMENT of this Subject to denote the invasion of any legally protected interest of another.
>
> (2) The word "harm" is used throughout the RESTATEMENT of this Subject to denote the existence of loss or detriment in fact of any kind to a person resulting from any cause.

Id. § 7. Throughout this Article, I will not be making that distinction and I will use the terms "injury" and "harm" interchangeably.

3. *See* Cass R. Sunstein et al., *Assessing Punitive Damages (with Notes on Cognition and Valuation in Law)*, 107 YALE L.J. 2071, 2131–37 (1998) [hereinafter Sunstein, *Assessing Punitive Damages*].

4. *See, e.g.*, Oscar G. Chase, *Helping Jurors Determine Pain and Suffering Awards*, 23 HOFSTRA L. REV. 763 (1995); *see also* James F. Blumstein et al., *Beyond Tort Reform: Developing Better Tools for Assessing Personal Injury*, 8 YALE J. ON REG. 171, 179 (1991). In this Symposium, however, Professor Blumstein argues that his suggestions for reform do not constitute a scheduling system. *See* James F. Blumstein, *Making the System Work Better: Improving the Process for Determination of Noneconomic Loss*, 35 N.M. L. REV. 401 (2005).

5. *See* Lind, *Damages*, *supra* note 1, at 298–308.

6. This is what the federal legislation affecting medical malpractice would do. It caps damages for all forms of noneconomic loss at a maximum of $250,000. *See* S. 354, 109th Cong. § 5(b) (2005); S. 366, 109th Cong. § 3(b) (2005); S. 367, 109th Cong. § 3(b) (2005); H.R. 534, 109th Cong. § 4(b) (2005).

7. The cost-benefit analysis in tort law traces to Judge Learned Hand's definition of negligence in those terms, which was pioneered through his opinion in *United States v. Carroll Towing Co.*, 159 F.2d 169 (2d Cir. 1947). For a collection of essays concerning the role of cost-benefit analyses in tort law, see COST-BENEFIT ANALYSIS: LEGAL, ECONOMIC AND PHILOSOPHICAL PERSPECTIVES (Matthew D. Adler & Eric A. Posner eds., 2001).

8. The term "noneconomic" appears in quotes because, like some other writers in the Symposium, I hold that this is not a legitimate classificatory term, particularly from the perspective of economics itself. *See* Heidi Li

they present one problem to be solved generically.[9] This obscures the *qualitative* issues that are at stake in the movement to reform traditional tort remedies. While the overarching purpose of compensatory damages is to restore the plaintiff to the "rightful position,"[10] I argue that individual damage categories perform different functions and address different social goals within the broad rubric of compensation. This factor should not be excluded from decisions concerning quantitative questions—in fact, substantive social goals should drive the quantitative concerns and not the other way around. It makes little sense to ask how much damages should be unless the question is put in terms of the goals the damages promote. This Article uses loss-of-society compensation as an exemplar to bring home this point. But, why examine loss-of-society awards and not something more common like damages for pain and suffering or mental distress? Simply because they constitute one of the most unique, one of the most important, but one of the least understood tort remedies.

Why are they unique? First, the broad concept of loss of society is that when a tortfeasor kills a person[11] with whom one had a special relationship, such as marriage, the lost bond (the lost "society") *itself* is a compensable harm separate and apart from other, more market-based damages caused by the tragedy.[12] As a result, these damages contemplate a developmental thing that would have flourished over time—a lost human interaction. Second, they open the logical space to address the transformative effects of tort injury—in other words, a loss that can actually change the survivor into a different person because the hurt is so profound. Finally, by their very nature, loss-of-society damages require us to focus on social bonds as things in themselves. As we shall see, this has several provocative implications. One is that, because human relationships have a greater public quality than interior sensations might have, damage to them is more verifiable.

Why are loss-of-society damages so important? A pair of reasons operates here. Where a tortfeasor kills someone who does not earn income in the market—or who

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Feldman, *Loss*, 35 N.M. L. REV. 375 (2005). In this regard, consider what Richard Posner has said:

> [O]ne of the most tenacious fallacies about economics [is] that it is about money. On the contrary, it is about resource use, money being merely a claim on resources. The economist distinguishes between transactions that affect the use of resources, whether or not money changes hands, and purely pecuniary transactions—transfer payments.

RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW § 1.1, at 6 (3d ed. 1986) (footnote omitted). Most important, the inability to assess a money value for loss does not mean the loss fails to reflect real economic cost. *See* Gary Becker, *The Economic Approach to Human Behavior*, *in* FOUNDATIONS OF THE ECONOMIC APPROACH TO LAW 6 (Avery Weiner Katz ed., 1998). For these reasons, this Article most frequently uses the term "nonpecuniary" to refer to damages that compensate for nonmarket forms of cost, rather than the term "noneconomic."

9. The exception here is punitive damages, which have been given specialized treatment in the tort reform movement and have generated groundbreaking opinions from the U.S. Supreme Court. *See, e.g.*, State Farm Mut. Ins. Co. v. Campbell, 538 U.S. 408 (2003); *see also* Lind, *Damages*, *supra* note 1, at 252–53, 252 n.7. Nonetheless, commentators who have criticized punitive damages level many of the same charges against *compensatory* nonpecuniary awards. *See, e.g.*, Sunstein et al., *Assessing Punitive Damages*, *supra* note 3.

10. As Douglas Laycock puts it, this is an amount of money necessary to restore the plaintiff to his or her "rightful" pre-accident position. *See* DOUGLAS LAYCOCK, MODERN AMERICAN REMEDIES: CASES AND MATERIALS 16 (3d ed. 2002).

11. Loss of society can occur on injury, not just on death, whenever someone cannot carry on important social relationships due to serious physical wounding. This theory has been most significant in the movement to allow parents of injured children to recover due to the children's inability to normally interact. *See infra* Part III.D.

12. *See, e.g.*, Moore v. Lillebo, 722 S.W.2d 683, 690 (Tex. 1986) (Spears, J., dissenting).

systematically earns less due to market defects like race discrimination—these damages may be the only realistic way to obtain compensation. Who are the people whose existence is not well valued in market terms? They are children, the working poor, homemakers, the elderly, women, and minorities.[13] Doing away with loss-of-society damages is tantamount to concluding that they have little worth in the eyes of the law compared to those at the economic pinnacle of American society. This suggests a second reason that this form of compensation is so important. Because loss-of-society damages require the existence of a social bond, they are necessarily communal. In this way, the goals of compensation are articulated in terms of the very ties that bind us. Loss-of-society damages allow the law of torts to reflect the impact to the community *itself* of injuries to its critical social roles and *all* the people essential to its health. In other words, the phenomenon of loss of society inevitably leads us to considering social loss as a thing in itself.

Why do we misunderstand loss-of-society damages? Perhaps it is because their uniqueness inheres in complex attributes like dynamism, transformative power, and social loss. More accidentally, they are not well understood because their availability is tied to two concepts—wrongful death and loss of consortium—whose intertwined histories and evolution can be intricate and arbitrary.[14] But, once the unique qualities of these damages are better known, they illustrate that the debate over whether awards for nonpecuniary harms are "too much" should be reframed into a debate over whether they fulfill the social policy objectives they are designed to address. This is true not just in terms of compensation generally, but in terms of each form of intangible loss specifically. Recognizing the need for this debate in the

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13. Other authors in this Symposium have made this point. *See, e.g.*, Lucinda Finley, *The Hidden Victims of Tort Reform: Women, Children, and the Elderly*, 53 EMORY L.J. 1263 *passim* (2004); *see also* Laura Spitz, *I Think, Therefore I Am; I Feel, Therefore I Am Taxed: Descartes, Tort Reform, and the Civil Rights Tax Relief Act*, 35 N.M. L. REV. 429 (2005) (describing the differential impact on women of taxing damages for intangible losses).

14. The ability to recover damages for loss of society is most closely associated with wrongful death statutory claims and common law claims for loss of consortium. *See infra* Part III.B. One of the confusing issues surrounding the *damages* for loss of society is how to relate them to loss of consortium. In some sense, both notions are rooted in injury, not abstract questions of the elements of liability, and, more than most claims, loss of consortium seems to blend the concept of a cause of action with its remedy. For instance, comments to New Mexico jury instructions on damages for wrongful death indicate that "loss of consortium" is a damage category for that cause of action, but the instruction itself enumerates the damages, one of which is "loss of society," and never mentions "loss of consortium." *See* UJI 13-1830 NMRA (allowing, however, for "loss of companionship"). More confusingly, New Mexico case law has recently developed to allow persons who could not sue for wrongful death (because they do not fit within the wrongful death statute's list of beneficiaries) to present an alternative claim for loss of consortium. *See, e.g.*, Lozoya v. Sanchez, 2003-NMSC-009, 66 P.3d 948 (allowing an unmarried cohabitant to sue for loss of consortium). In this sense, loss of consortium functions as the engine driving liability, and loss of society is one of the elements of damage flowing therefrom. In general, and notwithstanding its name, "loss" of consortium most frequently refers to a cause of action, not just damages. Moreover, consortium can be teased apart from loss of society in other ways. That is, loss of society is just one of the forms of harm that is caused by loss of consortium. As I discuss later, *see infra* Part III.A, the claim for loss of consortium arose first from the marriage relationship and encompassed three forms of damages: "services, society, and sexual intercourse." KEETON ET AL., *supra* note 1, § 124, at 916. Loss of society, in the sense of the pure lost opportunity to experience the companionship of marriage, did not develop as an item of recovery until later. *See id.* Modernly, both the *claim* for loss of consortium and the correlative *damages* stemming from it for loss of society have evolved so as not to be limited to the marital bond. *See, e.g.*, Fernandez v. Walgreen Hastings Co., 1998-NMSC-039, ¶¶ 2, 30–32, 968 P.2d 774, 776, 784 (allowing grandmother to bring action for loss of consortium in connection with her grandchild's death due to negligently filled drug prescription). On the other hand, recovery of damages for loss of society under wrongful death developed later, and it has been more difficult to recover them in wrongful death actions than in loss of consortium actions. *See* DOBBS, *supra* note 1, § 8.4.

case of loss-of-society damages makes a larger point: the normative questions lying behind the quantitative claims of the tort reform movement are much more complex than its proponents concede.

To articulate this argument, it is first necessary to define and clarify what loss-of-society damages are. Accordingly, Part II focuses on them in isolation and stresses the attributes that derive from their relational component. To illuminate this in context and to show how evolving communal norms have affected the very notion of injury itself, Part III traces the historical development of recovery for loss of society to the changes associated with wrongful death and consortium actions over time. Part IV returns to the social theme and develops it in relation not only to individual claimants, but also to the well-being of the community. Part V extends the previous discussion by suggesting some of the implications that arise in terms of juries, proof, and, of course, tort reform. Part VI concludes with the claim that generic tort reform would jettison the unique functions of loss-of-society damages, and that, more broadly, all forms of intangible harm raise qualitative questions that deserve more attention.

II. THE NATURE OF LOSS OF SOCIETY

Loss of society conceptualizes the problem of relational experiences that death forecloses. Jury instructions illuminate this. Consider this from Professor Ronald W. Eades' treatise:

> In determining the damages to be awarded, you are entitled to consider and evaluate the positive benefits flowing from the love, comfort, companionship and society the plaintiff would, in reasonable probability, have experienced had the decedent lived. In this context, you should have regard to the relationship between the parties, the living arrangements, the harmoniousness or otherwise of their relations, and also the extent of their common interests or activities....
>
> Remember, though, that mental anguish and loss of society and companionship are separate elements of recovery. Damages must not overlap. No double recovery is permitted.[15]

Despite this attempt to isolate loss of society from other intangible harms, is it distinctive? To answer this question, it is useful to focus on several linked characteristics, all of which emanate from the relational component of loss of society.

A. Expectancies, Dynamism, and Transformation

In the standard account, tort compensation gives injured victims enough money to return them to the status quo ante.[16] One can analogize an accident to an involuntary wealth transfer,[17] where, due to the defendant's negligence, the victim

15. RONALD W. EADES, JURY INSTRUCTIONS ON DAMAGES IN TORT ACTIONS § 8.04[1] (5th ed. 2003).

16. *See* LAYCOCK, *supra* note 10, at 11–19.

17. *See* POSNER, *supra* note 8, § 1.2, at 13. Moreover, modern accounts of economic efficiency—for instance Pareto superiority and Kaldor-Hicks efficiency—trade on the notion that, if an accident victim can be made whole in terms of being given a money substitute for his or her pre-accident position, and the defendant's behavior still generates surplus wealth after deducting the victim's monetary entitlement, the result is efficient. *Id.* § 1.2. *See generally* JULES L. COLEMAN, MARKETS, MORALS AND THE LAW 95–132 (1988).

is worse off than before, having been displaced from the pre-accident status in terms of bodily health, need for medical expenditures, time lost from work, and so forth. If these losses can be quantified and returned to the plaintiff in dollars, the plaintiff has arguably been made whole.[18] In this way, classic tort compensation is loss oriented and backward looking, asking how an event has made the plaintiff's position inferior to what it was before the encounter with the defendant.

In contrast, contract damages are supposed to replicate expectancies; that is, contract remedies give the benefit of the expected bargain in terms of the value the contract would have had, had it been performed.[19] In this way, contract law is future looking and wealth producing, seeking to place the plaintiff in the forward, post-performance position with money substitutes.[20] Fundamentally, contract remedies compensate the plaintiff for benefits expected from a relationship, the contract relationship, although the contract is usually a market transaction with no particular connotation of emotional attachments or ties.[21]

While loss-of-society damages depend on feelings and emotional bonds, they also exhibit the forward-looking, expectation-based attributes of contract law.[22] They focus on the missed opportunity of interacting over time with another in a significant relationship. While the benefits foregone are nonpecuniary, the core concept comes from the positive, futuristic probabilities of human connection.[23] Had the plaintiff not been deprived of the relationship, the plaintiff would have been *better off.* Instead, the tortfeasor prevented the advantages of the affectional tie from being realized. This gives rise to two tiers of harm, one relatively obvious, the other more subtle, but perhaps more important.

The following example illustrates these two levels of injury. When a loved one, such as a child, dies in an accident, this obviously prevents future interactions with the deceased. For instance, a parent cannot go to the park with a child who no longer exists, read books to her, or teach her to ride a bicycle. At the first tier, and as things in themselves, these activities would have generated ongoing, occurrent emotions, ideas, perceptions, and other experiences for both parties. The surviving parent cannot experience these particular events because the child is not available. The inability to participate in these activities is a "loss" of opportunity. If these forgone positive experiences can be valued as experiences alone, they should be compensable.[24] Nevertheless, at the second tier of harm, experiences of this sort do

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18. *See* DOBBS, *supra* note 1, § 3.1.

19. *See* JOHN D. CALIMARI & JOSEPH M. PERILLO, THE LAW OF CONTRACTS 543 (4th ed. 1998).

20. *See* LAYCOCK, *supra* note 10, at 44–48.

21. However, the work of Ian MacNeil and Steward Macaulay has emphasized the importance of non-contractual relations in business, where norms independent of legally enforceable contracts provide a basis for ordering expectations and interactions. *See* Ian R. MacNeil, *Relational Contract: What We Do and Do Not Know*, 1985 WIS. L. REV. 483, 487–91. *See generally* Steward Macaulay, *Non-Contractual Relations in Business: A Preliminary Study*, 28 AM. SOC. REV. 55 (1963).

22. For instance, New Mexico's uniform jury instruction regarding wrongful death damages contemplates loss of expected benefits and includes loss of society in that category. *See* UJI 13-1830 NMRA.

23. *See, e.g.*, Moore v. Lillebo, 722 S.W.2d 683, 688 (Tex. 1986) ("Companionship and society shall be defined as the positive benefits flowing from the love, comfort, companionship, and society the named plaintiff would, in reasonable probability, experience if the decedent lived.").

24. The idea that, even at the first tier of loss-of-society recovery, at least some significant occurrent interaction must take place is borne out by cases that refuse damages for parents upon the death of a child that is

not have meaning just as present happenings; instead, they contribute to the rich mosaic of the whole relationship, which is a dynamic and developmental thing that would have evolved over time. Each interaction would have shaped the next one, as well as the whole affiliation, in inter-nested and mutually reinforcing ways.[25] Understood from this perspective, the relationship as a totality would have affected the survivor's personality formation and development, goals, and life course, and would have had other transfiguring consequences.[26] This is because the connections that yield loss-of-society damages are long term and interdependent in ways that nurture human personalities. In fact, these connections make up some of the most important roles we play in life, roles that can define in large part who we are: parent, mate, lover, and so forth.

Thus, loss of society captures not only lost positive utilities as occurrent phenomena, but also the more complex effects engendered by the loss of the relationship itself. The starkest way of putting this is that the claimant had an opportunity to become a different person through the relationship—to occupy a special role—but that opportunity is no more. This notion isolates injury that is different from the negative experience of grief. Direct recovery for grief (which is seldom allowed)[27] pays one back for the precipitate decline in welfare caused by actual negative feelings. Damages for loss of society give a money substitute for the absent benefits of significant familial or social relations, both in terms of the positive experiences of the discrete interactions themselves, and in terms of the way those interactions might have constituted one's very personhood and identity over time.

Critics might argue that even at the first tier, this is a gross simplification and masks the philosophical question of whether a positive experience is simply the absence of a painful one: if this is so, then loss of society would be logically equivalent to giving direct damages for the mental distress of grief.[28] Sensitive to this possibility, courts have been concerned about whether, in permitting loss-of-society recovery, they are truly isolating a unique harm, particularly in jurisdictions where damages for grief *are* allowed.[29] As Texas Supreme Court Justice Spears stated:

> Despite the...attempt to separate mental anguish and loss of society and companionship, the jury's awards will include different amounts for shades of the same interest. This is analogous to the tale of the six blind men who felt and

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stillborn or lives for only a very few hours. *See, e.g.*, Jackson v. Tastykake, Inc., 648 A.2d 1214 (Pa. Super. Ct. 1994). However, this approach misses the point of the second order harm caused by loss of society. For instance, even in the case of a stillborn child, the role-related aspects of the parent-child bond are second-level opportunities that are frustrated when one's expectation of becoming a parent is precluded by the tortfeasor's actions.

25. Joseph Raz has developed an account of how individual autonomous behavior both constitutes and is constituted by the range of social institutions, practices, and, above all, roles open to persons within a given society. In this way, autonomy itself is linked via relationships to the nature and health of the wider community within which one lives. *See* JOSEPH RAZ, THE MORALITY OF FREEDOM (1986).

26. *See* Lind, *Damages*, *supra* note 1, at 302–09.

27. *See* Victor Schwartz & Cary Silverman, *Hedonic Damages, the Rapidly Bubbling Cauldron*, 69 BROOK. L. REV. 1037, 1059 (2004).

28. For a classic discussion of this point, see PLATO, THE REPUBLIC, 251–75 (Allen Bloom trans., 1968).

29. *See, e.g.*, Moore v. Lillebo, 722 S.W.2d 683, 690 (Tex. 1986) (Spears, J., dissenting) (arguing that without the requirement of a physical manifestation of mental distress caused by the death of a loved one, the court invites a double recovery when also giving damages for loss of society); Leon Green, *Relational Interests*, 29 ILL. L. REV. 460, 466 (1934) [hereinafter Green, *Relational Interests*].

> then tried to describe an elephant. One felt the trunk, one the tusk, one the tail, another a leg, one the ear, and another the side. Each had a different description of the elephant, but they all were describing the same animal. Similarly, the majority's instruction allows different awards for the same injury.
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> Proper definitions are needed because loss of society and companionship damages and mental anguish damages are closely related and only finely distinguished categories of emotional harm damages. With improper definitions... mental anguish and loss of society and companionship issues ask jurors the same question: how much emotional distress has the plaintiff suffered? Asked the same question twice, jurors will give the same answer—twice.[30]

But simply because it is difficult to distinguish between these forms of harm does not mean they are the same. And, Justice Spears' own comments indicate that "proper" definitions in the form of precise jury instructions can differentiate them. Moreover, there are many other contexts in the law where establishing the unique factors separating foregone expectancies from backward-looking losses is challenging. Even the classic tort/contract divide can show the complexity of drawing lines in this area, but this does not mean that tort and contract are the same.

For instance, it is common in tort cases to replace the lost stream of *future* income an injured victim would have earned.[31] This can be conceived as compensating an expectancy. In the realm of intangible losses, mental distress or pain and suffering do not necessarily terminate at the time of trial, especially when they are associated with chronic conditions.[32] Despite its primary focus on the condition of the victim before an accident, tort law includes these future losses in recoverable damages.[33] In the world of contract, failure to perform promises not only frustrates expected gain but also can make a party worse off than if the party had never contracted with the breaching party to begin with—the doctrine of consequential damages captures this.[34] Lon L. Fuller and William R. Perdue's influential article, *The Reliance Interest in Contract Damages*,[35] teased apart the differences between expectation, restitution, and reliance interests in contract cases, but acknowledged the close association between reliance and loss and the challenge of isolating reliance from expectation.[36]

Notwithstanding the difficulty of drawing a line between the status quo and the future, the theoretical difference between tort and contract remedies is meaningful. If it were not, then a contract plaintiff who had not relied on the defendant's promise would have no claim to damages. Nevertheless, the law actually rewards bare

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30. *Moore*, 722 S.W.2d at 691–92 (Spears, J., dissenting) (footnote omitted).

31. Moreover, diminished earning *capacity* is also futuristic and, in a way, perhaps even more similar to loss of society, as it compensates for one's lost opportunity to earn at a particular level in a future employment market. *See* Stephens v. Crown Equip. Corp., 22 F.3d 832, 836 (8th Cir. 1994).

32. This is why *future* pain and suffering is a common item of recovery where it can be proved with certainty. *See, e.g.*, UJI 13-822 NMRA (treating recovery for future pain and suffering as a matter of course and exempting such damages from present valuation).

33. *See* EADES, *supra* note 15, § 6.22; *see also* Southwestern Brewery & Ice. Co. v. Schmidt, 226 U.S. 162, 169 (1912) (confirming the availability of damages for future pain and suffering).

34. *See, e.g.*, U.C.C. § 2-715(2) (1998) (delineating entitlement to consequential damages in sales cases including damages for personal injury and property damage caused by a defective product sold pursuant to contract).

35. Lon L. Fuller & William R. Perdue, *The Reliance Interest in Contract Damages*, 46 YALE L.J. 52, 53–54 (1936).

36. *Id.* at 55.

expectancies.[37] It seems equally understandable that there is a difference between compensating a tort plaintiff for *negative* experiences that will not be suffered until a future time (in the form, for instance, of physical pain experienced in the future) and compensating for *positive* encounters to which the plaintiff was entitled, but that will never take place. Physical pain and suffering might one day cease with physical improvement. Grief at the death or injury of another may fade over time. But, I argue that losing the opportunity to experience a child's growth into adulthood, with all the interactions, perceptions, feelings, and activities inherent in the parent-child bond is, by its nature, more a road not taken, more a whole form of life that is missed, than a harm that diminishes in degree. Damages for loss of society not only compensate for discrete experiences lost, but they also signal that social bonds have transfiguring properties going beyond their momentary expression. These bonds function on multiple levels: first to provide us with daily interactions, second to open up important life roles for us to occupy, and third, in their incarnation as roles, to connect us to the broader community in unique ways.

For example, as I have written elsewhere, bodily harm caused by a tort can be so catastrophic as to transform the injured victim.[38] One of the reasons for this is that when a direct victim's injuries inhibit human interaction, the victim loses opportunities constitutive of who he or she was or could have become. Thus, physical harm can metamorphose an injured person beyond the physical expression of the injury itself. Loss-of-society damages address the other side of the association—the survivor's perspective. As a result, the forward-looking, expectation-based quality of the remedy necessarily depends on the existence of a relationship—a living, breathing structure that affects each party dynamically. What this suggests is that the core harm these damages redress traces not just to expectations, but to expectations uniquely created from social bonds. This takes the discussion to the next feature of these damages—that they depend on our familial and communal ties.

B. Of Relationships and Objectivity

So far the discussion has focused on damages themselves, but damages are not free-floating; they must connect to theories of liability. As the law of torts has expanded to recognize more causes of action, and therefore more categories of plaintiffs, a correlative concern arises over how to limit the scope of responsibility so that it does not become too large and unpredictable.[39] The problems of scope can be reconceptualized as problems of concreteness, or, from another perspective, objectivity, in the sense of objectively verifiable loss. To help clarify this claim, it is useful to visualize tort recovery along multiple axes, each showing harms that are

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37. *See* Chatlos Sys., Inc. v. Nat'l Cash Register Corp., 670 F.2d 1304, 1305 (3d Cir. 1982) (affirming the trial court's grant of contract damages in excess of $200,000 for breach of warranty in connection with a computer system in which the purchase price was only some $46,000); *see also* POSNER, *supra* note 8, § 4.8, at 109–12 (discussing the complexities of determining the amount of the expectation interest in a manner that is optimal from the perspective of economic efficiency).

38. *See* Lind, *Damages*, *supra* note 1, at 298–308.

39. *But see* Thomas C. Galligan, Jr., *Disaggregating More-Than-Whole Damages in Personal Injury Law: Deterrence and Punishment*, 71 TENN. L. REV. 117, 136–37 (2003) (suggesting that the economic harm rule and the confinement of relational torts to a limited group of beneficiaries may give rise to systemic under-compensation) [hereinafter Galligan, *Disaggregating*].

increasingly removed from the classic tort scenario.[40] That scenario begins with the direct victim of the tortious activity.

Along the first axis, liability and damages might originate with the person who is physically injured by the defendant's actions or defective product. This creates an obvious physical nexus between the tortfeasor's behavior and its consequence. In this circumstance, the damages that seem most concrete (or objective) are those that represent the victim's actual out-of-pocket expenditures in connection with the physical harm. These are typically dubbed the "pecuniary" losses, which are borne for medical expenses, property damage, and lost wages.[41] One step removed from these harms are the intangible losses the physical wound itself causes the plaintiff to suffer. This is the pain and suffering that accompanies the physical injury. One step further removed from that is the mental distress that the physical pain, or a permanent physical impairment, itself might provoke. However, what of the "direct" victim who suffers *only* mental distress? How, in this context, is directness understood? Most clearly, when the tortfeasor's goal is not just to injure physically alone, or to injure physically at all, but to cause mental distress, then the mentally injured person can be a direct victim.[42] In that case, the injury can be fairly represented on the same axis that measures physical harm. The law of torts reflects this, because mental distress is an obvious form of injury caused by intentional torts in general,[43] and the tort of intentional infliction of emotional distress in particular. However, there is increasing skepticism as the trajectory of harm moves from the paradigm of the physically injured plaintiff seeking recovery for hard pecuniary losses to the individual suffering only mental distress.[44]

Another axis leading away from the direct casualty of a tort represents what might broadly be called "third-person" harm.[45] Third-person harm is possible because a tort affects more people than just the immediate victim.[46] The victim stands in important relations to others, making economic and social contributions through

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40. My colleague, Robert Blomquist, suggested the depiction of tort scope questions on this model during discussion in the faculty colloquium in which I presented a draft of this Article.

41. But Heidi Li Feldman and Lucinda Finley have made the point that even so called "pecuniary" damages can be difficult to quantify, are uncertain, and, perhaps, even themselves incommensurable. M.E. Occhialino, *Examining the Spectrum of Noneconomic Harm: An Introduction*, 35 N.M. L. REV. 391, 392–93 (2005).

42. The combination of physical touching, even injury, and intentional harm to the victim's mental state all too frequently arises in the context of sexual misconduct. *See, e.g.*, Allstate Ins. Co. v. Lahoud, 605 S.E.2d 180 (N.C. App. 2004). In this area, the intentionality of the defendant's conduct becomes a reason for holding that an insurer is not bound to pay for the harm, due to policy provisions excluding coverage for the defendant's intentional acts. *See id.* at 183–84.

43. However, extreme or outrageous conduct is typically required for liability to ensue, and many jurisdictions require some type of physical manifestation of the emotional injury. *See* KEETON ET AL., *supra* note 1, § 12.

44. *See id. But see* Daniel W. Shuman, *Science, Law and Mental Health Policy*, 29 OHIO N.U. L. REV. 587, 601–03 (2003) (arguing that unjustified assumptions about the difference between mental and physical injuries lie behind this skepticism).

45. *See* KEETON ET AL., *supra* note 1, § 54, at 365–66.

46. Robert Cooter has suggested an approach for attempting to calculate the value of these connections using risk analysis and willingness to pay. *See* Robert Cooter, *Hand Rule Damages for Incompensable Losses*, 40 SAN DIEGO L. REV. 1097, 1108–15 (2003). This calculation of the value of lost social relations is in some sense parasitic to the value of a statistical life. In the context of regulation, not litigation, a governmental estimate of the value of a life for purposes of cost-benefit analysis is as much as $6.1 million on average. *See* Cass R. Sunstein, *Lives, Life-Years, and Willingness to Pay*, 104 COLUM. L. REV. 205, 205–06 (2004) [hereinafter Sunstein, *Lives*]; *see also* Giuseppe Dari-Mattiacci & Gerrit De Geest, *The Filtering Effect of Sharing Rules*, 34 J. LEGAL STUD. 207, 218–20 (2005).

work and other activities.[47] Where economic activity alone is involved, third persons can suffer downstream pecuniary loss caused by disruption of the direct victim's business.[48] Also, witnessing the victim's injury or death can cause onlookers mental distress.[49] The most important thing to note about third-person harm at the outset is that, logically, the effects are not physical. This is obvious, for if one is *physically* injured, then one is an immediate sufferer of the tort itself.[50] Along the trajectory of this axis, we can visualize persons who are ever more removed from the direct victim, but in at least two senses. The first sense is purely spatial—how physically connected was the person who seeks recovery? The more spatially removed one is from the scene of a tort, the less likely it is that one will be able to qualify as a plaintiff.[51] The second sense is relational. Even if one might not be within the technical "zone of danger" of an accident, when one stands in a close relationship with the person who is injured, then recovery is more possible.[52] The common thread in this area is that of the third-person claimant.

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47. *See* Cooter, *supra* note 46, at 1108–15.

48. *See, e.g.*, Manouchehri v. Heim, 1997-NMCA-052, ¶¶ 23–25, 941 P.2d 978, 983–84 (affirming award to doctor for downstream lost profits that could not be earned when machine he had purchased was defective).

49. The controversy in this area is whether a jurisdiction will recognize the tort of negligent infliction of emotional distress (NIED) to allow recovery by bystanders for the mental anguish they suffer on witnessing physical harm to another caused by the tortfeasor. For instance, in *Migliori v. Airborne Freight Corp.*, 690 N.E.2d 413 (Mass. 1998), an action certified to the Massachusetts Supreme Judicial Court from the federal court, the plaintiff came upon an accident victim lying in the street. It was not clear whether the plaintiff saw the victim being struck by the vehicle or not. The plaintiff rendered CPR to the victim, who died nonetheless. *Id.* at 414. The Massachusetts Supreme Court concluded that the plaintiff could not recover for negligent infliction of emotional distress because he was not closely related to the victim. *Id.* at 418. In an earlier era, even when the bystander *was* closely related to the victim and directly witnessed the accident, courts denied recovery for negligent infliction of emotional distress. In *Waube v. Warrington*, 258 N.W. 497 (Wis. 1935), *overruled by* Bowen v. Lumbermens Mut. Cas. Co., 517 N.W. 2d 432, 435 (Wis. 1994), a child was run down and killed crossing the road to home after getting off the school bus. The child's mother was looking out the window and saw the accident. Her shock and distress was so severe that it led to her own death. When her husband sued the driver for the wrongful death of his wife, the court denied recovery on the theory that the mother herself would have had no cause of action for her mentally induced injuries if she had survived. *Id.* at 497–98, 501. The court concluded that the defendant had no duty to the mother: "[T]he emotional distress or shock must be occasioned by fear of personal injury to the person sustaining the shock, and not fear of injury to his property or to the person of another." *Id.* at 499.

50. This is the logical extension of the "impact rule." The impact rule is simply the requirement that the plaintiff suffer some physical injury or impact from the defendant's conduct or product as a condition to recovery. *See* KEETON ET AL., *supra* note 1, § 54, at 363–65. However, some courts have allowed recovery where the "impact" is so minor as to trivialize the prerequisite and make it less meaningful as a curb on unwarranted compensation. *See id.*

51. *See, e.g.*, Fernandez v. Walgreen Hastings Co., 1998-NMSC-039, ¶¶ 2, 33, 968 P.2d 774, 776, 784 (denying recovery for NIED to grandmother who did not actually witness injury-producing event that caused grandchild's death from negligently filled prescription but allowing loss of consortium claim).

52. The best and most famous example is *Dillon v. Legg*, 441 P.2d 912 (Cal. 1968). Although the mother in that case did witness the injury to her child, she was not in the zone of danger; nonetheless, the California Supreme Court jettisoned the impact and zone-of-danger requirements and allowed her to recover for the emotional distress as a more direct form of injury. The court noted:

> Thus we have before us a case that dramatically illustrates the difference in result flowing from the alleged requirement that a plaintiff cannot recover for emotional trauma in witnessing the death of a child...unless she also feared for her own safety because she was actually within the zone of physical impact....
>
> ...The instant case exposes the hopeless artificiality of the zone-of-danger rule....[T]o rest upon the zone-of-danger rule when we have rejected the impact rule becomes even less defensible. We have, indeed, held that impact is not necessary for recovery.

Id. at 915.

Just as moving along the axis of direct "victimhood" from pecuniary loss to mental distress provokes the increasing skepticism of tort law, so does the area of third-person liability. As the would-be plaintiff is further removed (either spatially or relationally) from the obvious victim, so increases the difficulty of making a claim.[53] These issues implicate value choices about how tort compensation should address the multiplying social costs of tortious behavior—that is, where the limits of liability should be fixed, given the fact that injury to ever-more remote claimants is a probability. My suggestion is that one way to clarify the question of limiting compensation is to examine the human affiliations and communal norms we find important, not only for immediate victims of a tort, but also in terms of the damage to the fabric of our larger groups. As we shall see, this damage takes place via injury to the critical social roles that individual victims—both direct and third-person—occupy. One way to articulate this is in terms of "relational interests."

In a series of articles in the *Illinois Law Review* that began to appear in 1934, Leon Green argued that tort law did not adequately address what he called relational interests, or interests that emanate from human interactions.[54] In his view, these interests had been inappropriately classified as forms of property.[55] Clearly, Green was on to something. He may have failed to appreciate, however, why tort law analogized social bonds to property, and the significance of that designation for the nature of wrongs committed in connection with them. Green denied that claims evolving from human associations could be property because they were not "tangible thing[s]."[56] But, at the same time, he was well aware that they could not be completely individual either: "The situation is this: plaintiff stands in some relation to some other person; defendant hurts plaintiff's relation with that person. Thus is a hurt done to a relational interest."[57]

Green's one-step move from harm to the relationship to harm to a personal interest obscures a host of possibilities for loss of society. At the first level of analysis, Green used, but then ignored, the mutuality inherent in affiliations. This was unwarranted, because one's interaction with another cannot, by its nature, be solipsistic. Moreover, while our internal experiences of connections are personal, our outward manifestations of behavior make the relationship possible; we must do something or say something, we must *interact*, to have a bond with another human being that is more than transient. Moreover, these outward manifestations—our

53. In a complex analysis, Heidi Hurd and Michael Moore have criticized the dominant school of "risk analysis" in American tort law. *See* Heidi M. Hurd & Michael S. Moore, *Negligence in the Air*, 3 THEORETICAL INQUIRIES L. 333 (2002). Their key criticism of this school is its interpretation of duty and foreseeability in relational terms, so that it is not possible for a person to be "negligent, full stop, without any isolation of any particular [victim] or harm." *Id.* at 334. This Article does not argue that relational requirements should be imported into duty and foreseeability in order to restrict notions of who counts as a direct victim in the sense that Hurd and Moore decry. Rather, the point here is that, with loss-of-society damages, a dyadic relation is logically necessary and the relationship itself can be treated as a direct object of harm.

54. *See* Green, *Relational Interests*, *supra* note 29; *see also* Leon Green, *Relational Interests: Trade Relations*, 29 ILL. L. REV. 1041 (1935); Leon Green, *Relational Interests: Commercial Relations*, 30 ILL. L. REV. 1 (1935); Leon Green, *Relational Interests: Professional and Political Relations*, 30 ILL. L. REV. 314 (1935).

55. "The value of the *relational* interest in dealing with tort cases has not been generally recognized. It has been in large measure ignored or else classified as a property interest." Green, *Relational Interests*, *supra* note 29, at 460.

56. *Id.* at 462.

57. *Id.*

external associational behaviors—themselves have an objective, in the sense of a public reality. Beyond that, the most significant relationships, that is the ones that lead to compensation, have the status of recognized social roles. They function as communally constructed placeholders that we can occupy and in so doing, they allow us to "author" ourselves. In other words, as Joseph Raz has argued, they help us write our life scripts by making our individual experiences intelligible in terms of social ties, institutions, and practices.[58] If a person's experience in a relationship cannot be solipsistic, neither can the experiences of the parties be just mutual. Blackstone himself treated the claims that arise from human bonds as a function of the social aspect of our existence. He did so by making reference to the injuries "that affect [the] relative rights [of persons],...*considered as members of society, and connected...by various ties and relations*,...[as] husband and wife, parent and child...."[59] He recognized that the roles we play vis-à-vis each other are shaped not just by personal actions and feelings, but also by the social institutions that make the very roles possible. Following this logic, while a social bond may not have corporeal existence, it nonetheless has some of the attributes of a "thing" in the sense that it exists both inside and outside the parties involved. This "thing," in turn, has symbiotic qualities both from the perspective of the parties to the relationship and in terms of the connection between that relationship and the larger society. This is because our most healthy and generative associations tie us not only to each other, but also to the broader community.

Consider the affiliations of close friendship, wife and husband, or parent and child in their ideal incarnations. Each party has needs and wants; optimally, each person both gives and receives through the exchange of physical and psychological intimacy, knowledge, ideas and expertise, and mutual nurturing. Nevertheless, just as individuals do not exist in isolation, neither do these fundamental relationships. Human history shows that the nature, availability, and particular meaning of "friend," "parent," "child," "mate," and all other significant social ties are not just determined by bare biological or psychological needs outside of culture; rather, the social setting itself constitutes, defines, and privileges relationships to a great extent.[60]

Seen in this light, human associations have an objective quality. They require behavior that takes us, even the most reclusive of us, closer to the civil sphere. Moreover, our most significant connections, things such as marriage, are often possible *only* because they carry the force of law with them.[61] For these reasons, when a tortfeasor kills or harms a person embedded in these roles, the roles

58. *See* RAZ, *supra* note 25, at 369.

59. 3 WILLIAM BLACKSTONE, COMMENTARIES *138 (emphasis added).

60. Some of the most interesting and provocative anthropological studies have identified and described the astonishing variation in basic kinship relationships. Cultures and groups might be patrilineal or matrilineal, monogamous or polygamous. A father figure might actually be one's maternal uncle; friendships might exist across genders and classes, or be confined to them, and so on. *See generally* KINSHIP AND FAMILY: AN ANTHROPOLOGICAL READER (Robert Parkin & Linda Stone eds., 2004); MATRILINEAL KINSHIP (David M. Schneider & Kathleen Gough eds., 1961); PHILIP CARL SALZMAN, UNDERSTANDING CULTURE: AN INTRODUCTION TO ANTHROPOLOGICAL THEORY (2001). *See also* Pat Sekaquaptewa, *Evolving the Hopi Common Law*, 9 KAN. J.L. & PUB. POL'Y 761, 762 n.5 (2000).

61. *See* RAZ, *supra* note 25, at 202–09, 368–95.

themselves are objective, public artifacts that can concretize damages. An example is useful here. We know that the death of a child destroys the parent/child bond and the socially constructed meaning of parenthood goes a long way toward establishing the reality and the seriousness of the loss. The bond itself is a biological and a social fact. The meaning of parenthood is both personally and communally defined in our culture, and the benefits and detriments of our brand of parenting are constant subjects of public discourse, political discussion, and representation in literature and film.[62] Compare this to other forms of intangible harm, for instance to a plaintiff's claim for mental distress that has no genesis in physical injury. Unless mental distress stems from harm with similar social meaning, for instance employment discrimination,[63] the law is skeptical concerning the reality or depth of the plaintiff's claim to injury. Loss-of-society damages, being rooted in social realities, could prove a more trustworthy form of noneconomic harm than others.

Because of the communal component in human personality and relationships, it should not be surprising that tortious injury to a social bond could be injury to an object and not just to an individual. The harm can run both ways. It moves downward to the survivor who loses the relationship, and it moves upward to erode broader social ties that knit groups together in higher levels of association. As I will show below, the history of damages for loss of society reverberates with these phenomena and uncovers the social construction and collective consequences of injury in a particularly intense way.

III. THE HISTORY OF LOSS OF SOCIETY

Loss-of-society damages arose from two claims that made recovery by third persons their prime objective: consortium and wrongful death.[64] Looking at the intertwined histories of these claims provides a specific example of how social experiences shape injury,[65] expectations,[66] and roles.[67] Generally, the substantive

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62. For a complex depiction of the parenting relationship, see LARRY MCMURTRY, TERMS OF ENDEARMENT (1975) (narrating the relationship between a strong-willed single mother and her adult daughter who eventually dies of cancer); SUE MILLER, THE GOOD MOTHER (1986) (describing the difficult decision of a mother to forgo a love relationship in order not to lose custody of her child); and WILLIAM STYRON, SOPHIE'S CHOICE (1979) (depicting the moral dilemma of a young woman who has to sacrifice one of her two children in a Nazi concentration camp).

63. My point here is that being an employee is a role with important social meaning. *See* Spitz, *supra* note 13, at 441 (discussing the serious emotional impact of losing employment). Moreover, one of the reasons that hate speech is so destructive of its victims is that it trades on socially constructed conceptions of racial subordination. *See generally* Richard Delgado, *Words That Wound: A Tort Action for Racial Insults, Epithets, and Name-Calling*, 17 HARV. C.R.-C.L. L. REV. 133 (1982) (articulating the bases for developing a theory of tort liability and discussing how the Supreme Court's reluctance to recognize the doctrine of hate speech limits recovery in this area).

64. From Leon Green's perspective, both causes of action address uniquely relational harms. *See* Green, *Relational Interests*, *supra* note 29, at 461, 469.

65. In fact, whether we experience something as pleasurable or painful can itself be a function of socialization. *See generally* ROSELYNE REY, THE HISTORY OF PAIN (Louise Elliot Wallace et al. trans., 1995). Perhaps even more basic than that, the way people carve up reality into comprehensible units—an inescapable feature of the perceptual process—can be determined by local language. *See* W.V. QUINE, *Ontological Relativity*, *in* ONTOLOGICAL RELATIVITY AND OTHER ESSAYS, 26, 53–68 (1969).

66. Feelings can be deeply affected by the social setting. *See generally* THE SOCIALIZATION OF EMOTIONS (Michael Lewis & Carolyn Saarni eds., 1985) (including disparate theories as to the nature and extent of emotional socialization).

67. For a discussion of how the social construction of gender roles, particularly through religion, has affected the situation of women, see Gila Stopler, *The Free Exercise of Discrimination: Religious Liberty, Civil Community and Women's Equality*, 10 WM. & MARY J. WOMEN & L. 459, 522 (2004). For an analysis of how social constructs

theories of wrongful death and loss of consortium apply only when the tortfeasor damages a significant relationship.[68] Injuries to affiliations drove the law first to create the theories of liability protecting them, and second to adapt those theories to changing norms.

A. Loss of Consortium

The genesis and nature of the claim for loss of consortium is intricate and obscure. It stems from family relations, particularly those of husband and wife, and comes from various archaic causes of action for loss of services.[69] As John Fabian Witt has remarked, "personal injury litigation was virtually unknown prior to the nineteenth century."[70] The primary exception was the ability of the head of a household to sue for the lost services of servants or family members:

> There was, however, an important category of eighteenth- and early-nineteenth-century cases that arose out of personal injuries. Personal injuries, after all, caused damages not just to the immediate victim of bodily harm, but also to anyone who possessed rights in the life and services of the victim. Thus, when eighteenth-century common lawyers dealt with actions for damages from personal injury, they were likely to be concerned with actions by masters for the loss of services caused by an injury to a member of the master's household.[71]

Prosser and Keeton trace loss of consortium to the more general notion that the head of a household had a right to the services of his dependent inferiors. As they put it:

> The husband's interest in his relation with his wife first received recognition as a matter of her services to him as a servant. Over a period of some centuries it took form as something considerably broader than this, which was given the name of "consortium." Consortium was said to be made up of a bundle of legal rights to the alliterative trio of the services, society, and sexual intercourse of the wife.[72]

These ideas emphasized claims for intentional interference with the marital relation itself, for example, elopement with another, criminal conversation (adultery),

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affect relations as pragmatic as policing in the field, see Monique Marks, *Researching Police Transformation: The Ethnographic Imperative*, 44 BRIT. J. CRIMINOLOGY 866, 881 (2004).

68. This may not be as clear with wrongful death statutes that make awards transmissible assets of the estate or actions that allow the decedent's own claim to survive death. *See infra* notes 98–102 and accompanying text. Nonetheless, historically, the core aim of wrongful death legislation was to provide a monetary substitute for the missing head of household. *See infra* notes 103–115 and accompanying text. For an exhaustive treatment of wrongful death that emphasizes the overlapping and confusing categories of recovery, see 12 AM. JUR. TRIALS *Wrongful Death Actions* (1966).

69. Prosser and Keeton put it this way: "[T]he law of torts is concerned not only with the protection of interests of personality and of property,...but also with what may be called 'relational' interests, founded upon the relation in which the plaintiff stands toward one or more third persons." KEETON ET AL., *supra* note 1, § 124, at 915 (footnote omitted). Negligent infliction of emotional distress has also been used to reach relational harm. *See* John G. Culhane, *A "Clanging Silence": Same-Sex Couples and Tort Law*, 89 KY. L.J. 911, 943–49 (2000–2001).

70. John Fabian Witt, *From Loss of Services to Loss of Support: The Wrongful Death Statutes, the Origins of Modern Tort Law, and the Making of the Nineteenth-Century Family*, 25 LAW & SOC. INQUIRY 717, 722 (2000).

71. *Id.* at 723.

72. KEETON ET AL., *supra* note 1, § 124, at 916.

and alienation of affection.[73] However, husbands sometimes recovered damages for harm to the marriage caused by a wife's bodily injury.[74] With the appearance of *Guy v. Livesey*[75] in 1629, a husband's interest in his wife's society and sexual services was included.[76] It is important to note that these theories did not allow recovery for losses that occurred *after* the death of the wife.[77]

Loss of consortium has an unsavory history. Only married men could bring the claim. Remnants of the Roman law concept of paterfamilias[78] and the hoary theory that, upon marriage, a woman's legal identity merged with her husband's contributed to this limitation.[79] Thus, loss of consortium was asymmetrical, for being considered her husband's "inferior," a wife had no property right in him and a woman could not sue for losses she suffered from a tortfeasor's harm to her husband.[80] This legal gap became especially problematic with nineteenth century industrialization. As society developed to be more mechanical and mobile, accidental injuries and deaths increased.[81] Wex Malone described the consequences of these changes:

> [S]uddenly at mid-century society faced up in panic to a virtually new phenomenon—accidental death through corporate enterprise. Tragedy as a result of indifference and neglect was suddenly upon us in the factory, on the city streets, and on the rails. Nor was the principal villain of the piece...[an] impecunious felon. In his place stood the prospering corporation with abundant assets to meet the needs of widows and orphans.[82]

These phenomena eventually led to the statutory cause of action for wrongful death (also called the "death action").[83]

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73. These are the "heart balm" causes of action. *See* Douglas E. Cressler, *An Old Tort with a Unique Hoosier History Finds New Life*, 47 RES GESTAE 26, 26 (2004). *See generally* Danaya C. Wright, *Untying the Knot: An Analysis of the English Divorce and Matrimonial Causes Court Records 1858–1866*, 38 U. RICH. L. REV. 903 (2004) (discussing how the creation of civil courts to determine divorce and other family law matters affected more entrenched conceptions of women and marital injury).

74. *See* Evans Holbrook, *The Change in the Meaning of Consortium*, 22 MICH. L. REV. 1, 2 (1923).

75. 79 Eng. Rep. 428 (1629).

76. The court approved the husband's claim for damages for battery to his wife stating, "the action is not brought in respect of the harm done to the wife, but is brought for the particular loss of the husband, for that he lost the company of his wife." *Id.* As Prosser and Keeton say regarding the connection between physical injuries and loss of consortium today, "any tort causing direct physical injury to one spouse will give rise to a claim for loss of consortium by the other." KEETON ET AL., *supra* note 1, § 125, at 932.

77. *See generally* 1 SPEISER ET AL., *supra* note 1, § 3:36.

78. "Paterfamilias" means "head of the household" in Roman law. *See* UNIVERSITY OF NOTRE DAME, LATIN DICTIONARY AND GRAMMAR AID, *at* http://www.archives.nd.edu/cgi-bin/lookup.pl?stem=pater&ending=familias (last visited Mar. 31, 2005); *see also* Markus Dirk Dubber, *"The Power to Govern Men and Things": Patriarchal Origins of the Police Power in American Law*, 52 BUFF. L. REV. 1277, 1281–98 (2004).

79. This was the doctrine of *feme couvert*. It infiltrated English law through Blackstone's *Commentaries*. *See* 1 BLACKSTONE, *supra* note 59, at *430; *see also* JoEllen Lind, *Dominance and Democracy: The Legacy of Woman Suffrage for the Voting Right*, 5 UCLA WOMEN'S L.J. 103, 134–35 (1994) [hereinafter Lind, *Dominance*].

80. *See* 3 BLACKSTONE, *supra* note 59, at *142. Another impediment to relief was that married women had no capacity to sue in their own right. *See* Holbrook, *supra* note 74, at 2.

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

82. *Id.*

83. *Id.*

B. Wrongful Death

The history of death actions is contested. Many commentators claim that there was no common law theory for wrongful death,[84] but others assert that remedies available under ancient English law included recovery for death.[85] And, some early American cases did give compensation for a decedent's lost services.[86] The prohibition against common law actions for wrongful death is most commonly attributed to the English case *Baker v. Bolton*.[87] There, after his wife was killed when a coach the couple was riding in overturned, the husband sought damages for "the comfort, fellowship, and assistance of his said wife, and had from thence hitherto suffered and undergone great grief, vexation, and anguish of mind."[88] However, Lord Ellenborough instructed the jury that it could only give damages for the period of time up to the death, stating famously that, "in a civil Court, the death of a human being could not be complained of as an injury; and in this case the damages, as to the plaintiff's wife, must stop with the period of her existence."[89]

According to Stuart M. Speiser, *Baker* "became a magical intoned incantation recited by rote, without any critical examination, by hundreds of decisions in the various courts throughout the length and breadth of the United States."[90] This created a gap in remedies that did not allow women and children to sue for losses suffered because of an injury to the father, and, if death resulted, the decedent's own cause of action died with him.[91] Thus, many families had no redress for loss of a breadwinner. In response, by the middle of the nineteenth century, the English Parliament acted to provide a cause of action.[92] This legislation, popularly known as Lord Campbell's Act,[93] influenced the willingness of American states to allow recovery for wrongful death,[94] and a spate of statutorily-created claims arose soon after.

Wrongful death legislation in the United States is confusing,[95] and gives rise to multiple and overlapping approaches.[96] Most states designed variations on the English Act.[97] Many American statutes created a new right in the personal

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84. *See, e.g.*, FRANCIS B. TIFFANY, DEATH BY WRONGFUL ACT: A TREATISE ON THE LAW PECULIAR TO ACTIONS FOR INJURIES RESULTING IN DEATH § 1 (2d ed. 1913); *see also* Witt, *supra* note 70, at 731–32.

85. *See, e.g.*, William S. Bailey, *Flawed Justice: Limitation of Parental Remedies for the Loss of Consortium of Adult Children*, 27 SEATTLE U. L. REV. 941, 949–53 (2004); *see also* McDavid v. United States, 584 S.E.2d 226, 230–31 (W. Va. 2003).

86. *See* TIFFANY, *supra* note 84, § 6.

87. 170 Eng. Rep. 1033 (1808).

88. TIFFANY, *supra* note 84, § 3 (describing and quoting from *Baker*).

89. *Baker*, 170 Eng. Rep. at 1033. Wex Malone also explores the extent to which historic limitations of probate practice made death claims problematic. *See* Malone, *supra* note 81, at 1045–51.

90. 1 SPEISER ET AL., *supra* note 1, § 1:1; *see also* Moragne v. States Marine Lines, Inc., 398 U.S. 375 (1970) (criticizing the reasoning and validity of *Baker* and authorizing recovery for wrongful death under general maritime law).

91. *See* McDavid v. United States, 584 S.E.2d 226, 231 (W. Va. 2003). Hence, it was "better" to kill a victim outright than to maim him, for the law gave no remedy in the former case. *See* KEETON ET AL., *supra* note 1, § 127, at 945.

92. Lord Campbell's Act (Fatal Accidents Act), 1846, 9 & 10 Vict., c. 93 (Eng.).

93. *See* KEETON ET AL., *supra* note 1, § 127, at 945.

94. *See* TIFFANY, *supra* note 84, §§ 20, 24; *see also* KEETON ET AL., *supra* note 1, § 127, at 945–49.

95. *See* DOBBS, *supra* note 1, § 8.2, at 552–55.

96. *See* TIFFANY, *supra* note 84, §§ 24–30.

97. *Id.* § 24. Despite the obvious impact of Lord Campbell's Act, some scholars argue that American states

representative of the decedent's estate to sue on behalf of designated family members, and the damages allowed were those suffered *by these beneficiaries*, such as loss of family income, loss of the decedent's services, and later, loss of society.[98] Other states enacted legislation that invested the new cause of action for wrongful death in the estate of the deceased, which provided a transmissible asset for heirs or devisees, but one that was still based on the type of damages suffered by the beneficiaries, not the deceased.[99] Still others simply allowed the cause of action the victim had before death to survive death (survival acts).[100] Some states authorized both wrongful death claims for dependents and survival acts, as well as "hybrid" actions.[101]

From the first, American law "gendered" the statutory remedy by allowing only wives and next-of-kin, but not husbands, to sue.[102] This is perhaps understandable because wrongful death focused on the specific economic harm that occurred when the tortfeasor killed the breadwinner and, given classic gender roles in that era, the family's prime breadwinner was most likely a male.[103] However, regardless of the type of wrongful death statute that applied, damages were available for pecuniary loss only, for example, loss of the earner's wages. As Prosser and Keeton describe it:

> Where the damages recoverable are based upon the loss to the surviving beneficiaries, it is the general rule that only pecuniary loss is to be considered. The death acts obviously are aimed at protection of the relational interest, and bear a close analogy to the action of the spouse...for loss of services [*i.e.*, consortium] through injury to the other spouse.... But the original English act received a very strict construction at the hands of a court alarmed at the difficulty of

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had already begun to legislate in the area of wrongful death. *See* Witt, *supra* note 70, at 733; *see also* Malone, *supra* note 81, at 1071 n.141.

98. *See* TIFFANY, *supra* note 84, §§ 22–24.

99. *See id.* § 25.

100. A classic "survival" act simply provides that whatever cause of action the decedent had because of the defendant's tort survives the decedent's death and can be litigated by the personal representative of the estate. *See* KEETON ET AL., *supra* note 1, § 126, at 942–45.

101. *See* DOBBS, *supra* note 1, § 8.2, at 555–56. Wex Malone makes the point that "[t]he hybrid character of many of the enactments has been a source of considerable confusion." Malone, *supra* note 81, at 1044. *See generally* James O. Pearson, Jr., Annotation, *Recovery, in Action for Benefit of Decedent's Estate in Jurisdiction Which Has Both Wrongful Death and Survival Statutes, of Value of Earnings Decedent Would Have Made After Death*, 76 A.L.R.3D 125 (2004). In such circumstances, "[t]he usual method of dealing with the two causes of action has been to allocate the pain and suffering, expenses and loss of earnings...to the estate, and the loss of benefits of the survivors to the action for wrongful death, and so to the beneficiaries." KEETON ET AL., *supra* note 1, § 127, at 950 (footnote omitted).

102. *See* Witt, *supra* note 70, at 733–41.

103. While women have always performed work, until the nineteenth century and even into the twentieth, much of this work was unpaid labor in the household or labor that paid less than men's work and was undertaken in restricted occupations. *See* Joan W. Scott, *The Woman Worker*, *in* A HISTORY OF WOMEN IN THE WEST: IV. EMERGING FEMINISM FROM REVOLUTION TO WORLD WAR 399, 407–17 (Geneviève Fraisse & Michelle Perrot eds., 1993). As of 2002, women still earned only approximately seventy-eight percent of the pay men earned for the same or similar work. U.S. DEP'T OF LABOR, BUREAU OF LABOR STATISTICS, WOMEN'S EARNINGS UP RELATIVE TO MEN'S IN 2002 (2003), *available at* http://www.bls.gov/opub/ted/2003/apr/wk3/art03.htm (last visited Mar. 31, 2005).

> evaluating the impalpable injuries to sentiments and affections because of death....[104]

The primary meaning of this strict approach was that wrongful death claimants could not sue directly for the grief they experienced.[105] Because death actions did not give survivors damages for intangible grief losses, they were arguably under-compensatory.[106] In response to a variety of social and demographic changes,[107] both wrongful death and loss of consortium began to evolve.

C. From Lost Services to Loss of Society

Over the centuries, the model of marriage—and the roles of husband and wife within it—changed from an economic construct to a richer one that, at least ideally, contemplated a voluntary association between spouses motivated by romantic love.[108] In this context, partners were to reciprocally provide companionship and support. One can argue that, by the modern era, marriage had metamorphosed from its property form to its relational form. With that change, so changed the conception of loss of consortium from a cause of action founded in damage to one's property *in* other persons to a cause of action founded in one's relation *with* other persons. In the 1950s, states responded and began to extend the cause of action to women by statute and case law.[109] Similarly, by the mid-twentieth century, wrongful death statutes began to be adjusted so that a husband could recover for the death of his wife.[110] As altering conceptions of marriage and gender roles began to affect the

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104. KEETON ET AL., *supra* note 1, § 127, at 951.

105. *See, e.g.*, *In re* Estate of Watson, 673 N.W.2d 60, 63 (S.D. 2003).

106. *See* Green, *Relational Interests*, *supra* note 29, at 470–71. Moreover, the recognition of survival actions did not fully redress this continuing problem because survival actions typically invested the decedent's estate with the right to bring the decedent's own claim against the defendant, but limited damages to out-of-pocket expenses and pre-death pain and suffering. *See* DOBBS, *supra* note 1, § 8.2, at 553. "Loss of enjoyment of life" includes both the lost opportunity of a decedent to live a future life and the diminished capacity to enjoy life endured by an injured party who survives an accident. For a discussion of loss of enjoyment of life where death is involved, see *Wahlstrom v. Kawasaki Heavy Industries, Ltd.*, 4 F.3d 1084, 1093–94 (2d Cir. 1993). Where an injured victim survives, courts are concerned that loss of enjoyment of life may cause a double recovery if pain and suffering and mental distress are also compensable. *See, e.g.*, Adams v. Miller, 908 S.W.2d 112, 116 (Ky. 1995), *overruled on other grounds by* Guiliani v. Guiler, 951 S.W.2d 318 (Ky. 1997). Both situations fit within the general category of "hedonic damages." For a general survey of the jurisdictions regarding recovery for loss of enjoyment of life—in either sense—see David Polin, *Damages for Loss of Enjoyment of Life*, 49 AM. JUR. PROOF FACTS 3D 339 (1998).

107. *See generally* LAWRENCE STONE, THE FAMILY, SEX AND MARRIAGE IN ENGLAND 1500–1800 (1977) (arguing that around the end of the eighteenth century the family changed from an authoritarian construct to one nurturing affective individualism).

108. *See generally* ERNEST W. BURGESS ET AL., THE FAMILY: FROM TRADITIONAL TO COMPANIONSHIP (4th ed. 1971).

109. *See, e.g.*, Hitaffer v. Argonne Co., 183 F.2d 811 (D.C. Cir. 1950), *overruled in part by* Smither & Co. v. Coles, 242 F.2d 220 (D.C. Cir. 1957). Holbrook credits the Married Women's Property Acts as a major catalyst of the change. *See* Holbrook, *supra* note 74, at 4–9; *see also* D. Richard Joslyn, Annotation, *Wife's Right of Action for Loss of Consortium*, 36 A.L.R.3D 900 (2004).

110. As Michael Mogill states it: "Essentially, courts recognize that parties to contemporary marriages view their roles in many different ways, varying the traditional role of 'breadwinner' and 'homemaker' to meet their economic and psychological needs, with these functions subject to change over the years." Michael A. Mogill, *And Justice for Some: Assessing the Need to Recognize the Child's Action for Loss of Parental Consortium*, 24 ARIZ. ST. L.J. 1321, 1324 (1992). *But see* Martha Chamallas, *The Architecture of Bias: Deep Structures in Tort Law*, 146 U. PA. L. REV. 463, 489–503 (1998) (arguing that the structure of tort law still shows a bias in favor of property interests and against relational and emotional interests).

substantive causes of action for harm to one's spouse, so they also came to shape damages. Wrongful death stemmed from a market model of pecuniary loss;[111] loss of consortium had started as economic replacement for lost services,[112] but soon included the role of wife as helpmate and nurturer in measuring damages for loss of her society.

The types of damages recoverable for wrongful death began to intermingle with those recoverable for loss of consortium. The relational nature of loss of consortium infiltrated into the lexicon of wrongful death as the result of a two-stage development. In the first stage, courts extended death actions to cover loss of services, which could be fit within the pecuniary model.[113] For instance, in analyzing the damages available for death under the Federal Employers Liability Act,[114] the Supreme Court approved loss of services damages because they could be measured by "some standard," which was market-based, in that lost services "can only be supplied by the service of another for compensation."[115] For instance, if the lost services included lost childcare or cooking, one would have to hire a nanny or a cook to replace them, paying market rates to do so. This reasoning did not extend to more intangible items, such as society or companionship, for there was no ready market-based substitute for the lost society and companionship of a loved one.[116] However, in the second stage of development, loss of society became a part of wrongful death recovery in many jurisdictions.[117]

One technique for bringing this about was for courts to give an expansive definition to "pecuniary" harm, so that loss of society could be included. For instance, in *Miller v. Southern Pacific Co.*,[118] a case interpreting California law, the Missouri Supreme Court explained:

> Damages for the destruction of a home of which the beneficiary has the moral right to expect the continuance, including the benefits reasonably expected from the kindly relations of the parties and the peculiar disposition of the deceased toward his family, considered in connection with their physical condition and needs; and the loss to the beneficiary of the society, comfort and care of [the] deceased, is also included to the extent of their pecuniary value. They are founded upon the theory that the wrongdoer ought not to be permitted to destroy the home or to take away the support, society, comfort and care which one enjoys, and of which he has a moral right to expect the continuance, and escape liability to the extent of purely pecuniary compensation for the wrong, on the

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111. *See supra* notes 102–117 and accompanying text.

112. *See supra* notes 69–83 and accompanying text.

113. *See* Michigan C.R. Co. v. Vreeland, 227 U.S. 59 (1913) (construing the meaning of pecuniary loss recoverable under the Federal Employers Liability Act as encompassing the decedent's services that could be readily measured by market standards).

114. 45 U.S.C. §§ 51–60 (2000).

115. *Vreeland*, 227 U.S. at 70–71.

116. The Court also reasoned that, because wrongful death had its genesis in the victim's own injury, the survivor's direct damages for grief were not recoverable: "There must, however, appear some reasonable expectation of pecuniary assistance or support of which [the survivors] have been deprived. Compensation for such loss manifestly does not include damages by way of recompense for grief or wounded feelings." *Id.* at 70.

117. In *Breckon v. Franklin Fuel Co.*, 174 N.W.2d 836 (Mich. 1970), the Michigan Supreme Court bridged the gap by concluding that loss of society is actually a form of pecuniary loss.

118. 178 S.W. 885 (Mo. 1915).

> ground that these things, however important they may be to the life and future of the sufferer, are too intangible to be cognized by the law.[119]

Similarly, some statutes appeared to include loss of society within pecuniary harm.[120] While this approach made wrongful death damages more compensatory, it blended the categories of services and society,[121] raising worry about double recovery. However, in other jurisdictions, wrongful death simply evolved so that damages extended beyond the limits of strict pecuniary harm.[122] Now, regardless of the source or theory, companionate damages have become so closely tied with death actions that the existence of loss of consortium as a separate theory apart from wrongful death might be questioned.[123] In this light, some of the most difficult challenges of statutory construction involve the exact relationship between common law claims based on consortium and statutory wrongful death actions.[124] The difficulty of teasing apart these actions, and the common harms they vindicate, stems from their shared genesis in relationships.

D. Changing Norms, Changing Roles, and Changing Conceptions of Injury

A snapshot of the state of recovery for injuries in nineteenth-century America provides an arresting picture. A man could sue for damages for loss of consortium if his wife was injured, but not if she was killed.[125] Wives (and other dependents) could sue in wrongful death for the pecuniary losses caused by the demise of the head of household, but not for loss of consortium.[126] This history shows that the spheres of wife and husband—the one confined to the private sphere of the family, the other operating in the public sphere of the labor market[127]—determined whether

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119. *Id.* at 893. While recognizing that these elements are part of damages, the court ordered remittitur, reasoning that the damages actually awarded were excessive. *Id.*

120. *See, e.g.*, Sea-Land Servs., Inc. v. Gaudet, 414 U.S. 573 (1974), *superseded by statute as stated in* Miles v. Apex Marine Corps., 498 U.S. 19 (1990). As the Court put it in *Sea-Land*: "[U]nder the maritime wrongful-death remedy, the decedent's dependents may recover damages for their loss of support, services, and society, as well as funeral expenses." *Id.* at 584.

121. For instance, where a child sued for the death of a parent, jurisdictions treated loss of training, nurture, education, and guidance as recoverable without explicating whether these were strictly pecuniary or nonpecuniary losses. *See* 1 SPEISER ET AL., *supra* note 1, § 3:39, at 3-144 to 3-147.

122. In *Sanchez v. Schindler*, 651 S.W.2d 249, 252–53 (Tex. 1983), the Texas Supreme Court summarized the then-existing law of damages for wrongful death:

> Either by statute or judicial decision, thirty-five states allow recovery for loss of companionship and society in a wrongful death action brought by the parents. Presently, fourteen jurisdictions allow recovery for damages for loss of companionship and society under statutes containing language which traditionally had been interpreted as limiting recovery to pecuniary loss. Twenty one states recognize recovery for loss of society and companionship by statute. Nine of these statutes were amended to include these elements after their existing statutes were judicially interpreted to include society and companionship.

123. *See, e.g.*, Green v. S. R. Co., 319 F. Supp. 919 (D.S.C. 1970).

124. Many of these decisions rest on the question of whether loss of consortium is a "derivative" claim, meaning that the ability to recover is dependent on the claim the victim would have had. *See, e.g.*, Johnson v. Eldridge, 799 N.E.2d 29, 36 (Ind. Ct. App. 2003).

125. *See* Witt, *supra* note 70, at 740.

126. *See* KEETON ET AL., *supra* note 1, § 125, at 931–32.

127. The notion that women were naturally suited to the domestic sphere of the home and hearth was a major social construct of the nineteenth century. *See* Lind, *Dominance*, *supra* note 1, at 127, 146. By implication, women were excluded from the public sphere of commerce and the market. *See* Lisa R. Pruitt, *"On the Chastity of Women All Property in the World Depends": Injury from Sexual Slander in the Nineteenth Century*, 78 IND. L.J. 965, 987 (2003).

injuries occurred at all and gave those injuries content. The tortfeasor's actions disrupted social roles and so gave rise to correlative recovery. However, as female mortality declined and these stereotypes began to change,[128] so did the social constructs that defined damages. Eventually, both loss of consortium, which redressed "male" injuries, and wrongful death, which compensated "female" harm, lost some of their gendered nature.[129]

This evolution reveals that loss-of-society damages reflect communal conceptions of injury to affective ties and the sanctioned roles these ties embody. However, the relationship between loss of society and communal conceptions has functioned as a double-edged sword. Human affiliations can be more malleable, intricate, and non-standard than the mainstream paradigms the substantive law reflects at any given moment. The actual phenomena of relational loss can outpace recognized legal categories. In the case of both wrongful death and loss of consortium, the originating paradigm was the marital bond.[130] This created a structural framework for each claim that could place other forms of companionate injury outside the purview of redress and make them vulnerable to majority conceptions of more valued or more proper social relations. It is instructive to consider wrongful death legislation with these problems in mind.

Wrongful death statutes recognize designated beneficiaries only.[131] These beneficiaries reflect the various legislatures' assumptions concerning family relationships.[132] Despite its longevity, in many aspects, wrongful death legislation still follows the paradigm of the traditional nuclear family.[133] Under modern statutes, the spouse is the most common recipient, and, in some states, if a spouse survives, the children of the decedent have no right to recovery of their own—the assumption is apparently that the recovery is a family asset and that the children do not have

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128. Theorists differ as to the moments in history when gender-based stereotypes began to change and the extent to which they have changed. *See, e.g.*, Elisabeth G. Sledziewski, *The French Revolution as the Turning Point* (Arthur Goldhammer trans.), *in* 4 A HISTORY OF WOMEN IN THE WEST 33 (Genèvieve Fraisse & Michelle Perrot eds., 1993) (arguing that the French Revolution was a primary catalyst for changing views of women). Certainly, some American women in the nineteenth century began to object to the traditional views of women's nature and proper sphere while others did not. *See* Lind, *Dominance*, *supra* note 1, at 145–54. At the very least, late twentieth century opinions issued by the U.S. Supreme Court requiring gender differentiations to be subject to intermediate scrutiny marked a shift in legal approach. *See, e.g.*, Frontiero v. Richardson, 411 U.S. 677 (1973) (invalidating benefit plans giving less protection to women); Reed v. Reed, 404 U.S. 71 (1971) (striking statute discriminating in selection of estate representative on the basis of gender).

129. Martha Chamallas argues that, as loss of consortium became less gendered, it fell in importance in the hierarchy of tort compensation. *See* Chamallas, *supra* note 110, at 528. For the treatment of women generally under the regime of nineteenth century tort law, see Margo Schlanger, *Injured Women Before Common Law Courts*, 21 HARV. WOMEN'S L.J. 79 (1998).

130. This is evidenced by the fact that most statutes exclude relationships that do not fit within traditional categories of the nuclear family from coverage; for example, they exclude unmarried lovers. *See, e.g.*, Cockrum v. Fox, No. 04-42, 2004 WL 2750317, at *1 (Ark. 2004) (utilizing tables of descent to ascertain wrongful death beneficiaries and standing to sue); KEETON ET AL., *supra* note 1, § 125, at 932; *see also* 2 SPEISER ET AL., *supra* note 1, § 10:1; Laurence C. Nolan, *Critiquing Society's Response to the Needs of the Posthumously Conceived Child*, 82 OR. L. REV. 1067, 1075 (explaining the phenomena of posthumously conceived children being excluded from intestate succession statutes and wrongful death recovery).

131. *See* 2 SPEISER ET AL., *supra* note 1, § 10:1, at 7–9.

132. *See id.* §§ 10:2–10:20.

133. This may be one reason why the death of a woman gives rise to smaller damages than the death of a man. *See* Jane Goodman et al., *Money, Sex and Death: Gender Bias in Death Damage Awards*, 25 LAW & SOC'Y REV. 263, 263 (1991).

independent harms of note.[134] Moreover, many wrongful death statutes incorporate the jurisdiction's intestate succession principles and their judgments as to who is the "natural object" of a decedent's bounty.[135] Another technique is to specify particular classes of persons whose rights to recover are exclusive and hierarchical; only if no one of the first class has survived the decedent does the cause of action devolve to a member of the second class, and the spouse and children usually make up the first class.[136] Yet another approach is to specify more exactly who comes within the protection of the wrongful death statute.[137] Whatever the version, most statutes exclude many people who experience actual loss of society on the death of the direct victim. For instance, siblings, stepchildren, and grandparents of the deceased are usually excluded, at least as first order beneficiaries.[138] More tellingly, wrongful death recovery emanating from the parent-child bond has been problematic. Until developing principles of constitutional law prevented it,[139] most wrongful death statutes denied remedies to non-marital children.[140]

Where the child, and not the parent, is the direct victim, issues are more complex. Even if the wrongful death statute extends to cover the death of a child, damages can be under-compensatory if recovery is limited to pecuniary loss[141] or sums are offset against damages for the costs of raising the child.[142] Some jurisdictions have responded by passing "child wrongful death" legislation,[143] but these statutes typically allow parental recovery only for the death of a minor, unless the child is enrolled in college.[144] This reveals another problem category—adult children.[145] In most jurisdictions, if a spouse or minor child survives an adult, parents are excluded as beneficiaries.[146] Finally, given its historic accent on marriage, courts interpreting wrongful death statutes typically preclude compensation for unmarried lovers (regardless of sex), or close friends, no matter how dependent they might have been on the deceased in terms of money, love, or care.[147]

These limitations show a structural defect because there are numerous survivors who have connections with the decedent other than the marital

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134. *See* 2 SPEISER ET AL., *supra* note 1, §§ 10:2–10:3. As Green notes, outside death actions, children typically have not had any other recognized injuries due to relational harms that the law would compensate, such as loss of consortium. *See* Green, *Relational Interests*, *supra* note 29, at 484.

135. *See* 2 SPEISER ET AL., *supra* note 1, § 10:2, at 8–9, 9 n.16.

136. *See, e.g.*, Shipley v. Daly, 20 N.E.2d 653 (1939) (holding that when the cause of action had passed to a wife, but she died, secondary beneficiaries could not sue); KEETON ET AL., *supra* note 1, § 127 (Supp. 1988).

137. *See, e.g.*, TIFFANY, *supra* note 84, § 102 (describing original Mississippi rule).

138. *See* KEETON ET AL., *supra* note 1, § 127, at 947; *see also* Brynne D. McBride, Note, *And Then There Was One: Defining a "Special Relationship" in Iowa's Wrongful-Death Statute for the Relief of Twins*, 88 IOWA L. REV. 471 (2003).

139. *See* Levy v. Louisiana, 391 U.S. 68, 70–72 (1968) (holding interpretation of "child" for purposes of Louisiana's wrongful death statute to mean only legitimate children was a denial of equal protection).

140. This traces to Lord Campbell's Act itself. *See* TIFFANY, *supra* note 84, § 85, at 203–04.

141. *See* Green, *Relational Interests*, *supra* note 29, at 481–82.

142. *See, e.g.*, Thor v. City & County of San Francisco, 34 P.2d 1056, 1057 (Cal. Ct. App. 1934).

143. *See, e.g.*, IND. CODE ANN. § 34-23-2-1 (West 2004).

144. *Id.*

145. *See, e.g.*, Philippides v. Bernard, 88 P.3d 939, 943–44 (Wash. 2004) (explaining that parents are second-tier beneficiaries under wrongful death statute and, also, that they may not bring alternative action for loss of consortium unless they can show financial dependence on adult child).

146. *See, e.g.*, Van Horn v. United States, 437 F.2d 94 (9th Cir. 1971).

147. *See* KEETON ET AL., *supra* note 1, § 127, at 947–48.

relationship, but who suffer loss of society nonetheless. In parent-child contexts,[148] in the case of extended family members, or where no traditional family relations exist, the phenomenon of an injury in search of a substantive theory to champion it arises again. Paradoxically, because wrongful death is a creature of statute, it can be both more and less sensitive to social change than common law remedies.[149] Nothing shows this more clearly than recent disputes over domestic partners and gay marriage.[150] Some states that recognize civil unions or give domestic partner benefits have revised their wrongful death laws to allow partners to recover.[151] This reflects the emerging communal recognition of these formerly disfavored human bonds.[152] Moreover, some individuals have challenged the constitutionality of wrongful death statutes that protect one class of dependents but deny protection to others.[153] Still, most jurisdictions exclude these persons—siblings, lovers, friends, sometimes even parents and children—from wrongful death relief.[154] As an alternative strategy, litigants rebuffed by the standard categories of statutory liability have gone back to the common law claim for loss of consortium and attempted to shape it to fit emerging social relationships.[155] This is a fascinating phenomenon, for it reminds us that the common law can be an alternative to the legislative process for those seeking recognition of emerging communal realities and needs.[156]

However, adaptations of the common law can be difficult as well. Just as wrongful death's origin in the marital bond made it problematic for parents,

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148. As early as 1934, Green found the lack of remedies for parents notable. *See* Green, *Relational Interests*, *supra* note 29, at 479.

149. *See id.* at 473.

150. *See generally* Barbara J. Cox, *"The Little Project": From Alternative Families to Domestic Partnerships to Same-Sex Marriage*, 15 WIS. WOMEN'S L.J. 77 (2000) (discussing how relatively rapid changes in non-traditional living arrangements have been recognized through legislative change, often from the community level up).

151. For instance, California's wrongful death statute specifically includes "domestic partners" as persons who have standing to bring suit. CAL. CIV. PROC. CODE § 377.60 (West Supp. 2004).

152. *See* Grace Ganz Blumberg, *Legal Recognition of Same-Sex Conjugal Relationships: The 2003 California Domestic Partner Rights and Responsibilities Act in Comparative Civil Rights and Family Law Perspective*, 51 UCLA L. REV. 1555 (2004).

153. This arose first with regard to contraception for nonmarital couples. *See* Vivian Hamilton, *Mistaking Marriage for Social Policy*, 11 VA. J. SOC. POL'Y & L. 307, 350 (2004). But as early as the 1970s, Jean C. Love argued that differential applications of death actions and consortium claims might give rise to more generalized equal protection challenges. Jean C. Love, *Tortious Interference with Parent-Child Relationship: Loss of an Injured Person's Society and Companionship*, 51 IND. L.J. 590, 605–16 (1976).

154. *See* Elisa Laird, Comment, *The Law Is Straight and Narrow, How American Courts Define Families*, 9 CARDOZO'S WOMEN'S L.J. 221, 223 (2003).

155. In fact, efforts to use loss of consortium as an alternative remedy when one's relationship fell outside the statute began almost as soon as the statutes were enacted. *See* Malone, *supra* note 81, at 1059–60, 1071–72. New Mexico has been a leader in this area. In *Fernandez v. Walgreen Hastings Co.*, 1998-NMSC-039, 968 P.2d 774, the New Mexico Supreme Court extended the loss of consortium action to a grandparent on the ground that the grandparent's mental distress was a foreseeable injury where she had been the caretaker of the deceased child. Strikingly, in *Lozoya v. Sanchez*, 2003-NMSC-009, ¶ 25, 66 P.3d 948, 956–57, New Mexico allowed an unmarried cohabitant to bring a cause of action for loss of consortium so long as an intimate family relationship, almost akin to common law marriage, could be shown. Similarly, in *Fitzjerrell v. Gallup*, 2003-NMCA-125, ¶ 13, 79 P.3d 836, 841, parents and siblings who did not qualify to sue for the wrongful death of an adult man were allowed to bring causes of action for loss of consortium, so long as the they had "a significant enough relational bond" with the victim.

156. *See generally* MARTHA ALBERTSON FINEMAN, THE NEUTERED MOTHER, THE SEXUAL FAMILY AND OTHER TWENTIETH CENTURY TRAGEDIES (1995) (arguing that the common law has been appropriated by conservatives to pursue their agenda in a revival that revisits nineteenth century conceptions of appropriate relations); *see also* Chamallas, *supra* note 110, at 463–64.

children, other family members, unmarried lovers, and friends, so has the root of consortium in marriage affected its modern applicability to these groups.[157] Nonetheless, because loss of consortium is judge made, and because it is so closely tied with loss-of-society injury, individuals who have suffered harm to affectional bonds that are not recognized by wrongful death statutes have appropriated consortium for recovery. For this reason, consortium is a special prism reflecting changing norms about the status and worth of actual relationships. In recent decades, people suffering affiliational losses have tried to adapt consortium actions to their circumstances, with varying success. Accordingly, claims for filial consortium have been pressed on behalf of children,[158] "parental" consortium for parents whose children have been injured but not killed,[159] partner consortium for unmarried cohabitants,[160] and animal consortium for those who lose a dearly loved pet.[161]

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157. *See* KEETON ET AL., *supra* note 1, § 125, at 932.

158. As a mirror image of parental consortium, a *child's* ability to recover independently for the diminished capacity of a parent has been problematic, but perhaps for different reasons. The RESTATEMENT (SECOND) OF TORTS § 707A (1976) specifically excludes children as plaintiffs in this context. First, the parent has a cause of action for personal injury with all its attendant pecuniary and nonpecuniary damage items. *See* Love, *supra* note 153, at 603 (discussing concern for possible double recovery). Second, where a spouse can recover for loss of consortium, courts begin to worry about ever-enlarging damages if children of the parents have their own ground for relief. *See* Mogill, *supra* note 110, at 1341–43. After all, whatever monies the injured parent recovers, or the spouse who claims loss of consortium might receive, will "trickle-down" to dependent children. However, many commentators claim that this approach misses an important element: the child expected and is entitled to the benefits of the parental relationship. *Id.* at 1360–65. That the parent-child interaction is transformed from what it was or could have been is an independent injury to the child when injury changes that relationship into something else or forecloses its meaning altogether. *See generally* Timothy David DiResta, Note, *Children's Rights: The Parental Consortium Dilemma and Connecticut Law*, 14 QUINNIPIAC L. REV. 437 (1994).

159. For a brief summary of the historical evolution of consortium claims related to injured children, see generally Benny Agosto, Jr. & Mario A. Rodriguez, *What About the Parents? Can the Parents of a Non-Fatally Injured Child Recover Damages for Loss of Consortium?*, 66 TEX B.J. 396, 397–99 (2003). Because consortium was originally dependent on the marital bond, injury to children was not covered. *See* KEETON ET AL., *supra* note 1, § 125, at 935. But, as the conception of the parent-child relationship changed from one founded on services to one focused on society, some jurisdictions began to allow parents to recover damages for loss of an injured child's ability to relate to them in a normal parent-child manner. *See* Todd R. Smyth, Annotation, *Parent's Right to Recover for Loss of Consortium in Connection with Injury to Child*, 54 A.L.R.4TH 112, § 2 (2004). The idea that a child's disability could cause a parent to experience a compensable injury, because the disability makes the child unable to interact normally with the parent, has been controversial. One reason is that, since the child retains his or her own cause of action, courts worry about a double recovery. *See* Dralle v. Ruder, 529 N.E.2d 209, 212–14 (Ill. 1988). Another reason for reluctance may be that recovery would raise contested questions of the value of a child's life as a thing in itself and many of the same policy considerations raised by causes of action for wrongful birth. *See generally* Thomas A. Burns, Note, *When Life Is an Injury: An Economic Approach to Wrongful Life Lawsuits*, 52 DUKE L.J. 807 (2003). Loss of parental consortium claims have been particularly poignant in the context of medical malpractice that has rendered an otherwise healthy child profoundly retarded or disabled. For instance, in a case of first impression, the New Mexico Court of Appeals refused to extend the action of loss of consortium to parents of a child who suffered brain damage due to medical malpractice. *See* Wilson v. Galt, 100 N.M. 227, 233–35, 668 P.2d 1104, 1110–12 (Ct. App. 1983). This case may be of doubtful validity following the New Mexico Supreme Court's recent opinions in *Fernandez* and *Lozoya*. *See supra* note 155.

160. In the contemporary era, many people have dispensed with formal marriage but still live in relationships where their partners provide pecuniary support, services, and society. Many of these couples are heterosexual; many are homosexual; many have children. When accidental death or injury occurs, uncompensated pecuniary losses, as well as losses of services and society, can provide a windfall to the tortfeasor because the victim was not tied to others by legally sanctioned social bonds. Because most wrongful death statutes do not give beneficiary status to nonmarital partners, the third-party victim sometimes pursues loss of consortium for redress, with very limited results. However, New Mexico has recently allowed an unmarried cohabitant to seek redress for loss of consortium, so long as the plaintiff can show an "intimate family relationship" that is similar to common law marriage. *See* Lozoya v. Sanchez, 2003-NMSC-009, ¶ 25, 66 P.3d 948, 956–57. Due to the court's emphasis on the similarity of

All four of these new categories have common elements. They are (1) the existence of a significant affectional tie; (2) injury to that tie; and (3) resulting losses, most notably the lost opportunity of the relationship itself. The overarching value reflected by these elements is the bond itself. As one commentator has expressed it in a different context, "The claim arises solely from the relationship, so let each relationship dictate the result."[162] The notion here is that the claimant's tie with the victim existed as a matter of fact; the tortfeasor's action has foreclosed it, giving rise to loss of society in fact; therefore, recovery should be available as a logical extension of the bond's reality, rather than being precluded because the relationship has not achieved widespread acceptance.

The development of these claims shows what a driving force the overarching concept of loss of society can be and how critical changing patterns of relationships and evolving social mores are to it. This is significant for the nexus between social loss and the tort reform movement. Simply because a theory of compensation tied to communal values reflects the arguable weaknesses of those values, as well as their strengths, does not mean that the enterprise of loss-of-society compensation should be aborted. The evolution of wrongful death liability to cover more kinds of relationships and the appropriation of consortium actions by marginalized groups to voice their own values and vindicate their own lifestyles creates a healthy push-pull between individual autonomy and communal norms. But, another side effect of generic tort reform would be to abruptly terminate the dialogue between the mainstream and counterculture concerning human associations. If little or no recovery is available to anyone for this form of loss, an arena of discourse that operated uniquely in legal space is no more. Without the arbitrary limit of a cap on all noneconomic damages, the dialogue could continue, to the community's benefit. To understand why this is so, it is important to show the necessary connection between the hurts individuals suffer when their essential ties are destroyed and the health of the polity as a thing in itself. This is a phenomenon that should matter vitally to dominant groups in the community, as well as to those seeking greater recognition and acceptance.

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the relationship involved to a traditional marriage, it may be difficult to extend the *Lozoya* approach to same-sex couples. *But see* Flynn Sylvest, Note and Comment, *New Tort Rules for Unmarried Partners: The Enhanced Potential for Successful Loss of Consortium and NIED Claims by Same Sex Partners in New Mexico After* Lozoya, 24 N.M. L. REV. 461 (arguing that *Lozoya* could be applicable to same-sex couples). *See generally* Kelly M. Martin, Note, *Loss of Consortium: Should California Protect Cohabitants' Relational Interest?*, 58 S. CAL. L. REV. 1467 (1985). These problems became particularly intense in the aftermath of the World Trade Center bombing on September 11, 2001. *See generally* Symposium, *After Disaster: The September 11th Compensation Fund and the Future of Civil Justice*, 53 DEPAUL L. REV. 205, 231–35 (2003).

161. When a tortfeasor kills someone's dearly loved animal, the remedies are few. *See generally* Rebecca Huss, *Valuation in Veterinary Malpractice*, 35 LOY. U. CHI. L.J. 479 (2004). If animals are treated only as property, then regular compensatory damages for harm to that property are available. *See id.* at 514–17. However, unless the pet is a valuable farm or pedigreed animal, these damages are typically nominal. *See id.* Clearly, wrongful death is not available as a vehicle for seeking loss-of-society damages—the animal is not a decedent that this legislation covers. As with other, more novel, relationships, pet owners might pursue the remedy of loss of consortium to vindicate the social losses they have experienced. *See id.* at 526–27.

162. Hara Jacobs, Note, *A New Approach for Gay and Lesbian Domestic Partners: Legal Acceptance Through Relational Property Theory*, 1 DUKE J. GENDER L. & POL'Y 159, 171 (1994).

IV. SOCIALITY, PERSONAL HARM, AND COMMUNAL HARM

The contemporary era is replete with theories and studies—from psychology, to philosophy, to sociology, to biology—suggesting that our relationships make the development of identity possible,[163] and profoundly affect our well-being, for good or ill, as we move through life.[164] Despite individualist political theories, humans are born into a group setting and do not form their self-conceptions or conceptions of the world in isolation.[165] People removed from others are frequently maladjusted[166] and have higher mortality rates.[167] This has complex effects beyond the individuals directly involved.

A. The Community as Victim

At a minimum, the linked evolution of loss of consortium and wrongful death recovery shows that the community has a special stake in the nature and applicability of loss-of-society damages. But, this is not the only effect relational harms have on the community. Due to concerns for the need to limit liability, the law has sharply confined loss-of-society damages,[168] but this may not be justified.

When a person who had been embedded in family, friendship, work, and broader social affiliations is killed or injured, the relational harms go beyond the limited class of claimants that can be compensated under theories of wrongful death and loss of consortium.[169] This does not produce simple aggregative effects; we cannot get at the problem here by simply summing all the harms to individuals. This is because the direct victim had partners in all these roles, who lose society in fact, even if the law does not give them causes of action. This is most obvious when we consider that siblings often cannot sue, and that extended family members are

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163. *See generally* WILLIAM CRAIN, THEORIES OF DEVELOPMENT: CONCEPTS AND APPLICATIONS (4th ed. 1999); HANDBOOK OF SELF AND IDENTITY (Mark R. Leary & June Price Tangney eds., 2003).

164. *See generally* PAT M. KEITH & ROBERT B. SCHAFER, RELATIONSHIPS AND WELL-BEING OVER THE LIFE STAGES (1991).

165. *See* ORVILLE G. BRIM, JR. & STANTON WHEELER, SOCIALIZATION AFTER CHILDHOOD: TWO ESSAYS (1966).

166. *See, e.g.*, Kristin L. Caballero, Note, *Blended Sentencing: A Good Idea for Juvenile Sex Offenders?*, 19 ST. JOHN'S J. LEGAL COMMENT. 379, 391–92 (2005) (describing the high correlation between social isolation and teenage sexual offenders).

167. *See* Marilyn Denny, *Managed Care: Increasing Inequality & Individualism*, 3 QUINNIPIAC HEALTH L.J. 59, 59 (1999–2000).

168. *See supra* text accompanying notes 131–157.

169. As Galligan says:

> In many instances, our legal rules do not allow recovery by all those injured. For example, wrongful death and survival actions compensate only certain classes of persons, almost always limited to close relatives. Others go uncompensated. Certainly, one reason for this restrictive rule concerns the administrative impossibility of allowing all those damaged by a death to file suit and recover: the number and cost of those lawsuits would be phenomenal. But, what if increased awards to those who are allowed to recover could force defendants to take account of these otherwise omitted death costs without an undue administrative burden? The defendant might respond that it would be impossible to calculate this damage, which is one reason why we allow only close relatives to recover. But what about an estimate? Would such and [sic] approximation be preferable to *no* award? Or would it run the risk of overdeterrence? One can imagine a similar series of questions relating to other legal rules, such as the economic harm rule, providing that negligently inflicted economic loss is not recoverable when it is the only loss suffered. Indeed, I have asked and considered those very questions.

Galligan, *Disaggregating*, *supra* note 39, at 136–37 (footnotes omitted).

without a remedy, as well as unmarried lovers, very close friends, and so on.[170] However, because the affiliations involved are dynamic and interconnected in a complicated, interwoven, and hierarchal structure of social relations, just adding them together does not capture the total social loss created by these uncompensated injuries. Not only do the affected individuals forgo benefits, but also the lost bonds harm social groups, as things in themselves. Thus, the relational loss at the societal level can be greater than the sum of its parts.

In the 1970s and 1980s, political theorists showed renewed interest in the social construction of identity, groups, and values. The work of C.B. MacPherson,[171] Michael Sandel,[172] and Charles Taylor,[173] among others, posed the question of how individualistic our political system and norms could be if personhood was in large measure a function of socialization.[174] As Charles Taylor describes this point:

> I want to defend the strong thesis that doing without frameworks [social constructs] is utterly impossible for us; otherwise put, that the horizons within which we live our lives and which make sense of them have to include these strong qualitative discriminations [between communal forms of life]. Moreover, this is not meant just as a contingently true psychological fact about human beings, which could perhaps turn out one day not to hold for some exceptional individual or new type....Rather the claim is that living within such strongly qualified horizons is constitutive of human agency, that stepping outside these limits would be tantamount to stepping outside what we would recognize as integral, that is, undamaged human personhood.[175]

These ideas led to the rise of communitarian political theory, which now competes with individualism. Exponents like Amitai Etzioni have written numerous works to show the symbiotic nature of relationships, first, between persons, and then, between those relationships and more ramifying social connections.[176] As I have noted in other contexts, for Joseph Raz, it is the mutually reinforcing relationships between individuals, families, groups, and the larger society that make *both* a meaningful individualism *and* a healthy sociality possible.[177] This whole body of work—from MacPherson to Raz—is significant because it shows an essential social component in human personality and human relationships, both close and distant.

Social science research and other work on civil society help to put this in concrete terms. Certain sectors of the American polity suffer disproportionate harms to fundamental relationships and this makes the building of community difficult.[178] For instance, the effects of poverty, violence, and isolation in the inner city act as

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170. *See supra* text accompanying notes 131–157.

171. *See generally* C.B. MACPHERSON, THE POLITICAL THEORY OF POSSESSIVE INDIVIDUALISM: HOBBES TO LOCKE (1962).

172. *See generally* MICHAEL J. SANDEL, LIBERALISM AND THE LIMITS OF JUSTICE (2d ed. 1998).

173. *See generally* CHARLES TAYLOR, SOURCES OF THE SELF: THE MAKING OF MODERN IDENTITY (1989).

174. *See* Jeremy Waldron, *Particular Values and Critical Morality*, 77 CAL. L. REV. 561, 563–65, 563 n.5 (1989).

175. TAYLOR, *supra* note 173, at 27.

176. *See, e.g.*, AMITAI ETZIONI, THE NEW GOLDEN RULE: COMMUNITY AND MORALITY IN A DEMOCRATIC SOCIETY 35–37 (1996).

177. *See* Lind, *Damages*, *supra* note 1, at 298–308.

178. *See* George H. Taylor, *Racism as "The Nation's Crucial Sin": Theology and Derrick Bell*, 9 MICH. J. RACE & L. 269, 275–76 (2004).

barriers to the creation and maintenance of networks of family, friends, employment, and other associations.[179] The absence of these networks, in turn, negatively affects the individual well-being of people who do not have access to a rich and secure communal life.[180] This phenomenon gives rise to trenchant criticisms of mainstream culture by social groups that have been marginalized. For example, people of color have long decried the effects of slavery, racism, poverty, and prison on their ability to maintain and nurture family and communal ties.[181] Similarly, the external pressures of the greater society have transformed the kinship structures, values, and communal patterns of indigenous peoples, and not to their benefit.[182] These phenomena show that if enough social roles are obstructed, the social group, as a thing in itself, is imperiled. Certainly, any healthy civil society requires a critical mass of possible relationships, ties, connections, bonds, and affiliations to survive. We can apply this to the concept of externalities, which is a pivotal paradigm in tort law.[183]

The concept of an externality is that one who undertakes an action with costs often does not bear the costs involved, but externalizes those outlays to others.[184] The classic example is the person who pollutes the communal stream by dumping waste in it. As the community has become more attuned to the problem of externalities, so has the legal regime come to protect against them through regulation.[185] The notion of polluting the communal stream extends to loss-of-society damages. Perhaps they have become more available to claimants as we have come to see relational harms as the source of "uncompensated third-party costs extending to all of us."[186] However, these costs are not just linear and aggregative; instead, they can produce structural harm to the very fabric of the community itself.[187] Loss-of-society

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179. *See generally* THE BLACKWELL COMPANION TO THE SOCIOLOGY OF FAMILIES (Jacqueline Scott et al. eds., 2004).

180. For a complex account of the constituent factors in individual well-being, including the impact of family and communal ties and values, see PARTHA DASGUPTA, AN INQUIRY INTO WELL-BEING AND DESTITUTION (1993).

181. *See generally* DONNA L. FRANKLIN, ENSURING INEQUALITY: THE STRUCTURAL TRANSFORMATION OF THE AFRICAN-AMERICAN FAMILY (1997) (cataloging and critiquing the history of and the debate over the effects of slavery and social subordination on black family life).

182. *See* Taiawagi Helton, *Nation Building in Indian Country: The Blackfoot Constitutional Review*, KAN. J.L. & PUB. POL'Y, Fall 2003, at 12–15 (discussing the impact of the federal government's policies on Indian welfare).

183. *See* Wendy E. Wagner, *Commons Ignorance: The Failure of Environmental Law to Produce Needed Information on Health and the Environment*, 53 DUKE L.J. 1619, 1632 n.31 (2004) (defining externalities as those circumstances in which an actor does not "bear all the costs of his or her action") (quoting TOM TIETENBERG, ENVIRONMENTAL AND NATURAL RESOURCE ECONOMICS 45 (2d ed. 1988)).

184. *See id.*

185. One might argue that this explains the whole phenomenon of environmental law. *See* LAYCOCK, *supra* note 10, at 407–08 (asserting that since the common law of nuisance proved incapable of equitably dealing with the social costs of pollution, regulation came to replace it).

186. I attribute this idea and its expression to discussions with my colleague Paul Brietzke over a previous version of this Article.

187. As John Chapman and Ian Shapiro have explained it:

> [C]ommunitarians have come to think that an almost fetishistic addiction to freedom, without regard for its differential worth in our inegalitarian society, lies at the core of most that is wrong with the modern world...unless the virtues and demands of community can gain precedence over individualistic aims and opportunism, at least some if not most of the time, the social and cultural ingredients of a viable political and economic order cannot flourish.

John W. Chapman & Ian Shapiro, *Introduction*, *in* DEMOCRATIC COMMUNITY: NOMOS XXXV 1, 2 (John W. Chapman & Ian Shapiro eds., 1993).

damages allow us to consider these structural aspects, not just at the personal level, but also at the level of the polity.

B. Between Individual and Group Rights

One of the great debates over the American legal system is whether it promotes individualism as the primary norm.[188] This question threads its way into numerous contexts. Most globally, it lies behind the dispute over whether the Constitution protects individual and not group rights.[189] Deriving individual rights from our singular existence is a trait of Western political philosophy.[190] This tradition posits human beings, living atomistically, in a "state of nature," free from governmental control.[191] As unjustified as this conception might be from the perspective of anthropology or biology, the emphasis on persons as morally prior units and groups as having only derivative importance has made its way into constitutional decision making.[192]

Similarly, the substantive law presumes that rights are individual, not communal. For instance, this presumption shows up when the law of property attempts to reconcile the public interest in regulating ownership with the value placed on unfettered private use,[193] and in the differing views of property itself held by indigenous people and other claimants.[194] The same thread appears in the procedural context over whether there is a public character to private litigation.[195] The law of remedies is no exception. It, too, intones that remedies must be particularized to the specific plaintiff,[196] at the same time that remedies based on statutory schema imbued with the public interest make up a significant portion of litigation, and

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188. *See* JoEllen Lind, *Liberty, Community, and the Ninth Amendment*, 54 OHIO ST. L.J. 1259, 1259–61 (1993).

189. *See* Ronald R. Garet, *Communality and Existence: The Rights of Groups*, 56 S. CAL. L. REV. 1001, 1002–03 (1983).

190. *See generally* RICHARD TUCK, NATURAL RIGHTS THEORIES: THEIR ORIGIN AND DEVELOPMENT (1979).

191. One of the clearest modern variations on this theme is found in the work of Robert Nozick:

> Individuals have rights, and there are things no person or group may do to them (without violating their rights). So strong and far-reaching are these rights that they raise the question of what, if anything, the state and its officials may do....
>
> ...[A] minimal state, limited to the narrow functions of protection against force, theft, fraud, enforcement of contracts, and so on, is justified;...any more extensive state will violate persons' rights not to be forced to do certain things....

ROBERT NOZICK, ANARCHY, STATE, AND UTOPIA ix (1974); *see also* STEVEN LUKES, INDIVIDUALISM 73 (1973).

192. *Compare* Beauharnais v. Illinois, 343 U.S. 250, 263 (1952) (recognizing a theory of group libel), *with* R.A.V. v. City of St. Paul, 505 U.S. 377, 391 (1992) (refusing to regulate hate speech).

193. This was a major subtext in the Supreme Court's resolution of the takings issue in *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1025–28 (1992).

194. *See* Angela R. Riley, *Recovering Collectivity: Group Rights to Intellectual Property in Indigenous Communities*, 18 CARDOZO ARTS & ENT. L.J. 175, 184–86 (2000).

195. These issues are especially intense in the context of class actions. *See* Kenneth S. Abraham, *Individual Action and Collective Responsibility: The Dilemma of Mass Tort Reform*, 73 VA. L. REV. 845, 846–47 (1987).

196. *Hatahley v. United States*, 257 F.2d 920, 925 (10th Cir. 1958), states:

> The District Court seemed to think that because the horses and burros played such an important part in the Indians' lives, the grief and hardships were the same as to each. The equal award to each plaintiff was based upon the grounds that it was not possible to separately evaluate the mental pain and suffering as to each individual, and that it was a community loss and a community sorrow....Pain and suffering is a personal and individual matter, not a common injury, and must be so treated.

devices like injunctions rectify harm—such as racial discrimination—that is a result of group membership.[197] Nevertheless, loss-of-society damages, by their very nature, include individual, dyadic, and communal components. Because of the central function of social roles in their meaning and operation, they force us to look beyond the perceived dichotomy between personal claims and group claims.

If marriage, the family, parenthood, friendship, and other collectively shaped activities, bonds, and institutions are important to its health, even constitutive of it, then the community has a vital stake in promoting and protecting them by insisting that the worth of these connections be factored into the mix of compensation. Loss-of-society damages are distinctive from other types of tort compensation, even other forms of compensation for noneconomic loss, because of their essential social component. Through this communal aspect, they can promote and protect relationships we value now and are coming to value as time goes on—those that prove indispensable not only to the individual's well-being, but to civil society as well. If this is true, what other implications might follow?

V. SOME IMPLICATIONS: JURIES, PROOF, AND GENERIC TORT REFORM

Analyzing the significance of loss-of-society damages for law in general is a major project. After all, the philosophical, social science, and legal questions they raise are some of the most complex and contested that exist. The first goal of this Article was to better define loss-of-society damages; the remainder of the discussion can only be programmatic, in the sense that it provokes a series of questions and issues but does not attempt to answer them. At the very least, because the idea of an injury to a relationship is central to them, loss-of-society damages suggest some important policy questions about juries, scientific evidence regarding social relations, and tort reform.

A. The Jury's Role

As Charles McCormick put it in his classic work on damages: "The amount of the damages...from the beginning of trial by jury, was a 'fact' to be found by the jurors."[198] One of the reasons for this was the idea that the community as represented by the jury would have access to more localized information than central political authorities would have.[199] More important from the perspective of democracy, the locality might disagree with the central authority and the idea of drawing a jury from local citizens could function as a counterweight to externally controlled litigation.[200]

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197. This is the concept of "public law litigation" championed by Chayes. *See* Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281, 1284 (1976).

198. CHARLES T. MCCORMICK, HANDBOOK ON THE LAW OF DAMAGES 24 (1935). McCormick goes on, however, to detail the development of increasing control over damage assessments exerted by trial judges. *Id.* at 25–28.

199. Arguably, this connection is assumed by the fair cross section requirement of 28 U.S.C. § 1861 (2000). *See also* Robert Post, *Response to Commentators*, 88 CAL. L. REV. 119, 119 (2000).

200. Perhaps this is why, in the context of criminal law, the community's will, in the form of the jury's determination, has been so important. *Taylor v. Louisiana*, 419 U.S. 522, 530 (1975), states:

> Community participation in the administration of the criminal law, moreover, is not only consistent with our democratic heritage but is also critical to public confidence in the fairness

When the power of assessing damages is seen in the light of creating economic incentives and disincentives to behavior, the jury's ability to express the community's desire to determine its own fate is central. No less an authority than William Blackstone asserted that juries are the "bulwark of...liberty,"[201] but this claim should not be confined to the liberty of individuals.

Jury deliberations can express the community's own desire for self-determination as much as they can insulate particular people from governmental oppression. As David Millon stated it: "The common law process may in effect have given jurors the freedom to decide the applicable norms as well as the facts, with communal values (societal concepts) rather than externally imposed common law rules supplying these norms."[202] In a general critique of the way legal theorists approach the intersection of social norms and law, Stephen Hetcher has argued that more attention should be paid to the effect of juries on the ground-level creation of legal values: "Legal centralists wrongly focus on top-down, formal explanations of the source of entitlements at the expense of bottom-up explanations that would take into account the causal impacts of informal social norms, such as those that might flow from the deliberations of juries."[203] If Hetcher is right and juries perform an essential function in vindicating developing social values, and if, moreover, they are the most democratic of political institutions and the least vulnerable to political corruption,[204] then the best alternative for improving loss-of-society damages (for answering the question of "how much") would simply be to give the jury better and richer evidence concerning them. It is telling that this option is not offered by tort reformers, who apparently fear that the available evidence would actually support larger awards for loss-of-society damages, not smaller ones, and so would legitimate the jury verdicts they decry.

B. Scientific Evidence and Proof

Under standard doctrine, the jury is to assess "fair and just" compensation in an amount that is reasonable to compensate for loss of society based on the evidence before it.[205] Nevertheless, the evidence the jury considers is narrowly circumscribed.[206] In general, juries may not consider expert testimony if the matters they

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of the criminal justice system. Restricting jury service to only special groups or excluding identifiable segments playing major roles in the community cannot be squared with the constitutional concept of jury trial.

201. *See* 3 WILLIAM BLACKSTONE, COMMENTARIES * 350.

202. David Millon, *Positivism in the Historiography of the Common Law*, 1989 WIS. L. REV. 669, 703 n.139.

203. Stephen Hetcher, *The Jury's Out: Social Norms' Misunderstood Role in Negligence Law*, 91 GEO. L.J. 633, 634 (2003) (citing ROBERT ELLICKSON, ORDER WITHOUT LAW: HOW NEIGHBORS SETTLE DISPUTES 4–5 (1991)).

204. *See* EUGENE W. HICKOK, JR., THE BILL OF RIGHTS 352–53 (1991). Randolph N. Jonakait argues that juries are less susceptible to corruption in large part because they are not entrenched institutionally; individual jurors come and go. RANDOLPH N. JONAKAIT, THE AMERICAN JURY SYSTEM 30 (2003).

205. *See, e.g.*, CALIFORNIA JURY INSTRUCTIONS: CIVIL 14.52 (West 2004) (allowing for "just compensation" for the death of a child); *see also* Patch v. Glover, 618 N.E.2d 583, 589 (Ill. App. Ct. 1993) ("[D]amages for loss of society are difficult to estimate and no standard of value applies; rather, their assessment is committed to the sound discretion of the jury as to what is reasonable under the circumstances of any given case guided by their observations, experience, and sense of fairness."); Romero v. Byers, 117 N.M. 422, 428, 872 P.2d 840, 846 (1994).

206. See, for example, *Patch*, 618 N.E.2d at 586–87, where the court found the admission of expert economic evidence on loss of society to be an abuse of discretion. This is how the court described the evidence the plaintiff

decide can be determined using "common sense" unaided by specialized knowledge.[207] This principle expresses the goal of retaining the jury and not displacing it in favor of experts, but it functions too often to deprive the jury of useful information. This has put the American civil jury in a "Catch-22"[208] with regard to proof of intangible losses in general and loss-of-society damages in particular. Tort reformers have exploited this Catch-22 to argue that jury verdicts are insufficiently concrete, consistent, or supported by the evidence.

Social science research on the enduring psychological impact of losing one's child, for instance, is generally not admissible.[209] Similarly, courts have been hostile to expert testimony that seeks to quantify relationships using economic studies based on the value of a statistical life or our willingness to pay to avoid losing them.[210] While in many jurisdictions, especially the federal courts, the trial judge is supposed to compare the jury's damage award for intangible losses with awards in similar cases, the jury itself is not allowed to consider this information.[211] At the same time that courts actively restrict access to this data,[212] tort reformers argue that jury awards are suspect because they are irrational, indeterminate, too large, and vary too much from case to case.[213]

Ironically, these reformers invoke empirical studies to assert that juries need to be controlled.[214] At the same time, they work to restrict the *jury's* access to empirical evidence on the grounds that "junk science"[215] is too unreliable, that scientific

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wished to introduce:

> Smith [the expert] testified during his *voir dire* examination that, in his opinion, the value of the loss of society and companionship sustained by Patch's surviving family was about $819,000. He arrived at this figure through what he termed was the "willingness to pay methodology." Smith stated that by examining available data, he concluded, based on the amount of money that American society spends on average to save lives, the "statistically average" person, a 31-year old with a life expectancy of 45 more years, has a value to society of $2.3 million. That net figure excludes the amount of money the person would have earned in his lifetime. According to Smith, most of the $2.3 million non-monetary value of the statistically average person is captured by those people who have a direct, palpable, and immediate relationship with the individual. The group includes the spouse, children, siblings, parents, grandparents, aunts, "close family[,] loved ones," and close friends. To this gross value figure, Smith applied a factor based on the decedent's remaining life expectancy, as determined by sex, race, and age at the time of death, to arrive at the value of the loss of society sustained in any given case. Smith admitted, albeit reluctantly, that as applied, the value of the loss of society sustained by the survivors of any person of the same sex, race, and age as Patch would be the same.

Id. (alteration in original).

207. *See, e.g.*, Schwalbe v. Berscheid Lumber & Supply Co., No. C5-96-1594, 1997 WL 193908, at *2 (Minn. Ct. App. 1997) (unpublished).

208. Joseph Heller coined this phrase to denote an inescapable dilemma with existential consequences. *See* JOSEPH HELLER, CATCH-22 (1961).

209. *See* Bailey, *supra* note 85, at 960–64 (discussing the results of social science research regarding the impact on parents of the death of an adult child).

210. *See Patch*, 618 N.E.2d at 586–88.

211. The comparative samples are considered in ruling on motions for new trial. *See* Lind, *Damages*, *supra* note 1, at 270–73.

212. In some sense, this is the whole point of *Daubert* hearings in the federal courts. *See* JoEllen Lind, *Procedural Swift: Complex Litigation Reform, State Tort Law, and Democratic Values*, 37 AKRON L. REV. 717, 771–73 (2004).

213. *See* Christine Jolls et al., *A Behavioral Approach to Law and Economics*, *in* BEHAVIORAL LAW AND ECONOMICS 1 (Cass R. Sunstein ed., 2000).

214. *Id.*

215. *See generally* Thomas O. Garrity, *Our Science Is Sound Science and Their Science Is Junk Science:*

studies are too "confusing,"[216] or that this information does not "individuate damages" enough to the particular plaintiff.[217] However, wholesale exclusion of this evidence trades on a false dichotomy between "common sense," uninformed by any other data, and a "trial of the experts," which displaces the jury completely. In a different context, Jeffrey Abramson has remarked that "[m]odern law unnecessarily undermines the fullness of jury deliberation, even about the facts of the case, by posing a false opposition between well-informed jurors and fair-minded jurors."[218] It is time to consider whether the "fullness" of jury deliberation on loss-of-society damages might be restored through additional types of proof.[219]

C. Generic Tort Reform

As the discussion above makes evident, loss of society is by its nature "noneconomic" as critics use the term.[220] As a result, any broad-based tort reform that caps or eliminates noneconomic damages generically will cap or eliminate loss of society.[221] However, if these damages are unique, this is unintended and unwelcome. To put this most clearly, under a regime that limits noneconomic damages across the board, it is a windfall to the tortfeasor if the victim is a child or homemaker, rather than an able-bodied worker who sells his labor in the market. Yet, who would opt for a life with no possibility of enjoying the benefits of a close tie with a lover, the bond with a child, or a connection with our parents or friends? What implications does this have for the broad call to reform all damages for intangible harms? There are at least three perspectives on this question.

First, indiscriminately sweeping away loss-of-society damages with the broad brush of tort reform will preclude any remedy for some of the most devastating wrongs that take place. Consider medical malpractice, where the movement to cap noneconomic compensation has been quite successful.[222] In this context, horrific injuries to essential relationships occur. The nightmare paradigm is the perfectly healthy child whose delivery is botched, and who is profoundly brain damaged as

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Science-Based Strategies for Avoiding Accountability and Responsibility for Risk-Producing Products and Activities, 52 U. KAN. L. REV. 897 (2004) (describing the controversy in litigation and regulatory activity over what scientific methods and data should count as "junk" and therefore not factor into decisions concerning socially acceptable risk).

216. For instance, some argue that expert testimony on hedonic damages should be excluded so the science will not confuse the jury. *See, e.g.*, Choctaw Maid Farms, Inc. v. Hailey, 822 So. 2d 911, 924 (Miss. 2002) (Cobb, J., concurring in part and dissenting in part). *But see* Susan E. Cowell, Note, *Pre-Trial Mediation of Complex Scientific Cases: A Proposal to Reduce Jury and Judicial Confusion*, 75 CHI.-KENT L. REV. 981 (2000) (arguing that pretrial mediation might reduce confusion caused by a fundamental tension between the goals of science and the goals of law).

217. For instance, the objection of the U.S. Supreme Court to the relevance of the empirical evidence linking race discrimination to the death penalty was that the evidence could not be connected clearly enough to the particular jury's decision with regard to the particular defendant. *See* McClesky v. Kemp, 481 U.S. 279, 296 (1987).

218. JEFFREY ABRAMSON, WE, THE JURY: THE JURY SYSTEM AND THE IDEAL OF DEMOCRACY 9 (1994).

219. *See, e.g.*, Sunstein, *Lives*, *supra* note 46, at 205 n.1.

220. *See* LAYCOCK, *supra* note 10, at 169–70 (noting that it is the proponents of tort reform who have coined the term "noneconomic").

221. *See supra* note 6.

222. *See* Fineman, *supra* note 156, at 40. For a survey of the status of damage caps in the states, see Kevin J. Gfell, Note, *The Constitutional and Economic Implications of a National Cap on Non-Economic Damages in Medical Malpractice Cases*, 37 IND. L. REV. 773, 783–84 (2004). *See also* Schwartz & Silverman, *supra* note 27, at 1052 n.66.

a result. Many jurisdictions will not completely compensate even the "hard" pecuniary losses associated with the doctor's negligence.[223] This means that the community as a whole will subsidize the doctor's malpractice, as public aid programs will inevitably undertake the child's care.[224] What happens to the parent/child bond, the marriage, and the remaining family unit in this circumstance? The death of a child by itself is transformative because it obliterates the parental role in regard to that child; living and caring for a child with profound but avoidable disabilities might be even more transfiguring. To really empathize here, one should ask what the experience must be like of looking at, being with, and caring for one's own severely brain damaged child who would have been normal without the doctor's negligence. Such a child likely needs twenty-four-hour care, must be intubated to breathe, and will never be able to live without wearing a diaper, much less communicate in meaningful ways. The tort reform movement would ignore the impact on all social bonds here and severely limit recovery for loss of society.

Second, what about the community's stake? It is ironic that in the era of moral values, where family ties are exalted, no child is supposed to be left behind, and abortion is divisive because it involves contested understandings of the nature of life, the tort reform movement will, if successful, eliminate compensation for the intangible, but critical, worth of human ties in the name of cost-benefit analyses. By their nature, generic efforts to restrict noneconomic damages deny that the social world of humans and their interactions have significant worth, while the broader society seems to be moving toward a more substantive, even a religious, conception of essential ties that defies common accounts of economic efficiency. The cognitive dissonance that results is troublesome, to say the least, and deserves more explicit attention than an indiscriminate approach to intangible harms normally provides.

Finally, is it possible that there really are "hard" costs associated with loss of society that might be calculated in strict economic terms? As already indicated, economic experts in the governmental arena have developed methods that endeavor to calculate the value of a human life for purposes of determining the efficacy of regulatory legislation.[225] A variety of methods are used to reach these figures, including the notion of a statistical life and also extrapolations from our willingness to pay to reduce our risks, or our insistence that wages for high-risk work be higher.[226] Some jurisdictions have allowed this sort of information into the decision of actual cases by allowing awards for "hedonic" damages, in which the value of the decedent's own loss of the enjoyment of life is placed in the context of expert conceptions of average values.[227] Astonishingly, given the general perception fostered by tort reformers that personal injury awards are too high, governmental figures used in regulatory decision making have valued an average life at as much

223. *See, e.g.*, IND. CODE ANN. § 34-18-14-3 (Michie 2004) (limiting recovery to a maximum of $1,250,000).

224. Because catastrophic medical expenses typically render families who suffer them indigent and therefore eligible to have all or a portion of medical care paid for by the state, the resulting undercompensation becomes an externality that the community has to subsidize. *See* Thomas C. Galligan, Jr., *Deterrence: The Legitimate Function of the Public Tort*, 58 WASH. & LEE L. REV. 1019, 1037 (2001).

225. *See* Sunstein, *Lives*, *supra* note 46.

226. *See* Cooter, *supra* note 46, at 1099–1100, 1109–12.

227. New Mexico has been a leader in allowing the introduction of expert testimony regarding hedonic damages. *See* Romero v. Byers, 117 N.M. 422, 872 P.2d 840 (1994).

as $6.1 million.[228] Robert Cooter has suggested that these methods might be adapted using the Learned Hand notion of a reasonable person (which incorporates cost-benefit analysis) so that the actual social costs of relational loss from death or injury might be translated into economic terms.[229] If this is possible, then the entire project of delegitimizing so called "noneconomic" damages loses its critical force, because the distinction between pecuniary and nonpecuniary harms is blurred.[230] At a minimum, an approach such as Cooter's indicates that there is uncompensated pecuniary cost that is tolerated by the traditional system of legal remedies because the system has not been open to creative efforts to translate "noneconomic" into economic harm. Consider, for instance, the loss to an employer of the hard cash value of the experience of an employee who is killed.[231] These costs are not being recovered because they are socially diffuse and because courts typically resist the introduction of evidence concerning them. One wonders whether some of the hostility to expert testimony on hedonic damages stems from the fact that repeat defendants fear this evidence will show that tort awards are systematically too small, not too large.

The limited class of beneficiaries in wrongful death actions magnifies these problems.[232] Recall that even obvious injury that occurs on the death of a loved one, for instance the loss of the role of a sibling, is frequently not compensated under these statutes.[233] Given that pecuniary harm might indeed be involved in terms of social loss unaccounted for and that the range of beneficiaries is so circumscribed that it must result in externalities, we should *at least* preserve the ability of recognized claimants to recover for loss of society so that they stand proxy for the community's interest. Generic tort reform ignores these realities.

VI. CONCLUSION

The purpose of this Article was to use loss-of-society damages to prove that the quantitative criticisms of compensation for intangible losses are incoherent without connecting them to the goals each category of nonpecuniary compensation promotes. The Article underscores the simple idea that loss-of-society damages are unique within the spectrum of "noneconomic" harm. This is because loss-of-society recovery is relational by its very nature. A closer look at these damages shows that they are dynamic and capture the transformative effects of changes in our social roles. They also provide a niche in tort law where third-person recovery is standard. These characteristics depend on the social institutions loss-of-society damages reflect and the mutually reinforcing, symbiotic connections between the person and the community that a regime of compensation focused on social connections makes

228. *See* Sunstein, *Lives*, *supra* note 46, at 205.

229. *See* Cooter, *supra* note 46, at 1098–99, 1102–05; *see also* Patch v. Glover, 618 N.E.2d 583 (Ill. App. Ct. 1993) (explaining and rejecting the use of this type of expert evidence).

230. These theories and formulations are probably too narrow, as they are made within the strict confines of economic assumptions concerning the stability of preferences over time, the comparability of all values, and the ability to aggregate individual utility functions. *See* Lind, *Damages*, *supra* note 1, at 309–18.

231. *See* Galligan, *Disaggregating*, *supra* note 39, at 136–37 (discussing the difficulty in allowing all those harmed to bring claims).

232. *See supra* text accompanying notes 131–137.

233. *See supra* note 138 and accompanying text.

possible. This collective component provides these damages with an objective element that reflects and reinforces the community's values and interests. Before reformers indiscriminately jettison them, their unique nature and importance should be taken into account. As one exemplar of compensation for "noneconomic" loss, they show that the normative implications of limiting recovery for intangible harms must be seen in qualitative terms.