RIGHTS WITHOUT REMEDIES: WHY LIMITING DAMAGES RECOVERABLE BY THE DECEDENT RENDERS THE FLORIDA WRONGFUL DEATH ACT INCONSISTENT WITH 42 U.S.C. § 1983

Ryan C. Reese*

I. INTRODUCTION: AUTOMOBILE NEGLIGENCE RESULTING IN DEATH

Motorist John Doe is travelling along the I-275 freeway when his vehicle is suddenly blindsided by a neighboring car merging into his lane. Mr. Doe's vehicle spins out of control and flips several times before coming to a rest. Tragically, Mr. Doe is instantly killed. His wife and only passenger, Mrs. Doe, walks away from the incident unscathed. The driver of the merging car happens to be Deputy Smith, a patrol officer with the Tampa Police Department. Deputy Smith recounts that when he merged he was looking at the license plate of the vehicle ahead of him and thus never saw Mr. Doe's vehicle occupying the adjacent lane. Deputy Smith was acting within the course and scope of his employment on patrol in the City of Tampa, Florida.

These types of accidents happen each and every day. Here, Mr. Doe's life was taken as a result of a negligent act, and thus Mrs. Doe may be able to recover monetarily.[1] Specifically, Mrs.

 Associate, *Stetson Law Review*. J.D., with Honors, Stetson University College of Law, 2014, Honors Program Graduate; M.A., University of Illinois, Springfield, 2010; B.A., *cum laude*, University of Illinois, Springfield, 2008. The Author wishes to thank Professor Jeffrey Minneti for his guidance in shaping this work. The Author also thanks everyone on the *Stetson Law Review* staff for their contributions toward the completion of this Article.

1. FLA. STAT. § 768.19 (2014) (providing that when a person's death is caused by "the wrongful act [or] negligence . . . of any person . . . and the event would have entitled the person injured to maintain an action and recover damages if death had not ensued, the person . . . that would have been liable in damages if death had not ensued shall be liable for damages . . . .").

Doe would seek recovery for her husband's wrongful death, which was caused as a result of Deputy Smith's alleged negligence.[2]

In this instance, an attorney may bring a claim under both the state and federal laws.[3] The state claim would seek redress under the state wrongful death act.[4] If the facts supported it, a federal claim would also be brought for a deprivation of constitutional rights, namely the right to life as protected under the Fourteenth Amendment.[5] However, who may recover on behalf of the deceased varies from state to state, as does the damage categories one can sue for and any potential limitations to the ultimate damage award.[6] These intricacies will be discussed throughout this Article.

II. HISTORICAL AND CONSTITUTIONAL CONTEXT

First and foremost, what is a wrongful death action, and where does this cause of action come from? What is the purpose behind allowing individuals to recover for the loss of a family member, and what are the limitations on doing so? Further, what are the policy considerations behind such limitations? This Article will explore all of these questions, but will look more closely at the application of wrongful death act remedies to specific—and oftentimes unique—sets of facts. This Article will focus on the Florida Wrongful Death Act[7] in an attempt to see whether its comprehensive nature may violate the underlying legislative pur-

2. *Id.* The Florida Wrongful Death Act provides a cause of action for a "wrongful act, *negligence*, default, or breach of contract or warranty" that results in death. *Id.* (emphasis added).

3. A federal claim is only appropriate when a government entity is involved, and thus the defendant is "acting under the color of state law," which triggers a 42 U.S.C. Section 1983 analysis. *See* David v. City & Cnty. of Denver, 101 F.3d 1344, 1353 (10th Cir. 1996) (defining "under color of state law" as power exercised by the defendant "by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law").

4. FLA. STAT. §§ 768.16–26.

5. U.S. CONST. amend. XIV, § 1. A plaintiff's attorney would fashion his or her pleadings this way in order to get the most comprehensive monetary award from the cause of action. *See* Steven H. Steinglass, *Wrongful Death Actions and Section 1983*, 60 IND. L.J. 559, 568–69 (1985) (explaining the routine practices of plaintiffs and why they frequently seek supplementary federal claims).

6. Law Offices of James O. Cunningham, P.A., *Florida Wrongful Death Act / Statute 768.16*, CUNNINGHAMPILAW.COM, http://www.cunninghampilaw.com/wrongful-death/ (last visited Apr. 10, 2015) [hereinafter Cunningham].

7. FLA. STAT. §§ 768.16–26.

pose behind its creation. Specifically, this Article will explore the tension between the federally protected right to recovery for deprivation of civil rights and the amended language in Florida's Act that seeks to limit certain aspects of that recovery.

A. What Is a Wrongful Death Act?

The Restatement defines a "wrongful death act" as "a statute which gives a right of action against one who has wrongfully killed another."[8] This right, however, exists solely through state statutes.[9] This simply means that recovery under such an act extends only as far as the enabling legislative power of each state allows.[10] For this reason, wrongful death acts have been coined "creatures of statute," because recovery is both *created* and *limited* by the same lawmaking authority.[11]

At common law, there existed no remedy providing for recovery for an individual's wrongful death.[12] Today, however, state death statutes permit recovery for the death of an individual by a wrongful act or neglect, but damage categories and recovery limitations vary among the states.[13] In the United States, there is no federal wrongful death statute. However, a wrongful death may also be a violation of one's federal civil rights.[14] All citizens have the right to *life*, liberty, and property, as provided for by the Fourteenth Amendment to the United States Constitution.[15]

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8. RESTATEMENT (SECOND) OF TORTS § 493 cmt. a (1965).

9. *E.g.*, Toombs v. Alamo Rent-A-Car, Inc., 833 So. 2d 109, 111 (Fla. 2002) (explaining that Florida's death act is purely a statutory right); Belluso v. Tant, 574 S.E.2d 595, 597 (Ga. Ct. App. 2002) (explaining that Georgia's death act is "a legislative imposition of a penalty upon the person who causes the death of another by negligence").

10. Chavez v. Carpenter, 91 Cal. App. 4th 1433, 1438 (6th Dist. 2001). Currently, each of the fifty states possesses an individual death statute governing its own jurisdiction. Bolin v. Wingert, 764 N.E.2d 201, 203 (Ind. 2002).

11. Justus v. Atchison, 565 P.2d 122, 128 (Cal. 1977).

12. *Id.*; Olsen v. Farm Bureau Ins. Co. of Neb., 609 N.W.2d 664, 671 (Neb. 2000). At common law, any cause of action for negligence dissipated upon the death of the claimant. *Id.* In the early nineteenth century and prior, only persons who were living could file personal injury claims. *Id.* Injury claims did not survive the death of the decedent, and thus the decedent's family members had no cause of action for redress. *Id.* This would likely be seen as inequitable in today's society.

13. *Compare* FLA. STAT. § 768.21 (2014) (explaining recovery is limited to economic damages of decedent, non-economic damages of survivors), *with* GA. CODE ANN. § 51-4-5 (2013) (explaining recovery shall be equal to the "full value of the life of the decedent" and any appropriate "funeral, medical [or] other necessary expenses").

14. 42 U.S.C. § 1983 (2012).

15. U.S. CONST. amend. XIV, § 1.

Therefore, when a government actor is involved in the negligent taking of a life, the wrongful death suit may also include a federal Section 1983 cause of action.[16] Practically, when the government *is* involved, there is often both a state and federal element to the wrongful death suit.[17] However, to fully understand the state element and why state death acts were promulgated, the federal concept of civil rights must first be discussed.

B. The Jurisprudence of 42 U.S.C. Section 1983

The civil rights statutes of the United States are codified under Title 42 of the United States Code and serve many purposes. The Supreme Court has stated that Section 1983 was created to "interpose the federal courts between the States and the people, as guardians of the people's federal rights."[18] This was done both to uphold federalism between the state and federal governments and also to protect individuals from unconstitutional state acts.[19] Section 1983 was specifically designed to protect citizens from unconstitutional state action carried out under the guise of state law—action that may be executive, legislative, or judicial in nature.[20] Section 1983 has been interpreted as a mechanism that prevents the states from violating the Fourteenth Amendment.[21]

It has been further extended as an avenue for compensating injured plaintiffs, and thus has frequently been referred to as

16. 42 U.S.C. § 1983. The text of the Section is purposely broad, but it essentially states that a person who causes a deprivation of rights provided for by the Constitution and laws of the United States shall be liable to the injured party. *E.g.*, Adamson v. City of Provo, 819 F. Supp. 934, 944 (D. Utah 1993) (recognizing that Section 1983 contains "broad language" whose remedy must further be "broadly construed").

17. Examples of scenarios where wrongful death actions may also include a Section 1983 claim include government workplace negligence, police brutality resulting in death, and deaths from automobile collisions with government actors during the course of their employment.

18. Mitchum v. Foster, 407 U.S. 225, 242 (1972).

19. 1 SHELDON H. NAHMOD, CIVIL RIGHTS & CIVIL LIBERTIES LITIGATION: THE LAW OF SECTION 1983 § 1:4 (WestlawNext current through Sept. 2014).

20. *Mitchum*, 407 U.S. at 242. For an in-depth discussion of this federalism balance, see *Ex parte* Virginia, 100 U.S. 339, 346 (1879) (noting that "every addition of power to the [Federal] government involves a corresponding diminution of the governmental powers of the States").

21. Carey v. Piphus, 435 U.S. 247, 258–59 (1978). Paramount to this inquiry will be the specific focus of the deprivation of "*life* . . . without due process of law." U.S. CONST. amend. XIV, § 1 (emphasis added).

creating a "species of tort liability."[22] The common law of torts supports the principle that an individual should be compensated for his or her injuries that were the result of a violation of his or her civil rights, and this compensation has frequently been carried out by Section 1983 actions.[23] Examples include recovery for invasion upon an individual's privacy rights,[24] injury resulting from a failure to protect while incarcerated,[25] and adverse employment actions.[26]

As a result of this federal jurisprudence, Section 1983 and tort liability for wrongful death have become intertwined.[27] The language of Section 1983 states Federal law provides that

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . . .[28]

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22. Imbler v. Pachtman, 424 U.S. 409, 416–17 (1976). Section 1983 originated as Section 1 of the Ku Klux Klan Act of April 20, 1871 and was originally intended to give individuals a cause of action for abuses of power by government officials resulting in a deprivation of constitutional rights. *See* Moor v. Cnty. of Alameda, 411 U.S. 693, 669–700 (1973).

23. *Carey*, 435 U.S. at 258. As will be later discussed, *Carey* also stated that "the purpose of [Section] 1983 would be defeated if injuries caused by the deprivation of constitutional rights went *uncompensated*." *Id.* (emphasis added).

24. *See* Wright v. Fla., 495 F.2d 1086, 1089 (5th Cir. 1974) (using Section 1983 as an avenue of recovery for violations of the Fourth Amendment regarding illegal wiretaps).

25. *See* Hayes v. City of Des Plaines, 182 F.R.D. 546, 549–50 (N.D. Ill. 1998) (requiring law enforcement to use reasonable care in preserving prisoners' lives while in custody).

26. *E.g.*, Wood v. Strickland, 420 U.S. 308, 328–29 (1975) (holding that a public official may be personally liable for actions that violate constitutional rights or were taken with malicious intent to deprive of such rights); Wesley Kobylak, Annotation, *Immunity of Public Officials from Personal Liability in Civil Rights Actions Brought by Public Employees Under 42 U.S.C.A § 1983*, 63 A.L.R. FED. 744, § 2(a) (1983) (explaining that public officials are no longer immune from liability if such officials "knew or reasonably should have known" that the actions taken would violate constitutional rights) (citing Fujiwara v. Clark, 703 F.2d 357, 359 (9th Cir. 1983)).

27. *See infra* Part IV. Our common law that originated in England was based on the notion that any claim for injuries abated when the injured party died. Olsen v. Farm Bureau Ins. Co. of Neb., 609 N.W.2d 664, 671 (Neb. 2000).

28. 42 U.S.C. § 1983 (2012). It is also important to note that under Section 1983, "a plaintiff must assert [a] violation of a federal *right*, not merely a violation of federal law." Blessing v. Freestone, 520 U.S. 329, 340 (1997) (emphasis in original).

Thus, Section 1983 was effectuated, in part, to enforce rights guaranteed by the Fourteenth Amendment.[29] The Fourteenth Amendment was adopted and applied to the states as part of the concept of federalism, to ensure that states were not depriving citizens of their constitutional liberties.[30] Practically speaking, wrongful death at the hands of a state actor falls under a deprivation of the right to life guaranteed by the Fourteenth Amendment[31] and thus triggers the possibility of a Section 1983 claim. However, because the language of Section 1983 is broad, there are instances in which the federal law does not expressly define an available remedy for every single scenario that may arise in a civil rights claim.[32] When this is the case, the analysis turns to 42 U.S.C. Section 1988(a), in search of such redress.[33]

C. The Relationship Between Sections 1983 and 1988(a)

When an individual is injured as a result of a Section 1983 constitutional deprivation, there exist no details outlining the cause of action and the categories of damages available for recovery.[34] In this respect, Section 1983 has been labeled as "deficient" and "unsuited or insufficient to furnish suitable remedies" for some federal civil rights violations.[35] In this situation, Section

29. Carey v. Piphus, 435 U.S. 247, 253 (1978).

30. 16A AM. JUR. 2D. *Constitutional Law* § 423 (WestlawNext through Aug. 2014).

31. U.S. CONST. amend. XIV, § 1.

32. Moor v. Cnty. of Alameda, 411 U.S. 693, 702 (1973). A good example of this is the survival of federal civil rights claims. At common law, an individual's personal injury claim abated upon the death of either himself or the defendant. *Id.* at 702 n.14. Thus, an alleged wrongdoer could get away with a negligent action that eventually results in the injured party's death. In the alternative, the wrongdoer's family could be exempted from liability if the wrongdoer dies. This was deemed inequitable, and thus, many states passed survival laws reversing the common law abatement of claims. *Id.* at 703.

33. Because there exists no "on point" federal remedy, 42 U.S.C. Section 1988(a) must "borrow" state law to fashion one. *Id.* at 702–03; *see also* Brazier v. Cherry, 293 F.2d 401, 408 (5th Cir. 1961) (Section 1988 reflects Congress' intent to "effectuate the broad policies" civil rights statutes provide.); Pritchard v. Smith, 289 F.2d 153, 157 (8th Cir. 1961) (Section 1988 is an avenue by which Congress intended state law to supplement gaps in the federal law.).

34. Wrongful death is a perfect example. Section 1983 does not outline the necessary details for bringing a wrongful death cause of action and what is recoverable thereunder, but instead broadly states the *general principle* of what types of injuries are prohibited by state actors. *See* 42 U.S.C. § 1983 (2012).

35. *E.g.*, Robertson v. Wegmann, 436 U.S. 584, 594–95, 598 (1978) (opining that Section 1983 was not deficient simply because the application of state survivorship law would cause the claim to abate); Botefur v. City of Eagle Point, 7 F.3d 152, 158 (9th Cir. 1993)

1988(a) provides that the common law may be extended to govern and supply a remedy for a certain cause of action, including wrongful death.[36]

The "common law" is interpreted in this respect as the laws of the forum state in the district in which the federal claim was brought.[37] This notion of borrowing state law, or "incorporation," as it is often referred to, is exercised on a limited basis,[38] but incorporation is expressly codified in the Reconstruction Era civil rights statutes via Section 1988(a).[39] Put simply, the state law is supplementing the federal law in order to fashion a suitable remedy for a federal civil rights violation because the state law likely has an on-point statute remedying the problem.[40] This is precisely the case with state wrongful death acts. State substantive law is vastly more encompassing and detailed than federal law in this area, and state death acts were used to help fill the civil rights void in an attempt to provide a framework of remedies for torts resulting in death.[41]

Application of Section 1988(a) and the borrowing of state law is limited, however, to situations where the state law is "not inconsistent" with the purpose behind Section 1983, and as such has been exercised conservatively.[42] Such a situation is the focus of this Article, which seeks to examine a Florida statute whose

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(stating that a state rule requiring notice-of-claim is not a prerequisite to a Section 1983 suit, and thus federal law is not deficient).

36. 42 U.S.C. § 1988(a) (2012). A paraphrase of the text applicable to the civil rights context would essentially read: "[W]e incorporate state law only where federal law is 'deficient in the provisions necessary to furnish suitable remedies,' and where the state rule is not 'inconsistent with the Constitution and laws of the United States.'" *Botefur*, 7 F.3d at 155–56 (citing 42 U.S.C. § 1988 (1988)).

37. For a detailed interpretation of what specifically embodies the "common law," see *Robertson*, 436 U.S. at 589 n.5 (defining the "common law" as either the judge-made law of a forum state or the more general federal jurisprudence borrowed from England).

38. *Botefur*, 7 F.3d at 155. Federal law often lacks the "procedural or quasi-procedural elements" that are necessary for litigation of federal causes of action. Brown v. United States, 742 F.2d 1498, 1503 (D.C. Cir. 1984).

39. *Brown*, 742 F.2d at 1504.

40. Green v. Cauthen, 379 F. Supp. 361, 370 (D.S.C. 1974). The question of whether the availability of a state remedy barred claims to a federal remedy was answered in the negative in *Monroe v. Pape*, in which the Court decided that any federal remedy "is supplementary to the state remedy," and that "the latter need not be first sought and refused before the federal one is invoked." 365 U.S. 167, 183 (1961).

41. *See* Steinglass, *supra* note 5, at 603–05 (describing federal law in general as "interstitial" and Section 1983 in particular as a "threadbare statute").

42. 42 U.S.C. § 1988(a) (2012). Stated in the alternative, state law is always incorporated when there exists an on-point state statute that is consistent with the policy of Section 1983.

framework can produce scenarios where recovery is limited or ultimately unavailable.[43] The remainder of this analysis will principally examine Florida law, but will also look at the other states within the Eleventh Circuit in an attempt to determine whether application of Florida's Wrongful Death Act as a means of compensating injured plaintiffs can be inconsistent with the policies behind Section 1983.

III. THE FLORIDA WRONGFUL DEATH ACT

Under Florida law, when an individual is wrongfully killed, suit may be brought by the decedent's survivors[44] to recover monetary damages under Florida Statutes Sections 768.16 through .26, hereinafter referred to by its common name the "Florida Wrongful Death Act" or "FWDA."[45] Florida's scheme, however, is different from wrongful death acts in other states, especially those within the Eleventh Circuit.[46] In 1972, Florida amended its Act to make it comprehensive in nature, combining what were previously two separate causes of actions—the survival action and the wrongful death action—into one lawsuit.[47] Before the actions may be discussed comprehensively, however, they must

43. *See* FLA. STAT. § 768.21 (2014) (failing altogether to account for the non-economic damages of the decedent).

44. Under Florida Statute Section 768.18(1), "survivors" are defined as

> the decedent's spouse, children, parents, and, when partly or wholly dependent on the decedent for support or services, any blood relatives and adoptive brothers and sisters. It includes the child born out of wedlock of a mother, but not the child born out of wedlock of the father unless the father has recognized a responsibility for the child's support.

45. FLA. STAT. §§ 768.16–26. The underlying policy behind a wrongful death act is simply to shift the economic and non-economic losses that may result from the death of the decedent from that decedent's family or survivors onto the tortfeasor or wrongdoer. *Id.* § 768.17. This is seen as equitable given the person or entity that caused the wrongful death should bear the burden. *Id.*

46. Florida combines damages for survival and wrongful death in a single remedial scheme. *Compare* FLA. STAT. § 768.21 (comprehensive remedial scheme limited to economic damages of decedent and non-economic damages of survivors), *with* GA. CODE ANN., § 51-4-5 (2013) (general remedial scheme providing for "full value of the life of the decedent"), *and* ALA. CODE § 6-5-410 (1975) (general remedial scheme providing for such damages as "the jury may assess").

47. Florida Clarklift, Inc. v. Reutimann, 323 So. 2d 640, 641 (Fla. 2d Dist. Ct. App. 1975). The legislative intent behind combining the actions was to abolish the numerous independent lawsuits brought by various survivors of the decedent. 17 FLA. JUR. 2D *Death* § 2 (WestlawNext through Aug. 2014).

be broken down individually to allow a better understanding of what remedies are available under each.

A. Wrongful Death and Survival as Separate Causes of Action

The main differences between the two types of suits are the focus on *who* the actions attempt to compensate and what *types of damages* can be recovered.[48] A traditional wrongful death action focuses entirely on the decedent's survivors.[49] The damages seek to compensate those individuals for both the future economic[50] and non-economic[51] losses resulting from the death of the deceased.[52] In pre-1972 Florida, the categories of damages recoverable in wrongful death actions generally included survivors' claims for loss of support, services, consortium, comfort, the decedent's future estate, and claims for the survivors' emotional pain and suffering.[53]

The traditional survival action, on the other hand, focuses instead on the deceased in an attempt to compensate the victim for any injuries suffered before death.[54] Before Florida combined the two causes of action, the decedent's estate could bring an independent survival action under Section 46.021, Florida Statutes, in an attempt to recover for the decedent's pain and suffering and loss of earnings from the time of his or her initial injuries until the time of death, as well as for any medical and funeral expenses incurred during that period.[55] An additional way to distinguish

48. Scott Perry, *The Difference Between a Wrongful Death Case and a Survival Action*, PERRY CHARNOFF, PLLC BLOG, http://perrycharnoff.com/2013/03/03/the-difference-between-a-wrongful-death-case-and-a-survival-action/ (last visited Apr. 10, 2015).

49. *Id.*

50. Economic damages generally consist of damages that take the shape of "financial contributions" that would be provided by the decedent had he or she survived. Cunningham, *supra* note 6. They typically include expected earnings, loss of benefits and inheritances, and the value of goods and services that would have been provided if not for the wrongful death. *Id.*

51. Non-economic damages are the "less tangible losses." *Id.* These include pain and suffering, loss of consortium, care, advice, and even nurturing. *Id.*

52. *Id.*

53. Martin v. United Sec. Servs., Inc., 314 So. 2d 765, 767–68 (Fla. 1975).

54. *Id.* at 767. These types of suits are common when an individual is injured due to the negligence of another but does not succumb to those injuries until a later time. Ben Glass, *What Is the Difference Between Survival Action and Wrongful Death in Virginia?*, BENGLASSLAW.COM, http://www.vamedmal.com/faqs/what-is-the-difference-between-survival-action-and-wrongful-death.cfm (last visited Apr. 10, 2015) [hereinafter BenGlassLaw].

55. *Martin*, 314 So. 2d at 767.

between these wrongful death and survival actions is simply to consider the timing involved. A typical wrongful death suit occurs when the negligent act of another party causes injury that results in immediate death.[56] On the other hand, a survival action "survives" with the victim's estate from the point at which he or she is first injured through his or her death.[57] In many states, a decedent's family or estate may bring suit for one or both of these independent causes of action.[58] Florida, however, has elected to combine these two civil tort claims into a single cause of action.[59]

B. Purpose and Construction of the *Amended* FWDA

The substance of Florida's new statutory scheme appears unchanged on its face. Damages that are recoverable under the Act still fall into the same two specific categories: those recoverable by the decedent's survivors, and those recoverable by the decedent through his or her estate.[60] The categories of damages are briefly outlined below.

1. Survivors

The decedent's survivors may recover "the value of lost support and services from the date of the decedent's injury to her or his death, with interest, and future loss of support and services from the date of death."[61] The damages are further broken into categories based upon the individual's relationship with the decedent.[62] The decedent's surviving spouse may recover "loss of . . . companionship and protection" damages and also for his or her

56. BenGlassLaw, *supra* note 54.

57. *Id.*

58. Perry, *supra* note 48. Some states prohibit bringing suit under both causes of action because it would be inequitable to "double-collect" the damages available under each. *Id.*

59. *See generally* FLA. STAT. § 768.19 (2014) (establishing a right of action that addresses liability for wrongful death). The statute also includes the supplementary survival component if "the event would have entitled the person injured to maintain an action [to] recover" but for the wrongful death. *Id.* Florida is currently the *only* state within the Eleventh Circuit with a "comprehensive" wrongful death scheme. *See supra* note 46 and accompanying text.

60. Cunningham, *supra* note 6.

61. FLA. STAT. § 768.21(1).

62. *Components of Damages in Wrongful Death Claims*, 27 No. 4 TRIAL ADVOC. Q. 40, 40 (2008). It is important to note this distinction because not *all* survivors are eligible for the same damages. *Id.*

own "mental pain and suffering" from the date of the injury.[63] Minor children of the decedent can recover for "lost parental companionship, instruction, and guidance," and for their own "mental pain and suffering."[64] A surviving parent, in the instance of a deceased minor child, may recover for his or her own "mental pain and suffering," and parents of a deceased adult child may recover the same if there are no other survivors.[65] Any survivor who pays for medical and funeral expenses is also entitled to reimbursement.[66]

2. The Decedent's Estate

Furthermore, the decedent's estate may recover the "loss of earnings of the deceased" from injury until death, the "loss of prospective net accumulations of an estate, which might reasonably have been expected,"[67] and any medical or funeral expenses that were charged against the estate.[68] While this may seem like a complete framework of recoverable damages, there are areas where damages have been significantly excluded from recovery by the new scheme. These omissions are addressed in the following section.

C. Limitations on Recovery

In any wrongful death, there are typically two victims. The first victim is the decedent. The second class of victims includes his or her survivors or estate in terms of the emotional and monetary damage that the negligent act has effectuated.[69] Florida's new death statute, however, was amended as part of a Florida

63. FLA. STAT. § 768.21(2).

64. *Id.* § 768.21(3). Further, *all* children of the decedent may recover under this category if there is no surviving spouse. *Id.*

65. *Id.* § 768.21(4).

66. *Id.* § 768.21(5).

67. *Id.* § 768.21(6)(a). Net accumulations can be defined as "the decedent's expected net business or salary income, including pension benefits, that the decedent probably would have retained as savings and left as part of her or his estate if the decedent had lived her or his normal life expectancy." *Id.* at § 768.18(5)(a). Put simply, net accumulations are "what the decedent's estate would have been worth at death." Delta Air Lines v. Agelorff, 552 So. 2d 1089, 1092 (Fla. 1989).

68. FLA. STAT. § 768.21(6)(b).

69. *Cf.* Brazier v. Cherry, 293 F.2d 401, 409 (5th Cir. 1961) (alluding to a decedent and his survivors as separate classes of victims).

Law Revision Commission initiative to focus on recovery for the living as opposed to the dead.[70] This meant that specific focus would be given to the survivor's damages and not those damages suffered by the actual decedent.[71] In theory, by making the statute comprehensive, Florida has effectively written out the decedent as being a victim in his or her own death. In application, this has been done by limiting two distinct damage categories: damages for the decedent's pain and suffering and hedonic damages.[72] Each is discussed below.

1. Damages for Pain and Suffering of the Decedent

In amending the 1972 version of the statute,[73] the Florida Legislature eliminated the claim for the decedent's pain and suffering, ostensibly "substituting" it with a claim for the pain and suffering of eligible survivors.[74] Any pain and suffering damages, therefore, are awarded to only one class of victim—the decedent's *close* survivors.[75] This has been a major criticism of Florida's new wrongful death act and has caused some practitioners to claim that it may perhaps "be far more profitable [for a defendant] to kill the plaintiff than to scratch him."[76] However, the Florida Su-

70. *See* Martin v. United Sec. Servs., Inc., 314 So. 2d 765, 768–69 (Fla. 1975) (citing Florida Law Revision Commission, Recommendations and Report on Florida Wrongful Death Statutes, at 41–42, Item 8 (Dec. 1969)).

71. The express purpose of the Act is "not to recover for injuries to the deceased, but to recover for statutorily identified losses the survivors have suffered directly as a result of the death." City of Pompano Beach v. T.H.E. Ins. Co., 709 So. 3d 603, 605 (Fla. 4th Dist. Ct. App. 1998).

72. See *infra* Part III(C)(1)–(2) (discussing Florida's lack of recognition of these two categories of damages under its statutory framework).

73. The 1972 supplement to Florida Statutes § 768.17 (1971) states that "[i]t is the public policy of the state to shift the losses resulting when wrongful death occurs from the survivors of the decedent to the wrongdoer."

74. *Martin*, 314 So. 2d at 769.

75. Emphasis is added to the word "close" because only certain relatives of the decedent are allowed recovery for pain and suffering under the new Act. *See* FLA. STAT. § 768.18(1) (defining who qualifies as an eligible "survivor").

76. Heath v. City of Hialeah, 560 F. Supp. 840, 843 (S.D. Fla. 1983) (citing WILLIAM L. PROSSER, LAW OF TORTS 902 (4th ed. 1971)). This phrase is referenced by the *Heath* court in relation to the FWDA's abatement of a claim for the decedent's pain and suffering. *Id.* at 843. Killing the decedent abates any claim for such injuries whereas only injuring the victim would not, resulting in the potential—and often significant—recovery of those damages by the victim. *Id.* It is a major point of contention in this Article that this is an inequitable policy. *See infra* Part IV(D)(2) (posing a scenario where the absence of a decedent's pain and suffering remedy meant little to no damages would otherwise have been recovered).

preme Court has upheld this limitation on damages, asserting that dividing pain and suffering damages among eligible survivors is reasonable given that they are the only ones available to openly testify to offer proof of their emotional suffering.[77]

This may seem like a suitable limitation in the instance of an individual dying instantaneously (thus making his or her pain and suffering damages nominal), but seems far from a fitting result in the instance of a decedent who survives an accident only to succumb to his or her injuries weeks, months, or perhaps even years later. Why should the decedent not receive his or her own pain and suffering damages for what could have been a long, agonizing, and perhaps painful dying process?[78] Shouldn't his or her survivors also be awarded their separate pain and suffering damages based upon their experiences at the bedside of the decedent and thereafter upon his or her passing? While this may sound like a double recovery of pain and suffering damages, keep in mind that there are again *two* classes of victims[79]—each with its own unique type and degree of emotional and perhaps even physical pain and suffering. Part IV of this Article will address some unique factual scenarios in cases where Florida's wrongful death act has effectively written out recovery altogether because damages for the decedent's pain and suffering were statutorily unrecoverable.

2. Hedonic Damages

Florida also does not recognize hedonic—or loss of enjoyment of life—damages in a wrongful death action.[80] Hedonic damages seek to compensate a decedent's survivors for loss of the decedent's "independent value" of life—the fulfillment of life through making a living, building and maintaining relationships, child-

77. *Martin*, 314 So. 2d at 771. The converse being that under the old wrongful death statute, evidence of the decedent's pain and suffering would have had to have been corroborated by the testimony of others. *Id.*

78. *See* Andrew Jay McClurg, *It's a Wonderful Life: The Case for Hedonic Damages in Wrongful Death Cases*, 66 NOTRE DAME L. REV. 57, 116 n.40 (1990) ("An injured person whose prognosis is death may, of course, experience great suffering because of this prospect, which may be compensable as one aspect of pre-death pain and suffering.").

79. Brazier v. Cherry, 293 F.2d 401, 409 (5th Cir. 1961).

80. FLA. STAT. § 768.21 (2014). For a general description of why hedonic damages are precluded from recovery in Florida, see Brown v. Seebach, 763 F. Supp. 574, 583 (S.D. Fla. 1991).

rearing, getting married, entertaining and laughing, etc.[81] One scholar notes that hedonic damages are the "missing link" in death remedies because many survival statutes only allow for economic damages for the decedent's injuries up until death, after which the wrongful death statutes generally provide the remaining remedies to the survivors.[82] The decedent's value for the loss of his or her life simply goes "uncompensated" and is "lost in a kind of legal limbo."[83]

But why are hedonic damages significant? In the United States, most jurisdictions, including Florida, follow the "loss-to-the-survivors rule," which is exactly the principle that the Florida Legislature sought to establish with its 1972 revisions.[84] Under this rule, damages are limited to the "pecuniary loss"[85] suffered by the decedent's survivors.[86] What is ironic, however, is that while this pecuniary value accounts for lost contributions the decedent would have made to others (i.e., his or her survivors' damages for loss of consortium, mental anguish, and pain and suffering), it wholly fails to consider the value of the decedent's life to him or herself.[87] In other words, the value of the decedent's life is recoverable only up to the value he or she would have contributed to others, and not what he or she contributed for him or herself.[88] This is a strangely inequitable policy.

There is, however, strong opposition to awarding hedonic damages as part of a wrongful death claim.[89] Opponents to such recovery typically argue two points: first, hedonic damages, regardless of how monetarily lofty, can never make a decedent whole again; and second, that these damages are simply too spec-

81. McClurg, *supra* note 78, at 60.

82. *Id.* at 90.

83. *Id.*

84. *Id.* at 62–63.

85. "Pecuniary loss" can be defined as those "financial contributions the decedent would have been expected to make to his beneficiaries had he lived." *Id.* at 63. Put more simply, this value equates to the potential financial and service-rendered contributions of the decedent to his or her family. *Id.*

86. *Id.*

87. *Id.*

88. McClurg describes the types of decedents who are not expected to make significant pecuniary contributions upon their deaths. *Id.* at 64. The examples provided include minor children, adult children before they create families of their own, and the elderly towards the final stages of their lives. *Id.*

89. This is evidenced by the fact that Connecticut is currently the only jurisdiction in the United States that *explicitly* recognizes the right to recover hedonic damages in a wrongful death action. *Id.* at 114.

ulative.[90] But each point can be refuted. In regards to the inability of hedonic damages to make the decedent whole, American society puts monetary value on a variety of incalculable injuries, such as the physical pain or loss of daily functionality resulting from the loss of an appendage.[91] Common sense dictates that no scientific or mathematical formula can truly put a monetary amount on an individual's legs, arms, or hands.

In terms of hedonic damages being too speculative, so too are several other categories of damages including pain and suffering, mental anguish, loss of consortium, and mental distress, which are nevertheless compensated under wrongful death statutes.[92] As stated by the Supreme Court of New Jersey in *Botta v. Brunner*:

> [P]ain and suffering have no known dimensions, mathematical or financial. There is no exact correspondence between money and physical or mental injury or suffering, and the various factors involved are not capable of proof in dollars and cents. For this reason, the only standard for evaluation is such amount as reasonable persons estimate to be fair compensation.[93]

Perhaps this is another reason why we often ask twelve[94] people rather than one sole person to decide damages in civil trials?

It is obvious that hedonic damages are somewhat speculative and may ultimately need to be judicially or statutorily capped, but Florida precedent has impliedly excluded them from consideration altogether because the State's wrongful death statute does not expressly name them as a category of recoverable damages.[95] In contrast, other states either provide for general damag-

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90. *See id.* at 66–71 (reflecting upon the current attitudes towards hedonic damages and refuting the arguments against their inclusion in wrongful death schemes).

91. *Id.* at 67.

92. *Id.* at 68.

93. 138 A.2d 713, 720 (N.J. 1958).

94. FLA. R. CIV. P. 1.430. The Author uses the number twelve here as the general number of jurors sitting on a civil trial while also recognizing that this number often varies by jurisdiction.

95. *See generally* Brown v. Seebach, 763 F. Supp. 574, 583 (S.D. Fla. 1991) (providing that there is no cause of action for a claim of hedonic damages in Florida). Ironically, the *Brown* court appears to allude to the foreseeability of such damages, stating that "[t]he court must follow the guidelines established by [Florida Statutes Section] 768.21 and Florida case law *until* such a time as the Supreme Court or the Florida Legislature decides differently." *Id.* (emphasis added).

es[96] or provide that their damages categories are non-exhaustive[97] thereby creating the *opportunity* for recovery of hedonic damages.[98] Florida should follow suit.

The next section will examine the policies behind Section 1983 and some of the notable caselaw that has arisen within Florida and other Eleventh Circuit jurisdictions. This case study will focus in depth on the remedies provided in many wrongful death claims in the context of equitable constitutional principles.

IV. INCONSISTENCY WITH SECTION 1983

Consider the case of Mr. Doe from our earlier hypothetical while working through the following legal and constitutional analysis. Mr. Doe was killed when his vehicle was struck by Deputy Smith. Mr. Doe's wife thus brings both a state wrongful death claim against Deputy Smith individually, and a pendant federal Section 1983 action against the Tampa Police Department because Deputy Smith was acting within the "scope and course of his employment"[99] and thus under the color of state law. Section 1983 requires that a remedy be provided for a civil rights violation—in this case, the wrongful death caused by a state actor.[100] However, as previously discussed, there is tension between the federal and state laws in this respect because Section 1983 is such a broad provision that it is oftentimes deemed "unsuited or insufficient 'to furnish suitable remedies'" and thus the federal law may "not cover every issue that may arise in the context of a federal civil rights action."[101] Since there is no specific federal remedy available for a wrongful death at the hands of a state actor available under Section 1983, Section 1988(a) directs that

96. McClurg, *supra* note 78, at 96 n.171. Idaho, Mississippi, Montana, and Utah all provide for the awarding of "general damages," determined to be just under the circumstances of the case in their statutory language. *Id.*

97. *Id.* at 96 n.172. The statutes of Indiana, Michigan, Virginia, and West Virginia all possess language stating that their list of damage categories is non-exhaustive. *Id.*

98. *Id.* at 96–97 (identifying five different classifications of damages available under state wrongful death statutes).

99. Acting in such a capacity would make Deputy Smith vicariously liable for his actions. Vicarious liability can be defined as "liability imputed to one person for the actions of another." STEVEN H. GIFIS, DICTIONARY OF LEGAL TERMS, 527 (3d ed. 1998). *See also* Steinglass, *supra* note 5, at 568–69 (describing why the federal claim is so imperative in personal injury suits when a death arises from the actions of government officials).

100. *See supra* text accompanying note 28.

101. Moor v. Cnty. of Alameda, 411 U.S. 693, 702–03 (1973).

the laws of the forum state can apply "as long as [they] are not inconsistent with the Constitution and laws of the United States."[102] Returning to the hypothetical, we thus arrive back at Florida law because the State's wrongful death act provides an applicable and lawful remedy available for those negligently killed by another.

Under the Florida Wrongful Death Act, Mrs. Doe can recover for loss of support and services, loss of companionship, mental pain and suffering, and of course medical and funeral expenses.[103] As the beneficiary of her husband's estate,[104] she may also recover the loss of Mr. Doe's net accumulations.[105] This may seem like a reasonable recovery, or at least as reasonable a recovery for losing a loved one can possibly be. Now let's change the facts.

Suppose that Mr. Doe had no other family, that Mr. Doe and his wife had been separated, but not divorced, for several years, and that each party had been living independent from one another.[106] This would effectively limit damages for lost support and services and loss of companionship to no more than a nominal value. Suppose too that Mr. Doe was an artist, but that he had fallen on rough times and was thus unemployed at the time of his death. Recovery for Mr. Doe's net accumulations and future estate could also be nothing more than nominal. Mrs. Doe could still recover pain and suffering damages and funeral expenses—damages that may be reasonably compensatory but are hardly financially significant. But, in this scenario, where are the damages placing any value whatsoever on Mr. Doe's life in general? Remember, Florida does not recognize hedonic damages.[107]

Now consider these facts. Suppose Mr. Doe was not killed instantly and that he spent ten grueling months in a hospital undergoing various life-sustaining procedures before eventually succumbing to his injuries. Upon his death, Mrs. Doe could collect damages for medical expenses in addition to damages for her pain and suffering.[108] But where are the damages for Mr. Doe's signifi-

102. Robertson v. Wegmann, 436 U.S. 584, 588 (1978).

103. FLA. STAT. § 768.21(1), (2), (5) (2014). Mrs. Doe is a "survivor" under this statute as explained in *supra* text accompanying note 44.

104. Assuming hypothetically that she is the *only* surviving beneficiary of his estate.

105. FLA. STAT. § 768.21(6)(a)(1).

106. Mr. Doe was thus alone in the automobile that day.

107. Brown v. Seebach, 763 F. Supp. 574, 583 (S.D. Fla. 1991).

108. FLA. STAT. § 768.21(2), (5).

cant pain and suffering? Remember again that such damages were written out of the amended FWDA.[109] Here again the phrase "it would be far more profitable to kill the plaintiff than to [injure] him,"[110] is applicable. Had Mr. Doe recovered from his injuries, he could have received significant pain and suffering damagdamages under Florida tort law.[111] But because he died, those damages vested in his only survivor who—in this case—is simply his estranged wife, someone whose recovery may be only nominal.[112]

While the above hypothetical may seem far-reaching, these types of scenarios do happen, and continue to occur within Florida.[113] Plaintiffs have begun to file wrongful death suits claiming that the Florida Wrongful Death Act is inconsistent with the policies governing Section 1983, and is therefore an inadequate remedy.[114] Thus far, the Act has been upheld as constitutional, but whether it violates the general purpose of Section 1983 and the *Robertson* principles addressed in the next section[115] has only been discussed in limited instances within the Eleventh Circuit.[116] Several of those cases and other notable state death act statutes and appellate decisions are discussed in the following Subpart.

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109. FLA. STAT. § 768.21.

110. Heath v. City of Hialeah, 560 F. Supp. 840, 843 (S.D. Fla. 1983).

111. *See generally* FLA. STAT. § 768.042 (allowing for recovery of both "general" and "special" damages in an action for personal injury or wrongful death).

112. Consider also the current hot topic of domestic partnerships and their lack of recognized legal protection in Florida. Suppose Mr. Doe's only survivor was his same-sex domestic partner he cohabitated with for over twenty years. Domestic partnerships not being recognized by law, the only recovery available for Mr. Doe's injuries would be reimbursement for his medical and funeral expenses, a stark example of the Florida scheme's impact on recovery rights. *See* FLA. STAT. § 741.211 (stating that common-law marriages are not recognized in Florida); FLA. STAT. § 768.21 (providing the damages recoverable by various classes of beneficiaries under the FWDA); *see also supra* note 44 (outlining the statutory definition of a "survivor" eligible to recover under Florida law).

113. *See infra* Part IV(B)–(C).

114. *See infra* Part IV(B)–(C). Some plaintiffs argue for an arbitrary federal award of damages irrespective of Florida's limiting framework. *Id.*

115. *See infra* Part IV(A).

116. *Compare* Breedlove v. Orange Cnty. Sheriff's Office, No. 6:11-cv-2027-Orl-31KRS, 2012 WL 2389765, at *3 (M.D. Fla. June 25, 2012) (finding FWDA consistent with Section 1983 policies in precluding decedent's pre-death pain and suffering damages), *with* Heath v. City of Hialeah, 560 F. Supp. 840, 844 (S.D. Fla. 1983) (finding FWDA inconsistent with Section 1983 policies for failure to provide an adequate remedy for emancipated adult males without survivors).

A. Compensation and Deterrence

The United States Supreme Court explicitly identified the policies underlying Section 1983 as "*compensation* of persons injured by deprivation of federal rights and prevention of abuses of power by those acting under color of state law."[117] These two policies have become known as the "*Robertson* principles," arising out of the famous case *Robertson v. Wegmann*.[118] The latter of the two principles is often referred to as *deterrence*.[119] Such deterrence of bad acts, however, is frequently satisfied through the (often significant)[120] monetary compensation of victims.[121] Thus, compensation is really the primary policy.[122] But does Florida's death act effectively compensate *each* class of victims in a wrongful death? The Florida Wrongful Death Act currently terminates any non-economic claims for harm to the decedent, and instead awards only damages for harms suffered by the survivors.[123] But, is the elimination of the decedent's right of recovery, specifically through pain and suffering and hedonic damages, consistent with the above policies underlying Section 1983?

B. Eleventh Circuit Precedent

The federal courts have repeatedly emphasized the need to consider the remedies of both classes of victims in a wrongful

117. Robertson v. Wegmann, 436 U.S. 584, 591 (1978) (emphasis added).

118. *Id.*

119. Carey v. Piphus, 435 U.S. 247, 256–57 (1978).

120. Wrongful death suits have the potential to bring about inordinately high jury verdicts. *See, e.g.*, Verdict and Settlement Summary, Barber v. Mr. Martinez of Mia., Inc., 1990 WL 641305 (Fla. 17th Cir. Ct. Date Unknown) (No. 87-33565) (finding for the plaintiff an award within the range of two to nearly five million dollars). These high jury awards also impact settlement tendencies between the parties. *See* Verdict and Settlement Summary, Carboni v. Enter. Leasing Co., 2000 WL 33299948 (Fla. 15th Cir. Ct. Dec. 2000) (No. 385568) (settlement award exceeded five million dollars).

121. *Carey*, 435 U.S. at 256–57. Florida's Wrongful Death Act attempts to "substitute the financial resources of the wrongdoer for the resources of the decedent, in an attempt to meet the financial obligations of the decedent." Wagner, Vaughan, McLaughlin & Brennan, P.A. v. Kennedy Law Grp., 64 So. 3d 1187, 1191 (Fla. 2011). Obviously, in practice, this compensation does not come from the tortfeasor, but likely from his insurance company, which makes this rationale perplexing. It is equally confusing for bad acts committed by government actors where the government is not the one ultimately footing the bill; rather, it is borne by the taxpayers.

122. *Carey*, 435 U.S. at 256–57.

123. *See supra* text accompanying note 71. Again, keep in mind the limitations on those eligible to recover as a "survivor" under Florida Statutes Section 768.18.

death action.[124] However, because there exists no specific measure for damages under the federal common law and Section 1983,[125] it is up to the state law via Section 1988(a) to supply that remedy in order to ensure the decedent's injuries are compensated accordingly upon his or her death. The following federal cases effectively hold that state law should be applied in Section 1983 actions where the federal remedy is vague or inadequate when remedying wrongful death. Addressing the decedent's non-economic damages is an important starting point for determining the adequacy of state law if it is going to be applied and deferred to with frequency in these types of actions.

1. Brazier v. W.B. Cherry

In *Brazier*, the Fifth Circuit[126] determined whether a decedent's death entitled him to damages "sustained . . . during his lifetime, by his survivors, or both."[127] The victim sustained injuries after being beaten by police while in their custody, and he eventually died due to those injuries.[128] His widow brought the claim on his behalf, alleging "savagely brutal injuries," suffering, aggravation, mental anguish, and ultimately, death.[129] The court asserted that Congress would not have created protection against such civil rights violations through Section 1983 only to rescind such protections upon the decedent's death.[130] The court then looked to Georgia state law of survival to redress the injuries caused to the decedent *during his lifetime*.[131] Georgia's statute provided for recovery for non-economic injuries to the decedent suffered during his lifetime as well as recovery to his survivors thereafter.[132] Florida's statute, however, does not provide the

124. *See generally* Brazier v. W.B. Cherry, 293 F.2d 401, 402 (5th Cir. 1961); Monroe v. Pape, 365 U.S. 167, 167 (1961).

125. *Brazier*, 293 F.2d at 406–10.

126. Due to the Fifth Circuit split that occurred in 1981, decisions rendered by the Fifth Circuit before October 1 of that year are considered binding upon the Eleventh Circuit. Bonner v. City of Pritchard, 661 F.2d 1206, 1209 (11th Cir. 1981).

127. *Brazier*, 293 F.2d at 402.

128. *Id.*

129. *Id.* at 402 n.1.

130. *Id.* at 404. That the court notes that "regard has to be taken of both classes of victims. Section 1988[a] declares that this need may be fulfilled if state law is available." *Id.* at 409.

131. *Id.*

132. *Id.*

same relief, which is inconsistent when compared to other states' framework within the same federal circuit.[133]

2. Gilmere v. City of Atlanta

The *Gilmere* case took the "decedent's losses" analysis one step further.[134] The plaintiff in this case brought suit against Atlanta police officers, their supervisors, and the City of Atlanta for the wrongful beating and killing of her brother.[135] She alleged physical harm, emotional suffering, humiliation, and death.[136] The plaintiff only sought damages on behalf of her brother, not for his survivors.[137] Thus, this case was unique in the respect that the issue revolved solely around the damages to the decedent.[138]

The plaintiff argued that the Georgia Wrongful Death Statute should have been applied to determine the degree of damages, but she ultimately lost on the issue due to a defective complaint.[139] Thus, the court only considered the federal claim and awarded twenty thousand dollars to the decedent's estate for violation of his due process rights.[140] The important facet of this case is relatively hidden among the civil procedure issues and the astonishingly low value of the plaintiff's damages award, but beneath those matters is the notion that the decedent *is* allowed to recover for his or her wrongful death at the state level.[141] The argument in this case was simply which level of recovery should

133. *Compare* FLA. STAT. § 768.21 (involving a comprehensive remedial scheme limited to economic damages of decedent and non-economic damages of survivors), *with* GA. CODE ANN., § 51-4-5 (2013) (regarding a general remedial scheme providing for "full value of life of the decedent"), *and* ALA. CODE § 6-5-410 (1975) (involving a general remedial scheme providing for such damages as "the jury may assess").

134. Gilmere v. City of Atlanta, 864 F.2d 734, 736 (11th Cir. 1989).

135. *Id.* at 736.

136. *Id.* at 738.

137. *Id.* This is different from most cases where both classes of victims seek redress. It is unclear from the opinion why the plaintiff only sought damages for the decedent, her brother. *Id.* at 739 n.4. It appears, however, that the plaintiff never properly raised the wrongful death action in pleading. *Id.* at 737.

138. *Id.* at 739.

139. *Id.* at 737. The plaintiff failed to "allege a pendent state cause of action for wrongful death." *Id.* at 737–38.

140. *Id.* at 736. The dissent alleged that such a low award for the unlawful killing of a human being simply "shocks the conscience." *Id.* at 748 (Clark, J., concurring in part and dissenting in part).

141. *Id.* at 739 (majority opinion).

control, federal law[142] or state law because both provided a remedy.[143]

Recovery for constitutional deprivations is always available through federal law, as was provided for in this case.[144] However, by framing the issue as which law to apply (i.e., state or federal) the Eleventh Circuit implies that the decedent's non-economic damages should also be recoverable under state law.[145] The interesting question is—then—what happens when state law does not provide for such damages to the decedent, as is the case in Florida? In a similar situation, where there is no pendent federal claim, and where only state law damages are being alleged under the FWDA, failure to compensate the decedent directly appears to be inconsistent with *Gilmere* and the Eleventh Circuit standard.[146]

One ironic point regarding the reasoning in *Gilmere* is that the majority almost pushes for the creation of a federal common-law standard of damages in wrongful death actions.[147] The dissent appropriately recognizes that there is no set "standard" for evaluating such damages and no federal case law supporting how to calculate them, which is why focus on state substantive law remedies is so critical.[148] While construction of a uniform federal remedy is outside the context of this Article, the court itself recognizes the inconsistencies inherent in applying state laws that vastly differ in nature.[149] As the majority notes:

142. The court stated that "applying a federal standard of damages for injuries suffered by a decedent will promote consistency in the type and amount of damages awarded." *Id.* That standard, however, will have to be created as none currently exists. *Id.*

143. *Id.* Thus, it appears the federal courts have implied a state right of recovery for a decedent upon his wrongful death. Florida's failure to adequately provide damages that support that right could render the FWDA inconsistent with Section 1983.

144. *Id.* The dissent argues, however, that state law should always be applied to determine those damages. *Id.* at 743–48 (Clark, J., concurring in part and dissenting in part).

145. The court ultimately based its decision on the fact that no recovery was sought for the victim's survivors and thus federal law adequately provided a remedy for the decedent. *Id.* at 739 n.4 (majority opinion). However, the court did allude to the fact that resorting to Georgia law may have been necessary had the survivors sought recovery for their own injuries as well. *Id.*

146. Interestingly, the court did not have to answer this question because under Georgia law, damages suffered by the decedent *are* recoverable. *See id.* at 736; GA. CODE ANN. § 51-4-5(a) (2013).

147. *Gilmere*, 864 F.2d at 739.

148. *Id.* at 746 (Clark, J., concurring in part and dissenting in part).

149. *Id.* at 739–40 (majority opinion).

> Were we to follow the . . . rule and award the damages provided in the state wrongful death statute, there would be three separate measures of damages for the unconstitutional deprivation of life in this circuit: the damages permitted by the wrongful death statutes of Alabama, Florida and Georgia. Under that scenario, it is not inconceivable that a plaintiff in one state would be awarded substantially more damages under her state's wrongful death statute than another plaintiff who happens to live in a state with a different measure of damages for wrongful death. Such a result would not only lead to inconsistent awards, it could be prohibited by [Section] 1988.[150]

Although the Eleventh Circuit recognizes this inconsistency within the broad context of *Gilmere*, its precedent has been little to no help in terms of scrutinizing Florida's Wrongful Death Act and pushing for recovery of the decedent's non-economic damages in Florida.

C. Florida State Precedent

Ironically, the binding precedent set in *Brazier* is rarely considered in Florida cases targeted at the state's Wrongful Death Act. As determined by the court in *Brazier*, when a wrongful death results in both federal and state claims, the claims function as two separate entities.[151] However, the state law claim is more crucial for two reasons: first, because it governs the wrongful death claim; and second, because it fills in any gaps contained in the federal law regarding due process.[152] But again, what if the state law is already deficient to begin with? Little focus has been given to examining the other limiting aspects of Florida's recovery scheme through a constitutional lens. The following Florida state cases paint the picture of how the limitations in Florida's framework have produced inequitable results in wrongful death cases.

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150. *Id.* The last sentence in the quote regarding awards "be[ing] prohibited by [Section] 1988" is precisely the thesis of this article. Florida law varies greatly when compared to both Alabama and Georgia law with respect to redressing damages specifically sustained by the decedent. *See supra* note 46.

151. Brazier v. W.B. Cherry, 293 F.2d 401, 404–05 (5th Cir. 1961). As the court notes, the state remedy controls the wrongful death claim, while the federal remedy is merely "supplementary." *Id.*

152. *See supra* Part IV(B)(1). The court in *Brazier* notes that when federal law contains a "gap," it is the duty of state law to fill that gap. 293 F.2d at 407.

1. White v. Clayton[153]

Florida's new Wrongful Death Act not only eliminated pain and suffering of the decedent as a category of recoverable damages, but it also put a limitation on what the decedent's heirs could recover in terms of the decedent's prospective estate.[154] Under Florida's previous Act, heirs and beneficiaries could recover what was then termed "loss of prospective estate," which is essentially the inheritance that a decedent would leave to his or her next of kin upon passing.[155] When the Florida Legislature amended the Act in 1972, it did not do away with this category of damages, but it instead limited those damages so that only certain heirs—spouses and lineal descendants—could recover.[156]

In *White*, that was precisely the issue.[157] A decedent passed leaving her estate to her two sisters.[158] However, following the guidelines in the amended Act, they—as *lateral* descendants—were not eligible to recover their sister's expected net accumulations as a category of damages.[159] A lengthy dissent argued that such an application was "arbitrary and capricious" by limiting other heirs from recovery of their inheritance rights[160] as would be provided for by Florida intestate succession rules under Florida Statutes Section 732.103(3).[161] The majority skirts the issue, asserting "legislative prerogative," and claims that "only the elements of damage have been changed."[162] But fewer elements of recoverable damages reflect negatively upon the overall award. As the majority acknowledges, the new Act will "increase damages in some circumstances and decrease them in others."[163] While the latter scenario is more easily envisioned, the possibility of the

153. 323 So. 2d 573 (Fla. 1975).

154. *Id.* at 576. It is important to note that like pain and suffering and hedonic damages, "net accumulations" also focus on recovery for the death of the decedent, albeit his or her economic contributions. *Id.*

155. *Id.*

156. *See* FLA. STAT. § 768.21(6)(a)(1) (2014) (limiting recovery to spouses and lineal descendants).

157. *White*, 323 So. 2d at 575.

158. *Id.* at 576.

159. *Id.* at 575. The majority reaches the conclusion that the reason for this distinction between eligible survivors is to ensure "full recovery on behalf of those who were *dependent* on the deceased." *Id.* (emphasis added).

160. *Id.* at 577 (Adkins, C.J., dissenting).

161. FLA. STAT. § 732.103 (2007).

162. *White*, 323 So. 2d at 575 (majority opinion).

163. *Id.*

former is difficult to imagine. Take pain and suffering damages of the decedent for example. If such damages were meant to be divided up among a decedent's eligible survivors,[164] the damage award certainly would not increase. The total sum would remain the same but would instead be *divided up* among those eligible members. Furthermore, limiting those next of kin eligible for recovery under the "loss of prospective estate,"[165]means that total damage awards could only decrease, given that fewer kin were recognized as qualified recipients, as was the case above. In *White*, the Florida Supreme Court did nothing more than muddy the waters on what was an obvious attempt by the Florida Legislature to limit the categories of recoverable damages in wrongful death cases.[166]

2. Henderson v. Insurance Company of North America[167]

Similar to *White*, *Henderson* also examined a gap in the recovery scheme for a decedent's injuries through his estate.[168] *Henderson* held that four adult children who were not dependent on the decedent had no right to recover his net accumulations.[169] In a situation where a wife or minor children existed, this scenario may seem reasonable. However, in one where the four adult children are the *only* survivors able to recover as next of kin, how is the value of the decedent's life defined? His hedonic or "value of life" damages are not recoverable; neither are his specific pain and suffering damages.[170] Like *White*, this case reaffirms that in certain scenarios where there exists no dependent children and

164. *See supra* text accompanying note 77.

165. It is worth mentioning that this category is now considered a subpart of the decedent's "loss of net accumulations." *White*, 323 So. 2d at 577 (Adkins, C.J., dissenting).

166. Although beyond the scope of this Article, consider too the limitation on adult children and the parents of an adult child under Section 768.21(8), Florida Statutes, denying recovery for companionship, instruction, guidance, and mental pain and suffering when the claim stems from medical malpractice. In the instance when the defendant is a state facility such as a Veterans Affairs Hospital, recovery may be extremely limited given the statutory cap on damages recoverable from government entities as detailed in Part V(B).

167. 347 So. 2d 690 (Fla. 4th Dist. Ct. App. 1977).

168. *Id.* at 691.

169. *Id.* at 692. Section 768.18(5), Florida Statutes, describes net accumulations as "the part of the decedent's expected net business or salary income, including pension benefits, that the decedent probably would have retained as savings and left as part of her or his estate if the decedent had lived her or his normal life expectancy."

170. *See* FLA. STAT. § 768.21 (2014).

no surviving spouse, a decedent's economic damages are also unrecoverable.[171] Decedents must either make sure their spouses survive them, or ensure they have minor or dependent children alive when they die.[172]

D. Florida District Court Precedent

1. Breedlove v. Orange County Sherriff's Office[173]

Only a handful of federal cases exist that actually allege the FWDA's inconsistency with Section 1983 for excluding damage categories. *Breedlove* is one of them, arising out of Florida's Middle District.[174] The decedent's estate brought suit under both Florida's Wrongful Death Act and Section 1983 after the shooting of the decedent while in the custody of the local sheriff's office.[175] The sole issue in the case was whether the elimination of decedent's pain and suffering damages rendered Florida's Wrongful Death Act inconsistent with the redress policies of Section 1983.[176]

The Middle District, in a brief opinion, distinguished *Breedlove* from the only other applicable district court case within the Eleventh Circuit,[177] asserting that:

> [A] state statute is inconsistent with the compensatory purpose of [Section] 1983 when it bars a decedent's personal injury claim in cases where the violation causes death. The Florida Wrongful Death Act, however, does not bar the *entire* personal injury claim. It merely excludes non-economic damages, while allowing the estate to recover the decedent's economic damages.[178]

171. *Henderson*, 347 So. 2d at 692.

172. This insert by the Author is meant to instill some comedic sarcasm into a topic that really is not all that laughable. The phrase "writing out the decedent to his own death," *supra* Part III(C), is becoming more and more clear.

173. No. 6:11-cv-2027-Orl-31KRS, 2012 WL 2389765 (M.D. Fla. June 25, 2012).

174. *Id.* at *1.

175. *Id.*

176. *Id.* at *2.

177. *Id.* at *3; *see* Heath v. City of Hialeah, 560 F. Supp. 840, 844 (S.D. Fla. 1983) (holding that the FWDA *is* inconsistent with [Section] 1983).

178. *Breedlove*, 2012 WL 2389765, at *3 (emphasis added).

The Court's rationale for the limitation on the non-economic damages was simply that they are often "hard to quantify."[179] The court went further and explained that the practical effect the limitation had on the policy of compensation was "in most cases, modest."[180]

But what constitutes "most cases?" Is it merely that in fifty-one percent of all wrongful death actions, the decedent does not live long enough to suffer? If so, that means forty-nine percent of decedents actually do suffer before death, but because their situation does not fall in the majority of "most cases" they do not qualify to have such damages statutorily recognized. What kind of a policy relies upon "most cases" as the basis for recognizing recovery? The equivalent would be to say that because "most cases" of injuries resulting from defective products result in only nominal damages, the legislature is going to limit recovery from defective products altogether.

Ultimately, the Middle District concluded that the exclusion of one category of damages did not render the entire Florida Wrongful Death Act inconsistent with Section 1983's compensatory policies. The Middle District is one of only two Florida district courts to actually decide the issue.[181] There exists a split within the Florida district courts because the Southern District decided the opposite in *Heath v. City of Hialeah*.[182]

2. Heath v. City of Hialeah

There is only one federal court case that actually supports the notion that Florida's wrongful death scheme is inconsistent with the compensatory purpose of Section 1983.[183] In *Heath*, a young man was shot and killed by an off-duty police officer.[184] The

179. *Id.* Consider this quote in the context of Part III(C)(2) *supra*, and the other causes of action that provide for unquantifiable damages plaintiffs are often allowed to recover in American courts.

180. *Id.* The court provides this statement with no statistical support of the percentage pain and suffering compensation for injuries resulting prior to death constituted in the overall scheme of damages awarded resulting from a wrongful death.

181. *Id.* at *3–4.

182. *Heath*, 560 F. Supp. at 842.

183. *Id.*

184. *Id.* at 840. Although the officer was off-duty, Section 1983 was triggered because the complaint alleged a subsequent cover-up by the police department, as well as the fact that they allowed the officer who shot the decedent to "moonlight," (i.e., work in an unofficial capacity at another job where the officer was still armed). *Id.* at 840–41.

mother of the man brought suit alleging several Section 1983 claims, asserting that federal law must be applied because Florida did not provide an adequate remedy and was thus inconsistent with the federal principles of redress.[185] She argued that because damages that focused squarely on the life of the decedent were not recoverable under Florida law, the court must find the FWDA inconsistent with Section 1983 and apply the overarching federal common law to calculate damages.[186] Specifically, because the decedent was an "emancipated adult male" who had no eligible survivors or beneficiaries entitled to recover damages under the FWDA, "the plaintiff would have rights without remedies."[187] Because his pain and suffering were excluded, and because the plaintiff had little "value" in terms of his future estate, and neither he nor his estate sustained any losses for medical expenses, his only recovery would have been his funeral expenses.[188]

When examining the policies underlying Section 1983 with regards to wrongful death, the court first examined the compensation aspect, focusing on the concept of federalism.[189] The court noted that Section 1983 was enacted to protect the people from unconstitutional state action, and in this specific instance, the remedies available were so wholly unjust that federal law must be supplemented to afford appropriate relief.[190] The court then examined the element of deterrence, citing William Prosser,[191] "[w]here death is the cause of the suit . . . the deleterious effect on the policy of deterrence is plainer to see. Indeed, it would be far more profitable to kill the plaintiff than to scratch him."[192] In

185. *Id.* The mother sought damages for the man's pain and suffering, future earnings, and medical and funeral expenses: the first element was barred from recovery by the FWDA, the second nominal, and the third inapplicable. *Id.*; *see* FLA. STAT. § 768.21 (2014).

186. *Heath*, 560 F. Supp. at 841; *see* Gilmere v. City of Atlanta, 864 F.2d 734, 738 (11th Cir. 1989) (discussing the federal common law of survival).

187. *Heath*, 560 F. Supp. at 842.

188. *Id.* The majority opinion submits that under the Florida Wrongful Death Act, the plaintiff's damages would provide "little more than the cost of a casket." *Id.*

189. *Id.* at 844.

190. *Id.*

191. *Id.* at 843. Prosser offered several famous academic works on the law of torts including a series of treatises entitled *Prosser on Torts*, as well as his contributions as a reporter on the Restatement of Torts. John W. Wade, *William L. Prosser: Some Impressions and Recollections* 60 CAL. L. REV. 1255, 1261 (1972).

192. *Heath*, 560 F. Supp. at 843; W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 127, at 945 (5th ed. 1984). This policy is also reflected in the holding of *Brazier v. W.B. Cherry*, as the court noted that "[v]iolent injury that would kill was not less prohibited than violence which would cripple." 293 F.2d 401, 404 (5th Cir. 1961).

other words if the state death act abates the decedent's pain and suffering claims for injuries sustained, a defendant avoids liability for those damages by actually *killing* the victim. This is juxtaposed to only injuring the victim, where a defendant would most certainly be expected to pay significant monetary sums for an individual's pain and suffering injuries. The court also recognized this inequitable policy and, following precedent from the United States Supreme Court,[193] allowed federal law to govern the damages in the case.[194]

The Southern District would not go so far as to allude to the breadth of its decision, which is why *Heath* is likely overlooked in the scheme of FWDA litigation.[195] Holding the Act inconsistent with the federal policies of Section 1983 in one specific instance showed more of a willingness by the federal courts to apply this standard in an ad-hoc, case-by-case basis.[196] The court did not, however, suggest changes to the FWDA's damages provisions. *Heath* was published in 1983 and yet over thirty years later has exhibited little-to-no precedential value.[197]

V. REWORKING THE SCHEME

As of this writing, *Breedlove* and *Heath* are the only cases that have specifically attacked the Florida Wrongful Death Act for failure to account for a decedent's injuries.[198] As the Middle District noted in *Breedlove*, *Gilmere* was the only Eleventh Circuit case to have previously discussed this exact issue, and is distinguishable because it was directed toward Georgia law and

193. *See* Carlson v. Green, 446 U.S. 14, 24 (1980) (The Supreme Court affirmed the ruling of the Seventh Circuit, which held Indiana's wrongful death statute inconsistent with the remedial aspect of federal law.).

194. *Heath*, 560 F. Supp. at 843–44. It is unclear as to exactly *what* remedy the court applied to the decedent in terms of damages, as that measure was outside of the court's opinion; however, it was sure to be an ad-hoc award given that there are no statutory guidelines outlining the federal common law damage categories. *Id.* at 844.

195. *See Heath*, 560 F. Supp. 840 (from WestlawNext Citing References, select Cases) (last visited Apr. 10, 2015). As of this writing, *Heath* is only cited by a total of eleven cases. *Breedlove* is the only one in Florida, and it distinguishes *Heath*. *Id.*

196. *See id.* at 844.

197. Although *Heath* is currently cited and supported, the few opinions that cite *Heath* do so more for *Heath*'s value in applying federal common law (notwithstanding the availability of inadequate state statutory law) as opposed to discussing *Heath*'s criticism of the Florida Wrongful Death Act.

198. This—of course—is based solely upon the researching skills of the Author.

not Florida law.[199] Thus, at the federal appellate level, the issue of Florida's scheme would be one of first impression.[200] With the Southern District Court ruling one way in *Heath*,[201] and then the Middle District Court declining to follow and ruling oppositely in *Breedlove*,[202] this issue appears ripe for appeal. However, as of this writing, the issue has not made it to the Eleventh Circuit.

It is entirely logical that the Florida Legislature decided to vest the decedent's losses onto the eligible survivors given the notion that they are the only true class of victims that can technically "recover" anything for their loss. The decedent obviously cannot. But by limiting damages categories, Florida's framework has created recovery problems for those individuals who died without eligible heirs or survivors.[203] Albeit, this is definitely an exception as opposed to the rule, but a noteworthy exception nonetheless. If the purpose of the Florida Wrongful Death Act is to afford recovery,[204] the Florida Legislature should amend it to do so in every instance. When gaps exist in the state statutory scheme—and they currently do—it is up to the federal courts to recognize it, ensure that the state law is not applied, and allow federal law to afford a remedy. However, because the federal law on the subject is purposefully vague, that remedy remains a question mark as well, and although federal courts have arbitrarily applied federal common-law damage principles in wrongful death cases, the real solution lies in amending Florida's Wrongful Death Act to account for unique factual scenarios.[205]

A. Amending the FWDA

Since Section 1983 is a general remedial statute, it is unfeasible to try to amend it, especially given the disparities between the various states' wrongful death acts and the need for an elabo-

199. Breedlove v. Orange Cnty. Sheriff's Office, No. 6:11-cv-2027-Orl-31KRS, 2012 WL 2389765, at *3 (M.D. Fla. June 25, 2012).

200. A case of first impression is one in which a new question of law is presented in a given jurisdiction. GIFIS, *supra* note 99, at 189.

201. 560 F. Supp. at 844.

202. 2012 WL 2389765, at *4.

203. *See supra* Part IV(C)–(D).

204. WAGNER, *supra* note 121, at 1191.

205. *See supra* Part IV(C).

rate framework of remedies at the state substantive level.[206] Thus, a focus on amending the FWDA is more accomplishable.[207] To use the exact words of the Federal District Court for the Middle District of Florida, adding provisions for the pain and suffering of the decedent would in "most cases" turn out only "modest" rewards.[208]

So, why should the Act not account for such recovery? This is especially applicable to situations like the one in *Heath* where the decedent had no eligible survivors and little-to-no economic worth, and thus recovery was specifically limited to his medical and funeral expenses.[209] An amendment to the Act providing for non-economic damages to the decedent would serve only to fill in the gaps by providing a state remedy, and thus, reliance on the vague and arbitrary federal common law would be unnecessary.

Further, there are states that have general recovery provisions under their respective death acts.[210] Florida could have just as easily provided a general remedial instruction as provided for in the Mississippi wrongful death statute, which reads "[t]he party or parties suing shall recover such damages allowable by law as the jury may determine to be just, taking into consideration all the damages of every kind to the decedent and all damages of every kind to any and all parties interested in the suit."[211] Such a provision wholly accommodates both classes of victims as well as each category of damages. How much and to whom those damages will go to is a question left for the jury, as it should be.[212] A remedial scheme such as this would limit the abundance of litigation regarding which damage provisions are applicable under the

206. Although one option as implied by the *Gilmere v. City of Atlanta* majority would be for federal law to provide damages for the loss of life by the decedent and allow state law to account for the survivors. 864 F.2d 734, 739 (11th Cir. 1989).

207. The Restatement of the Law of Torts seems to support this proposition as well, providing that a common law right to recovery for wrongful death has often been recognized by the courts and used to fill in gaps in wrongful death statutes, implying its frequent occurrence. RESTATEMENT (SECOND) OF TORTS § 925 (1979).

208. *See* Breedlove v. Orange Cnty. Sheriff's Office, No. 6:11-cv-2027-Orl-31KRS, 2012 WL 2389765, at *3 (M.D. Fla. June 25, 2012) (noting that decedents typically do not live long enough after their initial injuries to suffer, thereby incurring relatively insignificant pain and suffering damages).

209. Heath v. City of Hialeah, 560 F. Supp. 840, 842 (S.D. Fla. 1983).

210. *See supra* text accompanying note 96.

211. MISS. CODE ANN. § 11-7-13 (West 2013).

212. *Id.*

statute, and which are constitutional for sake of consistency with federal civil rights redress.

Turning finally to hedonic damages, such damages are currently being provided to plaintiffs in some Section 1983 claims in federal jurisdictions as a basis for deterring negligence of state actors.[213] Regarding the dual *Robertson* facets of compensation and deterrence,[214] federal courts have focused more on this category of damages serving as a deterrent for future negligence in instances where the compensation damages (likely provided for under the state wrongful death act) are insignificant.[215] Unlike other jurisdictions, the Florida district courts currently do not focus on hedonic damages.[216] In Florida, though, hedonic damages would only serve to fill in the gaps in cases where the decedent's compensatory damages were nominal. Given the caps on tort damages provided by Florida's sovereign immunity statute,[217] adding a category of hedonic damages would simply ensure adequate compensation in cases where recovery was nominal, albeit only up to the statutory limit.

Hedonic damages should be recoverable under Florida substantive law. One scholar notes that compensating the decedent for his non-economic losses instead of compensating the survivors is simply a matter of "form."[218] While that may be true in a majority of cases, *Heath*-type scenarios[219] will arise where neither compensation nor deterrence is satisfied by Florida's law. Instead of placing the burden on the federal courts to "tailor" an appropriate remedy to an ad-hoc situation, it would be much easier to add a provision into the state substantive law providing for these gaps.[220] Such a provision should be based upon an objective standard applied to the specific set of facts. For instance, any award would take into account the plaintiff's circumstances pre-

213. McClurg, *supra* note 78, at 85.
214. *See supra* Part IV(A).
215. McClurg, *supra* note 78, at 85–87.
216. *Id.* at 85 n.113.
217. *See infra* text accompanying note 227.
218. McClurg, *supra* note 78, at 99.
219. *See* Heath v. City of Hialeah, 560 F. Supp. 840, 842 (S.D. Fla. 1983) (referring to a scenario where a decedent may die without eligible survivors or beneficiaries, and may have a disproportionately low economic worth at death).
220. This is even more important in cases where only state causes of action are brought.

death, most notably his or her age,[221] gender,[222] occupation,[223] and other measurements used by courts to consider pre-death circumstances. Considering that the victim is deceased and cannot provide evidence, an objective standard would assist in painting the picture and explaining the loss of value of one's life. Put simply, the statutory language could read: "In the event of a wrongful death, any hedonic damages may be recoverable and shall be based on an objective standard, taking into account the following characteristics of the deceased: (1) . . . . " The statutory language would then go on to list what factors should qualify.

Rewriting the wrongful death statute, however, will take great legislative initiative because it will open the government, and ultimately taxpayers, up to more liability.[224] But exactly how much more liability? That is a very important question with an even more intriguing answer.

B. Who Is the Defendant?

One major consideration in wrongful death suits revolves around who is sitting across the table from the plaintiff. There is a tremendous difference between the defendant as an individual or as a government-entity.[225] The role that insurance plays in covering human defendants for their acts of negligence has led to the placement of practically no ceiling on what a worthy plaintiff may recover in terms of damages.[226] However, when a government entity sits across the table, the Florida Legislature has limited the amount of damages recoverable as reflected in Florida's waiver of sovereign immunity statute.[227] If an individual can only

221. For determining the life expectancy of a decedent, which is common in personal injury litigation.

222. Simply for determining the "types" of enjoyments in life, for instance, childbearing. This is not to say that men may not also enjoy the process.

223. To ascertain a value for measurements such as social standing and financial status.

224. *See* McClurg, *supra* note 78, at 102–07 (discussing the "Willingness-To-Pay Approach" governing the economics behind 'value of human life' damages). McClurg provides an interesting theory on how to get the Legislature behind hedonic damages. *Id.*

225. *See* FLA. STAT. § 768.28 (2014) (outlining the waiver of sovereign immunity in tort actions).

226. *See supra* note 120 (examining the financial limits of liability a defendant may be responsible for if he or she caused or contributed to a wrongful death).

227. *See* FLA. STAT. § 768.28(5) (providing that Florida waives its sovereign immunity in tort actions only up to a specific amount: two hundred thousand dollars per judgment per person, or three hundred thousand dollars total judgment including all claims).

recover two hundred thousand dollars[228] total on a judgment, or three hundred thousand dollars in the case of multiple plaintiffs sustaining injuries from the "same incident or occurrence,"[229] it begs the question as to why the legislature would need to limit specific *categories* of damages to save money.[230] Given the increasingly high monetary claims for damages in personal injury actions, damages for a decedent's own non-economic injuries likely is not going to be the category of damages that fills up that two hundred to three hundred thousand dollars the quickest.[231]

There are also exceptions to the sovereign immunity statute for those defendants acting with a malicious purpose or in a manner exhibiting wanton and willful disregard of a person's rights or safety.[232] If such facts apply, the defendant may not be protected under Florida's sovereign immunity statute and instead, may be found *personally* liable, in which case the statutory award limitations would be inapplicable.[233]

Consider too the deterrence aspect of redress for wrongful death. If little to no damages are paid to the estates of those who receive injuries resulting in death, there will undoubtedly be less incentive for defendants to take the proactive measures to avoid

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228. *Id.*

229. *Id.*

230. Keep in mind that if a jury renders an amount above the statutory limit, the plaintiff may file a "claim bill" to the Florida Legislature, which may then provide an amount up to the unclaimed portion of the award. Gerald T. Wetherington & Donald I. Pollock, *Tort Suits Against Governmental Entities in Florida*, 44 FLA. L. REV. 1, 80 (1992). However, these requests must pass in both chambers of the Florida Legislature by majority approval, and therefore are examined with the highest scrutiny. Fla. Senate Office of President & Fla. House of Representatives Judiciary Comm., *Legislative Claim Bill Manual: Policies, Procedures, and Information Concerning Introduction and Passage*, FLORIDA SENATE (2014), http://www.flsenate.gov/PublishedContent/ADMINISTRATIVEPUBLICATIONS/leg-claim-manual.pdf.

231. One scholar notes that hedonic damages are simply a means to "influence the jury to reach a multi-million dollar verdict," and that they "provide an attractive opportunity for plaintiffs' lawyers to channel a jury's sympathy for an injured person." Victor E. Schwartz & Cary Silverman, *Hedonic Damages: The Rapidly Bubbling Cauldron*, 69 BROOK. L. REV. 1037, 1070 (2004). However, so too are the intangible damages of pain and suffering and emotional distress. McClurg, *supra* note 78, at 68–72. Further, this statement is inapplicable in Florida where there exist statutory caps for damages from government tort liability. *See* FLA. STAT. § 768.28(5) ($200,000 per judgment per person, or $300,000 total judgment including all claims).

232. FLA. STAT. § 768.28(9)(a).

233. *See id.* ("The state or its subdivisions shall not be liable in tort for the acts or omissions of an officer, employee, or agent . . . committed in bad faith or with malicious purpose or in a manner exhibiting wanton and willful disregard of human rights, safety, or property.").

injurious acts in the future. This is especially true for government actors who are accountable for the public safety and welfare. This is not to say that the government will not take proactive measures to protect the citizenry from potentially tortious behavior unless it risks having to make monetary reparations, but the fact that government actors may be more susceptible to tort litigation and high damage awards in the first place may force it to use a sort of cost–benefit analysis when considering such measures. In this case, policy and other changes may only commence upon the leveling of a hefty plaintiff payout for finding the government at fault in a given scenario.[234] While this may not be an ideal result from a taxpayer point of view, what is important to remember is that the government is tasked with keeping the public safe, and while no entity can predict all potential liabilities,[235] if precautionary measures cannot keep an injury from occurring, subsequent remedial measures targeted at the injured party must attempt to rectify the damages.

VI. CONCLUSION

The FWDA's limitation on damages is too ad-hoc of an application to be deemed "consistent" with Section 1983. Because there are instances where a plaintiff may not recover, or recovery is extremely limited, the compensation requirement under *Robertson* is left unsatisfied. It has become abundantly clear that the Florida Legislature attempted to combine the survival and wrongful death actions in an attempt to limit recovery. This is partly understandable in situations where government actors are the defendants, given that the cost will ultimately be borne by the citizenry. However, those costs cannot come at the expense of the survivors of those wrongfully injured and killed, especially in those situations where government actors are involved. Money, in this respect, must remain a deterrent to properly ensure that safety and public welfare are maintained in our society.

Florida should institute changes to its wrongful death scheme or else litigation will continue. Either the Florida Legislature should amend its Wrongful Death Act or the Eleventh Cir-

234. This, however, brings up the same concerns voiced in *supra* note 121, alluding to taxpayers ultimately shouldering the burden of government fault through taxes.

235. This is equally true for corporations and other associations in the business arena.

cuit Court of Appeals should hear this issue and provide appropriate precedent. Otherwise the remedies provided to those seeking redress for the loss of loved ones will continue to be unjust. Unique factual situations arise in every context of litigation; wrongful death suits are not immune to this phenomenon. Section 1983 was drafted vaguely for an all-encompassing purpose,[236] and thus it is the job of Florida substantive law to fill in those gaps to provide appropriate redress. Even those with unique factual situations are entitled to equal protection under the laws of our Constitution.

236. *See generally* Higgins v. Beyer, 293 F.3d 683, 688 (3d Cir. 2002) (stating that Section 1983 was constructed to allow a person to file suit against state actors for a deprivation of their federally-protected rights, rights that come from either statute or are inherent in the Constitution).