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# THE YEAR OF MAGICAL THINKING: FRAUD, LOSS, AND GRIEF

Jayne W. Barnard\*

## ABSTRACT

*In The Year of Magical Thinking, her wrenching memoir of the year following the death of her husband John Gregory Dunne, Joan Didion describes the episodes of magical thinking that forestalled her acceptance of Dunne's sudden absence from her life. In the hours after his death, she charged his cell phone. Weeks later, she gave his clothes to charity but kept his shoes because, she thought, "He would need shoes if he were to return."*

*Modern grief theory tells us that episodes like these are common during the months following a loved one's death, particularly when the death, like Dunne's, occurs suddenly and unexpectedly. This article argues that the same type of magical thinking also affects victims of fraud.*

*Through a close review of the victim impact statements, in-court allocution, and memoirs of Bernard Madoff's victims, we can see that the loss of money in a Ponzi scheme often feels like the death of a beloved family member. In both cases, survivors display what Didion calls a "shallowness of sanity." They imagine alternative scenarios by which their losses can miraculously be unwound.*

*This article examines the parallels between financial loss due to fraud and the death of a loved one and explores, in particular, the magical thinking that has driven some of the Madoff victims' litigation. Though written in the context of the legal profession and focusing on the role of lawyers, the article also offers insights to counselors, family members, and victims of fraud.*

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## I. INTRODUCTION

On the evening of December 30, 2003, author John Gregory Dunne suddenly stopped talking mid-sentence and slumped in his chair. His wife at first thought he was playing a bad joke. Then, she realized this was no joke. She called the paramedics, who arrived within minutes and worked briefly on Dunne on the couple's living room floor. Then, they transported Dunne by ambulance to a nearby Manhattan hospital. Within the hour, Dunne was pronounced dead. Several months later, Dunne's widow, author Joan Didion, began writing what would become a Pulitzer-prize winning memoir and later a Broadway play, both named *The Year of Magical Thinking*.<sup>1</sup>

In her memoir, Didion is unsparing when describing her early strategies to fend off the truth of what had happened to Dunne. Even though she was clearly aware that her husband had died; even though she had authorized his autopsy at the hospital on the night of his death; even though she had phoned in his obituary to the *Los Angeles Times* that same night and weeks later had orchestrated his memorial service at the Cathedral of Saint John the Divine, Didion months later "still believed that given the right circumstances [her husband] would come back."<sup>2</sup> She thought or hoped that somehow she could "reverse the narrative [and] change the outcome" of their story.<sup>3</sup>

Magical thinking like this is not uncommon among bereaved persons. In his early work on grief, for example, Sigmund Freud observed that survivors sometimes miss their loved one so much that "a turning away from reality ensues."<sup>4</sup> Less common is the recognition that *many* kinds of loss can lead to magical thinking. People who lose their jobs, whose homes are destroyed by fire, or whose spouses suddenly leave them for another lover all engage in magical thinking. So do victims of fraud.

This article explores the "magical thinking" that often characterizes fraud victimization. Using the Bernard Madoff Ponzi scheme as a model, this article explores the initial reaction of fraud victims to the discovery of their loss followed by a series of adaptive (or maladaptive) responses. In the Madoff case, these responses included suicides, physical violence, street demonstrations, organization of support groups, demands on legislators to write new laws to address victims' needs, initiation of

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1. JOAN DIDION, *THE YEAR OF MAGICAL THINKING* (2005).

2. *Id.* at 150.

3. *Id.* at 35.

4. SIGMUND FREUD, *Mourning and Melancholia*, in *GENERAL PSYCHOLOGICAL THEORY: PAPERS ON METAPHYSICOLOGY* 161, 163 (Simon & Schuster 2008) (1963).

lawsuits, declines in physical and mental health, dependency on others, and finally – for most Madoff victims – a cooling of passions and a recognition that much of their wealth, real or imagined, was gone.

It would be easy, perhaps, to view these responses through the traditional lens of the “five stages of grief” – denial, anger, bargaining, depression, and acceptance.<sup>5</sup> Modern grief theory has largely rejected the “five stages,” however, at least insofar as they represent a fixed progression of steps through which bereaved persons must work to achieve some level of stability in their lives.<sup>6</sup> Rather, modern grief theory stresses a more organic approach to the grieving process – one characterized by instinct, flexibility, resilience, and personal growth.<sup>7</sup>

Under the modern framework, bereaved persons are not confined to a prescribed series of “stages.” Instead, they are likely to find their own way through a series of episodes – called “oscillations” – of sadness, anger, longing, and resignation.<sup>8</sup> They process these emotions on their own timetable and on their own terms. They instinctively know how to do so.

Importantly, most bereaved persons are remarkably resilient. Most of them are able, within a few months of their loved one’s death, to accept their loss, face their future, and begin to reassemble their lives. Very few bereaved persons get stuck in their grief.<sup>9</sup> They adapt, regroup, and move on.

This article will examine the parallels between the death of a loved one and the loss of one’s fortune. It begins with a brief review of the five stages of grief familiar to most Americans.<sup>10</sup> It will then consider some of the teachings of modern grief theory, especially the behavioral patterns of

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5. See *infra* Part III.A.

6. See *infra* Part III.B.

7. See generally GEORGE A. BONANNO, *THE OTHER SIDE OF SADNESS: WHAT THE NEW SCIENCE OF BEREAVEMENT TELLS US ABOUT LIFE AFTER LOSS* (2009); Jeanne W. Rothaupt & Kent Becker, *A Literature Review of Western Bereavement Theory: From Decathecting to Continuing Bonds*, 15 *FAM. J.* 6 (2007).

8. BONANNO, *supra* note 7, at 39-43.

9. A non-trivial minority of bereaved people do get stuck. “Approximately 10 to 15 percent of bereaved people are likely to struggle with enduring grief reactions. In other words, one or two out of every ten people tends to have grief reactions that continue to interfere with their ability to function for several years or longer after the loved one’s death.” BONANNO, *supra* note 7, at 96.

10. See *infra* Part III.A. A note on vocabulary is in order here: “Bereavement” is the objective situation of having lost someone significant through death; “grief” is a person’s reaction – emotional, physical, and social – to the loss; “mourning” is the public display of grief. Margaret S. Stroebe et al., *Bereavement Research: Contemporary Perspectives, Introduction to HANDBOOK OF BEREAVEMENT RESEARCH AND PRACTICE: ADVANCES IN THEORY AND INTERVENTION* 3, 4-5 (Margaret S. Stroebe et al. eds., 2008).

people who are the survivors of a person who dies in a sudden, unanticipated death.<sup>11</sup>

It will then explore the similarities between coping with such a death and coping with a sudden, unanticipated financial loss due to fraud.<sup>12</sup> This is not a disrespectful comparison. We know that, when people lose their money through theft or fraud, their loss is about much more than money. People who are the victims of fraud face profound issues of identity, security, autonomy, and trust. Victims question whether they will ever again be loved by their families; they wonder if they will ever again be able to put their faith in others or themselves.<sup>13</sup>

In addition, people who discover they have been the victims of fraud often behave like bereaved persons. They suffer shock, anguish, confusion, rage, and regret. They seek to cast blame. They yearn for a “do-over.” They imagine that, somehow, history can be rewritten and they can be delivered from their pain.

In short, they engage in magical thinking. As with bereaved persons, this process may go on for weeks, months, or occasionally even longer. Then, with the passage of time, magical thinking evaporates. Fraud victims, like bereaved persons, begin to emerge from their grief.

The article considers some of the specifics of the Madoff victims’ magical thinking: in particular, their efforts to recover *from just about anybody* all of the money they thought was theirs.<sup>14</sup> They wanted to be paid not only their out-of-pocket losses, but also the fictional profits Madoff had told them they had earned. Some of these efforts were canny and fruitful. Others were outlandish, narcissistic, and futile – and, regrettably, these efforts, too, were encouraged by lawyers.

This article then offers some suggestions for lawyers and other professionals who deal with fraud victims.<sup>15</sup> It emphasizes the need for lawyers to recognize, first, that magical thinking is often an element of fraud victimization and, second, that magical thinking is a transient, transitional phenomenon through which people pass and from which they

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11. See *infra* Parts III.B-D.

12. See *infra* Part IV.

13. See Jayne W. Barnard, *Allocution for Victims of Economic Crimes*, 77 NOTRE DAME L. REV. 39 (2001) (noting the physical and psychological effects of fraud victimization); see also David Shichor et al., *Victims of Investment Fraud*, in CONTEMPORARY ISSUES IN CRIME AND CRIMINAL JUSTICE: ESSAYS IN HONOR OF GILBERT GEIS 81, 86 (Henry N. Pontell & David Shichor eds., 2000) (“[A]part from the financial effects, [fraud] victimization impacts [victims’] self-concept and self-esteem, which in many cases may be even more devastating for the victim than their material loss.”).

14. See *infra* Part V.

15. See *infra* Part VI.

emerge, usually sooner than later. Lawyers who appreciate the similarities between sudden financial loss and the death of a loved one will provide more effective representation to their clients and will avoid the risk of revictimizing those clients. They also may avoid falling into magical thinking themselves.

## II. THE CONTEXTUAL BACKDROP: BERNIE MADOFF AND HIS VICTIMS

The story of Bernard Madoff's crimes has been widely told.<sup>16</sup> Here, we will examine only a few highlights of the story, focusing on Madoff's victims, of whom there are approximately 13,000.<sup>17</sup> Whatever these victims might have known or suspected in the months leading up to December 2008, they were horrified to discover on Thursday, December 11, that Bernie Madoff had been arrested the previous night on charges that he had engineered a multi-billion-dollar fraud.<sup>18</sup>

The victims quickly divided into two groups. The first group of investors had entrusted their funds directly to Bernard L. Madoff Investment Securities, Inc. (BLMIS).<sup>19</sup> The second group had entrusted their funds to other entities which, in turn, had invested some or all of those funds with BLMIS.<sup>20</sup> The direct investors enjoyed the protection of the Securities Investor Protection Corporation (SIPC).<sup>21</sup> The indirect investors had no entitlement to that protection and would have to pursue the managers of their feeder funds (or some other defendants) if there was to be any hope of recovering any of their losses. Both groups of victims quickly

16. See, e.g., DIANA B. HENRIQUES, *THE WIZARD OF LIES: BERNIE MADOFF AND THE DEATH OF TRUST* (2011); ERIN ARVEDLUND, *TOO GOOD TO BE TRUE: THE RISE AND FALL OF BERNIE MADOFF* (2009); BRIAN ROSS, *THE MADOFF CHRONICLES: INSIDE THE SECRET WORLD OF BERNIE AND RUTH* (2009); HARRY MARKOPOLOS, *NO ONE WOULD LISTEN: A TRUE FINANCIAL THRILLER* (2010); ANDREW KIRTZMAN, *BETRAYAL: THE LIFE AND LIES OF BERNIE MADOFF* (2009); JERRY OPPENHEIMER, *MADOFF WITH THE MONEY* (2009); see also Christine Hurt, *Evil Has a New Name (and a New Narrative): Bernard Madoff*, 2009 MICH. ST. L. REV. 947 (2009) (describing Madoff's fraud, incorporated in a rich legal and historical context).

17. Bruce Golding, *Bernie's Rip-Off Roll Call*, N.Y. POST (Feb. 5, 2009, 7:40 AM), <http://nypost.com/2009/02/05/bernies-rip-off-roll-call/>.

18. Diana B. Henriques & Zachery Kouwe, *Prominent Trader Accused of Defrauding Clients*, N.Y. TIMES (Dec. 11, 2008), [http://www.nytimes.com/2008/12/12/business/12scheme.html?pagewanted=all&\\_r=0](http://www.nytimes.com/2008/12/12/business/12scheme.html?pagewanted=all&_r=0).

19. Stephen Gandel, *Madoff Victims Look for Ways to Recover Their Money*, TIME (Dec. 16, 2008), <http://content.time.com/time/business/article/0,8599,1866689,00.html>.

20. *Id.* These entities are known as "feeder funds." *Id.*

21. The SIPC protects investors by working to return investors' money when a brokerage firm closes due to bankruptcy or financial problems and investors' money is missing. *SIPC Mission*, SECURITIES INVESTOR PROTECTION CORPORATION, <http://www.sipc.org/about-sipc/sipc-mission> (last visited May 21, 2014).

mobilized. They organized support groups, held meetings and rallies, and began meeting with lawyers and elected officials. Not surprisingly, the first plaintiffs' class action was filed within hours of Madoff's arrest.<sup>22</sup>

As the victims and their lawyers assembled their files and theories, five issues quickly surfaced: (1) whether victims could recover income taxes paid on income they had reported as a result of the fictitious account statements from BLMIS; (2) for those victims whose investments were covered by SIPC, what formula should be used to determine how much they would be able to recover; (3) for those victims whose investments were *not* covered by SIPC, whether a legislative solution could extend coverage to them; (4) whether there were any other parties who had participated in or benefited from Madoff's scheme who could be liable for some or all of the investors' losses and, if so, under what theory; and (5) whether there might be legitimate claims – known as “clawback” claims – against some or all of the investors who had withdrawn substantial amounts from their BLMIS accounts before Madoff's fraud was discovered. In addition, there was the issue of whether Madoff might have stashed some of the proceeds of his scheme. Where was the money? Did he have offshore accounts? Had he slipped the investors' millions to his family and friends?

All of these issues quickly unfolded. Within months of Madoff's arrest, the victims' out-of-pocket principal losses had been calculated to be \$17.5 billion.<sup>23</sup> Within a year, the Trustee in Bankruptcy of BLMIS, Irving Picard, had recovered about \$1.5 billion of that amount and had filed “clawback” lawsuits seeking an additional \$15 billion from some of Madoff's biggest clients.<sup>24</sup> The Trustee estimated he would recover as much as \$10 billion from these and other sources.<sup>25</sup>

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22. Erik Larson, *Madoff Sued in Investor Class Action, Lawyer Says*, BLOOMBERG (Dec. 12, 2008, 5:43 PM), [http://www.bloomberg.com/apps/news?pid=newsarchive&sid=a96bKX\\_UGrGk&refer=home](http://www.bloomberg.com/apps/news?pid=newsarchive&sid=a96bKX_UGrGk&refer=home).

23. See Bob Van Voris & Edvard Pettersson, *Madoff Investors Sued by Bankruptcy Trustee Over Alleged Fictitious Profit*, BLOOMBERG (Nov. 27, 2010, 10:27 AM), <http://www.bloomberg.com/news/2010-10-31/bernard-madoff-trustee-reports-1-5-billion-recovered-for-scheme-victims.html>.

24. Jane J. Kim, *News Gets a Bit Better for Victims of Madoff*, WALL ST. J. (Dec. 9, 2009, 12:01 AM), <http://online.wsj.com/news/articles/SB10001424052748704825504574584310679694216>.

25. Amir Efrati, *Baker Hostetler's Picard Victorious in Madoff Victims Case*, WALL ST. J. L. BLOG (Mar. 1, 2010, 3:05 PM), <http://blogs.wsj.com/law/2010/03/01/baker-hostetlers-picard-victorious-in-madoff-victims-case/>.

To everyone's surprise, at year-end 2010, the Trustee had already recovered \$7.2 billion from a single BLMIS customer.<sup>26</sup> By year-end 2012, he had recovered \$9.2 billion, or more than fifty cents on the dollar of the direct investors' out-of-pocket losses.<sup>27</sup> In addition to the Trustee's efforts, the IRS had relaxed its rules to accommodate recovery of some of the taxes paid by victims on "phantom income."<sup>28</sup> This accommodation provided a significant recovery for many, though not all, of Madoff's victims.<sup>29</sup> "It's not nearly as dire as we all feared," opined a tax advisor.<sup>30</sup>

Nevertheless, many Madoff victims were still furious and were still hopeful they could recover 100% of their losses, or even more. Many direct investors were arguing that they were entitled to recover from SIPC the face value of their account statements, rather than the traditional formula recognizing their net investment as the baseline for recovery.<sup>31</sup> Some investors even sued the SEC, alleging negligence in its oversight of Bernie Madoff's activities.<sup>32</sup>

In March 2009, Madoff pleaded guilty to eleven counts of fraud, money laundering, perjury, and theft, and in June 2009, he was sentenced to 150 years in prison.<sup>33</sup> He was ordered to forfeit his assets to provide some repayment to his victims.<sup>34</sup> At his sentencing, Madoff turned to the victims assembled in the courtroom and said quietly, "I am sorry. . . . I know that doesn't help you."<sup>35</sup> Madoff's claim of remorse at his sentencing

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26. Michael Rothfeld & Chad Bray, *Widow to Return \$7.2 Billion*, WALL ST. J. (Dec. 17, 2010, 12:01 AM), <http://online.wsj.com/article/SB10001424052748704034804576025392596402176.html>.

27. Jacqueline Palank, *Madoff Recoveries Increase: Trustee Said He Has Collected More Than Half of \$17.3 Billion in Principal Lost*, WALL ST. J. (Nov. 6, 2012, 8:08 PM), <http://online.wsj.com/news/articles/SB10001424052970203846804578103233730404730>.

28. *Id.*

29. Kim, *supra* note 24.

30. *Id.* (explaining that other tax relief came as the result of litigation); see Peter J. Reilly, *New Jersey Tax Court Cuts a Break to Madoff Victim*, FORBES (Aug. 27, 2012, 8:06 AM), <http://www.forbes.com/sites/peterjreilly/2012/08/27/new-jersey-tax-court-cuts-a-break-to-madoff-victim/>.

31. See *infra* Part V.C.

32. See *infra* Part V.B.

33. Diana B. Henriques & Jack Healy, *Madoff Goes to Jail After Guilty Pleas*, N.Y. TIMES (Mar. 12, 2009), <http://www.nytimes.com/2009/03/13/business/13madoff.html?pagewanted=all>; Diana B. Henriques, *Madoff Is Sentenced to 150 Years for Ponzi Scheme*, N.Y. TIMES (June 30, 2010), <http://www.nytimes.com/2009/06/30/business/30madoff.html?pagewanted=all>.

34. Halah Touryalai, *Madoff Brother to Plead Guilty, Forfeits All Assets*, FORBES (June 27, 2012, 4:55 PM), <http://www.forbes.com/sites/halahtouryalai/2012/06/27/madoff-brother-to-plead-guilty-and-forfeit-143-1-billion>.

35. Henriques, *supra* note 33.



was, as he surmised, of little comfort to his victims.<sup>36</sup> As Madoff went off to prison, many of his victims were (and some still are) deeply mired in grief.

### III. HOW PEOPLE GRIEVE

#### A. Elisabeth Kübler-Ross and the Five Stages of Grief

Modern American and European concepts of grieving can be traced to the important work of the Swiss psychiatrist Elisabeth Kübler-Ross, which began in the late 1960s. Kübler-Ross's book *On Death and Dying* was something of a manifesto on the needs of people with terminal illnesses.<sup>37</sup> The point of the book – a revelation at the time – was that dying patients did not want to be kept in the dark about their disease, their prognosis, or their trajectory toward death.<sup>38</sup> To the contrary, most dying patients were aware they were dying, longed to know more about what to expect in the process, wanted to talk candidly about their hopes and fears, wanted to feel less alone on the journey, and wanted to be treated with dignity and love as they approached the last days and hours of their lives.<sup>39</sup>

This transformative book has been called “one of the most influential books in the history of psychology.”<sup>40</sup> It played an important role in the development of the American hospice movement. It also launched four decades of books and workshops on grieving and “grief work” and formed the basis for what is now a large and lucrative “grief industry.”<sup>41</sup>

*On Death and Dying* laid out the five stages of grief: denial, anger, bargaining, depression, and acceptance.<sup>42</sup> Kübler-Ross wrote many later

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36. Madoff may have revealed his true feelings for his victims in a conversation with an inmate at his North Carolina prison. “Fuck my victims,” he was quoted as saying. “I carried them for twenty years, and now I’m doing 150 years.” Steve Fishman, *Bernie Madoff, Free at Last*, N.Y. MAG. (June 6, 2010), <http://www.nymag.com/news/crimelaw/66468/>.

37. ELISABETH KÜBLER-ROSS, *ON DEATH AND DYING: WHAT THE DYING HAVE TO TEACH DOCTORS, NURSES, CLERGY AND THEIR OWN FAMILIES* (40th Anniversary ed., Routledge 2009) (1969).

38. *Id.*

39. *Id.*

40. Russell Friedman, *Stages of Grief: The Myth*, GRIEF RECOVERY METHOD (Jan. 5, 2012), <http://www.griefrecoverymethod.com/2012/01/stages-of-grief-myth>.

41. See Jerome Groopman, *The Grief Industry: How Much Does Crisis Counseling Help – Or Hurt?*, NEW YORKER, Jan. 26, 2004, available at <http://jeromegroopman.com/ny-articles/GriefIndustry-012604.pdf>.

42. KÜBLER-ROSS, *supra* note 37.

books about dying and death.<sup>43</sup> As she approached her own death, she wrote one last book, *On Grief and Grieving*.<sup>44</sup> Part memoir and part how-to book, *On Grief and Grieving* revisited the five stages of grief – now rechristened the “five stages of loss” – and applied them specifically to the experiences and actions of bereaved persons.<sup>45</sup>

*On Grief and Grieving* addressed some of the criticisms that had been levied against the five stages of grief. Kübler-Ross conceded the five stages “are not stops on some linear timeline in grief. Not everyone goes through all of them or goes in a prescribed order.”<sup>46</sup> She acknowledged that grieving is “never as easy as items on a checklist. Real life and real grief are never as neat and tidy as that.”<sup>47</sup>

Kübler-Ross’s discussion of dreams and “hauntings” are particularly pertinent to this article. “After a loss, it is not unusual to dream that your loved one is still alive,” she said.<sup>48</sup> And “hauntings” – the sense that the dead person is in the room, giving advice, signaling approval, etc. – are also common.<sup>49</sup> “When we are grieving,” she said, “it is hard to let go of the fantasies, especially when death has taken a loved one from us unexpectedly.”<sup>50</sup>

### B. Modern Grief Theory

Over the decades following the publication of *On Death and Dying*, scholars challenged Kübler-Ross’s theories, not only as they applied to people facing a terminal illness, but also as they had been applied to people confronted with other kinds of losses. “Admittedly, the stages concept has its appealing features,” concedes one of the leading scholars in the field; “[i]t serves as a neat and tidy way to think about grieving.”<sup>51</sup> Still, scholars observed that many people who were grieving did not behave in the way Kübler-Ross’s theory predicted. In study after study, the concept of

43. E.g., ELISABETH KÜBLER-ROSS, *DEATH: THE FINAL STAGE OF GROWTH* (Simon & Schuster 2009) (1975); ELISABETH KÜBLER-ROSS, *TO LIVE UNTIL WE SAY GOODBYE* (Simon & Schuster 2011) (1978).

44. ELISABETH KÜBLER-ROSS & DAVID A. KESSLER, *ON GRIEF AND GRIEVING: FINDING THE MEANING OF GRIEF THROUGH THE FIVE STAGES OF LOSS* (2005).

45. *Id.*

46. *Id.* at 7.

47. *Id.* at 157.

48. *Id.* at 52.

49. *Id.*

50. *Id.* at 98.

51. BONANNO, *supra* note 7, at 22.

“stages” did not seem to parallel the way in which most people in Western industrialized societies actually experienced grief.<sup>52</sup>

Today, based on rigorous empirical research, scholars understand bereavement as a dynamic, rather than a linear, process:

Bereavement is essentially a stress reaction, an attempt by our minds and bodies to deal with the perception of a threat to our well-being. And like any stress reaction, it is not uniform or static. . . . Grief is tolerable, actually, only because it comes and goes in a kind of oscillation. We move back and forth emotionally. We focus on the pain of the loss, its implications, its meanings, and then our minds swing back toward the immediate world, other people, and what is going on in the present.<sup>53</sup>

Stated another way,

[R]ecovery is not like an elevator that takes you from the basement of despair to the penthouse of peace and understanding. It is more like a maze where you go forward a bit, move back a few steps, cover the same ground again, and find yourself at the beginning. Like a fun house hall of mirrors, you see yourself over and over again, distorted and misshapen until you come out the other side.<sup>54</sup>

Modern grief theory, in short, dispenses with the concept of sequential “stages of grief” and instead focuses on the natural, organic, and restorative practices employed by most bereaved persons. Modern theorists do not deny the pathologies of the small percentage of bereaved persons who cannot let go of their loss but focus instead on the processes that most “normal” bereaved persons discover and employ on their own.<sup>55</sup>

### *1. Resilience*

In recent years, bereavement scholars have focused particularly on the concept of resilience. Resilience is a well-established concept in the general

52. *See id.* at 40.

53. *Id.* at 40.

54. BROOK NOEL & PAMELA D. BLAIR, *I WASN'T READY TO SAY GOODBYE: SURVIVING, COPING, AND HEALING AFTER THE SUDDEN DEATH OF A LOVED ONE* 56 (Sourcebooks, Inc., updated ed. 2008) (2000).

55. In some respects, the academic study of bereavement resembles the academic study of parenting, moving from a highly structured, prescriptive set of “must do’s” to a more empowering, flexible approach to the subject. *Compare* BENJAMIN M. SPOCK, *BABY AND CHILD CARE* (1946), *with* T. BERRY BRAZELTON, *TOUCHPOINTS: THE ESSENTIAL REFERENCE – YOUR CHILD’S EMOTIONAL AND BEHAVIORAL DEVELOPMENT* (1992).

psychological literature.<sup>56</sup> Resilience is defined in the bereavement literature as “the ability of adults in otherwise normal circumstances who are exposed to an isolated and potentially highly disruptive event, such as the death of a close relation or a violent or life-threatening situation, to maintain relatively stable, healthy levels of psychological and physical functioning.”<sup>57</sup>

In dealing with loss, resilient people “may experience transient perturbations in normal functioning (e.g., several weeks of sporadic preoccupation or restless sleep).”<sup>58</sup> They may also experience “at least some yearning and emotional pangs, and virtually all [subjects of a bereavement study] reported intrusive cognition and rumination at some point early after [their] loss.”<sup>59</sup> What distinguishes resilient people from others, however, is that “these experiences [are] transient rather than enduring and [do] not interfere with their ability to continue to function in other areas of their lives, including the capacity for positive affect [e.g., happiness and joy].”<sup>60</sup>

Researchers estimate that nearly fifty percent of bereaved persons exhibit resilience throughout the period of grieving their loss.<sup>61</sup> Another ten percent show an even more positive trajectory, progressing from pre-loss depression to a markedly improved post-loss state.<sup>62</sup> Still another ten percent (those experiencing so-called “common grief”) become depressed immediately after the death of a loved one but steadily improve as time passes.<sup>63</sup>

Added together, more than two-thirds of bereaved persons end their period of mourning as functional as or more functional than at the time of their loved one’s death. “The struggle may last anywhere from a few hours

56. See JEROME GROOPMAN, *THE ANATOMY OF HOPE: HOW PEOPLE PREVAIL IN THE FACE OF ILLNESS* 203 (2004) (citing studies).

57. George A. Bonanno, *Loss, Trauma, and Human Resilience: Have We Underestimated the Human Capacity to Thrive After Extremely Aversive Events?*, 59 AM. PSYCHOLOGIST 20, 20 (2004).

58. *Id.* at 21.

59. *Id.* at 23.

60. *Id.* at 24.

61. George A. Bonanno et al., *Resilience to Loss and Chronic Grief: A Prospective Study From Preloss to 18-Months Postloss*, 83 J. PERS. & SOC. PSYCHOL. 1150 (2002) (detailing results of a longitudinal study of bereaved persons). “[T]he most frequent bereavement pattern was . . . the resilient pattern (45.9%).” *Supra* at 1160.

62. *Id.* at 1160 (“[Another group of respondents] (10.2%) exhibited a pattern that had been suggested in the literature but not yet documented in a prospective study: high preloss depression followed by improvement during bereavement.”).

63. *Id.* (“[T]he so-called common pattern of elevated depression that gradually declines over time [was seen in] (10.7%) [of the subjects].”).

to a few days to a few weeks, sometimes longer, but most of us find a way to regain equilibrium and get on with our lives.”<sup>64</sup>

## 2. *Emotional Oscillations*

Another key concept in modern grief theory is the phenomenon of emotional “oscillations.”<sup>65</sup> Bereaved persons typically oscillate – sometimes several times a day – between sadness, anger, fear, remorse, and more positive emotions.<sup>66</sup> There is no single pattern for processing these emotions. However, research shows that emotional oscillations may continue for weeks or months after a loved one’s death.<sup>67</sup> Indeed, many people replay these emotions years or even decades after the death.<sup>68</sup>

One core insight about emotional oscillations, however, is that, while they may be intense and disquieting in the early days following a death, over time, they “dampen” or subside.<sup>69</sup> Research also shows that “[t]he oscillating pattern evolves into a broader flexibility and a more stable balance as the pull of painful emotions and the yearning for the lost loved one gradually decrease.”<sup>70</sup>

## 3. *Cognitive Impairment in Response to Grief*

A bereaved person not only experiences a flurry of emotions following a loved one’s death; grieving also involves cognitive processes, physical sensations, and outward behaviors.<sup>71</sup> All these functions evolve and change during the grieving process.

For example, a bereaved person typically experiences a range of cognitive impairments during the weeks immediately following a death.

64. BONANNO, *supra* note 7, at 58.

65. *See generally id.* at 41 (noting that grieving is not static but rather involves emotional oscillations and that, recently, researchers have begun to theorize about this wavelike nature of grief).

66. *Id.* at 74.

67. George A. Bonanno & Stacey Kaltman, *The Varieties of Grief Experience*, 21 CLINICAL PSYCHOL. REV. 705, 709-10 (2001).

68. Katherine B. Carnelley et al., *The Time Course of Grief Reactions to Spousal Loss: Evidence from a National Probability Sample*, 91 J. PERS. & SOC. PSYCHOL. 476, 489 (2006).

69. *See* Toni L. Bisconti et al., *Emotional Well-Being in Recently Bereaved Widows: A Dynamical Systems Approach*, 50 J. GERONTOLOGY: PSYCHOL. SCI. 158, 164 (2004) (describing a pattern among widows of wide swings in emotional well-being, followed by a gradual damping of the oscillations, with an overall positive trend).

70. BONANNO, *supra* note 7, at 74.

71. *See* JAMES WILLIAM WORDEN, GRIEF COUNSELING AND GRIEF THERAPY: A HANDBOOK FOR THE MENTAL HEALTH PRACTITIONER 17-31 (4th ed. 2009).

She may have trouble concentrating, thinking clearly, or making decisions.<sup>72</sup> She is likely to feel absent-minded or confused.<sup>73</sup> She may even experience “quasi-hallucinatory” episodes.<sup>74</sup>

The most common cognitive response to death is a preoccupation with the deceased, which occurs as a form of obsessional thinking. Some preoccupation may be in the form of intrusive thoughts that may be related to guilt or other unresolved issues. This commonly occurs in the early stages of grief and disappears after a short while.<sup>75</sup>

#### 4. *Magical Thinking*

Another cognitive response to grief is magical thinking, the process by which the grieving person seeks to rewrite history, or fend off reality, at least for a little while.<sup>76</sup> As Joan Didion describes it, when she contemplated the possibility of her husband’s return, she was “thinking as small children think, as if [her] thoughts or wishes had the power to reverse the narrative, change the outcome.”<sup>77</sup>

A very public example of magical thinking occurred in the aftermath of the terrorist attack on the World Trade Center in 2001:

Although it was clear that few had survived the towers’ collapse, there was always the possibility that a person had been injured or become disoriented after the attack and was somehow still alive. Many [loved ones] held onto whatever sliver of hope they could muster. Downtown New York City was literally plastered with photos of those still missing. But over time, hope gave way to somber resignation.<sup>78</sup>

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72. *See id.* at 27.

73. “The death of a loved one is painful and sad. It is also confusing. . . . [T]he confusion that often surrounds the death is not a normal, everyday kind of confusion. It’s bigger than that. It can be strange. It can be disturbing, and sometimes it can be mystifying.” BONANNO, *supra* note 7, at 113-14.

74. *Id.* at 134.

75. Australian Institute of Professional Counselors, *Manifestations of Normal Grief*, COUNSELING CONNECTION, <http://www.counselingconnection.com/index.php/2010/06/02/manifestations-of-normal-grief/>.

76. DIDION, *supra* note 1, at 32-33.

77. DIDION, *supra* note 1, at 35.

78. BONANNO, *supra* note 7, at 61.

This example of magical thinking is useful here for at least four reasons: (1) the people who posted the flyers in lower Manhattan were clearly confronted with a sudden, unanticipated loss; (2) the media bombardment of images of the falling towers and empty emergency rooms gave them no reason to think anyone could have survived the collapse of the buildings and wandered around undetected for hours or days; (3) there was a “mob” aspect to this behavior, as hundreds of flyer-posters reinforced each person’s fantasy of reunion; and (4) the group’s behavior was fueled by media attention. These four elements of the World Trade Center story – a sudden loss, no reasonable hope of complete recovery, mutual reinforcement of a hopeless cause, and media exploitation – also characterize the experience of Bernie Madoff’s victims.

Magical thinking is not maladaptive. It can provide important psychological benefits to a grieving person. It can minimize stress and reduce feelings of anxiety, especially in the days immediately following a death.<sup>79</sup> It can also reinforce the grieving person’s need for stability and continuity in her life. Magical thinking is, in this sense, adaptive. “One clear way to maintain stability and to protect from chaos the system of associations that comprise our own sense of identity is to simply deny that [an] absolute loss [has occurred] and to hold to some notion of continuity.”<sup>80</sup>

Magical thinking may take the form of fantasies “such as ‘He’s just away on a trip,’ or ‘She’ll be walking in the door any minute.’”<sup>81</sup> It may also take the form of “what if?” questions: What if he had left the office five minutes earlier? What if I had insisted the doctor conduct just one more test?<sup>82</sup>

It may also take the form of what Kübler-Ross calls a “haunting” – vivid dreams of a loved one, mistaken identity in the street, or a sense that the loved one is somewhere nearby – perhaps just inches away.<sup>83</sup> “According to studies, about one-third to one-half of widows and widowers have had these experiences.”<sup>84</sup> Hauntings are a normal part of grieving, and

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79. See Roger Luckhurst, *Reflections on Joan Didion's The Year of Magical Thinking*, 67 *NEW FORMATIONS* 91, 95 (2009), available at <http://www.lwbooks.co.uk/journals/newformations/articles/67%20luckhurst.pdf> (noting that magical thinking helps people increase their sense of control in stressful situations).

80. Martin Lunghi, *Ontology and Magic: A Conceptual Exploration of Denial Following Bereavement*, 11 *MORTALITY* 31, 36 (2006).

81. NOEL & BLAIR, *supra* note 54, at 27.

82. See *id.* at 45.

83. KÜBLER-ROSS & KESSLER, *supra* note 44, at 55.

84. NOEL & BLAIR, *supra* note 54, at 148.

survivors of sudden, unanticipated deaths are particularly open to hauntings.<sup>85</sup>

Magical thinking typically occurs during the earliest phase of mourning, when the bereaved person is consumed with longing and experiences an “overwhelming urge to recover the lost object.”<sup>86</sup> She may need to “buy time” to come to grips with her loss. Then, with the passage of time and the gradual acceptance of the “new normal,” episodes of magical thinking dwindle and then ultimately subside.<sup>87</sup>

### 5. *The Timing and Duration of Grief*

Scholars are reluctant to set out a timetable for grief. Still, we know from empirical studies that the conventional wisdom that grief is usually resolved within one year of a loved one’s death is generally valid.

[D]epending upon the measures used, between 50% and 85% of the bereaved individuals [in studies] appeared to exhibit . . . moderate disruptions in cognitive, emotional, physical, or interpersonal functioning during the initial months after a loss. Although some disruptive aspects of grief continue for several years after the loss, *most bereaved individuals returned to normal (baseline) levels of functioning by the end of the first year.*<sup>88</sup>

We also understand that grief unfolds in a relatively predictable way. For example, cognitive disruptions typically occur in the early months after a loved one’s death and then gradually decline during the first year.<sup>89</sup> “Pining,” or “yearning,” and its sister, magical thinking, generally occur most intensely during the first two months.<sup>90</sup> These processes then continue through the six-month point but decline significantly by fourteen months after the loved one’s death.<sup>91</sup> These findings match Joan Didion’s description of her own bereavement experience. She last reports an episode of magical thinking – the belief that John might still come back – sometime in mid-summer of 2004, six months after John’s death.<sup>92</sup>

85. KÜBLER-ROSS & KESSLER, *supra* note 44, at 57.

86. Luckhurst, *supra* note 79, at 94.

87. *Id.*

88. Bonanno & Kaltman, *supra* note 67, at 709-10 (emphasis added).

89. *Id.* at 715.

90. *Id.* at 718.

91. *Id.*

92. DIDION, *supra* note 1, at 184. She pinpoints a specific date, August 30, 2004, as the first time she clearly and consciously accepted the fact of her husband’s death. *Id.*



When obsessional processes go on for too long, bereaved persons may transition into a pathological state known as “complicated” or “prolonged” grief.<sup>93</sup> Prolonged grief cannot be diagnosed until at least six months after a loved one’s death.<sup>94</sup> This point is significant – a clinician cannot determine whether a person’s grief is “normal” or “abnormal” until at least six months have elapsed after a loss.

After six months, the diagnostic markers for prolonged grief include “(1) a sense of disbelief regarding the death; (2) anger and bitterness over the death; (3) recurrent pangs of painful emotions, with intense yearning and longing for the deceased; and (4) preoccupation with thoughts of the loved one, often including distressing intrusive thoughts related to the death.”<sup>95</sup>

One crucial insight is that prolonged grief is dominated by yearning, the repetitive and futile search for the lost loved one. People in this state can think only of the person they lost. They want nothing but to have that person back. They yearn for that person with their entire being . . . .

. . . .

The yearning of prolonged grief . . . is entirely focused on one thing: finding the lost loved one.

. . . .

The paradox is that yearning brings no comfort, only deeper pain.<sup>96</sup>

Recent neuroimaging studies suggest that there may be a physical basis for prolonged grief – “there’s actually a difference in the brains of people

93. Psychologists now recognize a “relatively well-established diagnostic category for extreme grief reactions, called prolonged grief disorder, or PGD.” BONANNO, *supra* note 7, at 110.

94. Holly G. Prigerson et al., *Prolonged Grief Disorder: Psychometric Validation of Criteria Proposed for DSM-V and ICD-11*, 6 PLOS MED. 1, 9 (Aug. 4, 2009), available at <http://www.plosmedicine.org/article/fetchObject.action?uri=info%3Adoi%2F10.1371%2Fjournal.pmed.1000121&representation=PDF>; see also BONANNO, *supra* note 7, at 110 (“Although there is still no clear consensus, six months is generally considered the minimal time passage for identifying a prolonged grief reaction. That is, as much as we might want to encourage a person to seek treatment after a loss, we can’t reliably determine whether there is a true psychological problem until at least six months have passed.”).

95. Katherine Shear et al., *Treatment of Complicated Grief: A Randomized Controlled Trial*, 293 JAMA 2601, 2601 (2005). Recently, a group of distinguished experts in bereavement, mood and anxiety disorders, and psychiatric nosology identified a consensus listing of prolonged grief symptoms. Prigerson et al., *supra* note 94, at 1. These include “feeling emotionally numb, stunned, or that life is meaningless; experiencing mistrust; bitterness over the loss; difficulty accepting the loss; identity confusion; avoidance of the reality of the loss; or difficulty moving on with life.” *Id.*

96. BONANNO, *supra* note 7, at 98.

who [suffer from prolonged grief] compared to the ones who don't."<sup>97</sup> Whatever the origins, prolonged grief is debilitating and causes real suffering.<sup>98</sup> Bereaved persons experiencing prolonged grief often require professional intervention. The task for clinicians is to help their patients to explain, accept, and come to terms with their loss.<sup>99</sup>

### 6. *Grief in the Face of a Sudden, Unanticipated Death*

Sometimes grief is compounded by the shock of an *unanticipated* death. Any loved one's death is painful and disorienting, but deaths that are sudden and unexpected place a double burden on those left to mourn. Survivors mourning a sudden, unanticipated death have to deal not only with the loss of a loved one but also with a separate, profound, unexpected, and destabilizing disruption in their lives. An accidental death, or some freak death from a runaway virus, for example, can challenge a survivor's sense of personal security.

A sudden tragic event shatters our sense of order and thrusts us into a world forever changed. Survivors of sudden loss may experience a greater sense of vulnerability and heightened anxiety. The safe world we once knew, no longer exists. We fear for ourselves, our family and friends. Survivors can become overwhelmingly preoccupied with thoughts that such a [disruptive event] might happen again.<sup>100</sup>

Not surprisingly, sudden, unanticipated deaths pose a greater risk to survivors of prolonged grief disorder,<sup>101</sup> present more difficult therapeutic

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97. Rob Stein, *Unrelenting Grief May Be Sign of Distinct Syndrome*, WASH. POST (Aug. 4, 2008), <http://www.washingtonpost.com/wp-dyn/content/story/2008/08/03/ST2008080301520.html> (quoting Katherine Shear, Professor of Psychiatry at Columbia University).

98. BONANNO, *supra* note 7, at 96-97 ("[When sadness runs unchecked for too long], it becomes pernicious and dysfunctional. People who are overwhelmed by sadness get lost in themselves; they withdraw from the world and become mired in an endless preoccupation, an insatiable desire to have the deceased person back again.").

99. Shear et al., *supra* note 95, at 2601.

100. Kirsti A. Dyer, *Dealing with Sudden, Accidental or Traumatic Death*, JOURNEY OF HEARTS (Sept. 11, 2002), <http://www.journeyofhearts.org/grief/accident2.html>; *see also* NOEL & BLAIR, *supra* note 54, at 68 ("When we grapple with sudden loss, we are forced to reconsider some basic assumptions about ourselves. We may begin to feel vulnerable and a sense that life is tenuous. We may begin to question whether or not the world is meaningful and orderly. We may see ourselves as weak and needy for the first time.").

101. Keith Hawton, *Complicated Grief After Bereavement*, BMJ (May 10, 2007), [www.bmj.com/content/334/7601/962?ijkey=BMIAXik0QYAnQLU&keytype=ref](http://www.bmj.com/content/334/7601/962?ijkey=BMIAXik0QYAnQLU&keytype=ref).

challenges,<sup>102</sup> and give rise more frequently to episodes of magical thinking than do “expected” or planned-for deaths.<sup>103</sup> As Kübler-Ross observed, “[I]n sudden death, the denial will be longer and deeper. The suddenness thrusts us into a new, abnormal world. How can you grasp that your loved one was here for breakfast and dead by lunchtime? You can’t.”<sup>104</sup> Not surprisingly then, survivors of a sudden, unanticipated death often report that they feel like they are “going crazy.”<sup>105</sup>

### C. *Guilt, Blame, and Third-Party Litigation*

Sometimes an essential element of grief is self-absolution. When a loved one dies, the survivors often feel responsible and ask themselves whether they did enough to avoid the death.<sup>106</sup> They often then ask whether others – like doctors or medics at an accident scene – might also, through some misconduct, have contributed to their loss.<sup>107</sup> This reassignment of blame to others is a predictable and understandable defense mechanism: “Of course, people die, and most of the time there isn’t much we can do to prevent it. Yet in moments of weakness we may succumb to irrational self-blame and doubt. The self-serving tendency to assign blame to factors outside our control may keep self-blaming thoughts at bay.”<sup>108</sup>

Thus, it is common for bereaved persons to look for someone to blame for their loss. It is common, as well, for them to turn to lawyers to help them pursue these ideas.<sup>109</sup> This is as much to absolve their own feelings of failure as to satisfy some notion of justice or (often least of all) to receive compensation.<sup>110</sup> The paradigm scenario of survivor displacement is the frivolous wrongful death lawsuit.<sup>111</sup>

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102. Paul T. Clements et al., *Life After Death: Grief Therapy After the Sudden Traumatic Death of a Family Member*, 40 PERSP. PSYCHIATRIC CARE 149 (2004).

103. See generally NOEL & BLAIR, *supra* note 54.

104. KÜBLER-ROSS & KESSLER, *supra* note 44, at 195.

105. NOEL & BLAIR, *supra* note 54, at 50.

106. Joan Didion flirted several times with self-blame. See DIDION, *supra* note 1, at 173-74. “I believed that I should have been able to prevent whatever happened.” *Id.* at 206. “Yet I was seized . . . by the . . . folly of having overlooked low-dose aspirin.” *Id.* Some – probably many – of the Madoff victims also engaged in self-blame. See *infra* Part IV.B.

107. BONANNO, *supra* note 7, at 80.

108. *Id.*

109. See Paul C. Rosenblatt, *Grief and Involvement in Wrongful Death Litigation*, 7 LAW & HUM. BEHAV. 351, 354 (1983).

110. See *id.*

111. See *id.*

### *D. Hedonic Adaptation*

Psychologists have taught lawyers much about the process of adaptation to loss, both inside and outside the context of bereavement. The pioneering study of what has come to be known as “hedonic adaptation” dealt with lottery winners and accident victims (paraplegics).<sup>112</sup> Both groups were asked to rate their happiness at various points in time after their change in circumstances.<sup>113</sup> Of interest here is not the relative unhappiness of the lottery winners but the relative happiness of the paraplegics.<sup>114</sup> This study introduced the idea of a “hedonic treadmill,” in which “good and bad events cause brief changes in well-being with rapid returns to an established set point.”<sup>115</sup> Hedonic adaptation towards increasing levels of contentment reaching or nearly reaching that which existed prior to the life-changing event has occurred in persons with spinal cord injuries, burn victims, colostomy patients, amputees, and persons suffering from the death of a child or spouse.<sup>116</sup>

In a nutshell, hedonic adaptation means that persons suffering an injury or loss take an emotional “hit” from their loss and may never *fully* recover.<sup>117</sup> Still, even where an injury is permanent, a victim “within two years will report levels of happiness far closer to her pre-injury state than she had expected” at the time of the loss.<sup>118</sup>

## IV. FRAUD VICTIMS AND GRIEF

So far, this article has looked at the basic outlines of grief dynamics when a loved one dies. People whose loved one has suffered a sudden, unanticipated death may experience profound confusion, anxiety, and dislocation. They frequently ascribe the blame for their loss to others, but

112. Philip Brickman et al., *Lottery Winners and Accident Victims: Is Happiness Relative?*, 36 J. PERS. & SOC. PSYCHOL. 917 (1978).

113. *Id.* at 918-19.

114. *Id.* at 919-20.

115. Brickman et al., *supra* note 112, at 920-21.

116. See SHANE FREDERICK & GEORGE LOEWENSTEIN, *Hedonic Adaptation*, in WELL-BEING: THE FOUNDATIONS OF HEDONIC PSYCHOLOGY 302 (Daniel Kahneman et al. eds., 1999), available at [http://pages.ucsd.edu/~nchristenfeld/Happiness\\_Readings\\_files/Class%209%20-%20Fredrick%201999.pdf](http://pages.ucsd.edu/~nchristenfeld/Happiness_Readings_files/Class%209%20-%20Fredrick%201999.pdf).

117. See Sonja Lyubomirsky, *Hedonic Adaptation to Positive and Negative Experiences*, in OXFORD HANDBOOK OF STRESS, HEALTH, AND COPING 200 (Susan Folkman ed., 2011), available at <http://sonjalyubomirsky.com/wp-content/themes/sonjalyubomirsky/papers/L2011.pdf>.

118. John Bronsteen et al., *Hedonic Adaptation and the Settlement of Civil Lawsuits*, 108 COLUM. L. REV. 1516, 1516 (2008).

only after blaming themselves. They yearn for the return of their “lost object.” They also engage in magical thinking. The same scenario often befalls victims of economic crimes.

### A. *The Theory*

This article suggests, and in the next section will illustrate, that there are many similarities between the grieving process of someone whose loved one has died without warning and someone whose money has disappeared in a Ponzi scheme. Is this really a reasonable analogy? Psychologists suggest the answer may be “yes.” Many Americans conflate their wealth with their personal identity and their sense of self-worth.<sup>119</sup> Losing their money to a con artist may mean losing an essential element of their being.

The argument here is based on much more than the known correlations between wealth and sexual attractiveness,<sup>120</sup> access to partners,<sup>121</sup> and political influence.<sup>122</sup> Rather, the argument is premised on the notion that a person’s relationship with money may be a *true* relationship – one that provides a sense of satisfaction, accomplishment, confidence, security, connectedness, hope, and inspiration. And, while this article does not suggest that a person’s relationship with money is exactly the same as a human relationship, it is fair to say that, for many people, wealth plays the same role in their lives as a parent, sibling, spouse, lover, or adored child. For them, money – like loved ones – can motivate, energize, and provide consolation. The absence of money – like the absence of loved ones – can lead to shame, secrecy, fury, or remorse.

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119. See Stephen Goldbart et al., *Money, Wealth, and Identity 3*, available at <http://dennisjaffe.com/adminpanel/uploads/documents/1307421711WealthIdentity.pdf> (unpublished manuscript) (“At this historical moment, too many [Americans] have mixed up personal and psychological well-being with financial well-being.”).

120. See Jonathan Leake & Holly Watt, *Why Women Have Better Sex with Rich Men: Women’s Sexual Pleasure is Directly Linked to Their Partner’s Wealth, Says New Research*, SUNDAY TIMES (London) (Jan. 18, 2009), [http://www.thesundaytimes.co.uk/sto/news/uk\\_news/article143977.ece](http://www.thesundaytimes.co.uk/sto/news/uk_news/article143977.ece).

121. A sample of high net-worth Americans (both men and women) report that their wealth affords them more sex, higher quality sex, and more sexual partners than people with less money. Hannah Shaw Grove & Russ Alan Prince, *Money as Aphrodisiac – Being Rich Means Getting Lucky on Your Own Terms*, HSGROVE (Jan. 2007), <http://www.hsgrove.com/content/FactsFiguresJan07-Vol1.pdf>.

122. See CHRYSTIA FREELAND, *PLUTOCRATS: THE RISE OF THE NEW GLOBAL SUPER RICH AND THE FALL OF EVERYONE ELSE* 270-71 (2012) (citing a political science study showing that U.S. senators of both parties were “50 percent more likely to react to constituents in the top third of the income distribution than constituents in the middle third. Those at the bottom had almost no chance of being heard.”).

Some psychologists draw specific parallels between having money and enjoying a romantic relationship.<sup>123</sup> Behavioral economists also have recognized an analogy between wealth and romantic love in the form of an “endowment effect,” whereby people tend to “fall in love with,” and then overvalue, their material possessions.<sup>124</sup> This “love affair” extends not only to tangible possessions like furniture or artwork but also to possessions as intangible as an investment portfolio.<sup>125</sup> It particularly exists for people who associate their ownership of possessions (or other forms of wealth) with their own creative activity.<sup>126</sup>

The theory upon which this article is based, then, goes something like this: Money is one of the many “significant others” that populate people’s lives. People interact with money with a degree of intimacy and dependency that reflects their values, culture, and personal role in the generation of wealth. When their wealth increases, individuals feel empowered and happy.<sup>127</sup> When their wealth declines, they feel diminished and sad. It is only natural that, when money disappears suddenly without their complicity or consent, people are shocked, then angry, and often inconsolable. They experience grief.

123. Goldbart et al., *supra* note 119, at 8 (“[When people acquire] sudden wealth, there is an adrenalin raising blend of excitement: disbelief, feeling blessed, lucky, and all powerful. In many ways it is like the honeymoon phase of a love relationship.”).

124. See generally Richard H. Thaler, *Toward a Positive Theory of Consumer Choice*, 1 J. ECON. BEHAV. & ORG. 39 (1980), available at <http://www.eief.it/butler/files/2009/11/thaler80.pdf>.

125. See David Serchuk, *Beat Your Investing Biases*, FORBES (June 15, 2009, 4:00 PM), <http://www.forbes.com/2009/06/15/behavioral-finance-emotions-intelligent-investing-psychology.html>.

126. See Christopher Buccafusco & Christopher Jon Sprigman, *The Creativity Effect*, 78 U. CHI. L. REV. 31, 52 (2011).

127. Much has been written in recent years regarding whether wealth increases happiness. See, e.g., BARBARA EHRENREICH, BRIGHT-SIDED: HOW THE RELENTLESS PROMOTION OF POSITIVE THINKING HAS UNDERMINED AMERICA 205 (2009) (“[R]icher people tend to be happier, with about 90 percent of Americans in households earning at least \$250,000 a year reporting being ‘very happy,’ compared with only 42 percent of people in households earning less than \$30,000.”); but see DANIEL GILBERT, STUMBLING ON HAPPINESS 239 (2006):

Economists and psychologists have spent decades studying the relation between wealth and happiness, and they have generally concluded that wealth increases human happiness when it lifts people out of abject poverty and into the middle class but that it does little to increase happiness thereafter. Americans who earn \$50,000 per year are much happier than those who earn \$10,000 per year, but Americans who earn \$5 million per year are not much happier than those who earn \$100,000 per year.

### B. *The Madoff Victims' Experience*

This article argues that losing one's wealth can feel very much like the death of a cherished loved one. But, do victims of fraud actually experience their loss in the same way as grieving people do? There have been no contemporaneous academic studies of victims' responses to the discovery that they have been defrauded.<sup>128</sup> Other than the theory advanced in this article, we lack any theory upon which to base an understanding of the short-term impact of fraud victimization.

There is a useful case study, however, in the Bernie Madoff case. Some of Madoff's 13,000 victims have generated memoirs, blogs, and reminiscences.<sup>129</sup> Moreover, at the time of Madoff's sentencing, more than 100 of his victims submitted written victim impact statements.<sup>130</sup> Nine of the victims spoke in open court.<sup>131</sup> Some months later, a group of Madoff's victims published a collective memoir, *The Club No One Wanted to Join*.<sup>132</sup>

These narratives capture the victims' experiences, beginning with the disclosure of Madoff's fraud in December 2008 and ending when *The Club No One Wanted to Join* went to press in December 2009.<sup>133</sup> The narratives provide striking evidence that mourning a sudden financial loss can look

128. One study surveyed fraud victims, months after the fact, about their reaction to the fact of their victimization:

[T]he largest group (39.2 percent) expressed anger and dismay; 23.1 percent reported similar sentiments, but presented their feelings more mildly, stating that they were disappointed, shocked, and could not believe that this would happen to them. A smaller proportion, 10.9 percent, were philosophical about their loss, showing an acceptance of the fact. One respondent even looked at this outcome with a stoic view as a part of the risk one takes when he/she invests; another 5.9 percent expressed helplessness and sadness rather than anger; and finally, a small number (five, 2.9 percent) showed some "active" response by stating that they will never again be involved in such a scheme.

Shichor et al., *supra* note 13, at 91.

129. See, e.g., GENEEN ROTH, *LOST AND FOUND: ONE WOMAN'S STORY OF LOSING HER MONEY AND FINDING HER LIFE* (2011); ALEXANDRA PENNEY, *THE BAG LADY PAPERS: THE PRICELESS EXPERIENCE OF LOSING IT ALL* (2010); SHERYL WEINSTEIN, *MADOFF'S OTHER SECRET: LOVE, MONEY, BERNIE, AND ME* (2009).

130. See Peter Lattman & Annelena Lobb, *Victims' Speeches in Court Influenced Judge's Ruling*, WALL ST. J. (June 30, 2009, 12:01 AM), <http://online.wsj.com/news/articles/SB124632127336071155>.

131. See Jayne W. Barnard, *Listening to Victims*, 79 *FORDHAM L. REV.* 1479, 1483-86 (2011) (describing the victims who provided victim impact testimony and the substance of their testimony).

132. *THE CLUB NO ONE WANTED TO JOIN: MADOFF VICTIMS IN THEIR OWN WORDS* (Erin Arvedlund ed., 2010).

133. See *id.*

and feel very much like mourning the loss of a loved one.<sup>134</sup> Indeed, the Madoff victims often describe their experience as feeling like the death of someone close to them.<sup>135</sup> They describe their emotional oscillations in the weeks and months following the discovery of their loss.<sup>136</sup> And, like traditional mourners, many of them turn out to be remarkably resilient.<sup>137</sup>

In reviewing the Madoff victims' narratives, one can discern a common response pattern after a person realizes he or she has become the victim of fraud. After a period of stunned disbelief, fraud victims go through cycles of cursing their victimizer(s), blaming themselves, and blaming the law enforcement officials who failed to detect or prevent the fraud. Indeed, many fraud victims are "more upset with the ways the authorities handled their case than with the perpetrators of the fraud."<sup>138</sup> Their anger toward regulators "[is] sometimes as strong as or even stronger than [their] animosity against the perpetrators themselves."<sup>139</sup>

At some point, though, fraud victims begin to regroup and face their new economic reality. They may sell or pawn assets, accept cash from their friends, seek employment, downsize their homes, move in with their children, or file for bankruptcy. They may also find satisfaction and joy in the challenge of reinvention. Not everyone, of course, moves at the same pace or even in the same direction. At the end of 2009, for example, some of Madoff's victims were still enraged or inconsolable. Some still are enraged in 2014. Most of Madoff's victims, however, are doing surprisingly well.

The following excerpts from the Madoff victims' narratives illustrate the claim advanced in this article: In the aftermath of the discovery of their loss, fraud victims feel, think, and act like someone they loved has died. Then, they slowly begin to feel better and re-embrace the world.

### 1. "Like a Death in the Family"

Many of the Madoff victims spontaneously described their experience as some kind of "death." Interestingly, none of them said, "I felt like I was

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134. It is important to note that the victim impact statements, victim allocution, and memoirs of victims reflect only a small non-random subset of Madoff's victims. Certainly the authors of the Madoff victim narratives provide evidence supporting the thesis of this article. The many victims who have remained silent may have a different story to tell.

135. See *infra* Part IV.B.1.

136. See *infra* Part IV.B.6.

137. See *infra* Part IV.B.7.

138. See Shichor et al., *supra* note 13, at 87.

139. *Id.* at 94.



dying.” Rather, they consistently said, “I felt like someone I cared for had suddenly died.” For example:

I was at work at a client[‘s office all morning with colleagues. Upon my return to the office[,], my phone was ringing non-stop, my instant message going crazy[,], and my cell phone non-stop!!!

My father, who had invested with Madoff[,], was trying to reach me to tell me Bernie was arrested due to admitting to a Ponzi scheme!!

Finally[,], I picked up, thinking there was something wrong with my family – possibly a death[,], and I was right!!! It was the beginning of a new kind of death – our family, including my dad, mom, brother, aunt, uncle, [and] cousins[,], were ALL dead—in one shot.<sup>140</sup>

Another victim stated:

“Suddenly I remember[ed] that I ha[d] stashed away one very strong tranquilizer in the bathroom medicine chest in case there should be a death in the family. Well, there it [was]. My money ha[d] passed away. I pop[ped] the pill in my mouth.”<sup>141</sup>

Acquaintances of the victims also treated them as if there had been a death in the family:

I learned something important at Sarah’s party. People do feel sorry for you. They do pity you. They don’t know what to say to you. They expect that you’ll be different somehow. It is like a death and you’re treated with great fragility – and often, you’re held at a distance.<sup>142</sup>

One victim, a widow, recognized her feelings, having experienced them once before:

The feelings and emotions that were pounding in my brain [when I learned of Bernie Madoff’s arrest] were all too familiar to me[,], for

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140. U.S. Attorney’s Letter and Attached Victim Impact Statements, *United States v. Madoff*, 09 Cr. 213 (S.D.N.Y. June 15, 2009), available at [http://www.cbsnews.com/htdocs/pdf/Madoff--Victim\\_Impact\\_Statements.pdf](http://www.cbsnews.com/htdocs/pdf/Madoff--Victim_Impact_Statements.pdf) [hereinafter Victim Impact Statements] (statement of Jackie Stone).

141. PENNEY, *supra* note 129, at 10.

142. *Id.* at 129.

I had been through great loss before. I almost said, “[W]elcome back old friends.” Shock, horror, anxiety, irritability, and sadness and worry: these are the words that describe loss, but words are inadequate to describe what your mind, body, soul, spirit[,] and psyche experience when you are dealt a life-altering blow. I had now had two of these blows that had struck me down.<sup>143</sup>

## 2. *Shock and Disbelief at the Discovery of the Fraud*

Throughout the victims’ narratives, there are vivid descriptions of the victims’ initial discovery that, suddenly, their wealth was apparently gone. Many of them simply could not believe it. Nor could they believe that the legendary Bernie Madoff could possibly be a crook:

“I’m hoping it’s a rumor,” [said] a very dear friend, Alex, . . . “but Bernard Madoff’s just been arrested. All your money’s with him right?”

Jesus Christ!!!! All!! Every cent I ever saved since I started working summers at Lord & Taylor when I was sixteen years old. *This cannot be true!*<sup>144</sup>

Rationalization began almost immediately:

After almost driving off the road[,] I calmed down[,] realizing it was yet another rumor.

. . . .

He was the former Chairman of the NASDAQ stock exchange and had been on Wall Street since 1960. In a man there was no one alive that personifies Wall Street [better] than Bernard L. Madoff. I am supposed to believe that one day he gets up in the morning and does something to get arrested for? Not likely.<sup>145</sup>

For most victims, however, the news of Madoff’s arrest was literally incomprehensible. One victim stated that she “just sat down trying to grasp the severity of the situation. It seemed surreal. My brain just could not

143. Maureen Ebel, *Surviving the Loss of a Love*, in *THE CLUB NO ONE WANTED TO JOIN: MADOFF VICTIMS IN THEIR OWN WORDS*, *supra* note 132, at 125, 132.

144. PENNEY, *supra* note 129, at 6 (emphasis in original).

145. Timothy Murray, *It Was All a Lie: Bernie, The Securities and Exchange Commission and Securities Investors Protection Corporation*, in *THE CLUB NO ONE WANTED TO JOIN: MADOFF VICTIMS IN THEIR OWN WORDS*, *supra* note 132, at 16, 16-17.

process this information. I was hoping that it was all a terrible mistake.”<sup>146</sup>  
Still another said:

“I didn’t want to believe what I was hearing. It had to be a mistake. Instinctively, I tried to reassure [my son] Eric. There was no way what he was saying could be true.”<sup>147</sup>

. . . .

I kept listening to the television, waiting for the newscasters to come on and report it had been one big mistake.<sup>148</sup>

Victim Emma De Vita stated, “I simply could not believe that all those brokerage account statements, stock transaction statements[,] and 1099s reporting all my ‘earnings’ were nothing more than tissue paper.”<sup>149</sup> Still another victim, known only as “AKL,” stated:

I have heard people talk about an out-of-body experience . . . .  
[F]or me, this was it, because this s—t can’t be real. It must be a movie or something, but if it is a movie[,] who the hell is the director, because this plot doesn’t make any sense . . . .  
[E]verybody knows that Jews do not steal from Jews . . . .<sup>150</sup>

### 3. *Cursing the Defrauder*

Another recurring theme in the victims’ narratives is the condemnation of Madoff and his family. Descriptions such as “psychopath,” “sociopath,” “devil,” and “monster” are scattered throughout the victim impact statements. Depending on the writer’s choice of metaphor, Madoff was also a “serial criminal,” a “murderer,” or an “economic terrorist.”<sup>151</sup> He was “one of the most heartless and evil villains of our time.”<sup>152</sup>

Perhaps surprisingly, victims made repeated references to Adolph Hitler:

146. Stephanie Halio, *How Our Lives Have Changed*, in *THE CLUB NO ONE WANTED TO JOIN: MADOFF VICTIMS IN THEIR OWN WORDS*, *supra* note 132, at 113, 115.

147. WEINSTEIN, *supra* note 129, at 188.

148. *Id.* at 3.

149. Emma De Vita, *Rags to Riches, to Rags*, in *THE CLUB NO ONE WANTED TO JOIN: MADOFF VICTIMS IN THEIR OWN WORDS*, *supra* note 132, at 8, 13.

150. AKL, *Act I*, in *THE CLUB NO ONE WANTED TO JOIN: MADOFF VICTIMS IN THEIR OWN WORDS*, *supra* note 132, at 27, 32.

151. Victim Impact Statements, *supra* note 140 (statements of Randy Baird, Julie Behar, Adele Behar, and Henry A. Backe, Jr., M.D.).

152. *Id.* (statement of Ann M. Altman, Ph.D.).

Adolf Hitler hated Jews and exterminated 6 million of them[,] and that was bad. Bernard Madoff openly befriended thousands of Jews[,] but behind their backs was stealing their money and causing the equivalent of financial extermination of his victim's lives. Who is worse?<sup>153</sup>

....

History shows us that there are monsters who think that they are above the law. Laws of humanity and common decency don't apply to them because they have created their own world in which they are the Supreme Being. There are many examples, Adolph Hitler, Saddam Hussein and Bernard Madoff. . . Extreme, I don't think so. Bernard Madoff annihilated thousands for his own gain just as surely as the aforementioned did.<sup>154</sup>

The victims sometimes translated their anger and despair into creative punishments for Madoff: "Due to his egregious deeds, Mr. Madoff deserves no better than to live under a bridge in a cardboard box, scavenging for his food and clothing . . ." <sup>155</sup> Another argued that Madoff "should be treated like the thug he has shown himself to be. He should be doing hard time, with manual labor." <sup>156</sup> Still another suggested:

I would like him to be in a solitary cell with a screen, and on that screen, for at least five years of his life, every day and every night there should be pictures of his victims, one after the other after the other, always saying, "[L]ook, look what you have done to this poor lady, look what you have done to this child, look what you have done." But nothing else – he should not be able to avoid those faces, for years to come.<sup>157</sup>

#### 4. *Self-Blame*

The Madoff victims' narratives, understandably, tend to overplay the victims' diligence or reliance on others in selecting and monitoring Madoff before his arrest and underplay the victims' own negligence and overconfidence in Madoff's investment skills. Still, self-blame often bleeds through the narratives:

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153. *Id.* (statement of Gregg Felsen).

154. *Id.* (statement of Natalie Erger).

155. *Id.* (statement of Robert G. Mick).

156. *Id.* (statement of Lenore Schupak).

157. *Id.* (statement of Ann M. Altman, Ph.D.).

Marcy's e-mail got me thinking. Were our decisions bad? Were we wrong to trust other people with our fortunes? Were we so focused on other things in our lives that we simply "didn't pay attention?"<sup>158</sup>

....

[M]y mind beg[an] to race with the same old scary thoughts. How am I going to survive? Was I greedy?<sup>159</sup>

Some victims flagellated themselves for losing control over their families' wealth:

So, where was I when my dad needed me to go to battle for him? Where was I when he needed protection? Where was I when the man who put me through school on his own dime and has never asked me for anything in return . . . needed me? I can't help but feel responsible, as if there is something I should have been able to do for him, for my family, even for myself.<sup>160</sup>

....

"How could I have allowed this to happen?" I kept asking myself.<sup>161</sup>

##### 5. *Finding a Villain: Fury at Regulators*

Bernie Madoff was by no means the only villain in the Madoff victims' narratives. The victims were angry at Madoff and his family, to be sure.<sup>162</sup> However, they also directed their anger at the Securities and Exchange Commission (SEC), the Internal Revenue Service (IRS), the Financial Industry Regulatory Authority (FINRA), the Securities Investors Protection Corporation (SIPC), Congress, and the President:

Our government has failed us. The SEC has allowed a psychopath to steal our money after having investigated him and ignored information from Harry Markopolos; Congress has allowed securities firms to function in a virtually regulation-free

158. PENNEY, *supra* note 129, at 184.

159. *Id.* at 42.

160. AKL, *supra* note 150, at 31.

161. Richard Friedman, *Man Plans, God Laughs, Man Learns Lesson*, in *THE CLUB NO ONE WANTED TO JOIN: MADOFF VICTIMS IN THEIR OWN WORDS*, *supra* note 132, at 143, 144.

162. The victims' fury even extended to Madoff's daughters-in-law, both of whom have written or contributed to their own memoirs. See STEPHANIE MADOFF MACK, *THE END OF NORMAL: A WIFE'S ANGUISH, A WIDOW'S NEW LIFE* (2011); LAURIE SANDELL, *TRUTH AND CONSEQUENCES: LIFE INSIDE THE MADOFF FAMILY* (2011).

environment; and SIPC and the SEC have failed to assure that Madoff's victims are compensated in accordance with the law.<sup>163</sup>

One victim lamented:

"I felt so disheartened, so abandoned by my government and so incredibly angry. Not only were we the victims of a heinous crime, but now we were being victimized again, by SIPC, Madoff trustee Irving Picard, the financial industry and our government."<sup>164</sup>

Another victim complained:

After being a contributing and worthy citizen I find that our government has let me down.

They lied when they said that the Madoff Securities was a safe investment, for the Securities and Exchange Commission never fully investigated the company. In spite of all the red flags they didn't bother, and they still refuse to accept the responsibility for permitting thousands to be defrauded. SIPC is not returning the funds listed on the last statement, as the law requires. The government is not standing by its promise to prevent fraud, thereby leaving everyone in this country unprotected.<sup>165</sup>

Still another victim declared:

I rage when I think about the failures of Congress and the President to demand that SIPC and the Trustee follow the Congressional law, instead of making it up to benefit Wall Street. I rage that we can't completely move on because of the litigation forced upon us to fight the iniquities of the SEC and the Trustee and our government.<sup>166</sup>

Another complained about the government's failings, as well:

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163. Victim Impact Statements, *supra* note 140 (statement of David Greenspan and L. Friedman).

164. Stephanie E., *Survivor, Not Victim*, in *THE CLUB NO ONE WANTED TO JOIN: MADOFF VICTIMS IN THEIR OWN WORDS*, *supra* note 132, at 150, 154.

165. Renee Rosen, *Picture It*, in *THE CLUB NO ONE WANTED TO JOIN: MADOFF VICTIMS IN THEIR OWN WORDS*, *supra* note 132, at 121, 125.

166. Cynthia Friedman, *Life is Not a Videotape*, in *THE CLUB NO ONE WANTED TO JOIN: MADOFF VICTIMS IN THEIR OWN WORDS*, *supra* note 132, at 75, 80-81.

We were devastated by the SEC's failure to uncover Madoff's fraud and its continued stamp of approval bestowed on Madoff over the decades of his crime. We have been abandoned by our elected representatives who have refused to require the Internal Revenue Service to disgorge the taxes we paid on phantom income. We have been betrayed by SIPC which, in order to save money, has invented a new definition of "net equity" to deprive us of the \$500,000 of insurance of which we were assured.<sup>167</sup>

This drumbeat continued: "We trusted the SEC to protect us[,] and they failed us. At this point, we really feel like we cannot trust anyone."<sup>168</sup>

In truth, by the time of Madoff's sentencing, many of the victims had lost interest in Madoff. On the day of the sentencing, June 29, 2009, seats were set aside in the courtroom and in video overflow rooms for victims who wished to observe the sentencing proceedings. Many of the victims preferred instead to stay in the streets outside the courthouse for a lunchtime rally decrying the failures of the SEC and SIPC.<sup>169</sup> And several of the victims who did testify at Madoff's sentencing condemned not only Madoff, but also the federal regulators. U.S. District Judge Denny Chin had to admonish the victims that "[t]his is not the time to criticize the government."<sup>170</sup>

### 6. *Emotional Oscillations*

The Madoff victims' narratives sometimes allude to the emotional turmoil the victims suffered during the months after discovery of the fraud. Predictably, their emotions ranged from "[h]orror, fear, [and] sadness, [to] anger, loss and rage."<sup>171</sup> As described by one of Madoff's victims, "[i]t was a strange feeling to have been a victim of Madoff. My emotions range[d] from feeling violated to anger to depression to disbelief."<sup>172</sup>

167. Victim Impact Statements, *supra* note 140 (statement of Carla Hirschhorn).

168. *Id.* (statement of Sheila Ennis).

169. Thom Weidlich, David Glovin & Patricia Jurtado, *Madoff Cursed by Victims Who Mourn Lost Savings, Blame SEC*, BLOOMBERG (July 30, 2009), <http://www.bloomberg.com/apps/news?pid=newsarchive&sid=aZMVdSzMjCHI> (describing the Foley Square rally, including T-shirts that read "SEC Failed Us" and signs that read "SIPC = SCAM").

170. Transcript of Sentencing Hearing at 11, *United States v. Madoff*, 09 CR 213 (D.C. 2009), available at <http://www.justice.gov/usao/nys/madoff/20090629sentencingtranscriptcorrected.pdf>.

171. Friedman, *supra* note 166, at 80.

172. SM, *From Innocent Sunny Oaks, to the Biggest Ponzi Scheme in the World*, in *THE CLUB NO ONE WANTED TO JOIN: MADOFF VICTIMS IN THEIR OWN WORDS*, *supra* note 132, at 54, 59.

### 7. *Reinvention and Joy*

Notwithstanding the misery, pain, and complete befuddlement the victims' narratives portray, the Madoff victims also made clear that, by the end of the year following disclosure of Madoff's fraud, and sometimes much sooner, many of them had reckoned with their losses and had begun to drink the lemonade that life and Madoff had handed them.<sup>173</sup> Alexandra Penney, a tireless self-promoter, rhapsodized about the prospect of reinventing herself.<sup>174</sup> But others, who had nothing to sell, told much the same story. They personified resilience and resolve:

Right now, I work pretty much every day of the week, on most weekends and pay my bills. I will soon be able to slowly set aside some money in the next year so I can take another stab at re-becoming a successful American entrepreneur! I learned in my past life as an entrepreneur . . . that success is easy to come by if you are honest and hard-working. People love honest, hard-working people with good ideas here in America. That's what this country is all about[,] and I am all about that!<sup>175</sup>

. . . .

Life really does come down to choices. After time passes and the darkness lessens[,] you realize you do have a choice: stay bogged down in your sad, depressed world or to make a conscious choice to enjoy each moment, each day (maybe not dentist's visits) – choose to live – choose to be happy. I know skeptics won't believe it[,] and perhaps I wouldn't have before. But each day I get up[,] I make a choice to be happy today, to look at the glass as half full instead of half empty. As corny as it sounds, it works for me.<sup>176</sup>

Some victims redirected their attention from their woes to their joys:

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173. It is significant that, of 13,000 victims, only nine appeared to speak at Madoff's sentencing; another several dozen were in the courthouse that day, but thousands of Madoff's victims stayed home. Transcript of Sentencing Hearing, *supra* note 170, at 4.

174. In dozens of passages like this one, she describes (and praises) her own resilience:

When you experience loss or change[,] you will surprise yourself. I am definitely getting through; I am moving on – and up. I'm welcoming new experiences, I'm off on new adventures, I'm finding out what's important and what's not worth a second glance. Most of all, I have surprised myself by actually having a great time[,] even in the few months right after the debacle. I lost it all, but I am coming out on top.

PENNEY, *supra* note 129, at 4.

175. Elisabetta Sandolo, *My Madoff Story*, in *THE CLUB NO ONE WANTED TO JOIN: MADOFF VICTIMS IN THEIR OWN WORDS*, *supra* note 132, at 63, 68.

176. Friedman, *supra* note 166, at 83.



In short, life is much simpler now. We draw comfort from seeing our kids do well and lead happy and productive lives in spite of what has happened. We also draw strength from each other, and keep looking to the future with a curious excitement that seems misplaced, but is real. It feels like an adventure, starting over at an age when most people plan on retiring. Actually, it is an adventure, and it has energized us and made us feel young again.<sup>177</sup>

Others took action to find a new way of living:

Last May I moved with my daughters to Florida. It has been a fresh start for my family. My girls are doing well – they are getting good grades, have made friends, and are looking forward to college. I think with financial aid we can afford a state school. The cost of living is significantly cheaper than [in] New Jersey[,] and we do not need any winter clothes (a big savings with children!).

I am now working full time. I am surprised to discover that I enjoy working again. I like the challenges and the diversity of the people I am meeting. I also enjoy the boost in self-esteem that working can give. I feel productive and useful, and proud that I am making a positive change in the lives of others.<sup>178</sup>

Others reported a surprising buoyancy:

Am I happy that I had my savings stolen? No. Or that my house burned down, my relationship ended, my friend and my uncle died. No. I am not happy those things happened to me. But at the same time[,] I am glad to be where I am – not in the old house, nor the new one, not with my former partner [but] open to a new partner, spending time with new friends, loving my family, doing meaningful work, exploring what each day brings.<sup>179</sup>

And one final example:

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177. Alexandra Roth, *Letters to Madoff*, in *THE CLUB NO ONE WANTED TO JOIN: MADOFF VICTIMS IN THEIR OWN WORDS*, *supra* note 132, at 196, 197-98.

178. LAS, *Constant Changes*, in *THE CLUB NO ONE WANTED TO JOIN: MADOFF VICTIMS IN THEIR OWN WORDS*, *supra* note 132, at 154, 158.

179. Sarah Fisk, *“What happens to you does not matter; what you become through those experiences is all that is significant. This is the true meaning of life.” – Author Unknown, But Whoever You Are or Were: Thanks*, in *THE CLUB NO ONE WANTED TO JOIN: MADOFF VICTIMS IN THEIR OWN WORDS*, *supra* note 132, at 1, 6.

Fast forward to today in 2010; we are plugging along, we are trying to remain positive, we have each other, our health and friends and family who have helped us.

We take one day at a time and try to keep our positive attitude. We do not let people get us down[,] and we have belief that we can rebuild.<sup>180</sup>

It is fair to say that some of these narratives may overstate the writers' positive outlook. As Barbara Ehrenreich has pointed out, Americans take pride – often excessive pride – in a chirpy outlook and a plucky can-do spirit.<sup>181</sup> Still, the Madoff victims' narratives make clear that, even with a literal reversal of fortune, most people can and do recover and move on.

As one victim concluded, after recounting the “panic, terror, self-blame, [and] rage” she experienced immediately after learning of Madoff's fraud, she “came to the conclusion that ‘the real suffering was not living without money; it was living with this ranting mind.’”<sup>182</sup>

## V. THE MADOFF VICTIMS' MAGICAL THINKING

One of the most fascinating aspects of the Madoff victims' behavior did not involve their condemnation of Madoff, their self-blame, their fury at the federal regulatory agencies, or their efforts at reinvention. This section looks at some of the victims' efforts at recovery of their losses through the legal system. During the months following disclosure of Madoff's crimes, these victims – and their lawyers – filed lawsuits against every conceivable party affiliated with Madoff's pernicious scheme. A website tracking these lawsuits – not including those brought by the BLMIS trustee – once listed hundreds of cases.<sup>183</sup>

Most of these lawsuits can be characterized as sitting somewhere on a continuum from interesting, innovative, or sometimes long-shot theories to altogether frivolous claims. This section provides a few examples, beginning with the most plausible and ending with the most risible. In some

180. Jackie S., *Gut Reaction*, in *THE CLUB NO ONE WANTED TO JOIN: MADOFF VICTIMS IN THEIR OWN WORDS*, *supra* note 132, at 84, 97.

181. See EHRENREICH, *supra* note 127.

182. Alyce Lomax, *How Getting Robbed by Bernie Madoff Led Her to a Happier Life*, *DAILY FINANCE* (May 12, 2012, 9:54 PM), <http://www.dailyfinance.com/2012/05/11/how-getting-robbed-by-bernie-madoff-led-her-to-a-happier-life/>.

183. Kevin LaCroix, *The List: Madoff Investor and Feeder Fund Litigation*, *THE D&O DIARY* (Dec. 26, 2008), <http://www.dandodiary.com/2008/12/articles/securitieslitigation/the-list-madoff-investor-and-feeder-fund-litigation/> (providing a table of cases).

of the later cases, one might ask, “What could these lawyers have been thinking?”

#### A. *Victims vs. the Feeder Fund Managers*

Many of Madoff’s victims were so-called “indirect investors.” They had entrusted their funds to investment managers, who in turn had selected BLMIS to handle the clients’ investments. Madoff lavishly compensated these “feeders,” earning their loyalty and, their clients suggested, a willingness to avert their eyes from Madoff’s suspicious behavior.<sup>184</sup>

Very quickly after Madoff’s arrest, some of the indirect investors initiated lawsuits against the feeder fund managers.<sup>185</sup> The thrust of the claims was that the feeder fund managers had negligently selected and overseen Madoff, thus breaching their fiduciary duties.<sup>186</sup> Some of the feeder fund claims resulted in substantial recoveries for the indirect investors.<sup>187</sup>

#### B. *Victims vs. Securities and Exchange Commission*

In an effort to find another deep pocket, some of Madoff’s victims sued the Securities and Exchange Commission.<sup>188</sup> Following the August 2009 release of the SEC Inspector General’s report detailing the many occasions on which the SEC had failed to unmask Madoff during a decades-long regulatory relationship,<sup>189</sup> these victims concluded that the SEC itself should be held liable for some or all of Madoff’s fraud.

Invoking the Federal Tort Claims Act (FTCA), which allows an aggrieved person to sue the federal government for negligence,<sup>190</sup> the

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184. Ezra Merkin, for example, was said to have received nearly a half billion dollars in referral fees from Madoff. Merkin settled with the New York Attorney General for \$405 million. Diana B. Henriques, *Hedge Fund Manager to Pay \$405 Million in Madoff Settlement*, N.Y. TIMES (June 24, 2012), <http://www.nytimes.com/2012/06/25/business/hedge-fund-manager-merkin-to-pay-405-million-in-madoff-settlement.html>.

185. See Stephen Gandel, *Madoff Victims Look for Ways to Recover Their Money*, TIME (Dec. 16, 2008), <http://content.time.com/time/business/article/0,8599,1866689,00.html>.

186. See *id.*

187. See Henriques, *supra* note 184; see also Chad Bray, *Investors to Receive \$100 Million in Settlement of Madoff Claims by Tremont*, WALL ST. J. (Feb. 27, 2011, 9:35 AM), <http://online.wsj.com/article/SB10001424052748703409304576167460807966574.html>.

188. See Andrew Longstreth, *Alleging Negligence, Madoff Victims Sue SEC for \$2.4 Million*, LAW.COM (Oct. 15, 2009), <http://www.law.com/jsp/article.jsp?id=1202434602813>.

189. See U.S. Securities & Exchange Commission Office of Investigations, *Investigation of Failure of the SEC to Uncover Bernard Madoff’s Ponzi Scheme – Public Version* (Aug. 31, 2009), <http://www.sec.gov/news/studies/2009/oig-509.pdf>.

190. 28 U.S.C. § 1346(b)(1) (2010):

victims alleged that the SEC's multiple failures to discover Madoff's fraud reflected the kind of negligence for which monetary recovery was authorized under the FTCA.<sup>191</sup> The plaintiffs argued preemptively that incompetent investigations of the sort documented by the Inspector General are not the kind of "discretionary function" that is exempt from coverage under the FTCA.<sup>192</sup> The plaintiffs' lawyers metaphorically claimed that the SEC "staffers who investigated Bernard Madoff might as well have fallen asleep on the floor of a bank vault while it was being robbed."<sup>193</sup>

The notion that citizens could recover damages from a law enforcement agency for botching an investigation was mind-boggling to lay observers.<sup>194</sup> If such a cause of action were permitted, the government would be swamped with claims.

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[Suit may be brought against the United States claiming damages] for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

191. See Complaint at 3, *Molchatsky v. United States*, 778 F. Supp.2d 421 (S.D.N.Y. 2011) (No. 09 Civ. 8697 (LTS/AJP)), 2009 WL 3328688.

192. The "discretionary function" exception is found in 28 U.S.C. § 2680(a) (2006):  
[This provision exempts from the FTCA] [a]ny claim based upon an act or omission of an employee of the Government . . . based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.

193. Sur-Reply Memorandum of Law in Opposition to Defendant's Motion to Dismiss at 1, *Molchatsky*, 778 F. Supp. 2d 421 (No. 09 Civ. 8697 (LTS/AJP)).

194. One commentator described his reaction to the SEC lawsuit this way:

Let's dispense first with the idea that the S.E.C. should be reimbursing Madoff victims. Why? Government agencies make mistakes, treat people unfairly and do all sorts of things we all wish they wouldn't. But by law, the federal government cannot be sued when it carries out an unjust prosecution or, for that matter, when it fails to uncover a giant fraud. Government negligence led pretty directly to the recent financial crisis. Does that mean the feds should be reimbursing us for our stock market losses? Of course not. Because it's not really the S.E.C. that would be paying out the money – it would be the taxpayers. Why should my tax dollars go to helping Madoff victims? This is not 9/11.

Joe Nocera, *Madoff Victims, Get Over It*, N.Y. TIMES DEALBOOK (June 30, 2009, 12:01 PM), <http://dealbook.blogs.nytimes.com/2009/06/30/madoff-victims-get-over-it/>; see also Joe Nocera, *Madoff Had Accomplices: His Victims*, N.Y. TIMES (Mar. 13, 2009), <http://www.nytimes.com/2009/03/14/business/14nocera.html?pagewanted=all> ("Investors blaming the S.E.C. for their decision to give every last penny to Bernie Madoff is like a child blaming his mother for letting him start a fight while she wasn't looking.").

The SEC moved to dismiss the cases against it for failure to state a claim upon which relief could be granted.<sup>195</sup> The SEC in effect made the same argument as that made by the Department of Social Services in the famous “Poor Joshua” case.<sup>196</sup> In that case, the U.S. Supreme Court was persuaded that the failure of a local child protection agency to discover facts that might have forestalled the savage beating of a toddler could not give rise to a cause of action, no matter how inept the investigation and no matter how great the harm.<sup>197</sup> The SEC argued similarly that “how to staff cases, which leads to pursue, and from what sources to obtain evidence – decisions made in the course of *every* investigation – are classic discretionary judgments that courts have traditionally refused to second-guess.”<sup>198</sup>

Most observers predicted that the lawsuits against the SEC would quickly be dismissed.<sup>199</sup> In fact, the U.S. District Court for the Central District of California quickly dismissed the first of the victims’ cases against the SEC.<sup>200</sup> Judge Stephen V. Wilson ruled that “[the plaintiffs failed] to rebut the Government’s preliminary showing that the SEC retained discretion to decide when to investigate, how to investigate, and whether or not to take enforcement actions.”<sup>201</sup> That decision was affirmed in 2013 by the U.S. Court of Appeals for the 9<sup>th</sup> Circuit.<sup>202</sup>

A similar case languished in the U.S. District Court for the Southern District of New York for more than a year, but it, too, was ultimately

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195. See David Bario, *SEC Invokes Immunity in Negligence Suit by Madoff Victims*, LAW.COM (Dec. 16, 2009), [http://www.law.com/jsp/article.jsp?id=1202436367968&SEC\\_Invokes\\_Immunity\\_in\\_Negligence\\_Suit\\_by\\_Madoff\\_Victims](http://www.law.com/jsp/article.jsp?id=1202436367968&SEC_Invokes_Immunity_in_Negligence_Suit_by_Madoff_Victims).

196. *DeShaney v. Winnebago Cty. Soc. Servs. Dept.*, 489 U.S. 189 (1989).

197. *Id.* at 197.

198. United States of America’s Memorandum of Law in Support of Its Motion to Dismiss at 1, *Molchatsky*, 778 F. Supp. 2d 421 (No. 09 Civ. 8697 (LTS/AJP)) (emphasis in original).

199. See Greg Farrell, *Investors Who Lost \$2.4 Million in Madoff Scheme Sue SEC*, FIN. TIMES (Oct. 15, 2009), <http://www.ft.com/cms/s/0/d1ddc146-b922-11de-98ee-00144feab49a.html> (“‘They’re not going to win,’ said John Coffee of Columbia Law School. ‘The lawyers pursuing this action are equivalent to the people who bought a \$1 ticket in the Irish Sweepstakes.’”).

200. See Amanda Bronstad, *Judge Tosses Investors’ Madoff-Related Claims Against SEC*, LAW.COM (Apr. 22, 2010), <http://www.law.com/jsp/article.jsp?id=1202448463744>.

201. *Dichter-Mad Family Partners, LLP v. United States*, 707 F. Supp. 2d 1016 (C.D. Cal. 2010), *aff’d*, 709 F.3d 749 (9th Cir. 2013).

202. See Jonathan Stempel, *U.S. Appeals Court Shields SEC from Madoff Investor Lawsuit*, REUTERS (Jan. 29, 2013, 5:25 AM), <http://in.reuters.com/article/2013/01/28/madoff-appeal-idINLN0AXMDZ20130128>.

dismissed.<sup>203</sup> That decision was affirmed in 2013 in the U.S. Court of Appeals for the Second Circuit.<sup>204</sup> As late as July 2013, federal courts were still dismissing Madoff victims' lawsuits against the SEC.<sup>205</sup>

### C. *Victims vs. the Trustee*

Perhaps the most intense litigation brought by some of Madoff's victims (and some of the most vituperative rhetoric heard in the many lawsuits brought by victims) was that involving Irving Picard, the Trustee in Bankruptcy handling the liquidation of BLMIS. Picard was appointed as Trustee by the U.S. District Court for the Southern District of New York on December 15, 2008.<sup>206</sup> His actions are governed by the Securities Investors Protection Act (SIPA),<sup>207</sup> and the matter was assigned to the U.S. Bankruptcy Court for the Southern District of New York.

The chief complaint against Picard was his use of the so-called "cash in/cash out" (or "CICO") formula for determining the amount of "net equity" in the accounts of Madoff's direct investors.<sup>208</sup> The "net equity" determination governs both who is eligible to receive a payment from SIPC and how much the claimants will ultimately recover.<sup>209</sup>

Other issues, too, swirled around Picard: his denial of the claims of the indirect investors;<sup>210</sup> his initiation of hundreds of "clawback" suits against

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203. See *Madoff Investors' Lawsuit Blaming the S.E.C. for Losses Is Dismissed by a Federal Judge*, N.Y. TIMES (Apr. 19, 2011), <http://www.nytimes.com/2011/04/20/business/20madoff.html>.

204. See Bob Van Voris, *Madoff Investors Can't Sue SEC, U.S. Appeals Court Rules*, BLOOMBERG (Apr. 10, 2013, 12:47 PM), <http://www.bloomberg.com/news/2013-04-10/madoff-investors-can-t-sue-sec-u-s-appeals-court-rules.html>.

205. See Anna Sarfo, *Madoff Victims Can't Sue SEC, 3rd Circ. Says*, LAW360 (July 1, 2013, 5:09 PM), <http://www.law360.com/articles/454473/madoff-victims-can-t-sue-sec-3rd-circ-says>.

206. BERNARD L. MADOFF INVESTMENT SECURITIES LLC LIQUIDATION PROCEEDING, <http://www.madofftrustee.com/>.

207. 15 U.S.C. § 78 (2010).

208. Following precedent from other Ponzi scheme cases, Picard construed "net equity" as "the amount of cash deposited by the customer into his BLMIS account, less any amounts already withdrawn by him from his BLMIS customer account" (the cash in/cash out approach). *Trustee's Amended Third Interim Report for the Period Ending March 31, 2010* at 50, Sec. Investor Prot. Corp. v. Bernard L. Madoff Inv. Sec. LLC, Adv. Pro. No. 08-1789 (BRL) (Bankr. S.D.N.Y.), available at <http://www.madoffTrustee.com/document/reports/000002-thirdinterimreport.pdf> [hereinafter *Trustee's Third Interim Report*].

209. *Id.*

210. On December 8, 2009, the Trustee denied approximately 8,500 claims filed by indirect investors ("Claimants Without an Account"). *Trustee's Third Interim Report*, *supra* note 208, at 53. That decision was affirmed by U.S. Bankruptcy Judge Burton Lifland. See Jonathan Stempel, *Madoff Judge: Feeder Fund Investors Cannot Recover*, REUTERS (June 28, 2011, 6:16 PM), <http://www.reuters.com/article/2011/06/28/us-madoff-feederfunds->

some of Madoff's customers;<sup>211</sup> the reasonableness of his fees and expenses;<sup>212</sup> the availability of interest on whatever amounts were due;<sup>213</sup> and the appropriate treatment (one award or two) for investors holding joint accounts.<sup>214</sup>

On the matter of the "net equity" formula by which direct investors' eligibility for SIPC reimbursement would be determined, the victims argued that their net equity should be calculated as the amount shown on their BLMIS account statements as of November 30, 2008.<sup>215</sup> This formula – one might call it the "fantasy formula" – would not only provide compensation for "phantom profits," but it would also permit investors who had withdrawn more from Madoff than they had invested (the so-called "net winners"), as well as those who had never received any payouts or who had withdrawn much less than they originally invested (the "net losers"), to receive an SIPC reimbursement.<sup>216</sup> The CICO formula would limit recovery to BLMIS investors who had actually lost money as a result of Madoff's scheme.<sup>217</sup>

The dispute thus not only pitted victims against the Trustee, but also pitted one group of victims against another.<sup>218</sup> If "net winners" as well as "net losers" were deemed eligible to receive SIPC payouts, the pool of funds available to the "net losers" would necessarily be reduced. One of the "net losers" argued that, if "net winners" were included, the Trustee would "have to split the pie into pieces that much smaller for all of us."<sup>219</sup>

idUSTRE75R6A320110628. The U.S. Court of Appeals for the Second Circuit affirmed the Trustee's decision. See Bill Singer, *Madoff Victims Suffer Major Setback in Federal Appeals Court*, FORBES (Feb. 23, 2013, 11:53 AM), <http://www.forbes.com/sites/billsinger/2013/02/23/madoff-victims-suffer-major-setback-in-federal-appeals-court/>.

211. The U.S. Court of Appeals for the Second Circuit ultimately approved the use of the clawback mechanism. Peter J. Henning, *Madoff Trustee Gets a Green Light on Clawbacks*, N.Y. TIMES DEALBOOK (Aug. 17, 2011, 2:05 PM), <http://dealbook.nytimes.com/2011/08/17/madoff-trustee-gets-a-green-light-on-clawbacks/>.

212. The Bankruptcy Court has heard and rejected numerous objections to the Trustee's fee requests. *Trustee's Third Interim Report*, *supra* note 208, at 58-59.

213. *Trustee's Third Interim Report*, *supra* note 208, at 53.

214. *Id.*

215. *Id.* at 50.

216. See *Seeking Funds, Madoff Victims Battle Each Other*, N.Y. TIMES DEALBOOK (June 29, 2009, 7:44 AM), <http://dealbook.blogs.nytimes.com/2009/06/29/investors-compete-for-a-piece-of-the-madoff-pie/>.

217. See *Trustee's Third Interim Report*, *supra* note 208, at 33.

218. See *Seeking Funds, Madoff Victims Battle Each Other*, *supra* note 216.

219. *Id.* (quoting Bert Ross, one of the "net loser" victims).

Making payouts to “net winners” would also benefit Madoff’s early investors at the expense of later investors.<sup>220</sup> Paying victims based on the fantasy formula, said a critic, would “hurt precisely those Madoff victims who have come out of this tragedy the worst off financially.”<sup>221</sup>

Picard ultimately denied the claims of the “net winner” claimants, thereby setting up the issue for judicial review. His decision was upheld by the U.S. Bankruptcy Court in March 2010.<sup>222</sup> The court held that Picard’s “cash in/cash out” formula was “the only interpretation consistent with the plain meaning and legislative history of the [SIPA] statute, controlling Second Circuit precedent, and considerations of equity and practicality.”<sup>223</sup> In August 2011, the Second Circuit affirmed.<sup>224</sup>

#### D. *Victims vs. SIPC*

Not only did Madoff’s victims sue the BLMIS Trustee to challenge the cash in/cash out formula for determining a customer’s “net equity,” but some of them also sued the president and directors of SIPC.<sup>225</sup> The lawsuit, brought by three victims, alleged fraud, bad faith failure to pay insurance claims, and violations of the New Jersey Consumer Fraud Act.<sup>226</sup>

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220. See News Release, Securities Investor Protection Company, *\$61 Million in Commitments Made to Madoff Claimants, with \$100 Million Level Expected to Be Reached by Memorial Day* (May 14, 2009), <http://www.sipc.org/news-and-media/news-releases/20090514> (articulating SIPC’s view on this matter):

[Paying pro rata to all BLMIS investors] would benefit longer-term customers at the expense of shorter term customers. It would allow a certain favored few who received compounded annual returns at substantially higher rates than other customers to also benefit. This would in effect allow Bernie Madoff to determine which entities would get a larger proportion of customer property. This would do extreme prejudice to persons who put cash into the scheme relatively recently.

221. Joe Nocera, *Ire at Madoff Swings Toward the Referee*, N.Y. TIMES (July 3, 2009), <http://www.nytimes.com/2009/07/04/business/04nocera.html?pagewanted=all>.

222. See *Judge Backs Trustee’s Plan to Repay Madoff Victims*, N.Y. TIMES DEALBOOK (Mar. 1, 2010, 12:35 PM), <http://dealbook.nytimes.com/2010/03/01/judge-backs-trustees-plan-to-repay-madoff-victims/>.

223. Motion for an Order Approving an Initial Allocation of Property to The Fund of Customer Property and Authorizing an Interim Distribution to Customers at 31, Sec. Investor Prot. Corp. v. Bernard L. Madoff Inv. Sec., 496 B.R. 744 (Bankr. S.D.N.Y. 2013) (No. 08-01789 (BRL)), 2011 WL 1663442.

224. See Diana B. Henriques, *Court Sides with Trustee Over Madoff Payouts*, N.Y. TIMES (Aug. 16, 2011), <http://www.nytimes.com/2011/08/17/business/court-rejects-move-to-include-profits-in-madoff-returns.html?pagewanted=all>.

225. See David Voreacos & Erik Larson, *Madoff Investors Sue SIPC Directors in Dispute Over Claims*, BLOOMBERG (Feb. 24, 2010, 4:29 PM), [http://www.bloomberg.com/apps/news?pid=newsarchive&sid=atBi\\_FiL.kmI](http://www.bloomberg.com/apps/news?pid=newsarchive&sid=atBi_FiL.kmI).

226. See *id.*



SIPC's President, Stephen P. Harbeck, criticized the lawyers who filed the case, saying:

[W]e are disappointed to see that certain attorneys are exploiting the plight of these victims to incorrectly direct their anger and frustration at SIPC. Sadly, this frivolous litigation will have the effect of making it harder for SIPC to focus all of its time and attention on aiding the Madoff victims.

That being said, SIPC is not now and never was a FDIC-like 'insurance' entity.<sup>227</sup>

The case was quickly dismissed.<sup>228</sup>

#### *E. Victims vs. Insurance Carriers*

Some victims sought to invoke their rights under their homeowner's insurance policies.<sup>229</sup> Robert and Harlene Horowitz, for example, claimed they had lost more than \$8.5 million (based on the face value of their account at BLMIS), and they filed a class action against their insurance carrier, AIG, seeking recovery of their losses based on the fantasy formula.<sup>230</sup> AIG argued that losses like these were expressly excluded from the terms of the policy, and the Second Circuit agreed.<sup>231</sup>

#### *F. Victims vs. Goldman Sachs*

Among the many, many private lawsuits filed on behalf of Madoff's victims, one particularly ludicrous lawsuit surfaced in 2010. Retired businessman Jerome Goodman was a long-time investor with Bernie Madoff. In 2003, Goldman Sachs acquired Goodman's investment

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227. See News Release, Securities Investor Protection Company, SIPC Statement on Lawsuit Filed by BLMIS Investors (Feb. 24, 2010), available at <http://www.sipc.org/news-and-media/news-releases/20100224>.

228. See *Canavan v. Harbeck*, No. 10-954 (FSH), 2010 WL 2710453 (D.N.J. July 6, 2010).

229. See Marlys Harris, *Madoff Victims: Will Homeowners Insurance Help?*, CBS NEWS (Aug. 25, 2009, 3:59 PM), [http://www.cbsnews.com/8301-505145\\_162-38140283/madoff-victims-will-homeowners-insurance-help/](http://www.cbsnews.com/8301-505145_162-38140283/madoff-victims-will-homeowners-insurance-help/).

230. See Jessica Dye, *AIG Not on the Hook for Policyholders' Madoff Claims – US Court*, REUTERS (Aug. 15, 2012, 12:38 PM), <http://www.reuters.com/article/2012/08/15/madoff-aig-claims-idUSL2E8JF6ZT20120815>.

231. See *id.*

advisor.<sup>232</sup> A Goldman advisor then urged Goodman to take \$5 million of the \$12 million he had placed with Madoff and move it to a Goldman-managed hedge fund. Goodman declined.<sup>233</sup> In his complaint, Goodman alleged that Goldman Sachs should have *insisted* that he move his money.<sup>234</sup> Goldman Sachs moved for dismissal, arguing that the plaintiff not only had failed to present a cognizable claim for relief, but also had missed the statute of limitations by more than three years.<sup>235</sup> The claim, not surprisingly, was ultimately dismissed.<sup>236</sup>

### G. *The Bottom Line*

It would be easy to argue that many of these lawsuits were grandstand plays – designed by lawyers to generate headlines and recruit clients for other, more profitable cases. Lawyers, however, are not the villains in this story. Many of the victims’ successes – with the IRS, with the feeder funds, and in tracing Madoff’s assets – are the result of exceptional lawyering, particularly by the BLMIS Trustee, Irving Picard. Whatever some of the victims may think of him or his use of the cash in/cash out formula for determining the “net equity” upon which their compensation will be based, Picard has recovered more than \$10 billion on their behalf, and more recoveries are anticipated.<sup>237</sup> Many of the victims’ suits, on the other hand, have been dismissed or quietly withdrawn. Only the most dogged of the plaintiffs, often appearing *pro se*, have persisted with their claims.

So is there a lesson in this story for lawyers? How can we account for some of the lawsuits brought by lawyers who were not themselves victims? One lesson might be that some lawyers are incapable of sorting out good

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232. Henry Gottlieb, *Goldman Sachs Sued for Not Divulging Madoff Ban to Investor*, LAW.COM (Mar. 18, 2010), <http://www.law.com/jsp/article.jsp?id=1202446397546>.

233. *Id.*

234. *Id.*

235. See Henry Gottlieb, *Goldman Sachs Seeks Dismissal of Suit by Investor Alleging Bad Madoff Advice*, LAW.COM (May 5, 2010), <http://www.law.com/jsp/article.jsp?id=1202457691918>.

236. See David Voreacos & David Glovin, *Goldman Sachs Won't Face Negligence Suit by Madoff Investor, Judge Rules*, BLOOMBERG (Dec. 15, 2010, 11:01 PM), <http://www.bloomberg.com/news/2010-12-15/goldman-sachs-wins-dismissal-of-lawsuit-by-madoff-investor.html>.

237. See Erik Larson, *Madoff Trustee Tops \$10 Billion Recovery with Bank Deal*, BLOOMBERG (Jan. 8, 2014, 12:23 PM), <http://www.bloomberg.com/news/2014-01-07/madoff-trustee-to-get-543-million-in-jpmorgan-accord.html>; Kevin McCoy, *More Time for Madoff Victims to Seek Recovery*, USA TODAY (Feb. 21, 2014, 12:03 PM), <http://www.usatoday.com/story/money/markets/2014/02/21/madoff-victim-recovery-extended/5679573/>.

cases from bad.<sup>238</sup> Another might be that some lawyers do not care whether their cases are good or bad, so long as they can get some airtime on Bloomberg or CNN.

The primary lesson for lawyers, however, is to be cautious when dealing with victims of fraud. These victims are fragile, they are experiencing the kinds of oscillating emotions and cognitive impairments that bereaved persons often face, and they are suffering from a very real upheaval in their lives. They may be engaged in magical thinking, which is harmless in the short term but can become pathological if it continues for too long. Lawyers should take care not to encourage – or to prolong – their clients' magical thinking, and they should stifle their “rescue” impulse.

## VI. LAWYERS AND FRAUD VICTIMS

In thinking about the role of lawyers in dealing with victims of fraud, one must consider the range of behaviors those victims may exhibit. Some victims may feel so humiliated, demoralized, and defeated that they are unable to communicate their story or to seek advice on their own behalf. Other victims may become so angry at their situation that they cannot initiate constructive coping strategies and will need professional help. Others may unduly blame themselves for their loss and refuse to seek counsel or assert their rights.

Some victims may fantasize that all will be well, that their money will somehow be recovered, and that they can go on with their lives as if nothing had happened. They experience their loss as if no crime had been committed. These are the magical thinkers.

Fortunately, most fraud victims fall into a fifth category – they recognize that they have been victimized through little or no fault of their own. They mobilize to further protect themselves. They redefine their expectations in accordance with their new financial reality, and they work collaboratively with advisors and family members to make the best of an awful situation.

This article focuses on the fourth category of victims – those who believe (or want to believe) that everything, somehow, can be made right. In the case of some Madoff victims, they insisted that they should be entitled to recover the full amount of funds reflected on their final BLMIS account statements, *plus interest*, regardless of the funds available and

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238. See Jane Goodman-Delahunty et al., *Insightful or Wishful: Lawyers' Ability to Predict Case Outcomes*, 16 PSYCHOL. PUB. POL'Y & L. 133 (2010) (study revealed that “lawyers were overconfident in their predictions, and calibration did not increase with years of legal experience”).

regardless of the law. If they could not recover this amount from SIPC, then they believed they ought to recover it from the SEC or somebody else. Many of them were encouraged in these fantasies by their lawyers. A few of them continue to believe these fantasies today.

The behavior of these victims raises this issue: When approached by a fraud victim during the first days or weeks following disclosure of a fraud, what should a lawyer do? Assuming there is some colorable source of recovery,<sup>239</sup> it may seem necessary to take immediate action, freeze assets, assert claims, and pursue innovative theories. Victims, understandably, feel a sense of great urgency.

On the other hand, if the lawyer sees that his client may be caught up in magical thinking, it may be wiser to take a breath, wait for the dust to clear, assist the victim in assessing his or her true situation, and help prepare him or her for a long wait. It is, of course, difficult to advise a desperate client to wait, particularly when other lawyers may be more eager to sue.

Lawyers might draw four lessons from the Madoff narratives as seen through the lens of modern grief theory. First, lawyers dealing with fraud victims should observe the same guidelines the legal profession prescribes for criminal defense lawyers, divorce lawyers, personal injury lawyers, and even transactional lawyers: They must avoid raising their clients' false hopes.<sup>240</sup> This is true for lawyers who are asked to provide direct representation to a fraud victim and for lawyers serving as prosecutors. The obligations are the same.

Second, lawyers who initiate litigation on behalf of fraud victims should revisit their claims after six to twelve months have passed. As we have seen in the case of bereavement, the belief that a person's dead loved one might somehow return and resume his or her life typically dissipates within six to twelve months. By pursuing unrealistic claims for too long, a lawyer may not only waste a fraud victim's time but also may foster a fraud victim's version of "complicated" or "prolonged" grief. That is, a client who clings to the false belief that a lawsuit may rescue him or her from loss and despair is unlikely to be able to move forward.<sup>241</sup> By reinforcing the

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239. In most Ponzi scheme cases, there are no realistic sources for recovery. The money is gone.

240. See, e.g., MODEL RULES OF PROF'L CONDUCT R. 7.1 (2008) ("A lawyer shall not make a false or misleading communication about the lawyer or the lawyer's services.").

241. Recall that, in prolonged grief, bereaved persons "get lost in themselves; they withdraw from the world and become mired in an endless preoccupation, an insatiable desire to have the deceased person back again." BONANNO, *supra* note 7, at 96-97. "The pain of loss simply overwhelms them, and they find it all but impossible to return to their normal daily routine." *Id.* at 6.

notion that victims can somehow be made whole and then disappointing them, lawyers are likely to make their clients' pain worse.

Third, lawyers themselves should be wary of magical thinking. When there is a crisis, and especially when, as in the Madoff case, there is a media frenzy (and billions at stake), it can be easy even for lawyers to get caught up in the whirlwind. It is hard to say with certainty why some of the Madoff lawsuits were filed, but at least some of them must have been the product of irrational exuberance.

Finally, it important for lawyers (and others) who deal with fraud victims to acknowledge the claim made in this article – fraud victimization acts on victims much like the death of a loved one. The mourning is real. The suffering fades. People are resilient if they are given the chance.<sup>242</sup>

## VII. CONCLUSION

The popular notion that most of Bernie Madoff's victims were rich insiders who "got what they deserved" is inaccurate, unfair, and cruel. Many of Madoff's victims were solid, middle class people who relied on Madoff to protect and grow their assets. Many of them (and even some of Madoff's very rich clients) lost everything, at least for a while. They deserve our compassion, not scorn.

A few of these victims came to believe that they could recover from somebody the money reflected on their final BLMIS account statements, and they believed that Madoff's fraud could somehow be made to disappear. These victims found some lawyers who reinforced this fantasy. These victims (and perhaps their lawyers) were engaged in magical thinking.

Lawyers should recognize magical thinking among fraud victims and treat those clients much as they would treat clients who were facing the sudden death of a loved one. They should move cautiously, revisit the need to pursue dubious claims as the clients' acceptance of reality increases, and most importantly, treat their clients with solicitude and care. Lawyers must find a way to support – but not exploit – their clients when dealing with financial loss due to fraud.

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242. There are other possible lessons for lawyers, though I do not subscribe to them. First, if the pain of financial loss due to fraud is only temporary, such as with grief, then perhaps we should discount fraud victims' claims of irreparable damage. In other words, maybe judges should pay less attention to victim impact testimony in sentencing than the law currently requires. Second, and more importantly, if the pain of bereavement itself is only temporary, then perhaps we should discount or eliminate altogether claims for loss of consortium. Finally, perhaps we should make a smaller personal investment in compassion for our bereaved friends.