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Alabama's Wrongful Death Statute:
A Problematic Existence

Bert S. Nettles
Forrest S. Latta

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* Member of the Alabama State Bar. J.D. 1960, The University of Alabama School of Law. Mr. Nettles, until recently of the Mobile Bar, is now a senior partner in the Birmingham, Alabama, law firm of Spain, Gillon, Grooms, Bian & Nettles. He served in the Alabama Legislature, and he was President of the Alabama Defense Lawyers Association from 1986 to 1987.

**Member of the Alabama State Bar. B.S. 1980, Troy State University; J.D. 1983, Cumberland School of Law. Mr. Latta is a member of the Mobile, Alabama, law firm of Barker, Janecky & Copeland.

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I. INTRODUCTION

It is well known that Alabama courts, for more than a century, have interpreted the wrongful death act¹ to allow recovery of only punitive damages.² Like an ill-fitting garment, perhaps no rule has necessitated more stretching and hemming to fit the balance of Alabama's legal framework. In addition to the broader issues addressed by this Article, the exclusively punitive construction has led to problems in the areas of products liability,³ income taxes,⁴

1. See ALA. CODE § 6-5-410 (1975) (main statute); *id.* § 6-5-391 (minors). Unless otherwise noted, this Article will refer to these statutes collectively as the "wrongful death statute," "wrongful death act," or "homicide act."

2. See, e.g., *Kennedy v. Davis*, 171 Ala. 609, 55 So. 104 (1911); *Alabama Great S.R.R. v. Burgess*, 116 Ala. 509, 22 So. 913 (1897); *Richmond & D.R.R. v. Freeman*, 97 Ala. 289, 11 So. 800 (1892); *South & N. Ala. R.R. v. Sullivan*, 59 Ala. 272 (1877); *Savannah & M.R.R. v. Shearer*, 58 Ala. 672 (1877). Although it is indisputable that Alabama courts have characterized the damages allowed by the wrongful death statute as punitive in nature, it has been argued that the damages are in effect at least partially compensatory. See Hare & Pate, *Alabama Death Act—What Does Punitive Mean?*, 7 ALA. TRIAL LAW. J. 4 (1979).

3. The supreme court's adoption of the Alabama Extended Manufacturer's Liability Doctrine, as opposed to the no-fault concept of *Restatement (Second) of Torts* § 402A, reportedly was necessary because the Restatement approach would pretermitt the issue of culpability upon which punitive damages must be graded. See *Huntsville City Bd. of Educ. v. National Gypsum Co.*, No. CV83-325L, at 44-45 (Madison County Cir. Ct., Ala., Aug. 27, 1984) (citing Note, *Torts—Products Liability—A Manufacturer, Supplier, or Seller Who Markets a Product Not Reasonably Safe When Applied to Its Intended Use in the Usual and Customary Manner Is Negligent as a Matter of Law*, 28 ALA. L. REV. 747, 759 (1977)).

the Federal Tort Claims Act,⁵ civil rights actions against municipalities,⁶ and breach of warranty claims.⁷ Furthermore, the Alabama Supreme Court has strained to apply traditional compensatory concepts to punitive-only wrongful death cases.⁸ This has resulted in contradictions between theory and application regarding such matters as nonapportionment of damages and the appropriate standard of proof. These examples underscore the not uncommon view, which the Authors advance in this Article, that the Alabama courts' early misinterpretation of the wrongful death

But see Owen, *Punitive Damages in Products Liability Litigation*, 74 MICH. L. REV. 1257, 1271 (1976) (in strict products liability, "there is no sound reason for not allowing a plaintiff seeking punitive damages to show a greater culpability for that purpose than he must for his underlying theory of compensatory liability").

4. There is an almost constant debate regarding whether Alabama wrongful death awards are analogous to compensatory damages for tax purposes. See *Burford v. United States*, 642 F. Supp. 635 (N.D. Ala. 1986) (holding that, contrary to Rev. Rul. 84-108, 1984-2 C.B. 32, damages awarded under Alabama's wrongful death act are not taxable income); Bonnell, *Back and Forth With the I.R.S.: Taxation of Wrongful Death Damages in Alabama*, 17 CUMB. L. REV. 53 (1986); Wooldridge, *Income Taxation of Wrongful Death Proceeds in Alabama*, 46 ALA. LAW. 127 (1985); Casenote, *Commissioner Rules that Damages Received Under the Alabama Wrongful Death Act Constitute Income*, 15 CUMB. L. REV. 745 (1985).

5. In 1947, a special congressional amendment to the Federal Tort Claims Act was necessary to afford people in Alabama a special right of action for wrongful death under that otherwise compensatory federal statute. See Hobbs, *Damages Recoverable for Wrongful Death in Alabama Under the Federal Tort Claims Act*, 48 ALA. LAW. 16 (1987).

6. Local governments generally are immune from the assessment of punitive, as opposed to compensatory, damages, in actions under 42 U.S.C. § 1983 (1982). See, e.g., *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 271 (1981); *Weeks v. Benton*, 649 F. Supp. 1297, 1300 (S.D. Ala. 1986); *Carter v. City of Birmingham*, 444 So. 2d 373, 379 (Ala. 1983), *cert. denied*, 467 U.S. 1211 (1984).

7. See, e.g., *Geohagan v. General Motors Corp.*, 291 Ala. 167, 279 So. 2d 436 (1973). The supreme court in *Geohagan* held that a wrongful death action could not be maintained in Alabama for breach of warranty because contract claims are purely compensatory. *Geohagan*, 291 Ala. at 172, 279 So. 2d at 440; see Note, *Torts—Wrongful Death—An Action for Wrongful Death Cannot Be Maintained in Alabama for Breach of Implied Warranty*, 26 ALA. L. REV. 273 (1973). In contrast, the court in *Benefield v. Aquaslide 'N' Dive Corp.*, 406 So. 2d 873, 874 (Ala. 1981), did succeed in gerrymandering a right of action for breach of warranty on behalf of a decedent's personal representative for personal injuries which preceded death. See Recent Decision, *Recovery for Personal Injuries Causing Death after Benefield v. Aquaslide 'N' Dive Corp.*, 34 ALA. L. REV. 339 (1983).

8. See, e.g., *Black Belt Wood Co. v. Sessions*, 514 So. 2d 1257, 1262 (Ala. 1987) (discussing *Bell v. Riley Bus Lines*, 257 Ala. 120, 57 So. 2d 612 (1952), and the apportionment of punitive damages among tortfeasors), *on return after remand* by 514 So. 2d 1249 (Ala. 1986). For a recitation of the Alabama Supreme Court's analysis in *Black Belt Wood*, see *infra* notes 229-39 and accompanying text.

statute mandates legislative as well as judicial revision to conform the act to constitutional constraints.

The punitive-only construction of Alabama's Wrongful Death Act has been discussed in several recent opinions by the Alabama Supreme Court.⁹ Because problems involving the act and its application center on this interpretation, this Article briefly will review the origin and history of the punitive construction. The supreme court itself has admitted, more than once, the unsoundness of the original punitive-only construction, but nevertheless has steadfastly adhered to it.¹⁰ This Article further will explore, from both a state and federal constitutional standpoint,¹¹ some of the more controversial subjects involving the punitive-only interpretation of the wrongful death act. These subjects include punishment of simple negligence,¹² punishment without a heightened standard of proof,¹³ and nonapportionment of punitive damages among joint tortfeasors.¹⁴ Finally, the Article will address the constitutional validity of giving juries unlimited discretion to impose punitive damages in wrongful death cases.¹⁵

II. LEGISLATIVE HISTORY OF THE WRONGFUL DEATH ACT

The Alabama wrongful death statute has its origin in Lord Campbell's Act,¹⁶ an 1846 enactment by the English Parliament.¹⁷

9. See, e.g., *Tatum v. Schering Corp.*, 523 So. 2d 1042, 1049-63 (Ala. 1988) (Houston, J., dissenting); *Black Belt Wood*, 514 So. 2d 1257, 1260-64 (Ala. 1987) (per curiam), *on return after remand by* 514 So. 2d 1249 (Ala. 1986); *Merrell v. Alabama Power Co.*, 382 So. 2d 494, 496-97 (Ala. 1980).

10. See, e.g., cases cited *supra* note 9.

11. For purposes of this Article, it is assumed the applicable Alabama constitutional guarantees are coextensive with the Federal Constitution. See ALA. CONST. art. I, § 15 (excessive fines); *id.* §§ 6, 13 (due process).

12. See *infra* notes 112-36 and accompanying text.

13. See *infra* notes 137-99 and accompanying text.

14. See *infra* notes 200-43 and accompanying text.

15. See *infra* notes 244-300 and accompanying text.

16. Fatal Accidents Act, 1846, 9 & 10 Vict., ch. 93.

17. *Breed v. Atlanta, B. & C.R.R.*, 241 Ala. 640, 650, 4 So. 2d 315, 324 (1941) (Gardner, C.J., dissenting) (noting the Alabama act is modeled after Lord Campbell's Act). See generally Malone, *The Genesis of Wrongful Death*, 17 STAN. L. REV. 1043, 1058 (1965) (until passage of Lord Campbell's Act, death of a person did not qualify as injury, and damages ceased with death; however, the Act provided a remedy for wrongful death to family members).

The English and Alabama common law,¹⁸ prior to Lord Campbell's Act, afforded no civil remedy for wrongful death.¹⁹ Any claim of damages for injury, resulting in death occasioned by the wrongful act of another, ended with the deceased's existence.²⁰ Therefore, in terms of civil liability, it was cheaper to kill than maim.²¹ Surviving dependents were remediless.²² Lord Campbell's Act was passed to change this inequitable state of affairs in England. Most American states enacted similar wrongful death statutes patterned after the English example.²³

18. Alabama has adopted the English Common Law. See ALA. CODE § 1-3-1 (1975).

19. See, e.g., *Mobile Life Ins. Co. v. Brame*, 95 U.S. 754, 756 (1878); *Kennedy v. Davis*, 171 Ala. 609, 610, 55 So. 104, 104 (1911). See generally Smedley, *Wrongful Death—Bases of the Common Law Rules*, 13 VAND. L. REV. 605, 608 (1960) ("So long as the recovery of damages was regarded as a matter of personal vengeance and punishment as between the transgressor and his victim, death erased the purpose of a civil action between them.").

20. See, e.g., *Baker v. Bolton*, 1 Campbell 493, 170 Eng. Rep. 1033 (1808). The plaintiff claimed damages for his wife's death in a coach accident. The trial judge, Lord Ellenborough, denied relief: "In a civil Court, the death of a human being could not be complained of as an injury; and in this case the damages, as to the plaintiff's wife, must stop with the period of her existence." *Id.*; see also Waddams, *Damages for Wrongful Death: Has Lord Campbell's Act Outlived its Usefulness?*, 47 MOD. L. REV. 437 (1984). At common law, the death of the decedent was "civil death" under the law. *Breed v. Atlanta, B. & C.R.R.*, 241 Ala. 640, 4 So. 2d 315 (1941).

21. W. KEETON, D. DOBBS, R. KEETON & D. OWEN, PROSSER AND KEETON ON THE LAW OF TORTS § 127, at 945 (5th ed. 1984) [hereinafter PROSSER AND KEETON]; Comment, *Alabama's Wrongful Death Statute*, 4 ALA. L. REV. 75 (1951).

22. *East Tenn., V. & G.R.R. v. King*, 81 Ala. 177, 2 So. 152 (1887) (no redress for wrongful death at common law).

23. PROSSER AND KEETON, *supra* note 21, § 127, at 946; see ALASKA STAT. § 09.55.580 (1983); ARIZ. REV. STAT. ANN. § 12-611 (1982); ARK. STAT. ANN. § 16-62-102 (1987); CAL. CIV. PROC. CODE § 377 (West 1973 & Supp. 1989); COLO. REV. STAT. § 13-21-202 (1987); DEL. CODE ANN. tit. 10, § 3724 (Supp. 1988); FLA. STAT. ANN. § 768.19 (Harrison 1984); GA. CODE ANN. § 51-4-2 (1982 & Supp. 1988); HAW. REV. STAT. § 663-3 (1985); IDAHO CODE § 5-311 (1979 & Supp. 1988); ILL. REV. STAT. ch. 70, para. 1 (Smith-Hurd 1989); IND. CODE ANN. § 34-1-1-2 (West 1983 & Supp. 1988); IOWA CODE ANN. § 633.336 (West 1987 & Supp. 1988); KAN. STAT. ANN. § 60-1901 (1987); KY. REV. STAT. ANN. § 411.130 (Michie/Bobbs-Merrill 1972 & Supp. 1988); LA. CIV. CODE ANN. art. 2315 (West 1979 & Supp. 1988); ME. REV. STAT. ANN. tit. 18-A, § 2-804 (1964 & Supp. 1988); MD. CTS. & JUD. PROC. CODE ANN. § 3-902 (1984); MASS. GEN. LAWS ANN. ch. 229, § 2 (West 1985); MICH. COMP. LAWS ANN. § 600.2922 (West 1986); MINN. STAT. ANN. § 573.02 (West 1988); MISS. CODE ANN. § 11-7-13 (1972 & Supp. 1988); MO. ANN. STAT. § 537.080 (Vernon 1988); MONT. CODE ANN. § 27-1-513 (1987); NEB. REV. STAT. § 130-809 (1985); NEV. REV. STAT. § 41.085 (1987); N.H. REV. STAT. ANN. § 556:12 (1983); N.J. STAT. ANN. § 2A:31-1 (West 1987); N.M. STAT. ANN. § 41-2-1 (1986 & Supp. 1988); N.Y. EST. POWERS & TRUSTS LAW § 5-4.1 (McKinney 1981 & Supp. 1989); N.C. GEN. STAT. § 28A-18-2 (1984 & Supp. 1988); N.D. CENT. CODE § 32-21-01 (1976 & Supp. 1987); OHIO REV. CODE ANN. § 2125.01 (Baldwin 1987); OKLA. STAT. ANN. tit. 12, § 1053 (West 1988); OR. REV. STAT. § 30.020 (1988); 42 PA. CONS. STAT. ANN. § 8301 (Purdon 1982 & Supp. 1988); R.I. GEN. LAWS § 10-7-1 (1985); S.C. CODE ANN. § 15-51-10 (Law. Co-op. 1976); S.D. CODIFIED LAWS ANN.

Although the enactment date of Alabama's statute is uncertain, a provision authorizing personal representatives to recover damages for any "wrongful act or omission" causing death first appeared in the Alabama Code of 1852.²⁴ That original statute provided for only compensatory recovery.²⁵ Damages for the benefit of the surviving family could not exceed "three years' income of the deceased, and in no case [more than] three thousand dollars,"²⁶ which equals approximately \$80,000 today.²⁷

A companion statute authorized vicarious claims against *corporations* for "the wrongful act, omission or *culpable negligence*" of any officer or agent.²⁸ The absence of the words "or culpable negligence" in section 1938 of the Alabama Code of 1852, which, as stated above, authorized an action against persons for any "wrong-

§ 21-5-1 (1987); TENN. CODE ANN. § 20-5-106 (1980); TEX. CIV. PRAC. & REM. CODE ANN. § 71.002 (Vernon 1986); UTAH CODE ANN. § 78-11-7 (1987); VT. STAT. ANN. tit. 14, § 1491 (1974); VA. CODE ANN. § 8.01-50 (1984); WASH. REV. CODE ANN. § 4.20.010 (1988); W. VA. CODE § 55-7-5 (1981); WIS. STAT. ANN. § 895.03 (West 1983); WYO. STAT. § 1-38-101 (1988).

24. ALA. CODE § 1938 (1852). The statute provided as follows:

When the death of a person is caused by the wrongful act or omission of another, the personal representative of the former may maintain an action against the latter at any time within one year thereafter, if the former could have maintained an action against the latter, for the same act or omission, had he lived.

Id.

25. See *Black Belt Wood Co. v. Sessions*, 514 So. 2d 1257, 1260 (Ala. 1987) (*per curiam*), *on return after remand* by 514 So. 2d 1249 (Ala. 1986).

26. The statute containing the \$3,000 ceiling provided entirely as follows:

The damages recovered in such action cannot exceed three years' income of the deceased, and in no case exceed three thousand dollars. The amount recovered is for the benefit of the widow; if there be none, then for the benefit of the child or children; if there be none, then to be distributed as other personal property amongst the next kin of the deceased.

ALA. CODE § 1939 (1852). Such claims could be maintained notwithstanding the criminal conviction or acquittal of the defendant. *Id.* § 1940.

27. This \$80,000 figure is based upon a 2.45% average annual increase in the consumer price index from 1852-1987. See generally U.S. DEPT. OF COMMERCE/BUREAU OF THE CENSUS, HISTORICAL STATISTICS OF THE UNITED STATES: COLONIAL TIMES TO 1957 Series E 113-39, E 157-60 (1971); U.S. DEPT. OF COMMERCE/BUREAU OF THE CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES 450, table 738 (108th ed. 1988). For purposes of comparison, the 1987 median income of households in the United States was approximately \$25,818, applying a 3.7% increase for 1987. See generally *id.*, at 422, table 690; *id.* at 450, table 739 (disclosing annual percentage increase in the consumer price index for all items). For figures adjusting historical dollars to current dollars for 1852 through 1987, see *infra* Appendix, Table II.

28. ALA. CODE § 1941 (1852) (emphasis added). This statute stated as follows:

If such death is caused by the wrongful act, omission or *culpable negligence* of any officer or agent of any chartered company or private association of persons, such company or association are [sic] responsible for damages, and an action may be maintained against them as provided in the preceding sections.

ful act or omission," suggests that a level of conduct *more* blameworthy than one predicated on negligence was required for an award of damages under the act.²⁹ At least under the 1852 Alabama Code, there was an undeniable distinction between persons and corporations, with only the latter subject to damages for negligent acts.

The Alabama Legislature repealed the damages ceiling of section 1938 in 1860,³⁰ during the same tumultuous week in which it authorized and armed a militia to "defend" the state in obvious contemplation of secession.³¹ The new act, headed by the title "To prevent Homicides," provided in pertinent part as follows: "[W]hen the death of a person is unlawfully caused by another, the personal representative of the deceased may maintain an action against the latter at any time within two years thereafter, and may recover *such sum as the jury deem just. . .*"³² The Alabama Supreme Court has recently acknowledged that there was "no express mention" whether the damages were compensatory or punitive and, "arguably, the statute could be construed to mean that the legislature merely removed the limitation on damages contained in the original act."³³ However, as will be shown, the title "To prevent Homicides" was relied upon by the early court in arriving at the punitive-only construction.

Due to a code commissioner's oversight,³⁴ the 1860 revised version of the wrongful death act was omitted from the 1867 Alabama Code.³⁵ One may speculate that the intervening war left many things in disarray, including legislative records. Regardless of the

Id. (emphasis added). The words "or culpable negligence" apparently meant corporate liability could be predicated upon ordinary negligence. See BLACK'S LAW DICTIONARY 931 (5th ed. 1979) (defining "culpable negligence").

29. See *supra* note 24 and accompanying text. See generally *Randle v. Birmingham Ry., Light & Power Co.*, 169 Ala. 314, 323-26, 53 So. 918, 921-22 (1910) (discussing the distinction between "negligence" and "wrongful act or omission").

30. Act of February 21, 1860, No. 46, 1859 Ala. Acts 42.

31. Act of February 24, 1860, No. 45, 1859 Ala. Acts 36.

32. Act of February 24, 1860, No. 46, § 2, 1859 Ala. Acts 42 (emphasis added). The new act also provided, for the first time, that such cause of action would survive against the estate of the person unlawfully causing the death. *Id.* § 3.

33. *Black Belt Wood Co. v. Sessions*, 514 So. 2d 1257, 1260 (Ala. 1987) (per curiam), *on return after remand by* 514 So. 2d 1249 (Ala. 1986).

34. See *Central of Ga. Ry. v. Ellison*, 199 Ala. 571, 579-80, 75 So. 159, 163 (1916); *Savannah & M.R.R. v. Shearer*, 58 Ala. 672, 679 (1877).

35. See ALA. CODE §§ 2297-2298 (1867).

reason, the 1867 Alabama Code contained the original version of the wrongful death statute with the \$3,000 compensatory damages ceiling.³⁶ Because the 1867 Alabama Code had been legislatively approved, it was necessary in 1872 to re-enact the revised 1860 version.³⁷ There were, however, some further changes so that the statute read as follows:

[W]hen the death of a person is caused by the *wrongful act or omission* of another, the personal representative of the former may maintain an action against the latter . . . if the former could have maintained an action against the latter for the same act or omission, had it failed to produce death, and may recover *such sum as the jury deem just*. . . .³⁸

This act, as codified in 1876,³⁹ again did not authorize recovery against *persons* for ordinary negligence. The companion statute, however, still provided that vicarious corporate liability could be predicated upon the “wrongful act, omission or *culpable negligence*” of a company employee.⁴⁰

In the 1886 Alabama Code, a strange event occurred. Without any legislative amendment so providing, the code commissioners combined the two statutes relating to personal and corporate liability under language that, for the first time, authorized plaintiffs to recover wrongful death damages for any “wrongful act, omission, or negligence” against persons as well as corporations.⁴¹ A

36. *Id.* § 2298. The codification of the wrongful death statute in 1867 was not taken verbatim from the Alabama Code of 1852. New language was added at the end of the statute to provide that the personal representative could bring such action as the decedent could have maintained for such injury “had it failed to produce death.” *Id.* § 2297.

37. *Shearer*, 58 Ala. at 679.

38. Act of February 5, 1872, No. 62, § 1, 1871 Ala. Acts 83 (emphasis added).

39. See ALA. CODE § 2641 (1876).

40. *Id.* § 2643 (emphasis added). For a discussion of “culpable negligence” and the distinction between corporations and persons, see *supra* notes 28-29 and accompanying text.

41. ALA. CODE § 2589 (1886). The codification of the wrongful death statute in 1886, combining the causes of action against persons and corporations, provides, in its entirety, as follows:

A personal representative may maintain an action, and recover such damages as the jury may assess, for the wrongful act, omission, or negligence of any person or persons, or corporation, his or their servants or agents, whereby the death of his testator or intestate was caused, if the testator or intestate could have maintained an action for such wrongful act, omission, or negligence, if it had not caused death; such action shall not abate by the death of the defendant, but may be revived against his personal representative; and may be maintained, though there has not been prosecution, or conviction, or acquittal of the defendant for such wrongful act, or omission, or

distinction previously had existed that required plaintiffs to prove more than ordinary negligence against persons vis-à-vis corporations.⁴² This change is significant because common law did not allow punitive damages for simple negligence,⁴³ a concept that is considered distinct from "wrongful act or omission."⁴⁴ Only the legislature could authorize such a rule in derogation of the common law.⁴⁵ In this instance, however, such recovery against *persons* was first authorized by, not the legislature, but apparently a code scrivener.⁴⁶ In any event, a joint committee of both houses ap-

negligence; and the damages recovered are not subject to the payment of the debts or liabilities of the testator or intestate, but must be distributed according to the statute of distributions. Such action must be brought within two years from and after the death of the testator or intestate.

Id.

42. See *supra* note 28 and accompanying text. Historically relevant is the fact that, on February 12, 1885, the Alabama Legislature passed an employer's liability act creating liability for death or injury caused by, among other things, a defective workplace and negligent co-employees. Act of February 12, 1885, No. 51, 1884 Ala. Acts 115 (codified at ALA. CODE § 2590 (1886)). Prior to that enactment, and perhaps for the same purpose of promoting a safe workplace, corporations and business associations, but not individuals, had been held liable for any negligence causing death, including that of their officers, agents and employees. See *Louisville & N.R.R. v. Phillips*, 202 Ala. 502, 80 So. 790 (1918); *Hull v. Wimberly & Thomas Hardware Co.*, 178 Ala. 538, 59 So. 568 (1912); *Williams v. South & N. Ala. R.R.*, 91 Ala. 635, 9 So. 77 (1891); *Louisville & N.R.R. v. Orr*, 91 Ala. 548, 8 So. 360 (1890).

43. See, e.g., *Alabama Power Co. v. Dunlap*, 240 Ala. 568, 200 So. 617 (1941); *Bradley v. Walker*, 207 Ala. 701, 93 So. 634 (1922).

44. See *Randle v. Birmingham Ry., Light & Power Co.*, 169 Ala. 314, 324, 53 So. 918, 921 (1910).

45. See ALA. CODE § 1-3-1 (1975):

The common law of England, so far as it is not inconsistent with the Constitution, laws and institutions of this state, shall, together with such institutions and laws, be the rule of decisions, and shall continue in force, *except as from time to time it may be altered or repealed by the legislature.*

Id. (emphasis added); see also *Swartz v. United States Steel Corp.*, 293 Ala. 439, 453, 304 So. 2d 881, 894 (1974) (Merrill, J., dissenting).

46. See *Randle*, 169 Ala. at 323, 53 So. at 921. A reasonable explanation for the combined "personal" and "corporate" wrongful death statute may be inferred on the basis of *Smith v. Louisville & Nashville R.R.*, 75 Ala. 449 (1883). In that case, the supreme court voided a statutory remedy for wrongful death of a minor because it singled out only corporate defendants for liability. The court deemed such a remedy a violation of the equal protection clause under the fourteenth amendment, a provision that the court observed had recently been passed. *Smith*, 75 Ala. at 451. The 1886 code commission, surely aware of that recent decision, possibly sought to eliminate further distinctions between corporations and individuals in the wrongful death statutes by combining the remedies to make "negligence" a ground for recovery against both.

proved the code, and the full legislature adopted it on February 28, 1887.⁴⁷

If there existed any uncertainty regarding whether the 1887 Alabama Legislature purposely authorized punishment of persons for negligence, the 1911 legislature resolved it. On April 18, 1911, the statute was amended, rendering the statute in substantially the same form as it exists today, including the negligence provision.⁴⁸ One may question, however, whether the language simply was brought forward from the 1886 Alabama Code without discussion or debate of the "negligence" provision. Nevertheless, the language of the present statute reads, in its entirety, as follows:

Wrongful act, omission or negligence causing death.

(a) A personal representative may commence an action and recover such damages as the jury may assess in a court of competent jurisdiction within the state of Alabama, and not elsewhere, for the wrongful act, omission or negligence of any person, persons or corporation, his or their servants or agents, whereby the death of his testator or intestate was caused, provided the testator or intestate could have commenced an action for such wrongful act, omission or negligence if it had not caused death.

(b) Such action shall not abate by the death of the defendant, but may be revived against his personal representative and may be maintained though there has not been prosecution, conviction or acquittal of the defendant for the wrongful act, omission or negligence.

(c) The damages recovered are not subject to the payment of the debts or liabilities of the testator or intestate, but must be distributed according to the statute of distributions.

(d) Such action must be commenced within two years from and after the death of the testator or intestate.⁴⁹

A similar statute authorizes parents to sue for the wrongful death of a child.⁵⁰ Still another statute provides that a personal representative may recover for damages to a decedent's property resulting

47. See ALA. CODE Acts Adopting and Providing for Publication of Code, at 1 (1886).

48. See Act of April 18, 1911, No. 455, 1911 Ala. Acts 484-85.

49. ALA. CODE § 6-5-410 (1975).

50. See *id.* § 6-5-391. For several years after this wrongful death of minors statute had been enacted, there was much confusion on the court over whether this statute authorized compensatory damages or punitive damages, with some cases saying that only compensatory damages could be recovered. It later was construed similarly to the main wrongful death act to allow punitive damages only. See *Alabama Power Co. v. Stogner*, 208 Ala. 666, 672, 95 So. 151, 157 (1922).

from the death-causing event.⁵¹ The relevant language in these statutes is the same as that quoted above: the measure of recovery is "such damages as the jury may assess."⁵² These provisions have not, however, been construed uniformly by members of the Alabama Supreme Court.⁵³

III. CHALLENGES TO ALABAMA'S WRONGFUL DEATH ACT

A. Punitive Damages Construction of the Act

1. *Origins of the construction.*—Alabama now is the only American jurisdiction with a punitive-only wrongful death statute after Massachusetts abandoned that approach in 1974 in favor of a system of compensatory damages.⁵⁴ The Alabama approach has its origin in the first judicial interpretation of the wrongful death act in 1877. In *Savannah & Memphis R.R. v. Shearer*,⁵⁵ the trial court had refused to give a jury charge on compensatory damages for the death of a railroad worker. The supreme court, through Justice Stone, affirmed on the ground that damages under the act "are punitive," notwithstanding that they are paid to the decedent's survivors.⁵⁶ The case initially was brought under the "corporate" wrongful death act, but the court construed the word "persons" in the 1872 version of the wrongful death act as applying equally to corporations.⁵⁷ Seizing upon the title of the 1872 statute, "To pre-

51. ALA. CODE § 6-5-411 (1975).

52. *Id.* §§ 6-5-391, -410, -411. The phrase "such damages as the jury may assess" is also contained in the Alabama Code section that creates a right of action against one who furnishes liquor to minors. *Id.* § 6-5-70.

53. *See, e.g.,* Tatum v. Schering Corp., 523 So. 2d 1042, 1049-52 (Ala. 1988) (Houston, J., dissenting) (dissecting language of ALA. CODE § 6-5-410 and comparing it to similar language of ALA. CODE § 6-5-70, which has been interpreted to allow compensatory damages).

54. On January 1, 1974, Massachusetts repealed its punitive-only statute. After years of study, the legislature adopted a statute that allows recovery of compensatory damages on the basis of the pecuniary loss to the deceased's dependents. MASS. GEN. LAWS ANN. ch. 229, §§ 1-11 (West 1985); *see* Zabin & Connolly, *The New Wrongful Death Act in Massachusetts Steps into the Twentieth Century*, 58 MASS. L.Q. 345 (1973). The statute further authorizes the imposition of punitive damages "in an amount of not less than five thousand dollars" where death is caused by malicious, willful, wanton or reckless conduct or gross negligence. MASS. GEN. LAWS ANN. ch. 229, § 2 (West 1985).

55. 58 Ala. 672 (1877).

56. *Shearer*, 58 Ala. at 680 (emphasis added); *see also* cases cited *supra* note 2.

57. Since the word "person" included corporations, the court held that the plaintiff's action against the railroad could be brought under either § 2641 or § 2643 of the 1886 Alabama Code. *Shearer*, 58 Ala. at 679.

vent Homicides," Justice Stone wrote on behalf of the court: "Prevention of homicide is the purpose of the statute, and this it proposes to accomplish by such pecuniary mulct as the jury 'deem just.'"⁵⁸

Justice Stone further explained the wrongful death act later that same year in *South & North Alabama R.R. v. Sullivan*.⁵⁹ He acknowledged that damages in wrongful death actions "*in effect*, are compensatory" because they are paid to the estate.⁶⁰ He insisted, however, that such an effect did not change the statute's punitive function or character: "[The statute] is punitive in its purposes. Punitive of the person or corporation by which the wrong is done, to stimulate diligence and to check violence, in order thereby to give greater security to human life; 'to prevent homicides.'"⁶¹ In a later case striking down a nearly identical statute on equal protection grounds, Justice Stone observed that "the statute is highly penal in its terms, and must be construed as a penal statute."⁶²

58. *Id.* at 680. Mental anguish and lost earnings, Justice Stone wrote, "do not constitute the measure of recovery." *Id.* "Mulct" means "fine or similar penalty." WEBSTER'S NEW WORLD DICTIONARY 934 (2d college ed. 1980).

By seizing upon the title, "To prevent Homicides," to construe the meaning of the wrongful death act as punitive only, Justice Stone appears to have violated rules of construction regarding the effect of legislative titles. As early as 1839, the court held that the title of an act should only be considered "to explain what is doubtful, and it cannot control what is contained in the body of the act." *Bartlett v. Morris*, 9 Port. 266, 270 (Ala. 1839). In *Bartlett*, there was no suggestion that the natural meaning of the words used in the body of the act created any doubt concerning the measure of recovery. *Bartlett*, 9 Port. 266; see also *Jones v. Stokes*, 179 Ala. 579, 60 So. 280 (1912) (title of an act should only be considered when statute's meaning is doubtful). The title therefore should not have been used to explain the general reference to "such damages as the jury may assess." ALA. CODE § 2641 (1872).

59. 59 Ala. 272 (1877).

60. *Sullivan*, 59 Ala. at 279 (emphasis added).

61. *Id.* at 278-79.

62. See *Smith v. Louisville & N.R.R.*, 75 Ala. 449, 450 (1883). This case involved the early statute creating a cause of action against corporations for the wrongful death of minors, ALA. CODE § 2899 (1876). It contained language identical to the other wrongful death statutes, prohibiting any "wrongful act or omission" causing death, upon penalty of "such damages as the jury may assess." *Id.* The court, however, declared the act unconstitutional in violation of the equal protection clause of the fourteenth amendment because it singled out corporations. See *Smith*, 75 Ala. at 452. The statute later was re-enacted without limitation to corporations and is now codified at ALA. CODE § 6-5-391 (1975). Although the concept of "strict scrutiny" had not been articulated at the time of the *Smith* decision, Justice Stone seems to have applied a similar standard of review due to the "penal" character of the statute.

The noncompensatory application of the wrongful death act was first seriously questioned in 1892. In *Richmond & Danville R.R. v. Freeman*,⁶³ Justice McClellan, writing for the supreme court, expressed the view that "a too far reaching influence was accorded to the title of the act."⁶⁴ He stated that if the issue were one of first impression, he would be "strongly inclined" to hold that the legislature intended to create a remedy for both compensatory and punitive damages under "well established common-law principles."⁶⁵ Such a rule would provide far more flexibility, he reasoned, and "would be more in harmony with general legal theories and precedents."⁶⁶ Because the act had been re-enacted twice since the *Shearer* and *Sullivan* decisions in 1877, however, the court held "it is now to be considered as if the terms and provisions, which have been evolved out of it and declared in concrete form by judicial interpretation, were expressly embodied in its letter."⁶⁷ The court since has followed that reasoning in refusing to reconstrue the language of the act.⁶⁸

Through Justice Simpson's dicta, the early punitive-only interpretation was criticized again in *Hull v. Wimberly & Thomas Hardware Co.*⁶⁹

In the opinion of this writer the mistake was in the first decision under the Homicide Act, for it is evident that the only meaning of the expression, that such damages should be recovered "as the jury may assess," was that the former statute, which limited the recovery to \$3,000, was repealed, and the jury should assess to any amount recoverable under the general principles of the law.⁷⁰

The supreme court in *Hull* resolutely determined that its consistent interpretation of the Employers Liability Act, which allowed recovery of compensatory damages, was unaffected by the "mistake" that it had made in reading the homicide act.⁷¹ Recently, the supreme court echoed Justice Simpson's thoughts

63. 97 Ala. 289, 11 So. 800 (1892).

64. *Freeman*, 97 Ala. at 296, 11 So. at 802.

65. *Id.*

66. *Id.*

67. *Id.* (commas omitted in Southern Reporter).

68. See, e.g., *Merrell v. Alabama Power Co.*, 382 So. 2d 494, 497 (Ala. 1980).

69. 178 Ala. 538, 59 So. 568 (1912).

70. *Hull*, 178 Ala. at 545, 59 So. at 570.

71. *Id.*

regarding the construction of the wrongful death statute: "There is no express mention made whether the damages were compensatory or punitive and, arguably, the statute could be construed to mean that the legislature merely removed the limitation on damages contained in the original [1852] act."⁷² The court nonetheless has refused to depart from this original construction.⁷³

2. *Constitutionality of the punitive damages construction.*—Current case law and commentary rarely have discussed whether the wrongful death statute violates federal constitutional principles by confining plaintiffs to punitive damages alone. Due process and equal protection arguments under the fourteenth amendment were asserted by the plaintiff on application for rehearing in *Merrell v. Alabama Power Co.*⁷⁴ However, the court refused to consider these arguments, since they were not raised at trial.⁷⁵ The subject was indirectly addressed by the United States Supreme Court in *Louis Pizitz Dry Goods Co. v. Yeldell*,⁷⁶ but without equal protection analysis of the punitive-only limitation.

Under equal protection rationality review, if the statute as construed by the Alabama Supreme Court⁷⁷ is rationally related to a legitimate state objective, then the damages limitation is valid despite the resulting classification between the rights of wrongful death plaintiffs and other tort plaintiffs.⁷⁸ A Ninth Circuit case is illustrative of the equal protection analysis.

In the case of *In re Paris Air Crash*,⁷⁹ Justice Anthony Kennedy, then on the Ninth Circuit Court of Appeals, analyzed a wrongful death statute that permitted compensatory, but *not* punitive, damages. The issue was whether that rule was "consistent

72. *Black Belt Wood Co. v. Sessions*, 514 So. 2d 1257, 1260 (Ala. 1987) (per curiam), on return after remand by 514 So. 2d 1249 (Ala. 1986).

73. *Black Belt Wood*, 514 So. 2d at 1263.

74. 382 So. 2d 497 (Ala.), denying reh'g on 382 So. 2d 494 (Ala. 1980).

75. *Merrell*, 382 So. 2d at 497-98.

76. 274 U.S. 112 (1927).

77. Where a state statute is at issue, federal courts adopt the construction given by that state's highest court. *Winters v. New York*, 333 U.S. 507 (1948).

78. See, e.g., *Levy v. Louisiana*, 391 U.S. 68 (1968) (Louisiana wrongful death statute); *In re Paris Air Crash*, 622 F.2d 1315, 1318 (9th Cir.), cert. denied, 449 U.S. 976 (1980) (California wrongful death statute); *Huff v. White Motor Corp.*, 609 F.2d 286, 298 (7th Cir. 1979) (Indiana wrongful death statute); see also *Duke Power Co. v. Carolina Envtl. Study Group*, 438 U.S. 59, 93-94 (1978) (case involving limitations on the type or amount of compensatory damages recoverable).

79. 622 F.2d 1315 (9th Cir.), cert. denied, 449 U.S. 976 (1980).

with the fourteenth amendment equal protection clause.⁸⁰ The district court had held that the damages restriction denied the plaintiffs equal protection.⁸¹ The Ninth Circuit reversed, based in part on two United States Supreme Court cases.⁸²

The appellate court held that the rational review analysis employed by the trial court was appropriate because the statute did not deprive the plaintiff of a fundamental personal right, the type of right accorded the greatest protection by the fifth amendment due process and fourteenth amendment equal protection clauses. Strict scrutiny was unwarranted absent involvement of a fundamental right, and the appellate court adhered to the trial court's standard because of its concern that, otherwise, "all civil remedies would be subject to the strictest standard of review."⁸³ The court then concluded that the statute bore a rational relationship to the legitimate state objective of avoiding excessive liability for wrongful death defendants.⁸⁴

The plaintiffs in *Paris Air Crash* sought, as a matter of fundamental constitutional right, "to act as private attorneys general to effect the deterrence and retribution functions" of the wrongful death statute.⁸⁵ Rejecting this argument, Justice Kennedy wrote for the court that such punitive and deterrent functions are matters of public interest and legislative discretion, rather than personal right.⁸⁶ The compensatory-only California statute, therefore, was not irrational in its terms or application.⁸⁷ Courts deciding similar equal protection challenges to compensatory-only wrongful death statutes have reached the same result.⁸⁸

80. *Paris Air Crash*, 622 F.2d at 1316.

81. *Id.* at 1317; see *In re Paris Air Crash*, 427 F. Supp. 701 (C.D. Cal. 1977), *rev'd*, 622 F.2d 1315 (9th Cir.), *cert. denied*, 449 U.S. 976 (1980); see also Recent Decision, 8 CUMB. L. REV. 567 (1977) (reviewing a federal district court's ruling which was later reversed on appeal).

82. *Paris Air Crash*, 622 F.2d at 1318-20 (citing *Duke Power Co. v. Carolina Env'tl. Study Group*, 438 U.S. 59 (1978); *Mobil Oil Corp. v. Higginbotham*, 436 U.S. 618 (1978)).

83. *Id.* at 1319.

84. *Id.* at 1319-20.

85. *Id.* at 1319. The same state's agent concept underlies the Alabama wrongful death statute. See *Maryland Casualty Co. v. Tiffin*, 537 So. 2d 469, 471 (Ala. 1988).

86. *Paris Air Crash*, 622 F.2d at 1319-20.

87. *Id.* at 1320.

88. See, e.g., *Huff v. White Motor Corp.*, 609 F.2d 286, 298 (7th Cir. 1979); *Cyr v. B. Offen & Co.*, 501 F.2d 1145, 1148 n.2 (1st Cir. 1974); *Johnson v. International Harvester Co.*, 487 F. Supp. 1176 (D.N.D. 1980).

Analysis of the Alabama statute presents the *Paris Air Crash* issue in reverse: whether the punitive-only construction offends due process or equal protection under the fourteenth amendment. In *Louis Pizitz Dry Goods Co. v. Yeldell*,⁸⁹ the United States Supreme Court held that the Alabama Legislature has the power to preserve human life by making homicide expensive.⁹⁰ It may effectuate that objective by imposing the "extraordinary liability" of punitive damages, even against those who are only vicariously liable.⁹¹ The Court, citing Alabama case law stating that the purpose of the statute was to prevent deaths by wrongful acts or omissions,⁹² termed this purpose "a permissible legislative object."⁹³

The next question becomes whether the act as construed and applied is "rationally related" to that objective. Returning to the early cases, the Alabama Supreme Court has construed the wrongful death act as *solely* punitive—to punish death-dealing conduct and deter others who would imitate it.⁹⁴ It has no compensatory purpose whatsoever, although payments to the estate clearly have a "fortuitous" compensatory effect, "not because of any intent of the lawmakers that it should ensue."⁹⁵ These deterrent and retributive purposes, as Justice Kennedy observed in *Paris Air Crash*, are matters of public interest, rather than personal right, over which the legislature should be given broad discretion "similar to the discretion of a prosecutor."⁹⁶ The plaintiff, moreover, has no "fundamental right" to seek punitive damages for wrongful death.⁹⁷ Wrongful death statutes therefore have not attracted "strict scrutiny" under federal equal protection analysis, which

89. 274 U.S. 112 (1927).

90. *Louis Pizitz Dry Goods*, 274 U.S. at 116.

91. *Id.*

92. *Id.* at 114 (citing *South & N. Ala. R.R. v. Sullivan*, 59 Ala. 272, 279 (1877); *Savannah & M.R.R. v. Shearer*, 58 Ala. 672, 680 (1877)).

93. *Id.* at 115.

94. See *supra* text accompanying note 56 and cases cited *supra* note 2.

95. *Richmond & D.R.R. v. Freeman*, 97 Ala. 289, 290, 11 So. 800, 801 (1892).

96. *In re Paris Air Crash*, 622 F.2d at 1320.

97. See, e.g., *Huff v. White Motor Corp.*, 609 F.2d 286, 298 (7th Cir. 1979); *Cyr v. B. Offen & Co.*, 501 F.2d 1145, 1148 n.2 (1st Cir. 1979); accord *Maryland Casualty Co. v. Tiffin*, 537 So. 2d 469, 471 (Ala. 1988) (citing *Comer v. Age Herald Publishing Co.*, 151 Ala. 613, 44 So. 673 (1907)); *Alabama Power Co. v. Goodwin*, 210 Ala. 657, 658, 99 So. 158, 159 (1923); *Dowling v. Garner*, 195 Ala. 493, 496, 70 So. 150, 152 (1915) (citing *Comer*, 151 Ala. 613, 44 So. 673); *Louisville & N.R.R. v. Street*, 164 Ala. 155, 157, 51 So. 306, 307 (1909) (citing *Comer*, 151 Ala. 613, 44 So. 673).

presumes if strict scrutiny is inapplicable that such an act is constitutionally valid.⁹⁸ Under this analysis it seems clear that Alabama's judicial limitation on punitive damages in wrongful death cases does bear a rational relationship to the act's punitive purpose, as construed and applied.⁹⁹ Hence, the fourteenth amendment equal protection clause is likely to prove an undesirable avenue for those seeking to overturn a wrongful death verdict.

3. *Barriers against judicial reinterpretation.*—As stated earlier, the Alabama Wrongful Death Act was enacted in substantially its present form in 1872.¹⁰⁰ The *Shearer* and *Sullivan* decisions authored by Justice Stone five years later placed the punitive-only construction upon it.¹⁰¹ The statute later was re-enacted by the Alabama Legislature without substantial revision.¹⁰² Short of constitutional invalidation of the punitive-only construction, the Alabama Supreme Court could perhaps *reconstrue* the statute to allow compensatory and punitive damages. This is only possible *if the court has the power* to do so. Standing in the way, however, is a steadfast common law rule of construction.

As Justice McClellan observed in *Richmond & Danville R.R. v. Freeman*,¹⁰³ wherein he criticized the punitive-only rule, common law principles of statutory construction preclude the court from reconstruing the act under these circumstances.¹⁰⁴ Justice McClellan described the status of the wrongful death statute as follows:

98. See *Huff*, 609 F.2d at 298.

99. Cf. *Pennell v. City of San Jose*, 108 S. Ct. 849, 859 (1988) (“[W]e will not overturn [a statute that does not burden a suspect class or a fundamental interest] unless the varying treatment of different groups or persons is so unrelated to the achievement of any combination of legitimate purposes that we can only conclude that the legislature’s actions were irrational.”) (quoting *Vance v. Bradley*, 440 U.S. 93, 97 (1979)).

100. See *supra* text accompanying note 38.

101. See *Savannah & M.R.R. v. Shearer*, 58 Ala. 672 (1877); *South & N. Ala. R.R. v. Sullivan*, 59 Ala. 272 (1877). For discussion of these cases, see *supra* notes 55-62 and accompanying text.

102. See *supra* text accompanying note 48.

103. 97 Ala. 289, 11 So. 800 (1892).

104. *Freeman*, 97 Ala. at 290, 11 So. at 801; accord *Bank of Mobile v. Meagher*, 33 Ala. 622 (1859). Where the legislature re-enacts a statute or uses language in a new statute that has been construed previously by the judiciary, the construction given in a prior decision becomes a part of the statute itself. *Musgrove v. United States Pipe & Foundry Co.*, 290 Ala. 156, 274 So. 2d 640 (1972).

The act of 1872 having been, without modification in any material sense, twice re-enacted since the judicial construction [that only punitive damages are recoverable under the wrongful death statute] was put upon it—in the Code 1876 and again in the Code 1886—and being with that construction a constitutional exercise of the legislative power, it is now to be considered as if the terms and provisions, which have been evolved out of it and declared in concrete form by judicial interpretation, were expressly embodied in its letter. This, we think, should close the door to the overruling of the cases which put that construction on it, and to the adoption of a different one.¹⁰⁵

According to this view, the statute must be read as stating that wrongful death recovery is limited to “such *punitive* damages as the jury may assess.”

Under that common law rule of construction, the Alabama Supreme Court apparently lacks the power to reconstrue the meaning of the wrongful death act to allow both compensatory and punitive damages. However, language in the Supreme Court’s opinion in *Black Belt Wood Co. v. Sessions*¹⁰⁶ indicates that the court believes it does have the power to reconstrue the wrongful death statute. Although the court was there considering whether it should reconstrue the wrongful death statute to allow for apportionment of damages, it did address the punitive-only construction of the statute. Ironically, the court quoted the passage from Justice McClellan’s *Freeman* opinion that appears to foreclose judicial reinterpretation of the wrongful death statute,¹⁰⁷ but it emphasized that the declaration of the terms of the statute in “concrete form” was by judicial interpretation.¹⁰⁸ Having laid this foundation for analyzing its power to reconstrue the wrongful death statute, the Alabama Supreme Court stated as follows:

The history of the wrongful death statute indicates that the legislature is aware of the interpretation placed on the statute by this Court, and it has not amended it. Even though this Court has the power to abrogate the longstanding judicial interpretation of the wrongful death statute, it should, as a matter of public policy, leave any change of that interpretation to the legislature.¹⁰⁹

105. *Freeman*, 97 Ala. at 296, 11 So. at 802.

106. 514 So. 2d 1257 (Ala. 1987) (per curiam), *on return after remand* by 514 So. 2d 1249 (Ala. 1986).

107. *See supra* text accompanying note 105.

108. *Black Belt Wood*, 514 So. 2d at 1262.

109. *Id.* at 1263 (footnotes omitted).

The apparent conflict between the principle of statutory construction discussed above¹¹⁰ and the assertion of the supreme court in *Black Belt Wood* renders debatable the issue of whether the court has the power to reconstrue the statute so as to modify the punitive-only interpretation. This controversy notwithstanding, the *Black Belt Wood* court's declaration, while asserting the court's power to alter the construction of the statute, makes it clear that the court will defer to the legislature on this matter. Thus, despite agreement in some circles that the punitive-only construction of the wrongful death statute was too narrow,¹¹¹ any revision of the punitive construction apparently must flow from legislative action.

B. Punishment for Simple Negligence

1. *Generally.*—Punishing ordinary negligence is a matter of independent constitutional concern. Unknown at common law,¹¹² punishment of simple negligence under current law is clearly aberrant in American jurisdictions.¹¹³ Yet, Alabama's punishment of

110. See *supra* note 104.

111. See, e.g., *Richmond & D.R.R. v. Freeman*, 97 Ala. 289, 296, 11 So. 800, 802 (1892).

112. The rule that simple negligence may not be punished is fundamental to American civil jurisprudence. Prosser recognized this principle:

Something more than the mere commission of a tort is *always* required for punitive damages. There must be circumstances of aggravation or outrage, such as spite or "malice," or a fraudulent or evil motive on the part of the defendant, or such a conscious and deliberate disregard of the interests of others that the conduct may be called wilful or wanton. There is general agreement that, because it lacks this element, *mere negligence is not enough*, even though it is so extreme in degree as to be characterized as "gross," a term of ill-defined content

PROSSER AND KEETON, *supra* note 21, § 2, at 9-10 (footnotes omitted) (emphasis added). Similarly, a leading writer on the constitutionality of punitive damages procedures has observed that "punitive damages cannot be awarded without a finding of fault greater than mere negligence." Wheeler, *The Constitutional Case for Reforming Punitive Damages Procedures*, 69 VA. L. REV. 269, 283 (1983).

113. See, e.g., *Alpha Zeta Chapter v. Sullivan*, 293 Ark. 576, —, 740 S.W.2d 127, 132 (1987) (wantonness or conscious indifference required for recovery of punitive damages generally); *Chrysler Corp. v. Wolmer*, 499 So. 2d 823, 824 (Fla. 1986) (punitive damages in wrongful death action recoverable only for reckless disregard and not gross negligence); *Mutual Life Ins. Co. v. Estate of Wesson*, 517 So. 2d 521, 532 (Miss. 1987) (gross negligence required for recovery of punitive damages in bad faith insurance setting); *Behrens v. Raleigh Hills Hosp., Inc.*, 675 P.2d 1179, 1184-87 (Utah 1983) (construing wrongful death act in case of first impression to allow punitive damages only for reckless or malicious conduct); *Tucker v. Marcus*, 142 Wis. 2d 425, —, 418 N.W.2d 818, 820-21 (1988) (interpreting comparative negligence law to exclude punitive damages in wrongful death and survival actions);

negligence in the wrongful death context remains. Many Alabama cases have, in fact, allowed substantial punitive damages for mere negligence,¹¹⁴ a position potentially offensive to federal eighth amendment notions of "unusual punishments" or "excessive fines,"¹¹⁵ as well as the requirements of fundamental fairness under the fourteenth amendment due process clause.

Being limited to wrongful death cases, Alabama's homicide act singles out for punishment only tortfeasors whose harmful negligence results in death. Although guilty of conduct identical to that of other tortfeasors, wrongful death defendants often are exposed to extreme punishment.¹¹⁶ Such classification could be viewed as wholly result-oriented, rather than related to the character of the tortfeasor's conduct, as punitive damages intuitively should be.¹¹⁷

As stated earlier, the notion of punishing negligence in death cases began as a statutory right of action against corporations only.¹¹⁸ There appears to be an early connection with the concept

Waugen v. Ford Motor Co., 97 Wis. 2d 260, —, 294 N.W.2d 437, 446 (1980) (punitive damages not recoverable in products liability setting based on mere negligence).

114. See, e.g., *Industrial Chem. & Fiberglass Corp. v. Chandler*, Nos. 86-381, 86-385 (Ala. Sept. 30, 1988) (WESTLAW, AL-CS Database) (\$2,500,000 punitive damages awarded in each of two related cases on basis of negligent failure to warn), *damages aff'd after remand* slip. op. at 22 (Ala. Jan. 16, 1989) (WESTLAW, AL-CS Database); *Alabama Power Co. v. Capps*, 519 So. 2d 1328 (Ala.) (\$500,000 award for negligence), *appeal dismissed*, 108 S. Ct. 1723 (1988); *Black Belt Wood Co. v. Sessions*, 514 So. 2d 1257 (Ala. 1987) (per curiam), *on return after remand* by 514 So. 2d 1249 (Ala. 1986) (\$3.5 million award for negligence).

115. *But see* *Industrial Chem. & Fiberglass Corp. v. Chandler*, slip op. at 10 ("[W]e hold that punitive damages awarded in a civil proceeding are not subject to the constitutional restrictions of the Eighth Amendment, which applies to criminal proceedings only."). For discussion of the effect of *Industrial Chem. & Fiberglass* on the eighth amendment challenge to Alabama's wrongful death statute, see *infra* notes 185-93 and accompanying text.

116. Compare cases cited *supra* note 114 with *Alabama Elec. Coop., Inc. v. Partridge*, 283 Ala. 251, 215 So. 2d 580 (1968) (punitive damages allowed in an action in which plaintiff alleged simple negligence and wantonness); *Bradley v. Walker*, 207 Ala. 701, 93 So. 634 (1922) (punitive damages not available in action based on simple negligence); *Jefferson Garage & Sales Co. v. Thompson*, 21 Ala. App. 369, 108 So. 632 (1926) (exemplary damages are not recoverable for simple negligence); *Routledge v. Schmitt*, 28 Ala. App. 167, 180 So. 127 (1938) (greater damages allowed for action based on wanton conduct than one based on negligent conduct).

117. See *Smith v. Wade*, 461 U.S. 30, 54 (1983). As the Supreme Court of Wisconsin also has stated, "Punitive damages depend on the nature of the wrongdoer's conduct." *Waugen v. Ford Motor Co.*, 294 N.W.2d 437, 446 (Wis. 1980); *accord* *Maryland Casualty Co. v. Tiffin*, 537 So. 2d 469 (Ala. 1988).

118. See *supra* note 28 and accompanying text.

of corporate responsibility for negligent injury or death of employees, which eventually led to the enactment of an employers liability act.¹¹⁹ The corporate wrongful death act, authorizing punishment for negligence, was enacted when employees had no remedy for death or injury resulting from defective and unsafe working conditions. Such remedies were enacted beginning in 1885,¹²⁰ but the negligence provision of the wrongful death act was nevertheless carried forward. It was extended to "persons" in the 1886 Alabama Code, despite the absence of any legislative amendment so authorizing.¹²¹ It then seems to have remained in the main statute by process of inertia.

2. *The implications of Smith v. Wade for punishing mere negligence.*—The Alabama Supreme Court has held that the Alabama Legislature has the power to punish negligence,¹²² and the wrongful death act's validity was upheld against early constitutional challenges.¹²³ No court, however, has analyzed fully whether punishing negligence offends due process, or whether that rule applied solely in death cases violates equal protection.¹²⁴

119. See *supra* note 42 and accompanying text.

120. *Id.*

121. See *supra* notes 46-47 and accompanying text.

122. See, e.g., *Richmond & D.R.R. v. Freeman*, 97 Ala. 289, 295, 11 So. 800, 802 (1892) ("It is as clearly within legislative competency, of course, to punish negligence as it is to punish wantonness, willfulness or intentional wrong doing.").

123. See, e.g., *United States Cast Iron Pipe & Foundry Co. v. Sullivan*, 3 F.2d 794 (5th Cir. 1925) (vicarious liability of innocent employer does not violate fourteenth amendment); *Merrell v. Alabama Power Co.*, 382 So. 2d 494, 497 (Ala. 1980); *Alabama Power Co. v. Talmadge*, 207 Ala. 86, 96, 93 So. 548, 558 (1921); *Supreme Lodge v. Gustin*, 202 Ala. 246, 247, 80 So. 84, 85 (1918); *Richmond & D.R.R. v. Freeman*, 97 Ala. 289, 295, 11 So. 800, 802 (1892) (statute does not infringe guarantees regarding arrest, arraignment, conviction and punishment in criminal cases).

124. In *Louis Pizitz Dry Goods Co. v. Yeldell*, 274 U.S. 112 (1927), appellant mounted a due process attack on the rule permitting punitive damages against an employer for the mere negligence of an employee. It further asserted various arguments that Alabama's wrongful death statute was generally defective under the fourteenth amendment. Appellant's Brief at 33-42, *Louis Pizitz Dry Goods*, 274 U.S. 112 (No. 171). The Court, however, affirmed on the limited issue of whether punishment of an employer for the negligence of an employee satisfied due process. *Louis Pizitz Dry Goods*, 274 U.S. at 115. It did not address whether punitive damages for negligence in wrongful death cases only, violates due process or equal protection guarantees, nor was that issue raised in the briefs. See Briefs of Counsel, *Louis Pizitz Dry Goods*, 274 U.S. 112 (No. 171).

A due process challenge recently was asserted in a case involving a \$500,000 wrongful death verdict based solely upon simple negligence, but the court did not reach the merits of the case. See *Alabama Power Co. v. Capps*, 519 So. 2d 1328 (Ala.), *appeal dismissed*, 108 S. Ct. 1723 (1988).

Furthermore, no court has analyzed whether the punishment of negligence is prohibited under the eighth or fourteenth amendments. It therefore seems appropriate, in light of several recent affirmances of large death verdicts,¹²⁵ to examine these questions in light of a recent Supreme Court case.

In *Smith v. Wade*,¹²⁶ the United States Supreme Court considered whether punitive damages are allowed in section 1983 suits.¹²⁷ The Court ruled, by a vote of five-to-four, that recklessness, as distinguished from specific intent, supports a punitive damages award against local government officials.¹²⁸ The majority upheld the lower court's application of a standard of "reckless or callous disregard of, or indifference to, the rights or safety of others."¹²⁹ Even though the Court did not impose the higher level of culpability of willfulness urged by the dissent,¹³⁰ clearly this is a stricter standard than simple negligence. By analogy, Alabama's punitive wrongful death awards should be upheld only if based on a level of culpability greater than simple negligence.

Three of the dissenting justices in *Smith* required an even higher standard in order to impose punitive damages in these actions. Surveying a century of state and federal tort law, Justice Rehnquist observed for the dissent that punitive damages are an extraordinary form of redress disfavored in the civil law.¹³¹ Based on this analysis, the dissent called for a standard of "at least some degree of bad faith or improper motive on the part of the defendant."¹³² Accordingly, under the dissent's approach, a higher substantive standard—one requiring specific intent—must be satisfied for application of punitive damages under section 1983. Justice Rehnquist's proposal of the higher standard was based on a comparison of punitive damages to the nineteenth century decisions imposing "'quasi-criminal' fine[s]"; furthermore, he noted that punitive damages are often subject to jury caprice.¹³³ The Court referred to its 1859 decision in *Philadelphia, Wilmington &*

125. See, e.g., cases cited *supra* note 114.

126. 461 U.S. 30 (1983).

127. 42 U.S.C. § 1983 (1982).

128. *Smith*, 461 U.S. at 56.

129. *Id.* at 33 (quoting the trial court) (emphasis added by *Smith* Court).

130. *Id.* at 56 (Rehnquist, J., dissenting).

131. *Id.* at 58 (Rehnquist, J., dissenting).

132. *Id.* at 56 (Rehnquist, J., dissenting).

133. *Id.* at 86-88 (Rehnquist, J., dissenting).

Baltimore R.R. v. Quigley,¹³⁴ which was cited by the majority as support for permitting an award of punitive damages when the defendant's culpability is below the level of actual intent.¹³⁵ Believing the broadest reading of the majority's interpretation of *Quigley* would allow punitive damages for simple negligence, Justice Rehnquist stated, "Plainly our decision in *Quigley* does not stand for this remarkable proposition."¹³⁶

C. Punishment Without Heightened Standard of Proof

1. *Generally.*—Civil punishment is a deprivation of property. The fourteenth amendment's due process clause therefore requires that it be fundamentally fair.¹³⁷ One procedural mechanism for ensuring fairness is the trial court standard of proof, which regulates the quality of evidence necessary to establish liability. It "instruct[s] the factfinder concerning the degree of confidence our society thinks he should have in the correctness of factual conclusions for a particular type of adjudication."¹³⁸ In typical tort actions, where the victim's interest in *compensation* is paramount, a standard requiring only "reasonable satisfaction"¹³⁹ adequately

134. 62 U.S. (21 How.) 202 (1859).

135. *Smith*, 461 U.S. at 41, 41-42 n.9.

136. *Id.* at 69 (Rehnquist, J., dissenting). Justice Rehnquist advocated the requirement of "wrongful intent" as a threshold predicate for punitive damages in section 1983 cases. He further argued that the majority was merely transferring the standard of punitive damages in *state* actions to *federal* actions, not recognizing the fundamental difference that exists between punitive damages awarded under section 1983 and a similar award by a state court acting under local law. *Id.* at 92. A section 1983 action involves the delicate matter of federal courts intruding "into sensitive areas of sovereignty of coordinate branches of our Nation." *Id.* Consequently, Justice Rehnquist would require a higher substantive standard in section 1983 cases than in others, but his opinion presumes that a state court standard of "reckless indifference" or something similar at least would apply.

137. See *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 429 (1982) (due process protects "civil litigants who seek recourse in the courts . . . as defendants hoping to protect their property").

138. *Addington v. Texas*, 441 U.S. 418, 423 (1979) (quoting *In re Winship*, 397 U.S. 358, 370 (1970) (Harlan, J., concurring)).

139. The burden of proof in all civil cases in Alabama traditionally has required a showing of reasonable satisfaction instead of a showing by a preponderance of the evidence. See ALA. PATTERN JURY INSTRUCTIONS COMM., ALABAMA PATTERN JURY INSTRUCTIONS—CIVIL APJI 8.00, 8.01, 8.02 (1974). However, the early cases seem to indicate these standards are synonymous.

In *Freeman v. Blount*, 172 Ala. 655, 55 So. 293 (1911), the court discussed the civil burden of proof as follows: "The presumption of innocence and of freedom from purposes and conduct immoral applies in civil as well as in criminal cases, and satisfactory evidence is

balances the interests of the plaintiff and defendant and fairly allocates the risk of error between them.¹⁴⁰ A punitive action, however, in order to satisfy procedural due process, must be analyzed in terms of the defendant's right to fair punishment.

In *Suell v. Derricott*,¹⁴¹ the Alabama Supreme Court held that wrongful death must be established "as in other civil cases . . . by proper and sufficient proof."¹⁴² The applicable standard later was described as "reasonable satisfaction."¹⁴³ Since *Suell* was decided, there apparently has been no judicial analysis of the sufficiency of the reasonable satisfaction standard in wrongful death cases. The Alabama Legislature recently enacted a "clear and convincing evidence" standard applicable to all civil punitive damages claims other than wrongful death actions,¹⁴⁴ for which an express exception was made.¹⁴⁵ Assuming the constitutional validity of that exception, the Authors will discuss the "reasonable satisfaction" standard in light of cases that apply procedural due process analysis to standards of proof.

2. *Procedural due process and the current standard of proof.*—The application of federal procedural due process analysis to state common law standards of proof in civil proceedings is il-

required to establish to the contrary. And when, in the judgment of the jury, the evidence is in equilibrio, the imputation is not established." *Id.* at 663, 55 So. at 296 (quoting *Wilcox v. Wilcox*, 46 N.Y. Sup. Ct. 32, 40 (App. Div. 1887)) (variations from original by court); see also *Mutual Life Ins. Co. v. Maddox*, 221 Ala. 292, 293, 128 So. 383, 384 (1930).

140. *Santosky v. Kramer*, 455 U.S. 745, 755 (1982) (citing *Addington*, 441 U.S. at 423).

141. 161 Ala. 259, 49 So. 895 (1909).

142. *Suell*, 161 Ala. at 267, 49 So. at 899.

143. The Alabama Pattern Jury Instruction regarding the burden of proof in civil cases provides as follows: "The burden is upon the plaintiff to reasonably satisfy you by the evidence of the truthfulness of the matters and things claimed . . . before the plaintiff would be entitled to recover." ALA. PATTERN JURY INSTRUCTIONS COMM., ALABAMA PATTERN JURY INSTRUCTIONS—CIVIL APJI 8.00 (1974).

144. Act of June 11, 1987, No. 87-185, 1987 Ala. Acts 251 (codified at ALA. CODE § 6-11-20 (Supp. 1988)). The term "clear and convincing evidence" is defined in the new statute as

[e]vidence that, when weighed against evidence in opposition, will produce in the mind of the trier of fact a firm conviction as to each essential element of the claim and a high probability as to the correctness of the conclusion. Proof by clear and convincing evidence requires a level of proof greater than a preponderance of the evidence or the substantial weight of the evidence, but less than beyond a reasonable doubt.

ALA. CODE § 6-11-20(b)(4) (Supp. 1988).

145. Act of June 11, 1987, No. 87-185, § 1(a), 1987 Ala. Acts 251, 252 (codified at ALA. CODE § 6-11-20(a) (Supp. 1988)).

illustrated in two cases in which the United States Supreme Court imposed the standard of "clear and convincing evidence."¹⁴⁶ In these two cases, the risk of factual error was deemed greater than in most civil disputes, but not as high as in criminal prosecutions. The intermediate standard was thus employed.

In *Addington v. Texas*,¹⁴⁷ the Court reviewed the burden of proof in Texas civil commitment actions. It first outlined three levels of proof traditionally used in judicial proceedings. At the lower end of the spectrum is the "preponderance of the evidence" standard that applies in "the typical civil case involving a monetary dispute between private parties"; with society having no great stake in the case, it is fair to divide the burden of proof equally between plaintiff and defendant.¹⁴⁸ At the top is the "beyond a reasonable doubt" standard where the interests of the defendant are of such magnitude that the highest standard is necessary to "exclude as nearly as possible the likelihood of an erroneous judgment."¹⁴⁹ The latter standard normally is employed in criminal cases in which personal liberty is at stake.

Between these two levels of proof is an intermediate standard commonly known as "clear and convincing evidence." The Court described its application as follows:

One typical use of the standard is in civil cases involving *allegations of fraud or some other quasi-criminal wrongdoing by the defendant*. The interests at stake in those cases are deemed to be more substantial than mere loss of money and some jurisdictions accordingly reduce the risk to the defendant of having his reputation tarnished erroneously by increasing the plaintiff's burden of proof.¹⁵⁰

The *Addington* Court did not require that Texas employ the "beyond a reasonable doubt" standard in civil commitment proceedings because such actions are "not exercised in a punitive sense."¹⁵¹ The Court did, however, mandate the intermediate standard of "clear and convincing evidence" because the individual's interest in the outcome of the case was of such gravity "that due

146. *Santosky v. Kramer*, 455 U.S. 745 (1982); *Addington v. Texas*, 441 U.S. 418 (1979).

147. 441 U.S. 418 (1979).

148. *Addington*, 441 U.S. at 423.

149. *Id.*

150. *Id.* at 424 (emphasis added).

151. *Id.* at 428.

process require[d] . . . proof more substantial than a mere preponderance of the evidence."¹⁵²

In *Santosky v. Kramer*,¹⁵³ the Court found the "fair preponderance of the evidence" standard to violate procedural due process and imposed the "clear and convincing evidence" standard in a New York case involving civil actions to terminate parental rights.¹⁵⁴ Such terminations must, of course, satisfy the requirements of procedural due process. The *Santosky* Court stated that minimal procedural due process is a matter of *federal* law, notwithstanding the fact that the state may deem its own procedures adequate.¹⁵⁵ The Court utilized the three factors articulated in *Mathews v. Eldridge*¹⁵⁶ to analyze the procedures at issue under the requirements of the fourteenth amendment due process clause.¹⁵⁷ The requisite procedural due process is based on factors enunciated in *Mathews*: (1) the private interests at stake affected by the procedures at issue; (2) the risk that existing procedures will lead to erroneous decisions; and (3) the government's interest in the existing procedures and the burden of administering the proposed procedure.¹⁵⁸ Applying these factors, the Court held that the "clear and convincing evidence" standard would effect a fair balancing of the interests of the parties and would "convey[] to the factfinder the level of subjective certainty about his factual conclusions necessary to satisfy due process."¹⁵⁹

3. *Application of Mathews factors to the current standard of proof in wrongful death cases.*—The *Mathews* elements must likewise be used to analyze whether a higher standard of proof is necessary in Alabama wrongful death actions to satisfy procedural due process.¹⁶⁰ The question is what threshold level of factual certainty should be required before a jury is allowed to impose a discretionary punitive damages award on the defendant.

152. *Id.* at 427.

153. 455 U.S. 745 (1982).

154. *Santosky*, 455 U.S. at 769.

155. *Id.* at 755.

156. 424 U.S. 319 (1976).

157. *Santosky*, 455 U.S. at 754.

158. *Lassiter v. Department of Social Services*, 452 U.S. 18, 27 (1981) (citing *Mathews*, 424 U.S. at 335).

159. *Santosky*, 455 U.S. at 769.

160. The *Mathews* analysis has been employed by the Alabama Supreme Court in *Johnson v. Alabama Agric. & Mech. Univ.*, 481 So. 2d 336, 338 (Ala. 1985).

Using the first *Mathews* factor in this context, the defendant has a substantial private property interest, both financial and personal, in the determination of liability. Regarding financial interests, the punitive damages awards imposed in some recent wrongful death cases are undeniably substantial deprivations of property interests.¹⁶¹ Defendants in wrongful death cases face exposure to virtually unlimited punitive damages for even the slightest degree of fault.¹⁶² The degree of the property interest deprivation has risen as wrongful death verdicts have increased in magnitude.¹⁶³

This increase in the deprivation of property interests raises an important question concerning procedural due process. Alabama's time-tested use of punitive damages to punish harmful negligence does not automatically insulate its interpretation against procedural due process attack today. The precise level of procedural protection required is closely linked to the facts and the setting in which the interest lies. As stated in *Mathews v. Eldridge*,¹⁶⁴ it is a "truism that "due process," unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstances."¹⁶⁵ Moreover, "'due process is flexible and calls for such procedural protections as the particular situation demands."¹⁶⁶ Essentially, the notion of due process is unlimited by any "fixed content, but requires consideration of changed circum-

161. See, e.g., *Industrial Chem. & Fiberglass Corp. v. Chandler*, Nos. 86-381, 86-385 (Ala. Sept. 30, 1988) (WESTLAW, AL-CS Database) (\$2,500,000 punitive damages awarded in each of two related cases), *on return after remand*, slip op. at 22 (Ala. Jan. 16, 1989) (WESTLAW, AL-CS Database); *Black Belt Wood Co. v. Sessions*, 514 So. 2d 1249 (Ala. 1986) (\$3,500,000 award); *General Motors Corp. v. Edwards*, 482 So. 2d 1176 (Ala. 1985) (\$2,875,000 total damages awarded); *Deaton, Inc. v. Burroughs*, 456 So. 2d 771 (Ala. 1984) (\$835,000 award).

162. See, e.g., *General Tel. Co. v. Cornish*, 291 Ala. 293, 298-99, 280 So. 2d 541, 545 (1973); *Airheart v. Green*, 267 Ala. 689, 692, 104 So. 2d 687, 690 (1958) (quoting *Liberty Nat'l Life Ins. Co. v. Weldon*, 267 Ala. 171, 190, 100 So. 2d 696, 713 (1957)) ("In arriving at the amount of damages which should be assessed, the jury should give due regard to the enormity or not of the wrong and to the necessity of preventing similar wrongs."); see also C. GAMBLE, *ALABAMA LAW OF DAMAGES* § 37-10 (2d ed. 1988) ("The jury in a wrongful death case is vested with broad discretion in its award of damages. Only if a verdict is the result of passion, prejudice, partiality, sympathy, undue influence, or some other corrupt cause or motive will a jury's verdict be reversed on appeal.").

163. See *infra* Appendix, Table I.

164. 424 U.S. 319 (1976).

165. *Mathews*, 424 U.S. at 334 (quoting *Cafeteria Workers v. McElroy*, 367 U.S. 886, 895 (1961)).

166. *Id.* (quoting *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972)).

stances.¹⁶⁷ The dramatic increase in punitive damages awards in Alabama¹⁶⁸ suggests an evolution in what are considered acceptable levels of punitive awards under the wrongful death act. The argument can be made, then, that the awarding of punitive damages under the current standard of proof now violates due process protection without necessarily asserting that the practice has done so since its inception.

Perhaps equally important from a personal standpoint, a verdict for the plaintiff in a wrongful death action results in reputational injury and social stigma to the defendant, another factor deemed important by the Court in determining the standard of proof.¹⁶⁹ Since the wrongful death act is "intended to protect human life, to prevent homicide, and to impose civil punishment on takers of human life,"¹⁷⁰ deprivation of interests extends beyond financial interests to deprivation of a socially acceptable reputation; indeed, the defendant is stigmatized by the punitive verdict. The Supreme Court has "mandated an intermediate standard of proof—'clear and convincing evidence'—when the individual interests at stake in a state proceeding are both 'particularly important' and 'more substantial than mere loss of money.'"¹⁷¹

The plaintiff's interest in a wrongful death action, by contrast, is subsumed in that of the decedent's personal representative, who acts as an agent *for the state* in carrying out the objectives of the act.¹⁷² This effectively de-emphasizes the compensatory interest of the plaintiff, with the focus being on the punishment of the defendant. Furthermore, the Alabama Supreme Court has held that the plaintiff has no fundamental right to the punitive damages: "Being of that class of damages, the plaintiff is without legal right to them, as that right attaches to actual damages suffered."¹⁷³

167. Wheeler, *The Constitutional Case for Reforming Punitive Damages Procedures*, 69 VA. L. REV. 269, 278 (1983).

168. See *infra* Appendix, Table I; cases cited *supra* note 161.

169. *Santosky*, 455 U.S. at 756.

170. *Geohagan v. General Motors Corp.*, 291 Ala. 167, 171, 279 So. 2d 436, 439 (1973).

171. *Santosky*, 455 U.S. at 756 (citing *Addington v. Texas*, 441 U.S. 418, 424 (1979)).

172. *Maryland Casualty Co. v. Tiffin*, 537 So. 2d 469 (Ala. 1988) (citing Note, *Apportionment of Punitive Damages*, 38 VA. L. REV. 71, 73 (1952)); *Geohagan*, 291 Ala. at 171, 279 So. 2d at 439; see *supra* text accompanying note 170 (describing the objectives of the act).

173. *Dowling v. Garner*, 195 Ala. 493, 496, 70 So. 150, 151-52 (1915) (quoting *Louisville & N.R.R. v. Street*, 164 Ala. 155, 157, 51 So. 306, 307 (1909)); see also *Maryland Casualty*

Thus, it can be argued that the interpretation of the wrongful death act has substantially reduced the interest of the plaintiff in the action as compared to an action in which compensatory damages are available.

Regarding the second factor enunciated in *Mathews*—the risk that existing procedures will lead to erroneous deprivation—it seems the minimal standard of proof employed in wrongful death actions is not commensurate with the potential exposure to punitive damages. In comparison to most civil cases, wrongful death trials assume the tone of a criminal prosecution. Punitive damages have, in fact, been described as “quasi-criminal” in nature—a modern-day “‘bounty’ that encourages private lawsuits.”¹⁷⁴ Risk of erroneous deprivation is also greater when the substantive standards of liability in tort actions, for example, the “reasonable person” standard, are imprecise and open to the subjective notions of the jury. In striking down a criminal statute, the Supreme Court expressed concern over the vagueness of standards used by juries:

That the terms of a penal statute . . . must be sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties, is a well-recognized requirement, consonant alike with ordinary notions of fair play and the settled rules of law. And a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law.¹⁷⁵

Furthermore, the scope of substantive post-trial review is also extremely limited because the jury's factual findings are not recorded. Although increasing the burden of proof would have no effect on the *amount* of an award, it is “one way to impress the factfinder with the importance of the decision and thereby perhaps reduce the chances [of incorrect results].”¹⁷⁶ In this way, the de-

Co., 537 So. 2d at 471 (citing *Comer v. Age Herald Publishing Co.*, 151 Ala. 613, 44 So. 673 (Ala. 1907)); *Alabama Power Co. v. Goodwin*, 210 Ala. 657, 658, 99 So. 158, 159 (1923).

174. *Smith v. Wade*, 461 U.S. 30, 58-59 (1982) (Rehnquist, J., dissenting) (citing *Electrical Workers v. Foust*, 442 U.S. 42, 48 (1979)).

175. *Connally v. General Constr. Co.*, 295 U.S. 385, 391 (1926) (citing *International Harvester Co. of Am. v. Kentucky*, 234 U.S. 216 (1914); *Collins v. Kentucky*, 234 U.S. 634 (1914)).

176. *Addington v. Texas*, 441 U.S. 418, 427 (1979); see also *Santosky v. Kramer*, 455 U.S. 745, 764-65 (1982).

defendant's interest is better balanced against the risk that an erroneous judgment, in any amount, will be entered.

The final factor under *Mathews*—the state's interest and the cost of an alternative procedure—likewise favors the higher standard of proof. No greater cost to the state would result from implementing a higher standard of proof; indeed, a "clear and convincing evidence" standard in wrongful death cases now would achieve uniformity with other tort actions in Alabama.¹⁷⁷ The state, furthermore, has an interest in consistently sanctioning accurate results in all cases. The state must implement the policy of punishing wrongdoers consistently, and the higher standard may reduce the risk of arbitrary and capricious jury verdicts.

On balance, the nature and magnitude of the risk to defendants of an incorrect result in wrongful death cases outweighs the state's concern that a guilty defendant may go unpunished under the intermediate standard of proof. Indeed, the Alabama Legislature recently mandated proof by clear and convincing evidence of conscious or deliberate oppression, fraud, wantonness or malice as a prerequisite to the awarding of punitive damages in all civil actions *except* those for wrongful death.¹⁷⁸ The legislature thus recognized that exposure to punitive damages necessitates "a high probability as to the correctness of the conclusion."¹⁷⁹ Evaluation under *Mathews* therefore supports the assertion that the current standard of proof violates procedural due process and that a higher standard of proof for punitive-only wrongful death cases in Alabama is required.

4. *Penal nature of punitive damages justifies heightened standards.*—Returning to *Addington v. Texas*,¹⁸⁰ actions for wrongful death in Alabama are less like typical monetary disputes and more like "civil cases involving allegations of fraud or some other quasi-criminal wrongdoing," which require a more stringent standard.¹⁸¹ In fact, as mentioned earlier, Justice Rehnquist, dissenting in a case, defined punitive damages as "quasi-criminal."¹⁸²

177. See *supra* notes 144-45 and accompanying text.

178. ALA. CODE § 6-11-20(a) (Supp. 1988).

179. *Id.* § 6-11-20(b)(4) (defining "clear and convincing evidence").

180. 441 U.S. 418 (1979).

181. *Addington*, 441 U.S. at 424.

182. *Smith v. Wade*, 461 U.S. 30, 59 (1982) (Rehnquist, J., dissenting); see *supra* text accompanying note 174.

Their quasi-criminal nature is also well illustrated by the applicability of the traditional criminal defenses of insanity¹⁸³ and self-defense in Alabama wrongful death actions.¹⁸⁴

In the past, the Alabama Supreme Court more often than not has characterized wrongful death actions as penal.¹⁸⁵ It has even termed them "highly penal."¹⁸⁶ However, in the recent case *Industrial Chemical & Fiberglass Corp. v. Chandler*,¹⁸⁷ the Alabama Supreme Court described the wrongful death act as having been "historically held to be nonpenal in effect."¹⁸⁸ In this case, the supreme court determined that the eighth amendment of the federal constitution is inapplicable in the context of civil cases on the basis

183. See *Parke v. Dennard*, 218 Ala. 209, 213, 118 So. 396, 399 (1928).

184. See *Suell v. Derricott*, 161 Ala. 259, 267, 49 So. 895, 899 (1909).

185. See, e.g., *Estes Health Care Centers, Inc. v. Bannerman*, 411 So. 2d 109, 113 (Ala. 1982); *Dees v. Gilley*, 339 So. 2d 1000, 1003 (Ala. 1976); *Boise Cascade Corp. v. Lee*, 291 Ala. 666, 671, 286 So. 2d 836, 840 (1973); *General Tel. Co. v. Cornish*, 291 Ala. 293, 298, 280 So. 2d 541, 545 (1973); *Geohagan v. General Motors Corp.*, 291 Ala. 167, 177, 279 So. 2d 436, 445 (1973) (Jones, J., dissenting); *Dowling v. Garner*, 195 Ala. 493, 497, 70 So. 150, 151 (1915); *Kennedy v. Davis*, 171 Ala. 609, 613, 55 So. 104, 105 (1911); see also PROSSER AND KEETON, *supra* note 21, § 127, at 946 ("statute, now in force . . . in Alabama, is interpreted to be penal in character").

Wrongful death actions have also been described as "nonpenal." See, e.g., *Esdale v. Baxter*, 219 Ala. 256, 257, 122 So. 12, 13 (1929); *Watson v. Adams*, 187 Ala. 490, 506, 65 So. 528, 532 (1914); *Southern Ry. v. Bush*, 122 Ala. 470, 489, 26 So. 168, 174 (1899). Without analysis, the "not penal" language in *Bush* was quoted by the Supreme Court in *Louis Pizitz Dry Goods Co. v. Yeldell*, 274 U.S. 112, 114 (1927), in the portion of the opinion summarizing the state court's construction of the statute. The *Bush* language was limited in *Howard v. Davis*, 209 Ala. 113, 95 So. 354 (1923), wherein it was explained as simply meaning "that the homicide statute was not such a penal one, strictly speaking, as to excuse answering [civil] interrogatories" under the fifth amendment right against self-incrimination of a criminally accused. *Howard*, 209 Ala. at 114, 95 So. at 354.

186. *Smith v. Louisville & N.R.R.*, 75 Ala. 449, 450 (1883) (construing identical language in statute punishing wrongful death of minors). *But see Loucks v. Standard Oil Co.*, 224 N.Y. 99, 120 N.E. 198 (1918) (construing the Massachusetts wrongful death statute as nonpenal in light of the use of "penal" as a term of art in the realm of private international law; "penal" in that context denotes a statute under which recovery is awarded to the state or its officer). In *Loucks*, Justice Cardozo placed a somewhat different construction on a similar Massachusetts statute as having "reparation to those aggrieved" as its purpose. *Loucks*, 224 N.Y. at 103, 120 N.E. at 199. The court therefore held the statute not "penal in the international sense," such as would preclude enforcement in another jurisdiction. *Id.* Justice Cardozo observed that the personal representative in a Massachusetts wrongful death action was not merely the "champion of the peace and order and public justice of the commonwealth." *Id.* at 106, 120 N.E. at 200. Instead, the wrongful death action was deemed a "private right" to vindicate the outraged family of the decedent. *Id.*

187. Nos. 86-381, 86-385 (Ala. Sept. 30, 1988) (WESTLAW, AL-CS Database), *on re- turn after remand*, slip op. at 22 (Ala. Jan. 16, 1989) (WESTLAW, AL-CS Database).

188. *Industrial Chem. & Fiberglass*, slip op. at 5.

of state law analysis.¹⁸⁹ Employing the historical analysis of the eighth amendment in the United States Supreme Court case of *Ingraham v. Wright*,¹⁹⁰ the court in *Industrial Chemical & Fiberglass* held that the "cruel and unusual punishment" clause of the eighth amendment is limited to criminal actions.¹⁹¹ The Alabama Supreme Court likewise held the excessive fines clause of the eighth amendment inapplicable in the civil context.¹⁹² Therefore, under the current Alabama construction, punitive damages under the wrongful death act remain unlimited by the federal constitution's eighth amendment. Should the United States Supreme Court determine that the eighth amendment is applicable in the civil context,¹⁹³ the Alabama wrongful death act will surely come under heightened constitutional scrutiny.

Nevertheless, the appropriate standard of proof should not rest on a superficial distinction between the penal or nonpenal nature of the wrongful death act, as apparently was the case in *Industrial Chemical & Fiberglass*. Analysis should center on application of constitutional standards under the due process clause in light of modern circumstances.¹⁹⁴ As Justice Black observed in *Giaccio v. Pennsylvania*,¹⁹⁵ "[b]oth liberty and property are specifically protected by the Fourteenth Amendment against any state deprivation which does not meet the standards of due process, and this protection is not to be avoided by the simple label a State

189. *Id.* at 5.

190. 430 U.S. 651 (1977).

191. *Industrial Chem. & Fiberglass*, slip op. at 6.

192. *Id.* at 4-6 (discussing *Electro Servs., Inc. v. Exide Corp.*, 847 F.2d 1524 (11th Cir. 1988)).

193. The United States Supreme Court has recently granted writ of certiorari to address the issue of the applicability of the eighth amendment to civil cases. *Kelco Disposal, Inc. v. Browning-Ferris Indus., Inc.*, 845 F.2d 404 (2d Cir.), *cert. granted in part*, 109 S. Ct. 527 (U.S. Dec. 5, 1988) (No. 88-556).

194. The court in *Industrial Chemical & Fiberglass* arguably erred by applying state law analysis of whether the statute is "penal" or sufficiently quasi-criminal to afford defendants additional federally protected rights under the eighth amendment. Determining what process satisfies the minimal requirements of procedural due process is a matter of federal law. See *Santosky v. Kramer*, 455 U.S. 745, 755 (1982) (quoting *Vitek v. Jones*, 445 U.S. 480, 491 (1980)). State labels such as "penal" or "nonpenal" do not control, and procedures deemed adequate by the state may not satisfy federal due process. *Id.*; cf. *In re Winship*, 397 U.S. 358, 365-66 (1970) (in the context of juvenile proceedings, "civil labels and good intentions do not themselves obviate the need for criminal due process safeguards").

195. 382 U.S. 399 (1966).

chooses to fasten upon its conduct or its statute."¹⁹⁶ "[D]ue process is flexible and calls for such procedural protections as the particular situation demands."¹⁹⁷ In this instance, regardless of labels, a higher standard of proof is required.

Superimposed on this analysis is the legislature's enactment of a "clear and convincing evidence" standard for all punitive damages claims *except* wrongful death.¹⁹⁸ The exception may stem from the fact that negligence, having always enjoyed the lesser standard, is the requisite level of culpability for wrongful death liability. It has the practical effect, however, of emphasizing the compensatory interest of the decedent's family contrary to the punitive-only construction of the wrongful death statute. The resulting classification arguably renders the "exception" clause in the tort reform legislation invalid under the fourteenth amendment, independent of the above arguments.¹⁹⁹

D. Punishment Without Apportionment Among Tortfeasors

In Alabama wrongful death actions against joint tortfeasors, punitive damages are not divided according to the relative culpability of each defendant.²⁰⁰ Consequently, one defendant may be forced to pay an entire punitive damages verdict. The Alabama Supreme Court recently questioned the soundness of this rule in *Black Belt Wood Co. v. Sessions*,²⁰¹ but the court declined to devi-

196. *Giaccio*, 382 U.S. at 402 (state statute assessing court costs was "penal"); see also *Addington v. Texas*, 441 U.S. 418, 427 (1979) (state's "civil labels and good intentions" do not obviate due process requirements) (citing *Winship*, 397 U.S. at 365-66).

197. *Mathews*, 424 U.S. at 334 (quoting *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972)) (brackets supplied by *Mathews* Court).

198. ALA. CODE § 6-11-20(a) (Supp. 1988).

199. The classification thus created employs a *lower* standard of proof in strictly punitive wrongful death actions than in combined punitive and compensatory actions and is based upon circumstances irrelevant to the defendant's conduct. This argument was raised in a recent appeal to the United States Supreme Court, but the Court denied jurisdiction. See Jurisdictional Statement, *Alabama Power Co. v. Capps*, 108 S. Ct. 1723 (No. 87-1597), *dismissing appeal from* 519 So. 2d 1328 (Ala. 1988).

200. See *Tatum v. Schering Corp.*, 523 So. 2d 1042, 1045 (Ala. 1988); *Black Belt Wood Co. v. Sessions*, 514 So. 2d 1257, 1260 (Ala. 1987) (per curiam), *on return after remand by* 514 So. 2d 1249 (Ala. 1986); *Bell v. Riley Bus Lines*, 257 Ala. 120, 123-24, 57 So. 2d 612, 615 (1952).

201. 514 So. 2d 1257 (Ala. 1987) (per curiam), *on return after remand by* 514 So. 2d 1249 (Ala. 1986).

ate from the nonapportionment rule.²⁰² The court perpetuated the rule by employing a principle of statutory construction to justify leaving the common law nonapportionment rule intact.²⁰³

The genesis of the nonapportionment rule in wrongful death actions is the case of *Bell v. Riley Bus Lines*.²⁰⁴ Instead of returning a joint verdict against the two defendants, the jury assessed damages in separate amounts against the defendants.²⁰⁵ On appeal, the supreme court stated that Alabama's wrongful death statute does not "authorize" apportionment of damages among joint tortfeasors, "[n]or does it recognize degrees of culpability."²⁰⁶ Referring specifically to four cases, the court stated as follows: "The well settled trial practice in our courts has been to require a single verdict, fixing a lump sum regardless of the culpability of tortfeasors. In the absence of express legislative authority we are not willing to depart from this well settled trial practice."²⁰⁷ Of the cases relied upon by the court, however, not one involved punitive damages. Moreover, no analysis was made of the distinctions in due process protection between compensatory and punitive damages.

In compensatory actions, the purpose of the law is to secure full compensation for the injured party.²⁰⁸ That purpose is effectuated by common law rules tailored to the plaintiff's interest throughout the proceedings. For example, where two or more tortfeasors are jointly at fault, regardless of degree, the principle of joint and several liability affords the plaintiff independent reme-

202. *Black Belt Wood*, 514 So. 2d at 1260-63.

203. *Id.*

204. 257 Ala. 120, 57 So. 2d 612 (1952).

205. *Bell*, 257 Ala. at 122, 57 So. 2d at 614. The verdict, in its entirety, read as follows: "We the Jury return verdict in favor of Plaintiff and assess damages against Riley Bus Line \$5,000.00 and Wallace Herrington \$2,500.00." *Id.* at 122-23, 57 So. 2d at 614 (quoting the jury verdict). Riley Bus Lines filed a motion for new trial challenging the apportioned verdict. The trial court granted the motion, set aside the verdict and ordered a new trial. The plaintiff appealed, and the defendant, Herrington, cross-appealed on the apportionment issue. *Id.* at 122-23, 57 So. 2d at 614.

206. *Id.* at 123-24, 57 So. 2d at 615.

207. *Id.* at 124, 57 So. 2d at 615 (citing *Bull v. Albright*, 254 Ala. 29, 47 So. 2d 266 (1950); *City of Tuscaloosa v. Fair*, 232 Ala. 129, 167 So. 2d 276 (1936); *City of Birmingham v. Hawkins*, 196 Ala. 127, 72 So. 25 (1916); *Layman v. Hendrix*, 1 Ala. 212 (1840)).

208. See, e.g., *Beloit Corp. v. Harrell*, 339 So. 2d 992, 998 (Ala. 1976); *Layman*, 1 Ala. at 214-15; see also *Tatum v. Schering Corp.*, 523 So. 2d 1042, 1048 (Ala. 1988) (Houston, J., dissenting) (distinguishing between apportionment of compensatory damages and apportionment of punitive damages in a wrongful death case).

dies against each one. If the plaintiff sues them jointly, the nonapportionment rule gives the plaintiff maximum assurance of satisfying the judgment from among defendants who "may not be equally solvent."²⁰⁹

As interpreted by the Alabama courts, wrongful death actions have an entirely different purpose—the prevention of homicide—which is accomplished under a statute construed as allowing only punitive damages.²¹⁰ To effectuate that purpose, the supreme court has devised a common law approach whereby punitive damages are assessed according to the degree of the defendant's culpability.²¹¹ The plaintiff's interest is subordinated to the primary goal of sufficiently but fairly punishing the defendant. The plaintiff is deemed to have no legal right to punitive damages,²¹² and the focus of trial is solely upon measuring the degree of the defendant's wrongdoing.²¹³ The jury, then, must assess a quantum of damages sufficient to punish the wrong done, and "[n]o more damages than that should be awarded."²¹⁴ It therefore is anomalous that a defendant should be legally obligated to pay more damages than needed for sufficient punishment due to the operation of a mandatory joint verdict that lumps all defendants together. The nonapportionment rule undermines the fundamental goal of matching punishment to the offense.

The supreme court in *Bell* appears to have ignored any material distinction between compensatory tort actions and punitive-only wrongful death actions. At least one of the cases relied upon by the court, however, should have suggested such a difference. In

209. *Layman*, 1 Ala. at 214.

210. See *supra* notes 58 & 61 and accompanying text.

211. *Randle v. Birmingham Ry., Light & Power Co.*, 169 Ala. 314, 321, 53 So. 918, 920 (1910).

212. See *Maryland Casualty Co. v. Tiffin*, 537 So. 2d 469, 471 (Ala. 1988); *Dowling v. Garner*, 195 Ala. 493, 496-97, 70 So. 150, 152 (1915); *Louisville & N.R.R. v. Street*, 164 Ala. 155, 157, 51 So. 306, 307 (1909) (citing *Comer v. Age Herald Publishing Co.*, 151 Ala. 613, 44 So. 673 (1907)).

213. See, e.g., *Louisville & N.R.R. v. Tegner*, 125 Ala. 593, 599, 28 So. 510, 512 (1900) (variation in party name in Southern Reporter) (evidence regarding decedent such as age, health, and earning capacity is inadmissible). See generally Recent Decision, 25 ARIZ. L. REV. 579 (1983) (discussing apportionment of punitive damages among joint tortfeasors based partially on this rationale).

214. *Randle*, 169 Ala. at 323, 53 So. at 920; see also *Karpeles v. City Ice Delivery Co.*, 198 Ala. 449, 461, 73 So. 642, 647 (1916) ("only such measure of punishment as the moral quality of the act . . . might seem to demand").

Layman v. Hendrix,²¹⁵ the oldest case cited, the court justified its nonapportionment holding partially upon a recognition that the remedy of trespass "contemplates the recovery of damages as a compensation to the injured party, and not as a punishment inflicted on the agressor [sic]."²¹⁶

Further authority exists for apportioning damages under the homicide act in *Southern Ry. v. Sherrill*,²¹⁷ wherein the court reduced a punitive award on the basis of concurrent negligence by the plaintiff.²¹⁸ After reviewing the factual determination of the trial court, the supreme court justified reducing the damages as follows:

It must be admitted that in a case such as this the amount of damages *must depend upon the degree of culpability of the respective parties* that entered into the proximately caused act and result eventuating in the death of plaintiff's intestate. Here, the cause of the injury and death for which the suit is brought was the *concurrent negligent acts of the defendant and plaintiff*, resulting in death. . . . In the light of these facts, damages awarded by the jury were excessive—because of this concurrent negligence, proximately causing such result and brought about by the acts of both parties as indicated.²¹⁹

This remarkable language by the supreme court certainly suggests that Alabama takes into account the degree of culpability of not only the defendants, but also the plaintiffs. This language, flavored with elements of comparative negligence in a state that has always embraced the doctrine of contributory negligence,²²⁰ was reiterated in *Louisville & Nashville Ry. v. Davis*.²²¹ The supreme court in *Davis*, citing *Sherrill* for the proposition, held that in the wrongful death context "the amount of damages must depend

215. 1 Ala. 212 (1840).

216. *Layman*, 1 Ala. at 214 (emphasis added).

217. 232 Ala. 184, 167 So. 731 (1936) (discussing damages under the wrongful death act as codified in ALA. CODE § 5696 (1923)).

218. *Sherrill*, 232 Ala. at 193, 167 So. at 739-40.

219. *Id.* at 193, 167 So. at 739 (citing *Southern Ry. v. Montgomery*, 229 Ala. 456, 157 So. 854 (1934)) (emphasis added).

220. See, e.g., *Sutton v. Mitchell Co.*, 534 So. 2d 289, 290 (Ala. 1988); *Brown v. Turner*, 497 So. 2d 1119, 1119 (Ala. 1986); *Murray v. Alabama Power Co.*, 413 So. 2d 1109, 1113 (Ala. 1982).

221. 236 Ala. 191, 181 So. 695 (1938).

upon the degree of culpability of the *respective parties*.²²² The *Davis* court agreed with the trial judge that "the accident must, at least in large part, have been due to the carelessness or heedlessness of plaintiff's intestate," and the judge remitted the damages to \$6,000.²²³

Such seeming notions of comparative negligence in wrongful death cases were, however, short-lived. In the case of *Jack Cole, Inc. v. Walker*,²²⁴ the supreme court held that "[a]ll damages allowed in cases like this are punitive, and should be measured by the *quality of the wrongful act*, and the degree of culpability involved."²²⁵ The court in *Walker* affirmed the plaintiff's verdict against the single defendant.²²⁶ That the court in *Walker* chose to focus on the wrongful act of the defendant alone, and ignored the potential that the plaintiff also might be culpable to some extent, perhaps exposes a subtle shift in the treatment of wrongful death punitive damages. Unfortunately, the court failed to state whether variances in the culpability of multiple defendants should be taken into account in determining the correct amount of punitive damages. It is nevertheless undeniable that comparative culpability as a basis for measuring wrongful death awards has been mandated by the Alabama Supreme Court in some cases.²²⁷ Perhaps, then, the holding in *Bell v. Riley Bus Lines*²²⁸ should be considered an aberration rather than controlling precedent.

In *Black Belt Wood Co. v. Sessions*,²²⁹ the supreme court recently recognized it had "relied mainly on the rationale supporting joint and several liability in compensatory damages case[s]" as the basis for its nonapportionment decision in *Bell*.²³⁰ The court then recognized that, contrary to the holding in *Bell*, it was *not* limited by the terms of the homicide act in deciding whether to allow apportionment in death cases:

222. *Davis*, 236 Ala. at 199, 181 So. at 700 (emphasis added).

223. *Id.*

224. 240 Ala. 683, 200 So. 768 (1941).

225. *Walker*, 240 Ala. at 687, 200 So. at 771 (emphasis added).

226. *Id.*

227. *See, e.g., supra* notes 217-23 and accompanying text.

228. 257 Ala. 120, 57 So. 2d 612 (1952); *see supra* notes 204-07 and accompanying text.

229. 514 So. 2d 1257 (Ala. 1987) (per curiam), *on return after remand* by 514 So. 2d 1249 (Ala. 1986).

230. *Black Belt Wood*, 514 So. 2d at 1262.

Because there was no statutorily expressed prohibition of apportionment, the *Bell* Court could have determined that apportionment of punitive damages in a wrongful death case was fair, constitutional, and in keeping with the punitive purpose of [the wrongful death statute], and could have gone with the majority rule in this country. It did not.²³¹

The Court in *Black Belt Wood* further noted that it had the power to change such common law rules "to make the law just and to make it conform to public policy" and cited examples where it had done so.²³² It nonetheless declined the opportunity and affirmed a joint verdict of \$3,500,000 in an action predicated on negligence.²³³

After discussing the unsoundness of the compensation-based rule of nonapportionment in punitive-only death cases, the *Black Belt Wood* court elected to perpetuate it on the basis of *stare decisis*. As legal justification for doing so, it relied upon a rule of statutory construction that has no application in this context. The court, citing *Richmond & Danville R.R. v. Freeman*,²³⁴ noted that the legislature has convened many times since the nonapportionment rule was first applied in a wrongful death case.²³⁵ The *Freeman* case, as previously discussed,²³⁶ held that, despite the earlier erroneous construction of the homicide act as punitive-only, it was constrained to follow that precedent under the rule that a statute may not be reconstrued after the legislature has re-enacted it without change.²³⁷ The nonapportionment rule, however, is a matter of *judge-made common law* rather than statutory construction.²³⁸ The restraints cited in *Freeman* therefore are no

231. *Id.*

232. *Id.* at 1263 n.1.

233. *Id.* at 1260-64.

234. 97 Ala. 289, 11 So. 800 (1892).

235. *Black Belt Wood*, 514 So. 2d at 1263.

236. *See supra* notes 63-67 and accompanying text.

237. *Freeman*, 97 Ala. at 294, 11 So. at 802.

238. The point was well made by Justice Jones, concurring in the result only, that the majority's reliance upon the *Freeman* rationale as a reason for declining to change the nonapportionment rule "takes the old metaphor—mixing apples and oranges—to a new extreme." *Black Belt Wood*, 514 So. 2d at 1266 (Jones, J., concurring). In calling upon the majority to adopt a rule whereby the jury would assign punitive liability separately among the defendants according to the degree of culpability, Justice Jones opined that the present nonapportionment rule is a "fiction" that is both unsound and dishonest. *Id.* at 1267 (Jones, J., concurring).

impediment to a revision of the common law nonapportionment rule in wrongful death cases.

As further authority, the *Black Belt Wood* court quoted an Illinois Supreme Court decision declining to abrogate the Illinois rule of contributory negligence in deference to the legislature. However, the quotation in *Black Belt Wood* exposes the precise reasons why the Alabama court *should* change the state's nonapportionment rule: "Where it is clear that the court has made a mistake it will not decline to correct it, even though the rule may have been reasserted and acquiesced in for a long number of years. . . . [C]ontravening no statute or constitutional principle, such rule ought to be followed. . . ." ²³⁹ The rule of nonapportionment in *Bell*, being inconsistent with the purpose and construction of the homicide act, certainly may be regarded as a mistake. Furthermore, the application of the rule appears to contravene the constitutional principles of due process and equal protection.

The effect of nonapportionment in punitive-only wrongful death cases is to place additional punishment upon one defendant due to a codefendant's insolvency. Once a wrongful death verdict is returned against multiple defendants, the punishment is imposed wherever, and in such sum as, the plaintiff elects. These notions can be said to violate the most fundamental concepts of due process.²⁴⁰ Punishment based upon financial status has no place in the law; punishment must be predicated upon specific misconduct.²⁴¹ Under the constitution, persons should be punished for what they do, not for who they are.²⁴²

239. *Black Belt Wood*, 514 So. 2d at 1263-64 (quoting *Maki v. Frelk*, 40 Ill. 2d 193, 239 N.E.2d 445 (1968)). The court borrowed the *Maki* language from an earlier Alabama decision in which it refused to change the contributory negligence rule. See *Golden v. McCurry*, 392 So. 2d 815 (Ala. 1981); cf. *Hurst v. Capitell*, No. 87-982 (Ala. Jan. 16, 1989) (WESTLAW, AL-CS Database) (per curiam) (partially abolishing judicially created parental immunity doctrine).

240. Cf. *Giaccio v. Pennsylvania*, 382 U.S. 399 (1966) (discussing the unconstitutionality of charging an acquitted defendant the costs of bringing a case to trial); *Barbier v. Connolly*, 113 U.S. 27, 31-32 (1885) (concerning legislative regulations for the public's general benefit and how these regulations may or may not fall equally on everyone).

241. See *Robinson v. California*, 370 U.S. 660, 666-67 (1962); *Griffin v. Illinois*, 351 U.S. 12, 19 (1956).

242. See generally *Jeffries, A Comment on the Constitutionality of Punitive Damages*, 72 VA. L. REV. 139 (1986) (suggesting that punitive awards without sufficient procedural safeguards may result in "excessive" punitive damages, particularly against corporate defendants sued by multiple plaintiffs).

The nonapportionment rule likewise has no rational relation to the legislative objective, as construed by the court, of assessing punishment according to culpability. To the contrary, the nonapportionment rule seemingly undermines the legislative objective of punishing specific misconduct proportionately. A wrongful death plaintiff may enforce a joint and several verdict upon a single defendant for any amount of the judgment, regardless of that defendant's relative culpability. This rule violates due process by rendering the punishment unsupported by any additional finding of culpable conduct.²⁴³ It would appear, given the opportunity, a court applying due process principles could not sustain such a rule.

E. Ascertaining the Amount of Punitive Damages

1. *Generally.*—Since 1860, discretionary wrongful death awards in Alabama have been unlimited by any statutory ceiling.²⁴⁴ Juries are instructed regarding the punitive and deterrent purposes of wrongful death awards, but no standards are given regarding the appropriate *amount* to be assessed. The Alabama pattern jury instructions now address this critical issue in a single sentence: "The amount of damages should be directly related to the amount of wrongdoing on the part of the defendant(s)."²⁴⁵ Such an insubstantial charge, without more, leaves the jury with

243. See *Giaccio v. Pennsylvania*, 382 U.S. at 405 (Stewart, J., concurring) (punishment unjustified by guilt "violates the most rudimentary concept of due process of law").

244. See *supra* note 30 and accompanying text.

245. ALA. PATTERN JURY INSTRUCTIONS COMM., ALABAMA PATTERN JURY INSTRUCTIONS—CIVIL APJI 11.18 (1974). The instruction reads, in its entirety, as follows:

UNLAWFUL HOMICIDE

In a suit brought for a wrongful act, omission, or negligence causing death the damages recoverable are punitive and not compensatory. Damages in this type of action are entirely punitive, imposed for the preservation of human life and as a deterrent to others to prevent similar wrongs. The amount of damages should be directly related to the amount of wrongdoing on the part of the defendant(s). In assessing damages you are not to consider the (pecuniary) (monetary) value of the life of the decedent, for damages in this type of action are not recoverable to compensate the family of the deceased from a (pecuniary) (monetary) standpoint on account of (his) (her) death, nor to compensate the plaintiff for any financial or pecuniary loss sustained by (him) (her) or the family of the deceased on account of (his) (her) death.

Your verdict should not be based on sympathy, prejudice, passion or bias, but should be directly related to the culpability of the defendant(s) and necessity of preventing similar wrongs in the future.

Id.

no meaningful guidance in determining the *optimum* size of the penalty.²⁴⁶ In view of recent trial and appellate trends of large punitive damages awards being sustained on appeal,²⁴⁷ due process notions suggest that Alabama should re-examine the procedures whereby juries are given open-ended discretion to assess punitive damages in wrongful death actions.

2. *Federal due process analysis.*—More than a century of precedent exists for allowing juries to make discretionary punitive damages awards. In 1851, for example, the United States Supreme Court recognized the following:

[W]here the injury has been wanton and malicious, or gross and outrageous, courts permit juries to add to the measured compensation of the plaintiff . . . something farther [sic] by way of punishment or example, which has sometimes been called "smart money." This has been always left to the discretion of the jury, as the degree of punishment to be thus inflicted must depend on the peculiar circumstances of each case.²⁴⁸

Due process, however, forbids imposition of penalties that are arbitrary and oppressive.²⁴⁹ In *Southern Telegraph and Telephone Co. v. Danaher*,²⁵⁰ the Supreme Court reviewed whether a state statute establishing a \$100 per day fine against telephone companies that discriminated against customers "was so arbitrary as to contravene the fundamental principles of justice which the constitutional guaranty of due process of law is intended to preserve."²⁵¹ The Court questioned not the *construction* of the penalty provision but the *application* of its terms.²⁵² The Court, on grounds of excessiveness, voided the imposition of a \$6,300 penalty as "so plainly arbitrary and oppressive as to be nothing short of a taking of [defendant's] property without due process of law."²⁵³ While the Court in *Danaher* overturned the application of a statute on due

246. The lone statement that "the amount of damages should be directly related to the amount of wrongdoing" is given no emphasis whatsoever in the pattern jury instruction. Indeed, its force is weakened by the statement preceding it that such damages are intended to punish and deter the defendant's conduct. See *supra* note 245.

247. See *infra* Appendix, Table I.

248. *Day v. Woodworth*, 54 U.S. (13 How.) 363, 371 (1851) (action for trespass).

249. See *Southwestern Tel. & Tel. Co. v. Danaher*, 238 U.S. 482, 491 (1915).

250. 238 U.S. 482 (1915).

251. *Danaher*, 238 U.S. at 489.

252. See *id.*

253. *Id.* at 491.

process grounds and did not question the jury function per se, it is the Court's intolerance for arbitrary penalties, regardless of how imposed, that makes this case especially noteworthy.

As *Danaher* demonstrates, federal due process challenges to state procedures authorizing unlimited jury discretion are not new.²⁵⁴ Another example is found in *Giaccio v. Pennsylvania*,²⁵⁵ wherein the Court invalidated a statute authorizing juries, in their discretion, to tax court costs against a criminal defendant acquitted of a misdemeanor. The state court upheld the statute as being "not a penal statute," but a measure providing for the collection of costs of a civil character.²⁵⁶ Justice Black, writing for a unanimous Court, recognized that the fourteenth amendment protects property against any state deprivation that does not satisfy due process, "and this protection is not to be avoided by the simple label a State chooses to fasten upon its conduct or its statute."²⁵⁷ The Court held that a law, so broad as to give the jury unlimited discretion "without any legally fixed standards," fails to meet the requirements of due process.²⁵⁸ Alabama's wrongful death statute, as it is presently applied, should succumb to the same reasoning.

3. *Past practice of remittitur in Alabama.*—The Alabama Supreme Court has historically exercised careful appellate supervision over wrongful death actions. For many years the court articulated standards for measuring punitive damages, often using

254. See, e.g., *St. Louis, I.M. & S. Ry. v. Williams*, 251 U.S. 63, 66-67 (1919) (recognizing that the due process "clause places a limitation upon the power of the States to prescribe [civil] penalties . . . [that are] wholly disproportioned to the offense and obviously unreasonable") (citing, *inter alia*, *Collins v. Johnston*, 237 U.S. 502 (1915); *Seaboard Air Line Ry. v. Seegers*, 207 U.S. 73 (1907); *Coffey v. County of Harlan*, 204 U.S. 659 (1907)); *Waters-Pierce Oil Co. v. Texas*, 212 U.S. 86, 111 (1909) (discussing whether "fines imposed [under state civil statute] are so grossly excessive as to amount to a deprivation of property without due process of law"); *Missouri Pac. Ry. v. Humes*, 115 U.S. 512 (1885) (applying the due process clause in reviewing and upholding the constitutionality of a statutory double-damages penalty awarded to a private plaintiff); *Kociemba v. G.D. Searle & Co.*, CV 3-85-1599, slip op. at 36 (D. Minn. Feb. 16, 1989) (WESTLAW, DCT Database) (in response to plaintiff's argument concerning limitless punitive damages jury verdicts, the court found that "allowing a jury to assess punitive damages without a set maximum or rigid standard does not violate [procedural] due process").

255. 382 U.S. 399 (1966).

256. *Giaccio*, 382 U.S. at 402 (quoting the state court).

257. *Id.* Justice Black observed that "whether labeled 'penal' or not," a statutory remedy must "meet the challenge that it is unconstitutionally vague." *Id.*

258. *Id.* at 402-03.

remittitur²⁵⁹ authority to conform excessive jury verdicts to those standards. For example, in *Cox v. Birmingham Ry., Light & Power Co.*,²⁶⁰ the trial court set aside a \$15,000 verdict as excessive. The Alabama Supreme Court, affirming on state law grounds, held that a jury deciding a wrongful death claim should not "be left to an unbridled and arbitrary power, without any guide in law or beyond the supervision and control of the court."²⁶¹ It further elaborated on the duty of the trial court to ensure that the jury is guided in fixing the amount:

[A]fter instructing the jury in respect to the elements which must be found to exist, to warrant the assessment of such damages, in submitting to the jury the question of imposing punitive damages, the court should always safeguard the submission with such instructions as that the jury will not be misguided, but will be held mindful, in fixing such damages, that they should act with due regard to the enormity or not of the wrong, and to the necessity of preventing similar wrongs, and that, if such damages are imposed, they should be in such an amount (much or little) as, under all the circumstances attending the commission of the wrong, the exigencies of the case, in the sound judgment and discretion of the jury, may demand. . . .²⁶²

The extent of the injury should not in itself determine the enormity of the wrong.²⁶³ The proper measure of damages must "be by reference alone to the quality of the wrongful act."²⁶⁴ The jury's discretionary award, moreover, must be "reasonable" and any unreasonable exercise of such discretion "is subject to correction by the court."²⁶⁵

259. Alabama courts have the power to require remittitur as a condition of overruling a motion for new trial. ALA. R. CIV. P. 59(f). See generally Commentary, *Remittitur Practice in Alabama*, 34 ALA. L. REV. 275 (1983).

260. 163 Ala. 170, 50 So. 975 (1909).

261. *Cox*, 163 Ala. at 172, 50 So. at 976.

262. *Id.* (citing *Coleman v. Pepper*, 159 Ala. 310, 314, 49 So. 310, 311 (1909)). *Coleman* was a trespass case wherein a \$311 award was challenged as excessive on grounds that the jury was given discretionary power in the assessment of damages "without stint or limit, and without any rule whatever." *Coleman*, 159 Ala. at 313, 49 So. at 310 (quoting appellee's argument).

263. *Cox*, 163 Ala. at 173, 50 So. at 976.

264. *Id.* (quoting *Richmond & D.R.R. v. Freeman*, 97 Ala. 289, 294, 11 So. 800, 801 (1892)) (variations from original by court).

265. *Id.*

One year later, in a different action against the same defendant,²⁶⁶ the court criticized a jury charge that omitted "definite directions and limitations for the assessment of punitive damages."²⁶⁷ The court further held that an amount *sufficient* to punish the conduct should be assessed, and "[n]o more damages than that should be awarded."²⁶⁸

The court's policy of using its remittitur power to conform punitive awards to the offense and to other awards for similar degrees of culpability is demonstrated in *Alabama Power Co. v. Irwin*.²⁶⁹ In that case the supreme court reduced a verdict of \$20,000 to \$15,000 on grounds that no higher fault than negligence was found.²⁷⁰ This use of remittitur to oversee punitive damages awards in wrongful death cases is not isolated. In *Alabama Gas Co. v. Talmadge*,²⁷¹ the court remitted an award to \$17,000 on the same grounds. In *Airheart v. Green*,²⁷² the court sustained a verdict of \$75,000, which had been remitted from \$135,000, by reference to another recent \$75,000 award.²⁷³

The court's exercise of its supervisory power to ensure that discretionary punishments were generally reasonable and consistent with the degree of culpability seems to have given way in more recent cases to a philosophy of greater deference to the jury. At the same time, however, the later decisions devote less attention than before to whether jury charges provide adequate guidance and limitation in order to avoid arbitrary assessments.

4. *Current level of review of jury verdicts.*—The last few years have seen a proliferation of wrongful death awards which, in the view of the Authors, would have been regarded as excessive by former standards of appellate review. As demonstrated by Table I of the Appendix, a representative sample of large wrongful death awards since 1892,²⁷⁴ an historical comparison discloses a substan-

266. *Randle v. Birmingham Ry., Light & Power Co.*, 169 Ala. 314, 53 So. 918 (1910). The plaintiff appealed from a \$500 jury award on grounds that it was insufficient.

267. *Randle*, 168 Ala. at 322, 53 So. at 920. The *Randle* court criticized the jury charge as misleading, but held it not erroneous.

268. *Id.* at 323, 53 So. at 920.

269. 260 Ala. 673, 72 So. 2d 300 (1954).

270. *Id.* at 678, 72 So. 2d at 304.

271. 207 Ala. 86, 93 So. 548 (1921).

272. 267 Ala. 689, 104 So. 2d 687 (1958).

273. *Id.* at 693, 104 So. 2d at 690 (citing *Liberty Nat'l Life Ins. v. Weldon*, 267 Ala. 171, 100 So. 2d 696 (1958)).

274. See *infra* Appendix, Table I.

tial increase in the upper limit of such awards in the past thirty years, with the most pronounced movement occurring in the last ten. By routinely affirming those awards, the Alabama Supreme Court effectively has removed a vital layer of judicial safeguards, which once ensured that jury discretion would be exercised within due process limits. Such large verdicts, a phenomenon not unique to Alabama,²⁷⁵ compels a re-examination of whether the wrongful death statute, as presently applied on both the trial and appellate levels, is consistent with due process.

On at least one occasion, the United States Supreme Court upheld the procedures for rendering wrongful death awards in Alabama. In *Louis Pizitz Dry Goods Co. v. Yeldell*,²⁷⁶ the Court agreed with the principle of imputing punitive liability to a corporation whose employee wrongfully causes death. Although the Court did not address the standardless exercise of jury discretion or whether the award was so excessive as to violate due process, the briefs of counsel disclose the assertion of those arguments by appellant.²⁷⁷ The appellee, interestingly, was represented by Hugo Black, who, perhaps not so coincidentally, later authored the *Giacio v. Pennsylvania*²⁷⁸ opinion holding that federal due process prohibits standardless jury discretion.

In view of several recent United States Supreme Court decisions in which large punitive damages awards have been challenged,²⁷⁹ one wonders whether a 1985 award, worth more than fifty times the inflation-adjusted amount in *Louis Pizitz Dry*

275. See generally M. PETERSON, S. SARMA & M. SHANLEY, PUNITIVE DAMAGES: EMPIRICAL FINDINGS (1987) (statistical analysis of trends in awarding punitive damages for a variety of torts); Neal, *Punitive Damages: Suggested Reform for an Insurance Problem*, 18 ST. MARY'S L.J. 1019 (1987) (discussing the response by the insurance industry to escalating punitive damages awards); Schwartz, *Deterrence and Punishment in the Common Law of Punitive Damages: A Comment*, 56 S. CAL. L. REV. 133 (1982) (analyzing deterrence and punishment separately and discussing punitive damages in products liability and bad faith insurance cases); Hiltzik, *Punitive Claims Challenge Limits of Law*, Los Angeles Times, Feb. 17, 1984, at 1, col. 4 (discussing escalation in amount and frequency of punitive awards).

276. 274 U.S. 112 (1927).

277. Briefs of Counsel, *Louis Pizitz Dry Goods Co. v. Yeldell*, 274 U.S. 112 (1927) (No. 171). The appellant further argued the lack of jury standards in terms.

278. 382 U.S. 399 (1966).

279. See, e.g., *Bankers Life & Casualty Co. v. Crenshaw*, 108 S. Ct. 1645 (1988); *Aetna Life & Casualty Co. v. Lavoie*, 475 U.S. 813 (1986); *Kelco Disposal, Inc. v. Browning-Ferris Indus., Inc.*, 845 F.2d 404 (2d Cir.), cert. granted, 109 S. Ct. 527 (1988) (U.S. Dec. 5, 1988) (No. 88-556).

Goods, could withstand constitutional scrutiny.²⁸⁰ Within the last three years, some members of the Court have questioned whether such discretionary punishment may contravene eighth and fourteenth amendment constitutional protections.²⁸¹ Various opinions and comments from the bench suggest they do.²⁸² Furthermore, at least one state supreme court has recently reversed a substantial punitive damages award as violating the excessive fines clause of its *state* constitution.²⁸³ Although no United States Supreme Court decision involving the discretionary punitive damages procedures has focused on wrongful death actions, such analyses necessarily apply to Alabama's wrongful death statute by reason of its purely punitive construction and application.

5. *Rationale for greater scrutiny of the jury function.*—This Article has not attempted to explicate the basis or authority for applying federal eighth and fourteenth amendment analysis to discretionary punitive damages awards in general.²⁸⁴ Nonetheless, at a

280. Compare *Black Belt Wood Co. v. Sessions*, 514 So. 2d 1249 (Ala. 1986) (Alabama Supreme Court affirmed a \$3.5 million award for simple negligence) with *Louis Pizitz Dry Goods Co. v. Yeldell*, 274 U.S. 112 (1927) (the \$9,500 awarded would, using the factors found *infra* in Appendix, Table II, be worth approximately \$64,985.70 today).

281. See, e.g., *Bankers Life & Casualty Co. v. Crenshaw*, 108 S. Ct. 1645, 1655 (1988) (O'Connor, J., concurring) (fourteenth amendment concerns); *Aetna Life & Casualty Co. v. Lavoie*, 475 U.S. 813, 828-29 (1986) (eighth and fourteenth amendment concerns).

282. Former Chief Justice Burger recognized potential constitutional challenges in *Lavoie* when he noted: "These arguments [that a punitive damages award may be impermissible under the excessive fines clause of the eighth amendment and that the lack of sufficient governing standards may violate the due process clause of the fourteenth amendment] raise important issues which . . . must be resolved." *Lavoie*, 475 U.S. at 828. In the bad faith insurance context, such constitutional arguments were also focused upon in *Bankers Life* by Justices Marshall and O'Connor, although the case was resolved in favor of the plaintiff on other grounds. Justice Marshall stated that the "[a]ppellant's reference to the excessiveness of the punitive damage award . . . raise[d] a cognizable constitutional challenge to the size of the award, one based on the Excessive Fines Clause of the Eighth Amendment." *Bankers Life*, 108 S. Ct. at 1650. Justice O'Connor, whom Justice Scalia joined, felt that the constitutional arguments involved in *Bankers Life* should have been scrutinized in the case, and stated that "[t]his grant of wholly standardless discretion [to the jury] to determine the severity of punishment appears inconsistent with due process." *Id.* at 1656 (O'Connor, J., concurring).

283. See, e.g., *Colonial Pipeline Co. v. Brown*, 258 Ga. 115, 365 S.E.2d 827 (1988).

284. For such a treatment, see generally Jeffries, *A Comment on the Constitutionality of Punitive Damages*, 72 VA. L. REV. 139 (1986) (suggesting that repetitive punitive damages in mass tort proceedings can easily exceed "any level of sanction that could rationally be thought necessary to serve any legitimate purpose"); Wheeler, *The Constitutional Case for Reforming Punitive Damages Procedures*, 69 VA. L. REV. 269 (1983) (comprehensive analysis of punitive damages procedures required by the United States Constitution based on recent

minimum, the fourteenth amendment due process clause has been applied to invalidate state statutes and procedures that grant juries wholly standardless discretion to impose punitive sanctions in civil cases.²⁸⁵ With regard to the Alabama statute, due process mandates the elimination of vagueness in jury charges regarding the amount of damages to be imposed. This could be accomplished by implementing definitions and standards to guide and limit the jury's discretionary authority.²⁸⁶ Moreover, the open-ended power given to juries under existing procedures in Alabama requires closer and more active appellate review. This more likely will ensure that such awards are neither arbitrary nor unreasonable in view of the degree of wrong being punished. It therefore seems that extreme care and consideration must be given to re-examining a process that permits a jury to impose millions of dollars in punishment for conduct no worse than simple negligence.

The present trend, as reflected in Table I of the Appendix,²⁸⁷ is in need of change. The supreme court, in the opinion of the Authors, must reassume its former supervisory role in overseeing the application of Alabama's wrongful death act. For more than a century, juries have played a useful and cherished role in deciding wrongful death cases and, although not to be regarded as sacrosanct, their verdicts are surely due a large measure of deference where the instructions have provided proper guidance and limitations in the exercise of their discretion. The appellate court has a duty, however, to set aside or reduce punitive awards where it appears the jury determination arbitrarily exceeds an amount sufficient to punish the defendant's conduct, regardless of whether larger verdicts have been entered in other cases.

There are other repercussions of this recent trend of deference. If remittitur is exercised only in cases when an award reaches or exceeds the upper limit of precedent, defendants in cases involving lesser awards are denied the due process safeguard of trial and appellate review. Further, an arbitrary or capricious punitive damages award is constitutionally invalid as violative of fourteenth

Supreme Court decisions). For in-depth analysis of punitive damages in general, see *Punitive Damages*, 40 ALA. L. REV. 687 (1989).

285. See *supra* notes 249-58 and accompanying text; e.g., *Giaccio v. Pennsylvania*, 382 U.S. 399 (1966); *Southwestern Tel. & Tel. Co. v. Danaher*, 238 U.S. 482 (1915).

286. See *supra* note 175 and accompanying text.

287. See *infra* Appendix, Table I.

amendment due process guarantees *regardless* of whether the verdict is facially excessive.

The Alabama Supreme Court recently held that the wrongful death act is "nonpenal" and therefore immune from federal eighth amendment limitations.²⁸⁸ As discussed earlier, however, if labels are to be the focus, it appears more cases than not construe Alabama wrongful death actions as "penal" in nature.²⁸⁹ The court therefore appears to have been incorrect in stating that the wrongful death statute has been "historically held to be nonpenal."²⁹⁰

Perhaps the major flaw in the court's holding, however, is its reliance upon state rather than federal analysis in determining that wrongful death awards are not sufficiently "penal" or "quasi-criminal" to trigger eighth amendment protections against excessive fines and unusual punishments. The state courts in *Santosky v. Kramer*,²⁹¹ *Addington v. Texas*,²⁹² and *Giaccio v. Pennsylvania*²⁹³ all committed similar error in labeling their state procedures "civil" in nature. The United States Supreme Court, however, looks beyond such labels in determining whether the statute deprives persons of liberty or property rights as a means of punishment.²⁹⁴

The Alabama Supreme Court in *Industrial Chemical & Fiberglass* cited as further authority a portion of the *Louis Pizitz Dry Goods* opinion in which the United States Supreme Court simply quoted a portion of *Southern Ry. v. Bush*²⁹⁵ for the purpose of illustrating the Alabama Supreme Court's construction of its own statute as "non penal."²⁹⁶ The mere fact of the quotation is not an

288. *Industrial Chem. & Fiberglass Corp. v. Chandler*, Nos. 86-381, 86-385 (Ala. Sept. 30, 1988) (WESTLAW, AL-CS Database), *on return after remand*, slip op. at 22 (Ala. Jan. 16, 1989) (WESTLAW, AL-CS Database).

289. See *supra* notes 185-86 and accompanying text.

290. *Industrial Chem. & Fiberglass*, slip op. at 5.

291. 455 U.S. 745 (1982).

292. 441 U.S. 418 (1979).

293. 382 U.S. 399 (1966).

294. See, e.g., *Addington v. Texas*, 441 U.S. 418, 427 (1979); see also *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 164-69 (1963) (the legislative and judicial history of the sanctions of forfeiture of citizenship indicate such sanctions are punitive rather than regulatory in nature); *Trop v. Dulles*, 356 U.S. 86, 96 (1958) ("If the statute imposes a disability for the purposes of punishment—that is, to reprimand the wrongdoer, to deter others, etc.—it has been considered penal.").

295. 122 Ala. 470, 26 So. 168 (1899).

296. See *Louis Pizitz Dry Goods Co. v. Yeldell*, 274 U.S. 112, 114 (1927).

endorsement or implied approval of that construction, as the penal nature of the wrongful death act was not at issue. Certainly nothing in *Louis Pizitz Dry Goods* holds that the statute is nonpenal for purposes of federal constitutional analysis.

As a point of beginning in the search for developing jury standards for wrongful death cases, the Alabama Supreme Court need look no further than some of its early opinions, cited above,²⁹⁷ which better define and explain the appropriate measure and limitations of the punitive award. Indeed, one of the more obvious deficiencies of the current construction of the wrongful death act is the absence of meaningful jury instructions incorporating these explanations of how to determine damages. Were this a statute involving criminal sentencing charges, it undoubtedly would be regarded as overly vague in defining and limiting the jury's discretion.²⁹⁸

As an example of additional standards that might be imposed, the jury should hear the court explain several matters: that there are several degrees of culpability in the law; that the degrees of culpability range from the simplest negligence to intentional killing (each degree of culpability being briefly described); that damages must be directly based upon, and proportionate to, the degree of culpability proven by the plaintiff; that the fact of the decedent's death does not alone determine the degree of culpability or enormity of the wrongful conduct; that the jury must consider the defendant's culpability only on such theory or theories of liability as the court directs, and no higher degree may be found; that if liability is found, the damages must directly relate to that degree of culpability; that the damages should be in such sum as will adequately punish that conduct, and no less or no more; that if the culpability is small or large, the damages should correspond thereto; that compensation of the family is irrelevant and may not be considered; that the financial loss to the plaintiff is irrelevant and may not be considered; that the wealth or size of the defendant is irrelevant and may not be considered; and that sympathy, anger, prejudice or bias can have no influence upon the verdict.

In the view of the Authors, more specific and meaningful instructions of this type would go much further toward guiding the

297. See *supra* notes 260-73 and accompanying text.

298. See *Giaccio v. Pennsylvania*, 382 U.S. 399, 402 (1966).

jury in the exercise of its discretion than the existing vague pattern instruction. Indeed, jury charges of similar import appear constitutionally required to lessen the possibility of arbitrary action by the jury. As a further due process safeguard, however, trial and appellate courts should actively and independently review wrongful death awards, as is now statutorily required in other types of Alabama tort cases.²⁹⁹ The courts should consider both the degree of the defendant's culpability and various indicia that reflect notions of fair and reasonable penalties for the conduct being punished.

This Article has avoided suggesting fixed limits or formulas for damages in wrongful death cases, which the Authors consider to be solutions of last resort. The law should have flexibility. Such flexibility must, however, be exercised in a consistent, controlled, and judicious manner. Unfortunately, regarding discretionary punitive damages awards in wrongful death cases, Alabama courts have been too tolerant, responding with too much deference to jury verdicts.

IV. CONCLUSION

The Alabama wrongful death act, as construed and applied by the supreme court, has become tangled in its own web of competing and inconsistent concepts. This Article has argued that punishing simple negligence, with amounts of punitive damages "as the jury may assess,"³⁰⁰ violates the fourteenth amendment due process clause and perhaps the eighth amendment as well. The minimal burden of proof and the rule prohibiting apportionment of punitive damages among joint tortfeasors likewise contravenes due process and equal protection. Those constitutional infirmities are compounded by the absence of sufficient standards to guide and limit the jury's discretion in determining damages, and are further compounded by the failure of Alabama courts to use remittitur where open-ended jury discretion produces excessive results.

The erroneous construction of the wrongful death act in 1877 as authorizing the recovery of only punitive damages is probably beyond judicial revision by the Alabama Supreme Court. It therefore is a matter that should be placed on the agenda of the

299. See ALA. CODE §§ 6-11-20 to -29 (Supp. 1988).

300. *Id.* § 6-5-410(a) (1975).

Alabama Legislature. In the meantime, the court can and should, however, revise the common law rules regarding standard of proof and nonapportionment to conform with the statute's punishment-oriented purposes. Furthermore, due process requires that the court define and implement trial and appellate standards for limiting jury discretion to prevent arbitrary and excessive results in wrongful death cases.