ESSAY

ONLY IN ALABAMA:* A MODEST TORT AGENDA

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This Essay examines four long-standing rules of Alabama tort law. Rules of law which have been sustained over a long period of time typically reflect the wisdom of accumulated experience and the respect for tradition which is paramount in the law. Each of these four rules, however, is unique to Alabama, and in each instance, Alabama adheres to tradition long repudiated in every other state. The social and legal context which gave rise to each rule has changed dramatically, eliminating what may once have been compelling justifications for the rule but which no longer have force. In response to contemporary social and legal realities, every state except Alabama has rejected: the rule against contribution for joint tortfeasors; the limitation of wrongful death damages to punitive damages only; the limitation of survival actions to those filed before the victim's death; and the immunity afforded drivers in actions brought by their non-paying passengers. Obviously, the fact that no other state follows these rules does not itself counsel change. But Alabama stands alone in adhering to rules which have little to recommend them, other than longevity, and which often yield unjust results. It is within the power of the Alabama Supreme Court to change each of these rules, with one exception, and within the power of the legislature to change any of them. This Essay sets out a modest agenda for the court or legislature. It is time for Alabama to reject tradition in favor of justice.

* The phrase "only in Alabama" is taken from Justice Gorman Houston's special concurrence in *Bassie v. Obstetrics & Gynecology Associates of Northwest Alabama*, 828 So. 2d 280, 285 (Ala. 2002), discussed *infra* note 55, agreeing with the plaintiff that the case presented "one of those 'only in Alabama' conundrums."

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I. THE RULE AGAINST CONTRIBUTION FOR JOINT TORTFEASORS

In Alabama, a defendant held jointly liable with other tortfeasors may be required to pay the full judgment without any recourse against the other tortfeasors.[1] This is true in no other state. Every other state either permits contribution among joint tortfeasors[2] or obviates the need for it by imposing several rather than joint liability where there are multiple tortfeasors.[3]

The rule prohibiting contribution among joint tortfeasors was originally adopted by the English courts in the 1799 case of *Merryweather v. Nixan*.[4] The case dealt with intentional tortfeasors, and many early English and American cases limited the no-contribution rule to intentional tortfeasors. In fact, one of the earliest Alabama cases, *Vandiver v. Pollak*,[5] limited the rule in precisely this way, permitting contribution where the plaintiff recovered damages for the wrongful seizure of property against one of several creditors who, acting in good faith, independently attached his property. The court explained that the right of contribution is founded in "acknowledged principles of natural justice."[6] Where the burden of joint liability falls upon one of several joint tortfeasors, it is fair to require the others to contribute. The court explicitly rejected the idea that all tortfeasors should be precluded by equitable principles from obtaining the assistance of the courts in enforcing contribution. According to the court, "[J]ustice and sound policy . . . require . . . that the general principle that contribution or indemnity will not be awarded as between joint wrongdoers is limited . . . to intentional, meditated wrongs."[7]

As the rules relating to third-party practice developed, permitting joinder of negligent defendants, American courts extended the rule against contribution to negligent tortfeasors. The case most often cited for this rule in Alabama is *Gobble v. Bradford*.[8] In a case of first impression, the court denied contribution between negligent drivers, reasoning that to permit a negligent wrongdoer to escape some portion of the full liability

1. *See* Gobble v. Bradford, 147 So. 619, 623 (Ala. 1933) (denying a right of contribution between negligent tortfeasors); *see also* Clay Kilgore Constr., Inc. v. Buchalter/Grant, L.L.C., 949 So. 2d 893, 898 (Ala. 2006) (mentioning "the general, unremarkable principle that 'exceptions exist as to the general rule that prohibits contribution among alleged joint tortfeasors'"); Consol. Pipe & Supply Co. v. Stockham Valves & Fittings, Inc., 365 So. 2d 968, 970 (Ala. 1978) ("No authority need be cited to support the proposition that there is no contribution among joint tortfeasors in Alabama."); SouthTrust Bank v. Jones, Morrison, Womack, & Dearing, P.C., 939 So. 2d 885, 899 (Ala. Civ. App. 2005) (citing the "well-known rule that there is no right to indemnity or contribution between joint tortfeasors in Alabama"); Citizens Bank v. Routh, 351 So. 2d 594, 597 (Ala. Civ. App. 1977) (citing the "well-established rule prohibiting contributions between joint tortfeasors").

2. *See infra* notes 13–16.

3. *See infra* note 17.

4. (1799) 101 Eng. Rep. 1337 (K.B.).

5. 19 So. 180 (Ala. 1895).

6. *Id.* at 182.

7. *Id.* at 183.

8. 147 So. 619 (Ala. 1933).

minimizes the deterrent effect of tort law and involves the courts in adjusting responsibilities among persons whose losses arose from their own unlawful conduct.[9] The paucity of these rationales is apparent today. Although the possibility of liability may deter intentional wrongdoing, simple negligence may be less susceptible to such incentives; and if liability rules in fact affect careless behavior, the no-contribution rule itself may significantly undercut negligence law's deterrence by allowing some negligent defendants to escape liability entirely. Concern about assisting wrongdoers is also inapt. Although we speak of "fault" in negligence cases, it is clear that most negligence consists of ordinary inadvertence and not the intentional misconduct which animates the doctrine of clean hands.

The prohibition against contribution was often criticized for these reasons and was gradually modified. Courts in many states began to allow contribution in specified types of cases where the party seeking contribution was not at fault. Most typically, courts permitted contribution in favor of a vicariously liable or passively negligent tortfeasor against the active tortfeasor. In each instance, these tortfeasors were not personally at fault and application of the prohibition clearly failed to serve its purposes. Alabama courts embraced this development, citing equity and justice and distinguishing indemnity and contribution to permit the transfer of an entire loss from the party vicariously liable to the actual wrongdoer.[10] At least one early Alabama case, *Mallory Steamship Co. v. Druhan*,[11] similarly permitted indemnity where one of the jointly liable parties furnished defective equipment that caused injury to the other defendant's employee, finding that the defendant employer was not at fault "except technically or constructively."[12]

Continuing criticism of the rules limiting contribution ultimately resulted in radical change in every state except Alabama. Many states enacted statutes modeled on the Uniform Contribution Among Tortfeasors Acts of 1939[13] and 1955,[14] while others enacted their own statutes permitting contribution in tort actions.[15] These enactments stemmed from the

9. *Id.* at 620, 622.

10. *See* Am. S. Ins. Co. v. Dime Taxi Serv., Inc., 151 So. 2d 783, 785 (Ala. 1963) ("The rule that there is no contribution between joint-tortfeasors does not apply in instances in which one tortfeasor is liable only by reason of the negligence or fault of the other."); *Gobble*, 147 So. at 622 (citing general prohibition and discussing cases permitting contribution where a person was made a wrongdoer "by inference of law only"); Huey v. Dykes, 82 So. 481, 482 (Ala. 1919) ("It is true that the master who is held to pay damages for an injury inflicted on a third party by the wrong or negligence of his servant has a right of action to recover the amount of such damages from the servant.").

11. 84 So. 874 (Ala. Ct. App. 1920).

12. *Id.* at 877.

13. *See infra* app. 1.A.

14. *See infra* app. 1.B.

15. *See infra* app. 1.C. Wyoming formerly permitted contribution among tortfeasors. 1973 Wyo. Sess. Laws page no. 71. However, Wyoming repealed its statutory provision permitting contribution after adopting WYO. STAT. ANN. § 1-1-110(b) (2007), which abolished joint and several liability.

general understanding that contribution does not typically involve judicial adjustment of differences among true wrongdoers since negligence is often inadvertent; that contribution is routinely permitted in contract, even where a party to a joint obligation deliberately breaches; and that fundamental justice and optimal deterrence call for equitable distribution of responsibility among those jointly liable in negligence. In the few states that did not enact contribution statutes, courts either declared that the common law supported rights of contribution among joint tortfeasors,[16] or the advent of comparative fault resolved the issue by limiting a joint tortfeasor's liability in damages to his or her share of the allocated fault.[17]

Alabama joined in none of these developments. The result is that Alabama stands alone in adhering to a no-contribution rule which, almost from its inception, has been criticized for its inequity and for which there is no justification except acceptance of traditional formulas. The problem can be easily addressed by enactment of the 1955 Act, which permits contribution in favor of a negligent tortfeasor who has paid more than a prorata share of common liability,[18] or a similar provision. The legislative adoption of a system of comparative fault could also resolve the problem (but that is a topic for another essay). However, the solution need not be legislative. The existing prohibition is a common law rule, and although many states reformed the law through legislation, other jurisdictions reformed

16. *See, e.g.*, Hobbs v. Hurley, 104 A. 815, 816–17 (Me. 1918) ("Contribution . . . is an equitable right founded on acknowledged principles of natural justice and enforceable in a court of law. . . . [T]he rule denying the right of contribution as between joint tort-feasors has no application to torts which are the result of mere negligence in carrying on some lawful transaction."); Royal Indem. Co. v. Aetna Cas. & Sur. Co., 229 N.W.2d 183, 189–90 (Neb. 1975) (rule denying contribution among joint tortfeasors limited to cases involving intentional wrong; right to equitable contribution among judgment debtors jointly liable in tort for negligence, based on general principles of justice); Ellis v. Chi. & Nw. Ry. Co., 167 N.W. 1048, 1053 (Wis. 1918) ("[W]here the element of moral turpitude is not involved and there is no willful or conscious wrong between the parties against whom a judgment in a tort action is recovered, there may be contribution between the tort-feasors.").

17. *See* ALASKA STAT. § 09.17.080(d) (2008). Prior to its adoption of comparative fault and rejection of joint and several liability, Alaska had enacted the Alaska Uniform Contribution Among Joint Tortfeasors Act. ALASKA STAT. § 09.16.010 (repealed 1982). Indiana does not permit contribution, IND. CODE ANN. § 34-51-2-12 (West 1999), but under its comparative fault act, defendants pay only their share of liability as determined by the fact finder. IND. CODE ANN. § 34-51-2-8 (West 1999). Mississippi's statute provides that liability for damages caused by two or more persons is several only and that a joint tortfeasor is responsible only for the proportion of damages allocated to him. MISS. CODE ANN. § 85-5-7(2) (West Supp. 2008). Joint and several liability may be imposed where tortfeasors act in concert and a right of contribution is available in that case. MISS. CODE ANN. § 85-5-7(4) (West Supp. 2008). Utah's comparative fault statute limits a defendant's liability to the percentage of fault attributed to that defendant and specifies that there is no right of contribution. UTAH CODE ANN. § 78B-5-820 (West 2008). There is generally no right of contribution under Vermont law, but the comparative fault statute limits each defendant's liability to his relative fault. VT. STAT. ANN. tit. 12, § 1036 (2002); *see also* Howard v. Spafford, 321 A.2d 74, 75 (Vt. 1974) (observing that Vermont law does not allow contribution among joint tortfeasors for intentional or negligent conduct).

18. UNIF. CONTRIBUTION AMONG TORTFEASORS ACT § 1, 12 U.L.A. 98 (1975).

the judicially created rule to recognize the right of contribution among tortfeasors.[19] The Alabama Supreme Court could do so as well.

II. WRONGFUL DEATH DAMAGES

In 1860, the Alabama legislature amended Alabama's wrongful death act to permit recovery in an amount "the jury deem[s] just" and added a new title: An Act to Prevent Homicides.[20] In the 1877 case of *Savannah & Memphis Railroad Co. v. Shearer*, the Alabama Supreme Court relied on this title to conclude that the legislature's purpose was punishment of wrongdoers rather than compensation of survivors. With this focus, the court construed the statute to afford recovery of punitive damages only: "Lacerated feelings of surviving relations, and mere capacity of deceased to make money if permitted to live, do not constitute the measure of recovery under the act . . . ."[21] Although the title was deleted long ago, and the language amended to permit "damages as the jury may assess,"[22] the rule that only punitive damages are permitted in wrongful death actions persists. Alabama jurors are instructed that they must consider only the defendant's wrongdoing. They are specifically instructed not to consider the pecuniary value of the decedent's life or the need to compensate the decedent's family.[23] Only Massachusetts imposed similar limitations on wrongful death damages. Since 1974, however, the wrongful death statute in Massachusetts permits recovery based on the loss to the decedent's fam-

19. *See, e.g.*, *Royal Indem. Co.*, 229 N.W.2d at 189–90 ("[W]e do not believe that the adoption of [a rule permitting contribution among negligent tortfeasors] would consist of an invasion by us of the realm of legislative discretion. . . . The common-law rule frequently said to deny contribution between joint tort-feasors was evolved by courts. If, as we think, this rule should be limited to cases where there is intentional wrong, moral turpitude or concerted action, it seems to be entirely proper for us to so limit the rule without waiting for the legislature to do so.").

20. *See* Savannah & Memphis R.R. Co. v. Shearer, 58 Ala. 672, 678 (1877).

21. *Id.* at 679.

22. ALA. CODE § 6-5-410 (2005).

23. Ala. Pattern Jury Instrs., Civ. 11.18 states:

> 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.
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> 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.

ily.[24] Today, in every jurisdiction except Alabama, wrongful death damages compensate survivors for their losses.[25]

Alabama's unique wrongful death rule rests on the related ideas that human life cannot be translated into a compensatory measurement and that the goal of wrongful death actions is to protect human life by imposing civil punishments.[26] Accordingly, the only appropriate basis for measuring damages is the gravity of the wrong done. Each of these rationales is problematic. First, the idea that the value of human life is incalculable rings true; but it is also belied by the daily activity of juries across the country in wrongful death cases, and even by Alabama juries who award compensation for equally incalculable nonpecuniary losses like pain and suffering and lost consortium. More fundamentally, the theoretical value of human life need not be at issue. In other states, the goal is compensating the decedent's survivors for their pecuniary and nonpecuniary losses. The calculation of damages is a matter of assessing the present worth of the economic and noneconomic contributions a decedent would have made to survivors, taking into account earnings, assistance, companionship, and advice. Second, the idea that an award of damages may deter careless and intentional wrongs underlies all of tort law. From the tortfeasor's perspective, however, deterrence is impacted minimally (if at all) by denominating the award "punitive" rather than "compensatory." Many jurisdictions specifically permit both compensatory and punitive wrongful death damages.[27] Alabama's statute, permitting "such damages as the jury may as-

24. MASS. GEN. LAWS ANN. ch. 229, § 2 (West 2000).

25. *See infra* app. 2.

26. *See, e.g.*, Killough v. Jahandarfard, 578 So. 2d 1041, 1044 (Ala. 1991) ("In limiting the damages in a wrongful death action to punitive damages only, the Legislature reflects the conviction of the citizens of this state that the value of human life can not be measured in dollars. The loss felt by a parent in the death of a child can not be compensated."); Cent. Ala. Elec. Coop. v. Tapley, 546 So. 2d 371, 376 (Ala. 1989) ("The sanctity of human life, the noble goal of preserving human life, and society's desire to punish those whose conduct results in the loss of human life, have all been accepted by our Legislature as criteria outweighing the seeming anomaly of permitting punitive damages for simple negligence. This view rests on the premise that one may be adequately compensated for his injuries, but the value of a human life has no measure."); Estes Health Care Ctrs., Inc. v. Bannerman, 411 So. 2d 109, 113 (Ala. 1982) ("The judicial interpretations of our wrongful death statute have developed this principle: While human life is incapable of translation into a compensatory measurement, the amount of an award of punitive damages may be measured by the gravity of the wrong done, the punishment called for by the act of the wrongdoer, and the need to deter similar wrongs in order to preserve human life."); *see also* Gen. Motors Corp. v. Johnston, 592 So. 2d 1054, 1063 (Ala. 1992) ("The reason Alabama's Wrongful Death Statute forbids compensatory damages is that 'one may be adequately compensated for his injuries, but the value of a human life has no measure.'" (quoting *Cent. Ala. Elec. Coop.*, 546 So. 2d at 376)).

27. *See, e.g.*, COLO. REV. STAT. ANN. § 13-21-203(3)(a) (West 2005 & Supp. 2008); KY. REV. STAT. ANN. § 411.130 (West 2005); MASS. GEN. LAWS ANN. ch. 229, § 2 (West 2000); MINN. STAT. ANN. § 573.02 (West 2000); N.C. GEN. STAT. ANN. § 28A-18-2(b) (West 2007); OKLA. STAT. ANN. tit. 12, § 1053 (West 2000 & Supp. 2009); OR. REV. STAT. § 30.020 (2003); S.C. CODE ANN. § 15-51-40 (2005 & Supp. 2008); TEX. CIV. PRAC. & REM. CODE ANN. §§ 71.009–.010 (Vernon 2008); VA. CODE ANN. § 8.01-52 (West 2007).

sess,"[28] could obviously be interpreted to encompass both compensatory and punitive damages without affecting the deterrence afforded by wrongful death actions.

The negative effects of Alabama's rule on wrongful death damages are far-ranging. Most significantly, the rule works gross inequities for the dependents of wrongful death victims. The original motivation for the enactment of wrongful death statutes, starting with Lord Campbell's Act in the English Parliament in 1846,[29] was the very real concern that widows and children could be driven into destitution by the wrongful death of the family's wage-earner.[30] In Alabama today, the needs of dependents are completely ignored in death cases that focus solely on assessing the nature and extent of the defendant's wrongdoing. The fortuity inherent in the system is obvious. If the victim is seriously injured and can no longer provide economic and emotional support, the tortfeasor is liable for lost wages, lost earning capacity, and lost consortium, and the victim's dependents are protected. If the victim is seriously injured and dies, the value of lost wages and the loss of companionship, comfort, advice, and support is irrelevant and liability may be greatly reduced, since it is measured by the character of the tortfeasor's act rather than the loss it occasions.

The Alabama rule also creates significant and substantial anomalies in the law. Most significantly, it contradicts basic tenets of damages law by permitting punitive awards unsupported by compensatory damages[31] and for simple negligence, rather than the more culpable conduct typically required.[32] As Alabama jurists have noted, it precludes application of the United States Supreme Court's due process guideposts for assessing punitive damages, which assume a compensatory award exists and call for a comparison of compensatory and punitive damages.[33] In wrongful death cases, Alabama judges either ignore this part of the required constitutional analysis of punitive damages as irrelevant or attempt to apply it "in principle" even though there is no basis for comparison.[34]

28. ALA. CODE § 6-5-410(a) (2005).

29. Fatal Accidents Act, 1846, 9 & 10 Vict., c. 93 (Eng.).

30. *See generally* Wex S. Malone, *The Genesis of Wrongful Death*, 17 STAN. L. REV. 1043 (1965). The long title for Lord Campbell's Act was *An Act for Compensating the Families of Persons Killed by Accidents*. *See* Terrance G. Reed & Joseph P. Gill, *RICO Forfeitures, Forfeitable 'Interests,' and Procedural Due Process*, 62 N.C. L. REV. 57, 64 n.63 (1983).

31. *See* Life Ins. Co. of Ga. v. Smith, 719 So. 2d 797, 806 (Ala. 1998) ("We now require . . . that a jury's verdict specifically award either compensatory damages or nominal damages in order for an award of punitive damages to be upheld.").

32. Alabama requires a showing that "the defendant consciously or deliberately engaged in oppression, fraud, wantonness, or malice." ALA. CODE § 6-11-20 (2005).

33. *See* State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408, 418 (2003); BMW of N. Am., Inc. v. Gore, 517 U.S. 559, 574–75 (1996).

34. *See* Mobile Infirmary Ass'n v. Tyler, 981 So. 2d 1077, 1106–09 (Ala. 2007) (Lyons, J., dissenting); Lance, Inc. v. Ramanauskas, 731 So. 2d 1204, 1218 (Ala. 1999) ("Ratio of Punitive Damages to Compensatory Damages: Because Alabama law does not allow the recovery of compensatory damages in a wrongful-death case, this factor is not applicable. Until the legislature amends the

Alabama's wrongful death rule also operates to preclude a federal civil rights action under 42 U.S.C. § 1983 against a municipality where the deprivation of constitutional rights results in death.[35] The issue arises because there is no wrongful death action under § 1983 and state law must fill the gap. However, Alabama's Wrongful Death Act allows only punitive damages, and municipalities are immune from punitive damages under federal case law.[36] Alabama's Wrongful Death Act required special accommodation in the Internal Revenue Code relating to the taxability of damages awards[37] and under the Federal Tort Claims Act (FTCA), which provides for liability of the United States in accordance with the law of the place where the tortious act or omission occurred but prohibits the award of punitive damages.[38] The FTCA was amended in 1948 because it became apparent that it precluded recovery against the United States for a wrongful death occurring in Alabama (and, at that time, Massachusetts).[39] If the limitation of wrongful death damages served important public policies, these difficulties would be justifiable. As it stands, they are not.

The Alabama Supreme Court could reverse its interpretation of the Wrongful Death Act and end the problems associated with its current approach. The justices have thus far refused to do so, assuming that legislative action would be required to permit recovery of compensatory damages for wrongful death.[40] Two reasons have been offered. The more general justification is that the legislature has presumptive knowledge of the judicial construction and has effectively adopted it through re-enactment. Under this view, legislative changes to the statute over more than a century constitute legislative acquiescence to the judicial construction.[41] Since the

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wrongful-death statute to allow compensatory damages for economic loss or allows recovery for mental anguish as part of punitive damages, our task in assessing the appropriate punitive damages in a wrongful-death case will remain extremely difficult."); *see also* Tillis Trucking Co. v. Moses, 748 So. 2d 874, 889–90 (Ala. 1999).

35. City of Tarrant v. Jefferson, 682 So. 2d 29, 30 (Ala. 1996). The U.S. Supreme Court granted certiorari, 520 U.S. 1154 (1997), but ultimately decided that the decision was not a final judgment, and thus outside the Court's certiorari jurisdiction, since the Alabama Supreme Court on interlocutory review held that the Alabama Act did not conflict with federal law and remanded for resolution of the remaining state law claims. Jefferson v. City of Tarrant, 522 U.S. 75, 84 (1997).

36. City of Newport v. Fact Concerts, Inc., 453 U.S. 247, 271 (1981).

37. *See* I.R.C. § 104(c) (2000). Gross income does not include the amount of damages, other than punitive damages, received for personal injury. I.R.C. § 104(a)(2). Section 104(c)(2) provides that the phrase "other than punitive damages" does not apply "with respect to which applicable State law . . . has been construed to provide by a court of competent jurisdiction pursuant to a decision issued on or before September 13, 1995, that only punitive damages may be awarded in such an action." I.R.C. § 104(c)(2).

38. Federal Tort Claims Act, ch. 753, § 410(a), 60 Stat. 843 (1946) (current version at 28 U.S.C. § 2674 (2006)); *see also* 28 U.S.C. § 1346(b)(1) (2006) (affording federal courts exclusive jurisdiction over civil actions on claims against the United States).

39. *See generally* Mass. Bonding & Ins. Co. v. United States, 352 U.S. 128, 130–32 (1956) (discussing the amendment).

40. *See* King v. Nat'l Spa & Pool Inst., Inc., 607 So. 2d 1241, 1246–47 (Ala. 1992).

41. *See, e.g.*, Richmond & D. R. Co. v. Freeman, 11 So. 800, 803 (Ala. 1892) ("[T]he legisla-

court's interpretation is based in policy rather than on particular statutory language, this conclusion is not necessary. It is equally or perhaps more plausible to infer that the legislature simply expects the court to correct its own errors. As Justice Maddox argued, "[C]learly this Court has the power to change its construction of the wrongful death statute, . . . especially 'to make the law just and to make it conform to public policy.'"[42]

The Alabama Supreme Court more specifically justifies its inaction by reference to the enactment of tort reform measures related to punitive damages in 1987 and 1999. The court infers from the legislature's enactment of these measures, without change to the Wrongful Death Act, an intent to afford exclusively punitive damages for wrongful death.[43] Even Justice Gorman Houston, who long advocated correcting what he viewed to be the court's error of interpretation, ultimately came to share this view.[44] This is not the only plausible inference. The legislature exempted wrongful death damages from its treatment of punitive damages generally[45] and specifically provided that wrongful death damages are not subject to any of the special rules relating to punitive damages: the heightened procedural requirement of proof by clear and convincing evidence;[46] the requirement that defendant engaged in "oppression, fraud, wantonness, or malice";[47] or the cap on punitive damages.[48] The court infers from this evidence first, that the legislature adopted its view of wrongful death damages as punitive, and second, that it then excluded those damages from its comprehensive reform of punitive damages law. The simpler inference is that the legislature does not independently view wrongful death damages as punitive. Instead, its careful exclusion of wrongful death damages from statutes dealing with punitive damages merely accommodates rather than adopts the court's approach, preserving the judiciary's opportunity to correct its own mistakes. The court should view the legislative record here as a deferential invitation to correct an erroneous interpretation of the statute.

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ture had the power to enact a law such as this one is, with the construction this court has given it. They have, in effect, done so here by the re-enactment of this statute after its construction, and it now only remains for the courts to enforce it as thus construed and re-enacted.").

42. *King*, 607 So. 2d at 1252 (Maddox, J., dissenting).

43. *See* Tillis Trucking Co. v. Moses, 748 So. 2d 874, 891 (Ala. 1999) ("The Legislature declined in 1987 to disturb the 135-year-old application of that law; it affirmatively declined to amend that law when it otherwise enacted tort reform legislation to affect punitive-damages awards in actions other than actions based on wrongful death.").

44. *See* McKowan v. Bentley, 773 So. 2d 990, 1000 (Ala. 1999) (Houston, J., concurring) (conceding that tort reform efforts in 1987 and 1999 put legislative imprimatur on the Court's interpretation of § 6-5-410).

45. *See* ALA. CODE § 6-11-29 (2005) (providing that article on punitive damages shall not affect wrongful death actions).

46. *See* ALA. CODE § 6-11-20(a), (b)(4) (2005).

47. *See* ALA. CODE § 6-11-20(a), (b)(1)–(3), (5) (2005).

48. *See* ALA. CODE § 6-11-21(j) (2005).

Nevertheless, judicial action may be unlikely. As the court has noted on more than one occasion, the weight of stare decisis in this instance is "crushing," since the court has consistently held—for more than a century—that the wrongful death statute affords recovery of punitive damages only.[49] The intersection of constitutional due process issues with Alabama's wrongful death rule may change the calculus. Stare decisis has a diminished effect in questions of constitutionality.[50] Although the United States Supreme Court rejected a claim that Alabama's approach in wrongful death cases denied due process in a 1927 case,[51] the jurisprudence of due process has evolved significantly, and it is not possible to conform to the contemporary requirements of due process analysis set out in *BMW v. Gore*[52] and *State Farm Mutual Automobile Insurance Co. v. Campbell*[53] in wrongful death cases in Alabama. It may be preferable for the Alabama Supreme Court to reinterpret the Wrongful Death Act as permitting compensatory as well as punitive damages than to run afoul of the standards of due process which prevail in the twenty-first century.[54] If the court continues to fail to correct its errors, the legislature should act by amending the wrongful death statute so that it specifically permits awards of compensatory damages.

III. THE SURVIVAL STATUTE

Alabama is the only state in which a tort claim does not survive the death of the victim. If the victim filed a lawsuit before death, the tort action survives; but an unfiled tort claim is lost.[55] In every other jurisdiction,

49. *See, e.g.*, CP & B Enters. v. Mellert, 762 So. 2d 356, 363 (Ala. 2000); Lance, Inc. v. Ramanauskas, 731 So. 2d 1204, 1221 (Ala. 1999) ("[T]his Court has, under the crushing weight of 150 years of stare decisis, consistently held that our wrongful-death statute allows for the recovery of punitive damages only.").

50. *See* City of Akron v. Akron Ctr. for Reprod. Health, Inc., 462 U.S. 416, 419–20 (1983), *overruled on other grounds by* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 882 (1992).

51. Louis Pizitz Dry Goods Co. v. Yeldell, 274 U.S. 112, 115–16 (1927) ("As interpreted by the state court, the aim of the present statute is to strike at the evil of the negligent destruction of human life by imposing liability, regardless of fault, upon those who are in some substantial measure in a position to prevent it. We cannot say that it is beyond the power of a legislature, in effecting such a change in common law rules, to attempt to preserve human life by making homicide expensive. It may impose an extraordinary liability such as the present, not only upon those at fault but upon those who, although not directly culpable, are able nevertheless, in the management of their affairs, to guard substantially against the evil to be prevented.").

52. 517 U.S. 559 (1996).

53. 538 U.S. 408 (2003).

54. *See* Mobile Infirmary Ass'n v. Tyler, 981 So. 2d 1077, 1109 (Ala. 2007) (Lyons, J., concurring in part and dissenting in part) (noting that to conform to the requirements of the due process analysis set out in *BMW v. Gore* and *State Farm Mutual Automobile Insurance Co. v. Campbell*, the Court would have to choose between striking the wrongful death statute or saving it with a construction consistent with prevailing due process jurisprudence).

55. ALA. CODE § 6-5-462 (2005). One of the problematic results of this rule appears in *Bassie v. Obstetrics & Gynecology Associates of Northwest Alabama*, 828 So. 2d 280 (Ala. 2002), in which the Alabama Supreme Court affirmed the dismissal of a personal injury claim filed on behalf of a patient

the claim survives, either as an independent action or as part of the recovery in a wrongful death action.[56] It is hard to conceive of good reasons for the Alabama approach. In combination with Alabama's rule on wrongful death recovery, the rule destroys the compensatory function of tort law in cases where the victim dies before filing. In such an instance, there can be no compensation for any of the ordinary damages recoverable in a tort action: medical and hospital expenses, lost wages, and pain and suffering. The wrongful death action is punitive only, focusing on the tortfeasor's conduct rather than the victim's loss. Similarly, the rule minimizes the deterrent effects of tort law by permitting the tortfeasor to escape liability for damages which would otherwise have been imposed.

Because the language of Alabama's statute is clear, this is a change which must be accomplished by the legislature, absent a finding that the statute is unconstitutional. The most likely constitutional challenge would be under the open courts provision of the Alabama constitution, article I, section 13, which provides that "every person, for any injury done him . . . shall have a remedy by due process of law."[57] The court has not addressed the constitutionality of the survival statute, although it has noted "that survival of a personal injury claim where the injury sued upon has resulted in death comports with the letter and spirit of Ala. Const. Art. I, § 13."[58] In general, the court has read section 13 to preserve "a remedy for accrued or vested causes of action."[59] Tort claims which are lost under the survival statute satisfy this requirement; a tort claim accrues on injury, and the death of the victim does not change the fact of accrual.

There are good models for legislative change. The Uniform Law Commissioners' Model Survival and Death Act of 1977, for example, provides that an action or claim for relief does not abate by reason of the death of the person to whom it accrued and may be maintained, subject to defenses to which it was subject during the decedent's lifetime, by the personal representative of the decedent.[60] Damages are limited to those that accrued before the victim's death and become part of the victim's estate.[61] Another possible model is Alabama House Bill 865, introduced in 2007. The drafters proposed changing the current rule to allow any claim, not of an equitable nature, filed or unfiled, to continue after the plaintiff's

who was "brain-dead" as defined in ALA. CODE § 22-31-1 (2006). *Bassie*, 828 So. 2d at 283. The Court ruled that the claim did not survive brain-death, with the result that there was no action for compensation for the costs of life support "regardless of the purported absurdity of any result." *Id.* at 282.

56. *See infra* app. 3.

57. ALA. CONST. art. I, § 13.

58. King v. Nat'l Spa & Pool Inst., 607 So. 2d 1241, 1247 (Ala. 1992).

59. *See, e.g.*, Reed v. Brunson, 527 So. 2d 102, 108–09 (Ala. 1988) (quoting Mayo v. Rouselle Corp., 375 So. 2d 449, 451 (Ala. 1979)).

60. MODEL SURVIVAL AND DEATH ACT § 2(a) (1977).

61. *Id.* § 2(b).

death.[62] Another possibility, of course, would be a joint reworking of the survival and wrongful death statutes to provide specifically for recovery for pecuniary and nonpecuniary losses arising out of tortious conduct, as well as punitive damages in appropriate cases.

IV. THE GUEST STATUTE

Alabama is the only state with a comprehensive guest statute. The statute precludes action for injury or death by any guest against an owner or operator absent "willful or wanton misconduct."[63] Illinois, Indiana, and Nebraska also have guest statutes, but they are far more limited in scope. The Illinois statute applies only to hitchhikers.[64] Indiana's guest statute precludes actions only by a nonpaying parent, spouse, child, stepchild, or sibling of the driver, or by a hitchhiker, unless the driver's conduct was wanton or willful.[65] The Nebraska statute permits actions where the driver of the vehicle is grossly negligent or driving under the influence,[66] and limits its scope to guests who are related to the driver within the second degree of consanguinity (defined to include parents and children, grandparents and grandchildren, and brothers and sisters).[67] Every other state has repealed its guest statute,[68] declared it unconstitutional,[69] or statutorily

62. H.R. 865, 2007 Reg. Sess. (Ala. 2007).

63. ALA. CODE § 32-1-2 (1999).

64. 625 ILL. COMP. STAT. ANN. § 5/10-201 (West 2008).

65. IND. CODE ANN. § 34-30-11-1 (West 1999).

66. NEB. REV. STAT. § 25-21, 237 (1995).

67. *Id.*

68. *See* ARK. CODE ANN. § 75-913, *repealed by* Act of February 2, 1983, No. 13, 1983 Ark. Acts 44; COLO. REV. STAT. § 42-9-101, *repealed by* Act of Apr. 9, 1975, ch. 379, § 1, 1975 Colo. Sess. Laws 1568; 1927 Conn. Pub. Acts page no. 4404, ch. 308, § 1, *repealed by* CONN. GEN. STAT. § 540(e) (Supp. 1939); FLA. STAT. § 320.59, *repealed by* 1972 Fla. Laws, ch. 72-1, § 1; MONT. CODE ANN. §§ 32-1113 to -1115, *repealed by* Act of April 3, 1975, ch. 236, 1975 Mont. Laws 466; OR. REV. STAT. ANN. § 30.115, *repealed by* 1979 Or. Laws, ch. 866, § 7; S.D. CODIFIED LAWS § 32-34-1, *repealed by* 1978 S.D. Sess. Laws, ch. 240, §§ 1, 2; VT. STAT. ANN. tit. 14, § 1491, *repealed by* 1969 No. 194 (Adj. Sess.) § 1; VA. CODE ANN. § 8-646.1, *repealed by* amended Acts 1974, c. 551 (to permit recovery on proof of simple negligence); WASH. REV. CODE ANN. § 46.08.080, *repealed by* 1974 Wash. Laws, Ex. Sess., ch. 3, § 1.

69. *See* Brown v. Merlo, 506 P.2d 212, 231 (Cal. 1973) (holding guest statute violated equal protection guarantees of California and United States Constitutions); Thompson v. Hagan, 523 P.2d 1365, 1371 (Idaho 1974) (holding guest statute violated equal protection guarantees of federal and state constitutions); Bierkamp v. Rogers, 293 N.W.2d 577, 585 (Iowa 1980) (holding guest statute unconstitutional under state equal protection guarantee since it did not rationally further the legitimate state purpose of preventing collusive recoveries from insurance companies, and distinguishing *Silver v. Silver*, 280 U.S. 117, 123–24 (1929) (finding that Connecticut guest statute did not violate federal equal protection)); Henry v. Bauder, 518 P.2d 362, 371 (Kan. 1974) (holding guest statute violated the equal protection guarantees of United States and Kansas Constitutions); Ludwig v. Johnson, 49 S.W.2d 347, 351 (Ky. App. 1932) (holding guest statute violated section 241 of Kentucky constitution providing that damages may be recovered for wrongful death); Longnecker v. Noordyk Mooney, Inc., 232 N.W.2d 654, 654 (Mich. 1975) (holding aviation guest statute unconstitutional); Manistee Bank & Trust Co. v. McGowan, 232 N.W.2d 636, 647 (Mich. 1975) (finding automobile guest statute violated equal protection guarantee of Michigan constitution), *overruled on other grounds by* Harvey v. Michigan, 664 N.W.2d 767, 773 (Mich. 2003); Laakonen v. Eighth Judicial Dist. Court of Nev., 538 P.2d

abrogated a common law immunity.[70] Other states found the rationales for guest statutes unconvincing from the outset and never enacted one.[71]

574, 579 (Nev. 1975) (holding guest statute invalid under equal protection clauses of Nevada and United States Constitutions); McGeehan v. Bunch, 540 P.2d 238, 241, 242, 244 (N.M. 1975) (holding it was a violation of federal and state equal protection clauses to penalize nonpaying guests by depriving them of the protection of the tort law, and irrational to reward host's generosity by denying nonpaying guests ordinary common law remedies; mandatory liability insurance removes burdens from host); Johnson v. Hassett, 217 N.W.2d 771, 780 (N.D. 1974) (holding guest statute violated North Dakota constitution provision forbidding the granting of special privileges and immunities to any class of citizens and requiring that laws have uniform operation); Primes v. Tyler, 331 N.E.2d 723, 729 (Ohio 1975) (holding Ohio guest statute, similar to Alabama's, unconstitutional because it denied equal protection through its grant of special privileges and immunities to negligent drivers who injured nonpaying passengers, closed the courts to some, but not all, and violated the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the United States Constitution); Ramey v. Ramey, 258 S.E.2d 883, 886 (S.C. 1979) (holding guest statute violated state and federal equal protection clauses); Whitworth v. Bynum, 699 S.W.2d 194, 197 (Tex. 1985) (holding automobile guest statute unconstitutional because its classifications were not rationally related to purpose of eliminating collusive lawsuits); Malan v. Lewis, 693 P.2d 661, 672–73 (Utah 1984) (holding guest statute unconstitutionally discriminated unreasonably and invidiously among guests who were barred from suing under the state guest statute in violation of federal and state equal protection); Nehring v. Russell, 582 P.2d 67, 79–80 (Wyo. 1978) (holding guest statute violated equal protection clause of Wyoming constitution, and distinguishing *Silver v. Silver*, 280 U.S. 117, 123–24 (1929) (finding that Connecticut guest statute did not violate federal equal protection)).

70. *See* Epps v. Parish, 106 S.E. 297 (Ga. Ct. App. 1921) (common law holds that injured guest may recover against host driver only for gross negligence), *superseded by statute*, GA. CODE ANN. § 51-1-36 (2000) (operator of motor vehicle owes passengers same duty of care owed to others); Gaboury v. Tindell, 158 N.E. 348 (Mass. 1927) (driver liable to gratuitous passenger only for gross negligence); Ruel v. Langelier, 12 N.E.2d 735, 736 (Mass. 1938) (stating rule that the only duty in gratuitous undertaking is to avoid gross negligence extended to auto passengers), *superseded by statute*, 1971 Mass. Acts ch. 865, § 1, MASS. GEN. LAWS ANN. ch.231, § 85L (West 2000).

71. *See* Leavitt v. Gillaspie, 443 P.2d 61, 71 (Alaska 1968) (permitting recovery against driver for death of passenger while noting automobile guest statutes in other states); Gordon v. Dramer, 604 P.2d 1153, 1158 (Ariz. Ct. App. 1979) (refusing to apply Utah guest statute to preclude recovery by Arizona passenger against negligent Arizona driver for accident in Utah because to apply Utah law "would defeat the basic tort policies of the State of Arizona and sanction wrongful conduct"); Pipher v. Parsell, 930 A.2d 890, 892–93 (Del. 2007) ("A 'driver owes a duty of care to her [or his] passengers because it is foreseeable that they may be injured if, through inattention or otherwise, the driver involves the care she [or he] is operating in a collision.'" (quoting Harris v. Carter, 582 A.2d 222, 235 (Del. Ch. 1990))) (alterations in original); Mossman v. Sherman, 34 Haw. 477, 480 (Haw. 1938) ("'The owner or operator of an automobile owes a duty to a gratuitous gues5t to exercise reasonable care in its operation and not unreasonably to expose him to danger and injury by increasing the hazards of travel.'" (quoting Casil v. Murata, 31 Haw. 123 (1929))); Welch v. State Dep't of Transp. & Dev., 640 So.2d 596, 598 (La. Ct. App. 1994) (recognizing that duty to abide by traffic laws is owed to "other motorists, pedestrians, and to passengers in the driver's vehicle"); Mansour v. State Farm Mut. Auto. Ins. Co., 510 So.2d 1305 (La. Ct. App. 1987) (same); Beaulieu v. Beaulieu, 265 A.2d 610, 612 (Me. 1970) ("[I]n guest cases, the host–operator must exercise in his own conduct ordinary care."); Dean v. Redmiles, 374 A.2d 329 (Md. 1977) (driver owes duty of reasonable care to passengers); Bolgrean v. Stich, 196 N.W.2d 442, 443–44 (Minn. 1972) (refusing to apply another state's guest statute and noting that Minnesota never adopted a guest statute); Kopp v. Rechtzigel, 141 N.W.2d 526, 527 (Minn. 1966) (same); Hatcher v. Daniel, 87 So.2d 490, 492 (Miss. 1956) (owner or operator of automobile owes duty to invited guest to exercise reasonable care in its operation); Busby v. Anderson, 978 So.2d 670, 675 (Miss. Ct. App. 2006) (same), *rev'd on other grounds*, 978 So.2d 670 (Miss. 2008); S.A.V. v. K.G.V., 708 S.W.2d 651, 653 n.4 (Mo. 1986) (noting that "Missouri's legal system has functioned adequately without a Guest Statute"); Griggs v. Riley, 498 S.W.2d 469, 471 (Mo. Ct. App. 1972) ("It is the policy of this state to compensate victims of negligent driving regardless of any host–guest relationship which may exist between the parties."); Clark v. Clark, 222 A.2d 205, 210 (N.H. 1966) (finding that New Hampshire never enacted a guest statute and that such a

The articulated purposes of guest statutes are to prevent collusive lawsuits and to encourage hospitality and generosity by drivers by protecting them from lawsuits by ungrateful passengers.[72] Both rationales are deeply flawed. First, collusion is a possibility in many types of cases, including, for example, cases between spouses, which are permitted in Alabama,[73] or cases between family members.[74] The appropriate response to the possibility of collusion is not to preclude a remedy for all potential claimants. Rather, the judicial system combats collusion with pretrial discovery, cross-examination, remedies for perjury, and the common sense of juries to detect false testimony. Second, guest statutes will not prevent collusion. Rather, a guest statute may simply change the nature of the collusion. Collusion about payment (where the ride was actually gratuitous) may substitute for collusion concerning the host driver's negligence.

Concerns about hospitality are also misplaced. The idea that drivers will not permit nonpaying guests to ride in their vehicles without the protection of a guest statute is obviously belied by the ordinary experience of drivers and passengers in other states. More importantly, Alabama's requirement of liability insurance,[75] which postdates the guest statute by

statute was no longer needed due to changes in the problems of automobile accident law); Mellk v. Sarahson, 229 A.2d 625, 627 (N.J. 1967) (refusing to apply another state's guest statute and noting New Jersey's strong policy of requiring a host to use at least ordinary care for the safety of guests); Babcock v. Jackson, 191 N.E.2d 279, 284–85 (N.Y. 1963) (refusing to apply Ontario's guest statute and noting that the New York legislature had repeatedly refused to enact a guest statute); Spivey v. Newman, 59 S.E.2d 844, 846 (N.C. 1950) (driver required to exercise reasonable care towards passengers); Thompson v. Bradley, 544 S.E.2d 258, 261 (N.C. Ct. App. 2001) (driver owes duty towards passengers to exercise reasonable and ordinary care for their safety); Mills v. Hoflick, 326 F. Supp. 95, 96 (D. Okla. 1971) (noting that Oklahoma has no guest statute); Kuchinic v. McCrary, 222 A.2d 897, 899 (Pa. 1966) (noting Pennsylvania does not have a guest statute); Abramson v. Rothman, 1981 WL 207418, 6 Phila. Cty. Rptr. 331, 341 (Phil. Cty. Ct. Comm. Pl. 1981) ("Case law has well-established that a driver of a motor vehicle assumes the duty to exercise ordinary care to prevent harm to an invited guest."), *aff'd*, 450 A.2d 754 (Pa. Super. Ct. 1982); Labree v. Major, 306 A.2d 808, 816 (R.I. 1973) ("[T]his state has never adopted the doctrine of degrees of negligence. . . . [I]n Rhode Island, a driver owes his guests the same duty of ordinary care that he owes to any other person."); Harrison v. Pittman, 534 S.W.2d 311 (Tenn. 1976) (driver owes duty of reasonable care to passenger); LaRue v. 1817 Lake Inc., 966 S.W.2d 423 (Tenn. App. 1977) (same); Paul v. Nat'l Life, 352 S.E.2d 550, 556 (W. Va. 1986) (refusing to apply guest statutes of foreign jurisdiction based on West Virginia's strong public policy in favor of compensating persons injured by the negligence of others); Wilcox v. Wilcox, 133 N.W.2d 408, 415–16 (Wis. 1965) (refusing to apply another state's guest statute and noting that the law of Wisconsin permits guests to recover from hosts on pleading and proof of ordinary negligence).

72. *See, e.g.*, Blair v. Greene, 22 So. 2d 834, 837 (Ala. 1945) ("The situation that this statute was apparently designed to prevent is well known. As the use of automobiles became almost universal, many cases arose where generous drivers, having offered rides to guests, later found themselves defendants in cases that often turned upon close questions of negligence. Undoubtedly the legislature in adopting this act reflected a certain natural feeling as to the injustice of such a situation.").

73. Alabama has never recognized interspousal tort immunity. *See, e.g.*, Johnson v. Johnson, 77 So. 335, 337 (Ala. 1917).

74. Alabama recognizes parental immunity, which prohibits minor children from bringing civil actions against their parents. *See, e.g.*, Smith v. Smith, 922 So. 2d 94, 101 (Ala. 2005); Newman v. Cole, 872 So. 2d 138, 139 (Ala. 2003).

75. ALA. CODE §§ 32-7A-1 to -22 (Supp. 2008).

many years,[76] largely eliminates the notion of the ungrateful passenger suing his generous host. In fact, the true beneficiary of the guest statute is not the careless driver but the driver's automobile insurer.[77] Finally, the inequity of a law that permits recovery for some passengers but not others is apparent. Even more problematic is that a guest may recover for property negligently damaged in an automobile accident but not for personal injury or death.[78]

At one time, guest statutes were defended by comparison to the traditional rules regarding landowners and their guests. Many of the states that no longer have guest statutes have also abandoned the traditional landowner classifications. Since Alabama retains traditional premises liability rules, the comparison remains relevant. Invitees are analogous to paying passengers under the guest statute, and both are owed a duty of reasonable care.[79] Licensees, who are typically social guests, are analogous to nonpaying (also typically social) passengers, and both are owed limited duties.[80] The analogy ends there. Social policy does not mandate that individuals maintain their premises for the safety of their guests. Guests are expected to take the premises as the host does. On the contrary, drivers operating their vehicles on public roadways are required to exercise reasonable care, regardless of who their passengers are, and must carry liability insurance. Additionally, the limited duties of landowners apply only to the condition of the premises. Landowners owe their guests a duty of reasonable care with respect to activities conducted on the premises.[81]

All of these concerns go to the wisdom of having a guest statute. Accordingly, the most appropriate body to address them is the Alabama legislature. The easiest way to eliminate the inequities of the guest statute is

76. Alabama's Mandatory Liability Insurance Act became effective on June 1, 2000. 2000 Ala. Acts 1005, Act No. 2000-554.

77. A number of early decisions describe guest statutes as a result of lobbying efforts by the insurance industry. For example, Nebraska limited its guest statute, as described *supra* text accompanying notes 66–67, rather than repealing it, as an accommodation to the insurance industry. During the floor debate on the bill, the sponsoring senator acknowledged that he retained the family limitations in response to industry lobbying: "I accepted that as the compromise necessary to sell the insurance companies or one of the many elements I utilized in dealing with the insurance companies because that was the necessary final piece, very simply." Judiciary Committee, 87th Sess. 1144 (Feb. 24, 1981).

78. ALA. CODE § 32-1-2 (1999) ("The owner, operator or person responsible for the operation of a motor vehicle shall not be liable for loss or damage *arising from injuries to or death of a guest* while being transported without payment therefore in or upon said motor vehicle . . . .") (emphasis added).

79. *See* Davidson v. Highlands United Methodist Church, 673 So. 2d 765, 767 (Ala. Civ. App. 1995).

80. *See id.*

81. *See* W.S. Fowler Rental Equip. Co. v. Skipper, 165 So. 2d 375, 381 (Ala. 1964), *superseded on other grounds by* ALA. R. CIV. P. 12(b), *as recognized in* Investors Guar. Fund, Ltd. v. Compass Bank, 779 So. 2d 185, 191 (Ala. 2000); *see also* Orr v. Turney, 535 So. 2d 150, 154 (Ala. 1988) (reaffirming the rule of *W.S. Fowler Rental Equip. Co. v. Skipper*: "A landowner, if he undertakes any affirmative conduct creating a danger to an unwitting licensee, independent and distinct from the condition of the premises, must give reasonable notice or warning of the danger or exercise reasonable or ordinary care to safeguard against that danger.").

legislative repeal. Otherwise, the only basis for striking the law is finding that it is unconstitutional. Alabama courts have consistently upheld the guest statute over state and federal constitutional challenges,[82] most recently in the 2004 case of *Tolbert v. Tolbert*.[83] The court in *Tolbert* ruled that the guest statute did not violate federal equal protection guarantees; the guarantee of a remedy for injury in article I, section 13 of the Alabama constitution; or the prohibition of grants of special privileges or immunities in article I, section 22.[84] However, *Tolbert* left open two possible challenges.

First, *Tolbert*'s conclusion on federal equal protection relied exclusively on the 1929 United States Supreme Court decision in *Silver v. Silver*, in which the Court rejected an equal protection challenge to Connecticut's guest statute (long since repealed).[85] As Justice Harwood noted, the plaintiff's argument fell "far short of demonstrating that we should presume *Silver v. Silver* to no longer be controlling authority."[86] However, a fully articulated argument that *Silver* is no longer controlling authority is highly persuasive. The *Silver* Court focused on whether the statute could permissibly distinguish between cars and other forms of transportation. It did not consider whether the statute discriminated against gratuitous as opposed to paying passengers, or automobile guests as opposed to recipients of generosity in other forms. As discussed above, there is no rational relationship between affording immunity to negligent drivers and the typically stated legislative objectives of promoting hospitality and preventing collusive lawsuits. *Silver* also predated the age of mandatory automobile insurance. The ubiquitous presence of a liability insurer in motor vehicle litigation minimizes concerns about protecting generous drivers from ungrateful and litigious guests; the insurer has an obligation both to defend any lawsuit against a careless driver and to indemnify the driver in the event of an adverse judgment. Relying on these arguments, a number of state supreme courts have found their guest statutes bear no rational relationship to the articulated legislative goals and ruled them unconstitutional as against the federal guarantee of equal protection despite *Silver*.[87] The Alabama Supreme Court could do so as well.

Alabama's guest statute may also violate the guarantee of equal protection under the Alabama Constitution of 1901 through the combination of

82. Beasley v. Bozeman, 315 So. 2d 570, 570–71 (Ala. 1975); Pickett v. Matthews, 192 So. 2d 261, 266 (Ala. 1939).

83. 903 So. 2d 103 (Ala. 2004).

84. *Id.* at 107–10.

85. 280 U.S. 117, 123–24 (1929); *see also* CONN. GEN. STAT. ch. 2, § 1628 (1930) (repealed 1937).

86. *Tolbert*, 903 So. 2d at 110.

87. *See supra* note 69.

article I, sections 1,[88] 6,[89] and 22.[90] The plaintiff in *Tolbert* did not argue state equal protection.[91] Although the Alabama Supreme Court's pronouncements on state equal protection have been less than clear,[92] the court recognized in *Tolbert* that the question of whether the Alabama constitution guarantees equal protection "remains in dispute."[93] More importantly, the court's most recent opinion raising the issue implicitly recognized a state guarantee of equal protection. The court cited, without discussion, plaintiff's claim that the licensing act in question violated "the right of equal protection guaranteed by the Alabama Constitution of 1901, Art. I, §§ 1, 6, and 22"[94] and held that it did not violate "equal protection of the laws as guaranteed by the Alabama Constitution."[95] Many states

88. ALA. CONST. art. I, § 1 ("That all men are equally free and independent; that they are endowed by their Creator with certain inalienable rights; that among these are life, liberty and the pursuit of happiness.").

89. Article I, section 6 deals with criminal prosecutions but includes the language "nor be deprived of life, liberty, or property, except by due process of law . . . ." ALA. CONST. art. I, § 6.

90. ALA. CONST. art. I, § 22 ("That no ex post facto law, nor any law, impairing the obligations of contracts, or making any irrevocable or exclusive grants of special privileges or immunities, shall be passed by the legislature; and every grant or franchise, privilege, or immunity shall forever remain subject to revocation, alteration, or amendment.").

91. Tolbert v. Tolbert, 903 So. 2d 102, 109 (Ala. 2004).

92. *See, e.g.*, *Ex parte* Melof, 735 So. 2d 1172 (Ala. 1999). Justice Houston wrote for the court, holding that there is no equal protection provision in the Alabama Constitution of 1901. There were four special concurrences on the question of state equal protection. *Id.* at 1181. Chief Justice Hooper concurred specially, agreeing that the Alabama constitution contains no equal protection clause, but explaining that each person in the state is equal before the law and entitled to receive the same protections afforded by the law. *Id.* at 1187. Justice Maddox noted that the court had on several occasions specifically held that Alabama's constitution, particularly sections 1, 6, and 22, guarantee equal protection of the laws. *Id.* at 1188 (Maddox, J., concurring) (citing *Ex parte* Jackson, 516 So. 2d 768 (Ala. 1986); *Ex parte* Branch, 526 So. 2d 609 (Ala. 1987)). Justice Houston also concurred specially, cautioning that the court should not deviate from its role in the system of government by creating an equal protection clause in the Alabama constitution, and noting that he personally would include an equal protection clause if he were to author a constitution for Alabama. *Id.* (Houston, J., concurring). Justice See, joined by Justice Brown, agreed that the Alabama Constitution of 1901 has no single, express equal protection provision, but added that it did not follow that there can be no claim of denial of equal protection cognizable under the Alabama constitution. *Id.* at 1194 (See, J., concurring specially). In the instant case, however, the plaintiff failed to present an argument found in the language of sections 1, 6, and 22. Justice Cook disagreed, stating that the Alabama constitution guarantees the citizens of Alabama equal protection of the laws, through sections 1, 6, 13, 22, and 35. *Id.* at 1197 (Cook, J., concurring in the result). He noted that many state constitutions do not contain an explicit equal protection provision but are nevertheless recognized as guaranteeing equal protection of the laws. He cited the court's numerous opinions finding that the constitution guarantees equal protection. Justice Johnstone agreed with Justice Cook and argued that the court should not overrule its equal protection jurisprudence. *Id.* at 1206 (Johnstone, J., dissenting). He noted the viewpoint that stare decisis should be discounted on constitutional issues, but argued that stare decisis should not be violated without a "practical mandate" so as to deprive Alabama citizens of constitutional rights. *Id.* at 1207.

93. *Tolbert*, 903 So. 2d at 109 (quoting Hutchins v. DCH Reg'l Med. Ctr., 770 So. 2d 49, 59 (Ala. 2000)).

94. Bd. of Water & Sewer Comm'rs v. Hunter, 956 So. 2d 403, 424 (Ala. 2006).

95. *Id.* at 426.

found their guest statutes violated the equal protection guarantees afforded by their own state constitutions.[96]

CONCLUSION

Alabama tort law elevates tradition over principles of natural justice with its prohibition of contribution among joint tortfeasors, the limitation of wrongful death damages and survival actions, and the guest statute. In addition, there are strong arguments that both the Wrongful Death Act as limited by the Alabama Supreme Court and the guest statute violate constitutional requirements of due process and equal protection. These are matters which deserve prompt judicial or legislative attention.

96. *See supra* note 69.

APPENDIX 1: CONTRIBUTION

A. 1939 Uniform Act

Arkansas	ARK. CODE ANN. §§ 16-61-201 to -212 (2005)
Delaware	DEL. CODE ANN. tit. 10, §§ 6301–6308 (1999 & Supp. 2008)
Hawaii	HAW. REV. STAT. §§ 663-11 to -17 (LexisNexis 2007)
Maryland	MD. CODE ANN., CTS. & JUD. PROC. §§ 3-1401 to -1409 (LexisNexis 2006)
New Mexico	§§ 41-3-1 to -8 NMSA (LexisNexis 1996)
Pennsylvania	42 PA. C.S.A. §§ 8321–8327 (West 2007)
Rhode Island	R.I. GEN. LAWS §§ 10-6-1 to -11 (1997 & Supp. 2008)
South Dakota	S.D. CODIFIED LAWS §§ 15-8-11 to -22 (2001)

B. 1955 Uniform Act

Alaska	ALASKA STAT. §§ 09.16.010–.060 (repealed by 1986 Tort Reform Act); ALASKA STAT. § 09.17.080 (2008) (current comparative fault provision providing for several liability only)
Arizona	AZ. REV. STAT. ANN. §§ 12-2501 to -2509 (2003)
Colorado	COLO. REV. STAT. ANN. §§ 13-50.5-101 to -106 (West 2005)
Florida	FLA. STAT. ANN. § 768.31 (West 2005)
Massachusetts	M.G.L.A. c. 231B, §§ 1–4 (West 2000)
Nevada	NEV. REV. STAT. ANN. §§ 17.225–.305 (LexisNexis 2008)
North Carolina	N.C. GEN. STAT. ANN. §§ 1B-1 to -6 (2007)
North Dakota	N.D. CENT. CODE §§ 32-38-01 to -04 (1996)
Ohio	OHIO REV. CODE ANN. §§ 2307.31–.34 (West 2004) (§§ 2307.31–.33 *repealed by* 1970 H. 1201)
Oklahoma	12 OKL. ST. ANN. § 832 (West 2000)
South Carolina	S.C. CODE ANN. §§ 15-38-10 to -70 (2005 & Supp. 2008)
Tennessee	TENN. CODE ANN. §§ 29-11-101 to -106 (2000)

C. States' Independent Statutes or Case

California	CAL. CIV. PROC. CODE §§ 875–880 (1980 & Supp. 2009)
Connecticut	CONN. GEN. STAT. ANN. § 52-572h (West 2005)
District of Columbia	M. Pierre Equip. Co. v. Griffith Consumers Co., 831 A.2d 1036, 1038 (D.C. 2003); District of Columbia v. Washington Hosp. Ctr., 722 A.2d 332, 336 (D.C. 1998) (en banc)
Georgia	GA. CODE ANN. § 51-12-32 (2000)
Idaho	IDAHO CODE ANN. § 6-803 (2004)
Illinois	S.H.A. 740 ILCS 100/1 to 100/5 (West 2002); S.H.A. 740 ILCS 100/3.5 to 100/5 (West 2002), *held unconstitutional by* Best v. Taylor Mach. Works, 689 N.E.2d 1057 (Ill. 1997)
Indiana	IND. CODE ANN. § 34-51-2-12 (West 1999) (comparative fault statute providing no right of contribution among joint tortfeasors)
Iowa	IOWA CODE ANN. §§ 668.1–.16 (West 1998 & Supp. 2009)
Kansas	K.S.A. § 60-2413 (2005)
Kentucky	KY. REV. STAT. ANN. § 412.030 (LexisNexis 2005)
Louisiana	LSA–C.C. art. 1804–1805 (2008)
Maine	Roberts v. Am. Chain & Cable Co., 259 A.2d 43, 50 (Me. 1969)
Michigan	M.C.L.A. §§ 600.2925a–d (West 2000 & Supp. 2008)
Minnesota	M.S.A. § 548.19 (West 2000)
Mississippi	MISS. CODE ANN. § 85-5-7 (Supp. 2008) (comparative fault statute providing for several liability only)
Missouri	V.A.M.S. § 537.060 (West 2008)
Montana	MONT. CODE ANN. § 27-1-703 (1995 & Supp. 2008)
Nebraska	Northland Ins. Co. v. State, 492 N.W.2d 866, 869 (Neb. 1992); Royal Indem. Co. v. Aetna Cas. & Sur. Co., 229 N.W.2d 183, 189 (Neb. 1975)
New Hampshire	RSA §§ 507:7-d to -g (LexisNexis 1997)
New Jersey	N.J.S.A. 2A:53A-2 to -3 (West 2000)

New York	N.Y. C.P.L.R. §§ 1401–1404 (McKinney 1997)
Oregon	OR. REV. STAT. § 31.800 (2003)
Texas	TEX. CIV. PRAC. & REM. CODE ANN. §§ 32.001–.003 (Vernon 2008)
Utah	UTAH CODE ANN. § 78B-5-820 (2008) (comparative fault statute limiting defendant's liability to percentage of fault attributed to him; no rights of contribution)
Vermont	12 V.S.A. § 1036 (2002) (generally no right to contribution under Vermont law, but legislative action in adopting comparative negligence statute limited each defendant's responsibility to his relative fault)
Virginia	VA. CODE ANN. § 8.01-34 (2007)
Washington	RCWA §§ 4.22.040–.050 (West 2005)
West Virginia	W. VA. CODE ANN. § 55-7-13 (LexisNexis 2008)
Wisconsin	W.S.A. § 815.59 (West 2007); Brandner v. Allstate Ins. Co., 512 N.W.2d 753, 760 (Wis. 1994); Mulder v. Acme-Cleveland Corp., 290 N.W.2d 276, 278–79 (Wis. 1980)
Wyoming	Wyoming permitted contribution among tortfeasors under WYO. STAT. ANN. § 1-1-110(b) (repealed by Laws 1986, ch. 24, § 2), but repealed that provision after adopting WYO. STAT. ANN. § 1-1-109(e) (2007), which abolished joint and several liability

APPENDIX 2: WRONGFUL DEATH

Alabama	ALA. CODE § 6-5-410(a) (2005)
Alaska	ALASKA STAT. § 09.55.580(c) (2008)
Arizona	Ariz. Rev. Stat. Ann. § 12-613 (2003)
Arkansas	ARK. CODE ANN. § 16-62-102(f) (2005)
California	CAL. CIV. PROC. CODE § 377.61 (West 2004)
Colorado	COLO. REV. STAT. ANN. § 13-21-203 (West 2005)
Connecticut	CONN. GEN. STAT. ANN. § 52-555(a) (West 2005)
Delaware	DEL. CODE ANN. tit. 10, § 3724(d) (Supp. 2008)
District of Columbia	D.C. CODE § 16-2701(b) (LexisNexis 2008)
Florida	FLA. STAT. ANN. § 768.21 (West 2005)
Georgia	GA. CODE ANN. § 51-4-2(a) (2000)
Hawaii	HAW. REV. STAT. ANN. § 663-3(b) (LexisNexis 2007)
Idaho	Idaho Code Ann. § 5-311 (2004)
Illinois	S.H.A. 740 ILCS 180/2 (West Supp. 2008)
Indiana	IND. CODE ANN. § 34-23-1-1 (West 1999)
Iowa	IOWA CODE ANN. § 633.336 (West Supp. 2009)
Kansas	K.S.A. § 60-1903 (2005)
Kentucky	KY. REV. STAT. ANN. § 411.130(1) (LexisNexis 2005)
Louisiana	LSA–C.C. art. 2315.2(A) (Supp. 2009)
Maine	18-A M.R.S.A. § 2-804(b) (Supp. 2008)
Maryland	MD. CODE ANN., CTS. & JUD. PROC. § 3-904 (LexisNexis 2006)
Massachusetts	M.G.L.A. c. 229, § 2 (West 2000)
Michigan	M.C.L.A. § 600.2922(6) (West Supp. 2008)
Minnesota	M.S.A. § 573.02(1) (West Supp. 2008)
Mississippi	MISS. CODE ANN. § 11-7-13 (2004)
Missouri	V.A.M.S. § 537.090 (West 2008)
Montana	Mont. Code Ann. § 27-1-323 (1995)
Nebraska	Neb. Rev. Stat. § 30-809(1) (1995)
Nevada	NEV. REV. STAT. ANN. § 41.085 (LexisNexis 2006)
New Hampshire	R.S.A. § 556:12 (LexisNexis 2006)
New Jersey	N.J.S.A. 2A:31-5 (West Supp. 2008)
New Mexico	§ 41-2-3 NMSA (LexisNexis Supp. 2007)
New York	N.Y. EST. POWERS & TRUSTS LAW § 5-4.3 (McKinney 1999)
North Carolina	N.C. GEN. STAT. ANN. § 28A-18-2 (2007)
North Dakota	N.D. Cent. Code § 32-21-02 (1996)
Ohio	OHIO REV. CODE ANN. § 2125.02(A)(2) (West 2005)
Oklahoma	12 OKL. ST. ANN. § 1053 (West Supp. 2009)
Oregon	Or. Rev. Stat. § 30.020(2) (2003)
Pennsylvania	42 PA. C.S.A. § 8301 (West 2007)
Rhode Island	R.I. Gen. Laws § 10-7-1.1 (1997)

South Carolina	S.C. Code Ann. § 15-51-10 (2005)
South Dakota	S.D. Codified Laws § 21-5-7 (1987)
Tennessee	Tenn. Code Ann. § 20-5-113 (1994)
Texas	TEX. CIV. PRAC. & REM. CODE ANN. §§ 71.009–.010 (Vernon 2008)
Utah	Utah Code Ann. § 78B-3-106(1) (2008)
Vermont	14 V.S.A. § 1492(b) (2002)
Virginia	VA. CODE ANN. § 8.01-52 (2007)
Washington	RCWA § 4.20.020 (West Supp. 2009)
West Virginia	W. VA. CODE ANN. § 55-7-5 (LexisNexis 2008)
Wisconsin	W.S.A. § 895.04(4) (West 2006)
Wyoming	WYO. STAT. ANN. § 1-38-102(c) (2007)

APPENDIX 3: SURVIVAL STATUTES

Alabama	ALA. CODE § 6-5-462 (2005)
Alaska	ALASKA STAT. § 09.55.570 (2008)
Arizona	ARIZ. REV. STAT. ANN. § 14-3110
Arkansas	ARK. CODE ANN. § 16-62-101 (2005)
California	CAL. CIV. PROC. CODE § 377.20 (West 2004)
Colorado	COLO. REV. STAT. ANN. § 13-20-101 (West 2005)
Connecticut	CONN. GEN. STAT. ANN. §§ 52-555 to -599 (West Supp. 2009)
Delaware	DEL. CODE ANN. tit. 10, § 3701 (1999)
District of Columbia	D.C. CODE § 12-101 (LexisNexis 2008)
Florida	FLA. STAT. ANN. § 46.021 (West 2006)
Georgia	GA. CODE ANN. § 9-2-41 (2007)
Hawaii	HAW. REV. STAT. ANN. § 663-7 (LexisNexis 2007)
Idaho	IDAHO CODE ANN. § 5-311 (2004)
Illinois	S.H.A. 755 ILCS 5/27-6 (West 2007)
Indiana	IND. CODE ANN. § 34-11-7-1 (West 1999)
Iowa	IOWA CODE ANN. § 611.20 (West 1999)
Kansas	K.S.A. § 60-513 (2005)
Kentucky	KY. REV. STAT. ANN. § 411.140 (LexisNexis 2005)
Louisiana	LSA–C.C. art. 2315.1 (Supp. 2009)
Maine	18-A M.R.S.A. § 3-817(a) (Supp. 2008)
Maryland	MD. CODE ANN., CTS. & JUD. PROC. § 6-401 (LexisNexis 2006)
Massachusetts	M.G.L.A. c. 228, § 1 (West 2000)
Michigan	M.C.L.A. § 600.2922 (West Supp. 2008)
Minnesota	M.S.A. § 573.01 (West 2000)
Mississippi	MISS. CODE ANN. § 11-7-13 (2004)
Missouri	V.A.M.S. § 537.020 (West 2008)
Montana	MONT. CODE ANN. § 27-1-501 (1995)
Nebraska	NEB. REV. STAT. § 30-809 (1995)
Nevada	NEV. REV. STAT. ANN. § 41.100(3) (LexisNexis 2006)
New Hampshire	R.S.A. § 556:9 (LexisNexis 2006)
New Jersey	N.J.S.A. 2A:15-3 (West 2000)
New Mexico	§ 37-2-1 NMSA (LexisNexis 1990)
New York	N.Y. EST. POWERS & TRUSTS § 11-3.2 (McKinney 2008)
North Carolina	N.C. GEN. STAT. ANN. § 28A-18-2 (2007)
North Dakota	N.D. CENT. CODE § 28-01-26.1 (2006)
Ohio	OHIO REV. CODE ANN. § 2305.21 (West 2004)
Oklahoma	12 OKL. ST. ANN. § 1051 (West 2000)
Oregon	OR. REV. STAT. § 30.020(1) (2003)
Pennsylvania	42 PA. C.S.A. § 8302 (West 2007)
Rhode Island	R.I. GEN. LAWS § 9-1-6 (1997)
South Carolina	S.C. CODE ANN. § 15-51-10 (2005)
South Dakota	S.D. CODIFIED LAWS § 15-4-1 (2001)
Tennessee	TENN. CODE ANN. § 20-5-106(a) (Supp. 2007)
Texas	TEX. CIV. PRAC. & REM. CODE ANN. § 71.021 (Vernon 2008)
Utah	UTAH CODE ANN. § 78B-3-107 (2008)
Vermont	14 V.S.A. § 1401 (2002)

Virginia	VA. CODE ANN. § 8.01-50 (2007)
Washington	RCWA § 4.20.060 (West Supp. 2009)
West Virginia	W. VA. CODE ANN. § 55-7-8 (LexisNexis 2008)
Wisconsin	W.S.A. §§ 877.01, 895.01(1)(bm) (West 2006 & Supp. 2008)
Wyoming	WYO. STAT. ANN. § 1-4-101 (2007)

APPENDIX 4: GUEST STATUTES

Alabama	ALA. CODE § 32-1-2 (1999)
Alaska	Leavitt v. Gillaspie, 443 P.2d 61, 71 (Alaska 1968) (permitting recovery against driver for death of passenger while noting automobile guest statutes in other states)
Arizona	Gordon v. Dramer, 604 P.2d 1153, 1158 (Ariz. Ct. App. 1979) (refusing to apply Utah guest statute to preclude recovery by Arizona passenger against negligent Arizona driver for accident in Utah because to apply Utah law "would defeat the basic tort policies of the State of Arizona and sanction wrongful conduct")
Arkansas	ARK. CODE ANN. § 75-913, *repealed by* Act of February 2, 1983, No. 13, 1983 Ark. Acts 44
California	Brown v. Merlo, 506 P.2d 212, 231 (Cal. 1973) (holding guest statute violated equal protection guarantees of California and United States Constitutions)
Colorado	COLO. REV. STAT. § 42-9-101, *repealed by* Act. of Apr. 9, 1975, ch. 379, § 1, 1975 Colo. Sess. Laws 1568
Connecticut	1927 Conn. Pub. Acts page no. 4404, ch. 308, § 1, *repealed by* CONN. GEN. STAT. § 540(e) (Supp. 1939)
Delaware	Pipher v. Parsell, 930 A.2d 890, 892–93 (Del. 2007) ("A 'driver owes a duty of care to her [or his] passengers because it is foreseeable that they may be injured if, through inattention or otherwise, the driver involves the car she [or he] is operating in a collision.'" (quoting Harris v. Carter, 582 A.2d 222, 235 (Del. Ch. 1990))) (alterations in original)
Florida	FLA. STAT. § 320.59, *repealed by* 1972 Fla. Laws, ch. 72-1, § 1
Georgia	Epps v. Parish, 106 S.E. 297 (Ga. Ct. App. 1921) (common law holds that injured guest may recover against host driver only for gross negligence), *superseded by statute*, GA. CODE ANN. § 51-1-36 (2000) (operator of motor vehicle owes passengers same duty of care owed to others)
Hawaii	Mossman v. Sherman, 34 Haw. 477, 480 (Haw. 1938) ("'The owner or operator of an automobile owes a duty to a gratuitous guest to exercise reasonable care in its operation and not unreasonably to expose him to danger and injury by increasing the hazards of travel.'" (quoting Casil v. Murata, 31 Haw. 123 (1929)))
Idaho	Thompson v. Hagan, 523 P.2d 1365, 1371 (Idaho 1974) (holding guest statute violated equal protection guarantees of federal and state constitutions)
Illinois	S.H.A. 625 ILCS 5/10-201 (West 2008) (limiting guest statute)
Indiana	IND. CODE ANN. § 34-30-11-1 (West 1999) (limiting guest statute)
Iowa	Bierkamp v. Rogers, 293 N.W.2d 577, 585 (Iowa 1980) (holding guest statute unconstitutional under state equal protection guarantee since it did not rationally further the legitimate state purpose of preventing collusive recoveries from insurance companies, and distinguishing *Silver v. Silver*, 280 U.S. 117, 123–24 (1929) (finding that Connecticut guest statute did not violate federal equal protection))
Kansas	Henry v. Bauder, 518 P.2d 362, 371 (Kan. 1974) (holding guest statute violated the equal protection guarantees of United States and Kansas Constitutions)
Kentucky	Ludwig v. Johnson, 49 S.W.2d 347, 351 (Ky. App. 1932) (holding guest statute violated section 241 of Kentucky constitution providing that damages may be recovered for wrongful death)
Louisiana	Welch v. State Dep't of Transp. & Dev., 640 So.2d 596, 598 (La. Ct. App. 1994) (recognizing that duty to abide by traffic laws is owed to "other motorists, pedestrians, and to passengers in the driver's vehicle"); Mansour v. State Farm Mut. Auto. Ins. Co., 510 So.2d 1305 (La. Ct. App. 1987) (same)
Maine	Beaulieu v. Beaulieu, 265 A.2d 610, 612 (Me. 1970) ("[I]n guest cases, the host–operator must exercise in his own conduct ordinary care.")
Maryland	Dean v. Redmiles, 374 A.2d 329 (Md. 1977) (driver owes duty of reasonable care to passengers)
Massachusetts	Gaboury v. Tindell, 158 N.E. 348 (Mass. 1927) (driver liable to gratuitous passenger

	only for gross negligence); Ruel v. Langelier, 12 N.E.2d 735, 736 (Mass. 1938) (stating rule that the only duty in gratuitous undertaking is to avoid gross negligence extended to auto passengers), *superseded by statute*, 1971 Mass. Acts ch. 865, § 1, M.G.L.A. c.231, § 85L (West 2000)
Michigan	Longnecker v. Noordyk Mooney, Inc., 232 N.W.2d 654, 654 (Mich. 1975) (holding aviation guest statute unconstitutional); Manistee Bank & Trust Co. v. McGowan, 232 N.W.2d 636, 647 (Mich. 1975) (finding automobile guest statute violated equal protection guarantee of Michigan Constitution), *overruled on other grounds by* Harvey v. Michigan, 664 N.W.2d 767, 773 (Mich. 2003)
Minnesota	Kopp v. Rechtzigel, 141 N.W.2d 526, 527 (Minn. 1966) (refusing to apply another state's guest statute and noting that Minnesota never adopted a guest statute); *see also* Bolgrean v. Stich, 196 N.W.2d 442, 443–44 (Minn. 1972) (same)
Mississippi	Hatcher v. Daniel, 87 So.2d 490, 492 (Miss. 1956) (owner or operator of automobile owes duty to invited guest to exercise reasonable care in its operation); Busby v. Anderson, 978 So.2d 670, 675 (Miss. Ct. App. 2006) (same), *rev'd on other grounds*, 978 So.2d 670 (Miss. 2008)
Missouri	S.A.V. v. K.G.V., 708 S.W.2d 651, 653 n.4 (Mo. 1986) (noting that "Missouri's legal system has functioned adequately without a Guest Statute"); Griggs v. Riley, 498 S.W.2d 469, 471 (Mo. Ct. App. 1972) ("It is the policy of this state to compensate victims of negligent driving regardless of any host–guest relationship which may exist between the parties.")
Montana	MONT. CODE ANN. §§ 32-1113 to -1115, *repealed by* Act of April 3, 1975, ch. 236, 1975 Mont. Laws 466
Nebraska	NEB. REV. STAT. § 25-21,237 (1995) (limiting guest statute)
Nevada	Laakonen v. Eighth Judicial Dist. Court of Nev., 538 P.2d 574, 579 (Nev. 1975) (holding guest statute invalid under equal protection clauses of Nevada and United States Constitutions)
New Hampshire	Clark v. Clark, 222 A.2d 205, 210 (N.H. 1966) (finding that New Hampshire never enacted a guest statute and that such a statute was no longer needed due to changes in the problems of automobile accident law)
New Jersey	Mellk v. Sarahson, 229 A.2d 625, 627 (N.J. 1967) (refusing to apply another state's guest statute and noting New Jersey's strong policy of requiring a host to use at least ordinary care for the safety of guests)
New Mexico	McGeehan v. Bunch, 540 P.2d 238, 241, 242, 244 (N.M. 1975) (holding it was a violation of federal and state equal protection clauses to penalize nonpaying guests by depriving them of the protection of the tort law, and irrational to reward host's generosity by denying nonpaying guests ordinary common law remedies; mandatory liability insurance removes burdens from host)
New York	Babcock v. Jackson, 191 N.E.2d 279, 284–85 (N.Y. 1963) (refusing to apply Ontario's guest statute and noting that the legislature had repeatedly refused to enact a guest statute)
North Carolina	Spivey v. Newman, 59 S.E.2d 844, 846 (N.C. 1950) (driver required to exercise reasonable care towards passengers); Thompson v. Bradley, 544 S.E.2d 258, 261 (N.C. Ct. App. 2001) (driver owes duty towards passengers to exercise reasonable and ordinary care for their safety)
North Dakota	Johnson v. Hassett, 217 N.W.2d 771, 780 (N.D. 1974) (holding guest statute violated North Dakota constitution provision forbidding the granting of special privileges and immunities to any class of citizens and requiring that laws have uniform operation)
Ohio	Primes v. Tyler, 331 N.E.2d 723, 729 (Ohio 1975) (holding Ohio guest statute, similar to Alabama's, unconstitutional because it denied equal protection through its grant of special privileges and immunities to negligent drivers who injured nonpaying passengers, closed the courts to some, but not all, and violated the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the United States Constitution)
Oklahoma	Mills v. Hoflick, 326 F. Supp. 95, 96 (D. Okla. 1971) (noting that Oklahoma has no guest statute)
Oregon	OR. REV. STAT. ANN. § 30.115, *repealed by* 1979 Or. Laws, ch. 866, § 7
Pennsylvania	Kuchinic v. McCrary, 222 A.2d 897, 899 (Pa. 1966) (noting Pennsylvania does not have a guest statute); Abramson v. Rothman, 1981 WL 207418, 6 Phila. Cty. Rptr. 331, 341 (Phil. Cty. Ct. Comm. Pl. 1981) ("Case law has well-established that a driver of a motor vehicle assumes the duty to exercise ordinary care to prevent harm to an invited guest."), *aff'd*, 450 A.2d 754 (Pa. Super. Ct. 1982)
Rhode Island	Labree v. Major, 306 A.2d 808, 816 (R.I. 1973) ("[T]his state has never adopted the doctrine of degrees of negligence. . . . [I]n Rhode Island, a driver owes his guests the same duty of ordinary care that he owes to any other person.")
South Carolina	Ramey v. Ramey, 258 S.E.2d 883, 886 (S.C. 1979) (holding guest statute violated state and federal equal protection clauses)
South Dakota	S.D. CODIFIED LAWS § 32-34-1, *repealed by* 1978 S.D. Sess. Laws, ch. 240, §§ 1, 2

Tennessee	Harrison v. Pittman, 534 S.W.2d 311 (Tenn. 1976) (driver owes duty of reasonable care to passenger); LaRue v. 1817 Lake Inc., 966 S.W.2d 423 (Tenn. App. 1977) (same)
Texas	Whitworth v. Bynum, 699 S.W.2d 194, 197 (Tex. 1985) (holding automobile guest statute unconstitutional because its classifications were not rationally related to purpose of eliminating collusive lawsuits)
Utah	Malan v. Lewis, 693 P.2d 661, 672–73 (Utah 1984) (holding guest statute unconstitutionally discriminated unreasonably and invidiously among guests who were barred from suing under the state guest statute in violation of federal and state equal protection)
Vermont	14 V.S.A. § 1491, *repealed by* 1969 No. 194 (Adj. Sess.) § 1
Virginia	VA. CODE ANN. § 8-646.1, *repealed by* amended Acts 1974, c. 551 (to permit recovery on proof of simple negligence)
Washington	WASH. REV. CODE ANN. § 46.08.080, *repealed by* 1974 Wash. Laws, Ex. Sess., ch. 3, § 1
West Virginia	Paul v. Nat'l Life, 352 S.E.2d 550, 556 (W. Va. 1986) (refusing to apply guest statutes of foreign jurisdiction based on West Virginia's strong public policy in favor of compensating persons injured by the negligence of others)
Wisconsin	Wilcox v. Wilcox, 133 N.W.2d 408, 415–16 (Wis. 1965) (refusing to apply another state's guest statute and noting that the law of Wisconsin permits guests to recover from hosts on pleading and proof of ordinary negligence)
Wyoming	Nehring v. Russell, 582 P.2d 67, 79–80 (Wyo. 1978) (holding guest statute violated equal protection clause of Wyoming Constitution, and distinguishing *Silver v. Silver*, 280 U.S. 117, 123–24 (1929) (finding that Connecticut guest statute did not violate federal equal protection))