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ABSTRACT

Within the past four decades, private arbitration has spread apace across the American legal landscape. The "mass production" of arbitration clauses has pervaded modern business life, relegating a multitude of legal doctrines from the public courthouse into the private realm. The results have been both acute and invidious. Modern judicial preferences for arbitration have given way to enforcement in areas of the formerly unenforceable. Courts are now compelling new classes of claims, previously thought to be beyond the pale of any arbitration agreement.

The latest target in this expedition is the wrongful death action, with courts now shifting wrongful death litigants into private arbitration when they never agreed to arbitrate their disputes in the first place. The recent paradigm shift into wrongful death arbitration raises a complex blend of conceptual, practical, normative, and doctrinal problems. Under modern judicial preferences for arbitration, the problems that inhere within wrongful death arbitration have remained largely hidden. In this article, we expose these problems and develop a more nuanced and coherent rule of analysis that comprehends the history and purpose behind these two legal doctrines: wrongful death liability and arbitration.

First, we show that courts compelling arbitration in this area distort the very rights wrongful death liability historically sought to defend—including the property rights of family members who depended upon the decedent for eco-

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nomic support. Next, we explain that, by denying family members access to public tribunals and punitive damage awards, courts compelling wrongful death arbitration erode the basic deterrence function of wrongful death liability. In reaching our conclusion, we urge a bright-line rule that rejects wrongful death arbitration as fundamentally inconsistent with the historical intent and purpose behind both wrongful death liability and arbitration.

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INTRODUCTION

Wrongful death arbitration represents the latest chapter in a seemingly endless arbitration saga in American courts. Over the past four decades, the United States Supreme Court has radically transformed the 1925 Federal Arbitration Act ("FAA") from its meek origins as a procedural device available only in federal courts into an imposing body of substantive law preempting state-court power over a large class of claims.[1] Consequently, the judiciary has elevated arbitration clauses to "super contracts," replete with special rules favoring enforcement in areas of the formerly unenforceable.[2] In the last decade, courts relying on the federal policy favoring arbitration have begun compelling arbitration of an entirely new line of cases—from those involving employee fatalities to the wrongful deaths of nursing home residents.[3]

Although wrongful death arbitration appears to be spreading apace throughout the nation, the power of courts to compel arbitration in this area remains an unsettled question. Federal and state courts have consistently opposed one another in deciding whether a wrongful death claim constitutes an arbitrable dispute.[4] Moreover, while a handful of commentators have be-

1. *See* Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24–25 (1983) (holding that FAA Section 2 "is a congressional declaration of a liberal federal policy favoring arbitration agreements, notwithstanding any state substantive or procedural policies to the contrary"). The Court has expanded its arbitration jurisprudence to nearly every type of justiciable claim. *See, e.g.*, Circuit City Stores, Inc. v. Adams, 532 U.S. 105, 109 (2001) (holding that employment claims are generally arbitrable); Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 35 (1991) (holding that claims under the Age Discrimination in Employment Act are arbitrable); Shearson/Am. Express Inc. v. McMahon, 482 U.S. 220, 222, 238, 242 (1987) (holding that claims under RICO and the Securities and Exchange Act of 1934 can be arbitrated); Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 631, 640 (1985) (holding that the defendant's antitrust claims were arbitrable). Many states have also adopted the Court's preference for arbitration over litigation. *See, e.g.,* Ericksen, Arbuthnot, McCarthy, Kearney & Walsh, Inc. v. 100 Oak Street, 673 P.2d 251, 257 (Cal. 1983) (observing California's "strong public policy in favor of arbitration as a speedy and relatively inexpensive means of dispute resolution"); Seifert v. U.S. Home Corp., 750 So. 2d 633, 636, 638 (Fla. 1999); Sanford v. Castleton Health Care Ctr., L.L.C., 813 N.E.2d 411, 416 (Ind. Ct. App. 2004) (citing Nw. Mut. Life Ins. Co. v. Stinnett, 698 N.E.2d 339, 343 (Ind. Ct. App. 1998)); Schaefer v. Allstate Ins. Co., 590 N.E.2d 1242, 1245 (Ohio 1992).

2. Richard Frankel, *The Arbitration Clause as Super Contract*, 91 WASH. U. L. REV. 531, 532–33 (2014); *see also* David S. Schwartz, *Enforcing Small Print to Protect Big Business: Employee and Consumer Rights Claims in an Age of Compelled Arbitration*, 1997 WIS. L. REV. 33, 36 ("The Supreme Court has created a monster.").

3. *See infra* Part I.B.

4. *Compare* Wilkerson *ex rel.* Estate of Wilkerson v. Nelson, 395 F. Supp. 2d 281, 288–89 (M.D.N.C. 2005) (concluding wrongful death actions in North Carolina are deriva-

moaned the marriage of arbitration and wrongful death liability as fundamentally unfair,[5] a close reading of the literature on wrongful death arbitration suggests that no commentator thus far has offered a complete, coherent, and convincing account of the power of courts to compel arbitration of wrongful death claims.

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tive "because wrongful death actions exist if and only if the decedent could have maintained an action for negligence or some other misconduct if she had survived"), Laizure v. Avante at Leesburg, Inc., 109 So. 3d 752, 754, 760–62 (Fla. 2013) (holding that wrongful death actions, despite such actions being independent under Florida statute, are "derivative for purposes of the issue presented in this case," thereby binding wrongful death claimants by decedents' arbitration agreements), *and* United Health Servs. of Ga., Inc. v. Norton, 797 S.E.2d 825, 827–28 (Ga. 2017) (holding that "despite the fact that the beneficiaries were not parties to the agreements in question," a wrongful death suit is arbitrable since such a claim is merely derivative of a decedent's underlying personal injury claim against the defendant), *with* Richmond Health Facilities v. Nichols, 811 F.3d 192, 196 n.3, 201 (6th Cir. 2016) ("At its heart, [compelled wrongful death arbitration] is not about preemption; it is about consent. . . . [F]ederal law does not force arbitration upon a party that never agreed to arbitrate in the first place under the guise of preemption principles."), Carter v. SSC Odin Operating Co., 976 N.E.2d 344, 358–60 (Ill. 2012) (holding that under Illinois law an arbitration agreement signed by a decedent did not bind a wrongful death claimant), Futurecare Northpoint, L.L.C. v. Peeler, 143 A.3d 191, 194 (Md. Ct. Spec. App. 2016) (holding that the Maryland wrongful death statute provides a new and independent cause of action which is not subject to the contractual obligations of the decedent), *and* Pisano v. Extendicare Homes, Inc., 77 A.3d 651, 662–63 (Pa. Super. Ct. 2013) (holding that the Pennsylvania wrongful death statute creates a new cause of action which cannot be limited or abrogated by the decedent's arbitration agreement with the defendant).

5. Much of the debate over wrongful death arbitration has focused on whether arbitrating these claims is a fairer and better alternative to litigation, or has focused on the contractual *defenses* to wrongful death arbitration. *See, e.g.*, Kelly Bagby & Samantha Souza, *Ending Unfair Arbitration: Fighting Against the Enforcement of Arbitration Agreements in Long-Term Care Contracts*, 29 J. CONTEMP. HEALTH L. & POL'Y 183, 188 (2013) (explaining four defenses to enforcement of an arbitration clause in the wrongful death context: (1) lack of capacity of the nursing facility resident; (2) lack of authority of the person signing the agreement; (3) inapplicability of the agreement to third parties; and (4) unconscionability of the agreement); Suzanne M. Scheller, *Arbitrating Wrongful Death Claims for Nursing Home Patients: What Is Wrong with This Picture and How to Make It 'More' Right*, 113 PA. ST. L. REV. 527, 563–71 (2008) (arguing that arbitrating wrongful death cases can be subject to several contractual defenses, such as third-party beneficiary issues and unconscionability); *see also* Laura K. Bailey, Note, *The Demise of Arbitration Agreements in Long-Term Care Contracts*, 75 MO. L. REV. 181, 201–05 (2010) (arguing that compulsory arbitration provisions in nursing home contracts should not be enforced under Missouri law). Yet the normative policy assumptions underlying many of these arguments are nevertheless rendered moot by the Supreme Court's own arbitration jurisprudence, especially the Court's repeated insistence that the FAA trumps state policy arguments disfavoring arbitration. *See, e.g.*, Marmet Health Care Ctr., Inc. v. Brown, 565 U.S. 530, 532–33 (2012) (invalidating West Virginia's general public policy prohibition against agreements to arbitrate personal injury or wrongful death claims against nursing homes). On remand, the West Virginia Supreme Court sent the consolidated cases to the trial court for discovery and to "develop the evidence" on whether, aside from the reversed state public policy grounds, the arbitration agreement was nonetheless "unenforceable under state common law principles." Brown v. Genesis Healthcare Corp., 729 S.E.2d 217, 229–30 (W. Va. 2012).

This article presents a new interpretation of wrongful death arbitration that critiques and refines judicial developments in this area by recharting the history and structure of these two legal doctrines: arbitration and wrongful death liability. Careful analysis will show that courts lack the power to compel arbitration of wrongful death claims. By consigning wrongful death litigants to arbitration when they never agreed to it, courts erode the substantive rights at play in a wrongful death action and distort its core deterrence objectives that have historically been the very tool for correcting public wrongs against society. Setting forth a comprehensive interpretation of wrongful death arbitration that rediscovers and reclarifies the principles behind wrongful death liability, this article intends to show that, instead of protecting rights and deterring misconduct, wrongful death arbitration has closed the door to public atrocities and, at the same time, abandoned the very protections wrongful death liability aims to defend.[6]

Part I studies the early twentieth century assent of arbitration and the modern decline of civil trial litigation. This part links this historical development to wrongful death litigation and explains the theoretical approaches courts have used to compel arbitration in this area.

Part II then turns to the history of wrongful death liability in an attempt to recover the twin theories of corrective justice and deterrence inhering within its doctrinal structure. What gave rise to the original wrongful death statutes in Anglo-American law, as we shall see, was the widespread nineteenth century belief that property rights were paramount to human liberty.[7] Wrongful death liability, both at common law and in its mid-nineteenth

6. The framework for this article follows the "two major camps of tort scholars"—corrective justice and deterrence theorists. *See* Stephen R. Perry, *The Moral Foundations of Tort Law*, 77 IOWA L. REV. 449 (1992); Gary T. Schwartz, *Mixed Theories of Tort Law: Affirming Both Deterrence and Corrective Justice*, 75 TEX. L. REV. 1801 (1997). A select group of scholars has noted the effect of arbitration on the erosion of these two camps in tort law. *See, e.g.*, J. Maria Glover, *Disappearing Claims and the Erosion of Substantive Law*, 124 YALE L.J. 3052, 3054 (2015) ("[P]rivate entities can [now] use contractual arbitration provisions effectively to erode substantive law from the books, with the consequent erosion of both the private compensatory goals and public deterrent objectives of that law."); Kathryn A. Sabbeth & David C. Vladeck, *Contracting (Out) Rights*, 36 FORDHAM URB. L.J. 803, 807 (2009) ("Privatizing the enforcement of statutory rights erodes those rights, as rights that are not enforced publicly vanish from the public's eye, making the public less educated about the laws governing society and probably less likely to recognize and correct the laws' violations.").

7. *See infra* notes 17–19 and discussion.

century statutory incarnation, served to protect the property loss of a family member—or "beneficiary"[8]—upon the death of a spouse or child. Only husbands and fathers could originally recover for property losses upon the death of a servant, wife or child; however, as time moved forward, states passed the first wrongful death statutes in order to extend these property protections to women and children alike.[9] This part concludes by exploring the contemporary treatment of wrongful death liability by showing that a twenty-nine-state majority now views wrongful death liability as a *deterrence device* designed to prevent future encroachments upon familial property rights.[10]

Part III draws several lessons from this history. First, it shows that courts directly violate the rights of a beneficiary by placing a decedent's arbitration agreement above a beneficiary's property interests. This article argues that wrongful death liability is, and always has been, a tool for family members to recover losses in property, not to enforce rights held by the decedent. Finally, this part explains that the ability of arbitration to limit punitive damage claims, coupled with a growing lack of public precedent and relaxed procedural safeguards, stifle the basic deterrent purpose behind wrongful death liability.

When properly understood, arbitration should not stand as a bar to the courtroom for wrongful death claimants. Rather, it was

8. Wrongful death statutes allow dependent family members, or beneficiaries, to recover economic losses arising out of the death itself. In contrast, survival statutes permit surviving relatives to recover any personal injury damages that the victim herself could have recovered had she not died, including damages for pain and suffering prior to death. *See* RESTATEMENT (SECOND) OF TORTS §§ 925 cmts. a, b(1)–(3), 926(a), 926 cmts. a–b (AM. LAW INST. 1979). The significance of this difference can be seen, for instance, in federal diversity cases involving either survival actions or wrongful death. While the decedent's domicile provides the basis of citizenship in survival actions, it is the domicile of the beneficiary that serves as the center of gravity in wrongful death cases. *See, e.g.*, Tank v. Chronister, 160 F.3d 597, 599, 601 (10th Cir. 1998) (concluding that 28 U.S.C. § 1332(c)(2) does not apply to Kansas wrongful death suits because the action "is brought neither on behalf or for the benefit of the estate, but only on behalf and for the benefit of the heirs"); Winn v. Panola-Harrison Elec. Coop., Inc., 966 F. Supp. 481, 482–83 (E.D. Tex. 1997) (distinguishing between wrongful death and survival actions and holding that 28 U.S.C. § 1332(c)(2), which provides that "the legal representative of the estate of the decedent is deemed to be a citizen only of the same State as the decedent," applies only to survival actions).

9. *See infra* Part II.A.

10. *See infra* Part II.B; *see also* Robert D. Cooter, *Punitive Damages for Deterrence: When and How Much?*, 40 ALA. L. REV. 1143, 1146–48, 1192–94 (1989); Jason S. Johnston, *Punitive Liability: A New Paradigm of Efficiency in Tort Law*, 87 COLUM. L. REV. 1385, 1389–91 (1987) (arguing that the threat of punitive damages, combined with procedural safeguards, should be used as a deterrent).

originally understood to be, often has been, and can become once again a contractual alternative to litigation for those parties *consenting* to its terms. If wrongful death litigation seems perverse today, it is only because our jurisprudence has imposed arbitration onto wrongful death liability, forcing *non*consenting family members to litigate their claims in ways they never saw fit.

I. THE MODERN DECLINE IN WRONGFUL DEATH LITIGATION

A. *Beginnings: The Rise of Arbitration in Postbellum Industrial America*

Mid-nineteenth century liberalism marked a high watermark in a gradual progression away from the world of property to the world of contract.[11] For much of the early period in American history, the bulk of consumption and production was accomplished within the family and local community.[12] Within this milieu, labor relations existed along lines of property status, with property acting as the touchstone of dignity and worth.[13]

As wage dependency began to climb in the mid-nineteenth century, however, organizations grew increasingly dependent upon

11. *See* JAMES WILLARD HURST, LAW AND THE CONDITIONS OF FREEDOM IN THE NINETEENTH CENTURY UNITED STATES 12–26 (1956). *See generally* ADAM SMITH, LECTURES ON JURISPRUDENCE 14–16 (R.L. Meek et al. eds., 1978) (referring to the four stages of human subsistence: hunter-gatherer, pastoral, agricultural, and commercial).

12. Sir William Blackstone, in his *Commentaries on the Laws of England*, wrote that,

> [t]here is nothing which so generally strikes the imagination, and engages the affections of mankind, as the right of property; or that sole and despotic dominion which one man claims and exercises over the external things of the world, in total exclusion of the right of any other individual in the universe.

2 WILLIAM BLACKSTONE, COMMENTARIES *2.

13. As one prominent historian described eighteenth-century American society, "[m]en were equal in that no one of them should be dependent on the will of another, and property made this independence possible. Americans in 1776 therefore concluded that they were naturally fit for republicanism precisely because they were 'a people of property; almost every man is a freeholder.'" GORDON S. WOOD, THE RADICALISM OF THE AMERICAN REVOLUTION 21–22, 234 (1991); *see also* W. NELSON, AMERICANIZATION OF THE COMMON LAW: THE IMPACT OF LEGAL CHANGE ON MASSACHUSETTS SOCIETY, 1760–1830, at 123–26 (1975) (emphasizing the postrevolutionary generation's "tendency . . . to equate the protection of property with the preservation of liberty"); Morton J. Horwitz, *The Historical Foundations of Modern Contract Law*, 87 HARV. L. REV. 917, 920–23 (1974) (describing the eighteenth century and early nineteenth century premarket period in America as subordinating "contract to property," whereby contract law was "conceived of as creating a *property interest* in specific goods," rather than as an agreement between two equal wills for some future monetary return (emphasis added)).

contracts for conducting everyday transactions.[14] As a result, society moved away from a property-based world to the age of contract, viewing human dignity as the equal *capacity* for human development and productivity.[15] In his 1861 treatise, *Ancient Law*, Henry Maine famously explained this societal shift:

> Starting, as from one terminus of history, from a condition of society in which all the relations of Persons are summed up in the relations of Family, we seem to have steadily moved towards a phase of social order in which all these relations arise from the free agreement of Individuals.
>
> . . . [W]e may say that the movement of the progressive societies has hitherto been a movement from Status to Contract.[16]

Law anchored the fixity of this social order by recognizing as paramount the agreements between free individuals. Scholars generally consider the *Lochner* era, from 1897 until 1937,[17] to be the apogee of freedom of contract in Supreme Court history.[18]

14. *See* Horwitz, *supra* note 13, at 920–23; Charles Perrow, *A Society of Organizations*, 20 THEORY & SOC'Y 725, 729 (1991).

15. *See* Morton J. Horwitz, *The Transformation in the Conception of Property in American Law, 1780–1860*, 40 U. CHI. L. REV. 248, 248 (1973) ("As the spirit of economic development began to take hold of American society in the early years of the nineteenth century, however, the idea of property underwent a fundamental transformation—from a static agrarian conception entitling an owner to undisturbed enjoyment, to a dynamic, instrumental, and more abstract view of property that emphasized the newly paramount virtues of productive use and development. By the time of the Civil War, the basic change in legal conceptions about property was completed.").

16. HENRY MAINE, ANCIENT LAW: ITS CONNECTION WITH THE EARLY HISTORY OF SOCIETY AND ITS RELATION TO MODERN IDEAS 180–82 (1930).

17. David N. Mayer, *The Myth of "Laissez-Faire Constitutionalism": Liberty of Contract During the* Lochner *Era*, 36 HASTINGS CONST. L.Q. 217, 217–18 (2009); *see, e.g.*, Adkins v. Children's Hosp., 261 U.S. 525, 562 (1923) (striking down a District of Columbia minimum wage law for women), *overruled by* W. Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937); Coppage v. Kansas, 236 U.S. 1, 26 (1915) (striking down a Kansas statute that made it a criminal offense to require employees, as a condition of hiring, to agree not to join a labor union), *abrogated by* Phelps Dodge Corp. v. NLRB, 313 U.S. 177 (1941); Adair v. United States, 208 U.S. 161, 179 (1908) (holding unconstitutional a federal statute that made it a criminal offense to fire an employee because that employee belonged to a union), *abrogated by Phelps*, 313 U.S. 177; Lochner v. New York, 198 U.S. 45, 64 (1905) (striking down a New York statute limiting the number of hours that bakers could work). *W. Coast Hotel Co*., 300 U.S. 379, implicitly overruled *Lochner*.

18. Legal historians generally regard the nineteenth century as "the century of contract." LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW 532 (2d ed. 1985); *see also* HURST, *supra* note 11, at 12 ("The nineteenth-century presumption always favored the exercise of the autonomy which the law of contract gave private decision makers."); Roscoe Pound, *Liberty of Contract*, 18 YALE L.J. 454, 470 (1909) (analyzing both state and federal cases that recognized freedom of contract as an element of liberty protected by the Fourteenth Amendment and concluding that "[t]he fountain head of this line of decisions seems to be the opinion of Mr. Justice Field in *Butchers' Union Co. v. Crescent City Co*., in which he restates the views of the minority in the *Slaughter House Cases*" that legislatures had no right to interfere "with the 'right to follow lawful callings'").

"[T]he major importance of legal contract," argued legal realist Karl Llewellyn in 1931, was that it provided "a frame-work for well-nigh every type of group organization and for well-nigh every type of passing or permanent relation between individuals and groups, up to and including states."[19]

Although the *Lochner* era eventually met its demise in 1937 with the advent of the New Deal,[20] the systematization of contracts in everyday life continued to soar. To manage the increasing complexity and volume of commercial transactions,[21] businesses began to regard traditional contractual bickering over terms as just another business input, one that must be subjected to cost controls.[22] Consequently, boilerplate terms in standard form contracts started to appear with greater frequency "in the transportation, insurance, and banking business," and "their use spread into all other fields of large scale enterprise, into international as well as national trade, and into labor relations."[23] With a greater demand for mass commercial goods and services, form-contracts streamlined the sales process and increased profitability for commercial enterprises.[24]

Part of the trend toward standardized contracts was the inclusion of arbitration clauses in most commercial contracts. The

19. Karl N. Llewellyn, *What Price Contract?—an Essay in Perspective*, 40 YALE L.J. 704, 736–37 (1931). Llewellyn is widely regarded as the father of the Uniform Commercial Code, with the code itself acquiring nicknames like "Karl's Kode" and "lex Llewellyn." *See* Mitchell Franklin, *On the Legal Method of the Uniform Commercial Code*, 16 LAW & CONTEMP. PROBS. 330, 330–31 (1951); Eugene F. Mooney, *Old Kontract Principles and Karl's New Kode: An Essay on the Jurisprudence of Our New Commercial Law*, 11 VILL. L. REV. 213, 213, 221 n.13 (1966).

20. Commentators agree that *West Coast Hotel* marks the demise of the *Lochner* era. *See* Riley v. Nat'l Fed'n of the Blind, 487 U.S. 781, 808 n.1 (1988) (Rehnquist, J., dissenting) (stating that *West Coast Hotel* "finally overruled *Lochner*"); Cass R. Sunstein, *Lochner's Legacy*, 87 COLUM. L. REV. 873, 876, 912 (1987) (noting that *West Coast Hotel* is "generally thought to spell the downfall of *Lochner*").

21. On the increased complexity and costs of trial, see Gillian K. Hadfield, *The Price of Law: How the Market for Lawyers Distorts the Justice System*, 98 MICH. L. REV. 953, 965 (2000) ("By 'complexity' I mean not only the intellectual subtlety of legal rules but also the mass of factors and contingencies which must or could be considered in determining legal strategies, arguments, and expectations. As the complexity of law and procedure increases, the total cost of resolving a matter goes up, and hence fewer disputes and claims (that is, fewer people) have access to law and lawyers.").

22. *See* Friedrich Kessler, *Contracts of Adhesion—Some Thoughts About Freedom of Contract*, 43 COLUM. L. REV. 629, 631 (1943).

23. *Id.*; *see also* Morris R. Cohen, *The Basis of Contract*, 46 HARV. L. REV. 553, 558 (1933).

24. *See* W. David Slawson, *The New Meaning of Contract: The Transformation of Contracts Law by Standard Forms*, 46 U. PITT. L. REV. 21, 24–26 (1984).

business community touted arbitration as an alternative to costly and inefficient litigation.[25] Remarking on this trend in 1928, legal historian Paul Sayre argued that arbitration was particularly suitable to the needs of modern businessmen who "want relief from decisions by judges or juries who may be profoundly ignorant of the many technical elements in modern commerce, and they want freedom from requirements of common law procedure and rules of evidence in determining these matters."[26] "[E]verybody to-day feels very strongly," Julius Henry Cohen explained before Congress in 1924, "that the right of freedom of contract, which the Constitution guarantees to men, includes the right to dispose of any controversy which may arise out of the contract in their own fashion."[27] With the growth of special interest groups in American politics, then, it only seemed apparent, "that the reasonable needs of business men [would] not be satisfied unless commercial arbitration [was applied] uniformly throughout the country."[28]

In lockstep fashion, legislatures and courts responded to these calls for arbitration.[29] In 1925, Congress passed the FAA as a means to reduce the volume of trial litigation[30] and encourage paternalistic control by legal elites.[31] For sixty years, the United

25. *See* D.G.R.McD., Note, *Contracts—Effect of the United States Arbitration Act*, 25 GEO. L.J. 443, 445 (1957).

26. Paul L. Sayre, *Development of Commercial Arbitration Law*, 37 YALE L.J. 595, 615 (1928).

27. *Arbitration of Interstate Commercial Disputes: Joint Hearings on S. 1005 and H.R. 646 Before the Subcomms. of the Comms. on the Judiciary*, 68th Cong. 13, 14 (1924) (statement of Julius Henry Cohen, Member, Comm. on Commerce, Trade & Commercial Law, Am. Bar Ass'n).

28. Sayre, *supra* note 26, at 597, 616.

29. D.G.R.McD., *supra* note 25, at 445–46 & n.20 (noting that the business world's support played a substantial role in the growing arbitration movement leading to the passage of the Act); *see also* Atl. Fruit Co. v. Red Cross Line, 276 F. 319, 322 (S.D.N.Y. 1921) (recognizing growing sentiment in the business community that courts should not intervene and invalidate arbitration agreements), *aff'd*, 5 F.2d 218 (2d Cir. 1924).

30. 9 U.S.C. § 2 (2012). The Act provides: "A written provision in . . . a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." *Id.*; *see* Julius Henry Cohen & Kenneth Dayton, *The New Federal Arbitration Law,* 12 VA. L. REV. 265 (1926) (noting that the Act was intended to correct delays associated with congested court dockets); *see also* H.R. REP. NO. 68-96, at 1–2 (1924) (noting that the Act arrived at an appropriate time because of costs and delays associated with litigation).

31. The postbellum period witnessed the rise of powerful corporate interests in American law, with new banking, insurance, and railroad interests ushering in a dramatic expansion of the regulatory state. *See* JAMES WILLARD HURST, THE GROWTH OF AMERICAN LAW: THE LAW MAKERS 339, 342 (1950). Part of the rise of special-interest groups in Amer-

States Supreme Court consistently interpreted the FAA as containing nothing more than a framework of procedural rights applicable only in federal courts.[32] Consequently, if state law forbade particular arbitration agreements, arbitration was not required regardless of the surrounding contracting circumstances.[33]

But with one stroke in 1984, the Court transformed the FAA from its humble beginnings into a talisman of substantive law that trumped state power to adjudicate a large class of claims.[34]

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ica was the establishment of the American Arbitration Association, a group founded by Progressive era business elites in 1926, one year after the passage of the FAA. As Amalia Kessler has recently shown,

> [t]here were two primary institutional contexts in which Progressives sought to use arbitration: the new municipal courts and the American Arbitration Association (AAA), established in 1926. As deployed within the municipal courts, arbitration was imposed at the discretion of the judge, rather than, as contemplated in the FAA, through prior agreement of the disputants themselves. In this sense, it is the AAA—created specifically for the purpose of facilitating the new system of arbitration envisioned by the FAA—that is the most direct institutional reflection of the statute's intended implementation.

Amalia D. Kessler, *Arbitration and Americanization: The Paternalism of Progressive Procedural Reform*, 124 YALE L.J. 2940, 2946 (2015). As it turned out, "legal elites" governing the AAA, "consistently embraced arbitration as a means of expanding access to justice (and thereby promoting national unity and values), while also empowering themselves to exercise significant paternalistic discretion." *Id.*

32. Wilko v. Swan, 346 U.S. 427, 437 (1953).

33. *See* Bernhardt v. Polygraphic Co., 350 U.S. 198, 204 (1956) (declining to apply the FAA to a Vermont state law dispute, reasoning that pursuant to *Erie Railroad v. Tompkins* and its progeny that the dispute was controlled by applicable state law).

34. Southland Corp. v. Keating, 465 U.S. 1, 16–17 (1984) (observing that the FAA put arbitration agreements "upon the same footing as other contracts"). In a subsequent line of cases, the Court expanded its liberal interpretation of the FAA. *See* Shearson/Am. Express, Inc. v. McMahon, 482 U.S. 220, 226 (1987); Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 625–26 (1985) (noting that the Act was intended to ensure enforcement of private agreements to arbitrate); Dean Witter Reynolds, Inc. v. Byrd, 470 U.S. 213, 221 (1985) (stating that Congress's primary concern in passing the Act was to enforce private arbitration agreements); Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 25 n.32 (1983) (observing that the Act "creates a body of federal substantive law establishing and regulating the duty to honor an agreement to arbitrate"); Scherk v. Alberto-Culver Co., 417 U.S. 506, 510–11 (1974) (indicating that Act was designed to allow parties to avoid costs and delays associated with litigation). In *Scherk*, the Supreme Court observed that English courts traditionally viewed arbitration agreements as "ousting" the courts of jurisdiction and therefore refused to enforce such agreements. *Scherk*, 417 U.S. at 510 n.4. The Court noted that American courts adopted this approach as part of the common law until the advent of the Act. *Id.* It indicated that the Act "was designed to allow parties to avoid 'the costliness and delays of litigation,' and to place arbitration agreements 'upon the same footing as other contracts.'" *Id.* at 510–11 (quoting H.R. REP. NO. 68-96, at 1–2). For scholarly commentary on this evolution, see Margaret L. Moses, *Statutory Misconstruction: How the Supreme Court Created a Federal Arbitration Law Never Enacted by Congress*, 34 FLA. ST. U. L. REV. 99, 132–38 (2006), critiquing the Court's interpretation of the FAA as preemptive of state law; and David S. Schwartz, *Correcting*

Arbitration clauses prohibiting claims for punitive damages and class actions, for example, suddenly became enforceable in state and federal courts alike.[35] And since countervailing state laws and policies disfavoring arbitration now became nugatory,[36] state courts eventually bowed to the Court's new FAA jurisprudence by adopting broad public policies favoring arbitration.[37]

To be sure, the expansion of arbitration in the United States historically correlated with the absolute decline in trial litigation in American courts,[38] a trend Marc Galanter appropriately dubbed "the vanishing trial."[39] Galanter shows that of all tort cases in 2002, only 2.2% resulted in trial, a sharp decline from 1962 when 16.5% of tort cases ended in trial.[40] Contract litigation increased dramatically starting in the 1970s and continued to soar until its peak in the early 1980s.[41] By 2002, just 700 contract cases resulted in trial, down from 2562 in 1984.[42] Significantly, during the period when contract trials began to tumble in the mid-1980s, the AAA reported at the end of the 1990s a steady and even increased commercial arbitration docket, rising from 1000 cases in 1960 to a staggering 17,000 in 2002.[43] As Galanter notes, perhaps we should consider the overall decline in trials not as the

Federalism Mistakes in Statutory Interpretation: The Supreme Court and the Federal Arbitration Act, 67 LAW & CONTEMP. PROBS. 5, 5 (2004), stating, "The current judicial treatment of the Federal Arbitration Act (FAA) is an embarrassment to a Court whose majority is supposed to be leading a federalism revival, if not a federalism revolution."

35. *See* E. Allan Farnsworth, *Punitive Damages in Arbitration*, 20 STETSON L. REV. 395, 408 (1991); Jean R. Sternlight, *As Mandatory Binding Arbitration Meets the Class Action, Will the Class Action Survive?*, 42 WM. & MARY L. REV. 1, 119–20 (2000); Jean R. Sternlight, *Disarming Employees: How American Employers Are Using Mandatory Arbitration to Deprive Workers of Legal Protection*, 80 BROOK. L. REV. 1309, 1310 n.9 (2015); Elizabeth G. Thornburg, *Contracting with Tortfeasors: Mandatory Arbitration Clauses and Personal Injury Claims*, 67 LAW & CONTEMP. PROBS. 253, 262 (2004); Stephen J. Ware, *Punitive Damages in Arbitration: Contracting Out of Government's Role in Punishment and Federal Preemption of State Law*, 63 FORDHAM L. REV. 529, 536 (1994).

36. *See, e.g.*, Marmet Health Care Ctr., Inc. v. Brown, 565 U.S. 530, 533 (2012).

37. *See* Glover, *supra* note 6, at 3061, 3066–67; Sabbeth & Vladeck, *supra* note 6, at 814–15.

38. Marc Galanter, *The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts*, 1 J. EMPIRICAL LEGAL STUD. 459, 466–67, 514–15 (2004).

39. *Id.* at 460, 530 (explaining that in nearly every legal field trial activity has declined since the midtwentieth century, "not only in relation to cases in the courts but to the size of the population and the size of the economy").

40. *Id.* at 466.

41. *Id.* at 467–68.

42. *Id.*

43. *See id.* at 467–68, 515.

"disappearance of trials," but rather as the "*relocation* of trials outside public courts."[44]

Yet looking at the last three decades, scholars have explained that the mass exodus of trials from the public courthouse has not produced "mass arbitrations" as one might expect. Cynthia Estlund shows that the reality behind mandatory arbitration contracts is a "black hole" of claims that simply disappear once subject to the arbitration process.[45] The vast majority of disputes subject to mandatory arbitration agreements "simply evaporate before they are even filed."[46] Similarly, Alexander Colvin, who conducted an empirical study on employment disputes, notes the small number of arbitration cases that actually resulted in awards, with most cases being settled or withdrawn prior to the award stage.[47] Modern preferences for arbitration thus seem to be giving way to the disappearance of cases altogether, a development that may "handicap efforts to hold firms publicly accountable" for their misconduct.[48]

B. *Mounting Tension: The Decline in Wrongful Death Trials and the Rise of Wrongful Death Arbitration*

In recent years, federal and state courts alike have begun compelling arbitration of a new line of cases—including notable wrongful death actions involving employee fatalities and nursing home deaths—previously thought to be beyond the pale of any arbitration agreement. All courts agree that a wrongful death action is designed to vindicate the pecuniary interests of aggrieved family members following the death of a spouse or child. Yet a handful of courts reason that wrongful death liability is but an extension of the decedent's personal injury claim,[49] an idea otherwise known as the "derivative theory" of wrongful death liabil-

44. *Id.* at 515 (emphasis added); *see also* Robert H. Klonoff, *Class Actions in the Year 2026: A Prognosis*, 65 EMORY L.J. 1569, 1571 (2016) ("Many other types of class actions, however—such as consumer, employment discrimination, and personal injury class actions—will continue to decline.").

45. Cynthia Estlund, *The Black Hole of Mandatory Arbitration*, 96 N.C. L. REV. 679, 682 (2018).

46. *Id.* at 682, 698.

47. Alexander J.S. Colvin, *An Empirical Study of Employment Arbitration: Case Outcomes and Processes*, 8 J. EMPIRICAL LEGAL STUD. 1, 4-6 (2011).

48. Estlund, *supra* note 45, at 681–82.

49. *See, e.g.*, Laizure v. Avante at Leesburg, Inc., 109 So. 3d 752, 754 (Fla. 2013).

ity.[50] These courts point to the fact that the same tortious "conduct" which caused the decedent's personal injury also undergirds the wrongful death action.[51] Without personal injury to the decedent, in other words, the wrongful death claim would otherwise not arise. Hence, since the same tortious "conduct" underlies both the wrongful death action and the personal injury action, these courts infer that a wrongful death action is derivative of the decedent's *rights* all the same.[52] Under this logic, a decedent enjoys rights over the wrongful death action, such that he or she can agree to arbitrate that claim entirely.[53]

On the opposite side of the debate, however, courts reject the derivative theory and insist that a wrongful death action secures an independent right of action for the benefit of a specific family member.[54] A wrongful death claim, as these courts point out,

50. *See, e.g.*, Wilkerson *ex rel*. Estate of Wilkerson v. Nelson, 395 F. Supp. 2d 281, 288–89 (M.D.N.C. 2005) (concluding wrongful death actions in North Carolina are derivative "because wrongful death actions exist if and only if the decedent could have maintained an action for negligence or some other misconduct if she had survived"); *Laizure*, 109 So. 3d at 754 (holding that wrongful death actions, despite such actions being independent under Florida statute, are "derivative for purposes of the issue presented in this case," thereby allowing wrongful death claimants to be bound by decedents' arbitrations agreements); United Health Servs. of Ga., Inc. v. Norton, 792 S.E.2d 825, 827–28 (Ga. 2017) (holding that "despite the fact that the beneficiaries were not parties to the agreements in question," a wrongful death suit is arbitrable against the defendant); Ballard v. Sw. Detroit Hosp., 327 N.W.2d 370, 371–72 (Mich. Ct. App. 1982) (holding that a wrongful death action is arbitrable).

51. Lindsey v. C&J Well Servs., Inc., No. 1:16-cv-019, 2018 U.S. Dist. LEXIS 203007, at *4, *13 (D.N.D. Nov. 30, 2018) ("[A] recovery in the wrongful death action arises from the *same conduct* that would have given rise to the deceased's personal injury claim." (emphasis added)).

52. *See, e.g.*, *Ballard*, 327 N.W.2d at 371–72 ("[A]lthough the Michigan wrongful death act provides for additional damages benefitting the decedent's next of kin for loss of society and companionship, it does not create a separate cause of action independent of the underlying rights of the decedent. Rather, the cause of action is expressly made derivative of the decedent's rights.").

53. *See, e.g.*, Briarcliff Nursing Home, Inc. v. Turcotte, 894 So. 2d 661, 665, 668 (Ala. 2004) (per curiam) (determining that the wrongful death claimant was bound by the arbitration provision entered into by the deceased); *In re* Labatt Food Serv., L.P., 279 S.W.3d 640, 646, 649 (Tex. 2009) (explaining that a wrongful death action is derivative in nature, because Texas expressly conditions the beneficiaries' claims on the decedent's right to maintain suit for his injuries).

54. *See, e.g.*, Ping v. Beverly Enters., Inc., 376 S.W.3d 581, 599 (Ky. 2012) (holding that under Kentucky law a wrongful death claim accrues separately to the wrongful death beneficiaries and a decedent cannot bind his beneficiaries to arbitrate their claim); Lawrence v. Beverly Manor, 273 S.W.3d 525, 527 (Mont. 2009) (en banc) (holding that under Missouri law, adult children of a nursing home resident were not bound by the resident's arbitration agreement with the home, because Missouri's wrongful death act created a new cause of action "distinct from any underlying tort claims," and that a wrongful death claim "does not belong to the deceased or even to a decedent's estate" (quoting Finney v. Nat'l Healthcare Corp., 193 S.W.3d 393, 395 (Mo. Ct. App. 2006))); Peters v. Columbus

deals only with the financial losses a family member suffers upon the death of the decedent.[55] That is, wrongful death liability does not concern recovery for personal injury at all or, for that matter, any other claim that the decedent may have had against the tortfeasor; instead, the action deals only with the economic effect the decedent's death had upon specific family members.[56] Remarking on these principles, the Sixth Circuit recently said that wrongful death claims rest upon an entirely independent right separate from the decedent's right to recover for personal injury,[57] and a decedent bears no right or power to a beneficiary's claim for wrongful death.

II. THE GENESIS AND TRAVEL OF THE WRONGFUL DEATH STATUTES IN ANGLO-AMERICAN LAW

With courts evenly divided[58] over whether a decedent possesses a cognizable right to the wrongful death "claim,"[59] it becomes nec-

Steel Castings Co., 873 N.E.2d 1258, 1262 (Ohio 2007) (holding that under Ohio law the decedent's agreement was an agreement "to arbitrate his claims against the company," and thus the provision in the agreement binding the decedent's heirs applied to a survival action, but the decedent could not "restrict his beneficiaries to arbitration of their wrongful-death claims, because he held no right to those claims"); Pisano Extendicare Homes, Inc., 77 A.3d 651, 658 (Pa. Super. Ct. 2013) (holding that wrongful death actions are derivative of the decedent's injuries but not of the decedent's rights); Bybee v. Abdulla, 189 P.3d 40, 50 (Utah 2008) (holding that in Utah "a decedent does not have the power to contract away the wrongful death action of his heirs"); Woodall v. Avalon Care Ctr.-Fed. Way, L.L.C., 231 P.3d 1252, 1257–58 (Wash. Ct. App. 2010) (holding that a wrongful death claim is not arbitrable because wrongful death liability creates a new cause of action for the beneficiary).

55. *See, e.g.*, *Pisano Extendicare Homes, Inc.*, 77 A.3d at 658 ("The survival action has its genesis in the decedent's injury, not his death. The recovery of damages stems from the rights of action possessed by the decedent at the time of death. . . . In contrast, wrongful death is not the deceased's cause of action. An action for wrongful death may be brought only by specified relatives of the decedent to recover damages in their own behalf, and not as beneficiaries of the estate . . . . 'This action is designed only to deal with the economic effect of the decedent's death upon the specified family members.'" (quoting Frey v. Pa. Elec. Co., 607 A.2d 796, 798 (1992))).

56. *See, e.g.*, Fla. E. Coast Ry. v. McRoberts, 149 So. 631, 633 (Fla. 1933) (finding that wrongful death liability "do[es] not purport to transfer to the statutory representatives of a person killed by another's wrongful act the right of action which the injured party might have maintained for his injury had he lived," but grants to the beneficiary "a totally new right of action for the wrongful death"); Whitford v. Panama R.R. Co., 23 N.Y. 465 (1861); Russell v. Sunbury, 37 Ohio St. 372 (1881); Mason v. Unison Pac. Ry. Co., 7 Utah 77 (1890).

57. Richmond Health Facilities v. Nichols, 811 F.3d 192, 195–97 (6th Cir. 2016) (holding that, under Kentucky law, a wrongful death claim was independent in nature, and the decedent possessed no cognizable legal rights in the claim).

58. Virginia offers an example of a state in which lower courts have offered conflicting interpretations of the wrongful death scheme and the state high court has yet to render a

essary to understand where exactly the rights-duty relationship exists in wrongful death liability. Who bears the right to prosecute a wrongful death action, and what is the nature of this right? Moreover, in whom does the right create a duty, and what is the nature of this duty? In approaching these questions, it will be helpful to examine more closely the theoretical and historical underpinnings behind wrongful death liability. By exploring the history and theory behind wrongful death liability, we show in this part that bringing wrongful death claims has always been the right of the beneficiary and that the decedent never has or could have a right to the wrongful death claim.

As guideposts for our discussion, we rely upon the two core tort principles underlying wrongful death liability: compensation and deterrence.[60] The goal of compensation is to place the innocent victim in the same position he occupied before the injury.[61] Wrongful death liability seeks to correct the pecuniary losses of family members "who might have expected to receive support or assistance from the deceased if he had lived," such as a husband,

decision on the issue. *Compare* Stevens v. Medical Facilities of Am. XXXII (32), 98 Va. Cir. 376, 386 (2018) ("As the wrongful death action never vested in the decedent, it cannot be waived by the decedent . . . because the statutory wrongful death cause of action is an independent, non-derivative right of action."), Pace v. Franklin Health Care Ctr., L.L.C., 98 Va. Cir. 393, 396–97 (2006) (finding that, in Virginia, the decedent's death gave way to "[a] new right of action"), *and* Bishop v. Medical Facilities of Am. XLVII (47), L.P., 65 Va. Cir. 187, 194 (2004) (finding that Virginia's wrongful death action creates for the beneficiary an independent right of action, over which the decedent has no bearing), *with* Culler v. Johnson, 98 Va. Cir. 470, 478 (2014) (finding that under Virginia's wrongful death scheme, "Virginia's wrongful death statute does not create a new cause of action, but only a right of action in a personal representative to enforce the decedent's claim for any personal injury that caused death," and, thus, "the decedent by his very conduct can affect the possibility of recovery under the wrongful death scheme" (quoting Miller v. United States, 932 F.2d 301, 303 (4th Cir. 1991))), *and* Harmon v. Birdmont Health Care, L.L.C., 98 Va. Cir. 433, 435–36 (2013) (finding that Virginia's wrongful death statute is designed to enforce "the decedent's claim for any personal injury that caused death" (quoting Miller v. United States, 932 F.2d 301, 303 (4th Cir. 1991)) (citing *In re* Labatt Food Serv., L.P., 279 S.W.3d 640, 646, 649 (Tex. 2009))).

59. To have a "claim" means "[t]o demand as one's own or as one's right." *Claim*, BLACK'S LAW DICTIONARY (6th ed. 1990). It is the "[m]eans by or through which claimant obtains possession or enjoyment of privilege or thing." *Id*. In other words, to have a claim is to have a right to "money or property as of right." *Id.*

60. *See* RESTATEMENT (SECOND) OF TORTS § 901 (AM. LAW INST. 1979) (listing compensation and deterrence as two principal purposes of tort law); RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 187 (3d ed. 1986) (discussing the compensatory and deterrent functions of tort law).

61. *See* GUIDO CALABRESI, THE COSTS OF ACCIDENTS: A LEGAL AND ECONOMIC ANALYSIS 299 (1970) (noting attitude underlying fault system that "the injurer should pay damages according to the degree to which he wronged the victim").

wife, parent, or child.[62] In contrast, the goal of deterrence is to discourage *future* tortfeasors from engaging in unreasonably risky activities.[63] On this score, wrongful death liability deters misconduct ex ante by exposing public jury awards to the public limelight, especially punitive damages for wanton misconduct.[64]

These two principles of wrongful death liability are overlapping and thus not mutually exclusive. When applying the corrective justice theory, for example, compensation of the victim may, in some circumstances, be so strong as to deter future tortfeasors from engaging in similar misconduct. Moreover, the mere prospect of liability can create incentives to engage in moral habits or "scripting:"[65] a potential tortfeasor might say that "this is the right thing to do; besides, it will reduce the risk of my company's liability."

A. *Wrongful Death Rights: A Distinct Right for a Discrete Class*

Tort law sets up a bilateral framework of morally recognized rights and duties, encompassing both the autonomy rights of potential victims and the correlative duties of tortfeasors. These legal rights and duties hinge upon the notion that "a person whose morally culpable behavior has violated another's autonomy [must] restore the latter as nearly as possible to his or her pre-injury status."[66] Yet a person's behavior may also affect more than one person's autonomy. Thus, we might wonder, why is this defendant held liable to *this* particular plaintiff rather than to

62. *See* PROSSER & KEETON ON THE LAW OF TORTS § 127, at 947 (Keeton et al. eds., 5th ed. 1984).

63. WILLIAM M. LANDES & RICHARD A. POSNER, THE ECONOMIC STRUCTURE OF TORT LAW 10 (1987); Benjamin C. Zipursky, *Civil Recourse, Not Corrective Justice*, 91 GEO. L.J. 695, 731 (2003).

64. *See, e.g.*, Lazenby v. Universal Underwriters Ins. Co., 383 S.W.2d 1, 1–3 (Tenn. 1964) ("Considering the theory of punitive damages as punitory and as a deterrent and accepting as common knowledge the fact that death and injury by automobile is a problem far from solved by traffic regulations and criminal prosecutions, it appears to us that there are especially strong public policy reasons for not allowing socially irresponsible automobile drivers to escape the element of personal punishment in punitive damages when they are guilty of reckless slaughter or maiming on the highway" (quoting N. Nat'l Cas. Co. v. McNulty, 307 F.2d 432, 441 (5th Cir. 1962))).

65. *See* Paul J. Heald, *Mindlessness and Nondurable Precautions*, 27 GA. L. REV. 673, 674 (1993) (describing "scripting" as "mindness discussionmaking"); Paul J. Heald & James E. Heald, *Mindlessness and the Law*, 77 VA. L. REV. 1127, 1143–51 (1991) (discussing "script theory").

66. DON DEWEES ET AL., EXPLORING THE DOMAIN OF ACCIDENT LAW: TAKING THE FACTS SERIOUSLY 8 (1996).

someone needier, or, put another way, why does the defendant owe a duty only to *this* plaintiff? Since injustice or wrongdoing consists in doing something inconsistent with a right of the plaintiff, we must ask what is the right or bundle of rights that justify the existence of the defendant's duty.

Wrongful death statutes seek to vindicate core property rights of family members. Prior to the death of the decedent, a spouse or child was entitled from the decedent a certain degree of property, usually in the form of income or services.[67] The defendant's wrongful killing of the decedent interferes with these familial property entitlements by divesting the spouse or child of the wealth he or she otherwise would have enjoyed had the decedent lived.[68] Hence, we recognize *this* family member as particularly situated to recover against this defendant, since disturbance of familial wealth entitlements constitutes a moral wrong in itself.

To be sure, the protection of familial property rights after the death of a spouse or child emerged out of a nineteenth century legal framework favoring the protection of private property.[69] According to one prominent historian, because the nineteenth century "most valued private property for its productive model, [it] was prepared to make strong, positive use of law to maintain such conditions as it thought essential to the main flow of private activity."[70] The fashioning of early wrongful death liability doctrine was central to maintaining conditions of private property, for it vindicated the property losses of males following the death of his servant, wife, or child.[71] It was said that, while a claim for

67. *See* 1 STUART M. SPEISER & JAMES E. ROOK, JR., RECOVERY FOR WRONGFUL DEATH § 6:27, at 6-88 (4th ed. 2005).

68. *See id*.

69. HURST, *supra* note 11, at 10–11 ("[T]he law of private property—the law of the autonomy of private decision makers—included also positive provision of legal procedures and tools and legal compulsions to create a framework of reasonable expectations within which rational decisions could be taken for the future.").

70. *Id.* at 26.

71. *See* John Fabian Witt, *From Loss of Services to Loss of Support: The Wrongful Death Statutes, the Origins of Modern Tort Law, and the Making of the Nineteenth-Century Family*, 25 LAW & SOC. INQUIRY 717, 722–26 (2000). The right of the man to recover for loss of services of a servant, wife, or child was grounded in the corresponding property interest the man held in his subservients. *See* 2 WILLIAM BLACKSTONE, COMMENTARIES *142 ("[T]he inferior [wife] hath no kind of property in the company, care, or assistance of the superior, as the superior is held to have in those of the inferior; and therefore the inferior can suffer no loss or injury."); Guy v. Livesey (1619) 79 Eng. Rep. 428, 502 Cro. Jac. 502 ("The action is not brought in respect of the harm done to the wife, but is brought for the particular loss of the husband, for that he lost the company of his

personal injury expired with the death of the injured party,[72] a master's property right in the services of his servant, child, or wife survived the death of the victim.[73]

In the 1825 case *Plummer v. Webb*,[74] for example, the United States District Court of Maine held that, while any claim for personal injury was extinguished upon the death of the injured victim, any claim of a third party with an interest in the services of the decedent, such as a master or father, survived.[75] For this wrong, the law provided a remedy, since "[t]he damages of the parent or master, and of the child or servant, are in their nature several and distinct, and a recovery by one is no bar to an action by the other."[76]

During the late nineteenth century, legislatures slowly began to extend to women and children the protection of property

wife, which is only a damage and loss to himself, for which he shall have this action").

72. *See, e.g.*, Kramer v. S.F. Mkt. St. R.R. Co., 25 Cal. 434, 436 (1864); Long v. Morrison, 14 Ind. 595, 600 (1860); Carey v. Berkshire R.R. Co., 55 Mass. (1 Cush.) 475, 480 (1848); Hyatt v. Adams, 16 Mich. 180, 200 (1867); Baker v. Bolton (1808) 170 Eng. Rep. 1033, 1033 1 Camp. 493, 493.

73. *See, e.g.*, Oakland Ry. Co. v. Fielding, 48 Pa. 320, 327–28 (1864) (holding that the trial court was correct in instructing the jury that the father was limited to pecuniary damages in his loss of services claim); Ream v. Rank, 3 Serg. & Rawle 215, 216–17 (Pa. 1817) (acknowledging that loss of services is the proper claim for the luring away of a father's daughter); H. & G.N.R.R. Co. v. Miller, 49 Tex. 322, 332 (1878) (declaring that a father is entitled to damages for loss of child's services, medical expenses, and any other expenses rendered necessary by the injury). The action for wrongful death in the United States followed a different history than in England, where it was the settled rule that no civil action could exist based upon the death of another. *See* W.S. Holdsworth, *The Origin of the Rule in* Baker v. Bolton, 32 LAW Q. REV. 431, 433–35 (1916). The English rule was first enunciated in *Baker v. Bolton* (1808) 170 Eng. Rep. 1033, 1 Camp. 493, which found that felony prosecution for the wrongful death of another exhausted all remedies at law. By the mid-nineteenth century, the common law in America recognized an action for wrongful death and, consequently, never accepted the English rule enunciated in *Baker*. *See* Wex S. Malone, *The Genesis of Wrongful Death*, 17 STAN. L. REV. 1043, 1067 (1965) ("Ellenborough's blunt announcement that no civil action can be grounded upon the death of a human being not only lacked historical support at the time but was consistently ignored in America . . . ."); Moragne v. States Marine Lines, Inc., 398 U.S. 375, 384 (1970) (observing that the English rule lacked historical justification and "never existed in this country").

74. 19 F. Cas. 894, 896–97 (D. Me. 1825) (holding that death of plaintiff's minor son did not extinguish the claim of a party with an interest in the services of the son but denying the father's claim on the ground that the services of the son belonged to the master to whom the father had released the right to the son's services).

75. *Id.*

76. *Id.* at 897; *see also* Ford v. Monroe, 20 Wend. 210, 210 (N.Y. Sup. Ct. 1838) (holding that, in an action for loss of services, a father suffered pecuniary losses from the death of his ten-year-old son as a result of a carriage accident); Shields v. Yonge, 15 Ga. 349 (1854) (holding that, in an action for loss of services, a father suffered pecuniary losses from the death of his minor son a result of a fatal railroad accident).

rights.[77] After Massachusetts codified the first wrongful death statute in 1840,[78] other states responded in kind by announcing that a wife or child dependent upon the income of a deceased male could recover for loss of services and income.[79] However, since these statutes aimed to vindicate only those property rights of "dependent" women and children, they also precluded recovery by male heads of household, who were not regarded as "dependent" on women or children.[80] As our society progressed toward a more equitable view of dependency, legislatures arrived at the current wrongful death liability model, which permits men, women, and children alike to recover equally for losses of property in the form of services and income.[81]

77. The wrongful death statutes enacted in most states during the mid-nineteenth century represented a watershed moment in American legal history. *See* Malone, *supra* note 73, at 1044 (describing the limitations the common law placed on wrongful death recovery); Witt, *supra* note 71, at 733. This period also produced prominent statutes known as Married Women's Acts, which abolished the fiction that the wife's rights inhered within the man and supplied a wife with a right to recover for her own lost services. *See* W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 74, at 489–90, §122, at 861 (4th ed. 1971).

78. Massachusetts enacted the first wrongful death statute in 1840. An Act Concerning Passenger Carriers, 1840 Mass. Acts 224 (providing that in the event of "negligence or carelessness" of common carriers, or the unfitness or "gross negligence or carelessness of their servants or agents," such common carriers shall be liable for a "fine not exceeding five thousand dollars" "for the benefit of [the decedent's] widow and heirs").

79. The proposition that a dependent wife or child could recover for loss of wages and services of a deceased of husband surfaced in the English casebooks four years after the enactment of the first wrongful death statute in Massachusetts in 1840. *See* Fatal Accidents Act 1846, 9 & 10 Vict. c. 93 (Eng.) ("Lord Campbell's Act") ("Whereas no Action at Law is now maintainable against a Person who by his wrongful Act, Neglect, or Default may have caused the Death of another Person, and it is oftentimes right and expedient that the Wrongdoer in such Case should be answerable in Damages for the Injury so caused by him."); *see also* Potter v. Metro. Dist. Ry. (1874) 30 L.T. (N.S.) 765, 765 (Eng.) (finding that the wife of the deceased could recover for loss of services and expenditures); Witt, *supra* note 71, at 733–34.

80. Witt, *supra* note 71, at 732. Moreover, since husbands and fathers were generally precluded from recovering under the early wrongful death statutes, many sought to reframe their claims as common law wrongful death actions, or actions for loss of services. Yet as Wex Malone described, the coexistence of common law and statutory wrongful death actions threatened to create problems of double recovery. Malone, *supra* note 73, at 1051. Consequently, every state but one simply abandoned the common law action for wrongful death in favor of the statutory action. The single exception was Georgia, which did permit husbands and fathers to recover under common law principles of wrongful death. *Id.* at 1071–73.

81. *See id*. at 745. Dean Prosser has said regarding modern wrongful death statutes:

> Recent years, however, have brought considerable modification of the rigid common law rules. It has been recognized that even pecuniary loss may extend beyond mere contributions of food, shelter, money or property; and there is now a decided tendency to find that the society, care, and attention of the deceased are 'services' to the survivor with a financial value, which may be compensated. This has been true, for example, not only where a child has

In giving doctrinal precision to wrongful death liability, we are permitted, even encouraged, to bring into full focus the history underlying its establishment. Looking to this history, we discover that the rights-duty relationship in wrongful liability is twofold: it first seeks to vindicate familial property rights and, second, seeks to impose a correlative duty upon society to respect the distribution of private wealth entitlements. Wrongful death liability recognizes that by wrongfully killing one of society's income-producing citizens, a person breaches his duty to respect the existent distribution of property rights in the private sphere, wrongfully gaining property at another's expense.[82] On this score, the wrongful death action vindicates the harm to the family member who must forfeit his or her wealth entitlements upon the wrongful death of the spouse or child.[83] This legal structure flows from the notion that rights in general are not secure without a governmental practice of sanctioning people who do not respect them.[84] To this end, familial property rights cannot survive with-

been deprived of a parent , . . . but also where the parent has lost a child.

PROSSER, *supra* note 77, § 127, at 908.

82. The term "property" includes not only the possessory interest in a thing, but also the "right of possessing, enjoying and disposing of a thing." NOAH WEBSTER, AN AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE (1828); *see also* HENRY CAMPBELL BLACK, DICTIONARY OF LAW CONTAINING DEFINITIONS OF THE TERMS AND PHRASES OF AMERICAN AND ENGLISH JURISPRUDENCE, ANCIENT AND MODERN 953 (1891) (noting that property includes the "[r]ightful dominion over external objects; ownership; the unrestricted and exclusive right to a thing; the right to dispose of the substance of a thing in every legal way, to possess it, to use it, and to exclude everyone else from interfering with it"). Prior to the death of the decedent, a beneficiary enjoyed not only a certain degree of property in the form of wealth and services, but also autonomy to maintain that property as he so chose. By killing the injured victim, the tortfeasor thus extinguishes not only the beneficiary's property right in income and services, but also his personal liberty to enjoy that property without unlawful deprivation. *See* Lynch v. Household Fin. Corp., 405 U.S. 538, 552 (1972) ("In fact, a fundamental interdependence exists between the personal right to liberty and the personal right in property. Neither could have meaning without the other. That rights in property are basic civil rights has long been recognized."); DAN B. DOBBS, THE LAW OF TORTS §§ 276–277, at 807–13 (2000) (observing that the beneficiary in a wrongful death action is entitled to economic damages in the form of loss of pecuniary support, but also noneconomic damages in the form of loss of companionship and consortium); Charles A. Reich, *The New Property*, 73 YALE L.J. 733, 771 (1964) (stressing the function of property in providing the security needed to promote individual autonomy).

83. *See* Andrew J. McClurg, *Dead Sorrow: A Story About Loss and a New Theory of Wrongful Death Damages*, 85 B.U. L. REV. 1, 18–33 (2005) (explaining that the decedent's loss of life's pleasures is not compensable under most wrongful death statutes).

84. *See, e.g.*, 1 F.A. HAYEK, LAW, LEGISLATION AND LIBERTY 107 (1982) (arguing that a well-ordered liberal society must designate "ranges of objects over which only particular individuals are allowed to dispose and from the control of which all others are excluded"); JOHN STUART MILL, PRINCIPLES OF POLITICAL ECONOMY 37–38 (Jonathan Riley ed., Oxford Univ. Press 1994) (1848) (arguing that the use of land in agriculture must, for the time being, be exclusive because one who sows must be permitted to reap); Morris R. Co-

out a governmental system of sanctioning the unlawful deprivation of property in cases of wrongful death.[85]

B. *The Policy of Deterrence: A Guiding Principle for Wrongful Death*

Yet corrective justice cannot fully account for the various deterrence mechanisms tort law supposes will prevent future bad conduct. As Benjamin Zipursky explains, if "the issue of whether there is a right of action in tort is distinct from the issue of what the *remedy* should be," then "corrective justice theory misses a link in the inference from tortious conduct to the imposition of liability."[86] "For example, although one who has wrongfully injured another has a duty to repair that loss [as a matter of corrective justice], this principle does not explain why courts impose punitive or nominal damages."[87]

Punitive damages fall within the deterrence function of tort law, as does the juridical process of publicly defining wrongs and shaming wrongdoers.[88] Our judicial system does not stop at redressing the concrete losses the plaintiff suffered by reason of the defendant's wrongful conduct.[89] Indeed, a broader function has long been the goal of tort law; that is, to punish and deter reprehensible conduct in the future.[90] This is so because, whatever

hen, *Property and Sovereignty*, 13 CORNELL L.Q. 8, 12–13, 18 (1927) (emphasizing that property rights create a form of private power over the external world).

85. McClurg, *supra* note 83, at 35–36.

86. Benjamin Zipursky, *Civil Recourse Not Corrective Justice*, 91 GEO. L.J. 695, 711 (2003) (emphasis added).

87. *Id.*

88. *See* Ernest Weinrib, *Deterrence and Corrective Justice*, 50 UCLA L. REV. 621, 624–27 (2002).

89. *See* Cooper Indus., Inc. v. Leatherman Tool Grp., Inc., 532 U.S. 424, 432 (2001) (citing RESTATEMENT (SECOND) OF TORTS § 903, at 453–54 (AM. LAW INST. 1979)).

90. The concept of punitive damages emerged first in the English casebooks in the mid-eighteenth century. *See* Wilkes v. Wood (1763) 98 Eng. Rep. 489, 498–99 (finding that the "jury have it in their power to give damages for more than the injury received. Damages are designed not only as a satisfaction to the injured person, but likewise as a punishment to the guilty, to deter from any such proceeding for the future, and as a proof of the detestation of the jury to the action itself."). Professor Akhil Reed Amar has called the *Wilkes* decision "probably the most famous case in late eighteenth-century America, period." Akhil Reed Amar, *Fourth Amendment First Principles*, 107 HARV. L. REV. 757, 772 (1994). Following the approach of the English common law, American courts began awarding punitive damages shortly after the American Revolution, insisting that punitive damages were to be imposed to set an example for all of society. *See, e.g.,* Coryell v. Colbaugh, 1 N.J.L. 90, 91 (1791); Genay v. Norris, 1 S.C.L. (1 Bay) 6, 7 (1784). In *Coryell*, for instance, the court instructed the jury "not to estimate the damages by any particular proof

norms a system of positive law may enact, it also presupposes that those norms have an effect on persons' conduct.[91]

Today, a twenty-nine-state majority agrees that punitive damages in cases of wrongful death serve the state's legitimate interest in deterring future misconduct: thirteen states have passed statutes expressly authorizing punitive damages in the wrongful death context,[92] while sixteen state high courts have interpreted their respective wrongful death acts as allowing punitive damages.[93] Alabama is the only state to permit punitive damages but

of suffering or actual loss; but to give damages for *example's* sake, to prevent such offenses in [the] future." *Coryell*, 1 N.J.L. at 91. By the mid-nineteenth century, Jeremy Bentham had begun to articulate these thoughts into a more coherent theory of deterrence in his novel treatise, PRINCIPLES OF PENAL LAW, *in* 1 THE WORKS OF JEREMY BENTHAM 365, 401–02 (John Bowring ed., 1843), where he argued that misconduct could be deterred by punishment such that the expected discomfort experienced would outweigh the pleasure of engaging in the misconduct.

91. Weinrib, *supra* note 88, at 624–25.

92. KY. REV. STAT. ANN. § 411.130(1) (2009) ("If the act was willful or the negligence gross, punitive damages may be recovered."); ME. STAT. tit. 18-A, § 2-804 (b) (2012) ("The jury may also give punitive damages not exceeding $250,000."); MASS. GEN. LAWS ch. 229, § 2 (2017) ("[P]unitive damages [allowed] in an amount of not less than five thousand dollars in such case as the decedent's death was caused by the malicious, willful, wanton or reckless conduct of the defendant or by the gross negligence of the defendant."); MINN. STAT. § 573.02 (2010) ("Punitive damages may be awarded."); N.M. STAT. ANN. § 41-2-3 (2018) ("[J]ury in every such action may give such damages, compensatory and exemplary, as they shall deem fair and just."); N.Y. EST. POWERS & TRUSTS LAW § 5-4.3 (Consol. 2006) ("[P]unitive damages may be awarded if such damages would have been recoverable had the decedent survived."); N.C. GEN. STAT. § 28-A-18-2 (b)(5) (2017) (stating that damages include "[s]uch punitive damages as the decedent could have recovered had he survived, and punitive damages for wrongfully causing the death of the decedent through maliciousness, willful or wanton injury, or gross negligence"); OKLA. STAT. ANN. tit. 12, § 1053 (West 2005) ("In proper cases . . . punitive or exemplary damages may also be recovered."); OR. REV. STAT. § 30.020(2)(e) (2017) (stating that damages include "punitive damages, if any, which the decedent would have been entitled to recover from the wrongdoer if the decedent had lived"); S.C. CODE ANN. § 15-51-40 (2005) ("In every such action the jury may give damages, including exemplary damages . . . ."); TEX. CIV. PRAC. & REM. CODE ANN. § 71.009 (Vernon 2008) ("When the death is caused by the willful act or omission or gross negligence of the defendant, exemplary as well as actual damages may be recovered."); VA. CODE ANN. § 8.01-52(5) (2015 & Supp. 2018) ("Punitive damages may be recovered for willful and wanton conduct, or such recklessness as evinces a conscious disregard for the safety of others."); WYO. STAT. ANN. § 1-38-102 (2017) ("[C]ourt or jury . . . may award such damages, pecuniary and exemplary, as shall be deemed fair and just.").

93. *In re* Air Crash Disaster Near Chicago, Illinois on May 25, 1979, 644 F.2d 594, 606 (7th Cir. 1981); Koppinger v. Cullen-Schiltz & Assoc., 513 F.2d 901, 909 (8th Cir. 1975) (applying Iowa law); Atkins v. Lee, 603 So. 2d 937, 942 (Ala. 1992); Tommy's Elbow Room, Inc. v. Kavorkian, 727 P.2d 1038, 1048–49 (Alaska 1986); Boies v. Cole, 407 P.2d 917, 919–20 (Ariz. 1965); Vickery v. Ballentine, 732 S.W.2d 160, 162 (Ark. 1987); Martin v. United Sec. Servs., Inc., 314 So. 2d 765, 771–72 (Fla. 1975); Gavica v. Hanson, 608 P.2d 861 (1980); Thornton v. Insurance Co. of N. Am., 287 So. 2d 262, 265 (Miss. 1973); Olsen v. Montana Ore Purchasing Co., 89 P. 731, 734 (Mont. 1907); Hopkins v. McBane, 427 N.W.2d 85, 91 (N.D. 1988); Kansas City Ft. S. & M.R. Co. v. Daughtry, 13 S.W. 698–99 (Tenn. 1890), *aff'd*, 138 U.S. 298 (1891); Behrens v. Raleigh Hills Hosp., Inc., 675 P.2d

not compensatory damages in wrongful death cases.[94] The minority of states refusing to recognize punitive damages in wrongful death cases rely on a narrow judicial construction of the state's wrongful death statute.[95]

Allowing punitive damages in the wrongful death context vindicates the public's interest in deterring misconduct[96] that has been shown to cause death. The public has a legitimate interest in deterring the wrongdoer who acts or fails to act "in order to augment profit," or where one acts willfully or maliciously "with a purpose to injure."[97] Studies show that the mere threat of punitive or "exemplary" damages eliminates the advantage of noncompliance,[98] by forcing potential wrongdoers "to internalize the

1179, 1185 (Utah 1983); Bond v. City of Huntington, 276 S.E.2d 539, 544 (W. Va. 1981).

94. Killough v. Jahandarfard, 578 So. 2d 1041, 1044 (Ala. 1991).

95. Twenty-one states have refused to allow punitive damage awards in wrongful death cases, with most courts citing as their principal justification that the purpose of a wrongful death action is to vindicate pecuniary loss *alone*, and not to punish the wrongdoer. California: Pease v. Beech Aircraft Corp., 113 Cal. Rptr. 416, 423 (Cal. Ct. App. 1974); Colorado: Mangus v. Miller, 535 P.2d 219, 221 (Colo. App. 1975); Delaware: Magee v. Rose, 405 A.2d 143, 147 (Del. Super. Ct. 1979); District of Columbia: Runyon v. District of Columbia, 463 F.2d 1319, 1322 (D.C. Cir. 1972); Georgia: Engle v. Finch, 139 S.E. 868, 869 (Ga. 1927); Hawaii: Enos v. Honolulu Motor Coach Co., 34 Haw. 5, 6–7 (1936); Illinois: Wills v. De Kalb Area Ret. Ctr., 175 Ill. App. 3d 833, 841 (2d. Dist. 1988); Indiana: Durham ex rel. Estate of Wade v. U-Haul Intern., 745, 757 N.E.2d 755, 757 (Ind. 2001); Kansas: Smith v. Printup, 866 P.2d 985, 992 (Kan. 1993); Louisiana: Vincent v. Morgan's Louisiana & T.R. & S.S. Co., 74 So. 541, 547–49 (La. 1917); Maryland: Cohen v. Rubin, 460 A.2d 1046, 1056 (Md. Ct. Spec. App. 1983); Michigan: Currie v. Fiting, 134 N.W.2d 611, 617 (Mich. 1965); Nebraska: Miller v. Kingsley, 230 N.W.2d 472, 474 (Neb. 1975); Nevada: Alsenz v. Clark Cty. Sch. Dist., 864 P.2d 285, 287 (Nev. 1993); New Hampshire: Kennett v. Delta Airlines, Inc., 560 F.2d 456, 458 (1st Cir. 1977); New Jersey: Graf v. Taggert, 204 A.2d 140, 146 n.1 (N.J. 1964); Ohio: Rubeck v. Huffman, 374 N.E.2d 411, 413 (Ohio 1978); Pennsylvania: Harvey v. Hassinger, 461 A.2d 814, 815–16 (Pa. 1983); South Dakota: Anderson v. Lale, 216 N.W.2d 152, 155 (S.D. 1974); Washington: Skidmore v. City of Seattle, 244 P. 545, 547 (Wash. 1926); Wisconsin: Wangen v. Ford Motor Co., 294 N.W.2d 437, 464–66 (Wis. 1980).

96. A consensus amongst legal scholars now holds that punitive damages serve the specific role of deterring future misconduct. *See* James B. Sales & Kenneth B. Cole, Jr., *Punitive Damages: A Relic That Has Outlived Its Origins*, 37 VAND. L. REV. 1117, 1124 (1984) ("The first American enunciation of the theory of punitive damages occurred in 1791 [in Coryell v. Colbaugh, 1 N.J.L. 77 (1791)]. . . . The *Coryell* court also stated that the damages should be 'such a sum as would mark their disapprobation, and be an example to others.'" (internal citation omitted)); Leslie E. John, Comment, *Formulating Standards for Awards of Punitive Damages in the Borderland of Contract and Tort*, 74 CALIF. L. REV. 2033, 2053 (1986) ("Neither punishment nor compensation offers a complete rationale for awarding punitive damages in borderland cases [between torts and contract]. Deterrence provides the only completely satisfactory rationale for the imposition of punitive damages in these cases."); *see also* RESTATEMENT (SECOND) OF TORTS § 908 cmt. a (AM. LAW INST. 1979).

97. Exxon Shipping Co. v. Baker, 554 U.S. 471, 494 (2008).

98. *See* Romo v. Ford Motor Co., 113 Cal. App. 4th 738, 747, 761 (2003) ("It would be

expected social costs of their actions."[99] These studies suggest that the threat of punitive damages can at a minimum "create[] incentives for parties to behave efficiently."[100] At a maximum, the threat of punitive damages can actually reduce noncompliant behavior.[101]

III. THE RIGHT COURSE OF ACTION: ELIMINATING ARBITRATION IN WRONGFUL DEATH CASES

In approaching our final analysis, we consider whether the two basic principles of wrongful death liability—corrective justice and deterrence—are amenable to arbitration. In doing so, we bear in mind that these principles are intertwined and not independent. Deterrence relies, in some respects, upon the imposition of liability costs, steep enough to prevent actors from engaging in injury-causing conduct; similarly, corrective justice assumes *a fortiori* that the tort system *should* ensure fewer wrongful gains and losses tomorrow.[102]

A. *Wrongful Death Arbitration: Divesting the Beneficiary of Statutory and Constitutional Rights*

When properly understood, the wrongful killing of another person gives rise to two distinct forms of injury: the personal injury to the decedent and the economic injury to the decedent's

unacceptable public policy to establish a system in which it is less expensive for a defendant's malicious conduct to kill rather than injure a victim. . . . Thus, the state has an extremely strong interest in being able to impose sufficiently high punitive damages in malicious-conduct wrongful death actions to deter a 'cheaper to kill them' mindset, while still maintaining limits on wrongful death compensation in cases of ordinary negligence.").

99. *See* Cooter, *supra* note 10, at 1148.

100. LANDES & POSNER, *supra* note 63, at 312. Mark Grady hailed the Landes & Posner book as a "milestone in tort scholarship." Mark F. Grady, *Discontinuities and Information Burdens: A Review of* The Economic Structure of Tort Law, 56 GEO. WASH. L. REV. 658 (1988) (book review).

101. *See* Cooter, *supra* note 10, at 1148 ("Punitive damages should be set for the sake of deterrence at a level that eliminates the advantage of noncompliance and forces potential injurers to internalize the expected social costs of their actions."); Johnston, *supra* note 10, at 1390 (1987) (arguing that the threat of punitive damages, combined with procedural safeguards, should be used to prevent underdeterrence).

102. *See* Frank H. Easterbrook, *Foreword: The Court and the Economic System*, 98 HARV. L. REV. 4, 10–11 (1984) ("The principles laid down today will influence whether similar parties *will be* in similar situations tomorrow. Indeed, judges who look at cases merely as occasions for the fair apportionment of gains and losses almost invariably ensure that there will be fewer gains and more losses tomorrow.").

family members. As we have seen, the common law historically permitted recovery of the latter but not of the former, based upon the theory that an action for personal injury died with the person, while an action for loss of services or property remained vested with the husband or master. Wrongful death statutes did not change the nature of this doctrinal rubric. Instead, they codified for women and children the very same right of action masters and husbands had long enjoyed at common law.[103] In this regard, the wrongful death right of action was designed to vindicate a family member's own losses in property, which the defendant caused by wrongfully killing the decedent.

As a statutory right, it encompasses the basic right to prosecute in open court a wrongful death "claim" against the defendant. Defending core statutory rights in open court lies at the heart of our republican government. As Justice Kennedy explained, the right to petition the courts ensures that individuals can "'engag[e] in litigation as a vehicle for effective political expression and association, as well as a means of communicating useful information to the public.' . . . It also allows individuals to pursue desired ends by direct appeal to government officials charged with applying the law."[104] A wrongful death beneficiary does not shirk these rights merely because the decedent entered into an arbitration agreement with the defendant.

Indeed, a beneficiary has not chosen to arbitrate his rights because, by definition, he was not party to the underlying contract between the decedent and the defendant. The Supreme Court of the United States has emphasized that "[i]t goes without saying that a contract cannot bind a nonparty,"[105] and courts have recognized that, as a general matter, nonsignatories are neither bound by nor entitled to enforce an arbitration agreement.[106] Even viewing the wrongful death claim as wholly derivative of the decedent's underlying personal injury claim, as some courts

103. See supra Part II.A.

104. Borough of Duryea v. Guarnieri, 564 U.S. 379, 397 (2011) (citations omitted) (quoting *In re* Primus, 436 U.S. 412, 431 (1978)) (holding municipality's allegedly retaliatory actions did not support liability under the Petition Clause).

105. EEOC v. Waffle House, Inc., 534 U.S. 279, 294 (2002) (Thomas, J., dissenting); *see also* Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ., 489 U.S. 468, 479 (1989) ("Arbitration under the [FAA] is a matter of consent, not coercion.").

106. *See, e.g.*, Bridas S.A.P.I.C. v. Gov't of Turkm., 345 F.3d 347, 353 (5th Cir. 2003) ("In order to be subject to arbitral jurisdiction, a party must generally be a signatory to a contract containing an arbitration clause.").

assert,[107] it simply does not follow that one party can dictate the very substance of *a third-party's* rights, when that party never agreed in the first place.[108]

Moreover, the FAA does not preempt a state court decision refusing to compel arbitration of wrongful death claims. Neither would such a decision rest on a public policy prohibiting the arbitration of wrongful death claims, nor would it present an obstacle to the accomplishment of the FAA's objectives.[109] Indeed, the touchstone of the FAA is freedom of contract, which is a matter of consent, not coercion.[110] In wrongful death cases, "federal law does not force arbitration upon a party that never agreed to arbi-

107. One of the first courts to apply the so-called derivative theory of wrongful death liability, for example, was the Texas Supreme Court in *In re Labatt Food Service, L.P.*, 279 S.W.3d 640 (Tex. 2009). In that case, the Court observed that a wrongful death beneficiary may pursue a wrongful death claim "only if the individual injured would have been entitled to bring an action for the injury if the individual had lived." *Id.* at 644 (citing TEX. CIV. PRAC. & REM. CODE § 71.003(a)). Based upon this language, the Court assumed that "the *right* of statutory beneficiaries to maintain a wrongful death action is entirely derivative of the decedent's *right* to have sued for his own injuries immediately prior to his death," meaning that "wrongful death beneficiaries' claims place them in the exact 'legal shoes' of the decedent." *Id.* Yet wrongful death liability is *always* premised upon the decedent's personal injury, which necessarily gave rise to his or her death. However, the fact that a decedent had a cause of action for personal injury does not suggest that the same decedent had a *right of action* for wrongful death. Indeed, as we have seen, a *right* of action for wrongful death does not concern the prosecution of personal injury claims at all, but rather *property claims* that arise because of the death of the decedent. A wrongful death action cognizes the harm to the beneficiary—not to the decedent. Hence, a wrongful death claim belongs to the beneficiary sine qua non and it cannot be said that a wrongful death beneficiary's "claims" place him in the *same* legal shoes of the decedent. *See supra* Part II.A.

108. *See, e.g.*, FREDERICK POLLOCK, THE LAW OF TORTS: A TREATISE ON THE PRINCIPLES OF OBLIGATIONS ARISING FROM CIVIL WRONGS IN THE COMMON LAW 59 (1887) ("[T]he right of action, or at any rate the right to compensation, given by the [wrongful death] statute is not the same which the person killed would have had if he had lived to sue for his injuries.").

109. The Court has described two situations in which a state rule is preempted by the FAA. AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 341 (2011). First, "[w]hen state law prohibits outright the arbitration of a particular type of claim, the analysis is straightforward: The conflicting rule is displaced by the FAA." *Id.* Second, when a "doctrine normally thought to be generally applicable . . . is alleged to have been applied in a fashion that disfavors arbitration," the court must determine whether the state law rule would have a "disproportionate impact" on arbitration agreements. *Id.* at 341–42. This type of disproportionate impact "stand[s] as an obstacle to the accomplishment of the FAA's objectives." *Id.* at 343; *see, e.g.*, Richmond Health Facilities v. Nichols, 811 F.3d 192, 201 (6th Cir. 2016) (concluding that a court's refusal to compel arbitration of wrongful death claims does not present an obstacle to the accomplishment of the FAA's objectives).

110. Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ., 489 U.S. 468, 479 (1989) ("Arbitration under the [FAA] is a matter of consent, not coercion.").

trate in the first place under the guise of preemption principles."[111]

Ultimately, then, compelling arbitration upon a party who did not waive his or her right to a jury trial runs afoul of important constitutional rights. The Seventh Amendment to the United States Constitution guarantees the right to trial by jury in civil actions in federal courts.[112] While the right "occupies so firm a place in our history and jurisprudence that any seeming curtailment of the right to a jury trial should be scrutinized with the utmost care,"[113] the Court has refused to extend this right against the state governments.[114] Nonetheless, nearly every state's constitution contains a similar guarantee that the right to jury trial shall be preserved inviolate.[115] Thus, in both federal and state court, denying wrongful death claimants their constitutional right to a jury trial, when they did not waive it of their own accord, would amount to placing contract law above that of both the United States and state constitutions.[116]

B. *Depreciating the Value of Publicity: The Need for Public Deterrence of Wrongful Death*

Arbitration gained buoyancy amongst courts and commentators in light of its perceived lack of "procedural rigor," its privacy, and its "lower costs, greater efficiency and speed."[117] Arbitrators are said to be neutral decision makers, whose decisions are perceived to be at least as favorable to employees as are the out-

111. *Richmond Health Facilities*, 811 F.3d at 201.

112. U.S. CONST. amend. VII; *see also* Simler v. Conner, 372 U.S. 221, 221–22 (1962) (per curiam).

113. Beacon Theatres, Inc. v. Westover, 359 U.S. 500, 501 (1959) (quoting Dimick v. Schiedt, 293 U.S. 474, 486 (1935)).

114. Walker v. Sauvinet, 92 U.S. 90, 92–93 (1876).

115. *See* Fleming James, Jr., *Right to a Jury Trial in Civil Actions,* 72 YALE L.J. 655, 657 n.15 (1963) ("In the states which have them ' . . . the constitutional guarantees of jury trial in civil cases usually are phrased in strong but not very detailed language. The constitutional authors generally were content to provide that trial by jury "shall remain inviolate forever," "shall remain inviolate," "shall be secured," "shall remain as heretofore," etc. . . . At least implicitly the purport is that the right shall remain in substance as it was when the state constitutional provision was adopted.'" (quoting DAVID W. LOUISELL & GEOFFREY C. HAZARD, JR., CASES AND MATERIALS ON PLEADING AND PROCEDURE, STATE AND FEDERAL 938 (1962))).

116. Commonwealth v. Gamble, 62 Pa. 343, 349–50 (1869) ("But that the legislature must act in subordination to the Constitution needs no argument to prove.").

117. Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp., 559 U.S. 662, 685–86 (2010).

comes of litigation.[118] More broadly, advocates argue that arbitration saves companies money and even results in larger awards for harmed shareholders, which in turn yields reduced prices for consumers.[119] In short, advocates propose that arbitration is beneficial not only to companies, but also consumers.

Yet as a growing body of scholarship suggests, there is good reason to doubt these sanguine views of the arbitration process.[120] Judith Resnick has recently provided important insight about the insufficient degree of judicial oversight of the arbitration process, and the dramatic shift of control "away from courts and to the organizations conducting arbitrations and the commercial enterprises drafting arbitration clauses."[121] To this end, numerous fed-

118. Lisa B. Bingham, *Is There a Bias in Arbitration of Nonunion Employment Disputes?: An Analysis of Actual Cases and Outcomes*, 6 INT'L J. CONFLICT MGMT. 369, 378 (1995) (indicating positive employee win-rates in employment-related arbitration); Lewis L. Maltby, *Private Justice: Employment Arbitration and Civil Rights*, 30 COLUM. HUM. RTS. L. REV. 29, 45–51 (1998) (citing studies of win-rates and satisfaction in arbitration awards).

119. Stephen J. Ware, *Paying the Price of Process: Judicial Regulation of Consumer Arbitration Agreements*, 2001 J. DISP. RESOL. 89, 93; *see also* Martin H. Redish et al., *Cy Pres Relief and the Pathologies of the Modern Class Action: A Normative and Empirical Analysis*, 62 FLA. L. REV. 617, 660–61 (2010) (citing recent data indicating that class action lawsuits, even meritorious ones, fail to compensate harmed shareholders in any meaningful way). For scholarly commentary arguing for the incorporation of mandatory arbitration provisions into corporate bylaws and charters for class stockholder disputes, see Hal S. Scott & Leslie N. Silverman, *Stockholder Adoption of Mandatory Individual Arbitration for Stockholder Disputes*, 36 HARV. J.L. & PUB. POL'Y 1187, 1194, 1209–10 (2013); Paul Weitzel, *The End of Shareholder Litigation? Allowing Shareholders to Customize Enforcement Through Arbitration Provisions in Charters and Bylaws*, 2013 BYU L. REV. 65, 68.

120. To be sure, arbitrating consumer claims merely shifts the risks and costs onto the consumer, since most arbitration contracts contain "seller-protective instead of customer-protective clauses." Llewellyn, *supra* note 19, at 734. Indeed, the plaintiff typically bears higher threshold costs than in typical litigation. Schwartz, *supra* note 2, at 61 ("With arbitration filing and administrative fees as high as thousands of dollars per case, and hourly rates for arbitrators ranging from $200 to $700, arbitration can be extremely expensive, particularly in more complicated cases. Plaintiffs generally are expected to cover half of these costs."). In the employment arbitration context, a fundamental disparity exists between the power of the employer and employee. Alexander J.S. Colvin, *Mandatory Arbitration and Inequality of Justice in Employment*, 35 BERKELEY J. EMP. & LAB. L. 71, 89 (2014). ("Beyond producing inequality in whether employees have access to the courts, the employer's decisions determine the type of arbitration procedure that is adopted, whether an arbitration service provider administers the procedure, the specific provider of the arbitration procedure, and even whether employees are able to bring a class action."). Finally, while employees may proceed to arbitration without representation—a so-called cost-saving advantage for the employee—it does not appear to be a very successful strategy. Colvin found that, for the 24.9% of employees who represented themselves, the win rate was 18.3% and the average award overall was $12,228, as compared to the 22.9% win rate and $28,993 average award for represented claimants. Colvin, *supra* note 47, at 16.

121. Judith Resnick, *Diffusing Disputes: The Public in the Private of Arbitration, the*

eral judges have lamented the potential for misbehavior in arbitration. U.S. Federal District Court Judge Terry R. Means pointed to the potential for private actors to misbehave during arbitration proceedings, especially given the relaxed rules of evidence and the arbitrator's possible bias: "Arbitration proceedings are conducted in private and before a privately paid arbitrator, beholden to some extent to those who bring him business, and who has not faced the vetting of the public at state election or the confirmation process of a federal judge."[122] Similarly, Judge William G. Young of the U.S. Federal District Court of Massachusetts argued that arbitration "is among the most profound shifts in our legal history" and "[o]minously, business has a good chance of opting out of the legal system altogether and misbehaving without reproach."[123]

These concerns are particularly acute in the wrongful death context, where actors are now using arbitration clauses to sidestep the deterrence mechanisms that underpin the doctrine's liability system.[124] Wrongful death liability aims to deter future misconduct by directly imposing high costs for morally culpable misconduct, including the combination of compensatory and punitive damages.[125] Yet if the terms of an arbitration agreement expressly deny an arbitrator the power to award punitive damages, courts agree that the right to recover punitive damages is waived altogether and a claimant may not recover them in open court.[126]

Private in Courts, and the Erasure of Rights, 124 YALE L.J. 2804, 2810 (2015).

122. Hon. Terry R. Means, *What's So Great About a Trial Anyway? A Reply to Judge Higginbotham's Eldon B. Mahon Lecture of October 27, 2004*, 12 TEX. WESLEYAN L. REV. 513, 518–19 (2006).

123. Jessica Silver-Greenberg & Robert Gebeloff, *Arbitration Everywhere, Stacking the Deck of Justice*, N.Y. TIMES (Oct. 31, 2015), https://www.nytimes.com/2015/11/01/business/dealbook/arbitration-everywhere-stacking-the-deck-of-justice.html [https://perma.cc/LZ8C-BPC2].

124. *See Family Fights Arbitration Agreement in Wrongful Death Case*, KARK.COM (Nov. 11, 2014, 11:05 PM CST), https://www.kark.com/news/ar-local/family-fights-arbitration-agreement-in-wrongful-death-case/206792538 [https://perma.cc/4QBG-RJFQ]; *see, e.g.*, Barrett v. Superior Court, 272 Cal. Rptr. 304, 308 (Ct. App. 1990) (discussing the public policy of "deterrence of conduct," which underlies the creation of a cause of action for wrongful death).

125. *See supra* Part II.B.

126. In *Mastrobuono v. Shearson Lehman Hutton, Inc*., the Court confronted a New York choice of law provision, which had the effect of prohibiting an arbitrator from adjudicating a punitive damages claim, given New York legal precedent. 514 U.S. 52, 53 (1995). However, the Court held that the choice of law provision did not waive an individual's right to recover punitive damages in open court, absent *express language* explaining the unavailability of punitive damages. *Id*. at 59. The holding in *Mastrobuono* predictably resulted in more arbitration agreements *expressly* covering punitive damages. *See* Jordan L.

Likewise, even if the arbitration agreement does allow for an award of punitive damages, the award itself is likely to be minor in comparison to what otherwise could be recovered at trial.[127] In the wrongful death context, forcing a beneficiary to forfeit any punitive damages award, when he has not chosen to do so, would again violate the beneficiary's substantive rights, while granting wrongdoers the luxury to insulate themselves from the threat of punitive damages.[128]

Moreover, wrongful death arbitration dispenses with litigation's disciplined discovery procedures predicated on a public fact-finding mission. Typical rules of discovery are designed to unearth facts that would otherwise remain within the dark and spread them across the public record in courtrooms and public media.[129] This process is especially helpful in deterring wrongful misconduct. If businesses are considering dangerous activities or products, fear of public exposure changes their calculations. Yet the high degree of privacy in arbitration proceedings isolates business actors from these judicial rules of procedure that expose

Resnick, *Beyond* Mastrobuono*: A Practitioners' Guide to Arbitration, Employment Disputes, Punitive Damages, and the Implications of the Civil Rights Act of 1991*, 23 HOFSTRA L. REV. 913, 939, 941 (1995) ("One firm has explicitly defined the implications of New York choice of law, while another has included language in its alternative dispute resolution policy to preclude arbitrators from awarding punitive damages in any cases whatsoever."); Ware, *supra* note 35, at 536 & n.33 (1994) ("Arbitration agreement terms expressly addressing punitive damages may be becoming more common."); *see also* Farnsworth, *supra* note 35, at 408 ("If the arbitration clause plainly states that the arbitrators have no power to award punitive damages, that ends the matter.").

127. *See* Jean R. Sternlight, *Panacea or Corporate Tool?: Debunking the Supreme Court's Preference for Binding Arbitration*, 74 WASH. U. L.Q. 637, 685–86 (1996) ("An arbitrator who issues a large punitive damages award against a company may not get chosen again by that company or others who hear of the award."); *cf.* Maltby, *supra* note 118, at 33 (noting that in employment arbitration, a company "is likely to be a repeat player, with the opportunity to reject arbitrators whose previous rulings displeased it").

128. *See* Edward Brunet, *Arbitration and Constitutional Rights*, 71 N.C. L. REV. 81, 104–08 (1992); Constantine N. Katsoris, *Punitive Damages in Securities Arbitration: The* Tower of Babel *Revisited*, 18 FORDHAM URB. L.J. 573, 593–96 (1991); Richard J. Oparil, *Preemption and the Federal Arbitration Act*, 13 GEO. MASON U. L. REV. 325, 338–45 (1990); G. Richard Shell, *The Power to Punish: Authority of Arbitrators to Award Multiple Damages and Attorney's Fees*, 72 MASS. L. REV. 26, 34 (1987); Thomas J. Stipanowich, *Punitive Damages in Arbitration:* Garrity v. Lyle Stuart, Inc. *Reconsidered*, 66 B.U. L. REV. 953, 1007–10 (1986); Brian R. Hajicek, Note, *Punitive Damages in New York Arbitration: Who Is Really Being Punished?* Barbier v. Shearson Lehman Hutton, Inc., 2 J. DISP. RESOL. 361, 372 (1992).

129. *See generally* Katharine Larson, *Discovery: Criminal and Civil? There's a Difference,* ABA (Aug. 9, 2017), https://www.americanbar.org/groups/young_lawyers/publications/tyl/topics/criminal-law/discovery_criminal_and_civil_theres_difference/ [https://perma.cc/NKK9-4828] (discussing the purpose and scope of the rules of discovery).

misconduct to public spectacle.[130] When the doors are closed to outsiders, the wrongdoers can control the information and outcomes that otherwise would be subjected to procedural neutrality and public scrutiny.[131]

Finally, by halting the development of common law precedent, wrongful death arbitration eliminates the very legal framework responsible for deterring future wrongful conduct.[132] When a court states "what the law is," it establishes precedent that regularly exceeds the impact of a single lawsuit.[133] Indeed, judicial decisions serve an informational value for both judges and the general population.[134] By exposing to the public the outcome in a respective case, including the legal rules and jury award, the common law educates the public about what our society tolerates as good and bad. In this way, actors receive notification ex ante that certain conduct is either just plain wrong or too costly to consider the risk. As Louis Brandeis astutely explained, exposing something to "[s]unlight" is "the best of disinfectants; electric light the most efficient policeman."[135] Announcing to the public the normative rules and expectations of a just society provides the common law with its implicit deterrence function.

Today, as more wrongful death cases are being evicted from the courthouse, the proper standard of reasonableness is becoming

130. Courts have recognized that discovery akin to what the federal rules require is inconsistent with the speedy, inexpensive and informal virtues arbitration is supposed to offer. *See, e.g.*, Nat'l Broad. Co. v. Bear Stearns & Co., 165 F.3d 184, 190–91 (2d Cir. 1999); Burton v. Bush, 614 F.2d 389, 390–91 (4th Cir. 1980); Yasuda Fire & Marine Ins. Co. v. Cont'l Cas. Co., 840 F. Supp. 578, 579 n.4 (N.D. Ill. 1993).

131. *See* DIRECTV, Inc. v. Imburgia, 577 U.S. __, __, 136 S. Ct. 463, 468–69 (2015) (Ginsburg, J., dissenting) (stating that the Court's expansion of the FAA has "resulted in the deprivation of consumers' rights to seek redress for losses, and, turning the coin, they have insulated powerful economic interests from liability for violations of consumer-protection laws"); *see also* Klonoff, *supra* note 44, at 1593 (criticizing Supreme Court Justices Breyer and Kagan for not joining Justice Ginsburg's dissent in *DIRECTV*).

132. *See* Wilko v. Swan, 346 U.S. 427, 436–37 (1953) (observing that an arbitrator's "award may be made without explanation of their reasons and without a complete record of their proceedings" and "[t]he United States Arbitration Act contains no provision for judicial determination of legal issues such as is found in the English law").

133. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803) (finding this was "emphatically the province and duty of the judicial department"); *see also* Mitchell v. United States, 526 U.S. 314, 330–32 (1999) (Scalia, J., dissenting) (stating that the fact that a rule has found "wide acceptance in the legal culture" is "adequate reason not to overrule" it).

134. *See* Mark F. Grady, *Why Are People Negligent? Technology, Nondurable Precautions, and the Medical Malpractice Explosion*, 82 NW. U. L. REV. 293, 318–19 (1988).

135. LOUIS D. BRANDEIS, OTHER PEOPLE'S MONEY—AND HOW BANKERS USE IT 92 (8th prtg. 1932).

less clear. Judge Patrick Higginbotham of the U.S. Court of Appeals for the Fifth Circuit recently lamented what effect arbitration is having on lawmaking: today, entire areas of law once defined by judges are not being developed by way of public judicial decisions.[136] By the same token, the exodus of wrongful death cases from the courts is creating unclear standards of reasonableness.[137] If the standard of care is unclear, which may occur to a greater degree as precedent ages and judges and juries have not developed the law alongside societal evolutions, actors may rationally decide to act with less than the level of care subsequently determined by a public court or jury.[138]

CONCLUSION

The debate over wrongful death arbitration remains one of the most difficult and interesting problems confronting courts today. Over the span of just one decade, the controversy has implicated fundamental principles of arbitrability and their relationship to our common understanding of wrongful death liability. No issue more pointedly illustrates the tension between the concept of arbitration as a tool of fairness founded on the notion of contractual "consent" and the realities of its role as a surrogate court.

As courts struggle with this issue, the history and meaning behind both arbitration and wrongful death liability has been lost. In its original form, wrongful death liability sought to vindicate the property interests of family members afflicted by the wrongful death of a spouse or child. Yet a family member enjoyed the right to recover in a wrongful death action not as a matter of contract, but because society deemed him or her a victim of wrongdoing

136. Patrick E. Higginbotham, *Judge Robert A. Ainsworth, Jr., Memorial Lecture, Loyola University School of Law: So Why Do We Call Them Trial Courts?*, 55 SMU L. REV. 1405 (2002); Patrick E. Higginbotham, *The Disappearing Trial and Why We Should Care*, 28 RAND REV. 28 (2004); Patrick E. Higginbotham, *The Present Plight of the United States District Courts*, 60 DUKE L.J. 745, 752–55 (2010); *see also* Hon. Beverley McLachlin, *Judging the "Vanishing Trial" in the Construction Industry*, 2 FAULKNER L. REV. 315, 315–16 (2011) ("The trend is clear. Fewer and fewer construction cases are reaching the courts where the law is developed. Increasingly, instead of being resolved by judges, construction disputes are being sent to mediation, arbitration, or other forms of alternate dispute resolution (ADR).").

137. *See supra* notes 49–54 and accompanying text.

138. *See generally* Richard Craswell & John E. Calfee, *Deterrence and Uncertain Legal Standards*, 2 J.L. ECON. & ORG. 279, 279–84 (1986) (discussing the consequences of uncertain legal standards regarding the proper level of care on an individual's behavior and the likelihood that behavior will violate the law).

and to be in the best position to police the misconduct. In the coming years, hopefully the latter will pay heed to what wrongful death liability was originally understood to be and strike a balance which is good for both the families and the parties to an arbitration agreement.

As society continues to face atrocities resulting in the death of citizens, including horrific stories of nursing home patients and employees facing persistent negligent misconduct by powerful institutions, perhaps the best way we can deter future misconduct and right public wrongs is by asking ourselves whether current legal doctrine favoring arbitration does full justice for the victims and for ourselves.