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The Future of Kentucky's Punitive Damages Statute and Jural Rights Jurisprudence: A Call for Separation of Powers

BY M. SCOTT MCINTYRE*

INTRODUCTION

The recent Kentucky Supreme Court decision in *Williams v. Wilson* struck down portions of Kentucky Revised Statute section 411.184 (Kentucky's "punitive damages statute"), holding that they violated the common law jural rights doctrine and were thus unconstitutional. The General Assembly enacted the punitive damages statute in 1988 in response to the perceived public need for "tort reform" legislation. The Supreme Court in *Williams*, however, utilized the mysterious and controversial jural rights doctrine to find that the General Assembly exceeded its authority by altering the plaintiff's firmly entrenched common law right to recover punitive damages for gross negligence. The General Assembly had modified the punitive damages standard of recovery to include only acts of which the defendant had a "subjective awareness." In addition, the legislature changed the plaintiff's

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2 See id. at 269; see also infra notes 60-74 and accompanying text (providing an introductory discussion).


4 See *Williams*, 972 S.W.2d at 268.

5 Ky. REV. STAT. ANN. [hereinafter K.R.S.] § 411.184(1)(c) (Banks-Baldwin 1999). The common law standard for the awarding of punitive damages, before the punitive damages statute was enacted, is described in *Horton v. Union Light, Heat*
burden of proof to "clear and convincing evidence," as opposed to the traditional "preponderance of the evidence" standard. The Williams court left open the question of whether the "clear and convincing evidence" standard violates the jural rights doctrine as well.

The legitimacy of a jural rights doctrine is not universally accepted in Kentucky. However, if one concludes (as does the most recent majority of the Kentucky Supreme Court) that the jural rights doctrine has its proper constitutional place, the next question is how broadly or narrowly it should be interpreted. In his concurrence in Williams, then-Chief Justice Stephens expressed hope that the case would spark a debate on the wisdom of the jural rights doctrine, before the court altered its powerful stare decisis effect. Justice Stephens was well aware of the "counter-majoritarian

& Power Co., 690 S.W.2d 382, 389 (Ky. 1985). The plaintiff had to prove the defendant's "evil motive" or a "reckless indifference to the rights of others," or that the defendant's conduct was "outrageous." Id. (quoting RESTATEMENT (SECOND) OF TORTS § 908(2) (1979)).

K.R.S. § 411.184(2) (Banks-Baldwin 1999).


See Thomas P. Lewis, Jural Rights Under Kentucky's Constitution: Realities Grounded in Myth, 80 KY. L.J. 953 (1991-92). This article has been praised by a justice of the Kentucky Supreme Court as "well reasoned and well documented." Williams, 972 S.W.2d at 272 (Cooper, J., dissenting). Its author has been described as "a preeminent scholar of Kentucky constitutional law." Id. (Cooper, J., dissenting). The Lewis article is cited extensively throughout the Williams case and thus will be referenced in this Note. It is particularly recommended for its thorough history of the founders' intent concerning the jural rights doctrine. See id. at 262-69.

See Williams, 972 S.W. 2d at 269 (Stephens, C.J., concurring) (referring to stare decisis as "a judicial policy implemented to maintain stability and continuity in our jurisprudence"). The Kentucky Supreme Court has recently been criticized for its willingness to reverse itself on the same topic within a short period of time. See Ronald L. Green, The Kentucky Law Survey: Torts, 86 KY. L.J. 907, 907 (1997-98) (arguing that "[t]he absence of deference to the principle of stare decisis has resulted in a lack of certainty in the law, making it impossible for practitioners to advise clients with any certainty, which in turn affects the decision whether to settle or litigate"). The Williams majority stated that "[p]rinciples of predictability counsel against such major shifts in the law." Williams, 972 S.W.2d at 267. Justice Stephens wisely called for a thorough examination of prior jural rights precedent, in order to avoid a series of reversals which would cause a general lack of certainty
difficulty”10 faced by the court when a decision such as Williams, or any other ruling based upon the jural rights doctrine, abrogates the will of the legislature.11 However, this difficulty is also counterposed with the court’s protection of its legitimacy by refraining from routinely abandoning the stare decisis effect of decisions based upon the Constitution.12

This Note explores the clash of powers between Kentucky’s legislative and judicial branches, as evidenced by the enactment of the punitive damages statute, its judicial abrogation in Williams, and the future direction of the jural rights doctrine. Part I will briefly outline the impetus for “tort reform” that spurred the Kentucky General Assembly to enact the punitive damages statute.13 Part II will examine both the Kentucky Supreme Court’s ruling that the punitive damages statute was unconstitutional and the jural

among current and potential litigants and the legal community. See id. at 269.


11 For an explanation of the inherent problems faced by courts when invoking the Constitution to strike down laws, see ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH 16-17 (1962): “When the Supreme Court declares unconstitutional a legislative act or the action of an elected executive, it thwarts the will of representatives of the actual people of the here and now; it exercises control, not in behalf of the prevailing majority, but against it.” Bickel then concedes the high value placed on stability, but concludes that that value is also a countermajoritarian factor. See id. at 17. Deference to the will of the people on matters of economic legislation, as evidenced through their elected legislators, has been characteristic of Supreme Court jurisprudence since United States v. Carolene Products Co., 323 U.S. 18 (1944). This deference, of course, does not apply when legislation has “no rational basis” or amounts to “an arbitrary fiat.” Id. at 31-32. The Supreme Court has held that it is permissible to abolish old common law rights to accomplish any “permissible legislative object.” Silver v. Silver, 280 U.S. 117, 122-23 (1929) (providing rational basis review to a statute barring automobile passengers from suing drivers for negligence and holding that the wisdom of legislation is generally the concern of legislatures, not the courts). As will be shown, the Kentucky courts, contrary to the Supreme Court’s example, provide a heightened version of strict scrutiny to legislation altering common law rights. The focus of this Note is whether the Kentucky Constitution justifies such heightened scrutiny. See infra notes 168-175 and accompanying text.

12 But see Hilen v. Hays, 673 S.W.2d 713, 716 (1984) (holding that the stare decisis authority on contributory negligence did not prevent the court from adopting comparative negligence). Justice Leibson noted that “the doctrine of stare decisis does not commit us to the sanctification of ancient fallacy . . . . The common law is not a stagnant pool, but a moving stream.” Id. at 717 (citing City of Louisville v. Chapman, 413 S.W.2d 74, 77 (1967)).

13 See infra notes 17-48 and accompanying text.
rights basis for that decision. Part III will analyze critically the legislative
purpose behind punitive damages reform and the expansive scope of the
jural rights doctrine used to defeat that purpose. Finally, Part IV will
examine the remaining portions of Kentucky's punitive damages statute
and suggest a shift to a restrained jural rights jurisprudence, an approach
more in line with that of other states. This debate implicates the legiti-
macy of the jural rights doctrine and its proper role in Kentucky jurispru-
dence vis-a-vis the separation of powers doctrine. These issues go to the
heart of a citizen's right to his day in court and to the question of who
decides what that day in court really means.

I. THE ADOPTION OF THE PUNITIVE DAMAGES STATUTE

A. The Punitive Damages "Crisis"

Punitive damages have been defined as "damages, other than compens-
satory or nominal damages, awarded against a person to punish him for his
outrageous conduct and to deter him and others like him from similar
conduct in the future." Punitive damages are, quite simply, awarded to
punish the defendant, and not for the purpose of compensating the
plaintiff. Punitive damages have been criticized as "unfair windfall[s]" to
plaintiffs, sought by attorneys merely as a way to enlarge their fees. For
that reason, and many others, a movement known as "tort reform" burst
upon the national scene in the 1980s. Many observers claimed that the tort
compensation system was in "crisis," largely due to punitive damage
awards in medical malpractice and product liability lawsuits. Anecdotes

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14 See infra notes 49-98 and accompanying text.
15 See infra notes 99-175 and accompanying text.
16 See infra notes 176-221 and accompanying text.
17 RESTATEMENT (SECOND) OF TORTS § 908(1) (1979). See generally Jane
Massey Draper, Annotation, Excessiveness or Inadequacy of Punitive Damages
18 See RESTATEMENT (SECOND) OF TORTS § 908(1) cmt. b (1979); see also LRC
Report, supra note 3, at 22.
19 LRC Report, supra note 3, at 22.
20 For a survey of tort reform laws enacted since 1986, see generally Tort
Reform Record, AM. TORT REFORM ASS'N, June 30, 1996.
21 See STEPHEN DANIELS & JOANNE MARTIN, CIVIL JURIES
AND THE POLITICS OF REFORM 2 (1995) (arguing that “[i]t has become more a lottery than a rational
system"; quoting Dr. Otis Bowen, Secretary of Health and Human Services in the
Reagan administration).
A CALL FOR SEPARATION OF POWERS

of extremely high jury verdicts—such as in the infamous "McDonald's coffee case"—fueled the fire for those clamoring for reform.\textsuperscript{22} Media reports lamenting such "freakish punitive damage bonanzas"\textsuperscript{22} helped to bring the issue into public debate.

There is no consensus as to the existence of a "tort crisis" and—assuming one does exist—no consensus respecting its resolution.\textsuperscript{24} In Kentucky, the General Assembly responded to "skyrocketing [insurance] premiums"\textsuperscript{25} in 1986 by establishing the Kentucky Insurance and Liability Task Force. A 1996 study, however, found that punitive damage awards "are not as frequent or as big as tort reformers claim."\textsuperscript{26} In fact, the Task Force "found no evidence nor heard testimony that caused them to


\textsuperscript{24} Compare Bill Garmer, Tort Reform, Justice for the Rich, Powerful and the Influential, KY. BENCH \& BAR, Spring 1995, at 31, with Senator Mitch McConnell, The Case for Legal Reform, KY. BENCH \& BAR, Spring 1995, at 33. This debate on the need (or lack thereof) for legislative action to accomplish tort reform in Kentucky is emblematic of the national tort reform debate. For a criticism of tort reform as largely unnecessary because neither the frequency nor the amount of punitive damages are increasing, see Peter J. Sajevic, Note, Failing The Smell Test: Punitive Damage Awards Raise the United States Supreme Court's Suspicious Judicial Eyebrow in BMW of North America, Inc. v. Gore, 116 S. Ct. 1589 (1996), 20 HAMLIN L. REV. 507, 550 (1996) (arguing that "[t]he empirical evidence examining punitive damage awards does not conclusively indicate that punitive damages are increasing in number or amount"). See also Stephen Daniels \& Joanne Martin, Myth and Realities in Punitive Damages, 75 MINN. L. REV. 1, 3-4 (1990). But cf. DANIELS \& MARTIN, supra note 21, at 6 n.24 (noting that there were 401 punitive jury verdicts totaling over $1 million each in 1984) (citing Ted Gest \& Clemens P. Work, Sky-high Damage Awards, U.S. NEWS \& WORLD REP., Jan. 27, 1986, at 35).

\textsuperscript{25} LRC Report, supra note 3, at 267 (citing H.R.J. Res. 139). The Task force was composed of attorneys, state and local officials, and representatives of diverse groups such as insurance companies, the Kentucky Medical Association, and the United Mine Workers. Id. at i.-ii. For a discussion of Kentucky tort reforms beyond punitive damages, see Robert R. Sparks, A Survey of Kentucky Tort Reform, 17 N. KY. L. REV. 473 (1989).

\textsuperscript{26} Andrew Blum, Study Finds Punitives Are Small, Rare, NAT'L L.J., July 1, 1996, at A6.
conclude that there is a litigation explosion in Kentucky."

Also, the commission recognized that tort reform, at least in the immediate future, would not reduce insurance premiums. However, it concluded that reforms were necessary to "bring about a greater degree of efficiency, predictability and cost-effectiveness [in the civil justice system]." The Task Force stated that "[t]here is concern with the tendency of our Courts [sic] to broaden the opportunities for recovery of damages for a greater array of injuries, economic and non-economic." This concern with efficiency, predictability, and limiting the expansion of the common law will prove to be pivotal evidence of legislative intent in the forthcoming jural rights debate.

The legitimacy of the need for legislative action in tort reform is a political question beyond the scope of this Note. The question is, perhaps, beyond the scope of the judiciary. The General Assembly, as the chosen representative of the people of Kentucky, saw a crisis and chose to resolve it. The only question for the courts, then, should be the constitutionality of the legislature's actions. In fact, the General Assembly itself was acting, in part, due to its own constitutional concerns. The standard of recovery

27 LRC Report, supra note 3, at 15.
28 See id.
29 Id.
30 Id.
31 See infra notes 75-44 and accompanying text.
32 Tort law is often described as having evolved over time and as mirroring the interests of the class possessing political power in a given era. See Roger I. Abrams, Tort Law and Family Values, 48 RUTGERS L. REV. 619, 620-22 (1996) (tracing how as negligence law developed to protect new industries in the nineteenth century, products liability law simultaneously developed as a way for plaintiffs to protect themselves from dangerous mass-produced products; but these laws later evolved to reflect the values of "traditional defendants," such as politically powerful product manufacturers and physicians). But cf. Stephen F. Williams, Public Choice Theory and the Judiciary: A Review of Jerry L. Mashaw's Greed, Chaos, and Governance, 73 NOTRE DAME L. REV. 1599, 1618 (1998) (pointing out the considerable influence of the plaintiff's bar lobby and noting that consequently several courts have struck down legislative tort reform on "creative constitutional grounds"). The author cites Williams v. Wilson as support for his argument. See id. at n.59.
33 See infra notes 129-136 and accompanying text (discussing separation of powers principles).
34 Juries have traditionally been given much discretion in Kentucky. However, unclear jury charges in the punitive damages area create a greater potential for
for punitive damages raises constitutional issues that go far beyond the cost of insurance rates. Kentucky has traditionally given great deference to jury verdicts, even in the area of punitive damages. However, to permit an arbitrary award to stand would be to disregard section two of Kentucky’s Constitution. Moreover, due to the fact that punitive damages are above and beyond mere compensation, courts must carefully scrutinize the amount of the award to avoid a deprivation of property in violation of the Fourteenth Amendment. In addition, the Supreme Court has held that arbitrary awards. See also KY. CONST. § 7 (stating that “[t]he ancient mode of trial by jury shall be held sacred”). But see id. § 2 (declaring that “[a]bsolute and arbitrary power over the lives, liberty, and property of freemen exists nowhere in a republic, not even in the largest majority”) (emphasis added).

The Court’s substantive due process analysis placed the Court in the role of ‘Superjury’ that reviews each punitive damage award independently. As applied in Gore, this analysis constituted little more than a ‘smell test’ whereby the Court invalidated the award because it disagreed with the jury without providing guidance to future courts. See id. at 575-85. But cf. Browning-Ferris Indus. of Vermont, Inc. v. Kelco Disposal, Inc., 492 U.S. 257, 260 (1989) (holding that the Eighth
punitive damages pose other due process concerns. Jury instructions typically leave the jury with wide discretion in choosing amounts, and the presentation of evidence of a defendant’s net worth creates the potential that juries will use their verdicts to express bias against big businesses, particularly those lacking strong local connections. States have touted punitive damage reform as an affirmative legislative step toward avoiding federal constitutional challenges to punitive damages regimes. Therefore, the General Assembly had a legitimate goal in enacting the punitive damages statute: giving juries brighter guidelines, so as not to offend the defendant’s Fourteenth Amendment right to due process of law.

Amendment “does not apply to awards of punitive damages in cases between private parties”). For a litigation-based analysis of the three factors cited by Gore, see Weddle, supra note 35, at 671-81.

See Gore, 517 U.S. at 559.

Justice O’Connor has opined:

Punitive damages are a powerful weapon. Imposed wisely and with restraint, they have the potential to advance legitimate state interests. Imposed indiscriminately, however, they have a devastating potential for harm. Regrettably, common-law procedures for awarding punitive damages fall into the latter category. States routinely authorize civil juries to impose punitive damages without providing them any meaningful instructions on how to do so. Rarely is a jury told anything more specific than “do what you think best” .

. . . .

. . . Juries are permitted to target unpopular defendants, penalize unorthodox or controversial views, and redistribute wealth. Multimillion dollar losses are inflicted on a whim.


See also Sajevic, supra note 24, at 550 (supporting giving deference to states when the states have taken action to address Fourteenth Amendment concerns with punitive damage awards). The author asserts that “[t]he Court should not have intruded into an area traditionally of state’s domain without more conclusive evidence and without acknowledging that the states have already taken steps to limit juror discretion in awarding punitive damages.” Id. The American Tort Reform Association has reported that 27 states passed tort reform legislation concerning punitive damages from 1986 to 1989. See DANIELS & MARTIN, supra note 21, at 200 n.7.

See Honda Motor Co. v. Oberg, 512 U.S. 415 (1994). The Court reversed and remanded the Oregon judgment on the grounds that federal due process mandates that state courts closely scrutinize punitive damage awards. See id. The Court refused to hear the case a second time. See Honda Motor Co. v. Oberg, 517 U.S.
Ultimately, the only question facing the Kentucky Supreme Court was whether the legislative change to the punitive damages standard violated the Kentucky Constitution.

B. Kentucky's Punitive Damages Statute—Kentucky Revised Statutes Section 411.184

Findings by the Kentucky Liability and Insurance Task Force ultimately resulted in the passage of House Bill 551, which became effective on July 15, 1988. Part of this bill created a new section 411 of the Kentucky Revised Statutes. The main differences between this section and prior Kentucky punitive damages law lie in the definition of malice and the standard of proof that a plaintiff must bear in order to be awarded punitive damages. The statute codifies the limited situations where punitive damages may be awarded, whereas before this legislation punitive damages were a common law matter. Changes include the requirement that a plaintiff prove "by clear and convincing evidence, that the defendant from whom such damages are sought acted toward the plaintiff with oppression, fraud, or malice." Malice was the critical factor found unconstitutional in Williams. Malice is defined under the statute as follows:

"Malice" means either conduct which is specifically intended by the defendant to cause tangible or intangible injury to the plaintiff or conduct that is carried out by the defendant both with a flagrant indifference to the rights of the plaintiff and with a subjective awareness that such conduct will result in human death or bodily harm.


42 See LRC Report, supra note 3, at 80.

43 This section was "applicable to all cases in which punitive damages are sought and supersedes any and all existing statutory or judicial law insofar as such law is inconsistent with the provisions of this statute." K.R.S. § 411.184(5) (Banks-Baldwin 1999).

44 See id. § 411.184.

45 Id. § 411.184(2); see also supra note 5 (describing the previous common law standard).

46 K.R.S. § 411.184(1)(c) (emphasis added).
Specifically, the Williams Court found the "subjective awareness" requirement to be in conflict with the jural rights doctrine (the common law right of plaintiffs to recover damages) and thus unconstitutional.\textsuperscript{47} However, the issue of whether the "clear and convincing" standard is constitutional, left open by the Williams court, can only be evaluated by exploring the future scope of the jural rights doctrine.\textsuperscript{48}

II. THE JUDICIAL RESPONSE:
THE JURAL RIGHTS DOCTRINE

A. Williams v. Wilson

On May 18, 1990, Patricia Wilson, a teacher, was driving to her school in Lexington, Kentucky.\textsuperscript{49} Wilson’s car was struck at an intersection by a vehicle driven by Teri Williams.\textsuperscript{50} Williams was arrested at the scene for driving under the influence and later pled guilty.\textsuperscript{51} Wilson sued Williams in Fayette Circuit Court seeking compensatory and punitive damages.\textsuperscript{52}

\textsuperscript{47} See Williams v. Wilson, 972 S.W.2d 260, 269 (Ky. 1998). For an example of how the Kentucky Supreme Court applied the "subjective awareness" requirement of the punitive damages statute, see Bowling Green Municipal Utility v. Atmos Energy Corp., 989 S.W.2d 577 (Ky. 1999). Atmos involved a natural gas supplier sued for damages arising from an explosion due to a gas leak in sub-zero weather. See id. at 581. The punitive damages statute was still in effect at the time of the accident and trial, thus the court required the plaintiffs to prove "subjective awareness." Id. at 580. The court found insufficient evidence to support an award of punitive damages, noting that the accident occurred "suddenly and without warning" due to the extreme cold. Id. at 581. The dissent, while applying the same statute, found the evidence to support a punitive damages charge because the pipe was dented so much that it "should have been replaced rather than repaired." Id. at 582 (Lambert, C.J., dissenting). This case represents an instance where the punitive damages statute worked to avoid punitive liability when proof of conscious awareness was tenuous. The dissent demonstrates that it is still reasonably possible to infer subjective intent without an admission or other direct testimony of conscious awareness. See infra notes 101-110 and accompanying text (discussing the inference of conscious awareness).

\textsuperscript{48} See infra notes 190-221 and accompanying text (proposing a more restrained approach to the jural rights doctrine).

\textsuperscript{49} See Williams, 972 S.W.2d at 261.

\textsuperscript{50} See id.

\textsuperscript{51} See id.

\textsuperscript{52} See id.
Williams was represented by counsel, but did not personally appear, nor was she available for discovery.\(^3\)

At the close of the evidence, Williams objected to instructing the jury on punitive damages, claiming that there was no evidence of her subjective awareness that death or bodily harm would result from her actions.\(^4\) The trial court agreed with Williams, and Wilson then asserted that the 1988 punitive damages statute was unconstitutional in that the "subjective awareness" requirement changed the common law in violation of the jural rights doctrine.\(^5\) In response to this argument, the trial court found it appropriate to give a common law "wanton or reckless" instruction.\(^6\) The court of appeals affirmed the trial court's verdict for Williams; Wilson then appealed to the Kentucky Supreme Court.\(^7\)

The Kentucky Supreme Court addressed two issues in its review: (1) whether the statute in question infringed upon the jural rights doctrine, and (2) if so, whether the jural rights doctrine is sound.\(^8\) The court answered both questions in the affirmative.\(^9\) In order to understand the court's holding that the right to recover for gross negligence invalidated the subjective awareness portion of the punitive damages statute, it is first necessary to understand the jural rights doctrine.

\[\text{B. The Origin of the Jural Rights Doctrine}\]

The jural rights doctrine is not specifically mentioned in the Kentucky Constitution. Former Chief Justice Stephens has recognized that "there is very little, if any, basis for this now routinely accepted doctrine in the

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\(^3\) See id. Justice Cooper noted that this failure to appear was the pivotal factor leading the trial judge to declare it impossible to prove "subjective awareness," compelling the conclusion that the statute is invalid. See infra note 111 and accompanying text. Justice Cooper took a different view, however, noting that the Kentucky Supreme Court had previously rejected the argument that subjective awareness could only be proven by direct testimony of the defendant. He also cited the principle that "a plaintiff is entitled to prove a defendant's state of mind through circumstantial evidence." Williams, 972 S.W.2d at 270 (Cooper, J., dissenting) (quoting Ball v. E.W. Scripps Co., 801 S.W.2d 684, 689 (1990)).

\(^4\) See Williams, 972 S.W.2d at 261.

\(^5\) See id.

\(^6\) See id.

\(^7\) See id. at 262.

\(^8\) See id. at 260-61.

\(^9\) See id. at 269.
Kentucky Constitution or in the Constitutional Debates." Rather, the Kentucky Supreme Court created it in the 1932 case of *Ludwig v. Johnson* by reading together three sections of the Kentucky Constitution. The *Ludwig* court combined sections 14, 54, and 241 and concluded that "[when read together] the conclusion is inescapable that the intention of the framers of the Constitution was to inhibit the Legislature from abolishing rights of action for damages for death or injuries caused by negligence." These three sections of the Kentucky Constitution read as follows:

Section 14:

All courts shall be open, and every person for an injury done him in his lands, goods, person or reputation, shall have remedy by due course of law, and right and justice administered without sale, denial or delay.

Section 54:

The General Assembly shall have no power to limit the amount to be recovered for injuries resulting in death, or for injuries to person or property.

Section 241:

Whenever the death of a person shall result from an injury inflicted by negligence or wrongful act, then, in every such case, damages may be recovered for such death, from the corporations and persons so causing the same. Until otherwise provided by law, the action to recover such damages shall in all cases be prosecuted by the personal representative of the deceased person. The General Assembly may provide how the recovery shall go and to whom belong; and until such provision is made, the same shall form part of the personal estate of the deceased person.

Provisions similar to the "open courts" and "limiting" language in sections 14 and 54, respectively, have been interpreted outside Kentucky as allowing courts to use heightened scrutiny for legislative changes to tort law; there is arguably historical justification for such a construction.

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60 Id. (Stephens, C.J., concurring).
61 Ludwig v. Johnson, 49 S.W.2d 347 (Ky. 1932).
62 Id. at 350.
63 Ky. Const. § 14.
64 Id. § 54.
65 Id. § 241.
66 The historical origins of such "open courts" provisions have been traced to the time of the Magna Carta, which was meant in part to ensure that courts were
However, the fact that the constitution does not refer to "jural rights," nor to reading the above sections in tandem, has led to much scholarly criticism of the court's decision in *Ludwig*. For example, Thomas Lewis, former Dean and Professor of Law at the University of Kentucky College of Law, has interpreted section 14 as merely guaranteeing process and "due course of law," not as a delegation to courts to declare substantive law. Despite criticisms, the Kentucky Supreme Court has repeatedly held since *Ludwig* that the purpose of section 14 is "to preserve those jural rights which had become well established prior to the adoption of the Constitution." For example, in *Kentucky Utilities Co. v. Jackson County Rural Elec. Corp.* accessible without having to pay the king for a special writ to "open" the court. See Janice Sue Wang, Comment, *State Constitutional Remedy Provisions and Article 1, Section 10 of the Washington State Constitution: The Possibility of Greater Judicial Protection of Established Tort Causes of Action and Remedies*, 64 WASH. L. REV. 203, 205 (1989) (citing Davidson v. Rogers, 574 P.2d 624, 625 (1978) (Linde, J., concurring) (noting that the Magna Carta is the origin of state remedy provisions)). Connections between the Magna Carta and state remedy provisions have been attributed to Sir Edward Coke, but the historical accuracy of this nexus theory has been greatly criticized. See *id.* at 206.

See, e.g., *Lewis*, supra note 8, at 966 (stating the court's interpretation of the jural rights provision when the 1891 constitutional convention opened). Id. Happy v. Erwin, 330 S.W.2d 412, 413-14 (Ky. 1959); see also *Perkins v. Northeastern Log Homes*, 808 S.W.2d 809, 816 (Ky. 1991); *McCollum v. Sisters of Charity*, 799 S.W.2d 15, 19 (Ky. 1990); *Carney v. Moody*, 646 S.W.2d 40, 41 (Ky. 1982); *Saylor v. Hall*, 497 S.W.2d 218, 222 (Ky. 1973); *Kentucky Util. Co. v. Jackson County Rural Elec. Coop. Corp.*, 438 S.W.2d 788, 790 (Ky. 1969). *Perkins* refined the Kentucky Supreme Court's holding in *Carney*, decided nine years earlier, which took a considerably more restrained approach to applying the jural rights doctrine. See *Carney*, 646 S.W.2d at 41 ("Our construction of [sections 14 and 54] is and should be that which leaves to the policy-making arm of government the broadest discretion consistent with their language."). High courts in states with "open courts" provisions quite similar to the provisions at issue in Kentucky's constitution have held that the legislature can freely alter punitive damages, because plaintiffs have no vested right to them. See, e.g., *Ross v. Gore*, 48 So. 2d 412, 414 (Fla. 1950) (en banc) (holding that punitive damages are allowed not as compensation to a plaintiff). The *Ross* court declared that "[t]he right to have punitive damages assessed is not property; and it is the general rule that, until a judgment is rendered, there is no vested right in a claim for punitive damages." *Id.* (citing *Kelly v. Hall*, 12 S.E.2d 881 (Ga. 1941)). *See also Osborn v. Leach*, 47 S.E. 811, 813 (N.C. 1904) (stating that "[punitive damages] are awarded on grounds of public policy, and not because the plaintiff has a right to the money, but it goes to him merely because it is assessed in his suit") (citations omitted).
Electric Cooperative Corp., the plaintiff sought indemnity in a wrongful death action. The trial court granted summary judgment to the defendant, however, citing an exclusive remedy provision in the Workers' Compensation Act. The court of appeals reversed, holding that the common law right of indemnity existed in the state of Kentucky. Moreover, since the right to indemnity existed prior to the adoption of the Kentucky Constitution, under the ruling of Ludwig it could not be eliminated by the General Assembly. This same reasoning was used by the Williams court in striking down part of the punitive damages statute.

Having identified the basic premise of the jural rights doctrine as it is utilized by Kentucky courts, the distinction between gross negligence and subjective awareness—posited throughout Williams—may be better assessed. In Ludwig, the fons et origo of Kentucky's jural rights doctrine, the court held that the guest statute at issue abolished the well-established right of a passenger to sue a driver for negligence. Therefore, the clear issue to be decided in Williams, from the court's jural rights perspective, was whether there was a "well-established right" to obtain punitive damages under the objective gross negligence standard in 1891, and whether the punitive damages statute abolished that right.


The fact that a right must be "well-established" at common law in order to receive jural rights protection is supported not only by Ludwig, but also by the venerable principle in Kentucky law that statutes are presumed valid unless they "clearly offend" the constitution. Therefore, the historical pursuit in Williams for the status of the law in 1891 is necessary if the jural rights doctrine is to be applied. The obvious difficulty in the historical analysis is that cases from the 1890s appear to allow recovery for both "subjective" and "objective" awareness. An example of an early case

71 See id. at 789 (citing K.R.S. § 342.015(1) (repealed 1972)).
72 See id. at 790.
73 See id.
74 See Ludwig v. Johnson, 49 S.W.2d 347, 351 (Ky. 1932).
75 See Johnson v. Commonwealth ex rel. Meredith, 165 S.W.2d 820, 823 (Ky. 1942); Happy v. Erwin, 330 S.W.2d 412, 413-14 (Ky. 1959).
76 For a summary of early Kentucky cases (and those from other jurisdictions) defining the standard of recovery for punitive damages, see generally Annotation,
allowing the plaintiff to recover without proof of subjective awareness of risk is *Fleet v. Hollenkemp.* That case awarded punitive damages where a pharmacist accidentally mixed a poisonous substance into a drug "whether ignorantly or by design, whether with or without the knowledge of the defendants." The court allowed the jury to award punitive damages for "negligence, wantonness, or with or without malice."

Another example of recovery for mere gross negligence, without any proof of intent, is *Maysville & Lexington Railroad v. Herrick.* In *Herrick*, the plaintiff received punitive damages for the defendant railroad's negligence without showing "intentional misconduct." Yet another railroad case, *Louisville & Nashville Railroad v. McCoy,* is even more explicit about not requiring proof of intent to recover punitive damages. The *McCoy* trial court allowed recovery for "negligence which indicates intentional wrong to others, or such a reckless disregard of their security or rights as to imply bad faith." Importantly, the Kentucky Supreme Court overruled the trial court, stating that gross negligence required no proof of a defendant's intention to cause harm, to act in bad faith, to behave fraudulently or maliciously, or to demonstrate such a reckless disregard for other's rights as to imply bad faith.

It is clear that Kentucky cases prior to 1891 allowed recovery for gross negligence, without a showing of intent, by labeling the actions of the defendant with a variety of different terms. However, Kentucky courts dur...
ing the same time period also limited recovery of punitive damages to a showing of some degree of subjective intent. In fact, the court of appeals in 1939 explained the nearly contradictory definitions of gross negligence used in earlier Kentucky decisions with the acknowledgement that “‘[n]o adequate definition has yet been formulated by the courts of the term ‘gross negligence,’ beyond such broad generalities as that ‘gross negligence is the want of slight diligence,’ and similar unworkable rules.’”

Some nineteenth century Kentucky courts did limit punitive damages by requiring at least some inference of intent, similar to that in the punitive damages statute. In Louisville & Nashville Railroad v. Robinson, the court defined conduct of a defendant necessary to justify a punitive damages award as “either an intentional wrong, or such a reckless disregard of security and right, as to imply bad faith, and therefore, squints at fraud, and is tantamount to the magna culpa of the civil law which, in some respects, is quasi criminal.”

An illustration of the degree of the “quasi-criminal” intent required for punitive damages is provided by the facts of Chiles v. Drake. In Chiles, the defendant walked into a room full of people and drew a loaded pistol which ultimately discharged in his hand, killing the plaintiff’s husband. The court awarded the plaintiff punitive damages despite the fact that it found no intent to kill or animosity on the part of the defendant. The court stated that “drawing and presenting a loaded pistol, with an intention to use it in a room where many persons were together, manifests such an utter disregard of the consequences . . . as leaves the party without any excuse for his conduct.”

Later cases have been even more forceful in requiring conscious awareness on the part of the defendant before awarding punitive damages. For example, in National Casket Co. v. Powar, punitive damages were limited to conduct showing “wanton disregard of the lives or safety of wantonness, recklessness, or gross negligence).

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86 See Louisville & Nashville R.R. v. George, 129 S.W.2d 986, 989 (Ky. 1939) (requiring a showing of “constructive or legal willfulness” to recover punitive damages).
87 Id. (quoting 10 AM. JUR. Carriers § 1147).
89 Id. at 509.
91 See id. at 154-55.
92 Id. at 155.
93 National Casket Co. v. Powar, 125 S.W. 279 (Ky. 1910).
others or [which] is willful or malicious." That case involved plaintiffs who were thrown from their horse-drawn buggy when the defendant’s car sped past them, frightening their horse. The court of appeals reversed a more plaintiff-oriented lower court instruction and held that the defendant either had to be conscious of the horse’s fright, or the conditions had to be such that he was “necessarily put . . . on notice that such conditions would most likely result from a continuation of his course.”

In modern cases, courts have returned to requiring “conscious awareness” before awarding punitive damages, a standard even more similar to that in the punitive damages statute. Courts have held that “[t]he key element in deciding whether punitives are appropriate is malice or conscious wrongdoing.” In fact, in determining whether punitive damages are appropriate, the element of “conscious wrongdoing” has been held to be more important than whether the act was intentional. It is safe to say that modern courts have not felt limited by the “objective definition” of gross negligence relied upon by the Williams court. This fact is evidenced by the conflicting terminology, and even standards, used by Kentucky courts in awarding punitive damages.

III. EXPLAINING WILLIAMS: AN UNNECESSARY EXPANSION OF JURAL RIGHTS

A. The General Assembly Sought to Clarify Ambiguous Common Law Standards

The General Assembly’s express intent in enacting the punitive damages statute was to “bring about a greater degree of efficiency, predictability and cost effectiveness” in the awarding of punitive damages. There is no doubt that the common law was lacking in predictability, as shown by the conflicting terminology and standards. Moreover, since punishment and deterrence are the motives behind punitive damages to begin with, requiring the defendant to have some degree of awareness

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94 Id. at 282.
95 See id. at 280.
96 Id. at 282.
97 Simpson County Steeplechase Ass’n v. Roberts, 898 S.W.2d 523, 525 (Ky. Ct. App. 1995) (citing Fowler v. Mantooth, 683 S.W.2d 250, 252 (Ky. 1984)).
98 See Fowler, 683 S.W.2d at 252 (“The mere fact that the act is intentional and a tort does not justify punitive damages absent this additional element of implied malice, meaning conscious wrongdoing.”) (citations omitted) (emphasis added).
99 LRC Report, supra note 3, at 15.
appeals to common sense notions of deterrence. Those without intent or awareness of the potential danger of their actions are obviously less deserving of punishment and less likely to be deterred in future cases. It is clear that permitting a defendant to avoid a punitive damage award by failing to testify (and thus preventing the plaintiff from proving subjective awareness) would be unjust and unfair to plaintiffs, as was the concern in *Williams*. The element of conscious awareness, however, can still be inferred by a jury without a defendant’s testimony.

Kentucky juries and courts have long been adequately able to infer conscious awareness, even after the punitive damages statute was enacted. Ironically, less than two weeks before the Kentucky Supreme Court reached its decision in *Williams*, the court of appeals applied the punitive damages statute without difficulty in *Roman Catholic Diocese of Covington v. Secer*. In *Secer*, the trial court awarded punitive damages to a plaintiff who was sexually abused by a teacher while attending a school operated by the Diocese. The Diocese sought to avoid punitive damages by pointing to the plain language of the statute, which requires a showing of oppression, fraud, or malice. The Diocese asserted that there was no proof of malice toward Secer because it was not aware that the teacher (over whom the Diocese had supervisory authority) had abused or would abuse Secer specifically. Nevertheless, the jury and the court of appeals found the requisite malice, without having to conclude that there was “intent” (i.e.,

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100 See Stewart v. Southeastern Group Inc., No. 97-CA-002908-MR, 1999 WL 557630, at *2 (Ky. Ct. App. July 23, 1999) (“The term punitive damages means ‘damages, other than compensatory and nominal damages, awarded against a person to punish and to discourage him and others from similar conduct in the future’”) (quoting K.R.S. § 411.184(f) (Banks-Baldwin 1999)) (emphasis added). See also Sajevic, supra note 24, at 520 (“Under the punishment rationale of just desserts, the wrongdoer is made to suffer for the harm caused, thereby rectifying the wrong and restoring the victim’s rights.”) (citing DAN B. BOBBS, LAW OF REMEDIES: DAMAGES—EQUITY—RESTITUTION 313, 318 (2d ed. 1993)).

101 See, e.g., Williams v. Wilson, 972 S.W.2d 260, 270 (Ky. 1998) (Cooper, J., dissenting) (noting that a defendant’s intent can be inferred by the jury in a criminal case by the act itself or its accompanying circumstances, even though the burden of proof is more stringent (beyond a reasonable doubt) than in the punitive damages context).


103 See id. at 287.

104 See id. at 291.

105 See id.
desire) to abuse the plaintiff on the part of the Diocese.\(^6\) This case illustrates that intent can be inferred from circumstances or omissions without proving that the defendant "desired" the outcome.

The *Secter* court then noted another recent Kentucky case allowing a punitive damages instruction for drunk driving, even though the defendant’s conduct was not specifically directed toward the plaintiff.\(^7\) Two years before the *Williams* decision, *Shortridge v. Rice* (a court of appeals case) held that the voluntary intoxication of a driver was sufficient to support an award of punitive damages under the statute.\(^8\) The court commented that "KRS 411.184 only requires an 'awareness' of the possible consequences. The statute does not require a deliberate or specific intent that the 'conduct' ... result in human death or bodily harm. The 'awareness' requirement can be satisfied by a showing of mere 'consciousness' or cognizance of potential danger."\(^9\) The court of appeals concluded that "[e]vidence that an individual was driving under the influence undoubtedly shows 'a flagrant indifference to the rights of [other drivers and pedestrians].'"\(^10\)

As the cases above demonstrate, conscious awareness can be inferred from the circumstances. Declaring the punitive damages statute unconstitutional is not an appropriate response to one case in which the trial judge felt that a jury could not infer conscious awareness without testimony from the defendant. Apparently, the *Williams* trial court was so stunned by the fact that Wilson did not testify that it thought the only solution was to conclude that intent could not be inferred without admission from the defendant.\(^11\) Wilson was convicted of driving while

\(^6\) *See id.* Punitive damages were awarded after finding that the Diocese failed to discipline Bierman, who was also a priest, or inform students, parents, or authorities of its knowledge that he had previously sexually abused students. *See id.* at 287-88, 290. It seems that the Diocese’s knowledge of Bierman’s prior criminal acts was sufficient to show subjective awareness that he was highly capable of abusing this particular plaintiff.

\(^7\) *See id.* at 291 (citing *Shortridge v. Rice*, 929 S.W.2d 194, 197-98 (Ky. Ct. App. 1996)).

\(^8\) *Shortridge*, 929 S.W.2d at 197 ("While neither this Court nor the Supreme Court has thus far interpreted the current version of KRS 411.184 to cover injuries caused by a drunk driver, we believe that the statute does encompass such situations.") (citation omitted).

\(^9\) *Id.* at 197-98 (citations omitted).

\(^10\) *Id.* at 197 (quoting K.R.S. § 411.184 (Banks-Baldwin 1999)).

\(^11\) *See Williams v. Wilson*, 972 S.W.2d 260, 270 (Ky. 1998) (Cooper, J., dissenting). When the case reached the Kentucky Supreme Court, Justice...
If the Kentucky Supreme Court was uncomfortable with creating a rule of law holding voluntary intoxication always sufficient for punitive damages, then perhaps expert testimony could have convinced the jury of Williams' conscious awareness. However, the inability of a litigant to produce sufficient evidence should have no bearing on the constitutionality of the punitive damages statute, or any other statute.

The General Assembly's intent to provide more certainty regarding the levels of conduct necessary to qualify for punitive damages does not require abolishing the cause of action altogether. At the outset, the
Williams court examined whether the punitive damages statute "abolished" a cause of action; however, the outcome of Williams was due to an extension of the jural rights doctrine beyond the question of "abolishment" to include scrutiny as to whether a statute "impairs" a jural right. Clarifying levels of conduct evidently equals an "impairment" for jural rights purposes. In the criminal context, the General Assembly has codified and clarified the elusive definition of "wanton." This principle of codification should be extended to the civil context, because (as the Kentucky cases aptly demonstrate) punitive damages are often awarded for "reckless" conduct, and the definition of "reckless" includes conduct that is wide and varied. Since punitive damages are not compensatory, there is a parallel between them and the legislature’s action in the criminal context. The "clear and convincing evidence" standard in the punitive damages statute addresses the "quasi-criminal nature" of these awards. Moreover, the subjective awareness requirement set forth by the General Assembly was a valid effort to provide more certainty, more "notice" to defendants of the kind of conduct that could result in punitive damage awards.

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115 See Williams, 972 S.W.2d at 260-61.
116 See id. at 272 (Cooper, J., dissenting).
117 See id. at 272 (Cooper, J., dissenting).
118 See Brown v. Commonwealth, 975 S.W.2d 922, 923-24 (Ky. 1998) (citing K.R.S. § 507.020, Commentary (Banks-Baldwin 1998)).
119 See supra note 76; see also Dorsey D. Ellis, Jr., Fairness and Efficiency in the Law of Punitive Damages, 56 S. CAL. L. REV. 1, 22 (1982) (noting that reckless conduct is hard to objectively measure, on a uniform basis, because it involves a weighing of matters that may be "incommensurable," such as risk of harm and the utility of dangerous conduct). Ellis recommends codifying the standards for punitive damage awards to alleviate the problem of lack of notice to defendants. See id. at 22 n.113.
121 The "quasi criminal nature of punitive damages" was emphasized by Justice Cooper when he stated that the "clear and convincing evidence" burden of proof was "middle ground" between the normal civil standard ("preponderance of the evidence") and the criminal burden ("beyond a reasonable doubt"). Williams, 972 S.W.2d at 271 (Cooper, J., dissenting).
122 See Pacific Mut. Life Ins. Co. v. Haslip, 499 U.S. 1, 2 (1991) (holding that punitive damage awards must have "objective criteria" so as to not offend the Fourteenth Amendment).
It is ironic that many of the cases defining the subjective versus objective standard for punitive damages involve railroad liability. The legislative history of section 54 of the Kentucky Constitution, the heart of the jural rights doctrine, speaks of the delegates' concern with improper railroad influence on the governing body:

The Legislature has, perhaps, in some cases, put a limit upon the amount to be recovered for damages by railroad accidents to persons resulting in death or injury to person or property. This section forbids the General Assembly from putting any limit upon the amount of damages to be recovered, leaving it to the jury.

Limiting the amount of damages to be recovered is far different from codifying standards governing obtaining damages. The General Assembly, in the punitive damages statute, did not seek to limit amounts of damages. The concern over having a particular constituent, such as railroad or insurance companies, corrupt the legislative process is valid. The Kentucky Constitution, however, already has special protection for these concerns with the "special legislation" provision, which provides more "bite" than even federal equal protection. If the General Assembly corruptly favors one group, intentionally or in effect, the supreme court can declare the

122 See, e.g., Perkins v. Northeastern Log Homes, 808 S.W.2d 809, 811-12 (Ky. 1991) (noting that the jural rights provisions, and others in the Kentucky Constitution of 1891, were enacted because of concerns that the General Assembly was giving special privileges to railroads and other corporate interests).

123 Special legislation, as defined by Kentucky Harlan Coal Co. v. Holmes, 872 S.W.2d 446 (Ky. 1994), is that "which arbitrarily or beyond reasonable justification discriminates against some persons or objects and favors others." See id. at 452 (quoting Board of Educ. of Jefferson County v. Board of Educ. of Louisville, 472 S.W.2d 496, 498 (1971)). See also White v. Manchester Enter., 910 F. Supp. 311, 315 (E.D. Ky. 1996) ("For a law to pass scrutiny under § 59 [the special legislative provision] it must satisfy two requirements: (1) it must apply equally to all in a class, and (2) there must be distinctive and natural reasons inducing and supporting the classification.").

125 See Ky. Const. §§ 59, 60; Tabler v. Wallace, 704 S.W.2d 179, 183 (Ky. 1985) (noting that § 59(5) "is much more detailed and specific than the equal protection clause of the Federal Constitution").
legislation invalid by pointing to the special legislation provision. In fact, *Williams* actually cited the above rationale, prevention of favoritism toward one group by "immuniz[ing] private groups the Legislature determined to be entitled to immunity," as a reason for the jural rights doctrine. Whatever intentions the framers may have had for the constitutional provisions which comprise the modern jural rights doctrine, the special legislation provision can protect just as well. However, when the special legislation doctrine is not implicated, the court's current application of the jural rights doctrine (which smacks of policy-making) raises separation of powers concerns. The *Williams* court has been criticized for its subtle yet dramatic expansion of the jural rights doctrine from testing whether legislation "abolishes" a cause of action to testing whether the legislation "impairs" the cause of action. This expansion is but an initial example of the doctrine which provides constitutional "justification" for the court to propound policy.

B. *A Critical Look at Jural Rights Jurisprudence*

Unlike the jural rights doctrine, the doctrine of separation of powers is *expressly* enumerated in the Kentucky Constitution:

The powers of the government of the Commonwealth of Kentucky shall be divided into three distinct departments, and each of them be confined

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126 See Lewis, *supra* note 8, at 958 (citing *Tabler*, 704 S.W.2d at 183) (the special legislation provision in the Kentucky Constitution, section 59, protects against special legislation specifically in 29 listed subjects, including legislation enacted "to regulate the limitation of civil or criminal actions").

127 *Williams*, 972 S.W.2d at 266 (citing *Happy v. Erwin*, 330 S.W.2d 412, 414 (Ky. 1959)). The full statement was that "if the Legislature could immunize certain classes of public officers, it could exempt all public officers and employees from liability, and if logically extended, could immunize private groups the Legislature determined to be entitled to immunity." *Id.* This hypothetical discriminatory enactment feared by the *Williams* court is the very legislation protected by the special legislation provision. See *id*.

128 See *Williams*, 972 S.W.2d at 272 (Cooper, J., dissenting) ("As Professor Lewis foresaw, this Court has now assumed for itself the sole power to make any meaningful changes in the area of tort law."). Professor Lewis has commented that "[i]t is undoubtedly the case, however, that some justices see the three sections [14, 54, 241] as interlocking strands that restrain the General Assembly in a web from which there is no escape." Lewis, *supra*, note 8, at 954.

129 See Legislative Research Comm’n v. Brown, 664 S.W.2d 907, 911-12 (Ky. 1984).
to a separate body of magistracy, to wit: Those which are legislative, to one; those which are executive, to another; and those which are judicial, to another.\textsuperscript{130}

Section 28 of the Kentucky Constitution holds that "[n]o person or collection of persons, being of one of those departments, shall exercise any power properly belonging to either of the others, except in the instances hereinafter expressly directed or permitted."\textsuperscript{131} Section 29 of the Kentucky Constitution places legislative power in the General Assembly, including "all powers which are solely and exclusively legislative in nature."\textsuperscript{132} The power to make public policy by amending, modifying, or repealing provisions of the common law is an inherently legislative function.\textsuperscript{133} Statutes are presumed constitutional; in fact, Ludwig, the case giving rise to the jural rights doctrine, warned that "every doubt as to the constitutionality of a law must be resolved in favor of its validity."\textsuperscript{134} The Kentucky Supreme Court held that "[t]he court has only one duty to 'lay the article of the constitution which is invoked beside the statute which is challenged and to decide whether the latter squares with the former.'"\textsuperscript{135} It is beyond the court's authority to overturn a legislative act because the "public policy promulgated therein is contrary to what the court considers to be in the public interest."\textsuperscript{136} The above interpretations of the Kentucky Constitution seriously challenge the supreme court's decision to choose among the different standards for the award of punitive damages and constitutionalize

\begin{footnotes}
\item[130] KY. CONST. § 27.
\item[131] Id. § 28.
\item[132] Brown, 664 S.W.2d at 913. See generally KY. CONST. § 29 ("The legislative power shall be vested in a House of Representatives and a Senate, which, together, shall be styled the 'General Assembly of the Commonwealth of Kentucky.'").
\item[133] See, e.g., Pryor v. Thomas, 361 S.W.2d 279, 280 (Ky. 1962). See Weddle, supra note 35, at 662 (discussing the "public remedy" aspect of punitive damages) (citing Kimberly A. Pace, Recalibrating the Scales of Justice Through National Punitive Damages Reform, 46 AM. U. L. REV. 1573, 1579 (1997) ("[P]unitive damages are meant to provide a public remedy for a public wrong rather than an individual remedy.").)
\item[134] Ludwig v. Johnson, 49 S.W.2d 347, 348 (Ky. 1932) (citations omitted).
\item[135] Fiscal Court of Jefferson County v. City of Louisville, 559 S.W.2d 478, 481 (Ky. 1977) (quoting United States v. Butler, 297 U.S. 1, 62 (1936)).
\item[136] Commonwealth ex rel. Cowan v. Wilkinson, 828 S.W.2d 610, 614 (Ky. 1992). See also Johnson v. Commonwealth ex rel. Meredith, 165 S.W.2d 820, 823 (Ky. 1942) (stating that the appropriateness of legislation is left to the body where the Constitution places it, i.e., the General Assembly and not the courts).
\end{footnotes}
one as opposed to another. It is apparent that recent jural rights jurisprudence usurps the role of determining what cause of action is in the public interest.\textsuperscript{137}

The expansive effect of the jural rights decision in \textit{Williams} is tied to criticisms of the doctrine itself. The court’s expansion of the doctrine seemed to reach its zenith with the case of \textit{Perkins v. Northeastern Log Homes}.\textsuperscript{138} Perkins held that jural rights were not limited to those rights which were present in 1891: “[T]he Kentucky Constitution must be applied to fundamental jural rights as presently accepted in society, not frozen in time to the year 1891.”\textsuperscript{139} Such a broad reading of jural rights is dangerous because it gives courts the power to determine what rights are “presently accepted in society,” which is quintessentially a legislative function. The \textit{Williams} majority even acknowledged this “‘constitutionalization’ of newly discovered rights” as “[p]erhaps the most controversial aspect of our jural rights decisions.”\textsuperscript{140}

An example of the expansive approach to the jural rights doctrine resulting in the judicial branch making “legislative value-judgments” is the 1999 case of \textit{Gilbert v. Barkes}.\textsuperscript{141} \textit{Gilbert} resolved the issue of whether the common law hybrid tort/contract cause of action based on breach of a promise to marry should continue to exist in Kentucky.\textsuperscript{142} Barkes sued Gilbert, her ex-fiance, claiming detrimental reliance by taking an early retirement and selling her house in expectation of their impending marriage.\textsuperscript{143} The court recited the lengthy history of the cause of action, but unlike in the punitive damages issue, there was no dispute as to whether the cause of action was “firmly established” by 1891.\textsuperscript{144} The court then

\begin{itemize}
  \item \textsuperscript{137} See infra notes 141-167 and accompanying text.
  \item \textsuperscript{138} Perkins v. Northeastern Log Homes, 808 S.W.2d 809, 809 (Ky. 1991).
  \item \textsuperscript{139} Id. at 817.
  \item \textsuperscript{140} Williams, 972 S.W.2d at 268 (citing Perkins, 808 S.W.2d at 816). The court did not explicitly decide whether this “constitutionalization of newly discovered rights” (as exemplified in Perkins) was still a part of the jural rights doctrine because Williams involved jural rights that the majority found to be clearly established in 1891. See id. However, the court indicated tacit disapproval of the broad jural rights interpretation in Perkins by stating that “[s]uch flaws as may have crept into the theory [jurial rights] arise from improper application and not from fundamental misconception.” Id. at 269.
  \item \textsuperscript{141} Gilbert v. Barkes, 987 S.W.2d 772 (Ky. 1999).
  \item \textsuperscript{142} See id.
  \item \textsuperscript{143} See id. at 773.
  \item \textsuperscript{144} See id. at 773-75 (outlining the extensive history of the cause of action, first in England, then in Kentucky).
\end{itemize}
proceeded to conclude that "the cause of action for breach of promise to marry has become an anachronism that has out-lived its usefulness and should be removed from the common law of the Commonwealth."145 The court referred to its power to abolish causes of action when they are found to be "anomalous, unworkable, or contrary to public policy."146 The court dismissed the argument that the General Assembly had "implicitly adopted" the cause of action by placing a statute of limitations on it.147 The majority acknowledged that the legislature "has the power to limit the time in which a common law action can be brought,"148 but that doing so does not indicate approval or disapproval of the claim.

Ironically, the court dismissed jural rights objections to removing the cause of action from the common law:

While we are removing a cause of action from the common law, we are not eradicating the ability of a party to seek a remedy for such a wrong, but rather we are modifying the form that remedy may take. Accordingly, our jural rights doctrine, enunciated in Ludwig v. Johnson, is not implicated in this matter.149

The passage above is strikingly similar to the arguments put forth by the losing party in Williams. The Gilbert majority actually cited the dissenting opinion in Williams for the proposition that "modification of a jural right is permissible as long as the right itself is not abolished."150 The Gilbert majority then concluded: "Since we have merely modified the means by which certain wrongs may be remedied, we have no need to address the jural rights doctrine."151 The majority sought to distinguish Williams by claiming that the punitive damages statute "impair" a fundamental right by raising the standard of proof, whereas "abolishing" the breach of promise to marry cause of action in Gilbert did not impair any right, but "simply modified the methods" by which the right may be accessed.152 The meaning of the terms "abolish" and "impair" were given just the opposite

145 Id. at 776.
146 Id. (citing D & W Auto Supply v. Department of Revenue, 602 S.W.2d 420, 424. (Ky. 1980)).
147 See id. at 775.
148 Id. at 776 (citing Saylor v. Hall, 497 S.W.2d 218, 223 (Ky. 1973)).
149 Id.
150 Id. (citing Williams v. Wilson, 972 S.W.2d 260, 271 (Ky. 1998) (Cooper, J., dissenting)) (citations omitted).
151 Id.
152 Id. at 777-78.
effect in *Williams*—there the court held that the General Assembly could not “impair” a right, because this impairment had the affect of abolishing a right. However, in *Gilbert*, it was constitutionally permissible for the court to abolish a right, because the abolition of the right did not impair the right. *Williams* and *Gilbert* are, needless to say, quite difficult to reconcile.

After eliminating the breach of promise to marry cause of action from the common law, the court then considered Barkes’ claims under her “modified” causes of action: breach of contract and intentional infliction of emotional distress. Barkes was denied recovery on the contract claim because her damages were not “direct wedding-related economic out-of-pocket expenses,” and there was no proof of final, serious intent to marry. With regard to the emotional distress claim, the court held that Barkes did not allege facts that could even begin to support a claim.

Although the *Gilbert* majority sought to distinguish their holding from that in *Williams*, their actions in *Gilbert* did far more to “alter a firmly established common law right” than did the actions of the General Assembly in the punitive damages statute. The majority claimed that the alternative remedies of breach of contract and intentional infliction of emotional distress would preserve a plaintiff’s ability to recover. However, the elements and standard of proof for breach of contract and intentional infliction of emotional distress are much more onerous on the plaintiff than those for breach of promise to marry. To maintain an action for a breach of promise to marry, there must be mutual promises to marry, as well as offer and acceptance, but the offer need not be formal. As far as damages, the amount is not limited to what is recoverable in a typical contract action for a breach of promise. These elements are crucial because they show that under the breach of promise to marry cause of action, *Gilbert* would have met the elements at least for a prima facie case. As the court pointed out, however, under the alternative remedies *Gilbert*

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153 See *Williams*, 972 S.W.2d at 265-69.
154 *Gilbert*, 987 S.W.2d at 777.
155 See id.
156 See id. at 776 n.3.
157 See id. at 776.
158 See id.
159 See id. The court could award the plaintiff damages for anxiety of mind, loss of time and money in preparation for marriage, loss of advantages which the plaintiff might have obtained from the marriage, etc. The damages available for the old “breach of promise to marry” cause of action clearly go above and beyond typical contract damages.
could not begin to establish a cause of action. This difference is dispositive in showing that the court actually abolished the breach of promise to marry cause of action. Under the common law elements, there was no proof required of formal contractual standards, nor formal contractual damages, because the cause of action was tort-related. The Gilbert court proceeded to add these elements.

The effect of Gilbert on the breach of promise to marry cause of action is far different than the effect of the punitive damages statute on the common law right to punitive damages. The punitive damages statute merely codified a standard for recovery that was already present at common law: that of requiring some level of intent. On the other hand, Gilbert judicially substitutes two causes of action for the original common law cause of action: the actions of breach of contract and intentional infliction of emotional distress. These alternative causes of action were never a part of the breach of promise to marry action at common law.

A further example of the broad interpretation of the jural rights doctrine which permits the court to make legislative-like policy is the 1999 decision in Shamrock Coal Co. v. Maricle. Shamrock is the court's latest word on the subject, and the majority opinion wisely refuses to further expand the reach of the jural rights doctrine. The dissenting opinion,

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160 See id. at 776-77.
161 See supra notes 86-98.
162 See supra note 157.
163 See Gilbert, 987 S.W.2d at 778 (Cooper, J., dissenting) ("That language [in the majority opinion stating that the cause of action for breach of promise to marry is no longer valid before the courts of the Commonwealth] can lead to but one conclusion: the cause of action for breach of promise to marry has thereby been abolished.").
164 Shamrock Coal Co. v. Maricle, 5 S.W.3d 130 (Ky. 1999). In this suit, former workers of the Shamrock Coal Company sued their former employer for compensation for work-related pneumoconiosis. The plaintiffs were laid off 30 days after the General Assembly modified the Workers' Compensation Act to remove coverage for their particular level of disease (category 1 pneumoconiosis). Before the legislative change, the plaintiffs' illness would have been covered under the statute. See id. at 132.
165 The majority opinion cites the exclusive remedy provision of the Workers' Compensation Act and points out that the plaintiffs' "right to occupational disease benefits is purely statutory in nature." Id. at 134. Thus, it does not fall within the jural rights provision because there was no such cause of action in existence in 1891. See id. at 134. Therefore, the plaintiffs are precluded from bringing suit in circuit court. See id. at 133.
however, reveals the true conception of jural rights jurisprudence for those who subscribe to the broad view of the doctrine. It argues that the jural rights doctrine is a constitutional basis for the Kentucky Supreme Court to prevent "violence to justice and fundamental fairness" caused by permitting plaintiffs to be "stripped of their constitutional jural rights to pursue a cause of action for damages." According to the dissent, "common sense" determines whether violence to justice and fundamental fairness has occurred. Of course, this "common sense" is that of the justices, and not that of the General Assembly. The jural rights doctrine is a constitutional sword by which the court can do individual justice based upon its conception of which outcome is dictated by common sense.

To analogize to federal due process, the Shamrock dissent's broad conception of the jural rights doctrine is strikingly similar to the much-criticized and now overturned "Lochner doctrine." The Lochner doctrine allowed the Supreme Court to substitute its judgment about appropriate economic laws for that of the legislative branch, under the guise of the Fourteenth Amendment's freedom of contract provision. The Lochner doctrine

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166 Id. at 136 (Graves, J., dissenting). Among other things, the plaintiffs in this case "alleged that Shamrock 'intentionally violated' safety procedures." Id at 132. It is difficult to argue with the proposition that it is unfair for plaintiffs to be stripped of their day in court to seek compensation for their work-related injuries.

167 Id. at 136 (Graves, J., dissenting). However, the "big picture" of separation of powers demands that each branch of government stay within its proper constitutional sphere. See supra note 133 and accompanying text. This author believes the use of the highly subjective notion of "common sense" as a talisman for constitutional interpretation results in disparate outcomes; Williams, Gilbert, and the Shamrock dissent all use the jural rights doctrine to satisfy a particular sense of "individual justice" for individual litigants, but this "do the right thing," results-oriented jurisprudence is difficult to rationalize in our system based upon stare decisis.

168 See Lochner v. New York, 198 U.S. 45, 53 (1905). The Supreme Court declared a New York maximum working hours law for bakers unconstitutional as an impairment of the freedom of contract provision of the Fourteenth Amendment. See id. at 64. This decision characterizes the "Lochner-era," where the Supreme Court routinely overturned economic laws based upon the Court's conception that the express term "liberty" in the Fourteenth Amendment included freedom of contract per laissez-faire economics. See generally Erwin Chemerinsky, Constitutional Law: Principles and Policies 480 (1997).

169 The demise of the Lochner doctrine was based upon a realization that the Supreme Court's support for a particular brand of economic policy (laissez-faire economics, where the "fittest" were supposed to survive) had no place in expounding upon the Constitution. Justice Holmes commented that, "[t]he Fourteenth Amendment does not enact Mr. Herbert Spencer's Social Statics . . . .
doctrine was overturned in the 1930s (ironically, in the same decade in which the Kentucky Supreme Court announced the jural rights doctrine). Justice Holmes foreshadowed the later demise of the Lochner doctrine in his Lochner dissent: "[M]y agreement or disagreement [with the legislature's economic theory] has nothing to do with the right of a majority to embody their opinions in law." Those on the Kentucky Supreme Court who favor the broad jural rights doctrine seem to view it as justification for reaching the "common sense" decision. However, the fact that the plaintiff in Gilbert was denied her day in court, for a claim that the common law had allowed, did not appeal to the supreme court's sense of injustice. Such disparities in the meting out of justice call for a ruling by the Kentucky Supreme Court discrediting this discretionary, Lochner-like approach as plain judicial activism.

In sum, under current jural rights jurisprudence, the Kentucky Supreme Court can alter or abolish a right based upon its conception of whether the cause of action "command[s] the allegiance of the Citizens of the Commonwealth." The court has this power in order to "keep the

[A] Constitution is not intended to embody a particular economic theory, whether of paternalism and the organic relation of the citizen to the State or of laissez faire." Id. at 75 (Holmes, J., dissenting).


171 Lochner, 198 U.S. at 75 (Holmes, J., dissenting). Parrish admitted that the Lochner-era judicial activism went beyond constitutional principles: "What is this freedom? The Constitution does not speak of freedom of contract. It speaks of liberty and prohibits the deprivation of liberty without due process of law." Parrish, 300 U.S. at 391. Likewise, the Kentucky Constitution does not speak of the duty or right of the supreme court to police the common law of tort based upon its "common-sense notions" of which laws make "common sense." The Kentucky Constitution speaks only of open courts and limitations on damages. See KY. CONST. §§ 14, 54, and 241.

172 Gilbert, 987 S.W.2d at 777. It appears that Justice Cooper's fears in the Williams dissent have come to fruition—the jural rights doctrine is applied by the court as a sword against legislative acts with which the court disagrees, but this sword is never used to check the power of the body wielding it. Justice Cooper posited, "Surely, the majority of this Court does not believe that the Constitution applies only to the legislature and not to us." Williams v. Wilson, 972 S.W.2d 260, 274 (Ky. 1998) (Cooper, J., dissenting) (considering the scope of jural rights jurisprudence and arguing that under the Williams majority's logic, the Kentucky Supreme Court itself acted unconstitutionally in abolishing the common law tort of alienation of affections in Hoye v. Hoye, 824 S.W.2d 422 (1992)). Now, under
Common Law of Kentucky in step with its citizens." However, the General Assembly is not permitted even to codify into law elements of punitive damages which already existed at common law in order to clarify standards of recovery. As Professor Lewis predicted in 1992, "[u]nder the court's current interpretation of the open courts provisions, tort principles will be whatever the court decides they shall be; the merits or demerits of efforts by the General Assembly to modify those principles are irrelevant because it has no voice in the matter." The 1999 Gilbert case adds to the jural rights list the quasi-contract/tort action of breach of promise to marry. The evidence is clear that workable limits must be developed. The uncertainty surrounding the scope of the jural rights doctrine has even led to a 1999 challenge to Kentucky's entire system of Workers' Compensation, based on the Williams precedent. Workable limits, appropriate to the separation of powers doctrine, need to be developed before the remainder of Kentucky's punitive damages statute falls victim to the dangerous and unpredictable jural rights sword.

IV. THE "CLEAR AND CONVINCING EVIDENCE" STANDARD AND APPLICATION OF A RESTRAINED JURAL RIGHTS DOCTRINE

A. Support for the Clear and Convincing Evidence Standard

The "clear and convincing evidence" standard in the punitive damages statute is an effort by the General Assembly to establish a "middle ground

the Williams logic, the court again acted unconstitutionally in abolishing the common law tort of breach of promise to marry in Gilbert v. Barkes.

Gilbert, 987 S.W.2d at 777.

Lewis, supra note 8, at 963. See also Gilbert, 987 S.W.2d at 778 (Cooper, J., dissenting). Justice Cooper points out the inconsistency with which the court applies the jural rights doctrine: "[I]f a pre-1891 cause of action is cloaked with constitutional protection, it is protected as well from an act of this Court as it is from an act of the legislature." Id. (Cooper, J., dissenting) (citing Williams, 972 S.W.2d at 274).

See McClain v. Dana Corp., No. 1998-CA-002831-MR, 1999 WL 819638 (Ky. Ct. App., Oct. 15, 1999). Although this challenge was unsuccessful, the opinion is not final. The uncertainty of the jural rights doctrine is addressed in Gilbert, 987 S.W.2d at 778 (Cooper, J., dissenting) (stating that some proponents of the jural rights doctrine assert that it only applies to causes of action for injuries causing death or due to negligence). However, Justice Cooper argues that Williams outlines a broader construction of the doctrine, making punitive damages, intended to punish and deter wrongdoing, a jural right. See id.
between the standard ordinarily used in civil cases of proof by a 'preponderance of the evidence,' and the criminal law standard of proof 'beyond a reasonable doubt.' The "clear and convincing evidence" standard has been adopted by a majority of states. This standard has been touted as a way to "help reduce the number of frivolous claims" while retaining the plaintiff's right to punitive damages when he "produce[s] substantial evidence of outrageous behavior." The same clear and convincing evidence standard is also authorized by the American College of Trial Lawyers and the American Law Institute Reporter's Study on Enterprise Responsibility for Personal Injury. In fact, the Supreme Court has also favorably acknowledged the clear and convincing evidence standard of proof for punitive damages cases.

To be sure, the above authority is evidence that the Kentucky General Assembly was on firm ground in establishing the clear and convincing evidence standard in the punitive damages statute. In addition, the clear and convincing evidence standard has been asserted as a way for courts to provide stronger procedural protection for defendants (preventing arbitrary juror action) without turning appeals courts into "super-juries" which reverse jury decisions because they disagree with the outcome. As

176 Williams, 972 S.W.2d at 271 (Cooper, J., dissenting).
177 See id. See, e.g., Owens-Illinois, Inc. v. Zenobia, 601 A.2d 633, 655-56 (Md. 1992); Rodriguez v. Suzuki Motor Corp., 936 S.W.2d 104, 110 (Mo. 1996); Wangen v. Ford Motor Co., 294 N.W.2d 437, 458 (Wis. 1980) (noting that even if the jury finds that the plaintiff proves her case by the clear and convincing evidence standard, the jury still is not required to award punitive damages).
181 See Sajevic, supra note 24, at 551 ("The Court should impose stronger procedural protections for defendants and constrain its substantive due process analysis to a proper concrete basis. Stronger procedural protections will limit juror discretion at the most appropriate time: before the jury makes its award."). Excessive second-guessing of the jury in the name of the Fourteenth Amendment is parallel to the undesirable Lochner doctrine, just as the Kentucky Supreme Court's application of the jural rights doctrine to second-guess the General
previously mentioned, the court in Williams did not reach the question of whether the clear and convincing evidence standard also violated the jural rights doctrine. Therefore, the view of the Kentucky Supreme Court on this issue is largely an open question. The Kentucky Supreme Court has previously given latitude to the General Assembly to modify the burden of proof for establishing a cause of action. Clark's Administratrix v. Louisville & Nashville Railroad, held that "the general assembly can change or designate the 'degree' for which it may authorize a recovery of punitive damages." However, whether altering a burden of proof (in the same fashion as "impairing" a cause of action) effectively destroys a cause of action is a question that can only be answered by determining the future direction of jural rights jurisprudence.

B. Jural Rights Reforms for the Future

It is obvious that the current state of uncertainty surrounding the "clear and convincing evidence" portion of the punitive damages statute prevents both plaintiffs and defendants from forming reliable expectations regarding the nature of the proof required for an award of punitive damages. The current uncertainty harms plaintiffs because the lack of clarity in jury instructions (under the common law) raises the potential for a Fourteenth Amendment challenge to any award obtained. Of course, under the common law approach, the defendant is faced with the prospect of quasi-criminal punishment based upon a jury's discretionary determination of what is "grossly negligent" behavior. Allowing such punishment of a defendant without the most clear and convincing evidence epitomizes the "devastating potential for harm" from punitive damages which concerned Assembly in Lochner-like fashion is undesirable.

See supra note 7 and accompanying text.

Clark's Adm'x v. Louisville & Nashville R.R., 39 S.W. 840 (Ky. 1897).

Id. at 841.

The punitive damages statute was advantageous for plaintiffs as well as defendants. Keeping the remaining part of the punitive damages statute will likewise benefit both plaintiffs and defendants. The United States Court of Appeals for the Sixth Circuit has stated that the statute, in comparison with the common law, "eased the standard a plaintiff must meet to have the issue of punitive damages submitted to a jury." Miller's Bottled Gas, Inc. v. Borg-Warner Corp., 56 F.3d 726, 733 (6th Cir. 1994). This case offers a useful comparison of the punitive damages standards under the statute and under the prior common law.

See supra notes 37-41.

See supra notes 119-121.
Justice O'Connor in *Pacific Mutual Life Insurance Co. v. Haslip*.\(^{188}\) Therefore, a modification of Kentucky's jural rights scrutiny is in order to allow the clear and convincing evidence standard to remain, thereby benefitting plaintiffs by largely alleviating Fourteenth Amendment challenges to punitive damages awards. This modification would also benefit defendants by making it tougher for juries to award punitive damages on a whim.

However, abandoning the jural rights doctrine in its entirety is probably not a feasible solution.\(^{189}\) The most modest reform would be for the Kentucky Supreme Court to return to a modified version of their 1982 conception of the jural rights doctrine, as outlined in *Carney v. Moody*.\(^{190}\) *Carney* exemplifies the narrow view of the jural rights doctrine, an approach which examines whether the specific facts of a plaintiffs' complaint would give rise to a legal cause of action when the constitution was adopted in 1891.\(^{191}\) Adopting this narrow approach would preclude the

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\(^{189}\) The jural rights doctrine does provide a useful basis for Kentucky courts to scrutinize legislation on state constitutional grounds when the legislation does not fit within a "classification" calling for special legislation scrutiny. *See KY. CONST. § 59*. Moreover, the jural rights doctrine has been a fixture of Kentucky constitutional law (at least in some form) since *Ludwig v. Johnson* in 1932. Courts are naturally concerned with the effect that a dramatic reversal of current constitutional interpretation will have on the court's credibility. Justice O'Connor addressed this concern in 1992 when the Supreme Court was considering overturning the then-19-year-old precedent of *Roe v. Wade*, 410 U.S. 113 (1973). *See Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 864-67 (1992). Justice O'Connor pointed out that in order to overrule a monumental and workable precedent, there must be "some special reason over and above the belief that a prior case was wrongly decided." *Id.* at 864. She also commented that "to overrule under fire in the absence of the most compelling reason to reexamine a watershed decision would subvert the Court's legitimacy beyond any serious question." *Id.* at 867.


\(^{191}\) *Carney*, 646 S.W.2d at 41. This case refused to extend the jural rights doctrine to protect rights presently accepted in society, but not accepted in 1891. The court further rejected the contention that all negligence-based actions were protected because negligence itself was established by 1891, concluding that such "an equation between jural rights and an evolving common law... would lead to
type of broad, policy-laden constructions of the jural rights doctrine that the
dissent in Shamrock propounded. This approach acknowledges that while
“statutes . . . may occasionally leave injured parties without a remedy, or
without a solvent defendant,” this circumstance “cannot justify the courts
in taking corrective measures that more appropriately fall within the
prerogative of the legislature.” With a narrow construction of the
doctrine, justices would not be permitted to decide which causes of action
were worthy of keeping. The supreme court would merely conduct an
historical inquiry to discover if the cause of action was firmly established
in 1891.

The obvious drawback to this narrow Carney approach is that it is
largely the same approach used in Williams. This approach still permits
the justices to wield the jural rights doctrine as a policy-making sword by
using their discretion to determine whether a cause of action was indeed
“firmly established” in 1891. A stronger, more deferential approach is
needed, especially since the court has already discarded the Carney
holding.

An examination of the approach taken by other states with constitu-
tional provisions similar to the jural rights doctrine indicates that a slight
change in the Kentucky Supreme Court’s application would provide an
approach more in line with separation of powers principles and less
conducive to judicial policy determinations. Thirty-nine states have
constitutional provisions similar to Kentucky’s jural rights provision which
serve to protect “an individual’s right to a legal remedy.” The states
basically agree that their remedy provisions protect the plaintiff’s common
law cause of action from infringement by the legislature after it has
accrued. This interpretation is truly narrow given the power Kentucky’s
provision has been interpreted to possess. Other courts, such as those in
Vermont, limit their “jurial rights” provision to preventing courts from

the unacceptable result that ‘every enlargement in . . . liability for negligent
conduct . . . would assume constitutional status.’” Lewis, supra note 8, at 958
(quoting Carney, 646 S.W.2d at 41).

192 See supra notes 164-167 and accompanying text. Carney, 646 S.W.2d at 41.

194 Shannon M. Roesler, The Kansas Remedy By Due Course of Law Provision:
Defining a Right to a Remedy, 47 U. KAN. L. REV. 655, 655 (1999) (citing David
Schuman, The Right to a Remedy, 65 TEMP. L. REV. 1197, 1201 n.25 (1992)).

See id. at 660 (citing Harrison v. Schrader, 569 S.W.2d 822, 827 (Tenn.
1978) (quoting Barnes v. Kyle, 306 S.W.2d 1, 4 (Tenn. 1957)); Schuman, supra
note 194, at 1206-08.
denying a remedy for a cause of action created by the legislature. The Vermont approach is consistent with the historic purpose of a remedy-limiting provision: to protect the judiciary from corrupt influences. Although the Kentucky courts have recognized a distinct purpose for the jural rights doctrine of preventing legislative corruption, this purpose seems already to be provided for in the Kentucky Constitution with the “special legislation” provision. However, Kentucky has recently construed the jural rights doctrine as limiting legislative, not judicial, power. States have sought to offset the legislative power of the remedy-limiting provision by requiring the legislature to supply “an adequate substitute remedy” when it eliminates or restricts a cause of action. This interpretation would have made sense with the Kentucky punitive damages statute, as the subjective intent requirement adopted by the General Assembly was already consistent with Kentucky case law. However, the Kentucky Supreme Court has adopted a modified version of the alternative remedy approach consistent with the awesome power enjoyed by the court in the jural rights area: the supreme court, not the legislature, decides when an

196 See Roesler, supra note 194, at 661 (citing Quesnel v. Town of Middlebury, 706 A.2d 436, 439 (Vt. 1997)) (holding that Vermont’s remedy provision merely “guarantees access to the courts” for as long as the legislature has not repealed the cause of action).

197 See id. at 658-59.

198 See supra note 124. The Vermont approach is tacitly given credence by the Kentucky Supreme Court in McCollum v. Sisters of Charity of Nazareth Health Corp., 799 S.W.2d 15, 18 (Ky. 1990) (“[Section 14] has been held to apply to the legislative branch of government as well as to the judicial branch.”) (citing Commonwealth v. Werner, 280 S.W.2d 214 (Ky. 1955)).

199 This emphasis on checking legislative power is obvious from the examples of Wilson, Gilbert, and Shamrock, discussed earlier. But see Lewis, supra note 8, at 967 (quoting Johnson v. Higgins, 60 Ky. (3 Met.) 566, 570-71 (1861)). Lewis noted that mid-nineteenth century Kentucky courts construed the jural rights doctrine as merely a “check” on the judicial department and not the legislature:

The terms and import of this provision [§ 14] show that it relates altogether to the judicial department . . . which is to administer justice “by due course of law,” and not to the legislative department . . . .

. . . . Any other construction would make it inconsistent with other clauses of the constitution, and, in fact, render it practically absurd.

Id.

alternative remedy is appropriate and the substance of that remedy.\footnote{201} The above interpretation, although perhaps consistent with the intent of the framers of the constitution, is unlikely to be accepted now due to the nearly seventy years of stare decisis following \textit{Ludwig}.

The most likely alternative which Kentucky could use to make the jural rights doctrine more in step with separation of power principles involves a familiar balancing test. This is the most workable solution to shift the power and responsibility back to the General Assembly to determine proper public policy through tort law. This approach has long been used in federal due process law and allows for appropriate deference to legislative judgments without abandoning the court’s power to find an enactment unconstitutional if it infringes on constitutional rights.\footnote{202} For example, this approach has been adopted in Illinois: “[T]he General Assembly may alter the common law and change or limit available remedies . . . . The legislature is not free to enact changes to the common law which are not rationally related to a legitimate government interest.”\footnote{203} Illinois courts further require that legislative enactments by the General Assembly be “dependent upon the nature and scope of the particular change in the law.”\footnote{204} The Illinois Supreme Court struck down the limit which had been placed on compensatory damages for noneconomic losses, finding the legislature’s enactment “arbitrary” under this approach.\footnote{205}

Constitutional balancing tests have often been criticized as unpredictable.\footnote{206} Currently, there is no explicit balancing done by the Kentucky Supreme Court in jural rights jurisprudence. The outcome is based upon an articulated judicial judgment of whether the right was “firmly established”

\footnotetext[201]{See Gilbert v. Barkes, 987 S.W.2d 772, 775-76. (Ky. 1999).}
\footnotetext[202]{See generally G. Sidney Buchanan, \textit{A Very Rational Court}, 30 Hous. L. Rev. 1509 (1993) (tracing the history of the rational basis and strict scrutiny tests applied by the Supreme Court).}
\footnotetext[203]{Best v. Taylor Mach. Works, 689 N.E.2d 1057, 1077 (Ill. 1997) (citation omitted).}
\footnotetext[204]{Id.}
\footnotetext[205]{See id.}
\footnotetext[206]{See Bendix Autolite Corp. v. Midwesco Enter., Inc. 486 U.S. 888, 897 (1988) (Scalia, J., concurring) (criticizing the interstate commerce balancing test as a task for Congress and “ill-suited for the judicial function,” but approving balancing judgments in determining “how far the needs of the State can intrude upon the liberties of the individual”). \textit{But cf.} Thomas C. Marks, Jr., \textit{Three Ring Circus Six Years Later}, 25 Stetson L. Rev. 81 (1995) (concluding that balancing of interests is generally a valid judicial approach).}
at common law. As Gilbert indicates, the results of the test are explicitly based on a judicial interpretation of which causes of action merit retention. This interpretation is largely discretionary. Therefore, a balancing test would, at the least, add factors for the court to consider and, at the worst, add no more discretion than that already present.

Under a strict scrutiny model the legislature must show that the change is due to "overpowering public necessity" or that the change allows for a "reasonable alternative" to the one repealed. The current Kentucky approach can fairly be characterized as ultrastrict. The approach in Kentucky has evolved into a one-part "value judgment test" which assumes that if the legislature (not the court) is modifying a remedy, and the court approves of the original remedy, then the plaintiff has a fundamental right to the original remedy. A better approach both tests whether the right is "fundamental" (i.e., was firmly entrenched at the time the constitution was enacted) and then balances it against whether the legislature had an important basis for the change and whether the change was reasonable. Texas adopted this intermediate approach in Sax v. T.P. Votteler. The Texas Constitution has a very similar "open courts" provision to the Kentucky version. Article I, section 13 of the Texas Constitution provides: "All courts shall be open, and every person for an injury done him, in his lands, goods, person or reputation, shall have remedy by due course of law." The Sax court wisely construed this as "plainly, a due process guarantee," and like the Kentucky court in Ludwig, began its analysis with a presumption that the legislature had not acted arbitrarily or unreasonably. Sax was a challenge to the removal of a tolling provision for minors' medical malpractice claims as a violation of the Texas open courts provision. The Texas courts began construing this provision to ensure that plaintiffs would "not unreasonably be denied access to the courts" in 1932, the same time as the Ludwig decision. The test is described as:

207 See supra note 58 and accompanying text.
208 See Gilbert, 987 S.W.2d at 776.
209 See Wang, supra note 66, at 208 (noting the strict scrutiny approach of the Florida Supreme Court, as demonstrated by Klugerv. White, 281 So.2d 1 (Fla. 1973)).
211 TEX. CONST. art. I, § 3.
212 Sax, 648 S.W.2d at 664.
213 See id. at 663-64.
214 See id. (citing Hanks v. City of Port Arthur, 48 S.W.2d 944, 945 (Tex. 1932)).
[L]egislative action withdrawing common-law remedies for well-established common-law causes of action for injuries to one's "lands, goods, person or reputation" is sustained only when it is reasonable in substituting other remedies, or when it is a reasonable exercise of the police power in the interest of the general welfare. Legislative action of this type is not sustained when it is arbitrary or unreasonable.215

The Sax court stressed that in applying this balancing test, it considers "the general purpose of the statute and the extent to which the litigant's right to redress is affected."216 Step two involves a two-part burden on the plaintiff: proof that a well-settled cause of action is being curtailed, and that the restriction is "unreasonable or arbitrary."217 In applying this test, the Sax court first determined that the legislative intent for removing the tolling provision was to limit the potential liability period of health care providers. This, in turn, would reduce the cost of medical malpractice insurance, so that providers could obtain insurance to compensate legitimate malpractice claims.218 Next, the court found that the minor plaintiff had a well-established right to sue for negligence; however, the

215 Id. at 665 (quoting Lebohm v. City of Galveston, 275 S.W.2d 951, 955 (Tex. 1955)).
216 Id. at 666.
217 Id. Professor Lewis also points out the safeguards other than the jural rights doctrine available to the court to use in declaring a law unconstitutional: "Of course, a given legislative modification of the common law of torts might be 'special legislation,' or a violation of equal protection, state or federal, or an exercise of arbitrary power." Lewis, supra note 8, at 976 (emphasis added). Intermediate review is in no way an abdication by the courts of judicial authority to the legislative branch. Even rational basis review has "bite" when the legislation is arbitrary or discriminatory. See, e.g., Romer v. Evans, 517 U.S. 620, 631-32 (1996) (holding that animus toward a particular group failed rational basis as unreasonable); Metropolitan Life Ins. Co. v. Ward, 470 U.S. 869 (1985) (finding that economic discrimination against out-of-state insurance companies, as evidenced by lower taxes for in-state insurance companies, failed rational basis as discriminatory and unreasonable). To be sure, the Kentucky courts could strike down any law deemed to be discriminatory or arbitrary. In addition, the intermediate scrutiny approach generally does not "hypothesize" an important government interest; the legislature has to proffer one. See, e.g., Craig v. Boren, 429 U.S. 190, 200 (1976) (rejecting state statistics offered as justification for allowing 18 year old women but not 18 year old men to purchase low-alcohol beer; the Court found the legislative intent substantially unrelated to an important goal).
218 See Sax, 648 S.W.2d at 666.
cause of action normally belongs to the parent. The court then determined that the statute, by relying on parents to sue on the minor's behalf, was unreasonable when balanced against the fact that the minor was "forever precluded from having her day in court" if her parents were "ignorant, lethargic, or lack[ed] concern" and failed to bring the suit within the prescribed time.

The intermediate balancing test allows for a middle ground between protecting the jural rights of plaintiffs and the Fourteenth Amendment rights of defendants. This intermediate balancing test is appropriate for Kentucky because it still allows the courts some discretion to determine what is reasonable or arbitrary. However, the burden is placed on the plaintiff to make this showing. For example, applied to the Williams case, the step one outcome of determining legislative intent would be that of "providing more certainty to the standards of recovery." Under step two, if the court concluded that the right was not "well-established" at common law, the analysis would end; the legislation would be upheld by pointing to a rational basis. However, the court would probably conclude again that the plaintiff had a "well-established right" to recover for gross negligence. This conclusion would necessitate a balancing under the intermediate scrutiny test. This balancing should lead to the conclusion that the codification of conscious awareness was not unreasonable or arbitrary, and that the legislature had an important goal in enacting the statute: to promote certainty and to avoid Fourteenth Amendment problems. This finding would be mandated because the alternative remedy of inferring intent was already in place at common law. Moreover, under the intermediate scrutiny scheme, the court's approval would be aided by the fact that the plaintiff in Williams would still have the burden of showing that the punitive damages statute was unreasonable or arbitrary. However, the court would not hypothesize a legitimate legislative goal; the legislature would have to provide one. It is important to note that if the Williams court, under the intermediate scrutiny test in step one, determined that some favoritism to special interests underlay the legislative intent, or found that the punitive damages statute precluded a plaintiff from having her day in court, the statute could then be declared unreasonable.221

219 See id.
220 Id. at 667.
221 See supra note 217. It is important to note, however, that under this proposed version of intermediate scrutiny, the state's burden of proof for showing an important reason would be a preponderance of the evidence. Cf. United States v. Virginia., 518 U.S. 515, 531, 533 (1996) (holding that the federal intermediate
CONCLUSION

The punitive damages statute is a modest Kentucky contribution to a larger national movement for tort reform. The common law standard of recovery for punitive damages was largely discretionary, as demonstrated not only by varying terminology, but also by the substantive disparity of allowing recovery both for objective gross negligence and the more subjective conscious awareness requirement. The General Assembly had the legitimate legislative goal of clarifying the ambiguous standards, to heed the warning of the Supreme Court not to run afoul of the Fourteenth Amendment “taking” prohibition.

Williams v. Wilson expanded the reach of the jural rights doctrine to strike down the conscious awareness aspect of the punitive damages statute. The Williams court perceived that the statute mandated an inequitable result for the plaintiffs when the defendant was not available to prove subjective intent. However, subjective intent has traditionally been inferred from facts and circumstances. The Williams “fair-result”-oriented constitutional approach is characteristic of the policy-laden jural rights doctrine. This approach, whereby the Kentucky Supreme Court is the exclusive arbiter of Kentucky tort law, raises serious separation of powers concerns. Far-reaching matters of public policy, including the wisdom and propriety of legislation, are clearly and properly within the realm of the General Assembly.

The uncertainty and unpredictability stemming from the jural rights doctrine demands a shift to a more restrained review. A more restrained approach would save the “clear and convincing evidence” reform of the punitive damages statute from jural rights attack. In turn, the clear and convincing evidence standard can save the punitive damages scheme from a Fourteenth Amendment attack. Both plaintiffs and defendants would suffer if the clear and convincing evidence standard were declared unconstitutional because such a ruling would increase Fourteenth Amendment challenges and remittiturs of plaintiff punitive awards. An intermediate scrutiny balancing test where the legislation enjoys a presumption of constitutionality would provide the proper deference to the General Assembly, yet still allow the courts to strike unreasonable or arbitrary changes to jural rights.

scrutiny standard requires the state to show “exceedingly persuasive justification”). The federal approach is more similar to the ultrastrict scrutiny approach currently employed by the Kentucky courts.