Can Punitive Damages Withstand a Due Process Challenge After Bankers Life & Casualty Co. v. Crenshaw and Browning-Ferris Industries of Vermont v. Kelco Disposal?

Sanjit S. Shah

Follow this and additional works at: https://ir.lawnet.fordham.edu/ulj

Part of the Constitutional Law Commons

Recommended Citation

Available at: https://ir.lawnet.fordham.edu/ulj/vol18/iss1/5

This Article is brought to you for free and open access by FLASH: The Fordham Law Archive of Scholarship and History. It has been accepted for inclusion in Fordham Urban Law Journal by an authorized editor of FLASH: The Fordham Law Archive of Scholarship and History. For more information, please contact tmelnick@law.fordham.edu.
CAN PUNITIVE DAMAGES WITHSTAND A DUE PROCESS CHALLENGE AFTER BANKERS LIFE & CASUALTY CO. V. CRENSHAW AND BROWNING-FERRIS INDUSTRIES OF VERMONT V. KELCO DISPOSAL?

I. Introduction

Punitive or exemplary damages are damages, other than compensatory or nominal damages, awarded against a person in a civil action to punish him for his outrageous conduct and to deter him, and others like him, from similar conduct in the future.\(^1\) Long an integral part of tort law, punitive damages were first awarded in the United States in 1791.\(^2\) By 1851, the Supreme Court declared that the doctrine of punitive damages was so well established that it would not "admit of argument."\(^3\) In 1967, the Supreme Court held that the Constitution presents no general bar to the assessment of punitive damages in a civil case.\(^4\)

In recent years, however, the Justices have indicated a willingness to review the constitutionality of this formidable weapon of the plaintiff's bar.\(^5\) Last year, in Browning-Ferris Industries of Vermont v. Kelco Disposal,\(^6\) the Court held that the eighth amendment's Excessive Fines Clause did not apply to awards of punitive damages in actions between private parties.\(^7\) But Browning-Ferris was only a partial victory for plaintiffs. Citing Justice O'Connor's concurring opinion in

---

3. Day v. Woodworth, 54 U.S. (13 How.) 362, 371 (1851) (stating that "if repeated judicial decisions for more than a century are to be received as the best exposition of what the law is, the question [of punitive damages] will not admit of argument").
5. In 1985, the Supreme Court heard Aetna Life Insurance Company's appeal of a $3.5 million punitive damage award in a case where the actual damages assessed were $1,650.22. Aetna Life Ins. Co. v. Lavoie, 475 U.S. 813 (1986). Although the Court did not address the appellant's contention that the punitive damage award violated the fourteenth amendment's Due Process Clause, it recognized the importance of the issue, "which, in an appropriate setting, must be resolved ...." Id. at 828-29. The Court vacated the award on other grounds. Id. at 827-28.
6. In Bankers Life & Casualty Co. v. Crenshaw, 486 U.S. 71 (1988), the Supreme Court considered, but did not decide, the appellant's claim that the $1.6 million exemplary damage award assessed against it violated the eighth amendment's Excessive Fines Clause and the Due Process Clause. Id. at 77-78.
7. Id. at 2909 (1989).
8. Id. at 2912.
Bankers Life & Casualty Co. v. Crenshaw, the Browning-Ferris majority acknowledged that the Court had never addressed the question of whether due process requires a check on undue jury discretion to award punitive damages in the absence of any express statutory limit. This was a question to be left for another day.

In Crenshaw and Browning-Ferris, Justice O'Connor voiced her opinion that the standardless discretion given to juries to assess punitive damage awards presents vagueness and procedural due process problems. In Browning-Ferris, Justice Brennan expressed his belief that the minimum guidance received by juries in determining the size of a punitive damage award may run afoul of procedural due process. While Justices O'Connor and Brennan addressed the procedural due process and vagueness issues raised by punitive damages, the Browning-Ferris majority framed the question in somewhat broader terms. The Court recognized that the defendant sought due process protections beyond fundamental fairness, addressed directly to the size of the award. Acknowledging some support for the argument that a civil damage award may be unconstitutionally excessive, the Court seemed to suggest that there might be substantive as well as procedural due process problems with punitive damages.

10. Id. This question may be resolved in the near future. On April 2, 1990, the Supreme Court granted certiorari to a due process challenge to punitive damages. Pacific Mutual Life Ins. Co. v. Haslip, 110 S. Ct. 1780 (1990).

This grant of wholly standardless discretion to determine the severity of punishment appears inconsistent with due process. The Court has recognized that “vague sentencing provisions may pose constitutional questions if they do not state with sufficient clarity the consequences of violating a given criminal statute.” Nothing in Mississippi law warned appellant that by committing a tort that caused $20,000 of actual damages, it could expect to incur a $1.6 million punitive damages award.

12. See Browning-Ferris, 109 S. Ct. at 2923 (Brennan, J., concurring).
13. Fundamental fairness is defined as due process of law applied to judicial procedure. BLACK'S LAW DICTIONARY 607 (5th ed. 1979). However, defendants in mass tort litigations often argue that fundamental fairness prevents more than one plaintiff from recovering punitive damages against a single tortfeasor. See, e.g., Leonen v. Johns-Manville Corp., 717 F. Supp. 272, 283 (D.N.J. 1989).
15. See id.
This Note will consider whether punitive damages can withstand a constitutional challenge brought under the Due Process Clause of the fourteenth amendment. Part II of the Note examines how courts have resolved procedural due process and traditional vagueness challenges to exemplary damage awards. This section also discusses Justice O'Connor's approach to the vagueness doctrine, and the possibility that substantive due process may affect jury discretion to award punitive damages. Part III discusses why punitive damages do not violate the Due Process Clause. This Note concludes that punitive damages are not unconstitutional on procedural due process, fundamental fairness or traditional vagueness grounds. While stronger constitutional arguments against punitive damages lie in Justice O'Connor's vagueness approach and the substantive due process doctrine, this Note maintains that punitive damages meet both these challenges.

II. Due Process Challenges to Punitive Damages

Since the 1960s, defendants have asserted that exemplary damages offend the fourteenth amendment's Due Process Clause. Typically, their attacks focus on one or both of two theories. The first is that juries have unbridled discretion to determine the size of a punitive damage award, thus depriving a defendant of his procedural due process right against arbitrary government action. The second theory is that state standards for determining punitive liability are unconstitutionally vague. Defendants argue that because of such vagueness,

16. Justice O'Connor suggested that the Due Process Clause requires defendants to be on notice of the potential size of punitive damage awards. See Crenshaw, 486 U.S. at 88 (O'Connor, J., concurring).
17. See infra notes 106-44 and accompanying text.
18. See infra notes 145-58 and accompanying text.
19. See infra notes 159-85 and accompanying text.
20. See infra notes 85-93 and accompanying text.
21. See infra notes 94-105 and accompanying text.
22. See infra notes 186-221 and accompanying text.
juries have no standards to guide them in deciding whether a defendant will be subject to punitive liability,26 and defendants are not provided with fair notice of what conduct is prohibited.27

Where numerous plaintiffs seek punitive damages against a defendant for a single wrong, the defendant may advance a third theory by arguing that multiple punitive damage awards violate the fundamental fairness requirement embodied in the Due Process Clause.28 This theory is closely related to Judge Friendly's famous dicta in Roginsky v. Richardson-Merrell, Inc.29 Although Judge Friendly stopped short of stating that multiple exemplary awards worked a deprivation of due process, he opined that such awards amounted to overkill and did more harm than good.30 Carrying Roginsky one step further, some courts have held that multiple punitive damage awards violate a defendant's right to fundamental fairness.31 Other courts, however, have flatly rejected this contention.32

Justice O'Connor's opinion in Crenshaw has sparked comment on whether the vagueness doctrine requires a defendant to be given notice of the potential size of a punitive damage award.33 However, be-

---

26. See Leonen, 717 F. Supp. at 278-80; Neal, 548 F. Supp. at 377; Sturm, Ruger, 594 P.2d at 46; Fletcher, 10 Cal. App. 3d at 404, 89 Cal. Rptr. at 96.
27. See Neal, 548 F. Supp. at 377; Sturm, Ruger, 594 P.2d at 46; Fletcher, 10 Cal. App. 3d at 404-05, 89 Cal. Rptr. at 96.
29. 378 F.2d 832 (2d Cir. 1967).
30. See infra note 59.
32. See Cathey, 776 F.2d at 1571; Leonen, 717 F. Supp. at 283-84 (stating that "although... fundamental fairness demands that some safeguards be present to protect defendants in mass tort litigations... the Juzwin decision cites no legal or equitable basis for allowing the first plaintiff who brings a claim to obtain punitive damages, and then, denying punitive damages... to all those who follow").
cause of its recent origin, courts have not yet had occasion to address
the issue. Another issue not yet addressed by the courts is whether
substantive due process limits jury discretion to award punitive
damages. Since the *Browning-Ferris* decision, the idea that substantive
due process places an outer limit on the size of an exemplary award
has gained popularity with the defense bar.\(^{34}\)

**A. Procedural Due Process**

The fourteenth amendment prohibits states from denying individu-
als life, liberty, or property without due process of law.\(^{35}\) The doc-
trine of procedural due process requires that a government provide
certain procedural safeguards before acting against that individual.\(^{36}\)
In the context of punitive damages, it has been asserted that a defend-
ant is deprived of these procedural safeguards because state laws give
juries “standardless discretion” to determine the amount of a puni-
tive award.\(^{37}\) This assertion has been uniformly rejected by both fed-
eral and state courts for over twenty years.\(^{38}\)

Courts generally agree that whether punitive damages are provided
for by state common law or statute, juries are never given standardless
discretion to award punitive damages.\(^{39}\) In *Toole v. Richardson-Mer-
rell Inc.*,\(^{40}\) the defendant challenged the constitutionality of the Cali-
ifornia exemplary damage statute\(^ {41}\) on the ground that it contained no
standard by which to measure the punishment, nor any limitation as

---


\(^{35}\) “[N]or shall any State deprive any person of life, liberty, or property, without due process of law...” U.S. Const. amend. XIV, § 1.

\(^{36}\) Daniels v. Williams, 474 U.S. 327, 338 (1986) (Stevens, J., concurring). However, the Supreme Court has also held that due process can be satisfied when a state provides an individual with a postdeprivation tort remedy. See *Parratt v. Taylor*, 451 U.S. 527 (1981).


\(^{40}\) 251 Cal. App. 2d 689, 60 Cal. Rptr. 398 (1967).

\(^{41}\) CAL. CIV. CODE § 3294 (West 1970).
to the amount to be awarded. The California Court of Appeal rejected the challenge, holding that, although the amount to be awarded lies within the sound discretion of the trier of fact, exemplary damages must bear a reasonable relationship to actual damages suffered.

States which allow plaintiffs to recover exemplary damages typically require juries to take certain factors into account when determining the quantum of such an award. Courts hold that a consideration of these factors limits jury discretion and prevents juries from doing what they subjectively think is right. For example, in *FDIC v. W.R. Grace & Co.*, a federal district court in Illinois held that Illinois juries did not have unbridled discretion to determine the size of a punitive damage award because they are instructed to consider the station, wealth, and activities of the defendant and of others.

---

42. Toole, 251 Cal. App. 2d at 719, 60 Cal. Rptr. at 419.
43. Id.
44. Id.
45. Id.
46. See infra notes 46-58 and accompanying text.
48. 691 F. Supp. 87 (N.D. Ill. 1988), aff'd in part, rev'd in part, 877 F.2d 614 (7th Cir. 1989), cert. denied, 110 S. Ct. 1524 (1990). In *Grace*, defendant Grace secured a $75 million loan from the Continental Illinois Bank through fraudulent misrepresentations. Continental assigned the loan to the FDIC, which in turn brought an action against Grace. An Illinois jury awarded the FDIC $25 million in compensatory damages and $75 million in punitive damages. The trial judge held that the punitive damage award was excessive and remitted it to $25 million. *Grace*, 877 F.2d at 616-17.

On appeal, Grace argued that the $25 million punitive damage award was unconstitutional. The Seventh Circuit rejected this contention, holding that "the [punitive damage] award here was excessive neither by Illinois nor by federal constitutional standards." *Id.* at 623. However, the court reversed the punitive and compensatory damage awards, but only because the jury had not properly computed the amount of compensatory damages:

The problem is with the award of *compensatory* damages. . . . The jury was allowed to pick a figure out of the air . . . . Grace is entitled to a new trial, though one limited to damages. The amount of punitive damages, related as they are to compensatory damages, will have to be redetermined as well in the new trial that we are ordering. We could take the position that the first trial fixed the ratio of punitive to compensatory damages as one to one, so that whatever the next award of compensatory damages is it will just have to be doubled to yield the final judgment (before interest). But proportionality to actual damages is not the only consideration in determining how large the award of punitive damages should be, so the ratio will have to be redetermined in the new trial that we are ordering on damages.

*Id.* at 623-24 (emphasis in original).
PUNITIVE DAMAGES

in a position to commit similar offenses.\textsuperscript{47} The court recognized that these instructions enable jurors, whose deliberations are assisted by the arguments of counsel,\textsuperscript{48} to assess the appropriate amount of damages to punish and deter.\textsuperscript{49} Thus, a jury would know that a larger amount would be necessary to punish a multinational corporation than "would be necessary to punish a blue collar worker."\textsuperscript{50}

Similarly, in \textit{Davis v. Merrill Lynch, Pierce, Fenner & Smith, Inc.},\textsuperscript{51} the Eighth Circuit held that South Dakota law mandated that the following factors be considered in setting a punitive damage award: the amount allowed in compensatory damages; the nature and enormity of the wrong; the intent of the wrongdoer; the wrongdoer's financial condition; and all of the circumstances attendant to the wrongdoer's actions, including any mitigating circumstances which may operate to reduce, but not defeat, the punitive damages award.\textsuperscript{52}

In light of these factors, the court rejected a defendant's assertion that South Dakota law violated due process by conferring standardless discretion upon juries.\textsuperscript{53}

In \textit{State ex rel. Young v. Crookham},\textsuperscript{54} the Supreme Court of Oregon stated that a consideration of the factors similar to those enumerated in \textit{Grace} and \textit{Davis} reduces the danger that a punitive award will destroy a defendant even when that defendant faces multiple suits.\textsuperscript{55}

The court noted that because juries review the financial condition\textsuperscript{56} and the prior and potential punitive liability of the wrongdoer\textsuperscript{57} along with societal concern for the injured and the future protection of society,\textsuperscript{58} the so-called "overkill" argument\textsuperscript{59} is highly exagger-

\textsuperscript{47} Grace, 691 F. Supp. at 99.
\textsuperscript{48} Id.
\textsuperscript{49} Id.
\textsuperscript{50} Id.
\textsuperscript{51} 906 F.2d 1206 (8th Cir. 1990).
\textsuperscript{52} Id. at 1227.
\textsuperscript{53} Id. at 1227-28.
\textsuperscript{54} 290 Or. 61, 618 P.2d 1268 (1980).
\textsuperscript{55} See \textit{id.} at 66, 72, 618 P.2d at 1271, 1274.
\textsuperscript{56} See \textit{id.} at 66, 618 P.2d at 1271.
\textsuperscript{57} See \textit{id.} at 72, 618 P.2d at 1274.
\textsuperscript{58} See \textit{id.} at 66, 618 P.2d at 1271.
\textsuperscript{59} The overkill argument was first propounded by Judge Friendly.

We have the gravest difficulty in perceiving how claims for punitive damages in such a multiplicity of actions throughout the nation can be so administered as to avoid overkill. . . Although multiple punitive awards running into the hundreds may not add up to a denial of due process, nevertheless if we were sitting as the highest court of New York we would wish to consider very seriously whether awarding punitive damages . . . would not do more harm than good. Roginsky v. Richardson-Merrell, Inc., 378 F.2d 832, 839-40 (2d Cir. 1967).

A number of courts have since rejected this argument. See Cathey v. Johns-Manville
However, in *Juzwin v. Amtorg Trading Corp.*, a federal judge concluded that submitting evidence of prior exemplary damage awards to juries unduly prejudices a defendant’s case.

Another reason courts have rejected the contention that juries have standardless discretion is that each punitive damage award is subject to trial and appellate review. Although most courts hold that judicial review sufficiently protects defendants from awards which reflect jury passion or prejudice, *Juzwin* is one notable exception. The *Juzwin* court concluded that judicial review of punitive damage awards is unsatisfactory because it is not based upon any recognized or established standards and simply reflects the subjective feelings of

---

Sales Corp., 776 F.2d 1565, 1570 (6th Cir. 1985) ("Accordingly, we . . . reject the so-called 'overkill doctrine' as a basis for denying an otherwise proper punitive damages recovery."); cert. denied, 478 U.S. 1021 (1986);Neal v. Carey Canadian Mines, 548 F. Supp. 357, 376-77 (E.D. Pa. 1982), aff'd sub nom. Van Buskirk v. Carey Canadian Mines, 760 F.2d 481 (3d Cir. 1985); *Crookham*, 290 Or. at 66, 618 P.2d at 1271 ("Hindsight demonstrates that the apprehension of the Roginsky court was heavily exaggerated. Of the 1,500 cases, in only 3 did juries award punitive damages. The vast majority of cases were settled and the financial destruction feared by the Second Circuit did not come to pass."); *Wangen v. Ford Motor Co.*, 97 Wis. 2d 260, 307, 294 N.W.2d 437, 461 (Wis. 1980) ("[W]e are confident that the fair administration of punitive damage awards in the state courts of this country will prove Judge Friendly's fears unfounded.").

60. See *Crookham*, 290 Or. at 66, 618 P.2d at 1271.


62. In *Juzwin*, Judge Sarokin stated:

It has been suggested that one of the means available to a defendant to combat the cumulative effect of successive punitive damage awards against it is to offer evidence as to the prior awards and ask the jury to offset their own verdict to the extent of those earlier awards. This alternative, although valid in concept, is unrealistic in practice. It requires a defendant to advise the jury that prior juries hearing the same evidence have already found that the defendant's conduct was so egregious as to warrant punitive damage awards. To require a defendant to present such prejudicial evidence to a jury as its only alternative is to place it between Scylla and Charybdis.


Expressing concern that the imposition of repeated penalties on the same defendant could preclude recovery of compensatory damages by subsequent plaintiffs, and echoing Judge Friendly's fears of corporate destruction, the *Juzwin* court held that multiple punitive damage awards for a single wrong violate the fundamental fairness requirement of the Due Process Clause. *Id.* at 1055, 1061.


the court.66

B. Void for Vagueness Doctrine

The foundation of the void for vagueness doctrine lies in the Due Process Clause.67 The Supreme Court has held that for a law to comport with due process, it must afford the public adequate notice of the conduct it prohibits and must provide judges and jurors with sufficient guidelines for its application.68 A law which does not meet both of these requirements is unconstitutionally vague.69

Primarily intended to protect the public from ambiguously phrased criminal statutes,70 the Supreme Court has employed the void for vagueness doctrine to assess the constitutionality of civil legislation as well.71 In Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.,72 the Court indicated that criminal statutes require greater clarity than civil statutes because the sanctions provided by the former are qualitatively more stringent.73 This suggests that there are situations where the quality of a penalty for violating a civil statute is so severe that the statute warrants scrutiny under the stricter vagueness test reserved for criminal laws.74

66. "[T]he right to review is no more satisfactory than the jury's initial determination, because it is dependent upon the visceral reaction of the court rather than on any established or recognized standards." Id.
68. Id. at 402-03.
69. Id.
70. Jordan v. DeGeorge, 341 U.S. 223, 230 (1951) ("The essential purpose of the 'void for vagueness' doctrine is to warn individuals of the criminal consequences of their conduct.").
73. "The Court has also expressed greater tolerance of enactments with civil rather than criminal penalties because the consequences of imprecision are qualitatively less severe." Flipside, Hoffman Estates, 455 U.S. at 498-99. See also Barenblatt v. United States, 360 U.S. 109, 137 (1959) (Black, J., dissenting); Winters v. New York, 333 U.S. 507, 515 (1948).
74. For example, if the penalty for violating a civil statute affects a defendant's personal liberty, the statute may be considered tantamount to a criminal sentencing provision and as such, subject to the stricter vagueness test. In Giaccio and DeGeorge, the Supreme Court disregarded the distinction between criminal and civil laws in applying the vagueness doctrine to the civil statutes at bar. See Giaccio, 382 U.S. at 402; DeGeorge, 341 U.S. at 231. In Giaccio, a Pennsylvania law allowed the state to imprison acquitted defendants if they were assessed and failed to pay the court costs of criminal prosecutions. Giaccio, 382 U.S. at 401. In DeGeorge, a civil statute provided for the deportation of aliens. The Court recognized that "'deportation is a drastic measure and at times the equivalent of banishment or exile . . . . It is the forfeiture for misconduct of a residence in this country.' " In DeGeorge, 341 U.S. at 231 (quoting Fong Haw Tan v. Phelan, 333 U.S. 6, 10 (1948)).
There are two prongs to the argument that punitive damages are unconstitutionally vague. The first is that the standards for determining punitive liability are so vague that juries have arbitrary power to decide when to impose punitive damages, and defendants are not given fair notice of what conduct is prohibited. The second is that the defendant is not given sufficient notice of the potential size of a punitive award.

1. Vagueness of the Standards for Determining Punitive Liability

Typically, states allow juries to award punitive damages only upon a showing that a defendant's conduct was wanton, willful, malicious or outrageous. Defendants maintain that because of the vagueness of these standards, juries are given the power to decide subjectively what behavior is or is not prohibited in each case, and defendants are not put on notice of what conduct will incur punitive liability. The courts, however, have held that terms such as wanton, willful, malicious, and outrageous are sufficiently clear to defeat these vagueness challenges. Nonetheless, defendants continue to claim that the standards which serve as a predicate for imposing punitive

---

75. See infra notes 77-84 and accompanying text.
76. See infra notes 85-93 and accompanying text.
82. See Neal, 548 F. Supp. at 377 (action brought against asbestos suppliers and product manufacturers for failure to warn of the dangers of asbestos); Sturm, Ruger, 594 P.2d at 46 (products liability action against gun manufacturer); Fletcher, 10 Cal. App. 3d at 405, 89 Cal. Rptr. at 96 (action against insurance company for intentional infliction of mental distress by threatening to withhold and actually withholding disability benefits). See also Leitner, Punitive Damages: A Constitutional Assessment, 38 FED'N OF INS. & CORP. COUNS. Q. 119, 126-32 (1988).

For example, if a defendant's act of firing a gun in the air results in injury to the plaintiff, the defendant may reasonably expect to be held liable for compensatory damages. However, the defendant will argue that he could not anticipate punitive liability because terms such as wanton and outrageous are so vague that he did not expect them to apply to the act of firing a gun in a public space.

83. See Leonen, 717 F. Supp. at 278-80; Neal, 548 F. Supp. at 377; Sturm, Ruger, 594 P.2d at 46; Fletcher, 10 Cal. App. 3d at 404-05, 89 Cal. Rptr. at 96.
liability are unconstitutionally vague.84

2. Insufficient Notice of the Potential Size of a Punitive Damage Award

The second prong of the argument that punitive damages are unconstitutionally vague embraces the idea that the Due Process Clause requires defendants in civil actions to be given sufficient notice of the potential size of a punitive award.85 This theory originated in Justice O’Connor’s concurring opinion in Bankers Life & Casualty Co. v. Crenshaw.86 In that case, Justice O’Connor implied that punitive damage schemes are equivalent to criminal sentencing laws.87 Because sentencing provisions may be unconstitutionally vague if they do not clearly state the consequences of violating a given criminal statute,88 Justice O’Connor reasoned that punitive damage schemes may be unconstitutional for failing to warn defendants of the amount of the penalty for wrongful behavior.89

Whether a defendant has a due process right to be aware of the potential size of an exemplary damage award depends on the Supreme Court’s willingness to review the civil remedy of punitive damages under the stricter vagueness standards90 reserved for criminal statutes.91 Despite the penal nature of punitive damages, the Court is not certain to do this. In Browning-Ferris, the Court recognized the dis-

87. Justice O’Connor stated:
The Court has recognized that “vague sentencing provisions may pose constitutional questions if they do not state with sufficient clarity the consequences of violating a given criminal statute.” Nothing in Mississippi law warned appellant that by committing a tort that caused $20,000 of actual damages, it could expect to incur a $1.6 million punitive damages award.
Id. at 88 (citation omitted) (quoting United States v. Batchelder, 442 U.S. 114, 123 (1979)).
89. Crenshaw, 486 U.S. at 88.
90. In this context, the words “standard” and “test” merely refer to the general principle that the vagueness doctrine requires criminal statutes to be clearer and more precise than civil statutes. See Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc., 455 U.S. 489, 498-99 (1982); Barenblatt v. United States, 360 U.S. 109, 137 (1959) (Black, J., dissenting); Winters v. New York, 333 U.S. 507, 515 (1948).
91. See infra notes 186-203 and accompanying text.
tinction between punitive damages and criminal penalties. Accordingly, the Browning-Ferris Court held that a punitive damage defendant in an action between private parties is not entitled to the safeguard of the eighth amendment's Excessive Fines Clause.

C. Substantive Due Process

The substantive component of the Due Process Clause prohibits a state from taking certain actions regardless of the fairness of the procedures used to implement them. The substantive due process implications of punitive damages remain unclear because courts have not yet addressed them. Relying on St. Louis, I. M. & S. Ry. v. Williams, the Browning-Ferris Court seemed to suggest that substantive due process may place an outer limit on the size of an exemplary award that a jury can assess.

In Williams, the petitioner claimed that an Arkansas statute violated the Due Process Clause by allowing passengers to recover damages of "not less than fifty dollars, nor more than three hundred dollars" in civil actions against railroads that overcharged fares. The Williams Court recognized that substantive due process prohibited states from prescribing severe and oppressive penalties that are wholly disproportionate to the offense and obviously unreasonable. However, the Court upheld the statute and concluded that a seventy-five dollar damage judgment against the petitioner for a sixty-six cent overcharge was neither severe nor oppressive when considered in light of the public interests and the numberless opportunities for committing the offense.

Williams involved a civil damage award made pursuant to a statutory scheme. Whether substantive due process similarly limits the size of a punitive damage award assessed by juries acting without stat-

93. See id. at 2912.
95. In In re School Asbestos Litig., 789 F.2d 996 (3d Cir. 1986), the Third Circuit stated that "the concerns [about punitive damages] recited by a number of courts and commentators are centered on the substantive component of due process." Id. at 1004. Unfortunately, the court failed to cite any of these sources and failed to specify what substantive due process problems punitive damages may create. See id. at 1004.
96. 251 U.S. 63 (1919).
97. See Browning-Ferris, 109 S. Ct. at 2921.
98. Williams, 251 U.S. at 64.
99. Id.
100. Id. at 66-67.
101. Id.
utory guidelines remains undecided. A damage award "made without the benefit of a legislature's deliberation and guidance" is perhaps more likely to be disproportionate to the offense than an award constrained by statutory limits. But Williams does show that a punitive award does not violate substantive due process merely because the amount of the penalty far exceeds the actual injury. The Williams Court emphasized that the interests of the public and the need for punishment and deterrence must be considered when determining whether an award is constitutionally excessive.

III. Punitive Damages Do Not Violate Due Process

A. Legal Reasons

1. Juries Do Not Have Unfettered Discretion to Award Punitive Damages

Punitive damages serve to punish a defendant and to deter him and others like him from committing the same acts in the future. Therefore, the amount of an exemplary damage award is determined from the perspective of the defendant rather than that of the plaintiff. Since each case is different, there can be no fixed formula for determining whether an award is constitutionally excessive.

103. See id. at 2923 (Brennan, J., concurring).
104. See Williams, 251 U.S. at 66-67. The Williams Court did not let the judgment stand merely because the absolute size of the award was relatively small. In Waters-Pierce Oil Co. v. Texas, 212 U.S. 86 (1909), the State of Texas fined the defendant corporation $1.6 million for violating the state's antitrust laws. The defendant asserted that the fine was so excessive that it amounted to a deprivation of due process. Noting that the defendant had over $40 million worth of assets, the Supreme Court held that the award did not offend the Due Process Clause. Id. at 111-12.
105. The Williams Court remarked:
When the penalty is contrasted with the overcharge possible in any instance it of course seems large, but, as we have said, its validity is not to be tested in that way. When it is considered with due regard for the interests of the public, the numberless opportunities for committing the offense, and the need for securing uniform adherence to established passenger rates, we think it properly cannot be said to be so severe and oppressive as to be wholly disproportional to the offense or obviously unreasonable.
Williams, 251 U.S. at 67.
assessing an appropriate penalty. Instead, a jury must award punitive damages by reference to objective factors such as the wealth of the defendant, the nature of the wrong, and the importance of the public interest violated.

Far from conferring unfettered discretion, this system prevents jurors from dispensing justice based on their personal feelings of right and wrong. There is no standardless discretion because a jury must look to the relevant factors as a guide in determining what amount would be sufficient to achieve the goals of punishment and deterrence. Thus, based on the judge’s instructions and the arguments of counsel, a jury would know that a smaller award would be needed to punish a reckless defendant than would be needed to punish an intentional wrongdoer. Similarly, a larger award would be necessary to deter a defendant who has committed the same tort in the past than would be necessary to deter a first offender. The requirement that a tortfeasor's financial position be considered ensures that a jury will not assess damages in an amount that would bankrupt a defendant.

aff’d sub nom. Van Buskirk v. Carey Canadian Mines, 760 F.2d 481 (3d Cir. 1985); Wangen v. Ford Motor Co., 97 Wis. 2d 260, 302-03, 294 N.W.2d 437, 459 (Wis. 1980) (“The circumstances of each case must be considered to determine whether the award under the particular circumstances of that case serves the purposes of punitive damages.”).


111. See Davis, 906 F.2d at 1227; Kociemba, 707 F. Supp. at 1537; Grace, 691 F. Supp. at 99.

112. See Kociemba, 707 F. Supp. at 1537; State ex rel. Young v. Crookham, 290 Or. 61, 72, 618 P.2d 1268, 1274 (1980); Wangen, 97 Wis. 2d at 305, 294 N.W.2d at 460.


114. See Davis, 906 F.2d at 1227-28; Leonen, 717 F. Supp. at 280-81; Kociemba, 707 F. Supp. at 1536; Grace, 691 F. Supp. at 99; Crookham, 290 Or. at 72, 618 P.2d at 1274; Wangen, 97 Wis. 2d at 302-05, 294 N.W.2d at 458-60; supra notes 46-58 and accompanying text.


117. See Crookham, 290 Or. at 66, 618 P.2d at 1271 (“[F]inancial interests of the malicious and wanton wrongdoer must be considered . . . .”); Wangen, 97 Wis. 2d at 302-04, 294 N.W.2d at 458-60. The Wangen court observed:

Our cases have stated that the factors to be considered by the jury in determin-
By identifying the relevant factors that must be considered in assessing exemplary damages, courts provide jurors with the means to reach the ends of punishment and deterrence. Because both the means and the ends must be considered, jurors have a clear roadmap by which to reach an established destination. Thus, while juries have some discretion to weigh the peculiar circumstances of each case,\textsuperscript{118} that discretion cannot be called standardless.

In some states, a jury may not assess an exemplary damage award which does not bear a reasonable relationship to actual injury.\textsuperscript{119} In these jurisdictions, punitive damage awards are seldom greater than three or four times actual damages suffered.\textsuperscript{120} Courts correctly hold that the reasonable relationship rule limits jury discretion to award punitive damages.\textsuperscript{121} However, the reasonable relationship rule is unnecessary because standardless discretion is avoided when jurors are asked to consider the relevant factors\textsuperscript{122} to fix a sum sufficient to punish and deter.\textsuperscript{123} Requiring a reasonable relationship between punitive and compensatory damages as an additional check on jury discretion may prevent the community from voicing its legitimate

\begin{itemize}
\item\textsuperscript{120} See \textit{Toole v. Richardson-Merrell Inc.}, 251 Cal. App. 2d 689, 60 Cal. Rptr. 398 (punitive damage award was 1.4 times greater than compensatory damage award); \textit{Neal v. Carey Canadian Mines}, 548 F. Supp. 357 (E.D. Pa. 1982) (punitive damage awards were smaller than the compensatory damage awards), \textit{aff'd sub nom. Van Buskirk v. Carey Canadian Mines}, 760 F.2d 481 (3d Cir. 1985). See also \textit{Sturm, Ruger & Co. v. Day}, 615 P.2d 621 (Alaska 1980) (punitive damage award was 3.6 times greater than compensatory damage award when the Alaska Supreme Court applied the reasonable relationship principle), \textit{remanded on rehearing}, 627 P.2d 204, cert. denied, 454 U.S. 894 (1981), \textit{overruled on other grounds}, Dura Corp. v. Harned, 703 P.2d 396, 405 n.5 (1985).
\item\textsuperscript{121} See \textit{Leonen}, 717 F. Supp. at 281; \textit{Neal}, 548 F. Supp. at 377; \textit{Sturm, Ruger}, 594 P.2d at 48.
\item\textsuperscript{122} These factors include the defendant's wealth, the nature of the wrong, and the importance of the public interest violated. See \textit{supra} notes 106-18 and accompanying text.
\item\textsuperscript{123} See \textit{supra} notes 106-18 and accompanying text.
\end{itemize}
concerns for punishment and deterrence. For example, in *Sturm, Ruger & Co. v. Day,* an Alaska jury awarded $137,750 in compensatory damages and $2,895,000 in punitive damages to a plaintiff for injuries sustained as a result of a design flaw in a gun manufactured by the defendant. The evidence at trial showed that the defendant earned millions of dollars in profits from the manufacture of more than 1,500,000 revolvers of the type that caused the plaintiff's injuries. To reach the exemplary damage award of $2,895,000, the jury multiplied 1,500,000 by the increased cost per revolver, $1.93, to cure the defect. Although the verdict clearly reflected dispassionate analysis of the case by the jury, the Alaska Supreme Court followed the reasonable relationship principle and reduced the award to $500,000.

*St. Louis, I. M. & S. Ry. v. Williams* indicates that the Constitution does not require a reasonable relationship between exemplary and compensatory damages. In that case, the Supreme Court held that a punitive award which was one hundred fourteen times greater than actual injury did not offend the Due Process Clause. Thus, whether to afford punitive damage defendants the protection of the

---

124. If the plaintiff suffered $5,000 in compensatory damages, a jury in a jurisdiction with a reasonable relationship rule would be able to award no more than $20,000 to $25,000 in punitive damages even if it felt that more was needed to deter the defendant. See Note, *Punitive Damages and the Reasonable Relation Rule: A Study in Frustration of Purpose,* 9 PAC. L.J. 823, 824 (1978) ("By thus limiting the monetary amount that may be awarded as punitive damages the reasonable relation rule limits the effectiveness of punitive damages in fulfilling the express functions of punishment and deterrence."); Note, *The Imposition Of Punishment By Civil Courts: A Reappraisal Of Punitive Damages,* 41 N.Y.U. L. REV. 1158, 1170 (1966) ("This [reasonable relationship] requirement . . . seems to ignore the important deterrent aspect of punitive damages . . . .").


126. The compensatory damage award was reversed because the issue of comparative fault was not submitted to the jury. See *Sturm, Ruger,* 594 P.2d at 42.

127. 251 U.S. 63 (1919).

128. See supra notes 104, 105 and accompanying text.
reasonable relationship rule is a decision which should be left to the states.\textsuperscript{135} Another reason the unfettered discretion argument must fail is that defendants have the added procedural safeguards of trial and appellate review to ensure that a jury award does not lack the basic elements of fundamental fairness.\textsuperscript{136} While different jurisdictions have different standards for determining whether or not to grant a new trial, a judgment \textit{n. o. v.}, or a remittitur,\textsuperscript{137} judicial scrutiny of punitive damage awards is intense and exacting.\textsuperscript{138} Indeed, the Supreme Court has held that punitive damages do not constitute a prior restraint in

\begin{itemize}
\item \textsuperscript{135} The \textit{Browning-Ferris} Court held:

[T]he propriety of an award of punitive damages for the conduct in question, and the factors the jury may consider in determining their amount, are questions of state law. . . . Although petitioners and their \textit{amicis} would like us to craft some common-law standard of excessiveness that relies on notions of proportionality between punitive and compensatory damages, . . . these are matters of state, and not federal, common law.

\begin{flushleft}
\end{flushleft}


\item \textsuperscript{137} For example, the Sixth Circuit has held that an appellate court should order a new trial or a remittitur if a punitive damage award is "contrary to all reason." \textit{Cathey, 776 F.2d at 1572}. In Illinois, an exemplary damage award will be reduced if it is "clearly excessive." \textit{Grace, 691 F. Supp. at 100}. In California, the test is whether the punitive damage award was the result of "passion or prejudice." \textit{Fletcher v. Western Nat'l Life Ins. Co., 10 Cal. App. 3d 376, 408, 89 Cal. Rptr. 78, 98 (1970).}

\item \textsuperscript{138} In \textit{Sturm, Ruger & Co. v. Day, 594 P.2d 38 (Alaska 1979), remanded on rehearing, 615 P.2d 621 (1980), 627 P.2d 204, cert. denied, 454 U.S. 894 (1981), overruled on other grounds, Dura Corp. v. Harned, 703 P.2d 396, 405 n.5 (1985)}, the Supreme Court of Alaska held that the $2,895,000 punitive damage award was so out of proportion to actual damages "as to suggest that the jury's award was the result of passion or prejudice" and that the trial judge abused his discretion by not reducing the punitive damage award. \textit{Sturm, Ruger, 594 P.2d at 48}. Remanding the case for a new trial as to compensatory and punitive damages, the court held that if punitive damages were awarded at the second trial, they could not exceed $250,000. \textit{Id.} at 48-49. On rehearing, the Alaska Supreme Court held that the original punitive damage award was not the result of jury passion or prejudice, but was simply an excessive verdict. \textit{Sturm, Ruger, 615 P.2d at 624}. The court further held that a "judgment for $500,000 in punitive damages may be entered immediately upon remand." \textit{Id.}

In a tortious breach of contract action against an insurance company, a California jury awarded the plaintiff $123,600 in compensatory damages and $5 million in punitive damages. On appeal, the California Court of Appeal held that the exemplary award was so grossly disproportionate as to clearly suggest passion or prejudice on the part of the jury. Accordingly, the court reduced the punitive damage award to $2.5 million. \textit{Egan v. Mutual of Omaha Ins. Co., 63 Cal. App. 3d 659, 691-92, 133 Cal. Rptr. 899, 919-20 (1976).} The California Supreme Court vacated the punitive damage award holding that it "must be deemed the result of passion and prejudice on the part of the jurors and excessive as a
violation of the first amendment because freedom of speech and press is adequately protected by judicial control over excessive verdicts.\textsuperscript{139} The Juzwin court's criticism that judicial review of punitive damages is based upon the "gut feeling" of the trial or appellate court is unfounded.\textsuperscript{140} A court will review a case in its entirety and will set aside or remit an exemplary award if it does not reasonably serve the functions of punishment and deterrence or if it is the result of jury bias or passion.\textsuperscript{141} In a jurisdiction where there must be a reasonable relationship between punitive and compensatory damages, judicial review is an even greater check on jury discretion. Any award which is greater than three or four times actual injury will be deemed excessive and will not stand.\textsuperscript{142}

The case law makes it clear that judges are not loath to reduce exemplary awards that are excessive or the result of passion or prejudice.\textsuperscript{143} One commentator advocating the abolition of punitive damages concedes that punitive damages are frequently reduced by remittitur in the trial court, or on subsequent appeal.\textsuperscript{144} In light of all the protections a defendant receives during a jury trial and through the appellate process, punitive damages cannot be said to deprive an individual of procedural due process.

\textsuperscript{139} See Curtis Publishing Co. v. Butts, 388 U.S. 130, 159-60 (1967).  
\textsuperscript{140} See supra note 66 and accompanying text. In Juzwin, Judge Sarokin stated that "[d]efendants are entitled to know that there is a more substantial ground for appeal other than that the verdict offends the 'gut feeling' of the trial or reviewing court." Juzwin v. Amtorg Trading Corp., 705 F. Supp. 1053, 1057, vacated, 718 F. Supp. 1233 (D.N.J. 1989).  
\textsuperscript{141} See Grace, 691 F. Supp. at 100-02. The Grace court scrupulously and objectively examined the facts in the trial record to reach its well reasoned determination that the punitive damage award was excessive. See id. at 101.  
\textsuperscript{142} See, e.g., Sturm, Ruger, 615 P.2d at 624 (punitive damage award 21 times greater than compensatory damages reduced to a sum 3.6 times greater than compensatory damages); Egan, 24 Cal. 3d at 824, 620 P.2d at 149, 169 Cal. Rptr. at 699 (punitive damage award forty times greater than compensatory damages vacated).  
\textsuperscript{143} Indeed, the General Accounting Office found that between 1983 and 1985, appellate courts in five states reversed or remanded for retrial all twelve punitive damage awards on which they relied. Study Says Punitive Awards Aren't Excessive, Nat'l L. J., Nov. 27, 1989, at 5, col. 1.  
\textsuperscript{144} See Ingram, Punitive Damages Should Be Abolished, 17 CAP. U.L. REV. 205, 206 (1988).
2. Multiple Punitive Damage Awards Do Not Violate the Fundamental Fairness Component of the Due Process Clause

Recently, in *Juzwin v. Amtorg Trading Corp.*, Judge Sarokin joined those jurists who take the position that multiple exemplary awards for a single wrong violate the fundamental fairness requirement of due process. But the *Juzwin* decision was unusual because it was the first in the country to hold that subsequent plaintiffs would not be able to recover punitive damages from a defendant if the defendant had previously been subjected to punitive liability for the same wrong. Realizing the inequity and impracticability of a solution which would cause plaintiffs to "race to the courthouse door," Judge Sarokin later vacated the order in which he barred a subsequent plaintiff's punitive damage claim, but reiterated his belief that multiple punitive awards violated the Due Process Clause. Those jurists who argue that multiple punitive damage awards are unconstitutional offer the vague statement that such awards violate the "sense of fundamental fairness inherent in the Due Process Clause." But the fundamental fairness doctrine only requires that a judicial proceeding comport with due process. As long as a defend-
ant can litigate each case in which he faces punitive liability before a fair and impartial court, there is no deprivation of due process. Fundamental fairness does not prevent a defendant from being subjected to punitive liability in each action brought against him merely because his outrageous conduct injured many people. Fundamental fairness may prevent a defendant in a case from paying more than one punitive damage award to a single plaintiff. Such a double recovery of a penalty by a plaintiff from one defendant can reasonably be said to undermine the fairness of a judicial proceeding that the Due Process Clause requires. However, this is clearly different from the situation in which many plaintiffs recover punitive damages for the injuries each sustained by virtue of a defendant’s single wrongful act.

Courts correctly recognize that the overkill theory is an improper basis for denying plaintiffs’ claims for punitive damages. If a de-

152. See id. See also Cathey v. Johns-Manville Sales Corp., 776 F.2d 1565, 1571 (6th Cir. 1985) (stating that “we believe that the presence of a judicial tribunal before which to litigate the propriety of a punitive damages award provides Johns-Manville with all of the procedural safeguards to which it is due”), cert. denied, 478 U.S. 1021 (1986).

An interesting question is whether due process permits the application of offensive non-mutual collateral estoppel to a finding of punitive liability in a mass tort litigation. See Parklane Hosiery Co. v. Shore, 439 U.S. 322, 329-31 (1979). In other words, if the plaintiff in case 1 recovers punitive damages against the Acme Corporation, does due process allow Acme to be estopped from relitigating the finding of punitive liability in a subsequent case arising out of the same wrong? This topic is beyond the scope of this Note.

153. See Cathey, 776 F.2d at 1571. Indeed, punitive damages awarded to more than one plaintiff would serve to “punish and deter the tortfeasor for the willful and wanton invasion of the independent rights of each injured person.” Wangen v. Ford Motor Co., 97 Wis. 2d 260, 317, 294 N.W.2d 437, 466 (Wis. 1980).

154. See John Mohr & Sons, Inc. v. Jahnke, 55 Wis. 2d 402, 409, 198 N.W.2d 363, 367 (Wis. 1972) (stating that “to allow treble damages and punitive damages would amount to double recovery of a penalty [by the claimant] and thus violate the basic fairness of a judicial proceeding required by the due process clause of the Fourteenth Amendment to the federal constitution”). See also Wangen, 97 Wis. 2d at 317-19, 294 N.W.2d at 465-66.

155. See Jahnke, 55 Wis. 2d at 409-12, 198 N.W.2d at 367-68.

156. See Cathey, 776 F.2d at 1571; Wangen, 97 Wis. 2d at 317-19, 294 N.W.2d at 465-66.

157. “The relief sought by [the defendant] may be more properly granted by the state . . . legislature than by this [c]ourt.” Accordingly, we . . . reject the so-called ‘overkill doctrine’ as a basis for denying an otherwise proper punitive damages recovery.” Cathey, 776 F.2d at 1570 (quoting Moran v. Johns-Manville Sales Corp., 691 F.2d 811, 817 (6th Cir. 1982)). “Moreover there is no legal or equitable basis to allow punitive damage awards to the first plaintiffs in multiple product liability litigation but then deny such a right to recovery to future plaintiffs.” Neal v. Carey Canadian Mines, 548 F. Supp. 357, 376-77 (E.D. Pa. 1982), aff’d sub nom. Van Buskirk v. Carey Canadian Mines, 760 F.2d 481 (3d Cir. 1985). “[T]he Erie doctrine wisely prevents our engaging in such extensive law-making on local tort liability, a subject which the people of New York have entrusted to their legislature . . . .” Roginsky v. Richardson-Merrell, Inc., 378 F.2d 832, 841 (2d Cir. 1967).
fendant's funds are limited, so that payment of exemplary damages to early plaintiffs may preclude recovery of compensatory damages by later claimants, the defendant may submit evidence of his potential liability and straitened financial condition to the jury.\textsuperscript{158} A court should not, however, give legal and constitutional legitimacy to the overkill argument by holding that multiple punitive damage awards deprive a defendant of fundamental fairness.

3. \textit{The Standards for Determining Punitive Liability Are Not Unconstitutionally Vague}

If a state allows the imposition of exemplary damages upon proof that a defendant's behavior was wanton, willful, malicious or outrageous, the first prong of the vagueness argument\textsuperscript{159} must fail. The description of conduct by such terms is not unconstitutionally vague. In \textit{Jordan v. DeGeorge},\textsuperscript{160} the Supreme Court held that the test for vagueness is "whether the language conveys sufficiently definite warning as to the proscribed conduct when measured by common understanding and practices."\textsuperscript{161} Using this test, the Court rejected an assertion that the phrase "crime involving moral turpitude" was void for vagueness because such language had been construed without exception to embrace fraudulent conduct.\textsuperscript{162}

158. Because mandatory class actions on the issue of punitive damages have not been allowed in mass tort situations, see, e.g., \textit{In re School Asbestos Litig.}, 789 F.2d 996, 1005 (3d Cir.), \textit{cert. denied}, 479 U.S. 915 (1986); Abed v. A.H. Robins Co., 693 F.2d 847, 852 (9th Cir. 1982), \textit{cert. denied}, 459 U.S. 1171 (1983), allowing juries to consider evidence of the prior and potential punitive liability of defendants is an appropriate alternative method to deal with cumulative punitive damage awards. See \textit{Leonen v. Johns-Manville Corp.}, 717 F. Supp. 272, 284 (D.N.J. 1989); \textit{State ex rel. Young v. Crookham}, 290 Or. 61, 66-72, 618 P.2d 1268, 1271-74; \textit{Restatement (Second) of Torts § 908 comment e} (1978).

The \textit{Juzwin} court's fears that evidence of prior and potential liability is prejudicial are unwarranted. Consideration of such evidence can only enable jurors to realize that a wrongdoer has been and will be subjected to exemplary damages in other actions. Consequently, a jury will not be inclined to assess an exemplary award that, standing alone, punishes and deters the defendant. In addition, separate trials on the issues of punitive liability and the amount of punitive damages would prevent prejudice. If a jury could review evidence of prior and potential awards only in the trial on the amount of damages, then evidence of prior awards would not influence a jury's verdict on the issue of liability. See, e.g., \textit{Corboy, License To Do Evil?}, Nat'l L.J., Nov. 6, 1989, at 14, col. 1 (stating that "[c]ourts already possess authority to protect defendants from prejudicial evidence, including bifurcation of proceedings").

159. \textit{See supra} notes 77-84 and accompanying text.


162. \textit{Id.} at 232. \textit{DeGeorge} involved a challenge to a statute which required the deportation of any alien sentenced more than once to imprisonment for one year or more because of conviction in the United States for a crime involving moral turpitude.
When measured by common understanding and practices, the terms willful and wanton provide a sufficiently definite warning as to proscribed conduct, and as a consequence are open to easy comprehension by any reasonable person or juror. As the Grace court noted, wanton and willful conduct is defined as "[a] course of action which shows actual or deliberate intention to harm or which, if not intentional, shows an utter indifference or conscious disregard for the rights of the others." The Grace court recognized that such behavior had long served as a benchmark for the imposition of liability in Illinois, and correctly concluded that the phrases wanton and willful provide juries with ample guidelines for determining when a defendant's conduct qualifies for the imposition of punitive damages.

California has adopted a vagueness test similar to the one fashioned by the DeGeorge Court. In Fletcher v. Western National Life Insurance Co., the California Court of Appeal held that a statute is sufficiently certain if it employs words of long usage or with a common law meaning. The court concluded that the terms "malice," "op-
pression,” and “fraud” all had well established meanings,\(^{169}\) and rejected a defendant’s claim that California’s exemplary damage statute was unconstitutionally vague.\(^{170}\)

Likewise, the term “outrageous” carries a sufficiently definite warning as to proscribed conduct when measured by common understandings and practices.\(^{171}\) Outrageous behavior has been construed to mean acts done with malice or a reckless indifference to the rights of another since 1939.\(^{172}\) The Alaska Supreme Court found that this definition prevented jurors from arbitrarily deciding when to impose punitive liability and provided fair warning of what conduct would subject a person to punishment.\(^{173}\) Accordingly, the court rejected a vagueness challenge to Alaska’s exemplary damage scheme.\(^{174}\)

Therefore, when a state’s punitive damage scheme is framed in language that can be comprehended by reference to common understandings and practices, a defendant cannot argue that the standards for imposing punitive liability are unconstitutionally vague.\(^{175}\) A defendant can validly argue, however, that he has no notice that his conduct will incur punitive liability when the plaintiff’s cause of action is a novel one.\(^{176}\) Since a defendant has no prior knowledge that

\(^{169}\) Id.

\(^{170}\) Id.


\(^{172}\) “[I]n order to recover punitive . . . damages, the plaintiff must prove that the wrongdoer’s conduct was ‘outrageous, such as acts done with malice or bad motives or a reckless indifference to the interests of another.’” Sturm, Ruger, 594 P.2d at 46 (quoting RESTATEMENT (SECOND) OF TORTS § 908 (Tent. Draft No. 19, 1973)). “The conduct must be outrageous, either because the defendant’s acts are done with an evil motive or because they are done with reckless indifference to the rights of others.” RESTATEMENT (SECOND) OF TORTS § 908 comment b (1979). “Punitive damages are awarded only for outrageous conduct, that is, for acts done with a bad motive or with a reckless indifference to the interests of others.” RESTATEMENT OF TORTS § 908 comment b (1939).

\(^{173}\) See Sturm, Ruger, 594 P.2d at 46.

\(^{174}\) See id.

\(^{175}\) See DeGeorge, 341 U.S. at 231-32.

\(^{176}\) See Kelsay v. Motorola, Inc., 74 Ill. 2d 172, 384 N.E.2d 353 (1978); Nees v. Hocks, 272 Or. 210, 536 P.2d 512 (1975). In Kelsay, the plaintiff employee alleged that she was fired from her job because she filed a workmen’s compensation claim. The appellate court reversed the trial court’s judgment for the plaintiff, holding that Illinois did not recognize a civil cause of action for retaliatory discharge. The Illinois Supreme Court held that retaliatory discharge was actionable, but that “punitive damages should not be awarded where, as here, the cause of action forming the basis for their award is a novel one.” Kelsay, 74 Ill. 2d at 188, 384 N.E.2d at 359-60. In Nees, an employee sued her employers, claiming that they fired her because she went on jury duty. The Oregon Supreme Court held that the employers were liable for compensatory damages, but not for punitive damages because they did not know at the time of the employee’s discharge that their conduct was improper. Nees, 272 Or. at 220-21, 384 P.2d at 517.
his wanton and malicious conduct is subject to a lawsuit, he cannot be aware that such conduct will subject him to punitive liability. In this situation, however, the defendant's lack of notice is not attributable to any flaw in the concept of exemplary damages and courts have developed a way to solve this problem.

For example, in *Kelsay v. Motorola, Inc.*, a first impression case, the Illinois Supreme Court held that an employee who had been fired from her job for filing a workmen's compensation claim could bring a civil suit against her employer. Addressing the issue of punitive liability, the *Kelsay* court recognized the conflict between the unfairness of sustaining a punitive damage award against a defendant who had no reason to believe his conduct was actionable, and the importance of protecting employees filing workmen's compensation claims from retaliatory discharge. The court struck a just balance and held that punitive damages may be awarded in similar future retaliatory discharge actions, but not in the case at bar.

Clearly, juries have adequate guidelines for determining punitive liability and defendants have ample protection from unanticipated assessments of punitive damages. Consequently, commentators are beginning to realize that a vagueness attack focusing on the conduct required for punitive liability is almost certain to fail. Therefore, these commentators are now directing their energies to invalidating exemplary damages on the untested theory that the vagueness doctrine requires defendants to be aware of the potential size of a punitive damage award.

4. **The Due Process Clause Does Not Require Defendants To Be Aware of the Potential Size of a Punitive Damage Award**

Punitive damage schemes do not apprise defendants of the consequences of wrongful behavior with the same precision as criminal sentencing provisions. A tortfeasor in a civil action knows that if his

177. See *Kelsay*, 74 Ill. 2d at 187-90, 384 N.E.2d at 360-61; *Nees*, 272 Or. at 220-21, 536 P.2d at 516-17.

178. See *Kelsay*, 74 Ill. 2d at 189, 384 N.E.2d at 361.

179. 74 Ill. 2d 172, 384 N.E.2d 353 (1978).

180. *Id.* at 181-86, 384 N.E.2d at 357-59.

181. *Id.* at 186-90, 384 N.E.2d at 359-61.

182. *Id.* at 189, 384 N.E.2d at 361.

183. See supra notes 159-82 and accompanying text.

184. See Note, Banker's Life: Justice O'Connor's Solution to the Jury's Standardless Discretion to Award Punitive Damages, supra note 33, at 736-37; Note, Can Punitive Damages Standards Be Void For Vagueness?, supra note 33, at 62.

185. See, e.g., Note, Can Punitive Damage Standards Be Void For Vagueness?, supra note 33, at 62, 68.
behavior meets certain standards, he will be subjected to punitive liability.\textsuperscript{186} However, the wrongdoer is not aware of the size of an exemplary award that a jury may assess.\textsuperscript{187} Criminal defendants know the consequences of their illegal acts with greater certainty because the vagueness doctrine requires that penal statutes specify the penalties available upon conviction.\textsuperscript{188} Thus, a criminal defendant is cognizant of the maximum punishment that he can receive.\textsuperscript{189} If punitive damage schemes were reviewed under the stricter vagueness test reserved for criminal statutes, due process would clearly require that defendants be on notice of the potential size of an exemplary award.\textsuperscript{190}

However, due process permits some uncertainty in sentencing provisions.\textsuperscript{191} A criminal defendant charged with violating a particular law need not be aware of the precise sentence he will receive if he is eventually convicted.\textsuperscript{192} He is only entitled to know the minimum and maximum punishments that may be incurred.\textsuperscript{193} In Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.,\textsuperscript{194} the Supreme Court stated that due process demands less precision from enactments which rely upon civil penalties for enforcement.\textsuperscript{195} Therefore, a civil statute which does not apprise defendants of the maximum punishi-

\begin{itemize}
\item \textsuperscript{186} See supra notes 159-85 and accompanying text.
\item \textsuperscript{188} According to the United States Supreme Court: It is a fundamental tenet of due process that "[n]o one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes." A criminal statute is therefore invalid if it "fails to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden." So too, vague sentencing provisions may pose constitutional questions if they do not state with sufficient clarity the consequences of violating a given criminal statute. United States v. Batchelder, 442 U.S. 114, 123 (1979) (citations omitted).
\item \textsuperscript{189} See Note, \textit{The Imposition Of Punishment By Civil Courts: A Reappraisal Of Punitive Damages}, supra note 124, at 1169 ("Criminal statutes usually provide minimum and maximum penalties for particular violations.").
\item \textsuperscript{190} See Batchelder, 442 U.S. at 123.
\item \textsuperscript{191} The Batchelder Court held: Although the statutes create uncertainty as to which crime may be charged and therefore what penalties may be imposed, they do so to no greater extent than would a single statute authorizing various alternative punishments. So long as overlapping criminal provisions clearly define the conduct prohibited and the punishment authorized, the notice requirements of the Due Process Clause are satisfied. Id.
\item \textsuperscript{192} See id.; supra note 189.
\item \textsuperscript{193} See Batchelder, 442 U.S. at 123; supra note 189.
\item \textsuperscript{194} 455 U.S. 489 (1982).
\item \textsuperscript{195} Id. at 498-99.
\end{itemize}
ment in terms of an explicit monetary limit cannot be considered unconstitutionally vague. Consequently, under the vagueness test applicable to civil statutes, punitive damage schemes would not need to forewarn defendants of the size of an exemplary award a jury may assess.

The argument that exemplary damages should be subjected to the stricter vagueness test rests on the assumption that punitive damage schemes are equivalent to criminal sentencing provisions. This assumption is invalid. Penal statutes often provide for the incarceration of offenders. By contrast, a defendant’s liberty interests are not implicated when he is subjected to punitive liability in a civil action between private parties. Even when the only consequence of violating a penal statute is the imposition of a fine, the defendant suffers the harsh stigma of a criminal conviction. A punitive damage judgment does not carry with it the same degree of censure. Clearly,
the civil remedy of punitive damages is qualitatively less severe than
the penalties imposed by criminal law. Thus, exemplary damage
schemes should be subjected to scrutiny under the lesser vagueness
standards applicable to criminal statutes.203

5. Punitive Damage Schemes Do Not Violate the Substantive
Component of the Due Process Clause

Punitive damage awards reflect the community’s consensus on the
amount necessary in a given case to achieve the goals of punishment
and deterrence.204 A jury need not award exemplary damages even
though a defendant’s behavior is sufficiently culpable to incur punitive
liability.205 Plaintiffs have no absolute right to recover punitive dam-
ages.206 Therefore, an exemplary award can never be unreasonably
low.207 Whether a punitive damage award can be so unreasonably
high as to be unconstitutional is a question of substantive due
process.208

The proposition that substantive due process limits the size of a
punitive damage award that a jury may assess is reasonable because
defendants should be protected from exemplary awards which are
wholly disproportionate to the offense at bar.209 But a penalty which
affects a significant portion of a defendant’s wealth and which far ex-
ceeds actual damages suffered does not necessarily offend the Due
Process Clause.210 The proper inquiry for determining the existence
of a substantive due process violation should focus on whether the
penalty serves the purpose for which it is intended.211 A punitive
tortfeasor injured the plaintiff by acting with a certain mental state. It does not imply
that the wrongdoer violated the law. In addition, punitive damage defendants do not
have the equivalent of a criminal conviction record. See generally Wittman v. Gilson, 70
civil verdict directing payment of punitive damages does not carry the same heavy socie-
tal stigma stamped by a criminal conviction no matter what sentence is imposed”).

204. See FDIC v. W.R. Grace & Co., 691 F. Supp. 87, 100 (N.D. Ill. 1988), aff’d in
205. See, e.g., State ex rel. Young v. Crookham, 290 Or. 61, 70, 618 P.2d 1268, 1273
(1980); Wangen v. Ford Motor Co., 97 Wis. 2d 260, 301, 294 N.W.2d 437, 458 (Wis.
1980).
206. See Wangen, 97 Wis. 2d at 301, 294 N.W.2d at 458.
207. See id. at 302, 294 N.W.2d at 458.
208. See Browning-Ferris Indus. of Vt. v. Kelco Disposal, 109 S. Ct. 2909, 2921
(1989).
209. See St. Louis, I. M. & S. Ry. v. Williams, 251 U.S. 63, 66-67 (1919); Waters-
Pierce Oil Co. v. Texas, 212 U.S. 86, 111 (1909).
210. See Waters-Pierce Oil Co., 212 U.S. at 111-12; Williams, 251 U.S. at 67.
211. See Williams, 251 U.S. at 67.
damage award which is more than an amount reasonably necessary to punish and deter does not serve the purpose for which it was intended,\textsuperscript{212} and may thus be considered to be inconsistent with the substantive component of the Due Process Clause.\textsuperscript{213}

Although exemplary awards may conceivably be inconsistent with substantive due process, the same cannot be said of punitive damage schemes.\textsuperscript{214} Instead of restricting the amount of damages that can be awarded by an express statutory limit,\textsuperscript{215} punitive damage schemes protect defendants from unconstitutionally excessive judgments by means of exhaustive judicial scrutiny.\textsuperscript{216} Under the various state standards of review, trial and appellate judges routinely remit awards which exceed the minimum amounts necessary to punish and deter.\textsuperscript{217} Punitive damage schemes prevent defendants in mass tort cases from paying unconstitutional sums because reviewing courts consider a defendant's prior and potential punitive liability when determining whether the punitive damage award at bar should stand.\textsuperscript{218} An exemplary award which exceeds an amount reasonably necessary to punish and deter in light of prior and potential punitive damage awards for

\textsuperscript{212} Wangen v. Ford Motor Co., 97 Wis. 2d 260, 303, 294 N.W.2d 437, 459 (Wis. 1980) (stating that "[a]n award which is more than necessary to serve its purposes (punishment and deterrence) or which inflicts a penalty or burden on the defendant which is disproportionate to the wrongdoing is excessive and is contrary to public policy"). The minimum amount reasonably necessary to punish and deter must depend upon the peculiar facts and circumstances of each case. See, e.g., Neal v. Carey Canadian Mines, 548 F. Supp. 357, 377 (E.D. Pa. 1982), aff'd sub nom. Van Buskirk v. Carey Canadian Mines, 760 F.2d 481 (3d Cir. 1985).

\textsuperscript{213} See Williams, 251 U.S. at 66-67.

\textsuperscript{214} The Williams Court intimated that if a penalty is excessive, the statute which prescribed it would be contrary to due process. See id. at 66. Although a jury might assess an unconstitutional punitive damage award, that award will invariably be reduced or vacated by a reviewing court. Thus, by the time the judgment is entered, the punitive award will have been reduced to a constitutionally permissible amount. See infra notes 216-20 and accompanying text.

\textsuperscript{215} See Browning-Ferris Indus. of Vt. v. Kelco Disposal, 109 S. Ct. 2909, 2921 (1989); Williams, 251 U.S. at 64.

\textsuperscript{216} See supra notes 136-44 and accompanying text.


the same conduct will be reversed or remitted. Consequently, defendants seldom, if ever, pay exemplary awards which do not comport with substantive due process. Thus, because judicial review of exemplary damages precludes the possibility of constitutionally impermissible awards, punitive damage schemes cannot be considered to be violative of substantive due process.

B. Policy Reasons

Defendants and insurers who challenge the validity of punitive damage schemes under the Due Process Clause clearly desire predictability. However, there is a compelling reason for retaining a system in which the degree of a civil defendant's punishment is not known with absolute certainty. In addition to punishing the defendant, exemplary damages serve the function of deterrence. Defendants are deterred from future wrongs, and by way of example, others are also deterred from similar misconduct. Federal and state courts recognize that where a defendant is a large company or corporation, exemplary damages deter the defendant from deciding that it is cheaper to be sued and pay compensatory damages than to remedy a dangerous condition.

219. The Supreme Court of New Jersey stated:

When evidence of other punitive awards is introduced, trial courts should instruct juries to consider whether the defendant has been sufficiently punished, keeping in mind that punitive damages are meant to punish and deter defendants for the benefit of society . . . Should a trial court determine that an award is “manifestly outrageous” or “grossly excessive,” it may reduce that award or order a new trial on punitive damages. In evaluating the excessiveness of challenged punitive damage awards, trial courts are expressly authorized to consider prior punitive damage awards.

Fischer, 103 N.J. at 670, 512 A.2d at 480 (citation omitted).


221. See Corboy, supra note 158, at 14, cols. 2-3.

222. See id.


225. Brown, 703 F.2d at 1053 (“The Arkansas Supreme Court will allow punitive damages to deter a defendant from deciding that it is cheaper to be sued and pay compensatory damages than to remedy a dangerous condition.”); Neal, 548 F. Supp. at 376 (“Punitive damages serve to deter manufacturers from accepting the risk of paying compensatory damages rather than changing the business practice which would result in ex-
Punitive damages have this deterrent effect on corporate defendants precisely because the size of an exemplary award cannot be anticipated with certainty.\textsuperscript{226} Were it otherwise, the corporate defendant would be able to include punitive damages as a known factor in the equation to determine the cost of doing business.\textsuperscript{227} In such a situation, the likelihood that hazardous practices would go unchecked would greatly increase.\textsuperscript{228}

In sum, punitive damages are awarded to plaintiffs only when a defendant's conduct is wanton, willful, malicious or outrageous.\textsuperscript{229} There is no reason for large corporations to abandon new projects for fear of punitive liability.\textsuperscript{230} Such defendants cannot be punished in civil lawsuits for simple negligence.\textsuperscript{231}

\section*{IV. Conclusion}

Challenges to punitive damages brought on procedural due process, fundamental fairness and traditional vagueness grounds are likely to fail. A defendant's procedural due process rights are preserved because juries are not given standardless discretion to determine a defendant's punishment. In addition, defendants have the added protection of thorough judicial review. Where a defendant's wrongful conduct injures many people, fundamental fairness does not limit the recovery of punitive damages to one plaintiff. The traditional void for vagueness argument fails because common law standards of culpability are sufficiently defined to clearly inform juries and defendants of what conduct qualifies for the imposition of punitive liability.

Exemplary damage schemes should be held to the more permissive vagueness standards reserved for civil statutes. Under these stan-
dards, due process does not require punitive damage defendants to be aware of the potential size of a jury award. Finally, because extensive judicial review ensures that defendants never pay constitutionally impermissible sums, courts should conclude that punitive damage schemes do not offend substantive due process.

Sanjit S. Shah