Indiana Law Journal

Volume 65 | Issue 1 Article 7

Winter 1989

Constitutional Defenses Against Punitive Damages: Down But Not Out

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NOTES

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INTRODUCTION

The United States Supreme Court this past term dealt a staggering blow to civil litigants wishing to attack awards of punitive damages on constitutional grounds. In the case of *Browning-Ferris Industries of Vermont v. Kelco Disposal,*[1] the Court concluded that the excessive fines clause is only intended to curb governmental action and does not serve to limit damage awards in private lawsuits. The Court thus removed one constitutional weapon from the defense bar's arsenal.[2]

Defendants in private actions have not yet been knocked out, however. There remains one viable constitutional means of attacking exemplary awards that the Court has not yet faced. This remaining challenge relies on the due process clause of the fifth and fourteenth amendments.

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1. 109 S. Ct. 2909 (1989).

2. *Id.* at 2912. Additionally, this past term, the Court signalled in *dicta* the death knell for any challenge on punitive damages under the double jeopardy clause by limiting the application of that clause to actions by the government. In United States v. Halper, 109 S. Ct. 1892 (1989), the Court held that the double jeopardy clause is violated when the government seeks a purely punitive civil penalty that bears no relation to actual loss from a defendant who has been previously criminally convicted for the same conduct. In the closing lines of the Court's opinion, Justice Blackmun noted "nothing in today's opinion precludes a private party from filing a civil suit seeking damages for conduct that previously was the subject of criminal prosecution and punishment. The protections of the Double Jeopardy clause are not triggered by litigation between private parties." *Id.* at 1903.

This Note will argue that the due process clause has always been the better challenge to punitive awards and that the Court was correct in rejecting the eighth amendment argument. Part I discusses the nature of punitive damages and the role they play in society. Part II reviews the history of the excessive fines argument, culminating with a discussion of the *Browning-Ferris* opinion. Part III addresses the views of six Supreme Court Justices that lend credence to the due process argument. Part IV lays a framework for applying the due process clause to limit punitive awards. This Note concludes by showing how the due process challenge has always been a better approach to limiting the punitive damage remedy than the excessive fines challenge.

I. ROLE OF PUNITIVE DAMAGES

Punitive damages are damages in addition to compensatory damages. Punitive damages are designed to punish the defendant for his outrageous conduct and to deter others from engaging in similar conduct in the future.[3]

Punishment plays a vital role in the civil law by filling gaps left by the criminal law. Certain conduct is sufficiently reprehensible that society feels obligated to punish the wrongdoer and to deter other would-be wrongdoers. Yet, for various reasons, the criminal law does not always perform this task adequately. Sometimes it is because criminal dockets are so swamped that prosecutors do not feel justified in prosecuting a less serious case.[4] Other times, especially with corporate wrongdoers, the criminal law does not sufficiently punish and deter particular actors.[5]

The need for a "gap-filler" may be seen in the Ford Pinto litigation. A design defect in the Pinto automobile caused fuel to leak from the gasoline tank when struck from behind, often resulting in an explosive fire. A relatively minor adjustment by the manufacturer would have corrected the defect, thus preventing the possibility of disaster. The Ford Motor Company decided, based on a cost-benefit analysis, to risk the lives of hundreds of people rather than make the adjustment. Ford concluded that it would cost

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3. The RESTATEMENT (SECOND) OF TORTS declares:

> 1) Punitive damages are damages, other than compensatory or nominal damages, awarded against a person for his outrageous conduct and to deter him and others like him from similar conduct in the future.
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> 2) Punitive damages may be awarded for conduct that is outrageous, because of the defendant's evil motive or his reckless indifference to the rights of others. In assessing punitive damages, the trier of fact can properly consider the character of the defendant's act, the nature and extent of the harm to the plaintiff that the defendant caused or intended to cause and the wealth of the defendant.

RESTATEMENT (SECOND) OF TORTS § 908 (1979).

4. *See* 1 J. GHIARDI & J. KIRCHER, PUNITIVE DAMAGES LAW & PRACTICE §§ 2.01-.13 (1988).

5. *Id.*

the company more money to make the repair than to pay judgments for wrongful death. Several people lost their lives as a result of Ford's decision.[6]

Very few would doubt that Ford's decision was socially unacceptable and deserved punishment. Ford's cynical decision is the very type that society needs to deter and wants to punish. However, the Ford Motor Company and its officers escaped criminal liability.[7] The criminal law was thus inadequate in performing its roles of punishment and deterrence.

Punitive damages, however, can serve to fill the void when the criminal law proves inadequate. In a suit against Ford brought by a private plaintiff, Ford suffered a punitive damage judgment of $125 million.[8] Through such measures in the civil law, a giant like Ford can be effectively punished, thus insuring that other such giants will not follow Ford's reprehensible lead. Therefore, punitive damages are necessary and useful to serve the purposes of the criminal law: the punishment and deterrence of unacceptable conduct.

Justice O'Connor noted in *Browning-Ferris,* however, that punitive damages have their faults. Because of their uncontrolled growth and their unpredictable size, punitive damages are having a chilling effect on industrial research and development.[9] Moreover, at least one commentator attributes the increasing unavailability of insurance coverage to punitive damages, and argues the lack of insurance has precipitated the bankruptcy of many companies.[10] It is therefore not surprising that many defendants have searched for a shield from punitive damages.

II. HISTORY OF THE EXCESSIVE FINES CHALLENGE

Most recently, defendants have looked to the Constitution as a means for attacking punitive damages. The aspects of punishment and deterrence at the core of punitive damages formed the basis for a series of appeals to the United States Supreme Court, challenging exemplary awards as violating the excessive fines clause of the eighth amendment.[11] These decisions culminated in *Browning-Ferris.*

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6. Note, *Corporate Homicide: The Stark Reality of Artificial Beings and Human Fictions,* 8 PEPPERDINE L. REV. 367, 372-74 (1981).

7. *Id.* at 370.

8. *See* Grimshaw v. Ford Motor Co., 119 Cal. App. 3d 757, 174 Cal. Rptr. 348 (1981) (The court, however, ordered a remittitur to $3.5 million. *Id.* at 772, 174 Cal. Rptr. at 358).

9. *Browning-Ferris,* 109 S. Ct. at 2924 (O'Connor, J., concurring in part and dissenting in part); *see infra* notes 45-114 and accompanying text.

10. *See* Comment, *Punitive Damages: The Burden of Proof Required by Procedural Due Process,* 22 U.S.F. L. REV. 99 (1987) (predicting that punitive damages will cause more bankruptcies, leading to increased concentration in the marketplace and a resultant decline in competition).

11. The eighth amendment provides, "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted." U.S. CONST. amend. VIII.

The first case was *Bankers Life and Casualty v. Crenshaw,*[12] decided on May 16, 1988. In *Bankers Life,* the plaintiff had dropped an alternator on his foot. The injury grew much worse, resulting in the necessary amputation of part of the foot. The defendant insurance company was obligated under its insurance policy to pay proceeds for amputations that were not the result of a pre-existing condition. The insurance company claimed that the deterioration of the foot was due to pre-existing arteriosclerosis and refused to pay.[13]

At trial, the jury found the insurance company in breach of contract. Additionally, the jury found the breach to be in bad faith. The jury then awarded $20,000 in compensatory damages and $1.6 million in punitive damages.[14] The insurance company eventually argued before the United States Supreme Court that the punitive award under Mississippi tort law violated the excessive fines and due process clauses of the federal Constitution.[15] The Supreme Court held the appellant had failed to preserve its constitutional challenges in the lower courts. Thus, the Court did not reach the constitutional challenges in its opinion.[16]

Two weeks later, the Supreme Court summarily disposed of eight more cases concerning the constitutionality of punitive damages. The Court denied writ of *certiorari* in four of the cases,[17] thus denying them any precedential authority from the High Court. In the remaining four cases, however, the Court dismissed the appeal for want of a substantial federal question.[18] The cases dismissed for want of a substantial federal question became binding decisions on the merits. Lower courts were bound by the necessary rejection of the issues and arguments raised in the jurisdictional statements of the appellants.[19] Of the four cases dismissed for want of a substantial federal

12. 108 S. Ct. 1645 (1988).
13. *Id.* at 1648.
14. *Id.* at 1649-50.
15. *Id.*
16. *Id.*
17. Aluminum Co. of America v. Sliman, 108 S. Ct. 2013 (1988); Playtex Holdings v. O'Gilvie, 108 S. Ct. 2014 (1988); Ohio Casualty Ins. Co. v. Downey Sav. and Loan Ass'n, 108 S. Ct. 2023 (1988); Atlantic Richfield Co. v. Nielsen, 108 S. Ct. 2023 (1988).
18. American Gen. Life & Accident v. Miller, 108 S. Ct. 2007 (1988); Treadwell Ford v. Campbell, 108 S. Ct. 2007 (1988); Mobile Dodge, Inc. v. Alford, 108 S. Ct. 2008 (1988); Alabama Power Co. v. Cantrell, 108 S. Ct. 2008 (1988).
19. At the time of these summary dispositions, cases decided by state supreme courts questioning the validity of a state law as being repugnant to the laws or Constitution of the United States arose within the Court's appellate jurisdiction. 28 U.S.C. § 1257 (1982). The Court was compelled to reach the merits of the dispute. Therefore, if the Court found want of a substantial federal question, and summarily dismissed a case arising within the Court's appellate jurisdiction, the decision became binding on the merits. Hicks v. Miranda, 422 U.S. 332, 344 (1975). Hence the lower courts were bound not only by the judgment reached in such a summary disposition, but also the necessary rejection of the specific federal question challenges brought before the Court. Mandel v. Bradley, 432 U.S. 173, 176 (1977). These

question, three posed the question of whether a punitive award violates the excessive fines clause.[20]

For example, in *American General Life & Accident v. Miller,* the appellant argued that punitive awards are constitutionally excessive when they are greater than 700 times the maximum applicable criminal penalty and 140 times the compensatory award.[21] Due to the binding effect on the issues raised by the appellant in this case, lower courts were precluded from holding that an award of punitive damages was unconstitutional under the eighth amendment if the award was *less* than 700 times the applicable criminal sanction for the punished activity or *less* than 140 times the compensatory award.

Bankers Life and the three summary dispositions created some confusing precedent for defendants and lower courts. Writing for the Court in *Bankers Life,* Justice Marshall had issued a plea for a "well developed record and a reasoned opinion on the merits" because the eighth amendment issue "is a question of some moment and difficulty."[22] Two weeks later, however, by rejecting the eighth amendment challenge for lack of a substantial federal question, the Court eliminated almost all possibility for a "well developed record" or a "reasoned opinion on the merits."

With these confusing signals, the stage was set for the Supreme Court to decide finally and conclusively the excessive fines argument.[23] The Court seized upon an opportunity in *Browning-Ferris.*[24]

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issues were not necessarily the issues raised before the lower court, but only those issues presented in the jurisdictional statement before the United States Supreme Court. *Id.* Since the time of these dispositions, Congress has amended the jurisdictional statute, making Supreme Court review in this type of case discretionary rather than mandatory. Therefore, in the future, the Supreme Court need not reach the merits in reviewing state laws of this character. If the Court should choose in its discretion not to consider such a case, the Court will not be creating precedent of any kind. *See* 28 U.S.C.A. § 1257 (West Supp. 1989).

20. In *Mobile Dodge,* the appellant argued that an award of $124,000 in punitive damages is constitutionally excessive when such an award is at least 77 times the maximum criminal penalty that could have been assessed for similar conduct. Brief of Appellant, Mobile Dodge, Inc. v. Alford, 108 S. Ct. 2008 (1988) (No. 86-107). The *Treadwell Ford* case raised the issue of whether a punitive award of $1.3 million is excessive because it is 500 times the maximum applicable criminal penalty. Brief of Appellant, Treadwell Ford, Inc. v. Campbell, 108 S. Ct. 2007 (1988) (No. 85-1799). Finally, the appellant in *American Gen. Life* argued that exemplary damages of $350,000 violate the Constitution because the amount is 140 times the compensatory award and 700 times the maximum applicable criminal penalty. Brief of Appellant, American Gen. Life and Accident Ins. Co. v. Miller, 108 S. Ct. 2007 (1988) (No. 85-1429).

21. *See supra* note 20.

22. *Bankers Life,* 108 S. Ct. at 1651.

23. *See* Greenhouse, *Supreme Court Agrees to Weigh Putting Limits on Damage Awards,* N.Y. Times, Dec. 6, 1988, at A1, col. 1; *Calling All Deep Pockets,* Wall St. J., June 2, 1988, at 22, col. 1; Taylor, *Court Fails to Consider Big Awards,* N.Y. Times, June 1, 1988, at D1, col. 3.

24. Browning-Ferris Indus. v. Kelco Disposal, 845 F.2d 404 (2d Cir. 1988), *cert. granted,* 109 S. Ct. 527 (1988).

Browning-Ferris involved alleged price cutting by Browning-Ferris Industries (BFI) in an attempt to eliminate a competitor, Kelco Disposal, from the waste-disposal business. Kelco brought an action under Section 2 of the Sherman Act and under the tort law of Vermont, which creates an action for interference with contractual relations. The jury found BFI liable on both counts and awarded $51,146 in compensatory damages. Additionally, the jury assessed $6 million in punitive liability. BFI ultimately appealed the exemplary damages to the United States Supreme Court, arguing such damages violate the excessive fines clause.[25]

Any hope for the excessive fines argument was completely shredded by Justice Blackmun's majority opinion. After giving an elaborate lesson on the history of our Bill of Rights, the Court held the eighth amendment "does not constrain an award of money damages in a civil suit when the government neither has prosecuted the action nor has any right to receive a share of the damages awarded."[26]

Several reasons prompted the Court's strong language. The Court noted that at the time the framers drafted the eighth amendment,[27] the word "fine" meant a "payment to a sovereign as punishment." The amendment, held the Court, was designed only to limit the power of the government.[28] This history dates not only to the English Bill of Rights, but also to the *Magna Carta* and its prohibition against excessive amercements.[29] The Court refused to "ignore the language of the Excessive Fines Clause, or its history, or the theory on which it is based, in order to apply it to punitive damages." On this reasoning, the Court upheld the $6 million award and rejected the excessive fines clause argument.[30]

III. The Due Process Opinions

The Court in *Browning-Ferris* chose not to address the issue of whether punitive awards violate due process. The majority side-stepped this challenge, noting the petitioner had failed to raise the due process question in either the district court or the court of appeals. In the Court's words, "[t]hat inquiry must await another day."[31]

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25. *Browning-Ferris,* 109 S. Ct. at 2912-13.

26. *Id.* at 2914.

27. The framers copied the eighth amendment from the Virginia Declaration of Rights of 1776. *See* Note, *The Constitutionality of Punitive Damages Under the Excessive Fines Clause of the Eighth Amendment,* 85 Mich. L. Rev. 1699 (1987).

28. *Browning-Ferris,* 109 S. Ct. at 2915.

29. *Id.* at 2916-19. The excessive fines clause first originated in chapter 20 of the *Magna Carta,* which prohibited excessive amercements, or monetary penalties levied for offenses against the Crown. *See* Note, *supra* note 27, at 1714.

30. *Browning-Ferris,* 109 S. Ct. at 2920-21.

31. *Id.* at 2921.

The concerns of six Supreme Court Justices shed light upon the *Browning-Ferris* majority's invitation to raise the due process issue. A majority of the current Court has expressed grave concern that the discretion given juries in assessing punitive awards may violate due process under the fifth and fourteenth amendments.[32]

Justice O'Connor authored a concurring opinion in *Bankers Life* that was the first to highlight the due process argument. Justice O'Connor, joined by Justice Scalia, wrote:

> Appellant has touched on a due process issue that I think is worthy of the Court's attention in an appropriate case. Mississippi law gives juries discretion to award any amount of punitive damages in any tort case in which a defendant acts with a certain mental state. In my view, because of the punitive character of such awards, there is reason to think this may violate the Due Process Clause.[33]

Justice O'Connor then indicated that the due process doctrine of void for vagueness[34] may invalidate punitive damage awards on two grounds: First, the standards for determining what conduct can give rise to punitive damages may be unconstitutionally vague. Second, the unbridled discretion given to juries when deciding what amount of punitive damages is needed to punish the defendant may also violate due process vagueness standards.[35]

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32. *See* Wermiel, *Vote of 7-2 Leaves Open Question of Due Process in Granting the Awards,* Wall St. J., June 27, 1989, at A3, col. 3.

33. *Bankers Life,* 108 S. Ct. at 1655 (O'Connor, J., concurring).

34. Courts have traditionally used the void for vagueness doctrine to invalidate criminal statutory law that is too indefinite. A law "which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law." Connally v. General Constr. Co., 269 U.S. 385, 391 (1926). This fundamental requirement of due process applies to the states through the fourteenth amendment. *Id.* at 390. Corporations as well as individuals enjoy the protections of the due process clause. Helicopteros Nacionales de Columbia v. Hall, 466 U.S. 408 (1984); Small Co. v. American Sugar Ref. Co., 267 U.S. 233 (1925); *see also Browning-Ferris,* 109 S. Ct. at 2925 (O'Connor, J., concurring in part and dissenting in part).

The void for vagueness doctrine protects against three hazards: lack of fair warning, unbridled discretion, and overbreadth. *See generally* W. LaFave & A. Scott, Criminal Law § 2.3 (2d ed. 1986). First, a law must not be so indefinite that reasonable people are denied notice or warning of how the law applies. *See Connally,* 269 U.S. at 391. Second, enforcement of a law cannot be subject to such unlimited discretion of a jury or trier of fact that its application becomes arbitrary. Giaccio v. Pennsylvania, 382 U.S. 399 (1966). Finally, if a law is susceptible to an application which allows it to infringe constitutionally-protected rights, the law suffers from overbreadth. *See* Winters v. New York, 333 U.S. 507 (1948). After the decision in Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974) (disallowing punitive damages in defamation cases where the plaintiff does not prove malice), an allegation that punitive damage laws suffer from overbreadth would probably be fruitless. They are not susceptible to a reading which would infringe upon constitutionally-protected rights. For a discussion of the impact of *Gertz,* see *infra* text accompanying notes 87-91.

35. O'Connor feels that the required mental state (willfulness or gross negligence) for awarding punitive damages in Mississippi is probably described with sufficient definiteness. However, she questions the lack of maximum penalty and the unbridled discretion given the jury. *Bankers Life,* 108 S. Ct. at 1655-56.

After *Bankers Life, Browning-Ferris* revealed that three other Justices would also question punitive damages on due process grounds. Justice Stevens joined Justice O'Connor in her dissenting opinion, which specifically reiterates the due process language of her *Bankers Life* concurrence.[36] Further, in a concurring opinion, Justices Marshall and Brennan criticized the unbridled discretion given a jury in determining the amount of a punitive award. "[P]unitive damages are imposed by juries guided by little more than an admonition to do what they think is best. . . . I for one would look longer and harder at an award of punitive damages based on such skeletal guidance. . . ."[37]

Additionally, Chief Justice Rehnquist has expressed essentially similar dissatisfaction with exemplary awards. In *Smith v. Wade*[38] the Court faced the question of what degree of culpability will permit a punitive award under 42 U.S.C. § 1983.[39] The plaintiff was an inmate who sought to recover damages from prison guards for injuries inflicted on the plaintiff by other prisoners. The trial court had charged the jury that it could award punitive damages upon a showing of "reckless or callous disregard of, or indifference to, the rights or safety of others."[40] Deliberating under this instruction, the jury awarded $5,000 in punitive damages.[41] The Supreme Court held that punitive damages may be awarded under § 1983 upon a showing of recklessness.[42]

Then Associate Justice Rehnquist, holding the view that punitive damages under § 1983 require a showing of intentional misconduct, dissented from the Court's judgment.[43] Justice Rehnquist's opinion launched a frontal assault on exemplary awards.

> Punitive damages are generally seen as a windfall to plaintiffs, who are entitled to receive full compensation for their injuries—but no more. Even assuming that a punitive "fine" should be imposed after a civil trial, the penalty should go to the State, not to the plaintiff—who by hypothesis is fully compensated. *Moreover, although punitive damages are "quasi-criminal," their imposition is unaccompanied by the types of safeguards present in criminal proceedings. This absence of safeguards is exacerbated by the fact that punitive damages are frequently based upon the caprice and prejudice of jurors.* We observed in *Electrical Workers v. Foust* that "punitive damages may be employed to punish unpopular defendants," and noted elsewhere that "juries assess punitive

36. *Browning-Ferris,* 109 S. Ct. at 2924 (O'Connor, J., concurring in part and dissenting in part).
37. *Id.* at 2923 (Brennan, J., concurring).
38. 461 U.S. 30 (1983).
39. *Id.* at 31.
40. *Id.* at 32-33 (emphasis omitted).
41. *Id.*
42. *Id.* at 51.
43. *Id.* at 56 (Rehnquist, J., dissenting).

> damages in wholly unpredictable amounts bearing no necessary relation to the actual harm caused." Finally, the alleged deterrence achieved by punitive damages awards is likely outweighed by the costs—such as the encouragement of unnecessary litigation and the chilling of desirable conduct—flowing from the rule, at least when the standards on which awards are based are ill-defined.[44]

Chief Justice Rehnquist thus appears troubled with the lack of safeguards to protect against arbitrary decisions in the jury room. These concerns are essentially the same as the due process concerns voiced by Justices Brennan, Marshall, O'Connor, Scalia, and Stevens. It is likely, therefore, that the Chief Justice could also be persuaded that the lack of safeguards violates the fifth and fourteenth amendments.

The Court is poised to hear the due process argument. The *Browning-Ferris* majority has invited the challenge. Moreover, five and possibly six Justices appear disposed to declare punitive damages unconstitutional under the fifth and fourteenth amendments. The defense bar's task is to create a framework for applying the due process clause and to persuade a majority of the Court to invalidate punitive damages.

IV. APPLYING THE DUE PROCESS CLAUSE

Punitive damages do not meet due process requirements. Punitive damages deny defendants fair notice of when and to what extent courts will assess exemplary awards. More importantly, punitive damage law generally gives the trier of fact too much discretion in determining the amount of a penalty.[45] Thus, the typical law of punitive damages is void for vagueness under the due process clauses of the fifth and fourteenth amendments.

The first step in arguing that punitive damages are unconstitutional is distinguishing *Browning-Ferris.* BFI asked the Court to hold that the eighth amendment placed a cap on punitive awards, and the Court ruled that it did not. This holding in no way affects the defense bar's argument under the due process clause. The *Browning-Ferris* majority did not address the question of whether defendants are entitled to notice of what amount of punitive damages may be forthcoming. Neither did the Court face the question of whether the jury is given too much discretion in awarding punitive damages. The Court merely reviewed the history and purpose behind the eighth amendment, and declared it inapplicable to the arena of private lawsuits. Thus, nothing in *Browning-Ferris* limits either defendants' arguments or remedies under the due process clause.

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44. *Id.* at 59 (citations omitted and emphasis added).

45. *See* L. SAND, J. SIFFERT, S. REISS, J. SEXTON & J. THROPE, III MODERN FEDERAL JURY INSTRUCTIONS § 77.01, Instruction 77-5 (1988) [hereinafter JURY INSTRUCTIONS]; *see also* CAL. CIV. CODE §§ 3294-95 (West Supp. 1989).

After distinguishing *Browning-Ferris,* the due process argument requires two further steps: First, defendants must counter the argument that void for vagueness is purely a creature of the criminal law. Second, defendants must illustrate how the law currently applied in punitive damages cases is indeed void for vagueness.

A. The Void for Vagueness Doctrine Is Not a Purely Criminal Safeguard

No Supreme Court precedent prevents the Court from applying the void for vagueness doctrine to a common law civil penalty such as punitive damages. Rather, existing Supreme Court precedent shows the doctrine should apply.

The void for vagueness doctrine is not limited to statutory law.[46] At least two cases have applied the standard to common law crimes. In *Cantwell v. Connecticut,*[47] the Court faced a challenge to Connecticut's common law crime of inciting a breach of peace. In *Ashton v. Kentucky,*[48] the Supreme Court examined Kentucky's common law crime of libel. In each case, the Court invalidated the law as unconstitutionally vague, even though it was non-statutory.[49] These two cases indicate the void for vagueness doctrine is not limited to statutory law.

Just as the doctrine is not limited to statutory law, neither is it limited to the criminal law. In *Giaccio v. Pennsylvania,*[50] the Court invalidated a Pennsylvania statute that permitted a jury to impose prosecution costs on an acquitted criminal defendant whenever the jury chose to do so. The statute imposed a *civil* remedy because it was designed to provide for the collection of costs rather than to punish. The Court felt, however, that this distinction between "punitive" and "civil" remedies was meaningless.

> *Whatever label be given the . . . Act,* there is no doubt that it provides the State with a procedure for depriving an acquitted defendant of his . . . property . . . and property [is] specifically protected by the Fourteenth Amendment against any state deprivation which does not meet the standards of due process . . . .[51]

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46. Note that some states have codified the standards for awarding punitive damages. *See, e.g.,* CAL. CIV. CODE §§ 3294-3295 (West Supp. 1989).

47. 310 U.S. 296 (1940).

48. 384 U.S. 195 (1966).

49. *Cantwell,* 310 U.S. at 307-11; *Ashton,* 384 U.S. at 200-01.

50. 382 U.S. 399 (1966).

51. *Id.* at 400 (emphasis added). For a further discussion of *Giaccio,* see *infra* text accompanying notes 96-97.

Therefore, it is not the existence of a label that gives rise to specificity requirements. When the government attempts to take an individual's property, it must comply with the requirements of due process.[52]

Giaccio also shows that the Court has invalidated *common law* elements of a civil penalty on vagueness grounds. Although the Court was faced with a civil statute in *Giaccio,* the Commonwealth argued that statutory interpretation and appropriate jury instructions solved any due process dilemmas. The Court noted, however, that such interpretations and instructions provided little help. The guidance given the jury through interpretation of the statute and instructions from the trial court in determining when to impose prosecution costs was no more definite and predictable than the statute itself. "If used in a *statute* which imposed forfeitures, punishments or judgments for costs, such loose and unlimiting terms would certainly cause the statute to fail to measure up to the requirements of the Due Process Clause . . ." and these terms are just as ineffective when they are used to interpret an already vague statute.[53] Therefore, common law interpretations of a statutory civil penalty are subject to the same vagueness principles as the statute itself. Logically, therefore, a purely common law civil penalty should be subject to scrutiny under the void for vagueness doctrine.

The void for vagueness doctrine cannot be limited to criminal statutes. The Court has applied vagueness standards to both common law and statutory penalties. Further, the vagueness doctrine is applicable to civil penalties as well as criminal penalties. Although punitive damages are typically awarded pursuant to the common law and are civil as opposed to criminal penalties, the void for vagueness doctrine still applies.

The next step in the due process argument is showing that the purposes behind the void for vagueness doctrine and punitive damages warrant its application. The function of the void for vagueness doctrine fully supports its application to punitive awards.

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52. Additionally, in Small Co. v. American Sugar Ref. Co., 267 U.S. 233 (1925), the defendant alleged, as a defense to a contract claim, illegality under a federal statute. The Court held that the civil statute in question was unconstitutionally vague. *Id.* at 242. The Court stated that it was not the existence of a criminal sanction that subjects a law to vagueness standards. Instead, it is "the exaction of obedience to a rule or standard which [is] so vague and indefinite as really to be no rule or standard at all." *Id.* at 239.

53. *Giaccio,* 382 U.S. at 404 (emphasis in original). It can also be argued that the void for vagueness doctrine *has* been applied to punitive damages. The Supreme Court in Gertz v. Welch, Inc., 418 U.S. 323 (1974), struck awards of punitive damages in defamation cases unless the plaintiff can show knowledge of falsity or reckless disregard for the truth. *Id.* at 349-50. The Court reasoned that the discretion given the jury would stifle first amendment rights unless additional protection were provided defendants. *Id.* Although this is a first amendment case, it rings of the void for vagueness doctrine and its protection against arbitrary enforcement of the law. For a further discussion of *Gertz,* see *infra* text accompanying notes 87-91.

One purpose of the void for vagueness doctrine is to require that society not proscribe and penalize certain types of conduct without specifying what is proscribed.[54] If society wishes to penalize particular conduct, the Constitution requires it do so in terms such that reasonable persons will not disagree about what is being punished or how to punish those found to have misbehaved.[55]

Punitive damages serve to punish and deter certain conduct. Punitive damages are not an attempt to compensate victims. Instead, they are society's deliberate attempt to tell people what conduct it finds reprehensible. Such conduct will be punished in an effort to deter others from engaging in similar conduct in the future. Society is thus attempting through punitive damages to proscribe conduct it finds outrageous, not by compensating the victim of the conduct for the harm done him, but by punishing the objectionable actor.[56]

The purpose behind punitive damages requires application of the void for vagueness doctrine. It is not the existence of a criminal law that triggers due process scrutiny. Rather, it is any attempt to deprive an individual of his property.[57] When society attempts to exact "obedience to a rule or standard . . ." through a threat to liberty or property, it must do so in conformity with the due process clause.[58] In awarding punitive damages the state exacts obedience by depriving individuals of their property.[59] Therefore,

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54. *See supra* note 34.

55. Connally v. General Constr. Co., 269 U.S. 385, 391 (1926).

56. In a case presenting the issue of whether to retroactively apply a new rule of law adopted by the Indiana Supreme Court to a contest of punitive damages, the Indiana Court of Appeals stated "in the area of criminal law it has long been recognized to be within the province of the court to apply a new rule of law retrospectively . . . ." Farm Bureau Mut. Ins. Co. v. Dercach, 450 N.E.2d 537, 541 (Ind. Ct. App. 1983). The court went on to note that punitive damages are designed to punish and not to compensate. The court therefore held that the criminal protection extended to the civil defendant. *Id.; see also supra* notes 11-30 and accompanying text.

57. *Giaccio,* 382 U.S. at 400-02; *see supra* notes 50-53 and accompanying text.

58. *Small Co.,* 267 U.S. at 239.

59. Indeed, at least one state supreme court has recognized the punitive remedy is sufficiently similar to criminal punishment to require heightened safeguards under the due process clause. In Travelers Indem. Co. v. Armstrong, 442 N.E.2d 349 (Ind. 1982), the Indiana Supreme Court required proof by clear and convincing evidence, as opposed to the traditional preponderance standard, in order to support a punitive award for breach of contract. *Id.* at 362-63. The court noted plaintiffs have no legal right to punitive damages, and due process requires increased protection of defendants' fundamental property right. *Id.* "[G]iven that the injured party has been fully compensated, it is better to exonerate a wrongdoer from punitive damages, even though his wrong be gross or wicked, than to award them at the expense of one whose error was one that society can tolerate and who has already compensated the victim of his error." *Id.* at 362.

In total, ten states have adopted a clear and convincing evidence standard, five states have passed laws bifurcating punitive and compensatory damage determination, and eight states have constrained the size of punitive damage awards. Goldberg, *Punitives in Peril,* A.B.A. J., Oct. 1989, at 46.

the standards for awarding such damages must comply with specificity requirements under the void for vagueness doctrine.

B. Punitive Damages Standards Do Not Meet Their Due Process Burdens

Most state law standards for determining either the existence or the amount of punitive liability are unconstitutionally vague. The constitutional infirmity lies both in a lack of fair warning to potential defendants and in giving the trier of fact too much discretion in imposing liability.

1. Lack of Notice

Potential defendants are denied fair notice of when and in what amount punitive damages will be assessed. In some states, the standards for determining what conduct is "outrageous," are unconstitutionally vague. More importantly, any state that does not establish a maximum award denies a warning of how much penalty a court may assess.

Defendants can thus argue that the standards for determining what conduct warrants punitive liability are void for vagueness. However, whether this argument will succeed depends on how the jurisdiction describes the proscribed conduct. The Restatement simply and inadequately describes the requisite conduct as "outrageous."[60] Many jurisdictions, however, will only award punitive damages upon some showing of a culpable mental state, such as fraud, gross negligence, willfulness, wantonness, or malice.[61] For example, the district court in *Browning-Ferris* required actual malice, outrageous conduct or a willful and wanton or reckless disregard of the plaintiff's rights.[62] Some state courts facing the due process argument have held common law definitions of such terms are sufficient to provide the public with fair notice.[63]

Despite the existence of such jurisdictions, other states are like the Restatement in penalizing conduct that is not so clearly described by judicial interpretation. For example, an essential element triggering punitive damages for breach of contract in Indiana is that the public interest would be served

60. RESTATEMENT, *supra* note 3, at § 908.

61. D. DOBBS, HANDBOOK ON THE LAW OF REMEDIES: DAMAGES - EQUITY - RESTITUTION § 3.9 (1973).

62. Browning-Ferris Indus. v. Kelco Disposal, 109 S. Ct. 2909, 2913 (1989).

63. *See, e.g.*, Sturm, Ruger & Co. v. Day, 594 P.2d 38, 46 (Alaska 1979) (overruled on different grounds, Dura Corp. v. Harned, 703 P.2d 396, 405 (Alaska 1985)); Toole v. Richardson-Merrell, Inc., 251 Cal. App. 2d 689, 60 Cal. Rptr. 398 (1967).

by the deterrent effect of such an award.[64] This element is far less susceptible to common law gloss than the element of gross negligence.[65]

Whether defendants can challenge the standards for imposing liability depends upon the jurisdiction. In some states, common law definitions answer this challenge. In other states, however, clear definitions do not exist. In challenging punitive damages in the latter type of jurisdiction, defendants must be careful to make and preserve the notice argument.

Moreover, even if the substantive standards are not indefinite enough to deny the public fair warning of potential liability, most punitive damages should be struck for lack of an upper limit on the amount.[66] Potential defendants are denied fair notice of how great the penalty for outrageous conduct may be when there is no limit to financial liability. The void for vagueness doctrine, which serves to prevent states from imposing a penalty when there is doubt about what punishment may be imposed, therefore requires that punitive damage law be voided unless and until the legislatures provide the constitutionally required cap on liability.

The cases of *United States v. Evans*[67] and *United States v. Batchelder*[68] show that due process requires fair notice at the penalty stage of trial. In *Evans,* the Court held a federal statute void for vagueness. Congress intended the statute to criminalize the concealing or harboring of illegal aliens. The Court held the statute void for vagueness because the penalty for breaking the law was too uncertain.[69] The Court relied on an institutional argument.[70] It is the job of the legislature, not the courts, to establish penalties for crimes. Depending on how one read the statute, there were at least three or four possible punishments that Congress could have intended. The government asked the Court to adopt and apply the one reading that most nearly coincided with Congress' intended criminal proscription.[71] This the Court refused to do. "[I]n our system . . . defining crimes and fixing

64. Hibschman Pontiac, Inc. v. Batchelor, 266 Ind. 310, 362 N.E.2d 845 (1977).

65. Indeed, the Indiana Supreme Court later realized this problem. After attempting to harmonize seemingly irreconcilable cases, and noting the standard often resulted in unpredictable results, the court adopted a clear and convincing evidence standard for punitive damages in breach of contract cases. *See* Travelers Indem. Co. v. Armstrong, 442 N.E.2d 349, 358-65 (Ind. 1982).

66. There should be no due process problem with establishing the limit as a multiple of compensatory damages. Compensatory damages must be proved by competent evidence. Defendants should reasonably be able to predict the compensatory liability likely to result from action or inaction. Chief Judge Learned Hand's negligence formula presupposes this predictability. *See* United States v. Carroll Towing Co., 159 F.2d 169 (2d Cir. 1947). If defendants can predict their compensatory liability, they can apply the multiple and predict their punitive liability.

67. 333 U.S. 483 (1948).

68. 442 U.S. 114 (1979).

69. *Evans,* 333 U.S. at 495.

70. *Id.* at 484-85.

71. *Id.*

penalties are legislative, not judicial, functions."[72] Therefore, the Court sent the statute back to Congress to remedy the uncertainty.[73] However, defendants should not rely on *Evans* alone in arguing that punitive damage law is void for vagueness because the *Evans* Court did not expressly address the issue of fair notice.

The *Batchelder* Court, however, cited *Evans* for the proposition that penalties must be described with certainty, and added an interesting twist. The Court faced a federal statute with two overlapping provisions that prohibited convicted felons from receiving firearms. Each provision, however, authorized a different maximum penalty. The Court found no due process problem with leaving violators uncertain of which crime would be charged. In resolving the constitutional issue, however, the Court expanded upon the analysis in *Evans* and indicated due process requires notice at the sentencing stage of punishment. "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."[74]

Although criminal statutes were involved in *Evans* and *Batchelder,* the reasoning of each case indicates the void for vagueness doctrine applies not only to the substantive standards for imposing liability, but also to the amount of liability that may be imposed. It is as much a denial of due process for a state to be indefinite about the maximum applicable penalty as it is for the state to be indefinite about when that penalty may be imposed. With punitive damages, defendants lack all warning of how much penalty may be awarded for outrageous conduct. So long as there is no notice of the maximum applicable penalty, due process is denied.

2. Jury Discretion

The problem of unbridled jury discretion presents an even greater constitutional pitfall for punitive damages. After finding outrageous conduct, juries are given total discretion in determining when to award punitive damages and in what amount.[75]

A typical jury instruction highlights the discretion given the jury:

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72. *Id.* at 486.

73. This case should be a very persuasive precedent against punitive damages with Justices Brennan and Marshall. They maintain that it is not the job of the jury but of "responsible officials" (presumably legislatures) to establish penalties. *See Browning-Ferris,* 109 S. Ct. at 2923 (Brennan, J., concurring). For a further discussion of *Evans,* see *infra* text accompanying notes 98-100.

74. *Batchelder,* 442 U.S. at 123 (citations omitted).

75. *See* D. DOBBS, *supra* note 61, at § 3.9; *see also Browning-Ferris,* 109 S. Ct. at 2923 (Brennan, J., concurring).

> If you should find that the defendant is liable for the plaintiff's injuries, then you have the discretion to award, in addition to compensatory damages, punitive damages. You may award punitive damages if the plaintiff proves that the defendant's conduct was wanton and reckless, not merely unreasonable. An action is wanton and reckless if it is done in such a manner, and under such circumstances, as to reflect utter disregard for the potential consequences of the act on the safety and rights of others. The purposes of punitive damages is [sic] to punish a defendant for shocking conduct and to set an example in order to deter him and others from committing similar acts in the future. Punitive damages are intended to protect the community and to be an expression of the jury's indignation at the misconduct.
>
> The awarding of punitive damages is within your discretion—*you are not required to award them.* Punitive damages are appropriate only for especially shocking and offensive misconduct. If you decide to award punitive damages, you must use sound reason in setting the amount—it must not reflect bias, prejudice, or sympathy toward any party. *But the amount can be as large as you believe necessary to fulfill the purpose of punitive damages.* In this regard, you may consider the financial resources of the defendant in fixing the amount of punitive damages and you may impose punitive damages against one or more of the defendants, and not others, or against more than one defendant in different amounts.[76]

A jury deliberating under this instruction proceeds with nearly unlimited freedom to decide the defendant's fate. The jury is not obligated to award exemplary damages, even though the elements of wantonness and recklessness are found. Moreover, other than consideration of the defendant's financial resources, the jury is given no guidance in setting the amount of an award. The amount can be as large as the jury deems necessary.

One can see the constitutional problems from such absolute discretion even more clearly in the line of cases limiting the states' ability to impose capital punishment. Due process is denied when too much discretion is given the jury in imposing the death penalty.

a. The Death Penalty Cases

The due process clause has not always protected against the arbitrary imposition of capital punishment. In *McGautha v. California,*[77] the Supreme Court faced a due process challenge to the death penalty. The issue was whether leaving the decision to impose the death penalty to the jury's sole discretion violates due process.[78] The Court held that the due process clause did not serve to limit the totally discretionary imposition of such a penalty.[79]

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76. JURY INSTRUCTIONS, *supra* note 45.
77. 402 U.S. 183 (1971).
78. *Id.* at 185.
79. *Id.* at 207-08.

Based on *McGautha* alone, there would be no argument that unbridled jury discretion in penalty decisions violates the due process clause.

McGautha has been implicitly overruled, however, by *Gardner v. Florida.*[80] In *Gardner,* the trial judge considered confidential information which was not admitted into evidence, was not subject to challenge by the defendant, and was not part of the official record. Relying on this evidence, the judge disregarded the jury's recommendation of leniency in a capital case.[81] The Supreme Court held the imposition of death under such circumstances is unconstitutional.[82] Justice Stevens noted that if such a penalty were allowed to stand, capital punishment would become arbitrary. Such a determination would place too much discretion with the trial judge and would allow little opportunity for the appellate court to determine if the discretion had been abused.[83]

The Court decided *Gardner* under the due process clause, not the cruel and unusual punishment clause.

> [I]t is now clear that the sentencing process, as well as the trial itself, must satisfy the requirements of the Due Process Clause. . . . The defendant has a legitimate interest in the character of the procedure which leads to the imposition of sentence even if he may have no right to object to a particular result of the sentencing process.[84]

After *Gardner,* the due process clause protects against arbitrary sentencing in capital cases. Yet, *McGautha* held arbitrariness in sentencing inflicted no due process violations. The reasoning supporting *Gardner* is inconsistent with and in opposition to the Court's holding in *McGautha.* The only possible conclusion from *Gardner* is that the fifth and fourteenth amendments serve to limit death penalty sentencing when too much discretion is given the trier of fact in imposing capital punishment.

b. Arbitrary Penalties in Other Settings

The reasoning of *Gardner* is not limited to death penalty cases. Although the Court has noted that "death is a different kind of punishment,"[85] there

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80. 430 U.S. 349 (1977) (plurality opinion). The analysis adopted in *McGautha* was initially undercut by Furman v. Georgia, 408 U.S. 238 (1972) (per curiam). In *Furman,* the same challenge to unbridled jury discretion was made; however, the challenge was based on the cruel and unusual punishment clause. The Supreme Court held that the penalty of death under such circumstances violates the eighth amendment. The Justices, feeling "imprisoned in the *McGautha* holding," found that such a discretionary imposition of death is unconstitutional. *Id.* at 256-57 (Douglass, J., concurring); *id.* at 274-77 (Brennan, J., concurring); *id.* at 309-10 (Stewart, J., concurring).

81. *Gardner,* 430 U.S. at 351-54.

82. *Id.* at 351.

83. *Id.* at 360-61.

84. *Id.* at 358 (citations omitted).

85. *Id.* at 357 (citation omitted).

is simply no reason why the principle that one should not be subject to the jury's unbridled discretion when being punished should be limited to capital punishment settings.

Due process is not an inflexible standard. When the penalty is death, due process requires greater protections because of the gravity and finality of capital punishment. Therefore, states must specifically outline aggravating circumstances that will qualify a murderer for the death penalty.[86] However, due process should protect against arbitrariness at the sentencing stage even when a jury is imposing a lesser penalty. When the penalty is death, procedural safeguards will be strict because of what is at stake. With a monetary penalty, the safeguards need not be so strict because the defendant does not face such a grave risk. However, the safeguards should be precise enough to prevent the imposition of an arbitrary penalty at the whim of a jury.

The Supreme Court has implicitly supported this view in the arena of punitive damages. The Supreme Court has noted the threat from uncontrolled jury discretion in awarding exemplary damages, and has held such damages uncollectible in certain settings.

In *Gertz v. Robert Welch, Inc.*,[87] the Court held states may not permit recovery of punitive damages in defamation suits when liability is not based at least on knowledge of falsity or reckless disregard for truth.[88] The Court felt the jury's uncontrolled discretion would lead to the punishment of unpopular opinions and would lead to awards in unpredictable amounts. Therefore, first amendment freedoms would be squelched.[89] The same problem does not exist when a jury is awarding compensatory damages because the jury is given "appropriate instructions" and an award must be "supported by competent evidence."[90]

Although *Gertz* is a first amendment case, the decision is based on essentially a procedural constitutional problem. If protections against arbitrary juries existed, then first amendment freedoms could not be curtailed by punitive damages. However, juries *can* be arbitrary in making exemplary awards. Due process questions are posed when arbitrariness allows a trier of fact to tread upon constitutionally protected rights.[91] Because traditional punitive damages would allow juries to tread upon the first amendment, plaintiffs must demonstrate a higher degree of culpability in order to collect punitive damages. *Gertz* involved the freedom of expression, but the constitutional shortcoming was procedural.

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86. *See* Gregg v. Georgia, 428 U.S. 153 (1976) (plurality opinion).
87. 418 U.S. 323 (1974).
88. *Id.* at 349.
89. *Id.* at 349-50.
90. *Id.* at 350.
91. *See supra* note 34 and its discussion of overbreadth as a void for vagueness protection.

Additionally, the Supreme Court has denied the collection of punitive damages under a federal statute. In *Electrical Workers v. Foust*,[92] the Court considered whether an employee could collect punitive damages from his union for breach of the duty of fair representation under the Railway Labor Act.[93] The Court noted that the broad discretion given juries under the statute would result in unpredictable and sizeable awards which would deplete union treasuries,[94] and proceeded to hold that such damages were not collectible.[95]

The Court has also voiced its concern over statutes that give the jury too much discretion in doling out a civil penalty. In *Giaccio v. Pennsylvania*,[96] the Court declared unconstitutional a Pennsylvania statute that allowed juries too much discretion. The statute permitted juries to assess prosecution costs against a criminal defendant who had been acquitted whenever they felt it appropriate to do so. There was no requirement that the costs be imposed on every acquitted defendant, nor was the jury given any significant guidance in deciding when to impose the civil penalty. The Court invalidated the statute and stated "the . . . Act is invalid under the Due Process Clause because of vagueness and the absence of any standards sufficient to enable defendants to protect themselves against arbitrary and discriminatory impositions of costs."[97]

Juries in punitive damage cases are given far-reaching discretion similar to that afforded by the unconstitutional statute in *Giaccio*. The jury is not told it must always award punitive damages when it finds outrageous conduct, nor is the jury given any significant guidance in deciding which cases of outrageous conduct are more deserving of an award than others. When a jury is given too much discretion in deciding when to punish, the penalty treads impermissibly upon due process.

The Court has further noted that penalty determination is the job of the legislature and not the courts. *United States v. Evans*[98] is a statutory interpretation case with due process ramifications. Congress was ambiguous about what penalty to impose for different violations of the Immigration Act of 1917. The Court refused to adopt the government's position of interpreting the statute to punish conduct that Congress unquestionably meant to punish. Instead, the Court, placing the onus on Congress to clarify the standards, stated, "separate offenses . . . might require, in any sound

92. 442 U.S. 42 (1979).
93. *Id.*
94. *Id.* at 50.
95. *Id.* at 52.
96. 382 U.S. 399 (1966). For a discussion of other aspects of *Giaccio*, see *supra* notes 50-53 and accompanying text.
97. *Id.* at 400-02.
98. 333 U.S. 483 (1948). For another discussion of *Evans*, see *supra* notes 67-73 and accompanying text.

legislative judgment, very different penalties . . . . That is essentially the sort of judgment legislatures rather than courts should make."[99] By the same token, the absence of standards in determining punitive damages makes such penalties subject to extremely vague and arbitrary enforcement. "Separate offenses" worthy of very different penalties might receive the same punishment. Worse yet, the more culpable or wealthier actor may be punished substantially less than the less culpable actor.

As in *Evans,* courts may not be asked to proceed blindly. Justices Brennan and Marshall seem persuaded by this argument. They imply it is the job of legislatures, rather than juries, to establish a range of penalties and standards for the determination of penalty amounts.[100]

c. Due Process Requirements Under *Mathews v. Eldridge*

The existing cases concerning penalty determination—whether it be death, incarceration, or monetary damages—indicate the due process clause protects against the arbitrary imposition of punishment by a jury. The due process clause strictly limits the jury's ability to arbitrarily impose the death penalty. The Supreme Court has recognized fatal constitutional deficiencies in procedural measures that foster arbitrariness in punitive damage determinations. Further, the Court has not hesitated to utilize the due process clause when a jury is given too much discretion in choosing when to impose a civil penalty. The Court has noted that it is the legislature's job to establish punishment. Thus, due process requirements against unbridled jury discretion at the punishment stage of trial are not limited to death penalty cases. The due process clause protects against arbitrariness in any setting.

The remaining issue is whether procedures currently employed in punitive damage settings adequately fulfill the due process burden. The Supreme Court opinion in *Mathews v. Eldridge*[101] provides guidance in answering this question.

In *Mathews,* the plaintiff had collected Social Security disability benefits for a number of years. The state agency charged with monitoring his medical condition determined he was neither disabled nor entitled to Social Security benefits. The plaintiff filed suit in federal court, challenging the termination of benefits prior to an evidentiary hearing on disability. The

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99. *Id.* at 489-90.

100. "I for one would look longer and harder at an award of punitive damages based on such skeletal guidance than I would at one situated within a range of penalties as to which responsible officials had deliberated and then agreed." *Browning-Ferris,* 109 S. Ct. at 2923 (Brennan, J., concurring).

101. 424 U.S. 319 (1976). For an overview of *Mathews* as applied to punitive damages, see generally Wheeler, *The Constitutional Case for Reforming Punitive Damages Procedures,* 69 VA. L. REV. 269 (1983).

Supreme Court rejected this challenge and held that due process did not require such adjudicatory process.[102]

The Court, after noting that due process is a flexible standard that changes with the times and the situation,[103] adopted a balancing test for determining due process requirements.[104] To determine whether existing procedural safeguards satisfy due process in a given situation, three elements must be examined: first, the private interests that will be affected by official action; second, the risk of erroneous deprivation of such private interests through existing procedures and protections as compared to the probable value of substitute or additional procedures or protections; and third, the state's interests, including the benefits accruing to the state from existing procedures, and the burdens of requiring additional procedures.[105]

The *Mathews* balancing test should be applied to determine whether current procedures in punitive damage determination satisfy due process. Courts have traditionally looked to *Mathews* in determining when due process requires that an individual receive an adjudicatory hearing.[106] However, if courts look to *Mathews* to determine when someone is entitled to adjudicatory process, they should also look to *Mathews* to determine what procedures are required to render the hearing "adjudicatory." Indeed, the Supreme Court has used *Mathews* to decide what safeguards are "due" in such a hearing.

In *Walters v. National Association of Radiation Survivors,*[107] the Court used *Mathews* to determine whether limiting the fee of an attorney who represents a veteran seeking benefits denies the veteran due process by denying him the right to retain counsel of his choice.[108] If it is appropriate for a court to use *Mathews* in determining what safeguards are required at an adjudicatory hearing, it should also be appropriate for a court to use *Mathews* in determining what safeguards are required at a judicial hearing or trial. In both cases, the court must decide the same issue: whether sufficient safeguards exist to protect against arbitrariness. Logic requires that courts answer this question by applying the same test.[109]

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102. *Mathews,* 424 U.S. at 323-26. "Adjudicatory process" is a term of art meaning a "[m]ethod of adjudicating factual disputes; used generally in reference to administrative proceedings in contrast to judicial proceedings." BLACK'S LAW DICTIONARY 40 (5th ed. 1979).

103. *Mathews,* 424 U.S. at 334.

104. *Id.* at 335.

105. *Id.*

106. *See, e.g.,* Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532, 537 n.2 (1985); Mackey v. Montrym, 443 U.S. 1, 10-11 (1979); Board of Curators v. Horowitz, 435 U.S. 78, 86 n.3 (1978).

107. 473 U.S. 305 (1985).

108. *Id.* at 312-13.

109. For an overview of *Mathews,* see generally J. NOWAK, R. ROTUNDA & J. YOUNG, CONSTITUTIONAL LAW §§ 13.8-.9 (3d ed. 1986).

The *Mathews* balancing test indicates existing protections in punitive damage cases do not meet the requirements of due process. The jury has total discretion in determining when and in what amount to award punitive damages. Under *Mathews* the risk of arbitrary decisions is simply too grave.

First, the private interests at stake are great. Both the plaintiff and the defendant in a punitive damage case have a constitutionally-protected interest: property. The defendant may be forced to relinquish his property pursuant to the court's award. Alternatively, the court may choose to deny the plaintiff punitive relief. The plaintiff would therefore be deprived of his property interest in a chose in action.[110] The fifth and fourteenth amendments require that property not be taken without due process of law.[111] The private interests, when viewed from this light, are great.

Second, the risk of erroneous deprivation of these private property interests is tremendous in some jurisdictions. Courts typically instruct the jury that it need not award punitive damages even though it finds the essential elements for such liability. Rather, the jury can award any amount it believes necessary to serve the purposes behind punitive damages.[112] Some defendants may be required to pay large sums of money when the purpose of punishing and deterring outrageous conduct does not warrant such measures. Concurrently, some plaintiffs may be denied these large sums of money when they should have received them. Such erroneous decisions will naturally result from an indefinite standard for arriving at an amount of liability. Moreover, because the decisions of when and in what amount to award punitive damages are typically in the jury's discretion, and because the basis for the jury's decision is not a part of the official record, appellate review is limited.

The risk of an erroneous and unreviewable result would be greatly reduced by establishing more specific standards for assessing damage awards. Standards could be established that would base the size of an award on specific characteristics of the defendant or the defendant's conduct. For example, larger awards could be levied on wealthy corporate defendants to achieve meaningful deterrent effects. Conduct causing personal injury or death could be punished more severely than conduct causing financial harm. States could draft the standards so that the conduct most deserving of punishment would be punished the most. Regardless of what the legislative judgments may be, due process requires standards that are clear such that reasonable people will not differ as to their application. If courts require legislatures to provide clear standards, it is much less likely that juries will punish or not punish defendants when the purposes of punitive damages require a different result.

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110. *See generally* BLACK'S LAW DICTIONARY 1096 (5th ed. 1979).
111. U.S. CONST. amend. V & amend. XIV.
112. *See* JURY INSTRUCTIONS, *supra* note 45.

Third and finally, a consideration of the state's interests lends support to the argument that due process requires limits on the jury's discretion. The government's interests in punitive damages are punishment and deterrence. The burden of drafting more specific standards for determining awards does not seem great in light of the enhanced deterrent effects society would enjoy. It is difficult to get a deterrent effect when defendants do not understand how a court will decide punishment. However, if defendants were specifically informed before engaging in outrageous conduct that they would be financially ruined by the ensuing litigation, rational defendants would not engage in the conduct. Thus, the "burden" of enacting standards to curb arbitrary decisions should not harm the state's interests in punitive damages. Rather, it should advance those very interests.

Under *Mathews,* courts should invoke the due process clause of the fifth and fourteenth amendments to invalidate punitive damage law when it allows unbridled jury discretion. As long as the jury has such discretion in determining damages, the risk of erroneous deprivation of the constitutionally-protected private interest in property is too great. If legislatures adopted more specific standards, the risk of an erroneous deprivation would be vastly reduced. By forcing legislatures either to reform punitive damage law or forgo its benefits, the courts would not harm state or federal interests in punishment and deterrence. On the contrary, those interests would be materially advanced.

C. *Legislative Action*

Legislative action is necessary to mend the constitutional infirmities of punitive damage law. To eliminate the lack of fair warning, legislatures must impose a maximum limit on punitive awards.[113] To deal with the problem of unbridled discretion, legislatures must give juries standards for determining the occasions for and the amount of exemplary damages.

It does not necessarily follow, however, that damage awards need be unduly limited by legislative action. Legislatures are free to determine that certain conduct by certain defendants goes beyond the pale and should be absolutely deterred. For example, if a corporate decision to risk hundreds of lives based on a cost-benefit analysis fits within the category of absolutely unacceptable behavior, total deterrence could be accomplished without constitutional infirmity by setting the maximum penalty equal to the corporate defendant's gross revenue for the previous fifty years.[114]

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113. And in those states where the substantive standards for liability are arguably unclear, more specific standards are needed. *See supra* note 59.

114. Perhaps a statute drawn along these lines would cut too broadly, because many activities which society encourages will risk human life based on some modified form of cost-benefit

Legislative action will result in defendants being able to predict what penalty will be imposed for misconduct. Such predictability has long coincided with the generally acceptable deterrent effects of the criminal law. There is no good reason why defendants in punitive damage cases are entitled to less.

V. DUE PROCESS: THE BETTER ALTERNATIVE

Although *Browning-Ferris* has left only the due process clause for defendants to wield against punitive damages, the due process clause was the proper weapon all along. The due process clause is much more effective than the excessive fines clause at solving the essential social problems with punitive damages, which were noted by Justice O'Connor in her *Browning-Ferris* dissent.

Justice O'Connor observed two major problems with punitive damages. First, awards are skyrocketing. Second, the unpredictability of huge punitive awards is curbing research and development in many industries.[115] The

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analysis. For instance, all automobiles, not just the Pinto, risk lives. However, as a society we do not feel that this risk outweighs the benefits that automobiles bring to society. Similarly, the building of skyscrapers and even the sale of aspirin risk lives.

Society has indicated, though, that these activities are not to be discouraged, but encouraged. Thus a statute imposing the maximum penalty on a corporation because the defendant has risked human life based on a cost-benefit analysis would probably be too broad. Society is concerned when corporations under-value human life and over-value the benefits accruing from an activity. It would pose no problem to narrow adequately the scope of the penalty statute, however. For instance, the maximum penalty could be imposed upon a corporation that knowingly risks lives by selling a product which could have been feasibly designed so as reasonably to prevent the risk. A feasible design change might be any change that could be implemented without significantly altering the price of the product. Risking a human life would not necessarily include the risk of lives lost due to the blatant and knowing misuse of the product by the consumer. Such a statute would bring the makers of the Ford Pinto within its scope, but would exclude the makers of Bayer Aspirin.

115. *Browning-Ferris Indus. v. Kelco Disposal,* 109 S. Ct. 2909, 2924 (1989) (O'Connor, J., concurring in part and dissenting in part). Justice O'Connor notes that as recently as ten years ago, the largest punitive award affirmed by an appellate court in a products liability case was $250,000. Today, awards as great as $40 million have been sustained. The threat of these huge awards, she claims, has curbed development in the prescription drug industry, the airline industry, and the automobile industry. *Id.*

There is solid evidence supporting Justice O'Connor's observations on these industries. Statistics show a notable increase during the 1980's in both the number of punitive awards and the percentage of cases in which punitive damages were awarded. In both Cook County, Illinois, and San Francisco County, California, the percentage of cases in which punitive damages were awarded during the period 1980 through 1984 was nearly double the percentage for the years 1975 through 1979. M. PETERSON, S. SARMA & M. SHANLEY, PUNITIVE DAMAGES: EMPIRICAL FINDINGS 9 (1987). Indeed during 1980 through 1984, punitive damages were awarded to plaintiffs in roughly one-third of those cases finding compensatory liability in commercial disputes in San Francisco County. *Id.* at 11.

There is also evidence that the size of individual punitive damage awards has been growing. The total amount of money awarded as punitive damages during 1980 through 1984 in Cook County, Illinois, increased by 800 percent, adjusted for inflation, over that awarded during 1975 through 1979. *Id.* at 14-15. During this same period, the median award tripled and the average award more than quadrupled. *Id.* at 17. Because the average is growing more quickly than the median, these statistics indicate the size of the largest awards is growing. *Id.*

excessive fines argument would have done nothing to solve these problems. Courts would have grappled with the concept of "excessiveness." Although there was some commentary on how this term might be defined,[116] there was no way to define it in any manner allowing reasonable predictability. The problems Justice O'Connor noted would have gone unsolved by the eighth amendment.

However, the due process clause sufficiently solves the problems that Justice O'Connor noted. First, the size of awards would no longer be of concern. If defendants are told what conduct will give rise to punitive liability, what the jury will consider in assessing an award, and what the maximum award will be, society need not be concerned when, in the face of such notice, a defendant engages in reprehensible conduct and receives the maximum penalty. The skyrocketing liability problem would be placed within the control of the defendants themselves. A party with control over its problem should not be heard to complain of it.

Second, there would be no problem with research and development under the due process approach. If businesses were aware of what conduct would warrant punitive damages and what the jury would consider in assessing punitive damages, proper research and development would not be adversely affected. Businesses would know whether they were engaging in marginal conduct, and would only curb development in areas of unacceptable conduct where they risk potential liability for punitive damages.

The better challenge to punitive damages has always been the due process clause. It stands on more solid ground substantively, and it provides a better solution to the problems facing business and industry. With a majority of the Court waiting to hear this argument, constitutional challenges to punitive damages have not been set back by *Browning-Ferris.* Instead, the proper arrow may be drawn from the constitutional quiver for an attack that appears stronger than ever.

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116. *See* Comment, *Punitive Damages and the Eighth Amendment: An Analytical Framework for Determining Excessiveness,* 75 CALIF. L. REV. 1433 (1987).