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## Can Punitive Damages Standards Be Void for Vagueness?

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# NOTES

## CAN PUNITIVE DAMAGES STANDARDS BE VOID FOR VAGUENESS?

Courts have long questioned the propriety of punitive damages.<sup>1</sup> Yet, as criticism mounts,<sup>2</sup> juries continue to award such damages in amounts that are nothing short of alarming.<sup>3</sup> Some commentators, abandoning policy arguments, have taken up the Constitution as a shield by contending that these damages may vi-

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<sup>1</sup> See *Day v. Woodworth*, 54 U.S. (13 How.) 363, 371 (1851) ("We are aware that the propriety of this doctrine has been questioned . . . ."); *McKeon v. Citizens' Ry. Co.*, 42 Mo. 79, 88 (1867) ("very questionable, upon principle and authority, whether damages for punishment can be given in any civil action"); *Spokane Truck & Dray Co. v. Hoefer*, 2 Wash. 45, 50, 25 P. 1072, 1075 (1891) ("doctrine of punitive damages is unsound in principle, and unfair and dangerous in practice").

Punitive damages "are not compensation . . . [but] are private fines levied by civil juries to punish reprehensible conduct and to deter its future occurrence." *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 350 (1974). There are several theories as to why English courts began to allow punitive damages in the eighteenth century, including their reluctance to interfere with excessive damages awards for injuries marked by malice, oppression, or fraud. 1 J. LEE & B. LINDAHL, *MODERN TORT LAW* § 21.01, at 724-28 (1988). In most jurisdictions, recovery of punitive damages still requires a wrongful act committed in "circumstances of *aggravation* such as wilfulness, wantonness, malice or maliciousness." 2 S. SPEISER, C. KRAUSE & A. GANS, *THE AMERICAN LAW OF TORTS* § 8:45, at 806-08 (1985).

<sup>2</sup> See, e.g., *Smith v. Wade*, 461 U.S. 30, 57-59 (1983) (Rehnquist, J., dissenting) (criticizing liberality with which juries award punitive damages); *Ellis, Fairness and Efficiency in the Law of Punitive Damages*, 56 S. CAL. L. REV. 1, 76 (1982) (vague standards for determining punitive awards coupled with juror discretion "extend liability far beyond that justified by fairness"); *Ghiardi, The Case Against Punitive Damages*, 8 FORUM 411, 414 (1972) (punitive damages represent punishment, which is best left to criminal courts); *Mahoney, The Courts Are Curbing Creativity*, N.Y. Times, Dec. 11, 1988, § 3 (Business), at 3, cols. 1-2 (suggesting fear of punitive damages prevents marketing of beneficial products).

<sup>3</sup> See, e.g., *Grimshaw v. Ford Motor Co.*, 119 Cal. App. 3d 757, 174 Cal. Rptr. 348 (1981) (reduction of \$125 million award to \$3.5 million upheld); *Ford Motor Co. v. Stubblefield*, 171 Ga. App. 331, 319 S.E.2d 470 (1984) (\$8 million exemplary award upheld); *Texaco, Inc. v. Pennzoil, Co.*, 729 S.W.2d 768 (Tex. Ct. App. 1987), cert. dismissed, 108 S. Ct. 1305 (1988) (\$3 billion award remitted to \$1 billion).

olate the excessive fines clause of the eighth amendment,<sup>4</sup> the double jeopardy provision of the fifth amendment,<sup>5</sup> and the criminal procedure guarantees of the due process clause.<sup>6</sup>

Recently, in *Bankers Life & Casualty Co. v. Crenshaw*,<sup>7</sup> the Supreme Court considered constitutional challenges to a \$1.6 million punitive damages award, but ultimately found that the issues had been insufficiently raised below<sup>8</sup> and declined to resolve them.<sup>9</sup> Justice O'Connor, joined by Justice Scalia, issued a concurrence in

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<sup>4</sup> See Hughes, *The Excessive Fines Clause—Its Role in the Constitutional Attack on "Bad Faith" Punitive Awards*, 54 DEF. COUNS. J. 252 (1987). "The Excessive Fines Clause of the Eighth Amendment probably lends itself to the most logical presentation and development in cases where a large verdict . . . has been returned." *Id.* at 261. Other commentators have viewed the Excessive Fines Clause as a ceiling for punitive awards. See Jeffries, *A Comment on the Constitutionality of Punitive Damages*, 72 VA. L. REV. 139 (1986); see also Note, *The Constitutionality of Punitive Damages Under the Excessive Fines Clause of the Eighth Amendment*, 85 MICH. L. REV. 1699 (1987) (excessive fines clause applicable to punitive liability notwithstanding civil or criminal nature of underlying offense); Comment, *Punitive Damages and the Eighth Amendment: An Analytical Framework for Determining Excessiveness*, 75 CALIF. L. REV. 1433 (1987) (principle of proportionality encompassed in eighth amendment mandates limitation on punitive damages).

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

<sup>5</sup> See Note, *Damages—Punitive Damages and Double Jeopardy*, 21 NOTRE DAME L. REV. 206 (1946). "[I]t would seem unconscionable to inflict criminal damages . . . and then inflict civil damages, in punitive ways, to an extent that would persist if [the defendant] were not punished criminally." *Id.* at 207. Indiana long ago accepted this argument in *Taber v. Hutson*, 5 Ind. 322 (1854), holding that punitive damages are not recoverable in a tort action if the defendant is subject to possible criminal prosecution. *Id.* at 325-27. But see McLemore, *Punitive Damages and Double Jeopardy: A Critical Perspective of the Taber Rule*, 56 IND. L.J. 71, 73 (1980) (arguing Taber should be reexamined). The Taber rule has been superseded by statute. IND. CODE ANN. § 34-4-30-2 (Burns 1986); see *Gosnell v. Indiana Soft Water Serv.*, 503 N.E.2d 879, 880 (Ind. 1987).

The fifth amendment provides in pertinent part: "[N]or shall any person be subject for the same offence to be twice put in jeopardy of life or limb . . ." U.S. CONST. amend. V.

<sup>6</sup> See, e.g., Wheeler, *The Constitutional Case for Reforming Punitive Damages Procedures*, 69 VA. L. REV. 269 (1983). "[A]lthough punitive damages actions are nominally civil, the more specific criminal procedural safeguards prescribed by the fourth, fifth, and sixth amendments might . . . apply." *Id.* at 272.

<sup>7</sup> 108 S. Ct. 1645 (1988).

<sup>8</sup> *Id.* at 1649-50. The defendant had not raised its excessive fines clause and due process clause claims before the trial court but argued that these issues had been raised in its petition for rehearing before the Mississippi Supreme Court. *Id.* at 1649. The Supreme Court rejected this argument because the assertions that the award "was clearly excessive" and "violated[d] constitutional principles" were too general to preserve a constitutional challenge. *Id.* at 1650.

<sup>9</sup> *Id.* The Court indicated that it is an unsettled question whether, under its certiorari jurisdiction, the Court can review claims not raised in state court. *Id.* at 1651. The Court observed that even if the requirement that the claim be raised in state court is merely prudential, declining review still is proper. *Id.*

which she agreed that the Court should not reach the constitutional issues.<sup>10</sup> The concurrence maintained, however, that the jury's "standardless discretion to determine the severity of punishment appears inconsistent with due process."<sup>11</sup> Recounting that criminal sentencing provisions may be so vague as to raise constitutional objections, Justice O'Connor argued that the defendant often is without warning as to the substantial punitive damages liability in which his conduct could result.<sup>12</sup>

Two weeks after deciding *Crenshaw*, the Court denied certiorari in eight cases involving various constitutional challenges to punitive damages awards,<sup>13</sup> thus indicating a desire that these issues develop further in the lower courts.<sup>14</sup> Nevertheless, only six months later the Court agreed to hear a challenge claiming that a \$6 million punitive award for tortious interference with contractual relations violated the excessive fines clause.<sup>15</sup> Regardless of how

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<sup>10</sup> *Id.* at 1656 (O'Connor, J., concurring). Justice O'Connor asserted that the Court had the power to review the claim but that "it would not be prudent to do so." *Id.* (O'Connor, J., concurring).

<sup>11</sup> *Id.* (O'Connor, J., concurring).

<sup>12</sup> *Id.* (O'Connor, J., concurring).

<sup>13</sup> See Taylor, *Court Fails to Consider Big Awards*, N.Y. Times, June 1, 1988, at D1, col. 3. Justices O'Connor and Kennedy would have granted certiorari in two of the cases. See *Ohio Casualty Ins. Co. v. Downey Savings & Loan Ass'n*, 108 S. Ct. 2023 (1988); *Atlantic Richfield Co. v. Nielsen*. 108 S. Ct. 2023 (1988).

<sup>14</sup> Constitutional attacks on punitive damage awards based on the vagueness doctrine have sometimes been dismissed in a mere sentence or short paragraph. See, e.g., *Textile Workers Pension Fund v. Standard Dye & Finishing Co.*, 725 F.2d 843, 856 (2d Cir. 1984) ("other vagueness claims are totally without merit and do not warrant discussion"); *Malandrino v. Merrill Lynch, Pierce, Fenner & Smith Inc.*, 703 F.2d 1152, 1173 (10th Cir. 1981) ("Supreme Court has clearly recognized that [the Constitution is not a general bar to punitive awards] and we are not persuaded that any basis for a departure from this view is demonstrated"), *cert. denied*, 464 U.S. 824 (1983); *Vollert v. Summa Corp.*, 389 F. Supp. 1348, 1350 (D. Haw. 1975) ("this argument does not rise to constitutional dimensions"); *Sturm, Ruger & Co. v. Day*, 594 P.2d 38, 46 (Alaska 1979) ("We find these standards to be sufficient in order to meet a void-for-vagueness challenge."), *cert. denied*, 454 U.S. 894 (1981).

<sup>15</sup> See Greenhouse, *Supreme Court Agrees to Weigh Putting Limits on Damage Awards*, N.Y. Times, Dec. 6, 1988, at A1, col. 1. The United States Court of Appeals for the Second Circuit had upheld the award of \$6 million in punitive damages, even though the jury had awarded only \$51,146 in compensatory damages for the underlying state claim. See *Kelco Disposal, Inc. v. Browning-Ferris Indus.*, 845 F.2d 404, 406-07 (2d Cir.), *cert. granted*, 109 S. Ct. 527 (1988). Noting that the punitive damages amounted to about .6% of the defendant's net worth and less than 5% of its 1986 net income, the court found the size of the award commensurate "with punitive damages levied in other jurisdictions against large corporations." *Id.* at 410. Addressing the defendant's excessive fines clause challenge, the court concluded: "Even if the eighth amendment does apply to this nominally civil case we do not think the damages here were so disproportionate as to be cruel, unusual, or constitu-

the Court rules, its forthcoming decision is likely to spring Justice O'Connor's vagueness concerns to the center of the growing debate concerning the constitutionality of punitive damages awards.<sup>16</sup>

This Note will explore the possibility that state punitive damages standards may violate the constitutional requirement of definiteness embodied in the vagueness doctrine. Part One will examine the manner in which the Supreme Court uses the vagueness concept to protect constitutional rights. Part Two will consider the threshold concerns in applying vagueness analysis to punitive damages standards. Finally, the discussion in Part Three will focus on determining which elements of the punitive damages award are most susceptible to a vagueness attack.

## I. USE OF THE VAGUENESS DOCTRINE

Commentators have rarely challenged the theoretical underpinnings of the void-for-vagueness concept.<sup>17</sup> Rather, most discussion has focused on the Supreme Court's use of the vagueness doctrine. The doctrine developed during the heyday of laissez-faire economics, just in time to strike down state economic regulation.<sup>18</sup> Then, as protection of first amendment rights became a particular concern of the Court, vagueness was invoked to invalidate laws inhibiting free expression.<sup>19</sup> In this regard, the Court has noted that

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tionally excessive." *Id.* (citations omitted).

<sup>16</sup> The Supreme Court may rule that the excessive fines clause is inapplicable due to the civil nature of punitive damages. *Cf. Ingraham v. Wright*, 430 U.S. 651, 664 (1977) ("An examination of the history of the [eighth amendment] and the decisions of this Court construing the proscription against cruel and unusual punishment confirms that it was designed to protect those convicted of crimes."). The vagueness doctrine then would provide a logical alternative for constitutional attack because the Supreme Court has held it applicable to civil cases. See *infra* notes 31-32 and accompanying text. On the other hand, if the Court declares that the eighth amendment provides a measure of protection from punitive damages, it is suggested the vagueness doctrine provides a means—grounded in a history of constitutional adjudication—for furthering that protection.

<sup>17</sup> One commentator has attacked the "notice" branch of the vagueness doctrine, suggesting that the formality of the notice requirement does not place an affirmative obligation on government to apprise people of the content of laws and, therefore, is less effective than the analogous constitutional requirements in civil litigation. See Jeffries, *Legality, Vagueness, and the Construction of Penal Statutes*, 71 VA. L. REV. 189, 206-07 (1985). As a result, this commentator suggested that the notice requirement of the vagueness doctrine is "not structured to achieve actual notice of the content of the penal law." *Id.* at 207.

<sup>18</sup> See Note, *The Void-For-Vagueness Doctrine in the Supreme Court*, 109 U. PA. L. REV. 67, 74 n.38 (1960). "The void-for-vagueness doctrine was born in the reign of substantive due process and throughout that epoch was successfully urged exclusively in cases involving regulatory or economic-control legislation." *See id.*

<sup>19</sup> See, e.g., *Coates v. City of Cincinnati*, 402 U.S. 611 (1971) (criminal statute prohibit-

the need to protect free speech raises the level of scrutiny employed in determining vagueness.<sup>20</sup> Thus, it is suggested, constitutional policy distinct from vagueness concerns can affect application of the vagueness doctrine, and the shift in its application from economic freedoms to first amendment freedoms suggests the process is flexible.

Punitive damages awards implicate a variety of constitutional policies.<sup>21</sup> To date, only first amendment concerns have been held so substantial as to render such awards unconstitutional.<sup>22</sup> But should the Court decide that the freedoms inherent in other guarantees—for example, protection against excessive fines<sup>23</sup>—are in need of more active protection, it is submitted that the vagueness doctrine may be invoked to require a higher degree of definiteness in punitive standards. Specifically, punitive damages awards could be reversed on constitutional grounds where the guidelines for determining the amount are particularly uncertain. Such a holding becomes more likely as the Court's distaste for punitive damages grows.<sup>24</sup>

## II. APPLYING THE VAGUENESS DOCTRINE TO PUNITIVE DAMAGES STANDARDS

The vagueness doctrine is an outgrowth of procedural due pro-

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ing public assembly); *Winters v. New York*, 333 U.S. 507 (1948) (banning magazine publication); *Herndon v. Lowry*, 301 U.S. 242 (1937) (forbidding solicitation of members for political party).

<sup>20</sup> See *Smith v. California*, 361 U.S. 147, 151 (1959). In *Smith*, Justice Brennan stated that "stricter standards of permissible statutory vagueness may be applied to a statute having a potentially inhibiting effect on speech; a man may the less be required to act at his peril here, because the free dissemination of ideas may be the loser." *Id.*

<sup>21</sup> See *supra* notes 4-6 and accompanying text. These policies include protection of defendants from excessive fines, double jeopardy, and denial of criminal procedure rights. *Id.*

<sup>22</sup> See *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 350 (1974). In *Gertz*, the Supreme Court held that the first amendment restricts a private individual who sues in defamation from recovering damages beyond those for actual injury. *Id.* The Court reasoned that the states' interest in defamation actions did not extend beyond compensating plaintiffs, and concluded that the private plaintiff must prove actual malice in order to recover punitive damages. *Id.* at 348-50. The Court has refused to apply the *Gertz* restriction on punitive damages where the defamatory statement is not a matter of public concern. See *Dun & Bradstreet v. Greenmoss Builders, Inc.*, 472 U.S. 749, 757-63 (1985).

<sup>23</sup> See *supra* notes 4 & 15 and accompanying text.

<sup>24</sup> See *Gertz*, 418 U.S. at 350 ("juries assess punitive damages in wholly unpredictable amounts bearing no necessary relation to the actual harm caused . . . [a]nd they remain free to use their discretion selectively to punish expressions of unpopular views").

cess.<sup>25</sup> It holds that a law may be constitutionally flawed in two ways. First, a law may fail to provide notice of what is prohibited to those who would conform their conduct.<sup>26</sup> Second, and arguably more significant,<sup>27</sup> a law may lack explicit standards for application, rendering enforcement arbitrary or discriminatory.<sup>28</sup> Because

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<sup>25</sup> See *United States v. Professional Air Traffic Controllers Org.*, 678 F.2d 1, 3 (1st Cir. 1982); see also *State v. Lee*, 96 N.J. 156, 165, 475 A.2d 31, 36 (1984) (vagueness is concept of procedural due process and grounded in notions of "fair play"). Closely related to vagueness is the "overbreadth" doctrine. See *Kolender v. Lawson*, 461 U.S. 352, 358 & n.8 (1983). Courts use this concept to invalidate enactments that substantially impinge on first amendment rights. See *Central Hudson Gas & Elec. v. Public Serv. Comm'n*, 447 U.S. 557, 565 n.8 (1980). The Supreme Court of Utah drew the following distinction between the vagueness and the overbreadth doctrines:

"Vagueness" goes to the issue of procedural due process, i.e., whether the statute is sufficiently explicit and clear to inform the ordinary reader of common intelligence what conduct is prohibited. On the other hand, "overbreadth" relates to whether the statute is so broad that it may prohibit constitutionally protected behavior as well as unprotected behavior—a question of substantive due process.

*State v. Hoffman*, 733 P.2d 502, 505 (Utah 1987) (citation omitted). One commentator characterized the vagueness and overbreadth issues respectfully as matters of "procedural" and "substantive" due process uncertainty cases. See *Collings, Unconstitutional Uncertainty—An Appraisal*, 40 CORNELL L.Q. 195, 196-97 (1955).

<sup>26</sup> See *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972). As the Court in *Grayned* stated, "[B]ecause we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly." *Id.*; see also *Lanzetta v. New Jersey*, 306 U.S. 451, 453 (1939) ("All are entitled to be informed as to what the State commands or forbids."); *Hastings v. Judicial Conference of the United States*, 829 F.2d 91, 105 (D.C. Cir. 1987) ("[a] vague law denies due process by imposing standards of conduct so indeterminate that it is impossible to ascertain just what will result in sanctions"), cert. denied, 108 S. Ct. 1487 (1988); *Duplantis v. Bonvillain*, 675 F. Supp. 331, 333 (E.D. La. 1987) ("vague laws do not give individuals fair notice of the conduct proscribed").

<sup>27</sup> See *Kolender*, 461 U.S. at 358 ("more important aspect . . . 'is not actual notice, but . . . the requirement that a legislature establish minimal guidelines'" (quoting *Smith v. Goguen*, 415 U.S. 566, 574 (1974))). The argument that the notice requirement is less important relies on the notion that, outside the commercial area, people do not look to statutory language when planning their conduct. See *Smith v. Goguen*, 415 U.S. 566, 574 (1974). Nevertheless, both aspects of the vagueness doctrine—minimal notice and clear guidelines—are typically invoked. The Supreme Court of Connecticut, for example, has stated that these two aspects are "founded upon the same common premise [—due process—] and thus may be treated as one." See *Seals v. Hickey*, 186 Conn. 337, 343, 441 A.2d 604, 607 (1982) (quoting *McKinney v. Town of Coventry*, 176 Conn. 613, 616, 410 A.2d 453, 454 (1979)); see also *Jeffries, supra* note 17, at 216 ("The fact that the two problems are so often factually coincident makes it difficult, but usually unnecessary to disentangle the two strands.").

<sup>28</sup> See *Grayned*, 408 U.S. at 108. "A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an *ad hoc* and subjective basis . . . ." *Id.* at 108-09. Concern for minimal guidelines dates back more than one hundred years. See, e.g., *United States v. Reese*, 92 U.S. 214 (1876). It would be "dangerous if the legislature could set a net large enough to catch all possible offenders, and leave it to the courts to step inside and say who could be rightfully detained." *Id.* at 221; see also

almost all the laws which the vagueness doctrine has struck down have been criminal statutes,<sup>29</sup> application of vagueness principles to punitive damages standards implicates two initial inquiries: the civil nature of punitive damages, and the absence of statutory damages standards in many jurisdictions.

The Supreme Court first held a statute void for vagueness in a case involving the lack of notice provided by a criminal prohibition.<sup>30</sup> Although one early case suggested that the vagueness doctrine could be utilized to strike down criminal statutes only,<sup>31</sup> the

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Papachristou v. City of Jacksonville, 405 U.S. 156, 168-70 (1972) (invalidating "vagrancy ordinance" because uncertainty in determining violation gave police "unfettered discretion" in making arrests).

<sup>29</sup> The Supreme Court has held only one civil statute void for vagueness. In Giaccio v. Pennsylvania, 382 U.S. 399 (1966), the Court invalidated a state law allowing a jury to assess the costs of prosecution against an acquitted criminal defendant. *Id.* at 405. The Court reasoned as follows:

Both liberty and property are specifically protected by the Fourteenth Amendment against any state deprivation which does not meet the standards of due process, and this protection is not to be avoided by the simple label a State chooses to fasten upon its conduct or its statute. So here this state Act whether labeled "penal" or not must meet the challenge that it is unconstitutionally vague.

*Id.* at 402.

In dismissing a vagueness challenge to a punitive damages statute, a California appellate court noted that "[d]efendants and amici concede . . . that no decision of the United States Supreme Court has held that a state statute, which authorized punitive damages, was invalid as a violation of federal due process." See *Egan v. Mutual of Omaha Ins. Co.*, 63 Cal. App. 3d 659, 684, 133 Cal. Rptr. 899, 915 (1976). In *Egan*, the Supreme Court of California, ruling en banc, later held that the punitive damages awarded were excessive due to jurors' prejudice and reduced the award. *Egan v. Mutual of Omaha Ins. Co.*, 24 Cal. 3d 809, 821, 169 Cal. Rptr. 691, 699, 620 P.2d 141, 149 (1979), *cert. denied*, 445 U.S. 912 (1980). It is not suggested that the dearth of invalidations in the civil context prevents civil defendants from formulating a forceful argument. *Jordan v. De George*, 341 U.S. 223 (1951), demonstrates the importance of the vagueness doctrine in the civil field. In that case, the Court applied vagueness analysis to—but upheld—a civil deportation scheme, *id.* at 231-32, even though the parties had neither raised nor argued the issue. *Id.* at 229.

<sup>30</sup> See *International Harvester Co. v. Kentucky*, 234 U.S. 216 (1914). The Court of Appeals of Kentucky had construed a federal act, a state statute, and the state constitution together as criminalizing business combinations which fix a price greater than the "real value" of the article, *i.e.*, the value under normal market conditions. *Id.* at 221. Thus, before fixing a price by means of a combination, businessmen could predict the legal consequences only by determining a hypothetical price that would prevail in the absence of a combination. *Id.* at 222. The Court observed that "[t]o compel them to guess on peril of indictment what the community would have given for [goods] if the continually changing conditions were other than they are . . . is to exact gifts that mankind does not possess." *Id.* at 223-24. The unstated premise, it is submitted, is that the Constitution requires that a court construe a criminal statute in a manner that provides notice of an ascertainable standard of conduct.

<sup>31</sup> See *Edgar A. Levy Leasing Co. v. Siegel*, 258 U.S. 242 (1922). In *Edgar*, the Court upheld against a vagueness challenge a New York civil statute directed against "unreasonable rents." *Id.* at 249-50. In the process, the Court distinguished its invalidation of a simi-

Court later concluded that the doctrine was applicable to civil legislation as well.<sup>32</sup> Recently, while addressing civil application in *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*,<sup>33</sup> the Court indicated that enactments providing for civil penalties require a lesser degree of clarity than criminal statutes because the latter carry more severe consequences.<sup>34</sup> It is submitted that the rationale behind the rule suggests that linking the severity of the penalty with the level of scrutiny for determining unconstitutional indefiniteness could be helpful to defendants against whom very large punitive damages awards have been assessed. For example, where a defendant's act is subject to both a civil action and a criminal prosecution, if resulting punitive damages far exceed the criminal fine imposed, due process might require a higher degree of definiteness in the standards by which the jury imposes damages than in the statute underlying the fine.<sup>35</sup> It should be noted, how-

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larly worded federal act proscribing unreasonable sugar prices, stating that: "United States v. Cohen Grocery Co., 255 U.S. 81 (1921), dealing with definitions of crime, is not applicable." Siegel, 258 U.S. at 250. It is suggested that the clear implication was that the vagueness doctrine was inapplicable to civil statutes. But the criminal/civil distinction was abandoned when, in a later case, the Court said that it had distinguished *Cohen Grocery* on the ground that the word "unreasonable" had a more definite meaning when describing rent in the New York housing market than when describing the price of sugar. See A.B. Small Co. v. American Sugar Ref. Co., 267 U.S. 233, 240-42 (1925).

<sup>32</sup> See *Cline v. Frink Dairy Co.*, 274 U.S. 445, 463 (1927). "The principle of due process of law requiring reasonable certainty of description in fixing a standard for exacting obedience from a person in advance has application as well in civil as in criminal legislation . . ." *Id.*

<sup>33</sup> 455 U.S. 489 (1982).

<sup>34</sup> *Id.* at 498-99. At least five courts of appeals have adopted the approach that toleration of vagueness varies with the severity of possible sanctions. See, e.g., *Chalmers v. City of Los Angeles*, 762 F.2d 753, 757 (9th Cir. 1985) (conflicting vending ordinances held void for vagueness despite court's observation that economic regulation subject to less stringent test than criminal prohibitions); *Cotton States Mut. Ins. Co. v. Anderson*, 749 F.2d 663, 669 (11th Cir. 1984) (commercial regulation not unconstitutionally vague unless "substantially incomprehensible"); *Garner v. White*, 726 F.2d 1274, 1278 (8th Cir. 1984) (state paraphernalia statutes subjected to stricter vagueness test than other business-oriented statutes due to imposition of criminal liability); *Exxon Corp. v. Busbee*, 644 F.2d 1030, 1033 (5th Cir.) (gasoline industry regulations subject to lenient test), cert. denied, 454 U.S. 932 (1981); *Brennan v. Occupational Safety & Health Review Comm'n*, 505 F.2d 869, 872 (10th Cir. 1974) (administrative regulation subject to test of whether it "delineates its reach in words of common understanding").

*Hoffman Estates* was not the first Supreme Court case to indicate that the certainty requirement is less demanding in civil cases. See *Winters v. New York*, 333 U.S. 507, 515 (1948) ("The standards of certainty in statutes punishing for offenses is higher than in those depending primarily upon civil sanction for enforcement.").

<sup>35</sup> Of course, a criminal penalty typically carries with it a stigma that might be considered in measuring the harshness of punishment. Cf. *Hoffman Estates*, 455 U.S. at 499 ("the

ever, that strict requirements for certainty in civil laws find little support in legal precedent, since the Supreme Court has a very limited history of striking down civil statutes on the ground of vagueness.<sup>36</sup>

While a state's punitive damages standards may derive from legislation,<sup>37</sup> often the standards are based on common law.<sup>38</sup> It is suggested that codification should not be a prerequisite to the application of vagueness analysis.<sup>39</sup> In *Cantwell v. Connecticut*,<sup>40</sup> the Supreme Court indicated that even if a crime is defined solely by common law, imprecise standards for the prohibition can implicate the vagueness concern of standardless enforcement. In reversing a conviction on first amendment grounds,<sup>41</sup> the Court found that the

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ordinance is 'quasi-criminal,' and its prohibitory and stigmatizing effect may warrant a relatively strict test"). Yet some punitive awards carry a stigma which the criminal sphere would be hard pressed to match. *See, e.g.*, O'Gilvie v. International Playtex, Inc., 821 F.2d 1438, 1447 (10th Cir. 1987) (upholding \$10 million award to plaintiff whose wife died from use of defendant's product), *cert. denied*, 108 S. Ct. 2014 (1988).

<sup>36</sup> See *supra* note 29.

<sup>37</sup> See *infra* note 62. At the federal level, Congress has specifically provided for punitive awards. *See e.g.*, 15 U.S.C. § 298(c) (1982) (defendant in action alleging falsely stamped gold or silver may recover punitive damages if action was brought "frivolously, for purposes of harassment, or . . . in restraint of trade"); 15 U.S.C. § 1691e(b) (1982) (allowing punitive damage awards up to \$10,000 for Consumer Credit Protection Act violations); 18 U.S.C. § 2520(b) (Supp. V 1987) (allowing punitive awards for violation of wiretapping prohibitions).

<sup>38</sup> See D. DOBBS, HANDBOOK ON THE LAW OF REMEDIES § 3.9, at 205 (1973). Typically, courts have required a finding that conduct was malicious, reckless, oppressive, wanton, or morally culpable before allowing punitive damages to be awarded. *See id.*

The Supreme Court has occasionally confronted the need to create federal punitive damages remedies. *Compare Smith v. Wade*, 461 U.S. 30, 56 (1983) (setting "reckless or callous indifference" threshold for recovery of punitive damages in 42 U.S.C. § 1983 actions) and *Carlson v. Green*, 446 U.S. 14, 22 (1980) (indicating punitive damages are recoverable in "Bivens suit") with *International Bhd. of Elec. Workers v. Foust*, 442 U.S. 42, 52 (1979) (punitive damages not recoverable against unions breaching duty of "fair representation" under Railway Labor Act because of public policy disfavoring punishment of labor unions).

<sup>39</sup> Cf. *Niemotko v. Maryland*, 340 U.S. 268, 271-72 (1951). In *Niemotko*, the Supreme Court reversed convictions for holding public meetings in the city park without permits because the city had not developed any objective standards upon which to base issuance of the permits. *Id.* at 272-73. The Court found no distinction between statutory and nonstatutory practices:

In the instant case we are met with no ordinance or statute regulating or prohibiting the use of the park; all that is here is an amorphous "practice," whereby all authority to grant permits for the use of the park is in the Park Commissioner and the City Council. . . . It is clear that all that has been said about the invalidity of such limitless discretion [in statutes] must be equally applicable here.

*Id.* at 271-72.

<sup>40</sup> 310 U.S. 296 (1940).

<sup>41</sup> *Id.* at 309. In *Cantwell*, the defendant had been playing a phonograph record that criticized organized religion in an offensive manner. *Id.* at 308-09. The Court was concerned

crime of inciting a breach of the peace was "based on a common law concept of the most general and undefined nature."<sup>42</sup> The uncertain character of the offense presented "a situation analogous to a conviction under a statute sweeping in a great variety of conduct under a general and indefinite characterization, and leaving to the executive and judicial branches too wide a discretion in its application."<sup>43</sup> Indeed, since statutory standards carry an implicit judgment that the public is made reasonably aware of what the law requires,<sup>44</sup> there is even greater reason to apply vagueness analysis to common law punitive standards.

Courts apply the vagueness doctrine in two ways. Under a facial challenge, "the complainant must demonstrate that the law is impermissibly vague in all of its applications";<sup>45</sup> that is, the law's vagueness in itself must inhibit constitutionally protected activity. This approach relieves the attacking party from the burden of establishing the law's vagueness as applied to the facts of his case.<sup>46</sup> The Supreme Court has maintained that it will consider the definiteness of a law on its face only in situations where the law deters expression protected by the first amendment.<sup>47</sup> The restriction to

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with the limitation a conviction for breach of the peace would place on person's right to speak freely about religion. *Id.* at 310.

<sup>42</sup> *Id.* at 308.

<sup>43</sup> *Id.*

<sup>44</sup> See, e.g., *Texaco, Inc. v. Short*, 454 U.S. 516, 533 (1982). The *Texaco* Court stated: "We refuse to displace hastily the judgment of the legislature and to conclude that a legitimate exercise of state legislative power is invalid because citizens might not have been aware of the requirements of the law." *Id.*; cf. *Walters v. National Ass'n of Radiation Survivors*, 473 U.S. 305, 319-20 (1985) ("deference to congressional judgment must be afforded even though the claim is that a statute Congress has enacted effects a denial of the procedural due process guaranteed by the Fifth Amendment").

<sup>45</sup> *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 497 (1982). *Coates v. City of Cincinnati*, 402 U.S. 611 (1971), presented an example of a facially vague statute. The statute made it a criminal offense for "three or more persons to assemble . . . on any of the sidewalks . . . and there conduct themselves in a manner annoying to persons passing by." *Id.* at 611 (footnote omitted). The Court found that such an "unascertainable standard" is impossible to apply because "[c]onduct that annoys some people does not annoy others." *Id.* at 614; see also *Smith v. Goguen*, 415 U.S. 566, 572-76 (1974) (statute making it criminal offense to treat United States flag "contemptuously" provides no ascertainable standard and is facially vague).

<sup>46</sup> See *Coates*, 402 U.S. at 614-16.

<sup>47</sup> See *United States v. Mazurie*, 419 U.S. 544, 550 (1975). First amendment implications do not guarantee that a court will judge the statute on its face. When the law provides only an indirect obstacle to constitutionally protected conduct, the Supreme Court has refused to consider the law on its face if the law lacks serious deterrent effect and its limited degree of vagueness is easily susceptible of a narrowing construction by state courts. See *Young v. American Mini Theatres*, 427 U.S. 50, 58-61 (1976) (refusing facial consideration of

first amendment cases destroys this line of attack for most punitive damages defendants.<sup>48</sup>

The second application of vagueness principles is open only to the actual victims of the allegedly vague law. When a facial challenge is unwarranted, the court must analyze the law, not in terms of its potential effects, but as applied to the facts presented.<sup>49</sup> In this situation, the doctrine of standing prevents a party from litigating whether applicable punitive damages standards may be vague as applied to persons not before the court.<sup>50</sup>

### III. INDEFINITESS IN PREVAILING STANDARDS

A challenge to the validity of punitive damages standards is almost certain to fail if it focuses solely on the defendant's inability to anticipate punitive liability.<sup>51</sup> Rather, the defendant should emphasize that he was not put on notice as to the potential size of the award.<sup>52</sup> The magnitude of punitive damages is virtually unpredictable because typically it lies wholly in the discretion of the jury.<sup>53</sup> While it has been argued that judicial review of awards is

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zoning ordinance prohibiting adult theatres in close proximity to each other).

<sup>48</sup> Under the threshold requirement that the law restrict first amendment activity, it might seem the logical person to raise a facial vagueness challenge to punitive damages standards would be the defendant in a defamation action. However, these defendants frequently are immune from liability for punitive damages because of the protection afforded by the first amendment itself. See *supra* note 22.

<sup>49</sup> See *Mazurie*, 419 U.S. at 550. The *Mazurie* Court noted: "It is well established that vagueness challenges to statutes which do not involve First Amendment freedoms must be examined in the light of the facts of the case at hand." *Id.*

<sup>50</sup> See *Broadrick v. Oklahoma*, 413 U.S. 601, 610 (1973). In *Broadrick*, the Court noted that "even if the outermost boundaries of [a prohibition of political activity] may be imprecise, any such uncertainty has little relevance here, where appellants' conduct falls squarely within the 'hard core' of the statute's proscriptions." *Id.* at 608. Thus, standards of degree will be upheld against a challenge by one to whom the standard is easily applied. For a discussion of how standing requirements differ from those of the related "overbreadth doctrine," see L. TRIBE, AMERICAN CONSTITUTIONAL LAW § 12-32, at 1035-37 (2d ed. 1988).

<sup>51</sup> See *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). "[D]efendants can be expected to be aware that, if their conduct is outrageous because it is willful, malicious or a wanton disregard of the rights of the party injured, then punitive damages may be awarded." *Id.*

<sup>52</sup> See *Bankers Life & Casualty Co. v. Crenshaw*, 108 S. Ct. 1645, 1656 (1988) (O'Connor, J., concurring).

<sup>53</sup> See *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 350 (1974). "In most jurisdictions jury discretion over the amounts awarded is limited only by the gentle rule that they not be excessive. Consequently, juries assess punitive damages in wholly unpredictable amounts bearing no necessary relation to the actual harm caused." *Id.*

more rigorous than the deliberations of the jury,<sup>54</sup> the standards of review address only matters such as whether the size or imposition of the award shocks the conscience of the trial court<sup>55</sup> or is attributable to the presence of juror passion or prejudice.<sup>56</sup> The question of whether a particular punitive award violates notice principles, however, turns on the state of mind of the *defendant*—whether he could be expected, under all the circumstances, to have anticipated that his conduct would result in the penalty assessed.<sup>57</sup> Some state courts have reversed impositions of liability in excess of fair compensation when the law existing at the time of the act failed to provide the defendant with notice,<sup>58</sup> but the Supreme Court has

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<sup>54</sup> See Brief for the Insurance Consumer Action Network at 3, *Bankers Life & Casualty Co. v. Crenshaw*, 108 S. Ct. 1645 (1988) (No. 85-1765). Judicial limitation on punitive awards has been thus described:

Any lawsuit in which punitive damages are awarded invariably results in the exercise of the following civil judicial review: demurrer, motion to strike, summary judgment, motion for directed verdict, motion for judgment notwithstanding the verdict, motion for new trial, conditional motion for new trial (and remittitur), lengthy and protracted appeals to intermediate appellate courts, and to the State Supreme Court and, in some instances, request for and review by the United States Supreme Court. Therefore, an award of punitive damages is never based on the sole caprice of a jury acting under passion and prejudice, but is subject to review by more judges than the twelve jurors rendering the verdict.

*Id.*

<sup>55</sup> See, e.g., *Gross v. Kouf*, 349 N.W.2d 652, 654 (S.D. 1984) (“[p]unitive damages must not be oppressive or so large as to shock the senses of fair-minded men”).

<sup>56</sup> See, e.g., *Surrency v. Harbison*, 489 So. 2d 1097, 1105 (Ala. 1986) (punitive damages award reversed only when “amount is so excessive as to indicate prejudice or passion”); *Alaskan Village, Inc. v. Smalley*, 720 P.2d 945, 949 (Alaska 1986) (award deemed excessive when “manifestly unreasonable, resulting from passion or prejudice or disregard of the rules of law”); *Bankers Life & Casualty Co. v. Crenshaw*, 483 So. 2d 254, 278 (Miss. 1985) (interference with award warranted “when it evinces passion, bias and prejudice on the part of the jury so as to shock the conscience”), *aff’d*, 108 S. Ct. 1645 (1988); cf. COLO. REV. STAT. § 13-21-102(2)(a)-(c) (1987) (allowing reduction of award to extent that deterrent effect is accomplished, defendant’s conduct has ceased, and purpose of damages has been served).

Alabama has recently enacted legislation dispensing with the presumption that a punitive award by the trier of fact is correct. See ALA. CODE § 6-11-23(a) (Supp. 1988).

<sup>57</sup> See *supra* note 26 and accompanying text.

<sup>58</sup> The highest courts in at least two states have recognized that punitive awards can present a notice problem. In *Kelsay v. Motorola, Inc.*, 74 Ill. 2d 172, 384 N.E.2d 353 (1978), the Supreme Court of Illinois held that, while in future actions a punitive damage award for retaliatory discharge would be proper, a punitive damage award in the instant case could not be sustained in light of the fact that the defendant was the first to incur civil liability for retaliatory discharge of an employee filing a workers’ compensation claim. *Id.* at 188-89, 384 N.E.2d at 360-61. The court found that “the cause of action . . . was novel and there was no statutory or judicial pronouncement which would have caused the defendant to believe that its conduct was actionable . . . [therefore] it would be extremely unfair to sustain [the] award.” *Id.* at 189, 384 N.E.2d at 361.

not specifically addressed the issue.<sup>59</sup>

In addition to the notice objection, a defendant may challenge the lack of definite guidelines under which juries impose punitive liability and calculate the resulting awards.<sup>60</sup> Liability for punitive damages generally is based on some culpable mental state of the defendant.<sup>61</sup> Those states that have codified their standards of liability have tended to retain the common law terms, such as "malicious," "oppressive," "wanton," and "willful."<sup>62</sup> In cases not dealing with damages, courts have held void for vagueness those standards which, through the use of terms such as "unprofessional"<sup>63</sup> and "immoral,"<sup>64</sup> require a subjective judgment as to the

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In *Nees v. Hocks*, 272 Or. 210, 536 P.2d 512 (1975) (en banc), the court similarly reversed a punitive damages award because the defendant was the first to be civilly liable for the retaliatory discharge of an employee serving jury duty and thus could not have had adequate notice. *Id.* at 221, 536 P.2d at 517. The court's reasoning approached constitutional dimensions when it compared the award with "[t]he sanctions of the criminal law [which] cannot constitutionally be imposed when the criminality of the conduct is not capable of being known beforehand." *Id.*

<sup>59</sup> The Supreme Court has rejected a more general due process attack which called a punitive damages statute "unreasonably oppressive, arbitrary, unjust, violative of fundamental conceptions of fair play, and, therefore, repugnant of the Fourteenth Amendment." See *Louis Pizitz Dry Goods Co. v. Yeldell*, 274 U.S. 112, 114 (1927). The statute—which the Court upheld—saddled the defendant employers with vicarious punitive damages for deaths caused by the negligence of their employees. See *id.* at 113. The Court apparently addressed only the question of whether vicarious liability for punitive damages comports with due process. *Id.* at 112.

<sup>60</sup> See *supra* notes 24-28 and accompanying text.

<sup>61</sup> See D. DOBBS, *supra* note 38, § 3.9, at 205-06; see also J. McCARTHY, PUNITIVE DAMAGES IN BAD FAITH CASES § 1.41, at 90 (3d ed. 1983) ("Almost all jurisdictions will award punitive damages upon a showing that the insurer's conduct was characterized by 'malice, fraud, or oppression' substantially certain or intended to harm the insured.").

<sup>62</sup> See, e.g., ALA. CODE § 6-11-20(a) (Supp. 1988) ("oppression, fraud, wantonness, or malice"); CAL. CIV. CODE § 3294(a) (Deering 1984) ("oppression, fraud or malice"); FLA. STAT. ANN. § 768.73(1)(a) (West Supp. 1988) ("willful, wanton or gross misconduct"); N.J. STAT. ANN. § 2A:58C-5(a) (West 1987) ("wanton and willful disregard"); OKLA. STAT. ANN. tit. 23, § 9(A) (West 1987) ("wanton or reckless disregard for the rights of another, oppression, fraud or malice").

The use of common law terms tends to eliminate the vagueness problem. See *International Harvester Co. of Am. v. Kentucky*, 234 U.S. 216, 223 (1914) ("a great body of precedents on the civil side coupled with familiar practice make it comparatively easy . . . to keep to what is safe"). In striking down a statute for vagueness, the Court has addressed as one factor in the analysis the lack of common law meaning. See, e.g., *Lanzetta v. New Jersey*, 306 U.S. 451, 454-55 (1939) (meaning of "gang" not defined by common law).

<sup>63</sup> See, e.g., *Ex parte McNulty*, 77 Cal. 164, 168, 19 P. 237, 239 (1888) (no punishment "for the violation of any vague, undefined notion of unprofessional conduct, which might, after the fact, be entertained by certain individuals constituting a board of examiners"); *Matthews v. Murphy*, 63 S.W. 785, 786-87 (Ky. 1901) (revocation of physician's license for "unprofessional conduct" held void for uncertainty); *Moore v. Vincent*, 174 Okla. 339, 343,

character of an act.<sup>65</sup> Standards based on the operation of the defendant's mind, however, invoke no subjective characterization; unlike the normative classification of an act as "moral," the determination of what the defendant intended is essentially factual.<sup>66</sup>

Juries need not be allowed unfettered discretion to award punitive damages; jury instructions can aid in clarifying the standards to be applied.<sup>67</sup> Also, the legislative trend toward requiring that the plaintiff establish the facts underlying liability by clear and convincing evidence<sup>68</sup> further erodes juror discretion. Consequently, as with a challenge based on lack of notice,<sup>69</sup> it is submitted that a vagueness challenge grounded in the absence of enforce-

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<sup>65</sup> 50 P.2d 388, 391 (1935) (statute allowing revocation of embalmer's license for "unprofessional or disorderly conduct" void for vagueness).

<sup>66</sup> See, e.g., *State v. Truby*, 211 La. 178, 203, 29 So. 2d 758, 766 (1947) (voiding statutory proscription on maintaining a place "for any . . . immoral purpose"); *State v. Musser*, 118 Utah 537, 539, 223 P.2d 193, 194 (1950) (statute defining as criminal offense commission of "any act injurious . . . to public morals" held void for vagueness).

<sup>67</sup> See *Matthews*, 63 S.W. at 787. In analyzing the statute providing for the revocation of a physician's license for "grossly unprofessional conduct," the *Matthews* court concluded that, under the statute, an act committed:

[D]uring the administration of the present board might be regarded by it as not being unprofessional conduct, yet the board which succeeds it might adjudge it to be, as the statute prescribes no rule which is to govern the conduct of the medical profession or the state board of health in adjudging its effect.

*Id.*

<sup>68</sup> See *Toole v. Richardson-Merrell, Inc.*, 251 Cal. App. 2d 689, 719, 60 Cal. Rptr. 398, 419 (1967) (denial of petition for rehearing). In *Toole*, the court recognized the determinable nature of a mental state: "As to malice, . . . it may be established by a showing that the defendant's wrongful conduct was willful, intentional, and done in reckless disregard of its possible results. It cannot be found in a vacuum. Its existence depends upon facts proven." *Id.*

<sup>69</sup> See, e.g., *Palmer v. A.H. Robins Co.*, 684 P.2d 187, 215 n.8 (Colo. 1984). "We further note that the trial court fully explained the meaning of 'fraud' and 'wanton and reckless' in its instructions to the jury, thereby enhancing the jury's ability to apply the statutory elements in determining whether Robins' conduct was such as to justify an assessment of punitive damages." *Id.*

<sup>65</sup> See, e.g., ALA. CODE § 6-11-20(a) (Supp. 1988) (defendant's oppression, fraud, wantonness, or malice must be proven by clear and convincing evidence); IND. CODE ANN. § 34-4-34-2 (Burns 1986) (same); KAN. STAT. ANN. § 60-3701(c) (Supp. 1987) (same); MINN. STAT. ANN. § 549.20(1) (West 1988) (same); OKLA. STAT. ANN. tit. 23, § 9(A) (West 1987) (exemplary award cannot exceed actual damages unless court finds punitive liability by clear and convincing evidence); cf. COLO. REV. STAT. § 13-25-127(2) (1987) (requiring statutory elements be proven beyond reasonable doubt). But see N.J. STAT. ANN. § 2A:58C-5(a) (West 1987) (requiring only proof by preponderance of evidence). Additionally, the highest courts in at least two states have, in the absence of a statute, judicially established a clear and convincing standard. See *Tuttle v. Raymond*, 494 A.2d 1353, 1363 (Me. 1985); *Wangen v. Ford Motor Co.*, 97 Wis. 2d 260, 299-301, 294 N.W.2d 437, 457-58 (1980).

<sup>69</sup> See *supra* notes 51, 52, 57 and accompanying text.

ment guidelines is weak if it concentrates only on the standards for liability.

Unlike the threshold determination of punitive liability, the magnitude of punitive damages has no fixed base and generally is left to the discretion of the jury.<sup>70</sup> While jury instructions may provide additional guidance in setting the size of an award,<sup>71</sup> instructions on this point often are significantly more vague than the standards provided for making the threshold determination.<sup>72</sup> Given both the inherent limitations of language<sup>73</sup> and the varying circumstances in which courts find defendants,<sup>74</sup> perfect clarity in

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<sup>70</sup> See *supra* note 53 and accompanying text. See generally 1 J. LEE & B. LINDAHL, *supra* note 1, § 21.39, at 811 (entirely within discretion of jury to determine whether damages should be awarded and to determine amount which should be awarded).

<sup>71</sup> See, e.g., COMMITTEE ON JURY INSTRUCTION GUIDES, MINN. DIST. JUDGES ASS'N, 4 MINNESOTA PRACTICE, MINNESOTA JURY INSTRUCTION GUIDES ¶ 195, at 179-80 (3d ed. 1986) [hereinafter MINNESOTA GUIDES]. Minnesota's pattern jury instruction provides that the jury may consider, but is not limited to, eight factors when determining the magnitude of punitive damages. Among these eight factors are the profitability of defendant's conduct, the duration of the hazard created by that conduct, the defendant's financial condition, and the severity of possible criminal punishment. *Id.*

<sup>72</sup> See Ellis, *supra* note 2, at 53. The lack of guidance contained in many jury instructions is alarming. See, e.g., *Sharp v. Roberson*, 495 S.W.2d 394, 395 (Mo. 1973) ("[jury] may award [p]laintiffs . . . such sum as [jury] believe[s] will serve to . . . deter [defendant] and others from like conduct"); *Smithers v. Brunkhorst*, 178 Wis. 530, 534, 190 N.W. 349, 350 (1922) ("such sum, if any, . . . by way of punishment to the defendant and as example to others, to deter him and others"); ALABAMA PATTERN JURY INSTRUCTIONS COMM., ALABAMA PATTERN JURY INSTRUCTIONS—CIVIL ¶ 11.03, at 135 (1974) ("in fixing the amount, you must take into consideration the character and degree of the wrong as shown by the evidence . . . and the necessity of preventing similar wrongs"); COUNCIL OF SUPERIOR COURT JUDGES OF GA., SUGGESTED PATTERN JURY INSTRUCTIONS 117 (2d ed. 1984) ("[t]he measure of damages is your enlightened conscience as an impartial jury").

<sup>73</sup> See *United States Civil Serv. Comm'n v. National Ass'n of Letter Carriers*, 413 U.S. 548, 578-79 (1973). In *Letter Carriers*, the Court upheld the Commission's regulations interpreting the Hatch Act, 5 U.S.C. § 7324(a)(2) (1982), and explained the need for some toleration of uncertainty:

[T]here are limitations in the English language with respect to being both specific and manageably brief, and it seems to us that although the prohibitions may not satisfy those intent on finding fault at any cost, they are set out in terms that the ordinary person exercising ordinary common sense can sufficiently understand and comply with, without sacrifice to the public interest.

*Id.* at 578-79.

<sup>74</sup> It is suggested that a dilemma arises in that pattern jury instructions need to be both sufficiently general to deal with the variety of cases in which punitive liability may surface, and yet sufficiently specific to guide a jury faced with a unique set of facts. Where the trial judge finds that a specific jury charge is necessary to encompass the specific facts of a case, the vagueness problem is not eliminated but is merely shifted to the point at which the judge creates such a charge.

instructions cannot be demanded.<sup>76</sup> Furthermore, even the most detailed instructions ask the jury to make a judgment regarding how to further the policies underlying punitive damages.<sup>76</sup> Absent meaningful guidance as to factors restricting the size of an award, allowing such a jury determination in itself runs afoul of the vagueness doctrine.<sup>77</sup>

It has been said that the "power to impose [punitive] damages is also the power to destroy, but the power need not be feared as long as the courts sit."<sup>78</sup> Certainly, courts have the opportunity to scrutinize punitive damages awards.<sup>79</sup> Generally, however, courts reduce an award only when passion or prejudice on the part of the jury is manifest.<sup>80</sup> This limited form of review does not adequately address the problem posed by vague guidelines.<sup>81</sup> The nature of a case may present a wide range of "rational" maximum awards.<sup>82</sup> More fundamentally, the purpose of requiring definite enforcement guidelines is not only to eliminate the effects of juror passion,<sup>83</sup> but also to prevent subjective decisions by jurors as to what the law

<sup>76</sup> Instructions may, however, clarify—rather than substitute for—existing law and thus serve a valuable function in defeating a vagueness challenge. *See supra* note 71.

<sup>77</sup> Minnesota's pattern jury instruction, for example, is quite detailed. *See supra* note 71. Yet it still counsels the jury to award an "amount which will serve to punish the defendant and deter others from the commission of like acts." MINNESOTA GUIDES, *supra* note 71, ¶ 195, at 179.

<sup>78</sup> See *Grayned v. City of Rockford*, 408 U.S. 104, 108-09 (1972). "A vague law impermissibly delegates basic policy matters to . . . juries for resolution on an *ad hoc* and subjective basis, with the attendant dangers of arbitrary and discriminatory application." *Id.*

<sup>79</sup> *Brown v. Missouri Pac. R.R.*, 703 F.2d 1050, 1054 (8th Cir. 1983).

<sup>80</sup> *See supra* note 54; *see also* 2 S. SPEISER, C. KRAUSE & A. GANS, *supra* note 1, § 8.62, at 972-75 (discussing appellate review of awards alleged to be excessive).

<sup>81</sup> *See supra* note 56 and accompanying text.

<sup>82</sup> *See Ellis, supra* note 2, at 55. The author states:

Without agreed standards to guide judges as to the appropriate magnitude of assessments, however, judicial decisions reducing large awards make little contribution to consistency and certainty; they merely reduce the probability that very large awards will be upheld. . . . [Furthermore,] courts have reduced assessments that were arrived at through unquestionably rational means, and upheld awards that had no apparent basis.

*Id.* at 55-56 (footnotes omitted).

<sup>83</sup> For example, when the wealth of the defendant is a factor for the jury to consider, and there is conflicting evidence as to the extent of that wealth, the court must assume that the jury chose to believe the highest figure that the evidence can support. This follows from the general rule that an appellate court will not disturb a punitive damages award based on the weight of the evidence. *See Hasson v. Ford Motor Co.*, 32 Cal. 3d 388, 402, 650 P.2d 1171, 1177, 185 Cal. Rptr. 654, 662 (1982), cert. dismissed, 459 U.S. 1190 (1983). Similar problems arise when there is conflicting evidence as to the duration or extent of the plaintiff's injury.

<sup>84</sup> *See supra* note 56 and accompanying text.

ought to be.<sup>84</sup>

### CONCLUSION

The standards for determining punitive liability are sufficiently definite, but the guidelines by which juries determine the magnitude of punitive damages awards typically are so vague as to amount to no standard at all. Jury instructions and review of punitive awards by judges lend little, if any, assistance to jurors, who are asked to make a basic policy decision toward furthering the purposes of punitive damages. In addition, defendants who incur large awards often lack notice that their conduct might be punished so severely. Consequently, to ensure compliance with the demands of due process, the Supreme Court should require increased certainty in the standards by which a jury may calculate the magnitude of punitive damages awards.

*Christopher Gunther*

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<sup>84</sup> See *Giacco v. Pennsylvania*, 382 U.S. 399, 403 (1966). The *Giacco* Court, holding a law void for vagueness, stated that “[a]ll of the so-called court-created conditions and standards still leave to the jury such broad and unlimited power . . . that the jurors must make determinations of the crucial issue upon their own notions of what the law should be instead of what it is.” *Id.*