

Louisiana Law Review

Volume 70 | Number 2

Symposium on Punitive Damages

Winter 2010

Punitive Damages and the Constitution

Thomas H. Dupree Jr.

Repository Citation

Thomas H. Dupree Jr., *Punitive Damages and the Constitution*, 70 La. L. Rev. (2010)

Available at: <https://digitalcommons.law.lsu.edu/lalrev/vol70/iss2/3>

This Article is brought to you for free and open access by the Law Reviews and Journals at LSU Law Digital Commons. It has been accepted for inclusion in Louisiana Law Review by an authorized editor of LSU Law Digital Commons. For more information, please contact kayla.reed@law.lsu.edu.

Punitive Damages and the Constitution

Thomas H. Dupree, Jr.*

Few areas of the law are as plagued by problems of uncertainty and unfairness as punitive damages. They are all too often awarded in amounts that bear little relation to the alleged injury, and for conduct that was not clearly unlawful—let alone so extreme and outrageous as to warrant an additional sanction on top of a compensatory damages award. In many cases, punitive damages amount to a lottery ticket that can lead to a multimillion dollar windfall for a fortunate plaintiff.

Punitive, or exemplary, damages have existed for centuries, yet it was only in the later years of the twentieth century that the dangers of punitive damages captured the nation's attention, as juries began awarding staggering sums, often against large multinational corporations.¹ By 1996, the United States Supreme Court had seen enough. In its landmark ruling in *BMW of North America, Inc. v. Gore (Gore)*, the Court held that the Constitution prohibits “grossly excessive” punitive damages awards.² The Court set forth three guideposts to steer the excessiveness inquiry, directing the lower courts to focus on the reprehensibility of the defendant's conduct, the ratio between the compensatory and punitive damages awards, and the amount of statutory penalties that could be imposed for comparable conduct.³

In the years since *Gore* was decided, the lower courts have repeatedly applied and interpreted these guideposts, some faithfully, others less so. The Supreme Court itself has revisited the issue several times, clarifying and strengthening the constitutional limits on punitive damages.⁴

The *Gore* guideposts assist courts in determining when the amount of a punitive damage award renders the award

Copyright 2010, by THOMAS H. DUPREE, JR.

* Partner, Gibson, Dunn & Crutcher LLP. The author represented Chrysler in *Flax v. DaimlerChrysler*, 272 S.W.3d 521 (Tenn. 2008), which is discussed in this Article.

1. See, e.g., *Pac. Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 61–62 (1991) (O'Connor, J., dissenting) (“Recent years . . . have witnessed an explosion in the frequency and size of punitive damages awards. . . . The amounts can be staggering. . . . Medians as well as averages are skyrocketing, meaning that even routine awards are growing in size.”).

2. 517 U.S. 559 (1996).

3. *Id.* at 574–75.

4. See *Philip Morris USA v. Williams*, 549 U.S. 346 (2007); *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408 (2003); *Cooper Indus., Inc. v. Leatherman Tool Group*, 532 U.S. 424 (2001).

unconstitutional. But there is an antecedent question: what limits does the Constitution place on *when* punitive damages may be imposed? That is to say, the Constitution limits the amount of awards, but does it also limit the circumstances under which a defendant may even be held liable for punitive damages in the first place?

The answer is yes. It is a bedrock principle of constitutional law that individuals are entitled to fair notice of the conduct that may subject them to punishment. If the law is so unclear or indeterminate that a reasonable person cannot discern the line separating the lawful from the unlawful, then he may not, as a matter of due process, be punished for crossing that line.

But whereas this general constitutional principle is firmly established, the Supreme Court has yet to clarify how courts should apply it in practice when reviewing punitive damages awards in particular cases. This Article identifies two closely analogous lines of case law that can inform and guide this inquiry. The first is the “void for vagueness” doctrine, which holds that a law that does not identify the prohibited conduct with sufficient precision may not be enforced.⁵ The second is the common law rule, recognized most recently in *Safeco Insurance Co. of America v. Burr* (*Burr*), that recklessness must be determined by reference to objective standards that are known in advance.⁶

Part I of this Article traces the history of the constitutional limitations on punitive damages, paying particular attention to the concept of “fair notice” that underlies the Supreme Court’s decisions in this area. Part II then argues that the Court’s vagueness jurisprudence, along with the common law approach to recklessness, provide concrete standards that courts can use in considering a defendant’s claim that *no* amount of punitive damages is constitutionally permissible in light of the conduct at issue.

I. THE DEVELOPING LAW OF PUNITIVE DAMAGES

A. *The Early Cases*

Even before *Gore*, the Supreme Court had recognized that the Constitution limits punitive damages awards and the procedures through which they may be imposed. The Court noted the issue in a 1986 case, *Aetna Life Insurance Co. v. Lavoie*, in which it stated that federal constitutional challenges to punitive damages awards raise “important issues which, in an appropriate setting, must be

5. *See Grayned v. City of Rockford*, 408 U.S. 104 (1972).

6. 551 U.S. 47 (2007).

resolved.”⁷ Two years later, Justice O’Connor, in a concurring opinion, wrote that “[i]n my view, because of the punitive character of such awards, there is reason to think that [unlimited jury discretion] may violate the Due Process Clause.”⁸

The Court revisited the issue the following term in *Browning-Ferris Industries, Inc. of Vermont v. Kelco Disposal*, holding that while the Excessive Fines Clause did not constrain a punitive damages award—because the government neither prosecuted the action nor could claim a share of the award, the Court would reserve for “another day” the “precise question . . . whether due process acts as a check on undue jury discretion to award punitive damages in the absence of any express statutory limit.”⁹

In 1991, the Court finally made explicit what it had been hinting: that the Due Process Clause limits the amount of a punitive damages award. In *Pacific Mutual Life Insurance Co. v. Haslip* (*Haslip*), the Court concluded that “unlimited jury discretion—or unlimited judicial discretion for that matter—in the fixing of punitive damages may invite extreme results that jar one’s constitutional sensibilities.”¹⁰ Although the Court declined to “draw a mathematical bright line between the constitutionally acceptable and the constitutionally unacceptable that would fit every case,” it held that “general concerns of reasonableness and adequate guidance from the court when the case is tried to a jury properly enter into the constitutional calculus.”¹¹ The Court reinforced this point two years later in *TXO Production Corp. v. Alliance Resources Corp.*, where it again emphasized that “general concerns of reasonableness” govern the determination of whether a punitive damages award is “so ‘grossly excessive’ as to violate the substantive component of the Due Process Clause.”¹²

The Court’s final pre-*Gore* punitive damages case was *Honda Motor Co. v. Oberg* (*Oberg*).¹³ In that case, the Court emphasized that punitive damages “pose an acute danger of arbitrary deprivation of property” and noted that “the rise of large, interstate and multinational corporations has aggravated the problem of arbitrary awards and potentially biased juries.”¹⁴

7. 475 U.S. 813, 828–29 (1986).

8. *Bankers Life & Cas. Co. v. Crenshaw*, 486 U.S. 71, 87 (1988) (O’Connor, J., concurring).

9. *Browning-Ferris Indus. of Vt., Inc. v. Kelco Disposal*, 492 U.S. 257, 264, 276–77 (1989).

10. 499 U.S. 1, 18 (1991).

11. *Id.*

12. 509 U.S. 443, 458 (1993).

13. 512 U.S. 415 (1994).

14. *Id.* at 431–32.

B. The Due Process Guideposts

The Court made these limits concrete in *Gore*, where it set forth the three guideposts—reprehensibility, ratio, and comparable penalties—that govern constitutional review of the excessiveness of punitive damages awards. At heart, *Gore* is a case about “fair notice.” The guideposts are intended to assist in determining whether the defendant can be deemed to have had fair notice of the punishment that could be imposed for particular conduct. As the Court explained, “[e]lementary notions of fairness enshrined in our constitutional jurisprudence dictate that a person receive fair notice not only of the conduct that will subject him to punishment but also of the severity of the penalty that a state may impose.”¹⁵

A constitutional excessiveness analysis must be performed “with care[] to ensure both reasonableness and proportionality.”¹⁶ When reviewing an award on appeal, a court must apply an “[e]xacting” standard, and conduct its own “thorough, independent review” of the trial court’s determination of the award’s constitutionality.¹⁷ Rigorous appellate review under a *de novo* standard, the Court has emphasized, ensures that the *Gore* standards “will acquire more meaningful content through case-by-case application” and “helps to assure the uniform treatment of similarly situated persons that is the essence of law itself.”¹⁸

The Court has identified a variety of factors that may bear upon a defendant’s level of reprehensibility. These include the presence of physical harm, the financial vulnerability of the plaintiff, and repeated or malicious conduct by the defendant.¹⁹ Nonetheless, “[t]he existence of any one of these factors weighing in favor of a plaintiff may not be sufficient to sustain a punitive damages award; and the absence of all of them renders any award suspect.”²⁰ Moreover, in many cases, *no* award of punitive damages may be justified. That is because “[i]t should be presumed a plaintiff has been made whole for his injuries by compensatory damages, so punitive damages should only be awarded if the defendant’s culpability, after having paid compensatory damages, is so reprehensible as to warrant the imposition of further sanctions to achieve punishment or deterrence.”²¹

15. *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 574 (1996).

16. *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 428 (2003).

17. *Id.* at 418; *Cooper Indus. v. Leatherman Tool Group*, 532 U.S. 424, 441 (2001).

18. *Cooper Indus.*, 532 U.S. at 436 (citation omitted).

19. *Campbell*, 538 U.S. at 419.

20. *Id.*

21. *Id.*

Although the Court has eschewed imposing a bright-line permissible ratio between compensatory and punitive damages, it has repeatedly noted—in *Haslip*, *Gore*, and *State Farm v. Campbell*—that legislative sanctions typically provide for double, treble, or quadruple damages.²² Moreover, it has emphasized that where “compensatory damages are substantial, then a lesser ratio, perhaps only equal to compensatory damages, can reach the outermost limit of the due process guarantee.”²³ Notably, in *Exxon Shipping Co. v. Baker*—a case that involved not a constitutional excessiveness challenge but rather an excessiveness challenge under federal maritime common law—the Court reduced a punitive damages award to a 1:1 ratio.²⁴

The third guidepost requires courts to compare the punitive damages award with legislatively authorized civil sanctions, as well as with punitive damages awards imposed in comparable cases. The Court has underscored the limited relevance of criminal sanctions, explaining that “[p]unitive damages are not a substitute for the criminal process, and the remote possibility of a criminal sanction does not automatically sustain a punitive damages award.”²⁵

The Court has also held that punitive damages may not be imposed on the basis of harm to nonparties or on a defendant’s extraterritorial conduct or business activities.²⁶ Permitting punishment to vindicate harms to persons not before the court would deny the defendant an opportunity to raise defenses particular to the absent persons; for example, in a product liability case, the defendant might be able to show that the absent person assumed the risk or ignored a manufacturer’s warning.²⁷ Although harm to others may factor into the reprehensibility calculus, “a jury may not go further than this and use a punitive damages verdict to punish a defendant directly on account of harms it is alleged to have visited on nonparties.”²⁸ Likewise, punitive damages generally may not be based on a defendant’s conduct in other states. That is because “[a] basic principle of federalism is that each State may make its own reasoned judgment about what conduct is permitted or proscribed within its borders, and each State alone can determine what measure of punishment, if any, to

22. *Pac. Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 23–24 (1991); *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 581 & n.33 (1996); *Campbell*, 538 U.S. at 425.

23. *Campbell*, 538 U.S. at 425.

24. 128 S. Ct. 2605 (2008).

25. *Campbell*, 538 U.S. at 428.

26. *Id.* at 421–22.

27. *Philip Morris USA v. Williams*, 549 U.S. 346, 353–54 (2007).

28. *Id.* at 355.

impose on a defendant who acts within its jurisdiction.”²⁹ Thus, a jury “may not use evidence of out-of-state conduct to punish a defendant for action that was lawful in the jurisdiction where it occurred,” nor “does a State have a legitimate concern in imposing punitive damages to punish a defendant for unlawful acts committed outside the State’s jurisdiction.”³⁰

II. FAIR NOTICE AND THE THRESHOLD QUESTION OF LIABILITY

The fair notice principle articulated in *Gore* mandates that defendants be given notice of the conduct that may subject them to punishment, as well as the amount of the penalty that may be imposed. But the Court has given little concrete guidance as to how this principle should be applied in the first situation—that is, where a defendant claims it lacked fair notice that its conduct could subject it to punishment.

The Court need not write on a blank slate, however, as two lines of case law inform this analysis. The first is the Court’s “void for vagueness” jurisprudence, which generally holds that a person cannot be punished for violating a statute that is so indeterminate that it is not clear what conduct it prohibits.³¹ The second is the common law rule, recently reaffirmed in *Burr*, that a person may not be punished for engaging in conduct that was objectively reasonable.³² As the Supreme Court recognized in *Oberg*, common law requirements provide a “touchstone” for constitutional analysis, and where a state elects to jettison a longstanding common law protection against punitive damages, there is a presumption that the state’s scheme is unconstitutional.³³

These two lines of case law are properly read to require, as a matter of federal due process, that a defendant’s conduct be assessed by reference to some objective measure or standard before punitive damages may be imposed. In a particular case, an objective measure might consist of a relevant statute or regulation, or the common practices of others in an industry or community. If, however, the basis for a punitive damages claim is merely the belief of the plaintiff—or his expert witness—that the defendant acted outrageously, it cannot be said that the defendant had fair notice that the challenged conduct could subject him to punishment. Whether viewed as an issue of vagueness (in the sense

29. *Campbell*, 538 U.S. at 422.

30. *Id.* at 421–22.

31. *See Grayned v. City of Rockford*, 408 U.S. 104 (1972).

32. *Safeco Ins. Co. of Am. v. Burr*, 551 U.S. 47 (2007).

33. *Honda Motor Co. v. Oberg*, 512 U.S. 415, 430 (1994).

that the applicable punitive damages statute could not have given notice that the conduct was prohibited) or through the lens of the common law (in the sense that the defendant's conduct could not be deemed objectively unreasonable), the Constitution prohibits the imposition of punishment under such circumstances.

A. Vagueness

The Constitution guarantees “fair notice . . . of the conduct that will subject [one] to punishment.”³⁴ As the Supreme Court said in *Arthur Andersen LLP v. United States*—where it reversed the accounting firm's conviction—“a fair warning should be given to the world in language that the common world will understand[] of what the law intends to do if a certain line is passed.”³⁵ This principle has been given concrete application in the Court's vagueness case law, in which the Court has considered due process challenges to noise and vagrancy ordinances, among other things, based on the argument that the statute fails to identify with any precision what conduct it prohibits.

In *Grayned v. City of Rockford*, the Court stated that “[i]t is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined.”³⁶ There are two vices in vague laws. The first is that vague laws “may trap the innocent by not providing fair warning.”³⁷ The Court explained that “because 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.”³⁸ The second vice is that laws that fail to “provide explicit standards for those who apply them” create the risk of “arbitrary and discriminatory enforcement.”³⁹ That is because “[a] vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis.”⁴⁰

With regard to the first problem with vague laws—that they fail to provide fair warning—the Court has long deemed it “a well recognized requirement” that “the terms of a penal statute creating

34. *Campbell*, 538 U.S. at 417 (quoting *BMW of N. Am, Inc. v. Gore*, 517 U.S. 559, 574 (1996)).

35. *Arthur Andersen LLP v. United States*, 544 U.S. 696, 703 (2005) (quoting *McBoyle v. United States*, 283 U.S. 25, 27 (1931)).

36. 408 U.S. 104, 108 (1972).

37. *Id.*

38. *Id.*

39. *Id.*

40. *Id.* at 108–09.

a new offense must be sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties."⁴¹ Such a requirement is:

[C]onsonant alike with ordinary notions of fair play and the settled rules of law; and a statute 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.⁴²

In *Connally v. General Construction Co.*, the Court held that a state statute compelling businesses to pay workers "not less than the current rate of per diem wages in the locality" was unconstitutionally vague.⁴³ Businesses that had every intention of complying with the law were unable to determine what the law required, and hence unable to steer a lawful course. There could be no assurance that a company's assessment of what territory was encompassed within a "locality" would square with a jury or court's hindsight determination, and a company faced the threat of severe sanctions if it guessed wrong. The Court concluded that the consequence of the statute's indeterminacy was that:

[T]he application of the law depends, not upon a word of fixed meaning in itself, or one made definite by statutory or judicial definition, or by the context or other legitimate aid to its construction, but upon the probably varying impressions of juries as to whether given areas are or are not to be included within particular localities.⁴⁴

Regarding the second problem with vague laws—that they create a risk of arbitrary and discriminatory enforcement—the Court in *Kolender v. Lawson* emphasized "the requirement that a legislature establish minimal guidelines to govern law enforcement."⁴⁵ In that case, the Court held that a statute requiring loiterers to provide a "credible and reliable" form of identification to police officers upon request was unconstitutionally vague.⁴⁶ The Court condemned the law as "failing to describe with sufficient particularity what a suspect might do in order to satisfy the statute," thus permitting "a standardless sweep [that] allows

41. *Connally v. Gen. Constr. Co.*, 269 U.S. 385, 391 (1926).

42. *Id.*

43. *Id.* at 388.

44. *Id.* at 395.

45. 461 U.S. 352, 357–58 (1983) (quoting *Smith v. Goguen*, 415 U.S. 566, 574 (1974)).

46. *Id.* at 353–54.

policemen, prosecutors, and juries to pursue their personal predilections.”⁴⁷

These rules are readily applicable to the law of punitive damages. In fact, the Court has repeatedly warned that punitive damages awards are particularly susceptible to vagueness problems; it has condemned “[v]ague instructions, or those that merely inform the jury to avoid ‘passion or prejudice,’” on the ground that such instructions “do little to aid the decisionmaker in its task of assigning appropriate weight to evidence that is relevant and evidence that is tangential or only inflammatory.”⁴⁸ In one of the Court’s early punitive damages decisions, Justice O’Connor dissented, warning that:

[T]he Due Process Clause does not permit a State to classify arbitrariness as a virtue. Indeed, the point of due process—of the law in general—is to allow citizens to order their behavior. A State can have no legitimate interest in deliberately making the law so arbitrary that citizens will be unable to avoid punishment solely upon bias or whim.⁴⁹

A majority of the Court later adopted this reasoning in full.⁵⁰

The concerns underlying the Court’s vagueness jurisprudence apply with full force to punitive damages awards. In many cases, there is no way that the defendant could have known in advance that it could be subjected to punitive damages for the conduct at issue. For example, a Tennessee jury awarded a plaintiff \$98 million in punitive damages in a product liability case based on an allegation that the seatbacks in Chrysler’s Dodge Caravan were defectively designed because they were too weak.⁵¹ Chrysler pointed to undisputed evidence that its design more than doubled federal seatback strength standards and that Chrysler’s seats were “mainstream” within the industry.⁵² And even though Tennessee law “restrict[s] the awarding of punitive damages to cases involving the most egregious of wrongs,”⁵³ the jury imposed a massive punitive damages award, and the Tennessee Supreme Court agreed that punitive damages were appropriate.⁵⁴ Under these circumstances, there is no way that Chrysler, or any

47. *Id.* at 358, 361 (quoting *Smith*, 415 U.S. at 575).

48. *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 418 (2003).

49. *Pac. Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 59 (1991) (O’Connor, J., dissenting).

50. *See Campbell*, 538 U.S. at 417–18.

51. *See Flax v. DaimlerChrysler*, 272 S.W.3d 521 (Tenn. 2008).

52. *Id.* at 557 (Koch, J., dissenting).

53. *Hodges v. S.C. Toof & Co.*, 833 S.W.2d 896, 901 (Tenn. 1992).

54. *See Flax*, 272 S.W.3d at 536–37.

manufacturer, could have known in advance that Tennessee law would authorize an award of punitive damages.

The Court's concern about vague laws creating a risk of arbitrary or discriminatory enforcement is reflected in the frequency with which juries impose punitive damages against large corporations, particularly those from out of state. The dangers of arbitrariness and bias are heightened when a plaintiff is allowed to introduce evidence of the defendant's wealth or net worth, on the theory that only a substantial monetary award will suffice to "get their attention" and "send a message" to a wealthy corporate defendant. As the Court has recognized, "[j]ury instructions typically leave the jury with wide discretion in choosing amounts, and the presentation of evidence of a defendant's net worth creates the potential that juries will use their verdicts to express biases against big businesses, particularly those without strong local presences."⁵⁵

In short, punitive damages laws are precisely the type of vague laws that are vulnerable to the dangers about which the Supreme Court has repeatedly warned. This is not to say that most punitive damages laws are unconstitutional on their face. Rather, courts must take care to ensure that they are applied in a constitutional manner; that is, in a way that the defendant can be deemed to have had fair notice that its conduct could subject it to punishment.

B. Common Law

Another source of authority that casts light on how to determine when a defendant has the constitutionally-mandated fair notice is the common law. In determining the scope of constitutional protections against arbitrary punitive damages awards, the Court has looked to traditional common law practice. In *Oberg*, the Court held that Oregon's "abrogation of a well-established common-law protection against arbitrary deprivations of property raises a presumption that its procedures violate the Due Process Clause."⁵⁶ The Court explained that "traditional practice provides a touchstone for constitutional analysis," and "[w]hen the absent procedures would have provided protection against arbitrary and inaccurate adjudication, this Court has not hesitated to find the proceedings violative of due process."⁵⁷ In fact, even Justice Scalia, who has never accepted the *Gore* guideposts, agreed that

55. *Campbell*, 538 U.S. at 417 (quoting *Honda Motor Co. v. Oberg*, 512 U.S. 415, 432 (1994)).

56. *Oberg*, 512 U.S. at 430.

57. *Id.*

“[t]he deprivation of property without observing (or providing a reasonable substitute for) an important traditional procedure for enforcing state-prescribed limits upon such deprivation violates the Due Process Clause.”⁵⁸

The common law enshrines the principle that when an individual acts based upon an objectively reasonable interpretation of the law, he cannot be punished—even if it turns out that his interpretation was incorrect. In *Burr*, the Court explained that, at common law, whether a defendant acted “recklessly”—and thus could be subjected to punishment—must be determined by reference to objective standards.⁵⁹ “It is this high risk of harm, objectively assessed, that is the essence of recklessness at common law.”⁶⁰ The Court went on to hold that because the defendant’s understanding of its legal obligations, “albeit erroneous, was not objectively unreasonable,” the defendant could not be deemed to have acted willfully or with reckless disregard.⁶¹ The Court explained that “[w]here, as here, the statutory text and relevant court and agency guidance allow for more than one reasonable interpretation, it would defy history and current thinking to treat a defendant who merely adopts one such interpretation as a knowing or reckless violator.”⁶²

The *Burr* Court looked for guidance to the law of qualified immunity, which examines “whether an action was reasonable in light of legal rules that were ‘clearly established’ at the time.”⁶³ Thus, a federal officer is entitled to qualified immunity “if officers of reasonable competence could disagree on the issue.”⁶⁴ In short, the qualified immunity test is “simply the adaptation of the fair warning standard to give officials . . . the same protection from civil liability and its consequences that individuals have traditionally possessed in the face of vague criminal statutes.”⁶⁵

The common law approach to recklessness dovetails with the constitutional limits on vagueness. At common law, an individual who acts in an objectively reasonable fashion cannot have acted

58. *Id.* at 436 (Scalia, J., concurring).

59. *Safeco Ins. Co. of Am. v. Burr*, 551 U.S. 47 (2007).

60. *Id.* at 69 (citing W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 34, at 213 (5th ed. 1984)). This tracks the standard identified by Holmes in *The Common Law*—that recklessness must be assessed by reference to “a general objective standard.” OLIVER WENDELL HOLMES, JR., THE COMMON LAW 136 (Dover Publ’ns, Inc. 1991) (1881).

61. *Burr*, 551 U.S. 47 at 69.

62. *Id.* at 70 n.20.

63. *Id.* at 70 (quoting *Saucier v. Katz*, 533 U.S. 194, 202 (2001)).

64. *Malley v. Briggs*, 475 U.S. 335, 341 (1986).

65. *United States v. Lanier*, 520 U.S. 259, 270–71 (1997).

recklessly. But where an individual defies the indicators or metrics of objectively reasonable conduct, he may well be found to have acted recklessly. There is rarely a vagueness problem in punishing a person for objectively unreasonable conduct because the objective nature of the test ensures that the person had fair notice that he was engaging in conduct that could subject him to punishment. However, if the test of unreasonableness is not an objective one, the defendant cannot be deemed to have had fair notice, thus triggering both the constitutional and common law prohibitions on punishment.

C. Objective Reasonableness

The discussion above has demonstrated that if a defendant's conduct cannot be deemed reckless by reference to readily ascertainable, objective standards of reasonableness, then punitive damages may not be imposed as a matter of federal due process. This subpart identifies and discusses some benchmarks that are commonly used in establishing the parameters of objectively reasonable conduct.

One common benchmark of objective reasonableness is the existence of federal or state statutes governing the conduct at issue. For example, product liability lawsuits often target a product whose design is subject to government regulation, such as airplanes or motor vehicles. If the claim in such a case is that the manufacturer should not have designed its product in a way that satisfies the government's design requirements, the manufacturer should not be subjected to punitive damages for its design. Looking to government regulations for guidance cannot be deemed a reckless act, and a manufacturer should not be subjected to punishment for following the approach prescribed by the government rather than the *ex post* approach recommended by the plaintiff or his expert. Even if a judge or jury concludes that the manufacturer acted negligently in following the approach approved by the government, it cannot be said that the manufacturer acted recklessly and should be subjected to punishment. Such a conclusion would render the law unconstitutionally vague and would improperly punish the manufacturer for having acted in an objectively reasonable fashion. As one of the leading torts treatises explains, "[i]n most contexts . . . compliance with a statutory standard should bar liability for punitive damages."⁶⁶ The common law thus recognizes that a defendant should not be subjected to punishment for doing what the government has said it can do.

66. KEETON ET AL., *supra* note 60, § 36, at 233 n.41.

Another benchmark is the practice of similarly situated people or companies.⁶⁷ For example, in a case involving allegedly reckless behavior by a lawyer or accountant, one very relevant measure of objective reasonableness would be the approach taken by other professionals under similar circumstances. Likewise, in a case where the plaintiff seeks punitive damages based on the actions of a corporation, the conduct of other companies in that industry that have been faced with similar circumstances would, in many cases, be highly relevant to whether the defendant acted in an objectively unreasonable fashion. A company whose conduct falls within the mainstream has a strong argument that it did not act recklessly.

A third benchmark is the existence of a genuine, reasonable debate within the relevant professional or technical community over the propriety of the challenged course of conduct. If reasonable people can disagree as to the propriety of a certain action, that fact alone undercuts any conclusion that taking the action amounts to objectively unreasonable behavior. The Supreme Court emphasized this point in *Burr*, where it held—solely on the basis of its own reading of the law at issue—that the defendant’s interpretation was objectively reasonable and hence not reckless.⁶⁸ In fact, the Court took an identical approach in an early case in which it held that a \$6,300 civil penalty violated due process where the defendant was “well justified in regarding [its conduct] as reasonable and in acting on that belief” *even assuming* that the defendant “should have known that the Supreme Court of the State . . . might hold the [conduct] unreasonable.”⁶⁹ The Court has also recognized this principle in the context of qualified immunity, explaining that “if officers of reasonable competence could disagree on th[e matter at] issue, immunity should be recognized.”⁷⁰ In many punitive damages cases, particularly cases involving alleged corporate wrongdoing, there will have been an internal debate over the actions at issue, and the mere fact that

67. *Drabik v. Stanley-Bostitch, Inc.*, 997 F.2d 496, 510 (8th Cir. 1993) (“Compliance with industry standard and custom serves to negate conscious disregard and to show that the defendant acted with a nonculpable state of mind.”); David G. Owen, *Problems In Assessing Punitive Damages Against Manufacturers of Defective Products*, 49 U. CHI. L. REV. 1, 40–41 (1982) (“In a typical case, compliance with a universal industry custom should be held conclusively to establish good faith against a punitive damages claim. Rarely will an entire industry act with flagrant impropriety against the health and safety of the consuming public, and running with the pack in general should shield a manufacturer from later punishment for conforming to the norm.”).

68. *Safeco Ins. Co. v. Burr*, 551 U.S. 47, 70 n.20 (2007).

69. *Sw. Tel. & Tel. Co. v. Danaher*, 238 U.S. 482, 490 (1915).

70. *Malley v. Briggs*, 475 U.S. 335, 341 (1986).

some employees expressed a contrary view does not automatically entitle a plaintiff to a punitive damages award.

The indicators discussed above are not meant to be an exclusive list. The nature of the conduct at issue will determine the relevant benchmarks of objectively reasonable conduct in a particular case. But the key point is that courts must ensure that the standard is an objective one, which typically will mean that there must be evidence other than the subjective belief of the plaintiff and his expert that the defendant acted recklessly. While awarding *compensatory* damages for negligence, or on the basis of strict liability, may not raise the due process dangers discussed in this Article, a defendant should not be *punished* in the absence of fair notice that its conduct was wrongful. The Constitution requires no less.