# ESSAY

# THE ENDURING AND UNIVERSAL PRINCIPLE OF "FAIR NOTICE"

THEODORE J. BOUTROUS, JR.*

BLAINE H. EVANSON†

## I. INTRODUCTION

The Supreme Court held in *FCC v. Fox Television Stations, Inc.* that the due process clause of the Fifth Amendment precludes the Federal Communications Commission from punishing Fox for its broadcasting of "fleeting expletives," because the regulations did not give Fox "fair notice" that such conduct could subject it to punishment.[1] The result surprised many court watchers, who were expecting a key First Amendment ruling on whether minor obscenities uttered or shown on TV were protected speech.[2] But the Court's holding (and that of a similar case,

* Mr. Boutrous is a partner in the Los Angeles office of Gibson, Dunn & Crutcher LLP, where he cochairs the firm's national Appellate & Constitutional Law practice group. The authors thank Molly Gerratt and Amy Friedman for their excellent assistance with this Article, as well as John Thomas of Dykema Gossett PLLC, for his thinking and analysis on these issues over the years. Gibson Dunn represented NBCUniversalMedia, LLC in *FCC v. Fox Television Stations, Inc.*

† Mr. Evanson is an associate in the Los Angeles office, and practices in the Appellate & Constitutional Law group.

1. FCC v. Fox Television Stations, Inc., 132 S. Ct. 2307, 2317–18 (2012).

2. *See, e.g.*, Theodore J. Boutrous, Jr., *Broadcast 'Indecency' on Trial*, WALL ST. J., Jan. 17 2012, at A13 (describing the First Amendment issues at stake in *Fox* and arguing both that the Supreme Court jurisprudence on censorship of broadcast television is outdated and that the Commission's indecency regulations are unconstitutionally vague); Amy Davidson, *The Court Flees from Expletives*, THE NEW YORKER (June 21, 2012), http://www.newyorker.com/online/blogs/closeread/2012/06/supreme-court-ruling-television-swearing.html ("[The Court] had an opportunity here to address First Amendment issues dating back to the crackdown on George Carlin's 1972 monologue 'Seven Words You Can Never Say on Television' . . . and dodged it, finding procedural refuge in the F.C.C.'s

*Christopher v. SmithKline Beecham Corp.*)[3]—which was based on the doctrine that defendants must receive "fair notice" of the conduct that can subject them to punishment[4]—is supported by nearly a century of established due process jurisprudence.[5] The fair notice requirement is an essential protection of the due process clause, and shields all defendants from unfair and arbitrary punishment.

In requiring fair notice of a civil penalty imposed by a regulatory agency, *Fox* and *Christopher* remove any doubt that where a defendant—whether criminal or civil—faces punishment, the standards of conduct giving rise to such punishment must be reasonably discernible *before* the punishment is imposed. The Court specified that "laws which regulate persons or entities must give fair notice of conduct that is forbidden or required,"[6] thus reaffirming the constitutional mandate "that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly."[7] In particular, courts that have long grappled with how to apply the Supreme Court's fair notice doctrine to the availability of punitive damages should look to the clear holdings in *Fox* and *Christopher*, which almost certainly preclude punitive damages liability against defendants based on liability standards that were not clearly established at the time of the challenged conduct.[8]

capriciousness . . . ."); Lyle Denniston, *Opinion Recap: TV Indecency Policy Awaits Next Round*, SCOTUSBLOG (Jun. 21, 2012, 2:49 PM), http://www.scotusblog.com/2012/06/opinion-recap-tv-indecency-policy-awaits-next-round/ ("Notably, Justice Ruth Bader Ginsburg, in a brief opinion . . . [said] that she joined only in the result, not in Kennedy's reasoning, [and] called for 'reconsideration' of the *Pacifica* precedent."); Edward Wyatt, *Can You Say That on TV? Broadcasters Aren't Sure*, N.Y. TIMES, June 22, 2012, at B6, *available at* http://www.nytimes.com/2012/06/22/business/media/broadcasters-still-arent-sure-whats-allowed.html?_r=0 ("I think the Supreme Court has been irresponsible in not taking a case that would help the government and the broadcasters understand what the parameters of the First Amendment are.") (quoting Michael Powell, a former Commission chairman).

3. Christopher v. SmithKline Beecham Corp., 132 S. Ct. 2156, 2167 (2012). *See also Fox*, 132 S. Ct. at 2317.

4. *Fox*, 132 S. Ct. at 2317 ("A fundamental principle in our legal system is that laws which regulate persons or entities must give fair notice of conduct that is forbidden or required.") (citation omitted). *See also, e.g.*, Grayned v. City of Rockford, 408 U.S. 104, 108–09 (1972) ("[W]e insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. . . . [Moreover,] vague law[s] impermissibly delegate[] basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis . . . .").

5. *See Fox*, 132 S. Ct. at 2317.

6. *Id.*

7. *Grayned*, 408 U.S. at 108.

8. *See Fox*, 132 S. Ct. at 2317; *Christopher*, 132 S. Ct. at 2167.

## II. FAIR NOTICE IN THE CRIMINAL LAW

The Supreme Court has long construed the constitutional requirement of due process to mean that no person ought to be forced "to speculate as to the meaning of penal statutes. All are entitled to be informed as to what the State commands or forbids."[9] As such, criminal defendants may not be prosecuted unless the statute "define[s] the criminal offense [1] with sufficient definiteness that ordinary people can understand what conduct is prohibited and [2] in a manner that does not encourage arbitrary and discriminatory enforcement."[10] This constitutional standard is based on the fairness to defendants of being able to order their conduct in a way that avoids punishment, and the protection against arbitrary enforcement by police officers, judges, and jurors.[11]

The Court has traditionally analyzed fair notice challenges to criminal statutes under the "void-for-vagueness" doctrine.[12] The Court's decisions require that "the terms of a penal statute creating 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."[13] To survive a constitutional challenge, the statute must therefore "describe with sufficient particularity what a suspect must do in order to satisfy the statute."[14]

This analysis is based on a "common intelligence" test—the question is not whether a person with *special expertise* would be able to derive the true meaning of a criminal statute, but whether a person of *common intelligence* can determine what conduct is prohibited based on the text of the statute and any guidance from the legislature, enforcement agency, or controlling courts.[15] Thus, for example, in *City of Chicago v. Morales*, the

9. Lanzetta v. New Jersey, 306 U.S. 451, 453 (1939) (footnote omitted).

10. Skilling v. United States, 130 S. Ct. 2896, 2927–28 (2010) (quoting Kolender v. Lawson, 461 U.S. 352, 357 (1983)).

11. *Kolender*, 461 U.S. at 359 ("It is clear that the full discretion accorded to the police . . . necessarily entrust[s] lawmaking to the moment-to-moment judgment of the policeman on his beat.") (quoting Smith v. Goguen, 415 U.S. 566, 575 (1974)) (internal quotation marks omitted); Giaccio v. Pennsylvania, 382 U.S. 399, 402–03 (1966) ("It is established that a law fails to meet the requirements of the Due Process Clause if it is so vague and standardless that it leaves the public uncertain as to the conduct it prohibits or leaves judges and jurors free to decide, without any legally fixed standards, what is prohibited and what is not in each particular case.").

12. *See, e.g.*, City of Chicago v. Morales, 527 U.S. 41, 56 (1999); *Grayned*, 408 U.S. at 108–09.

13. Connally v. Gen. Constr. Co., 269 U.S. 385, 391 (1926). *See also* United States v. Lanier, 520 U.S. 259, 267 (1997) (stating that criminal statutes must make "reasonably clear at the relevant time that the defendant's conduct was criminal").

14. *Kolender*, 461 U.S. at 361. This may also be referred to as the "ascertainable standards of guilt" requirement. *See* Palmer v. City of Euclid, 402 U.S. 544, 545 (1971).

15. *See Grayned*, 408 U.S. at 110; Lanzetta v. New Jersey, 306 U.S. 451, 454–55 (1939) (citing

Court invalidated a statute that prohibited the "loitering" of criminal street gangs in public places, because the statute did not specify what behavior constituted "loitering."[16]

Due process also precludes "novel construction" of statutes—otherwise known as the antiretroactivity doctrine[17]—which expands the scope of conduct that can be prosecuted under a statute if "neither the statute nor any prior judicial decision ha[d] fairly disclosed [the defendant's conduct] to be within its scope."[18] For example, the Court in *Bouie v. City of Columbia* reversed criminal convictions that were based on the South Carolina Supreme Court's redefining of a criminal trespass statute to include the conduct at issue. Although the state Supreme Court had authority to interpret the laws and define what conduct fell within its scope, it could do so only prospectively.[19] As a result, the U.S. Supreme Court held that the defendants in the case lacked fair notice at the time they were engaged in the conduct at issue.[20]

## III. FAIR NOTICE OF CIVIL FINES FROM A REGULATORY AGENCY

The Supreme Court in *Fox* and *Christopher* applied the same due process protections articulated in such cases as *Grayned*,[21] *Skilling*,[22] and

*Connally*, 269 U.S. at 391). The Court has analogized the fair notice doctrine to the "objective reasonableness" standard in qualified immunity cases, which protects public officials if their conduct could be considered "objectively reasonable" at the time of an alleged violation of a constitutional right. A determination after the fact that the official violated a constitutional right cannot result in punishment against the official. *See* Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982); *Lanier*, 520 U.S. at 270–71 ("[B]oth serve the same objective, [as] 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.").

16. *Morales*, 527 U.S. at 46, 50–51.

17. *Lanier*, 520 U.S. at 266; John Calvin Jeffries, Jr., *Legality, Vagueness, and the Construction of Penal Statutes*, 71 VA. L. REV. 189, 189 (1985).

18. *Lanier*, 520 U.S. at 266. *See also* Lankford v. Idaho, 500 U.S. 110, 119–20 (1991) (holding that the defendant did not have notice that the judge would impose a death sentence); Bouie v. City of Columbia, 378 U.S. 347, 352 (1964) ("When a statute on its face is . . . precise, however, it lulls the potential defendant into a false sense of security, giving him no reason even to suspect that conduct clearly outside the scope of the statute as written will be retroactively brought within it by an act of judicial construction."); *Lanzetta*, 306 U.S. at 456 ("It would be hard to hold that, in advance of judicial utterance upon the subject, [defendants] were bound to understand the challenged provision according to the language later used by the court.").

19. *Bouie*, 378 U.S. at 362. The doctrine of antiretroactivity may also lead to a narrowing of the interpretation of a particular statute, rather than a finding particularly tailored to the defendant's conduct in the case before the court. *See, e.g.*, Skilling v. United States, 130 S. Ct. 2896, 2932 (2010).

20. *Bouie*, 378 U.S. at 354–55, 362.

21. Grayned v. City of Rockford, 408 U.S. 104, 108–09 (1972).

*Lanier*,[23] to corporate civil defendants facing imposition of civil penalties by regulatory agencies. The Court invalidated the regulations at issue because they failed to provide a party "of ordinary intelligence fair notice of what is prohibited," and because the regulations were "so standardless that [they] authorize[d] or encourage[d] seriously discriminatory enforcement."[24]

In *Fox*, the Court assessed whether the Federal Communication Commission violated the due process rights of ABC and Fox by imposing sanctions for three distinct broadcasts involving either brief profanity or nudity, termed "fleeting expletives."[25] After the broadcasts occurred, the Commission enacted guidelines making the conduct in all three instances subject to sanctions, but at the time of the broadcasts, there were no regulations or other agency guidance that the broadcasters could have relied on in analyzing whether the brief profanity or nudity was punishable.[26] The Court thus concluded that "[t]he Commission's lack of notice to Fox and ABC that its interpretation had changed so the fleeting moments of indecency contained in their broadcasts were a violation . . . 'fail[ed] to provide a person of ordinary intelligence fair notice of what is prohibited.'"[27]

Similarly, in *Christopher v. SmithKline Beecham Corp.*, the Court refused to adopt the Department of Labor's interpretation of the Fair Labor Standard Act on the question whether pharmaceutical detailers were "outside salesmen" and therefore exempt from overtime requirements. The Department argued that the Court should defer to the Department's statement in a 2009 amicus brief, but the Court held that the amicus brief did not provide fair notice that the detailers fell within the exemption. The brief was written years after the offensive conduct,[28] the pharmaceutical

22. *Skilling*, 130 S. Ct. at 2928.

23. *Lanier*, 520 U.S. at 266.

24. FCC v. Fox Television Stations, Inc., 132 S. Ct. 2307, 2317 (2012) (quoting United States v. Williams, 553 U.S. 285, 304 (2008)). The Court went on to describe the relationship between the principle announced in *Fox* and the void-for-vagueness criminal doctrine:

> [T]he void for vagueness doctrine addresses at least two connected but discrete due process concerns: first, that regulated parties should know what is required of them so they may act accordingly; second, precision and guidance are necessary so that those enforcing the law do not act in an arbitrary or discriminatory way.

*Id*. at 2317 (citing *Grayned*, 408 U.S. at 108–09).

25. *Id*. at 2314.

26. *Id*. at 2318. *See also* Boutrous, *supra* note 2 ("Vague laws chill constitutionally protected speech and risk arbitrary censorship based on regulators' personal and artistic moral predilections.").

27. *Fox*, 132 S. Ct. at 2318 (quoting *Williams*, 553 U.S. at 304).

28. Christopher v. SmithKline Beecham Corp., 132 S. Ct. 2156, 2167 (2012) ("Petitioners invoke the DOL's interpretation of ambiguous regulations to impose potentially massive liability on respondent

industry's practice was to classify the detailers as exempt employees, and the Department had never initiated any enforcement action against such practices.[29] As a result, the Court held that "[t]o defer to the agency's interpretation in this circumstance would seriously undermine the principle that agencies should provide regulated parties 'fair warning of the conduct [a regulation] prohibits or requires.'"[30] According to the Court,

> [I]t is one thing to expect regulated parties to conform their conduct to an agency's interpretations once the agency announces them; it is quite another to require regulated parties to divine the agency's interpretations in advance or else be held liable when the agency announces its interpretations for the first time in an enforcement proceeding and demands deference.[31]

*Fox* imported directly the long line of decisions in criminal law establishing the enduring principle that a defendant is entitled to fair notice of the conduct that will subject it to punishment—any punishment. Although the Court had previously struck down civil penalties on the ground that the defendant lacked fair notice, it had not done so in several decades.[32] In holding that "[a] fundamental principle in our legal system is that laws which regulate persons or entities must give fair notice of conduct that is forbidden or required,"[33] the *Fox* Court tied its analysis to such landmark criminal decisions as *Connally*,[34] *Lanzetta*,[35] and *Grayned*.[36]

for conduct that occurred well before that interpretation was announced.").

29. *Id.* at 2167–68. *See also* B&B Insulation, Inc. v. Occupational Safety and Health Review Comm'n, 583 F.2d 1364, 1372 (5th Cir. 1978) ("B&B, on the contrary, produced a variety of witnesses representing labor and management to demonstrate that the 'reasonable man' would have done no more than B&B under these circumstances.").

30. *Christopher*, 132 S. Ct. at 2167 (quoting Gates & Fox Co. v. Occupational Safety and Health Review Comm'n, 790 F.2d 154, 156 (D.C. Cir. 1986)).

31. *Id.* at 2168.

32. *See, e.g.*, Champlin Ref. Co. v. Corp. Comm'n of Okla., 286 U.S. 210, 242–43 (1932) (striking down a statute as unconstitutionally vague where the statute's "general terms" were not well defined by the common law and were not "shown to have any meaning in the oil industry sufficiently definite to enable those familiar with the operation of oil wells to apply them with any reasonable degree of certainty"); A.B. Small Co. v. Am. Sugar Ref. Co., 267 U.S. 233, 239 (1925) (looking to industry norms but finding no objective guidance and striking down statute as void for vagueness); United States v. L. Cohen Grocery Co., 255 U.S. 81, 89 (1921) (striking down statute as void for vagueness because "to attempt to enforce the section would be the exact equivalent of an effort to carry out a statute which in terms merely penalized and punished all acts detrimental to the public interest when unjust and unreasonable in the estimation of the court and jury").

33. FCC v. Fox Television Stations, Inc., 132 S. Ct. 2307, 2317 (2012) (citation omitted).

34. Connally v. Gen. Constr. Co., 269 U.S. 385, 391 (1926) ("[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.")

35. Lanzetta v. New Jersey, 306 U.S. 451, 453 (1939) ("No one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes. All are entitled to be informed as to

*Fox* and *Christopher* (and the decisions that have followed) highlight the importance of *agency guidance* in giving regulated entities fair notice of what conduct could subject them to punishment.[37] For example, the Ninth Circuit, in a 2012 opinion citing *Christopher*, struck down a regulatory fine because the agency at issue did not provide firm guidance as to the interpretation of the regulation: "The Director could have issued notice-and-comment regulations regarding interest on compensation awards long ago . . . rather than taking inconsistent positions on interest-related issues over the years."[38] As in *Fox* and *Christopher*, the Ninth Circuit premised its decision on the concern that allowing regulatory fines for deviations from regulations not clearly delineated at the time of action "would severely undermine the notice and predictability to regulated parties that formal rulemaking is meant to promote."[39]

And several courts have made clear that the *custom* and *practice of the industry* is critical in determining whether a reasonable regulated party could have anticipated punishment for certain conduct.[40] The Eighth Circuit held in *Drabik v. Stanley-Bostitch, Inc.* that "[c]ompliance with industry standard and custom serves to negate conscious disregard and to show that the defendant acted with a nonculpable state of mind. . . ."[41] Part

what the State commands or forbids.").

36. Grayned v. City of Rockford, 408 U.S. 104, 108–09 (1972) (discussing the requirement that parties be able to know that conduct is prohibited prior to performing it and the prohibition on discriminatory enforcement of the law).

37. *See, e.g.*, Price v. Stevedoring Servs. of Am., Inc., 697 F.3d 820, 830–31 (9th Cir. 2012) (citing Christopher v. SmithKline Beecham Corp., 132 S. Ct. 2156 (2012)) (stating that the agency at issue failed to announce interpretations of its regulation before the defendant's conduct); Summit Petroleum Corp. v. EPA, 690 F.3d 733, 756 (6th Cir. 2012) (noting the "EPA's refusal to include a functional relationship test in its single stationary source analysis and its current position that its analysis cannot be completed without it"); EME Homer City Generation, L.P. v. EPA, 696 F.3d 7, 33 (D.C. Cir. 2012) (citing both *Fox* and *Christopher* in striking down an interpretation of an EPA regulation that was announced "*after* the States' chance to comply with the target has already passed").

38. *Price*, 697 F.3d at 830–31 (citation omitted).

39. *Id.* at 830. *See also, e.g.*, City of Chicago v. Morales, 527 U.S. 41, 50–51 (1999) (striking down a city ordinance that prohibited "loitering" in public places, based on the fact that the statute did not provide notice as to what constituted loitering, and noting that the Constitution does not permit such vague standards by which citizens must conform their behavior); Giaccio v. Pennsylvania, 382 U.S. 399, 402 (1966) ("It is established that a law fails to meet the requirements of the Due Process Clause if it is so vague and standardless that it leaves the public uncertain as to the conduct it prohibits . . . ."); *Lanzetta*, 306 U.S. at 453 ("No one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes.").

40. *See, e.g.*, *Summit Petroleum*, 690 F.3d at 746 (discussing the fact that the term "adjacent" could not be credited with the EPA's preferred interpretation, in part because of memoranda given to members of the oil and gas industry reflecting a different interpretation); *EME Homer City*, 696 F.3d at 33 (stating that one of the reasons for states not complying with an EPA guideline was that industry custom among states dictated a different result than the regulation).

41. Drabik v. Stanley-Bostitch, Inc., 997 F.2d 496, 510 (8th Cir. 1993).

of the fair-notice analysis therefore involves a comparison between the conduct of the defendant and the common practices of the defendant's competitors in the relevant industry. This conflicting guidance from the way other entities are interpreting the laws[42] means that a defendant lacked the constitutionally required fair notice.[43]

## IV. FAIR NOTICE OF CONDUCT THAT CAN SUBJECT A DEFENDANT TO PUNITIVE DAMAGES LIABILITY

Although the Supreme Court has not squarely addressed the question, *Fox* and *Christopher* leave no doubt that a defendant is entitled to fair notice of conduct that can give rise to punitive damages liability. The Court has termed punitive damages "quasi-criminal," and has made clear that such damages "further a State's legitimate interests in punishing unlawful conduct and deterring its repetition."[44] Thus, because punitive damages are intended to punish, they cannot be imposed on a defendant that lacks fair notice that the conduct at issue could result in punitive damages liability.

The Supreme Court in *BMW v. Gore* and *State Farm v. Campbell* addressed constitutional limits on the *amount* of a punitive damages award,[45] and the Court in *Philip Morris USA v. Williams* established *procedural* protections that punitive damages defendants must be afforded.[46] In doing so, the Court made clear that "[e]lementary notions of fairness enshrined in our constitutional jurisprudence dictate that a person receive fair notice" of both "the conduct that will subject him to

42. *See* Grayned v. City of Rockford, 408 U.S. 104, 110 (1972) ("Here, we are relegated . . . to the interpretations the court below has given to analogous statutes . . . .") (quoting Coates v. Cincinnati, 402 U.S. 611, 614 (1971)) (internal quotation marks omitted); United States v. Lanier, 520 U.S. 259, 267–68 (1997) (holding that if case law existing at the time of a criminal defendant's alleged violation of a statute did not "make specific" that such conduct was proscribed, the criminal defendant cannot be held to have had fair notice) (citing Screws v. United States, 325 U.S. 91, 105 (1945)).

43. *See Lanier*, 520 U.S. at 266 (stating that defendants may not be punished under a "novel construction" of a statute if "neither the statute nor any prior judicial decision has fairly disclosed [the defendant's conduct] to be within its scope"); Bouie v. City of Columbia, 378 U.S. 347, 354–55 (1964) (overturning a state Supreme Court's affirmance of convictions under a statute prohibiting entry onto the land of another for a student sit-in because the state court construction of the statute was unfamiliar at the time the students engaged in the sit-in).

44. BMW of N. Am., Inc. v. Gore, 517 U.S. 559, 568 (1996) (citations omitted).

45. *Id.* at 575–85 (discussing degree of reprehensibility, ratio, and sanctions for comparable misconduct as factors in this determination); State Farm Mut. Auto. Ins. v. Campbell, 538 U.S. 408, 426 (2003) ("In sum, courts must ensure that the measure of punishment is both reasonable and proportionate to the amount of harm to the plaintiff and to the general damages recovered.").

46. Philip Morris USA v. Williams, 549 U.S. 346, 353 (2007) ("The Due Process Clause prohibits a State from punishing an individual without first providing that individual with 'an opportunity to present every available defense.'") (quoting Lindsey v. Normet, 405 U.S. 56, 66 (1972)).

punishment" and "the severity of the penalty that a state may impose."[47] A defendant must violate specifically prescribed liability standards in order to be subject to punitive damages—a "defendant should be punished for the conduct that harmed the plaintiff, not for being an unsavory individual or business."[48] Thus, the Court has already acknowledged the requirement that a defendant receive "fair notice" of "the conduct that will subject him to punishment."[49]

Notwithstanding the due process protections established by the Court on the amount of punitive damages awards in *Gore* and *Campbell*, the vagueness problems concerning punitive damages liability persist to this day. Because the standards for imposing punitive damages liability are often extremely vague and open ended, it is crucial that the fair-notice principle constrain the scope of conduct that can give rise to punitive damages liability. As the Supreme Court explained in *Honda Motor Co. v. Oberg*,

> Punitive damages pose an acute danger of arbitrary deprivation of property. Jury instructions typically leave the jury with wide discretion in choosing amounts, and the presentation of evidence of a defendant's net worth creates the potential that juries will use their verdicts to express biases against big businesses, particularly those without strong local presences.[50]

The Court has consistently expressed distaste for the arbitrary nature of punitive damages awards.[51]

Vagueness problems are inherent in the punitive damage context because states generally authorize such punishments for a wide range of torts—from strict liability to negligence to fraud—pursuant to an

47. *Gore*, 517 U.S. at 574 (footnote omitted). *See also* Cooper Indus., Inc. v. Leatherman Tool Grp., Inc., 532 U.S. 424, 433 (2001); *Campbell*, 538 U.S. at 417.

48. *Campbell*, 538 U.S. at 423.

49. *See, e.g.*, Deters v. Equifax Credit Info. Servs., Inc., 981 F. Supp. 1381, (D. Kan. 1997) ("The court has no difficulty with this requirement [of fair notice of the underlying conduct].") (quoting another source) (internal quotation marks omitted); Cont'l Trend Res., Inc. v. OXY USA Inc., 101 F.3d 634, 638 (10th Cir. 1996) ("BMW did not discuss this requirement except in the context of the severity of the penalty the defendant might expect. In the instant case we have no difficulty with this requirement.").

50. Honda Motor Co. v. Oberg, 512 U.S. 415, 432 (1994).

51. *See, e.g.*, Exxon Shipping Co. v. Baker, 554 U.S. 471, 499–500 (2008); Pac. Mut, Life Ins. Co. v. Haslip, 499 U.S. 1, 59 (1991) (O'Connor, J., dissenting) ("[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 based solely upon bias or whim."); *Campbell*, 538 U.S. at 417–18 (adopting Justice O'Connor's reasoning in her *Haslip* dissent).

overarching but ill-defined and malleable standard of conduct, such as "malice," that governs in all cases in which punitive damages are sought.[52] As Justice O'Connor once observed, punitive damages "instructions are so fraught with uncertainty that they defy rational implementation. Instead, they encourage inconsistent and unpredictable results by inviting juries to rely on private beliefs and personal predilections."[53] And as Justice Brennan once put it, standard jury instructions do not help, instead giving juries "little more than an admonition do what they think is best."[54]

The constitutional protections of fair notice are therefore critical when a defendant is faced with the open-ended discretion of a jury tasked with meting punishment against a defendant it has found liable under the civil laws. As in the context of fines by an administrative agency, reviewing courts can look to industry custom, agency guidance, and decisional law in determining whether a defendant was given fair notice that the conduct at issue could subject it to punishment.

Thus, when a defendant complies with all guidance by the relevant regulating agency or agencies, "it would defy history and current thinking to treat [that] defendant . . . as a knowing or reckless violator."[55] Where there is conflicting agency guidance that makes it unclear whether certain conduct can be sanctioned, as occurred in *Fox*, a defendant that acts on such an interpretation cannot be punished.[56] This is true even if a court subsequently determines that the defendant's interpretation was incorrect. For example, the Supreme Court in *Safeco Insurance Co. of America v. Burr* reversed a punitive damages award because the defendant's interpretation of the law—based on the agency's guidance—"albeit erroneous," was not unreasonable given the vagueness of language in the

52. *See, e.g.*, *Oberg*, 512 U.S. at 432.

53. *Haslip*, 499 U.S. at 43 (O'Connor, J., dissenting).

54. Browning-Ferris Indus. of Vt. v. Kelco Disposal, Inc., 492 U.S. 257, 281 (Brennan, J., concurring).

55. Safeco Ins. Co. of Am. v. Burr, 551 U.S. 47, 70 n.20 (2007). *See also id.* at 69–72 (holding the defendant to an "objectively reasonable" standard).

56. *See* FCC v. Fox Television Stations, Inc., 132 S. Ct. 2307, 2318 (2012); *Safeco*, 551 U.S. at 69 (stating that the plaintiffs were not entitled to punitive damages in part because the defendant's "reading of the statute, albeit erroneous, was not objectively unreasonable"); Toffoloni v. LFP Publ'g Grp., 483 F. App'x 561, 564 (11th Cir. 2012) (vacating a punitive damages award where the defendant "reasonably and honestly (albeit mistakenly) believed" that publication of nude photographs was subject to the newsworthiness exception to the right of publicity); Clark v. Chrysler Corp., 436 F.3d 594, 603 (6th Cir. 2006) (vacating a punitive damages award where there was a "good faith dispute" as to the necessity of testing that may have prevented the plaintiff's accident) (citation omitted); Satcher v. Honda Motor Co., 52 F.3d 1311, 1316–17 (5th Cir. 1995) (vacating a punitive damages award where there was a "genuine dispute" as to the lawfulness of the defendant's conduct).

regulation.[57]

Likewise, the custom and practice in the industry should be a guide for determining what notice was available to a defendant. The Court in *Christopher* analyzed whether it was customary in the pharmaceutical industry to consider pharmaceutical detailers as exempt "outside salesmen."[58] Because the general practice in the industry was to treat detailers as exempt, the Court held that the defendant was not on notice that its treatment of the detailers transgressed any agency guideline.[59] Likewise, where a defendant's conduct is in line with the industry's custom and practice, a defendant's "objectively reasonable" conduct[60] cannot support a punitive damages award.[61]

While lower courts have not analyzed whether *Fox* and *Christopher* preclude punitive damages against a defendant without any indication in regulatory guidance, custom and practice in the industry, or decisional law that its conduct could subject it to punishment, the Supreme Court's most recent fair-notice pronouncement leaves little doubt that punishing a defendant in such a case would be unconstitutional.[62] Cases arising after *Fox* and *Christopher* emphasize that the due process inquiry turns on both *notice* and *punishment*. For example, the Ninth Circuit in *Price v. Stevedoring Services of America, Inc.* required notice by the Director of the Office Workers' Compensation Programs in order for employment benefits

57. *Safeco*, 551 U.S. at 69. *See also* Ivy v. Ford Motor Co., 646 F.3d 769, 777 (11th Cir. 2011) (holding that finding "an after-the-fact expert to opine that a product is defective cannot be sufficient to create a jury question on the issue of wantonness . . . when the product satisfied all the government and industry standards extant at the earlier relevant time") (citation omitted); *Satcher*, 52 F.3d at 1317 (stating that compliance with regulatory standards was a key factor demonstrating "that no reasonable jury could conclude . . . that [that case was] an 'extreme case' meriting punitive damages"); Richards v. Michelin Tire Corp., 21 F.3d 1048, 1059 (11th Cir. 1994) (holding that "JNOV should be granted in [the manufacturer's] favor" on the issue of punitive damages where, among other things, "the record demonstrates that [the manufacturer] complied with all Federal Motor Vehicle Standards"); Farmy v. Coll. Hous., Inc., 121 Cal. Rptr. 658, 663–64 (Cal. Ct. App. 1975) (finding that punitive damages were not warranted for an alleged nuisance by adjoining landowners where the landowners complied with all applicable ordinances and regulations).

58. Christopher v. SmithKline Beecham Corp., 132 S. Ct. 2156, 2167–68 (2012).

59. *Id.* at 2168.

60. *Safeco*, 551 U.S. at 69–72.

61. *See id*. at 69 ("It is this high risk of harm, *objectively assessed* that is the essence of recklessness at common law.") (emphasis added) (citations omitted) (quoting another source); Drabik v. Stanley-Bostitch, Inc., 997 F.2d 496, 510 (8th Cir. 1993) (stating that where a defendant proves that it has complied with industry standards and custom, such proof "serves to negate conscious disregard and to show that the defendant acted with a nonculpable state of mind").

62. *See* Price v. Stevedoring Servs. of Am., Inc., 697 F.3d 820, 830 (9th Cir. 2012) (identifying that punishment without regulatory guidance "would severely undermine the notice and predictability to regulated parties that formal rulemaking is meant to promote") (citation omitted).

to be incurred against an employer.[63] And the Sixth Circuit in *Summit Petroleum Corp. v. EPA* determined that notice of the EPA's interpretation of the Clean Air Title V program was required before noncompliance could subject the defendant to punishment.[64] These cases make clear that liability standards must be set forth in advance and available to defendants before punitive damages or other civil penalties may be imposed.

Courts have not always followed the fair-notice mandate as applied to punitive damages awards,[65] and those that have at times have applied a watered-down notice requirement. But *Fox* and *Christopher* make clear that fair notice is a constitutional protection afforded all defendants—especially defendants faced with potentially arbitrary and excessive punitive verdicts. Where a defendant's conduct does not clearly conflict with applicable agency guidance, custom and practice of the industry, or decisional law, the defendant cannot constitutionally be punished with a punitive damages verdict.

## V. CONCLUSION

The constitutional requirement that defendants be given fair notice of conduct that can subject them to punishment is deeply rooted in our legal system and applies to any defendant—criminal or civil—faced with punishment at the hands of the state, an agency, or a jury. The Supreme Court has applied this rule consistently, and made clear in *Fox* and *Christopher* that the rule applies broadly any time a defendant faces the possibility of punishment.

63. *Id.*

64. Summit Petroleum Corp. v. EPA, 690 F.3d 733, 756 (6th Cir. 2012).

65. *See, e.g.*, Flax v. DaimlerChrysler Corp., 272 S.W.3d 521, 536–37 (Tenn. 2008) (upholding a punitive damages award even where the defendant proved that it had complied with all government standards and that its actions were "mainstream" in the industry); Buell-Wilson v. Ford Motor Co., 73 Cal. Rptr. 3d 277, 301, 314 (Cal. Ct. App. 2008) (holding that compliance with industry standards or custom was irrelevant to whether the defendant could be subjected to punitive damages); Grimshaw v. Ford Motor Co., 174 Cal. Rptr. 348, 382–83 (Cal. Ct. App. 1981) (rejecting the argument that the defendant did not have "fair warning" that it could face punitive damages because previous case law gave warning that punitive damages are available for a "nondeliberate or unintentional tort where the defendant's conduct constitutes a conscious disregard of the probability of injury to others") (citations omitted).