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The Constitutionality of Punitive Damages Under the Excessive Fines Clause of the Eighth Amendment

The eighth amendment to the Constitution prohibits excessive fines as well as excessive bail and cruel and unusual punishments.¹ The Supreme Court has construed the eighth amendment generally as a check on the criminal justice system, which bears primary responsibility for imposing state-sponsored punishment.² However, the criminal system is not the sole means through which the law punishes misconduct; the civil system also uses penal sanctions. Civil courts and juries can punish a defendant's misconduct by awarding the plaintiff punitive or exemplary damages.³ Such awards can reach millions⁴ and even billions of dollars.⁵ Because of the punitive purpose of these awards, they resemble fines assessed for criminal misconduct. This resemblance raises the question of whether the excessive fines clause controls excessive punitive damage awards assessed in the civil system.⁶

Courts have been unwilling to apply the excessive fines clause to punitive damage awards that are arguably excessive. This reluctance results from the view that many constitutional safeguards, including

1. "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. CONST. amend. VIII.

2. *Ingraham v. Wright*, 430 U.S. 651, 664 (1977).

3. *See Morris, Punitive Damages in Tort Cases*, 44 HARV. L. REV. 1173, 1176-77 (1931). Civil penalties are sanctions related to punitive damages but they arise where the government is the plaintiff. While such penalties should undergo similar analysis, they generally are statutorily set at levels far below punitive damages and therefore do not violate the excessive fines clause. They are also assessed for reasons other than punishment. *See, e.g., United States v. Ward*, 448 U.S. 242, 246, 250 (1980).

This Note relies on numerous civil penalty cases. Courts that treat civil penalties as civil sanctions that fall outside the scope of the eighth amendment would presumably do likewise for punitive damages.

4. *E.g., Grimshaw v. Ford Motor Co.*, 119 Cal. App. 3d 757, 174 Cal. Rptr. 348 (1981) (jury awarded \$125 million punitive damages).

5. *See, e.g., Texaco Must Pay \$11 Billion Award, Texas Court Rules*, N.Y. Times, Dec. 11, 1985, at 1, col. 1 (\$3 billion in punitive damages).

6. The Supreme Court has not answered this question, but may do so soon. *See Bankers Life & Casualty Co. v. Crenshaw*, 483 So. 2d 254 (Miss. 1985) (defendant argues that \$1.6 million punitive damage award on a compensatory award of \$20,000 violates the excessive fines clause), *prob. juris. noted*, 107 S. Ct. 1367 (1987), *summarized in* 55 U.S.L.W. 3600 (Mar. 10, 1987).

This question has also been raised in Jeffries, *A Comment on the Constitutionality of Punitive Damages*, 72 VA. L. REV. 139 (1986). Professor Jeffries has "open[ed] the debate," *id.* at 158, as to whether repetitive punitive damage awards may violate either the eighth amendment or more general due process requirements. He argues that punitive damages are "functionally equivalent to the 'fines' addressed by the eighth amendment and should be subject to constitutional scrutiny on that basis." *Id.* at 151. This Note goes beyond Jeffries to look at the difficulties courts have encountered in addressing the excessive fines clause argument and further to suggest means by which courts should analyze the argument. It suggests that the relevant inquiry is not whether punitive damages are a criminal or quasi-criminal sanction but whether they are sufficiently penal to require eighth amendment scrutiny.

the protections of the eighth amendment, are limited to the criminal setting and are inappropriate in a civil lawsuit between private parties. Most of these protections are textually linked to criminal proceedings.⁷ Others, while not textually linked, are also closely associated with criminal investigations and prosecutions.⁸ In cases involving the cruel and unusual punishment clause, the Supreme Court has closely associated the entire eighth amendment with criminal punishment, particularly capital punishment.⁹ As a result, the excessive fines clause has generally been assumed to apply only in criminal cases.¹⁰ But a fine that is constitutionally excessive in a criminal setting is no less excessive in a civil setting. From the defendant's perspective, monetary penalties assessed in a criminal prosecution are functionally identical to punitive damages awarded in a civil lawsuit — in either case he owes money as punishment for his wrongdoing.

Of the few lower courts facing the excessive fines clause argument, most have addressed the issue on a more superficial level by relying on the Supreme Court's decision in *Ingraham v. Wright*.¹¹ In that decision, the Court held that the cruel and unusual punishment clause of the eighth amendment is inapposite in a civil suit.¹² Most courts read *Ingraham* as controlling. However, this reliance is problematic. The excessive fines clause was not at issue in *Ingraham* but was merely implicated by association. Nonetheless, courts regularly rely on *Ingraham* in holding that all clauses of the eighth amendment apply only in the criminal context.

Undeniable differences exist between criminal prosecutions and civil lawsuits;¹³ however, because of the escalating stakes involved, courts and commentators are reexamining whether the criminal/civil distinction is a satisfactory reason for denying a defendant certain protections to which he would be entitled if he were criminally prosecuted.¹⁴ Some courts have questioned, without deciding, whether

7. *E.g.*, U.S. CONST. amend. V ("nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself") (emphasis added); U.S. CONST. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence.") (emphasis added).

8. *E.g.*, U.S. CONST. amend. IV (unreasonable search and seizure).

9. *See* *Ingraham v. Wright*, 430 U.S. 651 (1977); *Gregg v. Georgia*, 428 U.S. 153 (1976); *Furman v. Georgia*, 408 U.S. 238 (1972). The excessive bail clause also links the eighth amendment with the criminal context.

10. *See, e.g.*, *Dalton v. Bob Neill Pontiac, Inc.*, 476 F. Supp. 789, 797 n.13 (M.D.N.C. 1979), *affd. mem.*, 628 F.2d 1348 (4th Cir. 1980); *Palmer v. A.H. Robins Co.*, 684 P.2d 187, 217 (Colo. 1984).

11. 430 U.S. 651 (1977) (5-4 decision).

12. 430 U.S. at 664; *see* Section II.A *infra*.

13. *See* Comment, *Criminal Safeguards and the Punitive Damages Defendant*, 34 U. CHI. L. REV. 408, 410-11 (1966) [hereinafter Comment, *Criminal Safeguards*].

14. Articles reciting some of the challenges include: Clark, *Civil and Criminal Penalties and Forfeitures: A Framework for Constitutional Analysis*, 60 MINN. L. REV. 379 (1976); Note, *The*

large punitive damage awards may violate the excessive fines clause of the eighth amendment.¹⁵ The criminal/civil distinction is unsettling where it results in excessive monetary punishments that are immune from eighth amendment scrutiny merely because they arise in the setting of a civil suit between private parties.¹⁶

In *Aetna Life Insurance Co. v. Lavoie*,¹⁷ the Supreme Court recently heard argument as to whether the excessive fines clause applies to punitive damages, but the Court did not have occasion to pass on the issue.¹⁸ The case arose from a bad faith insurance claim in which

Imposition of Punishment by Civil Courts: A Reappraisal of Punitive Damages, 41 N.Y.U. L. REV. 1158 (1966); Sales & Cole, *Punitive Damages: A Relic That Has Outlived Its Origins*, 37 VAND. L. REV. 1117 (1984); Seltzer, *Punitive Damages in Mass Tort Litigation: Addressing the Problems of Fairness, Efficiency and Control*, 52 FORDHAM L. REV. 37 (1983).

The most serious questions fall into four categories: First, whether punitive damages function as quasi-criminal sanctions and as such entitle the defendant to criminal procedural safeguards of the fourth, fifth, and sixth amendments. See Charney, *The Need for Constitutional Protections for Defendants in Civil Penalty Cases*, 59 CORNELL L. REV. 478 (1971); Grass, *The Penal Dimensions of Punitive Damages*, 12 HASTINGS CONST. L.Q. 241 (1985); Wheeler, *The Constitutional Case for Reforming Punitive Damages Procedures*, 69 VA. L. REV. 269 (1983). Second, whether multiple recoveries of punitive damages in mass tort litigation violate the "fundamental fairness" at the heart of due process. Compare *In re Northern Dist. of Cal. "Dalkon Shield" IUD Prods. Liab. Litig.*, 526 F. Supp. 887, 899-900 (N.D. Cal. 1981), *vacated*, 693 F.2d 847 (9th Cir. 1982), *cert. denied*, 459 U.S. 1171 (1983), with *Cathey v. Johns-Manville Sales Corp.*, 776 F.2d 1565, 1571 (6th Cir. 1985), *cert. denied*, 106 S. Ct. 3335 (1986); see also *In re "Agent Orange" Prod. Liab. Litig.*, 100 F.R.D. 718, 728 (E.D.N.Y. 1983); *In re School Asbestos Litig.*, 789 F.2d 996, 1003-05 (3d Cir.), *cert. denied*, 107 S. Ct. 182 (1986); Jeffries, *supra* note 6, at 151-53; Note, *Mass Liability and Punitive Damages Overkill*, 30 HASTINGS L.J. 1797 (1979); Note, *Punitive Damages in Mass Tort Litigation* — Froud v. Celotex Corp., 32 DE PAUL L. REV. 457 (1983); Ford, *The Constitutionality of Punitive Damages*, in *THE CASE AGAINST PUNITIVE DAMAGES* 15, 20-22 (Defense Research Institute Monograph 1969); 1 J. GHIARDI & J. KIRCHER, *PUNITIVE DAMAGES LAW AND PRACTICE* § 3.03, at 8-10 & nn.12-23.50 (1985 & Supp. 1986). Third, whether statutory standards for assessing punitive damages are void for vagueness. See *id.* at 10-11 & nn.25-30. Finally, whether punitive damages implicate equal protection rights, See *In re Paris Air Crash of Mar. 3, 1974*, 427 F. Supp. 701, 705 (C.D. Cal. 1977) (state law denying claims for punitive damages in wrongful death actions violates equal protection clause), *revd.*, 622 F.2d 1315 (9th Cir. 1985), *cert. denied*, 449 U.S. 976 (1980); *Texaco, Inc. v. Pennzoil Co.*, 784 F.2d 1133, 1139 (2d Cir. 1986) (defendant argues bond provision for punitive damage award prevents an effective appeal), *revd.*, 107 S. Ct. 1519 (1987), or violate first amendment freedoms, *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974); *Curtis Pub. Co. v. Butts*, 388 U.S. 130 (1967).

15. *E.g.*, *Aetna Life Ins. Co. v. Lavoie*, 106 S. Ct. 1580, 1589 (1986); *Womack v. Gettelfinger*, 808 F.2d 446, 451 (6th Cir. 1986); *Wilmington v. J.I. Case Co.*, 793 F.2d 909, 922 n.10 (8th Cir. 1986); *In re School Asbestos Litig.*, 789 F.2d 996, 1004 (3d Cir.), *cert. denied*, 107 S. Ct. 182 (1986).

16. See *Telephone News Sys. v. Illinois Bell Tel. Co.*, 220 F. Supp. 621 (N.D. Ill. 1963) (three-judge court), *aff'd*, 376 U.S. 782 (1964):

[W]here the forfeiture of property will be fatal to the business life of the party involved and substantially greater and more severe than the maximum punishment which could have been imposed in a direct criminal proceeding, labeling it preventive and non-penal is a sophistry which hardly warrants the abrogation of the Constitutional protections which are the keystones of American criminal justice.

220 F. Supp. at 643 (Will, J., concurring). See also *In re School Asbestos Litig.*, 789 F.2d 996, 1003-05 (3d Cir.), *cert. denied*, 107 S. Ct. 182 (1986).

17. 106 S. Ct. 1580 (1986).

18. 106 S. Ct. at 1589. The Court held that one justice of the Alabama Supreme Court should have been disqualified from the case because he had filed two similar actions of his own. The Court vacated and remanded the decision.

the jury awarded the plaintiff \$1,378 in actual damages and \$3,500,000 in punitive damages¹⁹ — a ratio that the defendant characterized as “the same as four hours bears to one year.”²⁰ The Alabama Supreme Court upheld the jury award in a five-to-four decision which the United States Supreme Court vacated.²¹ Writing for the Court, Chief Justice Burger did not simply dismiss the excessive fines question but acknowledged that the defendant’s argument “that a \$3.5 million punitive damage award is impermissible under the Excessive Fines Clause of the Eighth Amendment . . . raise[s] [an] important issue[] which, in an appropriate setting, must be resolved”²²

This Note explores whether courts should look beyond the broad language in *Ingraham v. Wright* and scrutinize punitive damages under the excessive fines clause. Part I sets out the intuitive argument that punitive damages are analogous to criminal fines. Part II analyzes the Supreme Court’s decision in *Ingraham v. Wright* and also reviews the few federal and state court decisions that have dealt with the excessive fines clause in civil cases, most of which have concluded that the clause has no application in a civil setting. This Part asserts that courts cannot rely solely on the *Ingraham* decision but must examine the history of the excessive fines clause and the penal character of punitive damages. Part III pursues the analysis that is lacking in those decisions which have relied on *Ingraham*. First, this Part sketches the history of the eighth amendment to determine whether the excessive fines clause should apply only to criminal fines and not civil punitive damages or whether the clause expresses a broader principle requiring proportionality in punishments of any form. Second, this Part questions whether punitive damages are sufficiently penal to implicate eighth amendment scrutiny. Part III suggests that courts apply the analysis outlined in *Kennedy v. Mendoza-Martinez*,²³ rather than *Ingraham*. Finally, Part IV concludes that, since the excessive fines clause is historically linked to civil monetary penalties and since punitive damages are penal in nature, excessive awards violate the eighth amendment’s principle of proportionality in punishments. This Note contends that the eighth amendment, unlike other constitutional protections, functions as a restraint on the broader system of punish-

19. 106 S. Ct. at 1582.

20. Brief for Appellant at 45, *Aetna Life Ins. Co. v. Lavoie*, 106 S. Ct. 1580 (1986) (No. 84-1601).

21. 106 S. Ct. at 1589.

22. 106 S. Ct. at 1589. On remand to the Alabama Supreme Court, two justices wrote specially concurring opinions that took note of the Supreme Court’s acknowledgment of the significance of the excessive fines clause argument. *Aetna Life Ins. Co. v. Lavoie*, 505 So. 2d 1050 (Ala. 1987). One justice predicted that the United States Supreme Court would soon review the issue, 505 So. 2d at 1059 & n.1 (Maddox, J., concurring specially); the other explicitly accepted the argument that punitive damages could violate the eighth amendment, 505 So. 2d at 1060-61 (Houston, J., concurring specially).

23. 372 U.S. 144 (1963).

ment rather than simply the process through which criminals are prosecuted. It argues that courts should determine whether punitive damages are sufficiently penal to warrant eighth amendment protection and not whether punitive damages are criminal or quasi-criminal sanctions.

I. THE CRIMINAL FINE ANALOGY

Punitive damages occupy a unique position in the civil courts. They are a criminal/civil hybrid: while arising only in civil cases, they mainly serve the criminal law goals of retribution and deterrence rather than the traditional compensatory goals of the civil law.²⁴ Like criminal punishments, punitive damages are assessed with respect to the defendant's culpability and the egregiousness of his conduct. Punitive damages serve as a surrogate for criminal sanctions by punishing misbehavior through the civil law that may go unpunished or underpunished in the criminal law.²⁵ As such, the law of punitive damages historically has not been concerned with awarding a windfall to the successful plaintiff but rather has looked to punishing the culpable defendant. Ultimately, it is the state and not the individual that is exacting the punishment.²⁶

Courts and commentators analogize punitive damages to criminal fines. For instance, the Supreme Court in *Gertz v. Robert Welch, Inc.*,²⁷ stated that "[punitive damages] are not compensation for injury. Instead, they are private fines levied by civil juries to punish reprehensible conduct and to deter its future occurrence."²⁸ Other jurists have recognized that punitive damages "serve the same function as criminal penalties and are in effect private fines,"²⁹ "punitive 'fine[s],'"³⁰ and "fine[s] imposed for the vindication of the criminal law."³¹ Some commentators view punitive damages as virtual

24. See generally Ausness, *Retribution and Deterrence: The Role of Punitive Damages in Products Liability Litigation*, 74 KY. L.J. 1 (1985-86); 1 J. GHIARDI & J. KIRCHER, *supra* note 14, §§ 4.13-16. The majority of jurisdictions cite punishment and deterrence as the purposes of punitive damages. See *id.* § 4.14. Some states see the purpose as deterrence alone, see *id.* § 4.15; one views it as punishment alone, see *id.* § 4.16. In a few states, punitive damages are intended only as compensation to injured parties for damages above the actual physical damages. See *id.* § 4.13.

25. 1 J. GHIARDI & J. KIRCHER, *supra* note 14, § 2.02, at 5.

26. There have been suggestions that punitive damages should not be paid to the plaintiff at all but should go to the state. *E.g.*, *Smith v. Wade*, 461 U.S. 30, 59 (1983) (Rehnquist, J., dissenting). Statutes have also been proposed whereby punitive damage awards would go to state school systems, nonprofit organizations, or the state treasury. See 2 J. GHIARDI & J. KIRCHER, *supra* note 14, § 21.02, at 4, § 21.04, at 22, § 21.06, at 41; K. REDDEN, *PUNITIVE DAMAGES* § 1.1(C) (1980).

27. 418 U.S. 323 (1974).

28. 418 U.S. at 350.

29. *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29, 82 (1971) (Marshall, J., dissenting).

30. *Smith v. Wade*, 461 U.S. at 59 (Rehnquist, J., dissenting).

31. *Fay v. Parker*, 53 N.H. 342, 381 (1873).

equivalents of criminal fines. In their criminal law treatise, LaFave and Scott write, "Paying damages (especially 'punitive damages') for torts or contract breaches is not much different from paying fines for criminal violations."³² Prosser and Keeton recognize punitive damages as a "rather anomalous" invasion of criminal law into "the field of torts."³³ Courts and commentators have attached the label "quasi-criminal" to punitive damages, indicating that such damages contain elements of the criminal law.³⁴

There are undeniable differences between punitive damages and criminal fines. Punitive damages are paid to the private plaintiff; criminal fines are paid to the state.³⁵ Imprisonment may accompany a criminal fine. A criminal conviction carries a greater stigma than a large civil judgment.³⁶ Such distinctions, however, seem of little consolation for the defendant subject to a large punitive damage award for misconduct that would be less harshly punished if he were subject to criminal prosecution only.

A comparison between criminal fine cases and civil punitive damage cases highlights the troublesome civil/criminal distinction. The criminal defendant in *United States v. Busher*,³⁷ convicted of federal racketeering, forfeited approximately \$3 million to the United States for fraudulent conduct amounting to only \$335,000³⁸ — a ratio of less than ten to one. The Ninth Circuit held that the defendant made a

32. 1 W. LAFAVE & A. SCOTT, *SUBSTANTIVE CRIMINAL LAW* § 1.3(a), at 16 (1986) (footnote omitted).

33. W.P. KEETON, D. DOBBS, R. KEETON & D. OWEN, *PROSSER AND KEETON ON THE LAW OF TORTS* § 2, at 9 (5th ed. 1984) [hereinafter *PROSSER AND KEETON*]. See also K. REDDEN, *supra* note 26, § 2.4(A) ("Exemplary damages occupy an anomalous position among civil remedies because of their distinctive deterrent or punitive character.").

34. See, e.g., *Smith v. Wade*, 461 U.S. 30, 59 (1983) (Rehnquist, J., dissenting) (citing *Huber v. Teuber*, 10 D.C. (3 MacArth.) 484, 490 (1877)); *Boyd v. United States*, 116 U.S. 616, 634 (1886); *Womack v. Gettelfinger*, 808 F.2d 446, 451 (6th Cir. 1986); *Clark*, *supra* note 14, at 414; *Sales & Cole*, *supra* note 14, at 1118. The term "quasi-criminal" traditionally characterizes proceedings bearing the nature of a criminal prosecution. Examples include proceedings for contempt, disbarment, and failure to pay child support. 35A *WORDS & PHRASES* 450-52 (1963).

35. The distinction between the parties — private persons versus state actors — raises the issue of whether the excessive fines clause should apply where the state is not directly involved as a litigant. Commentators examining the issue have concluded that the plaintiff's identity should not determine whether constitutional safeguards should apply. *Wheeler*, *supra* note 14, at 345-49; *Charney*, *supra* note 14, at 505-06 & n.152; *Jeffries*, *supra* note 6, at 148 & n.37. The focus of the eighth amendment supports this conclusion: the amendment aims to protect the defendant from excessive punishment and not to prevent the plaintiff from obtaining a windfall. However, the punishment must at least be imposed under color of state law. See *Oral Argument of Petitioner at 2*, *Ingraham v. Wright*, 430 U.S. 651 (1977), reprinted in 93 *LANDMARK BRIEFS AND ARGUMENTS OF THE SUPREME COURT OF THE UNITED STATES* 314 (P. Kurland & G. Caspar eds. 1978) [hereinafter *LANDMARK BRIEFS*]. The "color of state law" requirement is probably satisfied by the state's enactment and administration of statutes authorizing punitive awards. E.g., CAL. CIV. CODE § 3294(a) (*Deering* 1984); COLO. REV. STAT. § 13-21-102 (Supp. 1986).

36. Comment, *Criminal Safeguards*, *supra* note 13, at 410-11.

37. 817 F.2d 1409 (9th Cir. 1987).

38. 817 F.2d at 1414.

prima facie showing that the forfeiture may have been so disproportionate as to violate the excessive fines clause, and therefore remanded to the district court for a determination of the constitutionality of the fine.³⁹ In comparison, punitive damages may be assessed in ratios far greater than ten to one without invoking constitutional scrutiny under the excessive fines clause. For instance, punitive damages in bad faith insurance cases can reach millions of dollars where compensatory damages amount to only a few thousand dollars.⁴⁰ In mass tort and products liability cases, such as the Dalkon Shield litigation, defendants may be liable for multiple punitive damage awards arising out of the same misconduct.⁴¹ While each individual award may not be excessive, the aggregate could be. As a result, the defendant who has incurred punitive damages may be punished more harshly by the civil system than by the criminal system.

Currently, juries assessing punitive damages are constrained only by ill-defined and inconsistently applied notions of excessiveness.⁴² For instance, in *Gertz v. Robert Welch, Inc.*,⁴³ the Supreme Court commented that "jury discretion over the amounts awarded is limited only by the gentle rule that [punitive damages] not be excessive. Consequently, juries assess punitive damages in wholly unpredictable amounts bearing no necessary relation to the actual harm caused."⁴⁴ Courts can admonish juries to avoid passion, prejudice, or other emotions in fixing punitive awards⁴⁵ and can remit awards that they consider excessive.⁴⁶ However, there is far less control over civil jury awards than over criminal punishments, thus the potential for excessive awards is higher in civil cases.⁴⁷

II. THE INFLUENCE OF *INGRAHAM V. WRIGHT*

In spite of the acknowledged similarities between punitive damages and criminal fines, many courts have retreated from the analogy for purposes of the eighth amendment. For the few cases involving the

39. 817 F.2d at 1415-16.

40. *E.g.*, *Aetna Life Ins. Co. v. Lavoie*, 106 S. Ct. 1580 (1986) (\$3.5 million to \$1,378). *See also* *Downey Sav. & Loan Assn. v. Ohio Casualty Ins. Co.*, 189 Cal. App. 3d 1072, 234 Cal. Rptr. 835 (1987) (\$5 million to \$153,000), *petition for cert. filed*, 56 U.S.L.W. 3115 (U.S. July 22, 1987) (No. 87-159).

41. *E.g.*, *In re Northern Dist. of Cal. "Dalkon Shield" IUD Prods. Liab. Litig.*, 526 F. Supp. 887, 899-900 (N.D. Cal. 1981), *vacated*, 693 F.2d 847 (9th Cir. 1982), *cert. denied*, 459 U.S. 1171 (1983).

42. *See* K. REDDEN, *supra* note 26, §§ 3.4-5.

43. 418 U.S. 323 (1974).

44. 418 U.S. at 350.

45. *See generally* 1 J. GHIARDI & J. KIRCHER, *supra* note 14, §§ 11.01-.20 (survey of model jury instructions).

46. *See* 2 J. GHIARDI & J. KIRCHER, *supra* note 14, § 18.05, at 16-17.

47. *See generally* K. REDDEN, *supra* note 26, § 3.6(A), at 62-63 (discussing criticism of the jury's power to award punitive damages).

excessive fines clause in the last decade, the Supreme Court's 1977 decision in *Ingraham v. Wright*⁴⁸ has had controlling influence. The case, however, involved the cruel and unusual punishment clause and not the excessive fines clause. In deciding *Ingraham* and other cruel and unusual punishment cases, the Supreme Court has characterized the *entire* eighth amendment as intended for the criminal context only.⁴⁹ The Court's language has subsumed the excessive fines clause into the cruel and unusual punishment clause. This characterization has led courts to hold that the excessive fines clause applies to criminal cases only.⁵⁰ Such a broad reading of *Ingraham* is not warranted.

A. *The Supreme Court Decision*

The case arose out of the paddling of two children attending a Florida public school. Their parents sued, claiming in part that the disciplinary paddlings by the teachers violated the children's eighth amendment right to be free from cruel and unusual punishment.⁵¹ The Court held in a five-to-four decision that the cruel and unusual punishment clause does not apply in civil cases involving the paddling of schoolchildren.⁵² The majority recited the history of the eighth amendment, concluding:

Bail, fines, and punishment traditionally have been associated with the criminal process, and by subjecting the three to parallel limitations the text of the Amendment suggests an intention to limit the power of those entrusted with the criminal-law function of government. An examination of the history of the 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.⁵³

To support this conclusion, Justice Powell examined the English curbs on torture and other cruel punishments and determined that the framers of the eighth amendment were principally concerned with lim-

48. 430 U.S. 651 (1977).

49. 430 U.S. at 664; *Bell v. Wolfish*, 441 U.S. 520, 535-36 nn.16-17 (1979); *Estelle v. Gamble*, 429 U.S. 97, 102-03 & n.7 (1976); *In re Kemmler*, 136 U.S. 436, 446 (1890).

50. *E.g.*, *Campus Sweater & Sportswear Co. v. M.B. Kahn Constr. Co.*, 515 F. Supp. 64, 108-09 n.129 (D.S.C. 1979), *affd. mem.*, 644 F.2d 877 (4th Cir. 1981); *Dalton v. Bob Neill Pontiac, Inc.*, 476 F. Supp. 789, 797 n.13 (M.D.N.C. 1979), *affd. mem.*, 628 F.2d 1348 (4th Cir. 1980); *Downey Sav. & Loan Assn. v. Ohio Casualty Ins. Co.*, 189 Cal. App. 3d 1072, 234 Cal. Rptr. 835, 852 (1987), *petition for cert. filed*, 56 U.S.L.W. 3115 (U.S. July 22, 1987) (No. 87-159); *Palmer v. A.H. Robins Co.*, 684 P.2d 187, 217 (Colo. 1984); *Unified School Dist. No. 490 v. Celotex Corp.*, 6 Kan. App. 2d 346, 355-56, 629 P.2d 196, 206 (1981).

51. *Ingraham*, 430 U.S. at 653-59.

52. 430 U.S. at 664.

53. 430 U.S. at 664. *See also* 430 U.S. at 665-66 ("[T]he principal concern of the American Framers appears to have been with the legislative definition of crimes and punishments. But if the [eighth amendment] was intended to restrain government more broadly than its English model, the subject to which it was intended to apply — the criminal process — was the same.") (citations omitted).

iting the extent of *criminal* punishments.⁵⁴ He found it “not surprising . . . that every decision of this Court considering whether a punishment is ‘cruel and unusual’ . . . has dealt with a criminal punishment.”⁵⁵ From this collective history he concluded that the cruel and unusual punishment clause does not apply outside the criminal context. Justice Powell also noted that eighth amendment concerns do not arise without an adjudication; where there has been no formal adjudication, the pertinent constitutional safeguard is the due process clause.⁵⁶

For Justice Powell, the setting of the punishment was controlling. He wrote, “In the few cases where the Court has had occasion to confront claims that impositions outside the criminal process constituted cruel and unusual punishment, it has had no difficulty finding the Eighth Amendment inapplicable.”⁵⁷ Furthermore, he stated, “The prisoner and the schoolchild stand in wholly different circumstances, separated by the harsh facts of criminal conviction and incarceration.”⁵⁸ Powell, however, did not make the criminal label absolutely mandatory for eighth amendment protections to apply. He did concede that “[s]ome punishments, though not labeled ‘criminal’ by the State, may be sufficiently analogous to criminal punishments . . . to justify application of the Eighth Amendment.”⁵⁹ However, he did not specify how a court is to determine whether a particular punishment is “sufficiently analogous to criminal punishments.”

Justice White wrote a dissenting opinion which was joined by Justices Brennan, Marshall, and Stevens.⁶⁰ He criticized the majority’s “vague and inconclusive recitation of the history of the Amendment”⁶¹ and the Court’s bootstrap argument which reasoned that because every prior case has involved criminal punishment the eighth amendment necessarily distinguishes criminal from noncriminal punishment.⁶² He also highlighted the majority’s acknowledgment that

54. 430 U.S. at 664-66.

55. 430 U.S. at 666. This reasoning is ironic since Justice Powell later uses the opposite reasoning to criticize the dissent. He argues that “the absence of reported Florida decisions hardly suggests that no remedy [for unreasonable corporal punishment] is available.” 430 U.S. at 677 n.45.

56. 430 U.S. at 671 n.40.

57. 430 U.S. at 667-68.

58. 430 U.S. at 669.

59. 430 U.S. at 669 n.37. As an example, Justice Powell cites *In re Gault*, 387 U.S. 1 (1967), which held that a juvenile subject to a delinquency hearing is entitled to certain criminal protections, even if the proceeding is not labeled “criminal.” He later noted *Kennedy v. Mendoza-Martinez*, 372 U.S. 144 (1963), where the Court held that denationalization was a punishment, though not labeled criminal, which could only be imposed through the criminal process. 430 U.S. at 671 n.40 (citing 372 U.S. at 162-67, 186).

60. 430 U.S. at 683 (White, J., dissenting). Justice Stevens also filed a separate dissenting opinion that discussed the due process issue. 430 U.S. at 700-02 (Stevens, J., dissenting).

61. 430 U.S. at 685.

62. 430 U.S. at 686.

the eighth amendment has never been confined to criminal punishments so long as the punishment at issue is sufficiently analogous to criminal punishment.⁶³

Justice White read the eighth amendment as requiring an examination of the punishment's purpose and not the label attached.⁶⁴ He stated,

If there are some punishments that are so barbaric that they may not be imposed for the commission of crimes, designated by our social system as the most thoroughly reprehensible acts an individual can commit, then, *a fortiori*, similar punishments may not be imposed on persons for less culpable acts, such as breaches of school discipline. Thus, if it is constitutionally impermissible to cut off someone's ear for the commission of murder, it must be unconstitutional to cut off a child's ear for being late to class.⁶⁵

The dissenting justices would rather adopt a "purposive approach" that would turn on "whether the purpose of the deprivation is among those ordinarily associated with punishment, such as retribution, rehabilitation, or deterrence."⁶⁶ They focus on the words of the amendment itself, stating, "[T]he constitutional prohibition is against cruel and unusual *punishments*; nowhere is that prohibition limited or modified by the language of the Constitution."⁶⁷ Justice White criticizes the majority for being misleading: "The Court would have us believe . . . that there is a recognized distinction between criminal and non-criminal punishments for purposes of the Eighth Amendment. This is plainly wrong."⁶⁸ Unlike the majority, the dissent does not take a strict historical view, but reads the words of the amendment in broad terms, addressing the scope of all punishments, irrespective of their contexts.

The majority's opinion in *Ingraham* addresses the cruel and unusual punishment issue in language that implicates the entire eighth amendment.⁶⁹ However, the Court did not confront the questions of whether the excessive fines clause requires the same conclusion after a similar analysis and what forms of punishment are "sufficiently analo-

63. 430 U.S. at 688 (noting the majority's statement, 430 U.S. at 669 n.37). See note 59 *supra* and accompanying text.

64. 430 U.S. at 688 ("The relevant inquiry is not whether the offense for which a punishment is inflicted has been labeled as criminal"); 430 U.S. at 688 ("the majority adopts a rule that turns on the label given to the offense for which the punishment is inflicted").

65. 430 U.S. at 684 (footnote omitted).

66. 430 U.S. at 686-87.

67. 430 U.S. at 685 (emphasis in original).

68. 430 U.S. at 686.

69. Justice Blackmun at oral argument even assumed that the excessive fines clause applies only in the criminal context, stating, "Well now, there are three parts to the Eighth Amendment, aren't there? Excessive bail and fines, both of which are in the criminal context." Oral Argument of Petitioner at 7, *Ingraham v. Wright*, 430 U.S. 651 (1977), reprinted in LANDMARK BRIEFS, *supra* note 35, at 319 (1978).

gous to criminal punishments" to invoke the eighth amendment's protections. In spite of the apparent differences between a cruel and unusual punishment argument in a child-spanking case and an excessive fines clause argument in a punitive damages case, courts have read *Ingraham* broadly to foreclose the latter. In doing so, they have avoided an independent inquiry into the origins of the excessive fines clause and into the penal aspects of punitive damages.

B. *Excessive Fines Clause Cases and Reliance on Ingraham v. Wright*

Of those courts that have interpreted the excessive fines clause⁷⁰ or the state equivalent⁷¹ in punitive damages cases, the majority have held or implied that the clause or the entire eighth amendment is inapplicable in civil cases. However, some courts, both federal and state, have either accepted the argument for applying the clause in civil cases or recognized its merit.

A few cases decided prior to *Ingraham v. Wright* generally considered the excessive fines clause as categorically the same as the cruel and unusual punishment and excessive bail clauses and held that it did not apply in civil penalty cases.⁷² No meaningful authority or analysis supported these cases. For instance, in *United States v. Stangland*,⁷³ the Seventh Circuit upheld the constitutionality of civil penalties as-

70. Although the Supreme Court has never explicitly stated that the excessive fines clause applies to the states, such an inference would be reasonable based upon the Court's treatment of the other two clauses of the eighth amendment. *See, e.g., Robinson v. California*, 370 U.S. 660, 666-67 (1962); 370 U.S. at 675 (Douglas, J., concurring); *Schilb v. Kuebel*, 404 U.S. 357, 365 (1971) (citing *Pilkinton v. Circuit Court*, 324 F.2d 45 (8th Cir. 1963)). Moreover, the Supreme Court has held that the other safeguards of the Bill of Rights apply to the states. *See, e.g., Pointer v. Texas*, 380 U.S. 400, 403 (1956); *Malloy v. Hogan*, 378 U.S. 1, 4 & n.2 (1964).

71. In addition to the application of the excessive fines clause to the states through the fourteenth amendment, most states have clauses in their constitutions identical to the eighth amendment. States whose constitutions predate the Bill of Rights adopted the principles in the Virginia Bill of Rights. R. PERRY & J. COOPER, *SOURCES OF OUR LIBERTIES* 309 (1959); *see, e.g., DEL. DECLARATION OF RIGHTS* § 16 (1776), reprinted in R. PERRY & J. COOPER, *supra*, at 339; *MASS. CONST.* pt. 1, art. XXVI (1780), reprinted in R. PERRY & J. COOPER, *supra*, at 377. Later, other states modelled their constitutions on the federal Constitution. *E.g., OHIO CONST.* art. I, § 9; *TEX. CONST.* art. I, § 13. *Cf. FLA. CONST.* art. I, § 17 ("Excessive fines . . . are forbidden").

72. *See Robbins v. Police Pension Fund*, 321 F. Supp. 93, 99 (S.D.N.Y. 1970); *Zwick v. Freeman* 373 F.2d 110, 119 (2d Cir.), *cert. denied*, 389 U.S. 835 (1967); *United States v. Stangland*, 242 F.2d 843, 848 (7th Cir. 1957); *State ex rel. Hardy v. State Bd. of Equalization*, 319 P.2d 1061, 1063-64 (Mont. 1958); *Skinner v. State ex rel. Williamson*, 115 P.2d 123, 125-26 (Okla. 1941), *revd. sub nom. Skinner v. Oklahoma*, 316 U.S. 535 (1942); *In re Chester School District's Audit*, 151 A. 801, 808 (Pa. 1930); *cf. In re Walsh*, 315 N.Y.S.2d 59, 61 (1970) (eighth amendment applies to criminal cases only). *But see State ex rel. Hardy v. State Bd. of Equalization*, 319 P.2d 1061, 1066 (Mont. 1958) (Angstman, J., dissenting) ("It is a fallacious notion that [Montana's excessive fines provision] protects a criminal who has been convicted of a crime, but that the sky is the limit [for civil penalties]"). While the early cases involved civil penalties, the majority view that the eighth amendment is inapplicable would also apply to punitive damages cases.

73. 242 F.2d 843 (7th Cir. 1957).

sessed against wheat farmers for violations of marketing quotas. The court held, without citation of any authority or analysis of any history, that in "suits to recover civil penalties . . . the Eighth Amendment argument is inapposite."⁷⁴ Subsequent cases relied upon the terse holding in *Stangland* to reach the same conclusion. For instance, the Second Circuit in *Zwick v. Freeman*⁷⁵ relied exclusively on *Stangland* in ruling that the excessive fines clause does not apply to civil penalties.⁷⁶ Other courts have subsequently cited *Stangland* or *Zwick* for the same proposition.⁷⁷ Therefore, this pre-*Ingraham* line of cases ultimately depended upon the *Stangland* holding — a holding unsupported by any case law or analysis.

Some pre-*Ingraham* courts were not satisfied that the eighth amendment argument could be so easily dismissed. In *Toepleman v. United States*,⁷⁸ the appellants argued that multiple civil forfeitures assessed by the government were unconstitutionally excessive. Although the Fourth Circuit found no constitutional abuses, it reasoned that the eighth amendment limits the excessiveness of civil punishments.⁷⁹ Before *Ingraham*, some state courts also either recognized or implied that the excessive fines clause applies to civil sanctions, including punitive damages.⁸⁰

74. 242 F.2d at 848.

75. 373 F.2d 110 (2d Cir.), *cert. denied*, 389 U.S. 835 (1967).

76. 373 F.2d at 119.

77. *E.g.*, *Dalton v. Bob Neill Pontiac, Inc.* 476 F. Supp. 789, 797 n.13 (M.D.N.C. 1979), *affd. mem.*, 628 F.2d 1348 (4th Cir. 1980); *Downey Sav. & Loan Assn. v. Ohio Casualty Ins. Co.*, 189 Cal. App. 3d 1072, 234 Cal. Rptr. 835, 852 (1987), *petition for cert. filed*, 56 U.S.L.W. 3115 (U.S. July 22, 1987) (No. 87-159).

78. 263 F.2d 697 (4th Cir.), *cert. denied*, 359 U.S. 989 (1959).

79. [W]hile the Eighth Amendment has generally been thought to apply only to criminal cases . . . there would seem to be no basis in reason why a court could not invoke the Eighth Amendment, either specifically or by analogy, to prevent an abuse of the power of punishment though it be only manifested in a civil form.
263 F.2d at 700 (citations omitted).

80. *E.g.*, *Keller v. Keller*, 323 P.2d 231, 235 (Wash. 1958) ("In a civil proceeding, . . . [c]onstitutional prohibitions against cruel and unusual punishment and excessive fines provide the extreme limits of the court's discretionary powers.").

Although Florida courts have never scrutinized excessive punitive damage awards on a constitutional plane, *cf.* *Wackenhut Corp. v. Canty*, 359 So. 2d 430, 436 (Fla. 1978) (Florida courts examine punitive damages for excessiveness but not with reference to the state prohibition against excessive fines), they have stated that a prohibition against excessive fines is not limited to criminal cases, but also limits legislatively set civil fines and penalties. *See State v. Champe*, 373 So. 2d 874, 879 (Fla. 1978) ("the legislature is free to set civil fines and penalties in amounts which are not so excessive as to be 'cruel' or 'unusual'"); *Amos v. Gunn*, 94 So. 615, 641 (Fla. 1922).

Nebraska courts, which prohibit punitive damage awards outright, also define punitive damages as fines or penalties for state constitutional purposes. In *Abel v. Conover*, 104 N.W.2d 684, 688-89 (Neb. 1960), the court reasoned that punitive damages are fines and as such are unconstitutional since the proceeds benefit a private person and not the school system as mandated by article VII, section 5, of the Nebraska Constitution. 104 N.W.2d at 688-89. Absent the prohibition against punitive damages, Nebraska courts would arguably continue to characterize punitive damages as "fines" within the scope of the state's excessive fines clause. NEB. CONST. art. I, § 9. Moreover, Nebraska courts have long held that punitive damages represent an inappropriate

After the *Ingraham* decision, courts have relied on its broad characterization that the eighth amendment applies to criminal cases only and have assumed that its analysis of the cruel and unusual punishment clause also controls the excessive fines clause. The Colorado Supreme Court's recent decision in *Palmer v. A.H. Robins Co.*⁸¹ is typical of the manner in which courts, both federal and state, have rejected the excessive fines argument for punitive damages. In a products liability action against the manufacturer of the Dalkon Shield intrauterine device, the jury awarded compensatory damages of \$600,000 and punitive damages of \$6,200,000. Relying on *Ingraham's* analysis of the cruel and unusual punishment clause, the court dismissed the defendant's eighth amendment argument for overlooking "the more fundamental proposition that the Cruel and Unusual Punishments Clause deals exclusively with the criminal process and criminal punishments."⁸² While the defendant separately raised the excessive fines clause argument, the court assumed that the analysis was no different from that of the cruel and unusual punishment clause. The court made no attempt to examine the history of the excessive fines clause or the penal aspects of punitive damages.

Other courts have been at least as perfunctory as the *Palmer* court, usually relegating the excessive fines clause argument to a footnote.⁸³ One court has written,

The imposition of punitive damage awards, although penal in nature, does not approach the severity of criminal sanctions and does not demand the same safeguards as do criminal prosecutions. . . . The United States Supreme Court . . . has . . . ruled [in *Ingraham v. Wright*] that the Eighth Amendment is generally limited to challenging conditions of a

intrusion into the state's criminal law function — suggesting that punitive damages would be appropriate for scrutiny under the state's excessive fines clause. See *Riewe v. McCormick*, 9 N.W. 88, 89-90 (Neb. 1881) (punitive damages are not recoverable since they are in excess of the injury and only the state can inflict punishment).

81. 684 P.2d 187 (Colo. 1984).

82. 684 P.2d at 217.

83. *E.g.*, *Help Hoboken Hous. v. City of Hoboken*, 650 F. Supp. 793, 800 (D.N.J. 1986); *Campus Sweater & Sportswear Co. v. M.B. Kahn Constr. Co.*, 515 F. Supp. 64, 108 n.129 (D.S.C. 1979), *affd. mem.*, 644 F.2d 877 (4th Cir. 1981); *Dalton v. Bob Neill Pontiac, Inc.*, 476 F. Supp. 789, 797 n.13 (M.D.N.C. 1979), *affd. mem.*, 628 F.2d 1348 (4th Cir. 1980); *State ex rel. Brown v. Dayton Malleable, Inc.*, 1 Ohio St. 3d 151, 158 n.5, 438 N.E.2d 120, 125 n.5 (1982); *In re Garay*, 89 N.J. 104, 111-12 & n.7, 444 A.2d 1107, 1111-12 & n.7 (1982) ("[*Ingraham*] suggests that the 'civil' label may be dispositive in the Eighth Amendment context even as to a clearly punitive sanction."); *Rasky v. Department of Regis. & Educ.*, 410 N.E.2d 69, 78-79 (Ill. App. 1980), *appeal dismissed*, 454 U.S. 806 (1981); *Woolstrum v. Mailloux*, 141 Cal. App. 3d Supp. 1, 9 n.3, 14, 190 Cal. Rptr. 729, 734 n.3, 738 (1983) (listing the "demerits" of punitive damages: "Although the remedy is quasi-criminal, the defendant does not have the protections of a criminal defendant, such as . . . prohibition of excessive fines"); *Peterson v. Superior Court*, 31 Cal. 3d 147, 161, 642 P.2d 1305, 1313, 181 Cal. Rptr. 784, 792 (1982) ("The constitutional safeguards applicable in the criminal area do not apply in a case presenting the possible exposure to civil penalties.").

criminal sentence.⁸⁴

Another court, in a \$5 million punitive damage case, simply stated, "[T]he Eighth Amendment applies only to criminal actions, not to purely civil penalties, as involved here."⁸⁵

One explanation for the cursory treatment of the excessive fines clause argument is that defendants have not pressed the argument. If it is included at all it is usually tacked on to the end of a catalogue of other constitutional challenges.⁸⁶ Courts accordingly do not grant it much attention.⁸⁷

Although no courts since *Ingraham* have actually held that the excessive fines clause protects the punitive damages defendant, some courts have taken notice of the argument. The Third Circuit, in *In re School Asbestos Litigation*,⁸⁸ noted the growing concerns over the constitutionality of punitive damages, observing that "[t]he parallels between the assessment of exemplary damages and a fine levied in criminal courts have led to suggestions that the concepts of double jeopardy and excessive punishment should be invoked in the civil field as well."⁸⁹ The Eighth Circuit, in *Wilmington v. J.I. Case Co.*,⁹⁰ went so far as to question the constitutionality of excessively large punitive damages but did not confront the issue.⁹¹ The court held that a punitive damage award of ten times the actual damages was neither unfair

84. *Unified School Dist. No. 490 v. Celotex Corp.*, 6 Kan. App. 346, 355-56, 629 P.2d 196, 206 (1981).

85. *Downey Sav. & Loan Assn. v. Ohio Casualty Ins. Co.*, 189 Cal. App. 3d 1072, 234 Cal. Rptr. 835, 852 (1987) (citing *Ingraham v. Wright*), *petition for cert. filed*, 56 U.S.L.W. 3115 (U.S. July 22, 1987) (No. 87-159).

86. *E.g.*, *Unified School Dist. No. 490 v. Celotex Corp.*, 6 Kan. App. 2d 346, 355-56, 629 P.2d 196, 206 (1981).

87. *E.g.*, *State ex rel. Brown v. Dayton Malleable, Inc.*, 1 Ohio St. 3d 151, 158 n.5, 438 N.E.2d 120, 125 n.5 (1982) ("[The defendant] makes a passing reference in its brief to the prohibition against 'excessive fines' . . . [but] does not, however, explain why we should apply this language in the civil context.").

88. 789 F.2d 996 (3d Cir. 1986). The case involved certification of a nationwide mandatory plaintiff class for punitive damages. The Third Circuit vacated the district court's class certification for the punitive damages plaintiffs.

89. 789 F.2d at 1004 (citing *Aetna Life Ins. Co. v. Lavoie*, 106 S. Ct. 1580 (1986)). Although the court accorded considerable discussion to different arguments attacking the constitutionality of punitive damages, it held that certification of a nationwide punitive damages class was improper where there was no showing of potential abuses that would implicate constitutional protections. 789 F.2d at 1003-05.

90. 793 F.2d 909 (8th Cir. 1986).

91. The court, citing Jeffries, *supra* note 6, noted "the existence of a growing body of academic work suggesting that punitive damages may be unconstitutional. In the present case, however, the constitutional issue has not been raised, and thus we do not consider this interesting and significant question." 793 F.2d at 922 n.10 (citation omitted). Although the court did not specify the possible grounds for finding punitive damages unconstitutional, its citation of the Jeffries article would suggest either a due process basis or the excessive fines clause argument. See Jeffries, *supra* note 6, at 140. Because the *Wilmington* case did not involve multiple punitive damage awards, the court was necessarily referring to Jeffries' argument against punitive damages as excessive fines rather than his due process attack of multiple punitive damages in mass tort litigation. The import of the court's footnote is unclear. The comment could be a mere

nor shocking.⁹² The Sixth Circuit has also expressed some concern over excessive punitive damage awards.⁹³ None of these federal courts, however, were required to address the excessive fines clause argument. Of those states that have stated or implied that the excessive fines clause applies to punitive damages, none have confronted the language in *Ingraham*.⁹⁴

III. MISPLACED RELIANCE ON *INGRAHAM V. WRIGHT*

While *Ingraham v. Wright* is factually distinguishable from an excessive fines clause/punitive damages case,⁹⁵ it is distinguishable on more fundamental grounds: the case involved neither the excessive fines clause nor punitive damages. The Court restricted its historical inquiry to the cruel and unusual punishment clause and did not extend its reasoning to forms of punishment outside the scope of that clause. For a court to conclude that the excessive fines clause is inapposite in a punitive damages case, it should undertake first a historical analysis of whether the scope of the excessive fines clause includes noncriminal punishments and, second, an inquiry as to whether punitive damages are sufficiently penal to warrant constitutional protections of the eighth amendment. Courts have avoided both inquiries by resorting to the broad language of *Ingraham*.

observation or it could be a deliberate indication that in the proper context the court might find an excessive punitive damage award unconstitutional under the excessive fines clause.

92. 793 F.2d at 922.

93. See *Womack v. Gettelfinger*, 808 F.2d 446, 451-52 (6th Cir. 1986).

94. Texas courts have held that their prohibition against excessive fines extends to civil penalties, implying perhaps that punitive damages are likewise subject to scrutiny. In *Pennington v. Singleton*, 606 S.W.2d 682 (Tex. 1980), the Texas Supreme Court applied the state's excessive fines clause to a treble damage award paid to a private party under the state's consumer protection act. 606 S.W.2d at 690 (relying on *State v. Galveston, H. & S.A. Ry.*, 100 Tex. 153, 97 S.W. 71 (1906), *revd. on other grounds*, 210 U.S. 217 (1908)). The court treated treble damages as a fine within the meaning of the state constitution but held that the award was not constitutionally excessive. 606 S.W.2d at 690-91. Nevertheless, it appears that Texas courts have not addressed punitive damages on excessive fines grounds.

Apparently no other courts have gone as far as the Texas courts, but some have suggested that they might. See note 80 *supra*. Several justices of the Alabama Supreme Court have apparently accepted the excessive fines clause argument in light of the Supreme Court's dicta in *Aetna v. Lavoie*. See note 22 *supra* and text at notes 17-22 *supra*.

95. First, factual considerations peculiar to the spanking of schoolchildren would not be pertinent to a test of the excessive fines clause. In *Ingraham*, the availability of civil and criminal remedies for excessive punishments rendered the constitutional issue less acute. 430 U.S. at 661, 677-78. Secondly, the Court felt that advance procedural protections would create a burden which would outweigh any added benefit. 430 U.S. 680-82. School discipline would be difficult if prior hearings were necessary before any punishment could be administered.

These factors would not apply to punitive damages assessed in the course of a civil trial. There could be no subsequent liability for imposing an excessively large punitive award. Who would the defendant sue? What cause of action would he have? The procedural protections contemplated in *Ingraham* would not apply to a punitive damage award. Spanking schoolchildren is far different from assessing monetary penalties in a formal civil trial. It would be impossible and inappropriate to translate the context of a punitive damage award into the context of *Ingraham*.

A. *History of the Excessive Fines Clause*

To discern the meaning of the cruel and unusual punishment clause, the Supreme Court in *Ingraham* examined the history of the eighth amendment; the same analysis is appropriate for the excessive fines clause.⁹⁶ Historical analysis of the excessive fines clause necessarily focuses on the origins and meaning of the "fine" and the context in which a "fine" could arise. The analysis reveals that the word "fine" has not always had its modern meaning. It evolved from the "amercement" — a monetary penalty paid to the Crown as punishment for civil or criminal misconduct.

Like the cruel and unusual punishment clause, the excessive fines clause has a long history that extends back to the Magna Carta of 1215 and the English Bill of Rights of 1689.⁹⁷ The principle underlying the excessive fines clause originated in Chapter 20 of the Magna Carta which prohibited "amercements," monetary penalties assessed for lesser offenses against the Crown, that were disproportionate to a wrongdoer's offense or that would deprive him of his means of livelihood.⁹⁸ The chapter provided:

A freeman shall not be amerced for a slight offence, except in accordance with the degree of the offence; and for a grave offence he shall be amerced in accordance with the gravity of the offence, yet saving always his "contentment"; and a merchant in the same way, saving his "merchandise"; and a villien shall be amerced in the same way, saving his "wainage" — if they have fallen into our mercy: and none of the aforesaid amercements shall be imposed except by the oath of honest men of the neighbourhood.⁹⁹

A court levied an amercement upon finding an offender guilty of a minor offense and declaring him in the "king's mercy."¹⁰⁰ In a private suit, the court would amerce a plaintiff for his false claim if he did not

96. See *Ingraham*, 430 U.S. at 670-71 n.39 ("The applicability of the Eighth Amendment always has turned on its original meaning, as demonstrated by its historical derivation.").

97. 4 W. BLACKSTONE, COMMENTARIES *378-79; R. PERRY & J. COOPER, *supra* note 71, at 235-36, 430. See generally Granucci, "Nor Cruel and Unusual Punishments Inflicted": The Original Meaning, 57 CALIF. L. REV. 839, 845-47 (1969); Jeffries, *supra* note 6, at 154-57. The Supreme Court has sketched out some of the history of the eighth amendment in *Furman v. Georgia*, 408 U.S. 238, 316-28 (1972) (Marshall, J., concurring), and in *Solem v. Helm*, 463 U.S. 277, 284-86 (1983).

98. See W. McKECHNIE, MAGNA CARTA 284-93 (2d ed. 1914). Webster's defines "amerce" as "to punish by a pecuniary penalty the amount of which is not fixed by law but is left to the discretion of the court." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 68 (1981).

99. MAGNA CARTA ch. 20 (1215), translated in W. McKECHNIE, *supra* note 98, at 284. Chapter 20 of the Magna Carta was later renumbered as Chapter 14. See Granucci, *supra* note 97, at 845 n.29. Chapters 21 and 22 of the Magna Carta also express this principle of proportionality but apply to nobles and clergy. See W. McKECHNIE, *supra* note 98, at 295, 298.

100. 2 F. POLLOCK & F. MAITLAND, THE HISTORY OF ENGLISH LAW 513 (2d ed. 1952); W. McKECHNIE, *supra* note 98, at 286.

prevail.¹⁰¹ If the defendant lost, the court amerced him for his misconduct or for disobeying the command of the original writ.¹⁰² Assessing an amercement was a two-step process: First, the court would provisionally assess the penalty, and thereafter a jury of twelve neighbors would adjust the amercement as the misconduct and the wrongdoer's ability to pay warranted.¹⁰³ The amercement would then be paid to the court. The amercements were generally small but frequently assessed.¹⁰⁴

Although loosely considered the equivalent of a modern criminal fine,¹⁰⁵ the amercement, at the time of the Magna Carta, was distinct from the criminal fine.¹⁰⁶ The fine, as the term was used at the time of the Magna Carta, operated as a substitute for imprisonment. The court, having no actual power to impose a fine, would sentence the wrongdoer to prison. To avoid imprisonment, the wrongdoer could then "make fine" by "voluntarily" contracting with the Crown to pay money, thereby ending the matter.¹⁰⁷ The Crown gradually eliminated the voluntary nature of the fine by imposing indefinite sentences upon wrongdoers who effectively would be forced to pay the fine. Once the fine was no longer voluntary, it became the equivalent of an amercement. As a result, the use of the term "amercement" gradually dropped from ordinary usage as the term "fine" took on its modern meaning¹⁰⁸ — a meaning that more closely resembles the meaning of

101. 3 W. BLACKSTONE, *supra* note 97, at *274-75, *376, *398. The Supreme Court has described the process of assessing amercements in *Tumey v. Ohio*, 273 U.S. 510, 524-25 (1927).

102. See 3 W. BLACKSTONE, *supra* note 97, at *398.

Offenses punished in the course of civil actions. Every tort, nay, every cause of civil action, was a punishable offence. Every vanquished defendant, even though the action was 'real' or was contractual, had earned punishment. At the least he had been guilty of an unjust detention . . . In the lower courts he could only be — but he would be — amerced.

2 F. POLLOCK & F. MAITLAND, *supra* note 100, at 519.

103. W. McKECHNIE, *supra* note 98, at 288; 2 F. POLLOCK & F. MAITLAND, *supra* note 100, at 513.

104. 2 F. POLLOCK & F. MAITLAND, *supra* note 100, at 513; W. McKECHNIE, *supra* note 98, at 287.

105. In translating Chapter 20 of the Magna Carta, some have equated amercements with fines. See, e.g., *Solem v. Helm*, 463 U.S. at 284 n.8; R. PERRY & J. COOPER, *supra* note 71, at 15.

106. In the thirteenth century, these terms were sharply contrasted. "Amercement" was applied to sums imposed in punishment of misdeeds; the law-breaker had no option of refusing, and no voice in fixing the amount. "Fine," on the contrary, was used for voluntary offerings made to the King to obtain some favour or to escape punishment. Here the initiative rested with the individual, who suggested the amount to be paid, and was, indeed, under no legal obligation to make any offer at all. This distinction between fines and amercements, absolute in theory, could readily be obliterated in practice.

W. McKECHNIE, *supra* note 98, at 292-93.

107. 2 F. POLLOCK & F. MAITLAND, *supra* note 100, at 517. See Note, *Fines, Imprisonment, and the Poor: "Thirty Days or Thirty Dollars"*, 57 CALIF. L. REV. 778, 783-86 (1969).

108. W. McKECHNIE, *supra* note 98, at 293; see Note, *supra* note 107, at 784-85 (noting the verbal change from "making fine" to "being fined"). New York, in its Bill of Rights, has retained the term "amercement" along with "fine": "No citizen of this state ought to be fined or

"amercement" than the old meaning of "fine."¹⁰⁹

Since the amercement originated at a time when little distinction existed between tort law and criminal law, it was neither strictly a civil nor a criminal sanction.¹¹⁰ It could arise in either a case brought by the Crown or a case between two private parties. After the tort and criminal law systems diverged, the principle of proportionality spanned both. It operated as a limitation on punishment rather than on the nature of the proceeding. William Blackstone, writing in the eighteenth century, distinguished between fines and amercements based upon the setting but acknowledged the analogous policy governing each:

The reasonableness of fines in criminal cases has also been usually regulated by the determination of *Magna Carta* . . . concerning *amercements* for misbehavior by the suitors in matters of *civil right*.¹¹¹

Like imprisonment, the amercement was simply a means of punishing misconduct, regardless of whether it arose in actions that today would be considered criminal or civil.¹¹² The *Magna Carta* established a general principle that punishment must be in proportion to the offense.¹¹³

In 1689, the English adopted their Bill of Rights in reaction to the judicial excesses in criminal cases under the reign of James II.¹¹⁴ The Bill of Rights provided, "That excessive bail ought not to be required, nor excessive fines imposed; nor cruel and unusual punishments inflicted."¹¹⁵ This provision elucidated the enduring principle that originated in the *Magna Carta*: the right to be free from excessive or disproportionate punishment, including excessive pecuniary punish-

amerced without reasonable cause, and such fine or amercement should always be proportioned to the nature of the offense." N.Y. CIV. RIGHTS LAW § 11 (McKinney 1976).

109. For instance, Webster's recognizes the metamorphosis of the "fine," defining it as "a sum formerly paid as compensation or for exemption from punishment but now imposed as punishment for a crime." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 852 (1981).

110. 2 W.S. HOLDSWORTH, A HISTORY OF ENGLISH LAW 363, 365 (3d ed. 1923); 3 W.S. HOLDSWORTH, *supra*, at 328; 3 W. BLACKSTONE, *supra* note 97, at *376, *398; 4 W. BLACKSTONE, *supra*, at *372; W. MCKECHNIE, *supra* note 98, at 285; 2 F. POLLOCK & F. MAITLAND, *supra* note 100, at 511-12, 523-25.

111. 4 W. BLACKSTONE, *supra* note 97, at *379 (emphasis added).

112. "Every tort, nay, every cause of civil action, was a punishable offence." 2 F. POLLOCK & F. MAITLAND, *supra* note 100, at 519.

113. See *Solem v. Helm*, 463 U.S. 277, 284 (1983). Immediately after discussing the clause in the English Bill of Rights prohibiting excessive fines, Blackstone observed that the reasonableness of criminal fines is the same as the reasonableness of amercements in civil cases. 4 W. BLACKSTONE, *supra* note 97, at *378-79.

114. R. PERRY & J. COOPER, *supra* note 71, at 222-24.

115. ENGLISH BILL OF RIGHTS, 1 Wm. & Mary, sess. 2, ch. 2 (1689), reprinted in R. PERRY & J. COOPER, *supra* note 71, at 247. An early draft included a reference to "persons committed in criminal cases" relating to the prohibition against excessive bail. See Granucci, *supra* note 97, at 855-56. The phrase was dropped in the final version. It is unclear whether the omission of the reference is of any significance since the preamble retains a similar reference. Compare Ingraham v. Wright, 430 U.S. 651, 665 & n.33 (1977), with *Ingraham*, 430 U.S. at 685 (White, J., dissenting).

ments.¹¹⁶ Since it incorporated the earlier prohibition against excessive amercements — which could arise in civil settings — as well as other forms of punishment, the pronouncement that “excessive fines [ought not to be] imposed” cannot be limited to strictly criminal cases but extends to monetary sanctions imposed in both criminal and civil contexts.¹¹⁷ The drafters of the American Bill of Rights copied the *entire* eighth amendment from section nine of the Virginia Declaration of Rights of 1776, which had incorporated the English text.¹¹⁸ In adopting the English text, the framers of the American Bill of Rights intended to ensure, at a minimum, those rights possessed by the English.¹¹⁹ The principal impetus for adopting the amendment was to answer the complaints of some that the original Constitution failed to limit the degree of punishment for those convicted of crimes.¹²⁰ In doing so, the framers also incorporated the amendment’s historical contours, including the broader scope of the excessive fines clause.

Numerous eighth amendment cases have been decided by the Supreme Court — most involving the cruel and unusual punishment clause.¹²¹ While a few criminal cases have been decided under the excessive fines clause,¹²² the Court has never decided a civil case under the clause.¹²³ Despite this dearth of case law, the Supreme Court has

116. See *Solem v. Helm*, 463 U.S. at 284-86; Granucci, *supra* note 97, at 845-47. See generally 4 W. BLACKSTONE, *supra* note 97, at *12-19 (writing on the proportionality of punishments).

117. 4 W. BLACKSTONE, *supra* note 97, at *379 (“the Bill of Rights was only declaratory of the old constitutional law”); Granucci, *supra* note 97, at 847 (“Thus, prior to adoption of the Bill of Rights in 1689 England had developed a common law prohibition against excessive punishments in any form.”).

118. *Solem v. Helm*, 463 U.S. 277, 285-86 & n.10 (1983). R. PERRY & J. COOPER, *supra* note 71, at 311-12, 423.

119. When the Framers of the Eighth Amendment adopted the language of the English Bill of Rights, they also adopted the English principle of proportionality. Indeed, one of the consistent themes of the era was that Americans had all the rights of English subjects. Thus our Bill of Rights was designed in part to ensure that these rights were preserved. . . . [The Framers] intended to provide at least the same protection — including the right to be free from excessive punishments.

Solem v. Helm, 463 U.S. at 285-86 (footnotes & citations omitted).

120. See *Ingraham v. Wright*, 430 U.S. 651, 666 & n.35 (1977).

121. *E.g.*, *Furman v. Georgia*, 408 U.S. 238 (1972) (capital punishment); *Gregg v. Georgia*, 428 U.S. 153 (1976) (capital punishment); *Solem v. Helm*, 463 U.S. 277 (1983) (cruel and unusual punishments clause prohibits life imprisonment without possibility of parole for a nonviolent felony); *Trop v. Dulles*, 356 U.S. 86 (1958) (divestiture of citizenship is penal, thereby violating the cruel and unusual punishment clause).

122. *E.g.*, *Badders v. United States*, 240 U.S. 391 (1916); *Gulf, C. & S.F. Ry. v. Texas*, 246 U.S. 58 (1918).

123. In several cases, the Court has discussed the excessive fines clause without deciding its scope. In *Ex parte Watkins*, 32 U.S. (7 Pet.) 568 (1833), the petitioner, a federal prisoner, sought a writ of habeas corpus and argued in part that the criminal fine imposed was excessive and contrary to the excessive fines clause. 32 U.S. at 573. The Court noted, “The eighth amendment is addressed to courts of the United States exercising criminal jurisdiction, and is doubtless mandatory to them and a limitation upon their discretion.” 32 U.S. at 573-74. This statement is only a declaratory preface to the Court’s holding that it was without proper appellate jurisdiction to revise the fine. 32 U.S. at 574. Because the Court did not address the question of whether the excessive fines clause applies to civil cases, no court has since relied on *Ex parte Watkins* for that

continuously recognized the eighth amendment as restating the Magna Carta's principle of proportionality. In *Solem v. Helm*,¹²⁴ the Court examined the history of the eighth amendment — citing the Magna Carta's rule against excessive amercements — and concluded that the framers of the amendment implicitly had incorporated the longstanding principle of proportionality in punishments.¹²⁵

Historical analysis of the excessive fines clause in light of contemporary punitive damage awards is problematic. English courts at the time of the Magna Carta and the English Bill of Rights and United States courts at the time of the American Bill of Rights had not outlined the basis for punitive damages and certainly did not contemplate awards reaching millions and even billions of dollars.¹²⁶ It is difficult to say conclusively that the history of the eighth amendment does or does not bring punitive damages within the scope of the excessive fines clause.

The history does support at least two plausible arguments that punitive damages fall within the scope of the excessive fines clause as contemplated in the English Bill of Rights. One argument is that the Magna Carta — as the source of the excessive fines clause — *specifically* included civilly assessed sanctions within the scope of its prohibition of disproportionate punishments. While amercements do differ from punitive damages in that the amercement was paid to the state rather than the plaintiff, other attributes are similar: The principal purpose of each is to punish the wrongdoer; both are generally assessed by a jury; both are mandatory upon the wrongdoer; and both arise in the civil context. The fine, originally negotiated between the wrongdoer and the Crown, eventually became a mandatory penalty,

proposition, although some litigants have argued that this case does restrict the clause's application to the criminal context. Brief for Appellee at 33, *Aetna Life Ins. Co. v. Lavoie*, 106 S. Ct. 1580 (1986) (No. 84-1601). See also *Furman v. Georgia*, 408 U.S. 238, 242-44 (1972).

124. 463 U.S. 277 (1983).

125. 463 U.S. at 284-86.

126. Whether English courts would have treated punitive damages as analogous to amercements within the meaning of the Magna Carta and the Bill of Rights is uncertain. At the time of the adoption of the English Bill of Rights in 1689, punitive damages paid to private parties were virtually unknown. Not until the eighteenth century did courts outline the basis for punitive damages. K. REDDEN, *supra* note 26, § 2.2(A)(2) nn. 15-16 (citing two 1763 English cases as the first explicit articulation of punitive damages: *Wilkes v. Wood*, 98 Eng. Rep. 489 (C.P. 1763), and *Huckle v. Money*, 95 Eng. Rep. 768 (C.P. 1763)). Before the English Bill of Rights, some cases did involve jury awards above the actual physical injury to the plaintiff. However, these awards were usually double or treble damages for offenses such as adultery and the cutting off of plaintiff's ear. *E.g.*, 3 W. BLACKSTONE, *supra* note 97, at *140 (exemplary damages for adultery); *Id.* at *121 (treble damages for severed ear). See also Owen, *Punitive Damages in Products Liability Litigation*, 74 MICH. L. REV. 1257, 1263 & n.18 (1976). As such, courts arguably did not view these awards as testing the limits of excessiveness. Therefore, punitive damages, moreover excessively high awards, were not of any significance at the time and would not have been contemplated in drafting the excessive fines language of the English Bill of Rights.

Likewise, in the United States, the doctrine of punitive damages was virtually unknown at the time of the drafting of the Bill of Rights. See K. REDDEN, *supra* note 26, § 2.3(B).

thereby subsuming the amercement. Therefore, punitive damages, as civil monetary sanctions, are sufficiently analogous to amercements to invoke the Magna Carta's prohibition against excessive amercements and the English Bill of Rights' prohibition against excessive fines.

A second interpretation would read the clause's roots in the Magna Carta and the English Bill of Rights as evincing the broader principle that punishment in any form must be in proportion to the misconduct. The Magna Carta limited punitive sanctions that were disproportionate and that would deprive the defendant of his livelihood. Therefore, an excessively large punitive damage award, assessed in order to punish the defendant, would subvert the intent of this established principle.¹²⁷ Under this interpretation, the amendment focuses upon the punishment, whereas the other criminal safeguards focus on the process through which punishment is imposed.¹²⁸

In contrast, the history of the excessive fines clause could be and has been interpreted as imposing restraints only upon excessive criminal sanctions without reference to civil punitive sanctions. Most courts have assumed the latter interpretation, primarily because it is consistent with and parallels the other two clauses of the eighth amendment.¹²⁹ From this assumption, the conclusion necessarily follows that the Supreme Court's *Ingraham* interpretation of the cruel and unusual punishment clause restricts the excessive fines clause to the criminal setting. However, this interpretation ignores much of the history of the clause that supports the two former interpretations and that is not addressed in *Ingraham*.¹³⁰

B. *The Penal Nature of Punitive Damages*

By relying on *Ingraham*'s historical analysis of the cruel and unusual punishment clause and the "civil" label attached to punitive damages, courts have avoided the question, raised by *Ingraham*, of whether punitive damages are "sufficiently analogous to criminal punishments" to invoke eighth amendment protection. To answer this question, courts should examine the functional nature of the sanc-

127. In a case decided the same year as the enactment of the English Bill of Rights, the House of Lords reiterated the broad principle prohibiting excessiveness in punishments. Although the case did involve a fine paid to the Crown, the decision reflects an attitude that would arguably encompass any excessive pecuniary penalty, including punitive damages. The House of Lords stated that "the fine of 30,000/ . . . was excessive and exorbitant, against Magna Charta, the common right of the subject, and against the law of the land." *Case of the Earl of Devonshire*, 11 State Tr. (Howell) 1367, 1370 (1689).

128. This is the approach Justice White takes in his *Ingraham* dissent, noting that eighth amendment scrutiny of "punishments" would not necessarily invoke the procedural guarantees of the "criminal" process. *Ingraham v. Wright*, 430 U.S. 651, 686 & n.2. (1977) (White, J., dissenting).

129. See section II.B, *supra*.

130. Both arguments are suggested in *Aetna Life Ins. Co. v. Lavoie*, 505 So. 2d 1050, 1059 n.1 (Ala. 1987) (Maddox, J., concurring specially).

tion¹³¹ and not merely the label attached.¹³²

The Supreme Court's decision in *Kennedy v. Mendoza-Martinez*¹³³ is the most widely cited test for determining whether a sanction is sufficiently penal as to invoke some or all protections.¹³⁴ In *Kennedy*, the Supreme Court recognized that certain punitive measures may not be constitutionally imposed without criminal protections.¹³⁵ The Court determined that automatic forfeiture of citizenship provisions of the immigration laws amounted to punishment that could not be imposed without due process of law.¹³⁶ The Court listed seven factors for consideration in determining whether a sanction is punitive:

- [1] Whether the sanction involves an affirmative disability or restraint,
- [2] whether it has historically been regarded as a punishment,
- [3] whether it comes into play only on a finding of *scienter*, [4] whether its operation will promote the traditional aims of punishment — retribution and deterrence, [5] whether the behavior to which it applies is already a crime, [6] whether an alternative purpose to which it may rationally be connected is assignable for it, and [7] whether it appears excessive in relation to the alternative purpose assigned¹³⁷

While this list is "neither exhaustive nor dispositive,"¹³⁸ the Supreme Court has afforded it considerable weight.¹³⁹ Commentators applying the *Kennedy* factors to punitive damages have concluded that most, if not all, of the factors qualify punitive damages as penal in nature and deserving of certain constitutional protections.¹⁴⁰ While

131. For instance, in *United States v. Ward*, 448 U.S. 242 (1980), the Supreme Court scrutinized the civil penalty to determine whether it was "so punitive as to 'transfor[m] what was clearly intended as a civil remedy into a criminal penalty.'" 448 U.S. at 249 (quoting *Rex Trailer Co. v. United States*, 350 U.S. 148, 154 (1956)). See 448 U.S. at 253-55; *Ingraham*, 430 U.S. at 669 n.37; *Boyd v. United States*, 116 U.S. 616, 634 (1886) ("[P]roceedings instituted for the purpose of declaring the forfeiture of a man's property by reason of offenses committed by him, though they may be civil in form, are in their nature criminal."); cf. *Trop v. Dulles*, 356 U.S. 86, 94-97 (1958).

132. See *Trop v. Dulles*, 356 U.S. at 94 ("How simple would be the tasks of constitutional adjudication and of law generally if specific problems could be solved by inspection of the labels pasted on them!").

133. 372 U.S. 144 (1963).

134. See, e.g., *United States v. One Assortment of 89 Firearms*, 465 U.S. 354, 365-66 & n.7 (1984); *United States v. Melendez-Carrion*, 790 F.2d 984, 998-99 (2d Cir.), cert. denied, 107 S. Ct. 562 (1986); *Atlas Roofing Co. v. Occupational Safety & Health Review Commn.*, 518 F.2d 990, 1000-01 (5th Cir. 1975). See Grass, *supra* note 14, at 245-48; Jeffries, *supra* note 6, at 150. Courts, however, have not applied this test to punitive damages. See Grass, *supra* note 14, at 245-46.

135. 372 U.S. at 167. See also *Bell v. Wolfish*, 441 U.S. 520, 537 (1979).

136. 372 U.S. at 165-70, 186.

137. 372 U.S. at 168-69 (footnotes omitted).

138. *United States v. Ward*, 448 U.S. 242, 249 (1980).

139. See, e.g., *United States v. Ward*, 448 U.S. at 249-51; *Bell v. Wolfish*, 441 U.S. at 537-39.

140. In an extensive analysis of *Kennedy* and the supporting cases, Grass concludes that all seven factors apply to punitive damages. Grass, *supra* note 14. Two others conclude that all but the first factor are satisfied. Jeffries, *supra* note 6, at 150-51; Wheeler, *supra* note 14, at 349. Another commentator, while querying whether the *Kennedy* test strictly applies, contends that under the *Kennedy* test or one like it punitive damages are penal and should not be assessed

all seven factors may arguably not apply, most would seem to qualify punitive damages for penal status.

The applicability of the first factor, whether the sanction involves an affirmative disability or restraint, turns on the definition of "disability or restraint." The Court intended "disability or restraint" to encompass more than actual imprisonment.¹⁴¹ Whether the factor extends to large monetary damages is unresolved. Although two members of the Court have found that moderately sized civil penalties do not qualify as a restraint or disability,¹⁴² some lower courts have characterized certain monetary sanctions as restraints.¹⁴³ Arguably, excessively large punitive damages could be as severe as imprisonment. For example, a multi-billion dollar award, such as that in the Texaco-Pennzoil litigation, would certainly restrain a corporation's activities, if not force it into bankruptcy.¹⁴⁴ Likewise, a large monetary judgment may be as severe to a poor defendant as a jail term.¹⁴⁵

The second and fourth factors, whether punitive damages have historically been regarded as punishment and whether they will promote retribution and deterrence, are also satisfied. The very label "punitive" manifests the penal nature of punitive damages. Courts have historically imposed punitive damages to punish a culpable defendant.¹⁴⁶ The vast majority of courts, including the Supreme Court,¹⁴⁷ recog-

without certain constitutional protections. K. REDDEN, *supra* note 26, § 7.2, at 607-08. Cf. *United States v. Futura, Inc.*, 339 F. Supp. 162, 165 (N.D. Fla. 1972) (court found civil fine to be penal under all *Kennedy* factors).

141. The Court cited cases that involved restraints other than imprisonment. See *Ex parte Garland*, 71 U.S. (4 Wall.) 333, 377 (1866) (exclusion from the practice of law viewed as punishment); *United States v. Lovett*, 328 U.S. 303, 316 (1946) (permanent prohibition from government service is a severe punishment); *Flemming v. Nestor*, 363 U.S. 603, 617 (1960) (denial of non-contractual government benefit imposes no affirmative disability or restraint).

142. *United States v. Ward*, 448 U.S. at 256 (Blackmun, J., joined by Marshall, J., concurring).

143. See *Atlas Roofing Co. v. Occupational Safety & Health Review Commn.*, 518 F.2d 990, 1001 (5th Cir. 1975) ("[E]ven though monetary penalties do not fit within the conventional definition of disability, . . . they do inflict a pocket-book deterrence or restraint on the recipient."), *affd.*, 430 U.S. 442 (1977); *United States v. Futura, Inc.*, 339 F. Supp. 162, 165 (N.D. Fla. 1972); *United States v. J.B. Williams Co.*, 354 F. Supp. 521, 529 & n.3 (S.D.N.Y. 1973), *affd. in part, revd. in part*, 498 F.2d 414 (2d Cir. 1974). But see *United States v. General Motors Corp.*, 403 F. Supp. 1151, 1161 (D. Conn. 1975) (finding that *Kennedy* did not intend to include monetary sanction as a "restraint").

144. See *Texaco, Fighting Pennzoil Attack, Asks Bankruptcy*, N.Y. Times, Apr. 13, 1987, at 1, col. 5.

145. 1 W. LAFAVE & A. SCOTT, *supra* note 32, § 1.3(a), at 16-17; Clark, *supra* note 14, at 406; Grass, *supra* note 14, at 252. The burden of a huge debt would certainly restrict, if not terminate, a defendant's financial activities.

146. E.g., *In re School Asbestos Litig.*, 789 F.2d 996, 1003 (3d Cir. 1986); *Day v. Woodworth*, 54 U.S. (13 How.) 363, 371 (1851) ("courts permit . . . [punitive damages] by way of punishment or example, which [have] sometimes been called 'smart money'"); K. REDDEN, *supra* note 26, § 2.3(A), at 31-32.

147. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 350 (1974) (punitive damages are "private fines levied by civil juries to punish reprehensible conduct and to deter its future occurrence").

nize that punitive damages serve the functions of retribution and deterrence.¹⁴⁸

Although standards vary,¹⁴⁹ the third *Kennedy* factor, a finding of scienter, is a required element for a punitive damage award.¹⁵⁰ In all jurisdictions, a punitive damage inquiry focuses on the reprehensible nature of a defendant's misconduct, which must entail an element of knowing wrongdoing, such as malice, evil motive, willfulness, or gross negligence, to warrant punitive damages.¹⁵¹

The fifth factor, whether the behavior giving rise to the action is already criminalized, varies from case to case. While punitive damages may be assessed where the misconduct is not a crime, they are often assessed where the conduct is also subject to criminal prosecution.¹⁵² Some statutes even make recovery of punitive damages contingent on a felony conviction.¹⁵³ In other cases, punitive damage suits are substitutes for criminal prosecution — a means of deputizing "private attorneys general."¹⁵⁴ However, other conduct subject to punitive damages, such as breach of contract, may not be subject to criminal prosecution. But insofar as punitive damages substitute for criminal punishment, the absence of any corresponding criminal liability should not prevent a court from concluding that a sanction is penal. A court should be more concerned if the state is circumventing the criminal process by labeling a sanction noncriminal when it is really criminal.

The sixth factor considers whether there is an alternative purpose for punitive damages.¹⁵⁵ Some courts have held that the government is permitted to exact high civil penalties as a means of recovering general investigation and legal costs incurred in pursuing the defendant

148. See PROSSER AND KEETON, *supra* note 33, at 9 & n.21, and cases cited therein; 1 J. GHIARDI & J. KIRCHER, *supra* note 14, § 4.14, at 15-16 (1985 & Supp. 1986). Cf. *Helvering v. Mitchell*, 303 U.S. 391, 398-99 (1938) (proceeding is criminal where there is intent to punish).

149. 1 J. GHIARDI & J. KIRCHER, *supra* note 14, § 5.01.

150. PROSSER AND KEETON, *supra* note 33, at 9-10.

151. 1 J. GHIARDI & J. KIRCHER, *supra* note 14, § 5.01. See also *Smith v. Wade*, 461 U.S. 30, 56 (1983) (punitive damages under § 1983 permitted "when the defendant's conduct is shown to be motivated by evil motive or intent, or when it involves reckless or callous indifference to the federally protected rights of others"); *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 349 (1974) (plaintiff may not recover punitive damages in a defamation action against a publisher or broadcaster without a showing that defendant had either knowledge of statement's falsity or reckless disregard of its truth or falsity).

152. See Grass, *supra* note 14, at 288-96.

153. E.g., CAL. CIV. CODE § 3294(d) (Deering 1984) (permitting exemplary damages on behalf of felony-murder victims).

154. See *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 493 (1985) ("Private attorney general provisions . . . are in part designed to fill prosecutorial gaps."). See also Ausness, *supra* note 24, at 69-70; Owen, *supra* note 126, at 1287-88.

155. A handful of courts view punitive damages as compensatory: as such, the label "punitive" would be a misnomer and such damages would properly be nonpenal. See Ausness, *supra* note 24, at 67-69.

and others like him;¹⁵⁶ however, this rationale would not apply to private citizens recovering punitive damages in a single lawsuit where the penalties recovered are much greater than costs. Furthermore, excessive civil sanctions are less likely where the government is the plaintiff and is constrained by statute and the political process.¹⁵⁷ Another role of punitive damages is to encourage private individuals to prosecute misconduct. This goal cannot be seen as an alternative since the underlying purpose of the scheme continues to be the punishment of wrongdoers.¹⁵⁸ Excessively large punitive damage awards serve no other significant purpose than to punish and deter misconduct, thereby satisfying the sixth *Kennedy* consideration.

Absent a substantial nonpunitive purpose, punitive damages greater than uncompensated costs must necessarily satisfy the seventh *Kennedy* factor — excessiveness in serving an alternative purpose. Often punitive damage awards dwarf amounts needed to achieve any possible purpose other than punishment. For instance, in the case of civil penalties, a treble damages provision may be reasonable as a means of recovering general prosecutorial costs; however, litigation cost recovery cannot justify punitive damages where awards reach hundreds or even thousands of times the actual costs incurred.

Under the *Kennedy v. Mendoza-Martinez* analysis, an excessively large punitive damage award is a penal sanction. It is difficult to escape this conclusion in light of the weight of authority that has historically regarded punitive damages as principally serving the criminal law aims of punishing and deterring egregious misconduct. Punitive damages are what they are labeled — punitive.

If courts can look beyond the language in *Ingraham* and find that punitive damages are penal in nature, defendants should be entitled to certain constitutional protections,¹⁵⁹ including that of the excessive fines clause.¹⁶⁰ Determining what is constitutionally excessive may be

156. *E.g.*, *In re Garay*, 89 N.J. 104, 114, 444 A.2d 1107, 1112 (1982) (purpose of civil penalty is to recover costs of fraud investigations and legal proceedings).

157. *See* *Atlas Roofing Co. v. Occupational Safety & Health Review Commn.*, 518 F.2d 990, 1003-09 (5th Cir. 1975) (citing civil penalty statutes), *aff'd.*, 430 U.S. 442 (1977). *Cf.* *United States v. Ward*, 448 U.S. 242, 254 (1980) (congressional intent behind civil penalty provision in the Federal Water Pollution Control Act was nonpunitive); 33 U.S.C. § 1321(b)(6) (1982) (limiting civil penalty to \$5,000 for each violation of the Clean Water Act).

158. *Ausness*, *supra* note 24, at 69-70.

159. *See* *United States v. Ward*, 448 U.S. at 248-51. The Supreme Court has held that criminal safeguards can arise in proceedings labeled civil. *E.g.*, *Kennedy v. Mendoza-Martinez*, 372 U.S. 144 (1963) (safeguards of the fifth and sixth amendments apply to forfeiture of citizenship); *Boyd v. United States*, 116 U.S. 616 (1886) (fourth and fifth amendments prohibit compulsory forfeiture of fraudulently imported merchandise); *One 1958 Plymouth Sedan v. Pennsylvania*, 380 U.S. 693 (1965) (exclusionary rule applies to forfeiture under state liquor laws); *see* *Wheeler*, *supra* note 14, at 324-33. *But see* *Murphy v. United States*, 272 U.S. 630 (1926) (fifth amendment safeguard against double jeopardy does not apply to occupancy injunctions subsequent to criminal acquittal under National Prohibition Act).

160. *See* *Charney*, *supra* note 14; *Clark*, *supra* note 14; Comment, *Criminal Safeguards*, *supra* note 13. *Cf. In re Gault*, 387 U.S. 1 (1967).

a difficult task but one that is required.¹⁶¹ Certain protections already exist whereby a court may overturn an excessive award.¹⁶² Other protections could be implemented to constrain punitive damage verdicts further.¹⁶³ Whatever the measure, by elevating the scrutiny to a constitutional plane, the courts may more carefully examine those punitive damage awards that exceed the bounds of reasonableness and proportionality.

IV. CONCLUSION

It is not surprising that the framers of the English and American Bills of Rights did not contemplate that punitive damages would deserve excessive fines clause scrutiny, but the underlying principle of the clause, derived from the Magna Carta, implies an intention to permit only punishments that are proportional to the misconduct. As Chief Justice Warren said in *Trop v. Dulles*, "[T]he words of the [Eighth] Amendment are not precise, and . . . their scope is not static. The Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society."¹⁶⁴ Contem-

161. Cf. *United States v. Busher*, 817 F.2d 1409, 1416 (9th Cir. 1987) (grossly disproportionate forfeiture required by federal racketeering laws may violate the eighth amendment):

[The constitutional boundary of excessiveness] is, admittedly, not an easy line to draw; the eighth amendment does not provide a bright line separating punishment that is permissible from that which is not. But a court may not turn its back on a constitutional constraint simply because it is difficult to apply.

162. Most courts may upset punitive damages awards for excessiveness. See 2 J. GHIARDI & J. KIRCHER, *supra* note 14, §§ 18.01-10. Most courts require that the award bear a reasonable relation to the actual damages. Mallor & Roberts, *Punitive Damages: Toward a Principled Approach*, 31 HASTINGS L.J. 639, 666 (1980). This "reasonable relation" standard is inadequate because courts may not be willing to overturn jury determinations, thereby permitting constitutionally abusive verdicts. In the context of mass tort litigation, past and potential punitive awards might not be considered, thereby subjecting the defendant to multiple and repetitive punitive awards. If the amount of the award threatens to surpass a constitutional limit, courts should examine the verdict with greater scrutiny than is required under the reasonable relation test.

163. Commentators and courts have proposed more sophisticated yardsticks for assessing punitive damages than the reasonable relation test. Mallor & Roberts, *supra* note 162, at 667-69; Owen, *supra* note 126, at 1369. Courts could limit awards based upon particular factors or a combination of factors: for example, the severity of the threatened harm, the egregiousness of the misconduct or its profitability, the defendant's financial position, the amount of the actual damages and litigation costs, potential criminal sanctions, and other legal actions based upon the same misconduct. Mallor & Roberts, *supra* note 162, at 667-69.

Legislatures could enact statutes setting the maximum amount of a punitive award based upon a fixed ceiling, the type and egregiousness of the misconduct, or as a set proportion of the actual damages incurred. Wheeler, *supra* note 14, at 298-300. Courts could bifurcate trials — the first phase determining liability and the second determining punitive measures. *Id.* at 300-02. While juries would retain the role of assessing liability and actual damages, judges could assume the role of fixing punitive damages, thereby allowing determinations based upon other relevant information such as prior punitive awards against the same defendant arising out of the same misconduct, comparative awards from within and without the jurisdiction, and, most importantly, the constitutional boundaries of such awards. *Id.* at 302-03; Mallor & Roberts, *supra* note 162, at 664-65.

164. *Trop v. Dulles*, 356 U.S. 86, 100-01 (1958) (plurality opinion) (footnote omitted).

porary punitive damage awards are often large enough to raise serious constitutional questions.

While the history of and the decisions involving the cruel and unusual punishment clause were sufficient to persuade a majority of the Supreme Court in *Ingraham* that the clause was inapplicable to the spanking of schoolchildren, such a conclusion does not flow from an analysis of the excessive fines clause with respect to punitive damages. First, the history of the excessive fines clause more strongly supports the argument that the clause applies outside the criminal context than does the history of the cruel and unusual punishment clause.¹⁶⁵ While the cruel and unusual punishment and excessive bail clauses are closely tied to the criminal law, the excessive fines clause finds its roots in both civil and criminal settings; therefore, its scope should not be limited to strictly criminal fines. Second, the penal dimensions of punitive damages are also more significant than those of a schoolroom spanking.¹⁶⁶ Punitive damages are closely analogous to criminal fines, whereas spankings are hardly comparable to punishments that would be considered "cruel and unusual." While little danger exists that punishment of schoolchildren could reach constitutional proportions,¹⁶⁷ punitive damages are less controlled and can reach disproportionate amounts.

An examination of the history of the excessive fines clause and the purpose of punitive damages indicates that punitive damages should fall within the scope of the excessive fines clause. A historical examination shows that the excessive fines clause represents the longstanding principle that punishments must be in proportion to the misconduct. This principle focuses not on the criminal process but on the punitive process. Since the excessive fines clause embodies this principle of proportionality, the relevant inquiry is whether the sanction is intended as punishment and not whether the underlying offense is labeled criminal. If the sanction is penal, then the excessive fines clause applies, regardless of the setting.

In *Kennedy v. Mendoza-Martinez*, the Supreme Court outlined a seven-factor test for determining whether a sanction is penal. The test usually involves safeguards that are textually linked to the criminal process.¹⁶⁸ In those cases the appropriate question that the test addresses is whether the sanction is sufficiently penal to require *criminal* procedural protections. In the case of the excessive fines clause, the criminal/civil label should not be determinative. The relevant inquiry under *Kennedy* is whether the sanction is associated with punishment

165. See section III.A *supra*.

166. See section III.B *supra*.

167. *Ingraham*, 430 U.S. at 670 n.39.

168. See *Kennedy*, 372 U.S. at 164-65 ("rights guaranteed by the Fifth and Sixth Amendments are 'preserved to every one accused of crime'").

rather than with some other purpose.¹⁶⁹ The sanction would not necessarily have to be so penal as to rise to a level requiring all the constitutional protections strictly associated with the criminal process.¹⁷⁰

Punitive damages, if examined under the *Kennedy* test, are certainly penal sanctions — most, if not all, of the seven factors are satisfied. If punitive damages are punishment and if the excessive fines clause requires proportionality in *all* punishments, then the excessive fines clause should protect the defendant from excessive punitive damage awards.

By not subjecting punitive damages to constitutional scrutiny, we create an anomalous situation — the label attached determines whether the defendant has certain constitutional protections. The criminal defendant is immunized from constitutionally excessive fines,¹⁷¹ while the civil defendant is not and is thereby vulnerable to huge, disproportionate, and even multiple punitive awards.¹⁷² Without excessive fines clause protection, an odd question results: Will defendants seek criminal prosecutions to obtain the Constitution's safeguard against excessive fines and to avoid an unrestrained punitive damage award in the civil courts?¹⁷³

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169. See *Trop v. Dulles*, 356 U.S. at 96.

170. Cf. *Ingraham*, 430 U.S. at 686 n.2 (White, J., dissenting).

171. See, e.g., *United States v. Busher*, 817 F.2d 1409, 1414 (9th Cir. 1987).

172. Compare *Palmer v. A.H. Robins Co.*, 684 P.2d 187, 215-16 (Colo. 1984) (addressing the threat of multiple awards), with *Hammond v. North Am. Asbestos Corp.*, 97 Ill. 2d 195, 212, 454 N.E.2d 210, 219 (1983) ("[A]n additional award would not serve to punish or deter the defendant who had already been punished in the first action.").

173. Justice White might rephrase his dissenting comment in *Ingraham*, 430 U.S. at 684, to read:

[I]f it is constitutionally impermissible [to fine] someone [excessively] for the commission of murder, it must be unconstitutional to [assess excessive punitive damages] for being late to class.