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Constitutional Law - The Color of Money: Does the Excessive Fines Clause Impose a Limit of Proportionality on the Amount of Punitive Damages Assessed in a Civil Action between Private Parties - Browning-Ferris Indus. of Vermont, Inc. v. Kelco Disposal, Inc.

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CONSTITUTIONAL LAW—*The Color of Money: Does the Excessive Fines Clause Impose a Limit of Proportionality on the Amount of Punitive Damages Assessed in a Civil Action Between Private Parties? Browning-Ferris Indus. of Vermont, Inc. v. Kelco Disposal, Inc.*, 109 S. Ct. 2909 (1989).

Browning-Ferris Industries, Inc. (BFI) operated a nationwide waste-collection and disposal business.¹ In 1976, BFI entered the industrial roll-off² dumpster collection market in Burlington, Vermont, and was the exclusive provider of such services in that area until 1980.³ In 1980, Joseph Kelley, BFI's local district manager since 1973, went into business for himself, organizing Kelco Disposal, Inc. In less than a year, Kelco had obtained almost 40% of the Burlington roll-off dumpster market, and by 1982, his market share had risen to 43%.⁴ BFI attempted to drive Kelco out of business, first by offering to buy Kelco out, and then by drastic price decreases.⁵ By 1985, however, Kelco had obtained 56% of the market. That same year, BFI sold out to a third party.

In 1984, Kelco brought an action in the United States District Court for the District of Vermont alleging BFI had violated the Sherman Act by attempting to monopolize the Burlington dumpster market. Kelco also claimed BFI had tortiously interfered with contractual relations. Both the tort and antitrust claims were tried before a jury, and BFI was found guilty on both counts. The district court instructed the jury that punitive damages could be awarded on the tort claim if BFI's conduct "revealed actual malice, outrageous conduct, or constituted a willful and wanton or reckless disregard of the plaintiff's rights."⁶ The judge instructed the jury that in figuring punitive damages it could take into account "the character of the defendants, their financial standing, and the nature of their acts."⁷ The jury returned a verdict of \$51,146 in actual damages, and \$6 million in punitive damages.⁸

1. *Browning-Ferris Indus. of Vermont, Inc. v. Kelco Disposal, Inc.*, 109 S. Ct. 2909, 2912 (1989).

2. A roll-off dumpster is a large trailer-type container for waste, typically used at industrial or construction sites. It is called "roll-off" due to the fact that the container is picked up by a large truck backing into the dumpster and hoisting it onto the bed. When depositing the dumpster, either at the dumping site or at the industrial site, the truck tilts its bed and the dumpster "rolls-off."

3. *Browning-Ferris*, 109 S. Ct. at 2912.

4. *Id.*

5. *Id.*

6. *Id.* at 2913.

7. *Id.* Justice Brennan, writing a separate concurring opinion, had this to say regarding the jury instruction: "Guidance like this is scarcely better than no guidance at all. . . . [p]unitive damages are imposed by juries guided by little more than what they think is best." *Id.* at 2923 (Brennan, J., concurring).

8. *Id.* at 2913. This award was 117 times the actual damages suffered by Kelco and by far the largest punitive award ever affirmed by a Vermont appellate court. *Id.* at 2924 (O'Connor, J., concurring in part, dissenting in part). The previous highest

The United States Court of Appeals for the Second Circuit affirmed the decision both as to liability and damages. The Second Circuit Court held that the excessive fines clause did not apply to limit excessive punitive damages and therefore did not conduct any proportionality analysis.⁹ The United States Supreme Court granted certiorari on whether the damages were unconstitutionally excessive.¹⁰

On appeal, the Supreme Court held that the excessive fines clause does not apply to awards of punitive damages between private parties.¹¹ This weighty¹² and controversial¹³ question was an issue of first impression before the Supreme Court.¹⁴

"In the present era of large damage awards, perhaps no other issue has generated as much interest and controversy as the proposition that the imposition of punitive damages violates certain guarantees secured by the United States Constitution."¹⁵ This casenote will evaluate whether excessive punitive damages may be unconstitutional under an eighth amendment excessive fines clause analysis.¹⁶

punitive award was \$380,000. *Coty v. Ramsey Assoc., Inc.*, 546 A.2d 196 (1988).

9. *Browning-Ferris*, 109 S. Ct. at 2934 (O'Connor, J., concurring in part, dissenting in part).

10. *Id.* at 2913.

11. *Id.* at 2912. Perhaps showing their tentativeness at such a drastic decision, the majority conceded that their decision in *Browning-Ferris* leaves the door open for a different holding under a fourteenth amendment due process analysis. *Id.* at 2923 (Brennan, J., concurring). Justice Brennan stated: "Several of our decisions indicate that . . . the Due Process Clause forbids damages that are 'grossly excessive'" in civil cases brought by private parties. *Id.*

Currently several cases are before the Supreme Court on the issue of whether excessive punitive damages are unconstitutional under the due process theory. However, it would seem that if arbitrary and capricious awards of punitive damages are to be bridled, the stronger argument would be that of the eighth amendment. Unlike the amorphous concept of due process, the excessive fines clause theory, along with the standard proposed by Justice O'Connor in *Browning-Ferris*, would give the reviewing courts a workable and tangible standard. The fourteenth amendment theory would be as vague and unworkable as the practically nonexistent current standard.

Given the quasi-criminal characteristics of punitive damages, perhaps by using the eighth and fourteenth amendments together, a model boasting due process procedural safeguards and the proportionality rule would emerge. Such a model would provide a workable solution to the problem of arbitrary and inconsistent awards of punitive damages. However, the recent Supreme Court decision of *Pacific Mut. Life Ins. Co. v. Haslip* did away with any such notions. See 59 U.S.L.W. 4157 (U.S. Mar. 5, 1991). This case exemplified the difficulty of using the due process clause to limit excessive punitive damages. The issue was whether a vague jury instruction as to the assessment of punitive damages was a violation of the fourteenth amendment. *Id.* The Supreme Court held that the instruction was adequate and not violative of due process. *Id.*

12. *Browning-Ferris*, 109 S. Ct. at 2912.

13. *Eichenseer v. Reserve Life Ins. Co.*, 881 F.2d 1355, 1363 (5th Cir. 1989).

14. *Browning-Ferris*, 109 S. Ct. at 2913.

15. *Eichenseer*, 881 F.2d at 1363.

16. The history of the excessive fines clause has been thoroughly researched and discussed in several scholarly articles, all of which conclude that punitive damages fall within the confines of the clause. See Boston, *Punitive Damages and the Eighth Amendment: Application of the Excessive Fines Clause*, 5 COOLEY L. REV. 667 (1988); Massey, *The Excessive Fines Clause and Punitive Damages: Some Lessons from History*, 40 VAND. L. REV. 1233 (1987); Jeffries, *A Comment on the Constitutionality of*

BACKGROUND

The excessive fines clause originated in the Magna Carta, was revitalized in the English Bill of Rights, was adopted by the Virginia Declaration of Rights, and was finally implemented in the United States Constitution as part of the eighth amendment.¹⁷

It is important to review the history of the excessive fines clause in order to understand its past and present-day applications. The Framers of our Constitution used the precise language of the English Bill of Rights to guarantee that the comparable rights and privileges which Englishmen had enjoyed for five and a half centuries were available to American citizens.¹⁸ One of the most important of these rights was freedom from excessive fines.¹⁹

History of the Excessive Fines Clause

Punitive damages date back to just after the Norman conquest where we find their direct ancestor, the amercement.²⁰ An amercement was a financial penalty assessed by juries for a wide variety of illegal activity, both civil and criminal.²¹ If the action was criminal, the amercement was paid to the Crown.²² If the action was civil, the monetary sanction went to the victim or the victim's family.²³ Due to the nonexistence of a standard for juries to adhere to, the amount was entirely at the jury's discretion; thus, amercements were often excessive.²⁴

A central purpose of the Magna Carta, formulated in 1215, was to prevent excessive and ruinous amercements.²⁵ Under the Magna

Punitive Damages, 72 VA. L. REV. 139 (1986); Note, *The Constitutionality of Punitive Damages Under the Excessive Fines Clause of the Eighth Amendment*, 85 MICH. L. REV. 1699 (1987).

17. Boston, *supra* note 16, at 714, 744.

18. *Id.* at 744.

19. *Id.*

20. Massey, *supra* note 16, at 1251, 1258. See also W. McKECHNIE, *MAGNA CARTA* 285-86 (2d ed. 1914).

21. Massey, *supra* note 16, at 1251.

22. *Browning-Ferris*, 109 S. Ct. at 2927 (O'Connor, J., concurring in part, dissenting in part).

23. *Id.* See also Massey, *supra* note 16, at 1251.

24. Massey, *supra* note 16, at 1251, 1260.

25. W. McKECHNIE, *supra* note 20, at 284. See also *Solem v. Helm*, 463 U.S. 277, 284 (1983).

The Magna Carta provided: "A freeman shall not be amerced for a slight offense, except in accordance with the degree of the offense; and for a grave offense he shall be amerced in accordance with the gravity of the offense, yet saving always his 'contenement'. . . ." See Jeffries, *supra* note 16, at 155. See also W. McKECHNIE, *supra* note 20, at 284.

The Magna Carta provided two related protections: first, it established a rule of proportionality, requiring that the punishment be proportionate to the crime; and second, it established the principle that the punishment should not destroy the offender's means of making a living in his particular trade. Jeffries, *supra* note 16, at 156.

Carta, amercements became subject to a rule of proportionality.²⁶ The rule of proportionality required that the punishment, i.e., the amercement, be proportionate to the wrong committed.²⁷ Due to the effectiveness of the proportionality rule of the Magna Carta, the misuse of amercements declined.²⁸

Originating in the 13th century, fines were sums of money voluntarily paid to the Crown in lieu of being imprisoned.²⁹ Gradually, fines became involuntary and were assessed as a monetary sanction to deter illegal activity. Fines also began to be levied by the courts, rather than the Crown. Thus, in definition and practice fines became the equivalent of amercements.³⁰ Amercements and fines were not meant to compensate the victim, but were punitive in nature.³¹ If the action was criminal in nature, the fine was paid to the Crown.³² On the other hand, if the action was civil, fines were also paid to the offended private party.³³ Due to the similarities of amercements and fines, a confusion of terms resulted and the term "amercement" became obsolete.³⁴

English courts had authority³⁵ to set the amount of the fine.³⁶ During the reigns of Charles II and James II, English courts at times abused this power by imposing ruinous fines on wrongdoers and critics of the Crown.³⁷ Since the Magna Carta required that only amercements be proportionate to the offense, a new charter was needed to require proportionality of fines. To correct the problem, the House of Commons appointed a committee to draft articles and essential laws of liberty to be presented to William of Orange.³⁸ The committee drafted and reported thirteen articles to the House of Commons, article 10 of which provided that "excessive Bail ought not to be required, nor excessive Fines imposed, nor cruel and unusual Punishments inflicted."³⁹ Since article 10 of the English Bill of Rights incorporated

26. Massey, *supra* note 16, at 1259.

27. *Id.* See also W. McKECHNIE, *supra* note 20, at 284.

28. Massey, *supra* note 16, at 1259-60.

29. *Id.* at 1261.

30. *Id.*

31. *Id.* at 1264-66. See also *Browning-Ferris*, 109 S. Ct. at 2929 (O'Connor, J., concurring in part, dissenting in part).

32. Boston, *supra* note 16, at 715.

33. *Id.*

34. Massey, *supra* note 16, at 1264. See also W. McKECHNIE, *supra* note 20, at 293.

35. Under the previous policy of amercements, the jury had determined the amount of the fine. Through the use of fines, the court now had the power to set the amount. The main difference between the two was merely administrative. *Browning-Ferris*, 109 S. Ct. at 2928 (O'Connor, J., concurring in part, dissenting in part); Massey, *supra* note 16, at 1253. See generally Boston, *supra* note 16, at 667.

36. Massey, *supra* note 16, at 1253.

37. *Browning-Ferris*, 109 S. Ct. at 2928 (O'Connor, J., concurring in part, dissenting in part). See also Massey, *supra* note 16, at 1253.

38. *Browning-Ferris*, 109 S. Ct. at 2928 (O'Connor, J., concurring in part, dissenting in part).

39. *Id.*

the earlier prohibitions of excessive amercements from the Magna Carta, the article 10 limitation on excessive fines was not limited strictly to criminal cases, but extended to monetary sanctions levied in civil contexts as well.⁴⁰ These same ideas were later incorporated into the eighth amendment.⁴¹

The eighth amendment states: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."⁴² The amendment addresses bails, fines, and punishments, terms usually associated with criminal actions. Because of this association, the United States Supreme Court has applied the eighth amendment primarily to criminal actions.⁴³ There has been occasion, however, for the Court to apply it in civil contexts.⁴⁴

Case Law

Because the United States Supreme Court had never considered the issue of whether the excessive fines clause imposes a constitutional limit of proportionality on punitive damages, Supreme Court case law on point is nonexistent.⁴⁵ A review of how the eighth amendment has been applied in civil and criminal contexts is, however, helpful in defining the parameters of the excessive fines clause.

In *Ingraham v. Wright*,⁴⁶ Florida junior high school students brought a civil rights action alleging that they had been subjected to corporal punishment in violation of their eighth amendment rights.⁴⁷ The evidence showed that the paddling of petitioners was exceptionally harsh. However, the *Ingraham* majority refused to apply the eighth amendment in this civil context and held that it was designed to protect those convicted of crime.⁴⁸ While recognizing that the eighth amendment has traditionally been applied to criminal cases, the Court observed that some punishments, while not criminal in nature, may be sufficiently related to criminal punishments to justify ap-

40. Massey, *supra* note 16, at 1256. The word "amercement" had ceased to be used in ordinary terminology by the late 17th century, and the word "fine" in article 10 was simply shorthand for all monetary penalties, "whether imposed by judge or jury, in both civil and criminal proceedings." *Id.*

41. Boston, *supra* note 16, at 743-44.

42. U.S. CONST. amend. VIII.

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

44. See generally *Estelle v. Gamble*, 429 U.S. 97 (1976). See also *Ingraham*, 430 U.S. at 688, n.4.

45. *Browning-Ferris*, 109 S. Ct. at 2913. At least one state supreme court has invalidated an award of punitive damages as excessive and against the excessive fines clause of its state constitution. In 1988, in *Colonial Pipeline Co. v. Brown*, the Georgia Supreme Court struck down a punitive fine of \$5 million, more than 100 times the actual damages, because it violated the proportionality rule of the clause. 365 S.E.2d 827, 831 (Ga. 1988).

46. 430 U.S. 651 (1977).

47. *Id.* at 651.

48. *Id.* at 652.

plication of the eighth amendment.⁴⁹

Justice White, dissenting in *Ingraham*, noted that there is no recognized distinction between criminal and civil punishment for purposes of the eighth amendment.⁵⁰ He cited *Trop v. Dulles*,⁵¹ which established the relevant inquiry as being not whether the act is criminal, but whether the remedy for the wrong committed is one normally offset with some form of punishment.⁵² He asserted that if the wrong merited a penalty, then the eighth amendment would protect the citizen from excessive punishment.⁵³ Consistent with Justice White's analysis in *Ingraham*, the Supreme Court applied the excessive bail clause of the eighth amendment to deportation proceedings in *Carlson v. Landen*, suggesting that the excessive bail clause may be implicated in civil deportation hearings.⁵⁴

Regarding the issue of whether punitive damages are in fact fines, the Supreme Court in *Gertz v. Robert Welch, Inc.* noted that punitive damages are fines—"private fines levied by civil juries."⁵⁵ The *Gertz* Court also recognized that punitive damages should not be excessive and should bear some relation to the actual offense.⁵⁶ *Gertz* involved a libel action against a magazine publisher. In that context the *Gertz* Court recognized that punitive damages are penal sanctions designed to serve precisely the same purposes as criminal fines—to punish culpable individuals and deter reprehensible conduct.⁵⁷

The Supreme Court has also addressed the issue of whether the government need be the recipient of the monetary sanction in order for it to be classified as a fine. In *Missouri Pacific Ry. Co. v. Humes*,⁵⁸ the Court stressed that it is irrelevant, as far as the Constitution is concerned, how a monetary sanction is levied or by whom it is recov-

49. *Id.* at 669 n.37.

50. *Id.* at 686-87 (White, J., dissenting).

51. *Trop v. Dulles*, 356 U.S. 86 (1958).

52. *Ingraham*, 430 U.S. at 686-87 (White, J., dissenting).

53. *Id.*

54. *Carlson v. Landen*, 342 U.S. 524, 544-46 (1952). See also *United States v. Salerno*, 481 U.S. 739, 754 (1987), recognizing that *Carlson* was a civil case; *Browning-Ferris*, 109 S. Ct. at 2914 n.3, where the *Browning-Ferris* majority recognizes the *Carlson* concept that bail, by its very nature, is implicated when there is a direct government restraint on personal liberty. This holds true whether the personal liberty restricted is in either the civil or criminal context. The potential for government abuse is present in both instances. *Id.* In either case, the eighth amendment would prohibit excessive bail. *Id.*

55. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 350 (1974). The issue of whether punitive damages, as fines, are subject to an excessive fines clause analysis was not addressed in *Gertz*. *Id.* See also *Int'l Bhd. of Electrical Workers v. Foust*, 442 U.S. 42, 48 (1979).

56. *Gertz*, 418 U.S. at 350.

57. *Id.* See also *Smith v. Wade*, 461 U.S. 30, 59 (1983); *Memphis Community School Dist. v. Stachura*, 477 U.S. 299, 306 n.9 (1986); *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 266-67 (1981).

58. *Missouri Pacific Ry. Co. v. Humes*, 115 U.S. 512 (1885).

ered.⁵⁹ *Humes* involved a state statute providing for double damages to any person who suffered harm due to a railroad's failure to maintain fences and cattle guards.⁶⁰ The additional damages were meant to punish the railroad.⁶¹

The foregoing cases illustrate civil situations where the eighth amendment could apply to protect citizens from arbitrary and capricious punishment. In *Solem v. Helm*, a criminal case, the respondent was convicted for writing a "no account" check for \$100.⁶² Because of previous felony convictions for burglary, obtaining money under false pretenses, and grand larceny, he was sentenced to life imprisonment.⁶³ The Supreme Court, held that the sentence was disproportionate to the offense. *Solem* held that when the Framers of the eighth amendment adopted the language of the English Bill of Rights, they also adopted the English principle of proportionality (that the punishment be proportionate to the offense).⁶⁴ The *Solem* Court further held that the proportionality rule imposes "parallel limitations" on all the clauses of the eighth amendment, including that fines not be excessive.⁶⁵ *Solem*, along with the civil cases discussed, provides some parameters in applying the eighth amendment in both the civil and the criminal contexts.

PRINCIPAL CASE

Justice Blackmun, writing for the *Browning-Ferris* majority, used three primary principles to arrive at the holding that the excessive fines clause does not apply to punitive damages awards between private parties. The Court noted: first, that the eighth amendment should be applied only in criminal, rather than civil, actions;⁶⁶ second, that the word "fine" does not encompass punitive damages since fines are imposed by, and payable to, the government;⁶⁷ and third, that the excessive fines clause was intended to guard against an abuse of gov-

59. *Id.* at 513. The *Humes* court noted that some civil monetary sanctions are a form of punishment:

The additional damages being by way of punishment, . . . it is not a valid objection that the sufferer instead of the State receives them. . . . The power of the State to impose fines and penalties for a violation of its statutory requirements is coeval with government; and the mode in which they shall be enforced, whether at the suit of a private party, or at the suit of the public, and what disposition shall be made of the amounts collected, are merely matters of legislative discretion.

Id. at 522-23.

60. *Id.* at 512.

61. *Id.* at 513.

62. *Solem v. Helm*, 463 U.S. 277 (1983).

63. *Id.*

64. *Id.* at 285-86.

65. *Id.* at 289. See also *Ingraham*, 430 U.S. at 664.

66. *Browning-Ferris*, 109 S. Ct. at 2913-15. Indeed, the Court noted that fines have historically been and are now assessed in criminal rather than in civil private actions. *Id.* at 2915.

67. *Id.* at 2915.

ernmental power by subjecting citizens to excessive fines, not punitive damages.⁶⁸

The Court noted that the eighth amendment had traditionally been applied in criminal cases.⁶⁹ Because punitive damages arise in civil actions, the majority held that the excessive fines clause does not apply to punitive damages.⁷⁰

Additionally, the Court held that punitive damages do not fall within the traditional meaning of the term "fine," and therefore do not merit scrutiny under the excessive fines clause.⁷¹ The majority noted that the Framers, in drafting the eighth amendment, did not discuss what was meant by the term "fines," or whether the term applied in the civil context.⁷² The majority suggested that the word "fine" was understood in those times to mean a payment to a sovereign as punishment for some criminal offense.⁷³ Because punitive damages are typically paid to the plaintiff, instead of to the sovereign, the majority refused to classify such sanctions as fines subject to constitutional protection.⁷⁴ The *Browning-Ferris* majority ignored the argument that fines had traditionally been paid either to the sovereign or to the offended party, depending on the offense. Rather than adopt such historical particulars advanced by the dissent, the majority opted to follow the "lessons of more recent history,"⁷⁵ which, they concluded, coincided with present-day beliefs.⁷⁶ In holding that punitive damages are not fines, they recognized that punitive damages were commonly awarded at the time the eighth amendment was drafted.⁷⁷ Since punitive damages existed at the drafting of the eighth amendment, the majority's rationale was that the eighth amendment did not protect citizens from punitive damages because such sanctions were not explicitly included in the guarantees of the excessive fines clause.⁷⁸

Given the majority holding that punitive damages are not fines, the majority looked to the intent of the excessive fines clause.⁷⁹ They noted that the purpose of the clause is to guard against an abuse of governmental power by subjecting citizens to excessive fines.⁸⁰ Because of the majority view that punitive damages are not fines imposed by the sovereign, they held that excessive punitive damages are

68. *Id.*

69. *Id.* at 2913-14.

70. *Id.* at 2914.

71. *Id.* at 2915.

72. *Id.*

73. *Id.*

74. *Id.* at 2915-16.

75. Perhaps the Court was referring to *Ingraham v. Wright*, 430 U.S. 651 (1977).

76. *Browning-Ferris*, 109 S. Ct. at 2917.

77. *Id.* at 2919.

78. *Id.* at 2920.

79. *Id.* at 2915.

80. *Id.*

not an abuse of governmental power subject to constitutional scrutiny.⁸¹

In her dissenting opinion, Justice O'Connor⁸² took a contrary view by asserting: first, that the eighth amendment has never been, nor should it be, subject only to application in criminal cases; second, that the word "fine" encompasses the term "punitive damages," given their similar characteristics; and third, that the excessive fines clause was intended to guard against an abuse of governmental power by subjecting citizens to excessive fines, including punitive damages.⁸³

Justice O'Connor disagreed with the Court's premise that the eighth amendment only has application in the criminal context.⁸⁴ She asserted that neither history nor Supreme Court precedent forecloses an application of the excessive fines clause to punitive damages.⁸⁵ She further noted that the character of a sanction imposed as punishment "is not changed by the mode in which it is inflicted, whether by a civil action or a criminal prosecution."⁸⁶

Justice O'Connor looked to history to determine that punitive damages are analogous to fines and thus subject to constitutional limitations. She noted that the excessive fines clause "derives from limitations in English law on monetary penalties exacted in civil *and* criminal cases to punish and deter misconduct" through the use of amercements.⁸⁷ She relied on the history of the term "fine" to suggest that fines were also paid to private parties, and not solely to the governmental entity.⁸⁸ Because amercements, fines, and punitive damages have historically had such similar characteristics, Justice O'Connor further suggested that punitive damages are within the scope of the excessive fines clause because they are a modern-day analog of amercements which were subject to the excessive fines clauses of the earlier charters.⁸⁹

Justice O'Connor also recognized that punitive damages existed at the drafting of the eighth amendment.⁹⁰ She asserted that the

81. *Id.* at 2911.

82. *Id.* at 2924 (O'Connor, J., concurring in part, dissenting in part). Justice O'Connor, joined by Justice Stevens, concurred with the majority that a due process claim was not properly before the Court and that the punitive damages should not be overturned as a matter of federal common law. Justice O'Connor's dissent is directed at Part II of the majority opinion and the holding that the excessive fines clause of the eighth amendment places no limits on the amount of a monetary sanction levied in a suit between private parties. *Id.*

83. See generally *Browning-Ferris*, 109 S. Ct. at 2924-34 (O'Connor, J., concurring in part, dissenting in part).

84. *Id.* at 2926.

85. *Id.*

86. *Id.* at 2932 (citing *United States v. Chouteau*, 102 U.S. 603, 611 (1881)).

87. *Id.* at 2926 (emphasis supplied).

88. *Id.* at 2928. See also *Boston*, *supra* note 16, at 714.

89. *Browning-Ferris*, 109 S. Ct. at 2929 (O'Connor, J., concurring in part, dissenting in part). See also *Boston*, *supra* note 16, at 728-32.

90. *Browning-Ferris*, 109 S. Ct. at 2929 (O'Connor, J., concurring in part, dissent-

Framers used the term "fine" in a general sense and meant for the excessive fines clause to protect citizens from all excessive monetary sanctions that the courts would permit to be levied as punishment.⁹¹

Justice O'Connor further disagreed with the majority's assertion that a court's allowance of excessive punitive damages is not an abuse of governmental power. Since the courts represent the judiciary branch of government, she noted that "[a] governmental entity can abuse its power by allowing civil juries to impose ruinous punitive damages."⁹² Thus, governmental abuse such as subjecting citizens to excessive civil fines should be restricted by the excessive fines clause.⁹³

In the spirit of the excessive fines clause and proportionality, Justice O'Connor proposed that the formula advanced in *Solem* be used as a guide in reviewing punitive damages awards. The formula provides: first, the reviewing court must accord "substantial deference" to legislative standards regarding appropriate sanctions for the conduct at issue; second, the court should examine the gravity of the defendant's conduct and the harshness of the punitive damages assessed; and third, since punitive damages are penal in nature, the court should compare the civil and criminal penalties imposed in the same jurisdiction to the tortfeasor's conduct, and the civil and criminal penalties imposed by other jurisdictions for the same or similar conduct.⁹⁴

Justice O'Connor further suggested that reviewing courts look to relevant statutes in gauging the fairness of an award. In identifying the relevant civil penalties, the court should consider not only the amount of the punitive damages but also the statutory civil sanctions imposed for the same or similar conduct. In identifying the relevant criminal penalties, not only should the court consider the possible monetary sanctions, but also take into account the possible prison term assessed for the same or similar conduct.⁹⁵

The formula, revised from its criminal application in *Solem*, was proposed by Justice O'Connor in *Browning-Ferris* to apply in the civil context. Justice O'Connor advanced this formula as a framework, to provide some broad guidelines. It is to be used by reviewing courts as a guide to determine whether punitive damages are excessive, and thus, violative of the excessive fines clause.⁹⁶

ing in part).

91. *Id.* at 2931-33.

92. *Id.* at 2932 (citing *Lugar v. Edmonson Oil Co.*, 457 U.S. 922, 937 (1982)).

93. *Id.*

94. *Id.* at 2934 (citing *Solem*, 463 U.S. at 277).

95. *Id.*

96. *Id.* at 2933-34. Justice O'Connor pointed out that "the excessive fines clause is only a substantive ceiling on the amount of monetary sanction, and not an economic primer on what factors further the goals of punishment and deterrence." *Id.*

ANALYSIS

Punitive damages assessed in civil tort proceedings should be subject to the proportionality rule as contained in the excessive fines clause of the eighth amendment. The *Browning-Ferris* majority ignored history, policy, and the spirit of the eighth amendment in reaching an arguably shortsighted decision.

The Excessive Fines Clause Does Not Apply Only to Criminal Cases

In holding that the excessive fines clause does not apply to awards of punitive damages in cases between private parties, the *Browning-Ferris* majority stated that the Court need not go so far as to hold that the excessive fines clause applies only in the criminal context.⁹⁷ However, the Supreme Court clearly did go that far, if only in dictum, since throughout its entire opinion it made the narrow argument that fines only have application in criminal actions.⁹⁸

The Court relied on *Ingraham* for the proposition that the excessive fines clause applies only in the criminal context. However, the *Ingraham* considerations were totally different from the concerns of the *Browning-Ferris* case. The *Ingraham* case did not involve the excessive fines clause, did not consider the histories and policies of the clause, and did not hold that all civil proceedings are beyond the scope of the eighth amendment.⁹⁹ Ironically, *Ingraham* explicitly contradicted the *Browning-Ferris* majority's interpretation by acknowledging that "some punishments, though not labeled 'criminal' by the State, may be sufficiently analogous to criminal punishments to justify application to the eighth amendment."¹⁰⁰ Punitive damages, which serve the same purpose as criminal fines,¹⁰¹ would certainly seem to fit into this category.

Ingraham cannot be understood to hold that the eighth amendment is inapplicable to civil cases, since the Court had previously applied the excessive bail clause of the eighth amendment to civil proceedings in *Carlson v. Landon*.¹⁰² Given the *Ingraham* holding that parallel limitations (what applies to one clause applies to the others) apply to all clauses of the eighth amendment, the application of the

97. *Browning-Ferris*, 109 S. Ct. at 2914. The majority does not explain why it does not need to go so far as to hold that the eighth amendment and the excessive fines clause apply only in criminal cases. *Id.*

98. *Id.* at 2913-15. See generally *Browning-Ferris*, 109 S. Ct. at 2912-20.

99. See generally *Ingraham*, 430 U.S. at 669.

100. *Id.* at 669 n.37.

101. See generally *Massey*, *supra* note 16, at 1264-74. See also RESTATEMENT (SECOND) OF TORTS § 908 comment a (1977); D. DOBBS, HANDBOOK ON THE LAW OF REMEDIES § 3.9 at 210 (1973).

102. *Carlson*, 342 U.S. at 544-46. See also *Salerno*, 481 U.S. at 754.

In *Ingraham*, Justice White noted that the eighth amendment has never been confined to criminal punishments and cited previous civil applications of the amendment. *Ingraham*, 430 U.S. at 688 n.4 (White, J., dissenting).

excessive bail clause to civil proceedings in *Carlson* suggests the permissibility of applying the excessive fines clause to civil fines in *Browning-Ferris*. The idea that an action or sanction must be deemed "criminal" for the excessive fines clause to apply is inconsistent with other prior decisions of the Supreme Court, having held that a civil or criminal label does not determine the applicability of constitutional protections.¹⁰³ The correct test, rather, is as Justice White suggested in his *Ingraham* opinion.

Justice White, dissenting in *Ingraham*, stated, "the Court would have us believe . . . that there is a recognized distinction between criminal and non-criminal punishment for purposes of the Eighth Amendment. This is plainly wrong."¹⁰⁴ Any argument that the eighth amendment applies only in the criminal context is undermined, if we consider the plurality opinion in *Trop v. Dulles*.¹⁰⁵ Justice White cited *Trop* for the appropriate test: "The relevant inquiry is not whether the offense for which a punishment is inflicted has been labeled as criminal, but whether the purpose of the deprivation is among those ordinarily associated with punishment, such as retribution, rehabilitation, or deterrence."¹⁰⁶ No one can deny that punitive damages are assessed as punishment, for the similarities between punitive damages and other forms of punishment are too obvious to ignore. Punitive damages are imposed for the sole purpose of punishment, as they involve an institutionalized response to the violation of some official rule or public standard that proscribes certain conduct.¹⁰⁷ Because punitive damages share the penal characteristics of deprivation and punishment, safeguards should be afforded the defendant, as they would in a criminal trial (such as excessive fines clause and due process protections).¹⁰⁸

Additionally, the majority's decision in *Browning-Ferris* is not supported by the historical inception of punitive damages. One of the earliest known cases where punitive damages were awarded was in *Wilkes v. Wood*.¹⁰⁹ The date of the *Wilkes* decision, 1763, signifies

103. *United States v. United States Coin & Currency*, 401 U.S. 715, 718 (1971). See generally *In re Gault*, 387 U.S. 1 (1967). See also *Humes*, 115 U.S. at 522.

104. *Ingraham*, 430 U.S. at 686 (White, J., dissenting). Asserting the absurdity of believing that the eighth amendment can only be applied in criminal cases, Justice White said (using the cruel and unusual punishments clause as an example): "Thus, if a prisoner is beaten mercilessly for a breach of discipline, he is entitled to the protection of the Eighth Amendment, while the schoolchild who commits the same breach of discipline and is similarly beaten is simply not covered." *Id.* at 689.

105. *Trop*, 356 U.S. at 86.

106. *Ingraham*, 430 U.S. at 686-87 (White, J., dissenting, citing *Trop*, 356 U.S. at 86).

107. *Id.* at 685-86. Here Justice White applies a similar concept to the cruel and unusual punishments clause. *Id.*

108. D. DOBBS, *supra* note 101, § 3.9 at 219-20.

109. *Wilkes v. Wood*, 98 Eng. Rep. 489, 498-99 (K.B. 1763). In this case it was declared, "a jury have it in their power to give damages for more than the injury received. Exemplary damages are designed . . . as a punishment to the guilty, to deter from any such proceeding for the future, and as proof of the detestation of the jury to

that the concept of punitive damages existed at the time of the adoption of the eighth amendment in 1791.¹¹⁰ The meaning of the term "fine" at the time the eighth amendment was drafted is also revealing. The word "fine" in article 10, and subsequently the eighth amendment, was simply shorthand for all monetary penalties, "whether imposed by judge or jury, in both civil and criminal proceedings."¹¹¹ Thus, by using the term "fine" in its general meaning, it was the intention of the Framers to protect citizens from excessive fines, regardless of whether they were civil or criminal.¹¹²

History does not support the Court's assertion that the eighth amendment should apply only in the criminal setting.¹¹³ The eighth amendment was the direct descendent of article I, section 9, of the Virginia Declaration of Rights of 1776, which had adopted its language verbatim from article 10 of the English Bill of Rights, which took its language and ideas from the Magna Carta.¹¹⁴ This relationship among the charters manifests the intent of the Framers to incorporate the same protections into the eighth amendment as were in the earlier English charters.¹¹⁵

There was little debate over the eighth amendment in the First Congress, and no discussion of the excessive fines clause.¹¹⁶ A comparison of the language of the eighth amendment with that of the fifth and sixth amendments indicates that the eighth amendment was not intended to apply solely in the criminal context. The fifth and six amendments refer repeatedly to "crimes," "criminal cases," and "criminal prosecutions," whereas the eighth amendment does not.¹¹⁷ Such a comparison is reenforced by the fact that the First Congress debated the excessive fines clause immediately after the self incrimination clause of the fifth amendment.¹¹⁸ "[T]he fact that the Framers did not choose to insert the word 'criminal' into the language of the eighth amendment is strong evidence that the Amendment was designed to prohibit all inhumane or barbaric punishments, no matter what the nature of the offense for which the punishment is imposed."¹¹⁹

the action itself." *Id.* Another case awarding exemplary damages was *Huckle v. Money*, 95 Eng. Rep. 768 (K.B. 1763).

110. *Browning-Ferris*, 109 S. Ct. at 2919.

111. *Massey*, *supra* note 16, at 1256.

112. *Id.*

113. *Browning-Ferris*, 109 S. Ct. at 2924 (O'Connor, J., concurring in part, dissenting in part).

114. *Id.* at 2930. *See also Solem*, 463 U.S. at 285-86, n.10.

115. One of the dominant themes of the era was that the American charters provided citizens with all of the rights that the English charters provided to English subjects. *Solem*, 463 U.S. at 286-87.

116. *Browning-Ferris*, 109 S. Ct. at 2930 (O'Connor, J., concurring in part, dissenting in part).

117. *See U.S. CONST. amends. V, VI, AND VIII.*

118. *See I ANNALS OF CONGRESS 781-83* (Gales & Seaton eds. 1834).

119. *Ingraham*, 430 U.S. at 685 (White, J., dissenting).

Punitive Damages are Fines

Modern understanding and precedent compel the conclusion that punitive damages are fines within the parameters of the eighth amendment. The Supreme Court majority, however, held that the term "fine" was understood by drafters of the eighth amendment to mean a payment to the government for some offense committed.¹²⁰ Hence, they held that the excessive fines clause does not apply to punitive damages as they are monetary sums paid to offended private parties.¹²¹

Black's Law Dictionary defines the term "fine" as "a pecuniary penalty . . . it may include a forfeiture or penalty recoverable in a civil action."¹²² *Webster's Ninth New Collegiate Dictionary* defines the term as "a forfeiture or penalty paid to an injured party in a civil action."¹²³ The Restatement (Second) of Torts states that the "purposes of punitive damages and criminal fines are the same."¹²⁴ The Supreme Court labeled punitive damages as fines in *Gertz v. Robert Welch, Inc.*,¹²⁵ where the majority noted that punitive damages are "private fines levied by civil juries."¹²⁶

These definitions show that fines may be either civil or criminal and that the distinction does not make them any less a fine. To whom the fine is paid is also irrelevant.¹²⁷ If a legislature were to decide that criminal fines should be paid to the victim or a private charity, rather than to the government, would the sanction be any less a fine or exempt from constitutional scrutiny?¹²⁸ In order to evade such an argument the *Browning-Ferris* Court determined that the excessive fines clause becomes relevant only when the government reaps the benefits of the monetary sanction.

The majority holding that the word "fine" for eighth amendment purposes refers only to those fines directly imposed by, and payable to, the government, is superficial. The majority decision in *Browning-Ferris* suggests that if legislatures would allow for the State to receive a percentage of the punitive award, then the excessive fines clause

120. *Browning-Ferris*, 109 S. Ct. at 2910.

121. *Id.* at 2914-16.

122. BLACK'S LAW DICTIONARY 632 (6th ed. 1990).

123. WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY 464 (1987).

124. RESTATEMENT (SECOND) OF TORTS § 908 comment a (1977).

125. *Gertz*, 418 U.S. at 350.

126. *Id.* See also *Chouteau*, 102 U.S. at 611, where the majority held that the character of a sanction imposed as punishment "is not changed by the mode in which it is inflicted, whether by a civil action or a criminal prosecution."

127. *Humes*, 115 U.S. at 522-23.

128. In *Humes* the Court held that punitive damages, whether they be awarded to the state or the sufferer, are a matter of legislative discretion. *Id.* Additionally, from the standpoint of the defendant who has been forced to pay an excessive monetary sanction, it hardly matters what disposition is made of the award. *Browning-Ferris*, 109 S. Ct. at 2933 (O'Connor, J., concurring in part, dissenting in part).

would apply.¹²⁹ For the majority to say that punitive damages are not fines, simply because most states do not provide that a percentage be paid to the state, is not in line with the spirit of the eighth amendment protections. For example, a Colorado statute requires that one-third of a punitive damages award be paid to the State.¹³⁰ Since a portion of the punitive damages awarded goes to the State, does this mean that punitive damages assessed in Colorado are subject to excessive fines clause analysis, whereas in states without similar legislation they are not? Under a *Browning-Ferris* majority rationale, it would seem so (assuming, of course, that the Court would allow a "civil" fine to fall under eighth amendment protection).

The Excessive Fines Clause Applies to Punitive Damages

History and policy support the assertion that the excessive fines clause should apply to punitive damages. Amercements, civil or penal, when not proportionate to the wrong committed, were regulated by the excessive fines clause of the Magna Carta. Fines, civil or penal, when violating the rule of proportionality, were regulated by the excessive fines clause of the English Bill of Rights. The rule of proportionality, born in the Magna Carta, and adopted by the English Bill of Rights, was incorporated into the eighth amendment of the United States Constitution. The arbitrary awarding of excessive punitive damages, the amercement of today, presents exactly the type of governmental abuse that the excessive fines clause of the eighth amendment was designed to prevent.¹³¹

The excessive fines clause requires that fines, civil or penal, be proportionate to the conduct for which they are imposed.¹³² The test for proportionality is encompassed by Justice O'Connor's revised formula from the *Solem* case.¹³³ This formula agrees with the centuries old proportionality rule that fines should be proportionate to the wrong committed. The test advanced in *Solem* should be used as a guide for reviewing courts to determine whether punitive awards are excessive.

By not giving the appellate courts a functional model consistent with constitutional standards to limit punitive damages, the Court invites unbridled legislative action in the form of legislative caps, statutory defenses, and other inflexible aspects of tort reform. Laws in Alabama, Colorado, Florida, Kansas, and Texas already use such means

129. *Browning-Ferris*, 109 S. Ct. at 2911. See also *Browning-Ferris*, 109 S. Ct. at 2932-33 (O'Connor, J., concurring in part, dissenting in part).

130. COLO. REV. STAT. § 13-21-102(4) (1987). See also Florida's statute, which provides that sixty percent of punitive damages awarded are payable to the State. FLA. STAT. § 768.73(2)(b) (Supp. 1991).

131. See *supra* note 92 and accompanying text.

132. *Solem*, 463 U.S. at 284-86.

133. *Browning-Ferris*, 109 S. Ct. at 2934 (O'Connor, J., concurring in part, dissenting in part).

to set a limit on the amount of punitive damages assessed between parties.¹³⁴

Legislative caps placed on punitive damages violate the proportionality concept of the eighth amendment and therefore are unconstitutional. Caps are inflexible and would present a proportionality problem if the offense justified a sanction which was above the cap. Because punitive damages are penal in nature, depending on the degree of the wrong committed, they must be figured on a case-by-case basis. Caps placed on punitive damages would cause the sanction to lose its punitive effect.¹³⁵ A corporation faced with substantial research and development costs to make a safer product may instead choose to risk any potential lawsuits and pay the capped punitive fine.¹³⁶ Adherence to the proportionality concept of the eighth amendment, as implemented by the *Solem* formula, would make obsolete the notion that caps on punitive damages are necessary, since the sanction would be constitutionally fair yet still punish the offender.¹³⁷

CONCLUSION

The excessive fines clause imposes a limit of proportionality on the amount of punitive damages assessed in a civil action between private parties. This assertion complies with history, precedent, and policy.

The *Browning-Ferris* majority relied on the *Ingraham* test. They based their decision on the notion that the eighth amendment has typically been applied to criminal actions, and therefore a penal fine between private parties does not fall under eighth amendment scrutiny. The correct inquiry, rather, is the test advanced by Justice White in his *Ingraham* dissent. The Court should look at the nature

134. See ALA. CODE § 6-11-21 (Supp. 1990); COLO. REV. STAT. § 13-21-102(3) (1987); FLA. STAT. ANN. § 768.73(1)(b) (Supp. 1991); KAN. STAT. ANN. § 60-3701 (1990); OKLA. STAT. ANN. tit. 23, § 9 (West 1987); and TEX. CIV. PRAC. & REM. CODE ANN. § 41.007 (Vernon, Supp. 1991).

135. A hundred dollar assessment of punitive damages may be sufficient punishment for a man of limited means; a hundred thousand dollar punitive monetary sanction might be inadequate for a man of great wealth. For these reasons, courts permit the party claiming punitive damages to introduce evidence of the defendant's financial resources. D. DOBBS, *supra* note 101, § 3.9 at 218.

136. Skyrocketing punitive damages awards have been noted in the business sector. For an excellent article on the effect of excessive punitive damages on research and development, see Mahoney and Littlejohn, *Innovation on Trial: Punitive Damages Versus New Products*, 246 Science 1395 (1989). The test advanced by Justice O'Connor would help by allowing reviewing courts to weed out those awards not proportionate to the offense, thus promoting fairness and consistency.

137. See generally *Browning-Ferris*, 109 S. Ct. at 2933 (O'Connor, J., concurring in part, dissenting in part). See generally 4 W. BLACKSTONE, COMMENTARIES *378. Blackstone realized that caps or limits placed on punitive fines would be ineffective, and noted: "the quantum, in particular, of pecuniary fines neither can, nor ought to be, ascertained by any invariable law. The value of money itself changes from a thousand causes; and at all events, what is ruin to one man's fortune, may be a matter of indifference to another." *Id.*

of the sanction and whether the sanction is among those ordinarily associated with punishment. If so, the proportionality protections of the eighth amendment, reaffirmed in *Solem*, apply.

The *Solem* test would allow the reviewing court to accord substantial deference to constitutional legislative acts, apply the eighth amendment's rule of proportionality, and allow the courts to refer to civil and criminal sanctions for the same or similar conduct. This formula provides an objective working model for appellate courts to overturn excessive punitive awards.

Punitive damages are a necessary part of our legal system. They provide a check on companies and individuals that might otherwise make baseless decisions regarding the safety of people or the environment. The fear of punitive damages ensures responsible behavior. It is clear, however, that at times punitive damages have been arbitrarily awarded and excessive. The proportionality rule of the eighth amendment, as encompassed in the *Solem* test, provides the rational check necessary to determine whether an award is fair and consistent.

History has come full circle. The courts in England were instructed by the Magna Carta and the English Bill of Rights to protect citizens from excessive fines, whether criminal or civil, by applying the rule of proportionality. This need to apply the rule of proportionality exists today. The skyrocketing pace of punitive awards demands that our courts apply these same protections, as were adopted by the eighth amendment, to punitive damages.

The history of punitive damages, amercements and fines suggests that the term "punitive damages" is indeed a misnomer. Punitive damages are not damages. They are not intended to compensate the victim, but rather to punish and deter the offender from further reprehensible conduct. Punitive damages are fines in every respect, albeit civil fines. They should be renamed, more appropriately, "punitive fines." At least then they might fit into the *Browning-Ferris* majority's subjective standard.

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