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PUNITIVE DAMAGES:
STATE EXTRACTION
PRACTICE IS SUBJECT TO
EIGHTH AMENDMENT LIMITATIONS

James D. Gbiardi

I. INTRODUCTION

As civil defendants are becoming liable for an ever-increasing number of punitive damage awards, they have argued that punitive damages should be subjected to some constitutional limitations.¹ While many of these defendants have argued that they have not been provided with adequate procedural protections,² others have argued that the Eighth Amendment's excessive fines clause should be interpreted to place limitations on the amount of punitive damages that may be awarded.³

In *Browning Ferris Industries v. Kelco*,⁴ the U.S. Supreme Court addressed the issue of excessive fines and held that the Excessive Fines Clause is inapplicable to awards of punitive damages between private parties.⁵ However, the court left open the ques-

1. Ten years ago, the largest punitive damages award to be affirmed on appeal in a products liability suit was \$250,000. Since then, awards more than 30 times as high have been upheld. *Browning-Ferris Industries of Vermont, Inc. v. Kelco Disposal, Inc.*, 109 S. Ct. 2909, 2924 (1989) (O'Connor dissent) (citing Owen, *Punitive Damages in Product Liability Litigation*, 74 MICH. L. REV. 1257, 1329-32 (1976)). See *Texaco, Inc. v. Pennzoil Co.*, 729 S.W.2d 768 (Tex. Ct. App. 1987) (court reduced punitive damage award from \$3 billion to \$1 billion on appeal). (The compensatory damages were found to be \$7.53 billion.)

2. See Wheeler, *The Constitutional Case for Reforming Punitive Damages Procedures*, 69 VA. L. REV. 269 (1983) (providing discussion of inadequacy of procedural protections in punitive damage cases).

3. See Boston, *Punitive Damages and the Eighth Amendment: Application of the Excessive Fines Clause*, 5 COOLEY L. REV. 667 (1988) (providing discussion of applicability of the Excessive Fines Clause, in a civil context). The Eighth Amendment provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted."

4. *Browning-Ferris Industries of Vermont, Inc. v. Kelco Disposal, Inc.*, 109 S. Ct. 2909 (1989).

5. *Id.* at 2914.

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tion of whether punitive damages are subject to the excessive fines limitations when a state government shares in the recovery.⁶

As part of recent tort reform legislation numerous states have enacted legislation dealing specifically with punitive damages.⁷ Many of these statutes provide for some kind of limitation on the amount of punitive damages that a civil plaintiff may recover. This is generally accomplished in one of two ways: the statute either provides for a maximum amount allowable⁸ or provides that part of any punitive damage award will be paid into a state fund.⁹ This paper addresses the Eighth Amendment's application to the statutory schemes in these eight jurisdictions that have enacted state extraction provisions.

II. THE STANDARDS FOR AND PURPOSES OF PUNITIVE DAMAGES

Historically, punitive damages have been imposed in civil cases when the defendant's conduct was considered "outrageous,"¹⁰ "malicious,"¹¹ "willful and wanton,"¹² or the result of "reckless indifference to the rights of others."¹³ Although the standards for the imposition of punitive damages vary from state to state,¹⁴ there is general agreement that some element of conscious wrongdoing is required.¹⁵ When a court or jury is attempting to determine whether an award of punitive damages is justified, the focus is primarily upon the character and nature of the defendant's conduct and not upon the extent of the plaintiff's harm.¹⁶

Something more than the mere commission of a tort is always required for punitive damages. There must be circumstances of aggravation or outrage, such as spite or "malice," or a fraudulent or evil motive on the part of the defendant, or such a conscious and deliberate disregard of the interests of others that the conduct may be called willful or wanton. There is general agreement that, because it lacks this element, mere negligence is not enough, even though it is so extreme in degree as to be characterized as "gross," a term of ill-defined content, which occasionally, in a few jurisdictions, has been stretched to include the element of conscious indifference to consequences, and so to justify punitive damages. Still less, of course, can such damages be charged against one who acts under an innocent mistake in engaging in conduct that nevertheless constitutes a tort.¹⁷

6. *See id.* at 2920.

7. *See, e.g.*, J. GHIARDI & J. KIRCHER, *PUNITIVE DAMAGES: LAW AND PRACTICE* 21.12-21.23 (1989).

8. *See* ALA. CODE 6-11-21 (1987); COLO. REV. STAT. 13-21-102 (1987); FLA. STAT. ANN. 768.73 (1986); GA. CODE ANN. 51-12-5.1 (1987); KAN. STAT. ANN. 60-3701 (1987); OHIO REV. CODE ANN. 2307.80 (1988); OKLA. STAT. ANN. tit. 23, 9 (1987); TEX. CIV. PRAC. & REM. CODE ANN. 41.007 (1987); VA. CODE ANN. 8.01-38.1 (1988); *see also* J. GHIARDI & J. KIRCHER, *supra*, note 7, 21A (1989).

9. These jurisdictions are Colorado, Florida, Georgia, Illinois, Iowa, Missouri, Oregon and Utah; *See* J. GHIARDI & J. KIRCHER, *supra* note 7, § 21A (1989).

10. *Alyeska Pipeline Service Co. v. O'Kelley*, 645 P.2d 767 (Alaska 1982).

11. *Loucks v. Albuquerque National Bank*, 76 N.M. 735, 418 P.2d 191, 199 (1966).

12. *Haafke v. Mitchell*, 347 N.W.2d 381, 389 (Iowa 1984).

13. *Senn v. Bunick*, 40 Or. App. 22, 594 P.2d 837, 842 (1979).

14. *See* J. GHIARDI & J. KIRCHER, *supra* note 7, § 5.01 (1989).

15. *Id.*, Sec. 5.04.

16. J. GHIARDI & J. KIRCHER, *supra* note 7, § 5.01 at 2.

17. KEETON, PROSSER & KEETON ON TORTS 2 at 9-10 (5th ed. 1984).

The main purposes to be served by the imposition of punitive damages are those of punishment and deterrence.¹⁸ Punitive damages are considered punishment in the sense that they are an amount imposed over and above any amount that the plaintiff is entitled to recover as compensation. As such, the damages do more than just make a plaintiff "whole." They serve to "smart" the defendant. Punitive damages also serve a deterrence function in that a sufficiently large award serves "to teach the offender not to repeat the wrong, and to be a warning to others that such conduct is not to be tolerated."¹⁹

It is in the above two senses that punitive damages are similar to criminal fines. Many commentators have likened punitive damages to criminal fines²⁰ by pointing to the fact that, like criminal penalties, punitive damages are assessed by looking at the culpability of the defendant's conduct.²¹ Punitive damages serve to punish through the civil law conduct which might otherwise go unpunished under the criminal law.²² The U.S. Supreme Court has recognized 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."²³

The similarity between punitive damages and criminal fines has spurred civil defendants to seek the procedural and substantive protections of the Constitution. Specifically, defendants have argued that large punitive awards should be subject to the Excessive Fines Clause of the Eighth Amendment. Courts have uniformly rejected this argument by appointing out that the Eighth Amendment has traditionally been limited to the criminal setting.²⁴ However, the courts, until recently, had not addressed the situation where a state government shares in the punitive damage recovery.

III. LEGISLATIVE REFORM

As a result of the increasing frequency of awards of punitive damages there has been an outcry for a legislative response.²⁵ Although some argue that the proliferation of

18. See, e.g., *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247 (1981); *Edmond v. Fairfield Sunrise Village, Inc.*, 132 Ariz. 142, 644 P.2d 296 (Ct. App. 1982); *Ford Motor Co. v. Home Ins. Co.*, 116 Cal. App. 3d 374, 172 Cal. Rptr. 59, 62-63 (1981); *Beaver v. Country Mut. Ins. Co.*, 95 Ill. App. 3d 1122, 420 N.E.2d 1058 (1981); *Henderson v. Hassur*, 225 Kan. 678, 594 P.2d 650 (1979); *American Cent. Corp. v. Stevens Van Lines, Inc.*, 103 Mich. App. 507, 303 N.W.2d 234 (1981); *City Nat. Bank of Paris v. Haynes*, 614 S.W.2d 605 (Tex. 1981); *Bond v. City of Huntington*, 276 S.E.2d 539 (W. Va. 1981).

19. *Nash v. Craigco, Inc.* 585 P.2d 775, 778 (Utah 1978). See also *Foss v. Maine Turnpike Authority*, 309 A.2d 339 (Me. 1973).

20. See, e.g., 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); Comment, *Criminal Safeguards and the Punitive Damages Defendant*, 34 U. CHI. L. REV. 408 (1967).

21. Note, *The Constitutionality of Punitive Damages Under the Excessive Fines Clause of the Eighth Amendment*, 85 MICH. L. REV. 1699, 1703 (1987).

22. J.GHIARDI & J. KIRCHER, *supra* note 7, § 2.02 at 5.

23. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 350 (1974).

24. See, e.g., *Browning-Ferris*, 109 S. Ct. at 2920; *Daugherty v. Firestone Tire & Rubber Co.*, 85 F.R.D. 693 (N.D. Ga. 1980); *Palmer v. A.H. Robins Co., Inc.*, 684 P.2d 187 (Colo. 1984); *Coty v. Ramsey Associates, Inc.*, 149 Vt. 451, 546 A.2d 196 (1988). But see *Colonial Pipeline v. Brown*, 258 Ga. 115, 365 S.E.2d 827 (1988) (holding that, under Georgia's constitution, the Excessive Fines Clause applies to civil as well as criminal cases).

25. See, e.g., *Are Punitive Damages Getting Out of Control?*, 70 A.B.A. J. 16 (Dec. 1984).

punitive damage awards is more perceived than real,²⁶ many state legislatures have responded by enacting legislation intended to limit the amount of punitive damages that may be awarded. In fact, over one-half of the states have enacted statutes that change the traditional rules governing punitive damages.²⁷

One legislative response has been to place restrictions on the amount a plaintiff may recover. Many of these restrictions simply put a limit upon the total dollar amount of punitive damages that may be recovered.²⁸ The legislators of these states appear to be concerned with the amount of an award in a single case rather than with the number of awards arising out of a single wrongful act or defective product in a multiple number of cases.²⁹ Eight states have employed a new tactic; they have placed a limitation on the amount of punitive damages a plaintiff may recover by providing for a portion of the award to go into state coffers.³⁰

Illinois

In Illinois, legislation gives the trial court the discretion to "apportion the punitive damage award among the plaintiff, the plaintiff's attorney and the State of Illinois Department of Rehabilitation Services."³¹ The Illinois statute was enacted to discourage punitive damages, which, in the words of the Illinois legislature, "had been identified as a particularly important reason for the rapidly increasing cost and diminished availability of liability insurance."³² Further, the legislature stated that the provision providing for a part of punitive damages awards to be given to the state "reflects the fact that a principal justification for punitive damages is that visiting financial distress on wickedness serves a public purpose."³³

Georgia

In Georgia, 75 percent of the punitive damages awarded in a product liability action, less costs and fees, must be paid into the treasury of the state through the Fiscal Division of the Department of Administrative Services.³⁴

Missouri

In Missouri, after deduction of costs and fees, 50 percent of any final judgment awarding punitive damages shall be collected by the state attorney general for deposit into the "Tort Victims Compensation Fund."³⁵

26. *E.g.*, Daniels, *Punitive Damages: The Real Story*, 72 A.B.A. J. 60 (Aug. 1986).

27. J. GHIARDI & J. KIRCHER, *supra* note 7, § 21.12 at 76.

28. *See supra* note 8, for a listing of pertinent statutes.

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

30. *See supra*, note 9. The following states have placed a cap on the amount of punitive damages recoverable as well as provided for part of any punitive award to go to a state or public entity: Colorado, Florida and Georgia.

31. ILL. ANN. STAT. ch. 110, ¶ 2-1207 (1987).

32. Historical Practice and Notes, ILL. ANN. STAT. ch. 110, para. 2-1207 (1987).

33. *Id.*

34. GA. CODE ANN. 51-12-5.1 (2) (1987); *but see* *McBride v. General Motors Corp.*, _____ F. Supp. _____, 1990, WL 65267 (DC MD Ga 1990) holding that the statute is subject to the Eighth Amendment of the U.S. Constitution.

35. MO. ANN. STAT. 537.675 (1987).

Florida

Florida legislation provides that, in actions involving personal injury or wrongful death, 60 percent of an award of punitive damages is payable to the Public Medical Assistance Trust Fund.³⁶ In all other actions, 60 percent of the award is payable to the state's General Revenue Fund.³⁷

Iowa

Iowa distinguishes between situations in which "the conduct of the defendant was directed specifically at the claimant (or at the person from which the claimant's claim was derived)" and situations in which the conduct is directed at others. In the latter situation, the plaintiff may collect "an amount not to exceed twenty-five percent of the punitive damages awarded," and the remainder is paid into a civil reparations trust fund.³⁸

Colorado

Colorado law provides that one-third of all reasonable punitive damages awarded must be paid into the state general fund, and the remaining two-thirds must be paid to the claimant.³⁹

Oregon

Oregon legislation provides that after deduction of agreed upon attorney's fees, one-half of the remainder of any punitive damage award shall be paid to the Criminal Injuries Compensation account.⁴⁰

Utah

In Utah, 50 percent of the amount of punitive damages in excess of \$20,000, after subtraction of fees and costs, is to be paid to the state treasurer for deposit in the state's general fund.⁴¹

IV. PAYMENT TO THE STATE AS FINES

In situations in which a state shares in a punitive damage award, the criminal fine analogy is strongest. First, as with all punitive damage awards, the public purposes of punishment and deterrence are served.⁴² Further, as in criminal cases, the defendant is obligated to pay part of the judgment to a state government, which may be viewed as a judgment creditor.⁴³ As a result, the nature of the punitive damages award is

36. FLA. STAT. ANN. 768.73(2)(b) (1986).

37. *Id.*

38. IOWA CODE ANN. 668A.1(1987).

39. COLO. REV. STAT. 13-21-102(4) (1987).

40. OR. REV. STAT. 18.540(3)(1988).

41. UTAH CODE ANN. 78-18-1(3) (1989).

42. Illinois has specifically recognized that state collection of punitive damages properly serves the public purpose of visiting financial distress upon a wrongdoer. *See, supra*, note 38 and accompanying text.

43. Georgia's statute specifically points out that the state "shall have all rights due a judgment creditor until such judgment is satisfied and shall stand on equal footing with the plaintiff of the original case in securing a recovery. . . ." *See* GA. CODE ANN. 51-12-5.1(2) (1987).

changed from "private fines levied by civil juries"⁴⁴ to public fines provided for by the state, collected by the state, and later spent by the state for state purposes. Essentially, the only difference between the two situations appears to be that the state has not prosecuted the case and thereby incurred any litigation expenses. This factor also weighs in favor of finding such awards equivalent to criminal fines since the purpose for collecting part of the awards is not to reimburse the state.⁴⁵ States which collect part of a punitive damage award in cases they did not prosecute are simply exacting a punishment.

To fully assess the analogy between punitive damages collected by a state and criminal fines, it is necessary to review the traditional standards applied by courts in determining whether a punishment is sufficiently penal to amount to a "punishment." However, before doing so, the limits of the Supreme Court's decision in *Browning-Ferris Industries of Vermont, Inc. v. Kelco Disposal Inc.*⁴⁶ must be analyzed.

Browning-Ferris v. Kelco

After much anticipation,⁴⁷ the Supreme Court, in *Browning-Ferris v. Kelco*, addressed the issue of whether punitive damages awarded in private civil actions are subject to limitation by the Eighth Amendment. The case involved a claim against the attempts of the defendant, Browning-Ferris Industries of Vermont (BFI), to monopolize the waste-disposal business in Burlington, Vermont. The plaintiff, Kelco Disposal, alleged that BFI had engaged in a predatory pricing scheme in violation of Section 2 of the Sherman Act, and that BFI had interfered with Kelco's contractual relations in violation of Vermont tort law.

After trial to a jury, BFI was found liable on both counts. The jury awarded Kelco \$51,146 in compensatory damages on both the Sherman Act claim and the state tort claim.⁴⁸ In addition, after being instructed that it could take into account "the character of the defendants, their financial standing,⁴⁹ and the nature of their acts," the jury returned a verdict for \$6 million in punitive damages.⁵⁰

BFI then moved for judgment notwithstanding the verdict, remittitur, or alternatively a new trial. The district court denied BFI's motions and gave Kelco the option of accepting \$153,438 in treble damages and \$212,500 in attorney's fees and costs on the antitrust claim or \$6,066,082 in compensatory and punitive damages on the state-law claim.⁵¹ The U.S. Court of Appeals for the Second Circuit affirmed the district court's awards and, with respect to the punitive award, indicated that even if

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

45. *See, infra*, notes 73-74 and accompanying text.

46. 109 S. Ct. 2909 (1989).

47. In two prior cases the Supreme Court acknowledged the importance of resolving the issue of the Eighth Amendment's applicability to punitive damages. *See Bankers Life & Casualty Co. v. Crenshaw*, 108 S. Ct. 1645 (1988); *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813 (1986).

48. *Browning-Ferris*, 109 S. Ct. 2909 (1989).

49. At trial, the plaintiff stressed that the defendant had total revenues of \$1.3 billion the previous year and that this figure broke down to \$25 million per week. *Id.* at 2913.

50. *Id.*

51. *Id.*

the Eighth Amendment were applicable “to this nominally civil case” that the award was “not so disproportionate as to be cruel, unusual, or constitutionally excessive.”⁵²

The U.S. Supreme Court affirmed. In doing so, the majority relied upon the fact that the Eighth Amendment’s Excessive Fines Clause has traditionally been applied exclusively in the criminal context.⁵³ The court pointed out that, at the time the Eighth Amendment was drafted, the term *fine* meant payment to a sovereign as punishment for an offense.⁵⁴

Simply put, the primary focus of the Eighth Amendment was the potential for governmental abuse of its “prosecutorial” power, not concern with the extent or purposes of civil damages. . . .

The history of the Eighth Amendment convinces us that the Excessive Fines Clause was intended to limit only those fines directly imposed by, and payable to, the government.⁵⁵

Although the court was clear in its holding that the Excessive Fines Clause does not apply to awards of money damages in a civil suit, the Court was careful to limit its holding to the factual scenario before it. Specifically, the Court noted:

Here the government of Vermont has not taken a positive step to punish, as it most obviously does in the criminal context, *nor has it used the civil courts to extract large payments or forfeitures for the purpose of raising revenue or disabling some individual.*⁵⁶

As a result of this limitation the Court implies that the Excessive Fines Clause may apply to situations where a state government shares in a plaintiff’s recovery of punitive damages.⁵⁷ In her dissenting opinion, Justice O’Connor stated:

52. *Browning-Ferris Industries of Vermont Inc. v. Kelco Disposal, Inc.*, 845 F.2d 404, 410 (1988).

53. *Browning-Ferris*, 109 S. Ct. at 2913–14, (quoting *Ingraham v. Wright*, 430 U.S. 651, 664–68 (1977) (“Bail, fines, and punishment traditionally have been associated with the criminal process”); *Fong Yue Ting v. United States*, 149 U.S. 698, 730 (1893) (amendments not applicable to deportation because deportation is not punishment for a crime); *Ex parte Watkins*, 7 Pet. 568, 573–74 (1833) (“The Eighth Amendment is addressed to courts of the United States exercising criminal jurisdiction”).

54. *Id.* at 2915.

55. *Id.* at 2915–16; see *Pacific Mutual Life Insurance Co. v. Haslip*, 553 So. 2d 537 (Ala. 1989) citing *Browning-Ferris* with approval in a state court decision. See also *Eichenseer v. Reserve Life Insurance Co.*, 881 F.2d 1355 (5th Cir. 1989) where the court adapted the *Browning-Ferris* holding to an award of punitive damages imposed upon a defendant by a trial judge following a bench trial.

56. *Id.* at 2920 (emphasis added). The Court stated in footnote 21 that its decision in *United States v. Halper*, 109 S.Ct. 1892 (1989), implied that a government’s recovery of punitive damages in a civil action may raise Eighth Amendment concerns. However, the court distinguished *Halper* from *Browning-Ferris* because the government, and not a private party, was exacting punishment in *Halper*. The Court explicitly left the Eighth Amendment issue open.

57. Before any such finding, the Court would have to find that the Excessive Fines Clause applies to state governments through the Fourteenth Amendment. The majority declined to address this issue in *Browning-Ferris*. See *id.* at 2921 n.22. However, Justice O’Connor stated in her dissenting opinion that she would hold that the Excessive Fines Clause applies to the states. *Id.* at 2925. This appears to be the likely result since the Supreme Court has previously held that the cruel and unusual punishments clause may limit the powers of state governments. See, e.g., *Edmund v. Florida*, 458 U.S. 782 (1982) (limit on authority to impose capital punishment); *Robinson v. California*, 370 U.S. 660 (1962) (limit on power to impose prison sentence).

[B]y relying so heavily on the distinction between governmental involvement and purely private suits, the Court suggests . . . that the Excessive Fines Clause will place some limits on awards that are recovered by a governmental entity.⁵⁸

The statement of both the majority and dissenting justices indicates that the Court is leaning toward imposing excessive fines limitations upon state-extracted punitive damage awards. Once the Excessive Fines Clause is applied to such awards a second issue would arise: When is an award excessive and what standards should the court use to find the award "excessive"?

V. DETERMINING WHETHER A SANCTION IS "CRIMINAL"

Before *Browning-Ferris*, the Supreme Court addressed the applicability of the Cruel and Unusual Punishment Clause of the Eighth Amendment to a civil case involving the paddling of school children. In *Ingraham v. Wright*,⁵⁹ the Court laid the foundation for holding in *Browning-Ferris* by focusing upon the nature of the action to determine whether the Eighth Amendment's protections should extend to the civil setting. As in *Browning-Ferris*, the Court held that the nature of the action was controlling and that the Eighth Amendment governs punishment only for criminal convictions.⁶⁰ Even so, the court did recognize that this rule is not absolute. In now-famous footnote 37, Justice Powell points out that "[s]ome punishments, though not labeled 'criminal' by the State, may be sufficiently analogous to criminal punishments in the circumstances in which they are administered to justify application of the Eighth Amendment."⁶¹

The *Ingraham* court did not supply a standard for determining whether a particular punishment is "civil" or "criminal." However, both before and after the *Ingraham* decision, the Court has maintained a fairly uniform approach to determine whether a sanction is "criminal" and thereby subject to constitutional limitations. The test is essentially a two-step inquiry into the purpose beyond the sanction. First, the court must determine whether the sovereign, "in establishing the penalizing mechanism, indicated either expressly or impliedly a preference for one label or the other" (i.e. criminal or civil).⁶² Second, where the sovereign has expressed an intention to establish a civil penalty, the court must determine whether the penalizing scheme is so "punitive either in purpose or effect as to negate that intention."⁶³

58. *Browning-Ferris*, 109 S. Ct. at 2932-33 (citing FLA. STAT. 768.73(2)(b) (1987)). Justice O'Connor had also raised this issue during oral argument.

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

60. *Id.* at 664.

61. *Id.* at 699 n.37.

62. *United States v. Ward*, 448 U.S. 242, 248 (1980).

63. *Id.* at 248-249.

With respect to the second inquiry, the Supreme Court has stated that seven factors are relevant.⁶⁴ These seven factors, as first enumerated in *Kennedy v. Mendoza-Martinez*,⁶⁵ are:

[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 assigned.⁶⁶

Although these factors are not conclusive on the issue,⁶⁷ several commentators have concluded that the factors easily suggest that punitive damages are “criminal” in nature.⁶⁸

Another way to view the second inquiry is to determine whether the sanction is really being imposed for the purpose of punishment,⁶⁹ or for some other legitimate governmental purpose.⁷⁰ Often, while a sanction may appear penal on its face, further inquiry reveals that the sanction is actually serving a remedial, nonpunitive purpose. In *United States v. Halper*,⁷¹ the defendant made sixty-five false claims for reimbursement under the Federal Medicare Program. After being convicted on sixty-five counts of violating the criminal false claims statute, the government then brought a civil action against the defendant under the Civil False Claims Act.⁷² The remedial provision of the Act provided for a civil penalty of \$2,000 per count. After the district court ruled that the civil remedy constituted a second “punishment” under the Double Jeopardy Clause, the Supreme Court remanded for further findings.

In determining whether the sanctions could be considered “punishment,” the Court stated:

... the determination whether a given civil sanction constitutes punishment in the relevant sense requires a particularized assessment of the penalty imposed and the purposes that the penalty may fairly be said to serve. Simply put, a civil as well as a criminal sanction constitutes punishment when the sanction as applied in the individual case serves the goals of punishment.⁷³

64. *Id.* at 249. See also *Bell v. Wolfish*, 441 U.S. 520 (1979).

65. *Kennedy v. Mendoza-Martinez*, 372 U.S. 144 (1963).

66. *Id.* at 168–69.

67. *Ward*, 448 U.S. at 249.

68. See Grass, *The Penal Dimensions of Punitive Damages*, 12 HASTINGS L.Q. 241 (1985); Jefferies, *A Comment on the Constitutionality of Punitive Damages*, 72 VA. L. REV. 139 (1986); Comment, *Punitive Damages and the Eighth Amendment: An Analytical Framework for Determining Excessiveness*, 75 CAL. L. REV. 1433 (1987).

69. See, e.g., *Trop v. Dulles*, 356 U.S. 86 (1958) (plurality opinion) (although statute was labeled as “nonpenal,” Court found that deprivation of rights of citizenship as result of dishonorable discharge was “punishment” and consequently that statute was “penal”).

70. See, e.g., *Bell v. Wolfish*, 441 U.S. 520, 538 (1979).

71. *United States v. Halper*, 109 S. Ct. 1892 (1989).

72. *Id.* at 1896.

73. *Id.* at 1901–02.

Essentially, as a result of the rule in *Halper*, if the government does nothing more than recover its actual costs resulting from the defendant's conduct and the litigation, then the civil sanction must be viewed as remedial. However, where the provision of the statute imposes a sanction upon the defendant "overwhelmingly disproportionate" to the damages he has caused, then the statute must be viewed as "criminal."⁷⁴

This conclusion is generally supported by case law from lower federal and state courts. It appears as though the courts are concerned most with whether the amount collected pursuant to a civil sanction serves to reimburse the government (or society in general) for some harm or cost incurred by reason of the defendant's conduct. If it does, then the courts are prone to find the sanctions to be "remedial" in nature.⁷⁵ If the sanction does not reimburse for some harm, then it is purely "criminal" in nature.⁷⁶

VI. APPLICATION TO STATE EXTRACTION

A solid argument exists to apply the Excessive Fines Clause to cases in which a state government extracts a portion of a punitive damages award.⁷⁷ As noted above, the first prong of the two-step inquiry⁷⁸ into the purpose behind a sanction looks to whether the sovereign has expressly or impliedly labeled the action as "criminal" or "civil." Since punitive damages may only be imposed in civil actions, it is safe to assume that states have impliedly considered state extraction a "civil" sanction. However, under the two-step approach, it is necessary to look beyond the implicit label on the sanction, and to determine whether the purpose or effect of the sanction is so punitive that it amounts to a "penalty," or "punishment."

At this point in the analysis, an important issue arises. That is, in determining the "purpose" behind the specific state-extraction statute, does the general purpose behind punitive damages control, or does the purpose behind the state-extraction statute control, or do both control? This distinction would not ordinarily arise since the purposes behind punitive damages and state-extraction statutes are often the same; punishment and deterrence. However, if the purpose behind a state-extraction statute is different from that of punitive damages generally then an issue of law would

74. See, e.g., *id.* at 1902-03.

75. See, e.g., *State v. Barber*, 427 N.W.2d 375 (S.D. 1988)(sanction for possession of marijuana not criminal since it recompenses society for expenditures in law enforcement and drug awareness campaigns); *Toepelman v. United States*, 263 F.2d 697 (1959)(False Claims Act not criminal sanction since it reimburses government for costs of prosecution).

76. See, e.g., *Porter v. Montgomery*, 163 F.2d 211 (3d Cir. 1947)(civil action is a penalty if it seeks to obtain money for the state, an entity which has not suffered direct injury); *In re Thrift Packing Co., Inc.*, 100 F. Supp. 970 (N.D. Tex. 1951)(penalty found where United States had brought suit but had not suffered damage in any way).

77. This analysis assumes that the Court will look beyond the formal classification of the action as "civil" or "criminal" in order to determine the applicability of the clause. However, if the Court desires to apply the formal approach found in *Ingraham*, then the classification of the action could be dispositive of the excessive fines issue.

78. See *supra* notes 62-74 and accompanying text.

arise. For example, if a state-extraction statute provides for payment of the state's portion into a fund which serves to remedy the type of harm caused by the defendant's wrongful conduct,⁷⁹ then the purpose behind the provision may not be punishment and deterrence but merely remedial.

None of the state-extraction statutes enacted to date have evidenced such a remedial purpose. The current statutes simply allow state governments to reap the benefits of successful punitive damages claims, even though the states have not been damaged in any way. The states that have enacted such statutes do not incur expenses and costs in prosecuting claims against civil defendants. Consequently, state extraction does not serve a reimbursement purpose either. As a result, the cases holding that the action extracts a "penalty" where the state has suffered no damage are directly on point.⁸⁰

Thus, current punitive damages statutes which provide for state extraction serve the purposes of punishment and deterrence. Therefore, unless the courts put form over substance in determining whether a civil sanction is a "penalty," such legislative enactments should be subject to the excessive fines limitation. This result is warranted since the effect of a sanction upon a defendant is the same irrespective of whether the action is labeled "criminal" or "civil." Where the purpose and effect of a sanction is clearly punitive, states should not be able to escape constitutional restrictions simply because of the context in which the punitive sanction arose.

VII. STATE CASES

To date, only one state has had the occasion to consider the issue of the application of its state extraction law in light of the Eighth Amendment.⁸¹ The *McBride* case involved the constitutionality of certain sections of the Georgia Tort Reform Act of 1987. The Georgia Act provided that in product liability cases there would be no limitation on the amount of punitive damages that could be awarded, but only one award could be recovered in the state from a defendant. Further, 75 percent of any amount awarded as punitive damages would be paid into the state treasury.⁸² The District Court made several findings: (1) that the Georgia statute discriminated between plaintiffs having claims for punitive damages arising out of a product mishap versus those that did not arise out of the use of a product; (2) that the statute discriminated between product liability damage plaintiffs who secure an award of punitive damages and may retain only 25 percent of that award as distinguished from non-product liability cases where the plaintiff would keep 100 percent of the award; (3) that the statute making the state a judgment creditor as to 75 percent of any punitive damage award was contrary to the Georgia constitution in that it contained matter

79. For instance, if the defendant is a large industrial polluter and the statute provides for the funds to go into cleaning up the environment, then the purpose behind the statute would be remedial.

80. See *supra* note 76.

81. *McBride v. General Motors Corp.*, _____ F. Supp. _____, 1990 WL 65267 (DC MD Ga 1990).

82. GA. STAT. 51-12-5.1 (e) (1) and (2).

different from the title of the Act, to wit, revenue producing versus tort reform; and (4) that the one-award section was too vague to be enforced. In addition, the court held that since the state of Georgia has the right to receive a share of any punitive damages awarded, the statute is subject to the Excessive Fines Clause of both the state and the federal constitutions. The court reasoned that, by allowing the state to receive 75 percent of the product liability punitive damages awarded, the action was converted from one of a civil nature to a statute where fines are being assessed for the benefit of the state contrary to the constitutional prohibitions as to excessive fines and contrary to the double jeopardy clause of the Fifth Amendment to the United States Constitution.

In summary, the court held: (1) the one-award provision dealing with product liability punitive damages violates the Equal Protection and Due Process clauses of the Georgia and federal constitutions; (2) the state extraction provision is unconstitutional in that it violates the Georgia constitutional provisions referring to more than one subject matter or containing matter different from what was expressed in the title of the Act; (3) the section violates the excessive fines provisions of the Eighth Amendment of the U.S. Constitution and the Constitution of Georgia; and (4) the section violates the double jeopardy provision of the Fifth Amendment of the U.S. Constitution.

Clearly, the holding of the Georgia court is that the extraction provision of the Georgia statute is subject to the Excessive Fines clauses of the federal and state constitutions. The language of the court indicates that the statute is unconstitutional for that reason. However, in view of the fact that this was a declaratory judgment action and no award had been made, it is difficult to understand the court's statement that the Act was unconstitutional because it was subject to the Excessive Fines Clause. In any event, the decision holds that the extraction provision of the Georgia statute is subject to the Excessive Fines Clause of the Eighth Amendment of the United States Constitution.

VIII. CONCLUSION

State extraction provisions of so-called Tort Reform legislation are subject to the excessive fines provisions of the Eighth Amendment when a share of the punitive damage award is given to the state. Georgia has so held.⁸³ The same result should follow in the other seven jurisdictions,⁸⁴ unless the courts elevate form over substance when they evaluate the "penalty" provision of the legislation.

Once it is determined that the Excessive Fines Clause applies to a punitive damage extraction statute, the issue becomes whether the particular award is "excessive" within the meaning of the Eighth Amendment. McBride appeared to assume the fact

83. *McBride*, *supra* note 81.

84. Colorado, Florida, Illinois, Iowa, Missouri, Oregon and Utah.

of unconstitutionality.⁸⁵ This issue will have to be decided on a case-by-case basis and by analogy to criminal cases⁸⁶ and cases providing for civil forfeitures under particular statutes.⁸⁷

Justice O'Connor, in *Browning-Ferris*, acknowledged that determining whether a particular award is excessive would not be an easy task.⁸⁸

The proportionality framework that the Court has adopted under the Cruel and Unusual Punishment Clause, however, offers some broad guidelines. See *Solem*, 463 U.S. at 290–292, 103 S. Ct. at 3009–3011. Cf. *United States v. Busher*, 817 F.2d 1409, 1415 (CA9 1987) (applying *Solem* factors to civil forfeiture under RICO). I would adapt the *Solem* framework to punitive damages in the following manner. First, the reviewing court must accord “substantial deference” to legislative judgments concerning appropriate sanctions for the conduct at issue. Second, the court should examine the gravity of the defendant’s conduct and the harshness of the award of punitive damages. Third, because punitive damages are penal in nature, the court should compare the civil *and* criminal penalties imposed in the same jurisdiction for different types of conduct, and the civil *and* criminal penalties imposed by different jurisdictions for the same or similar conduct. In identifying the relevant civil penalties, the court should consider not only the amount of awards of punitive damages but also statutory civil sanctions. In identifying the relevant criminal penalties, the court should consider not only the possible monetary sanctions but also any possible prison term.⁸⁹

The amount to be awarded for a punitive damage claim, where state extraction is an issue, will involve the application of three different sets of criteria: (1) the factual considerations by the jury in determining the amount to be awarded;⁹⁰ (2) the criteria used by the trial and appellate courts to determine if the award is excessive or inadequate;⁹¹ and (3) the application of the proportional framework to determine if the award is excessive under the Eighth Amendment.⁹²

85. *McBride*, *supra* note 81. This result may have been warranted under the facts because of the other constitutional violations that were found to exist.

86. *Solem v. Held*, 463 U.S. 277, 290–92 (1983).

87. *United States v. Busher*, 817 F.2d 1409, 1415 (9th Cir. 1987) (civil forfeiture under RICO).

88. *Browning-Ferris Industries of Vermont, Inc. v. Kelco Disposal, Inc.*, 109 S. Ct. 2909, 2933 (1989).

89. *Id.* at 2933–2934.

90. See J. GHIARDI & J. KIRCHER, *supra* note 7, § 5.36–5.47.

91. *Id.* Chap. 18.

92. *Browning-Ferris*, *supra* note 89.