

“Experimenting” with State Constitutional Limits on Punitive Damages in California: Application of the California Excessive Fines Clause

Awards of punitive damages are skyrocketing. As recently as a decade ago, the largest award of punitive damages affirmed by an appellate court in a products liability case was \$250,000. Since then, awards more than 30 times as high have been sustained on appeal. The threat of such enormous awards has a detrimental effect on the research and development of new products. Some manufacturers of prescription drugs, for example, have decided that it is better to avoid uncertain liability than to introduce a new pill or vaccine into the market. Similarly, designers of airplanes and motor vehicles have been forced to abandon new projects for fear of lawsuits that can often lead to awards of punitive damages.¹

“Large assessments of punitive damages may . . . be a major threat to the continued viability of most manufacturing concerns”²

I. Introduction

A recent study by the Rand Corporation’s Institute for Civil Justice³ found that, since 1960, the number of cases in which punitive damages have been awarded has increased dramatically.⁴ For example, according to the study, between the late 1970s and the early 1980s the number of punitive damage awards in Chicago almost doubled.⁵ In San Francisco, during the same period, “punitive damages were awarded in more than

1. *Browning-Ferris Indus. v. Kelco Disposal, Inc.*, 109 S. Ct. 2909, 2924 (1989) (O’Connor, J., concurring and dissenting) (citations omitted).

2. Owen, *Problems in Assessing Punitive Damages Against Manufacturers of Defective Products*, 49 U. CHI. L. REV. 1, 6 (1982).

3. M. PETERSON, S. SARMA & M. SHANLEY, *PUNITIVE DAMAGES: EMPIRICAL FINDINGS* (1987) [hereinafter *EMPIRICAL FINDINGS*]. The Rand study is based mainly on data from jury trials in San Francisco, California, and Cook County, Illinois (“Chicago”); however, the study also examines punitive damage awards from throughout California for the years 1980-1984. DeBenedictis, *Punitive Awards Found Increasing In Business Cases*, L.A. Daily J., Mar. 24, 1987, at 1, col. 6 [hereinafter *Punitive Awards*].

4. *EMPIRICAL FINDINGS*, *supra* note 3, at iii; see also K. REDDEN & L. SCHLUETER, *PUNITIVE DAMAGES*, § 1.1(A) (Supp. 1987) (“In recent years, we have seen an ever-growing number of cases in which the plaintiff sought punitive damages.”).

5. *EMPIRICAL FINDINGS*, *supra* note 3, at 9.

one out of every eight jury trials (13.6 percent) . . . in which a defendant was found liable for compensatory damages."⁶ In business tort and breach of contract cases, the study found that the number of punitive awards between the late 1970s and the early 1980s doubled in Chicago and tripled in San Francisco.⁷

In addition to increases in the number of punitive damage awards, the Rand study also found that, since 1960, there has been a startling increase in the average amount of punitive awards.⁸ The study found that, in Chicago, the average punitive damage award increased from \$164,000 in the late 1970s to \$729,000 in the early 1980s.⁹ In San Francisco, the average punitive award increased from \$170,000 to \$381,000 during the same period.¹⁰ Moreover, in the 1980s punitive damage awards of one million dollars or more became increasingly commonplace.¹¹ For example, in 1987 Texaco won three billion dollars in punitive damages in its suit against Pennzoil for tortious breach of contract.¹² In 1988 two Ashland Oil officials were awarded seventy million dollars in punitive damages in a wrongful discharge employment case.¹³ Even more recently, in 1989 the Honda Motor Company was assessed five million dollars in punitive damages in a products liability case involving one of its all terrain vehicles or ATVs.¹⁴

These cases represent only a small sample of the many million dollar jury verdicts issued each year.¹⁵ Among these verdicts, the increasing number of astronomical punitive damage awards has generated growing concern among many groups that continued increases in the number and size of punitive damage awards may seriously threaten the future stabil-

6. *Id.*

7. *Id.* at vi.

8. *Id.* at iii; *Punitive Awards*, *supra* note 3, at 1, col. 6.

9. EMPIRICAL FINDINGS, *supra* note 3, at 15.

10. *Id.*

11. Jeffries, *A Comment on the Constitutionality of Punitive Damages*, 72 VA. L. REV. 139, 145 (1986); Owen, *supra* note 2, at 6; Greenhouse, *Supreme Court Agrees to Weigh Putting Limits on Damage Awards*, N.Y. Times, Dec. 6, 1988, at A1, col. 1 and at A11, col. 3 (reporting that according to a brief submitted by the National Association of Manufacturers in *Browning-Ferris Indus. v. Kelco Disposal, Inc.*, discussed *infra* notes 68-69 and 97-140, "while punitive damage awards of more than \$250,000 were rare only a few years ago, 'today hardly a month goes by without a multimillion-dollar punitive damages verdict against a manufacturer.'").

12. *See Texaco, Inc. v. Pennzoil Co.*, 729 S.W.2d 768 (Tex. Ct. App. 1987). The award was ultimately reduced to one billion dollars. *See infra* note 334.

13. *See Epperson, Jury Awards 2 Ashland Oil Ex-Officials \$70 Million in Suit Over Their Dismissal*, Wall St. J., June 14, 1988, at 2, col. 1.

14. *See Victor, Settle In Secret?*, NAT'L J., Nov. 25, 1989, at 2909.

15. *See Marcotte, Biggest Personal Injury Awards; Top 10 California Judgments Listed By Jury Verdict Research*, A.B.A. J. (Cal. ed.), Oct. 1, 1988, at CE-15-16; Sella, *The Ten Largest Jury Verdicts of 1988*, A.B.A. J., Mar. 1988, at 45-51.

ity of American industry.¹⁶ To date, most of the "concern" over this trend has been voiced by businesses,¹⁷ insurance companies,¹⁸ and scholars.¹⁹ The public, however, is increasingly being warned that the cost of damage awards paid by businesses, as well as the cost of liability insurance obtained by businesses to cover such awards, is ultimately passed along to consumers.²⁰ In response to these concerns, there has been increased pressure placed on courts and legislatures to take steps to control punitive damages.

This Note argues that the excessive fines clause of the California Constitution should be applied by California courts to limit awards of punitive damages in civil cases. The remainder of Part I reviews various legislative measures and recent judicial efforts aimed at controlling punitive damages. Part II criticizes the United States Supreme Court's decisions in *Ingraham v. Wright*,²¹ which limits application of the Eighth Amendment to criminal cases, and *Browning-Ferris Industries v. Kelco Disposal, Inc.*,²² which holds that the Eighth Amendment does not apply to punitive damage awards in cases between private parties. Part III discusses the "adequate and independent state grounds" doctrine, which allows states to interpret state constitutional provisions differently from their federal counterparts, and points out that California has been a leader in developing this doctrine. Part IV summarizes the historical evolution of the California excessive fines clause and concludes that its application was not intended to be limited to criminal cases. This Part also discloses that excessive fines clauses in other state constitutions have been applied to punitive damages. Part V outlines a proposed constitutional limit on punitive damages based on the treble damages model. The Note concludes that California should adopt this model.

A. Legislative Measures

In response to calls for greater control of punitive damages, several state legislatures have attempted to restrict the availability of punitive

16. Owen, *supra* note 2, at 6; Greenhouse, *supra* note 11, at A11, col. 3 (reporting that according to the National Association of Manufacturers, multi-million dollar punitive damage awards are having a "devastating" effect on industry); *see also* *Browning-Ferris Indus. v. Kelco Disposal, Inc.*, 109 S. Ct. 2909, 2924 (1989) (O'Connor, J., concurring and dissenting).

17. *See Punishment Through the Pocketbook*, U.S. NEWS & WORLD REP., Dec. 19, 1988, at 13.

18. *See* K. REDDEN & L. SCHLUETER, *supra* note 4, at 1 (noting the "uproar of the insurance industry over the insurability of punitive damages").

19. *See, e.g.*, Owen, *supra* note 2, at 6.

20. *See, e.g.*, Feder, *The Coming Showdown in Car Insurance*, N.Y. Times, Nov. 6, 1988, at F1, col. 2 (during debate over various automobile insurance reform initiatives on November 1988 California ballot, the insurance industry stressed that higher auto insurance rates resulted from the increasing number of large jury awards).

21. 430 U.S. 651 (1977).

22. 109 S. Ct. 2909 (1989).

damages.²³ For example, Nebraska²⁴ and Washington²⁵ prohibit recovery of punitive damages.²⁶ Louisiana,²⁷ Massachusetts,²⁸ and New Hampshire²⁹ prohibit punitive damages except when such awards are expressly authorized by statute to remedy a particular wrong.³⁰ Indiana prohibits punitive damage awards against defendants in civil cases if the defendants are also subject to criminal liability for the same conduct.³¹ Illinois recently outlawed punitive damages in legal and medical malpractice actions.³² Finally, Georgia,³³ Connecticut, and Michigan treat

23. See generally Shalowitz, *Tort Reform; Outlook 'Encouraging' in 8 States: ATRA*, BUS. INSURANCE, Feb. 6, 1989, at 3.

24. The Nebraska rule has been interpreted categorically:

It has been a fundamental rule of law in this state that punitive, vindictive, or exemplary damages will not be allowed, and that the measure of recovery in all civil cases is compensation for the injury sustained. This rule is so well settled that we dispose of it merely by the citation of cases so holding.

1 J. GHIARDI & J. KIRCHER, *PUNITIVE DAMAGES: LAW AND PRACTICE*, § 4.11 (Supp. 1988) [hereinafter *LAW AND PRACTICE*] (quoting *Abel v. Conover*, 170 Neb. 926, 104 N.W.2d 684, 688 (1960) (citations omitted)). Nebraska has to date refused to recognize any exceptions to this general rule. *Id.*; see also NEB. CONST. art. VII, § 5; NEB. REV. STAT. § 43-801 (1988).

25. Washington recently has recognized several exceptions to its general rule prohibiting punitive damage awards. In particular, at least one Washington appeals court has allowed treble damages for willful timber trespass. *LAW AND PRACTICE*, *supra* note 24, § 4.12 (citing *Henriksen v. Lyons*, 33 Wash. App. 123, 652 P.2d 18 (1982)). The rationale given for abrogating the general prohibition against punitive damages was to provide "deterrence, compensation and punishment," the traditional justifications for punitive awards. *Id.*

26. *Id.* §§ 4.11-4.12.

27. An example of a Louisiana statute that authorizes punitive damages is § 3.4278.1 which allows treble damages for willfully and intentionally destroying or removing trees from another's land without permission. LA. REV. STAT. ANN. § 3.4278.1 (West 1987); see also *LAW AND PRACTICE*, *supra* note 24, § 4.09.

28. To reinforce its general policy against punitive damages, Massachusetts has specifically outlawed punitive awards in three types of cases: actions for libel or slander, actions against public employers, and actions against a decedent's executor or administrator. *LAW AND PRACTICE*, *supra* note 24, § 4.10 n.6. However, in breach of warranty actions Massachusetts courts recently have held that manufacturers face awards of up to three times, but not less than two times, the actual damages plus attorneys fees. *Id.* § 4.10 (citing *Hannon v. Original Gunite Aquatech Pools, Inc.*, 385 Mass. 813, 434 N.E.2d 611 (1982) and *Burnham v. Mark IV Homes, Inc.*, 387 Mass. 575, 441 N.E.2d 1027 (1982)).

29. *Id.* § 4.11.5; see also N.H. REV. STAT. ANN. § 507:16 (1986) (effective July 1, 1986).

30. *LAW AND PRACTICE*, *supra* note 24, §§ 4.09-4.10, 4.11.5.

31. *Id.* § 4.08. Indiana courts have held that even if a defendant faces criminal prosecution, punitive damages may be awarded: "(1) when the conduct of the defendant indicated a heedless disregard of the consequences; (2) when the statute of limitations on the criminal charge had run; or, (3) when, in an action against a corporation, the corporation could not be criminally prosecuted for the act of its agent." *Id.* (citing *Nicholson's Mobile Home Sales, Inc. v. Schramm*, 164 Ind. App. 598, 330 N.E.2d 785 (1975)).

32. *Id.* § 4.07; see also ILL. REV. STAT. ch. 110, para. 2-1115 (1985) (effective Jan. 1, 1986); cf. *infra* note 54 and accompanying text.

33. In 1987 Georgia enacted a statute that bars punitive damage awards in tort cases in which "the entire injury is to the peace, happiness, or feelings of the plaintiff . . ." *LAW AND*

punitive damages almost exclusively as compensatory in nature.³⁴

Alternatively, some states have enacted statutes restricting the amount of punitive damage awards. Colorado³⁵ and Oklahoma³⁶ limit punitive damages to the amount of compensatory damages awarded. However, under certain circumstances, both Colorado³⁷ and Oklahoma³⁸ allow punitive awards to exceed the amount of actual damages. Florida limits the amount of punitive damages to three times the compensatory damages awarded.³⁹ Similarly, Connecticut restricts punitive damages in product liability suits to twice the actual damages.⁴⁰

In 1985 Montana tried a different approach by passing legislation that limited punitive damages in certain tort cases to \$25,000 or one percent of the defendant's net worth, whichever was greater.⁴¹ Two years after its adoption, this provision was quietly deleted from the Montana

PRACTICE, *supra* note 24, § 4.07.5; *see also* GA. CODE ANN. § 51-12-6 (1987) (effective July 1, 1987).

34. LAW AND PRACTICE, *supra* note 24, § 4.02; *see also infra* note 135.

35. *See* COLO. REV. STAT. § 13-21-102(1)(a) (1987).

36. *See* OKLA. STAT. ANN. tit. 23, § 9(A) (West 1987) (as amended in 1986).

37. Title 13, § 21-102(3) of the Colorado Code provides that the amount of exemplary damages can be increased to three times the amount of actual damages, if it is shown that "[t]he defendant has continued the behavior or repeated the action . . . in a willful and wanton manner" or "has acted in a willful and wanton manner during the pendency of the action in a manner which has further aggravated the damages of the plaintiff when the defendant knew or should have known such action would produce aggravation." COLO. REV. STAT. § 13-21-102(3) (1987).

38. Section 9(A) of the Oklahoma Damages Code provides that juries have discretion to award any amount of punitive damages if "there is *clear and convincing evidence* that the defendant is guilty of conduct evincing a wanton or reckless disregard for the rights of another, oppression, fraud or malice, actual or presumed . . ." OKLA. STAT. ANN. tit. 23, § 9(A) (West 1987) (emphasis added). The language in this section is similar to § 3294 of the California Civil Code, discussed *infra* notes 47-56 and accompanying text.

39. Section 768.73(1)(a) of the Florida Code provides that in all civil cases, except class actions, "based on negligence, strict liability, products liability, misconduct in commercial transactions, professional liability, or breach of warranty that involves willful, wanton, or gross misconduct, the judgment for the total amount of punitive damages awarded to a claimant shall not exceed *three times* the amount of compensatory damages awarded . . ." FLA. STAT. ANN. § 768.73(1)(a) (West 1988) (emphasis added). The statute further provides that any punitive award greater than three times the actual damages "is presumed to be excessive." *Id.* at § 768.73(1)(b). The defendant can rebut this presumption if he is able to show by clear and convincing evidence that under the circumstances the award is not excessive. *Id.*

40. CONN. GEN. STAT. ANN. § 52-240b (West 1988).

41. Adams, *Montana Puts Cap On Punitive Damage Awards; New Law One of Broadest In U.S.*, Nat'l L. J., Apr. 22, 1985, at 7, col. 1 [hereinafter *Montana Cap*]. As amended in 1985, § 27-1-221 of the Montana Code provided:

(6)(a) In cases of actual fraud or actual malice, the jury may award reasonable punitive damages after considering the circumstances of the case.

(6)(b) In all other cases where punitive damages are awarded, punitive damages may be in an amount up to but no greater than \$25,000 or 1% of the defendant's net worth, whichever is greater.

MONT. CODE ANN. § 27-1-221(6)(a)-(b) (1985).

Code.⁴² Despite this reversal, other states have continued to adopt controversial reform measures. For example, in 1987 Virginia placed a \$350,000 cap on all punitive damage awards.⁴³ The same year, Alabama enacted a \$250,000 limit on punitive damages, subject to certain specified exceptions,⁴⁴ and Texas adopted a limit of "four times the amount of actual damages or \$200,000, whichever is greater."⁴⁵ The Texas provision also is subject to certain prescribed exceptions.⁴⁶

In 1987 the California Legislature adopted more stringent standards for imposing punitive damages.⁴⁷ The Civil Liability Reform Act of 1987 (California Act) provides, in part, for revision of Civil Code section 3294, the general statute authorizing punitive damages in California.⁴⁸ As amended, section 3294 restricts awards of punitive damages to cases in which the plaintiff proves by "clear and convincing evidence," rather than by a mere preponderance, that the defendant is "guilty of oppression, fraud, or malice."⁴⁹ In addition, the definition of oppression was made more restrictive by requiring a finding of "despicable conduct" by the defendant.⁵⁰ The new definition of malice also requires "willful" and "conscious disregard" of the rights and safety of others rather than just

42. As amended in 1987, section 27-1-221(1) simply provides that "reasonable punitive damages may be awarded where the defendant has been guilty of actual fraud or malice." MONT. CODE ANN. § 27-1-221(1) (1987). Although there has been no official explanation of the motivation for this change, it is likely that following the adoption of the reform provision in 1985, groups opposed to tort reform placed substantial political pressure on members of the state legislature to repeal the unique provision capping punitive damages. Cf. Haggerty, *California Agent Leads One-Man Tort Campaign*, Nat'l Underwriter-Prop. & C. (employee benefits ed.), Feb. 13, 1989, at 3.

43. VA. CODE ANN. § 8.01-38.1 (Supp. 1989).

44. ALA. CODE § 6-11-21 (Supp. 1989). The \$250,000 limit does not apply when the defendant engaged in either a pattern and practice of intentional wrongful conduct or conduct involving actual malice. *Id.* § 6-11-21(1)-(2). Libel, slander, and defamation cases also are excepted from the limitation. *Id.* § 6-11-21(3).

45. TEX. CIV. PRAC. & REM. CODE ANN. § 41.007 (Vernon Supp. 1990).

46. *Id.* § 41.008 (Vernon Supp. 1990) (punitive damages cap does not apply to cases involving intentional torts or malice).

47. See CAL. CIV. CODE § 3294 (West 1989) (as amended by Willie L. Brown, Jr.-Bill Lockyer Civil Liability Reform Act of 1987); see also *Review of Selected 1987 California Legislation*, 19 PAC. L.J. 427, 689-91 (1988) [hereinafter *1987 Legislation*]; Dresslar, *Time May Tell Effects of New Liability Law*, L.A. Daily J., Oct. 2, 1987, at 2, col. 1 [hereinafter *Time May Tell*]; Dresslar, *Years of Lawsuits Predicted Over Tort Compromise; Trial Lawyers Say Reform Law Needs Court Clarification; Punitives Redefined?*, L.A. Daily J., Sept. 18, 1987, at 1, col. 6 [hereinafter *Years of Lawsuits*].

48. 1987 Cal. Stat. ch. 1498, sec. 1.

49. As revised, § 3294(a) provides that punitive damages are permitted:

(a) In an action for the breach of an obligation not arising from contract, where it is proven by clear and convincing evidence that the defendant has been guilty of oppression, fraud, or malice, the plaintiff, in addition to the actual damages, may recover damages for the sake of example and by way of punishing the defendant.

CAL. CIV. CODE § 3294(a).

50. Section 3294(c) as revised provides the following definitions of malice and oppression:

conscious disregard.⁵¹

The California Act further mandates that trials in all cases seeking punitive damages be bifurcated and prohibits plaintiffs from introducing any evidence of the defendant's wealth until after the defendant is found guilty of oppression, fraud, or malice.⁵² Plaintiffs also may no longer specify the amount of punitive damages sought.⁵³ Lastly, the California Act prohibits claims for punitive damages against doctors unless such claims are first approved by the court.⁵⁴

Although the California legislation appears to be a positive step in restricting the availability of punitive damages, its terms are vague and it does not provide juries with any additional guidance in setting the amount of punitive damage awards.⁵⁵ Further, the changes in the California punitive damages statute are not significant in redefining when punitive damages will be awarded by juries.⁵⁶

B. Judicial Action

1. State Efforts

As the controversy over punitive damages has heated up, courts in some states have taken steps to limit both the size and availability of punitive awards. In California, no reported cases have yet addressed the

(1) "Malice" means conduct which is intended by the defendant to cause injury to the plaintiff or despicable conduct which is carried on by the defendant with a willful and conscious disregard of the rights or safety of others.

(2) "Oppression" means despicable conduct that subjects a person to cruel and unjust hardship in conscious disregard of that person's rights.

CAL. CIV. CODE § 3294(c).

51. *Id.*

52. CAL. CIV. CODE § 3295(d); *see also*, 1987 Legislation, *supra* note 47, at 689-91; *Time May Tell* and *Years of Lawsuits*, *supra* note 47.

53. CAL. CIV. CODE § 3295(e).

54. CAL. CIV. PROC. CODE § 425.13. Coincidentally, the California Act was a compromise forged by a small group of trial lawyers, insurers, doctors, and business people. *Years of Lawsuits*, *supra* note 47. In exchange for their support of provisions in the Act that make it more difficult for plaintiffs to recover punitive damages, trial lawyers got a provision allowing them to collect higher contingency fees in medical injury cases, currently capped under MICRA, the Medical Injury Compensation Reform Act of 1975. *Id.* Trial lawyers also got a commitment from the coalition of insurers, doctors, and business people that they would not pursue a 1988 ballot initiative aimed at either capping contingency fees in personal injury cases or requiring additional restrictions in the general statute governing punitive damages. *Id.*

55. Many California trial lawyers believe that it will take years for courts to develop a workable definition of "clear and convincing evidence" as used in the context of punitive damages. *Id.*

56. According to Thomas Stoltman, first vice president of the Los Angeles Trial Lawyers Association and member of the Board of the California Trial Lawyers Association, the changes in Civil Code § 3294 do not alter the status quo. *Id.* "To win punitive damages cases, [Stoltman] said, 'you [have always needed] . . . proof beyond a mere preponderance of evidence because of the nature of [punitive damages]. Jurors, in their own minds, require more stringent proof from the plaintiff before awarding punitive damages.'" *Id.*

application of any provisions of the state constitution to punitive damage awards.⁵⁷ In 1988, however, the California Supreme Court handed down two landmark rulings that were specifically aimed at restricting the availability of punitive damages in some cases.

In *Moradi-Shalal v. Fireman's Fund Insurance Co.*,⁵⁸ the court overruled its earlier decision in *Royal Globe Insurance Co. v. Superior Court*,⁵⁹ thereby abolishing all suits by third parties for bad faith handling of insurance claims. Four months later, in *Foley v. Interactive Data Corp.*,⁶⁰ the court held that tort damages are not available for breach of the implied covenant of good faith and fair dealing as applied to employment contracts. The decisions in both of these cases were motivated, at least in part, by the court's concern over excessive damages.⁶¹

It is no coincidence that the Rand study, discussed earlier,⁶² found that the overall rise in punitive damage awards over the past twenty-five years was due, in large part, to the increase in business tort and breach of contract cases of the type addressed in *Moradi-Shalal* and *Foley*.⁶³ Nevertheless, according to the Rand study, only about one-third of the business tort and breach of contract cases that awarded punitive damages in the early 1980s involved bad faith claims.⁶⁴ Consequently, the study concluded that, even when bad faith claims are excluded, the number of

57. The lack of cases discussing the applicability, if any, of various provisions of the California Constitution is not surprising. The prevailing view among lawyers in California, as elsewhere in the United States, remains that the Federal Constitution is the "constitution of first resort." Turner, *The Constitution of First Resort*, CAL. LAW., June 1989, at 51-54. Yet, as the Supreme Court continues to close off avenues of relief under the Federal Constitution and send issues back to state courts for adjudication under state law, *see, e.g.*, *Webster v. Reproductive Health Servs.*, 109 S. Ct. 3040, 3050 (1989), the sequence of constitutional arguments will undoubtedly begin to shift. *See also* Brennan, *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 491, 495 (1977) (noting that "[o]f late, . . . more and more state courts are construing state constitutional counterparts of provisions in the [federal] Bill of Rights as guaranteeing citizens of their states even more protection than federal provisions, even those identically phrased."); Linde, *Without 'Due Process': Unconstitutional Law in Oregon*, 49 OR. L. REV. 125, 133 (1970); Linde, *First Things First: Rediscovering the States' Bills of Rights*, 9 U. BALT. L. REV. 379, 391 (1980) [hereinafter *First Things First*].

58. 46 Cal. 3d 287, 758 P.2d 58, 250 Cal. Rptr. 116 (1988).

59. 23 Cal. 3d 880, 592 P.2d 329, 153 Cal. Rptr. 842 (1979).

60. 47 Cal. 3d 654, 765 P.2d 373, 254 Cal. Rptr. 211 (1988).

61. *See Moradi-Shalal*, 46 Cal. 3d at 299, 758 P.2d at 64, 250 Cal. Rptr. at 123 (noting that one of the "undesirable social . . . effects" of the *Royal Globe* rule was "excessive jury awards"); *Foley*, 47 Cal. 3d at 699, 765 P.2d at 401, 254 Cal. Rptr. at 239 (claiming that one of the major reasons for the court's ruling was that the "expansion of tort remedies in the employment context ha[d] potentially enormous consequences for the stability of the business community.").

62. *See* EMPIRICAL FINDINGS, *supra* notes 3-10 and accompanying text.

63. EMPIRICAL FINDINGS, *supra* note 3, at vi, 65; *Punitive Awards*, *supra* note 3, at 1, col. 6.

64. *Punitive Awards*, *supra* note 3, at 1, col. 6; EMPIRICAL FINDINGS, *supra* note 3, at vii.

business tort and breach of contract cases awarding punitive damages has increased substantially.⁶⁵ Thus, despite the recent efforts of the California Supreme Court, the need for additional control of punitive damages in California persists.

2. National Efforts

On the national level, several novel arguments, based on provisions in the Federal Constitution, recently have been advanced in the courts in an attempt to place constitutional limits on punitive damages. In particular, punitive damages have been challenged under the Excessive Fines Clause of the Eighth Amendment.⁶⁶ On several occasions from 1986 to 1988 the Supreme Court declined to decide this issue.⁶⁷ Finally, in June 1989 the Court, in *Browning-Ferris Industries v. Kelco Disposal, Inc.*,⁶⁸ ruled that the Eighth Amendment's Excessive Fines Clause "does not apply to awards of punitive damages in cases between private parties."⁶⁹

Punitive damages also have been challenged recently under the Due Process Clause of the Fourteenth Amendment⁷⁰ and the constitutional vagueness doctrine.⁷¹ To date, the Supreme Court has adhered to the cautious approach it followed in reviewing the initial series of eighth amendment cases⁷² and has elected not to decide either of these related

65. *Punitive Awards*, *supra* note 3, at 1, col. 6; *EMPIRICAL FINDINGS*, *supra* note 3, at vi-vii.

66. The Eighth Amendment provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. CONST. amend. VIII.

67. See *Bankers Life and Casualty Co. v. Crenshaw*, 108 S. Ct. 1645, 1647 (1988); *Downey Sav. and Loan Ass'n v. Ohio Casualty Ins. Co.*, 189 Cal. App. 3d 1072, 234 Cal. Rptr. 835 (1987), *cert. denied*, 108 S. Ct. 2023 (1988); *Atlantic Richfield Co. v. Nielsen*, *cert. denied*, 108 S. Ct. 2023 (1988); *Playtex Holdings, Inc. v. O'Gilvie*, 821 F.2d 1438 (10th Cir. 1987), *cert. denied*, 108 S. Ct. 2014 (1988); *Aetna Life Ins. v. Lavoie*, 475 U.S. 813 (1986). In *Aetna*, 475 U.S. at 828-29, the Court recognized that the Eighth Amendment argument "raise[d] important issues which, in an appropriate setting, must be resolved." Similarly, two years later, in *Bankers Life*, 108 S. Ct. at 1651, the Court noted that the applicability of the Eighth Amendment to punitive damages was "a question of some moment and difficulty."

68. 109 S. Ct. 2909 (1989) (7-2 decision). Justice Blackmun delivered the opinion of the Court in which Chief Justice Rehnquist and Justices Brennan, White, Marshall, Scalia, and Kennedy joined. *Id.* at 2912. Justice Brennan filed a concurring opinion in which Justice Marshall joined. *Id.* Justice O'Connor filed an opinion concurring in part and dissenting in part in which Justice Stevens joined. *Id.*

69. *Id.* at 2912, 2920-21. The rationale of the Court's decision in *Browning-Ferris* is discussed *infra* notes 97-140 and accompanying text.

70. See *Browning-Ferris*, 109 S. Ct. at 2921; *Bankers Life*, 108 S. Ct. at 1649-50. The pros and cons of the due process argument are discussed in greater detail *infra* notes 304-309 and accompanying text.

71. See *Aetna Life and Casualty Co. v. Lavoie*, 475 U.S. 813, 828 (1986); see also Note, *Can Punitive Damages Standards Be Void for Vagueness?*, 63 ST. JOHN'S L. REV. 52 (1988).

72. See *Bankers Life*, 108 S. Ct. at 1650 (eighth amendment challenge not properly raised below); *Aetna*, 475 U.S. at 828-29 (unnecessary to reach eighth amendment issue).

issues.⁷³ Yet, dictum in *Browning-Ferris* and *Bankers Life* suggests that at least five members of the Court may be willing to rule that “the Due Process Clause constrains the imposition of punitive damages in civil cases brought by private parties.”⁷⁴ Similarly, in *Browning-Ferris* Justice O’Connor, joined by Justice Stevens, indicated that in her view the vagueness argument may be meritorious.⁷⁵ Despite these words of encouragement, the Court has yet to uphold either a due process or vagueness challenge to a punitive damage award.⁷⁶

II. Eighth Amendment Precedent

A. *Ingraham v. Wright*

Until recently, the most definitive decision of the United States Supreme Court interpreting the scope of the Eighth Amendment was *Ingraham v. Wright*.⁷⁷ *Ingraham* involved a claim that corporal punishment inflicted in Florida public schools constituted “cruel and unusual punishment” within the meaning of the Eighth Amendment.⁷⁸ By a slim five-to-four majority, the Court held that the Eighth Amendment applied only to criminal cases.⁷⁹ In so holding, the Court stated that “[b]ail, 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.”⁸⁰ The majority also stated that “[a]n examination of the history of the [Eighth] Amendment and the decisions of [the Supreme] Court construing the proscription against cruel and unusual punishment confirms that it was [only]

73. See *Browning-Ferris*, 109 S. Ct. at 2921 (due process challenge not sufficiently raised in lower courts); *Bankers Life*, 108 S. Ct. at 1649-50 (due process challenge not adequately preserved on appeal); *Aetna*, 475 U.S. at 828-29 (unnecessary to reach due process claim).

74. *Browning-Ferris*, 109 S. Ct. at 2923 (Brennan, J., joined by Marshall, J., concurring); see also *id.* at 2924 (O’Connor, J., joined by Stevens, J., concurring and dissenting); *Bankers Life*, 108 S. Ct. at 1654-56 (O’Connor, J., joined by Scalia, J., concurring).

75. 109 S. Ct. at 2924 (O’Connor, J., concurring and dissenting).

76. In the months following its decision in *Browning-Ferris*, the Court denied certiorari in three cases that presented due process and/or vagueness challenges to punitive damage awards. See *Clardy v. Sanders*, 110 S. Ct. 376 (1989); *Combined Ins. Co. of Am. v. Ainsworth*, 110 S. Ct. 376 (1989); *Vintage Enter., Inc. v. Jaye*, 110 S. Ct. 377 (1989). Recently, however, the Court granted certiorari in another case that raises the due process issue. See *Pacific Mutual Life Ins. Co. v. Haslip*, 1990 Westlaw 15078 (1990). Oral argument in the *Pacific Mutual* case is expected to be scheduled for some time during the fall of 1990. Greenhouse, *Justices to Decide Damage Awards Issue*, N.Y. Times, Apr. 3, 1990, at A17, col. 1.

77. 430 U.S. 651 (1977) (5-4 decision).

78. *Id.* at 653.

79. *Id.* at 664.

80. *Id.*

designed to protect those convicted of crimes."⁸¹

In the late 1980s a growing number of law review commentaries and court opinions began to sharply criticize the *Ingraham* decision.⁸² Some scholars challenged the historical underpinnings of the majority's conclusion.⁸³ Others argued that since *Ingraham* only involved the application of the Cruel and Unusual Punishment Clause of the Eighth Amendment, its holding with respect to the Excessive Fines Clause was merely dicta.⁸⁴ Despite this criticism, state courts repeatedly relied on *Ingraham* to find that the Eighth Amendment's Excessive Fines Clause did not apply to civil cases.⁸⁵ In 1988 the Georgia Supreme Court broke this pattern by attacking the majority's analysis in *Ingraham* and adopting the reasoning of the dissenting opinion.⁸⁶

The central theme of Justice White's dissent in *Ingraham* is that there is no "recognized distinction" between criminal and noncriminal

81. *Id.* One writer on this topic has argued that "the civil defendant needs even greater protection against excessive fines than does the criminal defendant, precisely because there are fewer constitutional protections available in civil actions." Note, *Punitive Damages and the Eighth Amendment: An Analytical Framework For Determining Excessiveness*, 75 CALIF. L. REV. 1433, 1441-42 (1987) (footnotes omitted) [hereinafter *Analytical Framework*].

82. See, e.g., Jeffries, *supra* note 11; Massey, *The Excessive Fines Clause and Punitive Damages: Some Lessons From History*, 40 VAND. L. REV. 1233 (1987); Note, *The Constitutionality of Punitive Damages Under the Excessive Fines Clause of the Eighth Amendment*, 85 MICH. L. REV. 1699 (1987) [hereinafter *Constitutionality*]; *Analytical Framework*, *supra* note 81; *Colonial Pipeline Co. v. Brown*, 258 Ga. 115, 365 S.E.2d 827, 829-30 (1988).

83. Jeffries, *supra* note 11; Massey, *supra* note 82; see also *Colonial Pipeline*, 365 S.E.2d at 830-31. It should be noted that the text of the Eighth Amendment does not contain any express limitation on its application. See *Analytical Framework*, *supra* note 81, at 1441; *Colonial Pipeline*, 365 S.E.2d at 830 n.3. The Georgia Supreme Court emphasized this omission in *Colonial Pipeline* by pointing out that

[i]n light of the fact that the Eighth Amendment was placed between the Seventh Amendment which provides for trial by jury in *civil* cases and the Ninth Amendment which is a reservation of rights of the people, the absence of any language limiting the Eighth Amendment to criminal cases is especially noticeable.

Id.

84. Massey, *supra* note 82, at 1240; *Colonial Pipeline*, 365 S.E.2d at 829. Professor Massey points out that all of the "prior decisions" referred to by the majority in *Ingraham* "involved consideration of a plainly criminal punishment." Massey, *supra* note 82, at 1237. Thus, Massey criticizes that

to reach definitive conclusions about the scope of the excessive fines clause while [only] considering and deciding cases challenging a given punishment as cruel and unusual is to ignore the separate text of the excessive fines clause and to fail to consider the differing context in which an excessive fines claim may arise.

Id. at 1239 (footnotes omitted).

85. See, e.g., *Downey Sav. & Loan Ass'n v. Ohio Casualty Ins. Co.*, 189 Cal. App. 3d 1072, 1100-1, 234 Cal. Rptr. 835, 851 (1987), *cert. denied*, 108 S. Ct. 2023 (1988); *Palmer v. A.H. Robins Co., Inc.*, 684 P.2d 187, 217 (Colo. 1984); *Underwriters Life Ins. Co. v. Cobb*, 746 S.W.2d 810, 817 (Tex. 1988); see also *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).

86. *Colonial Pipeline Co. v. Brown*, 258 Ga. 115, 365 S.E.2d 827, 829-31, *appeal dismissed*, 109 S. Ct. 36 (1988).

punishment for purposes of applying the Eighth Amendment.⁸⁷ Further, he claimed that use of the criminal/noncriminal distinction as the basis for interpreting the application of a given statute was “plainly wrong.”⁸⁸ In his view “[t]he 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 [criminal] punishment”⁸⁹

1. *Punitive Damages as Fines*

In discussing the “purposive approach” that he advocates, Justice White’s dissent in *Ingraham* identifies retribution, rehabilitation, and deterrence as the traditional purposes of criminal punishment.⁹⁰ These are the same justifications commonly associated with punitive damages.⁹¹ In fact, in nearly every jurisdiction including California the stated purpose for awarding punitive damages is “to punish the defendant for his improper motive, and to deter like conduct in others.”⁹²

At least one member of the Supreme Court has recently recognized that “[t]he character of a sanction imposed as punishment ‘is not changed by the mode in which it is inflicted, whether by a civil action or criminal prosecution.’”⁹³ Thus, from a functional as well as a theoretical standpoint, criminal punishments and punitive damages are indistinguishable.⁹⁴ In addition, punitive damages easily fit within the guidelines

87. *Ingraham v. Wright*, 430 U.S. 651, 686 (White, J., dissenting); see also *Colonial Pipeline*, 365 S.E.2d at 830 (citing Justice White’s dissent in *Ingraham* with approval).

88. *Ingraham*, 430 U.S. at 686 (White, J., dissenting) (“[E]ven a clear legislative classification of a statute as ‘non-penal’ would not alter the fundamental nature of a plainly penal statute.” (citing *Trop v. Dulles*, 356 U.S. 86, 95 (1958) (plurality opinion))).

89. *Id.* at 686-87 (emphasis added).

90. *Id.*

91. The majority opinion in *Browning-Ferris Indus. v. Kelco Disposal, Inc.*, conceded this point. 109 S. Ct. 2909, 2920 (1989) (“[W]e agree . . . that punitive damages advance the interests of punishment and deterrence, which are also among the interests advanced by the criminal law”). Justice O’Connor reached the same conclusion in her concurring and dissenting opinion. *Id.* at 2926 (O’Connor, J., concurring and dissenting) (“this Court’s cases leave no doubt that punitive damages serve the same purposes—punishment and deterrence—as the criminal law”).

92. K. REDDEN & L. SCHLUETER, *supra* note 4, § 5.2(a)(5), at 191; *Neal v. Farmers Ins. Exchange*, 21 Cal. 3d 910, 928 n.13, 582 P.2d 980, 990 n.13, 148 Cal. Rptr. 389, 399 n.13 (1978) (“The purpose of punitive damages is to punish wrongdoers and thereby deter the commission of wrongful acts.”); see also *Colonial Pipeline Co. v. Brown*, 258 Ga. 115, 365 S.E.2d 827, 830-31 (1988).

93. *Browning-Ferris*, 109 S. Ct. at 2932 (O’Connor, J., concurring and dissenting).

94. See *Analytical Framework*, *supra* note 81, at 1446-47, 1470 (1987). The similarity between punitive damages and other forms of criminal punishment has led some commentators to suggest that the appropriate standard of proof for imposing punitive damages should be “beyond a reasonable doubt.” See, e.g., Jeffries & Freeman, *Constitutional Issues in Punitive Damages Litigation: an Agenda for Defense Counsel*, FOR THE DEFENSE, Jan. 1989, at 9, 10

established by the Supreme Court in *Kennedy v. Mendoza-Martinez*⁹⁵ for determining whether a sanction is penal in nature.⁹⁶

B. *Browning-Ferris Industries v. Kelco Disposal, Inc.*

During the final days of its October 1988 term, the Supreme Court issued a decision in the closely watched case⁹⁷ of *Browning-Ferris Industries v. Kelco Disposal, Inc.*⁹⁸ In *Browning-Ferris* the Court granted certiorari for the sole purpose of deciding whether the Excessive Fines Clause of the Eighth Amendment placed any limits on awards of punitive damages in civil cases.⁹⁹ The jury in the underlying trial had found that the defendant, Browning-Ferris Industries (BFI), violated the Sherman Antitrust Act by attempting to monopolize the Burlington, Vermont waste

[hereinafter *Defense Agenda*]; Freeman, *Damage Control; Defense lawyers say punitive damages violate due process*, CAL. LAW., Feb. 1990, at 33.

95. 372 U.S. 144 (1963). The seven criteria set out in *Kennedy* are as follows:

- (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.

Id. at 168-69.

96. For an excellent discussion of the application of the *Kennedy* factors to punitive damages, see *Analytical Framework*, *supra* note 81, at 1443-44, 1446-47; *Constitutionality*, *supra* note 82, at 1720-26, 1723 (1987) (concluding based on an analysis of the *Kennedy* factors that “[p]unitive damages are what they are labeled—punitive”); see also *Browning-Ferris*, 109 S. Ct. at 2932 (O’Connor, J., concurring and dissenting) (“I agree with those commentators who have found it easy to conclude that punitive damages are penal under the *Mendoza-Martinez* factors.”). The California Supreme Court routinely has used the seven *Kennedy* criteria in determining whether a sanction is penal. See, e.g., *In re Reed*, 33 Cal. 3d 914, 919-22, 663 P.2d 216, 218-20, 191 Cal. Rptr. 658, 660-62 (1983) (concluding, based on an analysis of the *Kennedy* factors, that mandatory registration of sex offenders convicted under a misdemeanor disorderly conduct statute was “punishment”).

97. See *Punishment Through The Pocketbook*, U.S. NEWS & WORLD REPORT, Dec. 19, 1988, at 13; Grady, *Business Watches ‘Case of Decade’*, Chicago Tribune, Apr. 18, 1989, at 3; *Justices Hear Arguments In ‘Bloated Damages’ Case*, S.F. Banner Daily J., Apr. 20, 1989, at 6, col. 5; *Supreme Court Hears Oral Argument on Legality of Punitive Damage Award*, BNA DER No. 74, Apr. 20, 1989; *Is The Constitution Punitive?*, Wall St. J., Apr. 20, 1989, § 1, at 14, col. 1.

98. 109 S. Ct. 2909 (1989). After issuing its opinion in *Browning-Ferris*, the Court denied certiorari in three other cases challenging punitive damage awards. See *Hodder v. Goodyear Tire & Rubber Co.*, 426 N.W.2d 826 (Minn. 1988), *cert. denied*, 109 S. Ct. 3265 (1989); *April Enterprises v. KTTV*, 147 Cal. App. 3d 805, 195 Cal. Rptr. 421 (1983), *cert. denied*, 109 S. Ct. 3242 (1989); *Miller v. Cudahy Co.*, 109 S. Ct. 3265 (1989). These cases had been held by the Court pending a decision in *Browning-Ferris*. *Greenhouse*, *supra* note 11, at A1, col. 1 and at A11, col. 3.

99. 109 S. Ct. 527 (1988) (“Petition for writ of certiorari . . . [is] granted limited to Question 2 presented by the petition.”); see also *Greenhouse*, *supra* note 11, at 1, col. 1.

disposal market.¹⁰⁰ The jury also found that, under Vermont tort law, BFI's conduct constituted interference with contractual relations.¹⁰¹

As punishment for BFI's acts, the jury awarded the plaintiff, Kelco Disposal, Inc., six million dollars in punitive damages.¹⁰² The award represented approximately six percent of BFI's net worth¹⁰³ and was over 115 times the award of compensatory damages.¹⁰⁴ Upon review, the Second Circuit Court of Appeals, applying Vermont law, upheld the punitive award.¹⁰⁵ In reaching its decision, the Second Circuit expressly denied BFI's claim that the award violated the Excessive Fines Clause of the Eighth Amendment.¹⁰⁶

In affirming the Second Circuit's ruling, the Supreme Court shifted the focus of its eighth amendment analysis away from the criminal/civil distinction relied on by the majority in *Ingraham*.¹⁰⁷ Instead, the *Browning-Ferris* Court based its decision on what it perceived was the history and purpose of the Excessive Fines Clause.¹⁰⁸ On the historical side, the Court concluded that "at the time of the drafting and ratification of the [Eighth] Amendment, the word 'fine' was understood to mean a payment to a sovereign as punishment for some offense."¹⁰⁹ Furthermore, according to the majority's analysis, "nothing in English history suggests that the Excessive Fines Clause of the 1689 Bill of Rights, the direct ancestor of our Eighth Amendment, was intended to apply to damages awarded in

100. *Kelco Disposal, Inc. v. Browning-Ferris Indus.*, 845 F.2d 404, 406 (2d Cir. 1988).

101. *Id.*

102. *Id.* at 407.

103. *Id.* at 410. The punitive damage award amounted to .5% of defendant Browning-Ferris Industries' revenues and less than 5% of its net income for fiscal year 1986. *Id.* The court found that the amount of the award was "not inconsistent with punitive damages levied in other jurisdictions against large corporations." *Id.*

104. *Id.* at 406-07. The jury's verdict in the separate, one-day trial on damages was to award \$51,146 for the antitrust claim, \$51,146 in compensatory damages, and \$6 million in punitive damages. *Id.* The court subsequently amended the judgment and ordered Kelco to choose between alternative state and federal remedies. *Id.* at 407. The choice was between an award of \$153,438 in treble damages and \$212,500 in attorneys' fees and costs on the federal antitrust claim or \$6,066,082 in compensatory and punitive damages on the state claim. *Id.*

105. *Id.* at 410.

106. *Id.* ("[W]e reject the defendants' notion that the award violates the eighth amendment's proscription against excessive fines. Even if the eighth amendment does apply to this nominally civil case, we do not think the damages here were so disproportionate as to be cruel, unusual, or constitutionally excessive.") (citations omitted).

107. The Court did observe that "our cases long have understood [the Eighth Amendment] to apply *primarily, and perhaps exclusively*, to criminal prosecutions and punishments." *Browning-Ferris Indus. v. Kelco Disposal, Inc.*, 109 S. Ct. 2909, 2913 (1989) (emphasis added). Nevertheless, it concluded that "[t]o decide the instant case, . . . we need not go so far as to hold that the Excessive Fines Clause applies just to criminal cases." *Id.* at 2914.

108. *Id.* ("Whatever the outer confines of the [Excessive Fines] Clause's reach . . . it does not constrain an award of money damages in a civil suit when the government neither has prosecuted the action nor has any right to receive a share of the damages awarded.")

109. *Id.* at 2915.

disputes between private parties.”¹¹⁰

As to the purpose of the Excessive Fines Clause, the majority in *Browning-Ferris* decided that the Clause “was intended to limit only those fines directly imposed by, and payable to, the government.”¹¹¹ In addition, the Court stated that “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.”¹¹²

The majority’s analysis in *Browning-Ferris* is suspect for several reasons. First, as Justice O’Connor’s concurring and dissenting opinion points out, the eighteenth century meaning of the word fine is not nearly as clear as the majority’s portrayal would lead one to believe.¹¹³ For example, one seventeenth century law dictionary described a fine as “sometimes an amends, pecuniary punishment, or recompense upon an offense committed against the King, and his laws, or a Lord of a Manor.”¹¹⁴ In addition, section 37 of the Massachusetts Body of Liberties, which was drafted in 1641, specifically “required that ‘fines’ payable to private litigants in civil cases be proportional.”¹¹⁵ Moreover, numerous recent articles that have thoroughly reviewed the history of the Excessive Fines Clause have concluded that the Clause is applicable to punitive damages.¹¹⁶

1. State Action Analysis

The second major component of the majority opinion in *Browning-Ferris* is, in essence, a state action analysis. The Court’s reasoning is summarized in the following passage:

We think it clear, from both the language of the Excessive Fines Clause and the nature of our constitutional framework, that the Eighth Amendment places limits on the steps a government may take against an individual The fact that punitive damages are imposed through the aegis of courts and serve to advance governmental interests is insufficient to support the step petitioners ask us to take 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*

110. *Id.* at 2916.

111. *Id.*

112. *Id.* at 2915; *see also id.* at 2920.

113. *Id.* at 2931.

114. *Id.* (quoting T. BLOUNT, LAW DICTIONARY (1670) (unpaginated version)) (emphasis added).

115. *Id.* (citing 1 B. SCHWARTZ, THE BILL OF RIGHTS: A DOCUMENTARY HISTORY, 76 (1971) and Boston, *Punitive Damages and the Eighth Amendment: Application of the Excessive Fines Clause*, 5 COOLY L. REV. 667, 714 (1988)) (emphasis added).

116. *Id.* at 2926-31 (citing and discussing recent law review articles).

*individual.*¹¹⁷

At first glance the Court's reasoning may seem cogent. Upon scrutiny, however, the majority's analysis appears to both defy logic and disingenuously ignore well-established state action precedent. First, in most states, including California, the recovery of punitive damages is authorized by statute.¹¹⁸ In the absence of such legislative authority, courts in some jurisdictions flatly prohibit awards of punitive damages.¹¹⁹ Thus, on a very basic level, the participation of the state, acting through its legislative branch, is at the heart of any private litigants' recovery of punitive damages.¹²⁰ Consequently, contrary to the majority's position in *Browning-Ferris*, when the recovery of punitive damages is authorized by statute, the government has indeed "taken a positive step to punish" certain persons,¹²¹ namely those defendants in civil actions who are found liable for punitive damages under the state's statutory standards.¹²²

Furthermore, by facilitating the enforcement of punitive damage awards imposed by juries, "civil courts" are undeniably used "to extract large payments" aimed at punishing or "disabling some individual."¹²³ Where the state has "made available to . . . individuals the full coercive power of the government," the Supreme Court has ruled that state action is present.¹²⁴ In the landmark case of *Shelley v. Kraemer*¹²⁵ the Supreme Court held that "[s]tate action . . . refers to exertions of state power in all

117. *Id.* at 2920 (footnote omitted) (emphasis added).

118. See CAL. CIV. CODE § 3294 (West Supp. 1989); see also *supra* notes 47-56 and accompanying text.

119. See, e.g., *supra* note 24 and accompanying text discussing the approach taken in Nebraska.

120. *But see* *Tulsa Professional Collection Servs. v. Pope*, 485 U.S. 478, 486 (1988) ("Private use of state remedies or procedures does not [alone] rise to the level of state action."); see also *infra* note 124.

121. In this context, corporations would qualify as persons. As Justice O'Connor correctly notes in her concurring and dissenting opinion in *Browning-Ferris*, even though corporations are "not entitled to 'purely personal guarantees[,]'" *Browning-Ferris Indus. v. Kelco Disposal, Inc.*, 109 S. Ct. 2909, 2925 (1989) (quoting *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 779 n.14 (1978)), since they are "protected by the Due Process Clause from overbearing and oppressive monetary sanctions, [they are] also protected from such penalties by the Excessive Fines Clause." *Id.* at 2926.

122. Consistent with this view, one commentator has concluded that "[p]unitive damages are punitive fines imposed by the government." Olson, *Problems With Punitive Damages*, L.A. Daily J., July 18, 1989, at 6, col. 3.

123. The majority opinion does not discuss whether, in its view, the term "individuals" includes corporations for purposes of coverage under the Eighth Amendment. However, in her concurring and dissenting opinion, Justice O'Connor concludes that the provision should be applicable to corporations. *Id.*; see *supra* note 121.

124. *Shelley v. Kraemer*, 334 U.S. 1, 19 (1948); see also *Tulsa Professional Collection Servs. v. Pope*, 485 U.S. 478, 486 (1988) ("when private parties make use of state procedures with the overt, significant assistance of state officials, state action may be found").

125. 334 U.S. 1 (1948).

forms.”¹²⁶ *Shelley* involved a state court’s enforcement of a restrictive property covenant made between private parties.¹²⁷ On these facts, the Supreme Court ruled that “but for the active intervention of the state courts, supported by the full panoply of state power, petitioners would have been free to occupy the properties in question without restraint.”¹²⁸ Likewise, without the assistance of a court’s enforcement machinery, the recovery of punitive damages by private parties simply would not be possible.

Despite the apparent applicability of the holding in *Shelley*, the majority opinion in *Browning-Ferris* neither discusses nor distinguishes *Shelley* and its progeny. Instead, the Court merely concludes, without reference to any authority, that even though punitive damages are “imposed through the aegis of courts,” there is insufficient state action to apply the Eighth Amendment.¹²⁹

Although the Supreme Court repeatedly has refused to extend its holding in *Shelley*,¹³⁰ it nevertheless has endorsed the same general rule in other cases. For example, in disposing of the contention that a state court’s application of state libel law did not constitute state action for purposes of triggering the protection of the Fourteenth Amendment, the Court in *New York Times v. Sullivan*¹³¹ made the following statement:

Although this is a civil lawsuit between private parties, the [state] courts have applied a state rule of law which petitioners claim to impose invalid restrictions on their constitutional freedoms of speech and press. It matters not that that law has been applied in a civil action and that it is common law only, though supplemented by statute. *The test is not the form in which state power has been applied but, whatever the form, whether such power has in fact been exercised.*¹³²

It is axiomatic that by sanctioning and providing the means needed to recover punitive damages, the state in effect places its imprimatur on such awards. Thus, applying the Court’s reasoning in *Sullivan* to awards of punitive damages, it is equally axiomatic that “state power . . . has in

126. *Id.* at 20.

127. *Id.* at 18-19.

128. *Id.* at 19.

129. *Browning-Ferris Indus. v. Kelco Disposal, Inc.*, 109 S. Ct. 2909, 2920 (1989).

130. See generally Burke & Reber, *State Action, Congressional Power and Creditors’ Rights: An Essay on the Fourteenth Amendment*, 46 S. CAL. L. REV. 1003, 1086-91 (1973); Henkin, *Shelley v. Kraemer: Notes for a Revised Opinion*, 110 U. PA. L. REV. 473 (1962); Silard, *A Constitutional Forecast: Demise of the ‘State Action’ Limit on the Equal Protection Guarantee*, 66 COLUM. L. REV. 855 (1966).

131. 376 U.S. 254 (1964).

132. *Id.* at 265 (citing *Ex Parte Virginia*, 100 U.S. 339, 346-47 (1879) and *American Fed’n of Labor v. Swing*, 312 U.S. 321 (1941)) (citation omitted) (emphasis added).

fact been exercised."¹³³ As Justice O'Connor recognized in her concurring and dissenting opinion in *Browning-Ferris*, "[a] governmental entity can abuse its power by allowing civil juries to impose ruinous punitive damages" ¹³⁴

Finally, even though punitive damages are paid to private individuals rather than directly to the state, their imposition is, as Justice O'Connor has noted, "a way of furthering the purposes of [a state's] criminal law."¹³⁵ Along these lines, in *Gertz v. Robert Welch, Inc.*,¹³⁶ the Court observed that punitive damages are "private fines levied by civil juries to *punish* reprehensible conduct and *deter* its future occurrence."¹³⁷ To the extent that punitive damages serve this criminal law function, they are, in effect, an extension of the state's police power and as such, should constitute sufficient state action to invoke constitutional protections.

By the same token, given the conceptual rationale for punitive damages,¹³⁸ it would seem more appropriate for such damages to be paid to the state instead of to private parties.¹³⁹ In response to this criticism, as well as to prevent successful plaintiffs from reaping windfall recoveries, some states have begun to require the payment of at least some portion of punitive awards to public funds.¹⁴⁰ Under such a system, any remaining

133. As with *Shelley*, the majority opinion in *Browning-Ferris* neither discusses nor distinguishes *Sullivan*.

134. *Browning-Ferris*, 109 S. Ct. at 2932 (O'Connor, J., concurring and dissenting).

135. *Id.* In *Colonial Pipeline Co. v. Brown*, 258 Ga. 115, 365 S.E.2d 827, 830 (1988), the Georgia Supreme Court also noted that "[p]unitive damages, although civil in nature, nonetheless serve the criminal law goal of deterrence rather than the traditional compensatory goal of civil law."

136. 418 U.S. 323 (1974).

137. *Id.* at 350 (emphasis added); see also *Browning-Ferris*, 109 S. Ct. at 2932 (O'Connor, J., concurring and dissenting) (citing prior Supreme Court cases that recognize the penal nature of punitive damages).

138. See discussion of punitive damages as fines *supra* notes 90-96 and accompanying text.

139. See *Smith v. Wade*, 461 U.S. 30, 59 (1983) (Rehnquist, J., dissenting); see also *Massey*, *supra* note 82, at 1270.

140. For example, in Colorado "[o]ne third of all [punitive] damages collected . . . [are] paid into the state general fund." COLO. REV. STAT. § 13-21-102(4) (1987). In Florida, the plaintiff receives 40% of the punitive damage award and "[i]f the cause of action was based on personal injury or wrongful death, 60 percent of the award [is paid] . . . to the Public Medical Assistance Trust Fund . . . ; otherwise, 60 percent of the award [is paid] . . . to the General Revenue Fund." FLA. STAT. ANN. § 768.73(2) (West 1988). In Illinois, judges have discretion to order payment of part of a punitive damage award to a state fund. ILL. REV. STAT. ch. 110, para. 2-1207 (1987). In Iowa, if the defendant's wrongful conduct was not specifically directed at the plaintiff, 75% of the punitive damage award is paid into a civil reparations trust fund. IOWA CODE ANN. § 668A.1(2)(b) (West 1987). In Missouri, 50% of any punitive damage award, after the deduction of attorneys fees and expenses, is deemed rendered in favor of the state and goes into the state Tort Victims' Compensation Fund. MO. ANN. STAT. § 537.675(2) (Vernon 1988). Finally, in Georgia, 75% of any punitive damage award in a product liability case is paid into the state treasury. GA. CODE ANN. § 105-2002.1(e)(2) (Harrison Supp. 1989).

doubt about the sufficiency of state action involved in awarding punitive damages is effectively eliminated.

III. Independence of Rights Guaranteed by State Constitutions

It is a well settled principle of federalism that "decisions of the [United States Supreme] Court are not, and should not be, dispositive of questions regarding rights guaranteed by counterpart provisions of state law."¹⁴¹ Instead, state supreme courts are the ultimate arbiters of state law.¹⁴² Even when state and federal constitutional provisions are similarly or identically worded, states are free to construe the state provision differently.¹⁴³ The only restraint on this independence is that states may not infringe on any rights guaranteed under the Federal Constitution.¹⁴⁴ Thus, states retain the power to grant their citizens greater rights than those protected by the Federal Constitution.¹⁴⁵ In addition, as long as state courts explicitly base their rulings on "adequate and independent" state constitutional grounds, the United States Supreme Court lacks jurisdiction for review.¹⁴⁶

California has long been a leader in the development of the "adequate and independent state grounds" doctrine.¹⁴⁷ For example, in 1972,

141. Brennan, *supra* note 57, at 502. The California Supreme Court has repeatedly reiterated this principle. *See, e.g.,* *People v. Disbrow*, 16 Cal 3d 101, 114-15, 545 P.2d 272, 280-81, 127 Cal. Rptr. 360, 368-69 (1976).

142. *People v. Brisendine*, 13 Cal. 3d 528, 548, 531 P.2d 1099, 1111-12, 119 Cal. Rptr. 315, 327-28 (1975).

143. Brennan, *supra* note 57, at 495, 500; *Jankovich v. Indiana Toll Rd. Comm'n*, 379 U.S. 487, 491-492 (1965); *Brisendine*, 13 Cal. 3d at 548 n.16, 531 P.2d at 1112 n.16, 119 Cal. Rptr. at 328 n.16 (listing California cases applying this rule).

144. *Brisendine*, 13 Cal. 3d at 548, 552, 531 P.2d at 1111-12, 1114-15, 119 Cal. Rptr. at 327-28, 330-31.

145. *Cooper v. California*, 386 U.S. 58, 62 (1967); *Pruneyard Shopping Center v. Robins*, 447 U.S. 74, 81 (1980); *Oregon v. Hass*, 420 U.S. 714, 719 (1975); Brennan, *supra* note 57, at 491, 495. The Hawaii Supreme Court has observed that while this increase in independent interpretation "results in a divergence of meaning between words which are the same in both the federal and state constitutions, the system of federalism envisaged by the United States Constitution tolerates such divergence where the result is *greater* protection of individual rights under state law than under federal law." *State v. Kaluna*, 55 Haw. 361, 369 n.6, 520 P.2d 51, 58 n.6 (1974) (emphasis in original).

146. *Fox Film Corp. v. Muller*, 296 U.S. 207, 210 (1935); *Jankovich v. Indiana Toll Rd. Comm'n*, 379 U.S. 487, 491-492 (1965); Brennan, *supra* note 57, at 501; *see, e.g.,* *Colonial Pipeline Co. v. Brown*, 109 S. Ct. 36 (1988) (appeal of Georgia Supreme Court ruling reversing five million dollar punitive damage award as violative of the state's excessive fines clause, dismissed for want of jurisdiction). *But see* *Michigan v. Long*, 463 U.S. 1032, 1041-42 (1983) (if a state court does not specify whether it relied on adequate and independent state grounds and it "fairly appears" that the state court based its decision primarily on federal law, the Court assumes that there are no adequate and independent state grounds).

147. Goldberg, *Stanley Mosk: A Federalist for the 1980's*, 12 HASTINGS CONST. L.Q. 395, 401-08 (1985) ("The Supreme Court of California now leads the country in the progressive development of state constitutional law."). For a more complete discussion of California's use

in anticipation¹⁴⁸ of a contrary ruling by the United States Supreme Court,¹⁴⁹ the California Supreme Court, in *People v. Anderson*,¹⁵⁰ invalidated the death penalty based on the state constitution's prohibition against cruel *or* unusual punishment.¹⁵¹ In contrast to the California provision, the Eighth Amendment prohibits "cruel *and* unusual punishment."¹⁵² Thus, in reaching its conclusion, the *Anderson* court stressed differences in the language of the two provisions¹⁵³ as well as the unique history of the California Declaration of Rights.¹⁵⁴

of the adequate and independent state grounds doctrine, see Note, *Rediscovering The California Declaration of Rights*, 26 HASTINGS L. J. 481 (1974) [hereinafter *Rediscovering*]; see also *First Things First*, *supra* note 57, at 388 n.35 (listing recent California decisions relying on state rather than federal constitutional provisions).

148. The California Supreme Court also has relied on state constitutional grounds to preserve individual rights for California citizens on several other occasions when it "anticipated" contrary rulings by the United States Supreme Court. See, e.g., *Burrows v. Superior Court*, 13 Cal. 3d 238, 529 P.2d 590, 118 Cal. Rptr. 166 (1974) (California constitutional right of privacy held to prohibit disclosure of personal bank records to police without the depositor's knowledge or consent). As predicted, the United States Supreme Court subsequently decided that federal law was contrary to *Burrows*. Brennan, *supra* note 57, at 501 (citing *United States v. Miller*, 425 U.S. 435 (1976)).

149. The prediction of the California Supreme Court in this instance was incorrect since the United States Supreme Court later concluded that without additional guidelines, imposition of the death penalty also violated the Eighth Amendment. See *Furman v. Georgia*, 408 U.S. 238 (1972).

150. 6 Cal. 3d 628, 493 P.2d 880, 100 Cal. Rptr. 152, *cert. denied*, 406 U.S. 958 (1972).

151. CAL. CONST. art. I, § 17 (amended 1974) (emphasis added). See complete text of this section *infra* note 175. In November 1972 California voters approved a constitutional amendment overruling *Anderson* and reinstating the death penalty. See CAL. CONST. art. I, § 27.

152. U.S. CONST. amend. VIII (emphasis added).

153. During the period in which the California Constitution was being revised by the California Constitution Revision Commission (CCRC), see *infra* notes 197-202, there was a strong push by several members of the CCRC to bring all of the language of the California Declaration of Rights into identical conformity with the Federal Bill of Rights. Telephone Interview with Larry Sipes, former Staff Director of the California Constitution Revision Commission (Nov. 15, 1988) [hereinafter *Sipes Interview*]. The debate on this suggestion ended up centering on use of the language cruel *or* unusual punishment versus cruel *and* unusual punishment. *Id.* Eventually, the Chairman of the CCRC Drafting Committee, Frank Newman, and the Chief Staff Counsel, Larry Sipes, persuaded a majority of the CCRC's members to maintain the alternate language. *Id.* Ironically, it is this distinction that the California Supreme Court relied on in part to strike down the death penalty in *People v. Anderson*, 6 Cal. 3d at 639, 493 P.2d at 887, 100 Cal. Rptr. at 159. Thus, although the *Anderson* court ultimately concluded that the death penalty was both cruel and unusual, based on the court's interpretation of the California provision, a finding of either would have been sufficient to support the decision. *Rediscovering*, *supra* note 147, at 481 n.4.

154. See *Rediscovering*, *supra* note 147, at 481-82; see also *People v. Brisendine*, 13 Cal. 3d 528, 531 P.2d 1099, 119 Cal. Rptr. 315 (1975):

It is a fiction too long accepted that provisions in state constitutions textually identical to the [Federal] Bill of Rights were intended to mirror their federal counterpart. The lesson of history is otherwise: the [Federal] Bill of Rights was based upon the corresponding provisions of the first state constitutions rather than the reverse.

Id. at 550, 531 P.2d at 113, 119 Cal. Rptr. at 329.

Yet, even when no meaningful distinction can be made based on textual differences in the state and federal provisions, California has not hesitated to adopt independent interpretations of its constitutional provisions.¹⁵⁵ For example, although the state and federal constitutional prohibitions against unreasonable search and seizure are nearly identical,¹⁵⁶ in 1975 the California Supreme Court, in *People v. Brisendine*,¹⁵⁷ deviated from fourth amendment precedent¹⁵⁸ and ruled that the California provision¹⁵⁹ prevents police from conducting open-ended searches beyond the scope of their original search warrant.¹⁶⁰

In addition, in the area of free speech, the California Supreme

155. See, e.g., *Curry v. Superior Court*, 2 Cal. 3d 707, 716, 470 P.2d 345, 350-51, 87 Cal. Rptr. 361, 366-67 (1970) (stricter state standard for double jeopardy affirmed despite extreme similarity between state and federal constitutional provisions).

156. The Fourth Amendment provides that "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . ." U.S. CONST. amend. IV (emphasis added). Article I, § 13 of the California Constitution provides "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, may not be violated . . ." (emphasis added). The California Supreme Court did not base its decision in this instance on differences in meaning between the phrases "shall not" and "may not." However, according to the members of the CCRC who insisted on maintaining differences in the wording of state and federal provisions, "may not" is broader than "shall not." Transcript of General Session of the California Constitution Revision Commission, Oct. 8, 1970, at 42-46 [hereinafter *Final Meeting Transcript*]. The Chairman of the CCRC, Bruce Sumner, and the Chairman of the CCRC Drafting Committee, Frank Newman, believed that "may not" represented a direction to the court not to do something; whereas "shall not" deprived the court of any power or jurisdiction to even consider the question. *Id.* at 45-46.

157. *People v. Brisendine*, 13 Cal. 3d 528, 531 P.2d 1099, 119 Cal. Rptr. 315 (1975). In *Brisendine*, a police officer inspected an opaque bottle and two envelopes that he came across during a lawful weapons search. *Id.* at 543, 531 P.2d at 1108, 119 Cal. Rptr. at 324. The court held that, under the state constitution, "absent a showing of reasonable suspicion of the presence of an atypical weapon," lawful weapons searches by police could not be extended to cover the examination of containers that could not possibly conceal an ordinary weapon. *Id.* at 547, 531 P.2d at 1111, 119 Cal. Rptr. at 327.

158. See *United States v. Robinson*, 414 U.S. 218 (1973).

159. *Brisendine*, 13 Cal. 3d at 548-49, 531 P.2d at 1111-12, 119 Cal. Rptr. at 327-28. In basing its decision on the state constitution, the court reexamined the basic principles of federalism and defiantly asserted that "[t]his court has always assumed the independent vitality of our state Constitution In interpreting . . . [it], we of course retain the 'power to impose higher standards on searches and seizures than required by the Federal Constitution.'" *Id.* at 548-49, 531 P.2d at 1112, 119 Cal. Rptr. at 328.

160. The California Supreme Court's holding in *Brisendine* and other criminal procedure cases protecting rights based on the California Constitution may have been abrogated by the passage of Proposition 8, "The Victims Bill of Rights," in June, 1982. Goldberg, *supra* note 146, at 404 n.65. *But see* *People v. Castro*, 38 Cal. 3d 301, 696 P.2d. 111, 211 Cal. Rptr. 719 (1985). Proposition 8 was incorporated into the California Constitution as article I, § 28. Despite the passage of Proposition 8, the independent state grounds doctrine relied on in *Brisendine* has survived. Goldberg, *supra* note 147, at 404 n.65; see, e.g., *Ramona R. v. Superior Court*, 37 Cal. 3d 802, 693 P.2d 789, 210 Cal. Rptr. 204 (1985) (Proposition 8 does not proscribe state constitution's protection against self-incrimination).

Court, in *Robins v. Pruneyard Shopping Center*,¹⁶¹ interpreted the state constitution as protecting the reasonable exercise of free speech rights in privately owned shopping centers. This ruling also contradicted United States Supreme Court decisions applying the First Amendment.¹⁶² Nevertheless, upon review, the United States Supreme Court strongly reaffirmed that the California Declaration of Rights, as construed by the California Supreme Court, could provide "individual liberties more expansive than those conferred by the Federal Constitution."¹⁶³

To further memorialize the views expressed in the above described cases, the California Declaration of Rights was amended in 1974 to codify the common-law protection of independent state rights. The amendment added a clause to article I, section 23 of the 1879 Constitution¹⁶⁴ specifying that rights guaranteed by the California Constitution are not dependent on those guaranteed by the United States Constitution.¹⁶⁵ This provision was added by the state legislature during its review of proposed revisions to the California Constitution¹⁶⁶ and was subsequently approved by California voters.¹⁶⁷ The inclusion of this provision in the California Declaration of Rights reaffirms and solidifies the traditional view that "the California Constitution is, and always has been, a document of independent force."¹⁶⁸

IV. The California Excessive Fines Clause Should Apply to Punitive Damage Awards In Civil Cases

It remains uncertain how the United States Supreme Court will decide future due process and vagueness challenges to punitive damage awards. In addition, even if the Court ultimately decides that punitive

161. 23 Cal. 3d 899, 592 P.2d 341, 153 Cal. Rptr. 854 (1979), *aff'd*, 447 U.S. 74 (1980).

162. *See Lloyd Corp. v. Tanner*, 407 U.S. 551 (1972).

163. *Pruneyard Shopping Center v. Robins*, 447 U.S. 74, 81 (1980).

164. Former § 23 provided, "[t]his enumeration of rights shall not be construed to impair or deny others retained by the people." The CCRC recommended that this provision, which it renumbered as § 25, should be retained without alteration. California Constitution Revision Commission, *Background Study 3*, Oct. 1969, at 57.

165. As revised and renumbered by the legislature, article I, § 24 provides, "[r]ights guaranteed by this Constitution are not dependent on those guaranteed by the United States Constitution. This declaration of rights may not be construed to impair or deny others retained by the people." CAL. CONST. art. I, § 24.

166. After the CCRC completed its proposed revision of the state constitution in 1971, it presented its recommendations to the legislature for review. *See infra* notes 224-225 and accompanying text.

167. J. GOULD, REPORT ON MATERIALS OF CONSTITUTION REVISION COMMISSION RELATING TO PROVISIONS IN CALIFORNIA CONSTITUTION RECOMMENDED OR ENDORSED BY COMMISSION, Dec. 1974, at 74-77.

168. *People v. Brisendine*, 13 Cal. 3d 528, 549-50, 531 P.2d 1099, 1112-13, 119 Cal. Rptr. 315, 328-29 (1975); *cf. Massey, Antifederalism and The Ninth Amendment*, 64 CHI.-[]KENT L. REV. 987 (1988).

damages violate some constitutional theory, it is unclear what constitutional limits the Court would impose. Fortunately, irrespective of how these issues are decided, and in spite of the Court's decision in *Browning-Ferris* interpreting the Eighth Amendment,¹⁶⁹ as discussed above,¹⁷⁰ states have independent power to control punitive damages based on state constitutional grounds. In fact, in *Browning-Ferris* the Supreme Court specifically stated that "[a]lthough petitioners and their *amici* would like us to craft some common-law standard of excessiveness that relies on notions of proportionality between punitive and compensatory damages, . . . these are matters of state, and not federal, common law."¹⁷¹ Similarly, a year before rendering its decision in *Browning-Ferris*, the Supreme Court stated in *Bankers Life and Casualty Co. v. Crenshaw*¹⁷² that it might be more appropriate for states to "resolve the issue [of limits on punitive damages] by relying on the state constitution or on some other adequate and independent nonfederal ground."¹⁷³ To this end, several state supreme courts have held that state constitutional excessive fines clauses apply to civil cases, and to punitive damages in particular.¹⁷⁴

This Note strongly advocates the state constitutional approach and argues that California should place limits on punitive damages pursuant to the excessive fines clause of the California Constitution.¹⁷⁵ As noted in Part I,¹⁷⁶ no California case has ever dealt with such an application of the California excessive fines clause.¹⁷⁷ However, the Clause has been invoked to limit statutory civil penalties¹⁷⁸ and fines for civil contempt.¹⁷⁹ In addition, the history of the California provision indicates that its application was not intended to be limited to criminal cases.¹⁸⁰ Thus, in keeping with Justice Brandeis' belief that states should serve as

169. See *supra* notes 97-140 and accompanying text.

170. See *supra* notes 141-146 and accompanying text.

171. *Browning-Ferris Indus. v. Kelco Disposal, Inc.*, 109 S. Ct. 2909, 2922 (emphasis added).

172. 108 S. Ct. 1645 (1988).

173. *Id.* at 1651.

174. See *infra* notes 271-298 and accompanying text.

175. Article I, § 17 of the California Constitution, as amended in 1974, provides: "Cruel or unusual punishment may not be inflicted or excessive fines imposed." CAL. CONST. art. I, § 17.

176. See *supra* note 57 and accompanying text.

177. The California Court of Appeal in *Downey* did consider application of the Eighth Amendment to punitive damages. *Downey Sav. & Loan Ass'n v. Ohio Casualty Ins. Co.*, 189 Cal. App. 3d 1072, 1100-01, 234 Cal. Rptr. 835, 851 (1987), *cert. denied*, 108 S. Ct. 2023 (1988); see also *George v. International Soc'y For Krishna Consciousness*, 213 Cal. App. 3d 729, 798, 262 Cal. Rptr. 217, 257 (1989).

178. See *infra* notes 254-262 and accompanying text.

179. See *infra* notes 249-253 and accompanying text.

180. See *infra* notes 182-230 and accompanying text.

the laboratories of the nation,¹⁸¹ California should experiment with state constitutional limits on punitive damage awards.

A. Historical Development of the California Excessive Fines Clause

The first California Constitution, drafted in 1849, contained a Declaration of Rights that consisted of provisions copied directly from sections in the New York and Iowa state constitutions.¹⁸² Among the provisions incorporated was a prohibition against excessive fines.¹⁸³ This provision was taken verbatim from the New York Constitution of 1846.¹⁸⁴ The representatives to the 1849 constitutional convention adopted this provision without debate.¹⁸⁵ As a result, their views on the specific application of the provision cannot be ascertained directly.

However, since the precise language of the original California clause was taken from the New York Constitution, the history of its adoption in New York provides potential insight to the intent of the California framers.¹⁸⁶ In addition, several representatives from the New York constitutional convention of 1846 participated in the debates at the California constitutional convention of 1849.¹⁸⁷ Unfortunately, the framers of the New York Constitution also did not engage in any debate over the adop-

181. There must be power in the States and the Nation to remould, through experimentation, our economic practices and institutions to meet changing social and economic needs. . . . It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.

New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932).

182. J. BROWNE, REPORT OF THE DEBATES IN THE CONVENTION OF CALIFORNIA, ON THE FORMATION OF THE STATE CONSTITUTION, IN SEPTEMBER AND OCTOBER 1849, 31 (1850) [hereinafter 1849 DEBATES].

183. The provision, introduced as § 5, stated, “[e]xcessive bail shall not be required, nor excessive fines imposed, nor shall cruel and unusual punishments be inflicted, nor shall witnesses be unreasonably detained.” *Id.* at 30.

184. *Id.* at 31.

185. The discussion in the report of the debates is terse: “The question being on the fifth section of the report, Mr. McCarver moved to strike it out. He wanted no legislative enactments in a bill of rights. The motion to strike out was decided in the negative, and the section was adopted without debate.” *Id.* at 41. Apparently, for expediency, most of the sections in the Declaration of Rights were adopted with little or no debate. *Rediscovering*, *supra* note 147, at 491; *see also* 1849 DEBATES, *supra* note 182, at 30-48, 288-94, 298.

186. During the debates at the California convention concerning provisions borrowed from the New York Constitution, repeated references were made to New York’s rationale in adopting the original measure. *See* 1849 DEBATES, *supra* note 182, at 39, 299 (the history of New York furnishes precedent for the guidance of California). *But see Rediscovering*, *supra* note 147, at 490 (“there is no evidence that the framers relied on or were exposed to written histories of the proceedings of [the New York and Iowa] conventions.”).

187. *See* 1849 DEBATES, *supra* note 182, at 39; *see also* Grodin, *Some Reflections on State Constitutions*, 15 HASTINGS CONST. L.Q. 391, 394 (1988) (citing a discussion during the debates in which “Mr. Sherwood, from New York, rose in reply.”)

tion of their state excessive fines provision.¹⁸⁸ Consequently, this resource is of no help in deciphering the intent of the framers of the original California Constitution.

Beginning in 1878, another constitutional convention was held in California in order to correct several perceived "deficiencies of the old constitution."¹⁸⁹ During this convention, the provisions in the Declaration of Rights were once again not discussed at length.¹⁹⁰ However, the section containing the excessive fines clause was renumbered and became section 6.¹⁹¹ In addition, several clauses were added to the section. The additions included a clause defining when bail was appropriate and a prohibition against confining witnesses in any room where criminals are actually imprisoned.¹⁹² The language of the excessive fines clause itself, however, was not revised.¹⁹³ Consequently, there was once again no debate during the convention that might have revealed the intent of the framers with respect to the application of this clause.¹⁹⁴

In the 111 years since the 1879 Constitution was ratified,¹⁹⁵ the California Constitution has been amended numerous times through ballot initiatives.¹⁹⁶ Among these measures, in November 1962, California voters passed Proposition 7, which authorized the legislature to submit proposals to the voters for either a partial or total revision of the California Constitution.¹⁹⁷ The impetus for this initiative was the belief that "the

188. The relevant New York provision, as originally introduced, read as follows: "5. Excessive bail shall not be required, nor excessive fines imposed, nor cruel or unusual punishment inflicted." S. CROSWELL & R. SUTTON, *DEBATES AND PROCEEDINGS IN THE NEW YORK STATE CONVENTION FOR THE REVISION OF THE CONSTITUTION*, 153, 429 (1846). The only debate over this provision was whether or not to add a clause prohibiting witnesses from being unreasonably detained. *Id.* at 815. This amendment was adopted. *Id.*

189. *Rediscovering*, *supra* note 147, at 492 (footnotes omitted).

190. *Id.* ("While the Declaration of Rights was changed in certain respects, it did not command the attention of most of the delegates.")

191. E. WILLIS & P. STOCKTON, *DEBATES AND PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION OF THE STATE OF CALIFORNIA, CONVENEED AT THE CITY OF SACRAMENTO, SATURDAY, SEPTEMBER 28, 1878*, 243-47, 250-251, 1172-73, 1425, 1491 (1880) [hereinafter 1879 DEBATES].

192. As amended, the provision containing the excessive fines clause read as follows:
SEC. 6 All persons shall be bailable by sufficient sureties, unless for capital offenses when the proof is evident or the presumption great. Excessive bail shall not be required, nor excessive fines imposed; nor cruel or unusual punishments be inflicted. Witnesses shall not be unreasonably detained, nor confined in any room where criminals are actually imprisoned.

Id. at 1491.

193. *Id.*

194. The only issue involving § 6 that was debated at length during the convention related to various proposed amendments that would have prevented the prohibition of corporal punishment. *Id.* at 243-47. These amendments were all eventually defeated. *Id.* at 1172.

195. The California Constitution of 1879 was approved by the voters in May 1879. *Rediscovering*, *supra* note 147, at 485 n.21.

196. *Id.* at 487.

197. J. GOULD, *supra* note 167, at 1.

California Constitution had grown 'to be bad in form, inconsistent in many respects, filled with unnecessary detail, and replete with matter which might more properly be contained in the statutory law of the state.'"¹⁹⁸ To remedy this situation, the state legislature passed a resolution empowering the Joint Committee on Legislative Organization (which later became the Joint Rules Committee) to appoint members to a constitutional revision commission.¹⁹⁹ The California Constitution Revision Commission (CCRC) was subsequently formed and began meeting in February 1964.²⁰⁰

The CCRC divided its work into three phases.²⁰¹ Phase III included a complete revision of article I, the California Declaration of Rights.²⁰² During this revision, former section 6 of the 1879 Constitution was divided into three separate provisions.²⁰³ The excessive fines provision was renumbered as section 17 and combined with only one other provision, the cruel or unusual punishment clause.²⁰⁴ The decision to reshape former section 6 was based on research contained in a Background Study done on article I and recommendations in a report of the Article I Committee.²⁰⁵

The purpose of the Background Study was to analyze the article completely and present alternative methods of treating each provision.²⁰⁶ Regrettably, the Background Study contains only a short, one paragraph discussion of the excessive fines clause.²⁰⁷ However, the Background Study does note that "[t]he prohibition against excessive fines has been construed to prohibit imprisonment for an unlimited period for nonpayment of a fine for civil contempt."²⁰⁸ Despite the quasi-criminal nature of civil contempt citations, this finding does lend some support to the proposition that the California excessive fines clause traditionally has been applied in at least nominally civil contexts.²⁰⁹ Although the Background Study does not draw any conclusions about the application of the

198. *Id.* (citations omitted).

199. *Id.*

200. *Id.* at 2.

201. *Id.*

202. *Id.* at 2-3.

203. Revised §§ 10, 12 and 17 were created from former § 6. *Id.* at 77, 81-82.

204. *Id.* at 81. As revised, section 17 provides simply that "[c]ruel or unusual punishment may not be inflicted or excessive fines imposed." *Id.*

205. *Id.* at 4-5.

206. *Id.* In describing the history of former § 6, the Background Study incorrectly states that "the section was enacted in the Constitution of 1849 and *has not been modified.*" CALIFORNIA CONSTITUTION REVISION COMMISSION, ARTICLE I DECLARATION OF RIGHTS BACKGROUND STUDY 4, Dec. 1969, at 5 [hereinafter BACKGROUND STUDY] (emphasis added).

207. *Id.* at 6.

208. *Id.* In support of this assertion, the Background Study cites *Ex Parte Karlson*, 160 Cal. 378, 117 P. 447 (1911). See discussion *infra* notes 249-253 and accompanying text.

209. See *infra* notes 249-253 and accompanying text.

excessive fines clause, it is completely devoid of any indication that the clause was intended to apply only in criminal cases.²¹⁰

Upon its completion, the Background Study was reviewed by the Article I Committee, which in turn debated each provision and made substantive recommendations to the whole CCRC.²¹¹ Unfortunately, the Article I Committee Report (Committee Report) also does not discuss application of the excessive fines provision.²¹² In fact, with respect to the excessive fines and bail provisions of former section 6, the Committee Report states only that it "recommends that these provisions be retained without substantive change."²¹³ According to the report, the main reason for maintaining the provisions of former section 6 was to insure that, as a minimum, the basic protections of the Eighth Amendment applied to California citizens.²¹⁴

The Committee Report covering former section 6 discusses other sections as well and is subtitled "criminal procedure."²¹⁵ However, this grouping was expressly created merely to facilitate convenient analysis by the Article I Committee and was not intended to convey any broader

210. See BACKGROUND STUDY, *supra* note 206, at 5-8.

211. J. GOULD, *supra* note 167, at 5. The language proposed by the Article I Committee was as follows:

All persons shall be bailable by sufficient sureties, unless for capital offenses when the proof is evident or the presumption great. Excessive bail shall not be required, nor excessive fines imposed; nor shall cruel or unusual punishments be inflicted. Witnesses shall not be unreasonably detained. . . . All persons may be released at the discretion of the court on their own recognizance unless for capital offenses when the proof is evident or the presumption great.

CALIFORNIA CONSTITUTION REVISION COMMISSION, MINUTES OF ARTICLE I COMMITTEE MEETING, Dec. 12, 1969, at 1-2. At this same meeting, a motion was made to add the words "or imprisonment" after the phrase "excessive fines." *Id.* at 2. This motion failed. *Id.*

212. CALIFORNIA CONSTITUTION REVISION COMMISSION, ARTICLE I (DECLARATION OF RIGHTS): REPORT IV—CRIMINAL PROCEDURE; PROPOSED REVISION OF SECTIONS 5, 6, 13, 19 AND 20, Feb. 1970, at 3-5 [hereinafter COMMITTEE REPORT].

213. *Id.* at 4. According to Larry Sipes, former Staff Director of the CCRC, "in our reports, where we were only making a change in organization or an attempt at improved style or reduced length, we usually expressed the Commission's intention not to change the substance of the provision, which had the effect of leaving any prior judicial precedent in tact." Sipes Interview, *supra* note 153; see also CALIFORNIA CONSTITUTION REVISION COMMISSION, PROPOSED REVISION OF THE CALIFORNIA CONSTITUTION, PART 5 (Articles I, XX, and XXII), Jan. 1971, at 19 [hereinafter REPORT TO LEGISLATURE] (expressing same intention in commentary following proposed revisions outlined in CCRC's report to California legislature).

214. The Committee Report states that:

[The Eighth] Amendment serves as a prohibition on federal action and originally did not apply to the states. However, most of the Eighth Amendment has been judicially declared to apply to the states via the due process clause of the Fourteenth Amendment. The extent of this judicial incorporation is unclear and the law is presently in a formative stage. This fact militates strongly in favor of retaining the basic guarantees in Section 6 as part of California law.

COMMITTEE REPORT, *supra* note 212, at 5.

215. COMMITTEE REPORT, *supra* note 212, cover page. The other sections addressed in the Committee Report are former § 5, 13, 19 and 20. *Id.*

intention to limit the application of the excessive fines clause to criminal cases.²¹⁶ Such a limitation would be entirely inconsistent with the CCRC's overall approach to its mission. To the contrary, with respect to provisions in the Declaration of Rights, the CCRC made every effort to "preserve options" rather than restrict application.²¹⁷ Moreover, when the CCRC did intend to limit the application of a specific provision, it expressed its intention explicitly.²¹⁸

After the whole CCRC conducted further study and debate on the Article I Committee's recommendations, it approved the revised article in substance and forwarded it to the Drafting Committee.²¹⁹ The Drafting Committee was then responsible for rephrasing the article in more modern, concise language and organizing it in a more logical framework.²²⁰ In this regard, the Drafting Committee divided former section 6 into two separate sections.²²¹ During this reorganization, however, the Drafting Committee did not add any language to the excessive fines clause specifying that its application was to be limited to criminal cases.²²²

After the Drafting Committee's formulation was approved by the

216. Sipes Interview, *supra* note 153; see also COMMITTEE REPORT, *supra* note 212, at i ("For purposes of analysis this Article was divided by the Article I Committee into four topics—Eminent Domain, Government and Policies, Civil Rights and Criminal Procedure.") (emphasis added).

217. "Especially in the Article I provisions, every effort was made to preserve options rather than foreclose them." Sipes Interview, *supra* note 153.

218. Cf. CAL. CONST. art. I, § 15 ("The defendant in a *criminal* cause has the right to a speedy public trial . . .") (emphasis added); see also CAL. CONST. art. I, § 16.

219. J. GOULD, *supra* note 167, at 5. The text of the Committee's proposal was as follows:

All persons shall be bailable by sufficient sureties, unless for capital offenses when the proof is evident or the presumption great. All persons may be released at the discretion of the court on their own recognizance . . . Excessive bail shall not be required, nor excessive fines imposed; nor shall cruel or unusual punishments be inflicted. Witnesses shall not be unreasonably detained.

CALIFORNIA CONSTITUTION REVISION COMMISSION, MINUTES OF COMMISSION MEETING, Mar. 19, 1970, at 13. During this meeting, a proposal was again introduced to add the phrase "and imprisonment" after the word "fines." *Id.* This motion was once again defeated. *Id.*

220. J. GOULD, *supra* note 167, at 5.

221. CALIFORNIA CONSTITUTION REVISION COMMISSION, REPORT OF THE DRAFTING COMMITTEE ON ARTICLE I, SECTION 6, Nov. 1970 [hereinafter DRAFTING COMMITTEE REPORT]. The text of the Drafting Committee's recommendation was as follows:

Sec. 6. A person shall be released on bail by sufficient sureties, except for capital crimes when the facts are evident or the presumption great. Excessive bail may not be required. A person may be released on his own recognizance in the court's discretion.

Sec. 7. Cruel and unusual punishment may not be inflicted or excessive fines imposed.

Witnesses may not be unreasonably detained.

Id.

222. *Id.*

entire CCRC,²²³ the complete package of proposed constitutional revisions was forwarded to the Joint Rules Committee (JRC) of the California legislature.²²⁴ The JRC reviewed each of the CCRC's proposals and, in some instances, made minor alterations.²²⁵ Significantly, the legislature did not add any explicit language restricting the application of the excessive fines clause.²²⁶ However, the legislature did add just this sort of restrictive language to the new section prohibiting unreasonable detention.²²⁷ This provision had previously been part of former section 6.²²⁸

After the legislature completed its review of the CCRC's proposals, the revised constitutional provisions were placed on the ballot for voter approval.²²⁹ In November 1974 California voters passed Proposition 7, which amended article I of the state constitution.²³⁰ Based on all available information, as well as the omission of any restrictive language in revised article I, section 17, it is reasonable to conclude that neither the CCRC nor the California Legislature intended to preclude application of the excessive fines clause to civil cases.

223. The language agreed upon by the whole CCRC at its final meeting on October 8, 1970 was as follows:

Sec. 6. Cruel or unusual punishment may not be inflicted or excessive fines imposed.

A person may be released on bail or on his own recognizance, in the court's discretion. A person shall be released on bail by sufficient sureties, except for capital crimes when the facts are evident or the presumption great. Excessive bail may not be required.

Witnesses may not be unreasonably detained.

Final Meeting Transcript, supra note 156, at 40-41. Although no changes to the Drafting Committee's proposal were made at this meeting, for some unexplained reason, the language contained in the DRAFTING COMMITTEE REPORT, dated November 1970, *see supra* note 221, does not match the language agreed upon by the whole CCRC at this meeting.

224. J. GOULD, *supra* note 167, at 2. The language of the proposed revision of former section 6 contained in the CCRC's Report to the Legislature, matched the Drafting Committee's November 1970 Report, *see supra* note 223, rather than the language agreed upon by the whole CCRC at its final meeting on October 8, 1970. REPORT TO LEGISLATURE, *supra* note 213, at 19. Most notably, the language in the Drafting Committee Report prohibited "cruel and unusual punishment" rather than "cruel or unusual punishment." DRAFTING COMMITTEE REPORT, *supra* note 221. The text eventually adopted by the legislature corrected this inconsistency. *See* CAL. CONST. art. I, § 17, *supra* note 175; *see also* CAL. CONST. art. I, §§ 10 and 12 (amended 1974).

225. J. GOULD, *supra* note 167, at 2-3.

226. *See* CAL. CONST. art. I, § 17, *supra* note 175.

227. As amended, Article I, § 10 provides that "[w]itnesses may not be unreasonably detained. A person may not be imprisoned in a *civil* action for debt or tort, or in peacetime for a militia fine." CAL. CONST. art. I, § 10 (emphasis added).

228. *See supra* note 192.

229. J. GOULD, *supra* note 167, at 3. The voter information pamphlet does not mention any specifics as to the intended application of the revised provisions of Article I. BALLOT PAMPHLET, GENERAL ELECTION (Nov. 5, 1974) at 24-27.

230. J. GOULD, *supra* note 167, at 3.

1. State Action Requirement

Another unsettled issue regarding the scope of the California excessive fines clause is whether its application is limited to cases involving state action. As discussed above,²³¹ the historical materials that trace the development of the provision do not reveal the explicit intent of the framers' as regards application of the clause. On its face, the provision does not contain any state action restriction.²³² In contrast, other provisions in the California Declaration of Rights expressly protect only against state action. For example, the text of article I, section 25, the so-called "Right to Fish," provides that "*no law shall ever be passed making it a crime for the people to enter upon the public lands within this State for the purpose of fishing . . .*"²³³ Since article IV, section 1 of the California Constitution vests the state legislature with exclusive legislative power, the restriction contained in the "Right to Fish" provision can only apply to action by the state.²³⁴

By the same token, some provisions in the California Constitution are manifestly inapplicable to the state. The usury provisions set forth in article XV, section 1 fit within this category. These provisions mandate the interest rates that lenders in California are permitted to charge. Since all commercial lending in the state is done by private parties, article XV, section 1 is, by virtue of its subject matter, exclusively applicable to cases that do not involve state action.

Similarly, California courts have decided that some provisions in the state Declaration of Rights do not require state action.²³⁵ For example, in *Robins v. Pruneyard Shopping Center*,²³⁶ the California Supreme Court held that the state constitution's free speech provision²³⁷ prohibits privately owned shopping centers from restricting free speech activities. California courts have also interpreted the right to privacy in the state constitution²³⁸ as binding on private parties.²³⁹

231. See *supra* notes 182-230 and accompanying text.

232. See text of Article I, § 17, *supra* note 175.

233. CAL. CONST. art. I, § 25 (emphasis added).

234. See also, e.g., CAL. CONST. art. XX, § 4 ("The Legislature shall not pass any laws permitting the leasing or alienation of any franchise . . ."); CAL. CONST. art. XVI, § 1 ("The legislature shall not, in any manner create any debt . . . which shall . . . exceed the sum of three hundred thousand dollars (\$300,000) . . .").

235. Courts in other states have adopted the view that state constitutions only limit the power of state governments. See, e.g., *Western Pa. Socialist Workers 1932 Campaign v. Conn. Gen. Life Ins. Co.*, 512 Pa. 23, 515 A.2d 1331 (1986).

236. 23 Cal. 3d 899, 910, 592 P.2d 341, 347, 153 Cal. Rptr. 854, 860 (1979), *aff'd*. 447 U.S. 74 (1980); see also *supra* notes 161-163 and accompanying text.

237. Article I, § 2 of the California Constitution provides that "[e]very person may freely speak, write and publish his or her sentiments on all subjects, being responsible for the abuse of this right."

238. Article I, § 1 of the California Constitution provides, in part, that "[a]ll people are by nature free and independent and have inalienable rights. Among these are . . . privacy."

In other instances, the California Supreme Court has decided that even when a particular provision of the state constitution requires state action, the necessary level of state involvement may differ substantially from that required under counterpart provisions in the Federal Constitution. For example, in *Gay Law Students Association v. Pacific Telephone & Telegraph Co.*,²⁴⁰ the court held that, despite the absence of any explicit restriction in the text of the state constitution's equal protection clause,²⁴¹ application of the provision was limited to state action.²⁴² The court nevertheless went on to hold that the requisite level of state action was not the same as under the Fourteenth Amendment.²⁴³ In this regard, the court stated that "in interpreting the scope of the due process clause under the state Constitution, we are not bound by federal decisions analyzing the state action requirement under the Fifth or Fourteenth Amendments" ²⁴⁴ Ultimately, the court in *Gay Law Students* ruled that the California equal protection provision "bars a public utility from engaging in arbitrary employment discrimination."²⁴⁵

The California Supreme Court has never decided whether the state excessive fines clause requires state action. Very recently, however, in *Molko v. Holy Spirit Association For The Unification of World Christianity*,²⁴⁶ the court stated that "judicial sanctioning of tort recovery constitutes state action sufficient to invoke the same constitutional protections applicable to statutes and other legislative actions" Thus, even if the court subsequently determines that the excessive fines clause is sub-

239. See *Wilkinson v. Times Mirror Corp.*, 215 Cal. App. 1034, 264 Cal. Rptr. 194 (1989); *Porten v. University of San Francisco*, 64 Cal. App. 3d 825, 134 Cal. Rptr. 839 (1976); *Miller v. National Broadcasting Co.*, 187 Cal. App. 3d 1463, 1489-93, 232 Cal. Rptr. 668, 682-85 (1986); cf. *White v. Davis*, 13 Cal. 3d 757, 775, 533 P.2d 222, 234, 120 Cal. Rptr. 94, 106 (1975). The California Supreme Court has yet to directly confront this issue; however, dicta in *Schmidt v. Superior Court*, 48 Cal. 3d 370, 389 n.13, 769 P.2d 932, 944 n.13, 256 Cal. Rptr. 750, 762 n.13 (1989), is consistent with the view that, at least in some circumstances, the state privacy provision applies to purely private action.

240. 24 Cal. 3d 458, 595 P.2d 592, 156 Cal. Rptr. 14 (1979).

241. Article I, § 7(a) of the California Constitution provides that "[a] person may not be deprived of life, liberty, or property without due process of law or denied equal protection of the laws" The court in *Gay Law Students* pointed out that the absence of any explicit state action requirement in the California provision distinguished it from the Fourteenth Amendment. *Gay Law Students*, 24 Cal. 3d at 468, 595 P.2d at 598, 156 Cal. Rptr. at 20. The court, however, chose not to rely on this distinction in order to find that the state provision did not require state action. *Id.*

242. *Id.* (citing *Kruger v. Wells Fargo Bank*, 11 Cal. 3d 352, 366-67, 521 P.2d 441, 449-50, 113 Cal. Rptr. 449, 457-58 (1974)).

243. *Id.* at 469 (citing *Kruger*, 11 Cal. 3d at 367 n. 21 and *Garfinkle v. Superior Court*, 21 Cal. 3d 268, 282, 578 P.2d 925, 934, 146 Cal. Rptr. 208, 217 (1978)).

244. *Id.* (quoting *Garfinkle*, 21 Cal. 3d at 282).

245. *Id.* at 467.

246. 46 Cal. 3d 1092, 1114, 762 P.2d 46, 57, 252 Cal. Rptr. 122, 133 (1988) (citing *New York Times v. Sullivan*, 376 U.S. 254, 265 (1964)) (holding that, despite state and federal constitutional protections, religious groups are not immune from all tort liability).

ject to a state action restriction, based on the language in *Molko*, and for the reasons outlined earlier in connection with the United States Supreme Court's decision in *Browning-Ferris*,²⁴⁷ awards of punitive damages satisfy the requirement.

B. Prior Application of the California Excessive Fines Clause

As noted in the CCRC Background Study,²⁴⁸ despite the fact that the limits of the California excessive fines clause have never been fully defined, the clause has been held to limit penalties imposed for civil contempt. In *Ex parte Karlson*,²⁴⁹ the petitioner, Louis Karlson, was fined \$200 for contempt of court after he violated an injunction.²⁵⁰ Karlson failed to pay the fine and was taken into custody by the Los Angeles county sheriff.²⁵¹ Under the terms of Karlson's contempt citation, if he did not pay the fine he was to be imprisoned in the county jail until the fine was paid off "at the rate of one day's imprisonment for each two dollars" of the fine.²⁵² Karlson applied for a writ of habeas corpus. In denying the writ, the California Supreme Court stated in dicta that "[t]he danger that persons may be imprisoned for an unlimited period for non-payment of a fine for [civil] contempt is, as we think, completely removed by the constitutional guaranty that, 'excessive bail shall not be required, nor excessive fines imposed; nor shall cruel or unusual punishments be inflicted.'"²⁵³ Thus, since at least 1911, the entire California provision, including the excessive fines clause, has been interpreted as applying to civil penalties.

In 1978 this historical application was confirmed and expanded to cover other statutory civil penalties. In *Hale v. Morgan*²⁵⁴ the plaintiff, Hale, brought suit against his landlord, Morgan, for wrongfully shutting off utility services to his mobile home for a total of 173 days.²⁵⁵ California Civil Code section 789.3 "assesses a penalty of \$100 per day against a landlord who wilfully deprives his tenant of utility services for the purpose of evicting the tenant."²⁵⁶ The trial court found in favor of Hale and awarded him \$17,300, or \$100 times 173, the precise penalty called for under the statute.²⁵⁷ Morgan appealed claiming that the penalty vio-

247. See *supra* notes 97-140 and accompanying text; cf. *Park Redlands Covenant Control Comm. v. Simon*, 181 Cal. App. 3d 87, 98-99, 226 Cal. Rptr. 199, 205-06 (1986) (state action is present when a state court "lends the affirmative aid of the courts").

248. See *supra* note 208 and accompanying text.

249. 160 Cal. 378, 383, 117 P. 447, 449 (1911).

250. *Id.* at 378-79.

251. *Id.*

252. *Id.* at 379.

253. *Id.* at 383.

254. 22 Cal. 3d 388, 584 P.2d 512, 149 Cal. Rptr. 375 (1978).

255. *Id.* at 393.

256. *Id.* at 392; see also CAL. CIV. CODE § 789.3 (West 1982).

257. 22 Cal. 3d at 393.

lated state and federal due process provisions and that the penalty was constitutionally excessive.²⁵⁸ The California Supreme Court²⁵⁹ held that the penalty was oppressive and unreasonable²⁶⁰ and as such violated due process.²⁶¹ The court also held that “under all of the circumstances of this case, the amount of the penalties is constitutionally excessive.”²⁶²

In his concurring opinion in *Hale*, Justice Newman²⁶³ stated that “[a]rticle I, section 17 of the California Constitution commands that ‘excessive fines’ not be imposed. In my view those two words justify reversal of the judgment here. There is ample reason for concluding that the constitutional prohibition covers civil as well as criminal fines.”²⁶⁴ Justice Newman did not cite any authority to support this conclusion;²⁶⁵ however, he had inside information. He was, coincidentally, both a member of the CCRC and Chairman of the Drafting Committee that was responsible for revising article I, section 17 of the California Constitution.²⁶⁶ According to Justice Newman, his experience as a member of the CCRC is the source of his “ample reason” to believe that the California excessive fines clause applies to civil as well as criminal fines.²⁶⁷ In

258. *Id.* at 397-98.

259. *Id.* at 392. Justice Richardson announced the opinion of the court. *Id.* Justices Tobriner, Mosk, Clark, Manuel, and Chief Justice Bird concurred in the judgment. *Id.* at 407. Justice Newman wrote a separate concurring opinion. *Id.*

260. *Id.* at 397-98. The court held that the fatal aspect of the statute was that it did not give the trier of fact any discretion in fixing the penalty. *Id.* at 402 (“The exercise of reason is replaced by an adding machine.”). The court further reasoned that, “[in] our view . . . section 789.3 in its unlimited, ‘open ended’ character compels penalties which, in particular circumstances, may clearly exceed any appropriate and proportionate sanction for wrongful utility termination.” *Id.* at 403. However, the court did concede that “there are doubtless some situations in which very large punitive assessments are both proportioned to the landlord’s misconduct and necessary to achieve the penalty’s deterrent purposes.” *Id.* at 404.

261. *Id.* at 397-98. Unfortunately, in reaching its conclusion the court did not specify whether it was relying on the state or federal constitutional provision. In such a case, pursuant to *Michigan v. Long*, 463 U.S. 1032, 1040-42 (1983), upon review by the United States Supreme Court, it would be presumed that the decision was based on federal grounds. *See also Grodin, supra* note 187, at 399.

262. 22 Cal. 3d at 407. Since the court did not specifically cite article I, § 17 as authority for its conclusion, the holding in *Hale* is somewhat ambiguous. *See supra* note 261.

263. According to Justice Newman, he frequently used a standard one line concurring opinion to the effect that he concurred in the result but he would have relied solely on state rather than federal constitutional grounds. Telephone interview with Frank C. Newman, Former Justice of the California Supreme Court (Oct. 13, 1988) [hereinafter Newman Interview]; *see, e.g.*, *Bailey v. Loggins*, 32 Cal. 3d 907, 923, 654 P.2d 758, 769, 187 Cal. Rptr. 575, 586 (1982); *People v. Mirmirani*, 30 Cal. 3d 375, 388, 636 P.2d 1130, 1138, 178 Cal. Rptr. 792, 800 (1981); *Van Atta v. Scott*, 27 Cal. 3d 424, 454, 613 P.2d 210, 227, 166 Cal. Rptr. 149, 166 (1980); *People v. McGaughran*, 25 Cal. 3d 577, 595, 601 P.2d 207, 218, 159 Cal. Rptr. 191, 202 (1979).

264. 22 Cal. 3d at 407 (Newman, J., concurring).

265. *Id.*

266. Newman Interview, *supra* note 263.

267. *Id.*

any event, *Hale* clearly stands for the proposition that civil penalties can be constitutionally excessive.

C. Application of Excessive Fines Clauses in Other State Constitutions

Unlike state court opinions, decisions by the United States Supreme Court set a floor for the rest of the nation.²⁶⁸ This fact may encourage the Supreme Court to take a more conservative approach in interpreting federal constitutional provisions.²⁶⁹ Since state courts are not subject to this same institutional constraint, some commentators argue that instead of relying on United States Supreme Court precedent it is more appropriate for state courts to look to the decisions of other state courts for guidance in interpreting similar state constitutional provisions.²⁷⁰ In keeping with this view, courts in several other states have held that state excessive fines clauses, identical to California's, apply to civil cases in general and to punitive damages in particular.²⁷¹

In 1980 the Texas Supreme Court expressly ruled that the excessive fines clause of the Texas Constitution²⁷² was equally applicable to civil and criminal cases. In *Pennington v. Singleton*²⁷³ the plaintiff, Pennington, purchased a used boat, motor and trailer from the defendant, Singleton, a nonmerchant seller.²⁷⁴ Pennington subsequently brought suit against Singleton under the Texas Deceptive Trade Practices-Con-

268. See *supra* note 144 and accompanying text.

269. Grodin, *supra* note 187, 402 (citing Galie, *The Other Supreme Courts: Judicial Activism Among State Supreme Courts*, 33 SYRACUSE L. REV. 731, 734-53 (1982)).

270. *Id.*

271. *Colonial Pipeline Co. v. Brown*, 258 Ga. 115, 365 S.E.2d 827, *appeal dismissed*, 109 S. Ct. 36 (1988); *Pennington v. Singleton*, 606 S.W.2d 682 (Tex. 1980). Similarly, while expressly ruling that its state excessive fines provision does not apply to civil cases, the Pennsylvania Supreme Court has held "the principle embodied in the [state] constitutional provision is, of course, applicable in all proceedings, civil as well as criminal . . ." *Scranton City v. Peoples Coal Co.*, 274 Pa. 63, 71, 117 A. 673, 676 (1922); see also *Geffen v. Baltimore Mkt.*, 325 Pa. 509, 191 A. 24 (1937). Apparently, despite acknowledging that civil penalties may be excessive, the Pennsylvania Supreme Court has been unwilling to establish constitutional standards of excessiveness.

Courts in other states have more explicitly held that state excessive fines clauses apply only to criminal cases. *Lazarus Dep't Store v. Sutherland*, 544 N.E.2d 513, 529 (Ind. 1989); *Stoner v. Nash Finch, Inc.*, 446 N.W.2d 747, 755 (N.D. 1989); *Coty v. Ramsey Assoc.*, 546 A.2d 196, 207 (Vt. 1988); *Palmer v. A. H. Robins*, 684 P.2d 187, 216 (Colo. 1984); *Village of Sister Bay v. Hockers*, 106 Wis. 2d 474, 481, 317 N.W.2d 505, 508 (1982). These opinions all rely on one or both of the United States Supreme Court's controversial decisions in *Browning-Ferris Indus. v. Kelco Disposal, Inc.* and *Ingraham v. White* as authority for their holdings. *Browning-Ferris* and *Ingraham* are discussed and criticised *supra* notes 77-140 and accompanying text.

272. Article I, § 13 of the Texas Constitution provides in part that "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel or unusual punishments inflicted."

273. 606 S.W.2d 682 (Tex. 1980).

274. *Id.* at 685.

sumer Protection Act (DTPA) when he found defects in the motor.²⁷⁵ The trial court found in favor of Pennington and awarded him treble damages, as provided under the DTPA.²⁷⁶ On appeal,²⁷⁷ Singleton challenged the constitutionality of the treble damages provision as “an excessive fine in violation of both due process limitations and Article I, section 13 of the Texas Constitution,” the state excessive fines provision.²⁷⁸ The Texas Supreme Court accepted the premise of Singleton’s argument and announced that “[f]ines’ as used in article I, section 13 includes civil penalties.”²⁷⁹

As authority for its decision in *Pennington*, the Texas Supreme Court cited *State v. Galveston H. & S.A. Ry.*²⁸⁰ In *Galveston* four railroad companies were fined for failing to pay an annual tax of one percent on their gross receipts.²⁸¹ The statute establishing the tax imposed a penalty of \$200 per day for late payment.²⁸² The defendants challenged the fine as excessive under the state constitution.²⁸³ The Texas Supreme Court held that “[t]he term ‘fines’ is synonymous with . . . penalties, and the section of the [Texas] Constitution [prohibiting excessive fines] applies to penalties prescribed by this act for the failure of the parties to pay the taxes.”²⁸⁴

More recently, a Texas appeals court, in *Victoria Bank & Trust Co. v. Brady*,²⁸⁵ squarely addressed the applicability of the Texas excessive fines clause to punitive damage awards. The court initially attempted to distinguish *Pennington* because it involved a statutory treble damage

275. *Id.* Prior to the sale, Singleton represented to Pennington that the items had been recently “worked on,” were in “perfect condition,” and were “just like new.” *Id.* As it turned out, the motor’s housing was cracked and had been previously repaired inadequately. *Id.*

276. *Id.* Based on Pennington’s actual damages of \$481.68, the trial court awarded him \$1445.04. *Id.* Prior to trial, however, the parties agreed to a \$500 limit on exemplary damages, if such were awarded. *Id.* Due to this agreement, the award was reduced to \$981.68. *Id.* Despite this reduction, for purposes of appeal, the court held that “the case must be treated as one in which treble damages were recovered.” *Id.* at 688. The court reasoned that “[t]he \$500 awarded in addition to Pennington’s actual damages were not awarded as exemplary damages, but rather as a recovery of statutory treble damages partially waived by stipulation.” *Id.*

277. *Id.* At the first level of appeal, the Court of Civil Appeals affirmed the trial court’s judgment. *Id.* The court, however, granted Singleton’s petition for rehearing and subsequently reversed the judgment of the trial court and awarded Pennington nothing. *Id.* at 686. The Texas Supreme Court granted Pennington’s application for a writ of error. *Id.*

278. *Id.* at 690.

279. *Id.* The *Pennington* court ultimately ruled that the treble damages liability imposed by the DTPA was not constitutionally excessive. *Id.* at 690-91.

280. 100 Tex. 153, 97 S.W. 71 (1906), *rev’d on other grounds*, 210 U.S. 217 (1908).

281. *Id.* at 73.

282. *Id.* at 73, 78.

283. *Id.* at 78.

284. *Id.* The court went on to rule that the fines imposed by the tax statute were in fact constitutionally excessive. *Id.* at 78-79.

285. 779 S.W.2d 893, 912-13 (Tex. Ct. App. 1989).

award instead of a punitive damage award imposed by a jury.²⁸⁶ Nevertheless, the court ultimately ruled that “whether punitive damages are [constitutionally] excessive is a question to be decided under the facts of each individual case. On the facts now before us, we necessarily reach the conclusion that the exemplary damages awarded below [were] not excessive under Article I, § 13 of the Texas Constitution.”²⁸⁷ The *Victoria Bank* case thus implicitly confirms that the Texas Constitution’s prohibition against excessive fines applies to civil penalties and places limits on punitive damage awards.

In 1988 the Georgia Supreme Court adopted a similar interpretation of the Georgia Constitution’s excessive fines clause. In *Colonial Pipeline Co. v. Brown*²⁸⁸ Wright Contracting Company was hired to do grading work on a certain plot of land.²⁸⁹ Wright sued for damages when one of its bulldozers was destroyed upon striking and rupturing an unmarked, underground pipeline maintained by Colonial Pipeline.²⁹⁰ A jury awarded Wright \$52,728 in actual damages, \$304 in consequential damages, and \$5,000,000 in punitive damages, over 100 times the actual damages.²⁹¹

On appeal, Colonial argued that the punitive damage award violated due process and was an excessive fine prohibited by the Eighth Amendment.²⁹² It is unclear from the opinion whether Colonial raised the state excessive fines clause in its appeal. Nevertheless, the Georgia Supreme Court “elected” to decide the case based on the excessive fines clause of the Georgia Constitution.²⁹³ In doing so the court concluded unequivocally that “the excessive fines clause of . . . the Georgia Constitution applies to the imposition of punitive damages in civil cases”²⁹⁴ In reaching this conclusion, the court cited Justice White’s dissent in *Ingraham v. Wright* with approval and noted that “[p]unitive damages, although civil in nature, nonetheless serve the criminal law goal of deterrence rather than the traditional compensatory goal of civil law.”²⁹⁵ The

286. *Id.* at 912.

287. *Id.* at 912-13.

288. 258 Ga. 115, 365 S.E.2d 827 (1988). The opinion consolidates appeals in two related cases, *Colonial Pipeline Co. v. Brown* (Case No. 44925) and *Colonial Pipeline Co. v. Wright Contracting Co.* (Case No. 44926). The discussion in the text relates solely to the second case.

289. *Id.* at 827-28.

290. *Id.* at 828-29.

291. *Id.* at 829.

292. *Id.*

293. *Id.* at 829 n.2, 831. Article I, § 1, para. 17 of the Georgia Constitution provides that “[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted; nor shall any person be abused in being arrested, while under arrest, or in prison.”

294. *Colonial Pipeline*, 365 S.E.2d at 831. Since the court decided the case based on the Excessive Fines Clause of the Georgia Constitution, it did not address Colonial’s due process argument. *Id.* at 829 n.2.

295. *Id.* at 830.

court further stated that it believed the Eighth Amendment's Excessive Fines Clause "was intended as a protection from all excessive monetary penalties."²⁹⁶

The *Colonial Pipeline* case was a plurality opinion and as such it may be of dubious precedential value.²⁹⁷ However, the United States Supreme Court subsequently dismissed an appeal of the Georgia decision for lack of jurisdiction.²⁹⁸ Thus, above all else, *Colonial Pipeline* affirms and reinforces the principle that in interpreting state constitutional provisions, state courts are not constrained by United States Supreme Court decisions interpreting similarly worded sections of the United States Constitution.

V. Defining Excessiveness

Assuming that the California Supreme Court agrees that the excessive fines clause of the California Constitution applies to punitive damage awards in civil cases, the question remains what level of punitive damages should be deemed constitutionally excessive.

A. The Current System

Under the current system in California, in order to be sustained on appeal, a punitive damage award need only bear a "reasonable relationship" to the actual damages.²⁹⁹ Theoretically, the purpose of this requirement is to provide an objective measure of harm to counterbalance the inevitably subjective assessment of the reprehensibility of the defendant's conduct.³⁰⁰ Since juries, however, are given no guidelines to assist

296. *Id.* at 831. A state court's interpretation of federal constitutional provisions is, of course, not binding on the United States Supreme Court. See *Michigan v. Long*, 463 U.S. 1032, 1041 (1983). The Georgia Court felt, however, that since the "Georgia Constitution was patterned after the United States Constitution," its Eighth Amendment analysis was a condition precedent to its ultimate ruling with respect to the Georgia excessive fines clause. *Colonial Pipeline*, 365 S.E.2d at 830 n.3.

297. *Id.* at 833.

298. *Appeal dismissed*, 109 S. Ct. 36 (1988).

299. See *Rosener v. Sears Roebuck & Co.*, 110 Cal. App. 3d 740, 751, 168 Cal. Rptr. 237, 243 (1980), *appeal dismissed*, 450 U.S. 1051 (1981). Indeed, the Ninth Circuit, interpreting California law, has repeatedly held that "[a]n award of punitive damages is not considered excessive as long as it punishes the wrongdoer without causing financial ruin." *Transgo v. Ajac Transmission Parts Corp.*, 768 F.2d 1001, 1025 (9th Cir. 1985); *El Ranco v. First Nat'l Bank of Nevada*, 406 F.2d 1205, 1219 (9th Cir. 1968), *cert. denied*, 396 U.S. 875 (1969). Given this highly deferential standard of review, punitive damage awards are understandably rarely overturned in this jurisdiction.

300. *Neal v. Farmer's Ins. Exch.*, 21 Cal. 3d 910, 929, 582 P.2d 980, 991, 148 Cal. Rptr. 389, 399 (1978).

in conducting this comparison,³⁰¹ “there is wide variance in the magnitude of assessments, with no apparent correlation between the amounts assessed and defendants’ desert.”³⁰² In addition, a climate in which standards of liability are completely uncertain predominates.³⁰³

Some commentators have argued that the lack of sufficient guidelines provided juries and the unpredictability of punitive sanctions may violate the Due Process Clause of the Fourteenth Amendment.³⁰⁴ In addressing this argument, Justice O’Connor stated in her concurring opinion in *Bankers Life and Casualty Co. v. Crenshaw*³⁰⁵ that “[i]n my view, because of the punitive character of [exemplary damage] awards, there is reason to think that [they] may violate the Due Process Clause.”³⁰⁶ Applying the specific facts of *Bankers Life*, O’Connor then observed that “[n]othing in Mississippi law warned appellant that by committing a tort that caused \$20,000 of actual damages, it could expect to incur a \$1.6 million punitive damage award.”³⁰⁷ In addition, O’Connor further noted that giving juries “wholly standardless discretion to determine the severity of punishment appears inconsistent with due process.”³⁰⁸ Based on these concerns, O’Connor concluded that “the Court should scrutinize carefully the procedures under which punitive damages are awarded in civil lawsuits.”³⁰⁹

In addition to due process concerns, some commentators have also pointed out that since most states, including California, allow juries to

301. *Rosener*, 110 Cal. App. 3d at 751, 168 Cal. Rptr. at 243 (presently, there is no fixed ratio for determining the proper proportion between actual and punitive damages in regard to the “reasonable relationship” test).

302. Ellis, *Fairness and Efficiency in the Law of Punitive Damages*, 56 S. CAL. L. REV. 1, 62 (1982).

303. *Id.*

304. See, e.g., Jeffries, *supra* note 11, at 140, 151-58; Freeman, *supra* note 94, at 33. The Fourteenth Amendment provides, in pertinent part, that “[n]o state shall . . . deprive any person of life, liberty, or property, without due process of law” U.S. CONST., amend. XIV, § 1.

305. 108 S. Ct. 1645 (1988) (O’Connor, J., concurring). Justice Scalia joined in O’Connor’s concurring opinion. *Id.*

306. *Id.* at 1655. In her concurring and dissenting opinion in *Browning-Ferris*, Justice O’Connor reiterated her view of the due process issue: “I adhere to my comments in *Bankers Life* . . . regarding the vagueness and procedural due process problems presented by juries given unbridled discretion to impose punitive damages.” *Browning-Ferris Indus. v. Kelco Disposal, Inc.*, 109 S. Ct. 2090, 2924 (1989) (O’Connor, J., concurring and dissenting).

307. *Bankers Life*, 108 S. Ct. at 1656.

308. *Id.* In *Browning-Ferris* Justice Brennan stated in his concurring opinion that “[w]ithout statutory (or at least common law) standards for the determination of how large an award of punitive damages is appropriate in a given case, juries are left largely to themselves in making this important, and potentially devastating, decision.” 109 S. Ct. at 2923 (Brennan, J., concurring). Brennan also stated that punitive damages may raise due process concerns because they are “imposed by juries guided by little more than an admonition to do what they think is best.” *Id.*

309. *Bankers Life*, 108 S. Ct. at 1655.

consider the wealth of the defendant in deciding the appropriate amount of punitive damages,³¹⁰ there is a serious risk that passion or prejudice may influence the amount of punitive damages assessed by juries.³¹¹ While it may be true that "a penalty which would be sufficient to reform a poor man is likely to make little impression on a rich one,"³¹² this approach ignores the overriding goal of achieving proportionality of punishments to offenses.³¹³ In addition, it is inevitable that "using wealth as a factor in determining the size of punitive damage assessment[s] . . . invites otherwise unguided juries to indulge any redistributive inclinations they may have . . ." ³¹⁴ The result is a sort of "Robin Hood syndrome," whereby disproportionately large awards may be levied against giant corporations or very wealthy individuals.³¹⁵

B. Proposed Solution

As the preceding discussion demonstrates, the present system for meting out punitive damage awards presents a wide range of complex problems. Most of these problems can be avoided through the establishment of a constitutional standard of excessiveness. To this end, this Note advocates the adoption of a flexible formula, based on the treble damages model, linking punitive damages to actual damages.³¹⁶

The treble damages model is attractive for several reasons. First, treble damages have a long history of use in both American and English jurisprudence.³¹⁷ In the United States, federal and state law are replete with treble damages provisions, most notably in the area of antitrust law.³¹⁸ Further, states like Florida have already passed legislation placing a treble damage limit on punitive damage awards.³¹⁹ In light of these

310. In California, the three factors used by juries to determine the appropriate amount of punitive damages are: (1) the reprehensibility of the defendant's conduct; (2) the wealth of the defendant; and (3) the amount of compensatory damages awarded. *Neal v. Farmers Ins. Exch.*, 21 Cal. 3d 910, 928, 582 P.2d 980, 990, 148 Cal. Rptr. 389, 399 (1978).

311. *See, e.g., Analytical Framework, supra* note 81, at 1457. In recognition of this possibility, punitive damage awards may be set aside in all jurisdictions if it is demonstrated that the result was influenced by jury "passion" or "prejudice." *See Curtis Publishing Co. v. Butts*, 388 U.S. 130, 160-61 (1967) (plurality opinion).

312. *Morris, Punitive Damages in Tort Cases*, 44 HARV. L. REV. 1173, 1191 (1931).

313. *Analytical Framework, supra* note 81, at 1457; *see also Browning-Ferris*, 109 S. Ct. at 2933-34 (O'Connor, J., concurring and dissenting); *Jeffries & Freeman, supra* note 94, at 13; *Frey, Do Punitives Fit the Crime*, Nat'l L.J., Oct. 9, 1989, at 13, col. 1, and at 14, col. 1.

314. *Ellis, supra* note 302, at 61-62.

315. *Analytical Framework, supra* note 81, at 1460-61.

316. For purposes of this discussion, the phrases "actual damages" and "compensatory damages" are used interchangeably. *See BLACK'S LAW DICTIONARY* 352 (5th ed. 1979).

317. *Massey, supra* note 82, at 1265.

318. *See Sherman Antitrust Act*, 15 U.S.C. § 15; *Clayton Antitrust Act*, CAL. BUS. & PROF. CODE § 16750 (West 1987).

319. *See FLA. STAT. ANN.* § 768.73(1) (West Supp. 1989); *see also supra* note 39 and accompanying text.

developments, the adoption of a treble damage ceiling on punitive damages would not be without precedent.

Second, there is decisional authority suggesting that a treble damage limit on punitive damages may be appropriate. For example, in *Stokes v. Delcambre*³²⁰ the Fifth Circuit decided to uphold a punitive damage award in part because it was "within the range of familiar treble damage schemes."³²¹ On several occasions, California courts have also struck down punitive awards amounting to five times the actual damages. For example, in *Palmer v. Ted Stevens Honda*³²² a California court of appeal concluded that a ratio of five times the compensatory damages on its face "is some indication that the award resulted from passion and prejudice."³²³ Based on this analysis, the court reversed the punitive award.³²⁴ Another California court of appeal reached the same result in *Allard v. Church of Scientology*.³²⁵ These cases suggest that while punitive awards of more than four times the actual damages may raise an inference of excessiveness, awards of up to three times the actual damages may be presumptively constitutional.³²⁶

Consistent with this view, in 1986 the Special Committee on Punitive Damages of the American Bar Association's Litigation Section (A.B.A. Committee) recommended the adoption of just such a presumption.³²⁷ However, according to the A.B.A. Committee's proposal³²⁸ the

320. 710 F.2d 1120 (5th Cir. 1983).

321. *Id.* at 1127. Despite this statement, the court voiced disapproval of jurisdictions that use a formula to determine whether punitive damage awards are excessive. *Id.* In *George v. International Society For Krishna Consciousness*, 213 Cal. App. 3d 729, 798 n.52, 262 Cal. Rptr. 217, 257 n.52 (1989) (citing *Devlin v. Kearny Mesa AMC/Jeep/Renault, Inc.*, 155 Cal. App. 3d 381, 388, 202 Cal. Rptr. 204, 209 (1984)), a California court of appeal expressed similar reservations about applying mathematical formulas: "While we recognize that standardless discretion in the award of punitive damages may implicate constitutional concerns, . . . rigid adherence to mathematical standards may be neither possible nor desirable . . ."

322. 193 Cal. App. 3d 530, 238 Cal. Rptr. 363 (1987).

323. 193 Cal. App. 3d at 540, 238 Cal. Rptr. at 369. *See Analytical Framework, supra* note 81, at 1437 n.26 (listing cases in which courts found that the amount of punitive damages warranted a presumption that the award resulted from passion or prejudice).

324. 193 Cal. App. 3d at 540, 238 Cal. Rptr. at 369. *But see* *George v. International Soc'y For Krishna Consciousness*, 213 Cal. App. 3d 729, 797, 262 Cal. Rptr. 217, 257 (1989) ("A punitive/compensatory ratio of 6:1 is not particularly shocking.").

325. 58 Cal. App. 3d 439, 453, 129 Cal. Rptr. 797, 805 (1976) (punitive award of \$250,000 deemed excessive where actual damages were only \$50,000).

326. *Massey, supra* note 82, at 1273 (Punitive "award[s] of two to three times actual damages might be thought presumptively within the constitutional limits, inasmuch as the practice of double or treble damages has a [long] historical pedigree."); *see also* *Fanning, Damage Control*, *FORBES*, June 29, 1987, at 84.

327. *Punitive Damages: A Constructive Examination* 1986 A.B.A. LITIGATION SEC., SPECIAL COMMITTEE ON PUNITIVE DAMAGES 65 [hereinafter A.B.A. COMMITTEE REPORT] ("Our specific proposal is that a ratio be adopted of . . . three times the compensatory verdict. . . . [I]f the verdict falls within that limit (is three times or less the compensatory [damages]), then there would be a presumption that it was not excessive."); *see* *Mayne, Punitive*

presumption would not be absolute. Thus, plaintiffs could overcome the treble damage limit based upon proof of "special circumstances"³²⁹ warranting a larger punitive award.³³⁰ For example, cases involving nominal damages would qualify as an exception.³³¹

Conversely, defendants could also rebut the presumptive constitutionality of awards within the treble damage limit by demonstrating that the award was nevertheless disproportionate to the offense.³³² Thus, in a situation like the highly publicized *Texaco v. Pennzoil*³³³ case, even though the punitive damages were less than half of the actual damages,³³⁴ the defendant could have moved to reduce the punitive award.

While the A.B.A. Committee's overall approach is good, certain weaknesses in the proposal need to be addressed. First, several contingencies should be added to the list of special circumstances allowing abrogation of the ordinary treble damage limit. For example, if the defendant's wrongful conduct was extremely profitable or caused serious bodily injury, a larger punitive award might be justifiable. Larger punitives might also be appropriate where the defendant engaged in a continuing pattern of similar wrongful conduct. However, in order for the system to retain its utility, the designated special circumstances would

Damages Committee Completes Work, Recommends Caps on Punitive Awards, LITIGATION NEWS, Winter 1987, at 3.

328. The proposal was based on a statistical review of jury verdicts. A.B.A. COMMITTEE REPORT, *supra* note 327, at 1-3. For some unexplained reason, the Committee's proposal was not included in the joint resolution adopted by the ABA House of Delegates in February 1987. Corcoran, *Section Plays Key Role in Tort Reform Debate*, LITIGATION NEWS, Spring 1987, at 1, 8.

329. The report suggests three possible special circumstances: (1) total want of due care by the defendant; (2) willful conduct by the defendant; and (3) persistent conduct by the defendant after clear notice. A.B.A. COMMITTEE REPORT, *supra* note 327, at 65. Regrettably, this facet of the proposal is given only cursory treatment in the report.

330. *Id.* at 65-66; Mayne, *supra* note 327, at 10. Professor Massey also would allow larger awards in certain rigidly defined, egregious circumstances: "The historical practices surrounding amercement suggest that larger disparities might be justified in particularly heinous circumstances, [however,] it would be essential to define, with some particularity, the triggers for such disproportionately large awards." Massey, *supra* note 82, at 1273.

331. The A.B.A. Committee Report notes that application of the treble damage limit to nominal damage cases "would probably be regarded as undesirable." A.B.A. COMMITTEE REPORT, *supra* note 327, at 69 n.30; see also *Analytical Framework*, *supra* note 81, at 1465 n.193.

332. The standard for review would be similar to that of an ordinary motion for remittitur.

333. 729 S.W.2d 768 (Tex. Ct. App. 1987).

334. The actual damages were \$7.53 billion and the punitive damage award was \$3 billion. *Id.* at 784. On appeal, a result similar to the suggestion presented in this Note was actually achieved. Although it concluded that "[t]he proportion of punitive damages to actual damages present[ed] no problem," the Texas Court of Appeals nevertheless reduced the punitive award to \$1 billion on the theory that "punitive damages of one billion dollars are sufficient to satisfy any reason for their being awarded, whether it be punishment, deterrence, or encouragement of the victim to bring legal action." *Id.* at 865-66.

have to be narrowly circumscribed and clearly defined.³³⁵

The second weakness of the A.B.A. Committee's proposal is that it does not provide any guidance to juries in selecting between the three levels of punishment available within the treble damages model. In the absence of such guidelines, the same standardless decision-making that currently prevails would continue, albeit within a confined sphere. By the same token, mechanically multiplying the actual damages by three would deprive the jury of any discretion in determining the amount of punitive damages and would effectively take the decision out of the jury's hands.³³⁶

To prevent these problems, criteria for imposing intermediate levels of punishment within the treble damages framework must be established. Harold N. Hill, an Atlanta defense attorney,³³⁷ has proposed that the trier of fact should either multiply the actual damages by one, if it is determined that the defendant's conduct was intentional,³³⁸ or multiply the actual damages by two, if it is shown that both the defendant's conduct and the harm caused were intentional.³³⁹ Based on these criteria, once it is determined that punitive damages are appropriate under the applicable state statute, the trier of fact would undertake a secondary inquiry to determine whether an award of one or two times the actual damages was appropriate.³⁴⁰ While other formulations are undoubtedly

335. To avoid the necessity of creating a finite list of exceptions, the Florida punitive damages statute, which imposes a presumptive treble damage limit much like the A.B.A. Committee proposal, *see supra* notes 39 and 319, provides that the limit can be overcome if "the claimant demonstrates . . . by clear and convincing evidence that the award is not excessive in light of the facts and circumstances which were presented to the trier of fact." FLA. STAT. ANN. § 768.73(1)(b) (West Supp. 1989). The implicit uncertainty in this scheme, however, could continue to raise due process concerns. *See* discussion *supra* notes 304-309 and accompanying text.

336. This deprivation may also violate the state and federal constitutional rights of litigants to a jury trial.

337. Mr. Hill represented the Colonial Pipeline Company in *Colonial Pipeline v. Brown*, discussed *supra* notes 288-298. In deciding that case, the Georgia Supreme Court did not adopt Mr. Hill's proposed formula or any other guidelines for setting punitive awards. *Colonial Pipeline Co. v. Brown*, 258 Ga. 115, 365 S.E.2d 827, 833 (1988). Instead, the lead opinion by the Georgia court merely announced, in a conclusory fashion, that a punitive award of approximately 100 times the compensatory damages was excessive. *Id.*

338. For purposes of this determination, the Restatement of Torts definition of intent (i.e., knowledge or substantial certainty) would apply. RESTATEMENT (SECOND) OF TORTS § 8A (1965).

339. Telephone interview with Harold N. Hill, Attorney at Law (Nov. 10, 1988).

340. By way of example, in *Colonial Pipeline Co. v. Brown*, 258 Ga. 115, 365 S.E.2d 827 (1988), discussed *supra* notes 288-298 and accompanying text, if the jury had found that the defendant's action was intentional but the harm caused was unintended, the appropriate punitive damage award under Mr. Hill's guidelines would have been one times the actual damage award of \$52,728. Hence, the plaintiff's total award would have been \$105,556, twice the actual damages. Likewise, if the jury had concluded that the defendant intended to cause the specific harm that resulted, the punitive damage award called for under the guidelines would

possible, these criteria are straightforward and could be applied by juries with little difficulty.

The adoption of a comprehensive treble damages formula, along the lines discussed above, would establish a clear constitutional standard of excessiveness while at the same time providing both intermediate and extraordinary levels of punishment based on the character of the defendant's conduct. This approach would also comply with due process provisions and reduce the risk of awards based on passion and prejudice.

VI. Conclusion

The emerging crisis created by the sharp increase in massive punitive damage awards over the past several years demands a solution. In response, some have suggested new statutory controls on the availability and amount of punitive damages. Others, in desperation, have proposed a complete overhaul of the tort system.³⁴¹ Yet, a simpler answer may lie in the state constitutional protection against the imposition of excessive fines. The United States Supreme Court has decided that the Eighth Amendment does not apply to punitive damages awarded in civil cases between private parties. Eventually, the Court may invalidate punitive damage awards on due process or vagueness grounds. Yet, states need not stand idly by awaiting that fateful day.³⁴²

It is unquestioned that states have the power to interpret state constitutional provisions differently than their counterparts in the Federal Constitution. California has always been a leader in asserting independent state rights and the time has come for it to take the initiative in setting constitutional limits on punitive damages.³⁴³ Nothing in the history of the California excessive fines clause precludes such an application. In fact, the few California Supreme Court decisions interpreting the provision suggest that such a step is entirely appropriate.

have been \$105,556. Under this scenario, the plaintiff would have received a total award of \$158,284—triple the actual damages incurred.

341. See Sugarman, *Doing Away With Tort Law*, 73 CALIF. L. REV. 555 (1985).

342. In *Baker v. City of Fairbanks*, 471 P.2d 386 (Alaska 1970), the Alaska Supreme Court voiced precisely this sentiment. The court stated: "We need not stand by idly and passively, waiting for constitutional direction from the highest court of the land. Instead, we should be moving concurrently to develop and expound the principles embedded in our constitutional law." *Id.* at 402.

343. Reliance on the independent state grounds doctrine often is perceived as merely a vehicle for activist judges to further liberal causes. See Maltz, *False Prophet—Justice Brennan and the Theory of State Constitutional Law*, 15 HASTINGS CONST. L.Q. 429, 432-33 (1988). Ironically, implementation of the approach suggested in this Note may represent a rare instance in which independent state grounds are being used to promote what some see as conservative ends. *Cf. id.* at 433. The aim of this Note, however, is neither to advance nor oppose any particular political philosophy. Rather, the goal is simply to suggest a method of addressing a developing legal issue through application of existing legal principles.

Once the threshold question whether the California excessive fines clause applies to punitive damages is answered in the affirmative, California courts must then establish a principled method for determining excessiveness. A flexible system based on the treble damage model would accomplish the purposes underlying punitive damages and at the same time bring desperately needed order to the process. Moreover, this type of system would also remedy other constitutional infirmities inherent in the existing method of setting punitive damages. While the solution this Note proposes is admittedly not a panacea for all of the potential problems associated with punitive damages, it is a viable alternative to the present state of affairs and should be given thoughtful consideration.

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