Contempt Sanctions and the Excessive Fines Clause

Margaret Meriwether Cordray

CONTEMPT SANCTIONS AND THE EXCESSIVE FINES CLAUSE

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Few aspects of the American justice system are as susceptible to abuse as contempt of court, where the roles of victim, prosecutor, and jury are all combined in one person, and that person is the trial judge. Contempt powers give judges almost unlimited power to impose devastating fines on parties and attorneys and, even more disturbing, these powers have gone without constitutional review. This lack of review is not surprising, because the pertinent constitutional provision, the Excessive Fines Clause of the Eighth Amendment, has itself gone virtually without judicial comment for most of the two hundred years since the adoption of the Bill of Rights. The Supreme Court, however, has recently broken this long silence and has begun to define the scope of the Eighth Amendment in cases involving punitive damages and forfeitures of property connected with the commission of a crime. Professor Margaret Meriwether Cordray argues that this infant Eighth Amendment jurisprudence should also open the way for constitutional review, under the Excessive Fines Clause, of the penalties imposed for contempt of court. Professor Cordray first examines the often confusing categories of contempt sanctions, focusing on the breadth of the courts' power in the areas of criminal contempt and coercive civil contempt. She then considers whether the Excessive Fines Clause applies to contempt fines. In doing so, she discusses the history of the Excessive Fines Clause, as well as the Supreme Court's recent interpretation of the Clause's scope and meaning. Professor Cordray then analyzes, in light of both the historical understanding of contempt law and its current operation, whether criminal contempt sanctions or coerceive civil contempt sanctions are subject to the Excessive Fines Clause, and she concludes that both are sufficiently punitive in nature to trigger application of the Clause. Finally, Professor Cordray suggests a

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framework for analyzing whether particular contempt fines are constitutionally excessive.

I. INTRODUCTION

Contempt fines, especially those imposed to coerce compliance with court orders, are a judicial tool that is peculiarly subject to abuse. Contempt law is unique in that it allows the judge to perform not only the traditional judicial function, but also legislative and executive functions. In contempt cases, judges thus enjoy an unparalleled concentration of power: judges define the offense, initiate the prosecution, and determine the sanction. And because defendants are entitled to a jury trial only in criminal contempt cases, the contempt power is even more sweeping in coercive civil contempt

cases, in which the offended judge also serves as the factfinder and adjudicator.

Despite the potential for abuse of such vast power, there are at present no meaningful restrictions on a court's ability to impose severe, even devastating, monetary sanctions on a contempt defendant. In the last decade, however, the Supreme Court has issued four important decisions that, for the first time, interpret the Excessive Fines Clause of the Eighth Amendment.[1] These cases suggest that the Excessive Fines Clause may provide a new avenue for checking the courts' power to impose fines of virtually any magnitude on contempt defendants.

This Article examines whether the Excessive Fines Clause applies to contempt sanctions, and particularly to coercive civil contempt sanctions. In doing so, the Article begins with a review of contempt law, looking primarily at the distinction between criminal and civil contempt and at the special attributes of coercive civil contempt. The Article then discusses the purpose and scope of the Excessive Fines Clause. In that regard, the Article focuses on the Supreme Court's recent decisions in the area, which emphasize that the applicability of the Clause turns on whether the sanction constitutes punishment.

Following this overview, the Article considers whether the Excessive Fines Clause imposes a constitutional limit on the size of contempt sanctions. In analyzing this issue, the Article first addresses the relatively straightforward question of whether the Clause applies to criminal contempt sanctions, and concludes that the explicitly punitive nature of criminal contempt sanctions brings them easily within the purview of the Clause. The Article then considers the much more difficult question of whether the Excessive Fines Clause applies to coercive civil contempt sanctions, and concludes that though such sanctions also serve remedial objectives, they are sufficiently punitive in purpose and practice to trigger application of the Clause. Finally, the Article identifies and discusses the pertinent factors that courts should consider in determining whether a particular contempt sanction is constitutionally excessive.

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1. 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. The Supreme Court has considered the Excessive Fines Clause in *United States v. Ursery*, 116 S. Ct. 2135 (1996), *Alexander v. United States*, 509 U.S. 544 (1993), *Austin v. United States*, 509 U.S. 602 (1993), and *Browning-Ferris Industries v. Kelco Disposal, Inc.*, 492 U.S. 257 (1989).

II. THE CONTEMPT SANCTION

The courts' power to punish litigants for contempt is essential to preserving both the authority of courts and the integrity of court orders.[2] Indeed, "[c]ontempt makes injunctions work."[3] Because of its necessity, a broad contempt power has long been considered within the inherent authority of the courts.[4] Over the years, as courts have sought to exercise the contempt power for different purposes in many and various cases, they have developed a vast and complicated body of contempt law.

A. The Distinction Between Civil and Criminal Contempt

Courts have traditionally divided contempts into two general categories: criminal contempt and civil contempt.[5] The civil category is then further divided into compensatory civil contempt and coercive civil contempt.

The distinction between civil and criminal contempt "turns on 'the character . . .' of the sanction" imposed.[6] In the Supreme Court's leading case on the subject, *Gompers v. Bucks Stove & Range Co.*,[7] it articulated the distinction as follows: If the sanction is remedial—for the benefit of the injured party—then the contempt is civil; if, on the

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2. *See, e.g.*, International Union, United Mine Workers v. Bagwell, 512 U.S. 821, 831 (1994) ("Courts independently must be vested with 'power to impose silence, respect, and decorum, in their presence, and submission to their lawful mandates . . . .'" (quoting *Anderson v. Dunn*, 19 U.S. 204, 227 (1821), but altering the punctuation); Gompers v. Bucks Stove & Range Co., 221 U.S. 418, 450 (1911) ("[T]he power of courts to punish for contempts is a necessary and integral part of the independence of the judiciary, and is absolutely essential to the performance of the duties imposed on them by law.").

3. OWEN M. FISS & DOUG RENDLEMAN, INJUNCTIONS 1004 (2d ed. 1984); *see also id.* at 1004-12 (discussing the importance of contempt, and particularly coercive civil contempt, in protecting the plaintiff's substantive rights); Douglas Rendleman, *How to Enforce an Injunction*, LITIG., Fall 1983, at 23, 24 (same).

4. *See, e.g.*, *Bagwell*, 512 U.S. at 831 (citing cases); *Gompers*, 221 U.S. at 450 (citing cases).

5. *See Bagwell*, 512 U.S. at 826-27; Hicks v. Feiock, 485 U.S. 624, 631 (1988); *Gompers*, 221 U.S. at 441. *See generally* Dan B. Dobbs, *Contempt of Court: A Survey*, 56 CORNELL L. REV. 183, 235 (1971) (discussing the forms of contempt).

6. *Bagwell*, 512 U.S. at 827-28 (quoting *Gompers*, 221 U.S. at 441); *see also Hicks*, 485 U.S. at 631 (explaining that the character of the sanction determines whether a contempt is civil or criminal). Although traditionally the courts looked exclusively to the form of the sanction in order to determine whether the contempt was criminal or civil, in *Bagwell*, the Supreme Court indicated that in some circumstances it is necessary for the courts to perform a more substantive review of the content and effect of the contempt sanctions in order to determine whether the contempt was criminal in nature. *See Bagwell*, 512 U.S. at 836-38. Although this holding is sound, it promises to add further complexity to what has already proved to be a very difficult area of the law.

7. 221 U.S. 418 (1911).

other hand, the sanction is punitive—to vindicate the court's authority—then the contempt is criminal.[8] Thus, in general, a contempt sanction is criminal if it imposes punishment for past conduct, usually imprisonment or a fine in a fixed amount.[9] A contempt sanction is compensatory civil if it is designed to compensate the other party for losses sustained as a result of the contemnor's contumacious conduct.[10] And a contempt sanction is coercive civil if it is a conditional penalty designed to coerce compliance with the court's order.[11]

The third form of contempt—coercive civil contempt—is considered civil in nature even though the contemnor may be imprisoned or fined, and any fines assessed are typically payable to the court.[12] This characterization has prevailed because the penalty is specified in advance and is conditional, so that the contemnor can avoid the penalty (whether imprisonment or a fine) simply by complying with the court's order. The sanction has thus been treated as remedial, because its purpose is to compel the contemnor to comply with the requirements of the court's order.[13]

Nevertheless, because the sanction for coercive contempt bears many of the characteristics of criminal punishment, *Gompers*'s "purpose of the sanction" test for distinguishing between civil and criminal contempt has proved remarkably difficult to apply.[14] Indeed,

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8. *See id.* at 441; *see also Hicks*, 485 U.S. at 631 (also using the distinction articulated in *Gompers).* In *Gompers*, the Court also suggested that other factors—such as whether a private party or a government attorney commenced the proceeding, whether the order was mandatory or prohibitory, and how the contempt petition was styled—might also affect the classification of a contempt as civil or criminal. *See Gompers*, 221 U.S. at 442-48. These factors, however, have not proved influential. *See, e.g., Bagwell*, 512 U.S. at 827-28, 835 (relying on *Gompers's* "purpose of the sanction" test, and distancing itself from the "mandatory/prohibitory decree" factor); *Hicks*, 485 U.S. at 631-32 (relying on *Gompers*' "purpose of the sanction" test); *see also* Dobbs, *supra* note 5, at 241 (noting that the other factors suggested in *Gompers* "are not very important because they seldom if ever directly affect results of cases; courts do not follow [these factors] even when they state them").

9. *See Hicks*, 485 U.S. at 632-33; *Gompers*, 221 U.S. at 442-43.

10. *See Hicks*, 485 U.S. at 631-32; United States v. United Mine Workers, 330 U.S. 258, 303-04 (1947).

11. *See Hicks*, 485 U.S. at 632-33; *United Mine Workers*, 330 U.S. at 303-04.

12. *See Hicks*, 485 U.S. at 632; Thomas J. André, Jr., *The Final Judgment Rule and Party Appeals of Civil Contempt Orders: Time for a Change*, 55 N.Y.U. L. REV. 1041, 1051 n.66 (1980); *see also* New York State Nat'l Org. for Women v. Terry, 886 F.2d 1339, 1353-54 (2d Cir. 1989) (rejecting district court's decision to have the coercive fine paid to plaintiffs, and instead requiring that it be paid to the court).

13. *See Hicks*, 485 U.S. at 631-33; *United Mine Workers*, 330 U.S. at 303-04; *Gompers*, 221 U.S. at 441-42.

14. *See* Earl C. Dudley, Jr., *Getting Beyond the Civil/Criminal Distinction: A New*

even the Court in *Gompers* itself recognized that a neat line cannot be drawn between contempt sanctions imposed as criminal punishment and those imposed for remedial purposes:

> It is true that either form of [contempt sanction] has also an incidental effect. For if the case is civil and the punishment is purely remedial, there is also a vindication of the court's authority. On the other hand, if the proceeding is for criminal contempt and the imprisonment is solely punitive, to vindicate the authority of the law, the complainant may also derive some incidental benefit from the fact that such punishment tends to prevent a repetition of the disobedience.[15]

The difficulty of separating sanctions that are coercive from those that are criminal has been exacerbated in recent decades, as the variety of coercive sanctions has greatly expanded, encroaching ever more deeply into the traditionally criminal realm. Until relatively recently, coercive contempt sanctions were generally limited to situations in which the court sought compliance with some simple affirmative requirement, such as testifying or turning over a document.[16] If the defendant refused to comply, the court would imprison or fine the defendant until he complied.[17]

Modern courts, however, have used both injunctions and coercive contempt sanctions much more aggressively.[18] In addition to the more traditional uses, courts have, for example, imprisoned

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Approach to the Regulation of Indirect Contempts, 79 VA. L. REV. 1025, 1047-49 (1993) (stating that the civil/criminal distinction is "confusing, difficult to apply, and ultimately unresponsive to the most serious concerns engendered by the contempt process"); *see also Bagwell*, 512 U.S. at 827 n.3, 830 (noting that many scholars "have criticized as unworkable the traditional distinction" and describing the distinction as "somewhat elusive"); André, *supra* note 12, at 1048-52 (criticizing the distinction between civil and criminal contempt); Joseph Moskovitz, *Contempt of Injunctions, Civil and Criminal*, 43 COLUM. L. REV. 780, 780-81 (1943) (same).

15. *Gompers*, 221 U.S. at 443; *see also Bagwell*, 512 U.S. at 828 (noting the overlap between civil and criminal contempt sanctions); *Hicks*, 485 U.S. at 635-36 (same).

16. *See Bagwell*, 512 U.S. at 840-42 (Scalia, J., concurring) (noting that, at common law, civil contempt was generally used in conjunction with " 'single act' mandates [where compliance] could, in addition to being simple, be quick" (quoting HENRY L. MCCLINTOCK, HANDBOOK OF THE PRINCIPLES OF EQUITY 915 (2d ed. 1948))); *Gompers*, 221 U.S. at 442-43 (providing examples of simple affirmative acts that were proper subjects of coercive contempt).

17. *See Bagwell*, 512 U.S. at 840-41 (Scalia, J., concurring).

18. *See id.* at 842 (Scalia, J., concurring) ("Contemporary courts have abandoned these earlier limitations upon the scope of their mandatory and injunctive decrees."); *see also* Green v. United States, 356 U.S. 165, 207-08 (1958) (Black, J., dissenting) (describing the "incredible transformation and growth" of contempt law), *overruled in part by* Bloom v. Illinois, 391 U.S. 194 (1968).

defendants or imposed daily fines to exact compliance with complex orders;[19] they have imposed determinate sentences, suspended on condition of compliance;[20] and they have announced comprehensive prospective fine schedules to obtain compliance with the various requirements of multi-faceted decrees.[21]

Although the difference between civil and criminal contempt is, by the Supreme Court's own description, "elusive,"[22] much turns on this distinction. As discussed in more detail below, over the last half century, the Supreme Court has provided criminal contempt

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19. *See, e.g.*, New York State Nat'l Org. for Women v. Terry, 886 F.2d 1339, 1351 (2d Cir. 1989) (district court announced sanction of $25,000 for each subsequent daily violation of its detailed order prohibiting anti-abortion demonstrations); United States v. Work Wear Corp., 602 F.2d 110, 113-14 (6th Cir. 1979) (district court announced fine of $5000 per day until contemnor complied with order requiring it to divest itself of eight industrial laundries); United States v. Professional Air Traffic Controllers Org., No. 81-1805, 1982 WL 121560, at *2 (D.D.C. May 18, 1982) (district court announced an escalating schedule of daily fines pending compliance with its no-strike orders).

20. *See, e.g.*, *Hicks*, 485 U.S. at 639-41 (trial court imposed jail sentence on defendant who failed to pay child support, but then suspended the sentence, placed the defendant on probation, and imposed the condition that defendant make specified payments on his arrearage; Supreme Court held that, if this was "a determinate sentence with a purge clause, then it is civil in nature"); Shillitani v. United States, 384 U.S. 364, 366-70 (1966) (trial court imposed determinate two-year prison sentences on defendants for refusing to testify, but indicated that they would be released when they testified); Jencks v. Goforth, 261 P.2d 655, 655-57, 661 (N.M. 1953) (trial court imposed $4000 fine and 90-day prison sentence on defendants for violating injunction that barred various activities, including trespassing and blocking roads, but added that half the fine and all the jail sentence would be remitted or suspended if no further violations occurred during the following year); Dobbs, *supra* note 5, at 244 ("Courts often blur the distinction between determinate and indeterminate sentences. One device that blurs the distinction—some might say obliterates it—is the sentence that is determinate in form, but that is suspended on condition of compliance.").

21. *See, e.g.*, *Bagwell*, 512 U.S. at 824 (trial court announced fines of $100,000 for any future violent breach of the injunction and $20,000 for any future non-violent breach); Aradia Women's Health Ctr. v. Operation Rescue, 929 F.2d 530, 531 (9th Cir. 1991) (district court announced fines of $500 per violation for each violation of its order enjoining defendants " 'from blocking access to abortion facilities and other activities in the state' " (quoting the district court injunction)); Roe v. Operation Rescue, 919 F.2d 857, 862-63, 869 (3rd Cir. 1990) (district court imposed fines of $5000 for each past violation of the court's order prohibiting a variety of harassing activities; court then suspended those fines conditional on no future violations and also announced a prospective fine of $5000 for each future violation).

In *Bagwell*, the Supreme Court seemed to disapprove of this practice, stating that "the fact that the trial court announced the fines before the contumacy, rather than after the fact, does not in itself justify respondents' conclusion that the fines are civil or meaningfully distinguish these penalties from the ordinary criminal law." *Bagwell*, 512 U.S. at 836. Ultimately, the Court determined that the sanctions in that case were "more closely analogous to fixed, determinate, retrospective criminal fines which petitioners had no opportunity to purge once imposed." *Id.* at 837.

22. *Bagwell*, 512 U.S. at 830.

defendants with almost all of the procedural protections generally afforded to defendants in criminal cases, such as the right to a jury trial and the right to conviction only by proof beyond a reasonable doubt.[23] Defendants in civil contempt proceedings, however, receive virtually none of these enhanced protections, but instead are limited to the procedures used in ordinary civil proceedings.[24]

B. The Potential for Judicial Abuse

Although the contempt power is of unquestionable importance in maintaining the authority of the courts and securing the rights of plaintiffs who have been granted injunctive relief, this broad power is uniquely " ' "liable to abuse." ' "[25] The potential for abuse stems from the fact that, in this one area, legislative, executive, and judicial powers are joined. Thus, the judge, rather than the legislature, defines the offense and sets the penalty; the judge, rather than a representative of the executive, decides whether to pursue prosecution; and this same judge, rather than some neutral member of the judiciary, acts as adjudicator.[26]

Investing so much power in one person would be problematic in any circumstance, but in the contempt arena, the problem is exacerbated by the fact that "[c]ontemptuous conduct, though a public wrong, often strikes at the most vulnerable and human qualities of a judge's temperament."[27] Indeed, at least in cases

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23. *See infra* notes 29-33 and accompanying text (describing the procedural protections afforded to criminal contempt defendants).

24. *See Bagwell*, 512 U.S. at 827; Dobbs, *supra* note 5, at 235; Philip A. Hostak, Note, International Union, United Mine Workers v. Bagwell: *A Paradigm Shift in the Distinction Between Civil and Criminal Contempt*, 81 CORNELL L. REV. 181, 184 (1995).

25. *Bagwell*, 512 U.S. at 831 (quoting Bloom v. Illinois, 391 U.S. 194, 202 (1968) (quoting *Ex Parte* Terry, 128 U.S. 289, 313 (1888))). Despite its potential for abuse, however, the importance of the contempt power is widely acknowledged. *See id.* at 831-32; Gompers v. Bucks Stove & Range Co., 221 U.S. 418, 450 (1911); FISS & RENDLEMAN, *supra* note 3, at 1004-12.

26. *See Bagwell*, 512 U.S. at 831 (describing the "fusion of legislative, executive, and judicial powers" in civil contempt proceedings); THE FEDERALIST No. 47, at 325-26 (James Madison) (Jacob E. Cooke ed., 1961) (warning that "where the *whole* power of one department is exercised by the same hands which possess the *whole* power of another department, the fundamental principles of a free constitution are subverted"); Felix Frankfurter & James M. Landis, *Power of Congress over Procedure in Criminal Contempts in "Inferior" Federal Courts—A Study in Separation of Powers*, 37 HARV. L. REV. 1010, 1056 (1924) (noting that, in contempt cases, there are "subtle dangers of bias, unconsciously operating, owing to inevitable human infirmities where one person combines in himself the roles of accuser, trier of facts and intentions, and judge").

27. *Bloom*, 391 U.S. at 202. Justice Black noted in his dissent in *Green:*

> No official, regardless of his position or the purity and nobleness of his character,

involving criminal or civil coercive contempt, imposition of the contempt sanction is so closely centered on the need for the court—and the individual judge—to vindicate its own authority that the judge is "obviously incapable of holding the scales of justice perfectly fair and true and reflecting impartially on the guilt or innocence of the accused."[28]

Largely because of these concerns, the Supreme Court has extended the right to a jury trial, and thus the right to a neutral and objective factfinder, to defendants in criminal contempt cases.[29] The Court has likewise ensured that the defendant in a criminal contempt case enjoys virtually all of the other standard constitutional safeguards, including the protection against double jeopardy,[30] the right to trial in open court,[31] the right to notice of the charges against him, the right to have the assistance of counsel, the right to present a defense,[32] the right against self-incrimination, the presumption of innocence, and the right to conviction only by proof beyond a reasonable doubt.[33]

The Court, however, has consistently refused to extend these basic safeguards to defendants subject to coercive contempt charges.[34] But as Professor Earl Dudley has persuasively argued, the concerns about judicial bias are at least as strong in the coercive contempt context:

> There is, however, no reason to believe that the pervasive difficulties afflicting the contempt process are absent

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> should be granted such autocratic omnipotence.... Like all the rest of mankind [judges] may be affected from time to time by pride and passion, by pettiness and bruised feelings, by improper understanding or by excessive zeal.

Green v. United States, 356 U.S. 165, 198 (1958) (Black, J., dissenting), *overruled in part by* Bloom v. Illinois, 391 U.S. 194 (1968).

28. *Green*, 356 U.S. at 199 (Black, J., dissenting); *see also* Joseph H. Beale, Jr., *Contempt of Court, Criminal and Civil*, 21 HARV. L. REV. 161, 172 (1908) (discussing the problem of judicial bias); Dudley, *supra* note 14, at 1062-63, 1066-67 (same); Hostak, *supra* note 24, at 196 (same).

29. *See Bloom*, 391 U.S. at 201-09.

30. *See* United States v. Dixon, 509 U.S. 688, 695-96 (1993).

31. *See In re* Oliver, 333 U.S. 257, 278 (1948).

32. *See* Cooke v. United States, 267 U.S. 517, 537 (1925).

33. *See* Gompers v. Bucks Stove & Range Co., 221 U.S. 418, 444 (1911). *But see* Myers v. United States, 264 U.S. 95, 104 (1924) (holding that the normal provisions on venue do not apply in contempt cases). *See generally* International Union, United Mine Workers v. Bagwell, 512 U.S. 821, 826-27 (1994) (discussing the procedural protections afforded to criminal contempt defendants); Hicks v. Feiock, 485 U.S. 624, 632 (1988) (same); Young v. United States *ex rel.* Vuitton et fils S.A., 481 U.S. 787, 798-99 (1987) (same).

34. *See Bagwell*, 512 U.S. at 831.

> whenever the sanction chosen is civil in form. A judge offended by perceived flouting of his authority or harboring a jaundiced view of a party against whom he has already ruled on the underlying merits is no less likely to resolve factual issues in a biased manner simply because he chooses ultimately to impose a sanction designed to coerce obedience rather than expressly to punish. Moreover, the concerns arising from the unlimited nature of the sanctioning power are hardly diminished—indeed, they may be elevated—in civil contempt. By carefully crafting the sanction, a biased judge can drastically limit the procedural protections afforded the accused contemnor, foreclose any claim to a jury (thereby cloaking his factual findings with the protection of the "clearly erroneous" standard of appellate review), and possibly truncate the contemnor's right of appeal—all without losing much, if anything, in the way of punitive impact.[35]

Nonetheless, despite this grave danger of biased use of the coercive contempt power, the Supreme Court has insisted on treating the contemnor as a civil, and not a criminal, defendant.[36]

C. *The Breadth of Judicial Power to Impose Coercive Contempt Sanctions*

Although only the minimal civil protections apply in coercive contempt proceedings, the ability of judges to impose severe, even crushing, coercive sanctions is not constrained in any significant way. In the federal and most state systems, there is no cap on the amount that a court may sanction a contempt defendant, as long as the sanction is designed to coerce compliance.[37] Not surprisingly, the

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35. Dudley, *supra* note 14, at 1062-63. Professor Doug Rendleman has also noted the potential for abuse:

> Coercive confinement has an awesome potential for abuse. Power to imprison is concentrated in a single trial judge. The usual checks against abuse that precede criminal imprisonment, including a grand jury indictment, prosecutorial discretion, a jury trial for a sentence of greater than six months, the presumption of innocence, proof beyond a reasonable doubt, and the opportunity for an executive pardon, are absent before coercive confinement begins.

Doug Rendleman, *Disobedience and Coercive Contempt Confinement: The Terminally Stubborn Contemnor*, 48 WASH. & LEE L. REV. 185, 190 (1991).

36. *See Bagwell*, 512 U.S. at 827; Dobbs, *supra* note 5, at 235; Hostak, *supra* note 24, at 184.

37. *See* Dudley, *supra* note 14, at 1026-27 & n.6. The only federal statute limiting the severity of coercive contempt sanctions is 28 U.S.C. § 1826(a) (1994), which provides that a federal court may confine a recalcitrant witness for a maximum of 18 months. Most state statutes impose no upper limit on coercive contempt sanctions, providing only that

absence of any meaningful check on the courts' sanctioning power has led, in some instances, to the announcement of staggering coercive fines.[38] For example, in *New York Times Co. v. Newspaper & Mail Deliverers' Union*,[39] the district court announced that it would fine the defendant union $100,000 for every hour that it continued to obstruct delivery of the newspaper, and $500,000 for every hour in which it obstructed delivery of the newspaper's Sunday edition.[40] In *International Business Machines Corp. v. United States*,[41] the district court stated that it would fine IBM $150,000 per day until it complied with a discovery order.[42] And in *United States v. Russotti*,[43] the district court announced that a police officer who refused to disclose the name of his informant would be fined for each day of continued refusal in an amount starting at $100 per day and then doubling each day until a maximum of $50,000 was reached.[44]

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the judge may imprison the contemnor until he or she complies with the court's order. *See, e.g.*, CAL. CIV. PROC. CODE § 1219 (West 1994); IDAHO CODE § 7-611 (1996); MICH. COMP. LAWS § 600.1715(2) (1997); MISS. CODE ANN. § 9-1-17 (1996). *But cf.* WIS. STAT. ANN. § 785.04 (West 1997) (limiting coercive imprisonment to six months and coercive fines to $2000 per day, unless the court "expressly finds that those sanctions would be ineffectual to terminate a continuing contempt of court").

38. In Professor Dudley's words, coercive sanctions can be "breathtakingly severe." Dudley, *supra* note 14, at 1027 n.6.

39. No. 92 Civ. 3345, 1992 WL 110721 (S.D.N.Y. May 12, 1992).

40. *See id.* at *3.

41. 493 F.2d 112 (2d Cir. 1973).

42. *See id.* at 114.

43. 746 F.2d 945 (2d Cir. 1984).

44. *See id.* at 948-49. The Second Circuit, however, overturned the contempt sanctions on grounds unrelated to the severity of the fine schedule. *See id.* at 950. Many other cases have involved large coercive fines. *See, e.g.*, International Union, United Mine Workers v. Bagwell, 512 U.S. 821, 824 (1994) (trial court had announced a fine of $100,000 for every future violent breach and $20,000 for every future nonviolent breach; fines amounted to $64 million; Supreme Court held that the fines would be treated as criminal in nature); New York State Nat'l Org. for Women v. Terry, 886 F.2d 1339, 1351 (2d Cir. 1989) (district court announced sanction of $25,000 for each subsequent daily violation of its order prohibiting anti-abortion demonstrations; the court also permitted the sanction to be assessed against Randall Terry, Operation Rescue's leader, personally); United States Catholic Conference v. Baker, 824 F.2d 156, 160 (2d Cir. 1987) (district court announced fine of $50,000 per day until witnesses testified), *rev'd on other grounds sub nom.* United States Catholic Conference v. Abortion Rights Mobilization, Inc., 487 U.S. 72 (1988); United States v. Work Wear Corp., 602 F.2d 110, 113-14 (6th Cir. 1979) (district court announced fine of $5000 per day until contemnor complied with divestiture order; $1,035,000 in fines accumulated); New York Tel. Co. v. Communications Workers, 445 F.2d 39, 44 nn.3-4 (2d Cir. 1971) (district court announced escalating fines of up to $100,000 per day until union terminated the strike); *In re* Caucus Distribs., Inc., 83 B.R. 921, 927-28 (E.D. Va. 1988) ($16 million in contempt fines; court declined to discuss or decide whether the fines were criminal or civil); United States v. Professional Air Traffic Controllers Org., 525 F. Supp. 820, 821 (E.D. Mich. 1981) (district court announced fine of $100,000 per day against union until strike was terminated; court vacated its own fines

Moreover, the severity of the coercive fines that the trial courts impose is not carefully policed by the appellate courts. First, only loose guidelines govern the trial court's decision as to the amount of a coercive fine. In *United States v. United Mine Workers*,[45] the Supreme Court suggested that the lower courts should consider a variety of factors, including (1) "the character and magnitude of the harm threatened by continued contumacy"; (2) "the probable effectiveness of any suggested sanction in bringing about the result desired"; and (3) "the amount of defendant's financial resources and the consequent seriousness of the burden to that particular defendant."[46] Aside from these very general considerations, however, the Court has contented itself with frequent but vague reiteration of the general principle that "in wielding its contempt powers, a court 'must exercise "the least possible power adequate to the end proposed." ' "[47]

In reviewing the severity of coercive sanctions, moreover, both federal[48] and state[49] appellate courts use only the generous "abuse of discretion" standard.[50] Although appellate courts have, on occasion,

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because Government made compliance impossible by firing all striking employees).

45. 330 U.S. 258 (1947).

46. *Id.* at 304. In *United Mine Workers*, the lower court had imposed a determinate fine of $3.5 million against the defendant union for nationwide strike activities. *See id.* at 269. The Supreme Court, finding that the fine was excessive as a determinate criminal fine, exercised its inherent authority to reduce it to $700,000, but then reimposed the remaining $2.8 million as a coercive fine, which the union could purge by compliance with the court's order. *See id.* at 304-05.

47. Hicks v. Feiock, 485 U.S. 624, 637 n.8 (1988) (quoting Shillitani v. United States, 384 U.S. 364, 371 (1966) (quoting Anderson v. Dunn, 19 U.S. 204, 231 (1821))).

48. Federal courts employ the "abuse of discretion" standard. *See* United States v. Berg, 20 F.3d 304, 311 (7th Cir. 1994); *In re* Grand Jury Subpoena Duces Tecum, 91-02922, 955 F.2d 670, 673 (11th Cir. 1992); Whittaker Corp. v. Execuair Corp., 953 F.2d 510, 515 (9th Cir. 1992); Citronelle-Mobile Gathering, Inc. v. Watkins, 943 F.2d 1297, 1304 (11th Cir. 1991); Lamar Fin. Corp. v. Adams, 918 F.2d 564, 567 (5th Cir. 1990); United States v. Darwin Constr. Co., 873 F.2d 750, 756 (4th Cir. 1989); N.A. Sales Co. v. Chapman Indus. Corp., 736 F.2d 854, 857 (2d Cir. 1984); Perfect Fit Indus., Inc. v. Acme Quilting Co., 673 F.2d 53, 57 (2d Cir. 1982).

49. State courts also employ the "abuse of discretion" standard. *See* Williams v. Stumpe, 439 So. 2d 1297, 1299 (Ala. Civ. App. 1983); O'Neill v. Carolina Freight Carriers Corp., 239 A.2d 693, 694 (Conn. Super. Ct. 1967); City of Honolulu v. Kailua Auto Wreckers, Inc., 668 P.2d 34, 35 (Haw. 1983); Marks v. Vehlow, 671 P.2d 473, 481 (Idaho 1983); Arch Med. Assocs., Inc. v. Bartlett Health Enters., Inc., 589 N.E.2d 1251, 1254 (Mass. App. Ct. 1992); *In re* Graveley, 614 P.2d 1033, 1040 (Mont. 1980); Fenstamaker v. Fenstamaker, 487 A.2d 11, 16 (Pa. Super. Ct. 1985); State v. Price, 672 A.2d 893, 898 (R.I. 1996); *In re* Marriage of Mathews, 853 P.2d 462, 469 (Wash. Ct. App. 1993); Yamaha Motor Corp., U.S.A. v. Harris, 631 P.2d 423, 428 (Wash. Ct. App. 1981).

50. *See* Dudley, *supra* note 14, at 1028 n.6 (noting that, although the severity of the contempt sanction is reviewable on appeal, "the efficacy of this review is curtailed both by limitations on the appealability of some contempts . . . and by the deference traditionally accorded the trial court's choice of sanction by the reviewing court"); Louis Raveson, *A*

reduced the size of coercive fines,[51] this deferential standard has been applied to give the lower courts broad leeway in choosing the amount of the coercive sanction.[52] Indeed, the Supreme Court has recently noted that the federal courts and state courts have "relied on [*United*] *Mine Workers* to authorize a relatively unlimited judicial power to impose noncompensatory civil contempt fines."[53]

There is thus, at present, a troubling lack of meaningful constraints on the power of the courts to impose severe contempt sanctions. And because of the long-standing judicial treatment of coercive contempt as a civil matter, the problem is especially acute with respect to coercive sanctions, since the courts' power is not even checked by the standard criminal procedural protections.

In view of the pressing need for some protection against potential judicial abuse, it is worthwhile to consider whether the Excessive Fines Clause of the Eighth Amendment imposes a constitutional limit on the amount that a court may fine a contemnor in criminal and coercive civil contempt cases. Indeed, this inquiry is especially timely because, in the last decade, the Supreme Court has pulled the Clause out of obscurity, considering its scope and application in four important new cases.[54] Before turning to an analysis of whether the protection of the Excessive Fines Clause extends to contempt sanctions, some background on the history and meaning of the Clause is useful.

New Perspective on the Judicial Contempt Power: Recommendations for Reform, 18 HASTINGS CONST. L.Q. 1, 18-20 & n.69 (1990) (noting that the standard of review in both state and federal courts is "abuse of discretion"); Hostak, *supra* note 24, at 184 (stating that "there is ordinarily no limit to a court's civil sanctioning authority").

51. For instance, in *United States v. City of Yonkers*, 856 F.2d 444 (2d Cir. 1988), *rev'd on other grounds sub nom.* Spallone v. United States, 493 U.S. 265 (1990), the Second Circuit held that the district court had exceeded its discretion. *See id.* at 460. The district court had set a fine schedule under which fines against the defendant city were to start at $100 per day and double every day of noncompliance. *See id.* The Second Circuit, noting that the fine for day 25 would be more than $1 billion, and the fine for day 30 more than $50 billion, capped the maximum daily fine at (a still steep) $1 million per day. *See id.*

52. *See* International Union, United Mine Workers v. Bagwell, 512 U.S. 821, 830 (1994); *cf.* Simkin v. United States, 715 F.2d 34, 38 (2d. Cir. 1983) (stating that a trial judge has "virtually unreviewable discretion" to determine whether the contempt sanction may yet coerce).

53. *Bagwell*, 512 U.S. at 830.

54. *See* United States v. Ursery, 116 S. Ct. 2135 (1996); Alexander v. United States, 509 U.S. 544 (1993); Austin v. United States, 509 U.S. 602 (1993); Browning-Ferris Indus. v. Kelco Disposal, Inc., 492 U.S. 257 (1989).

III. THE EXCESSIVE FINES CLAUSE

A. *A Brief History of the Clause*

The Eighth Amendment provides that "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."[55] Although there was almost no debate over the Excessive Fines Clause, or even about the Eighth Amendment as a whole, in the First Congress,[56] history shows that the provision was included in an effort to secure for Americans the same rights and liberties that British subjects traditionally enjoyed.[57] In interpreting the Eighth Amendment, the Supreme Court has thus regularly looked to the Amendment's antecedents in British legal history.[58]

The origins of the Eighth Amendment date back to the English Declaration and Bill of Rights of 1689.[59] In the wake of the Glorious Revolution of 1688-89, when the English people deposed James II and elevated William III and Mary II to the throne, important new limitations were placed on royal authority.[60] These limitations were set forth in the Declaration of Rights and were codified into law in its

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55. U.S. CONST. amend. VIII.

56. *See* 1 ANNALS OF CONG. 753-54 (Joseph Gales ed., 1834). What little debate there was regarding the Excessive Fines Clause consisted only of a question raised and addressed about whether the words "nor cruel and unusual punishments" were too indefinite. *See id.* at 754. The entire amendment generated little more discussion other than one other short comment on the excessive bail provision. *See id.*; *see also* Weems v. United States, 217 U.S. 349, 368-69 (1910) (noting the lack of debate over the Eighth Amendment); Gerald W. Boston, *Punitive Damages and the Eighth Amendment: Application of the Excessive Fines Clause*, 5 COOLEY L. REV. 667, 703 (1988) (same).

57. *See* H.D. Hazeltine, *The Influence of Magna Carta on American Constitutional Development*, *in* MAGNA CARTA COMMEMORATION ESSAYS 180, 184-85 (Henry Elliot Malden ed., 1917); Philip B. Kurland, *Magna Carta and Constitutionalism in the United States: "The Noble Lie,"* *in* THE GREAT CHARTER 48, 57 (1965); Calvin R. Massey, *The Excessive Fines Clause and Punitive Damages: Some Lessons from History*, 40 VAND. L. REV. 1233, 1241-43 (1987); *see also Browning-Ferris*, 492 U.S. at 267 ("The Framers of our Bill of Rights were aware and took account of the abuses that led to the 1689 Bill of Rights."); Solem v. Helm, 463 U.S. 277, 286 (1983) ("Although the Framers may have intended the Eighth Amendment to go beyond the scope of its English counterpart, their use of the language of the English Bill of Rights is convincing proof that they intended to provide at least the same protection—including the right to be free from excessive punishments.").

58. *See, e.g.*, *Browning-Ferris*, 492 U.S. at 266-68 (considering the Eighth Amendment's English counterpart in interpreting the Excessive Fines Clause); *Solem*, 463 U.S. at 277, 284-86 & n.10 (considering the Eighth Amendment's English counterpart in interpreting the Cruel and Unusual Punishments Clause); Ingraham v. Wright, 430 U.S. 651, 664-65 (1977) (same).

59. *See Browning-Ferris*, 492 U.S. at 266-67; *Solem*, 463 U.S. at 285-86.

60. *See Browning-Ferris*, 492 U.S. at 267; Massey, *supra* note 57, at 1243-56.

statutory counterpart, the Bill of Rights.[61] Article 10 of both the Declaration and Bill of Rights contained prohibitions against excessive bail, excessive fines, and cruel and unusual punishments.[62] This provision was directly copied into the Virginia Declaration of Rights of 1776, which in turn served as the model for the Eighth Amendment.[63]

The prohibition against excessive fines in Article 10 of the 1689 Declaration and Bill of Rights was designed to accomplish two purposes. First, it reaffirmed the protection provided in Magna Carta against excessive amercements—financial penalties assessed by juries for a wide variety of misconduct, both civil and criminal.[64] Second, Article 10 afforded new protection against fines imposed by judges on their own authority, without consideration by a jury.[65]

This new protection against judicially imposed fines was regarded as necessary because of staggering abuses that had been perpetrated by seventeenth-century judges, who often acted as mere tools to implement the royal will.[66] To augment their authority, these judges had decided that the restrictions on excessive amercements laid down in Magna Carta applied only to fines imposed by juries.[67] This interpretation freed the judges from any restrictions whatsoever on their own power to impose fines. Having granted themselves this

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61. *See generally* LOIS G. SCHWOERER, THE DECLARATION OF RIGHTS, 1689, at 19-29 (1981) (describing generally the Declaration of Rights).

62. Article 10 provided: "That excessive bail ought not to be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." *See* SCHWOERER, *supra* note 61, at 21 (quoting Article 10); *id.* at 87 (also quoting and discussing Article 10).

63. *See Browning-Ferris*, 492 U.S. at 266-67; SCHWOERER, *supra* note 61, at 289-90; Massey, *supra* note 57, at 1240-41.

64. For helpful discussions of the history of amercements and Magna Carta's protections against abusive use of the amercement power, see J.C. HOLT, MAGNA CARTA 230 (1965), WILLIAM SHARP MCKECHNIE, MAGNA CARTA: A COMMENTARY ON THE GREAT CHARTER OF KING JOHN 287-94 (2d ed. 1914), 2 FREDERICK POLLOCK & FREDERIC WILLIAM MAITLAND, THE HISTORY OF ENGLISH LAW BEFORE THE TIME OF EDWARD I 513-15 (2d ed. 1923), and Boston, *supra* note 56, at 710-28. The gradual evolution of amercements into modern-day fines is described, *infra*, at notes 130-38.

65. *See* SCHWOERER, *supra* note 61, at 91. Professor Lois Schwoerer's book provides a comprehensive description and discussion not only of the terms of the Declaration of Rights, but also of the political context in which the document was born.

66. *See* SCHWOERER, *supra* note 61, at 91; Massey, *supra* note 57, at 1253-54.

67. *See* SCHWOERER, *supra* note 61, at 91 (describing the confusion over whether Magna Carta applied to judicially imposed fines); Massey, *supra* note 57, at 1263-64 (noting that "[b]y the Glorious Revolution, James II's judges had determined that the Magna Charta afforded no protection whatsoever from fines"). On the particularly profound abuses of the judges during the reign of James II, see generally 1 THOMAS BABINGTON MACAULAY, HISTORY OF ENGLAND FROM THE ACCESSION OF JAMES THE SECOND 421-658 (1899), and 2 *id.* at 1-155.

unfettered discretion, the judges (spurred on by the kings who controlled them) wielded their power with abandon, imposing outrageous, and often ruinous, fines on their critics and the royal enemies.[68]

The driving force behind Article 10 of the English Declaration and Bill of Rights was thus a desire to rein in these judges. As the Supreme Court has summarized the historical record: "The English version [of the Eighth Amendment], adopted after the accession of William and Mary, was intended to curb the excesses of English judges under the reign of James II."[69] This understanding of the impetus behind the Eighth Amendment and its direct precursor in British law has served as an important guide for the Supreme Court in applying the provisions of the Eighth Amendment.[70]

B. The Supreme Court's Interpretation of the Clause

Although the Supreme Court has issued a number of decisions concerning the bail and punishments clauses of the Eighth Amendment, it did not specifically consider the Excessive Fines Clause of the Eighth Amendment for more than two hundred years.[71] In 1989, however, the Court issued the first of four decisions that have provided significant insight into the scope and meaning of the Clause.

In the first case, *Browning-Ferris Industries v. Kelco Disposal, Inc.*,[72] the Court was confronted with the question of whether the Excessive Fines Clause imposes a constitutional limit on the size of punitive damages awards.[73] Relying heavily on the history and purpose of the Eighth Amendment, a divided Court held that the

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68. *See* SCHWOERER, *supra* note 61, at 91-92 (describing examples); Massey, *supra* note 57, at 1253-54 (same).

69. Ingraham v. Wright, 430 U.S. 651, 664 (1977); *see also* Browning-Ferris Indus. v. Kelco Disposal, Inc., 492 U.S. 257, 267 (1989) (noting that the Eighth Amendment's English counterpart was designed to curb the abuses by the English judges); SCHWOERER, *supra* note 61, at 87, 91 (same).

70. *See, e.g.*, *Browning-Ferris*, 492 U.S. at 262-72 (holding that the Eighth Amendment does not apply to awards of punitive damages to private parties); Solem v. Helm, 463 U.S. 277, 284-86 (1983) (interpreting the Eighth Amendment to contain a principle of proportionality for prison sentences); *Ingraham*, 430 U.S. at 664-66 (holding that the Cruel and Unusual Punishments Clause does not apply to corporal punishment in schools).

71. *See Browning-Ferris*, 492 U.S. at 262 ("[T]his Court has never considered an application of the Excessive Fines Clause."); *see also* Austin v. United States, 509 U.S. 602, 606 (1993) ("We have had occasion to consider this Clause only once before [in *Browning-Ferris*].").

72. 492 U.S. 257 (1989).

73. *See id.* at 259.

Excessive Fines Clause does not apply to an award of punitive damages in a civil case between private parties.[74]

Then in 1993, the Court reviewed a pair of cases involving the Excessive Fines Clause. In *Alexander v. United States*,[75] the Court considered whether the Excessive Fines Clause applies to criminal forfeitures, that is, to forfeitures of property imposed as punishment for a criminal offense.[76] The Court concluded that the protections of the Clause do extend to criminal forfeitures, reasoning that they are "clearly a form of monetary punishment no different, for Eighth Amendment purposes, from a traditional 'fine.' "[77] In the other case, *Austin v. United States*,[78] the Court went further still. *Austin* presented the issue of whether the Excessive Fines Clause also applies to civil in rem forfeitures, that is, to forfeitures of property that are based on the property's use in the commission of a crime, rather than on the property owner's criminal conduct.[79] The Court held that the Clause does apply to the civil forfeitures that were imposed under the statutory provisions at issue in that case.[80] More

74. *See id.* at 260, 262-76. In *Browning-Ferris*, the jury found Browning-Ferris liable for federal antitrust and state tort law violations resulting from Browning-Ferris's efforts to drive the plaintiff, Kelco, out of business. *See id.* at 260-61. The jury awarded Kelco $51,146 in compensatory damages and $6 million in punitive damages. *See id.* at 262. Browning-Ferris appealed, claiming that the punitive damages were so excessive as to violate the Eighth Amendment. *See id.*

75. 509 U.S. 544 (1993).

76. *See id.* at 558.

77. *Id.* In *Alexander*, the defendant was convicted of multiple violations of the obscenity laws and the Racketeer Influenced and Corrupt Organizations Act. *See id.* at 547. The district court imposed a six-year prison term and a $100,000 fine. *See id.* at 548. In addition, pursuant to 18 U.S.C. § 1963 (1988), the district court ordered the defendant to forfeit the assets that he had acquired as a result of his racketeering activities, including his businesses and almost $9 million. *See Alexander*, 509 U.S. at 548. The defendant argued that the forfeiture violated the Eighth Amendment's Excessive Fines Clause. *See id.* at 549. After deciding that the Excessive Fines Clause applied, the Supreme Court remanded the case to the court of appeals for determination of whether the particular forfeiture at issue was constitutionally excessive. *See id.* at 559.

78. 509 U.S. 602 (1993).

79. *See id.* at 606. As Justice Scalia has explained, civil in rem forfeitures differ from criminal in personam forfeitures in that "[t]he latter are assessments, whether monetary or in kind, to punish the property owner's criminal conduct, while the former are confiscations of property rights based on improper use of the property, regardless of whether the owner has violated the law." *Id.* at 624 (Scalia, J., concurring in part and concurring in the judgment).

80. *See id.* at 604, 611-22. In *Austin*, the defendant pled guilty in state court to drug charges and was sentenced to a prison term of seven years. *See id.* at 604. One month later, the United States instituted a civil forfeiture action, seeking forfeiture of the defendant's mobile home and automobile body shop. *See id.* The United States acted pursuant to 21 U.S.C. § 881(a)(4) and (a)(7) (1988), which provided for forfeiture of

generally, the Court also made clear that the Clause is not limited to criminal sanctions, but that it also applies to civil sanctions that contain a punitive component.[81]

In its most recent case concerning the Excessive Fines Clause, *United States v. Ursery*, the Court had occasion to address how punitive a civil sanction must be in order to come within the purview of the Clause.[82] Although the question in *Ursery* was whether the civil sanctions at issue constituted punishment for purposes of the Double Jeopardy Clause, the Court took pains to note that the level of punishment necessary to trigger the Excessive Fines Clause is *lower* than that necessary to invoke double jeopardy.[83]

In the course of these decisions, the Court gave shape and content to the Excessive Fines Clause. First and foremost, the Court emphasized that the purpose of the Clause is to limit the government's power to punish.[84] Relying on the historical roots of the Clause, the Court explained: "[B]oth the Eighth Amendment and § 10 of the English Bill of Rights of 1689, from which it derives, were intended to prevent *the government* from abusing its power to punish."[85] Indeed, the Court elaborated that the Amendment's purpose, "putting the Bail Clause to one side, was to limit the

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conveyances or real property that are used to facilitate the commission of a violation of the drug laws. *See Austin*, 509 U.S. at 604-05 & n.1. The United States prevailed, and the defendant challenged the forfeiture on Eighth Amendment grounds. *See id.* at 605-06. As in *Alexander*, the Supreme Court ultimately remanded the case to the court of appeals for determination of whether the particular forfeiture at issue was constitutionally excessive. *See id.* at 622-23.

81. *See id.* at 610.

82. 116 S. Ct. 2135, 2147 (1996).

83. *See id.* In *Ursery*, defendant Ursery was caught growing marijuana in his house. *See id.* at 2138. The United States instituted civil forfeiture proceedings against the house, and Ursery ultimately settled the claim for $13,250. *See id.* at 2138-39. Ursery was then indicted for manufacturing marijuana; he was convicted and sentenced to 63 months in prison. *See id.* at 2139. Ursery challenged the conviction, claiming that it violated the Double Jeopardy Clause. *See id.* The Supreme Court held that, although the civil forfeiture provision at issue constituted punishment for purposes of the Excessive Fines Clause, it was not sufficiently punitive to constitute punishment for purposes of the Double Jeopardy Clause. *See id.* at 2147.

84. *See Austin*, 509 U.S. at 609-10. The Court stated in *Browning-Ferris:*

> 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, whether it be keeping him in prison, imposing excessive monetary sanctions, or using cruel and unusual punishments.

Browning-Ferris Indus. v. Kelco Disposal, Inc., 492 U.S. 257, 275 (1989).

85. *Austin*, 509 U.S. at 607 (citing *Browning-Ferris*, 492 U.S. at 266-67).

government's power to punish."[86] The Court described the Cruel and Unusual Punishments Clause as "self-evidently concerned with punishment" and the Excessive Fines Clause as "limit[ing] the Government's power to extract payments, whether in cash or in kind, 'as *punishment* for some offense.' "[87]

In *Browning-Ferris*, the Court focused on the importance of governmental involvement, stressing that the Excessive Fines Clause was "intended to limit only those fines directly imposed by, and payable to, the government."[88] The Court thus declined to apply the Clause to awards of punitive damages that are payable solely to private parties.[89]

In *Alexander*, the Court confirmed that the Clause is broad enough to apply to criminal forfeitures and is not limited merely to cash fines.[90] The Court emphasized that "[t]he in personam criminal forfeiture at issue here is clearly a form of monetary punishment no different, for Eighth Amendment purposes, from a traditional 'fine.' "[91]

The Court then went significantly further in *Austin*, holding that the Excessive Fines Clause also applies to civil sanctions that are punitive in nature.[92] In *Browning-Ferris*, the Court had seemed on the verge of limiting the Clause to criminal fines.[93] But the Court dispelled any such notion in *Austin*, holding that the application of the Excessive Fines Clause is not determined by whether the fine is

86. *Id.* at 609.

87. *Id.* at 609-10 (alteration in original) (quoting *Browning-Ferris*, 492 U.S. at 265).

88. *Browning-Ferris*, 492 U.S. at 268.

89. *See id.* at 275. In *Browning-Ferris*, the Court left open the questions of whether the Excessive Fines Clause applies to the States and whether it protects corporations as well as individuals. *See id.* at 276 n.22. Although these remain open questions, it seems inevitable that the Court will answer both in the affirmative. As Justice O'Connor noted in her separate opinion in *Browning-Ferris*, "the Cruel and Unusual Punishments Clause has been regularly applied to the States," and "the Court has assumed that the Excessive Bail Clause of the Eighth Amendment applies to the States," and there is no apparent reason "to distinguish one Clause of the Eighth Amendment from another for purposes of incorporation." *Id.* at 284 (O'Connor, J., concurring in part and dissenting in part) (citing cases). Furthermore, "[i]f a corporation is protected by the Due Process Clause from overbearing and oppressive monetary sanctions," it seems quite likely that "it is also protected from such penalties by the Excessive Fines Clause." *Id.* at 285 (O'Connor, J., concurring in part and dissenting in part).

90. *See* Alexander v. United States, 509 U.S. 544, 558-59 (1993).

91. *Id.*

92. *See Austin*, 509 U.S. at 621-22.

93. *See Browning-Ferris*, 492 U.S. at 263. Further, the Court had previously suggested that the entire Eighth Amendment applies only in criminal cases. *See* Ingraham v. Wright, 430 U.S. 651, 664-68 (1977).

criminal or civil, but rather by whether the fine is judged to constitute punishment.[94]

Thus, in situations in which the government imposes and receives the fine, the critical question is whether the fine should be regarded as punitive in nature. On that point, the Court in *Austin* was careful to emphasize that sanctions—whether imposed in civil or criminal proceedings—often advance both punitive and remedial goals.[95] But as long as a sanction—again, whether civil or criminal—has a punitive component, it qualifies as punishment for purposes of the Excessive Fines Clause.[96] In the Court's words:

> We need not exclude the possibility that a [sanction] serves remedial purposes to conclude that it is subject to the limitations of the Excessive Fines Clause. We, however, must determine that it can only be explained as serving in part to punish. We said in *Halper* that "a civil sanction that cannot fairly be said solely to serve a remedial purpose, but rather can only be explained as also serving either retributive or deterrent purposes, is punishment, as we have come to understand the term."[97]

Moreover, the Court held that, in determining whether a civil sanction is punitive for purposes of the Excessive Fines Clause, courts should take a categorical approach, examining the sanction generally rather than limiting their consideration to how the sanction was applied in an individual case.[98] Thus, for instance, in *Austin* itself the Court focused on whether the relevant federal civil forfeiture provisions, taken as a whole, were punitive to some degree, rather than on whether they were punitive as applied to the defendant in that particular case.[99] Three years later, in *Ursery*, the Court reiterated that it takes a "categorical approach" when determining whether a civil sanction is punitive for purposes of the Excessive Fines Clause.[100]

Perhaps more importantly, the Court in *Ursery* also shed further light on the degree of punitiveness required for a civil sanction to

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94. *See Austin*, 509 U.S. at 610.

95. *See id.*

96. *See id.*

97. *Id.* (quoting United States v. Halper, 490 U.S. 435, 448 (1989)); *see also id.* at 621 (reiterating this same point).

98. *See id.* at 622 n.14.

99. *See id.* at 619-22. The forfeiture provisions at issue in *Austin* were 21 U.S.C. § 881(a)(4) and (a)(7) (1988). *See Austin*, 509 U.S. at 604-05.

100. United States v. Ursery, 116 S. Ct. 2135, 2146-47 (1996).

come within the scope of the Excessive Fines Clause. In *Ursery*, the issue was whether civil forfeitures constitute punishment for purposes of the Double Jeopardy Clause of the Fifth Amendment.[101] Two circuit courts of appeals had held that civil forfeitures do constitute punishment under the Double Jeopardy Clause, relying on the Supreme Court's decision in *Austin*, which had held that the same federal civil forfeiture provision constituted punishment for purposes of the Excessive Fines Clause.[102] Nonetheless, the Supreme Court reversed. In doing so, it clarified that the threshold at which a sanction constitutes punishment is *lower* for purposes of the Excessive Fines Clause than it is for the Double Jeopardy Clause:

> Forfeitures effected under 21 U.S.C. §§ 881(a)(4) and (a)(7) are subject to review for excessiveness under the Eighth Amendment after *Austin*; this does not mean, however, that those forfeitures are so punitive as to constitute punishment for the purposes of double jeopardy. The holding of *Austin* was limited to the Excessive Fines Clause of the Eighth Amendment, and we decline to import the analysis of *Austin* into our double jeopardy jurisprudence.[103]

Because the Supreme Court employs a categorical approach in determining whether a sanction is punitive for purposes of the Excessive Fines Clause, it performs its analysis of whether a given sanction violates the Clause in two stages. In the first stage, the Court considers whether the general type or category of sanction at issue is at least in part punitive.[104] To resolve this critical point, the Court considers "whether, at the time the Eighth Amendment was ratified, [the sanction] was understood at least in part as punishment and

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101. *See id.* at 2138. The Double Jeopardy Clause provides: "nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb." U.S. CONST. amend. V.

102. *See* United States v. Ursery, 59 F.3d 568, 573 (6th Cir. 1995), *rev'd*, 116 S. Ct. 2135 (1996); United States v. $405,089.23 U.S. Currency, 33 F.3d 1210, 1219 (9th Cir. 1994), *rev'd*, 116 S. Ct. 2135 (1996). *Ursery* involved the precise civil forfeiture provision at issue in *Austin* (21 U.S.C. § 881(a)(7)); *$405,089.23 U.S. Currency* involved two different civil forfeiture provisions (18 U.S.C. § 981(a)(1)(A) (1994) and 21 U.S.C. § 881(a)(6) (1994)).

103. *Ursery*, 116 S. Ct. at 2147. Also, in *Austin* itself, the Court emphasized that the determination of whether a civil fine involves punishment for purposes of the Excessive Fines Clause is entirely separate from the question of whether a nominally civil proceeding is so punitive that it should be "reclassified" as criminal, so that all of the criminal procedural safeguards apply. *See Austin*, 509 U.S. at 610 n.6 (distinguishing *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 167, 184 (1963), and *United States v. Ward*, 448 U.S. 242, 248 (1980), which articulated tests for determining when a civil proceeding must be considered criminal).

104. *See Austin*, 590 U.S. at 610-11.

whether [the sanction] should be so understood today."[105] If the answer to that inquiry is affirmative, then the Court proceeds to the second stage of the inquiry, considering whether the particular sanction imposed is so large as to be " 'excessive.' "[106]

Although the Court reaffirmed in *Ursery* that courts should use this two-stage inquiry to determine whether a civil sanction violates the Excessive Fines Clause,[107] the Court strongly suggested in *Alexander* that the first stage—determining whether the general category of sanction is subject to the Clause—is unnecessary when the sanction at issue is a personal fine imposed in a criminal proceeding.[108] In *Alexander*, the Court thus did not undertake that analysis, stating instead: "Unlike *Austin*, this case involves *in personam* criminal forfeiture not *in rem* civil forfeiture, so there was no threshold question concerning the applicability of the Eighth Amendment."[109] Based on this treatment of the issue, it appears that the Court may be willing simply to assume that all *criminal* fines are sufficiently punitive to come within the scope of the Eighth Amendment.

IV. APPLICATION OF THE EXCESSIVE FINES CLAUSE TO CONTEMPT SANCTIONS

With this background in mind, the Article now turns to the question of whether fines that are imposed as contempt sanctions fall within the scope of the Excessive Fines Clause. The Article first considers the relatively straightforward issue of whether criminal contempt fines are subject to the limitations of the Excessive Fines Clause. It then considers the much more difficult issue of whether coercive civil contempt fines are also subject to the Clause.[110]

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105. *Id.*

106. *Id.* at 622 (quoting Petitioner's Brief at 46-48, Austin v. United States, 509 U.S. 602 (1993) (No. 92-6073)); *see also Ursery*, 116 S. Ct. at 2146-47 (noting that, in an Excessive Fines Clause case, it is unnecessary to inquire at the first stage whether the civil sanction actually imposed in the case is excessive, because that inquiry is made at the second stage). In *Austin*, the Court recognized that

> it appears to make little practical difference whether the Excessive Fines Clause applies to all forfeitures ... or only to those that cannot be characterized as purely remedial. The Clause prohibits only the imposition of "excessive" fines, and a fine that serves purely remedial purposes cannot be considered "excessive" in any event.

Austin, 509 U.S. at 622 n.14.

107. *See Ursery*, 116 S. Ct. at 2146-47.

108. *See* Alexander v. United States, 509 U.S. 544, 559 n.4 (1993).

109. *Id.*

110. It is clear that compensatory civil contempt, which is designed only to compensate the plaintiff for any damages sustained as a result of the contemnor's violation of the

A. *Application to Criminal Contempt Fines*

Over the past several decades, the lower courts have consistently assumed that criminal contempt sanctions are subject to the restrictions of the Eighth Amendment.[111] Although none of these courts has provided any analysis of the issue, they have willingly entertained claims that particular sanctions are so excessive as to violate either the Excessive Fines Clause or the Cruel and Unusual Punishments Clause. A number of commentators have also made this same assumption, treating application of the Clauses almost as a given.[112]

The Supreme Court, however, has never directly addressed the issue. Although several individual Justices have opined that criminal contempt sanctions are constrained by the Eighth Amendment,[113] a majority of the Court has not so held. Whether criminal contempt

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court's order, is not subject to the Excessive Fines Clause. There are two reasons for this conclusion. First, damages awards in such cases are paid to the plaintiff, not the government. Second, the awards in such cases are purely remedial. Under both *Browning-Ferris* and *Austin*, therefore, such awards would not qualify for the protection of the Excessive Fines Clause. *See Austin*, 509 U.S. at 606-11; Browning-Ferris Indus. v. Kelco Disposal, Inc., 492 U.S. 257, 267-68 (1989).

111. A number of courts have assumed that the Excessive Fines Clause of the Eighth Amendment applies to criminal contempt fines. *See* United States v. Twentieth Century Fox Film Corp., 882 F.2d 656, 663 (2d Cir. 1989); Madden v. Grain Elevator, Flour & Feed Mill Workers, Local 418, 334 F.2d 1014, 1021-22 (7th Cir. 1964). Also, many courts have assumed that the Cruel and Unusual Punishments Clause of the Eighth Amendment applies to criminal contempt prison sentences. *See* United States v. Brown, 247 F.2d 332, 339 (2d Cir. 1957) ("[U]nless the punishment [for criminal contempt] offends the prohibition of the Eighth Amendment by reason of its cruel and unusual nature we must affirm the sentence imposed."), *aff'd*, 359 U.S. 41 (1959); Kasper v. Brittain, 245 F.2d 92, 96 (6th Cir. 1957); United States v. Thompson, 214 F.2d 545, 546 (2d Cir. 1954); United States v. Onan, 190 F.2d 1, 9 (8th Cir. 1951); Brown v. Lederer, 140 F.2d 136, 138-39 (7th Cir. 1944).

112. *See* RONALD L. GOLDFARB, THE CONTEMPT POWER 265-66 (1963); Nancy J. King, *Proportioning Punishment: Constitutional Limits on Successive and Excessive Penalties*, 144 U. PA. L. REV. 101, 151 (1995).

113. *See* Green v. United States, 356 U.S. 165, 200 (1958) (Black, J., dissenting) (stating that the Cruel and Unusual Punishments Clause applies to criminal contempt sanctions), *overruled in part by* Bloom v. Illinois, 391 U.S. 194 (1968); Sacher v. United States, 343 U.S. 1, 19 (1952) (Black, J., dissenting) (same); United States v. United Mine Workers, 330 U.S. 258, 377-78 (1947) (Rutledge, J., dissenting) ("The law has fixed standards for each [contempt] remedy[:] .... for punishment, what is not cruel and unusual or, in the case of a fine, excessive within the Eighth Amendment's prohibition."). Although these Justices were writing in dissent, their statements concerning the Eighth Amendment's applicability to criminal contempt sanctions were not contradicted by the majority. Moreover, the dissenting Justices in these cases were criticizing the majority position that criminal contempt defendants were not entitled to a jury trial. Eventually, the Court came around to the dissenters' view, holding that there is a right to a jury trial in criminal contempt cases. *See* Bloom v. Illinois, 391 U.S. 194, 195-210 (1968).

fines are subject to the Eighth Amendment's Excessive Fines Clause is thus an open question.

It is quite possible, indeed even likely, that the Supreme Court would approach this question as it approached the issue in *Alexander*—treating the application of the Excessive Fines Clause as beyond doubt.[114] This result seems likely because the criminal contempt fine, like the in personam forfeiture in *Alexander*, is a direct criminal sanction. In *Alexander*, that factor alone seemed to resolve the "threshold question concerning the applicability of the Eighth Amendment,"[115] and it would quite probably do so for criminal contempt sanctions as well.

Nevertheless, this threshold inquiry—looking at whether the criminal contempt sanction was historically understood at least in part as punishment, and whether it should be so understood today—is worthwhile for two reasons. First, although the Court has frequently insisted that criminal contempt is " 'a crime in the ordinary sense,' "[116] it has at times said that contempt is sui generis, neither wholly criminal nor wholly civil in nature.[117] Second, a complete understanding of why the Excessive Fines Clause does and should apply to criminal contempt sanctions will further the analysis of the more difficult question of whether the Clause applies to coercive civil contempt fines.

1. The Historical Understanding of Criminal Contempt

The first step in this inquiry is a determination of whether criminal contempt sanctions were understood at least in part as punishment when the Eighth Amendment was ratified. Because the Eighth Amendment was patterned on Article 10 of England's 1689 Declaration and Bill of Rights,[118] it is useful to begin with the

114. *See Alexander*, 509 U.S. at 559 n.4; *see also supra* notes 75-77 and accompanying text (discussing *Alexander*).

115. *Alexander*, 509 U.S. at 599 n.4.

116. International Union, United Mine Workers v. Bagwell, 512 U.S. 821, 826 (1994) (quoting *Bloom*, 391 U.S. at 201); *see also* United States v. Dixon, 509 U.S. 688, 696 (1993) (quoting this same language from *Bloom*).

117. *See* Cheff v. Schnackenberg, 384 U.S. 373, 380 (1966); Blackmer v. United States, 284 U.S. 421, 440 (1932); United States v. Goldman, 277 U.S. 229, 235-36 (1928); Myers v. United States, 264 U.S. 95, 103-05 (1924); Gompers v. Bucks Stove & Range Co., 221 U.S. 418, 441 (1911); *see also* GOLDFARB, *supra* note 112, at 62 (noting that the Court has sometimes referred to contempt as sui generis); Dudley, *supra* note 14, at 1040, 1048-49, 1068 (same).

118. *See supra* notes 59-70 (discussing the Amendment's origins in these English documents).

treatment of contempt in English law.

The notion of contempt of court dates back at least to the twelfth century, and contempt was punished as an offense against the King by the thirteenth century.[119] The law of contempt was originally divided into two categories: criminal contempt and contempt in procedure, which was also known as civil contempt.[120] In these earlier times, contempts were classified based on the type of behavior at issue. A contempt was criminal if it involved words or acts that obstructed the administration of justice, such as disruptive acts in the courtroom or publishing libelous statements about a judge.[121] A contempt was a contempt in procedure, on the other hand, if it involved disobedience to the orders or processes of the court.[122]

Although this historical division between forms of contempt looks, at first impression, something like the division that is used today, the categories themselves are fundamentally different. This discontinuity stems from the fact that an entirely different principle is now used to classify contempts.

While the classification of a contempt as criminal or civil originally turned on the nature of the underlying behavior, today it depends on the purpose of the sanction that is used to punish the contempt.[123] Thus, for instance, under the older classification scheme,

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119. *See* JOHN C. FOX, THE HISTORY OF CONTEMPT OF COURT 45-46, 122-23 (1927) [hereinafter FOX, HISTORY OF CONTEMPT].

120. *See id.* at 1; GOLDFARB, *supra* note 112, at 50; 7 HALSBURY, THE LAWS OF ENGLAND 280 (1909).

121. *See* FOX, HISTORY OF CONTEMPT, *supra* note 119, at 1; 7 HALSBURY, *supra* note 120, at 280-94 (listing and describing acts that would constitute criminal contempt).

122. *See* FOX, HISTORY OF CONTEMPT, *supra* note 119, at 1; 7 HALSBURY, *supra* note 120, at 280, 297-306 (listing and describing acts that would constitute contempt in procedure). Ronald Goldfarb contends that contempt in procedure "was considered a quasi-contempt; contempt in theory and name alone." GOLDFARB, *supra* note 112, at 50. Thus, he argues, "there was not, as is now the case, a body of law dubbed contempt, but divided into two separate parts—civil and criminal. Rather, there was a body of contempt law, and a distinct procedural device, like contempt, called contempt, but not really contempt." *Id.* at 51.

Also, it should be noted that the nomenclature was not always consistent. In the *Encyclopedia of the Laws of England*, the same basic distinction set out in the text is drawn between the two forms of contempt, but the author has denominated the categories "direct" contempt (rather than criminal contempt) and "indirect" contempt (rather than contempt in procedure). 3 ENCYCLOPEDIA OF THE LAWS OF ENGLAND 502 (2d ed. 1907) [hereinafter ENCYCLOPEDIA OF LAWS].

123. *See* International Union, United Mine Workers v. Bagwell, 512 U.S. 821, 827-28 (1994); Hicks v. Feiock, 485 U.S. 624, 631-32 (1988); Gompers v. Bucks Stove & Range Co., 221 U.S. 418, 441 (1911); *see also* Dudley, *supra* note 14, at 1035 (stating that the Supreme Court's distinction between criminal and civil contempt was "embryonic" in 1887); *supra* notes 5-24 and accompanying text (discussing the modern distinction between

a defendant's disobedience of a court order would be treated as a civil contempt, because that was the type of act that fell within the civil contempt category. Today, in contrast, a defendant's disobedience of a court order could be treated as *either* a criminal contempt *or* a civil contempt, depending on whether the court's sanction is designed to punish the past disobedience (in which case the contempt would be criminal), to coerce the defendant's compliance in the future (in which case the contempt would be coercive civil), or to compensate the plaintiff for harm caused by the defendant's disobedience (in which case the contempt would be compensatory civil).[124]

In consequence, it is risky to draw any conclusions about the treatment of modern-day contempt sanctions based on the treatment or understanding of contempt sanctions in centuries past. Indeed, Ronald Goldfarb contends that, in this area,

> all that can be gleaned from the past is that the legal rules supporting both civil and criminal contempts have been liquefied to the point where one often washes into the other. Today, civil and criminal contempts combine to form the law of contempt, though historically one was a contempt power, and the other was a procedure for civil execution, unfortunately and confusingly labeled, and having certain similar characteristics as "true" contempts.[125]

Although the reach of the criminal contempt category has thus expanded under the modern distinction between criminal and civil contempt, much of what was originally considered to be criminal

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civil and criminal contempt).

124. *See generally* GOLDFARB, *supra* note 112, at 51 ("Today, the law of contempt embodies both civil and criminal contempt, and though both were born from different history and reason, they are considered but nuances of each other and are often applied interchangeably. Civil contempts are now often treated in ways which are extraordinary....").

Various other aspects of ancient contempt procedure strongly suggest that the traditional categories of criminal and civil contempt bore little resemblance to the categories that are in use today. For instance, it appears that in older times, prison sentences for criminal, as well as civil, contempt could be indefinite in length. *See* 7 HALSBURY, *supra* note 120, at 316 & note n; John C. Fox, *The Practice in Contempt of Court Cases*, 38 L.Q. REV. 185, 200 (1922) [hereinafter Fox, *Practice in Contempt Cases*]. Today, a fixed and definite prison sentence is one of the hallmarks of criminal contempt. *See, e.g.*, *Bagwell*, 512 U.S. at 828-29. Further, although the authorities are not clear on this point, it seems that criminal contempt sanctions, as well as civil contempt sanctions, could (at least in some cases) be purged. *See* ENCYCLOPEDIA OF LAWS, *supra* note 122, at 504-05; 7 HALSBURY, *supra* note 120, at 282. Today, in contrast, the ability to purge the contempt sanction by complying with the court's order is limited to coercive civil contempt. *See Bagwell*, 512 U.S. at 828.

125. GOLDFARB, *supra* note 112, at 66.

contempt remains so today. As Sir John Fox, who painstakingly detailed the history of contempt, has summarized: "Acts of criminal contempt in that age [the fourteenth century] are criminal contempt to-day."[126] Further, because the modern distinction turns on the purpose of the contempt sanction, the forms of contempt more recently placed in the category of criminal contempts are, by definition, directly related in purpose to the traditional forms that have remained in this category. For these reasons, despite the extensive evolution that has occurred in contempt law, some parallels can be drawn between the historical and modern treatment of contempt, particularly with respect to criminal contempt.

Historically, the criminal contempt sanction was understood to be punishment. As Sir John Fox explained:

> [F]rom the earliest laws of the kingdom, through the records of the Curia Regis and the Parliament, the Year Books and the first treatises on law, the development of "contempt" in the legal sense can be traced until by the fourteenth century the principles upon which *punishment* is inflicted to restrain disobedience to the commands of the King and his courts as well as other acts which tend to obstruct the course of justice, have become firmly established.[127]

This ancient understanding of contempt sanctions as punishment continued as the law of contempt developed through the seventeenth century and beyond.[128] Indeed, it seems clear that contempt sanctions were not only understood as punishment, but also were subject to the restrictions of Magna Carta, and eventually the English Declaration and Bill of Rights of 1689.[129]

Prior to the seventeenth century, courts punished contempts in one of two ways: they either amerced the offender or imposed a

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126. John C. Fox, *The Nature of Contempt of Court*, 37 L.Q. REV. 191, 201 (1921) [hereinafter Fox, *Nature of Contempt*].

127. *Id.* (emphasis added); *see also* FOX, HISTORY OF CONTEMPT, *supra* note 119, at 47-49 (discussing the practice of punishing for contempt); GOLDFARB, *supra* note 112, at 13-14 (noting that the criminal contempt sanction was historically considered punishment).

128. *See* 1 EDWARD COKE, FIRST PART OF THE INSTITUTES OF THE LAWS OF ENGLAND 126 (facsimile ed. 1979) (1628) ("[F]ine signifieth a pecuniarie punishment for an offence or a contempt committed against the King ...."); FOX, HISTORY OF CONTEMPT, *supra* note 119, at 200 (repeatedly referring to the sanction for criminal contempt as "punishment"); 7 HALSBURY, *supra* note 120, at 280 ("Criminal contempt is a misdemeanour punishable by fine or imprisonment, or by order to give security for good behaviour.").

129. *See supra* notes 59-70 (discussing the Amendment's origins in these English documents).

sentence of imprisonment. An amercement was a monetary penalty, paid to the Crown, which was set by a jury of the offender's peers once his guilt was established.[130] Amercements were very common, not only for contempts,[131] but also for a wide variety of other offenses.[132] Because amercements were so prevalent, and the power to amerce so easily abused, three chapters of Magna Carta were devoted to regulating and restricting the amercement power.[133] These chapters, which eventually formed the basis for the Excessive Fines Clause in the English Bill of Rights of 1689, required that amercements be proportional to the degree of the offense.[134] Monetary penalties for contempt offenses, in the form of amercements, were subject to these limitations in Magna Carta.

The second form of punishment available for contempt was imprisonment. Prior to the seventeenth century, imprisonment could always be avoided by "making fine," that is, by paying to the Crown a sum of money in lieu of going to prison.[135] In theory, the fine was a bargain made between the offender and the court; it was not imposed by the court (indeed, at that time, judges had no power to impose fines), but rather it was negotiated by the offender to bring an end to the matter.[136]

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130. *See generally* 2 POLLOCK & MAITLAND, *supra* note 64, at 513-15 (describing amercements in general and the procedure for their imposition in particular); Massey, *supra* note 57, at 1252-53 (defining and describing amercements).

131. *See* FOX, HISTORY OF CONTEMPT, *supra* note 119, at 118-19 (providing examples of contemptuous behavior that could lead to amercement).

132. *See* 2 POLLOCK & MAITLAND, *supra* note 64, at 513 ("In the thirteenth century amercements are being inflicted right and left .... [M]ost men in England must have expected to be amerced at least once a year."); *id.* at 519 (noting that a "litigant who hoped to get to the end of his suit without an amercement must have been a sanguine man").

133. *See* MCKECHNIE, *supra* note 64, at 284-99 (describing and discussing chapters 20-22 of Magna Carta, which address amercements against freemen, merchants, and villeins; earls and barons; and the clergy). A fourth chapter, chapter 55, of Magna Carta also dealt with amercements, by providing for restitution of fines and amercements unjustly imposed. *See id.* at 454-56.

134. For instance, chapter 20 provided in part: " 'A freeman shall not be amerced for a slight offence, except in accordance with the degree of the offence; and for a grave offence he shall be amerced in accordance with the gravity of the offence, yet saving always his "contenement." ' " MCKECHNIE, *supra* note 64, at 284 (quoting MAGNA CARTA, ch. 20). "[T]o save a man's 'contenement' was to leave him sufficient for the sustenance of himself and those dependent on him." *Id.* at 293.

135. *See* FOX, HISTORY OF CONTEMPT, *supra* note 119, at 119; 2 POLLOCK & MAITLAND, *supra* note 64, at 517.

136. *See* FOX, HISTORY OF CONTEMPT, *supra* note 119, at 119, 121 (describing the process of "making fine"); MCKECHNIE, *supra* note 64, at 293 (same); 2 POLLOCK & MAITLAND, *supra* note 64, at 517-18 (same). As Professor William McKechnie notes,

Although the two punishment alternatives—amercement or imprisonment with the option to make fine—were originally quite distinct, the two began to meld over time. By the beginning of the seventeenth century, "the 'making fine for contempt' was disappearing," and the courts were beginning to impose fines on their own authority, in the modern sense.[137] When the Declaration and Bill of Rights were adopted in 1689, therefore, Article 10's prohibition against "excessive fines" was understood to reaffirm the ancient right against excessive amercements in Magna Carta, as well as to prohibit the imposition of excessive fines by the courts.[138]

History thus strongly indicates that monetary sanctions for criminal contempt, whether in the form of an amercement or a court-imposed fine, were subject to the limitations of the excessive fines clause in Article 10 of the 1689 Declaration and Bill of Rights. As noted above, the Eighth Amendment was intended to provide for Americans the same protections that were secured for the English people by Article 10.[139] It therefore seems clear that criminal contempt sanctions were understood to be punishment, and thus they would have been considered to be subject to the Excessive Fines Clause at the time that the Eighth Amendment was ratified.

2. Criminal Contempt as Punishment Today

The original understanding of criminal contempt fines as punishment continues today. Indeed, the Supreme Court has repeatedly described the purpose of the criminal contempt sanction

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however, the notion of the "voluntary" fine was often a fiction: "The Crown might imprison its victims for an indefinite period, and then graciously allow them to offer large payments to escape death by fever or starvation in some noisome gaol." MCKECHNIE, *supra* note 64, at 293.

137. FOX, HISTORY OF CONTEMPT, *supra* note 119, at 177; *see also* MCKECHNIE, *supra* note 64, at 293 ("With the gradual elimination of the voluntary element the word 'fine' came to bear its modern meaning, while 'amercement' dropped out of ordinary use."); ADAM SMITH, LECTURES ON JURISPRUDENCE 303, 431 (R.L. Meek et al. eds., 1978) (noting that, in the latter part of the eighteenth century, contempt was punished by imprisonment or fine).

138. *See* SCHWOERER, *supra* note 61, at 90-92 (explaining that the excessive fines clause in the Declaration of Rights applied to fines and amercements); Massey, *supra* note 57, at 1256 ("Article ten explicitly addressed the issue of fines, while it implicitly reaffirmed ancient rights with respect to amercements. The Declaration of Rights' excessive fines clause thus should be read as simultaneously prohibiting excessive fines and amercements, whether imposed by judge or jury, in both civil and criminal proceedings."); *see also* Solem v. Helm, 463 U.S. 277, 284 n.8 (1983) ("An amercement was similar to a modern-day fine. It was the most common criminal sanction in 13th century England.").

139. *See supra* notes 59-63 and accompanying text.

as punitive. In *Gompers v. Bucks Stove & Range Co.*,[140] the leading case on the distinction among the three forms of contempt, the Court flatly stated that the sanction for criminal contempt operates "solely as punishment for the completed act of disobedience."[141] The Court has consistently adhered to this view over the ensuing years, reiterating that "[s]entences for criminal contempt are punitive in their nature and are imposed for the purpose of vindicating the authority of the court."[142]

This understanding of the purpose of criminal contempt sanctions has led the Court to describe criminal contempt as "a crime in every fundamental respect,"[143] and to extend to criminal contempt defendants virtually all of the constitutional protections provided to defendants in other types of criminal cases.[144] It thus seems inevitable that the Court will also extend the protections of the Eighth Amendment's Excessive Fines Clause to criminal contempt defendants. And this result is unquestionably correct, given the historical record and the Court's explicit recognition of the punitive nature of the criminal contempt sanction.

B. Application to Coercive Civil Contempt Fines

Whether the Excessive Fines Clause applies to coercive civil contempt is, however, a much more vexing problem. The courts have always considered coercive contempt sanctions to be a civil (rather

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140. 221 U.S. 418 (1911).

141. *Id.* at 443. The Court also stated that where the sanction "is for criminal contempt the sentence is punitive, to vindicate the authority of the court." *Id.* at 441.

142. United States v. United Mine Workers, 330 U.S. 258, 302 (1947) (citing *Gompers*, 221 U.S. at 441); *see also* International Union, United Mine Workers v. Bagwell, 512 U.S. 821, 828 (1994) (stating that criminal contempt sanctions are punitive, for vindication of the court's authority); Hicks v. Feiock, 485 U.S. 624, 631-32 (1988) (same).

143. Bloom v. Illinois, 391 U.S. 194, 201 (1968). The Court explained more fully: "[C]onvictions for criminal contempt are indistinguishable from ordinary criminal convictions, for their impact on the individual defendant is the same. Indeed, the role of criminal contempt and that of many ordinary criminal laws seem identical—protection of the institutions of our government and enforcement of their mandates." *Id.*; *see also Bagwell*, 512 U.S. at 826 (describing criminal contempt as a crime in the ordinary sense); United States v. Dixon, 509 U.S. 688, 696 (1993) (same).

144. *See, e.g.*, *Dixon*, 509 U.S. at 696 (protection from double jeopardy); *Bloom*, 391 U.S. at 198 (right to a jury trial); *In re* Oliver, 333 U.S. 257, 278 (1948) (right to trial in open court); Cooke v. United States, 267 U.S. 517, 537 (1925) (notice of charges; assistance of counsel; presentation of defense); *Gompers*, 221 U.S. at 444 (presumption of innocence; proof beyond a reasonable doubt; right against self-incrimination). *But see* Myers v. United States, 264 U.S. 95, 104 (1924) (holding that the normal provisions on venue do not apply in contempt cases). *See generally supra* notes 29-33 and accompanying text (discussing the procedural protections afforded to criminal contempt defendants).

than a criminal) matter, because they serve a remedial purpose: to gain compliance with the court's order.[145] As *Austin* made clear, however, the Eighth Amendment's Excessive Fines Clause is not limited to criminal sanctions. Instead, the Clause applies to any government-imposed sanction that constitutes punishment in some respect, regardless of whether the sanction is characterized as "civil" or "criminal."[146]

Fines imposed for violation of a coercive contempt order are government-imposed sanctions. The fines are imposed by the court, for continued violation of the court's order. And the fines are payable to the court, not to the other litigants.[147] Coercive fines thus constitute "fines directly imposed by, and payable to, the government,"[148] and as such, meet the initial requirement for application of the Excessive Fines Clause.

The more difficult question is whether coercive contempt sanctions constitute punishment. The Court in *Austin* expressly recognized that a sanction may be punitive, even though it also serves remedial purposes.[149] Indeed, the Court emphasized that in order to be considered punishment for purposes of the Excessive Fines Clause, the sanction need only serve *in part* to punish.[150] Thus, in order for the Clause to apply to the coercive contempt sanction, a court "need not exclude the possibility that [the sanction] serves remedial purposes."[151] Rather, the court must simply determine that the coercive sanction "can only be explained as serving in part to punish."[152]

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145. *See, e.g., Hicks*, 485 U.S. at 631-33; *United Mine Workers*, 330 U.S. at 303-04; *Gompers*, 221 U.S. at 441-42. The characterization of coercive contempt sanctions as civil has, however, been roundly criticized. *See* Richard C. Brautigam, *Constitutional Challenges to the Contempt Power*, 60 GEO. L.J. 1513, 1521-23 (1972); Dudley, *supra* note 14, at 1062-63.

146. *See* Austin v. United States, 509 U.S. 602, 608-10 (1993); *see also supra* text accompanying note 97 (quoting the relevant discussion in *Austin*).

147. *See Hicks*, 485 U.S. at 632; New York State Nat'l Org. for Women v. Terry, 886 F.2d 1339, 1353-54 (2d Cir. 1989); *see also* André, *supra* note 12, at 1051 n.66 (noting that coercive fines are payable to the court).

148. Browning-Ferris Indus. v. Kelco Disposal, Inc., 492 U.S. 257, 268 (1989); *see also supra* notes 88-89 and accompanying text (discussing the Court's holding in *Browning-Ferris*).

149. *See Austin*, 509 U.S. at 610, 621; *see also supra* notes 92-97 and accompanying text (discussing the Court's holding in *Austin*).

150. *See Austin*, 509 U.S. at 610.

151. *Id.*

152. *Id.*

1. The Historical Understanding of Coercive Contempt

To make the determination that the coercive sanction serves in part to punish, it is necessary first to consider whether, at the time the Eighth Amendment was ratified, coercive contempt sanctions were understood at least in part as punishment. Again, because the Eighth Amendment grew out of Article 10 of the 1689 Declaration and Bill of Rights, the historical treatment of contempt in English law is the starting point of this inquiry.

As discussed above, however, reliance on the historical treatment of contempt is problematic, because of the fundamental change in the principle by which contempts today are categorized as criminal or civil.[153] Originally, contempts were not classified based on the purpose of the sanction, as they are today, but rather on the nature of the contemptuous conduct. If the conduct disrupted or hindered the administration of justice, it was characterized as a criminal contempt. If, on the other hand, the conduct involved disobedience to a court order, it was classified as a civil contempt (also known as a contempt in procedure).[154] As a result, the varieties of contempt falling within the civil contempt category were substantially different than they are today.

In addition, the nature of the sanction imposed for civil contempt has changed significantly over the centuries. Originally, under English law, a court could punish a civil contempt either by amercement or imprisonment.[155] According to Sir John Fox, however, the court could not impose a fine.[156] Today, of course, the courts routinely impose fines in contempt cases. To some extent, this power is analogous to the amercement power, the primary difference being that the judge, rather than the jury, sets the amount of the fine. But in the case of civil coercive contempt, it appears that the current use of the fine as a conditional penalty designed to coerce compliance is a modern novelty.

Looking at whether, historically, civil contempt sanctions were understood in part as punishment thus does little to advance the effort to ascertain the scope of the Excessive Fines Clause, because

153. *See supra* notes 123-25 and accompanying text (discussing the change in the principle by which contempts are categorized).

154. *See supra* notes 121-22 and accompanying text (discussing the traditional method for classifying contempts).

155. *See* Fox, *Practice in Contempt Cases*, *supra* note 124, at 189, 198.

156. *See id.* at 198.

civil contempt has changed so substantially over time.[157] However, to the extent that the historical understanding of civil contempt sanctions is relevant at all, it appears that sanctions for civil contempt were considered to be punishment, at least in part.

With respect to civil contempts that involved disobedience to a court order, the sanction imposed was historically understood to have *both* a remedial and a punitive purpose. As Lord Halsbury explained:

> In circumstances involving misconduct, contempt in procedure partakes to some extent of a criminal nature, and then bears a two-fold character, implying as between the parties to the proceedings merely a right to exercise and a liability to submit to a form of civil execution, but as between the party in default and the State, a penal or disciplinary jurisdiction, to be exercised by the court in the public interest. Misconduct of this kind consists in disobedience to . . . orders for the payment of money . . . , or in wilful disobedience to any order or process, or in the breach of an undertaking given to the court.[158]

Not surprisingly, therefore, in discussions of civil contempt, the sanctions imposed are regularly referred to as "punishment." For example, Lord Halsbury stated that "[w]ilful disobedience to a judgment or order requiring a person to do any act other than the payment of money, or to abstain from doing anything, is a contempt of court *punishable* by attachment or committal."[159]

In addition, one of the sanctions for contempts in procedure (or civil contempts) was amercement.[160] Magna Carta provided specific protections against abusive use of the amercement power.[161] These

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157. Justice Kennedy has cautioned against relying on outmoded historical practice: "In recounting the law's history, we risk anachronism if we attribute to an earlier time an intent to employ legal concepts that had not yet evolved." *Austin*, 509 U.S. at 628-29 (Kennedy, J., concurring in part and concurring in the judgment).

158. 7 HALSBURY, *supra* note 120, at 297-98 (footnotes omitted); *see also* GOLDFARB, *supra* note 112, at 50-51 (explaining that civil contempt was understood to have both remedial and punitive purposes); Fox, *Nature of Contempt*, *supra* note 126, at 201 (same).

159. 7 HALSBURY, *supra* note 120, at 302 (emphasis added); *see also* Fox, *Practice in Contempt Cases*, *supra* note 124, at 189 ("The procedure to *punish* [contempt in procedure] is a form of civil execution." (emphasis added)); *id.* at 198 ("Contempt in procedure is *punishable* by imprisonment, and not by fine." (emphasis added)).

160. *See* 2 POLLOCK & MAITLAND, *supra* note 64, at 519 ("Every mistake in pleading . . . brought an amercement on the pleader if the mistake was to be retrieved."); Fox, *Practice in Contempt Cases*, *supra* note 124, at 189 ("In early days the practice was more strict than at present, and a suitor who made a slip in procedure was considered guilty of contempt and amerced.").

161. *See supra* notes 130-34 and accompanying text (describing amercements and Magna Carta's regulation of the amercement power).

protections were implicitly reaffirmed in the Excessive Fines Clause of the English Declaration and Bill of Rights of 1689 and were eventually carried forward into the Eighth Amendment.[162] As a result, this traditional practice tends to confirm that civil contempt sanctions were historically understood to be punishment.

To the extent that the historical understanding of civil contempt sanctions can be relied on, therefore, it appears that such sanctions were considered to be punishment. Ronald Goldfarb supports this view, stating that "[r]eference again to the historical nature of the contempt power indicates that in any event, contempt of any kind or classification could historically only be a governmental power to be used essentially for governmental purposes, any private aspects notwithstanding. This is incontrovertible fact and history."[163]

2. Coercive Contempt as Punishment Today

In light of the ambiguity in the historical understanding of the nature of coercive contempt (at least in its modern form), a more significant inquiry for purposes of determining the applicability of the Excessive Fines Clause is whether coercive contempt sanctions as they are employed today are punishment. That inquiry requires a functional analysis of the purposes of such sanctions.

The courts have long said that the principal purpose of coercive contempt sanctions is remedial.[164] Coercive sanctions are remedial in the sense that the threat of the sanction serves to coerce the recalcitrant contempt defendant into complying with the court's order. When the court announces that it will imprison or fine a defendant unless or until the defendant abides by the court's order, the court is using the announced sanction as a lever to force the defendant to comply. That effort benefits the plaintiff to the extent that the threat of contempt sanctions achieves more immediate compliance with the court's order.[165] Once the defendant is coerced into compliance, the continuing wrong is abated, and thereby

162. *See supra* notes 137-39 and accompanying text (discussing the incorporation of Magna Carta's protection against excessive amercements in the Declaration of Rights and eventually the Eighth Amendment).

163. GOLDFARB, *supra* note 112, at 58.

164. *See supra* note 13 (citing cases).

165. *See* Hicks v. Feiock, 485 U.S. 624, 636 (1988) (citing Gompers v. Bucks Stove & Range Co., 221 U.S. 418, 443 (1911)) (noting that the plaintiff benefits when the contempt sanction modifies the defendant's disobedient behavior); *Gompers*, 221 U.S. at 442 (explaining that the coercive sanction "is intended to coerce the defendant to do the thing required by the order for the benefit of the complainant").

remedied.

The method that the courts have adopted to coerce that compliance is, however, unavoidably punitive. The tool by which the courts coerce compliance is the threat of punishment. The sanctions that result from an unheeded coercive order are thus punitive: they are the punishment that was threatened for noncompliance. The coercive contempt sanction is therefore at least in part punishment; although it serves a remedial purpose in that it helps to coerce compliance, the sanction also serves a punitive purpose because it is through the punishment implicit in the threatened sanction that the coercion is achieved.[166]

a. The Punitive Component of Coercive Contempt Sanctions

The Supreme Court has recognized this important punitive aspect of the coercive contempt sanction, acknowledging on a number of occasions that coercive contempt sanctions involve punishment:

> In contempt cases, both civil and criminal relief have aspects that can be seen as either remedial or punitive or both: when a court imposes fines and punishments on a contemnor, it is not only vindicating its legal authority to enter the initial court order, but it also is seeking to give effect to the law's purpose of modifying the contemnor's behavior to conform to the terms required in the order.[167]

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166. On the punitive nature of coercive contempt sanctions, Professor Richard Brautigam persuasively argues:

> Although civil contempt has been praised as the least drastic power adequate to compel obedience, such a view underestimates the essentially punitive nature of civil contempt. Unless monetary damages would fail to provide adequate compensation for disobedience, the only justification for attempting to coerce specific action through civil contempt is to punish the contemnor for his disobedience.

Brautigam, *supra* note 145, at 1521 (footnotes omitted); *see also* GOLDFARB, *supra* note 112, at 57 ("In civil contempt cases, though the rationale may be assistance to a private party litigant in the execution of his civil remedies, there is an exaltation of government and a strengthening of its control and power through the judicial process."); Hostak, *supra* note 24, at 195 ("[C]oercive fines and imprisonment have a distinctly criminal cast."). *But see* Beale, *supra* note 28, at 173 (describing coercive contempt as "purely coercive, not punitive"); Comment, *The Coercive Function of Civil Contempt*, 33 U. CHI. L. REV. 120, 127 (1965) ("When coercive imprisonment is applied only to enforce rights due others and is the sole means of enforcing those rights, it is being used for purely nonpunitive purposes.").

167. *Hicks*, 485 U.S. at 635; *see also* International Union, United Mine Workers v. Bagwell, 512 U.S. 821, 828 (1994) ("Most contempt sanctions, like most criminal punishments, to some extent punish a prior offense as well as coerce an offender's future obedience."); Shillitani v. United States, 384 U.S. 364, 369-70 (1966) (noting that courts "often speak in terms of criminal contempt and punishment for remedial purposes," and

Indeed, when the Court laid out the distinction between civil and criminal contempt in *Gompers*, it was even more blunt about the essentially punitive nature of the coercive sanction: "It is not the *fact of punishment* but rather its character and purpose that often serve to distinguish between the two classes of cases. If it is for civil contempt the *punishment* is remedial, and for the benefit of the complainant."[168]

This understanding of coercive contempt as containing a punitive component is fully consistent with the Court's notion of punishment. The Supreme Court has repeatedly held that "punishment serves the twin aims of retribution and deterrence."[169] Moreover, the Court has made clear that "a civil sanction that cannot fairly be said solely to serve a remedial purpose, but rather can only be explained as also serving either retributive or deterrent purposes, is punishment, as we have come to understand the term."[170]

In contempt cases, the Supreme Court has regularly reiterated that criminal contempt sanctions are punitive *because* they are designed to vindicate the court's authority.[171] When a sanction is designed to vindicate the court's authority, the sanction serves the traditional goals of punishment. The sanction serves the retributive goal in that it imposes a negative consequence on the contemnor for flouting the court's authority. The sanction also serves the deterrent goal in that it discourages both the particular contemnor before the court and future litigants in general from disobeying court orders. Both of these effects strengthen not only the orders of the court, but the authority of the court itself.[172]

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acknowledging that "any imprisonment, of course, has punitive and deterrent effects," but opining that it nonetheless "must be viewed as remedial if the court conditions release upon the contemnor's willingness to testify"); Lamb v. Cramer, 285 U.S. 217, 221 (1932) (noting the overlap between civil and criminal contempt).

168. *Gompers*, 221 U.S. at 441 (emphasis added).

169. United States v. Halper, 490 U.S. 435, 448 (1989); *see also* Austin v. United States, 509 U.S. 602, 610 (1993) (referring to retribution and deterrence as the goals of punishment); Bell v. Wolfish, 441 U.S. 520, 539 n.20 (1979) (same); Kennedy v. Mendoza-Martinez, 372 U.S. 144, 168 (1963) (same); King, *supra* note 112, at 164 (describing retribution and deterrence as "the two quintessential goals of criminal punishment").

170. *Halper*, 490 U.S. at 448; *see also Austin*, 509 U.S. at 610 (quoting this same language from *Halper*).

171. *See Bagwell*, 512 U.S. at 828 (stating that a sentence for criminal contempt is punitive, to vindicate the court's authority); *Hicks*, 485 U.S. at 631 (same); United States v. United Mine Workers, 330 U.S. 258, 302 (1947) ("Sentences for criminal contempt are punitive in their nature and are imposed for the purpose of vindicating the authority of the court."); *Gompers*, 221 U.S. at 441 ("[I]f [the sanction] is for criminal contempt the sentence is punitive, to vindicate the authority of the court.").

172. In *Bloom v. Illinois*, the Court made the point somewhat differently: "Indeed, the role of criminal contempt and that of many ordinary criminal laws seem identical—

Use of the contempt sanction to vindicate the court's authority, however, is not limited to criminal contempt cases. Vindication of the court's authority is also an important function of coercive civil contempt sanctions. As the Court recognized in *Hicks*, in coercive civil contempt cases, the court's imposition of a fine serves to "vindicat[e] its legal authority to enter the initial court order," as well as serving to modify the contemnor's behavior.[173] Indeed, the Court originally acknowledged this point in *Gompers*, stating that "[i]t is true that either form of imprisonment has also an incidental effect. For if the case is civil and the punishment is purely remedial, there is also a vindication of the court's authority."[174]

Contrary to the Court's suggestion in *Gompers*, however, it has become clear that vindication of the court's authority is more than a mere incidental by-product of the coercive contempt sanction. The importance of this aspect of the coercive sanction is perhaps best demonstrated by the reaction of the courts to settlement-based requests for vacatur of such sanctions.

Because coercive contempt fines can be so significant, the parties in a number of cases have sought to diminish or eliminate the fines through provisions in their settlement agreements.[175] In these cases, the parties have argued that the courts are obliged to vacate the fines, either on the ground that settlement of the action mooted the case or as a matter of policy.[176] The courts that have addressed the issue, however, have uniformly concluded that they have no obligation to

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protection of the institutions of our government and enforcement of their mandates." 391 U.S. 194, 201 (1968).

173. *Hicks*, 485 U.S. at 635; *see also Bagwell*, 512 U.S. at 828 (quoting this same language from *Hicks*).

174. *Gompers*, 221 U.S. at 443. The Court, however, emphasized that "such indirect consequences will not change imprisonment which is merely coercive and remedial, into that which is solely punitive in character, or *vice versa*." *Id.* at 443; *see also* Shillitani v. United States, 384 U.S. 364, 370 (1966) ("While any imprisonment, of course, has punitive and deterrent effects, it must be viewed as remedial if the court conditions release upon the contemnor's willingness to [comply] .... The test may be stated as: what does the court primarily seek to accomplish by imposing sentence?").

175. *See* United States v. Work Wear Corp., 602 F.2d 110, 114 (6th Cir. 1979); Clark v. United Mine Workers, 752 F. Supp. 1291, 1295 (W.D. Va. 1990); *In re* Rogers Oil Co., 17 B.R. 319, 321 (Bankr. W.D. Ark. 1982); Hawaii Pub. Employment Relations Bd. v. United Pub. Workers, Local 646, 667 P.2d 783, 797 (Haw. 1983); Labor Relations Comm'n v. Fall River Educators' Ass'n, 416 N.E.2d 1340, 1349 (Mass. 1981); Bagwell v. United Mine Workers, 423 S.E.2d 349, 358 (Va. 1992), *rev'd on other grounds*, 512 U.S. 821 (1994).

176. *See generally* Margaret Meriwether Cordray, *Settlement Agreements and the Supreme Court*, 48 HASTINGS L.J. 9, 61-73 (1996) (describing and discussing the vacatur issue).

reduce or vacate the coercive fines.[177] In reaching this conclusion, the courts have relied explicitly on the need to vindicate their authority through the coercive contempt sanction:

> Courts of the Commonwealth must have the authority to enforce their orders by employing coercive, civil sanctions if the dignity of the law and public respect for the judiciary are to be maintained. If we were to adopt the [defendant's] mootness contention, any organization which faced coercive, contempt fines would know that, in order to completely avoid payment of the fines, it only had to postpone actual collection of the fines until the settlement of the underlying litigation.[178]

The courts' unwillingness to allow parties to settle away coercive contempt sanctions confirms that vindication of the court's authority is a vital component of the coercive contempt sanction.[179] The

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177. *See supra* note 175 (citing cases).

178. *Bagwell*, 423 S.E.2d at 358; *see also Work Wear*, 602 F.2d at 114 & n.12 (noting that the trial court had refused to reduce the coercive fines on the ground that doing so "would denigrate the authority of the Court and sanction mere lip service to its Orders"); *Clark*, 752 F. Supp. at 1301 ("[T]he court's adoption of the [defendant's] mootness argument would absolutely undermine the efficacy of civil contempt sanctions.... No decision of this court will allow such unanswered contempt toward the rule of law."); *In re Rogers Oil Co.*, 17 B.R. at 321 ("To empower the officers of the estate to compromise the fines would mean that the judicial power might always be upset or overturned by nonjudicial officers charged with administration of the estate."); *Hawaii Pub. Employment Relations Bd.*, 667 P.2d at 797 (reasoning that allowing agreed vacatur of coercive contempt sanctions "could effectively defeat the coercive function of civil contempt sanctions").

Several courts, however, have indicated that in some instances it is appropriate for courts to exercise their discretion to reduce or vacate coercive contempt fines. *See Work Wear*, 602 F.2d at 116; League of Voluntary Hosps. & Homes of N.Y. v. Local 1199, Drug & Hosp. Union, 490 F.2d 1398, 1405 (Temp. Emer. Ct. App. 1973), *vacated in part*, No. 73 Civ. 4702, 1974 WL 1070 (S.D.N.Y., Apr. 16, 1974).

179. In *International Union, United Mine Workers v. Bagwell*, the United States Supreme Court reviewed the Virginia Supreme Court's decision to treat the contempt sanctions in that case as coercive civil sanctions. *See* 512 U.S. 821, 823 (1994). Although the majority mentioned the vacatur issue only in describing the procedural history of the case, *see id.* at 825-26, Justice Ginsburg, joined by Chief Justice Rehnquist, took pains to note that "the Virginia courts' refusal to vacate the fines, despite the parties' settlement and joint motion ... is characteristic of criminal, not civil, proceedings," *id.* at 847 (Ginsburg, J., concurring in part and concurring in the judgment). Indeed, Justice Ginsburg was persuaded that the Virginia Supreme Court's rationale for collecting the fines, which was that courts " 'must have the authority to enforce their orders by employing coercive, civil sanctions if the dignity of the law and public respect for the judiciary are to be maintained,' " reflected purposes characteristic of *criminal* contempt. *Id.* (Ginsburg, J., concurring in part and concurring in the judgment) (quoting *Bagwell*, 423 S.E.2d at 358); *see also* Cordray, *supra* note 176, at 70-73 (discussing Justice Ginsburg's argument).

primary purpose of such sanctions may be remedial, but the courts' insistence on enforcing the sanctions even against the parties' express preference shows that vindication of the court's authority is also an independent and integral function.[180]

Although the Supreme Court has often acknowledged that coercive contempt sanctions serve this function,[181] it has not been consistent on the point. The Court has often shied away from characterizing such sanctions as punitive, even denying outright that they involve punishment. Indeed, the Court's inconsistency is dramatically illustrated in *Gompers* itself: Four sentences after it acknowledged that coercive contempt sanctions involve punishment,[182] the Court insisted that "[i]mprisonment in [coercive contempt] cases is not inflicted as a punishment, but is intended to be remedial by coercing the defendant to do what he had refused to do."[183]

b. The "Keys to the Prison" Rationale

In order to buttress this difficult contention that coercive

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180. *See Bagwell*, 512 U.S. at 847 (Ginsburg, J., concurring in part and concurring in the judgment) ("[W]ith the private complainant gone from the scene, and an official appointed by the Commonwealth to collect the fines for the Commonwealth's coffers, it is implausible to invoke the justification of benefiting the civil complainant.").

Parties, of course, also have no authority to settle away criminal contempt sanctions. As the Court explained in *Gompers v. Bucks Stove & Range Co.*:

> If this had been a separate and independent proceeding at law for criminal contempt, to vindicate the authority of the court, with the public on one side and the defendants on the other, it could not, in any way, have been affected by any settlement which the parties to the equity cause made in their private litigation.

221 U.S. 418, 451 (1991). On the other hand, the Court in *Gompers* emphasized that parties may settle away compensatory civil contempt sanctions:

> [T]his was a proceeding in equity for civil contempt where the only remedial relief possible was a fine payable to the complainant.... [W]hen the main cause was terminated by a settlement of all differences between the parties, the complainant did not require and was not entitled to any compensation or relief of any other character.

Id. at 451-52.

181. *See supra* notes 167-74 and accompanying text (discussing the Supreme Court's recognition of the punitive aspect of coercive contempt sanctions).

182. *See Gompers*, 221 U.S. at 441. Specifically, the Court stated: "It is not the fact of punishment but rather its character and purpose that often serve to distinguish between the two classes of cases. If it is for civil contempt the punishment is remedial, and for the benefit of the complainant." *Id.*

183. *Id.* at 442; *see also Bagwell*, 512 U.S. at 828, 831 (conceding that "[m]ost contempt sanctions, like most criminal punishments, to some extent punish a prior offense as well as coerce an offender's future obedience," but stating, nevertheless, that "civil contempt sanctions are viewed as nonpunitive"); Hostak, *supra* note 24, at 200 (discussing the Court's inconsistency on this point).

contempt sanctions do not contain any punitive aspect, courts have primarily relied on the argument that, because the defendant can entirely avoid a coercive sanction simply by complying with the court's order, any sanction imposed is not punishment. This argument is captured in the quaint adage that a coercive contempt defendant "carries the keys of his prison in his own pocket."[184]

This "keys to the prison" argument has served as the Court's main justification for treating coercive contempt sanctions as civil, rather than criminal. It has thus led the Court, or at least enabled the Court, to continue to deny coercive contempt defendants the basic procedural safeguards, such as the right to trial by a jury, that are constitutionally required for defendants in criminal contempt cases.[185]

Indeed, the Court has used the "keys to the prison" rationale to reject a coercive contempt defendant's argument that his sentence violated the Eighth Amendment's Cruel and Unusual Punishments Clause.[186] In *Uphaus v. Wyman*,[187] the trial court had ordered the defendant confined until he produced subpoenaed documents.[188] On appeal, the defendant argued that the indefinite sentence constituted cruel and unusual punishment.[189] The Supreme Court, however, brushed off that argument, stating:

> "Before going any further, perhaps it should be emphasized that we are not at all concerned with the power of courts to impose conditional imprisonment for the purpose of compelling a person to obey a valid order. Such coercion,

184. *Gompers*, 221 U.S. at 442; *see also Bagwell*, 512 U.S. at 828 (employing the "keys to the prison" metaphor); *Hicks*, 485 U.S. at 633 (same); Shillitani v. United States, 384 U.S. 364, 368 (1966) (same); Penfield Co. v. SEC, 330 U.S. 585, 590 (1947) (same). The phrase originated in *In re Nevitt*, 117 F. 448, 461 (8th Cir. 1902).

185. *See Bagwell*, 512 U.S. at 831 ("Because civil contempt sanctions are viewed as nonpunitive and avoidable, fewer procedural protections for such actions have been required."); *Shillitani*, 384 U.S. at 370-71 ("The conditional nature of the imprisonment . . . justifies holding civil contempt proceedings."); Green v. United States, 356 U.S. 165, 197 (1958) (Black, J., dissenting) (contending that a criminal contempt defendant should have a right to a jury trial, but distinguishing coercive civil contempt on the ground that "[s]uch coercion, where the defendant carries the keys to freedom in his willingness to comply with the court's directive, is essentially a civil remedy"), *overruled in part by* Bloom v. Illinois, 391 U.S. 194 (1968).

186. The Supreme Court has treated its cases involving the Cruel and Unusual Punishments Clause as "instructive," but not "controlling" in cases involving the Excessive Fines Clause. Browning-Ferris Indus. v. Kelco Disposal, Inc., 492 U.S. 257, 263 n.3 (1989); *see also infra* note 196 and accompanying text (discussing the relationship between these clauses of the Eighth Amendment).

187. 360 U.S. 72 (1959).

188. *See id.* at 75.

189. *See id.* at 76.

> where the defendant carries the keys to freedom in his willingness to comply with the court's directive, is essentially a civil remedy designed for the benefit of other parties and has quite properly been exercised for centuries to secure compliance with judicial decrees."[190]

It is not clear from the Court's language in *Uphaus* whether it was simply rejecting the Cruel and Unusual Punishments Clause claim on the facts of that particular case, or whether it was holding more generally that the Clause is not applicable to coercive contempt sanctions. The Court has since characterized its holding in *Uphaus* in the latter way, stating that it "had no difficulty finding the Eighth Amendment inapplicable" to the judgment of coercive civil contempt in that case.[191]

The Court offered that characterization in *Ingraham v. Wright*,[192] in an effort to establish that the Eighth Amendment applies only in criminal cases and thus does not restrict the use of corporal punishment in the public schools.[193] *Ingraham*'s entire discussion of the scope of the Eighth Amendment is now of dubious value, however, for the Court markedly revised its understanding of the Eighth Amendment in *Austin*, which held that the Excessive Fines Clause applies to civil forfeiture proceedings.[194] Although in *Austin* the Court did not expressly overrule *Ingraham*'s apparent holding that the Cruel and Unusual Punishments Clause only applies in criminal cases, it cast considerable doubt on the continued vitality of that holding. Indeed, in *Austin*, the Court made plain its view that the Cruel and Unusual Punishments Clause, as well as the Excessive Fines Clause, applies to any government-imposed punishment, whether that punishment is meted out in a criminal case or a civil case.[195]

Nevertheless, the Court's reasoning in *Uphaus* and *Ingraham* has influenced what limited discussion there is in the case law of the

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190. *Id.* at 81 (quoting *Green*, 356 U.S. at 197 (Black, J., dissenting)).

191. Ingraham v. Wright, 430 U.S. 651, 667-68 (1977); *see also* United States v. Dien, 598 F.2d 743, 745 (2d Cir. 1979) (holding that the Cruel and Unusual Punishments Clause does not apply to coercive contempt sanctions, and stating that in *Uphaus* and *Ingraham* the Supreme Court took "the position that the Eighth Amendment is inapplicable to [a coercive contempt] sentence").

192. 430 U.S. 651 (1977).

193. *See id.* at 664, 668-71.

194. *See* Austin v. United States, 509 U.S. 602, 622 (1993).

195. *See id.* at 608-10; *see also* City of Milwaukee v. Kilgore, 517 N.W.2d 689, 699 n.13 (Wis. Ct. App. 1994) (suggesting that *Uphaus* may not have survived the Court's decision in *Austin*), *aff'd*, 532 N.W.2d 690 (Wis. 1995).

question at hand—whether the Excessive Fines Clause applies to coercive contempt sanctions. Although the Supreme Court has expressly stated that its decisions on the Cruel and Unusual Punishments Clause are not controlling in cases involving the Excessive Fines Clause,[196] and although it has made clear that the level of punishment necessary to trigger the Excessive Fines Clause is different from that necessary for other protections in the Bill of Rights,[197] the courts have previously looked to *Uphaus* and *Ingraham* for guidance on the Excessive Fines Clause issue. Actually, it is not quite accurate to say that "courts" have looked to those cases, as only one court, the Second Circuit, has attempted to resolve the issue.[198]

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196. Indeed, in *Alexander v. United States*, 504 U.S. 544 (1993), the Supreme Court specifically criticized the Court of Appeals for having "failed to distinguish between [the] two components of petitioner's Eighth Amendment challenge," and then it proceeded to emphasize the difference between the Cruel and Unusual Punishments Clause and the Excessive Fines Clause. *Id.* at 558. Likewise, in *Browning-Ferris*, the Supreme Court stated: "*Ingraham*, like most of our Eighth Amendment cases, involved the Cruel and Unusual Punishments Clause, and it therefore is not directly controlling in this Excessive Fines Clause case." Browning-Ferris Indus. v. Kelco Disposal, Inc., 492 U.S. 257, 263 n.3 (1989). The Court also noted that "[t]he insights into the meaning of the Eighth Amendment reached in *Ingraham* and similar cases . . . are highly instructive," *id.*, but as discussed in the text, *Ingraham*'s suggestion that the Eighth Amendment only applies to criminal cases has now been discredited, *see Austin*, 509 U.S. at 608-10.

197. For example, in *United States v. Ursery*, 116 S. Ct. 2135 (1996), the Court held that the threshold at which a sanction constitutes punishment is lower for the Excessive Fines Clause than it is for the Double Jeopardy Clause, so that the Excessive Fines Clause may apply to a sanction even though the Double Jeopardy Clause does not. *See id.* at 2147. Thus, although the Court has held that the Double Jeopardy Clause does not bar prosecution for both criminal contempt and coercive civil contempt, *see* Yates v. United States, 355 U.S. 66, 74-75 (1957), the coercive contempt sanction may nonetheless contain a sufficiently punitive component to invoke the protection of the Excessive Fines Clause. In addition, in *Austin*, the Court took pains to disengage the Excessive Fines Clause inquiry from the strict tests articulated in *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 167, 184 (1963), and *United States v. Ward*, 448 U.S. 242, 248 (1980), for determining whether a civil proceeding is in fact criminal, so that all of the criminal safeguards must be provided. *See Austin*, 509 U.S. at 610 n.6; *see also* King, *supra* note 112, at 162 ("[T]he Court has recognized that some civil awards that fail to qualify as essentially criminal under [the *Kennedy v. Mendoza-Martinez*] test are nevertheless subject to those provisions in the Bill of Rights that 'limit the government's power to punish,' namely the Double Jeopardy and Excessive Fines Clauses." (quoting *Austin*, 509 U.S. at 609)).

198. The Second Circuit has considered the issue in *United States v. Mongelli*, 2 F.3d 29 (2d Cir. 1993), and *United States v. City of Yonkers*, 856 F.2d 444 (2d Cir. 1988), *rev'd on other grounds sub nom.* Spallone v. United States, 493 U.S. 265 (1990). The issue was also raised in *International Union, United Mine Workers v. Bagwell*, but the Court did not have occasion to address it. *See* Petitioner's Brief at 37-40, International Union, United Mine Workers v. Bagwell, 512 U.S. 821 (1994) (No. 92-1625). Also, in *Keller v. Keller*, 323 P.2d 231 (Wash. 1958), the Washington Supreme Court at least assumed that the Excessive Fines Clause applies to coercive contempt sanctions:

> In a civil proceeding, the right of a constitutional court to exercise inherent

That court, however, has done so twice, once before and once after the Supreme Court's decision in *Austin*.

The Second Circuit's first consideration of the issue came in *United States v. City of Yonkers*.[199] In that case, the district court sought to enforce a prior consent judgment in which the City of Yonkers and various City Council members had agreed to enact certain legislation designed to help correct unconstitutional racial segregation in residential housing.[200] When the City Council refused to enact that legislation, the district court entered a coercive contempt order against both the City and the Council members, imposing escalating sanctions for every day past a specified deadline that the legislation was not enacted.[201] The coercive sanctions imposed against the City were especially steep, with fines to begin at $100 per day and double every day until the legislation was passed, so that the fine for day 21 would be over $100 million, for day 25 over $1 billion, and for day 30 over $50 billion.[202] The City appealed on numerous grounds, including that the fines violated the Excessive Fines Clause.[203]

Although the Second Circuit ultimately agreed that the prospective fines were excessive and capped them at $1 million per day, it did so by applying the vague tenets of its general supervisory authority.[204] The court refused to say that the fines violated the Excessive Fines Clause, holding instead that the Clause does not apply to coercive contempt sanctions.[205] The court noted that it had "already held that the Cruel and Unusual Punishments Clause does not apply to coercive imprisonment imposed as a civil contempt sanction, ... and [that reasoning] applies to the Excessive Fines Clause. Both clauses apply to sanctions imposed to punish past conduct, not to sanctions imposed to secure prospective

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> contempt powers resulting in confinement for a fixed term is one which must be exercised with the greatest discretion and restraint, for it is capable of arbitrary and capricious abuse. Constitutional prohibitions against cruel and unusual punishment and excessive fines provide the extreme limits of the court's discretionary powers.

Id. at 235. In that case, the court ultimately held that the coercive sanction was permissible. *See id.*

199. 856 F.2d 444 (2d Cir. 1988), *rev'd on other grounds sub nom.* Spallone v. United States, 493 U.S. 265 (1990).

200. *See id.* at 449.

201. *See id.* at 450.

202. *See id.*

203. *See id.* at 459.

204. *See id.* at 460.

205. *See id.* at 459.

compliance."[206]

Interestingly, two Supreme Court Justices found an opportunity to comment on this aspect of the Second Circuit's holding. After losing in the Second Circuit, the City sought a stay of the judgment pending filing and disposition of its petition for writ of certiorari.[207] The Supreme Court denied the application for stay, and Justice Marshall, joined by Justice Brennan, wrote separately to concur in that portion of the Court's decision.[208] In his opinion, Justice Marshall briefly addressed and rejected the City's contention that the coercive contempt fines violated the Excessive Fines Clause. Justice Marshall explained:

> [I]t appears settled that the Cruel and Unusual Punishments Clause does not apply to civil contempt sanctions. This is not surprising since the Cruel and Unusual Punishments Clause, like the Excessive Fines Clause, applies to punishments for past conduct, while civil contempt sanctions are designed to secure future compliance with judicial decrees. In any event, even assuming that the size of monetary contempt sanctions is limited by the Excessive Fines Clause or even the Due Process Clause, I do not think that the fines against the city, as modified by the Court of Appeals, are unreasonable.[209]

After the Supreme Court rendered its decision in *Austin*, the Second Circuit had another opportunity to consider the applicability of the Excessive Fines Clause to coercive contempt fines. In that case, *United States v. Mongelli*,[210] the Second Circuit was obliged to contend with the fact that the Excessive Fines Clause can apply to civil fines. Nonetheless, the Second Circuit reaffirmed its position that the Excessive Fines Clause does not apply to coercive civil contempt sanctions, again relying on the "keys to the prison"

206. *Id.* at 459 (citing United States v. Dien, 598 F.2d 743, 745 (2d Cir. 1979)); *see also* City of Milwaukee v. Kilgore, 517 N.W.2d 689, 698-99 & n.13 (Wis. Ct. App. 1994) (likening driver's license revocation to civil contempt, and relying on *Yonkers* for the proposition that the Excessive Fines Clause does not apply to sanctions imposed to gain compliance with court orders), *aff'd*, 525 N.W.2d 732 (Wis. 1994).

207. *See* Spallone v. United States, 487 U.S. 1251, 1251 (1988).

208. *See id.* at 1251-58 (Marshall, J., concurring in part and dissenting in part from the disposition of stay motions). The majority granted the applications for stay submitted by the individual Council members. *See id.* at 1251. Justices Marshall and Brennan dissented in part from that decision. *See id.* (Marshall, J., concurring in part and dissenting in part from the disposition of stay motions).

209. *Id.* at 1257 (Marshall, J., concurring in part and dissenting in part from the disposition of stay motions) (citations omitted).

210. 2 F.3d 29 (2d Cir. 1993).

rationale.[211] In response to the defendants' argument that coercive fines of $10,000 for each business day that they refused to testify before the grand jury violated the Excessive Fines Clause, the court stated that "appellants need only appear before the grand jury and testify to avoid the payments they consider excessive."[212] Using this same reasoning, the court also distinguished *Austin*: "Unlike coercive fines, civil forfeitures do not attempt to secure compliance with a court order by the defendant, and the defendant cannot avoid paying by compliance."[213] The Second Circuit thus concluded that the Excessive Fines Clause does not apply to coercive civil contempt sanctions, because such sanctions "are not punitive in nature."[214]

The reasoning in these cases—not only the Second Circuit's Excessive Fines Clause cases, but also the Supreme Court's decision in *Uphaus*[215]—is fundamentally unsound. The results in all of these cases are founded almost entirely on the "keys to the prison" rationale, that is, on the notion that because the defendant could have avoided the coercive sanction by complying with the court's order, the sanction itself is not punitive, even in part.

That rationale, however, does not withstand scrutiny. In the first place, the fact that the defendant has the power to avoid the coercive fine (or imprisonment) does not change the character of that fine (or imprisonment) once it is imposed. The coercion in a coercive contempt order is achieved through the threat of punishment. The court, in essence, announces the punishment in advance, in the hope that the defendant will prefer compliance to imposition of the threatened punishment. If, however, the defendant still refuses to comply, the court imposes the punishment in order to make good its threat. The fact that the defendant had the opportunity to choose compliance instead does not mean that the punishment that was threatened and eventually imposed is somehow drained of all punitive content.[216]

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211. *See id.* at 30.

212. *Id.* The district court had originally set the coercive fines at $4000 per business day, but it later raised the amount to $10,000 per business day. *See id.*

213. *Id.*

214. *Id.*

215. Uphaus v. Wyman, 360 U.S. 372 (1959); *see supra* notes 187-90 (discussing *Uphaus*).

216. Ronald Goldfarb makes the point even more starkly:

> [The argument that civil contemnors carry the keys to their own prison door] is the rationale by which the punishment of civil contempts is considered unlike other criminal punishments and not a true sanction, since the man imprisoned can control his incarceration by doing a required act. By such specious reasoning

Indeed, the mere fact that the defendant had the opportunity to choose to comply rather than endure the penalty cannot usefully serve to distinguish coercive contempt sanctions from criminal contempt sanctions or any other criminal sanctions. The Supreme Court itself made this point in *International Union, United Mine Workers v. Bagwell*,[217] its most recent decision concerning contempt law. In *Bagwell*, the trial court had entered an injunction that prohibited the defendant labor union from engaging in various obstructionist activities at the plaintiff companies.[218] After numerous violations of the injunction, the trial court announced a coercive sanction: a fine of $100,000 for each future violent breach of the injunction and $20,000 for each future nonviolent breach.[219] Over the next several months, the court levied more than $64 million in fines against the labor union pursuant to its coercive order, of which approximately $52 million was payable to the Commonwealth of Virginia and the affected counties.[220] On appeal, the Virginia Supreme Court upheld the sanctions, rejecting the union's argument that the contempt fines were in fact criminal in nature and could not be imposed without the requisite constitutional protections.[221]

Before the United States Supreme Court, the Commonwealth argued that the trial court's prospective announcement of the sanctions for future contemptuous behavior was dispositive.[222] It contended that the establishment of "a prospective fine schedule allowed the union to 'avoid paying the fine[s] simply by performing the . . . act required by the court's order,' . . . and thus transformed these fines into coercive, civil ones."[223] The Supreme Court, however, emphatically rejected this argument:

> Due Process traditionally requires that criminal laws provide prior notice both of the conduct to be prohibited and of the sanction to be imposed. The trial court here simply

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> it follows that if he does not cooperate to attain his release he is not truly being punished, but is doing some masochistic act which the state cannot control and for which it is not responsible.

GOLDFARB, *supra* note 112, at 59; *see also supra* note 166 and accompanying text (discussing the punitive aspect of coercive contempt sanctions).

217. 512 U.S. 821 (1994).

218. *See id.* at 823.

219. *See id.* at 824.

220. *See id.* The Court treated $12 million of the fines as payable to the companies, presumably as compensation. *See id.*

221. Bagwell v. United Mine Workers, 423 S.E.2d 349, 356-58 (Va. 1992), *rev'd*, 512 U.S. 821 (1994).

222. *See Bagwell*, 512 U.S. at 834-35.

223. *Id.* at 836 (quoting Hicks v. Feiock, 485 U.S. 624, 632 (1988)).

> announced the penalty—determinate fines of $20,000 or $100,000 per violation—that would be imposed for future contempts. The union's ability to avoid the contempt fines was indistinguishable from the ability of any ordinary citizen to avoid a criminal sanction by conforming his behavior to the law.[224]

In essence, the Court recognized in *Bagwell* that the conditional nature of the coercive contempt sanction is not unique; rather, criminal sanctions as well as coercive contempt sanctions are conditional on noncompliance, and thus are avoidable by compliance with the requirements of the law. As Justice Ginsburg explained in her concurring opinion, "*any* fine is 'conditional' upon compliance or noncompliance before its imposition."[225] This point, however, substantially undermines the "keys to the prison" rationale. That rationale is based on the notion that, because the defendant can avoid a coercive sanction by complying with the court's order, any sanction imposed cannot be characterized as punishment. Yet the Supreme Court has now expressly acknowledged that even in the traditional

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224. *Id.* at 836-37. In *Bagwell*, the Court eventually held that the fines were criminal in nature, citing a variety of other factors as well:

> The fines are not coercive day fines, or even suspended fines, but are more closely analogous to fixed, determinate, retrospective criminal fines which petitioners had no opportunity to purge once imposed. . . .
>
> . . . The union's sanctionable conduct did not occur in the court's presence or otherwise implicate the court's ability to maintain order and adjudicate the proceedings before it. Nor did the union's contumacy involve simple, affirmative acts, such as the paradigmatic civil contempts examined in *Gompers*. Instead, the Virginia trial court levied contempt fines for widespread, ongoing, out-of-court violations of a complex injunction. In so doing, the court effectively policed petitioners' compliance with an entire code of conduct that the court itself had imposed. The union's contumacy lasted many months and spanned a substantial portion of the State. The fines assessed were serious, totaling over $52 million. Under such circumstances, disinterested factfinding and evenhanded adjudication were essential, and petitioners were entitled to a criminal jury trial.

Id. at 837-38 (footnotes omitted).

225. *Id.* at 846 (Ginsburg, J., concurring in part and concurring in the judgment) (emphasis added). Justice Ginsburg explained more fully:

> [W]ere we to accept the logic of Bagwell's argument that the fines here were civil, because "conditional" and "coercive," no fine would elude that categorization. The fines in this case were "conditional," Bagwell says, because they would not have been imposed if the unions had complied with the injunction. The fines would have been "conditional" in this sense, however, even if the court had not supplemented the injunction with its fines schedule; indeed, any fine is "conditional" upon compliance or noncompliance before its imposition.

Id. (Ginsburg, J., concurring in part and concurring in the judgment).

criminal arena, defendants have the opportunity to avoid any sanction simply by complying with the law. Surely traditional criminal sanctions cannot therefore be treated as nonpunitive, and neither can coercive contempt sanctions. In other words, the characteristic of avoidability is simply not enough to render a sanction non-punitive. Thus, although the Court continued to pay lip service to the "keys to the prison" rationale in *Bagwell*,[226] its analysis in the case demonstrates the inadequacy of that rationale.

Perhaps sensing this, the Court in *Bagwell* made an effort to distance coercive day fines and suspended fines from prospectively announced fines.[227] But the logic of the Court's analysis does not sustain the asserted distinction. Even coercive day fines and suspended fines are imposed, or at least become irrevocable, only after the defendant fails to comply with the terms of the court's order. In this sense, these coercive fines are also retrospective: when they are ultimately extracted, the fines are fixed sanctions imposed for past conduct. These fines too are thus "closely analogous to fixed, determinate, retrospective criminal fines which [defendants have] no opportunity to purge once imposed."[228] In other words, when the court actually imposes the previously announced sanction, even in the context of coercive day fines and suspended fines, it does so as a direct result of the defendant's past conduct. Thus, sanctioning a contemnor "until he does a certain act is as much a punishment of his original refusal to do that same act as it is a coercion of his doing it in the future."[229] The essential point is that the punitive and remedial purposes of coercive contempt are inherently intertwined.

Thus, while in the coercive contempt setting the punishment is threatened and imposed in the pursuit of a remedial goal—to obtain compliance with the court's order—it nevertheless remains

226. *See id.* at 828 (describing several paradigms of coercive civil contempt and noting that, because the defendant may purge the contempt and obtain his release, he "thus 'carries the keys of his prison in his own pocket' " (quoting Gompers v. Bucks Stove & Range Co., 221 U.S. 418, 442 (1911)); *see also supra* notes 184-91 and accompanying text (discussing the Court's use of the "keys to the prison" rationale).

227. *See Bagwell*, 512 U.S. at 837. Specifically, the Court stated:

> The fines are not coercive day fines, or even suspended fines, but are more closely analogous to fixed, determinate, retrospective criminal fines which petitioners had no opportunity to purge once imposed. We therefore decline to conclude that the mere fact that the sanctions were announced in advance rendered them coercive and civil as a matter of constitutional law.

Id.

228. *Id.*

229. GOLDFARB, *supra* note 112, at 60.

punishment, at least in part. This is true despite the fact that the defendant could have avoided the punishment. As Ronald Goldfarb so persuasively concluded, "the unalterable and crucial fact remains that a man is imprisoned in civil contempt cases as a legal consequence of his past and current conduct, no matter what logical legerdemain is employed about prison keys and doors or future conduct."[230]

c. Consistency with the Purposes Underlying the Clause

From both a theoretical and practical standpoint, coercive contempt sanctions constitute punishment, at least in part, and thus come within the purview of the Excessive Fines Clause as the Court construed it in *Austin*.[231] This result is entirely consistent with the purposes that underlie the Clause; indeed, perhaps in this area more than any other, the protection afforded by the Clause is a critically important limitation on a single judge's virtually unchecked power to punish.

As described above, a primary motivation behind the enactment of the Eighth Amendment and its precursor, Article 10 of the English Declaration and Bill of Rights, was the desire to restrict the vast power of judges to impose virtually unlimited monetary fines on the litigants that came before them.[232] Today, the danger of such judicial excess is most pronounced in the area of contempt, and particularly in the area of coercive civil contempt.

Contempt is unique in that "[u]nlike most areas of law, where a legislature defines both the sanctionable conduct and the penalty to be imposed, civil contempt proceedings leave the offended judge solely responsible for identifying, prosecuting, adjudicating, and sanctioning the contumacious conduct."[233] Further, in contempt (and

230. *Id.* at 61; *see also* Dudley, *supra note* 14, at 1063 (criticizing the "keys to the prison" rationale on the ground that "[it assumes] that the court's findings are correct, *i.e.*, that the contemnor has violated the order and has the present ability to comply, factual issues that are frequently in serious dispute and upon which the court's potential bias may have come into play"); Comment, *supra* note 166, at 125 (criticizing the "keys to the prison" rationale). *But cf.* André, *supra* note 12, at 1086-87 (arguing that the "keys to the prison" rationale is a "fair factual description" of the difference between criminal and civil contempt, but contending that it is not a persuasive justification for denying the right of review to a civil contemnor).

231. *See* Austin v. United States, 509 U.S. 602, 610 (1993); *see also supra* text accompanying note 97 (quoting a portion of the Court's analysis in *Austin*).

232. *See supra* notes 64-70 and accompanying text.

233. International Union, United Mine Workers v. Bagwell, 512 U.S. 821, 831 (1994); *see also* Raveson, *supra* note 50, at 7 ("Unlike ordinary criminal proceedings, where prosecution must be initiated by the executive branch and crimes are defined by the

again, unlike most areas of law), there is no maximum limit on the penalty that a judge can impose.[234] Thus, in the prosecution and adjudication of contempt, judges have unparalleled power: they are in a position to define the offense, to initiate the prosecution, and to decide the size of the sanction. Moreover, because only defendants in criminal, and not coercive civil, contempt proceedings are entitled to the criminal procedural protections, the offended judge can, simply by restructuring the sanction so that it is coercive in form, deprive the defendant of most procedural protections, including the right to a neutral factfinder.[235]

Because the judge has such a significant personal stake in vindicating his or her own authority—either through sanctions for past disobedience, or through sanctions designed to bend the recalcitrant defendant to the judge's will—the potential for abuse of this vast power is dangerously high.[236] And there is, at present, no meaningful restriction on a judge's ability to abuse the coercive contempt power. Indeed, the Supreme Court has acknowledged that federal and state judges have understood themselves to have "relatively unlimited judicial power" to impose coercive contempt fines,[237] and the appellate courts have done little to contradict that

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legislative branch, the normal controls that act as checks and balances against abusive or mistaken exercise of the government's power to punish criminal conduct are not present [in contempt proceedings]."); Hostak, *supra* note 24, at 195-96 ("The contempt power is in considerable tension with the doctrine of separation of powers .... In such cases, the roles of legislator, adjudicator, prosecutor, enforcer, and, in civil contempt proceedings, fact finder are conflated and devolved upon the judge."); *see also supra* notes 25-28 and accompanying text (discussing the potential for abuse of the contempt power).

234. *See* Dudley, *supra* note 14, at 1026-27 (noting that, in contempt, "there is no fixed upper limit to the courts' sanctioning power"); *id.* at 1062 ("As virtually every commentator has noted, the most serious apprehensions with regard to contempt pertain to the essentially unlimited power granted to the judge and the grave danger of bias stemming from the court's conflicted role in vindicating its own authority."); King, *supra* note 112, at 152 n.146 ("Typically, neither contempt fines nor forfeitures are capped by the legislature."); *see also supra* notes 37-53 and accompanying text (describing the lack of limits on the courts' sanctioning power).

235. *See* Dudley, *supra* note 14, at 1067 n.165.

236. Indeed, the Supreme Court has regularly reiterated that the contempt power is uniquely " ' "liable to abuse." ' " *Bagwell*, 512 U.S. at 831 (quoting Bloom v. Illinois, 391 U.S. 194, 202 (1968) (quoting *Ex parte* Terry, 128 U.S. 289, 313 (1888))). Professor King has argued that contempt powers merit "close review," due to the "unique risk of excessive punishment." King, *supra* note 112, at 87. The danger, she notes, "is not that judges, as opposed to legislatures or juries, cannot be trusted to assess proportionate punishment.... Instead, contempt sanctions are more likely to be disproportionate than other penalties because of the judge's role as 'judge of his own cause.' " *Id.* (quoting Green v. United States, 356 U.S. 165, 199 (1958) (Black, J., dissenting), *overruled in part by* Bloom v. Illinois, 391 U.S. 194 (1968)).

237. *Bagwell*, 512 U.S. at 830.

view.[238]

These circumstances present the very concern that gave rise to the Excessive Fines Clause: unfettered and easily abused judicial power to impose excessive fines on litigants. The Clause was designed to impose an upper limit on that power, a function that is both necessary and appropriate with respect to coercive civil contempt fines.

V. DETERMINING EXCESSIVENESS

Once it is established that criminal contempt fines and coercive civil contempt fines are subject to the Excessive Fines Clause, the courts will need to determine the proper approach to evaluating whether particular fines are so large as to violate the Clause.[239] In its recent decisions on the Excessive Fines Clause, the Supreme Court has given only limited guidance about how the lower courts should conduct this excessiveness inquiry. In *Austin*, the Court expressly declined to decide what factors the courts should consider for an in rem forfeiture, preferring instead to turn the question back to the lower courts.[240] In *Alexander*, however, the Court at least indicated that for a criminal forfeiture the courts should consider the extent of the defendant's culpability and the gravity of the offense in relation to

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238. As discussed above, federal and state appellate courts use only the very generalized and forgiving "abuse of discretion" standard to review the size of coercive contempt fines. *See supra* notes 48-50 and accompanying text; *see also supra* notes 39-44 and accompanying text (describing cases in which the courts assessed huge coercive fines).

239. *See* United States v. Ursery, 116 S. Ct. 2135, 2146-47 (1996); Austin v. United States, 509 U.S. 602, 622 (1993); *see also supra* notes 104-06 and accompanying text (describing the Supreme Court's two-stage approach to the Excessive Fines Clause—first, determining whether a sanction is sufficiently punitive to come within the purview of the Clause, and then determining whether the particular fine is so excessive as to violate the Clause).

240. *See Austin*, 509 U.S. at 622. In response to the Supreme Court's invitation, the federal circuit courts of appeals have adopted various multi-factor tests for determining when an in rem forfeiture is excessive. Many of these courts have adopted a test that requires consideration of both the relationship of the penalty to the gravity of the offense and the culpability of the owner and the relationship between the property and the offense. *See, e.g.*, United States v. Milbrand, 58 F.3d 841, 847-48 (2d Cir. 1995), *cert. denied*, 116 S. Ct. 1284 (1996); United States v. RR #1, Box 224, 14 F.3d 864, 875-76 (3d Cir. 1994). Other courts, however, have focused more heavily on the relationship of the property to the offense. *See, e.g.*, United States v. Chandler, 36 F.3d 358, 365 (4th Cir. 1994); *see generally* William Carpenter, *Reforming the Civil Drug Forfeiture Statutes: Analysis and Recommendations*, 67 TEMP. L. REV. 1087, 1130-33 (1994) (discussing the various approaches that courts have taken in determining whether a forfeiture is excessive); King, *supra* note 112, at 109 (same); Judd J. Balmer, Note, *Civil Forfeiture Under 21 U.S.C. § 881 and the Eighth Amendment's Excessive Fines Clause*, 38 ARIZ. L. REV. 999, 1011-29 (1996) (same).

the value of the forfeited property.[241]

It is clear that the touchstone of any excessiveness inquiry should be proportionality.[242] Thus, at the center of the excessiveness test should be an evaluation of the harshness of the penalty in relation to the gravity of the offense.[243] In addition, to provide additional objectivity to the inquiry, courts should also compare the penalty imposed with the penalties imposed in similar cases.[244]

Courts should employ this straightforward proportionality analysis in evaluating criminal contempt sanctions under the Excessive Fines Clause. The purpose of a criminal contempt sanction is primarily, if not solely, to punish the defendant for the past contemptuous conduct. In this sense, criminal contempt sanctions operate exactly like the sanctions imposed for any other crime.

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241. *See* Alexander v. United States, 509 U.S. 544, 559 (1993) ("It is in the light of the extensive criminal activities which petitioner apparently conducted through this racketeering enterprise over a substantial period of time that the question whether the forfeiture was 'excessive' must be considered."); *see also* King, *supra* note 112, at 192-93 ("[T]he Court has already noted that excessiveness analysis for *criminal* forfeiture must focus on the extent and degree of the defendant's culpability, the gravity of the offense, and the value of the property forfeited.").

242. *See Alexander*, 509 U.S. at 558-59 & n.4; Solem v. Helm, 463 U.S. 277, 284-88 (1983).

243. *See Solem*, 463 U.S. at 292.

244. *See id.* In *Solem*, the Court announced a similar proportionality analysis for terms of imprisonment under the Cruel and Unusual Punishments Clause. *See id.* Eight years later in *Harmelin v. Michigan*, 501 U.S. 957 (1991), a divided Court reconsidered how the proportionality principle should be applied to terms of imprisonment. Although two Justices would have overruled *Solem*, *see id.* at 965, seven Justices reaffirmed that the Cruel and Unusual Punishments Clause contains a proportionality principle, and that the proportionality review must include consideration of the harshness of the penalty in light of the gravity of the offense. *See id.* at 966-1001 (Kennedy, J., concurring in part and concurring in the judgment); *id.* at 1009-21 (White, J., dissenting); *id.* at 1027 (Marshall, J., dissenting). Three of those Justices, however, indicated that "intrajurisdictional and interjurisdictional analyses are appropriate only in the rare case in which a threshold comparison of the crime committed and the sentence imposed leads to an inference of gross disproportionality." *Id.* at 1005 (Kennedy, J., concurring in part and concurring in the judgment). Those Justices, however, seemed particularly concerned that the sentence at issue was set by the legislature, not merely by a judge: "To set aside petitioner's mandatory sentence would require rejection not of the judgment of a single jurist, as in *Solem*, but rather the collective wisdom of the Michigan Legislature and, as a consequence, the Michigan citizenry." *Id.* at 1006 (Kennedy, J., concurring in part and concurring in the judgment). Contempt sentences, in contrast, are set by judges, not legislatures. Moreover, the proportionality guarantee is more explicit in the Excessive Fines Clause than in the Cruel and Unusual Punishments Clause. Indeed, even Justices Scalia and Rehnquist, who contended in *Harmelin* that the Cruel and Unusual Punishments Clause contains no proportionality guarantee, *see id.* at 966-97, have recognized that the Excessive Fines Clause embodies the proportionality principle, *see Alexander*, 509 U.S. at 558-59 & n.4.

Because a fine imposed to punish criminal contempt is not designed to serve any additional purposes, there is no need to deviate from the straightforward proportionality analysis.

With respect to coercive civil contempt, a proportionality analysis must also be at the core of the excessiveness test. In this special context, however, the test must also accommodate the court's need to achieve the remedial goal (that is, to coerce compliance) in order to secure the plaintiff's substantive rights. With this in mind, the factors that the Court set out in *United Mine Workers*[245] to guide the lower courts in setting coercive fines can serve as the starting point for consideration of the factors that should guide the excessiveness inquiry.

The three factors that the Court identified in *United Mine Workers* are: (1) "the character and magnitude of the harm threatened by continued contumacy"; (2) "the probable effectiveness of any suggested sanction in bringing about the result desired"; and (3) "the amount of the defendant's financial resources and the consequent seriousness of the burden to that particular defendant."[246] Although the Supreme Court has candidly acknowledged that the lower courts have applied these factors so loosely as "to authorize a relatively unlimited judicial power to impose noncompensatory civil contempt fines,"[247] the factors themselves are all pertinent to the inquiry.

The first factor—"the character and magnitude of the harm threatened by continued contumacy"[248]—goes to the gravity of the threatened offense and the defendant's culpability. In an excessiveness inquiry, this factor is critical.[249] The articulation of this factor in *United Mine Workers*, however, is incomplete. As the Court has recognized, a full proportionality analysis requires an assessment

245. United States v. United Mine Workers, 330 U.S. 258, 304 (1947).

246. *Id.*; *see also supra* note 46 and accompanying text (discussing *United Mine Workers*).

247. International Union, United Mine Workers v. Bagwell, 512 U.S. 821, 830 (1994).

248. *United Mine Workers*, 330 U.S. at 304.

249. *See Alexander*, 509 U.S. at 559 (directing the lower court to consider excessiveness "in the light of the extensive criminal activities which petitioner apparently conducted"); *Solem*, 463 U.S. at 290-91 ("First, we look to the gravity of the offense and the harshness of the penalty."); King, *supra* note 112, at 192 ("Proportionality can only be measured in relationship to the owner's culpability . . . ."); *cf.* Austin v. United States, 509 U.S. 602, 627-28 (1993) (Scalia, J., concurring in part and concurring in the judgment) (noting that with respect to monetary fines "the touchstone is value of the fine in relation to the offense," but suggesting that with respect to in rem forfeitures the key is "the relationship of the property to the offense").

of the gravity of the harm threatened in relation to the harshness of the penalty.[250] In other words, the court must assess the magnitude of the harm threatened by continued contumacy not in the abstract, but in relation to the severity of the coercive fine.

The second factor—"the probable effectiveness of any suggested sanction in bringing about the result desired"[251]—works in conjunction with the third factor—"the amount of defendant's financial resources and the consequent seriousness of the burden to that particular defendant."[252] These factors, in essence, direct the court to set the fine at a level that will in fact coerce the defendant into compliance. Although the Court did not make the point expressly in *United Mine Workers*, it seems implicit in these factors that courts should also try to impose fines that are no greater than necessary to achieve compliance, in accordance with the traditional principle that "in wielding its contempt powers, a court 'must exercise the least possible power adequate to the end proposed.' "[253] This part of the inquiry recognizes that coercive contempt sanctions should be significant enough to coerce, but not so high as to destroy the contemnor. Consideration of these factors—a sort of calibration of the sanction to the circumstances of the particular defendant—moves the courts beyond a simple proportionality analysis. This extension, however, is necessary to take account of the important remedial purpose of coercive contempt sanctions. Thus, in an excessiveness inquiry, courts should consider whether a coercive fine of such severity is necessary to achieve compliance in light of the defendant's financial resources.[254]

In addition to these factors, it would be useful for courts to compare the coercive fine at issue with coercive sanctions threatened or imposed in similar cases. The Court has recognized the value of such an inquiry, noting that "[i]f more serious crimes are subject to the same penalty, or to less serious penalties, that is some indication

250. *See Solem*, 463 U.S. at 291 ("Of course, a court must consider the severity of the penalty in deciding whether it is disproportionate.").

251. *United Mine Workers*, 330 U.S. at 304.

252. *Id.*

253. Hicks v. Feiock, 485 U.S. 624, 637 n.8 (1988) (quoting Shillitani v. United States, 384 U.S. 364, 371 (1966)).

254. *But see* Boston, *supra* note 56, at 742 (arguing that punitive damages are subject to the Excessive Fines Clause, and suggesting that the defendant's wealth should be irrelevant in determining the severity of the punishment); Lyndon F. Bittle, Comment, *Punitive Damages and the Eighth Amendment: An Analytical Framework for Determining Excessiveness*, 75 CAL. L. REV. 1433, 1453-54 (1987) (raising concerns about the fairness of allowing consideration of the defendant's wealth).

that the punishment at issue may be excessive."[255] Thus, courts should compare the coercive fine at issue with the fines that have been imposed on similar facts in both the same jurisdiction and in other jurisdictions. This kind of comparative analysis should prove useful in the coercive contempt setting, because the judge generally has no statutory limit set on his or her sanctioning authority. In this unique context, the comparative analysis can serve as an important means of ferreting out a coercive contempt fine that reflects the distorting effects of an individual judge's overreaction or bias.[256]

In sum, the constitutional excessiveness inquiry for coercive civil contempt sanctions must extend beyond the bare proportionality analysis that suffices for criminal contempt sanctions. Based on the preceding discussion, it would be appropriate for courts to consider four factors in evaluating whether a particular coercive fine is so excessive as to violate the Eighth Amendment:

(1) The gravity of the harm threatened by the contemptuous conduct in relation to the severity of the fine imposed;

(2) The probable effectiveness of the fine in coercing compliance in light of the defendant's financial resources;

(3) Whether the fine is greater than necessary to coerce compliance in light of the defendant's financial resources; and

(4) A comparison of the contempt fine at issue with contempt fines that have been imposed in similar circumstances in the same jurisdiction and other jurisdictions.

In applying these factors, the courts should give substantial weight to the first factor, as proportionality is the cornerstone of any excessiveness inquiry under the Eighth Amendment.[257]

This multi-factor test should serve as a more significant check on the courts. In emphasizing the central importance of the proportionality analysis, the courts will be forced to consider whether

255. *Solem*, 463 U.S. at 291. *But cf.* Harmelin v. Michigan, 501 U.S. 957, 1005 (1991) (Kennedy, J., concurring in part and concurring in the judgment) (indicating that such comparative analyses are necessary under the Cruel and Unusual Punishments Clause only if the penalty appears grossly disproportionate). *See also supra* note 244 (discussing *Harmelin*).

256. A similar comparative approach has also been urged as a tool to help identify jury verdicts that are based on passion or prejudice in cases presenting constitutional challenges to punitive damage awards. *See* BMW of N. Am., Inc. v. Gore, 116 S. Ct. 1589, 1608 (1996) (Breyer, J., concurring).

257. *See Solem*, 463 U.S. at 284-87.

the magnitude of the sanction is truly justified in view of the harm threatened in the circumstances of that particular case. In addition, the virtually limitless scope of the second factor is constrained by the third factor, which incorporates the long-standing concern that contempt power should be wielded with caution and moderation. Further, requiring courts to engage in a comparative analysis of any fines imposed will provide a more objective check on judicial discretion because it will push courts to look beyond the case at hand, and thus help them avoid getting bogged down in the immediate frustration of the defendant's recalcitrance. Finally, and perhaps most importantly, because this test for excessiveness is founded on the Constitution, courts will be obliged to apply it much more rigorously than they have applied the loose guidelines set forth in *United Mine Workers.*

VI. CONCLUSION

The contempt power is peculiarly subject to abuse because of the dangerous combination of judicial omnipotence and judicial bias that the law has countenanced in this area. Of particular concern is the courts' ability to impose severe fines in cases of criminal contempt and coercive civil contempt, which has not, as yet, been constrained in any meaningful way. In recent years, however, the Supreme Court has identified a possible new tool for limiting this untrammeled judicial authority: the Excessive Fines Clause of the Eighth Amendment. This Article has contended that under the Court's current jurisprudence, the Excessive Fines Clause can and should be applied as a constitutional limitation on the fines that are imposed not only on criminal contempt defendants, but on coercive civil contemnors as well. Application of this provision will oblige reviewing courts to scrutinize such fines more closely, thus diminishing the potential for judicial abuse in this area.