

THE ROAD NOT TAKEN: WOULD APPLICATION OF THE  
EXCESSIVE FINES CLAUSE TO PUNITIVE DAMAGES  
HAVE MADE A DIFFERENCE?

Sheila B. Scheuerman\*

I. INTRODUCTION

Nearly twenty years ago, the Supreme Court of the United States held that the Eighth Amendment's Excessive Fines Clause<sup>1</sup> did not impose any limits on punitive damages.<sup>2</sup> Analyzing the Clause's "original meaning," the Court concluded that "the Excessive Fines Clause was intended to limit only those fines directly imposed by, and payable to, the government[.]" and therefore did not apply to punitive damages awards in private civil suits.<sup>3</sup> It was not long, however, before the Court identified a different source of constitutional restraint on punitive damages: the Due Process Clause of the Fourteenth Amendment.<sup>4</sup>

Despite rejecting the Eighth Amendment's applicability to punitive damages, over the years, the Court repeatedly has drawn on criminal law—indeed Eighth Amendment precedent—in defining the parameters of the due process inquiry for punitive damages.<sup>5</sup> Perhaps because of this, but more likely because of dissatisfaction with the Court's due process punitive damages

---

\* Associate Professor of Law, Charleston School of Law. I would like to thank Christopher J. Robinette and the *Widener Law Journal* for inviting me to participate in this symposium. In addition, I would like to thank Erica Bedenbaugh for her research assistance. Errors and omissions are mine alone.

<sup>1</sup> 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.

<sup>2</sup> *Browning-Ferris Indus. of Vt., Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 264 (1989).

<sup>3</sup> *Id.* at 268.

<sup>4</sup> *TXO Prod. Corp. v. Alliance Res. Corp.*, 509 U.S. 443, 458 (1993).

<sup>5</sup> *See infra* Part II.D-F.

jurisprudence,<sup>6</sup> some have questioned whether the Excessive Fines Clause would have provided a more meaningful framework for analyzing the constitutionality of punitive damages awards.<sup>7</sup> Indeed, just last year in *Philip Morris USA v. Williams*,<sup>8</sup> Justice Stevens's dissenting opinion suggested that the Excessive Fines Clause should govern punitive damages.<sup>9</sup>

Though seemingly inconsistent with his prior views,<sup>10</sup> Justice Stevens's sentiment reflects an idea that has been quietly percolating in punitive damages scholarship, but has yet to be thoroughly explored: What would the analytical framework be today if the Court had found in 1989 that the Excessive Fines Clause governed punitive damages? This essay begins to explore this question.<sup>11</sup> Part I provides an overview of the Court's punitive damages and Excessive Fines Clause jurisprudence. Part II highlights the parallels and interconnections between the Court's punitive damages analysis and its excessive fines approach. Finally, while admittedly working with the benefit of hindsight, Part II concludes that it is unlikely that punitive damages jurisprudence would differ dramatically today had the Court

---

<sup>6</sup> See, e.g., A. Benjamin Spencer, *Due Process and Punitive Damages: The Error of Federal Excessiveness Jurisprudence*, 79 S. CAL. L. REV. 1085, 1088 (2006).

<sup>7</sup> See, e.g., Erwin Chemerinsky, *The Constitution and Punishment*, 56 STAN. L. REV. 1050 (2004).

<sup>8</sup> 127 S. Ct. 1057 (2007).

<sup>9</sup> *Id.* at 1066 n.1 (Stevens, J., dissenting) (expressing his view that "the Excessive Fines Clause is applicable to punitive damages awards regardless of who receives the ultimate payout").

<sup>10</sup> Justice Stevens has authored or joined the majority opinion in all of the Court's punitive damages decisions prior to *Philip Morris*—all decisions upholding a due process standard for the constitutionality of a punitive damages award. See *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 411 (2003) (majority opinion joined by Justice Stevens); *Cooper Indus., Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 426 (2001) (majority opinion authored by Justice Stevens); *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 562 (1996) (majority opinion authored by Justice Stevens); *Honda Motor Co. v. Oberg*, 512 U.S. 415, 418 (1994) (majority opinion authored by Justice Stevens); *TXO Prod. Corp. v. Alliance Res. Corp.*, 590 U.S. 443, 446 (1993) (plurality opinion authored by Justice Stevens).

<sup>11</sup> This essay merely opens the discussion on this topic, which certainly merits additional in-depth study.

applied the Excessive Fines Clause instead of the Due Process Clause to punitive damages. The standards for assessing both fines and punitive damages awards largely overlap and, indeed, have influenced each other significantly.<sup>12</sup> To the extent any differences exist, they are largely immaterial. In short, on this preliminary look, I conclude that the road not taken leads to the same destination.

## II. EXCESSIVE FINES AND PUNITIVE DAMAGES—THE COURT'S INTERTWINED APPROACH

Criminal sentences, fines payable to the state, and punitive damages payable to a private plaintiff traditionally have been viewed as advancing the same goals: punishment and deterrence.<sup>13</sup> As I have previously written, however, in recent years, the Court slowly has retreated from a deterrence-based approach to punitive damages.<sup>14</sup> So what then of punishment? As a general matter, punishment is supposed to fit the crime.<sup>15</sup> In other words,

---

<sup>12</sup> Of course, this is not to say that the Court has been consistent in its application of these standards. *Cf.* Chemerinsky, *supra* note 7, at 1050-59 (arguing the Court's application of its proportionality standards has been inconsistent when applied to sentencing, fines, and punitive damages).

<sup>13</sup> *See, e.g., Philip Morris*, 127 S. Ct. at 1062 ("This Court has long made clear that '[p]unitive damages may properly be imposed to further a State's legitimate interests in punishing unlawful conduct and deterring its repetition.'") (citations omitted); *State Farm*, 538 U.S. at 416 ("By contrast, punitive damages serve a broader function; they are aimed at deterrence and retribution."); *United States v. Bajakajian*, 524 U.S. 321, 329 (1998) ("Deterrence . . . has traditionally been viewed as a goal of punishment."); *BMW*, 517 U.S. at 568 ("Punitive damages may properly be imposed to further a State's legitimate interests in punishing unlawful conduct and deterring its repetition."); *Pac. Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 19 (1991) ("[P]unitive damages are imposed for purposes of retribution and deterrence.").

<sup>14</sup> *See* Sheila B. Scheuerman, *Two Worlds Collide: How the Supreme Court's Recent Punitive Damages Decisions Affect Class Actions*, 60 BAYLOR L. REV. (forthcoming 2008), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1087782](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1087782).

<sup>15</sup> More precisely, our system seeks to fit the punishment not just to the crime, but also to the offender. *Cf. Williams v. New York*, 337 U.S. 241, 247 (1949) (noting the "prevalent modern philosophy of penology that the punishment should fit the offender and not merely the crime"). "The belief no longer prevails that every offense in a like legal category calls for an identical

punishment should be proportional to the defendant's unlawful conduct.<sup>16</sup> In both its sentencing decisions as well as its punitive damages cases, the Court has announced a basic proportionality principle: the Constitution forbids an excessive sentence or an excessive punitive damages award.

The Court's first case concerning the constitutional limits on punitive damages—and its first Excessive Fines Clause case—were one and the same: *Browning-Ferris Industries of Vermont, Inc. v. Kelco Disposal, Inc.*<sup>17</sup> Rejecting an Excessive Fines Clause approach to punitive damages,<sup>18</sup> the Court subsequently recognized both procedural and substantive due process limits on punitive damages awards. In the punitive damages context, substantive due process limits the amount of an award—it asks whether the amount of an award is "excessive."<sup>19</sup> Unlike substantive due process, procedural due process is not concerned with the size of the award, but the procedures used to safeguard a defendant's rights.<sup>20</sup> Though the Court's development of procedural due process standards has been haphazard,<sup>21</sup> in *BMW of North America, Inc. v. Gore*,<sup>22</sup> the

---

punishment without regard to the past life and habits of a particular offender." *Williams*, 337 U.S. at 247. Thus, for example, consideration of the offender's recidivism is appropriate.

<sup>16</sup> *E.g.*, *Solem v. Helm*, 463 U.S. 277, 284 (1983).

<sup>17</sup> 492 U.S. 257 (1989).

<sup>18</sup> *See infra* text accompanying notes 44-53.

<sup>19</sup> *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 416 (2003) ("The Due Process Clause of the Fourteenth Amendment prohibits the imposition of grossly excessive or arbitrary punishments on a tortfeasor."); *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 562 (1996) (recognizing a substantive due process right against a "grossly excessive" punitive damages award); *TXO Prod. Corp. v. Alliance Res. Corp.*, 509 U.S. 443, 453-54 (1993) ("[T]he Due Process Clause of the Fourteenth Amendment imposes substantive limits 'beyond which penalties may not go.' ") (citation omitted). For criticism of the Court's substantive due process standard, see A. Benjamin Spencer, *Due Process and Punitive Damages: The Error of Federal Excessiveness Jurisprudence*, 79 S. CAL. L. REV. 1085, 1088 (2006) (arguing that the Court's substantive due process restrictions on punitive damages lack precedent and conflict with the constitutional principle of reserved rights and limited powers).

<sup>20</sup> ERWIN CHERMERINSKY, *CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES* 419-20 (1997).

<sup>21</sup> *See* Sheila B. Scheuerman & Anthony J. Franze, *Instructing Juries on Punitive Damages: Due Process Revisited After Philip Morris v. Williams*, 10

Court identified three factors or "guideposts" for evaluating whether a punitive damages award is constitutionally excessive: (1) the reprehensibility of the defendant's conduct, (2) the relationship between the harm suffered by the plaintiff and the punitive damages award, and (3) the difference between the punitive damages award and civil or criminal penalties for comparable misconduct.<sup>23</sup>

Two years after *BMW*, the Court created a similar framework for analyzing whether a monetary penalty payable to the government was constitutionally "excessive" under the Excessive Fines Clause. In *United States v. Bajakajian*,<sup>24</sup> the Court held that "a punitive forfeiture violates the Excessive Fines Clause if it is grossly disproportional to the gravity of a defendant's offense."<sup>25</sup> To make this determination, courts "must compare the amount of the forfeiture to the gravity of the defendant's offense,"<sup>26</sup> which includes consideration of (1) the level of the defendant's culpability, (2) other applicable penalties, and (3) the harm caused by the defendant's conduct.<sup>27</sup>

Superficially, the two standards have substantial similarities. The similarities, however, go beyond mere parallel terminology. The Court's punitive damages and excessive fines jurisprudence have been mutually reliant. The Court has intertwined the holdings, reasoning, and purposes of these doctrines such that one has substantially influenced the other.

#### A. Solem: *The Origins of the BMW Guideposts*

In 1983, the Court considered an Eighth Amendment challenge to a life sentence without the possibility of parole for a seventh nonviolent felony in *Solem v. Helm*.<sup>28</sup> In *Solem*, the defendant was convicted of writing a "no account" check in the

---

U. PA. J. CONST. L. (forthcoming 2008), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1071073](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1071073).

<sup>22</sup> 517 U.S. 559 (1996); see also *infra* Part I.D.

<sup>23</sup> *BMW*, 517 U.S. at 575.

<sup>24</sup> 524 U.S. 321 (1998).

<sup>25</sup> *Id.* at 334.

<sup>26</sup> *Id.* at 336-37.

<sup>27</sup> *Id.* at 337-40.

<sup>28</sup> 463 U.S. at 277.

amount of \$100.<sup>29</sup> Ordinarily, the maximum punishment for this offense would have been five years imprisonment and a \$5,000 fine.<sup>30</sup> The defendant, however, had three prior convictions and therefore fell within the scope of the state's recidivist statute.<sup>31</sup> Under this statute, the defendant received a sentence of life imprisonment without the possibility of parole.<sup>32</sup>

Addressing the constitutionality of this sentence, the Court invoked "[t]he principle that a punishment should be proportionate to the crime"<sup>33</sup> and established a "principle of proportionality" under the Eighth Amendment's Cruel and Unusual Punishment Clause.<sup>34</sup> Though recognizing that "no one factor will be dispositive in a given case,"<sup>35</sup> the *Solem* Court created a four-part framework to determine whether a sentence is disproportionate to the defendant's crime in violation of the Cruel and Unusual Punishment Clause.<sup>36</sup> First, the Court noted that "substantial deference" should be granted to the legislature's judgment in "determining the types and limits of punishments for crimes."<sup>37</sup> Second, courts should examine the "gravity of the offense and the harshness of the penalty."<sup>38</sup> Applying this factor, the Court noted

---

<sup>29</sup> *Solem*, 463 U.S. at 277.

<sup>30</sup> *Id.* at 281.

<sup>31</sup> *Id.*

<sup>32</sup> *Id.* at 282.

<sup>33</sup> *Id.* at 284.

<sup>34</sup> *Id.* at 286.

<sup>35</sup> *Solem*, 463 U.S. at 291 n.17.

<sup>36</sup> *Id.* at 290-92. Since *Solem*, the Court has retrenched on the application of these factors to criminal sentences. *See, e.g.*, *Ewing v. California*, 538 U.S. 11 (2003) (rejecting defendant's argument that sentence of twenty-five years to life for felony grand theft violated Eighth Amendment); *Harmelin v. Michigan*, 501 U.S. 957 (1991) (rejecting defendant's claim that life sentence for cocaine possession by a first-time offender violated Eighth Amendment); *see also* Richard S. Frase, *Excessive Prison Sentences, Punishment Goals and the Eighth Amendment: "Proportionality" Relative to What?*, 89 MINN. L. REV. 571 (2005) (discussing the Court's proportionality approach in noncapital criminal sentencing cases). Nevertheless, the Court revived the *Solem* factors in creating a standard under the Excessive Fines Clause. *See infra* text accompanying notes 98-105.

<sup>37</sup> *Solem*, 463 U.S. at 290.

<sup>38</sup> *Id.* at 290-91.

that "negligent conduct is less serious than intentional conduct"<sup>39</sup> and that "a State is justified in punishing a recidivist more severely than it punishes a first offender."<sup>40</sup> The Court further noted that the harm caused was financial and did not involve a crime against a person.<sup>41</sup> Third, courts should "compare the sentences imposed on other criminals in the same jurisdiction."<sup>42</sup> Finally, courts should "compare the sentences imposed for commission of the same crime in other jurisdictions."<sup>43</sup> A decade later, echoes of these factors would appear in the Court's creation of the "*BMW* guideposts," which govern whether punitive damages are excessive under the Due Process Clause.

*B. Browning-Ferris: Rejection of the Excessive Fines Clause*

Curiously, the Court did not have an occasion to consider the scope of the Excessive Fines Clause until 1989 in *Browning-Ferris Industries of Vermont, Inc. v. Kelco Disposal, Inc.*<sup>44</sup> In *Browning-Ferris*, the Court considered whether the Excessive Fines Clause applied to a civil jury award of punitive damages to a private plaintiff.<sup>45</sup> To answer this question, the Court looked to the original intent of the Framers; in other words, did the first Congress intend the Excessive Fines Clause to apply to punitive damages awards? The answer, according to the Court, was no.<sup>46</sup>

Finding no "direct evidence of Congress' intended meaning,"<sup>47</sup> the Court turned to the significance of the word "fine." The Court found that "[t]hen as now, fines were assessed in criminal, rather than in private civil, actions."<sup>48</sup> The Court rejected the defendant's argument that the Excessive Fines Clause derived from limits in the Magna Charta on "ameracements," a type of monetary penalty

---

<sup>39</sup> *Solem*, 463 U.S. at 293.

<sup>40</sup> *Id.* at 296.

<sup>41</sup> *Id.*

<sup>42</sup> *Id.* at 291.

<sup>43</sup> *Id.* at 291-92.

<sup>44</sup> 492 U.S. 257 (1989).

<sup>45</sup> *Id.* at 259.

<sup>46</sup> *Id.* at 265-76.

<sup>47</sup> *Id.* at 265.

<sup>48</sup> *Id.*

imposed in civil cases to punish and deter misconduct.<sup>49</sup> The Court first expressed its reluctance to "place great emphasis on the particulars of 13th-century English practice."<sup>50</sup> Turning to the merits of the defendant's argument, the Court found that the limits in the Magna Charta were aimed at curbing the power of the King and thus were not implicated in suits between private parties.<sup>51</sup> The Court found further support in the general context of the Eighth Amendment. The Court reasoned that the "primary focus of the Eighth Amendment was the potential for governmental abuse of its 'prosecutorial' power, not concern with the extent or purposes of civil damages."<sup>52</sup> Accordingly, the Court held that the "Excessive Fines Clause does not apply to awards of punitive damages in cases between private parties."<sup>53</sup>

Justice O'Connor, joined by Justice Stevens, dissented.<sup>54</sup> Justice O'Connor first challenged the majority's interpretation of the Clause's history. Justice O'Connor found that "the meaning of [the word 'fine'] was much more ambiguous than the Court is willing to concede."<sup>55</sup> Justice O'Connor surveyed historical sources showing that "fines" were assessed in both civil and criminal actions. Moreover, unlike the majority, Justice O'Connor focused on the "character of a sanction."<sup>56</sup> Justice O'Connor noted that "punitive damages serve the same purposes – punishment and deterrence – as the criminal law, and that excessive punitive

---

<sup>49</sup> *Browning-Ferris*, 492 U.S. at 268-73; see also Gerald W. Boston, *Punitive Damages and the Eighth Amendment: Application of the Excessive Fines Clause*, 5 T.M. COOLEY L. REV. 667 (1988); John Calvin Jeffries, *A Comment on the Constitutionality of the Punitive Damages*, 72 VA. L. REV. 139 (1986); Calvin R. Massey, *The Excessive Fines Clause and Punitive Damages: Some Lessons From History*, 40 VAND. L. REV. 1233 (1987) (arguing that the Excessive Fines Clause should apply to punitive damages based on a historical analysis of the Clause). As Professor Massey explained, an amercement was a "financial penalty assessed at the discretion of the party's peers for a wide variety of illegal conduct, both civil and criminal." Massey, *supra*, at 1251.

<sup>50</sup> *Browning-Ferris*, 492 U.S. at 268.

<sup>51</sup> *Id.* at 271-72.

<sup>52</sup> *Id.* at 266.

<sup>53</sup> *Id.* at 260. Still, the Court refrained from ruling that the Excessive Fines Clause applies only to criminal proceedings. *Id.* at 263.

<sup>54</sup> *Id.* at 282 (O'Connor, J., dissenting).

<sup>55</sup> *Browning-Ferris*, 492 U.S. at 295 (O'Connor, J., dissenting).

<sup>56</sup> *Id.* at 298.

damages present precisely the evil of exorbitant monetary penalties that the Clause was designed to prevent."<sup>57</sup> Justice O'Connor emphasized that punitive damages are a form of punishment and bolstered her conclusion by pointing to the *Mendoza-Martinez*<sup>58</sup> factors used to determine whether a sanction is penal.<sup>59</sup>

Turning to whether the punitive damages award was excessive, Justice O'Connor applied the *Solem* proportionality framework to punitive damages:

First, the reviewing court must accord "substantial deference" to legislative judgments concerning appropriate sanctions for the conduct at issue. Second, the court should examine the gravity of the defendant's conduct and the harshness of the award of punitive damages. Third, because punitive damages are penal in nature, the court should compare the civil *and* criminal penalties imposed in the same jurisdiction for different types of conduct, and the civil *and* criminal penalties imposed by different jurisdictions for the same or similar conduct. In identifying the relevant civil penalties, the court should consider not only the amount of awards of punitive damages but also statutory civil sanctions. In identifying the relevant criminal penalties, the court should consider not only the possible monetary sanctions, but also any possible prison term.<sup>60</sup>

---

<sup>57</sup> *Browning-Ferris*, 492 U.S. at 287 (O'Connor, J., dissenting).

<sup>58</sup> *Kennedy v. Mendoza-Martinez*, 372 U.S. 144 (1963). In *Mendoza-Martinez*, the Court established a seven-factor test to determine whether a sanction is penal:

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

*Id.* at 168-69; *see also* Jeffrey W. Grass, *The Penal Dimensions of Punitive Damages*, 12 HASTINGS CONST. L.Q. 241 (1985) (concluding punitive damages are penal under *Mendoza-Martinez* factors).

<sup>59</sup> *Browning-Ferris*, 492 U.S. at 298 (O'Connor, J., dissenting).

<sup>60</sup> *Id.* at 301.

Although she lost the battle in *Browning-Ferris*, Justice O'Connor's *Solem* framework would play a pivotal role in the development of standards for analyzing the constitutionality of a punitive damages award.

C. Alexander, Austin, and TXO: *An Excessive Fines and Punitive Damages Trilogy*

Despite expressly rejecting an Excessive Fines Clause approach to punitive damages, parallels in the Court's excessive fines and due process standards soon began to emerge. In a trilogy of cases decided within three days of each other in 1993, the Court set new standards for both excessive fines and punitive damages: *Alexander v. United States*,<sup>61</sup> *Austin v. United States*,<sup>62</sup> and *TXO Production Corp. v. Alliance Resources Corp.*<sup>63</sup> *Alexander* and *Austin* both considered the Excessive Fines Clause, while *TXO* considered an excessiveness challenge to a punitive damages award.

*Austin* was the Court's second Excessive Fines Clause case.<sup>64</sup> There, the defendant pled guilty to cocaine possession with the intent to distribute.<sup>65</sup> Following the guilty plea, the government sought forfeiture of the defendant's mobile home and auto-body shop on the grounds that the property was used to facilitate the drug offense.<sup>66</sup> The defendant argued that the forfeiture violated the Excessive Fines Clause.<sup>67</sup> Citing *Browning-Ferris*, the Court noted that the purpose of the Eighth Amendment was "to limit the government's power to punish."<sup>68</sup> The Court emphasized that "[t]he notion of punishment . . . cuts across the division between the civil

---

<sup>61</sup> 509 U.S. 554 (1993) (decided June 28, 1993).

<sup>62</sup> 509 U.S. 602 (1993) (decided June 28, 1993).

<sup>63</sup> 509 U.S. 443 (1993) (decided June 25, 1993).

<sup>64</sup> *Austin*, 509 U.S. at 606.

<sup>65</sup> *Id.* at 604.

<sup>66</sup> *Id.* at 604-05; *see also* 21 U.S.C. § 881(a)(4), (a)(7) (2006) (authorizing forfeiture of conveyances and real property used to facilitate the possession or transportation of illegal substances).

<sup>67</sup> *Austin*, 509 U.S. at 606.

<sup>68</sup> *Id.* at 609 (citing *Browning-Ferris Indus. of Vt., Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 266-67, 275 (1989)).

and the criminal law."<sup>69</sup> Recognizing that sanctions serve multiple purposes, the Court found that a forfeiture need not serve solely the goal of punishment to fall within the Excessive Fines Clause.<sup>70</sup> Concluding that the forfeiture constituted "payment to a sovereign as punishment for some offense,"<sup>71</sup> the Court found that the forfeiture was subject to the Excessive Fines Clause.<sup>72</sup> The Court, however, declined to create any standard for measuring whether a forfeiture was constitutionally excessive.<sup>73</sup>

Similarly, in *TXO*, the Court declined to create any standard for measuring whether a punitive damages award was excessive.<sup>74</sup> In *TXO*, the defendant raised a substantive due process challenge to the size of the punitive damages award. The defendant contended that "an award 526 times greater than the actual damages awarded by the jury – is so excessive that it must be deemed an arbitrary deprivation of property without due process of law."<sup>75</sup> While a plurality of the Court agreed that substantive due process limited the size of a punitive damages award, the plurality refused to establish any standard.<sup>76</sup> Instead, the plurality adopted a general reasonableness standard under the Due Process Clause.<sup>77</sup>

---

<sup>69</sup> *Austin*, 509 U.S. at 610 (quoting *United States v. Halper*, 490 U.S. 435, 447-48 (1989)).

<sup>70</sup> *Id.* at 610-22.

<sup>71</sup> *Id.* at 622 (quoting *Browning-Ferris*, 492 U.S. at 265).

<sup>72</sup> *Id.* at 622.

<sup>73</sup> *Id.* at 622-23.

<sup>74</sup> *TXO Prod. Corp. v. Alliance Res. Corp.*, 509 U.S. 443, 456-58 (1993).

<sup>75</sup> *Id.* at 453.

<sup>76</sup> *Id.* at 454. Justice Stevens authored the opinion and was joined by Chief Justice Rehnquist, Justice Blackmun, and Justice Kennedy (in part). *Id.* at 446.

<sup>77</sup> *Id.* at 458. Notably, Justice Scalia, joined by Justice Thomas, wrote separately. Justice Scalia found it

particularly difficult to imagine that "due process" contains the substantive right not to be subjected to excessive punitive damages, since if it contains *that* it would surely also contain the substantive right not to be subjected to excessive fines, which would make the Excessive Fines Clause of the Eighth Amendment superfluous in light of the Due Process Clause of the Fifth Amendment.

*Id.* at 471 (Scalia, J., concurring).

*D. BMW: Creation of the Guideposts*

In *BMW of North America, Inc. v. Gore*,<sup>78</sup> the Court replaced *TXO's* reasonableness standard with a three-factor test.<sup>79</sup> *BMW* involved a fraud claim against a car distributor for its failure to disclose that the plaintiff's car was repainted to repair acid rain damage, which had occurred during transit.<sup>80</sup> The jury awarded the plaintiff \$4,000 in actual damages and \$4 million in punitive damages.<sup>81</sup> Repeatedly citing Justice O'Connor's *Browning-Ferris* dissent as well as *Solem*, the Court drew heavily on its excessive fines jurisprudence and ultimately concluded that the award was constitutionally excessive.

In reaching this conclusion, the Court identified three objective "guideposts" to determine whether a punitive damages award was constitutionally excessive.<sup>82</sup> Citing Justice O'Connor's second *Browning-Ferris* factor,<sup>83</sup> the *BMW* Court held courts first should consider "the degree of reprehensibility of the defendant's conduct."<sup>84</sup> In support of this first guidepost, the Court quoted *Solem's* recognition that "[t]he principle that punishment should fit the crime 'is deeply rooted and frequently repeated in common-law jurisprudence.'"<sup>85</sup> Further quoting *Solem*, the Court emphasized that "'nonviolent crimes are less serious than crimes marked by violence or the threat of violence.'"<sup>86</sup> Likewise, drawing on *Solem's* recidivism language,<sup>87</sup> the Court noted that "evidence that a defendant has repeatedly engaged in prohibited conduct while knowing or suspecting that it was unlawful would provide relevant support for an argument that strong medicine is required to cure the defendant's disrespect for the law."<sup>88</sup> The Court emphasized

---

<sup>78</sup> 517 U.S. 559 (1996).

<sup>79</sup> *Id.* at 575.

<sup>80</sup> *Id.* at 563.

<sup>81</sup> *Id.* at 565.

<sup>82</sup> *Id.* at 574-85.

<sup>83</sup> See *supra* text accompanying note 60.

<sup>84</sup> *BMW*, 517 U.S. at 575.

<sup>85</sup> *Id.* at 576 n.24 (quoting *Solem v. Helm*, 463 U.S. 277, 284 (1983)).

<sup>86</sup> *Id.* at 576 (quoting *Solem*, 463 U.S. at 292-93).

<sup>87</sup> See *supra* text accompanying note 40.

<sup>88</sup> *BMW*, 517 U.S. at 576-77; see also *id.* at 577 ("Our holdings that a recidivist may be punished more severely than a first offender recognize that

that the harm to the plaintiff was "purely economic in nature" and did not evidence "disregard for the health and safety of others."<sup>89</sup> Similarly, the Court repeated that negligence is less reprehensible than "trickery and deceit."<sup>90</sup>

Second, the Court analyzed the relationship between the harm inflicted on the plaintiff and the amount of the punitive damages award.<sup>91</sup> Similar to *Solem*, this factor focused on the size of the "harshness of the penalty" in comparison to the harm caused.

Finally, courts should compare "the punitive damages award and the civil or criminal penalties that could be imposed for comparable misconduct."<sup>92</sup> Quoting Justice O'Connor, the Court observed that a reviewing court should "accord 'substantial deference' to legislative judgments concerning appropriate sanctions for the conduct at issue."<sup>93</sup> Applying this factor, the Court looked at statutory civil penalties imposed both in-state and in other jurisdictions for deceptive trade violations.<sup>94</sup> Nevertheless, despite the creation of the guideposts, the Court repeated its maxim that no "bright line" distinguishes the constitutional from the unconstitutional.<sup>95</sup>

#### *E. Bajakajian: Guideposts for Excessive Fines Cases*

Two years later, the Court again used the *Solem* standards to establish a comparable framework for evaluating the excessiveness of a fine in *United States v. Bajakajian*.<sup>96</sup> In *Bajakajian*, the government sought forfeiture of nearly \$360,000 from the defendant for his failure to report the transportation of U.S.

---

repeated misconduct is more reprehensible than an individual instance of malfeasance.").

<sup>89</sup> *BMW*, 517 U.S. at 576.

<sup>90</sup> *Id.* at 576 (quoting *TXO Prod. Corp. v. Alliance Res. Corp.*, 509 U.S. 443, 462 (1993)).

<sup>91</sup> *Id.* at 580-83.

<sup>92</sup> *Id.* at 583.

<sup>93</sup> *Id.* (quoting *Browning-Ferris Indus. of Vt., Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 301 (1989)).

<sup>94</sup> *Id.* at 584.

<sup>95</sup> *BMW*, 517 U.S. at 583.

<sup>96</sup> 524 U.S. 321 (1998).

currency to a foreign destination.<sup>97</sup> The Court noted that "[t]he touchstone of the constitutional inquiry under the Excessive Fines Clause is the principle of proportionality."<sup>98</sup> Specifically, in language reminiscent of *BMW*, the Court found that "[t]he amount of the forfeiture must bear some relationship to the gravity of the offense that it is designed to punish."<sup>99</sup> Sounding a cautious note (similar to *BMW*), the Court rejected "strict proportionality" and instead adopted a standard of "gross disproportionality" as articulated under the Cruel and Unusual Punishments Clause, specifically in *Solem*.<sup>100</sup> The Court then created a three-factor framework: (1) the level of the defendant's culpability,<sup>101</sup> (2) the harm caused by the defendant's conduct,<sup>102</sup> and (3) a comparison with other penalties for the same conduct.<sup>103</sup> Because it was not raised by the defendant, the Court did not consider whether the defendant's wealth or income were relevant to the proportionality standard.<sup>104</sup> The Court further reiterated the deference owed to legislatures regarding the appropriate level of punishment.<sup>105</sup>

#### *F. Cooper Industries: Recognition of the Mutual Influence*

In *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.*,<sup>106</sup> the Court recognized the overlap between its Excessive Fines Clause and punitive damages standards. *Cooper Industries* involved a \$4.5 million punitive damages award for unfair competition.<sup>107</sup> In determining the appropriate standard of appellate review for reviewing the constitutional excessiveness of a punitive damages award, the Court drew broad comparisons to its excessive fines jurisprudence.<sup>108</sup> The Court characterized punitive

---

<sup>97</sup> *Bajakajian*, 524 U.S. at 325.

<sup>98</sup> *Id.* at 334.

<sup>99</sup> *Id.*

<sup>100</sup> *Id.* at 337.

<sup>101</sup> *Id.* at 338-39.

<sup>102</sup> *Id.* at 339-40.

<sup>103</sup> *Bajakajian*, 524 U.S. at 339 n.14.

<sup>104</sup> *Id.* at 340 n.15.

<sup>105</sup> *Id.* at 336.

<sup>106</sup> 532 U.S. 424 (2001).

<sup>107</sup> *Id.* at 429.

<sup>108</sup> *Id.* at 432-35.

damages as " 'private fines' intended to punish the defendant and to deter future wrongdoing."<sup>109</sup> The Court again emphasized "the broad discretion that States possess with respect to the imposition of criminal penalties and punitive damages."<sup>110</sup> Noting that a proportionality test applied in both contexts,<sup>111</sup> the Court combined language from *Bajakajian* and *BMW* to note the flexibility of this standard: "We have recognized that the relevant constitutional line is 'inherently imprecise,' rather than one 'marked by a simple mathematical formula.'"<sup>112</sup> The Court expressly recognized that "the same general criteria" apply to determining whether a punitive damages award or fine is constitutionally excessive.<sup>113</sup> Specifically, the Court pointed to "the degree of the defendant's reprehensibility or culpability; the relationship between the penalty and the harm to the victim caused by the defendant's actions; and the sanctions imposed in other cases for comparable misconduct."<sup>114</sup>

#### G. State Farm: *Refinement of the Guideposts*

In *State Farm Mutual Automobile Insurance Co. v. Campbell*,<sup>115</sup> the Court further developed the *BMW* guideposts for punitive damages cases. The Court held that "few awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process."<sup>116</sup> Although the Court reaffirmed its prior holdings that a recidivist may be punished more severely than a first offender, the Court clarified that "in the context of civil actions courts must ensure that the conduct in question replicates the prior transgressions."<sup>117</sup> Accordingly, the Court concluded that "[a] defendant's dissimilar

---

<sup>109</sup> *Cooper Indus.*, 532 U.S. at 432.

<sup>110</sup> *Id.* at 433.

<sup>111</sup> *Id.* at 434.

<sup>112</sup> *Id.* at 434-35 (internal citations omitted).

<sup>113</sup> *Id.* at 435.

<sup>114</sup> *Id.* (citing *United States v. Bajakajian*, 524 U.S. 321, 339 (1998), *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 580-83 (1996), *Solem v. Helm*, 463 U.S. 277, 293 (1983)).

<sup>115</sup> 538 U.S. 408 (2003).

<sup>116</sup> *Id.* at 425.

<sup>117</sup> *Id.* at 423.

acts, independent from the acts upon which liability was premised, may not serve as the basis for punitive damages."<sup>118</sup> Finally, the *State Farm* Court also noted that a defendant's wealth "bear[s] no relation to the award's reasonableness or proportionality,"<sup>119</sup> though the Court did not bar the jury's consideration of the defendant's wealth.

### III. THE ROAD NOT TAKEN LEADS TO THE SAME DESTINATION

If *Browning-Ferris* had held that the Eighth Amendment governed punitive damages, would the standards today be different or better? The governing framework for determining whether a punitive damages award is constitutionally "excessive" parallels the Court's criminal punishment analysis.<sup>120</sup> In punitive damages cases, the *BMW* guideposts examine (1) the degree of reprehensibility of the defendant's conduct, (2) the relationship between the harm suffered by the plaintiff and the punitive damages award, and (3) the difference between the punitive damages award and the civil or criminal penalties authorized in comparable cases.<sup>121</sup> Under *Bajakajian*, an Excessive Fines Clause analysis considers the "gravity of the defendant's offense"<sup>122</sup> as measured by (1) the level of the defendant's culpability,<sup>123</sup> (2) the harm caused by the defendant's conduct,<sup>124</sup> and (3) a comparison with other penalties for the same conduct.<sup>125</sup>

---

<sup>118</sup> *State Farm*, 538 U.S. at 422-23.

<sup>119</sup> *Id.* at 427.

<sup>120</sup> Professor A. Benjamin Spencer has asserted that the *BMW* guideposts "derive much" from the Court's criminal punishment framework. Spencer, *supra* note 6, at 1111. While I agree with Professor Spencer, I also contend that the *BMW* guideposts were influenced by the state postverdict factors used by the Alabama courts. See Anthony J. Franze & Sheila B. Scheuerman, *Instructing Juries on Punitive Damages: Due Process Revisited After State Farm*, 6 U. PA. J. CONST. L. 423, 453-59 (2004) (noting influence of "*Green Oil*" factors).

<sup>121</sup> *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 574-85 (1996).

<sup>122</sup> *United States v. Bajakajian*, 524 U.S. 321, 337 (1998).

<sup>123</sup> *Id.* at 338-39.

<sup>124</sup> *Id.* at 339-40.

<sup>125</sup> *Id.* at 339 n.14.

First, both evaluate the blameworthiness of the defendant's conduct.<sup>126</sup> The punitive damages cases consider "the degree of reprehensibility of the defendant's conduct."<sup>127</sup> Similarly, the Excessive Fines Clause analysis considers the "gravity of the defendant's offense."<sup>128</sup> In both contexts, objective factors guide this determination.<sup>129</sup> For example, the *Solem* Court noted that "negligent conduct is less serious than intentional conduct"<sup>130</sup> and that "a State is justified punishing a recidivist more severely than it punishes a first offender."<sup>131</sup> Similarly, with respect to determining "reprehensibility" when assessing the amount of a punitive damages award, courts should consider whether "the conduct involved repeated actions or was an isolated incident" and whether "the harm was the result of intentional malice, trickery or deceit, or mere accident."<sup>132</sup> In *BMW*, for example, the Court found that the defendant's conduct was not "particularly reprehensible."<sup>133</sup> The Court noted that the harm was "purely economic"<sup>134</sup> and that "BMW's conduct evinced no indifference to or reckless disregard for the health and safety of others."<sup>135</sup> Similarly, in *Bajakajian*, the Court found "a minimal level of culpability."<sup>136</sup> The Court noted that the defendant's crime "was solely a reporting offense."<sup>137</sup> The Court reasoned that the defendant's crime "was unrelated to any

---

<sup>126</sup> Compare *BMW*, 517 U.S. at 575-76, with *Bajakajian*, 524 U.S. at 338-39.

<sup>127</sup> *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 419 (2003).

<sup>128</sup> *Bajakajian*, 524 U.S. at 337.

<sup>129</sup> Professor Pamela S. Kaplan has challenged the notion that the seriousness of the offense is an "objective factor." Pamela S. Kaplan, "Pricking The Lines": *The Due Process Clause, Punitive Damages, and Criminal Punishment*, 88 MINN. L. REV. 880, 888 (2004). Rather, Professor Kaplan argues that "the seriousness of an offense is not a universal, timeless fact." *Id.*

<sup>130</sup> *Solem v. Helm*, 463 U.S. 277, 293 (1983).

<sup>131</sup> *Id.* at 296.

<sup>132</sup> *State Farm*, 538 U.S. at 419.

<sup>133</sup> *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 576 (1996).

<sup>134</sup> *Id.*

<sup>135</sup> *Id.*

<sup>136</sup> *United States v. Bajakajian*, 524 U.S. 321, 339 (1998).

<sup>137</sup> *Id.* at 337.

other illegal activity" and found the money itself was the proceeds of lawful activity.<sup>138</sup>

Both next compare the amount of the penalty with the harm caused.<sup>139</sup> In *Bajakajian*, for example, the Court found that the "harm . . . caused was also minimal"<sup>140</sup> and concluded the government did not suffer any injury from the defendant's failure to report the currency.<sup>141</sup> In *BMW*, the Court found that the 500:1 ratio between the punitive damages award and the plaintiff's compensatory damages was enough to "raise a suspicious judicial eyebrow."<sup>142</sup> On this second factor, however, the Court's treatment of excessive fines challenges varies, at least in degree, from the punitive damages cases. Specifically, the punitive damages cases seem to impose a stricter proportionality test. In *State Farm*, for example, the Court stated that "few awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process."<sup>143</sup> The different emphasis placed on this factor may reflect the nature of a civil damages case. By definition, damages cases provide an objective calculation of "harm" through the plaintiff's compensatory damages award.<sup>144</sup> This concrete measure is lacking in criminal

<sup>138</sup> *Bajakajian*, 524 U.S. at 338. As part of its analysis, the Court noted that the defendant did not "fit into the class of persons for whom the statute was principally designed: He is not a money launderer, a drug trafficker, or a tax evader." *Id.* In applying *Bajakajian*, several Circuits have treated this analysis as a separate factor. *See, e.g.*, *United States v. Browne*, 505 F.3d 1229, 1281 (11th Cir. 2007); *United States v. Jose*, 499 F.3d 105, 111 (1st Cir. 2007).

<sup>139</sup> Compare *Bajakajian*, 524 U.S. at 339, with *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 580 (1996).

<sup>140</sup> *Bajakajian*, 524 U.S. at 339.

<sup>141</sup> *Id.*

<sup>142</sup> *BMW*, 517 U.S. at 583.

<sup>143</sup> *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 425 (2003). Some commentators have interpreted this statement as imposing a strict range of constitutionally permissible punitive damages awards of "two to nine times the amount of the compensatory damages." *E.g.*, Tracy A. Thomas, *Proportionality and the Supreme Court's Jurisprudence of Remedies*, 59 HASTINGS L.J. 73, 95 (2007). *But see* Anthony Sebok, *After Philip Morris v. Williams: What is Left of the "Single-Digit" Ratio?*, 2 CHAS. L. REV. 287, 293 (2008) (finding it "very likely that the ratio rule will be abandoned by the courts").

<sup>144</sup> Scheuerman, *supra* note 14 (noting "harm" is measured as a practical matter by the plaintiff's compensatory award).

cases. Nevertheless, even in the punitive damages cases, the Court repeatedly had rejected any "bright-line ratio which a punitive damages award cannot exceed."<sup>145</sup> Thus, any difference in the Court's treatment of the relationship factor is only a matter of degree, not kind.

Third, both consider comparable civil and criminal sanctions.<sup>146</sup> For example, in *BMW*, the Court compared the size of the punitive damages award both to comparable civil penalties authorized within Alabama as well as to comparable penalties in other jurisdictions.<sup>147</sup> In *Bajakajian*, the Court compared the nearly \$360,000 forfeiture with the maximum sentences under the Sentencing Guidelines,<sup>148</sup> as well as the maximum punishment authorized by the statute itself.<sup>149</sup> Moreover, in both contexts, the Court has expressed its deference to the legislature's judgment regarding the appropriate level of punishment.<sup>150</sup>

Fourth, punitive damages and forfeitures or fines serve the same purpose: punishment and deterrence.<sup>151</sup> Indeed, whether a sanction constitutes "punishment" determines the applicability of

---

<sup>145</sup> *State Farm*, 538 U.S. at 425.

<sup>146</sup> *Compare Bajakajian*, 524 U.S. at 338-39, with *BMW*, 517 U.S. at 583-84.

<sup>147</sup> *BMW*, 517 U.S. at 584.

<sup>148</sup> *Bajakajian*, 524 U.S. at 338-39.

<sup>149</sup> *Id.* at 339 n.14.

<sup>150</sup> *Id.* at 336; *BMW*, 517 U.S. at 583.

<sup>151</sup> *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 416 (2001); see also *Philip Morris USA v. Williams*, 127 S. Ct. 1057, 1062 (2007) ("This Court has long made clear that '[p]unitive damages may properly be imposed to further a State's legitimate interests in punishing unlawful conduct and deterring its repetition.' ") (citations omitted); *BMW*, 517 U.S. at 568 ("Punitive damages may properly be imposed to further a State's legitimate interests in punishing unlawful conduct and deterring its repetition."); *Austin v. United States*, 509 U.S. 602, 610 (1993) (noting that Excessive Fines Clause applied where purpose of sanction was, at least in part, "to punish"); *Pac. Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 19 (1991) ("[P]unitive damages are imposed for purposes of retribution and deterrence."). Apart from punishment and deterrence, scholars have advocated other purposes for punitive damages. *E.g.*, Anthony J. Sebok, *Punitive Damages: From Myth to Theory*, 92 IOWA L. REV. 957, 974 (2007) (arguing punitive damages serve "private retribution" function); Benjamin C. Zipursky, *A Theory of Punitive Damages*, 84 TEX. L. REV. 105 (2005) (arguing punitive damages serve private recourse function).

the Excessive Fines Clause.<sup>152</sup> Finally, were there any doubt of the similarities between these two doctrines, the Court itself has recognized the congruence of its punitive damages analysis and its excessive fines analysis.<sup>153</sup>

So why then did Justice Stevens urge a reconsideration of an Excessive Fines Clause approach?<sup>154</sup> One answer may lie in the Court's specific holding in that case. In *Philip Morris*, the Court held that "the Constitution's Due Process Clause forbids a State to use a punitive damages award to punish a defendant for injury that it inflicts upon nonparties or those whom they directly represent, that is, injury that it inflicts upon those who are, essentially, strangers to the litigation."<sup>155</sup> Given that Justice Stevens previously had endorsed—and even authored—the current due process framework,<sup>156</sup> his suggestion to use an Excessive Fines Clause framework seems to reflect his disagreement with this specific holding. In other words, perhaps using an Excessive Fines Clause framework to evaluate the excessiveness of a punitive damages award would not limit consideration of harm to others. But, the *Philip Morris* holding did not derive from the substantive due process *BMW* guideposts; rather the Court's holding grew out of procedural due process limitations on punitive damages awards.<sup>157</sup> Thus, the Court's holding reflected the general due process principle that a State cannot punish an individual "without first providing that individual with 'an opportunity to present every

---

<sup>152</sup> *Austin*, 509 U.S. at 609-11.

<sup>153</sup> *Cooper Indus., Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 433-34 (2001).

<sup>154</sup> See *Philip Morris*, 127 S. Ct. at 1066 (Stevens, J., dissenting).

<sup>155</sup> *Id.* at 1063.

<sup>156</sup> See *State Farm*, 538 U.S. at 411 (majority opinion joined by Justice Stevens); *Cooper Indus.*, 532 U.S. at 426 (majority opinion authored by Justice Stevens); *BMW*, 517 U.S. at 562 (majority opinion authored by Justice Stevens); *Honda Motor Co. v. Oberg*, 512 U.S. 415, 418 (1994) (majority opinion authored by Justice Stevens); *TXO Prod. Corp. v. Alliance Res. Corp.*, 590 U.S. 443, 446 (1993) (plurality opinion authored by Justice Stevens).

<sup>157</sup> See *Philip Morris*, 127 S. Ct. at 1063 (noting Court's consideration was limited to "Constitution's procedural limitations" on punitive damages). For an explanation of the difference between procedural due process and substantive due process in the context of punitive damages, see Scheuerman & Franze, *supra* note 21.

available defense.'"<sup>158</sup> Thus, regardless of the factors or guideposts used to evaluate excessiveness, the Due Process Clause independently requires "States to provide assurance that juries are not asking the wrong question, that is, seeking, not simply to determine reprehensibility, but also to punish for harm caused strangers."<sup>159</sup>

The result would be the same had the Court adopted an Excessive Fines Clause approach to the constitutionality of the amount of a punitive damages award. There, too, the line would have to be drawn between a jury's permissible consideration of harm-to-others evidence for determining culpability and the impermissible use of harm-to-others evidence to punish the defendant. In both situations, the court must "provide assurance that the jury will ask the right question, not the wrong one."<sup>160</sup> Indeed, applying the Due Process Clause to criminal cases, the Court has held that juries must be instructed on constitutional limits on their discretion.<sup>161</sup>

Putting aside whether any change would result from an Excessive Fines Clause approach, the practical reality is that the Court rejected this analysis nearly twenty years ago. Developments since then suggest that any change is unlikely. To be sure, the composition of the Court certainly has changed since 1989. Justice Blackmun delivered the Court's opinion in *Browning-Ferris*, and he was joined by Chief Justice Rehnquist, and Justices Brennan, White, Marshall, Scalia, and Kennedy. Only two Justices dissented on the Excessive Fines Clause holding: Justices O'Connor and Stevens. Of those on the Court in 1989, only Justice Stevens and Scalia remain on the Court today. So would today's Supreme Court accept an Excessive Fines Clause framework for punitive damages?

---

<sup>158</sup> *Philip Morris*, 127 S. Ct. at 1063 (quoting *Lindsey v. Normet*, 405 U.S. 56, 66 (1972)).

<sup>159</sup> *Id.* at 1064.

<sup>160</sup> *Id.*

<sup>161</sup> *See, e.g., Simmons v. South Carolina*, 512 U.S. 154, 164 (1994) (holding that due process requires courts to instruct juries about the defendant's ineligibility for parole where the state relies on future dangerousness in support of the death penalty); *Taylor v. Kentucky*, 436 U.S. 478 (1978) (requiring jury instruction in criminal cases regarding presumption of innocence).

Some language in *Bajakajian* and *Cooper Industries* could be read to suggest that the Court might take a different road today. Justice Thomas authored the majority opinion in *Bajakajian*, joined by Justices Stevens, Souter, Ginsburg, and Breyer. In *Bajakajian*, the Court analyzed whether a statutory fine for transporting unreported currency fell within the protection of the Excessive Fines Clause.<sup>162</sup> To answer this question, the Court analyzed whether the forfeiture constituted "punishment" or whether it was remedial.<sup>163</sup> Furthermore, in contrast to the analysis in *Browning-Ferris*, the Court now relied on the Magna Charta's influence on the Bill of Rights.<sup>164</sup> Indeed, in crafting its proportionality standard, the Court recognized the comparison to amercements, which the Court characterized as the "medieval predecessors of fines."<sup>165</sup> Finally, in contrast to the definitive tone taken in *Browning-Ferris* that the Founders were familiar with the concept of punitive damages, the *Cooper Industries* Court noted that "punitive damages have evolved somewhat" since the eighteenth century.<sup>166</sup> Citing Justice O'Connor's *Haslip* dissent, the *Cooper Industries* Court recognized that "[u]ntil well into the 19th century, punitive damages frequently operated to compensate intangible injuries."<sup>167</sup> The Court further noted that "the theory behind punitive damages has shifted toward a more purely punitive . . . understanding."<sup>168</sup>

Despite those stray phrases, it seems unlikely that the Court would be willing to revisit its *Browning-Ferris* holding. First, the *Bajakajian* Court reiterated the view adopted in *Browning-Ferris* that the Excessive Fines Clause requires government involvement: "[T]he word 'fine' was understood to mean a payment to a

---

<sup>162</sup> United States v. *Bajakajian*, 524 U.S. 321, 328-34 (1998).

<sup>163</sup> *Id.* at 328.

<sup>164</sup> *Id.* at 335-36. The Court noted that the Magna Charta endorsed a proportionality principle: "[The] Magna Charta—which the Stuart judges were accused of subverting—required only that amercements (the medieval predecessor of fines) should be proportioned to the offense and that they should not deprive a wrongdoer of his livelihood." *Id.*

<sup>165</sup> *Id.* at 335.

<sup>166</sup> *Cooper Indus., Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 437 n.11 (2001).

<sup>167</sup> *Id.*

<sup>168</sup> *Id.*

sovereign as punishment for some offense."<sup>169</sup> Quoting *Austin*, the Court noted that "[t]he Excessive Fines Clause thus 'limits the government's power to extract payments . . . as punishment for some offense.' "<sup>170</sup> Moreover, four Justices dissented from the Court's remedial/punitive approach to the Excessive Fines Clause.<sup>171</sup>

#### IV. CONCLUSION

At the end of the day, the Excessive Fines Clause leads to the same destination as the due process path that the Court chose to follow. The factors for evaluating the constitutional "excessiveness" of the penalty would be roughly the same. The same difficulties would have been presented by harm-to-others evidence. And the same questions remain unanswered such as the relevance of a defendant's wealth.

---

<sup>169</sup> *Cooper Indus.*, 532 U.S. at 327 (quoting *Browning-Ferris Indus. of Vt., Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 265 (1989)).

<sup>170</sup> *Id.* at 328 (quoting *Austin v. United States*, 509 U.S. 602, 609-10 (1993)).

<sup>171</sup> *United States v. Bajakajian*, 524 U.S. 321, 344 (1998) (Kennedy, J., dissenting, joined by Chief Justice Rehnquist and Justices Scalia and O'Connor).