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OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE
THE SUPREME COURT
OF THE
UNITED STATES

CAPTION: BROWNING-FERRIS INDUSTRIES OF VERMONT, INC.
ET AL., Petitioners v.
KELCO DISPOSAL, INC., ET AL.,

CASE NO: 88-556

PLACE: WASHINGTON, D.C.

DATE: April 18, 1989

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1 IN THE SUPREME COURT OF THE UNITED STATES

2 -----X
3 BROWNING-FERRIS INDUSTRIES :
4 OF VERMONT, INC, ET. AL., :
5

6 Petitioners, :

7 v. :

No. 88-556

8 KELCO DISPOSAL, INC., ET. AL., :
9
10 -----X

11 Washington, D.C.
12 Tuesday, April 18, 1989

13 The above-entitled matter came on for oral argument
14 before the Supreme Court of the United States at 10:06
15 a.m.

16 APPEARANCES:

17 ANDREW L. FREY, Washington, D.C.; on behalf of

18 Petitioners.

19 H. BARTOW FARR, III, Washington, D.C.; on behalf of

20 Respondents.
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1 P R O C E E D I N G S

2 10:06 a.m.

3 CHIEF JUSTICE REHNQUIST: We'll hear argument
4 first this morning in No. 88-556, Browning-Ferris
5 Industries of Vermont v. Kelco Disposal.

6 Mr. Frey.

7 ORAL ARGUMENT OF ANDREW L. FREY

8 ON BEHALF OF PETITIONERS

9 MR. FREY: Thank you. Mr. Chief Justice, and
10 may it please the Court:

11 The question in this case is whether a \$6
12 million verdict inflicted on Petitioner BFI to punish it
13 for a purely economic tort that caused Respondent Kelco
14 Disposal \$51,000 in actual damages is subject to attack
15 on the ground that it is disproportionate to the wrong
16 that BFI was found to have committed.

17 Now, BFI and Kelco were competitors in the
18 roll-off waste disposal business in Burlington, Vermont
19 and for a period of about six months in late 1982 and
20 early 1983 BFI, which had been losing market share to
21 Kelco, substantially reduced its prices in what the jury
22 found was an effort to put Kelco out of business and to
23 secure a monopoly in the market.

24 This effort in fact proved unsuccessful. Kelco
25 maintained its market share. BFI soon raised its

1 prices. And, eventually it was BFI that gave up, sold
2 out, and left the Burlington market. In the meanwhile,
3 this lawsuit had been brought.

4 The complaint charged an attempt to monopolize
5 in violation of Section 2 of the Sherman Act and in a
6 second count tortious interference with Kelco's business
7 relations in violation of Vermont common law. Now, the
8 same alleged misconduct, predatory pricing, underlay
9 both causes of action.

10 After the jury found BFI liable on both counts,
11 it was asked to assess damages, and after a hearing it
12 found that Kelco's injury, as I mentioned, was \$51,000.
13 Under the Federal Antitrust Claim, Kelco was of course
14 entitled to three times that amount together with
15 attorney's fees.

16 For the state tort, which, remember, involved
17 exactly the same conduct, Kelco was awarded the same
18 \$51,000 in compensatory damages and \$6 million in
19 punitive damages.

20 Now, the jury, which had before it a
21 sympathetic local plaintiff and was being asked to
22 punish a large, impersonal, out-of-state defendant,
23 awarded this astronomical amount after a damages hearing
24 in which it was repeatedly urged to send the message to
25 Houston -- which is where BFI has its corporate

1 headquarters -- and was invited to base its award on
2 BFI's size, which was detailed to it in terms of annual
3 income, revenues, monthly revenues, weekly revenues,
4 hourly revenues.

5 Now, when BFI challenged the verdict as
6 excessive, both the district court and the court of
7 appeals upheld it. And in the course of doing so they
8 did not undertake any careful analysis of the
9 circumstances of the case of BFI's conduct. They simply
10 upheld the award on the basis of their subjective
11 reactions that it was not excessive. And in the case of
12 the court of appeals essentially on the basis of BFI's
13 wealth.

14 Now, both Kelco and its amici speak at some
15 length about the generally valuable role played by
16 punitive damages in the modern American legal system.
17 And they charged BFI with asking the Court to overturn
18 traditional state tort law.

19 But the Court does not have before it any
20 question of the Constitutionality of punitive damages as
21 such. By and large, therefore, the impassioned defense
22 that has been made of the institution of punitive
23 damages is quite beside the point. There may be many
24 things right or wrong with punitive damages, but the
25 question before the Court is whether federal law

1 prohibits excessive awards of punitive damages.

2 This is a relatively recent phenomenon, by no
3 means a traditional part of state tort law, and little
4 has been said and little could be said to justify the
5 infliction of excessive punishments on tort-feasors.

6 QUESTION: Well, Mr. Frey, what kind of federal
7 law do you think applies here? Do we look to Vermont
8 state law in this instance? How do we get the federal
9 law issue before us?

10 MR. FREY: Well, I'm --

11 QUESTION: Is it through your Excessive Fines
12 Clause of the Constitution?

13 MR. FREY: Well, there are three provisions
14 that -- three bodies of law or provisions of law that
15 could regulate the excessiveness of damages awards in
16 tort cases, punitive damage awards.

17 One is the Excessive Fines Clause of the Eighth
18 Amendment and certainly the one we first think of as
19 being potentially applicable.

20 QUESTION: Well, is that the one you're arguing
21 today? Is that the one --

22 MR. FREY: I intend to --

23 QUESTION: -- that was raised below?

24 MR. FREY: That was raised below. The common
25 law argument that this is excessive, apart from the

1 Constitution, was raised below.

2 The third ground on which the Court could reach
3 the question whether the award is excessive is the due
4 process clause.

5 QUESTION: But was that raised below?

6 MR. FREY: The due process argument as such was
7 not raised below. We believe, however, your Honor, if I
8 can anticipate your next question, that that is not a
9 reason why this Court could not reach the due process
10 question if it found that the Excessive Fines Clause of
11 the Eighth Amendment was inapplicable.

12 While Kelco in its brief has mentioned several
13 times that the due process issue was not raised below,
14 what it has not done is cite any cases that indicate
15 that that is a defect that blocks the Court from ruling
16 on that question.

17 And, in fact, in our reply brief we cited
18 several cases, I think City of Revere, Braniff Airways
19 against Nebraska, and I think in fact the instances are
20 legion in which the party has cited -- has made the
21 correct substantive attack. That is, it has identified
22 specifically what its problem is with what happened to
23 it, what it thinks is wrong. But, it has assigned the
24 wrong provision of the Federal Constitution.

25 In a case like that, I think the Court has felt

1 free, if need be, to reach the correct provision.

2 Essentially our claim is that this award is
3 excessive. It is grossly disproportionate to what was
4 done wrong. We say that violates the Excessive Fines
5 Clause of the Eighth Amendment.

6 QUESTION: Has this court ever incorporated the
7 Excessive Fines Clause into the Fourteenth Amendment to
8 make it applicable to the states?

9 MR. FREY: I'm not sure that I'm aware of any
10 case in which it either has done so or has rejected
11 doing so. It's clear that it has applied both the
12 Excessive Bail Clause and a Cruel and Unusual
13 Punishments Clause.

14 In fact, the kinds of provisions that are not
15 incorporated are basically procedural provisions like
16 the jury trial right of the Seventh Amendment or the
17 indictment right under the Fifth Amendment.

18 We are talking here about a substantive
19 protection of individual rights under the Bill of
20 Rights, I think. The protection against excessive
21 punishments.

22 QUESTION: How do you define state action here?

23 MR. FREY: I define state action because it's
24 going to be -- in this case it's federal action really
25 -- it's going to be the United States Marshall who is

1 going to come to Browning-Ferris' office if they don't
2 pay the judgment and cart away its property to sell it.

3 QUESTION: So, you would limit this to just
4 suits in Federal Court?

5 MR. FREY: Not at all. Our position -- it
6 would be state action if the suit were in state court
7 and the sheriff were going to do it.

8 It seems -- It seems to me clear, Justice
9 O'Connor, that where the punishment is inflicted by
10 virtue of the judgment of a court, even in a private
11 civil action, that constitutes state action. I don't
12 think the state can avoid the responsibility to adhere
13 to the constitution by using the medium -- it's still
14 the power of the state that enforces the judgment. The
15 medium is simply this trial before a state or federal
16 court between private parties.

17 QUESTION: But, if you are right, it would
18 involve the federal courts and this Court in reviewing
19 every state tort judgment that resulted in punitive
20 damages.

21 MR. FREY: Well, I --

22 QUESTION: I mean, it would be a substantial
23 expansion, would it not?

24 MR. FREY: I believe it would not be a
25 substantial expansion at all and I think there are

1 several reasons for that.

2 First of all, there is no expansion of the
3 number of cases that would be brought. This is simply
4 an issue that would arise in an existing case. So, this
5 would not involve the lower federal courts in a single
6 case more than they would otherwise be involved in.

7 It is simply where a tort suit is brought and a
8 claim for punitive damages is made there is the
9 possibility of raising the claim that the Constitutional
10 award is -- that the punitive damages award is excessive.

11 QUESTION: Well, what about state courts,
12 though?

13 MR. FREY: State courts --

14 QUESTION: I mean, a lot of these are in state
15 courts.

16 MR. FREY: Well, the second -- yes, many of
17 these are in state courts. And, again, it would require
18 the state courts to do something similar to what they do
19 anyway, which is a normal judicial function, which is to
20 review the excessiveness of verdicts.

21 Now, we believe that the way many state courts
22 have done this is a constitutionally unacceptable method
23 for approaching it. That is, it's been purely
24 subjective in the standard --

25 QUESTION: But then petitions for certiorari

1 would be filed and if there is a federal doctrine we've
2 enunciated, that's one more thing we would have to look
3 at.

4 MR. FREY: Well, let me say this about that --
5 about that concern. I think there are several things to
6 be said.

7 The first is that if the Court decides this
8 case and it holds that the Eighth Amendment applies, and
9 it sets forth a framework within which the Eighth
10 Amendment analysis is to be conducted, I think you will
11 find that even though in theory it is possible to raise
12 claims, that the incidence of the exorbitant awards will
13 be substantially reduced.

14 The second thing is that the same thing could
15 be said about the rule that a criminal conviction must
16 rest on evidence that satisfies the reasonable doubts
17 standard. That is an issue -- well, the same thing
18 could be said about applying the Speedy Trial Clause to
19 the states.

20 QUESTION: In a criminal case you have habeas
21 corpus. A criminal judgment does not become final where
22 a civil judgment does.

23 MR. FREY: But that is in fact one of the
24 concerns. In a case like Jackson against Virginia the
25 concern was that you were creating an additional cause

1 of action, a whole new case, that could be brought to
2 review the question of the sufficiency of the evidence.

3 What we are talking about here is a claim which
4 will arise in a relatively small proportion of the
5 cases, and, indeed, a much smaller proportion of the
6 cases after this Court establishes the analytical
7 framework within which these cases are to arise or these
8 claims are to be evaluated.

9 And I think it will be easy for this Court
10 unless -- this Court would not grant certiorari in
11 particular cases unless it saw a question of general
12 importance about the administration of the punitive
13 damages system.

14 If it sees a question of general importance, if
15 it sees a recurring type of problem in which excessive
16 punitive damages may be being inflicted, then it seems
17 to me that the duty that the Constitution places upon
18 this court is to explicate the law in this area where it
19 would be useful.

20 QUESTION: Mr. Frey, assuming that the
21 Excessive Fines Clause applies to the states, I find --
22 why must it apply so as to impose a national standard?
23 I find it difficult to think that the Constitution meant
24 to say every state has to hate predatory pricing the
25 same amount.

1 MR. FREY: Well, I don't believe it does and I
2 don't believe it's the burden of our submission that it
3 does.

4 You have to distinguish between the class of
5 cases -- which I hope would increasingly come to be the
6 norm and which is the norm in the case of criminal case
7 finds -- where the legislature has established
8 standards. And in that class of cases our position is
9 that the constitutional inquiry would defer
10 substantially to the legislative judgment.

11 What the Constitution does --

12 QUESTION: Why not totally? Is the standard
13 you ask us to impose a national standard or rather
14 should we just look to each individual state and say
15 this award is excessive given what's done within that
16 state, and allow each state to say how much it hates it
17 each individual thing as much as it wants?

18 MR. FREY: Well, by and large I think that is
19 our position because our position is only that the
20 excessive fine inquiry under the Federal Constitution is
21 an outer perimeter. Within that outer perimeter, the
22 states are free to set the rules as they see fit.

23 QUESTION: No, but we're not in agreement. I'm
24 not talking about any outer perimeter. I'm saying that

25 --

1 MR. FREY: I understand.

2 MR. FREY: -- if the state wants to say for a
3 particular type of offense you can be fined one-quarter
4 of your net worth, that's fine if the state hates a
5 particular thing that much. So long as the state treats
6 everybody alike.

7 But I gather what you're mainly complaining
8 about is the flukiness of judgments. Now, that would be
9 eliminated within each state, at least, wouldn't it, if
10 you applied the Excessive Fines Clause simply to require
11 the state to have some consistency in judgments within
12 its own state.

13 MR. FREY: Well, let me say, Justice Scalia,
14 that I think your position comes to a hard place against
15 Solem against Helm when you come up against that. And I
16 think what Solem teaches us is that where the
17 legislature sets a boundary, that will be respected.

18 QUESTION: Do you regard Solem as the last word
19 on that subject?

20 MR. FREY: Well, let's say that it's the last
21 case I'm aware of in which this Court has addressed the
22 matter.

23 But let me back up for a minute. This is not a
24 case in which Vermont or federal law has authorized in
25 any affirmative way a \$6 million verdict. This is a

1 case in which we have a system of the sky is the limit,
2 we won't tell you what it is. Whatever amount the jury
3 comes up with, if it doesn't shock our conscience -- and
4 we won't tell you how we decide that -- is okay.

5 QUESTION: It would be a different case if you
6 had had fifteen \$6 million verdicts in Vermont and the
7 Vermont Supreme Court had looked at all of these and
8 said, "Yeah, we hate predatory pricing that much." It
9 would be a different case, wouldn't it? Even without a
10 legislative pronouncement.

11 MR. FREY: It would be a different -- It would
12 be a different case and I would have a much harder
13 task. But I'm not prepared to concede that if by some
14 fluke Vermont decided that for double-parking the
15 appropriate penalty was a million dollars, that this
16 Court would have nothing to say about it.

17 QUESTION: Why? Why would we care how much --
18 maybe Vermont has a real problem with double-parking.

19 (Laughter.)

20 QUESTION: The citizens of Vermont can -- you
21 know, can handle that the way they want, can't they?

22 MR. FREY: Because I think the Eighth Amendment
23 is a provision that commits to the courts some safety
24 net function in this area.

25 I mean, I hate -- I hate -- I don't want to, if

1 I can avoid it, prolong this dispute because I don't
2 think it's this case. That is, I don't see, even if you
3 were correct -- unless you want to take the next step
4 and say that a state that has no system, that sets no
5 standards, that the maximum penalty is any amount you
6 can dream of for any wrong that you do, which I think is
7 totally inconsistent with the Eight Amendment.

8 And I might say that this Court in a federal
9 case should not allow that kind of award to be entered.
10 I don't believe Vermont law permits that.

11 QUESTION: You were not -- all I'm -- I just
12 want to get your answer to one question. You do not --
13 you're not willing to read "excessive" to mean simply
14 excessive with regard to other fines imposed by that
15 state?

16 MR. FREY: I'm not willing to --

17 QUESTION: You insist upon some national
18 standard? Yes or no? I think that can be answered yes
19 or no.

20 MR. FREY: I am -- I am -- I think the answer
21 is no, although in this case I would be satisfied, I
22 think, with that reading. I think we would still win.

23 QUESTION: No -- yes, you insist on a national
24 standard? Isn't that right?

25 MR. FREY: I insist on -- I don't insist on

1 anything. I urge the Court --

2 (Laughter.)

3 MR. FREY: -- that it -- that it consider a
4 rule under which the punishment bears some relationship
5 to the crime. That is, I think the macado is somewhere
6 in the Eighth Amendment.

7 But I have to stress --

8 QUESTION: Mr. Frey, I don't understand why
9 you're not willing to say it's a national standard.
10 That's the way I read your brief.

11 MR. FREY: Because I think our position is that
12 the standard --

13 QUESTION: Do you think --

14 MR. FREY: -- is not the same where there are
15 different legislative judgments. That is --

16 QUESTION: Yes, but if there are no legislative
17 judgments.

18 MR. FREY: If there are no legislative
19 judgments --

20 QUESTION: Basically we have a system now with
21 no legislative judgments so far. So, in that ballpark
22 isn't the standard the same everywhere under your
23 submission?

24 MR. FREY: I'm still not sure, Justice Stevens,
25 that I can go that far because the approach that we

1 suggest which is the -- in which we are guided by Solem
2 -- and maybe I shouldn't be, but it is the most recent
3 word, if not the last word, of the Court on the subject
4 -- is a multi-factor approach.

5 One of the relevant factors is what happens in
6 Vermont, is this in line with the penalties that are
7 inflicted in Vermont for this kind of misconduct? That
8 is a relevant factor. So, I am not --

9 QUESTION: Well, assume we thought that a \$100
10 million fine was clearly excessive, do you think it
11 would stop being excessive because Vermont had inflicted
12 it a hundred times?

13 MR. FREY: No.

14 QUESTION: I don't follow that approach.

15 MR. FREY: I don't -- I'm not suggesting that.
16 One of the problems I have with looking at other
17 punitive damages awards, as opposed to legislative
18 judgments or even court-made common law explications of
19 rules is that they are all the product of the same, what
20 we feel, defective system that is bound, not regularly,
21 but all too frequently to produce these bloated,
22 irrational, excessive awards.

23 So, I don't even like looking at other punitive
24 damages awards. But I guess I'm somewhere -- I can
25 imagine a system or a set of rules -- and I don't think

1 this is the Court's problem today because it seems to me
2 that whoever is right in this debate, this award is
3 excessive. If the Eighth Amendment applies to the
4 states, the Eighth Amendment authorizes the striking
5 down of this award.

6 QUESTION: Do you think this award would be
7 excessive if Vermont had a statute that said there
8 should be no punitive damage awards in excess of \$10
9 million in cases -- and somehow describe this kind of
10 economic tort?

11 MR. FREY: Yes.

12 QUESTION: What if there was a federal -- what
13 if the federal antitrust penalties were raised to \$10 of
14 criminal penalties and you have this very violation?
15 Would a \$6 million fine violate the Excessive Fines
16 Clause?

17 MR. FREY: You mean where this --

18 QUESTION: Well, you have a Sherman Act found
19 violation here.

20 MR. FREY: I think it would be --

21 QUESTION: I would assume --

22 MR. FARR: I think it would be --

23 QUESTION: -- a judge, if --

24 MR. FREY: I think it would be a much -- a much
25 harder argument to make. Just as in Solem it was a hard

1 argument to make that the legislative determination --
2 it was a five to four case -- it's a much harder
3 argument to make.

4 Now, I will say about the one million dollars
5 that is -- authorizes a criminal fine for antitrust
6 violations, that that provides very little benchmark to
7 justify the \$6 million here. Because \$1 million
8 represents the Congressional judgment about the penalty
9 that should be imposed for the most severe violations of
10 the antitrust laws.

11 Now, whatever you may think about the conduct
12 here, and I'm sure Mr. --

13 QUESTION: Well, that's not quite right --

14 MR. FREY: -- will tell you --

15 QUESTION: -- because you can also go to jail.

16 MR. FREY: Well, a corporation can't.

17 QUESTION: Oh, okay.

18 MR. FREY: The penalty for a corporation -- in
19 fact, I think there may be a distinction in --

20 QUESTION: Mr. Frey, you take the position --
21 excessive in any state?

22 MR. FREY: This \$6 million for this conduct, I
23 think would be excessive anywhere, yes.

24 QUESTION: In any state?

25 MR. FREY: We -- that is our position. Yes.

1 QUESTION: Well, Mr. Frey, you're talking
2 interchangeably about an excessive fine and punishment.
3 Do you think we have to find that this fine was
4 punishment in order to agree with you?

5 MR. FREY: Well, I think -- I think you would
6 have to find that it was punishment to agree with us
7 under the Eighth Amendment argument.

8 QUESTION: Uh-huh. Because you think --
9 because?

10 MR. FREY: I think our view is that what the
11 word "fine" means is a monetary exaction for purposes of
12 punishment.

13 QUESTION: But you must be contending that it
14 needn't be criminal punishment?

15 MR. FREY: It need not be punishment that is
16 inflicted as a result of a criminal prosecution.
17 Definitely we are contending that. In fact -- In fact,
18 we think that --

19 QUESTION: Well, why do you have to even talk
20 about punishment then?

21 MR. FREY: Well, I think it's a question of how
22 we use the word punishment. Only if you define the word
23 punishment as being that which is inflicted after a
24 criminal proceeding. And I understand that in Ingraham
25 that the Court was talking about a different provision

1 of the Eighth Amendment.

2 QUESTION: Yes.

3 MR. FREY: The Cruel and Unusual Punishments
4 Clause. It said we're going -- what we are going to do
5 is to say that you can't punish people except through
6 the criminal process. Now, I'm not talking about fines
7 but other kinds of punishments. They are corporal
8 punishment.

9 Therefore, it said if something is punishment
10 within the meaning of the Cruel and Unusual Punishments
11 Clause, you have to have a criminal prosecution.

12 Now, we have a different history in the case of
13 civil penalties, civil punishments. We have a history
14 that goes back to, really, the time of amercements of
15 Magna Carta of punishing people for wrongdoing in civil
16 proceedings.

17 And where the punishment is monetary only and,
18 therefore, within the contemplation of the Excessive
19 Fines Clause, I think my provision is -- my argument is
20 that it doesn't matter whether it's inflicted on a civil
21 or criminal --

22 QUESTION: Well, I guess punitive damages are
23 often talked about as a form of punishment. I guess.

24 MR. FREY: They are almost always talked about
25 as a --

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QUESTION: Yes.

MR. FREY: -- form of punishment for --

QUESTION: Yes. So, it --

MR. FREY: -- purposes of --

QUESTION: -- it isn't much of a problem you say?

MR. FREY: Huh?

QUESTION: It isn't much of an issue?

MR. FREY: I don't think -- I don't think it's a problem for my case, to make that --

QUESTION: In the English or the Commonwealth countries, have they relied on the Magna Carta or the English Bill of Rights to set aside any punitive damage award --

MR. FREY: We have a --

QUESTION: -- in a civil case?

MR. FREY: We have a footnote in our reply brief which addresses that question, and my understanding is that the tradition is not to refer to the Magna Carta or the English Bill of Rights even -- even in setting aside criminal fines as excessive. It's just simply the way the English do it.

But I think it is understood that it is part of the tradition. That is, the rights that were protected by Magna Carta. This Court has always thought it part

1 of what was brought through the English Bill of Rights
2 into the Eighth Amendment.

3 QUESTION: Is there some objective standard
4 apparent there or is it again what seems to shock the
5 conscience of the trial court?

6 MR. FREY: You mean what is the standard for --

7 QUESTION: In setting aside --

8 MR. FREY: -- excessiveness?

9 QUESTION: Yes.

10 MR. FREY: Well, actually --

11 QUESTION: In civil -- in civil cases.

12 MR. FREY: Actually, Magna Carta contained a
13 standard which, to my mind, is far more satisfactory
14 than the "shock the conscience" standard.

15 QUESTION: No. I mean what the English judges
16 do when they set aside punitive damages awards, if they
17 do.

18 MR. FREY: They do set them aside.

19 QUESTION: But, do they have an --

20 MR. FREY: They do set them aside.

21 QUESTION: -- objective standard?

22 MR. FREY: Well, I can't tell you that I am as
23 familiar with the details of the English -- of the
24 English cases, so I'm not sure that I could tell you --

25 QUESTION: Well, because if we're saying that

1 the Magna Carta and the English Bill of Rights
2 incorporates this idea, then I should think that the
3 English judges would incorporate it somehow with an
4 objective standard, if that's what you say it means.

5 MR. FREY: Well, what it means is that the --
6 I mean, I'm not sure what does it mean to say that a
7 punishment is excessive. In my mind what it must mean
8 is that the punishment is -- you first look at what is
9 the purpose of punishing somebody.

10 The purpose is to exact just retribution for
11 wrongful conduct, first of all, and secondly, to deter
12 the offender and others like the offender from
13 committing similar offenses in the future.

14 Now, if you ask yourself whether a punishment
15 is excessive, it seems to me you have to ask yourself
16 whether considering what the offender did, considering
17 what the purposes of the punishment are, is this more
18 than is necessary.

19 And we have in American law in the area of
20 bail, precisely that kind of analysis. That is, we ask
21 what is the purpose for releasing somebody on bail and
22 requiring bail when we release somebody before a trial.
23 The purpose is to insure their attendance at trial.
24 What amount of bail is excessive? The amount of bail
25 that is more than reasonably necessary to accomplish

1 that purpose.

2 Now, I don't see how the protection that --
3 that you are given under the Eighth Amendment or under
4 the Due Process Clause, or that this Court should impose
5 as a discipline on the federal courts in reviewing
6 damages awards can soundly look to a different standard.

7 QUESTION: Is the Due Process Clause equally of
8 assistance to you in this case as -- suppose there were
9 no problem with it having been raised, that the Due
10 Process Clause was clearly raised below --

11 MR. FREY: I think that --

12 QUESTION: But does that really incorporate
13 just about the same standard we're talking about?

14 MR. FREY: I think it does, but I know that my
15 brother here thinks that it incorporates only the "shock
16 the conscience" standard which is a purely subjective
17 unreviewable standard. In my view, he has to explain
18 whether it's under the Due Process Clause or under the
19 Excessive Fines Clause how an award of this size can
20 possibly be justified by the purposes for which -- for
21 which BFI is being punished.

22 And I think that the cases that he relies on
23 make it clear that the Due Process Clause regulates
24 excessive punishments every bit as much as the Excessive
25 Fines Clause does. The pre-incorporation cases --

1 QUESTION: Mr. Frey, is your due process
2 argument a substantive due process argument entirely or
3 is it partly procedural?

4 MR. FREY: Well, it is almost entirely
5 substantive. And to the extent it's procedural, it only
6 asks the Court to consider as relevant in determining
7 the excessiveness, the process by which this came up.

8 That is, we did not object to the procedures as
9 such. We are, therefore, not making a procedural due
10 process claim. But, just as the Eighth Amendment brings
11 procedural considerations into the determination of
12 whether a punishment is cruel and unusual and requires
13 procedures as well as substance, we think the procedures
14 that produce this award are irrelevant.

15 Thank you.

16 CHIEF JUSTICE REHNQUIST: Thank you, Mr. Frey.
17 Mr. Farr.

18 ORAL ARGUMENT OF H. BARTOW FARR, III

19 ON BEHALF OF RESPONDENTS

20 MR. FARR: Thank you. Mr. Chief Justice, and
21 may it please the Court:

22 Our position today rests on two, I think,
23 relatively straightforward propositions.

24 First of all, that the Excessive Fines Clause
25 of the Eighth Amendment does not apply to damages,

1 punitive or not, awarded in private state court tort
2 actions.

3 Second, that in any event there is no basis in
4 the Eighth Amendment, or otherwise, for the sort of
5 intrusive second-guessing of jury verdicts the
6 Petitioners propose.

7 Now, before turning to the Eighth Amendment,
8 I'd like to just point out briefly the context in which
9 this claim arises.

10 The issue in this case is not whether there
11 should be any judicial review of punitive damage
12 awards. State law commonly provides for such review and
13 punitive damage awards are routinely reduced under such
14 standards or sometimes set aside altogether.

15 The reason that the Eighth Amendment is pressed
16 in this case and in this Court, when it was just an
17 afterthought in the courts below, is that the courts
18 below upheld this award under the traditional common law
19 standards.

20 Now, turning to the Eighth Amendment issue, I
21 would like to suggest that before this Court adopts a
22 constitutional rule that will be imposed on 50 state
23 tort systems that the constitutional basis for that rule
24 should be clear and fully supportive. And I would
25 submit to the Court that that standard is anywhere but

1 close to being met in this particular case.

2 What is absolutely clear, in fact -- and I
3 think really not open to dispute -- is that in 800 years
4 of history under the amercements clause of the Magna
5 Carta, the Excessive Fines Clause of the English Bill of
6 Rights and the Excessive Fines Clause of the Eighth
7 Amendment no court has ever held that any of these
8 provisions applied to damages awarded in suits between
9 one private litigant and another.

10 The reason is that damages, the payments
11 between private litigants as part of their remedies, are
12 simply not fines, as that term was commonly thought of
13 and used in 1789 and in 1689. Nor, are payments between
14 private litigants amercements, as that term was
15 generally known in the 13th and later centuries.

16 I think it's very important to understand this
17 fact because there is some slippery history here. Fines
18 and amercements were always demanded by and paid to the
19 government. Of course, in England the government
20 typically was represented by the Crown, sometimes by a
21 feudal lord to which the Crown had sold off the right to
22 demand amercements.

23 But in every instance, fines and amercements
24 were penalties demanded by, and paid to, what we would
25 now think of as government.

1 QUESTION: What about -- what about qwe time
2 actions where a private individual brings in effect a
3 criminal action and gets to keep part of the fine
4 himself?

5 MR. FARR: Well, I think those -- to begin
6 with, I think those are not --

7 QUESTION: Do you think that's --

8 MR. FARR: -- specifically the concerns at
9 which these particular provisions are aimed. But there
10 is a situation where the private party maybe stands more
11 closely in the shoes of the government itself.

12 QUESTION: Well, I mean, that's so because you
13 say it. Why can't we say this private party, to the
14 extent he's getting punitive damages, is essentially
15 standing in the shoes of the government?

16 MR. FARR: Because I think what you've done
17 then is you've not only taken the language out of
18 context, which are fines and amercements -- which,
19 again, I don't think at any time has been thought to
20 relate to damages -- but I think you've taken the
21 provision out of historical context and out of the
22 context of the evils at which these particular
23 provisions were aimed.

24 The concern with the Amercements Clause and the
25 concern of the Excessive Fines Clause is not with fines

1 in general, but with the incentive of the Crown, in
2 particular, to demand excessive fines.

3 QUESTION: Well, to give it to the person who
4 brings a qwe time action?

5 MR. FARR: But that is not in fact --

6 QUESTION: Do you acknowledge that what goes to
7 the private individual in one of those actions is a fine?

8 MR. FARR: I'm not sure that I think it is,
9 your Honor. I think if -- it is possible, I suppose,
10 that you might fit it within the definition.

11 QUESTION: So you can have fines of unlimited
12 scope so long as you don't make them payable to the
13 government. Just have an individual bring the suit and
14 keep the money?

15 MR. FARR: I think if you -- I guess my
16 position, Justice Scalia, is if you are going to go
17 outside what is normally thought of as a situation in
18 which a fine is imposed, which is when the government
19 brings the proceedings, selects the individual, brings
20 its prosecutorial forces to bear on that individual, and
21 in fact keeps the money -- that is the traditional
22 notion of what a fine is.

23 Now, what you have done is to take out one of
24 those elements and say some of the money is going to
25 someone else. My own personal feeling is that is not

1 enough to bring that kind of proceedings into the
2 category of fines.

3 QUESTION: How about a state like Florida that
4 makes a percentage of punitive damages awards go to the
5 state?

6 MR. FARR: I think in that particular
7 situation, again, that perhaps brings it somewhat
8 closer. And, of course, I will state the obvious, that
9 that is not the situation in this particular case.

10 But, the concern still is, though, is there any
11 real incentive for the state in that situation to be
12 seeking excessive fines or damages in particular of the
13 sort that was the concern --

14 QUESTION: It probably is if the state is
15 facing a budget deficit.

16 MR. FARR: Well, it is possible. I mean, I
17 think that given the particular situation in states
18 these days that --

19 QUESTION: Well, don't punitive damages serve a
20 penal function?

21 MR. FARR: They serve a penal --

22 QUESTION: They really do. They are designed
23 to deter and to punish.

24 MR. FARR: They do serve to deter and to
25 punish. I don't disagree with that, your Honor.

1 But they occur in a wholly different setting.
2 And that is the point that I'm trying -- trying to
3 make. The fact is that to some extent compensatory
4 damages in private tort suits serve the functions of
5 deterring and punishing.

6 I mean, there is a reason, for example, that
7 the particular defendant --

8 QUESTION: Well, they serve --

9 MR. FARR: -- pays the damages.

10 QUESTION: -- to make the plaintiff whole.

11 MR. FARR: Well, there is a particular -- you
12 could make the plaintiff whole by having insurance.

13 There is a reason that the states choose to make
14 plaintiffs whole through a proceeding which forces the
15 wrongdoer to pay the amount that is necessary to make
16 the plaintiff whole often well in excess of actual
17 economic injury. And that is because the use of the
18 tort system does serve to punish and deter conduct which
19 the state regards as unacceptable. Even in compensatory
20 damages.

21 QUESTION: Compensatory damages have all the
22 appearance of being penal in nature, and one does have
23 some concern when the amount awarded is more than 600
24 times the highest possible criminal time --

25 MR. FARR: Well, let me say --

1 QUESTION: -- for the same conduct. It's a
2 concern.

3 MR. FARR: Well, I agree that it can be a
4 concern. But let me address the question that I think
5 we are talking about immediately, which is whether this
6 is the kind of concern that draws into play something
7 like the Excessive Fines Clause.

8 The reason that the Excessive Fines Clause was
9 used to express the concern of the citizenry in, let's
10 say, 1689, which was the predecessor of the one in our
11 Eighth Amendment, is because the government itself had
12 an interest in the fines being excessive.

13 The government was using the fines for several
14 purposes. First of all, to raise revenues at a time
15 when the king was relatively impoverished. But, more
16 importantly, to punish its political enemies. So that
17 the king had an interest not just in fines being levied,
18 but, indeed, having the fines be as excessive as they
19 could possibly be in order to either imprison a
20 defendant who couldn't pay or impoverish one who was
21 fined to the full extent of his property.

22 QUESTION: Of course, there is a parallel
23 because in those cases the attorney who is standing
24 before the jury arguing for the court is representing
25 the Crown that gets the money.

1 MR. FARR: That's correct.

2 QUESTION: And the parallel is precise here
3 because the attorney standing before the jury arguing
4 for the punitive damages, his client gets the money. So
5 the parallel is precise, it seems to me.

6 MR. FARR: With due respect, I think the
7 parallel you've drawn is right, but I think it's the
8 incorrect parallel.

9 The fact is that it is the concern about the
10 government abuse -- that is what the Constitution is
11 typically aimed at. Not concerns about what attorneys
12 says for private litigants in private disputes.

13 QUESTION: By why is the incentive by either
14 the parties or the jury any greater to give punitive
15 damages where the government gets the money than where
16 the private plaintiff does, other than the fact that the
17 jurors are taxpayers?

18 MR. FARR: Well, Justice Kennedy, I would
19 suggest that the difference is not in the incentive of
20 the juries. The question is, it is the incentive for
21 abuse by government.

22 The State of Vermont has no particular interest
23 in whether Kelco gets an excessive amount of punitive
24 damages or not. In fact, the State of Vermont's view
25 would really be different from the sort of view that

1 would be expressed by the king in common law.

2 As I said, the king at common law would like to
3 have damages or fines -- because that is what the king
4 is seeking -- would like to have fines be as large as he
5 can possibly have them be. That makes them a more
6 effective punishment.

7 For the State of Vermont, if punitive damages
8 are excessive within the state, the state can be
9 expected to act to respond to that problem. The state
10 has no interest in punitive damages being more than
11 necessary to deter conduct. If it overdeters conduct,
12 then the state has an interest in fact in employing
13 common law standards and legislative standards to see
14 that punitive damages are reduced again.

15 QUESTION: I'm not sure that's always true, Mr.
16 Farr. Each state certainly has some incentive to want
17 to see its courts used to a certain extent, and I think
18 particularly you attract plaintiffs to a state where
19 there are liberal punitive damage rules.

20 MR. FARR: Well, your Honor, with all due
21 respect, I would suggest that the states are more likely
22 to be interested in attracting businesses to the state
23 than they are to be interested in attracting plaintiffs
24 to their state court systems.

25 I mean, I think that the concern that they

1 would have is that if their system does not regulate
2 through imposition of common law rules by the state
3 courts and ultimately through legislative rules, as
4 legislatures are now stepping in in certain states, that
5 that would in fact create the over-deterrence that a
6 state would not want to see have happened. But that is
7 different --

8 QUESTION: Mr. Farr --

9 MR. FARR: -- from the situation at hand.

10 QUESTION: These are the same jurors --

11 MR. FARR: I'm sorry, Justice --

12 QUESTION: In federal and the state court, they
13 are the same people.

14 MR. FARR: They are essentially the same
15 people. Although I might point out --

16 QUESTION: Talking about the state's interests.

17 MR. FARR: I might point out, Justice Marshall,
18 that BFI constantly stresses the sort of notion that
19 this is to favor local individuals against an
20 out-of-state corporation. To begin with, that's
21 essentially just its own surmise, but, of course, one of
22 the supposed remedies for that is diversity jurisdiction.

23 QUESTION: Is your position --

24 MR. FARR: And this was a case that was brought
25 into federal court.

1 QUESTION: -- there is no such thing as an
2 excessive --

3 MR. FARR: I'm sorry, your Honor.

4 QUESTION: No such thing as an excessive
5 verdict or judgment?

6 MR. FARR: Your Honor, no. That is not my
7 position. And please let me make that clear.

8 QUESTION: Do you know of one?

9 MR. FARR: What I am saying is that --

10 QUESTION: Do you know of one that's been upset?

11 MR. FARR: Oh, yes, your Honor. There have
12 been numerous judgments that have been reduced. They
13 have not been reduced under the Excessive Fines Clause,
14 and that is the point that I was making.

15 QUESTION: Well, was remittitur used in this
16 case?

17 MR. FARR: Remittitur was sought but it was
18 denied because the trial judge found that this was not
19 an excessive verdict but it was a reasonable punitive
20 measure, in his language, --

21 QUESTION: Who decided --

22 MR. FARR: -- for the conduct.

23 QUESTION: Who decided that?

24 MR. FARR: That was the trial judge who heard
25 the evidence.

1 QUESTION: The trial judge?

2 MR. FARR: Well, after the jury returned its
3 award, there was a motion for remittitur in the trial
4 and the trial judge, which had heard the same evidence
5 as the jury found that this was not an excessive award
6 but was a reasonable punitive measure in light of the
7 conduct.

8 QUESTION: And you say it got up to the Second
9 Circuit?

10 MR. FARR: That's correct, your Honor.

11 QUESTION: You are saying that there's no such
12 thing as an excessive award of punitive damages as far
13 as the Federal Constitution is concerned?

14 MR. FARR: Well, your Honor --

15 QUESTION: Aren't you saying that?

16 MR. FARR: I think that is probably an accurate
17 statement of our position.

18 QUESTION: All right. Could I talk about due
19 process for a minute, which you haven't alluded to.

20 MR. FARR: All right.

21 QUESTION: Suppose a state runs a system in
22 which it does not have any judge review of damages
23 award? Not punitive damages, but compensatory. He lets
24 the jury, you know, pick a number. And the judge
25 doesn't review it at all. Would that violate the Due

1 Process Clause?

2 MR. FARR: I look at that differently, Justice
3 Scalia. And let me at least explain, if I can, why I do.

4 I think there we are not simply saying that the
5 role of a court under the Constitution is to do what I
6 think BFI is asking, which is just to pick another
7 number, a number which is unspecified by BFI, but is
8 apparently lower than \$6 million.

9 What would happen in that situation is that you
10 would look at the overall procedures. Whether in fact
11 the overall system of awarding punitive damages,
12 including the legislative standards if any, the
13 instructions given to the jury, the process of review by
14 the courts, would meet with -- I believe that's a
15 procedural due process issue.

16 QUESTION: It is a -- well, it is a procedural
17 due process issue, but you can tell whether the
18 procedure is working, I suppose, by whether you have
19 rough uniformity of treatment.

20 I'm not sure that the result is any different
21 from excessive fines. It wouldn't produce a \$6 million
22 verdict versus a \$100,000 verdict in the same kind of
23 case.

24 MR. FARR: Well, your Honor, let me make three
25 points, if I may.

1 First of all, let me make sure I stress that is
2 not a claim that ever been raised in this case, just to
3 start with. So, even if I agreed with all you said, I
4 think that it would make no difference to the outcome in
5 this case.

6 Secondly, however, I don't think quite fairly
7 you can say that the way you determine whether
8 procedural due process has been met is to look at the
9 outcome of the process. If that was true, then you
10 would open up procedural due process claims in all sorts
11 of cases where I think the court has pretty much closed
12 them down -- where somebody comes in and says, "Here is
13 what happened in my case in state court; this is the
14 result I got."

15 It couldn't have complied with due process.
16 There is no way I could have had a judgment like this
17 awarded against me, or some other particular relief
18 awarded against me, if the procedures had been fair.
19 But the Court has always said there that you look at the
20 procedures.

21 It may be that in a perfectly fair system there
22 is an inexplicable result. I don't think this is one.
23 But that is not -- does not mean the procedural due
24 process itself has been violated.

25 QUESTION: Well, certainly, all procedures are

1 directed to securing an objective and a fair result, are
2 they not?

3 MR. FARR: That's correct. That certainly
4 should be the goal of procedures.

5 The only point I'm making, Justice Kennedy, is
6 I don't think that the analysis works backwards. I
7 don't think you say that a litigant comes in and says,
8 "Here is the result that I submit to you as an absolute
9 figure is unfair," for whatever reason, and therefore
10 you should conclude from that there is no procedural due
11 process. And, in any event, that is not a claim that
12 BFI has made here.

13 Now, again, I would like to turn just for a
14 second to what it is that BFI wants the Eighth Amendment
15 to do if it would apply in this case.

16 As I've just discussed, this is not a case
17 about standards for the jury. BFI, quite properly,
18 concedes that it did not make any claim that the jury
19 should have been instructed any differently. In fact,
20 BFI specifically said that all it wanted was the jury to
21 be instructed in accordance with traditional Vermont law.

22 So, what BFI is really saying is that the court
23 should simply make a different finding of that amount as
24 a matter of its own judgment, and in the process of
25 doing that, give greater weight to certain factors which

1 It says that the jury must have given less weight to and
2 give some less weight to factors that it says the jury
3 must have given too much weight to. That is basically a
4 rebalancing test.

5 Now, the first point I guess I would make about
6 that is that I really don't see that that is a proper
7 function of the Eighth Amendment as a general
8 application of that amendment.

9 The Court in Rummel, for example, and in Solem,
10 has made clear that it is the extremely rare case in
11 which the Eighth Amendment would be used to strike down
12 on constitutional grounds a determination made below.
13 In those cases, of course, criminal sentences. And the
14 Court has also made clear that it's the rare case in
15 which even an extended analysis will be necessary.

16 Now, in Rummel, in particular, the Court found
17 that it was constitutional, without an enormously
18 detailed analysis, to sentence a particular defendant to
19 life imprisonment for what were three relatively small
20 economic crimes.

21 I simply don't understand the concept of the
22 Eighth Amendment that says that that sentence of life
23 imprisonment is constitutional and that system of review
24 is acceptable, and yet says that the Eighth Amendment
25 requires very stringent review of an award of damages

1 for, let's say, fraud or business misconduct that
2 involves a greater amount of money.

3 There is certainly nothing in the history of
4 the Eighth Amendment that I'm aware of that --

5 QUESTION: I suppose one can ask whether Rummel
6 was the last word on the Eighth Amendment.

7 (Laughter.)

8 MR. FARR: Well, I'm like Mr. Frey. I can't
9 say I'm not aware of a case after Rummel. However, I
10 should point out, as the Court is well aware, the Court
11 in Solem said that it was not in any sense overruling
12 Rummel and that Rummel still stood for good law.

13 QUESTION: Of course, Rummel wouldn't --
14 wouldn't stand in the way of an interpretation of the
15 Excessive Fines Clause that simply applies it on a state
16 by state basis. In Rummel there was no indication that
17 that particular sentence was excessive as far as what
18 that same state would do in another case.

19 It might have been considered by some excessive
20 on the basis of a national standard. But on the basis
21 of a state standard there were clear limits established
22 within the state by the legislature.

23 MR. FARR: Well, in that situation I suppose
24 that's true, although that is, of course, not any sort
25 of analysis that was made in Rummel.

1 QUESTION: I understand.

2 MR. FARR: Nor, for that matter, your Honor,
3 was that the analysis that was followed in Solem. I
4 mean, the Court did not say in making these
5 determinations under the Eighth Amendment, "We will look
6 at other penalties only within the same state" in order
7 to determine whether we think it falls in or out of the
8 particular analysis it was applying.

9 So, I think in that sense I agree with Mr.
10 Frey. That the emphasis in Solem, at least, was on a
11 standard that would have to be applied nationwide. And
12 I'm certainly saying that there is no -- nothing that I
13 can see in the history of the Eighth Amendment that
14 would call for that sort of nationwide standard in a
15 situation like this.

16 Now, I would just like to touch on one or two
17 other brief points, if I might, because I think they do
18 bear on the question of how the Eighth Amendment would
19 apply, if it does. And I repeat again that I don't
20 believe that it does.

21 The principal argument I think, as I understand
22 it made for BFI in this situation, is that the Eighth
23 Amendment does not require the same sort of deference to
24 jury verdicts that it requires for decisions made on
25 sentencing by a judge within legislative guidelines.

1 I guess I just have two points about that.
2 First of all, the idea itself is basically contrary to
3 the constitutional framework in which jury
4 determinations are given the greatest of deference in
5 most situations where cases are properly before the
6 Jury. And there isn't any question that this is a case
7 that properly went to the Jury on the issue of punitive
8 damages and on the amount of punitive damages.

9 Second and more specifically, though, I would
10 point out that this is totally inconsistent with the
11 history of the Excessive Fines Clause itself which,
12 after all, is the clause that BFI is invoking to get
13 into this in the first place.

14 The one thing that is absolutely clear from the
15 Eighth Amendment, the Amercements Clause, whatever
16 antecedent you wish to look at, is that there was no
17 concern in addressing any of these provisions about jury
18 misconduct or jury excessiveness.

19 Indeed, in the 13th Century, the jury was
20 regarded as the principal safeguard against the sort of
21 abuses that the Amercement Clause was addressed at.

22 QUESTION: Well, I take it you're not claiming
23 that this Excessive Fines Clause applies only in
24 criminal cases?

25 MR. FARR: Your Honor, I think quite frankly

1 that is its root.

2 QUESTION: Well, there are -- the Federal
3 Government imposes what's called fines in civil cases,
4 doesn't it? Do you think this provision is applicable
5 to those situations?

6 MR. FARR: I don't know, your Honor, to be
7 perfectly honest.

8 QUESTION: You don't know? Well, I would
9 suppose you would have to know to make this argument.

10 MR. FARR: Well, I would feel I had to know a
11 little bit more if I was here --

12 QUESTION: Well --

13 MR. FARR: -- representing the government in a
14 civil fines case. But --

15 QUESTION: Well, here is a fine that is called
16 a fine and it's in a civil case and it's paid to the
17 government. Now, is this provision amercements?

18 I thought you would -- I thought one of your
19 points was that -- that if it's paid to the government,
20 then the clause is applicable.

21 MR. FARR: That is one of the points, your
22 Honor. As you'll recall --

23 QUESTION: Well --

24 MR. FARR: -- from the discussion, I had --

25 QUESTION: Well, what about --

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MR. FARR: -- several points that --

QUESTION: What about --

MR. FARR: Let me say this. That the Court in Ingraham said -- and I think correctly said -- that the Eighth Amendment is properly interpreted in light of its history. Now, if that is in fact applied to the Eighth Amendment Excessive Fines Clause, it would apply strictly in criminal cases. That is what the Excessive Fines Clause specifically was addressed at.

QUESTION: But you don't think it's -- you don't think that when you use the word "fine" -- just fine -- it can be a fine imposed in a civil case by the government?

MR. FARR: Well, what I would certainly say is that the language of the Eighth Amendment fits more naturally, even with a civil fine, than obviously it does with a separate concept like damages which were known at the common law and are used separately.

In my own view, if you stay with the historical analysis which was approved in Ingraham, you still would not get into the civil context. But I do agree that where the government is using essentially its prosecutorial power in a civil context in seeking fines, that that certainly is a closer analogue to what the concerns of the Eighth Amendment were initially.

1 QUESTION: Well, so, you aren't prepared to
2 concede, though, that the clause applies to those fines
3 by the government in civil cases?

4 MR. FARR: Your Honor, I see no particular
5 reason to concede it or not concede it in this case.
6 But my feeling is that it does not apply by its
7 historical terms to that.

8 Whether the Court felt that in a particular
9 situation a provision that was --

10 QUESTION: Well, I think your answer is -- your
11 answer is that obviously, no, it doesn't apply. Look to
12 history and it doesn't apply.

13 QUESTION: If you looked at history, it does
14 not apply, Justice White. That is correct. But that is
15 in fact the analysis that the Court has had in other
16 provisions which are clearly intended to apply and, in
17 fact, specifically limited by their terms, to criminal
18 cases. The Court has not automatically said we apply
19 them.

20 Even in civil cases in which the government is
21 the moving force, the Court has sometimes applied an
22 analysis to say is this fine essentially something that
23 we can call -- even though it's a denominated civil --
24 criminal in nature? And if that's the kind of
25 situation, like in United States v. Ward, the Court has

1 not said this applies outside the criminal context.

2 It says this is basically something that is
3 criminal in nature and has moved it into the context
4 that way. That is possible. I'm not suggesting that
5 that could not be appropriate in a case in which those
6 standards were met.

7 But that is very different from a situation
8 which is simply a dispute between private parties.

9 If the Court has no further questions, thank
10 you.

11 CHIEF JUSTICE REHNQUIST: Thank you, Mr. Farr.
12 Mr. Frey, do you have rebuttal?

13 MR. FREY: Yes, please, your Honor.

14 REBUTTAL ARGUMENT OF ANDREW L. FREY
15 ON BEHALF OF PETITIONERS

16 MR. FREY: First of all, in looking to history
17 let me just say that Mr. Farr neglects to mention or
18 explain why every single commentator who has written on
19 this subject disagrees with him. This notion of the
20 role of juries that he espouses is in fact inconsistent
21 with the history because after Magna Carta the writ of
22 misericordia was available to reduce excessive jury
23 amercements.

24 I don't want to get bogged down in the history
25 which has been thoroughly briefed on both sides.

1 Let me say with respect to the Rummel point
2 that was discussed that what Mr. Farr persists in
3 ignoring is the element of legislative deference.
4 Rummel was a mandatory life sentence established by
5 Texas, and in that context the Court said it wasn't
6 going to find that the Eighth Amendment refused to
7 permit that.

8 The principle, though, and the principle of the
9 dissenters in Solem against Helm was you have to defer
10 where the legislature has made a judgment. That was the
11 dispute in Solem. There is no legislative judgment in
12 this case that underlies this award.

13 Now, I don't want the Court to forget our
14 common law non-constitutional review of excessiveness
15 argument because it's of course much more interesting to
16 debate the Eighth Amendment, but even if you decide the
17 Eighth Amendment is inapplicable, you have to ask
18 yourselves whether you have a responsibility in a
19 federal case to establish a reasonable federal rule.

20 QUESTION: From a federal court?

21 MR. FARR: A case from a federal court. Yes.
22 A state law question coming up from a federal court. I
23 don't think there is any disagreement in the briefs that
24 the federal law governs not the question of whether
25 punitive damages should be inflicted -- that's governed

1 by state law -- but this sort of excessiveness question.

2 Now, use of the word "damages" by Mr. Farr is a
3 shell game because what he wants to do is collapse
4 compensatory damages, which are a completely different
5 animal, with punitive damages. The concern of the
6 Eighth Amendment is with punishments, and our argument
7 is addressed solely to the punitive part.

8 The fact that the Courts have been highly
9 deferential traditionally to compensatory damages awards
10 takes them, I think, exactly nowhere.

11 And, finally, I'd like to discuss this question
12 of the use of the word fine -- rather, the fact that a
13 fine is paid to a private citizen.

14 One of the points I want to mention is -- and I
15 think it was brought up in the argument -- is that this
16 is a problem, not a virtue of the system, because you
17 don't have a neutral prosecutor deciding what charge to
18 bring, deciding how much to press for. This is like in
19 Young against Fulton, where the Court was troubled by the
20 idea of having a self-interested private prosecutor.

21 Now, that institution does exist and we're not
22 suggesting that it be set aside. We are suggesting,
23 however, that it is a concern that should inform the
24 court's decision.

25 A hundred years ago in Missouri Pacific Railway

1 against Humes the Court addressed specifically this
2 question of who a punishment is paid to, and we quoted
3 it in our brief. The Court said the additional damages
4 being by way of punishment, it is not a valid objection
5 -- I'm sorry.

6 CHIEF JUSTICE REHNQUIST: Your time has
7 expired, Mr. Frey.

8 The case is submitted.

9 (Whereupon, at 11:02 o'clock a.m., the case in
10 the above-entitled matter was submitted.)
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CERTIFICATION

Alderson Reporting Company, Inc., hereby certifies that the attached pages represents an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of The United States in the Matter of:

Browning-Ferris Industries of Vermont, Inc., et al., v.

KELCO Disposal, Inc., et al., - Case No., 88-556

and that these attached pages constitutes the original transcript of the proceedings for the records of the court.

BY alan friedman

(REPORTER)

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