

11-1987

## The Excessive Fines Clause and Punitive. Damages: Some Lessons From History

Calvin R. Massey

Follow this and additional works at: <https://scholarship.law.vanderbilt.edu/vlr>



Part of the [Criminal Law Commons](#), and the [Criminal Procedure Commons](#)

---

### Recommended Citation

Calvin R. Massey, *The Excessive Fines Clause and Punitive. Damages: Some Lessons From History*, 40 *Vanderbilt Law Review* 1233 (1987)

Available at: <https://scholarship.law.vanderbilt.edu/vlr/vol40/iss6/1>

This Article is brought to you for free and open access by Scholarship@Vanderbilt Law. It has been accepted for inclusion in *Vanderbilt Law Review* by an authorized editor of Scholarship@Vanderbilt Law. For more information, please contact [mark.j.williams@vanderbilt.edu](mailto:mark.j.williams@vanderbilt.edu).

## The Excessive Fines Clause and Punitive Damages: Some Lessons From History

*Calvin R. Massey\**

I. INTRODUCTION .....	1234
II. APPLICATION OF THE EIGHTH AMENDMENT ONLY TO CRIMINAL CASES: A DOCTRINE FASHIONED FROM DICTA .....	1234
III. THE HISTORICAL DEVELOPMENT OF THE EXCESSIVE FINES CLAUSE .....	1240
A. <i>The English Declaration of Rights of 1689</i> ...	1243
B. <i>A Summary of the Ancient Law Restated by         the Excessive Fines Clause of the Declaration         of Rights</i> .....	1257
1. Amercements .....	1259
2. Fines .....	1261
3. The Displacement of Amercements by Costs, Fines, Punitive Damages, and Judi- cial Sanctions .....	1264
IV. PUNITIVE DAMAGES AS PRIVATE FINES .....	1269
V. CONCLUSION .....	1274

\* Associate Professor of Law, University of California, Hastings.

## I. INTRODUCTION

Contrary to the notion that the eighth amendment<sup>1</sup> is confined strictly to criminal cases,<sup>2</sup> the excessive fines clause of the eighth amendment should apply to the imposition of punitive damages and all judicially imposed monetary sanctions in civil cases. Although this view represents a sharp departure from accepted doctrine, this interpretation of the excessive fines clause is consistent with the historical development of the textual antecedents of the eighth amendment,<sup>3</sup> the political theory that underlies the adoption of the eighth amendment,<sup>4</sup> and the contemporary purposes served by punitive damages themselves.<sup>5</sup> Moreover, this view in no way violates the holdings of those cases which have articulated the doctrine that the eighth amendment applies only to criminal sanctions.<sup>6</sup>

Section II of this Article summarizes the eighth amendment case law which has spawned the notion that the amendment has no applicability beyond criminal cases. Section III examines in detail the historical evolution of the excessive fines clause and the legal practices to which it and its antecedents were intended to respond. Finally, Section IV tests the congruence of this Article's thesis with both the political theory that the eighth amendment reflects and the ends sought to be achieved by punitive damages in civil actions.

## II. APPLICATION OF THE EIGHTH AMENDMENT ONLY TO CRIMINAL CASES: A DOCTRINE FASHIONED FROM DICTA

The notion that the eighth amendment applies only to criminal proceedings is derived from litigation that considered whether a given punishment could be termed "cruel and unusual." In reaching a generalized conclusion about the applicability of the entire eighth amendment, the Supreme Court has treated the amendment as a single concept by assuming implicitly that the scope of each of the amendment's three guarantees is and was intended to be identical. This rigid view also assumes that the historical sources of eighth amendment guarantees are identical, when, in

---

1. The eighth amendment states: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. CONST. amend. VIII.

2. See *infra* text accompanying notes 7-40.

3. See *infra* text accompanying notes 41-210.

4. See *infra* text accompanying notes 216-33.

5. See *infra* text accompanying notes 211-15.

6. See *infra* text accompanying notes 7-25.

fact, each of the amendment's clauses has a distinct historical origin.

As recently as 1977, the Supreme Court in *Ingraham v. Wright*<sup>7</sup> firmly restated its view that the entire eighth amendment applies only to criminal proceedings. *Ingraham*, however, dealt with the relatively narrow question of whether corporal punishment inflicted in the Florida public school system was a cruel and unusual punishment within the meaning of the eighth amendment. In holding, by a scant five to four majority, that the amendment had no applicability to discipline administered in the Florida public schools, the Court decided only that paddlings and whippings (concededly nonfinancial punishments) outside of the criminal process were beyond the scope of the punishments clause of the eighth amendment.<sup>8</sup> However questionable this conclusion may be,<sup>9</sup> it in no way disposes of a contention that the prohibition of excessive fines is broader in scope than the prohibition of cruel and unusual punishments. In order to support its conclusion that the entire subject matter of the amendment was intended to focus upon the criminal process, the *Ingraham* Court relied on a reading of historical sources detailing the perceived intentions of the eighth amendment's proponents.<sup>10</sup> The clear implication, of course, is that the excessive fines clause is limited to criminal proceedings. This conclusion, however, is too contrived because the historical sources that the *Ingraham* Court considered are much too superficial upon which to hang so weighty and definitive a pronouncement.<sup>11</sup>

The *Ingraham* Court did not write on a blank slate. Although the eighth amendment did not produce much litigation during the nineteenth century,<sup>12</sup> by 1910 the Supreme Court had begun to

7. 430 U.S. 651 (1977).

8. *Id.* at 664.

9. See generally *id.* at 683-700 (White, J., dissenting).

10. *Id.* at 664-66 (majority opinion). But see *infra* text accompanying notes 41-57.

11. See *infra* text accompanying notes 41-210.

12. The accepted wisdom of the eighteenth and nineteenth centuries was that the "cruel and unusual" punishments clause prohibited only barbarous punishments, such as the rack and other instruments of torture. For example, the objection raised in the Massachusetts ratification convention stated:

[Congressional legislators] are nowhere restrained from inventing the most cruel and unheard-of punishments and annexing them to crimes; and there is no constitutional check of them, but that racks and gibbets may be among the most mild instruments of their discipline.

2 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 111 (J. Elliot 2d ed. 1968) (emphasis in original) [hereinafter J. ELLIOT]. Because the rack and similar atrocities were not often employed in the first century of the Nation, the punishments clause rarely was invoked. Accordingly, some contemporary commentators

formulate the modern doctrine that punishments disproportionate to the offense offend the cruel and unusual punishments clause.<sup>13</sup> *Weems v. United States*<sup>14</sup> involved an appeal from a Philippine territorial court of a fifteen-year sentence at hard labor in chains<sup>15</sup> for an apparently inadvertent false entry in a government payroll book.<sup>16</sup> Four Justices of a seven member Supreme Court held that this punishment was cruel and unusual because it was sufficiently disproportionate to the offense.<sup>17</sup>

The *Weems* principle of proportionality has been applied with some regularity. In *Robinson v. California*<sup>18</sup> the Court held that a ninety-day sentence constituted a disproportionate penalty for the crime of being a drug addict.<sup>19</sup> In *Coker v. Georgia*<sup>20</sup> the Court held that ordinarily the death penalty "is grossly disproportionate and excessive punishment for the crime of rape."<sup>21</sup> The Court also concluded in *Enmund v. Florida*<sup>22</sup> that the death penalty was excessive and disproportionate for felony murder when imposed on a

thought the clause was obsolete. See, e.g., 1 T. COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATE OF THE AMERICAN UNION 694 (8th ed. 1927). See generally Granucci, "Nor Cruel and Unusual Punishments Inflicted:" The Original Meaning, 57 CALIF. L. REV. 839 (1969).

13. The first stirrings of this doctrine appear in *O'Neil v. Vermont*, 144 U.S. 323 (1892), in which the defendant, a licensed New York liquor dealer, had been sentenced to 54 years in prison after failing to pay a \$6638.72 fine imposed upon conviction of 307 separate counts of illegal mail order sales of alcoholic beverages to Vermont residents. The majority of the Supreme Court never ruled upon O'Neil's contention that the sentence was so disproportionate to the crime that it was barred by the punishments clause of the eighth amendment because O'Neil had failed to brief the point, *id.* at 331, and the amendment "does not apply to the States." *Id.* at 332. Mr. Justice Field dissented, contending that the eighth amendment "is directed . . . against all punishments which by their excessive length or severity are greatly disproportioned to the offenses charged." *Id.* at 339-40 (Field, J., dissenting).

14. 217 U.S. 349 (1910).

15. The sentence was actually to 15 years of "*cadena temporal*," a "bizarre penalty . . . unknown to Anglo-Saxon law [which] . . . entailed . . . imprisonment chained day and night at the wrists and ankles, hard and painful labor while so chained, and a number of 'accessories' including lifetime civil disabilities." *Solem v. Helm*, 463 U.S. 277, 306-07 (1983) (Burger, C.J., dissenting) (discussing *Weems*).

16. *Weems*, 217 U.S. at 363.

17. The Court adopted the principle of proportionality as a constitutional standard, *id.* at 372-73, after having noted that "it is a precept of justice that punishment for crime should be graduated and proportioned to offense." *Id.* at 367.

18. 370 U.S. 660 (1962).

19. *Id.* at 667.

20. 433 U.S. 584 (1977) (plurality opinion).

21. *Id.* at 592.

22. 458 U.S. 782 (1982). *But see Tison v. Arizona*, 107 S. Ct. 1676 (1987) (holding that death penalty not excessive and disproportionate when applied to major participant in felony murder recklessly indifferent to homicide).

defendant who neither had killed, attempted to kill, nor intended that killing occur or lethal force be employed in the commission of a crime. Most recently, the Court held in *Solem v. Helm*<sup>23</sup> that life imprisonment without possibility of parole was excessive and disproportionate when imposed on an "habitual offender" convicted of writing a 100 dollar check on a fictional bank account and whose prior offenses were "relatively minor."<sup>24</sup> The *Solem* Court observed that the Supreme Court "has continued to recognize that the Eighth Amendment proscribes grossly disproportionate punishments, even when it has not been necessary to rely on the proscription."<sup>25</sup> But, of course, all of these cases except *Ingraham* involved consideration of a plainly criminal punishment. None of the cases dealt with either the question of excessiveness of a criminal fine or other types of fines to which the eighth amendment prohibition may apply.

More interesting, from the perspective of this Article, are those cases that required consideration of penalties imposed outside the criminal process but, it was argued, were prohibited by the eighth amendment. Thus, in *Fong Yue Ting v. United States*<sup>26</sup> the Court held that the eighth amendment did not apply to the deportation of aliens on the ground that "deportation is not a punishment for crime."<sup>27</sup> To similar effect is *Bugajewitz v. Adams*,<sup>28</sup> in which Justice Holmes curtly characterized deportation as not "a punishment," but rather "a refusal by the Government to harbor persons whom it does not want."<sup>29</sup> Both cases are cited approvingly in *Ingraham*,<sup>30</sup> and this highly artificial and compartmentalized notion of penalty continues to survive in American immigration law.<sup>31</sup>

---

23. 463 U.S. 277 (1983).

24. *Id.* at 303. The defendant's prior offenses included three burglary convictions, one grand larceny conviction, one drunk driving conviction, and one conviction for obtaining money under false pretenses. *Id.* at 279-80.

25. *Id.* at 288 (citing *Hutto v. Finney*, 437 U.S. 678, 685 (1978); *Ingraham v. Wright*, 430 U.S. 651, 667 (1977); *Gregg v. Georgia*, 428 U.S. 153, 171-72 (1976)). Even *Rummel v. Estelle*, 445 U.S. 263 (1980), which upheld Texas' mandatory life imprisonment statute for three-time felons on a factual pattern similar to *Solem*, acknowledges that some prison sentences may be constitutionally disproportionate. *Id.* at 274 n.11.

26. 149 U.S. 698 (1893).

27. *Id.* at 730.

28. 228 U.S. 585 (1913).

29. *Id.* at 591.

30. See 430 U.S. 651, 668 (1977).

31. See Schuck, *The Transformation of Immigration Law*, 84 COLUM. L. REV. 1, 25, 66 (1984).

In *Trop v. Dulles*,<sup>32</sup> however, the Court concluded that statutory deprivation of the "rights of citizenship,"<sup>33</sup> by reason of dishonorable discharge from the armed services, was a cruel and unusual punishment. Although the *Trop* Court assumed that the eighth amendment applied only to punishments penal in nature,<sup>34</sup> a plurality adopted a purposive approach to that inquiry:

In deciding whether or not a law is penal, this Court has generally based its determination upon the purpose of the statute. If the statute imposes a disability for the purposes of punishment—that is, to reprimand the wrongdoer, to deter others, etc.—it has been considered penal. But a statute has been considered nonpenal if it imposes a disability, not to punish, but to accomplish some other legitimate governmental purpose.<sup>35</sup>

The *Trop* purposive approach was wholly ignored in *Ingraham*; instead, Justice Lewis Powell, writing for the majority, seemingly read *Trop* as a criminal punishment case by linking the expatriation to a prior military conviction for desertion.<sup>36</sup> Yet, the *Ingraham* Court did concede the possibility that "[s]ome punishments, though not labeled 'criminal' by the State, may be sufficiently analogous to criminal punishments in the circumstances in which they are administered to justify application of the Eighth Amendment."<sup>37</sup> The *Ingraham* Court, apparently, did not think that *Trop*'s loss of citizenship rights resulting from his dishonorable discharge was analogous to criminal punishment. Nor, of course, was corporal punishment in the Florida public schools.

For purposes of this inquiry, however, it is important to note that general pronouncements about the applicability of the eighth amendment have been made in the context of the cruel and unusual punishments clause. Even viewed from the punishment perspective, however, there seems to be some doctrinal disharmony about the exclusively criminal application of the eighth amend-

---

32. 356 U.S. 86 (1958) (plurality opinion).

33. Nationality Act of 1940, § 401(g), 54 Stat. 1168, 1169 (1940), amended by 58 Stat. 4 (1944) (codified at 8 U.S.C. § 1481(a)(10) (1982)).

34. 356 U.S. at 99-100.

35. *Id.* at 96 (footnotes omitted).

36. *Ingraham*, 430 U.S. at 667.

37. *Id.* at 669 n.37. The *Ingraham* majority also chose to neglect the holding of *Estelle v. Gamble*, 429 U.S. 97 (1976), in which a prison official's deliberate indifference to prisoners' medical needs was deemed a form of cruel and unusual punishment. Only the most cynical observer would conclude that such official misconduct is part of the punishment inflicted for committing a crime. 430 U.S. at 669; cf. *In re Gault*, 387 U.S. 1 (1967) (concluding that due process was violated by a state's forced commitment of a 15-year-old boy as a juvenile delinquent without notice or service of any charges, taking of any sworn testimony, opportunity of confronting accusers, or preservation of a record).

ment. *Ingraham* appears to stand for the inflexible proposition that the eighth amendment is properly applied only to avowed and express criminal proceedings. Yet, the opinion recognized the possibility that what is labeled civil may be treated as criminal for purposes of the eighth amendment. This escape hatch—from what otherwise would be suffocatingly mechanical jurisprudence—is amply supported by *Trop*, which focuses on the apparent purpose of the punishment in question as the rationale for distinguishing between punishments that must be tested for eighth amendment compliance and those that escape such constitutional review altogether.<sup>38</sup>

Regardless of whether one accepts the *Trop* purposive approach, the facial rigidity of *Ingraham*, or *Ingraham* diluted by a dose of *Trop*, one is left with the conclusion that there must be a penal aspect to the contested sanction to merit eighth amendment scrutiny. This conclusion is based on a reading of history, according to *Ingraham*,<sup>39</sup> and is the product of litigation concerning some form of nonfinancial punishment. *Ingraham*, *Trop*, and their predecessors do not deal with excessive fines, but rather with cruel and unusual punishments. Relying on historical sources concerning only the punishment aspect of the eighth amendment to determine whether the amendment applies to excessive fines is to use history in a misleading fashion and to indulge in an interpretational ethic that is textually warped. The analytic exercise displayed by *Ingraham*, when applied to the excessive fines clause, fails to acknowledge the possibility that the excessive fines clause has a history independent of the bail and punishments clauses. Moreover, to reach definitive conclusions about the scope of the excessive fines clause while considering and deciding cases challenging a given punishment as cruel and unusual is to ignore the separate text of the excessive fines clause and to fail to consider the differing context in which an excessive fines claim may arise.<sup>40</sup> The Court's gen-

---

38. See *supra* text accompanying note 35.

39. See *Ingraham*, 430 U.S. at 664-65.

40. While the focus of this Article is primarily upon the historical developments leading to inclusion of the excessive fines clause in the United States Constitution, I do not contend that history is the sole legitimate determinant of constitutional meaning. Nor do I accept the notion that constitutional interpretation is bounded by the text itself, a position labeled "textualist" by Professor Thomas Grey. See Grey, *The Constitution as Scripture*, 37 STAN. L. REV. 1 (1984) (stating that "textualists" are "those who consider the text the sole legitimate source of operative norms in constitutional adjudication"). On the other hand, I reject noninterpretivism, a label for the notion that anything may be used to supplement constitutional text. See Grey, *Do We Have An Unwritten Constitution?*, 27 STAN. L. REV.



eral statements in *Ingraham* are, in short, mere dicta and not binding on a later court's consideration of the scope of the excessive fines clause. For these reasons, it is important to examine critically the historical evolution of the excessive fines clause, with a particular focus upon the practices the excessive fines clause and its antecedents in Anglo-American law sought to limit.

### III. THE HISTORICAL DEVELOPMENT OF THE EXCESSIVE FINES CLAUSE

A fresh look at the historical evolution of the excessive fines clause should cause the contemporary examiner to reconsider precisely what was meant by its inclusion in the eighth amendment. The immediate history of the eighth amendment is well known. The text was taken, almost verbatim, from a provision of the Virginia Declaration of Rights of 1776,<sup>41</sup> which was identical to a provision in the 1689 Bill of Rights.<sup>42</sup> Prior to its incorporation in the Constitution as the eighth amendment, eight other states adopted

---

703 (1975). Grey's definitions seem to have shifted slightly, as he now replaces "noninterpretivist" with "supplementer," to denote "those who accept supplementary sources of constitutional law." Grey, *The Constitution as Scripture*, *supra*, at 1. In this parlance, I am a supplementer, primarily with respect to historical sources.

The interpretative ethic I employ begins with text, first inspecting the ordinary usage of the terms. Next, I reason by analogy from "core cases to their close substitutes . . . [and proceed to] exceptions to a general prohibition that must be accepted as a necessary implication from the text, given the theory which renders intelligible its central commands." Epstein, *A Last Word on Eminent Domain*, 41 U. MIAMI L. REV. 253, 264-65 (1986). Meaning that can be derived from the structure and relationship of terms, limits, and rights in the text is also legitimate. See generally C. BLACK, *STRUCTURE AND RELATIONSHIP IN CONSTITUTIONAL LAW* (1969). Finally, I believe that the text can not fully be understood without an appreciation of the historical context in which it was written. This context may assume multiple forms, including political, social, and intellectual, but definitely includes directly relevant legal history. It is that latter inquiry that provides the focus of this Article. By itself, however, history is unable to answer the questions raised by constitutional interpretation. See Powell, *Rules for Originalists*, 73 VA. L. REV. 659 (1987).

41. The Virginia Convention of 1776 was convened to consider whether Virginia ought unilaterally to declare itself independent from Britain. The convention promptly resolved both to instruct its delegates to the Continental Congress to propose a declaration of independence of all the colonies and prepare a declaration of rights in order to "secure substantial and equal liberty to the people" of Virginia. Resolution of Virginia Convention of 1776, *quoted in* H. GRIGSBY, *THE VIRGINIA CONVENTION OF 1776*, at 18 (1855). Section 9 of the Declaration of Rights adopted by the Virginia convention read: "That excessive bail ought not to be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." 1 *THE PAPERS OF GEORGE MASON* 288 (R. Rutland ed. 1970).

42. 1 W. & M., 2d sess., ch. 2 (1689). The Bill of Rights provision is identical to article 10 of the English Declaration of Rights, *reprinted in* L. SCHWOERER, *THE DECLARATION OF RIGHTS*, 1689, at 297 (1981).

the clause,<sup>43</sup> and the federal government placed it in the 1787 Northwest Ordinance.<sup>44</sup>

There was little debate over the excessive fines clause in the First Congress.<sup>45</sup> What little debate there was occurred in a peculiar context, which suggests an uncritical attitude by the congressional authors toward the excessive fines clause. The debate over the excessive fines clause immediately followed congressional consideration of the fifth amendment.<sup>46</sup> In considering the self-incrimination clause of that amendment, the House discussed whether the guarantee could or should apply outside of criminal proceedings. After deliberation of this issue, the House adopted an amendment that specifically confined the benefits of the clause "to criminal cases."<sup>47</sup> Only then did Congress turn its attention to the proposed eighth amendment. If it had been the framers' specific intent to confine the excessive fines clause (or, for that matter, the entire eighth amendment) to criminal actions, a similar amendment would seem to have been the obvious solution. The fact that none was proposed may suggest the lack of any such intent.<sup>48</sup> Or, it simply may suggest that Congress thought the eighth amendment's guarantees so clearly applied only to criminal prosecutions that no clarifying amendment was needed.<sup>49</sup> Far too much meaning can be read into the congressional silence; a more likely, and mundane, reading is that Congress uncritically accepted the language, treating it as a shorthand expression for ancient rights rooted in the soil of English law. For, as Leonard Levy has observed, in connection with colonial declarations of rights:

The history of the writing of the first American bills of rights and constitutions simply does not bear out the presupposition that the process was a diligent or systematic one. Those documents, which we uncritically exalt, were imitative, deficient, and irrationally selective. In the glorious act of framing a social compact expressive of the supreme law, Americans tended simply to draw up a random catalogue of rights that seemed to satisfy their urge for a statement of first principles—or for some of them. That task was executed in

---

43. See Granucci, *supra* note 12, at 840.

44. 1 THE FOUNDERS' CONSTITUTION 28, § 14, art. II (P. Kurland & R. Lerner eds. 1987).

45. 1 ANNALS OF CONG. 782-83 (J. Gales & W. Seaton eds. 1789).

46. *Id.* at 781-82.

47. *Id.* at 782.

48. See, e.g., L. TRIBE, CONSTITUTIONAL CHOICES 29-44 (1985). But see Powell, *supra* note 40, at 671-72.

49. With respect to the cruel and unusual punishments clause, this might very well be the case. Objections to the clause were voiced in the First Congress on the grounds that the clause might prohibit common criminal punishments such as whipping and earcropping. 1 ANNALS OF CONG., *supra* note 45, at 782-83.

a disordered fashion that verged on ineptness.<sup>50</sup>

At least with respect to the excessive fines clause, Levy's characterization has an apt flavor. The congressional debates reflect an uncritical acceptance of the clause, which was first formulated in an American bill of rights in the 1776 Virginia Declaration of Rights.<sup>51</sup> The best evidence is that the draftsman of the Virginia declaration, George Mason, a planter without formal legal training but well-versed in English constitutional history, simply adopted wholesale the 1689 English Bill of Rights when he drafted Virginia's version in 1776.<sup>52</sup>

George Mason's views were unequivocal. Mason was on record as early as 1766 that American colonials "claim Nothing but the Liberty & Privileges of Englishmen, in the same degree, as if we had still continued among our Brethren in Great Britain."<sup>53</sup> By 1774, in the Fairfax County Resolves, Mason reiterated that colonists were entitled to all the "Privileges, Immunities and Advantages" of English constitutional and common law.<sup>54</sup> Mason's intent in drafting the Virginia Declaration of Rights is equally unmistakable: "We have received [the ancient constitutional and common-law rights of Englishmen] from our Ancestors, and, with God's Leave, we will transmit them, unimpaired to our Posterity."<sup>55</sup>

Even if Mason's catalogue of rights was derivative, it had a symbolic importance that was, perhaps, larger than the text. During the Virginia ratification debates, Patrick Henry declared that the Virginia Declaration of Rights "secures the great and principal rights of mankind," such "rights of the people" being those secured by English and American statutory law, English constitu-

---

50. L. LEVY, ORIGINS OF THE FIFTH AMENDMENT: THE RIGHT AGAINST SELF-INCRIMINATION 411 (1968).

51. See *supra* note 41. However, as early as 1682, Pennsylvania guaranteed its citizens "[t]hat all fines shall be moderate, and saving men's contentments, merchandize, or wainage." Pennsylvania Frame of Government § XVIII, reprinted in 1 THE ROOTS OF THE BILL OF RIGHTS 141 (B. Schwartz ed. 1971). The provision is plainly derived from the Magna Charta's Chapter 14, which limited amercements, yet is phrased in terms of fines only. See *infra* notes 108 & 153-54. Thus, at least some colonial Americans regarded fines and amercements as functional equivalents. The Pennsylvania provision predated the English Bill of Rights by seven years, perhaps indicating both that Americans were especially quick to restate the old guarantees of the Magna Charta in a modern, broad form and that the American predisposition was to conclude that the excessive fines clause of the English Bill of Rights operated to limit amercements as well as fines.

52. See H. GRIGSBY, *supra* note 41, at 155-66; Granucci, *supra* note 12, at 840.

53. 1 THE PAPERS OF GEORGE MASON, *supra* note 41, at 65, 71 (reprinting letter of June 6, 1766, to "the Committee of Merchants in London").

54. *Id.* at 201.

55. *Id.* at 71.

tional law, and the common law of England, especially as imported to America.<sup>56</sup> Henry's views were not atypical; revolutionary America was peppered with assertions that colonial Americans possessed all the ancient rights and liberties of Englishmen.<sup>57</sup> Part of the revolutionary animus was the perceived need to preserve inviolate those ancient liberties. It should not be regarded as novel, therefore, to conclude that the revolutionary charters and their immediate progeny—particularly the Bill of Rights—were intended, in part, as restatements of long-established English constitutional and common-law liberties.

Since the lineage of the excessive fines clause is so obviously and directly traceable to the 1689 English Declaration of Rights and its statutory counterpart, the Bill of Rights, it is vital to examine the sources of that great declaration in order to understand fully what political aspirations, ideas, and ancient liberties the excessive fines clause was intended to encapsulate.

#### A. *The English Declaration of Rights of 1689*

No understanding of the English Declaration of Rights can be complete without some appreciation of its context: in particular, the almost bloodless Glorious Revolution of 1688-89, which culminated in the flight of James II to France and the accession to the throne of William of Orange and his wife Mary, a daughter of James by his first marriage. Following James' flight, a parliamentary convention was elected, which drafted the Declaration of

---

56. 3 J. ELLIOT, *supra* note 12, at 461, 513, 587-88.

57. Mason and Henry were not alone. The 1774 Continental Congress declared for all the colonists that "we claim all the benefits secured to the subject by the English constitution." 1 JOURNAL OF THE CONTINENTAL CONGRESS 83 (W. Ford ed. 1904), *quoted in* *Solem v. Helm*, 463 U.S. 277, 286 (1983). To similar effect were the Georgia Resolutions of 1774 that colonists were "entitled to the same rights, privileges, and immunities with their fellow-subjects in *Great Britain*." 1 AMERICAN ARCHIVES 700 (4th series 1837) (emphasis in original), *quoted in* *Solem*, 463 U.S. at 286.

Historians generally have agreed that the Virginia Declaration "was a restatement of English principles—the principles of Magna Charta . . . and the Revolution of 1688," out of which came the 1689 English Bill of Rights. A. NEVINS, *THE AMERICAN STATES DURING AND AFTER THE REVOLUTION, 1775-1789*, at 146 (1924), *quoted in* *Solem*, 463 U.S. at 285-86 n.10; *see also* A. HOWARD, *THE ROAD FROM RUNNYMEDE: MAGNA CARTA AND CONSTITUTIONALISM IN AMERICA* 205-07 (1968); *cf.* D. LOVEJOY, *THE GLORIOUS REVOLUTION IN AMERICA* (1972). This view has been accepted by the United States Supreme Court:

Although the Framers may have intended the Eighth Amendment to go beyond the scope of its English counterpart, their use of the language of the English Bill of Rights is convincing proof that they intended to provide at least the same protection—including the right to be free from excessive punishments.  
*Solem*, 463 U.S. at 286.

Rights and offered the crown to William and Mary. Upon his acceptance, William acknowledged the validity of the rights stated in the Declaration.<sup>58</sup> Parliament then enacted the Declaration into law, in almost identical form, as the Bill of Rights.<sup>59</sup> The Declaration and Bill of Rights are the lasting work of this nonviolent revolution that altered forever the terms by which democracy and monarchy coexisted in England. By forcing the abdication of one king, setting forth new limits on royal authority, restating old limits, establishing the correlative rights of the citizenry, and obtaining royal assent to the validity of these principles, the actors of the Glorious Revolution did more than substitute a new king for an old one; they created a new kingship, diminished in power and expressly observant of the rights of Englishmen.

James II, a devout Catholic, succeeded his brother Charles II to the throne in February 1685,<sup>60</sup> much to the distaste of the Whigs<sup>61</sup> and their preferred successor, the exiled Duke of Monmouth, Charles' illegitimate son. Monmouth, a fervent Anglican, immediately challenged James with a small, armed invasion from Holland. The rebellion, however, was easily crushed; Monmouth was executed, and his followers were cruelly dealt with.<sup>62</sup>

---

58. William's brief and gracious speech, accepting the crown and acknowledging the Declaration, follows:

This is certainly the greatest proofe of the trust you have in us that can bee given, which is the thing that maketh us value it the more, and wee thankfully accept what you have offered. And as I had no other intention in coming hither than to preserve your Religion, Lawes and Liberties, so you may bee sure that I shall endeavour to support them and shall bee willing to concurre in any thing that shall bee for the good of the kingdome and to do all that is in my power to advance the welfare and Glory of the Nation.

See L. SCHWOERER, *supra* note 42, at 259 (reprinting photograph of actual written speech). It is interesting to observe that William uses "we" in accepting the crown on Mary's and his behalf but immediately switches to "I" when discussing future royal administration. Royal authority was joint in name alone.

59. 1 W. & M., 2d sess., ch. 2 (1689).

60. All dates concerning the Glorious Revolution are given in Old Style, then in use in England, but with the year beginning on January 1. The Old Style calendar was 10 days behind New Style dating.

61. During the "Exclusion Crisis" of 1676-83, the Whigs made a valiant effort to enact legislation that would bar James, then Duke of York, from succeeding his brother, Charles II, to the throne. James' Catholicism was a principal (but not the only) reason for this antipathy. See generally J. JONES, *THE FIRST WHIGS: THE POLITICS OF THE EXCLUSION CRISIS, 1678-1683* (1961).

62. Monmouth's invasion force landed in the west of England in June 1685. The uprising caused the cancellation of the autumn assizes in the west country, but James compensated by appointing Lord Jeffreys, Chief Justice of the King's Bench, to assume circuit responsibilities for the trial of Monmouth's adherents. See G. KEETON, *LORD CHANCELLOR JEFFREYS AND THE STUART CAUSE* 301, 306 (1965); see also 4 J. CAMPBELL, *LORD CHANCELLORS*

James' brief and tempestuous reign otherwise was marked by bitter hostility toward his policies, particularly the exercise of a claimed royal power to suspend or dispense with parliamentary laws, which was utilized by James to enforce official toleration for Catholics and Dissenters.<sup>63</sup> These efforts directly and severely

---

OF ENGLAND 340 (J. Mallory ed. 1874). Lord Jeffreys began his task in August 1685 with the trial of Lady Alice Lisle, an elderly widow, on a charge of harboring rebels. G. KEETON, *supra*, at 301-31; *see also* 4 J. CAMPBELL, *supra*, at 341-43. Lady Lisle was promptly convicted and sentenced to be burned at the stake, but James commuted her sentence to beheading. 4 J. CAMPBELL, *supra*, at 343.

Once Jeffreys realized that the sheer volume of prosecutions would make the swift disposition of Monmouth's rebels impossible, he resorted to plea bargaining. He offered to forego imposition of the particularly grisly death penalty for treason (drawing, hanging until not quite dead, dismemberment, beheading and quartering) in exchange for guilty pleas and transportation into penal servitude in the West Indies. *See* Granucci, *supra* note 12, at 854; *see also* L. SCHWOERER, *supra* note 42, at 97. The offer was not indicative of either judicial efficiency or mercy, for treason law provided that all property of a traitor was forfeited to the crown. *See* 4 W. BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND \*381. Although prohibited by statute, *see* 8 Hen. 6, chs. 16, 18 (1423), and condemned by commentators, *see, e.g.*, 2 E. COKE, THE INSTITUTES OF THE LAWS OF ENGLAND \*48, a sordid practice had developed by which the crown granted to its favored courtiers the rights to such forfeited property. The grantee then solicited forfeiture prior to conviction. L. SCHWOERER, *supra* note 42, at 96-97. As a result of the bargain offered, Jeffreys estimated each rebel was worth 10 to 15 pounds, which represented the profit to be made by selling the unfortunate accuseds into penal servitude. 4 J. CAMPBELL, *supra*, at 347-48; G. KEETON, *supra*, at 325. Moreover, Jeffreys was personally corrupt; he sold a pardon to Edward Prideaux, a wealthy Whig, for 14,500 pounds, paid directly to Jeffreys. G. KEETON, *supra*, at 326; *cf.* 4 J. CAMPBELL, *supra*, at 347-48. Finally, Jeffreys reneged on his plea bargains and signed death warrants for some 200 rebels who had pled guilty in response to Jeffreys' offer. *See* Granucci, *supra* note 12, at 854. All were executed that winter and their property confiscated. *Id.*; *see also* 1 T. MACAULAY, HISTORY OF ENGLAND 583-87 (Belford, Clarke ed. n.d.) (describing the thoroughness of the confiscation). Little wonder this exercise became known as the "Bloody Assizes."

63. The suspending power was the power to set aside the operation of a law for a period of time, but not to repeal it altogether. The dispensing power was the power to grant permission to an individual, corporation, or group to disobey a statute. *See* 6 W. HOLDSWORTH, A HISTORY OF ENGLISH LAW 217 (1924); *see also* L. SCHWOERER, *supra* note 42, at 59-60. It has been argued that James disclaimed the suspending power and relied entirely on the dispensing power to effect official toleration for Catholics and Nonconformists. *See* J. MILLER, JAMES II: A STUDY IN KINGSHIP 157, 165 (1978). In any case, his opponents thought he utilized both powers, made them the subject of accusations in the Declaration of Rights, and asserted that he lacked these powers. *See* L. SCHWOERER, *supra* note 42, at 62-64. The legality of the dispensing power was firmly established at the time of the Glorious Revolution, no matter what James' adversaries contended. *See* *Godden v. Hales*, 89 Eng. Rep. 1050 (K.B. 1686), in which Hales, a Catholic, held military office without satisfying the requirements of the Test Act, with which a Catholic could not comply. Godden sued Hales for the award informers were entitled to under the Test Act. Hales defended on the ground of a royal dispensation from the Act. Chief Justice Herbert affirmed the validity of the dispensing power. The proceedings are more fully reported at 11 COBBETT'S COMPLETE COLLECTION OF STATE TRIALS AND PROCEEDINGS FOR HIGH TREASON AND OTHER CRIMES AND MISDEMEANORS 1166 (T. Howell ed. 1809-28) [hereinafter STATE TRIALS]; *see also* 6 W. HOLDSWORTH,

threatened the Tory gentry and the Anglican establishment in church and university.<sup>64</sup> By exercise of his claimed royal prerogative, James set aside the Test Act,<sup>65</sup> which enabled him to place Catholics in office, often at the expense of a removed Anglican incumbent.<sup>66</sup> James' Declarations of Indulgence,<sup>67</sup> which suspended all religious restrictions upon Catholics, were especially unpopular, particularly with the Anglican clergy. It was the second Declaration of Indulgence, however, which James commanded be read from every pulpit, that brought revolutionary sentiment to a fever. Seven Anglican bishops refused to read the decree and prepared a petition against the Indulgence that was widely distributed. The bishops were promptly charged with seditious libel, tried, and acquitted.<sup>68</sup> At the same time, James' wife gave birth to a baby boy, which provided James with a Catholic heir to the throne.

These two developments were particularly significant. The bishops' acquittal was dramatic and demonstrable evidence that public opinion was strongly against James. The birth of the heir meant that delay was no longer affordable for James' opponents because as long as James lacked offspring, his demise would mean the end of Catholic rule. Accordingly, James' opponents, working skillfully with William, issued William an invitation to invade and restore the ancient liberties of the people.<sup>69</sup> William responded with a carefully drafted declaration of his purposes,<sup>70</sup> in which he disclaimed any intention to conquer. Rather, William declared that

---

*supra*, at 225.

64. L. SCHWOERER, *supra* note 42, at 59.

65. 25 Char. 2, ch. 2 (1673).

66. L. SCHWOERER, *supra* note 42, at 71-72, 79-81, 92, 250.

67. The first Declaration of Indulgence was promulgated in 1687, which dispensed with the Test Act in order to place Catholics in positions of importance in the army, church, universities, and government. The second such Declaration was a reissuance of the first with the added requirement, galling to Protestants, that it be read from the pulpit by all Anglican ministers. See L. SCHWOERER, *supra* note 42, at 63-64.

68. The trial proceedings are reported at 12 STATE TRIALS, *supra* note 63, at 183 (1688) ("Trial of the Seven Bishops").

69. The letter of invitation was dated June 30, 1688. ENGLISH HISTORICAL DOCUMENTS, 1660-1714, at 120 (A. Browning ed. 1953).

70. 10 H.C. JOUR. 1-5 (1688). William's declaration was entitled "Declaration of His Highness William Henry, Prince of Orange, of the Reasons Inducing Him to Appear in Armes in the Kingdom of England for Preserving of the Protestant Religion and for Restoring the Lawes and Liberties of England, Scotland, and Ireland." It was dated October 10, 1688, and quickly was followed by a postscript "Second Declaration of Reasons," dated October 20, 1688. *Id.* at 5. A third declaration, repudiated by William, appeared in November and was "a hysterical attack on the Papists." See L. SCHWOERER, *supra* note 42, at 119.

he was merely bringing an armed force "sufficient" to protect himself from the "violence" of James' "evil counselors." William asserted that he desired only a freely elected Parliament, that he would concur with its determinations, and intended "nothing . . . [but the] preservation of the Protestant religion, the covering of all men from persecution for their consciences, and the securing to the whole nation the free enjoyment of their laws, rights and liberties, under a just and legal government."<sup>71</sup>

With this statement as his vanguard, William and his troops arrived in November 1685. James responded with a series of pamphlets that questioned William's motives, linked him with English radicals, stressed his Dutch connections, and doubted his integrity.<sup>72</sup> These measures did little good, for James either lost his nerve or took an immense, foolish gamble by fleeing the country in early December.<sup>73</sup> In his flight, James dropped the Great Seal into the Thames in an attempt to render any subsequent parliamentary action illegal.<sup>74</sup> James may well have gambled that his actions would precipitate such chaos that the people would beg him to return. If so, James misjudged William, the Whigs, and the English people. William promptly entered London and, with the aid of such Whigs as Thomas Herbert, Earl of Pembroke,<sup>75</sup> and Sir Henry Pollexfen,<sup>76</sup> issued a circular letter calling for the election of a "Convention" to resolve the crisis created by James' flight.<sup>77</sup>

Over a three week period in January 1689, a parliamentary

---

71. 10 H.C. JOUR. 5 (1688).

72. See L. SCHWOERER, *supra* note 42, at 120-25.

73. *Id.* at 126. Before fleeing the country, James disbanded the army and dissolved all writs calling for elections of sheriffs and a new Parliament. *Id.*

74. *Id.*

75. Herbert was 33 at the time of the Revolution. He was not a politician; he was a scientific intellectual who was President of the Royal Society in 1689. He was a friend of both Isaac Newton and John Locke. Professor Schwoerer credits him with introducing the convention idea. *Id.* at 135.

76. Pollexfen was a 57-year-old prominent Whig lawyer. He was a cousin of Sir George Treby but lacked Treby's prior experience in Parliament. He was regarded by his peers as among the finest lawyers in England. Pollexfen had defended a number of Whigs and Whig interests in proceedings brought by Charles II and James II, including defense of the Seven Bishops in 1688, but also had been a crown prosecutor in Lord Jeffrey's Bloody Assizes. Pollexfen was acutely aware of the illegal nature of the convention and sought to effect a swift and conservative resolution to the crisis. Despite his surly nature, Pollexfen was influential with his colleagues and probably was responsible for the conservative tack taken by the convention. *Id.* at 55.

77. *Id.* at 133-37. The circular letter, dated December 29, 1688, is reprinted at 10 H.C. JOUR. 7-8 (1688). It was directed to the county coroners instead of the sheriffs because James had successfully replaced the Anglican sheriffs with Catholics.



convention was elected by elections genuinely contested between Tory and Whig candidates and generally free from royal intervention.<sup>78</sup> Strictly speaking, the convention was an illegal and revolutionary body,<sup>79</sup> but, given the circumstances, there were few who cared to assert the point. Tory candidates proposed three options for resolving the crisis: restoring James to the throne with conditions placed upon his powers, creating a regency, or making Mary queen in her own right.<sup>80</sup> Whigs argued for both a change in the king and the kingship.<sup>81</sup> The result was a modest Whig victory: out of a 513 member convention, 174 were Whigs from prior parliaments, 156 were former Tory members of Parliament, and the remaining 183 were "new" members lacking confirmed loyalties to either faction.<sup>82</sup> The convention thus was not a radical body predisposed to wholesale surgery on the English crown. Rather, as a whole, it was a moderately conservative group that convened on January 22, 1689<sup>83</sup> in the noisy, "long, narrow, high-ceilinged St. Stephen's Chapel"<sup>84</sup> to frame a conclusion to the crisis.

By the end of its first week, Commons had appointed a committee of thirty-nine members, chaired by Sir George Treby,<sup>85</sup> charged with the responsibility of drafting the "heads of things that were absolutely essential to secure the nation's religion, laws and liberties."<sup>86</sup> Four days later, on February 2, Treby's committee

---

78. L. SCHWOERER, *supra* note 42, at 138-42.

79. The elections had not been lawfully called by the crown but had been summoned on the people's own authority. The convention's lawyers were acutely aware of its illegal status. *Id.* at 55, 283. Even so, the convention justified its work by relying on contract theories of government, primarily the variation known as "philosophical contractarianism," rooted in natural right theories. *Id.* at 159-62. John Locke is, of course, most readily identified with this school of thought. Locke's *Two Treatises of Government* was first published in November 1689, after the Declaration was adopted but before Parliament had enacted it into law as the Bill of Rights. L. SCHWOERER, *supra* note 42, at 275. It is highly likely that Locke influenced John Somers and other members of the convention. *See infra* note 90.

80. L. SCHWOERER, *supra* note 42, at 144.

81. *Id.* at 141-53, 168.

82. *Id.* at 152.

83. *Id.* at 171.

84. *Id.* at 172. This was the regular meeting place for the House of Commons; in other respects the convention did not differ from a regular Parliament. Hereafter, the elected members of the convention are sometimes referred to as the House of Commons. The House of Lords was not an elected body and thus continued without interruption.

85. Treby was a 46-year-old veteran member of Parliament, radical Whig, Recorder of London, and ardent opponent of the Stuarts. Educated at Oxford and the Middle Temple, he had been a lawyer since 1671. Treby was handsome, graceful, gregarious, and a confident and skilled speaker who delighted his colleagues with his adept mimicry of James. Most importantly, Treby was a knowledgeable parliamentarian and an able lawyer. *Id.* at 43-46.

86. *Id.* at 30.

presented the convention with a draft "Heads of Grievances"<sup>87</sup> containing twenty-three "absolutely essential" articles. Five more were added by the entire House of Commons in a brief, low-keyed debate that contrasted markedly with the public tension and excitement outside.<sup>88</sup> Two days later, however, Treby's committee was instructed to divide the grievances into two categories, one restating ancient law and the other consisting of rights that could only be secured effectively by new legislation.<sup>89</sup> Treby did so and reported back to the full House on February 7. On the same date a second committee, chaired by John Somers,<sup>90</sup> was appointed to amend the motion sent to the House of Commons by the House of Lords, declaring William and Mary to be king and queen of England.<sup>91</sup> Upon Somers' request, the House of Commons agreed to link together the draft declaration of rights and the offer of the crown.<sup>92</sup> After much intricate bargaining and politicking, Lords and Commons approved the final Declaration and read the document to William and Mary. The Declaration consisted of thirteen accusations against James and a recitation of thirteen claimed "ancient rights and Liberties," followed by an offer of the throne.<sup>93</sup> The implication of this linkage was inescapable: acceptance of the throne meant acceptance of the Declaration and acquiescence to the rights it claimed.

In reducing the "Heads of Grievances" from twenty-eight to thirteen, the convention dropped every claimed right that was thought by Treby's committee to require new legislation.<sup>94</sup> This does not mean, however, that the Declaration was, in fact, an exclusive recitation of truly established rights. Articles eight through thirteen of the final version were designated by Treby's group as both declaratory of old law and requiring new law. For this Article's purposes, article ten is of especial interest, for it provides "[t]hat excessive bail ought not to be required nor excessive fines

---

87. *Id.* app. 2, at 299.

88. *Id.* at 208-09. One man was arrested for threatening to kill William, another for distributing radical tracts urging replacement of the monarchy with a commonwealth. The public had to be cleared from the chambers to make room for the Members of Parliament.

89. *Id.* at 30.

90. Somers was 38, a radical Whig educated at Oxford and the Middle Temple, and was known to his convention colleagues as a man of "erudition and legal knowledge." He likely was influenced by John Locke, who became a close friend following the Revolution. *Id.* at 47.

91. *Id.* at 30.

92. *Id.* at 30-31.

93. *Id.* app. 1, at 295-98.

94. *Id.* at 24, 230.

imposed, nor cruel and unusual punishments inflicted."<sup>95</sup> As Professor Lois Schworer has pointed out, articles eight through thirteen use the conditional verb "ought," which implies an ambivalence about the ancient and established nature of the claimed rights.<sup>96</sup> Both Treby's designation and the use of an ambivalent verb may be explained by concluding, as Professor Schworer does, that the prohibition of excessive bail went beyond existing law, while the prohibitions of excessive fines and cruel and unusual punishments were declaratory of existing law.<sup>97</sup> Yet, to describe freedom from excessive fines as "indisputably an ancient right of the subject"<sup>98</sup> is to engage in a technical overstatement. More properly, the ancient right restated by the excessive fines clause of the Declaration was the right to be free of excessive financial punishment; freedom from excessive fines—especially criminal fines—was of much more recent vintage.

Notions of prohibiting excessive fines originated in general prohibitions of punishments beyond specified maximum limits. Ancient Hebrew law, assertedly of divine origin, explicitly demanded an eye for an eye, a tooth for a tooth.<sup>99</sup> Whether regarded now as retribution or limitation, the hoary commands of Old Testament law imposed an equality between offense and punishment.<sup>100</sup> It is for that reason that this ancient law has been described as the *lex talionis*.<sup>101</sup>

The principle of proportionality between offense and punishment was not peculiar to Hebrew civilization. Ancient Greeks, such as Aristotle, expressed a similar concern that justice consisted of rendering equal the offense and the consequences of the action.<sup>102</sup> These notions arrived in England at an early date. According to one commentator:

---

95. *Id.* app. 1, at 297.

96. *Id.* at 22, 87. *But see* F. McDONALD, *NOVUS ORDO SECLORUM* 61 (1985).

97. *See id.* at 87-94.

98. *Id.* at 90.

99. *Exodus* 21:23-25 (King James).

100. *Leviticus* 24:19-20 (King James) provides: "And if a man cause a blemish in his neighbour; as he hath done, so shall it be done to him; Breach for breach, eye for eye, tooth for tooth: as he hath caused a blemish in a man, so shall it be done to him *again*." (emphasis in original).

101. Granucci, *supra* note 12, at 844. "*Talion*" is French, derived from the Latin "*talio*," for "punishment that exacts a penalty just like the crime; retaliation, as the principle of an eye for an eye, a tooth for a tooth." WEBSTER'S NEW TWENTIETH CENTURY DICTIONARY, UNABRIDGED 1860 (2d ed. 1977).

102. ARISTOTLE, *Nicomachean Ethics*, in 9 GREAT BOOKS OF THE WESTERN WORLD 379-81 (W. Ross ed. 1952).

A similar concept of equality is found in the laws of the Angles and the Saxons of pre-Norman England. The penal laws in the Germanic peoples of the Middle Ages were enforced through a system of fixed penalties, and the Norse Vikings followed such a system by listing each known crime and its appropriate penalty in the Gulathing and Frustathing Laws. The penalties ranged from outlawry to fines of a few ora.<sup>103</sup>

The Saxon system was codified in such great detail that almost every conceivable injury or offense carried with it a corresponding financial punishment.<sup>104</sup>

With the Norman conquest, the *lex talionis* passed from the English legal landscape. The *lex talionis* was replaced by the amercement, a financial penalty assessed at the discretion of the party's peers for a wide variety of illegal conduct, both civil and criminal.<sup>105</sup> The amercement was assessed most commonly as a civil sanction for wrongfully bringing or defending a civil lawsuit.<sup>106</sup>

Because the amercement was discretionary, it was subject to abuse. The rigidity of the Saxon system had stunted the development of mercy or mitigation but had the virtue of preventing wildly excessive penalties (in the sense of being beyond the legally established norms). While the amercement permitted the penalty assessed to vary according to its peculiar, individual circumstances, the danger existed that the amercement could be used to impose vindictive and excessive punishments. To curb these abuses, an entire body of medieval law emerged that predated the Magna Charta.<sup>107</sup> By the time of the Great Charter in 1215, the problem of

103. Granucci, *supra* note 12, at 844 (footnote omitted).

104. *Id.* at 845. See also the decrees of King Aethelbert 1-90, and of King Alfred 1-77, in *THE LAWS OF THE EARLIEST ENGLISH KINGS* 5-17, 63-93 (F. Attenborough ed. & trans. 1922), which are so detailed as to include the price for loss of a toenail. *Id.* at 15.

105. 2 F. POLLOCK & F. MAITLAND, *THE HISTORY OF ENGLISH LAW BEFORE THE TIME OF EDWARD I* 513-22 (2d ed. 1898); see also *Beecher's Case*, 8 Co. 58, 77 Eng. Rep. 559 (Ex. 1609) (in which a variety of conduct for which amercement is proper is catalogued); 2 BRACTON ON THE LAWS AND CUSTOMS OF ENGLAND 330-33 (S. Thorne trans. 1968); *infra* note 107.

106. See *infra* text accompanying notes 147-63.

107. Lord Coke believed that the Magna Charta's protections against excessive amercements were "made in the affirmance of the common law." 2 E. COKE, *supra* note 62, at \*27-28. Glanvill, writing in the late twelfth century, before the Magna Charta, supports this assertion by his adumbration of the Magna Charta: "Amercement by the lord king here means that he is to be amerced by the oath of lawful men of the neighbourhood, but so as not to lose any property necessary to maintain his position." *THE TREATISE ON THE LAWS AND CUSTOMS OF THE REALM OF ENGLAND COMMONLY CALLED GLANVILL* 114 (G. Hall ed. & trans. 1965) [hereinafter *GLANVILL*]. Bracton, writing in the mid-thirteenth century, after the Magna Charta, restates the principles of Chapter 14 of the Magna Charta as if they were long established at common law. 2 BRACTON, *supra* note 105, at 329-30. Bracton provides a

excessive amercements was so widespread that an entire chapter of the Magna Charta was devoted to curbing amercements.<sup>108</sup> Subsequent statutes further refined and extended the Magna Charta's guarantees.<sup>109</sup> Thus, English law from a very early date contained protections against excessive financial punishments imposed by juries but did not expressly contain similar prohibitions against excessive financial punishments imposed by judges.<sup>110</sup>

To understand fully the convention's use of the phrase "excessive fines" in article ten of the Declaration of Rights, it is necessary to appreciate the medieval distinctions between amercements and fines. An amercement was a financial penalty payable to the crown or its representative, the feudal lord,<sup>111</sup> assessed for some

voluminous listing of conduct meriting amercement that may be categorized as follows: petty official corruption, economic wrongs (*e.g.*, usury, establishing or altering a market without a license), crimes (*e.g.*, burglary, forgery), noncorrupt official error (*e.g.*, action without jurisdiction, wrongful or excessive levy, wrongful refusal of bail), civil misconduct (*e.g.*, "wreck of the sea," poaching), and sanctions in civil litigation (*e.g.*, default, failure to appear). *Id.* at 330-33. Bracton's exhaustive catalogue demonstrates both that amercements were very well established and that they applied to practically every form of conduct.

108. Chapter 14 of the Magna Charta was devoted exclusively to protection against excessive amercements. Chapter 14 provided that a free man shall not be amerced for a small wrong (*delicto*), but according to the manner of the wrong, and for a great wrong according to the magnitude of the wrong. Exempted from any amercement was that which was necessary for one's support and maintenance. Although the Magna Charta provided that earls and barons were not to be amerced except by their peers (*per pares*), Coke read this as extending to all persons, whether nobility or not. 2 E. COKE, *supra* note 62, at \*27-29. Chapter 14 of the Magna Charta originally was numbered Chapter 20; with its reissuance by Henry III in 1225, it became Chapter 14. *See* 2 BRACTON, *supra* note 105, at 330 nn.5-6.

109. The first Statute of Westminster, 3 Edw., ch. 6 (1275), cured a number of perceived faults in the Magna Charta. It extended the Magna Charta's guarantees to political and corporate bodies, removed the free men limitation (freeholders) by extending the guarantees to all men, made certain there could be no amercement without cause, confirmed that no amercement could be assessed save by one's peers, and retained the property exemptions. *See* 2 E. COKE, *supra* note 62, at \*169-70. The Statute of Marlebridge, 52 Hen. 3, ch. 18 (1267), limited the courts in which an amercement could be imposed. *See* 2 E. COKE, *supra*, at \*136.

110. Coke is explicit in his conclusion that the Magna Charta's protections extend only to amercements and not fines. 2 E. COKE, *supra* note 62, at \*27; *see also infra* text accompanying note 124. *But see* 4 W. BLACKSTONE, *supra* note 62, at \*372-73, in which Blackstone asserts that "[t]he reasonableness of fines in criminal cases has also been usually regulated by the determination of *magna carta*, concerning amercements for misbehaviour in matters of civil right." (footnotes omitted, emphasis in original). *Id.* at \*372. The difference may be attributable to the fact that Blackstone wrote after the Declaration of Rights and Coke predated the Declaration. This explanation strongly suggests that article 10 of the Declaration did operate, to legal scholars at least, as a reaffirmation of ancient restrictions on amercements and as an explicit imposition of those same limits on criminal fines.

111. Coke notes that "amerciements belong to the king." 2 E. COKE, *supra* note 62, at \*29. Yet, contemporary cases report the payment of amercements to feudal lords. *See* Griesley's Case, 8 Co. 38, 77 Eng. Rep. 530 (C.P. 1588). Professors Pollock and Maitland assert

misdeed—either civil or criminal—and was enforceable by an action in debt or detinue.<sup>112</sup> A fine, by contrast, was a voluntary offering made to the king to avoid royal displeasure or obtain some favor.<sup>113</sup> As the fine gradually lost its voluntary character, the amercement fell out of use. Imposition of costs and punitive damages began to replace amercements as a civil sanction, particularly with respect to civil litigation.<sup>114</sup> In addition, criminal fines replaced the amercement's penal function. This division by no means was complete in 1689, however, and cannot safely be relied upon as a basis for concluding that the convention was interested exclusively in curbing criminal fines.

In the early seventeenth century, the constitutional and political struggles between Parliament and the crown manifested themselves in a distortion of the law pertaining to amercements and fines.<sup>115</sup> Amercements could not be assessed solely by the court but could only be imposed by a jury. Assessing fines, which lost their voluntary character of medieval times, however, became entirely a judicial function. Accordingly, the Stuart kings seized upon this judicial prerogative as a device to deal with their enemies. The Court of Star Chamber imposed heavy fines, a fact that eventually led to the Star Chamber's dissolution.<sup>116</sup> Indeed, when the Star Chamber was abolished in 1641, courts were specifically forbidden from following its practices—including the levying of excessive fines.<sup>117</sup> Nevertheless, Charles II's judges ignored the limitations and imposed "ruinous fines" on the King's critics.<sup>118</sup> The fines imposed by Charles' judges were so severe that the House of Commons appointed a committee in December 1680 to examine judicial proceedings.<sup>119</sup> The committee reported that the judges had acted "ar-

---

that the recipient of the amercement was determined by the court in which the amercement was imposed. Amercements imposed in royal courts went to the king, those imposed in county courts went to the sheriff, and those imposed in seignorial courts went to the lord of the manor. 2 F. POLLOCK & F. MAITLAND, *supra* note 105, at 513.

112. F. BULLER, *AN INTRODUCTION TO THE LAW RELATIVE TO TRIALS AT NISI PRIUS* 167 (2d ed. 1775); 3 W. HOLDSWORTH, *supra* note 63, at 425.

113. W. McKECHNIE, *MAGNA CARTA: A COMMENTARY ON THE GREAT CHARTER OF KING JOHN* 293 (2d rev. ed. 1914).

114. See 4 W. HOLDSWORTH, *supra* note 63, at 536-37; see also 3 W. BLACKSTONE, *supra* note 62, at \*399; *infra* notes 177-210 and accompanying text.

115. L. SCHWOERER, *supra* note 42, at 91.

116. *Id.*

117. *Id.*

118. *Id.*

119. *Id.* at 90.

bitrarily, illegally, and partially" in imposing fines.<sup>120</sup> The House of Commons then debated a bill to provide relief against fines imposed "not according to their crimes, but their principles: sometimes because they have been Protestants."<sup>121</sup> During the final years of Charles II's reign, the situation deteriorated further. In 1682 the Whig sheriff of London was fined 100,000 pounds, an astronomical sum, for speaking ill of James, then Duke of York.<sup>122</sup> Others, who were fined such enormous sums that they could not pay, were imprisoned and thus ruined financially.<sup>123</sup> Further insult was added by judicial rulings that the Magna Charta provided no protection against fines imposed for offenses against the king.<sup>124</sup>

Although such abuses undoubtedly concerned the authors of the Declaration of Rights, they left no indication that this was their only concern. By assigning article ten to both categories—a right declaratory of old law and one requiring new law—the authors clearly indicated a desire to restate old guarantees as well as claim new specific entitlements to prevent the reoccurrence of Stuart abuses. Moreover, article ten was significantly altered from its first formulation as the nineteenth grievance in the Heads of Grievances. The original expression of the grievance was as follows: "The requiring excessive bail of persons committed in criminal cases, and imposing excessive fines and illegal punishments to be prevented."<sup>125</sup> By eliminating the reference to criminal cases, the convention must have intended to make the grievance applicable to all cases.<sup>126</sup> This revision probably was not accidental. Solid ma-

120. 9 H.C. JOUR. 692 (1680).

121. 8 A. GREY, DEBATES OF THE HOUSE OF COMMONS, FROM THE YEAR 1667 TO THE YEAR 1694, at 227-28 (1769), cited in L. SCHWOERER, *supra* note 42, at 91.

122. L. SCHWOERER, *supra* note 42, at 91.

123. *Id.*

124. John Hampden's Case, in 9 STATE TRIALS, *supra* note 63, at 1125 (1684). The rejection of the Magna Charta's applicability to fines was crassly instrumental, as there was a well established common-law tradition invalidating excessive fines. Richard Godfrey's Case, 11 Co. 42, 77 Eng. Rep. 1199 (1615), declared that "the reasonableness of the fine shall be adjudged by the justices; and if it appears to them to be excessive, it is against law, and shall not bind." *Id.* at 44, 77 Eng. Rep. at 1202.

125. L. SCHWOERER, *supra* note 42, app. 3, at 300 (emphasis added).

126. It is possible that the change was made because Treby's committee could not envision the use of bail in anything other than a criminal proceeding, in which case the language removed was mere surplusage. That conclusion is an unlikely one, however, because bail or its close cousin, mainprize, commonly were used in civil proceedings at the time. See, e.g., J. COWEL, A LAW DICTIONARY OR THE INTERPRETER OF WORDS AND TERMS n.p. (1727) (defining the terms "bail" and "mainprize"); 4 E. COKE, *supra* note 62, at \*178-79; 1 A. FITZ-HERBERT, NEW NATURA BREVIVM \*251 (9th ed. 1794) (Fitz-Herbert wrote his work during the reign of Henry VIII). Their use in civil proceedings was closely linked to the

juries of both Treby's and Somers' committees were able, accomplished lawyers; they were especially sensitive to the needs of their profession.<sup>127</sup> Since article ten fell into both categories, by reason of its aggressive position with respect to prohibiting excessive bail,<sup>128</sup> Treby's committee was, in all likelihood, anxious to ensure both that the "new law" portion be as encompassing as possible in order to frustrate any new and ingenious royal devices of judicial oppression, and that the declaratory portion be an accurate summation of ancient rights. Elimination of the reference to criminal proceedings achieved both aims. To the extent bail might be imposed in civil proceedings, it could not be excessive.<sup>129</sup> Since an-

---

various writs of *capias*. *Capias ad satisfaciendum* was a writ of execution following a civil judgment delivered to the sheriff requiring that the sheriff seize and imprison the debtor until payment of the judgment was made. See J. COWEL, *supra* (defining the term "*capias ad satisfaciendum*"). *Capias ad respondendum* was a similar writ issued before judgment when a writ of distress (functionally similar to a modern prejudgment attachment) was returned unsatisfied. See J. COWEL, *supra* (defining the terms "*capias*" and "distress"). Bail or mainprize was available to the unfortunate upon whom *capias* was levied; sureties were required who could (and would) be amerced if the defendant failed to pay or appear at trial. See W. RASTALL, *LES TERMES DE LA REY, OR, CERTAIN DIFFICULT AND OBSCURE WORDS AND TERMS OF THE COMMON AND STATUTE LAWS OF ENGLAND* 284 (1812). This first American edition was a reprint of the last London edition of 1721. Rastall wrote his first edition during Mary's reign, 1553-58. While these procedural aspects of avoiding debtors' prison were not the burning issues before Treby's committee, they undoubtedly understood and appreciated their existence and significance. Accordingly, it is far more likely that the elimination of the grievance's restriction to criminal cases was a deliberate effort to make the Declaration truly declaratory of ancient law.

127. L. SCHWOERER, *supra* note 42, at 35-38, 227.

128. *Id.* at 86-90. Professor Schwoerer contends that ancient English regulations upon bail had never developed to the point that the crown was obligated to recognize bail or to impose bail in reasonable amounts. *Id.* at 88. The Statute of Westminster I, 3 Edw., ch. 15 (1275), was the first statutory regulation of bail; it did not bind the king but consisted of guidelines for sheriffs and other local officers. By 1689 bail law had not materially progressed. Lord Coke devoted considerable effort to an itemization of those persons "bailable" and those not "bailable." 2 E. COKE, *supra* note 62, at \*187-91.

129. Imposition of bail in civil proceedings may not be as exotic as it seems. A modern analogue is the reasonably common requirement that a party post a security bond in order to proceed with an action or appeal. See, e.g., CAL. CORP. CODE § 800 (West 1977 & Supp. 1987) (requiring a shareholder derivative plaintiff to post security for costs as a precondition for continued maintenance of suit). The concept of civil arrest for failure to pay a civil judgment is functionally similar to bail: the judgment becomes the bail amount, which if not posted, will result in loss of personal liberty. Moreover, civil arrest may be had for a variety of other reasons, and bail is applicable to a civil arrest. See, e.g., DEL. CODE ANN. tit. 10, § 3106 (1975). While civil arrest has largely passed from the scene, it survives in some jurisdictions. See, e.g., *id.* (stating that "[a] writ of *capias ad respondendum* is served by arresting the defendant, but he shall be discharged upon giving sufficient bail"). But see CAL. CIV. PROC. CODE § 501 (West 1979) (a person "may not be imprisoned in a civil action for debt or tort, whether before or after judgment"). Civil arrest statutes have survived constitutional attack. See *Non-Resident Taxpayers Ass'n of Pa. & N.J. v. Murray*, 347 F. Supp. 399 (E.D. Pa. 1972), *aff'd*, 410 U.S. 919 (1973).



cient prohibitions against excessive amercements—the precursor to seventeenth-century fines—applied to both civil and criminal proceedings, and since similar prohibitions against excessive fines were ingrained in the case law,<sup>130</sup> it was important for accuracy's sake that article ten not be limited to criminal cases.<sup>131</sup>

Moreover, at the time the convention drafted article ten, legal prohibitions against the imposition of excessive criminal fines and similar judicial penalties were of very recent vintage. The abolition of the Star Chamber and the attendant legal restrictions on criminal fines occurred less than fifty years prior to the convention and could hardly be called an ancient right. Although the Stuart kings elected to use judicially imposed fines, rather than amercements, as their instruments of political punishment, the astute lawyers of Treby's committee must have known that fines were similar to amercements and that ancient restrictions on abusive or excessive amercements arguably did not apply to fines. It was thus especially important to curb excessive fines and of little practical significance to recite in explicit detail the long-established protections with respect to amercements. Article ten explicitly addressed the issue of fines, while it implicitly reaffirmed ancient rights with respect to amercements. The Declaration of Rights' excessive fines clause thus should be read as simultaneously prohibiting excessive fines and amercements, whether imposed by judge or jury, in both civil and criminal proceedings.

---

130. See, e.g., *Richard Godfrey's Case*, 11 Co. 42, 77 Eng. Rep. 1199 (1615); see also *supra* note 124.

131. Justice Powell placed a different interpretation upon these events:

Although the reference to "criminal cases" was eliminated from the final draft [of the Declaration of Rights], the preservation of a similar reference in the preamble indicates that the deletion was without substantive significance. Thus, Blackstone treated each of the provision's three prohibitions as bearing only on criminal proceedings and judgments.

*Ingraham v. Wright*, 430 U.S. 651, 665 (1977) (footnotes omitted). Justice Powell's views may be criticized on two grounds. First, the recitation in the Declaration's statement of grievances (or preamble) that "excessive bail hath been required of persons committed in criminal cases," proves only that James' judges were thought to violate ancient liberties particularly in criminal bail proceedings. The similar grievance concerning excessive fines is not similarly confined to criminal cases. Of more importance is the fact that the grievances were designed to specify the particular abuses of James II; the declarations of rights were designed to reaffirm ancient liberties, whether or not James had infringed them. It is thus a highly suspect conclusion that "the deletion was without substantive significance." Moreover, Justice Powell's reading of Blackstone is erroneous. In addressing excessive fines, Blackstone expressly relates the Declaration's guarantee to the Magna Charta's limitation upon excessive amercements. 4 W. BLACKSTONE, *supra* note 62, at \*372-73. Although Blackstone applied the Declaration's excessive bail clause to criminal bail proceedings, he never asserted that the provision was confined strictly to criminal cases.

B. *A Summary of the Ancient Law Restated By the Excessive Fines Clause of the Declaration of Rights*

Given the claim of ancient authority contained within the Declaration of Rights, its later interpretation as "only declaratory, throughout, of the old constitutional law of the land,"<sup>132</sup> and the general American agreement with this understanding,<sup>133</sup> it is important to undertake a thorough examination of the roots and development of this "old constitutional law" that is embodied in the excessive fines clause of the eighth amendment. The inquiry begins in Saxon law, progresses to amercements with the advent of Norman law, considers the long and tangled connections between the law of amercements and the law of fines, and ends with the demise of amercements. As amercements fell into disuse, imposition of fines, civil sanctions, costs, and punitive damages began to serve functions previously performed by the use of amercements.

Saxon law did not distinguish between crime and tort.<sup>134</sup> Instead, it created an elaborate system of tariffs to compensate tort and crime victims. The payments were classified generally into *wer*, *bote*, and *wite*.<sup>135</sup> *Wer* represented the monetary value Saxon law placed on a man's life, which varied with his rank and importance.<sup>136</sup> *Wite* was the term employed for payments made to the king or other public authority.<sup>137</sup> *Bote* signified compensation generally.<sup>138</sup> These classifications worked together to form a unified

132. 4 W. BLACKSTONE, *supra* note 62, at \*372. Other commentators of the period held similar views. See, e.g., T. SOMERVILLE, HISTORY OF POLITICAL TRANSACTIONS AND OF PARTIES FROM THE RESTORATION OF KING CHARLES II TO THE DEATH OF KING WILLIAM (1792), cited in L. SCHWOERER, *supra* note 42, at 5 n.6. This view was accepted by such esteemed historians as Macaulay. See 2 T. MACAULAY, *supra* note 62, at 583-85, 588-94. Macaulay was emphatic that the Declaration "made nothing law which had not been law before." *Id.* at 594. Professor Schworer's pathbreaking contribution is her demonstration that the Declaration was intended to be both declaratory of the old law and to assert firmly new rights. See L. SCHWOERER, *supra* note 42, at 281-91.

133. See *supra* notes 51-57 and accompanying text. It is noteworthy that when St. George Tucker published his edition of Blackstone's Commentaries in 1803, his copious annotations and appendices relating Blackstone to American law accepted uncritically Blackstone's characterization of the Bill of Rights as declaratory of old law.

134. See, e.g., T. PLUCKNETT, A CONCISE HISTORY OF THE COMMON LAW 422-23, 425-26 (5th ed. 1956); 2 F. POLLOCK & F. MAITLAND, *supra* note 105, at 449-53.

135. 2 F. POLLOCK & F. MAITLAND, *supra* note 105, at 449; 1 F. POLLOCK & F. MAITLAND, *supra* note 105, at 48.

136. 1 F. POLLOCK & F. MAITLAND, *supra* note 105, at 48.

137. *Id.* Maitland terms *wite* a "penal fine." Lord Coke is far more ambivalent: "It is to be known that *wit*, *wita*, is an old Saxon word, and signifieth an amerciament. . . ." 1 E. COKE, *supra* note 62, § 194, at \*127.

138. 1 F. POLLOCK & F. MAITLAND, *supra* note 105, at 48; 1 E. COKE, *supra* note 62, § 194, at \*127 (indicating that "[b]ote is also an ancient Saxon word, and sometime

system of pecuniary settlement of both crimes and torts:

The offender could buy back the peace that he had broken. To do this he had to settle not only with the injured person but also with the king: he must make *bot* to the injured and pay a *wite* to the king. A complicated tariff was elaborated. Every kind of blow or wound given to every kind of person had its price. . . .<sup>139</sup>

The Saxons employed considerable embellishments upon this theme. They created variations, such as *manbote*<sup>140</sup> or *blodwite*,<sup>141</sup> which made the scheme both more costly and complicated.<sup>142</sup> In essence, the reduction of crime and tort law to a financial schedule created vast opportunity for cupidity. The Saxons were apparently no more immune from the acquisitive urge than their modern progeny: the revenue derived from the Saxon tariffs was apportioned among the king, the church, the crown's favored grantees, manorial lords, and even simple householders by a system of specialized *wites* and *botes* and related rights.<sup>143</sup>

But all of this changed with the Norman conquest. One commentator observed that "this elaborate system disappear[ed] with marvelous suddenness."<sup>144</sup> Yet, what little of the Saxon system that survived may have had a substantial impact on Norman law. The Saxon code listed specific *wites* and rights of the king over certain of his subjects, "and in Mercia he has the same over all men."<sup>145</sup> This adumbration of amercement, or amerciament as Lord Coke styled it, suggests that amercement had roots in Saxon law and was not entirely a Norman import.<sup>146</sup> In any case, it was after the Norman conquest that the notion of amercement became fully developed.

signifieth amerciament, or compensation").

139. 2 F. POLLOCK & F. MAITLAND, *supra* note 105, at 451 (footnote omitted). *Wer* was the *bote* for homicide.

140. *Manbote* was the pecuniary compensation to be paid for homicide. See J. COWEL, *supra* note 126 (defining the term "*manbote*").

141. *Blodwite*, according to Cowel, was both the "customary Fine paid as a Composition and Atonement, for the shedding or drawing Blood" and "an Amerciament for Bloodshed." J. COWEL, *supra* note 126 (defining the term "*bloodwit*"). Thus, at least a century before the Declaration of Rights, little effort was made to distinguish between amercements and fines. *But see infra* notes 171-74 and accompanying text; *supra* note 110.

142. See, e.g., Maitland's description of the system in 2 F. POLLOCK & F. MAITLAND, *supra* note 105, at 453-58.

143. *Id.* at 454.

144. *Id.* at 458.

145. *Id.* at 453 (quoting Cnut, ii. 12-15). Robertson translated the statute only slightly differently: "And in Mercia he is entitled to all the dues described above, from all men." A. ROBERTSON, *THE LAWS OF THE KINGS OF ENGLAND FROM EDMUND TO HENRY I* 181 (1925).

146. See *infra* text accompanying notes 158-60.

## 1. Amercements

An amercement was a monetary penalty, payable to the king or his representative, assessed for an enormous variety of misconduct.<sup>147</sup> The amercement was an all-purpose monetary sanction used to penalize both criminal and civil wrongdoing. Individuals and ecclesiastical and municipal corporations were all subject to amercement.<sup>148</sup> In the context of civil litigation, the amercement had a routine and well-understood application. A plaintiff in any civil action would be amerced as a result of nonsuit, bar, adverse verdict, or abatement of the action due to some irregularity of pleading or procedure.<sup>149</sup> A defendant would be amerced if judgment was rendered against him.<sup>150</sup> As is true of any complex and well-developed body of law, there were exceptions and immunities.<sup>151</sup> Yet, without delineating the practical aspects of civil litigation in the age of amercements, it is enough to know that the amercement was the financial sanction most commonly assessed upon civil litigants.

English law traditionally recognized a writ, *de moderata misericordia*, which afforded the subject of an amercement the opportunity to challenge the sanction as excessive.<sup>152</sup> There were multiple bases for asserting that an amercement was excessive. For instance, if the penalty was disproportionately large in relation to the offense, the amercement would be considered excessive. Indeed, this principle of proportionality was so fundamental that it became one of the cardinal limitations upon amercements imposed by the Magna Charta.<sup>153</sup> If the amercement was not tainted by

---

147. See *supra* note 107.

148. 1 E. COKE, *supra* note 62, at \*127; 2 E. COKE, *supra* note 62, at \*27-29; cf. 1 F. POLLOCK & F. MAITLAND, *supra* note 105, at 566-67. For example, a municipality could be amerced for its residents' failure to raise the "hue and cry" following commission of a crime or for the municipality's failure to apprehend a murderer. 3 E. COKE, *supra* note 62, at \*53; see also 1 F. POLLOCK & F. MAITLAND, *supra*, at 493 (stating that an amercement against a corporate body could be levied on all the goods of the individual members of the community).

149. See *Beecher's Case*, 8 Co. 58, 77 Eng. Rep. 559 (Ex. 1609).

150. *Id.*

151. For example, a defendant in a *praecipe quod reddat* would not be amerced if he complied with the demand of the writ on or before the return date. *Id.* at 61, 77 Eng. Rep. at 566.

152. For a complete summary of the procedure under the writ to test the egregiousness of the amercement, see 1 A. FITZ-HERBERT, *supra* note 126, at 74-76.

153. Chapter 14 of Magna Charta provided:

A Freeman shall not be amerced for a small Fault [*delicto*], but after the Manner of the Fault. And for a great Fault, after the Greatness thereof, saving to him his Contentement. (2.) And a Merchant likewise, saving to him his Merchandize. (3.) And any

such disproportionality, but was still so large as to infringe upon a person's means of earning a living or maintaining himself and his family, *miser cordia* would still lie.<sup>154</sup> Finally, relief was obtainable for any jurisdictional defect in the assessment of an amercement. For example, only certain courts could assess amercements,<sup>155</sup> and only a jury could determine the amount of the amercement.<sup>156</sup> These numerous protections did not mean that the assessment of amercements was rare; rather, these protections only placed substantial limitations upon the size of amercements and the process of their imposition. Indeed, the amercement was ubiquitous: "[i]n the thirteenth century amercements are being inflicted right and left upon men who have done very little that is wrong."<sup>157</sup>

The doctrinal theory of amercements was that, having committed some wrong, the offender was at the mercy of the crown. The Latin phrase of the time was that the miscreant was *in misericordia*.<sup>158</sup> Accordingly, the crown theoretically was permitted to

others Villain than ours shall be likewise amerced, saving his *Wainage*, if he fall into our Mercy. (4.) And none of the said Amerciaments shall be assessed, but by the Oath of honest and lawful Men of the Vicinage. (5.) Earls and Barons shall not be amerced, but by their Peers, after the Manner of their Offence. (6.) No Man of the Church shall be amerced after the Quantity of his Spiritual Benefice, but after his Lay Tenement, and after the Quantity of his Offence.

H. CARE, ENGLISH LIBERTIES, OR THE FREE-BORN SUBJECT'S INHERITANCE 19 (4th ed. 1719) (emphasis in original) [hereinafter ENGLISH LIBERTIES].

154. These limitations upon the amount of an amercement, regardless of the gravity of the offense, inhere in the Magna Charta's exceptions of "contenement," "merchandize," and "wainage." Contenement is "that which is necessary for his Support, according to his Condition or State of Life; so that tho' he might be amerced, yet something must be left for his Support." ENGLISH LIBERTIES, *supra* note 153, at 20; see also W. COCHRAN, LAW LEXICON 82 (R. Mace 4th rev. ed. 1956) ("a man's countenance or credit which he has together with, and by reason of his freehold; (2) that which is necessary for the support and maintenance of men, agreeably to their several qualities or states of life"). A villain was an indentured base servant or "bond-man." His wainage was his contenement. The term originated from the Saxon wagna, or cart, used by villains to carry dung from the Lord's manor to his fields. 2 E. COKE, *supra* note 62, at \*28; see also 1 E. COKE, *supra* note 62, at \*189.

155. See 2 E. COKE, *supra* note 62, at \*136 (commenting on the Statute of Marlebridge, 52 Hen. 3, ch. 18 (1267), which limited the amercement power to certain courts); cf. Richard Godfrey's Case, 11 Co. 42, 43-44, 77 Eng. Rep. 1199, 1202 (1615); Beecher's Case, 8 Co. 58, 60, 77 Eng. Rep. 559, 565-66 (Ex. 1609); *infra* note 174.

156. See, e.g., Griesley's Case, 8 Co. 38, 40, 77 Eng. Rep. 530, 533-34 (Ex. 1609). The jury was of indeterminate size, two being enough. 1 A. FITZ-HERBERT, *supra* note 126, at 76; 2 F. POLLOCK & F. MAITLAND, *supra* note 105, at 513. The Magna Charta formally established what may have been a preexisting right to a jury assessment of the amercement. See *supra* notes 107-08, 153. The first Statute of Westminster, 3 Edw., ch. 6 (1275), clarified the right by making explicit that all men were entitled to a jury determination of the amercement. See 2 E. COKE, *supra* note 62, at \*169-70.

157. 2 F. POLLOCK & F. MAITLAND, *supra* note 105, at 513.

158. See *id.* The translation of the phrase is "in mercy," or at the mercy of the King.

deal with the offender in any fashion the crown desired. In fact, under the Saxon system of fixed *wites*, "there were offences which put life and limb, lands and goods, 'in the king's mercy.'"<sup>159</sup> The principal advantage of the amercement over the *wite*, however, was the ability to tailor the size of the amercement to the offense. It was for this reason that the Saxon system swiftly gave way to amercements.<sup>160</sup> Eventually, this hoary doctrine transformed into a new, more benign, rationale. By the seventeenth century, Lord Coke spoke of amercement as *misericordia*, explaining its meaning as that which "ought to be assessed mercifully."<sup>161</sup> Similarly, in *Beecher's Case*<sup>162</sup> the court indicated that "[a]mercement is in Latin called *misericordia*; and the cause thereof is, because by the common law (which is a law of mercy) no man ought to be amerced so much as he deserves, but less."<sup>163</sup> Thus, at the time of the Glorious Revolution, the amercement had been transformed from its harsh Saxon origins into a flexible, discretionary tool that was well bounded by old legal limitations.

## 2. Fines

The amercement and the fine had very similar functions. Because the Declaration of Rights and the eighth amendment explicitly deal with fines, it is important to understand the manner in which fines developed, and the extent to which the law distinguished fines from amercements. Fines evolved as an alternative to imprisonment.<sup>164</sup> While statutory crimes generally resulted in imprisonment for a definite period,<sup>165</sup> common-law crimes could result in imprisonment for an indefinite period of time.<sup>166</sup> This scheme was not quite as harsh as it sounds because the judge, who possessed the power to confine an offender indefinitely, also had the power to discharge him after the offender paid a fine to the king. The thirteenth-century judge could not impose a fine but

---

159. *Id.* (quoting the *Domesday Book*).

160. *Id.* at 514.

161. 1 E. COKE, *supra* note 62, at \*126.

162. 8 Co. 58, 77 Eng. Rep. 559 (Ex. 1609).

163. *Id.* at 60, 77 Eng. Rep. at 564.

164. Originally, imprisonment was not a punitive device but was used for detentive purposes or to encourage some desired conduct. 2 F. POLLOCK & F. MAITLAND, *supra* note 105, at 516. Gradually, the concept of punitive imprisonment appeared and, by Edward I's reign, became commonplace. *Id.* at 517.

165. See, e.g., Statute of Westminster I, 3 Edw., chs. 9, 13, 15, 20, 29, 31 & 32 (1275), all of which provide for imprisonment for a definite period for the specified offenses.

166. 2 F. POLLOCK & F. MAITLAND, *supra* note 105, at 517.

could bargain with the culprit by accepting payment, or security for payment, of a sum sufficient to settle the matter. Thus, the offender had made an end (*finem facere*) of the matter. "In theory the fine is a bilateral transaction, a bargain; it is not 'imposed,' it is 'made.'"<sup>167</sup> Maitland argued that a judge could not impose a fine because to do so would violate or evade the Magna Charta, since "an amercement should be affeered [assessed], not by royal justices, but by neighbours of the wrong-doer."<sup>168</sup> Maitland thus implicitly acknowledges the functional indistinguishability of the fine and amercement.<sup>169</sup>

By the seventeenth century the fine had lost its original character of bargain and was formally separated from the amercement.<sup>170</sup> Yet, in practice, as *Griesley's Case*<sup>171</sup> illustrates, the distinctions were much less clear. According to custom, a manorial court had chosen Kingston to serve as constable. Kingston refused and was "fined" five pounds for his refusal. Baily, the bailiff of Griesley, the lord of the manor, then distrained Kingston's cattle. Kingston brought an action in replevin to recover his cattle, and the validity of the "fine" was offered as a defense. To rebut the point, Kingston contended that the Magna Charta required that the fine be "affeered," or assessed, by a jury of his peers. The court denied the replevin, and upheld the validity of the fine, but the manner in which it did so suggests that the court accepted Kingston's argument that the Magna Charta applied with equal force to

---

167. *Id.* In this sense the fine is very similar to another old meaning given the term. Conveyancing was done by fine, meaning that once the bargain was struck and the conveyance made, there was an end, an irrevocable finish, to the matter. *Finis* sums up the concept. To Cowel, Fine "Hath divers Applications in the Common Law, sometimes being used for a formal or ceremonious Conveyance of Lands or Tenements . . . sometimes an Amends, pecuniary Punishment or Recompence upon an Offence committed against the King and his Laws, or against the Lord of a Manor." J. COWEL, *supra* note 126; see also 1 E. COKE, *supra* note 62, at \*126; 1 A. FRITZ-HERBERT, *supra* note 126, at 97, 109, 146-47; W. RASTALL, *supra* note 126, at 225-26.

168. 2 F. POLLOCK & F. MAITLAND, *supra* note 105, at 517.

169. See *infra* notes 175-76 and accompanying text.

170. Lord Coke described the fine as "a pecuniary punishment for an offence, or a contempt committed against the King . . . And it is called *finis*, because it is an end for that offense." 1 E. COKE, *supra* note 62, at \*126. He then explained its manner of differing from an amercement. *Id.* Similar distinctions were observed in the reported cases of the time. *Beecher's Case*, 8 Co. 58, 77 Eng. Rep. 559 (Ex. 1609), provides voluminous examples of conduct meriting fine or amercement. A deceit on the court, for example, was fineable, but deceit of a party was only amerceable. Sometimes the distinctions were purely jurisdictional. Since only courts of record could levy fines, if a fineable matter was pursued in a court not of record only an amercement could be levied. *Id.*

171. 8 Co. 38, 77 Eng. Rep. 530 (Ex. 1609).

finer and amercements. The court drew a distinction "between amerciaments in actions real or personal. . .or upon a presentment or indictment, as for not repairing a bridge, or a highway."<sup>172</sup> Only one's peers could assess amercement for the former conduct, but "the Justices or Judges of the Court where the Cause depends" could assess "amercements of any who hath administration of justice, or of any officer or minister who hath execution of the King's Writs."<sup>173</sup> Because Kingston's misconduct consisted of his contumacious refusal to serve as constable, his offense was seen to be in the administration of justice, and therefore, the court-imposed amercement or fine was thus proper.

*Griesley's Case* depicts both the confusion concerning the nomenclature (Kingston was "fined," but the court's analysis was entirely in terms of amercement) as well as the conceptual differences between fines and amercements.<sup>174</sup> By rejecting the applicability of the Magna Charta to amercements for official misconduct, the court in *Griesley's Case* laid a solid footing for legal developments vastly more troubling to the convention committee-men who crafted the Declaration of Rights.

By the Glorious Revolution, James II's judges had determined that the Magna Charta afforded no protection whatsoever from fines, whether imposed for official misconduct or otherwise.<sup>175</sup> Thus, the political turmoil of the entire seventeenth century resulted in a wrenching exaggeration of the unfettered power of judges to impose financial penalties. The exceptions to the Magna Charta, so assiduously explained in *Griesley's Case*, had, following *John Hampden's Case*,<sup>176</sup> essentially swallowed the Great Char-

172. *Id.* at 40, 77 Eng. Rep. at 533-34.

173. *Id.* at 40, 77 Eng. Rep. at 534.

174. Richard Godfrey's Case, 11 Co. 42, 77 Eng. Rep. 1199 (1615), provides further contemporaneous illustration of the conceptual confusion. Godfrey contested the validity of a fine, and, in discussing the issues raised, the court relied almost exclusively on the law of amercements. In resolving the validity of a court-imposed fine by reference to amercement principles, the court underscored the functional similarity of the processes. Moreover, the court acknowledged that fines were limited by principles almost identical to those applicable to amercements: "[T]he reasonableness of the fine shall be adjudged by the justices; and if it appears to them to be excessive, it is against law, and shall not bind." *Id.* at 44, 77 Eng. Rep. at 1202.

The court further illustrated the doctrinal confusion by admitting that jurisdictional limitations made the whole business of fines, amercements, and imprisonment a crazy quilt: "Some [courts] may imprison and not fine . . . [some] may imprison but not fine. . . . Some Courts can neither imprison, fine, nor amerce. . . . And some Courts may fine, imprison, and amerce. . . ." *Id.* at 43-44, 77 Eng. Rep. at 1202.

175. See *John Hampden's Case*, 9 STATE TRIALS, *supra* note 63, at 1125 (1684).

176. *Id.*



ter's limiting principles. It was this unwelcome flexing of royal authority that undoubtedly was the immediate political target of article ten of the Declaration of Rights. The convention's lawyers, familiar with this legal history, sought to observe and restore limitations on financial penalties imposed during the judicial process, whether by juries via amercements or by judges via fines. Thus, while fines and amercements have separate historical antecedents, they share common functions and, in the tinderbox of seventeenth-century England, were inevitably linked as the legal system was engulfed in the political struggles of the century.

### 3. The Displacement of Amercements By Costs, Fines, Punitive Damages, and Judicial Sanctions

The amercement fell into disuse during the seventeenth and eighteenth centuries. As the amercement became obsolete, a variety of other devices assumed its functions. For instance, the fine replaced the amercement as a means by which to punish crimes. In addition, several devices replaced the amercement in its more complex function as an all-purpose financial sanction in civil litigation.

The practice of awarding costs to the prevailing party had long been a fixture of chancery jurisdiction,<sup>177</sup> although the practice was only slowly woven into the fabric of the common law. While Blackstone asserted that "the common law did not professedly allow any [costs], [leaving] the amercement of the vanquished party [as] his only punishment,"<sup>178</sup> this was not strictly true. Plaintiffs occasionally recovered, under the rubric of damages, compensation sufficient to "cover the costs of litigation as well as all other harm that he had sustained."<sup>179</sup> Recovery of costs was more difficult for defendants because statutory authority was a necessary prerequisite to such recovery.<sup>180</sup> Such statutes were rare,<sup>181</sup> and it was not until a series of statutes ending in Queen Anne's reign<sup>182</sup> that defendants could recover "the same costs as the plaintiff would have had,

---

177. 4 W. HOLDSWORTH, *supra* note 63, at 536.

178. 3 W. BLACKSTONE, *supra* note 62, at \*399.

179. 2 F. POLLOCK & F. MAITLAND, *supra* note 105, at 597 (footnote omitted); *see also* 2 E. COKE, *supra* note 62, at \*288.

180. 2 F. POLLOCK & F. MAITLAND, *supra* note 105, at 597.

181. The first such statute was the Statute of Marlebridge, 52 Hen. 3, ch. 6 (1267), discussed at 2 E. COKE, *supra* note 62, at \*109-12. Maitland thought such statutes were "novelties." 2 F. POLLOCK & F. MAITLAND, *supra* note 105, at 597.

182. The enactments include 23 Hen. 8, ch. 15 (1532); 4 Jac., ch. 3 (1607); 8 & 9 Will. 8, ch. 11 (1702); and 4 & 5 Anne, ch. 16 (1707).

in case he had recovered."<sup>183</sup> Although presumably the amercement was thought to be sufficient punishment of the losing litigant, "a payment to the king or lord was not much satisfaction to the successful party; and so, side by side with the amercement, we get the gradual growth of the rule that the vanquished party must pay costs."<sup>184</sup> In 1765 Blackstone wrote that "the amercement is disused, but the form still continues."<sup>185</sup> Thus, the practice of awarding costs to a successful civil litigant was linked by time and function with the disappearance of the amercement.

A similar linkage is evident in the development of punitive damages. At a time when amercements were well established, an action seeking recovery of even compensatory damages was virtually unknown.<sup>186</sup> Although during the twelfth century the notion of recovering damages was embryonic,<sup>187</sup> a century later several statutes were enacted that broadened considerably the circumstances in which damages could be obtained in an action to recover land.<sup>188</sup> Even without statutory authority, however, common-law judges began to permit compensatory damages in proceedings upon more prosaic writs.<sup>189</sup>

With the acceptance of compensatory damages as a legitimate remedy, English legislators began to experiment with the engrafting of a penal function onto the law of damages. "[U]nder Edward I, a favourite device of [English] legislators [was] that of giving double or treble damages to 'the party grieved.'"<sup>190</sup> Thus, in the first Statute of Westminster<sup>191</sup> double and treble damages were dispensed liberally. But penal damages appeared to be entirely a statutory matter; no mention was made of any common-law mechanism to punish a civil litigant by forcing him to pay his adversary

183. 3 W. BLACKSTONE, *supra* note 62, at \*399.

184. 4 W. HOLDSWORTH, *supra* note 63, at 536.

185. 3 W. BLACKSTONE, *supra* note 62, at \*376.

186. 2 F. POLLOCK & F. MAITLAND, *supra* note 105, at 523.

187. The idea apparently began with the assize of novel disseisin, in which the dispossessed freeholder was permitted to obtain recovery of his tenements and money to compensate him for the dispossession. See GLANVILL, *supra* note 107, at 170 (noting that "the party who has proved disseisin can require that the sheriff he ordered to see that the chattels and fruits . . . are restored to him").

188. The Statute of Gloucester, 6 Edw., ch. 1 (1278), was a general expansion of the power to award damages in novel disseisin. See 2 E. COKE, *supra* note 62, at \*284-90. Previous statutes had permitted more narrow expansions. See Statute of Merton, 20 Hen. 3, ch. 1 (1235) (dowagers, a favored class, given the right to recover damages); Statute of Marlebridge, 52 Hen. 3, ch. 16 (1267).

189. 2 F. POLLOCK & F. MAITLAND, *supra* note 105, at 524.

190. *Id.* at 522.

191. 3 Edw. (1275).

a financial penalty. Thus, in the heyday of the amercement, penal damages were in their infancy, limited to instances of statutory largesse.

It was only after the prevalence of the amercement had diminished that the cases began to report the award of punitive damages as a common-law entitlement. *Wilkes v. Wood*,<sup>192</sup> decided in 1763, provides a vivid illustration of this development. Because the case was inextricably entwined with the charged political situation of George III's early years on the throne, a background sketch is necessary. When George III became king in 1760, the Seven Years' War was four years old, and public discontent with the King's ministers was growing. By 1763, when the peace treaty with France was concluded, discontent with Grenville and Bute, two of George's key ministers, became vocal. Particularly pointed was the April 23, 1763, edition of *The North Briton*, which styled George's ministers as tools of despotism and corruption. The edition also hinted unsubtly that the peace treaty was "dishonestly negotiated, and that the King was a party to it."<sup>193</sup> Predictably, George was sufficiently unhappy with the charges that his ministers promptly issued a general warrant for the arrest of those responsible. Since the identities of those individuals were unknown, a general warrant was employed to search numerous homes in hopes of finding something incriminating. In accordance with the warrant English authorities searched the home of Wilkes, a member of Parliament and noisy critic of George's ministers. Wilkes was promptly convicted of seditious libel,<sup>194</sup> but he refused to let matters rest. Instead, Wilkes brought an action in trespass against Wood, one of the King's ministers who entered and searched Wilkes' home. Wilkes contended that the general warrant was unlawful and sought punitive damages.<sup>195</sup> Wood's counsel, the Solicitor General, responded that "[t]his was the first time he ever knew a private action represented as the cause of all the good people of England."<sup>196</sup> But in charging the jury, the Lord Chief Justice was unequivocal:

Notwithstanding what Mr. Solicitor-General has said, I have formerly deliv-

---

192. Lofft. 1, 98 Eng. Rep. 489 (1763).

193. W. CHURCHILL, *THE AGE OF REVOLUTION* 165 (1957).

194. For a discussion of the English law of seditious libel, see Mayton, *Seditious Libel and the Lost Guarantee of a Freedom of Expression*, 84 COLUM. L. REV. 91 (1984).

195. Wilkes' counsel asked that the jury's "resentment against such proceedings . . . be expressed by large and exemplary damages." *Wilkes*, Lofft. at 3, 98 Eng. Rep. at 490.

196. *Id.* at 8, 98 Eng. Rep. at 493.

ered it as my opinion on another occasion, and I still continue of the same mind, that a jury have it in their power to give damages for more than the injury received. Damages are designed not only as a satisfaction to the injured person, but likewise as a punishment to the guilty, to deter from any such proceeding for the future, and as a proof of the detestation of the jury to the action itself.<sup>197</sup>

After receiving this instruction, the jury had little difficulty awarding Wilkes 1000 pounds, approximately twice Wilkes' claimed actual damages and a very considerable sum. Wilkes' political travails continued, but the principle of punitive damages in a common-law civil action was firmly established.<sup>198</sup>

Common-law punitive damages emerged at a time when the amercement existed in form only and enjoyed no use in practice. If amercements were still a viable part of the common law in 1763, the amercement could have been effectively employed to punish Woods. Perhaps because Woods was an agent of the crown, and the wrongdoing the court sought to punish was really state excess, the amercement was quite inappropriate. In any case, the jury charge indicates that this was not the first instance in which a civil litigant recovered punitive damages or, as the Chief Justice stated, "damages for more than the injury received."<sup>199</sup> Moreover, the function of amercements, namely to sanction those guilty of offenses not criminal but worthy of punishment, is clearly replicated in the awarding of punitive damages. Although the link is not drawn by the participants in *Wilkes*, the functional connection is evident.

Statutory punitive damages evolved during the period when amercements were prevalent,<sup>200</sup> a condition that casts some doubt on a claim that punitive damages are derived purely from amercements. Yet, there is a gap of 500 years between the first Statute of Westminster, when statutory entitlements to punitive damages became more generalized, and the award of punitive damages as a common-law entitlement without the imprimatur of legislative action.<sup>201</sup> If punitive damages in common-law civil actions were an outgrowth of Edward I's statutory scheme, it would seem likely that a pattern of continued extension of the right to punitive damages would manifest itself over the intervening five centuries. But

---

197. *Id.* at 18-19, 98 Eng. Rep. at 498-99.

198. For a discussion of the Wilkes affair, see W. CHURCHILL, *supra* note 193, at 165-69.

199. *Wilkes*, Lofft. at 18, 98 Eng. Rep. at 498.

200. See *supra* text accompanying notes 186-91.

201. See *supra* notes 191-92 and accompanying text.

that does not seem to be the case. Instead, punitive damages suddenly reasserted themselves in the mid-eighteenth century. Several events may help to explain this curiosity. First, and most important, is the restructuring of royal authority and private rights accomplished by the Glorious Revolution. Claiming only to restate old law, the convention instead broadened private claims against state authority. This, in turn, undoubtedly accelerated the demise of the amercement, since it was a particularly obvious tool of royal authority. But because the functions performed by the amercement had become so ingrained in the English legal tradition, these functions were certain to be performed by other mechanisms. The eighteenth century became the point in time when these developments coalesced. The expansion of private rights, coupled with the functional necessity of punishing civil miscreants, created the logical opportunity for punitive damages to slip comfortably into the common-law system.

The argument that judicial sanctions are similarly related to amercements is more functional because it is harder to observe an eighteenth-century development of the practice at the time the amercement was dying. More a phenomenon of modern times, judicial sanctions are a reaction to abuses and incompetence as the litigation process and machinery has mushroomed. Nevertheless, amercements commonly were employed to deal with conduct thought to be contumacious of the judicial process. Thus, civil litigants were regularly amerced for improper essoin,<sup>202</sup> failure to admit facts later proven,<sup>203</sup> failure to respond to writs or other forms of process,<sup>204</sup> and other procedural deficiencies resulting from a litigant's error.<sup>205</sup> In addition to litigants, other participants in the judicial process were also subject to amercement; jurors, officers of the court, and those charged with the administration of justice were all candidates for amercement.<sup>206</sup> Moreover, persons responsi-

---

202. An essoin was an extension of time for defendants to appear and plead their cases. It was granted for a number of reasons; for example, sickness or absence from the jurisdiction due to service in the crown's military. See J. COWEL, *supra* note 126 (defining the term "essoin"). Glanvill deals at length with the various grounds for essoin. GLANVILL, *supra* note 107, at 5-20; see also *Le Gras v. Bailiff of Bishop of Winchester*, Y.B. Mich., 10 Edw. 2, pl. 4 (C.P. 1316), reprinted in 52 SELDEN SOCIETY 3 (1934) (granting relief for an excessive amercement resulting from an improper essoin).

203. *Beecher's Case*, 8 Co. 58, 60, 77 Eng. Rep. 559, 564 (Ex. 1609).

204. *Id.* at 61, 77 Eng. Rep. at 566.

205. *Id.*

206. *Griesley's Case*, 8 Co. 38, 77 Eng. Rep. 530 (Ex. 1609); *Vaughan's Case*, 5 Co. 49, 77 Eng. Rep. 128 (1598).

ble for the administration of justice were not entitled to the benefit of jury assessment of the amercement.<sup>207</sup> This aspect of amercement procedure closely resembles judicially imposed sanctions on attorneys.<sup>208</sup>

Of course, amercements were payable to the crown; sanctions more often are awarded to an adversary party.<sup>209</sup> In that respect, the evolution from amercements to sanctions is similar to the development of punitive damages. In both instances, the source of the claim against the culpable litigant or attorney has shifted from the state to a private party: the adversary. The state remains as the agent through which the financial penalty is assessed, and the penalties themselves are justified in terms of their believed furtherance of some desirable public policy. Thus, the most striking pattern is the privatization of the amercement. What started as an unflinching assertion of state power has become a blend of public purpose, state power, and private benefit. Perceiving desirable policies, the state permits private parties to seek financial penalties, which are thought to alter private behavior to conform with this public policy, and enforces the private benefits so obtained. Functionally, little has changed. From the standpoint of the party amerced, it does not matter whether the funds go to the state or a private adversary. Of course, if the state receives the proceeds of the penalties, at least the miscreant would reap some minuscule benefit by augmenting the public fisc. In addition, because the penalty is imposed in order to advance some public purpose, it seems inconsistent that a private party should reap the financial windfall inherent in any form of noncompensatory recovery.<sup>210</sup>

#### IV. PUNITIVE DAMAGES AS PRIVATE FINES

The accepted justification for permitting recovery of punitive damages is that the practice operates to deter egregiously culpable behavior. In other words, intentionally bad actors, or those willfully heedless of others' welfare, ought to be punished financially

---

207. See *Griesley's Case*, 8 Co. 38, 77 Eng. Rep. 530 (Ex. 1609).

208. See, e.g., Fed. R. Civ. P. 11, 37(b); 28 U.S.C. § 1927 (Supp. V 1982). Courts also possess inherent power to impose financial sanctions. See *Roadway Express, Inc. v. Piper*, 447 U.S. 752 (1980).

209. See, e.g., 28 U.S.C. § 1927 (Supp. V 1982) (providing that "[a]ny attorney . . . who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses and attorneys' fees reasonably incurred because of such conduct"); see also Fed. R. Civ. P. 11, 37(b).

210. See *infra* text accompanying note 214.

in order to deter those who might otherwise be inclined to emulate them. Whatever the merits of this deterrence argument, it offers absolutely no justification for the private recovery of these financial punishments, nor does it address the issue of legal limitations upon the size of such punishments.

Since the purpose of punitive damages is to punish the defendant for his acts, and not to redress some injury done to the plaintiff, it is anomalous to permit private recovery of the punishment. The theoretical justification for the punishment suggests that punitive damages ought to be paid to the state and not a private party. Justice William Rehnquist advanced that exact theory in his dissent in *Smith v. Wade*.<sup>211</sup> This theory garners additional support from the observation in *Gertz v. Robert Welch, Inc.*<sup>212</sup> that punitive damages "are private fines levied by civil juries."<sup>213</sup> The courts give jurors wide discretion to assess such fines, so long as jurors determine the existence of the requisite culpable conduct and the ultimate award is in some way reasonably related to the injury or the culpable conduct.<sup>214</sup> This rule is, in one way, linked to old practices concerning amercements. While the size of an amercement was within jury discretion, limited by the Magna Charta and the review available under the *miser cordia* writ, the amercement was expressly intended only to punish wrongful conduct. Indeed, amercements could be and were assessed in the absence of any private injury as they were linked solely to the heinousness of the offense. Translated into modern practice, the analogous rule would be that the size of punitive damages relates only to the culpability of the defendant's behavior and not the extent of the private plaintiff's injury. But in cases of purely financial injury, the heinousness of the defendant's behavior is measured principally by the extent of the plaintiff's injury. For example, is a penalty of 3.5 million dollars excessive if an insurer wrongfully and knowingly denies a single 1500 dollar claim?<sup>215</sup> If the same insurer

---

211. 461 U.S. 30, 59 (1983) (Rehnquist, J., dissenting).

212. 418 U.S. 323 (1974).

213. *Id.* at 350. At least one state has adopted this principle. Georgia requires that 75% of punitive damages imposed in product liability actions be paid directly to the state. GA. CODE ANN. § 105-2002.1(e)(1), (2) (Supp. 1987).

214. In *Gertz* Justice Powell observed: "[J]ury discretion over the amounts [of punitive damages] awarded is limited only by the gentle rule that they not be excessive. Consequently, juries assess punitive damages in wholly unpredictable amounts bearing no necessary relation to the actual harm caused." 418 U.S. at 350. Excessive, in this context, is a state common-law term of elastic dimensions.

215. Similar facts were presented in *Aetna Life Insurance Co. v. Lavoie*, 106 S. Ct.

adopts a knowing practice of deliberately denying valid claims of 1500 dollars or less, on the theory that it is economically advantageous for it to do so, might a 3.5 million dollar penalty be moderate? If so, the difference must surely lie in the widespread, and aggregately larger, financial injury created by the latter practice.

Implicit in this analysis is the assumption that the size of punitive damages is subject to constitutional limitations by means of the excessive fines clause of the eighth amendment. In addition to the historical origins of the excessive fines clause, other factors exist to support this assumption. For instance, employment of the governmentally created judicial apparatus is sufficient involvement of the government to counter any argument that the excessive fines clause does not apply to punitive damages because the government is not imposing the fine.<sup>216</sup> Moreover, in an historical context, the gradual privatization of the amercement, from royal sanction to private civil fine, firmly supports this conclusion.<sup>217</sup> Thus, from a functional and historical perspective, the preferable conclusion seems to be that punitive damages, costs, and judicial sanctions are all financial penalties contemplated by the excessive fines clause.

In order to apply to state court judgments, however, the excessive fines clause must be incorporated into the due process clause of the fourteenth amendment. In this regard, the Supreme Court

---

1580 (1986). The Court avoided the excessive fines question and remanded the action to the Alabama Supreme Court on other grounds. The issue of whether the excessive fines clause limits the imposition of punitive damages is again before the Supreme Court. See *Bankers Life & Casualty Co. v. Crenshaw*, 483 So. 2d 254 (Miss. 1985), *prob. juris. noted*, 107 S. Ct. 1367 (1987). A petition for certiorari was dismissed in another case raising this issue. See *Allstate Ins. Co. v. Hawkins*, 56 U.S.L.W. 3226, No. 87-40 (U.S. Oct. 5, 1987). Another appeal posing the issue was carried over into the October 1987 term. See *Mobile Dodge, Inc. v. Alford*, 55 U.S.L.W. 309, No. 86-107 (U.S. Aug. 12, 1986) (appeal filed July 24, 1986); 56 U.S.L.W. 3025, No. 86-107 (U.S. July 28, 1987).

216. In a different context, at least four Justices (and possibly more) were willing to opine that a "creditor's invocation of a State's postjudgment collection procedures constitutes action under color of state law within the meaning of 42 U.S.C. § 1983." *Pennzoil Co. v. Texaco, Inc.*, 107 S. Ct. 1519, 1530 (1987) (Brennan, J., concurring). The imposition and collection of punitive damages by state machinery seems even more integrally connected with state action.

217. When Blackstone wrote his *Commentaries*, the amercement was dead in practice, but observed in form. See *supra* note 185. Punitive damages, however, had not then acquired a comfortable, and recognized, niche in the common law. See *supra* text accompanying notes 190-99. Writing squarely in the middle of this cusp, Blackstone described numerous instances in which a successful private civil suit for damages would also obligate the private defendant to pay a fine to the crown. In general, a civil wrong accompanied by force and violence, such as battery or false imprisonment, would trigger an obligation to pay a fine to the king. 3 W. BLACKSTONE, *supra* note 62, at \*118, \*138; see also *id.* at \*179, \*188, \*402 (dealing with violent repossession or ouster and juror attain).



has held that the cruel and unusual punishments clause of the eighth amendment is so incorporated;<sup>218</sup> therefore, it seems a small enough, and a logical enough, extension to incorporate the excessive fines clause into the due process clause of the fourteenth amendment.

Even if the incorporation doctrine is rejected as the vehicle for imposing constitutional limits on state court awarded punitive damages, there remains another, unused device to reach the same result. It has been argued that the ninth amendment<sup>219</sup> binds the states and compels them to enforce substantive positive rights in existence at the time of the Constitution's adoption.<sup>220</sup> This alternative theory clearly supports a conclusion that the ninth amendment implicitly imported into the Constitution the common-law protections against excessive fines, amercements, and like financial penalties.<sup>221</sup> Whatever the mechanism, for any constitutional limitation upon punitive damages to be meaningful, the states, as well as the federal government, must be subject to those limits.

It can be argued that since state common law imposes limits upon punitive damages, a constitutional rule is not necessary and will only add to the Supreme Court's already burdened docket. Yet, if the contextual evidence plainly suggests that the right exists, it is improper to fail to enforce it on the grounds of inconvenience or unimportance. To do so would be to mock the reminder of *Marbury v. Madison*<sup>222</sup> that the Court must enforce judicially discoverable principles of the Constitution.<sup>223</sup>

Performing the duty of enforcing constitutional principles need not result in intolerable burdens upon the courts' dockets. State courts are well equipped to enforce constitutional guarantees<sup>224</sup> and are bound by the supremacy clause<sup>225</sup> to observe and

---

218. *Robinson v. California*, 370 U.S. 660 (1962).

219. "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people." U.S. CONST. amend. IX.

220. Massey, *Federalism and Fundamental Rights: The Ninth Amendment*, 38 *HASTINGS L.J.* 305 (1987).

221. There is little room to quarrel over whether these common-law protections were part of colonial law at the time of American independence. That generation of Americans enthusiastically endorsed and adopted the English common law. See M. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW, 1780-1860*, at 4-9 (1977); see also J. GOEBEL, *ANTECEDENTS AND BEGINNINGS TO 1801*, at 229-30 (1971).

222. 5 U.S. (1 Cranch) 137 (1803).

223. *Id.* at 166-67, 177-78.

224. *Cf. Brown v. Gerdes*, 321 U.S. 178, 189 (1944) (Frankfurter, J., concurring) (federal rights may be vindicated in a state forum unless Congress has conferred exclusive jurisdiction upon federal courts); *THE FEDERALIST* No. 82 (A. Hamilton) (6th ed. 1847).

enforce such rights. Thus, much of the litigation concerning the claimed constitutional excessiveness of any given punitive damage award is likely to remain in the state court systems. While it is possible that an increase of certiorari petitions to the Supreme Court may result, the Court is likely to dismiss routinely such petitions. Once the litigating bar understands what is constitutionally excessive, it is likely that futile petitions seeking certiorari will diminish.

The harder task would be to determine, in some reasonably certain yet principled manner, what characteristics of an award of punitive damages, costs, or sanctions make it excessive. Excessive costs present the easiest case. Costs usually are awarded by statute<sup>226</sup> and any material deviation is both statutory error and, given its lack of authority, presumptively excessive.<sup>227</sup> Punitive damages present an intermediate case. An award of two to three times actual damages might be thought presumptively within the constitutional limits, inasmuch as the practice of double or treble damages has a historical pedigree.<sup>228</sup> Though the historical practices surrounding amercement suggest that larger disparities might be justified in particularly heinous circumstances,<sup>229</sup> it would be essential to define, with some particularity, the triggers for such disproportionately large awards. Perhaps such an award is constitutionally permissible if the act in question can reasonably be determined to have affected adversely many people not represented in the action, or is part of a pattern or practice that affects adversely many strangers to the litigation and is committed with a particularly cynical intent; one calculated to injure or to place the interests of the wrongdoer ahead of others who he knows his deliberate self-enrichment is likely to injure. Other formulations of a rule are possible and may serve better than this tentative suggestion; but some such rule is essential, both to dampen the desire to test every punitive damages award and to clarify the kind of actions that warrant substantial private fines.

---

225. "This Constitution . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. CONST. art. VI, cl. 2.

226. See, e.g., CAL. CIV. PROC. CODE §§ 1021-1036 (West Supp. 1987); FED. R. CIV. P. 54(d). But see *Ex parte Peterson*, 253 U.S. 300 (1920); Payne, *Costs in Common Law Actions in the Federal Courts*, 21 VA. L. REV. 397 (1935).

227. The authors of the English Declaration of Rights were certain that any fine not in accord with law was presumptively excessive. See *supra* text accompanying notes 116-24.

228. See *supra* text accompanying notes 190-91.

229. See *supra* notes 153-54 and accompanying text.

In any case, the excessive fines clause ought to incorporate the rule, stemming from the Magna Charta, that no punitive damages award can be so large as to ruin the defendant financially.<sup>230</sup> Application of this ancient doctrine might have some surprising results. A homeless person with only the proverbial clothing on his back would escape imposition of even the most modest of financial penalties.<sup>231</sup> And Texaco, in its epic struggle with Pennzoil,<sup>232</sup> would be unable to claim that punitive damages of one *billion* dollars are excessive.<sup>233</sup> These are the extreme cases. Between them lie a wide range of cases that likely would be resolved by a straightforward application of a limit of double or treble damages. Such a result would provide a reasonably certain limitation and still operate to serve the perceived goal of deterring abusive conduct.

## V. CONCLUSION

Consideration of the excessive fines clause has been clouded by the cruel and unusual punishments clause. Litigation of the punishments issue has skewed constitutional thinking about the entire eighth amendment toward an undue preoccupation with the criminal process. A fresh and critical examination of its historical antecedents indicates that the scope of the excessive fines clause differs from that of the punishments clause. The authors of the eighth amendment paid scant attention to the scope of the excessive fines clause but merely adopted it from the Virginia Declaration of Rights. The clause in the Virginia Declaration was copied expressly from the English Declaration of Rights of 1689 and was placed in the Virginia Declaration as part of a broader effort of revolutionary colonials to claim all the historical rights of Englishmen. The Declaration of 1689 was a momentous event in English constitutional history because it asserted new rights against the

---

230. See *supra* note 154.

231. Of course, no practicing lawyer with bills to pay will waste time attempting to recover a significant punitive damage award from such a person, quite apart from the wisdom of attempting to obtain compensatory damages.

232. See generally T. PETZINGER, OIL & HONOR: THE TEXACO-PENNZOIL WARS (1987); see also *Pennzoil Co. v. Texaco, Inc.*, 107 S. Ct. 1519 (1987) (holding that the abstention doctrine outlined in *Younger v. Harris*, 401 U.S. 37 (1971), bars federal courts from enjoining the Texas appeals bond procedures).

233. Under this analysis, the original award of three billion dollars in punitive damages would not be considered excessive. Because Texaco has opted for bankruptcy, it might be argued that the entire judgment is so huge that it threatens Texaco's existence. While this may be true, it is the compensatory portion that makes the threat severe. No argument is made here that the excessive fines clause is intended to curb compensatory damage awards.

crown, firmly restated old rights, and laid the foundation of modern parliamentary democracy.

One of the old rights restated in the English Declaration of Rights was the protection against excessive fines. This right included more than protection from criminal fines; it also provided a great deal of protection with respect to civil fines. The Declaration's authors saw no need to state explicitly the scope of these protections because, at the time, the term "fine" was used to describe both criminal fines and the dying civil "fine" of amercement. It is thus highly likely that the excessive fines clause, born in 1689 during the Glorious Revolution, was intended to sweep broadly and impose limitations upon all manner of fines, civil or criminal. Because punitive damages did not become part of the common law until three-quarters of a century later, and then only in a tentative fashion, colonial Americans did not perceive a need to state explicitly that the excessive fines clause covered private as well as public fines. As a result, the applicability of the excessive fines clause to punitive damages has been overlooked.

Subjecting punitive damage awards to such constitutional scrutiny invites docket congestion and requires articulation of a principled definition of the term "excessive." Docket congestion will likely disappear with articulation of a clear definition that is applied consistently. One proposed standard is to presume that punitive damages of no more than three times actual damages are not excessive, and to evaluate more disproportionate awards by considering the bases upon which punitive damages are premised: the extent of the harm caused to both the litigants and society, and the cynicism of the wrongful action.

This Article's conclusions rely heavily upon the historical origins of the excessive fines clause, both in its original formulation in the 1689 Declaration of Rights and in the much older legal traditions that the excessive fines clause sought to express. Yet, this Article makes no contention that the Constitution ought to be interpreted solely by reference to historical sources or context.<sup>234</sup> While that effort weaves a useful background into the constitutional tapestry, the meaning of the excessive fines clause is informed as much by the functional purposes sought to be performed by punitive damages. Excessive private fines imposed and collected through an elaborate governmental apparatus are no less opprobrious by virtue of their ostensibly private character. This combina-

---

234. See *supra* note 40.

tion of history and function serves to illuminate the broad scope of the excessive fines clause.