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# Reviving the Excessive Fines Clause

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*Millions of American adults and children struggle with debt stemming from economic sanctions issued by the criminal and juvenile courts. For those unable to pay, the consequences—including incarceration, exclusion from public benefits, and persistent poverty—can be draconian and perpetual. The Supreme Court has nevertheless concluded that many of these concerns lie outside the scope of the Eighth Amendment's Excessive Fines Clause. In interpreting the Clause, the Court relied upon a limited set of historical sources to restrict "fines" to sanctions that are punitive in nature and paid exclusively to the government, and to define "excessive" as referring to—either exclusively or primarily—the proportionality between the crime's gravity and the amount of the fine.*

*This Article takes the Court at its word by assuming history is constitutionally relevant, but it challenges the Court's limited use of history by providing the first detailed analysis of colonial and early American statutory and court records regarding fines. This robust historical analysis belies the Court's use of history to announce*



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*historical "truths" to limit the scope of the Clause, by showing significant evidence that contradicts those limitations. The Article uses the historical record to identify questions regarding the Clause's meaning, to assess the quality of the historical evidence suggesting an answer to such questions, and then to consider that evidence—according to its value—within a debate that incorporates contemporary understandings of just punishment. Under the resulting interpretation, the historical evidence articulated in this Article would support an understanding of a "fine" as a deprivation of anything of economic value in response to a public offense. "Excessive," in turn, would be assessed through a broad understanding of proportionality that takes account of both offense and offender characteristics, as well as the effect of the fine on the individual. The proposed interpretation more faithfully reflects the history and its limitations, and broadens the Clause's scope to provide greater individual protections.*

## INTRODUCTION

> *Excessive bail shall not be required,* ***nor excessive fines imposed****, nor cruel and unusual punishments inflicted.*
>
> Eighth Amendment, United States Constitution

Fourteen-year-old Natasha Tucker and a friend got into a fight over an iPod.[1] Natasha threw a rock through the friend's living room window during the squabble. In response, the State of Washington charged Natasha with two felony offenses: residential burglary and malicious mischief. Natasha agreed to plead guilty in exchange for a deferred disposition—a suspended sentence through which a juvenile agrees to participate in community supervision for a period of time that, if successfully completed, results in a dismissal of the action without an ultimate finding of delinquency.[2] The court ordered the following terms for her supervision: "40 hours of community service, counseling, mandatory school attendance, residency requirements and curfew, a prohibition on drugs and alcohol, and restitution in the amount of $2,630.40, payable at a minimum rate of $10.00 per month."[3]

Over the next two years, Natasha complied in full with all of the nonmonetary terms of her supervision. During that time, her mother, the sole breadwinner for the family, received a cut in her hours at work. As a result, Natasha's mother had difficulty paying for the family's basic needs and was unable to contribute much, if anything, toward her daughter's restitution sanction. For part of the supervision period, Natasha held a part-time job and paid $235 toward the debt, "just $5 shy of the amount owed at the minimum rate of $10 per month."[4] Because Natasha was unable to pay for the entirety of the restitution, however, the State moved to revoke Natasha's supervision. The court revoked her deferred sentence and found her delinquent.[5]

Across the country, Nivardo Carela-Tolentino, a thirty-six-year-old husband and father of five living in Pennsylvania, was arrested with 188 grams of cocaine.[6] A first-time offender with only an eighth-grade education, Mr. Carela-Tolentino admitted to the court that he suffered from a drug addiction and testified that he had purchased the cocaine to share with one other person. He ultimately pled guilty to a drug offense. The relevant sentencing statute prevented the trial court from considering the specifics of his situation or how

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1. Unless otherwise noted, all facts detailed here regarding Natasha's case are available at *State v. N.S.T.*, 232 P.3d 584, 586 (Wash. Ct. App. 2010).

2. WASH. REV. CODE ANN. § 13.40.127 (West 2004).

3. *N.S.T.*, 232 P.3d at 586.

4. *Id.*

5. Natasha's delinquency was later reversed due to a technicality—the State's failure to timely request the revocation. *See* State v. Tucker, 246 P.3d 1275, 1275–76 (Wash. 2011).

6. Unless otherwise noted, all facts detailed here regarding Mr. Carela-Tolentino's case are available at *Commonwealth v. Carela-Tolentino*, 48 A.3d 1221 (Pa. 2012) or Brief for Appellant at 8–9, *Commonwealth v. Carela-Tolentino*, 48 A.3d 1221 (Pa. 2012) (No. 41 MAL 2011).

an economic sanction might affect his family's well-being. The trial court assessed the mandatory minimum fine required under Pennsylvania law: $25,000.

Nearly 250 years before these courts imposed economic sanctions on Natasha and Mr. Carela-Tolentino, the revered common law theorist William Blackstone discussed the right to be protected against the imposition of excessive fines, explaining that when assessing fines, courts must consider "[t]he age, education, and character of the offender; the repetition (or otherwise) of the offence; the time, the place, the company wherein it was committed; all these, and a thousand other incidents may aggravate or extenuate the crime."[7]

Yet neither court considered even one of these factors—not Natasha's age or her family's inability to pay the restitution sanction, not Mr. Carela-Tolentino's addiction, his lack of a criminal record, or his need to support his children—in holding them accountable for their fines. This is not to say that the courts were entirely blind to the predicament the fines created. At the hearing in which the Washington court revoked Natasha's suspended sentence, the juvenile court judge remarked:

> You did everything that you were asked to do with the exception of the financial obligations. So, you should feel proud of the fact that you completed those community service hours. . . . But, I am bound by the confines [of] the legislature. . . . I have no option but to revoke the deferred, okay?
>
> Somebody should go down and lobby Olympia [the seat of Washington's legislature] about this.[8]

And while the majority of Pennsylvania Supreme Court justices rejected in a per curiam order Mr. Carela-Tolentino's claim that given his circumstances a $25,000 mandatory minimum fine was excessive, Chief Justice Ronald D. Castille wrote in dissent:

> Put simply, mandatory minimums are automatic, indiscriminate, and blunt provisions that deny trial courts the ability to calibrate punishment to correspond to a defendant's actual criminal conduct and circumstances . . . . [T]hese types of sentencing provisions transform judges into "mere automatons" permitted only to mechanically impose standardized and arbitrary sentences . . . .[9]

Justice Castille's dissent is noteworthy because, unlike the mass of judicial and academic commentary on the Eighth Amendment dominated by the death penalty and incarceration, he highlights the perplexing reality of financial

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7. 4 WILLIAM BLACKSTONE, COMMENTARIES *15–16.

8. *N.S.T.*, 232 P.3d at 586.

9. *Carela-Tolentino*, 48 A.3d at 1227 (quoting David M. Zlotnick, *The War Within the War on Crime: The Congressional Assault on Judicial Sentencing Discretion*, 57 SMU L. REV. 211, 212–15 (2004)).

punishment in the United States. Economic sanctions are insidious in part because they often are assessed with little to no attention paid to the defendant's circumstances, including the extraordinarily severe consequences that often result for individuals, their families, and society at large.

That we have moved so far from the Blackstonian commitment to considering evidence suggesting such sanctions may be abusive, to a criminal justice system in which judges feel unable or are unwilling to consider the consequences of assessing fines, is a development of great consequence. Natasha's and Mr. Carela-Tolentino's stories are far from unique. Courts have subjected millions of American adults and children to economic sanctions that, especially for those living in poverty, can have lifelong consequences.[10]

These conditions would seem to fall squarely within the constitutional prohibition on excessive fines; however, the current Excessive Fines doctrine suggests otherwise. That doctrine arises from a quartet of Supreme Court cases decided between 1989 and 1998.[11] The Court used a limited array of historical information emanating primarily from England to announce a cramped definition of the word "fine," reasoning that fines were limited to "payment to a sovereign as punishment for some offense."[12] Turning to the question of the meaning of "excess," the Court made only a halfhearted attempt to assess any historical materials before abandoning that methodology altogether, choosing instead to import the Cruel and Unusual Punishment Clause's gross disproportionality test into its Excessive Fines Clause analysis.[13]

When the Court took up the Clause's meaning, it may have focused on the English record due to the availability of such information in 1989.[14] Just two years earlier, Calvin R. Massey produced a seminal contribution to the understanding of the English experience of fines.[15] Massey examined the

10. One in forty-eight American adults—just under five million people—are currently on probation or parole. LAUREN E. GLAZE & THOMAS P. BONCZAR, BUREAU OF JUSTICE STATISTICS, PROBATION AND PAROLE IN THE UNITED STATES, 2010, at 1 (2011). Additionally, nearly 490,000 children are adjudicated delinquent each year, many of whom are ordered to participate in probation or parole. CRYSTAL KNOLL & MELISSA SICKMUND, DELINQUENCY CASES IN JUVENILE COURT, 2009, at 3 (2012). The majority of individuals charged with crimes or delinquencies are assessed economic sanctions. Alexes Harris, Heather Evans & Katherine Beckett, *Drawing Blood from Stones: Legal Debt and Social Inequality in Contemporary United States*, 115 AM. J. SOCIOLOGY 1753, 1785–86 (2010).

11. United States v. Bajakajian, 524 U.S. 321, 328–33 (1998); Austin v. United States, 509 U.S. 602, 618 (1993); Alexander v. United States, 509 U.S. 544, 558–59 (1993); Browning-Ferris v. Kelco, 492 U.S. 257, 275–76 (1989).

12. *Browning-Ferris*, 492 U.S. at 265.

13. *Bajakajian*, 524 U.S. at 334, 336; *see also infra* notes 213–27 and accompanying text.

14 Only a limited amount of historical data regarding the use of fines in the colonies and early American states was available at the time the Court took up its interpretation of the Clause. *See, e.g.*, LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW 36, 44 (3d ed. 2005) (noting the use during the colonial era of indentured servitude in lieu of fines where defendants were too poor to pay).

15. Calvin R. Massey, *The Excessive Fines Clause and Punitive Damages: Some Lessons from History*, 40 VAND. L. REV. 1233 (1987).

relationship between the American Clause and parallel language—"nor excessive fines imposed"—in the English Bill of Rights, as well as the English experience leading up to that prohibition.[16] Massey, along with other commentators, concluded that punitive damages—the penalty under consideration by the Court in 1989—would have been considered fines when the English Bill of Rights was formed.[17] Although the Court disagreed with the conclusions reached in the literature, it noted Massey and other commentators' works on the English understanding of fines.[18]

While the scope of the literature expanded after the four Excessive Fines Clause cases were decided,[19] the literature attending to the historical bases for the cases has remained concentrated on English practice and precedent.[20] While some of these works touch on the American experience,[21] to date the literature

16. *Id.* at 1240–69.

17. *See generally id.* at 1264–74; *see also* Gerald W. Boston, *Punitive Damages and the Eighth Amendment: Application of the Excessive Fines Clause*, 5 COOLEY L. REV. 667, 671–732 (1988); John Calvin Jeffries, Jr., *A Comment on the Constitutionality of Punitive Damages Under the Excessive Fines Clause of the Eighth Amendment*, 72 VA. L. REV. 139, 154–58 (1986); Note, *The Constitutionality of Punitive Damages Under the Excessive Fines Clause of the Eighth Amendment*, 85 MICH. L. REV. 1699, 1705–17 (1987). Though not focused on the Excessive Fines Clause, Anthony F. Graucci's work detailing the English and early American experience with the Cruel and Unusual Punishments Clause is an important contribution to the historical understanding of the Eighth Amendment. *See* Anthony F. Granucci, *"Nor Cruel and Unusual Punishments Inflicted:" The Original Meaning*, 57 CALIF. L. REV. 839 (1969) (arguing that the Framers misinterpreted the English meaning of "cruel and unusual"). Massey also argued that the American Framers did not intend the Excessive Fines Clause to be limited to criminal cases. *See* Massey, *supra* note 15, at 1240–69. The Court later adopted this concept. *See* Austin v. United States, 509 U.S. 602, 606–10 (1993).

18. *See, e.g.*, Browning-Ferris v. Kelco, 492 U.S. 257 (1989); *see also* Brief for the Petitioners at 14, *Browning-Ferris*, 492 U.S. 257 (No. 88-556).

19. Youngjae Lee's work is particularly compelling, as he situates *Bajakajian* within the context of proportionality inquiries in the Court's muddied Cruel and Unusual Punishments jurisprudence. Youngjae Lee, *The Constitutional Right Against Excessive Punishment*, 91 VA. L. REV. 677 (2005); *see also*, LAWRENCE M. FRIEDMAN, CRIME AND PUNISHMENT IN AMERICAN HISTORY 37–38 (1993) (describing the prevalence of the use of fines in colonial America); Barry L. Johnson, *Purging the Cruel and Unusual: The Autonomous Excessive Fines Clause and Desert-Based Constitutional Limits on Forfeiture After* United States v. Bajakajian, 2000 U. ILL. L. REV. 461, 506–14 (arguing that use of the gross disproportionality test in the context of fines is inappropriate because the test is too deferential to apply to sanctions that create a "financial windfall" for the government and because the textual distinction between "excessive" and "cruel and unusual" suggests a more robust protection for fines); Matthew C. Solomon, 87 GEO. L.J. 849, 875–78 (1999) (predicting—correctly—that *Bajakajian*'s discussion of in rem and in personam forfeitures would cause confusion in the lower courts).

20. *See, e.g.*, Robert B. Durham, *The Cruel and Unusual Punishment and Excessive Fines Clauses*, 26 AM. CRIM. L. REV. 1617 (1989) (briefly describing the historical use of fines in England leading up to the Magna Carta); Nicholas M. McLean, *Livelihood, Ability to Pay, and the Original Meaning of the Excessive Fines Clause*, 40 HASTINGS CONST. L.Q. 833 (2013) (describing the English experience including the Magna Carta and English cases leading up to the English Bill of Rights, with reference to Blackstone's Commentaries on the Laws of England as well as some American sources); Craig W. Palm, *RICO Forfeiture and the Eighth Amendment: When Is Everything Too Much?*, 53 U. PITT. L. REV. 1, 6–9 (1991) (briefly describing three types of forfeitures used in early English law).

21. *See, e.g.*, Joseph Cramer, *Civilizing Criminal Sanctions—A Practical Analysis of Civil Asset Forfeiture Under the West Virginia Contraband Forfeiture Act*, 112 W. VA. L. REV. 991,

is missing a detailed description of the colonial and early American experience with fines that would allow for a more comprehensive critique of the Court's use of history in interpreting the Clause. This Article seeks to fill that gap.

To set the stage for this reassessment of the Excessive Fines doctrine, I begin in Part I by describing the contemporary use of economic sanctions in the United States and the collateral consequences debtors face after the imposition of such sanctions. A review of these circumstances is timely given the breadth and variety of such sanctions. Across the country, financial penalties take many forms: statutory fines; forfeitures of money and property; restitution awards; court costs (including, surprisingly, the costs of a public defender, despite a finding that the person represented is indigent); fees related to incarceration, probation and parole; and surcharges that operate as multipliers on top of other penalties. These sanctions accrue interest and collection fees at alarming rates, often multiplying the original debt several times. Once sanctions are assessed, collection practices can be draconian. Because some people are unable to pay off economic sanctions and related interest and collections costs, the specter of arrest and incarceration—and the additional economic sanctions related thereto—may be perpetual.

The Supreme Court has nonetheless concluded that many of these concerns lie outside the scope of the Eighth Amendment's Excessive Fines Clause, regardless of how excessive they might be. I therefore focus in Part II on whether the underlying basis for the current doctrine is faulty. In doing so, I take the Court at its word that history is constitutionally relevant. I analyze the negligible historical record upon which the Court relied and show that the Court's narrow interpretation of the Clause is both methodologically and substantively suspect. I offer an examination of the colonial and early American experience with economic sanctions taken from statutes and court records, which provide significant evidence that the ratifying generation would have understood the Clause's terms much more generously than today's Court.

Finally, in Part III, I propose an interpretation of the Clause that uses the historical record to identify questions regarding the Clause's meaning, assesses the quality of the historical evidence suggesting an answer to such questions, and then considers that evidence—according to its value—within a debate that incorporates contemporary understandings of just punishment. A proper interpretation of the Clause demands contemporary understandings of an offense's nature, how offender characteristics aggravate or mitigate, and the risk that a fine may impoverish an offender so as to render the punishment

994–95 (2010) (briefly describing the use of forfeitures in relation to early American navigation laws); McLean, *supra* note 20, at 865–72 (noting textual support for an expanded understanding of "excessive" in a handful of early colonial charters and documents as well as cases decided in the mid-nineteenth century); *see also id.* at 872–85 (discussing the understanding of the Clause during the Reconstruction Era); Palm, *supra* note 20, at 10–13 (briefly discussing the use of in rem forfeitures in nineteenth and twentieth century America).

perpetual. To solidify this prescription, I return to the cases of Natasha and Mr. Carela-Tolentino to exemplify how contemporary considerations operate within the historical framework that emerges from the record. Both the interpretation and application I propose more faithfully reflects the history and its limitations, and broadens the scope of the Clause to provide greater individual protections.

## I.
## THE BREADTH AND CONSEQUENCES OF CONTEMPORARY ECONOMIC SANCTIONS

Understanding the nature of economic sanctions and the consequences of their application is critical to understanding the perils of the Court's Excessive Fines Clause jurisprudence. While the widespread use and potential harms of economic sanctions have received minimal attention in the academic literature,[22] in recent years advocacy groups and think tanks have issued reports detailing some of the more troubling aspects of contemporary economic sanctions.[23] The sanctions they describe, and the wide variety of additional financial penalties often stemming from an inability to pay such sanctions, are so numerous and their applications so varied[24] that a comprehensive description is beyond the scope of this Article. Nevertheless, to provide an understanding of the ramifications that flow from the Court's interpretation of the Clause, I describe the most prevalent forms of economic sanctions and the most likely collateral consequences.

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22. The collateral consequences of economic sanctions are mentioned in a recent article. *See* McLean, *supra* note 20, at 886–92. Outside of the Eighth Amendment context, collateral consequences of fines also are gaining scholarly attention. *See, e.g.*, Ann Cammett, *Shadow Citizens: Felony Disenfranchisement and the Criminalization of Debt*, 117 PENN. ST. L. REV. 349 (2012) (regarding bars to voting related to unpaid criminal debt); Travis Stearns, *Intimately Related to the Criminal Process: Examining the Consequences of a Conviction After* Padilla v. Kentucky *and* State v. Sandoval, 9 SEATTLE J. SOC. JUST. 855, 874–77 (2011) (noting the relevance of collateral consequences to Sixth Amendment considerations). Outside of the legal academy, sociologists, most notably Katherine Beckett, Alexes Harris, and Heather Evans, have taken on empirical research on the imposition and effect of economic sanctions. *See* Harris, Evans & Beckett, *supra* note 10; KATHERINE A. BECKETT, ALEXES M. HARRIS & HEATHER EVANS, WASH. STATE MINORITY & JUSTICE COMM'N, THE ASSESSMENT AND CONSEQUENCES OF LEGAL FINANCIAL OBLIGATIONS IN WASHINGTON STATE (2008), *available at* http://www.courts.wa.gov/committee/pdf/2008LFO_report.pdf.

23. *See, e.g.*, ALICIA BANNON ET AL., BRENNAN CTR. FOR JUSTICE, CRIMINAL JUSTICE DEBT: A BARRIER TO REENTRY (2010), *available at* http://www.brennancenter.org/sites/default/files/legacy/Fees%20and%20Fines%20FINAL.pdf (describing forms of debt and collateral consequences in the fifteen states with the highest prison populations); ACLU, IN FOR A PENNY: THE RISE OF AMERICA'S NEW DEBTORS' PRISONS (2010), *available at* https://www.aclu.org/files/assets/InForAPenny_web.pdf; RACHEL L. MCLEAN & MICHAEL D. THOMPSON, REPAYING DEBTS (2007); *cf.* AM. BAR ASS'N, SECTION ON CRIMINAL JUSTICE, STEERING COMM. ON THE UNMET LEGAL NEEDS OF CHILDREN, REPORT TO THE HOUSE OF DELEGATES R3–R6 (2003) (describing the rise in collateral consequences of conviction).

24. *See, e.g.*, BECKETT, HARRIS & EVANS, *supra* note 22, at 1–3 (reporting the results of an empirical analysis of over three thousand Washington State felony cases showing a "high degree of variability" based on factors including race, gender, and county of conviction).

### *A. Common Types of Economic Sanctions*

Some economic sanctions—typically those entitled "fines"—are set out in statutes and based on general categories of crime. Statutory fines are ubiquitous and range from as little as one dollar for minor offenses to tens of thousands, or even millions, of dollars for serious offenses.[25] In most jurisdictions, a range of fines is available; the fine selected typically depends upon the category of the crime charged, but amounts usually are not directly related to a particular crime's circumstances.[26] Several jurisdictions also apply surcharges, either as a flat fee or as a percentage of the underlying fine, and thereby essentially impose fines on top of fines.[27]

Other economic sanctions are more closely tied to the crime itself, often dependent upon the harm caused by the incident at issue. In particular, restitution—which is imposed as part of a criminal sentence but made payable to crime victims—is crime specific. In some jurisdictions, the assessment is dictated by a strict measurement of the victim's actual loss or the defendant's gain, while in others restitution is limited to a multiplier of those amounts.[28]

Forfeitures of money and property are also linked to a specific crime or suspected offense[29] and may take many forms. Crime proceeds to which the

25. *Compare* ALA. CODE. § 36-21-67 (2001) (prescribing a $1 fine for a traffic violation), *with* 28 U.S.C. § 841(b)(1)(c) (2012) (prescribing up to a $1 million fine for drug offenses).

26. *See, e.g.*, KAN. STAT. ANN. § 21-6611(a)-(b) (West 2008).

27. *Compare, e.g.*, CAL. PENAL CODE §§ 1464(a)(1), 1465.5 (West 2011) (20 to 100 percent surcharge for vehicle code violations), *with* ALASKA. STAT. ANN. § 12.55.039 (West 20) ($10–$100 surcharge depending on severity of the offense). Some states impose surcharges on only certain types of conduct. *See, e.g.*, ARIZ. REV. STAT. ANN. §§ 12-116.01(A)–(C), 12-116.01-02 (West 2003) (imposing mandatory surcharges between 7 percent and 47 percent of the value of all fines, forfeitures or penalties imposed for certain offenses). In other states surcharges may be imposed for any offense. *See, e.g.*, GA. CODE ANN. § 15-21-73 (West 2003) (imposing a surcharge of up to 10 percent of the original fine); GA. CODE ANN. § 15-21-93 (West 2003) (same). *But see* GA. CODE ANN. § 15-21-92 (West 2003) (limiting imposition of surcharges imposed under § 15-21-93 until counties adopt a resolution to use the funds collected for jails).

28. *Compare, e.g.*, ALA. CODE § 15-18-66, 67 (2011), *with* WASH. REV. CODE ANN. 9.94A.753(3) (West 2010) (allowing up to double the offender's gain or victim's loss). *But see* ALA. CODE § 15-18-68(b) (2011) (requiring imposition of at least $50,000 in restitution in capital cases and at least $10,000 in first degree rape cases).

29. The practice of civil forfeiture—in which law enforcement officials seize property from individuals who are suspected of engaging in illicit activity—is highly lucrative. Seizure of money and property has generated billions of dollars in revenue since the mid-1980s. Because civil forfeiture can be accomplished without a finding of guilt or even imposition of criminal charges against the property-owner, practices employed by law enforcement in seizing property can be of questionable legality. *See, e.g.*, Eric Blumenson & Eva Nilsen, *Policing for Profit: The Drug War's Hidden Economic Agenda*, 65 U. CHI. L. REV. 35 (1998); Sarah Stillman, *Taken*, THE NEW YORKER (Aug. 12, 2013), http://www.newyorker.com/reporting/2013/08/12/130812fa_fact_stillman; *see also* MICHELLE ALEXANDER, THE NEW JIM CROW 79–83 (2010) (noting the profit motive built into civil forfeiture schemes and describing the actions of law enforcement as a "[s]hakedown"). Because such forfeitures are related to offenses against the public, under my analysis they would constitute "fines" subject to the protections of the Excessive Fines Clause. *See infra* Part III.

defendant has no legitimate, independent interest are routinely forfeited,[30] but so too are money and property to which the defendant or third parties have legitimate property rights. Instrumentalities—property alleged to be "tainted" by the crime—might be forfeited despite other legitimate purposes or ownership interests. For example, a Michigan court ordered the forfeiture of a car co-owned by a husband and wife following the husband's conviction of gross indecency for engaging in sexual acts with a prostitute in the vehicle, despite the fact that there were no allegations that the wife was involved in any illicit activity.[31]

In addition to statutory fines, restitution, and forfeitures, criminal defendants and juvenile adjudicants are also assessed sanctions related to the administration of the court system, punishment, and collection systems. These sanctions are so pervasive that courts sometimes impose them in amounts that surpass the value of sanctions directly related to the crime itself.[32]

The costs of administering the court system—from arrests to prosecution and sentencing[33]—are increasingly borne by the indigent, who make up the vast majority of criminal defendants.[34] Costs charged to the defendant include a wide variety of prosecutorial and administrative activities associated with the justice system, such as the costs related to law enforcement investigations,[35] prosecutors' preparation for trial,[36] issuance of arrest warrants,[37] and impaneling of a jury.[38] But perhaps the most surprising costs imposed on criminal defendants are costs related to the assignment of indigent defense counsel.[39] In some jurisdictions, there is an initial fee assessed just to apply for

30. *See, e.g.*, United States v. Voigt, 89 F.3d 1050, 1088 (3d Cir. 1996). Additionally, money and property unrelated to any criminal activity might be forfeited as substitute assets where the government is unable to trace alleged crime proceeds to any specific asset. *Id.*

31. Bennis v. Michigan, 516 U.S. 442, 452–53 (1996) (holding forfeiture did not violate the Takings Clause).

32. *See, e.g.*, BANNON ET AL., *supra* note 23, at 1 (describing a case in which a person in Pennsylvania was charged $2,464 in various sanctions, which was approximately three times higher than the imposed statutory fines and restitution combined).

33. Harris, Evans & Beckett, *supra* note 10, at 1769–70. Prosecution costs are typically assessed through flat fees, though in some jurisdictions courts require a direct link to the actual costs. *See, e.g.*, People v. Brown, 755 N.W.2d 664, 681 (Mich. Ct. App. 2008).

34. *See Indigent Def. Sys.*, BUREAU OF JUSTICE STATISTICS, *available at* http://www.bjs.gov/index.cfm?ty=tp&tid=28 (last visited Jan. 13, 2014) (reporting that 82 percent of felony defendants in the seventy-five most populous counties receive publicly financed counsel, as do 66 percent of federal felony defendants).

35. *See, e.g.*, KAN. STAT. ANN. § 21-6604a(8) (West 2008); MICH. COMP. LAWS. ANN. § 769.1f(2) (West 2000); 42 PA. CONS. STAT. ANN. § 9728(g) (West 2007); WIS. STAT. ANN. § 973.06(a)(3) (West 2007).

36. *See, e.g.*, IOWA CODE ANN. § 815.13 (West 2003).

37. *See, e.g.*, WASH. REV. CODE ANN. 10.01.160(2) (West 2002).

38. *See, e.g.*, TEX. CODE CRIM. PROC. ANN. art. 102.004(a) (West 2006).

39. *See, e.g.*, Helen A. Anderson, *Penalizing Poverty: Making Criminal Defendants Pay for Their Court-Appointed Counsel Through Recoupment and Contribution*, 42 U. MICH. J. L. REFORM 323 (2009); Susan Herlofsky & Geoffrey Isaacman, *Minnesota's Attempts to Fund Indigent Defense:*

a public defender.[40] Many other jurisdictions assess attorney's fees for representation provided by assigned counsel, even though counsel is assigned only to indigent defendants for the express reason that they are too poor to pay for an attorney.[41]

Many jurisdictions also impose costs associated with punishment, rehabilitation, and reentry. Fees for incarceration occurring both before and after trial may be imposed as additional economic sanctions.[42] The extent of these fees can depend on a wide variety of factors, including the length of confinement and the circumstances that arise during confinement, such as the need for medical care.[43]

Likewise, fees associated with probation and parole[44] are routinely imposed.[45] In some cases, eligibility for parole depends on the ability to pay processing fees. In Pennsylvania, for example, individuals are ineligible for parole unless they can pay a $60 fee;[46] those who cannot pay the fee remain in prison at a cost to taxpayers of approximately $80 to $110 per day[47] regardless

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*Demonstrating the Need for a Dedicated Funding Source*, 37 WM. MITCHELL L. REV. 559, 572–74 (2011); Kate Levine, *If You Cannot Afford a Lawyer: Assessing the Constitutionality of Massachusetts's Reimbursement Statute*, 42 HARV. C.R.-C.L. L. REV. 191, 208–13 (2007). The imposition of public defender costs can be a surprise to defendants as well, who report understanding the direction that counsel will be provided to them if they cannot pay to mean that counsel will be provided without charge. *See, e.g.*, BECKETT, HARRIS & EVANS, *supra* note 22, at 56.

40. *See* Anderson, *supra* note 39, at 333–34.

41. *See id.* at 329–34.

42. *See, e.g.*, LA. CODE CRIM. PROC. ANN. art. 890.2(A)–(B) (West 2013); MICH. COMP. LAWS ANN. §§ 801.83(1)(a), (3) (West 1998); MO. ANN. STAT. § 221.070 (West 2013); N.C. GEN. STAT. ANN. § 7A-313 (West 2004); *see also* Fox Butterfield, *Many Local Officials Now Make Inmates Pay Their Own Way*, N.Y. TIMES (Aug. 13, 2004), http://www.nytimes.com/2004/08/13/national/13prison.html (describing a "pay to stay" program in Michigan in which jail inmates are charged between $8 and $56 a day); *id.* (reporting the Federal Bureau of Prisons' finding that federal judges assessed $3 million in jail fees, though due to "legal confusion" the Bureau collected only $461 in 2003).

43. *See, e.g.*, 61 PA. CONS. STAT. ANN. § 3303(a) (West 2010); TEX. CODE CRIM. PROC. ANN. art. 104.002(d) (West 2006); VA. CODE ANN. § 17.1-275.5(A)(15) (West 2013); *see also* Harris, Evans & Beckett, *supra* note 10, at 1784 ("I didn't dare see the doctor even though I needed medication and I had withdrawals from being on lithium . . . because that would cost me another $10 for the doctor visit.").

44. Terminology associated with postincarceration supervision and the scope of such supervision varies widely from jurisdiction to jurisdiction. For ease of reference, I am using the phrase "probation and parole" in this Article to mean any form of supervision in the community mandated as part of a court order.

45. *See, e.g.*, FLA. STAT. ANN. § 948.09 (West 2006); MO. ANN. STAT. § 217.690(3) (West 2013); N.D. CENT. CODE ANN. § 12-1-32-07(2) (West 2008); N.D. CENT. CODE ANN. § 29-26-22(3) (West 2008); 18 PA. CONS. STAT. ANN. § 11.1102(c) (West 1998); *see also* BANNON ET AL., *supra* note 23, at 16 (describing the repercussions of monthly probation fees on an individual's ability to make restitution payments).

46. 18 PA. CONS. STAT. ANN. § 11.1101(a)(2) (West 1998); *see also* BANNON ET AL., *supra* note 23, at 22.

47. *See* Paul Peirce & Adam Brandolph, *Pa. Corrections Chief: Closings of Older Prisons to Save $23M in First Year*, TRIBUNE–REVIEW (Jan. 18, 2013), http://triblive.com/news/allegheny/3313969-74/wetzel-prison-state#axzz2JCoXvJHJ.

of the defendant's ability to successfully reintegrate into society. Where probation conditions include requirements such as participation in drug or alcohol treatment, training programs, or other rehabilitative activities, the defendant may be required to pay the costs.[48] Further, some jurisdictions restrict access to probation and parole to those individuals capable of paying the fines and costs assessed at sentencing.[49] In many places, probation terms—and the various payments related thereto—may also be extended as a penalty for failing to pay previously assessed economic sanctions.[50]

The wide variety of penalties—statutory fines, forfeitures, restitution, court costs, contempt fines, incarceration costs, and probation fees—can add up to a significant financial burden. For example, in Alabama, a woman's inability to pay a $179 speeding ticket ultimately resulted in three periods of incarceration totaling forty days, the revocation of her driver's license, and additional fees and fines that swelled to $3,170 over the course of three years.[51]

Each of these various economic sanctions also may be exacerbated by exorbitant interest rates, late fees, and collection costs. While interest rates vary, they can surpass 10 percent in some jurisdictions.[52] In many states, interest begins accruing at or near the time of a monetary penalty's imposition,[53] or it may be retroactively applied to the date of the crime.[54]

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48. *See, e.g.*, CARL REYNOLDS ET AL., COUNCIL OF STATE GOV'TS JUSTICE CTR., A FRAMEWORK TO IMPROVE HOW FINES, FEES, RESTITUTION, AND CHILD SUPPORT ARE ASSESSED AND COLLECTED FROM PEOPLE CONVICTED OF CRIMES: INTERIM REPORT 9 (2009), *available at* http://www.txcourts.gov/oca/debts/pdf/TexasFinancialObligationsInterimReport.pdf; *see also id.* at 13 (explaining that where private vendors provide screening and treatment, costs often are handled through "'point of service' payments and not part of any arranged payment plan"); *see also, e.g.*, UTAH CODE ANN. § 77-18-1(8)(a) (West 2004). Some jurisdictions also impose costs for registering as a sex offender. *See, e.g.*, ARIZ. REV. STAT. ANN. § 13-3821(Q) (West 2010); COLO. REV. STAT. ANN. § 16-22-108(7)(a) (West 2006).

49. *See, e.g.*, N.Y. CRIM. PROC. LAW § 420.10(1)(c) (McKinney 2005); N.C. GEN. STAT. ANN. §§ 15A-1343(b)(9)–(10), 15A-1374(b)(c) (West 2009); W. VA. CODE ANN. § 29-21-16(g)(5) (West 2002); WIS. STAT. ANN. §§ 973.20(1r), 973.05(2) (West 2007).

50. *See, e.g.*, ARIZ. REV. STAT. ANN. § 13-902(c) (West 2010); GA. CODE ANN. § 17-10-1(a)(2) (West 2003); LA. CODE CRIM. PROC. ANN. art. 894.4 (West 2013); MO. ANN. STAT. §§ 559.105(2)–(3) (West 2012); TEX. CODE CRIM. PROC. ANN. art. 42.12(22)(c) (West 2006).

51. Ethan Bronner, *Poor Land in Jail as Companies Add Huge Fees for Probation*, N.Y. TIMES (July 2, 2012), http://www.nytimes.com/2012/07/03/us/probation-fees-multiply-as-companies-profit.html.

52. *See, e.g.*, WASH. REV. CODE ANN. § 4.56.110(4) (West 2006); WASH. REV. CODE ANN. § 10.82.090 (West 2012).

53. *See, e.g.*, GA. CODE ANN. § 17-14-14(d) (West 2003) (interest set to equal civil judgments); 730 ILL. COMP. STAT. ANN. 5/5-9-3(e) (West 2007) (9 percent interest); MO. ANN. STAT. § 408.040(1) (West 2011) (9 percent interest); WASH. REV. CODE ANN. § 10.82.090 (West 2012) (interest set to equal civil judgments).

54. *See, e.g.*, IDAHO CODE ANN. § 19-5304(4) (2008); VA. CODE ANN. § 19.2-305.4 (West 2007). Some states even charge to process a defendant's request to set up a payment plan. *See, e.g.*, FLA. STAT. ANN. § 28.24(26)(c) (West 2010) ($25 processing fee); N.C. GEN. STAT. ANN. § 7A-304(F) (West 2004) ($20 set-up fee); TEX. CODE CRIM. PROC. ANN. art. 42.037(g)(1) (West 2006) ($12 fee for installment plan); *see also* BANNON ET AL., *supra* note 23, at 23 n.65.

Further, if an individual falls behind, late fees may be assessed in addition to other collection fees.[55] Some states contract with private debt collection companies that are allowed to assess collection costs, with some costs reaching as high as 25 to 40 percent of the principal debt.[56] Consequently, Shelby County, Alabama Judge Hub Harrington recently described a private probation company's collections practice as "a judicially sanctioned extortion racket."[57]

In assessing these kinds of economic sanctions, courts have limited and at times no discretion. Many statutes mandate the imposition of economic sanctions without allowing the court any opportunity to assess whether such sanctions are reasonable. For instance, a Washington state statute requires the imposition of a "Victim Penalty Assessment" in all cases—juvenile or adult, misdemeanor or felony—even where the crime or delinquency charged is victimless.[58] In other situations, statutes prohibit courts from considering a defendant's indigency in assessing sanctions. California's restitution statute, for example, forbids consideration of a defendant's ability to pay.[59]

The Supreme Court has recognized limited protection against economic sanctions by interpreting the Due Process and Equal Protection Clauses of the Fourteenth Amendment as restricting the imposition or collection of pecuniary penalties under two specific circumstances. The first situation involved a challenge under the Fourteenth Amendment. In the relevant case, the Supreme Court upheld an Oregon attorney fee recoupment statute in part because courts were not mandated to impose attorney fees and were required to consider whether the defendant had a foreseeable ability to pay the fees.[60] The second

55. *See, e.g.*, ALA. CODE § 12-17-225.4 (2006) (30 percent of delinquent amount); ARIZ. REV. STAT. ANN. § 12-116.03 (West 2003) ("reasonable costs"); CAL. PENAL CODE § 1214.1(A) (West 2011) (up to $300); FLA. STAT. ANN. § 28.246(6) (West 2010) (up to 40 percent of amount owed); 730 ILL. COMP. STAT. 5/5-9-3(e) (West 2007) (30 percent of delinquent amount); MICH. COMP. LAWS ANN. § 600.4803(1) (West 2013) (20 percent of delinquent amount); N.C. GEN. STAT. ANN. § 7A-321(b)(1) (West 2004) (lesser of the average cost of collecting debt or 20 percent of the delinquent amount); TEX. LOC. GOV'T CODE ANN. § 133.103(a) (West 2013) ($25 fee for payments made thirty-one days or more after judgment).

56. *See, e.g.*, ALA. CODE § 12-17-225.4 (2006) (30 percent); FLA. STAT. § 938.35 (2004) (40 percent); KAN. STAT. ANN. § 12-4119(b)(3) (West 2008) (33 percent); NEV. REV. STAT. ANN. § 178.39802(2) (West 2000) (35 percent or $50,000, whichever is lower); 42 PA. CONS. STAT. ANN. § 9730.1(b)(2) (West 2007) (not to exceed 25 percent of amount collected); TEX. CODE CRIM. PROC. ANN. art. 103.0031(b), (d) (West 2006) (30 percent of amount due); *see also* Bronner, *supra* note 51 (describing how a private company in Georgia assessed a $15 "enrollment fee" and additional monthly fees).

57. Ethan Bronner, *Judge in Alabama Halts Private Probation*, N.Y. TIMES (July 13, 2012), http://www.nytimes.com/2012/07/14/us/judge-in-alabama-halts-private-probation.html (describing Judge Harrington's order imposing a moratorium on a private probation company's practice of incarcerating individuals who cannot pay).

58. WASH. REV. CODE ANN. § 7.68.035 (West 2007).

59. CAL. PENAL CODE § 1202.4(c) (West 2011).

60. *See* Fuller v. Oregon, 417 U.S. 40, 54 (1974) (upholding recoupment statute because it was not mandatory, could only be imposed on individuals for whom the ability to pay in the future was

situation involved the revocation of parole where it was a requirement of parole that the defendant pay all fines and restitution. The Court held that revocation was not permissible unless courts first consider whether the failure to pay was willful and whether there were alternative sanctions to incarceration. In doing so, the Court suggested that incarceration may be available for a nonwillful failure to pay where no alternatives exist.[61]

While the Fourteenth Amendment might afford some protection in some cases, this limited protection is not enough. To start, the Fourteenth Amendment cases provide little guidance in addressing the question of whether pecuniary sanctions are "fines," a critical threshold question in the Eighth Amendment context but essentially irrelevant in Fourteenth Amendment analysis. Similarly, while these cases consider to some extent a defendant's ability to pay, they do not contemplate such ability in view of the constitutional notion of "excess" established in the Excessive Fines Clause. Relying on the Fourteenth Amendment alone to protect against improper use of fines does no more than write the Excessive Fines Clause out of the Constitution.

Further, the Fourteenth Amendment presumes that trial courts are engaging in a meaningful analysis of one's ability to pay. There is good reason to believe that judicial inquiries into these matters are largely futile. Anecdotal evidence shows that many courts are engaging in at best cursory consideration of a defendant's ability to pay in the first instance.[62]

### *B. Collateral Consequences*

For anyone who does not pay economic sanctions immediately, either because they are unwilling or unable, the consequences can be dire. Because the vast majority of criminal defendants and juvenile adjudicants are in financially precarious circumstances before penalties are imposed,[63] there is a high likelihood that debtors will be unable to make the mandated regular, often sizeable payments against their debt.

The repercussions of a failure to pay are extraordinarily serious. It may result in direct deprivations of liberty through arrest and incarceration, which

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reasonably foreseeable, allowed defendants to seek remission of debt in the future, and only allowed collections against those who actually became able to pay).

61. *See* Bearden v. Georgia, 461 U.S. 660, 672 (1983); *see also, e.g.*, N.M. STAT. ANN. §§ 31-17-1(B), (E) (West 2013) (requiring an assessment of the defendant's ability to pay, including consideration of the defendant's health, age, employment, family circumstances, and the amount of damages involved).

62. *See generally* ACLU, *supra* note 23. The Texas Office of Court Administration, for example, has reported that in an "informal survey" of judges regarding the extent to which they considered ability to pay in assessing economic sanctions, responses "ranged from 'as much as possible' to 'almost never.'" REYNOLDS ET AL., *supra* note 48, at 10.

63. *See, e.g.*, Harris, Evans & Beckett, *supra* note 10, at 1756; MCLEAN & THOMPSON, *supra* note 23, at 7.

result from probation revocation,[64] imposition of suspended sentences,[65] and imposition of direct penalties for failure to pay.[66] Ultimately, some people spend more time in jail or prison for failure to pay than for their original sentence.[67] For those who fall so far behind that they are incarcerated for failure to pay, the original debt may expand due to new costs associated with additional court hearings and incarceration.[68] Because some people are never able to pay off economic sanctions, the threat of arrest and incarceration may be perpetual.[69]

The cycle of economic sanctions, interest, collections, and incarceration can be financially devastating. In addition to the direct financial burden, the initial and ongoing imposition of economic sanctions has been associated with difficulties in obtaining and maintaining employment, a necessity that is already difficult for individuals with a criminal record to obtain.[70] In many

64. *See* MCLEAN & THOMPSON, *supra* note 23, at 8 (reporting that 12 percent of probation revocations are linked to failures to pay); *see also* Adam Liptak, *Debt to Society Is Least of Costs for Ex-Convicts*, N.Y. TIMES (Feb. 23, 2006), http://www.nytimes.com/2006/02/23/national/23fees.html ("In 2003, for instance, Sabrina Byrd, a 27-year-old single mother, was ordered to pay $852 for failing to leash and vaccinate her dog in College Park, Ga. Too poor to pay, she was placed on probation while she made 10 monthly installments, along with a monthly fee to a probation company of $39—about half of the fine. When she fell behind and failed to contact the company, a judge revoked her probation and sentenced her to 25 days in jail.").

65. For example, in *State v. D.P.G.*, 280 P.3d 1139, 1143 (Wash. Ct. App. 2012), a Washington Court of Appeals overturned a lower court decision to reduce the restitution amount owed by a juvenile. In doing so, the court allowed the restitution to stand but otherwise dismissed the deferred judgment and directed the lower court to enter an order of disposition. *Id.*

66. *See* Bronner, *supra* note 51 (describing how Gina Ray, a thirty-one-year-old resident of Alabama, has been incarcerated three separate times for a total of forty days stemming from a $179 speeding fine); Editorial, *The New Debtors' Prisons*, N.Y. TIMES (Apr. 5, 2009), http://www.nytimes.com/2009/04/06/opinion/06mon4.html (describing a 2006 lawsuit brought by a debtor incarcerated for eight months for failure to pay a $705 fine).

67. *See, e.g.*, Jody Lawrence-Turner, *Debt to Society: Unpaid Court Fees Can Land Released Convicts Back in Jail*, THE SPOKESMAN-REVIEW (May 24, 2009), http://www.spokesman.com/stories/2009/may/24/debt-to-society.

68. *See* BANNON ET AL., *supra* note 23, at 23 n.143.

69. Bronner, *supra* note 51 (describing how Richard Garrett, an Alabama resident, "has spent a total of 24 months in jail and owes $10,000, all for traffic and license violations that began a decade ago").

70. *See* Bruce Western, et al., *Black Economic Progress in the Era of Mass Imprisonment*, *in* INVISIBLE PUNISHMENT: THE COLLATERAL CONSEQUENCES OF MASS IMPRISONMENT 175–76 (Marc Mauer & Meda Chesney-Lind eds., 2002) (describing how the social stigma of conviction reduces job prospects for people who have been incarcerated in conjunction with the reduction in both skills and connections to legitimate employment that results from incarceration). 42 U.S.C. § 17501(b)(18) (2012) (finding "that 1 year after release, up to 60 percent of former inmates are not employed"); James v. Strange, 407 U.S. 128, 139 (1972) ("A criminal conviction usually limits employment opportunities. This is especially true where a prison sentence has been served."); MCLEAN & THOMPSON, *supra* note 23, at 2, 7; *see also* Harris, Evans & Beckett, *supra* note 10, at 1754. Difficulties finding employment post-conviction are exacerbated by statutory restrictions to employment, including automatic exclusion from particular forms of employment following certain convictions, *see, e.g.*, 49 U.S.C. § 31310 (2012) (mandating ineligibility to operate a commercial vehicle), or nonmandatory exclusions imposed by the trial court at sentencing, *see, e.g.*, 9 C.F.R. 362.4(a)(1)(viii) (2013) (limiting employment in poultry business).

jurisdictions, criminal histories remain active or cannot be sealed so long as criminal debts are outstanding,[71] which can impede the ability to find employment.[72] Additionally, some jurisdictions revoke driver's licenses as a penalty for failing to pay economic sanctions,[73] which can make finding and keeping a job even more difficult due to limitations on transportation options.[74] And for those lucky enough to find employment, the ability of the government and private parties to garnish a considerable percentage of wages for economic sanctions can significantly decrease an already limited amount of income coming into the home,[75] particularly in community property states where the government has the option of also garnishing the wages of the debtor's spouse.[76] Economic sanctions against a juvenile may also reduce families' total income, because courts may require the parent to pay or face incarceration.[77] These ramifications may perversely incentivize individuals to join the underground economy. As one debtor has explained, "[F]rankly, I mean, I'm not trying or wanting to do any crime and I still can't commit myself to do prostitution, but I think about it sometimes . . . at least that way I could pay some of these damn fines."[78]

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71. Harris, Evans & Beckett, *supra* note 10, at 1785; *see also* WASH. REV. CODE ANN. § 9.94A.640 (West 2010); WASH. REV. CODE ANN. § 10.97.060 (West 2012).

72. *See* BECKETT, HARRIS & EVANS, *supra* note 22, at 39–40; *see also* Jennifer Bayot, *Use of Credit Records Grows in Screening Job Applicants*, N.Y. TIMES (Mar. 28, 2004), http://www.nytimes.com/2004/03/28/jobs/use-of-credit-records-grows-in-screening-job-applicants.html.

73. *See, e.g.*, Harris, Evans & Beckett, *supra* note 10, at 1781 (quoting a debtor who had previously been employed as a truck driver as stating that he could not longer work in his occupation due to a driver's license revocation related to his noncompliance with debt payments); *see also* OFFICE OF PROGRAM POLICY ANALYSIS & GOV'T ACCOUNTABILITY, FLORIDA LEGISLATURE, CLERKS OF COURT GENERALLY ARE MEETING THE SYSTEM'S COLLECTION PERFORMANCE STANDARDS 4 (2007), *available at* http://www.oppaga.state.fl.us/reports/pdf/0721rpt.pdf; *id.* at 5 (describing concern by some judges and court clerks that driver's license suspensions could result in more court cases related to driving without a license and be particularly onerous for debtors in areas with limited public transportation).

74. *See* BANNON ET AL., *supra* note 23, at 2, 24, 28; MARGY WALLER, THE BROOKINGS INSTITUTION, HIGH COST OR HIGH OPPORTUNITY COST? TRANSPORTATION AND FAMILY ECONOMIC SUCCESS 3 (2005) ("[P]eople with cars are more likely to work, and car ownership is positively associated with higher earnings and more work hours."). The revocation of a driver's license may be particularly onerous for individuals in rural communities where public transportation is limited or non-existent as well as for individuals who must commute from inner cities to suburban areas where many jobs are located. *See id.* at 1–3.

75. State laws allow garnishment for criminal debt at rates as high as 35 percent of one's wages. *See* MCLEAN & THOMPSON, *supra* note 23, at 8; *see also, e.g.*, WIS. STAT. ANN. § 973.05(4)(b) (West 2007) (allowing garnishment of up to 25 percent of wages); ALEXANDER, *supra* note 29, at 151 (noting that "two-thirds of people detained in jails report annual incomes under $12,000 prior to arrest"). Some states also garnish tax returns. *See, e.g.*, CAL. REV. & TAX. CODE § 19280 (West 2014); IDAHO CODE ANN. § 1-1624 (West 2008).

76. *See, e.g.*, BECKETT, HARRIS & EVANS, *supra* note 22, at 44 n.60.

77. *See, e.g.*, *New Debtors' Prisons*, *supra* note 66.

78. Harris, Evans & Beckett, *supra* note 10, at 1785; *cf.* Bearden v. Georgia, 461 U.S. 660, 670–71 (1983) (rejecting the State's argument that allowing probation revocation even against those who cannot pay will increase restitution payments and noting that "such a policy may have the

Yet another perversion stems from the way in which the collateral consequences of being unable to pay sometimes pushes individuals farther and farther from a point where payment is possible. Low-income individuals with debt from economic sanctions lose out on public benefits for which they may otherwise qualify. For example, one debtor reported that he could not use a Section 8 housing voucher because it required that he contribute toward his housing costs, but he needed the money he might otherwise use to supplement the housing voucher to pay for his economic sanctions.[79] And for those debtors who are subject to probation or parole, the inability to pay may result in the exclusion from or termination of public housing benefits altogether.[80] As a result, the cost of housing effectively increases, thereby decreasing the individual's ability to pay assessed fines.

Likewise, individuals on probation and parole who miss a payment are excluded from receiving Social Security, food stamps, and Temporary Assistance for Needy Families (TANF).[81] These types of benefits are a lifeline for many low-income families, and without them, debtors may not be able to continue making payments on their economic sanctions or even meet their basic needs. As explained by one debtor in Washington state:

> I take [the debt payment] out of my Social Security check, it's part of my budget, so at the beginning of each month, I make my budget, I pay my rent, I pay my house fees, because there's a fee to stay at the house where I'm at, for toilet paper, laundry soap, stuff like that, and then I also put money, I get money orders for paying my [economic sanctions]. But sometimes, if I pay my [sanctions], I don't have enough left over for food.[82]

In other words, many debtors are choosing between basic necessities such as food, hygiene, and housing on the one hand, and making payments against their economic sanctions on the other.[83]

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perverse effect of inducing the probationer to use illegal means to acquire funds to pay in order to avoid revocation").

79. BECKETT, HARRIS & EVANS, *supra* note 22, at 42 (quoting a debtor: "I got my Section 8 voucher . . . if I [got] a one-bedroom apartment, my part would only be $216 a month, but I don't have $216 a month. Cause I gotta pay $50 a month on the [penalties]. If I did pay the $216, I couldn't feed myself, I couldn't pay [penalties] and utilities.").

80. 42 U.S.C. §§ 1437d(l)(9)(2), 1437f(d)(1)(B)(v)(II) (2012).

81. 42 U.S.C. § 1382(e)(4)(A)(ii) (2012) (SSI); 7 U.S.C. § 2015(k)(1)(B) (2012) (food stamps); 42 U.S.C. § 608(a)(9)(A)(ii) (2012) (TANF).

82. Harris, Evans & Beckett, *supra* note 10, at 1779; BECKETT, HARRIS & EVANS, *supra* note 22, at 42.

83. *See, e.g.*, BECKETT, HARRIS & EVANS, *supra* note 22, at 44–45 (quoting a debtor: "Well, you know, like I said I have three girls, and two are in high school, so it [paying on her debt] would actually take away from them, cuz we do reduced lunch. So if I was to pay my fines every month, I wouldn't be able to pay for their reduced lunch. And then I would actually have to take off like $150 off my grocery, or the hygiene that I put into the house. Cuz everything's on a budget, we live on a budget. And so with that budget, especially with me being the head of household, I have to budget for everything . . . so I just can't pay my [debt] right now.").

The lack of access to stable employment, housing, and basic needs, as well as the threat of reincarceration and the frustration of perpetual debt, can place tremendous pressure on individual debtors and their families. Researchers associate criminal debt with decreased child support payments,[84] family disunification,[85] and an inability to meet basic needs,[86] all of which complicate reentry and integration into the community.[87]

The overall effect of economic sanctions carries a significant risk that the poorest and most vulnerable in our society,[88] once ensnared in the system as a

84. Individuals leaving prison may have tens of thousands of dollars in back child support debt. *Id.* at 44; MCLEAN & THOMPSON, *supra* note 23, at 1–2, 7 (noting that the need to pay economic sanctions is in competition with child support payments for the 1.5 million children of incarcerated parents); *cf.* REYNOLDS ET AL., *supra* note 48, at 7 (showing how a hypothetical drug possession case, a low-level felony, could result in "$2,362 in court costs, attorney's fees, and criminal fines [and where] the person owed child support (estimated at $500 per month for 24 months for case study purposes), he or she could owe nearly $15,000 upon release from prison").

85. Harris, Evans & Beckett, *supra* note 10, at 1760–61 ("Mass incarceration harms families by reducing child well-being, increasing the likelihood of divorce and separation, and reducing family income."); Lawrence-Turner, *supra* note 67 (quoting a debtor describing the effect of his rearrest for failure to pay economic sanctions: "This messed up trust with my family; they think I committed another crime.").

86. Harris, Evans & Beckett, *supra* note 10, at 1786; *see also id.* at 1780 (quoting a debtor: "I couldn't get an apartment. They just said your credit's no good and we don't want to rent to you. 'You're a liability,' pretty much"); BANNON ET AL., *supra* note 23, at 29.

87. BECKETT, HARRIS & EVANS, *supra* note 22, at 13; Butterfield, *supra* note 42 (quoting Connecticut Attorney General Richard Blumenthal as opining that seizing assets from debtors could interfere with rehabilitation).

88. The effects of becoming embroiled in America's criminal and juvenile justice systems fall hardest on adults and juveniles that are already vulnerable due to poverty, and particularly communities of color. The reasons why these disparities exist continue to be debated. *See* Alex R. Piquero, *Disproportionate Minority Contact*, 18 THE FUTURE OF CHILDREN, no. 2, 2008 at 59, 64–67 (describing theories related to levels of involvement in crime and selection bias in arrest and processing through the criminal and juvenile systems). The effect on poor communities of color, however, is clear: "While one in 30 men between the ages of 20 and 34 is behind bars, for black males in that age group the figure is one in nine." THE PEW CHARITABLE TRUSTS, ONE IN 100: BEHIND BARS IN AMERICA 2008, at 3 (2008). For both men and women, people of color are more likely than whites to be incarcerated. *Id.* at 6. This has devastating consequences for communities, in particular by reducing already limited employment options for those with criminal histories, and even resulting in "spillover effects for entire demographic groups" when employers deny employment opportunities to men of color after assuming they must have criminal records. *See* Western, *supra* note 70, at 175, 178; *cf.* ALEXANDER, *supra* note 29, at 138–53 (arguing that limitations on access to employment and the denial of public benefits imposed upon people with criminal convictions, as well as the burden of criminal debt, effectively extends the Jim Crow era's exclusion of African Americans from mainstream society).

People with mental health problems are also uniquely susceptible to becoming involved in criminal and juvenile systems. *See, e.g.*, DORIS JAMES & LAUREN E. GLAZE, U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, MENTAL HEALTH PROBLEMS OF PRISON AND JAIL INMATES 1 (2006) (reporting that "56% of State prisoners, 45% of Federal prisoners, and 65% of jail inmates" have mental health problems); Thomas Grisso, *Adolescent Offenders with Mental Disorders*, 18 THE FUTURE OF CHILDREN, no. 2, 2008 at 143, 150 (describing studies showing that one half to two-thirds of youth in the juvenile justice system suffer from mental illness). Studies have linked severe psychiatric disorders with both "greater depth of poverty and likelihood of being poor," making the payment of criminal debt unlikely. Brandon C. Vick et al., *Poverty and Severe Psychiatric Disorders*

result of criminal conviction or juvenile adjudication, may never get out. As such, the penalties "transform punishment from a temporally limited experience to a long-term status."[89]

## II.
## REFUTING THE EXISTING EXCESSIVE FINES DOCTRINE

At a time when the use of economic sanctions has such dire consequences and is so widespread, the Eighth Amendment's Excessive Fines Clause is of critical importance. The Excessive Fines doctrine, however, restricts "fines" to payments made to a sovereign as punishment for wrongdoing,[90] and may limit "excessive" to gross disproportionality to the offense.[91] These restrictions place many contemporary forms of economic sanctions beyond the Clause's reach and suggest that the real-world consequences of imposing fines must be ignored. The jurisprudence has created disorder in the lower courts[92] and left jurists feeling hamstrung.[93] Put simply, the Clause is effectively moribund.

As detailed below, the four cases that serve as a basis for the Excessive Fines doctrine rest on a historical interpretation of the Clause. To be sure, the text of the Excessive Fines Clause itself—"nor excessive fines imposed"—

*in the U.S.: Evidence from the Medical Panel Expenditure Survey*, 15 J. MENTAL HEALTH POLICY ECON. 83, 83 (2012).

89. Harris, Evans & Beckett, *supra* note 10, at 1755 (describing how the U.S. penal system results in "the accumulation of disadvantage and the reproduction of inequality"); Jeremy Travis, *Invisible Punishment: An Instrument of Social Exclusion*, *in* INVISIBLE PUNISHMENT, *supra* note 70, at 19 ("In this brave new world, punishment for the original offense is no longer enough; one's debt to society is never paid."); ALEXANDER, *supra* note 29, at 140 ("Collectively, [collateral consequences] send the strong message that, now that you have been labeled, you are no longer wanted. You are no longer part of 'us,' the deserving.").

90. Browning-Ferris v. Kelco, 492 U.S. 257, 265 (1989).

91. United States v. Bajakajian, 524 U.S. 321, 336 (1998).

92. The doctrine has created a quagmire, both with respect to the question of what a fine is and the question of what renders a fine excessive. *Compare* Montana v. Good, 100 P.3d 644, 649 (Mont. 2004) (holding restitution is at least partly punitive and therefore a fine), *with* Idaho v. Cottrell, 271 P.3d 1243, 1246, 1250–51, 1254 (Idaho Ct. App. 2012) (relying on *Bajakajian* in holding that restitution of $24,921.47 for officer's twisted knee was not a fine because it was remedial); *compare* United States v. Aguasvivas-Castillo, 668 F.3d 7, 17 (1st Cir. 2012) (interpreting the gross disproportionality analysis to include consideration of "whether the defendant falls into the class of persons at whom the criminal statute was principally directed"), *with* United States v. $100,348.00 in U.S. Currency, 354 F.3d 1110, 1122 (9th Cir. 2004) (interpreting the gross disproportionality to include consideration of "the nature and extent of the crime [and] whether the violation was related to other illegal activities"), *with* Von Hofe v. United States, 492 F.3d 175, 186 (2d Cir. 2007) (using a hybrid of the considerations mandated in the First and Ninth Circuits), *with* United States v. Levesque, 546 F.3d 78, 83 (1st Cir. 2008) ("[A] court should also consider whether forfeiture would deprive a defendant of his or her livelihood."); *compare* United States v. Sigillito, 899 F. Supp. 2d 850 (E.D. Mo. 2012) (considering only whether forfeiture was grossly disproportional to the offense), *with Von Hofe*, 492 F.3d at 186 (considering the relationship between the property and the offense). *See also* McLean, *supra* note 20, at 843–47 & n.37 (noting that the lower courts are at odds regarding whether a forfeiture of crime proceeds is a fine and the extent to which dicta in *Bajakajian* controls cases involving in rem forfeitures).

93. *See supra* notes 8–9 and accompanying text.

reveals little, and it bears acknowledging that the Framers did not leave many clues that point to any particular understanding of the words "fine" and "excessive." The entirety of the relevant debate was reported as follows:

> [T]he committee . . . then proceeded to the sixth clause of the fourth proposition, in these words, "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."
>
> Mr. SMITH, of South Carolina, objected to the words "nor cruel and unusual punishments;" the import of them being too indefinite.
>
> Mr. LIVERMORE.—The clause seems to express a great deal of humanity, on which account I have no objection to it; but as it seems to have no meaning in it, I do not think it necessary. What is meant by the terms excessive bail? Who are to be the judges? What is understood by excessive fines? It lies with the court to determine. No cruel and unusual punishment is to be inflicted; it is sometimes necessary to hang a man, villains often deserve whipping, and perhaps having their ears cut off; but are we in future to be prevented from inflicting these punishments because they are cruel? If a more lenient mode of correcting vice and deterring others from the commission of it could be invented, it would be very prudent in the Legislature to adopt it; but until we have some security that this will be done, we ought not to be restrained from making necessary laws by any declaration of this kind.
>
> The question was put on the clause, and it was agreed to by a considerable majority.[94]

In the 1980s, the academy began to supplement this limited information by focusing primarily on the historical record surrounding the English Bill of Rights of 1689. Like the Eighth Amendment to the U.S. Constitution, the English Bill of Rights contained the prohibition "nor excessive fines imposed."[95] In particular, Charles Massey's seminal work in this area includes a detailed treatment of the earliest historical underpinnings of economic sanctions predating the English Bill of Rights.[96] In brief, the early history of the use of and limitations on financial punishments extends back to ancient Hebrew's *lex talionis*, as well as early systems of the pre-Norman England Angles and Saxons, which proscribed exact monetary and corporal punishments for specific wrongdoing.[97] These systems eventually gave way to the "amercement," a financial penalty assessed by juries for both civil and criminal wrongdoing, though English commentators including Blackstone primarily treated them as civil penalties.[98] The Magna Carta, which prohibited

94. 1 ANNALS OF CONGRESS 782–83 (1789) (Joseph Gales ed., 1834).
95. *See, e.g.*, Massey, *supra* note 15, at 1240–44.
96. *See id*. at 1257–69.
97. *Id.* at 1250–51.
98. *Id.* at 1251, 1253.

amercements that were disproportionate to the charged offense or that would serve to impoverish the wrongdoer, curtailed their abuse.[99]

Fines, in contrast, were initially voluntary offerings to the king to procure favor or forgiveness.[100] Over time, however, fines morphed into payments that were required to secure release from imprisonment.[101] With all economic sanctions rendered involuntary, "fines" and "amercements" merged, with the latter's term largely falling out of general usage.[102] The subsequent prohibition on excessive fines set out in the English Bill of Rights, reasoned Massey and other scholars, included both criminal (fines) and civil (amercements) economic sanctions, including punitive damages.[103]

While scholars had explored the relevant English history in earnest by the 1980s, little was known about the American experience,[104] in part because of a lack of Supreme Court precedent. Though the Excessive Fines Clause was ratified in 1791, nearly two centuries passed before the Supreme Court undertook its first meaningful foray into analyzing the Clause. In 1866 and 1916, the Court was asked to assess Excessive Fines claims but both times rejected the claims without attempting to interpret the Clause.[105] The Court finally took up that task in 1989 in *Browning-Ferris Industries of Vermont, Inc. v. Kelco Disposal, Inc.*,[106] where the apparently cutthroat business of waste disposal in Burlington, Vermont, had led to a $6 million punitive damages claim.[107] The Court considered and ultimately rejected the claim that punitive damage awards in civil cases were "fines" for the purposes of the Excessive

99. MAGNA CARTA, ch. 20–21 (1215), *reprinted in* A.E. DICK HOWARD, MAGNA CARTA: TEXT AND COMMENTARY 42 (rev. ed. 1998); *see also infra* Part II.C.

100. Massey, *supra* note 15, at 1253.

101. *Id.*

102. *See id.* Though rare, colonial court records contain the term "amerce," used as a substitute for fine. *See, e.g.*, PROCEEDINGS OF THE PROVINCIAL COURT OF MARYLAND 1666–1670, at 580 (J. Hall Pleasants & Louis Dow Scisco eds., 1940) (ordering sheriff to return a writ or else "shall be Amerced as the Cort shall thinke fit, noe particular Fyne beinge menconed"); PROCEEDINGS OF THE COUNTY COURT OF CHARLES COUNTY 1658–1666 AND MANOR COURT OF ST. CLEMENT'S MANOR 1659–1672, at 633 (J. Hall Pleasants & Louis Dow Scisco eds., 1936) (ordering defendants "amerced" for offenses such as "bowling without Licence").

103. *See supra* notes 15, 17; *see also* 2 JOSEPH STORY, CONSTITUTION OF THE UNITED STATES 39 (Thomas M. Cooley ed., 1873) (discussing the English Bill of Rights' prohibition against excessive fines as a reaction to the abuses of the Stuart Kings, including that "[e]normous fines and assessments were also sometimes imposed").

104. *But see* FRIEDMAN, *supra* note 14, at 36, 44.

105. Badders v. United States, 240 U.S. 391, 393–94 (1916) (stating only that there were "no ground[s] for declaring . . . unconstitutional" a $7,000 fine for seven counts of mail fraud); Pervear v. Commonwealth, 72 U.S. 475, 480 (1866) (holding that the Eighth Amendment does not apply to the states, but that even if it did the Court "perceive[d] nothing excessive, or cruel, or unusual" in a $50 fine and three months of hard labor for illegal sale and keeping of liquor).

106. Browning-Ferris v. Kelco, 492 U.S. 257, 257 (1989).

107. *Id.* at 260–61.

Fines Clause,[108] an idea that had gained significant traction in the academy as punitive damage awards skyrocketed in the years preceding the case.[109]

Although the *Browning-Ferris* majority, led by Justice Blackmun, determined that the proper method for interpreting the Excessive Fines Clause was to assess the historical record to decipher how the Clause's terms would have been understood at ratification, it rejected outright the historical interpretations reached by the academic community.[110] Instead, the Court determined that historical considerations mandated a narrow definition of "fine" that limited the term to "payment to a sovereign as punishment for some offense."[111]

This narrow definition was adopted without question in the three subsequent Excessive Fines cases. In the 1993 case of *Austin v. United States*, in an opinion written by Justice Blackmun, the Court determined that a civil in rem forfeiture—an action in which the government proceeds against the property in question rather than the owner—met the *Browning-Ferris* Court's historical definition of fine.[112] On the same day, the Court issued an opinion written by Chief Justice Rehnquist, *Alexander v. United States*, in which the Court held that an in personam forfeiture—in which the government proceeds directly against the property owner—also met that definition.[113] Finally, in the 1998 case *United States v. Bajakajian*, with Justice Thomas writing for the majority, the Court again used the *Browning-Ferris* definition in holding that a forfeiture of cash resulting from a criminal conviction for failure to report the transportation of money overseas was a fine for Excessive Fines Clause purposes.[114] *Bajakajian* is also the only opinion in which the Court interpreted the meaning of "excessive." In an odd turn of events, the Court essentially abandoned its methodology of engaging in an examination of history in order to discern the meaning of the Clause's operative language, choosing instead to

108. *Id.* at 259–60.

109. *See supra* note 17; *see also Browning-Ferris*, 492 U.S. at 282–83 (O'Connor, J., dissenting) ("As of a decade ago, the largest award of punitive damages affirmed by an appellate court in a products liability case was $250,000. . . . Since then, awards more than 30 times as high have been sustained on appeal.") (citations omitted).

110. The Court briefly analyzed the use of amercements and damages in England, ultimately concluding that they were entirely separate concepts. *Browning-Ferris*, 492 U.S. at 268–73. The extent to which this analysis is fair is outside of the scope of this article. It is worth noting, however, that Justice O'Connor in partial dissent disagreed with the Court's conclusion, *id.* at 290–94 (O'Connor, J., concurring in part and dissenting in part), as do numerous academics upon whose work Justice O'Connor relied, *see supra* note 17; *see also infra* note 135.

111. *Browning-Ferris*, 492 U.S. at 265. Punitive damages payable to private parties, as a result, were not subject to the Eighth Amendment's prohibition against excessive fines.

112. Austin v. United States, 509 U.S. 602, 618 (1993) (regarding an in rem forfeiture connected to a prior drug conviction).

113. Alexander v. United States, 509 U.S. 544, 558–59 (1993).

114. United States v. Bajakajian, 524 U.S. 321, 328–33 (1998). For a brief discussion of the inconsistent interpretations of in rem and in personam forfeitures that exist in *Austin* and *Alexander* on the one hand and *Bajakajian* on the other, see *infra* note 178.

adopt the Cruel and Unusual Punishment's Clause's gross disproportionality test wholesale.[115]

Even though the Court halted its historical examination with respect to excessiveness, the four Excessive Fines cases are steeped in the language of history. The actual historical record used, however, is notably truncated.[116] The Court focused primarily on the experience in England leading up to the adoption of the English Bill of Rights. Given the exact duplication in language prohibiting excessive fines, the English experience is undoubtedly significant to any historical consideration of the American Clause.[117] But it certainly is not the only or even the most relevant consideration. The ratifying generation's experiences are almost entirely absent from the Court's analysis. Though the majorities cite to the occasional early statute or case, the opinions are devoid of any meaningful attempt to investigate how colonial and early American courts and legislatures imposed and collected fines, "[b]y far the most common form of noncapital punishment in colonial America."[118] Moreover, the Court's analysis does not account for the temporal gap between the first articulation of the prohibition in the English Bill of Rights in 1689 and the Excessive Fine Clause's ratification over 100 years later in the American Bill of Rights in 1791.[119]

Further, while the English history can provide meaningful insight into the way those on American soil experienced and understood economic sanctions, its utility is inherently limited by adaption of the English common law to the peculiarities of colonial societies.[120] Writing in 1789 in the introduction to the first journal of law reports in America, Ephraim Kirby noted that while the early colonists "brought with them the notions of jurisprudence which prevailed in the country from whence they came," differences in commerce,

115. *Bajakajian*, 524 U.S. at 334–37.

116. In addition to the limited historical sources that the Court used to interpret the Clause's key terms and that I focus on here, the *Austin* Court also engaged in a textual and historical analysis related to the question of whether the Eighth Amendment is limited to criminal actions, concluding that it was not. *Austin*, 509 U.S. at 606–10 (relying heavily on Justice O'Connor's partial dissent in *Browning-Ferris*). The *Austin*, *Alexander*, and *Bajakajian* Courts also used some additional historical sources to interpret whether civil in rem and criminal in personam forfeitures would fit within the definition of "fines." *See infra* note 178.

117. *See generally* Massey, *supra* note 15; Granucci, *supra* note 17; *see also* JACK N. RAKOVE, ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION 20 (1997) ("It is evident, first, that the vocabulary of American constitutional thinking was profoundly shaped by the great disputes between the Stuart monarchs and their opponents (in Parliament and out) which reached a momentous climax in the Glorious Revolution of 1688–89.").

118. S. Union Co. v. United States, 132 S. Ct. 2344, 2350 (2012) (holding that facts that increase the maximum potential fine must be determined by a jury).

119. *See* Bernadette Meyler, *Towards a Common Law Originalism*, 59 STAN. L. REV. 551, 556–57 (2006).

120. *See* RAKOVE, *supra* note 117, at 20–21; Meyler, *supra* note 119, at 551; *see generally* Kathryn Preyer, *Penal Measures in the American Colonies: An Overview*, 26 AM. J. LEGAL HIST. 326 (1982).

development, and customs in America "rendered a deviation from the English laws, in many instances, highly necessary."[121] Similarly, as Connecticut Superior Court Judge Jesse Root described in his 1798 analysis of whether there was an American common law, while the American system derived from the English system, given "the genius of the people, [it was] calculated in an eminent manner to . . . give effectual security and protection to the rights, liberties, and properties of the citizens."[122] Therefore, while such changes were not understood to deprive Americans of the rights and protections afforded by the Magna Carta and English Bill of Rights,[123] the adaptation and development of law within the colonies and early states is certainly relevant to the question of how the ratifying generation would have understood the Clause's meaning.

In the following sections, I examine the historical record that served as the basis for the Court's restricted interpretation of the Clause's key terms, then expand the historical record well beyond that relied upon by the Court by analyzing colonial and early American statutory and court records.[124] The results of this more robust analysis undermine the Court's constrained interpretation of the Clause.

### *A. "Fines": The "To a Sovereign" Limitation*

The Court circumscribed the meaning of the term "fines" by requiring that the term be limited to monies payable to a sovereign.[125] To reach that restriction, the Court began by noting the very limited record of debate regarding the term's meaning.[126] The Court then turned to the definition of "fine" in one dictionary published before the Clause's ratification, and two additional dictionaries published forty-five and sixty-one years after ratification.[127] These dictionaries defined the phrases "fines for offenses" as "amends, pecuniary punishment, or recompence for an offence committed

121. EPHRAIM KIRBY, REPORTS OF CASES ADJUDGED IN THE SUPERIOR COURT OF THE STATE OF CONNECTICUT: FROM THE YEAR 1785, TO MAY 1788: WITH SOME DETERMINATIONS IN THE SUPREME COURT OF ERRORS, at iii–iv (1898).

122. JESSE ROOT, 1 REPORTS OF CASES ADJUDGED IN THE SUPERIOR COURT AND SUPREME COURT OF ERRORS: FROM JULY A.D. 1789 TO JUNE A.D. 1793, at xiii–xiv (1962).

123. *Cf.* JOHN PHILLIP REID, CONSTITUTIONAL HISTORY OF THE AMERICAN REVOLUTION: THE AUTHORITY OF RIGHTS 9–15 (2003) (describing the colonists' understanding that they held the same rights as Englishmen).

124. My analysis includes statutes passed in the original thirteen colonies from the date of their founding through the ratification of the Eighth Amendment in 1791 and for a ten-year period following ratification. I have also included statutory records from Vermont beginning in 1778 because Vermont became a state shortly before ratification. The statutory record alone shows that the Court's restricted interpretation of the Excessive Fines Clause is not supported by the historical use of fines in America, but I have also supplemented this analysis with additional evidence gleaned from court records from the same jurisdictions.

125. Browning-Ferris v. Kelco, 492 U.S. 257, 265 (1989).

126. *Id.*

127. *Id*. at n.6.

against the King and his laws."[128] This definition is of limited value, even setting aside that its vagueness could lead one to reject the Court's "to a sovereign" limitation in favor of an alternative understanding that does not distinguish fines based on the recipient of forfeited funds. As Justice O'Connor pointed out in her partial dissent, the Court's selection and reliance on these dictionaries was questionable given the number of dictionaries from the relevant period that did not specify to whom payment was made. Other dictionaries instead defined "fine" simply as "'a mulct [or] a pecuniary punishment'" or "a 'penalty,' or 'money paid for any exemption or liberty.'"[129] Further, Justice O'Connor asserted, contemporaneous dictionary definitions of "fine" rendered the word "much more ambiguous than the Court is willing to concede."[130]

In addition to dictionary definitions, the Court also looked to the ancestral relationship between the English Bill of Rights and the Excessive Fines Clause. The Court noted specifically the causal relationship between heavy fines and related imprisonment during the reign of England's Stuart Kings and the nation's eventual prohibition of excessive fines.[131] The Court concluded that because "nothing in English history suggests" that civil damages were within the purview of the English prohibition on excessive fines, our own Excessive Fines Clause must be limited to "only those fines directly imposed by, and payable to, the government."[132]

The Court's cursory review of a very specific period of English history that postdated the Magna Carta and predated the Eighth Amendment's ratification by one hundred years or more is ironic. In discounting the value of English practices leading up to the Magna Carta, the Court explained, "We hesitate to place great emphasis on the particulars of 13th-century English practice, particularly when the interpretation we are urged to adopt appears to conflict with the lessons of more recent history."[133] At a minimum, one would hope this recognition that practices change over time would lead the Court to take a broader look, particularly when a broader analysis would include the ratifying generation's own experience. Yet the Court took no steps to analyze how practice in the colonies and early states may have conflicted with the

128. *Id.* (relying on 2 T. CUNNINGHAM, A NEW AND COMPLETE LAW-DICTIONARY (1771); 1 THOMAS TOMLINS, THE LAW-DICTIONARY 796–99 (1836); and 1 JOHN BOUVIER, A LAW DICTIONARY 525 (4th ed. 1852)).

129. *Id.* at 295 (O'Connor, J., concurring in part and dissenting in part); *see infra* note 135.

130. *See Browning-Ferris*, 492 U.S. at 295 (O'Connor, J., concurring in part and dissenting in part) (relying on THOMAS SHERIDAN, A DICTIONARY OF ENGLISH LANGUAGE (6th ed. 1796); SAMUEL JOHNSON, A DICTIONARY OF THE ENGLISH LANGUAGE (7th ed. 1785)). Justice O'Connor dissented from the majority's determination that fines were restricted to penalties payable to a sovereign, writing that the "result is neither compelled by history nor supported by precedent." *Id.* at 283.

131. *Id*. at 266.

132. *Id*. at 266–68.

133. *Id.* at 268.

English experience in the years surrounding the adoption of the English Bill of Rights. The "to a sovereign" limitation was thus born from an unduly limited review of English history.

The actual practice in the colonies and early American states belies the Court's restriction of fines to sanctions payable to the sovereign. Colonial and early American statutory and court records show quite clearly that "fines" were not so limited. Indeed, the broader historical record reveals that the word "fine" served as shorthand for a variety of financial deprivations.[134] In particular, the colonies and early states used the term "forfeit" interchangeably with the word "fine."[135] Many statutes referenced "fines and forfeitures" simultaneously when referencing economic sanctions,[136] such as a 1782 Delaware statute in which a conviction for refusing to attend military service required the offender to "forfeit and pay the Sum of Three Shillings and Nine-pence" and then referred to the penalty as "the said Fine and Forfeiture."[137] There are also examples in the record where a single economic penalty is referred to as a "forfeiture" in one location in the statute and a "fine" in another.[138] In New York, for example,

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134. *See id.* at 291 (O'Connor, J., concurring in part and dissenting in part); *cf.* Massey, *supra* note 15, at 1256.

135. *See* Austin v. United States, 509 U.S. 602, 623 (1993) (Scalia, J., concurring) ("'Forfeiture' and 'fine' each appeared as one of many definitions of the other in various 18th-century dictionaries."). While "forfeit" was by far the most commonly used term for pecuniary penalties, the colonies and early states also substituted other words and phrases for "fine" including the precedent term "amerce," "penalty," "on pain of," or "mulct." *See, e.g.*, 1 Stat. 36 (1789) ("penalties"); 1790 Conn. Pub. Acts 396 ("amercement"); 1781 N.J. Laws 11 ("on pain of confiscation"); 1763 R.I. Pub. Laws 45 ("mulct"); *see also Browning-Ferris*, 492 U.S. at 290 (O'Connor, J., concurring in part and dissenting in part) (explaining that by the seventeenth century fines had largely replaced amercements in English practice, but that the terms were still used interchangeably). On occasion, sanctions related to public offenses were even referred to as "damages." *See, e.g.*, 1783 N.H. Laws 300–01 (describing the penalty for the offence of overcharging for ferry service as payment of "damages"); 1 RECORDS OF THE COURT OF TRIALS OF THE COLONY OF PROVIDENCE PLANTATIONS 1647–1662, at 65 (1920) (referring to the economic sanction for breach of peace as "Damag" and "fine"); 3 RECORDS OF THE COURT OF ASSISTANTS OF THE COLONY OF MASSACHUSETTS BAY 1630–1692, at 137, 294 (John F. Cronin ed., 1928) (jury issued "damage" award against defendant for bearing false witness, which was then listed in the court's index under the title, "acknowledge offense publicly or pay fine"). In *Browning-Ferris*, the Court stated that "[t]he dichotomy between fines and damages was clear," and that "the term 'damages' was also in use at the time the Eighth Amendment was drafted and ratified, and had a precise meaning limited to the civil context.'" 492 U.S. at 265 n.7 (relying on the same dictionaries it had used to define "fine"). The record included here suggests that the clarity the Court ascribed to the term "damages" was not valid.

136. *See, e .g.*, 1778 Conn. Pub. Acts 485–89; 1776–1777 Del. Laws 354–56 (1777); 1765 Ga. Laws 248–64; 1782 Md. Laws xvii–xviii; 1747 Mass. Acts 237–39; 1780 N.H. Laws 229; 1786 N.J. Laws 344; 1782 N.Y. Laws 479; 1777 N.C. Sess. Laws 208–26; 1771 Pa. Laws 361; 1783 R.I. Pub. Laws 52; 1769 S.C. Acts i–276; 1764 Va. Acts 449–50; 1779 Vt. Acts & Resolves 64–65.

137. 1782 Del. Laws 4 (1782).

138. *See, e.g.*, 1715 Conn. Pub. Acts 209 ("shall forfeit the sum" referred to as "his or their Fine or Fines"); 1700–1769 Del. Laws 423 (1766) ("shall forfeit the sum of Five Pounds each; one moiety of said fines to the orphan "); 1700–1769 Del. 108 (1721) ("shall forfeit and pay the sum of Ten Pounds . . . the said fine of Ten Pounds"); 1787 Ga. Laws 22 ("shall for the first offence forfeit . . . One half of which fine"); 1757 Ga. Laws 15 ("shall forfeit for every such offence . . . the one half of the said fine to go to the informer"); 1704 Md. Laws 67 ("shall forfeit . . . the said fine and forfeiture");

the statute prohibiting willfully setting fire to the woods dictated that one so convicted "shall *forfeit* and pay the sum of five pounds . . . and for want of effects to pay *such fine* the offender or offenders shall be committed to the common goal."[139] In other statutes, the language made clear that satisfying a fine required a forfeiture of money or some item of economic value. For example, a Rhode Island statute prohibited grain millers from taking an excess toll "upon the Penalty of forfeiting as a Fine Twelve Pounds for each Offence."[140] At times, a forfeiture was the only punishment imposed for what was obviously a public offense.[141] In fact, the use of the word "forfeiture" as a substitute for "fine" is so ubiquitous throughout the historical record that differentiating the two would lead to the untenable conclusion that the use of fines as punishment was extremely rare; research has clearly shown that fines were among the most prevalent forms of punishment in colonial America.[142]

The use of "fines" and "forfeitures" went well beyond the Court's "to a sovereign" limitation. For some convictions, in fact, statutes contemplated that pecuniary penalties go entirely to parties other than the sovereign. Where a government entity or actor committed the offence, fines and forfeitures were often awarded exclusively to individuals. For example, where the failure of Connecticut towns to maintain their bridges resulted in the loss of life, the

1744 Mass. Acts 102–03 ("shall for every such Offence forfeit the Sum" referred to as "All the abovementioned fines"); 1741 N.C. Sess. Laws 52–53 ("shall forfeit and pay the sum" referred to as "such fine"); 1778 N.H. Laws 135 ("shall Forfeit the Sum of *Fifteen Pounds* " referred to as "his or their Fine or Fines"); 1782 N.J. Laws 19 ("shall forfeit . . . such Fine"); 1781 N.Y. Laws 358–59 ("for every offense shall forfeit and pay the sum of ten pounds " referred to as "the said fine"); 1788 Pa. Laws 636 (penalty for property damage referred to as "forfeit" and later "fines"); 1777 Pa. Laws 34 ("shall forfeit and pay . . . and of the last mentioned fine"); 1777 Pa. Laws 73 ("shall forfeit and pay . . . And that the fines and penalties by this act set"); 1750 R.I. Pub. Laws 91 ("shall forfeit the Sum of Fifty Pounds" referred to as "the Fine . . . aforesaid"); 1698 R.I. Pub. Laws 43 (various penalties relating to the prevention of fires referred to as forfeitures and later "ye Fines before mentioned"); 1791 S.C. Acts 50 ("forfeit and pay a sum not exceeding two dollars per day" to be recovered by warrant of distress, later referred to as "all fines so recovered"); 1764 Va. Acts 449–50 ("forfeit . . . Fine and Forfeiture"); 1787 Vt. Acts & Resolves 33 ("shall forfeit . . . shall forfeit and pay a fine . . . both of which fines").

139. 1785 N.Y. Laws 63 (emphasis added).

140. 1779 R.I. Pub. Laws 20; *see also* 1787 Mass. Acts 639; 1771 N.H. Laws 547–48; 1776 R.I. Pub. Laws 37.

141. *See, e.g.*, 1786 Conn. Pub. Acts 331 (illegal coining of copper); 1789 Del. Laws 30–31 (1789) (illegal trafficking of slaves); 1790 Ga. Laws 11–12 (illegal deer hunting); 1737 Md. Laws 9–10 (enticing slave to run away); 1786 Mass. Acts 367 (gambling); 1791 N.H. Laws 271 (illicit lottery); 1747 N.J. Laws 406 (running illicit lottery); 1788 N.Y. Laws 627 (perjury); 1741 N.C. Sess. Laws 51 (stealing boats); 1788 Pa. Laws 636 (willful or malicious breaking or theft of city's pumps); 1776 R.I. Laws 25 (selling uninspected gunpowder); 1785 S.C. Acts 24 (acting as an attorney prior to taking oath); 1764 Va. Acts 449–50 (selling a free person as a slave); 1787 Vt. Acts & Resolves 93 (illicit lottery).

142. *See, e.g.* Preyer, *supra* note 120, at 350; *see also* FRIEDMAN, *supra* note 19, at 38 ("But the workaday fine, the drudge-horse of criminal justice, was probably the most common form of punishment."); *id.* at 37 (noting that in colonial times fines were punishment for small offenses as well as "[m]ore aggravated sins"); S. Union Co. v. United States, 132 S. Ct. 2344, 2350 (2012) ("Fines were by far the most common form of noncapital punishment in colonial America.").

towns were required to "pay a fine of One hundred Pounds, to the Parents, Husband, Wife or Children, or next of kin to the party deceased."[143] Likewise, where individual offenders served a public or quasi-public function, fines and forfeitures routinely went directly to those harmed by their offences. This included actors such as sheriffs, constables, and justices of the peace who abused their duties. These abuses included failure to follow writs of habeas corpus; engaging in vexatious arrests or other misconduct;[144] refusal by public officials to pay monies owed to individuals;[145] and misconduct by individuals statutorily assigned to serve the public in some way, such as by providing ferry service or serving as an inspector of goods or vessels.[146] In 1791, for example, Virginia passed a statute directing that forfeitures stemming from a trustee's failure to ensure a river's accessibility be apportioned to individuals who purchased subscriptions to keep the river clear.[147]

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143. 1702 Conn. Pub. Acts 10–11; 1672 Conn. Pub. Acts 7 (emphasis omitted).

144. *See, e.g.*, 1787 N.Y. Laws 426 ("forfeit to the prisoner or party grieved" for refusal to follow writ of habeas corpus); 1787 N.Y. Laws 398 (malicious and vexatious arrests by sheriff: "forfeit and pay to the party or parties, so arrested or attached . . . and shall also forfeit and pay unto such person or person in whose name . . . such arrest or attachment shall be had or made"); 1785–1786 Del. Laws 8 (1786) ("forfeit treble Damages to the Party grieved for abuse of duties"); 1785 Pa. Laws 244 ("forfeit to the prisoner or party grieved" for failure to release or re-arrest of person awarded writ of habeas); 1784 Mass. Acts 96 ("if any Sheriff or his deputy shall unreasonably neglect or refuse to pay to any person [monies received in execution] he shall forfeit and pay to such person"); 1782 N.Y. Laws 469 ("forfeit and pay to the party grieved" for failure to turn collected forfeitures over to magistrate); 1777 Pa. Laws 35 ("forfeit and pay the sum of thirty pounds to the owners of such house, and make good all damages he . . . may sustain" as a result of officer breaking into a house to search without a warrant); 1776 Mass. Acts 43 (sheriffs and other officers overcharging for fees "shall forfeit and pay to the person or persons injured"); 1769 Md. Laws ch. XV ("forfeit and pay to the party injured" for failure to provide a fair account of bonds); 1759 Ga. Laws 55–58 ("forfeit and pay . . . for the use of the party aggrieved" for failure to execute a precept); 1712 S.C. Acts 23 ("forfeit to the prisoner or party grieved" for failure to release prisoner upon writ of habeas corpus); 1699 N.Y. Laws 30 ("forfeit to every party so grieved" for failure to post election poll).

145. *See, e.g.*, 1702 N.Y. Laws 49 ("forfeit and pay, to the Party thereby being grieved" for refusal to pay bounty on wolves).

146. *See, e.g.*, 1 Stat. 173 (1790) ("forfeit" to "the use of the party grieved" for demanding excess rates during customs inspection); 1 Stat. 45 (1789) (same); 1759 Ga. Laws 55–58 ("forfeit" and "for the use of the party aggrieved" related to customs inspection); 1763 Md. Laws ch. I, para. xxxi ("forfeit and pay to the Party grieved" by sheriff's refusal or delay in delivering payments from tobacco inspection); 1777 N.J. Laws 20 ("forfeit and pay to the Person or Persons delayed or injured" by overseer's failure to attend to drawbridge); 1784 N.Y. Laws 667 ("forfeit . . . to the use of the person or persons so delayed" by pot and pearl ash examiner); 1750 N.Y. Laws 296 ("forfeit, to the Use of the Person or Persons so delayed" by flour inspector); 1764 R.I. Pub. Laws 64 ("forfeit to the Person or Persons injured" by demanding excess fees related to customs inspections); 1784 S.C. Acts 48–49 ("forfeit and pay to the persons so delayed" by ferry master); 1790 Va. Acts 21 ("forfeit and pay to the party aggrieved" for overcharging for ferry); 1784 Va. Acts 21 ("forfeit and pay to the party grieved" for hemp inspector's failure to meet duties); 1748 Va. Acts. 204–13 ("shall forfeit and pay to the Party grieved" for violations by ferry master); *cf.* 1784 N.Y. Laws 652 (penalty of overseer of the poor's failure to register notice is "forfeit . . . to the use of the party grieved"); 1734 N.Y. Laws 181–82 (gelder of horses to "forfeit to the Owner" of a horse gelded illegally).

147. 1791 Va. Acts. 18.

Fines and forfeitures were also awarded exclusively to nongovernmental entities, and particularly to victims and their families, where the offender and offense were unrelated to any government function. This occurred in a wide variety of offenses including thefts,[148] offenses resulting in property damage,[149] and various other offenses.[150] Examples include a Rhode Island case where the General Assembly ordered the Treasurer to divide the "Fine amongst those Persons that have lodged . . . the counterfeit Sixteen Pound Bills" that the defendant was convicted of passing;[151] a 1791 South Carolina statute that set the penalty for swindling as "refunding to the party aggrieved, double the sum he was so defrauded of" which was then referred to as "such fine or fines";[152] and a 1786 Delaware statute that mandated that the entire forfeiture imposed for a conviction of failure to aid a distressed ship be awarded to the master,

148. *See, e.g.*, 1745 Conn. Pub. Acts 543 (theft of bayberries: "shall forfeit and pay to the party Injured . . . Three times the Value of the Bay-berries"); 1721 Conn. Pub. Acts 263 (stealing boat: "shall for every such offence forfeit the Sum of *Five Shillings* to the Owner thereof, over and above the damages the said Owner shall sustain"); 1741 N.C. Sess. Laws 51 (stealing boat: "forfeit and pay, to the party who shall own . . . such boat"); 1705 Va. Acts 154 ("[S]hall pay to the Owner of [a stolen boat] . . . . And if there be several Actors . . . it is hereby declared, that every Person shall pay the whole Fine."); 1779 Vt. Acts & Resolves 42 (theft of boats or canoes: "forfeit and pay to the owner").

149. *See, e.g.*, 1759 Conn. Pub. Acts 298 (defacing timber: "shall forfeit and pay to the Owner . . . for each Offence the sum of *Ten Shillings*, and double the Value of said Logs"); 1726 Conn. Pub. Acts 329 (felling another's trees: "Forfeit and Pay to the Party . . . Injured"); 1744 Mass. Acts 365–66 (fines for fire distributed "among the Poor most distressed by the Fire"); 1735 Md. Laws 8 (cutting or altering tobacco: "shall forfeit . . . to the Party grieved"); 1791 N.Y. Laws 228–29 (discharging ballast or timber onto a dock: "forfeit and pay to such owner"); 1700 Pa. Laws 20 (cutting another's timber: "forfeit, to the owner thereof"); 1759 R.I. Pub. Laws 80 (fines for fire distributed "among the Poor most distressed by the Fire").

150. *See, e.g.*, 1710 Conn. Pub. Acts 152–53 ("[S]hall pay all Damages [arising from counterfeiting bills of credit] . . . One moiety of the said Fine."); 1780 Md. Laws vi–vii (sale of alcohol to a servant or slave without master's permission: "forfeit . . . to the master, mistress, or owner"); 1737 Md. Laws 9 (enticing slave to run away: "shall forfeit and pay the full Value of such Slave to the Master"); 1791 N.C. Sess. Laws 9 (harboring runaway slave: "forfeit and pay to the owner"); 1747 N.J. Laws 351–52 (failure of attorney to file cost bill: "forfeit . . . to the Party grieved"); 1732 N.Y. Laws 175 (running illicit ferry: "shall forfeit and pay to the Ferry-man"); 1730 N.Y. Laws 157–58 (trading to slaves without master's permission: "Forfeiture of treble the Value . . . to the Master or Mistress"); 1785 Pa. Laws 346 (ballot tampering during election: "forfeit . . . to the party grieved"); 1770 R.I. Pub. Laws 53–54 (selling butter in an unmarked firkin or tub: "shall forfeit and pay, as a Fine . . . [to] any Person to whom such Butter shall be offered for Sale"); 1791 S.C. Acts 41 (gambling: requiring "refunding to the party aggrieved" referred to later as a "fine or fines"); 1786 Vt. Acts & Resolves 6 (sale and transportation of negros and molattoes out of state: "shall forfeit and pay to the persons injured"); PROCEEDINGS OF THE COUNTY COURTS OF KENT (1648–1676), TALBOT (1662–1674) AND SOMERSET (1655–1668) COUNTIES 26 (J. Hall Pleasants ed., 1937) (slander: "shall pay a Fine . . . toward the Reparation of the plaintiffs Credit"); *see also* 1672 Conn. Pub. Acts 25 (noting that "fines as shall be imposed upon persons for delinquency" may be "disposed by Law to perticular persons"); 1772 N.H. Laws 569 (excepting from the requirement that fines be used to pay costs "where any fine or forfeiture is given to any party Injured by the Offence"); RECORDS OF THE PARTICULAR COURT OF CONNECTICUT, 1639–1663, at 213 (1928) ("John Packer is fined for his misdemeanor in Strikeing Edwrd Leake 20s to be paind vnto ye said Leake.").

151. 1756 R.I. Pub. Laws 65.

152. 1791 S.C. Laws 41.

superior officer, or owner of the ship in distress.[153] Likewise, in 1772, New Hampshire explicitly clarified its code as it related to the sale of "Spirituous Liquors" to note that a "fine or forfeiture [may be] given to any party Injured by the Offence or the Informer or any Particular Person Body Politic & Corporate."[154]

Even where fines and forfeitures were split among numerous entities, recipients often included nongovernmental actors. For example, the primary penal statute passed by the First Congress—just a year and a half prior to the ratification of the Bill of Rights—directed that upon conviction for larceny on federal land or the high seas, the amount "fined" be assessed based on the value of the stolen property, with "one moiety to be paid to the owner of the goods, or the United States, as the case may be, and the other moiety to the informer and prosecutor."[155]

Colonial and state statutes, as well as courts of the period, also routinely split awards between a sovereign and individuals.[156] The historical record provides multiple examples of such statutes. For example, in 1787, a Georgia

153. 1785–1786 Del. Laws 6 (1786).

154. 1772 N.H. Laws 569; *see also* 1787 Vt. Acts & Resolves 70–71 (directing all fines be paid to the public treasury "provided always, that where any such fines or penalties are or shall be otherwise ordered to be paid . . . they shall be disposed of according to the order of such law").

155. 1 Stat. 116 (1790).

156. *See, e.g.*, 1772 Conn. Pub. Acts 375 (avoiding ferry: "shall forfeit and pay . . . for every such Offence, one Half to the Owner . . . of said Ferry, the other Half to the Town Treasury"); 1702 Conn. Pub. Acts 92 (perjury: "shall for his or their offence, lose and forfeit *Twenty Pounds*, the one moiety thereof unto the publick Treasury . . . , and the other moiety to such person . . . as shall be grieved"); 1702 Conn. Pub. Acts 52 (branding another's horse: "shall be committed to the common Goal . . . and be whipt . . . , or else pay a fine of *Thirty Pounds*, such part thereof as the Court shall judge meet, to be the use of the party injured, the remainder to the Publick Treasury"); 1782 Del. Laws 4 (1782) (signaling the enemy from boat or vessel: "one Moiety of which Fine . . . to be paid to the innocent injured Owner . . . and the other Moiety to him or them who shall openly prosecute"); 1769 Md. Laws v–vi (improper taking of a horse: "forfeit . . . half to the party grieved"); 1715 Md. Laws 78–79 (embezzlement of wills or records: "forfeit . . . half to the party grieved"); 1789 N.J. Laws 516 (avoiding tax on cranberries: forfeiture directed to property owner whether private or public); 1788 N.Y. Laws 627–29 (perjury: "one moiety of the said forfeiture . . . to such person or persons as shall be grieved, hindered or molested"); 1750 N.Y. Laws 294 (false tare on flour or bread: "forfeit and pay . . . Half thereof to the Purchaser of said Flour or Bread");1788 N.C. Sess. Laws 448 (illegal slave trade: "forfeit and pay the sum of ten pounds, and be further liable to pay all damages that may accrue . . . half to the person injured"); 1784 N.C. Sess. Laws 362 (pilot refusing to assist vessel in distress: "forfeit and pay . . . half to the master of such vessel"); 1791 Pa. Acts 120 ("restitution of goods stolen by robbers and burglars, or of their value" prioritized over other penalties drawn from the "forfeiture of [the offender's] lands and chattels"); 1764 R.I. Pub. Acts 62–65 (overcharging for ferry: "forfeit . . . [to] the Colony . . . And shall also forfeit to the Person or Persons from whom such unlawful Fees have been exacted"); 1785 S.C. Acts 16–17 (overcharging at grist mill "to pay a fine . . . one-half to the prosecutor, and the other half to the person aggrieved"); 1709 S.C. Acts 14–15 (Justice of the Peace overcharging for service: "forfeit . . . [one] moiety to the party grieved"); 1783 Va. Acts. 20 (running illegal ferry: "forfeit and pay . . . one moiety to the ferry-keeper nearest the place"); 1779 Vt. Acts & Resolves 152 (fraudulent conveyances: "shall forfeit . . . which above forfeiture shall be equally divided between the party grieved, and the county treasurer"); 2 RECORDS OF THE COURT OF ASSISTANTS OF THE COLONY OF THE MASSACHUSETTS BAY 1630–1692 81 (John Noble ed., 1904) ("tempting" maids into uncleanliness: "fined 5£ to the country, & 20s" to each maid).

statute imposed a fine for biting, gouging, or maiming, with half of the fine paid directly to the victim.[157] In 1766, a Delaware statute awarded half of fines assessed against a public guardian to "the orphan or minor" injured by the guardian's neglect.[158] A New Hampshire statute in 1759 assessed a "fine" for breaking street lamps and dictated that "all such Fines shall be Applied in this manner namely, out of the same the owner or owners of such Lamp or Lamps shall be payed the damages he she or they have sustained."[159] Courts likewise ordered that fines be apportioned in part directly to victims, such as in a Connecticut case where a court ordered a defendant "*ffyned* to pay the fiue pownd to the Country and ten pownd to the wyddowe Scotte" upon conviction of death by misadventure.[160]

In awarding fines and forfeitures to individuals the colonists treated the concept of "victim" broadly, often awarding restitution penalties to the master of a slave or servant.[161] This was true whether the offender was engaged in a public or quasi-public act, or was a purely individual actor. In 1741, for example, North Carolina passed a statute that rendered marrying servants

157. 1787 Ga. Laws 21–22 ("one half of which fine to go to the party injured").

158. 1700–1769 Del. Laws 423 (1766).

159. 1754 N.H. Laws 73.

160. RECORDS OF THE PARTICULAR COURT OF CONNECTICUT, 1639–1663, *supra* note 150, at 25; *see also id.* at 190 (directing half of the "fine" for abusive carriage to the victim); 1 RECORDS OF THE COURT OF ASSISTANTS OF THE COLONY OF THE MASSACHUSETTS BAY 1630–1692, 14 (John Noble ed., 1901) (manslaughter: "Fined 20£ to County, 20£ to the father"); *id.* at 114 (manslaughter: "to fine him the sume of twenty pounds to the widdow . . . and as a fine to the Country five pounds"); PROCEEDINGS OF THE COUNTY COURTS OF KENT, *supra* note 150, at 26 (directing a "fine" to a victim of slander).

161. *See, e.g.*, 1789–1790 Del. Laws 974 (1790) (marrying servant without consent of master: "shall pay to the master or mistress of the servant"); 1765 Ga. Laws 250 (providing travel ticket to slave without master's consent: "forfeit to the owner the sum of five pounds over and above the damage that may accrue to such owner by the absence of such slave"); 1780 Md. Laws iv–vii (amount "forfeit" for "harbor[ing], entertain[ing], or serv[ing] any liquor" to servant or slave to the master or mistress); 1694 Mass. Acts 82 (master of vessel who takes on an absconding servant forfeits one "Moiety unto the . . . Master of such . . . Apprentice or Servant"); 1714 N.H. Laws 123 (same); 1713 N.J. Laws 23 (harboring a slave: "shall be also liable to pay the Value of such Slave to the Master or Mistress"); 1788 N.Y. Laws 676 (concealing runaway slave: "forfeit to the owner or owners of such slave"); 1741 N.C. Sess. Laws 45 (marrying servants without license "shall forfeit and pay . . . to the use of the Master or owner of such servant"); 1730 Pa. Laws 180–81 (marrying without consent of the master or mistress: "forfeit the sum of fifty pounds, to be recovered . . . by the person or persons grieved"); 1721 Pa. Laws 126–28 (selling liquor to a servant: "forfeit and pay the sum of twenty shillings . . . the one moiety shall be paid to the . . . master or mistress"); 1705 Pa. Laws 28 (extension of indenture "for the loss and damage they had sustained" where servant has a child out of wedlock); 1750 R.I. Pub. Laws 86 (trading with a servant or slave without master's permission: "on Penalty of forfeiting . . . Half to the Master, Mistress, or Owner"); 1740 S.C. Acts 165 (maiming a slave without cause: "forfeit and pay to the owner or owners of such slave . . . for every day his time lost"); 1759 Va. Acts 13 (servant woman having child out of wedlock: serve master or mistress for an additional year); *cf.* THE BURLINGTON COURT BOOK: A RECORD OF QUAKER JURISPRUDENCE IN WEST NEW JERSEY 1680–1709, at 156 (H. Clay Reed & George J. Miller eds., 1944) (ordering a man who "hath had carnally to doe with . . . [a] Negro woman" to pay the woman's master "for his losse of time in his Negro womans service").

without the permission of their master illegal, ordering the person performing such a marriage to "forfeit and pay five pounds . . . to the use of the Master or owner of such servant" and ordering the servant to "serve his or her said master or mistress . . . one whole year, after the time of service by indenture or custom is expired."[162]

Fines and forfeitures were also awarded to private parties besides victims, their families, and their masters. For example, individuals who served as replacements for others who neglected statutory obligations were also the recipients of fines, such as in a Rhode Island case where a contempt fine assessed against a man summoned to appear for jury duty was awarded to the replacement jurors.[163]

Further evidence that "fines" were not limited to monies payable to a sovereign is evident even in the absence of the terms "fine" and "forfeiture." Pecuniary punishments without those labels were often assessed to nongovernmental entities. Because the sanctions were often the sole punishment for an offense, they were clearly understood to be fines, regardless of nomenclature.[164] For example, in a Rhode Island case in which "Sachem an

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162. 1741 N.C. Sess. Laws 45.

163. RECORDS OF THE COURT OF TRIALS OF THE COLONY OF PROVIDENCE PLANTATIONS, *supra* note 135, at 54; *see also* 1709 Conn. Pub. Acts 150-51 ("All which Fines and Penalties aforesaid, shall be one . . . Moiety to the rest of the Souldiers Detached out of the same Company"); 1702 Conn. Pub. Acts 49 (refusing mandated work on highways: "forfeit for every days neglect . . . which fines shall be [used] to Hire others to work"); 1672 Conn. Pub. Acts 49 (refusal to serve as military clerk: "shall pay *forty shillings* . . . till one doth accept the place, and he that doth hold the place shall have a fourth part of all fines for his labour");1784 Mass. Acts 136 (juror failing to attend assessed a "fine . . . to be divided equally amongst the Grand Jurors who shall attend"); 1758 N.J. Laws 195 ("Which Fines, when recovered, shall be applied to the Fund for rewarding [soldiers] as shall behave valiantly."). *But see* 1788 N.Y. Laws 671 (authorizing courts to pay prosecutor costs and witness fees in felony cases in order to promote service in both roles). Doctors who treated victims were also sometimes awarded a portion of the penalty for an offense. *See, e.g.*, 2 RECORDS OF SUFFOLK COUNTY COURT 1671–1680, at 644 (1933) (ordering defendant who shot off the victim's testicle to pay the doctor "for the cure"); *see also* SELECT CASES OF THE MAYOR'S COURT OF NEW YORK CITY 1674–1784, at 742 (Richard B. Morris ed., 1935) (order to pay doctor who treated victim).

164. *See, e.g.*, 1733 Conn. Pub. Acts 407–08 (restitution for arson); 1718 Conn. Pub. Acts 233 (restitution for felling another's trees); 1702 Conn. Pub. Acts. 113–14 (restitution for theft of a horse); 1700–1769 Del. Laws 179–80 (1739) (restitution, costs and damages for stealing boat); 1713 Md. Laws 75 (restitution for clerk of court's failure or delay in entering demand for an appeal: "upon penalty to pay the respective damages which such appellant shall sustain"); 1700 Pa. Laws 10 (restitution for leaving service before indenture ended); 1729 N.C. Sess. Laws 35–36 (restitution for hunting on another's land); 1700–1769 Del. Laws 101 (1721) (stealing landmarks: "under the penalty of any sum not exceeding Fifty Pounds . . . to the use of the party wronged"); 1789 S.C. Acts 6 (tobacco inspector taking extra fee: "he or they shall pay to the party aggrieved . . . to be recovered . . . with costs of suit"); *see also* COURT RECORDS OF PRINCE GEORGES COUNTY, MARYLAND 1696–1699 22 (Joseph H. Smith & Philip A. Crowl eds., 1964) (riding horse without permission: "pay unto him the said Thomas Pingle two hundred pounds of tobaccoe"); 2 MINUTES OF THE COURT OF FORT ORANGE AND BEVERWYCK 1657–1660, at 9 (A.J.F. Van Laer ed., 1923) (killing a goat); 2 RECORDS OF THE COURT OF ASSISTANTS OF THE COLONY OF THE MASSACHUSETTS BAY 1630–1692, *supra* note 156, at 103 (sole punishment for negligent death 10£ to victim's wife and children).

Indian" confessed to stealing liquor out of William Cadman's cellar, the sole punishment imposed by the court was that Sachem "make Restitution to William Cadman for the loss of his liquors."[165] Likewise, a New York court punished a defendant convicted of gambling by ordering him to repay half his winnings to another player "to relieve his poor Children."[166]

At other times, the treatment of a pecuniary punishment as a fine is evident even without labeling because the sanctions were combined with corporal punishments or incarceration.[167] For example, in 1758, John Smith was convicted in Rhode Island of stealing from Captain Nathaniel Peck, and the "Sentence passed upon him [was] that he should be whipped, pay Costs of Prosecution, pay the said Nathaniel Peck One Hundred and Eighty Pounds Old Tenor, and be sold out of the Colony for a Term not exceeding Seven Years."[168]

The 1798 case *Goodall v. Bullock* presents especially damning evidence against the notion that a fine must be payable to a sovereign. In that case, a Virginia court overturned the trial court's imposition of a fine against sheriffs who had not served a *fieri facias*, an order similar to a modern subpoena.[169] The fine was set forth in statute as payable to the individual on whose behalf the *fieri facias* was to be served.[170] The sheriffs' counsel argued that the statute was faulty because it did not require the fine to be directed to the sovereign. Specifically, counsel argued that "all fines, before the revolution were payable to the king; and observing that now such as were not differently devoted or abolished were, by the constitution, transferred to the commonwealth."[171] The court succinctly put this idea to rest:

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165. RECORDS OF THE COURT OF TRIALS OF THE COLONY OF PROVIDENCE PLANTATIONS, *supra* note 135, at 52–53. The court offered Sachem an opportunity to avoid the fine if he were to turn in a co-defendant. *Id.*

166. SELECT CASES OF THE MAYOR'S COURT, *supra* note 163, at 742–44.

167. *See, e.g.*, 1783 Del. Laws 2–3 (1783) (whipping, pillory, cutting off of ear lobes and restitution for counterfeiting); 1715 Md. Laws 88 (pillory, whipping, and restitution for stealing); 1711 Mass. Acts 270 (listing punishments for robberies and assaults to include branding, imprisonment, and restitution); 1777 Pa. Laws 54–56 (pillory whipping, double damages, and costs for counterfeiting lottery tickets); 1754 R.I. Pub. Acts 15 (order to pay "double Damages" to victims of counterfeiting along with punishments including standing in the pillory, branding, and ear cropping); COURT RECORDS OF KENT COUNTY, DELAWARE 1680–1705 147–57, 252, 271 (Leon deValinger, Jr. ed., 1959) (combinations of corporal punishment and restitution for theft and fornication cases); 2 RECORDS OF THE COURT OF ASSISTANTS OF THE COLONY OF THE MASSACHUSETTS BAY 1630–1692, *supra* note 156, at 32 (restitution and whipping for theft); BURLINGTON COURT BOOK, *supra* note 161, at 338 (whipping, branding, restitution and charges for theft of a shirt); *cf.* 1715 N.C. Sess. Laws 23 (restitution plus "such other punishment . . . had the offence been committed to an Englishman" for defrauding or abusing of Indians).

168. 1762 R.I. Pub. Acts 133.

169. GEORGE WYTHE, DECISIONS OF CASES IN VIRGINIA BY THE HIGH COURT OF CHANCERY, WITH REMARKS UPON DECREES, BY THE COURT OF APPEALS, REVERSING SOME OF THOSE DECISIONS 328, 332–33 (1852).

170. *Id.* at 330–31.

171. *Id.* at 331.

> This is incorrect. not all fines, but only those inflicted for offences against the government, were formerly payable to the king. the fine in this case is appropriated to the party injured, because it is recoverable on the motion, that is, by the action, of the party injured. an action is a juridical vindication of that which the actor allegeth to be due to him. he, therefore, who hath the right to the action, hath, *per hypothesin*, the right to the thing demanded—recovers that which is due to him.[172]

*Goodall* occurred only seven years after the ratification of the Excessive Fines Clause, and its direct handling of the question and explanation of the nearly contemporaneous understanding of fines is noteworthy. Moreover, the case is consistent with the broader American experience detailed above. From the colonies' earliest days, legislatures and courts directed fines to be paid to the sovereign as well as to a variety of other persons, a practice which continued post-Revolution and post-ratification.[173] The limited historical record relied on by the *Browning-Ferris* Court to justify the "to a sovereign" limitation simply pales in comparison to the abundance of evidence that the ratifying generation would have experienced and understood fines to be payable to both the government and to individuals.

### *B. "Fines": The "Punitive Penalties" Restriction*

In addition to the sovereign-recipient requirement, the Court also restricted "fines" to penalties with a punitive purpose.[174] The Court has explained that a fine may have remedial qualities even if it is partially punitive,[175] but despite that caveat, it is important to note that any assessment of this requirement is likely to be convoluted. As Justice Kennedy remarked in his *Bajakajian* dissent, "It is a mark of the Court's doctrinal difficulty that we must speak of nonpunitive penalties, which is a contradiction in terms."[176]

This conceptual puzzle may explain why the historical support for this second restriction is even less impressive than the "to a sovereign" restriction. Beyond the dictionary definitions noted above, the *Browning-Ferris* Court made no effort to justify its notion that a sanction's purpose was relevant to the consideration of whether an economic sanction is a fine in the first instance.[177] In the three subsequent Excessive Fines Clause opinions, the Court accepted

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172. *Id.* The sheriffs' appeal was ultimately successful on other grounds. *See id.* at 332–33.

173. On the relevance of uniform post-ratification practice, see William Baude, *Rethinking the Federal Eminent Domain Power*, 122 YALE L.J. 1738, 1743–44 (2013).

174. Browning-Ferris v. Kelco, 492 U.S. 257, 265 (1989).

175. Austin v. United States, 509 U.S. 602, 621–22 (1993).

176. United States v. Bajakajian, 524 U.S. 321, 346 (1998) (Kennedy, J., dissenting). This requirement has also resulted in discrepancies in application by the lower courts. *See supra* note 92.

177. *See generally Browning-Ferris*, 492 U.S. 257.

the nonpunitive purpose restriction wholesale and focused instead on whether a given sanction would have historically been considered punitive.[178]

Adding colonial and early American records to the analysis reveals three problems with the Court's punitive purpose restriction. First, once again, the historical use of the relevant nomenclature was broader than the Court would allow. Second, the use of economic sanctions that have remedial or quasi-remedial qualities (such as restitution) for the purposes of punishment belies the Court's attempt to draw a distinction between remedial and punitive sanctions. And third, the identical treatment of "fines" and remedial sanctions for purposes of collection suggest that the ratifying generation would have seen such sanctions as one and the same.

*1. Nomenclature*

First, with respect to the nomenclature, there are several examples in the historical record where economic sanctions explicitly called "fines" or "forfeitures" were used for remedial purposes akin to contemporary remedial sanctions.[179] In addition to the direct payment of fines and forfeitures to victims (mirroring modern restitution awards),[180] court and statutory records also reveal the use of "fines" and "forfeitures" to describe other remedial charges such as court costs, costs related to law enforcement activities and incarceration, and bonds for good behavior (similar to contemporary probation and parole fees).[181]

178. The Court's attempts to apply the punitive restriction in the context of in rem and in personam forfeitures revealed the unworkable nature of the restriction. Though the Court looked to comparatively more historical sources to assess what the ratifying generation would have thought of such forfeitures than it did in support of the restriction, the inconsistent results undermine the credibility of the restriction in the first instance. *Compare Austin*, 509 U.S. at 609–10 (holding that civil in rem forfeitures were "fines" for Excessive Fines Clause purposes because, as a historical matter, the ratifying generation would have considered such forfeitures punishment), *and* Alexander v. United States, 509 U.S. 544, 558–59 (1993) (same for in personam forfeitures), *with Bajakajian*, 524 U.S. at 331, 341–44 (stating in dicta that "[t]raditional in rem forfeitures were . . . not considered punishment against the individual for an offense," and therefore were not fines, and that the ratifying generation would have excluded even in personam monetary forfeitures that penalized specific offenses from the definition of fines). As a result the Excessive Fines doctrine leaves us with two directly contradictory interpretations of a limited historical record that are internally unworkable.

179. The cost of indigent defense, which was not recognized as a right until *Powell v. Alabama*, 287 U.S. 45 (1932), is the only contemporary remedial sanction that is largely missing from the record. A statutory right to counsel, however, is found in the record of some colonies. *See, e.g.*, 1700–1769 Del. Laws 66 (1719); 1719 Pa. Laws 112; 1662 Va. Acts 11; 1731 S.C. Acts 130.

180. *See supra* Part II.A.

181. *See, e.g.*, 1 Stat. 217 (1791) (stating "a sum arising from the fines and forfeitures to the United States . . . is hereby appropriated for the payment of" judicial salaries, and jurors and witness fees); 1702 Conn. Pub. Acts 38 ("All fines and penalties as shall be imposed upon persons for delinquency . . . (which are not otherwise disposed of by Law) shall . . . belong to the several County Courts, to defray their Charges, and for the payment of just Fees"); 1672 Conn. Pub. Acts 27 (stating that for gambling, "one third part of the fine shall be to the party or parties that discover the offence"); 1700–1775 Del. Laws 473 (1770) (declaring "fines shall . . . be applied towards the public allowance to jurors"); 1700–1769 Del. Laws 71 (1719) ("Which forfeiture . . . after . . . the reasonable charges of their maintenance in prison, are deducted, shall go one half . . . for the defraying of the charges of

Often, statutes directed that such remedial expenses be deducted directly from the fines.[182] For example, a 1702 Connecticut statute mandated that fines not otherwise specifically designated be used first and foremost by "the several County Courts, to defray their Charges, and for the payment of just Fees."[183]

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prosecution, trial, and execution of such criminals."); 1759 Ga. Laws 54 (asserting "the Moieties of the Penalties and Forfeitures not herein before appropriated . . . after deducting the Legal Charges arising thereon" must go to the public treasury); 1759 N.H. Laws 13 (maintaining that "the costs of prosecution, [must] be forfeited"); 1705 Pa. Laws 71 (maintaining that "forfeiting" as penalty for allowing swine at large from which costs for "appraisers [and] the Justice's clerk" taken); 1771 R.I. Pub. Laws 37 (describing the sentence for counterfeiting as "One Thousand Dollars and Cost, as a Fine"); 1756 R.I. Pub. Acts 65 (declaring that "fines" for counterfeiting must go to the people who received the counterfeit money and to the treasurer for costs incurred in distributing the restitution); RECORDS OF THE COURT OF TRIALS OF THE COLONY OF PROVIDENCE PLANTATIONS, *supra* note 135, at 59 (describing a bond for good behavior as a "Fine"). Further, individuals who impounded illicit goods or strays were often the recipient of the forfeited property or animals. *See, e.g.*, 1702 Conn. Pub. Acts 67 (stating that in the case of faulty leather, the "Seizer" must be paid a third of "all fines, forfeitures and penalties . . . (not otherwise therein disposed of)"); 1791 Md. Laws ch. iii–iv (stating that in the case of swine impounders, the owner of the swine must "pay" "fines or forfeitures" to the impounder); 1759 N.H. Laws 12 (stating that in the case of sheep impounders, failure by owner to pay penalty "and all legal incident charges" would require that said ram or rams "be forfeited to the impounder"); 1787 N.Y. Laws 569 (maintaining that underweight copper coins "shall be forfeited to the use of the person or persons who shall seize the same"); 1759 R.I. Pub. Acts 65 (declaring that the impounder of horses running at large should receive half of "Fine").

182. *See, e.g.*, 1 Stat. 177 (1790) (directing that "all proper costs and charges" be deducted from "all penalties, fines and forfeitures, recovered by virtue of this act, (and not otherwise appropriated)"); 1702 Conn. Pub. Acts 38 ("all fines and penalties . . . (which are not otherwise disposed of by Law) shall be, and belong to the several County Courts, to defray their Charges, and for the payment of just Fees"); 1700–1769 Del. Laws 172 (1739) ("shall forfeit and pay . . . one half, after the charge of prosecution deducted"); 1759 Ga. Laws 4 (deducting legal charges directly from forfeitures imposed for theft of horses and cattle); 1780 Md. Laws ch. vii (listing various "fines" and "forfeitures" and directing that sheriff be paid five percent of all monies received under the act); 1783 Mass. Acts 233 (directing that costs of prosecution be paid "out of such Fines and Forfeitures" deposited into the public treasury); 1772 N.H. Laws 569 (directing "fines & forfeitures" paid into the county treasury be used for "Prisons Court houses & other charges"); 1781 N.J. Laws 51 ("one Half of the Monies arising from the Fines and Forfeitures incurred . . . after deducting the Costs of collecting the same"); 1788 N.Y. Laws 654 ("which fine (after such charges as the court shall judge reasonable to allow to the prosecutors and witnesses out of the same) shall be paid to the overseers of the poor"); 1780 N.Y. Laws 214 ("any such fine or forfeiture . . . after deducting ten dollars for the justices fee, and other reasonable costs and charges"); N.C. Sess. Laws 46 (directing that prosecution fees be paid from fines); 1777 Pa. Laws 51 ("discoverer or informer, shall have, as an encouragement for his discovery, the sum of fifty pounds" from the offender's forfeited property); 1775 R.I. Pub. Laws 161 (for treason, "forfeit . . . all necessary Charges of Prosecution, Condemnation and Execution, being first deducted"); 1769 S.C. Acts 269–72 (directing that "fines" not otherwise appropriated be "applied towards paying the several salaries" of court and law enforcement personnel); 1726 Va. Acts 372 (mandating sale of forfeited tobacco be used in part to pay law enforcement costs); JOURNAL OF THE COURTS OF COMMON RIGHT AND CHANCERY OF EAST NEW JERSEY 1638–1702, at 227 (Preston W. Edsall ed., 1937) (ordering defendants to pay "fines . . . out of which the Court & other Charges are to bee paid"); *id.* at 226 (same).

183. 1702 Conn. Pub. Acts 38; *see also, e.g.*, 1774 Conn. Pub. Acts 394 (for delinquencies, prosecution costs "shall be paid out of the Treasury into which the Fines, Forfeitures, or Penalties adjudged against such Delinquents on Conviction, are by Law to be paid"); 1752 Conn. Pub. Acts 267–68 (for theft, "one Half of the treble Damages recovered of the Person convicted, shall . . . belong to the said County Treasury" to be used for "the Charge of prosecuting").

"Fines" and "forfeitures" were also commonly used to cover the costs of qui tam prosecutions.[184] In fact, the practice of directly awarding a moiety of fines and forfeitures to qui tam prosecutors was prevalent from the earliest days of the colonies,[185] and it retained popularity through the Revolutionary War[186] and the ratification of the Eighth Amendment.[187]

*2. Use as Punishment*

Second, beyond nomenclature, statutory language often reflected an understanding that sanctions that served remedial purposes were, in fact, punishment, which indicated that the ratifying generation would not have looked for a division between remedial and punitive purposes. For example, in 1666, Virginia codified a requirement that criminal defendants pay the costs of their prosecution, reasoning that the failure to impose such charges resulted in "too favourable Censure" and allowed defendants to "escape their deserved Punishment."[188] In 1791, Pennsylvania passed a law ordering the costs of prosecution to be paid by the public where the sentence was capital or involved incarceration at hard labor, but requiring defendants in those cases to pay

184. The Court has recognized that payments to qui tam relators might fit within the scope of Excessive Fines Clause protection. *See* Browning-Ferris v. Kelco, 492 U.S. 257, 275–76 (1989); *see also id.* at 275 n.21 (noting that it would leave open the question of whether the Excessive Fines Clause applies to qui tam actions); Austin v. United States, 509 U.S. 602, 607 n.3 (1993) (declining to address the application of the Excessive Fines Clause to qui tam actions).

185. *See, e.g.*, 1682 N.H. Laws 56, 73 (King Charles II's "Instructions:" "And you shall observe in the fraeimng & passing of laws that now fines forfeitures & penalltyes . . . become payble then to us . . . & to the informer except in speciall Cases;" "all fines forfeitures & penalties arising by the breach of any Law within this Province shall be payable to his Maj'tie . . . & to the informer. Except in speciall cases where the Law otherwise directs"); COURT RECORDS OF KENT COUNTY, *supra* note 167, at 24 ("doe fine the said Luke Manlove . . . one third part whereof to goe to the said Griffith Jones for his information"); *see also* 1672 Conn. Pub. Acts 65; 1735 Ga. Laws 4–6; 1704 Md. Laws 66–67; 1668 Mass. Acts 11; 1711 N.J. Laws 111; 1700 N.Y. Laws 36–38; 1715 N.C. Sess. Laws 21; 1705 Pa. Laws 48–49; 1699 R.I. Pub. Acts 45; 1696 S.C. Acts 2–3; 1662 Va. Acts 25.

186. *See* 1766 N.H. Laws 15 (half of "Fine . . . to the Use of the Person who shall sue or inform"); *see also, e.g.*, 1769 Conn. Pub. Acts 342; 1700–1775 Del. Laws 481–500 (1772); 1764 Ga. Laws 233–35; 1776 Mass. Acts 66; 1769 Md. Laws ch. v–vi; 1782 N.J. Laws 95, 101; 1750 N.Y. Laws 294–97; 1767 N.C. Sess. Laws 164; 1784 Pa. Laws 181; 1776 R.I. Pub. Laws 37; 1778 S.C. Acts 302; 1779 Vt. Acts & Resolves 136; 1751 Va. Acts. 264–65.

187. Early federal statutes relied heavily on qui tam prosecutions. *See, e.g.*, 1 Stat. 196 (1791) (for banking violations, "shall forfeit . . . one half thereof to the use of the informer"); *see also* 1 Stat. 173 (1790) (customs inspector failure to post rates); 1 Stat. 138 (1790) (illegal trade with Indian tribes); 1 Stat. 131–35 (1790) (mariner's failure to do duty on ship); 1 Stat. 116 (1790) (larceny); 1 Stat. 67 (1789) (trade violations). The states also continued widespread use of qui tam prosecutions post-Revolution. *See, e.g.*, 1785 Conn. Pub. Acts 330 ("the Offender . . . shall forfeit . . . one Half . . . shall be to him or them who shall sue for, and prosecute to Effect"); *see also, e.g.*, 1789–1790 Del. Laws 972–77 (1790); 1790 Ga. Laws 12; 1791 Md. Laws ch. xliii; 1791 Mass. Acts 113; 1791 N.H. Laws 271; 1789 N.J. Laws 522; 1788 N.Y. Laws 805–07; 1789 N.C. Sess. Laws 471; 1788 Pa. Laws 640–41; 1785 R.I. Pub. Laws 5; 1791 S.C. Acts 12–13; 1787 Vt. Acts & Resolves 151; 1790 Va. Acts. 19.

188. 1666 Va. Acts 42.

prosecution costs where they were convicted of more than one offense.[189] Similarly, a 1773 Massachusetts statute imposed costs of prosecution on defendants where a violation of the law was willful and malicious, but not where the violation was accidental.[190] Likewise, the court and statutory records contain examples describing sanctions with remedial qualities as penal in nature[191] or using such sanctions as the only punishment.[192]

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189. 1791 Pa. Laws 123.

190. 1773 Mass. Acts 302–03.

191. *See, e.g.*, 1743 Conn. Pub. Acts 524 ("[I]f he shall be found guilty . . . such person shall become Bound in the Penal Sum to his peaceable and good Behaviour."); 1715 Md. Laws 88 (stating that upon conviction of theft offender should be "punished" via restitution, pillory, and whipping); 1785 Mass. Acts 279 (describing costs of suit as "punishments"); 1785 Mass. Acts 234 (describing the bond for good behavior as "punishments"); 1718 Pa. Laws 101 ("[F]or crimes inferior to murder the punishments might be by way of restitution, fine, imprisonment, and such like."); 1762 R.I. Pub. Laws 133 (describing restitution and prosecution costs as part of the "Sentence passed upon him" for stealing); 1754 R.I. Pub. Laws 14–16 (same for counterfeiting); *cf.* RICHARD S. COXE, 1 REPORTS OF CASES ARGUED AND DETERMINED IN THE SUPREME COURT OF NEW-JERSEY FROM APRIL TERM 1790 TO NOVEMBER TERM 1795, at 146 (2d ed. 1886) ("If it had appeared that Sloan [in *Sloan v. Harrison*] acted with a criminal intent, we should have made him pay costs, but as this does not appear, the costs must attend the event of the suit.").

192. Regarding restitution, see *supra* notes 143–54. For other examples of punishments comprised entirely of sanctions with remedial qualities see, for example, 1 Stat. 29–49 (1789) (authorizing prosecution costs and restitution only for certain customs offenses); 1791 Conn. Pub. Acts 410 (for escape, "if any Prisoner shall make his Escape . . . the necessary Expence of Pursuit, and Recommitment . . . shall be satisfied by such Prisoner"); 1778 Conn. Pub. Acts 489 (for price fixing, "Fines or Forfeitures . . . shall belong to the County Treasury . . . unless the same be recovered at the Suit of the common Informer; who . . . shall be intituled to the whole Penalty"); 1700–1775 Del. Laws 500–04 (1772) (for sheriff or coroner misconduct, "which said penalties may be recovered by any person who will sue for the same"); 1791 Ga. Laws 18 (setting punishment for charging excessive tavern rates at "two pounds over and above the sum extorted . . . to the informer recoverable with costs"); 1781 Md. Laws ch. vii (requiring "security to indemnify the county from any charge that may accrue by means of such child" as punishment for fornication); 1785 Mass. Acts 240 (contemplating that the sole punishment for manslaughter would be "to be bound to the good behaviour"); 1791 N.H. Laws 333 (assigning "all fines and forfeitures" under certain value to the qui tam prosecutor); 1783 N.J. Laws 59 (using restitution and qui tam costs as the only punishment for felling another's trees); 1724 N.Y. Laws 133–34 (for obstructing passage of vessels, entire "Forfeiture" to qui tam prosecutor); 1791 N.C. Sess. Laws 14 (for adulterating flour, "shall forfeit . . . to any person complaining or informing"); 1777 Pa. Laws 11 (for assigning debt after tendor of bills of credit, "forfeit and pay to the person to whom such assignment as aforesaid may be made"); 1738 S.C. Acts 157 (for failure to mark boat, "forfeit and pay" to qui tam prosecutor); 1786 Vt. Acts & Resolves 6 (for sale and transportation of negroes and mulattoes, "forfeit" restitution); 1791 Va. Acts 14 (same); COURT RECORDS OF KENT COUNTY, *supra* note 167, at 146–47 (for theft, "pay foure fold to the said Robert Bedwell [victim], of the good soe stolen . . . and pay all Costs"); PROCEEDINGS OF THE COUNTY COURT OF CHARLES COUNTY, *supra* note 102, at 636 (committing an "Affray and Shedding blood" punished by requiring offender "give Suretys for the peace"); 2 RECORDS OF THE COURT OF ASSISTANTS OF THE COLONY OF THE MASSACHUSETTS BAY 1630–1692, *supra* note 156, at 136 (requiring witness fees and bond for good behavior); RECORDS OF THE COURT OF TRIALS OF THE COLONY OF PROVIDENCE PLANTATIONS, *supra* note 135, at 39 (for breach of peace, "bownd to the peace & good behavior"); 2 RECORDS OF SUFFOLK COUNTY COURT 1671–1680, *supra* note 163, at 23–24, 26–27, 78, 80–81, 89–90, 125, 149, 234, 851 (describing multiple cases in which one or more remedial sanctions were the only punishment); *see also* Preyer, *supra* note 120, at 335, 345–46 (describing the use of bonds for good behavior as punishment in Massachusetts and Pennsylvania, and less frequently in New York); *cf.* 1783 N.Y. Laws 523–26 (pardoning offenses related to private lotteries where offenses not yet

Additionally, remedial sanctions were not always imposed as a matter of course, suggesting that at least some colonies and early states used remedial sanctions as punitive instruments to determine the appropriate punishment based on the defendant and the circumstances of the offense. For example, an abstract of cases from the Inferiour Court of Pleas in Boston, Massachusetts, between 1680 and 1698 included 460 convictions involving economic sanctions. Of those, the court ordered court fees or prosecution costs in only 154 cases (and in one case only half of the prosecution costs were assessed), law enforcement costs in only two cases, prison fees in only seven cases, and bonds for good behavior in only forty cases.[193] In thirty of these cases, a remedial sanction was the sole form of punishment.[194]

Comparisons between co-defendants or individuals charged with similar crimes in the same time period also indicate that remedial sanctions served punitive purposes.[195] For example, in a Massachusetts case in which three co-defendants were convicted of "breaking and entering" and stealing, the court sentenced one co-defendant to pay restitution but no court fees; another

charged; where offences already charged converting sole punishment for the offense to costs of prosecution).

193. *See generally* ABSTRACT AND INDEX OF RECORDS OF THE INFERIOUR COURT OF PLEAS (SUFFOLK COUNTY COURT) HELD AT BOSTON 1680–1698, at 107–38 (1940).

194. *Id.* Although not always imposed, in many colonies bonds for good behavior were often used as additional punishment. *See, e.g.*, 1779 Conn. Pub. Acts 533 (imposing bond for good behavior for life for dueling, but not for acting as a second or aid at a duel); 1702 Conn. Pub. Act 91–92 (giving courts the option of assessing bonds for good behavior "as the merits of the Case shall require"); 1702 Conn. Pub. Acts 123–24 (imposing only at second offense); 1672 Conn. Pub. Acts 34–36 (imposing only at fourth offense); 1700–1769 Del. Laws 1734 (1739) (using as additional punishment for resisting arrest); 1781 Md. Laws ch. vii (only punishment for bastardy); 1787 Mass. Acts 582 (imposing only at second offense); 1701 N.H. Laws 14 (imposing only at second offense); 1791 N.J. Laws 725 (manslaughter: only punishment may be "Security for good Behaviour for any Time not exceeding One year"); 1788 N.Y. Laws 654–55 (only punishment for gambling as a profession); 1784 N.C. Sess. Laws 365–66 (same); 1718 Pa. Laws 104 (imposing only at second offence); 1636 R.I. Pub. Acts 12 (same); 1740 S.C. Acts 163–75 (same); 1787 Vt. Acts & Resolves 151 (imposing only at second offense); 1788 Va. Acts 16 (stating that courts may require bond for good behavior if "reasonable").

195. *See also, e.g.*, BURLINGTON COURT BOOK, *supra* note 161, at 72–73 (convicting defendant of carnal copulation of wife's daughter; assessed fine and court charges for defendant; daughter ordered whipped and no charges); COURT RECORDS OF KENT COUNTY, *supra* note 167, at 278–79 (imposing costs and charges of trial on woman convicted of fornication and battery but not on her male co-defendant); *id.* at 160 (imposing court costs where defendant held in contempt for failing to serve as a juror when subpoenaed but not where defendant held in contempt for smoking in court); COURT RECORDS OF PRINCE GEORGES COUNTY, *supra* note 164, at 458–65 (charging multiple defendants with fighting and breach of the peace; one received corporal punishment and bond for good behavior, second received fine and bond for good behavior, and third received fine and fees); 2 RECORDS OF THE COURT OF ASSISTANTS OF THE COLONY OF THE MASSACHUSETTS BAY 1630–1692, *supra* note 156, at 121 (sentencing boys convicted of fornication to whipping and payment of restitution but girls only to whipping); MINUTES OF THE COURT OF RENSSELAERSWYCK, 1648–1652, at 135–37 (1922) (single defendant with multiple convictions over a two year period, costs only charged in some of the cases); *id.* at 25, 32 (ordering defendant to pay costs in one case of assault; in second assault case, no costs ordered).

defendant to pay restitution and court fees; and the third to pay a fine, court fees, and a bond for good behavior.[196] In another Massachusetts case, the court ordered a defendant convicted of manslaughter to pay two-thirds of the prosecution costs, and his co-defendant who was convicted of accessory to manslaughter to pay only one-third of the costs.[197] This suggests that the court imposed the specified costs and appropriate punishment by assessing the degree of culpability between the defendants.

Some jurisdictions linked punishment with remedial sanctions even more closely, by holding or codifying as improper the assessment of costs against a party who had not been convicted.[198] This was the case in 1791 when South Carolina explicitly prohibited imposing costs on defendants who were discharged or acquitted by the grand jury or at trial.[199]

However, the record also suggests that some jurisdictions might have on occasion understood court costs to serve a nonpunitive purpose. For example, in Connecticut in 1790, statutes allowed for the imposition of prosecution costs upon acquittal.[200] Similar examples exist in other colonies, although typically these jurisdictions also used prosecution costs as the sole punishment for some offenses.[201] Further, the practice of assessing costs without a conviction varied widely even within a given court. For example, on a single day in 1700 in Delaware, a court did not require defendants acquitted for aiding and abetting a runaway slave to pay fees, but did require a defendant acquitted of polygamy to pay all fees.[202] Also, courts imposed court costs upon acquittal in at least some

196. 2 RECORDS OF SUFFOLK COUNTY COURT 1671–1680, *supra* note 163, at 84–85, 87.

197. 1 RECORDS OF THE COURT OF ASSISTANTS OF THE COLONY OF THE MASSACHUSETTS BAY 1630–1692, *supra* note 160, at 305–07, 321.

198 Additionally, within a few months of the ratification of the Eighth Amendment, Congress codified that in all prosecutions where the defendant is found not guilty or where the prosecution is discontinued or nonsuited, costs may not be imposed against the defendant. 1 Stat. 277–78 (1792).

199. 1791 S.C. Acts 19–24; *see also* CHARTER OR FUNDAMENTAL LAWS OF WEST NEW JERSEY ch. XXII (1676) (prohibiting imposition of "any fees to the officer or officers of the said prison, either when committed or discharged").

200. *See, e.g.*, 1782 Mass. Acts 167; ROOT, *supra* note 122, at 198–99 (describing *Fowler v. Bishop*, a 1790 Connecticut case upholding assessment of costs of prosecution against an acquitted defendant because the statute allowed assessment of costs regardless of case outcome); *see also* THE SUPERIOR COURT DIARY OF WILLIAM SAMUEL JOHNSON, 1772–1773, at 68 (John T. Farrell ed., 1942) (sentencing a defendant to pay costs and charges of prosecution after grand jury found him not guilty).

201. *Compare, e.g.*, BURLINGTON COURT BOOK, *supra* note 161, at 323 (ordering defendant to pay fees despite grand jury returning "ignoramus"), *with id.* at 57 (finding that defendant at fault for burying a woman without a jury or inquest and ordering he pay all court charges); *compare, e.g.*, RECORDS OF THE COURT OF TRIALS OF THE COLONY OF PROVIDENCE PLANTATIONS, *supra* note 135, at 38 (imposing fees upon acquittal), *with id.* at 56 (imposing payment of fees as sole punishment following guilty plea). *See also* PROCEEDINGS OF THE COUNTY COURTS OF KENT, *supra* note 150, at 3 (ordering an acquitted defendant to pay jail fees, but allowing him to seek relief against the prosecutors who brought the suit).

202. COURT RECORDS OF KENT COUNTY, *supra* note 167, at 162–63.

cases in which they suspected that the defendant was guilty,[203] rendering the imposition at least quasi-punitive.

The contradictory history of imposing court costs in and of itself undermines the court's treatment of the punitive/nonpunitive distinction as an absolute historical truth. Therefore, while there is evidence in the statutory and court records that suggests costs were more commonly understood to have punitive qualities—thereby undermining the Court's attempt to disaggregate remedial and punitive fines—at best this evidence raises a question regarding the scope of fines without definitively answering it.[204]

*3. Collection Methods*

Finally, the third reason why the Court's remedial/punitive distinction is not supported by the historical record is the identical, and often punitive, means by which courts and legislatures promoted the payment of both remedial sanctions and "fines" and "forfeitures."[205] As with fines and forfeitures, collection methods for restitution, court costs, prosecution and incarceration costs, and bonds for good behavior included the seizure and forced sale of the defendant's property.[206]

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203. *See, e.g.*, 1787 Vt. Acts & Resolves 72 (stating that where indictment was not supported "the person complained of shall pay costs of prosecution . . . if there shall appear a strong presumption to the said Court, that the person complained of is guilty"); 2 RECORDS OF SUFFOLK COUNTY COURT 1671–1680, *supra* note 163, at 404 ("Thomas Holt bound over to the Court to answer for his concealing & conveying away Cuthberd Fowell a prisonr on board his Majties Friggot the Garland: The matter being not fully proved against him; but hee being suspitiously guilty thereof The Court Sentencd him to bee admonished & to pay fees of Court."); SUPERIOR COURT DIARY OF WILLIAM SAMUEL JOHNSON, *supra* note 200, at 97 ("And Wheeler also Moved to be dismissed without Costs. But he being apparently Guilty and escaping only upon a nice Construction of Law, the Court obliged him to pay Cost."); *id.* ("Indictment for Murder. The Grandjury returned Ignoramus. And it was now Moved that the Prisoner should be excused from the Payment of the Costs. And the Grandjury Testifying to the Court that there was little or no foundation for the Presentation, he was dismissed without Costs.").

204. For a discussion of how such questions play into a reinterpretation of the Clause, see *infra* Part III.

205. Unlike colonial and early state statutes, federal statutes were largely silent regarding methods of collection and therefore are not included in the examples below.

206. 1765 Conn. Pub. Acts 324 (prosecution costs by distress, indenture, or incarceration); 1702 Conn. Pub. Acts 46–47 (jail costs by distress); 1672 Conn. Pub. Acts 39–40 (law enforcement costs by distress); 1776–1777 Del. Laws 346 (1777) (qui tam costs by distress, incarceration, or indentured servitude); 1700–1769 Del. Laws 176 (1739) (costs by distress or incarceration); 1790 Ga. Laws 11–12 (qui tam costs by distress); 1777 Md. Laws ch. vii (costs by levying of goods or chattels); 1692 Mass. Acts 14–15 (forfeiture from which qui tam costs taken may be collected through distress); 1778 N.H. Laws 142–44 (qui tam costs by distress or incarceration); 1704 N.J. Laws 3–4 (costs by distress or stocks); 1781 N.Y. Laws 358–59 (prosecution costs by distress or incarceration); 1729 N.C. Sess. Laws 35 ("charges" paid from sale of forfeited animals); 1786 Pa. Laws 474–81 (costs by distress or incarceration); 1779 R.I. Pub. Acts 18–19 (costs by distress or incarceration); 1787 S.C. Acts 38–40 (prosecution costs by distress or incarceration); 1787 Vt. Acts & Resolves 70 ("liable to have his or her estate sold therefor"); 1680 Va. Acts 83 (directing that sheriff levy fines from the offender's estate).

Beyond the forfeiture of goods and chattels, the record also contains examples of forfeiture of a

Collection methods for remedial sanctions, like fines and forfeitures, also included incarceration until a defendant paid or found surety to pay the sanctions,[207] substitution of corporal punishment for remedial sanctions,[208] and forced servitude or military service.[209] And, while the *Bajakajian* majority

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slave's labor via incarceration of the slave. For example, a 1730 New York statute for the "more effectual preventing and punishing the conspiracy and Insurrection of Negroes and other Slaves" directed that slaves be whipped for a variety of offenses. 1730 N.Y. Laws 157–58. To facilitate this, the statute allowed towns to "have and appoint a common Whipper for the Slaves." The slave masters were required to pay the salary of the Whipper upon penalty of the incarceration of the slaves. *Id.* at 158; *see also* 1725 Pa. Laws 145 (ordering, "at the Owner's Charge," the whipping of slaves traveling without permission); SAMUEL W. PENNYPACKER, PENNSYLVANIA COLONIAL CASES 54–55 (1892) (decreeing that slaves found "gadding abroad . . . without a tickett" should be whipped "for which their sd Mr. or Mris. should pay 15d to the whipper").

207. *See, e.g.*, 1779 Conn. Pub. Acts 533 (bond for good behavior); 1702 Conn. Pub. Acts 123–24 (prosecution charges); 1700–1769 Del. Laws 176 (1739) (costs); 1764 Ga. Laws 204 (qui tam costs); 1781 Md. Laws vii (security for child support on conviction for fornication); 1737 Md. Laws 9 (restitution); 1786 Mass. Acts 416 (costs); 1778 N.H. Laws 143 (costs); 1753 N.J. laws 7–8 (costs); 1786 N.Y. Laws 202 (bond for good behavior); 1741 N.C. Sess. Laws 53 (security for bastard child and prosecution costs); 1788 Pa. Laws 636 (prosecution costs); 1776 R.I. Pub. Acts 37 (costs); 1721 S.C. Acts 113–15 (prosecution costs); 1787 Vt. Acts & Resolves 151 (prosecution costs); 1751 Va. Acts 244 (bond for good behavior). *But see* 1786 N.Y. Laws 202 (releasing from jail people with unpaid fines and forfeitures under "fifteen pounds exclusive of costs").

208. *See, e.g.*, 1702 Conn. Pub. Acts 97 (whipping for failure to pay restitution); 1702 Conn. Pub. Acts 92 (pillory and ears nailed for failure to pay restitution and qui tam costs); 1700–1769 Del. Laws 64–77 (1719) (pillory for failure to pay restitution for perjury); 1787 Ga. Laws 22 (whipping for failure to pay restitution); 1692 Md. Laws 61 (pillory and ears nailed for failure to pay restitution); 1787 Mass. Acts 582 (whipping if unable to pay fine, prosecution costs and bond for good behavior); 1791 N.H. Laws 259 (stocks or whipping for failure to pay prosecution costs); 1704 N.J. Laws 3 (stocks for failure to pay costs); 1788 N.Y. Laws 627 (pillory for failure to pay forfeiture from which restitution is drawn); 1733 N.C. Sess. Laws 41 (whipping for failure to pay forfeiture from which qui tam costs awarded); 1718 Pa. Laws 120 (pillory for failure to pay restitution); 1636 R.I. Pub. Acts 12 (stocks for failure to pay fine); 1789 S.C. Acts 11 (ordering that slave be whipped unless master pays fine from which qui tam costs awarded); 1779 Vt. Acts & Resolves 163 (whipping for failure to pay restitution and forfeiture); 1759 Va. Acts 12–13 (whipping for failure to pay costs and fine); BURLINGTON COURT BOOK, *supra* note 161, at 271 (ordering defendants receive corporal punishment unless fine paid). *But see* 1788 N.Y. Laws 682 (excluding imposition of charges where offender is placed in stocks in lieu of paying fine).

209. *See, e.g.*, 1770 Conn. Pub. Acts 355 ("[I]f such Offender . . . shall not be able to pay such Fine and Costs of Prosecution [the court may] assign such Person . . . in Service, for satisfying the same."); 1779 Del. 45–46 (1779) (for pretending to use witchcraft to cheat, "return to the Person so cheated, the Goods or Chattles . . . and the Value thereof in Money, or double the Money . . . and if unable to pay the Forfeitures hereby imposed, and the Costs of Prosecution, he or she shall be publickly sold"); 1737 Md. Laws 9–10 (for enticing slave to run away, "become a Servant to the Master or Owner of such Slave . . . or satisfy and pay to the Master or Owner, the Value of such Slave"); 1702 Mass. Acts 213–14 ("[T]he Prisoner shall pay and satisfie his own Fees and Charges; and if he be unable . . . to make Satisfaction by Service."); 1791 N.H. Laws 253 (for theft, if "unable to make restitution . . . he may be . . . sentenced to make satisfaction by service"); 1775 N.J. Laws 491 (stating that where defendant was unable to pay fine or fees courts may "sell and assign the Person so confined"); 1782 N.Y. Laws 440–56 (ordering indenture if defendant was unable to pay fines from which court martial costs are paid); 1741 N.C. Sess. Laws 57–58 (for abandoning indenture, restitution paid by further indenture); 1777 Pa. Laws 54–56 (for counterfeiting lottery tickets, "if the offender shall not have enough to satisfy the person aggrieved for his or her damages, together costs, he she or they shall be sold"); 1780 R.I. Pub. Acts 51 (if unable to pay costs and restitution "shall . . . be sold as a

suggested that the manner of collection, particularly through actions of debt, was evidence that a sanction would be deemed nonpunitive,[210] the Court's use of the historical record once again does not measure up. At the time of the ratification of the Excessive Fines Clause, fines and remedial sanctions were both recoverable through actions of debt in all states and under federal law.[211]

While these additional historical records, which shed light on the nomenclature and on sentencing and collection practices, do not definitively define "fines," they indicate that the ratifying generation would likely not have divided remedial and punitive penalties when determining whether a sanction qualified as a fine. At a minimum, these records indicate that the concept of nonpunitive penalties cannot fairly be treated as a historical truth.

### *C. "Excessive"*

The Supreme Court's only determination of the meaning of "excessive" came in the last of the four Excessive Fines cases, *Bajakajian*.[212] There, with no

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Servant"); 1696 S.C. Acts 2 (for stealing boat, servant liable for restitution and additional forfeiture from which qui tam costs are paid to be satisfied by indenture); 1779 Vt. Acts & Resolves 129 (for delinquency, if "convicted, he shall pay cost of such prosecution [for which a court may] dispose of such person in service"); 1751 Va. Acts 265 (for stealing hogs, servant to pay fine and costs through further indenture). Unlike other colonies, Georgia does not appear to have used forced service as a means for collecting fines.

210. United States v. Bajakajian, 524 U.S. 321, 342 n.18 (1998).

211. *See, e.g.*, 1 Stat. 102 (1790) ("all which forfeitures shall be recoverable . . . by action of debt, information or indictment"); 1785 Conn. Pub. Acts 331 ("Which Forfeiture shall be . . . one Moiety thereof to the Use of the Person prosecuting to Effect . . . and shall be recoverable by Action of Debt, or Information"); 1789–1790 Del. Laws 976 (1790) ("[T]he respective penalties or forfeitures herein . . . shall be recovered by action of debt, bill, plaint, or information."); 1764 Ga. Laws 235 ("[P]enalties and forfeitures" to be prosecuted "by action of debt or information"); 1777 Md. Laws vii ("[A]ll fines, penalties and forfeitures, directed and imposed by any of the laws now in force . . . shall and may be recovered . . . by action of debt in the name of this State and the informer"); 1791 Mass. Acts 113 ("[A]ll fines and forfeitures mentioned in this act . . . shall and may be sued for . . . by action of debt."); 1741 N.C. Sess. Laws 45–46 (various forfeiture related to illegal marriages "to be recovered, with costs, by action of debt, bill, plaint, or information"); 1782 N.J. Laws 95 ("[F]ined . . . or shall be liable to an Action of Debt for the Penalty aforesaid"); 1785 N.Y. Laws 121 ("forfeit . . . to be recovered . . . in an action of debt"); 1784 N.C. Sess. Laws 362 ("[F]orfeit and pay . . . to be recovered by action of debt."); 1785 Pa. Laws 354 ("[E]very specific fine and forfeiture . . . shall be recovered by actions of debt . . . or by information or indictment."); 1783 R.I. Pub. Acts 52 ("[A]ll Forfeitures, Fines and Penalties . . . shall be sued for in an Action of Debt."); 1786 S.C. Acts 63–64 ("[F]orfeit and pay . . . to be recovered . . . by action of debt, bill, plaint, or information."); 1786 Vt. Acts & Resolves 6 ("[S]hall forfeit and pay . . . to be recovered by action of debt, complaint, or information."); 1790 Va. Acts 29 ("[F]orfeit and pay . . . to be recovered with costs by action of debt.").

212. Though the *Austin* and *Alexander* defendants successfully argued that their forfeitures were "fines" for purposes of the Clause, they did not reach the question of excessiveness. The *Austin* Court declined an opportunity to determine whether the "government [was] exacting too high a penalty in relation to the offense committed" in order to let the lower court attempt to make that determination. Austin v. United States, 509 U.S. 602, 622–23 (1993). The *Alexander* Court also remanded the excessiveness determination with direction that the lower court should consider the extent of the defendant's criminal activities. Alexander v. United States, 509 U.S. 544, 559 (1993).

consideration of any distinctions between the provisions of the Eighth Amendment—textual, historical, or otherwise—the Court superimposed the Cruel and Unusual Punishment Clause's gross disproportionality test onto the Excessive Fines Clause.[213]

The Court based its adoption of the test on only one source contemporaneous to the ratification of the Eighth Amendment: a dictionary published in 1773 that defined "excessive" as "[b]eyond the common proportion."[214] Supplementing that lone contemporaneous record with a second dictionary published in 1828,[215] the Court then declared that the "constitutional question" before it was "just how proportional to a criminal offense a fine must be."[216]

To answer that question, the Court considered two additional historical sources. The first, an English case from 1689—the year the English Bill of Rights was adopted—also described "excessiveness" in general terms.[217] The second source, the Magna Carta, was significantly more useful to the Court. The Magna Carta is widely recognized as subsumed within the English Bill of Rights, and therefore critical to understanding the meaning of its protections.[218] The excessive fines proscription within the English Bill of Rights, in turn, served as the basis for the American Excessive Fines Clause.[219]

The *Bajakajian* Court pointed to a provision of the Magna Carta:

> A Free-man shall not be amerced for a small fault, but after the manner of the fault; and for a great fault after the greatness thereof, saving to him his contenement; (2) and a Merchant likewise, saving to him his merchandise; (3) and any other's villein than ours shall be likewise amerced, saving his wainage.[220]

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213. *Bajakajian*, 524 U.S. at 336–37. As with the punitive/nonpunitive restriction on fines, the Court's use of the gross disproportionality test has been the source of some confusion, and has led to various interpretations by the lower courts. *See supra* note 92. The confusion arises from the Court's reference to a provision of the Magna Carta that required consideration of an amercement's effect on a defendant, *see infra* notes 220, 224 and accompanying text, and the Court's application in the case at bar of the gross disproportionality test without considering the effect, *see infra* notes 225–27 and accompanying text.

214. *Bajakajian*, 524 U.S. at 335 (citing SAMUEL JOHNSON, A DICTIONARY OF THE ENGLISH LANGUAGE 680 (4th ed. 1773)).

215. *Id.* at 335 (citing 1 NOAH WEBSTER, AN AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE (1828) as defining "excessive" as "beyond the common measure or proportion").

216. *Id.* at 335.

217. *Id.* (citing Earl of Devonshire's Case, 11 Howell's State Trials 1367, 1372 (H.L. 1689), which found a fine of £30,000 to be "excessive and exorbitant" and "against [the] Magna Charta, the common right of the subject, and the law of the land").

218. *See, e.g.*, Massey, *supra* note 15, at 1251–55. Even Donald S. Lutz, who argues that the Magna Carta had only limited influence on the U.S. Bill of Rights, acknowledges that the Excessive Fines Clause can be traced directly to the Magna Carta's chapters 20 through 22. Donald S. Lutz, *The States and the U.S. Bill of Rights*, 16 S. ILL. U. L.J. 251, 251, 253 (1992).

219. *See supra* note 117 and accompanying text.

220. *Bajakajian*, 524 U.S. at 335–36. For unexplained reasons, the Court quoted a 1225 version of the provision rather than the original language. *Id.* The original provision stated: "A free

As the Court noted, this provision clearly contemplates that amercements (the precursor to fines[221]) should be proportional to the severity of the offense.[222] Indeed, subsequent provisions of the Magna Carta underscore the importance of this proportionality requirement.[223] These provisions also include specific orders that defendants not be ruined by fines—that their ability to maintain a livelihood be saved—which is a separate and distinct consideration from the proportionality between the harm caused and the penalty imposed.[224] In other words, the Magna Carta treated a fine that would impoverish a defendant as per se disproportionate.

The *Bajakajian* Court, however, did not comment further on this aspect of the Magna Carta. Instead, the Court simply announced that it would adopt a "gross disproportionality" test.[225] The question of impoverishment never came up in the test's application to Mr. Bajakajian; the District Court did not address the issue, and Mr. Bajakajian did not raise the question of impoverishment in his appeal.[226] Instead, the Court's discussion centered on the proportionality of the fine in light of the offense, Mr. Bajakajian's characteristics, and the harm caused.[227]

Not surprisingly, the *Bajakajian* opinion has resulted in some confusion. Lower courts have interpreted the opinion to mean both that proportionality between the penalty imposed and the harm caused is the exclusive consideration in assessing whether a fine is excessive, or alternatively that proportionality is a necessary albeit not exclusive condition whereby the Magna Carta's prohibition against impoverishing defendants may be brought to bear.[228] One recent commentator has argued for the latter interpretation.[229] Nevertheless, regardless of whether disproportionality to the harm alone or in conjunction with the effect on a defendant is the proper interpretation of the *Bajakajian* holding or the correct position to hold, the historical record suggests that the ratifying generation would have held a much broader understanding of

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man shall be amerced for a small fault only according to the measure thereof, and for a great crime according to its magnitude, saving his position; and in like manner a merchant saving his trade, and a villein saving his tillage, if they should fall under our mercy." MAGNA CARTA, *supra* note 99, ch. 20. The slight modifications in language are not important here.

221. *See supra* notes 97–102 and accompanying text.

222. *Bajakajian*, 524 U.S. at 336.

223. *See* MAGNA CARTA, *supra* note 99, ch. 21 (directing that amercements against earls and barons be issued "only in proportion to the measure of the offense"); *id.* ch. 22 (directing the same treatment for clerks).

224. WILLIAM SHARP MCKECHNIE, MAGNA CARTA 287 (2d ed. 1914) (discussing multiple distinct safeguards against "the arbitrary element," including: "In no case could the offender be pushed absolutely to the wall: his means of livelihood must be saved to him").

225. *Bajakajian*, 524 U.S. at 334–36.

226. *See id.* at 337–40.

227. *See id.*

228. *See supra* note 92.

229. *See* McLean, *supra* note 20, at 843–47.

the concept of excessiveness than that captured in the Supreme Court's treatment of the term.[230]

While the Court was correct that the historical record is limited and contains no precise definition of "excessive," historical evidence exists beyond the few sources the Court reviewed. Although this Article's contribution remains focused on the addition of records reflecting the colonial and early American experience, the Court's poor assessment of the English record with regard to the meaning of "excessive" warrants briefly stepping back to examine Blackstone's Commentaries on the Laws of England, which provides helpful context for the American record.

Like the Magna Carta, Blackstone's concept of proportionality was far broader than just that between the punishment and severity of the offense. To Blackstone, proportionality of punishment included two important factors: "the aggravations . . . of the offence," and "the quality and condition of the parties."[231] He wrote that all aggravating and mitigating factors—including offender characteristics such as age and education, and the nature of the offense, including the role of co-defendants and repetition of the crime—should be considered when determining the appropriate punishment.[232]

Additionally, like the Magna Carta, Blackstone believed the effect of the fine on the defendant was a critical consideration because "[t]he value of money itself changes from a thousand causes; and, at all events, what is ruin to one man's fortune, may be matter of indifference to another's."[233] According to Blackstone, in "ancient practice" when imposing a fine, a jury would ask how much an individual and his family needed in order to survive; and that though that procedure was in disuse, "it is never usual to assess a larger fine than a man is able to pay, without touching the implements of his livelihood."[234]

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230. McLean's position is limited by his acceptance of the Court's restrictions on the term "fines." *See id.* at 838 n.14. Such an approach excludes broad categories of economic sanctions used in contemporary society, rendering the Excessive Fines Clause irrelevant for vast numbers of individuals subjected to economic sanctions today. McLean also seems to accept the Court's assumption that historical analysis yields a strict definition of "excessive," *see generally id.*, a methodological premise I reject, *see infra* Part III.

231. 4 WILLIAM BLACKSTONE, COMMENTARIES *378; *see also id.* at *379 (describing the common practice of "tax[ing] and moderat[ing] the *general* amercement according to the *particular* circumstances of the offence and offender").

232. *Id.* at *15–16; *see also id.* at *13 ("But, in general, the difference of persons, place, time, provocation, or other circumstances, may enhance or mitigate the offence, and in such cases retaliation can never be a proper measure of justice.").

233. *Id.* at *378.

234. *Id.* at *380. In this section, Blackstone also suggests that corporal punishment or imprisonment might be inflicted as substitution for fines where an individual does not pay. *Id.* While at first glance this appears to contradict the notion that the offender's circumstances should be taken into account when considering the punishment—and therefore one might think it would be inappropriate to inflict physical pain on an offender simply because he has no money—there is evidence that suggests that permanent impoverishment was considered a worse punishment than corporal punishment or incarceration. *See infra* notes 280–83 and accompanying text.

The concepts of proportionality and mitigation set forth in Blackstone's Commentaries, as well as the Magna Carta, surface in colonial and early American records, albeit in limited and at times contradictory ways. The Framers' Debate regarding the Excessive Fines Clause, for example, provides little guidance ("What is understood by excessive fines? It lies with the Court to determine.").[235]

Further, while it is clear that courts considered mitigating factors when assessing and remitting fines,[236] existing court records are often silent as to the reason why a fine was set or remitted, merely noting the imposition or remission with nothing more.[237] Even where factual bases for remissions are given, the record does not indicate whether the circumstances rose to the level of a violation of the Magna Carta prior to 1689, the English Bill of Rights' prohibition on excessive fines during colonial times, or state constitutional prohibitions implemented post-revolution and in the lead up to the ratification of the Eighth Amendment.[238] The fact that colonial and early American courts operated against a backdrop of the rights protected by those documents,

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235. ANNALS OF CONGRESS, *supra* note 94, at 782–83.

236. *See, e.g.*, Preyer, *supra* note 120, at 335 (describing Massachusetts colony's first decade: "sentences actually carried out were frequently at variance with the sentences originally imposed, nearly 50% of them being remitted in part or in full").

237. *See, e.g.*, CRIMINAL PROCEEDINGS IN COLONIAL VIRGINIA 26 (1984) ("On the Motion of Isaac Arnold the fine of two hundred pounds of Tobacco laid on him by this Court this Day for his not appearing as a Jury Man is hereby remitted and it is Ordered that the same be not Levyed.").

238. Shortly after the colonists declared independence from England, six colonies—Delaware, Georgia, Maryland, North Carolina, Pennsylvania, and Virginia—drafted state constitutions, each expressly prohibiting excessive fines or mandating moderate fines. DEL. CONST. of 1776, Decl. of Rights, § 16; GA. CONST. of 1777, art. LIX; MD. CONST. of 1776, Decl. of Rights, § XXII; N.C. CONST. of 1776, Decl. of Rights, § X; PA. CONST. of 1776, Plan or Frame of Gov't, § 29; VA. CONST. of 1776, Bill of Rights, § 9. New Hampshire also drafted a state constitution in 1776 expressing an understanding that it "enjoy[ed the] constitutional rights and privileges" of English subjects prior to the Revolutionary War, N.H. CONST. of 1776, and amended the document in 1784 to prohibit excessive fines, N.H. CONST. of 1784, art. 1, § XXXIII. Also in the 1780s, Massachusetts and Vermont drafted their first state constitutions, the original terms of which included prohibitions on excessive or disproportionate fines. MASS. CONST. of 1780, pt. 1, art. XXVI; VT. CONST. of 1786, Plan or Frame of Gov't, § 29. South Carolina drafted a state constitution, which also prohibited excessive fines, in 1790. S.C. CONST. of 1790, art. IX, § 4. Of the remaining colonies, both New Jersey and New York drafted state constitutions shortly after 1776 that did not expressly prohibit excessive fines, but that included language declaring that the common law of England, which prohibited excessive fines, would remain in force in those states. N.J. CONST. of 1776, § XXII; N.Y. CONST. of 1777, § XXXV. Excessive fines prohibitions were added to their state constitutions in 1844 and 1846, respectively. N.J. CONST. of 1844, § XV; N.Y. CONST. of 1846, § V. Although neither Connecticut nor Rhode Island drafted state constitutions until the 1800s, both states included excessive fines prohibitions. CONN. CONST. of 1818, § 13; R.I. CONST. of 1842, art. 1, § 8. Additionally, Rhode Island sought to restrict the imposition of fines by the federal government as early as 1786. *See* 1786 R.I. Pub. Acts 33–35; *cf.* Steven G. Calabresi et al., *State Bills of Rights in 1787 and 1791: What Individual Rights Are Really Deeply Rooted in American History and Tradition?*, 85 S. CAL. L. REV. 1451, 1458, 1463 (2012) (arguing that the prohibition against excessive fines should be considered fundamental because over two-thirds of the state constitutions prohibited excessive fines by the time the Eighth Amendment was ratified in 1791).

however, provides important context. At a minimum, early court and statutory records provide insight into how colonial and early American citizens felt about whether fines were or were not justly imposed.

What is plain from those records is that early Americans had an expansive understanding of relevant factors when it came to the fair imposition of fines, including consideration of facts related to the offense—like the amount of harm caused—as well as offender characteristics related to culpability. The record also supports the notion that the ratifying generation would have considered the fine's effect on the offender and his family when analyzing a sentence's fairness. Finally, the record indicates that a fine's proportionality depended on weighing the effect of the fine against aggravating and mitigating circumstances of the crime, and included an upward bound by which fines that serve to impoverish would be prohibited.

*1. Offense and Offender Characteristics*

It is evident how important the specific facts of the offense and the characteristics of the offender were to the ratifying generation. Relevant facts included the degree of harm caused, the defendant's level of involvement and mens rea, the defendant's actions after the crime, and other individual characteristics bearing on culpability.

Regarding the proportionality between the harm and the punishment, *Goodall v. Bullock* once again proves instructive. As noted, *Goodall* involved a statutory fine assessed against a sheriff for failure to serve a *fieri facias*, despite there being no injury to the complaining party.[239] The *Goodall* court considered whether a court of equity had jurisdiction to remit "excessive, or otherwise unrighteous" fines,[240] and conducted a "short review of the principles whence is derived the power exercised by the court of equity, when it exonerates intirely from penalties or alleviates them."[241] The court noted that because courts of law "formerly condemned the [delinquent] party . . . to pay the mulct,"[242] courts of equity were not so hampered. Rather, courts of equity were allowed to consider the resulting harm in order to ensure penalties did not exceed the harm, even for offenses against society.[243] In particular, regarding statutory

239. *See* WYTHE, *supra* note 169 and accompanying text. In addition to the discussion on remitting excessive fines, the *Goodall* court also held that the trial court was not authorized to issue the fine because the statute only allowed for fines to be issued to an injured party. *Id.* at 332.

240. *Id.* at 332.

241. *Id.* at 334; *see also id.* at 334–37 (relying heavily on contract principles related to recovery for violation of contractual terms where no injury resulted); *id.* at 337 (explaining that there is no meaningful distinction between the manner in which the courts of equity should treat contractual violations and statutory violations because the "obligation to pay the conventional mulct, is unquestionably derived from the same source, consent of the obligors," either through contract or through "an act of his representative, the legislature").

242. *Id.* at 335–37.

243. *Id.*

penalties that required forfeiture not calculated to actual loss, the court explained:

> [I]f the default had not been intirely compensated by the fortunate escape of loss, justice, suspending her balance, and putting the detriment and penalty in opposite scales, and taking out of that which contained the latter, until the beam should settle in a horizontal position, would signify that she approved the liberal and benign doctrine inculcated in the court of equity, that forfeitures, intended to compensate detriment, are irrational, because, at the times when they are fixed, they cannot be subjects of isometrical computation; and that they are odious, because being extensive enough to cover the detriment, in any event, they must be extravagant in almost every event.
>
> This is believed to be the rationale of the daily practice of relieving against forfeitures, by the court of equity, which, if no detriment hath been suffered, exonerates from the forfeiture, intirely, and, if detriment hath been suffered, exonerates from so much of the forfeiture as excedes the detriment.[244]

*Goodall* was not an anomaly. Both statutory and court records indicate that the severity of the offense and the harm caused were routinely considered in determining the appropriate fine.[245]

Additionally, colonial and early American legislative bodies and courts also considered a defendant's mens rea and level of criminal involvement in assessing fines. For instance, a defendant's culpability in relation to his co-defendant's culpability might be relevant in a situation where one acted at the behest of the other, or where one's crime was only made possible by the other's actions.[246] Similarly, when a defendant had a valid excuse or defense,[247]

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244. *Id.* at 336–37. *But see* 1724 Pa. Laws 137 (prohibiting the pardon or release of fines assessed in relation to county levies).

245. *See, e.g.*, 1719 Conn. Pub. Acts 256 (fine to be set with "respect being had to the degrees of the Crime"); 1672 Conn. Pub. Acts 56 (directing consideration of the level of dangerousness involved, and the time, place, and provocation of the crime); 1785 Mass. Acts 240 (setting punishments "according to the aggravation of the offence"); 1759 N.H. Laws 1–2 (directing that a fine's amount depend on the dimensions of a tree wrongfully cut down and that the court should set a fine for leaving open a fence "according to the nature or aggravation of the trespass"); 1787 N.Y. Laws 354 ("[A]ll fines . . . shall be reasonable and just having regard to the trespass or offence and the causes for which they be set and imposed"); 1783 Pa. Laws 167 (granting jurisdiction to all courts and justices of the peace to order that recognizances be "levied, moderated or remitted, on hearing the circumstances of the case, according to equity and their legal discretion"); 1722 Pa. Laws 137–38 (directing that all fines be set "according to the quality of the offence"); 1757 R.I. Pub. Acts 18–19 (mandating that an offender "shall forfeit and pay as a Fine . . . in Proportion to the Nature of the Offence"); 1749 R.I. Pub. Acts 45 (requiring that a defendant be "fined according to the Degree and Circumstances of his Offence"); 1712 S.C. Acts 28 (stating that "[a]merciaments shall be reasonable and according to the offence"); 1779 Vt. Acts & Resolves 99 (directing that the offender "forfeit and pay . . . according to the nature and aggravation of the trespass").

246. *See, e.g.*, 1779 Conn. Pub. Acts 533 (setting punishment for accessory to dueling lower than for engaging in dueling); 1773 Conn. Pub. Acts 389–90 (directing that a fine be paid by the

such as accident,[248] infirmity,[249] or self-defense,[250] fines were often reduced or excused altogether.

Historical records also document examples of mens rea being treated as a relevant factor in considering the proportionality of fines. In particular, when determining the appropriate fine to levy, courts considered whether a defendant

person under whose direction a servant or minor sold unauthorized medicine); BURLINGTON COURT BOOK, *supra* note 161, 18–19 (taking into consideration that one defendant was "not soe Culpable as the rest" in deciding not to issue a fine); 1 RECORDS OF THE COURT OF ASSISTANTS OF THE COLONY OF THE MASSACHUSETTS BAY 1630–1692, *supra* note 160, at 305–07, 321 (sentencing defendant convicted of manslaughter to pay two-thirds of the prosecution charges and co-defendant convicted as an accessory to pay one-third of the charges); 2 RECORDS OF SUFFOLK COUNTY COURT 1671–1680, *supra* note 163, at 84–85, 87 (sentencing co-defendants significantly more harshly than an accessory).

247. *See, e.g.*, 1700–1769 Del. Laws 116–17 (1721) (allowing those who did not appear for jury duty to avoid fines where they could "render a reasonable excuse for . . . their absence"); 1782 Md. Laws xv (excusing failure to serve on a jury where defendant has "sufficient excuse"); 1789 N.H. Laws 484 ("And the informing officers aforesaid, shall have a right to [i]nquire of any person apparently offending against this act, the cause or necessity of his so doing, and if he shall neglect or refuse to assign such reason or reasons as may appear on trial to be sufficient, or shew such Certificate, he shall pay costs of prosecution, any other reason he shall give on trial notwithstanding."); 1785 N.Y. Laws 47 (allotting two days for juror to explain absence); 1778 R.I. Pub. Acts 42–43 (allowing remission of fine for failure of council members to attend the Council of War upon "sufficient Excuses"); 1731 S.C. Acts 126 (allowing juror to "shew good and sufficient cause of excuse" for failure to appear in order to avoid a fine); 1749 Mass. Acts 291 ("[U]nless reasonable Excuse be made."); 1705 Va. Acts 162 (allowing witness who failed to appear to avoid a fine where "sufficient Cause be shewn"); 2 RECORDS OF SUFFOLK COUNTY COURT 1671–1680, *supra* note 163, at 108 (remitting fine for failure to appear for jury duty because the constable told the defendant the wrong day).

248. *See, e.g.*, 1 Stat. 156 (1790) (ordering forfeiture for excluding goods or wards from a ship's manifest unless done by accident or mistake); 1778 N.J. Laws 101 (acquitting collector of paying assessments after the "enemy" burned down the house where collector stored his money because the money was "unavoidably lost"); 1779 Vt. Acts & Resolves 99 (declaring that penalty for felling another's trees reduced if the defendant "really believed the timber . . . was, when growing, on his own or some other person's land where he had a right to cut").

249. *See, e.g.*, 1702 Conn. Pub. Acts 5 (excusing failure to sound alarm if defendant could convince court of "disability to attend the same"); 1700–1769 Del. Laws 99 (1721) (allowing subpoenaed witness to avoid fine for failing to appear upon showing he was prevented from attending due to "sickness, or some unavoidable accident"); 1790 Pa. Laws 799–800 (excusing fines imposed for non-attendance in the militia where the defendant was "unable to attend, by reason of indisposition of body, or unavoidable absence"); BURLINGTON COURT BOOK, *supra* note 161, at 155 (remitting fine issued against constables for failure to appear because the offense was "excused by reason of sicknesse"); RECORDS OF THE COURT OF TRIALS OF THE COLONY OF PROVIDENCE PLANTATIONS, *supra* note 135, at 28–29, 35, 47 (remitting fines for failure to appear for jury duty because defendant had "weakenes of [] body," was "Sicke and Ill and haveinge none to atend them but him selfe," was "lame," and was "sicke at that time").

250. *See* 1779 Vt. Acts & Resolves 153–54 (punishing manslaughter by forfeiture, corporal punishment, etc., unless a defendant "in the just and necessary defence of his life, or the life of any other, . . . kill[s] any person attempting to rob or murther, in the field or highway, or to break into any dwelling house, if he conceives he cannot, with safety of his own person, otherwise take the felon or assailant, or bring him to trial").

acted willfully,[251] was ignorant of the law,[252] committed the crime in the heat of passion,[253] or was under duress during the commission of the crime.[254]

Further, a defendant's actions after the crime might have also affected the fine levied. This included whether the defendant confessed or implicated others in the crime,[255] expressed remorse or humility,[256] mitigated the resulting harm,[257] or promised to abide by the law in the future.[258]

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251. *See, e.g.*, 1 Stat. 209 (1791) (allowing remission by the Secretary of the Treasury if a court determines that a defendant did not, in violating laws regulating importation of distilled spirtits, act with willful negligence or intent); 1 Stat. 112–13 (1790) (allowing remission of fines and forfeitures for violation of revenue laws if the court finds the defendant did not act with willful negligence or intent to defraud); 1788 N.Y. Laws 786–91 (no forfeiture absent intent to defraud).

252. *See* 1786 R.I. Pub. Acts 19 (exonerating defendant for distributing false coin where "he is the only Person ever prosecuted in the said City upon the Law on which he was condemned, of which Law he was entirely ignorant"); 1784 S.C. Acts 31–32 ("And Whereas many recognizances have been, or hereafter may be forfeited . . . against persons for breach of the condition of such recognizances, many of which neglects or defaults may or shall have happened through the inattention of ignorant people . . . for remedy whereof, it shall be lawful for the Judges of the Court of Sessions . . . on petition and affidavit by, or on behalf of any person or persons impleaded or prosecuted . . . for the forfeiture or estreat . . . to remit the whole, or compound for any part of the amount of such recognizance"); PROCEEDINGS OF THE PROVINCIAL COURT OF MARYLAND, *supra* note 102, at 90 (remitting a fine of five hundred pounds of tobacco where constable was ignorant of his duty of posting a list of "tithables" in the court house).

253. 1765 Ga. Laws 262 (setting penalty for willful murder of a slave at up to the full value of the slave, but allowing for a sanction of only £150 if murder was committed in the heat of passion); 1740 S.C. Acts 172–73 (setting fine at a lower amount where a slave is murdered in the heat of passion); RECORDS OF THE PARTICULAR COURT OF CONNECTICUT, 1639–1663, *supra* note 150, at 79–81 (remitting a £5 fine assessed to a barber for striking a lieftenant, because it appeared "that hee is affected with his grea[t] euill and rash passionate Carriage in striking the Le[if]tennant"); PROCEEDINGS OF THE COUNTY COURTS OF KENT, *supra* note 150, at 69–70, 74 (remitting a fine assessed against a woman for defamation after husband requested clemency from the court by describing "his wiues weackenes & passion" as well as "pressures upon him").

254. *See* BURLINGTON COURT BOOK, *supra* note 161, at 58–59 (taking into consideration when setting a fine co-defendant's threat toward the defendant).

255. *See, e.g.*, 1771 R.I. Pub. Acts 14; 1754 R.I. Pub. Acts 14–16; 1727 Conn. Pub. Acts 341 ("[I]f such Persons [accused of fornication before marriage] shall at their Tryal, Plead Guilty, they shall suffer but the one half of the Penalty."); 1753 Mass. Acts 362 (where person receiving or purchasing illicit lottery ticket "shall inform against or prosecute" the person running the lottery "such Receiver or Purchaser shall not in that Case be liable to the Penalty aforesaid"); BURLINGTON COURT BOOK, *supra* note 161, 43–44, 48–49 (considering confessions in setting punishment); PENNYPACKER, *supra* note 206, at 91 (considering confession and promise to behave in excusing punishment ); *id.* at 33–34 (taking into consideration confession and defendant's status as a servant); 2 RECORDS OF SUFFOLK COUNTY COURT 1671–1680, *supra* note 163, at 22 (considering in setting penalty defendant's acknowledgement of guilt).

Equitable considerations also came into play in other ways in the remission of fines, particularly where there was evidence of a lack of procedural fairness. For example, following the Salem witch trials, the Queen of England pardoned numerous people convicted of witchcraft in part because the "Influence and Energy of the Evil Spirits so great at that time acting . . . upon those who were the principal accusers . . . [a]nd Some of the principal accusers and Witnesses in those dark and severe prosecutions have since discovered themselves to be persons of profligate and vicious conversation." 1711 Mass. Acts 71–72; *see also* 1779 N.Y. Laws 98 (pardoning a woman who had been convicted of murdering her infant, because a material witness who may have proven her innocence did not attend the trial); 1754 R.I. Pub. Acts 14–16 (pardoning a man who was convicted despite a promise of immunity in exchange for his testimony); PROCEEDINGS OF THE MARYLAND COURT OF APPEALS

Mitigating evidence also included factors unrelated to the crime but specific to individual characteristics understood to decrease a defendant's culpability. For example, the record shows that courts considered a defendant's individual characteristics like his youth[259] or mental and physical incapacity[260]

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1695–1729, at 533–38 (Carroll T. Bond ed., 1933) (reversing restitution order on appeal due to insufficiency of the indictment and jury selection proceedings); 2 RECORDS OF THE COURT OF ASSISTANTS OF THE COLONY OF THE MASSACHUSETTS BAY 1630–1692, *supra* note 156, at 104 (remitting fine "the presentment being upon a mistake").

256. *See, e.g.*, 1782 N.Y. Laws 485–86 (pardoning people who sided with the British and who "professed a sincere repentance of their crimes"); 1783 R.I. Pub. Acts 15 (remitting fine upon bond for good behavior after defendant expressed "[t]hat he is very sorry for his Offence" and was unable to pay); 1783 Vt. Acts & Resolves 178 (enabling the governor and council to pardon people convicted of public rebellion who had been banished because "it is suggested that some of said persons are penitent, and desirous of returning to their Duty"); COURT RECORDS OF KENT COUNTY, *supra* note 167, at 49 (releasing defendant from bond for good behavior because he was "sorry for his transgretions"); CRIMINAL PROCEEDINGS IN COLONIAL VIRGINIA, *supra* note 237, at 25 ("with humble Submission on his Knees acknowledging his Offence and begging the Courts pardon, have Ordered that the Fine of Fifty Shilling Currant Money imposed on him by the said Order be remitted"); 1 MINUTES OF THE COURT OF ALBANY, RENSSELAERSWYCK AND SCHENECTADY 1668–1673, at 115 (A.J.F. Van Lear ed., 1926) (remitting fine because of defendant's "humble petition"); RECORDS OF THE PARTICULAR COURT OF CONNECTICUT, 1639–1663, *supra* note 150, at 32 ("his misdemeanor therein is looked yppon as an offense of a high nature, but conceaueing yt a sudden inconsiderat act, and finding him much humbled and affected therewth giueing full acknowledgement of his Offence, he is adiudged to pay the Country fiue marke"); 2 RECORDS OF SUFFOLK COUNTY COURT 1671–1680, *supra* note 163, at 111 ("Vpon the humble Peticion of James Whiting of Hingham the Court was pleased to Remit halfe the fine imposed upon him . . . .").

257. *See, e.g.*, 2 RECORDS OF THE COURT OF ASSISTANTS OF THE COLONY OF THE MASSACHUSETTS BAY 1630–1692, *supra* note 156, at 40 (fining a defendant for selling boards at a price contrary to court order but remitting the fine upon the defendant's promise to provide planks "toward the sea fort"); *cf.* 1751 Va. Acts 240 (where defendant charged with gambling repaid the amount to those who lost money to him, the court was to order him "acquitted, indemnified and discharged").

258. *See, e.g.*, 1783 R.I. Pub. Acts 25–26 (partially remitting sentence where defendant requested opportunity to "demean himself as a peaceable Citizen"); 1782 R.I. Pub. Acts 11 (discharging defendant from incarceration for failure to pay bond upon "an Expectation of his future good Behaviour"); 1783 Vt. Acts & Resolves 175 (pardoning defendant convicted of treason given "his sincere and hearty Penitence and determination to behave orderly and submissive"); BURLINGTON COURT BOOK, *supra* note 161, 18–19 (considering "promise of amendment for the future" in determining no fine would be assessed); RECORDS OF THE PARTICULAR COURT OF CONNECTICUT, 1639–1663, *supra* note 150, at 7 (remitting fine imposed for misdemeanor drinking upon promise to avoid drinking in the future); 2 RECORDS OF SUFFOLK COUNTY COURT 1671–1680, *supra* note 163, at 443 (limiting punishment to only an admonishment and fees of court for women convicted of disorderly carriage because the defendants acknowledged their guilt and "promiss to avoide such Offences for time to come"); PENNYPACKER, *supra* note 206, at 90–92 (sentencing of multiple defendants convicted of keeping a drinking house without a license; one defendant was fined but the other two were not "upon their Confession & promise not to transgress in such way hereafter were excused"); RECORDS OF THE COURT OF TRIALS OF THE COLONY OF PROVIDENCE PLANTATIONS, *supra* note 135, at 57 (remitting bond for good behavior on larceny charge given defendant's good behavior and promise to continue with such behavior).

259. Some statutes excluded youth from liability. *See, e.g.*, 1 Stat. 101–02 (1790) (limiting liability for failing to comply with census laws to people "more than sixteen years of age"); 1702 Conn. Pub. Acts 67 (establishing a minimum age of fourteen for a conviction for lying); 1692 Mass. Acts 10–13 (same); 1791 N.H. Laws 252–57 (limiting liability for libel to people fourteen or older);

to be mitigating. Similarly, the extent of a defendant's criminal history may aggravate or mitigate, with penalties reduced for first-time offenders.[261] The colonists and early Americans also routinely treated race, gender, and caste as relevant to sentencing, in particular by imposing harsher punishments when offenders were people of color, servants, or slaves.[262] For example, a 1721 Delaware statute prohibiting adultery and fornication set different penalties depending on the defendant's gender, whether the crime was committed while in servitude, and whether the child would be "a [mulatto] bastard child."[263] Pursuant to that same statute, a black man convicted of fornicating with a white woman was to be whipped, forced to stand in the pillory for two hours with his ear nailed to it, and mutilated. A white man convicted of fornicating with a black woman, on the other hand, was whipped a lesser amount of times and

1741 N.C. Sess. Laws 52 (limiting liability for engaging in activities on the Lord's day other than attending church to individuals "of the age of fourteen years, and upwards"); 1784 R.I. Pub. Acts 25–26 (referencing restriction on forfeiture of estates of infants). The record also includes examples of courts and other reviewing bodies considering youth as a mitigating factor, even where the statute does not expressly make it one. *See, e.g.*, 1786 R.I. Pub. Acts 11 (remitting fine given defendant's inability to secure payment "by Reason of the Difficulty of the Times and his tender Years"); 1782 Vt. Acts & Resolves 93 (pardoning man who joined the British at age fifteen); BURLINGTON COURT BOOK, *supra* note 161, at 20 (finding co-defendants guilty of forcible entry on land to cut down corn, "[w]hereupon the Bench Fyned the aforesaid John Newbold Five pounds, and the sayd John Woolston, Michaell Buffin, Thomas Revell, and William Wayt Fifty shillings a peece, and bound them all to their good behaviour, And aquitt Michaell Newbold—being but a youth.").

260. *See, e.g.*, 1791 Conn. Pub. Acts 410 (allowing discharge of prisoners incarcerated for inability to pay costs who are "unable to labour"); RECORDS OF THE COURT OF TRIALS OF THE COLONY OF PROVIDENCE PLANTATIONS, *supra* note 135, at 26 (suggesting defendant's fines for selling a gun to an Indian be remitted upon consideration that the defendant was "simple").

261. *See, e.g.*, 1715 Conn. Pub. Acts 209 (increasing penalties for killing deer out of season for each subsequent offense); 1700–1769 Del. Laws 194 (1739) (setting penalty for first offense of gaming or drunkenness at 20 shillings and costs, and the second offense between 40 schillings and £5 plus costs); 1755 Ga. Laws 1 (doubling fine and jail time for second offense of declaring that the actions of Georgia's General Assembly are not in force); 1723 Md. Laws 169 (doubling fine upon second conviction); 1787 Mass. Acts 579, 582 (increasing sanction by adding bond for good behavior upon second conviction); 1791 N.H. Laws 252–57 (doubling fines for the second offense of drunkenness and trebling fines for all future offenses); 1777 N.J. Laws 15–16 (increasing amount of forfeiture after first offense); 1787 N.Y. Laws 426 (increasing penalties for sheriff's refusal to follow writ of habeas corpus for each subsequent offense); 1787 N.C. Sess. Laws 431–32 (doubling fine for "entertaining" slaves for second offense); 1788 Pa. Laws 636 (increasing forfeiture for property damage after first conviction); 1779 R.I. Pub. Acts 15 (increasing restitution penalties for theft for subsequent offenses); 1791 S.C. Acts 12–13 (setting fine for an officer's first offense of taking greater fees than he's entitled at four times the amount taken, and setting punishment for second offense as permanent divesture of his office); 1787 Vt. Acts & Resolves 151 (penalty for selling liquor without a license increased to include a bond for good behavior upon second offense); 1680 Va. Acts 83 (raising amount of fine after first offense).

262. *See, e.g.*, 1730 Conn. Pub. Acts 375; 1700–1769 Del. Laws 305–07 (1749); 1765 Ga. Laws 248–64; 1715 Md. Laws 109–18; 1704 Mass. Acts 151–52; 1754 N.H. Laws 72–73; 1741 N.C. Sess. Laws 60; 1713 N.J. Laws 18–24; 1788 N.Y. Laws 675–79; 1780 Pa. Laws 285; 1725 Pa. Laws 143–45; 1750 R.I. Pub. Acts 85–86; 1740 S.C. Acts 163–75; 1753 Va. Acts 308–10; *cf. supra* notes 161–62.

263. 1700–1769 Del. Laws 105–09 (1721); *see also* 1725 Pa. Laws 143–45.

fined £20.[264] While taking into account at sentencing factors like race and gender is improper by modern standards, this consideration reveals an early understanding that along with the specific characteristics of an offense, the individual characteristics of the offender were relevant to sentencing.

*2. The Effect of Fines*

The principle espoused by the Magna Carta and Blackstone that fines should not permanently impoverish defendants is also found in colonial and early American records. While the record lacks a single, unified view of the effect fines have on defendants across or even within jurisdictions, a consciousness of that risk is visible throughout. As stated in a 1779 Delaware statute, "it becomes the Wisdom and Policy of every State in the penal Laws thereof, to proportion Punishments to Crimes, as nearly as possible, *to do Justice in Mercy, and to reclaim rather than destroy*."[265]

Further, some state statutes show an explicit link to the Magna Carta's prohibition against defendant impoverishment. For example, in 1787 the New York legislature passed a law making it a requirement that any "fine or amerciament shall always be according to the quantity of his or her trespass or offence and saving to him or her, his or her contenement; That is to say every freeholder saving his freehold, a merchant saving his merchandize and a mechanick saving the implements of his trade."[266] This language preceded a recitation of what later became the Eighth Amendment's prohibition against excessive fines ("nor excessive fines imposed").[267]

Other statutes explicitly prohibited forfeiture of estate as a punishment.[268] For example, the primary criminal statute passed by the First Congress in 1790

264. 1700–1769 Del. Laws 105–09 (1721).

265. 1779 Del. Laws 44 (1779) (emphasis added) (decreasing punishments for various offenses); *see also* 1779 N.J. Laws 135 (repealing acts that raised fines because the "Acts are become unnecessary, and may be injurious to the Subjects of this State").

266. 1787 N.Y. Laws. 344–45.

267. *Id.*; *see also* 1712 S.C. Acts 28 ("[T]hat no City, Borough, nor Town, nor any man be amerced, without reasonable Cause, and according to the quantity of his Trespass; that is to say, every Free-man, saving his Freehold, a Merchant saving his Merchandise, a Villain saving his Waynage.").

268. *See, e.g.*, 1672 Conn. Pub. Acts 40 ("[I]t shall not be lawful for such Officer to Levy any mans necessary bedding, apparel, tools, or arms, neither Implements of House-hold, which are for the necessary upholding of his Life; but in such cases he shall Levy his land, or person according to Law."); 1700–1769 Del. Laws 71 (1719) (directing that forfeiture of "all his lands and tenements, goods and chattels" excepting half, "after such criminals just debts, and the reasonable charges of their maintenance in prison, are deducted . . . [to] go to such criminal's wife and children equally: But if he leaves no wife or children, then to the next of his kindred, not descending lower than the second degree, to be claimed within three years after the death of such criminals"); 1787 Ga. Laws 21–22 (ordering death without benefit of clergy for second offense of biting, gouging, or maiming, but prohibiting corruption of blood or forfeiture of the widow's dower or the defendant's goods and chattels); 1791 N.C. Sess. Laws 10–11 (regarding punishments for malicious and unlawful maiming and wounding, "no conviction and judgment under this act shall work a forfeiture of goods and chattels, lands and tenements, or corruption of blood"); 1777 Va. Acts 51 (allowing forfeiture of estate for counterfeiting saving an "allowance to his wife and children . . . [that is] just and reasonable"); *see*

forbade forfeiture of estate.[269] Some statutes also required courts to consider a defendant's ability to pay and the ill consequences the fines would present for the defendant's family. For instance, in 1791, New Hampshire passed a statute that directed men convicted of bastardy—fathering an illegitimate child—to pay for the child's care. In assessing charges, however, courts had to consider the defendant's "condition and circumstances."[270]

An inability to pay and the effect on one's family were also treated as mitigating factors at sentencing and upon later petition for relief.[271] For example, throughout the mid- to late 1700s, the Rhode Island General Assembly considered and routinely granted petitions for relief on those bases. In a 1784 Rhode Island case, the Assembly granted relief to a defendant who was incarcerated pending his ability to pay costs, because "he hath a Wife who [was] pregnant, [was] much indisposed, and [was] utterly unable to pay the [fine]."[272] Likewise, remission often occurred in cases where the discharge of

*also* 1774 Conn. Pub. Acts 394 (directing costs to be taken from public treasury upon inability to pay); 1748 Conn. Pub. Acts 570 (same); 1788 N.Y. Laws 664–71 (same).

269. *See* 1 Stat. 117 (1790); *see also* 1787 N.C. Sess. Laws 444 (prohibiting forfeitures after suicides reasoning that such a penalty "can answer no valuable purpose, and may distress creditors, innocent relations and orphans"); 1744 S.C. Acts 197–98 (excluding indigent defendants from paying costs related to incarceration and prosecution).

270. 1791 N.H. Laws 269–71; *see also* 1747 N.H. Laws 30 (directing court consider "the Quality & Circumstances of the Offender"); 1746 N.J. Laws 307 (exempting from forfeiture soldiers unable to pay for their arms or ammunitions); 1784 N.Y. Laws 656 (directing courts to set penalty for abandoning one's family based on the amount needed for "maintaining, bringing up, and providing for such wife, child or children").

271. *See, e.g.*, 1791 Pa. Laws 74–75 (releasing an individual incarcerated for failure to pay a fine because he was "destitute"); 1790 Pa. Laws 799–800 (allowing relief from fines where "such person [is] actually insolvent"); BURLINGTON COURT BOOK, *supra* note 161, at 326 ("Called on his recognizence appears nothing appearing against him he is Discharged per proclamation per order of Court and the officers in Consideration of his Poverty forgave him the fees."); *id.* at 226 (following a conviction for contempt, a woman was fined "in five pieces of eight Which in consideration of her poverty Was remitted unto her"); COURT RECORDS OF KENT COUNTY, *supra* note 167, at 69–70, 74 (agreeing to full remittitur of fine assessed against a wife following her husband's admission of her culpability and expression that he "had pressures upon him"); PROCEEDINGS OF THE COUNTY COURTS OF KENT, *supra* note 150, at 405–07 (ordering sole punishment of seeking forgiveness "in regard that they Court haue Considered theire poverty and abillity to make any other satisfaction"); 3 RECORDS OF THE COURT OF ASSISTANTS OF THE COLONY OF MASSACHUSETTS BAY 1630–1692, *supra* note 135, at 195–96 (following assessment of contempt fine and later a bond for good behavior, defendant filed a petition with the court seeking clemency given his "poore wife and distressed family," which was followed by a petition by his defendant's wife; the court abated the remainder of the fine); *see also* 1786 N.Y. Laws 202–03 (directing courts to "except the necessary wearing apparel and bedding of such person and of his wife and children" in identifying property subject to forfeiture).

272. 1784 R.I. Pub. Acts 17. In these cases the Assembly either remitted the penalty in full or, in several instances, ordered the release of the prisoner upon payment of costs or entry of a bond for good behavior. *See, e.g.*, 1791 R.I. Pub. Acts 13; 1787 R.I. Pub. Acts 8; 1784 R.I. Pub. Acts 8; 1783 R.I. Pub. Acts 15; 1783 R.I. Pub. Acts 22–26; 1782 R.I. Pub. Acts 21; 1781 R.I. Pub. Acts 7; 1776 R.I. Pub. Acts 302; 1763 R.I. Pub. Acts 9–10; 1752 R.I. Pub. Acts 64; 1750 R.I. Pub. Acts 28–29.

fines prevented further accrual of costs, particularly incarceration costs.[273] In 1744, for example, the New York legislature enacted a law that expedited misdemeanor offenses in part by eliminating the imposition upon conviction of pre-trial incarceration costs. The legislature reasoned that incarcerating individuals who were unable to make bail had "been a great Expence to such Counties" as well as "a great Damage to their Families."[274]

This is not to say, however, that the colonists and early Americans always followed the Magna Carta's dictate regarding offender impoverishment. For example, some statutes directly called for forfeiture of estate upon conviction,[275] though even in such cases some portion of the estate may have been preserved for the defendant's family.[276] Such forfeitures were in vogue during the Revolutionary War, when several colonies passed statutes penalizing with forfeiture of estate colonists who supported the British. In some cases, the applicable statutes expressly excluded from forfeiture amounts necessary to maintain the defendant's family,[277] while in other cases the statutes did not address the issue or simply allowed full forfeiture without relief.[278] After the

273. *See, e.g.*, 1789 Pa. Laws 688–90; 1785 R.I. Pub. Acts 11; 1781 R.I. Pub. Acts 25; 1771 R.I. Pub. Acts 84–85; *see also* 1766 Md. Laws ii (eliminating imposition of court costs where defendant is a slave in order to promote the "Speedy trial of criminals").

274. 1744 N.Y. Laws 240–41.

275. *See, e.g.*, 1787 Ga. Laws 22 ("That the said attaint shall not extend to corrupt the blood, forfeiture of the wife's dower or the offender's goods and chattels."); *see also* 1717 Md. Laws 139 (punishment for counterfeiting government seal was forfeiture of "goods and chattels, lands and tenements"); 1715 Md. Laws 78–79 (same punishment for embezzlement of wills or records); 1750 Mass. Acts 339–40 (punishment for rioting included "forfeit[ing] all their Lands and Tenements, Goods and Chattles"); 1786 N.C. Sess. Laws 409–412 (punishment for defrauding army accounts was "his or their estate forfeited to the use of the public"); 1779 Vt. Acts & Resolves 93–96 ("all the estate" of person convicted of counterfeiting forfeited); 2 RECORDS OF THE COURT OF ASSISTANTS OF THE COLONY OF THE MASSACHUSETTS BAY 1630–1692, *supra* note 156, at 32 (punishing theft by ordering, among other penalties, that "all his estate shalbe forfected"). Some forfeitures were not of the full estate but only of defendant's goods and chattels, without requiring forfeiture of real property. *See, e.g.*, BURLINGTON COURT BOOK, *supra* note 161, at 139 (sentencing forfeiture of "goods and Chattells debts and duties whatsoever"); MINUTES OF THE COURT OF RENSSELAERSWYCK, *supra* note 195, at 48–50 (sentencing defendant to forfeit "all his effects").

276. *See, e.g.*, 1788 N.Y. Laws 664–71 ("That no attainder of any person or persons, of or for any manner of treason or felony whatsoever, shall hereafter extend to corrupt the blood of the offender, or to forfeit the dowery of his wife."); 1718 Pa. Laws 105–23 (assessing one moiety of the forfeited estate "to such criminal's wife and children equally" or other family); *cf.* 1702 Conn. Pub. Acts 1 (directing the court to dispose of forfeited estates in capital cases "according to the rules of Righteousness and Equity").

277. *See, e.g.*, 1778 Conn. Pub. Acts 495–98; 1776–1777 Del. Laws 340 (1776); 1787 N.Y. Laws 347–50; 1780 N.J. Laws 14; 1777 N.C. Sess. Laws 228–32; 1780 Pa. Laws 319–21; 1777 Pa. Laws 18–20; *see also* 1786 N.Y. Laws 307–16 (establishing trusts for widows and children where defendant is deceased). *But see* 1786 N.Y. Laws 307–16 (disallowing provisions for defendant's family where defendant was not deceased).

278. *See, e.g.*, 1781 Conn. Pub. Acts 569–72; 1782 Md. Laws ix–x; 1777 Md. Laws xix–xxii, xii–xvi; 1777 Mass. Acts 107–08; 1777 N.H. Laws 111; 1777 N.H. Laws 67; 1787 N.Y. Laws 402–04; 1779 N.Y. Laws 174; 1782 Pa. Laws 84; 1780 R.I. Pub. Acts 4–5; 1779 R.I. Pub. Acts 24–26; 1777 R.I. Pub. Acts 30–35; 1775 R.I. Pub. Acts 160–62; 1782 Vt. Acts & Resolves 98; 1779 Vt. Acts & Resolves 134–35.

war, and perhaps at the behest of Congress, states reversed or amended their statutes,[279] with many states either allowing all offenders and respective family members to regain title to portions of a defendant's assets,[280] or remitting the forfeitures for specific groups or individuals.[281]

While any statute that calls for the full forfeiture of estate appears to violate the principles of the Magna Carta, the reality may be more complex. A 1777 petition for pardon in Rhode Island provides some insight. There, the petitioner Joseph Streeter sought relief from the deprivation of privileges that resulted from a 1735 felony conviction for counterfeiting paper money. Upon his conviction, Mr. Streeter suffered the forfeiture of his entire estate. Mr. Streeter subsequently joined the Army, and despite the forfeiture he had suffered he "not only maintained a considerable Family, but procured a real Estate."[282] While post-hoc recovery does not render a fine constitutional, if Mr. Streeter's ability to recover was apparent at the time of sentencing, the forfeiture, though severe at the time, would not violate the principles espoused in the Magna Carta because the punishment did not undermine Mr. Streeter's ability to secure a livelihood and progress beyond the pecuniary aspects of his sentence.

In evaluating digressions from the Magna Carta principle of permitting an offender to maintain a livelihood, one must bear in mind the distinctions between contemporary understandings of punishment and the realities of colonial life. For example, as with forfeitures of estate, at first glance the imposition of corporal punishment or incarceration upon an offender who was

279. *See* 1784 S.C. Acts 59 (noting that Congress "ha[s] earnestly recommended to the several states, to reconsider and revise their laws regarding confiscation, so as to render the said laws perfectly consistent, not only with justice and equity, but with that spirit of conciliation which, on the returns of the blessings of peace, should universally prevail").

280. *See, e.g.*, 1779 Mass. Acts 232 ("[W]here the Wife or Widow of any of the Persons aforenamed . . . remained within the Jurisdiction . . . she shall be entitled to the Improvement and Income of one third Part of her Husband's Real and Personal Estate, after Payment of Debts.");1781 N.H. Stat 282–86 (returning dower to wife of defendant whose property was forfeited, and where defendant had no wife returning property to "any Relation (collateral Kindred excepted)"); 1791 N.J. Laws 776–77 (returning portion of estate to adult child; returning portion of estate to son-in-law); 1782 N.C. Sess. Laws 311 (allowing the return of portions of forfeited estates "as will be sufficient for the reasonable support of the wives, widows and children, of any person whose estate is, or may be confiscated, and one third of the lands, or so much thereof as will be sufficient for their support . . . or may, at their discretion, assign the whole of the land, and manor plantation, where the same may be of small value and not more than sufficient for the purposes aforesaid").

281. *See, e.g.*, 1778 Del. Laws 6 (1778) (allowing for maintenance of defendant's wife and children); 1781 Pa. Laws 446–47 (restoring property to wife of defendant convicted of treason); 1779 Pa. Laws 225–27 (same for adult children of father convicted of treason); 1779 Pa. Laws 224–25 (reversing forfeiture where person ultimately acquitted of treason); 1787 S.C. Acts 57–58 (granting petition to individual who petitioned legislature for return of portion of his estate); 1784 S.C. Acts 59 (restoring portions of forfeited property for most defendants); *see also* 1784 N.Y. Laws 20–21 (directing discontinuance of prosecutions).

282. 1777 R.I. Pub. Acts 18–19.

unable to pay a fine[283] undermines the notion that the ratifying generation considered in mitigation an inability to pay. Our modern understanding of punishment, however, does not always map onto early American practices. It is possible that in at least some jurisdictions, fines that led to impoverishment were considered more punitive than corporal punishment or incarceration. For example, in a 1682 New Hampshire statute, the drafters noted that some individuals were "so indigent as . . . the paying of *ff*ines may be very injurious to themselves and *ff*amilies."[284] To alleviate that circumstance, the statute identified a poverty line below which a defendant could be whipped in lieu of paying fines.[285] Further, the colonists used incarceration as a standard debt collection mechanism for both fines and private debt.[286] And today's means of incarceration—jail and prison facilities that fully separate offenders from society—are fundamentally different than those in the colonies and early states. An individual held in jail for fines or other types of debt typically was allowed to "more or less come and go as he pleased, so long as he stayed within a certain area (the 'prison bounds'); he went back to jail at night, to sleep."[287] Even at "houses of correction," a more restrictive form of incarceration, prisoners might have access to their families who in turn provided them with necessities including their own food, bedding, and clothes.[288] On the other hand, the early practices of whipping and incarcerating individuals as punishment for the willful failure to pay fines as well as for indigent defendants suggests that avoiding corporal punishment or imprisonment was considered a significant motivator to spur payment.

Similarly, while still punitive, the use of indenture carried with it a very different meaning in colonial times. Like slavery, indenture was a part of colonial life.[289] In many colonies, for instance, indenture was not just a means of punishing crimes and dealing with public offenses, but also a way of addressing poverty, such as through the indenture of orphaned children.[290]

In short, interpreting the conflicting evidence and the many different views on punishment warrants caution. However, although the mixed record

283. *See supra* notes 207–08 and accompanying text.

284. 1682 N.H. Laws 62.

285. *Id.* at 62–63 ("That every person so offending not having five pound ratable estate according to the valuation stated by Law (or parents or masters, under whose Government they are, that will forthwith pay the fine;) Shall be lyable to be whip'd: viz for an offense where the fine doth not exceed 10s five stripes and where the fine doth not exceed 20s ten stripes; Where the fine doth not exceed [£]5[] 20 stripes; And where the fine doth not exceed [£]10[] thirty stripes; or upwards, not exceeding forty stripes."); *see also* PENNYPACKER, *supra* note 206, at 32–34 (sentencing two co-defendants to various fines for passing bad coins, but for the third co-defendant the court noted "that thou art a Servant, hath only Sentenced thee to Sitt an hour in the Stocks tomorrow morning").

286. *See* FRIEDMAN, *supra* note 19, at 49–50.

287. *Id.* at 49.

288. *See id.* at 49–50.

289. *See, e.g.*, FRIEDMAN, *supra* note 14, at 41–50.

290. *See, e.g.*, 1774 Mass. Acts 654–55; 1779 Vt. Acts & Resolves 159.

indicates that the principle that fines should not prevent defendants from securing a livelihood was inconsistently applied, the idea of saving defendants from persistent impoverishment was a guiding principle reaching back to the days of the Magna Carta and the English Bill of Rights, and enduring through the ratification of the Eighth Amendment.

*3. Proportionality Considerations in Action*

The historical record also provides some guidance on how aggravating and mitigating factors worked hand in hand. Factors relating to the characteristics of the offense and offender, and those pertaining to the likelihood of impoverishment were intertwined and informed one another.

For instance, consider a letter written to George Washington by United States District Judge William Lewis just days before the ratification of the Eighth Amendment.[291] In the letter, Judge Lewis sought a pardon for a man he had previously sentenced, and claimed that at the time of sentencing he had considered the defendant's "former good Conduct, for a considerable length of time, . . . his low Circumstances in life, and . . . [his wife and children's] helpless situation."[292] Judge Lewis further stated that the given circumstances "induced the Court to impose on [the defendant] as mild a Punishment as a Sence of . . . propriety would admit of, and yet the aggravating Circumstances attending [the assault and battery], to which he appeared to have been led by intoxication, were such, as to call for exemplary Punishment."[293] As explained

291. Letter from William Lewis, United States District Judge for Pennsylvania, to George Washington, President (Dec. 12, 1791), *in* THE PAPERS OF GEORGE WASHINGTON DIGITAL EDITION (Theodore J. Crackel ed., 2008), *available at* http://rotunda.upress.virginia.edu/founders/GEWN-05-09-02-0165.

292. *Id.* It is not clear from the record whether Judge Lewis believed it was necessary or simply more expedient to seek a pardon for the defendant. As a general matter, although the colonial and early American statutory and court records provide little insight into the process for seeking remission of a fine or claiming a violation of the English Bill of Rights or the Eighth Amendment, it is evident that both courts and legislatures were seen as having the power to remit fines.

It is also worth noting that the scope of an available pardon appears more limited than judicial or legislative power to remit fines. In a letter from Alexander Hamilton to his legal advisor, Richard Harrison, Hamilton asked for an opinion as to whether the president had the power to pardon the portion of a fine that was directed to a qui tam prosecutor. Letter of Alexander Hamilton, Secretary of the United States Treasury, to Richard Harrison, Esq. (Apr. 26, 1791), *in* THE PAPERS OF ALEXANDER HAMILTON DIGITAL EDITION (Harold C. Syrett ed., 2011), *available at* http://rotunda.upress.virginia.edu/founders/ARHN-01-08-02-0263. The response was that the pardon power was limited to only those portions of fines payable to the government. Letter from Richard Harrison, Esq., to Alexander Hamilton, Secretary of the United States Treasury (May 24, 1791), *in* THE PAPERS OF ALEXANDER HAMILTON, *supra*, *available at* http://rotunda.upress.virginia.edu/founders/ARHN-01-08-02-0326. Despite the distinctions in process and scope between the pardon power and the power of courts and legislatures to remit fines, the reasoning employed in granting pardons provides useful evidence regarding what facts were considered mitigating during this time period.

293. Lewis, *supra* note 291; *see also* Respublica v. Oswald, 1 U.S. 319, 319–29 (1788) (sentencing a newspaper publisher to contempt over the publication of a story about the court proceedings: "But some difficulty has arisen with respect to our sentence; for, on the one hand, we have been informed of your circumstances, and on the other, we have seen your conduct: your

in the letter, although the sentencing court had considered the circumstances of the offense, the characteristics of the offender, and the potential harm to the offender's family, in the end the aggravated circumstances of the offense called for a heavier fine.

In other cases, mitigating factors outweighed aggravating factors in favor of remittance. In 1752, for example, a Virginia court imposed a fine on a habitual criminal who had most recently been convicted of highway robbery. Despite the seriousness of the offense and the defendant's criminal record, the King remitted the fine in its entirety in light of the "unhappy Circumstances of [the defendant's] family," and because he was "a Youth under Age."[294] As in the abovementioned case with Judge Lewis, the court here considered the circumstances or seriousness of the offense, the characteristics of the offender, and the potential financial harm to the offender and his family.

The use of impoverishment as an upper bound is most evident in cases where that was the only argument made in a request for relief. For example, in 1786 Joseph Harris sought relief from his sentence following a conviction for forgery. The court sentenced Mr. Harris to be cropped and branded, and also imposed a fifteen-pound fine, the prosecution costs, and his "Expence while in Gaol."[295] In his petition for relief, Mr. Harris only argued that taken together these pecuniary punishments would "take the Whole of his Estate, leave himself and [his] Family in a miserable Condition, and injure his honest Creditors."[296] On that basis, the Rhode Island Assembly remitted his fine in its entirety.[297]

In sum, the manner in which pecuniary sanctions were imposed, collected, and remitted in the colonies and early American states supports the conclusion that the ratifying generation would have called for judicial consideration of the seriousness or circumstances of the offense, the characteristics of the offender, and the effect of the fine on the offender and his family when assessing a fine's fairness or excessiveness. Further, the three pieces of historical evidence with clear constitutional import—the Magna Carta, Blackstone's interpretation of the English Bill of Rights, and the single sentence in the Framer's debates—support an expansive understanding of proportionality that would prohibit the imposition of a fine that would deny the offender a meaningful opportunity to pay the fine and extricate himself from the punishment.

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circumstances are but small, but your offence is great and persisted in. Since, however, the question seems to resolve itself into this, whether you shall bend to the law, or the law shall bend to you, it is our duty to determine that the former shall be the case").

294. Holderness to the Lords of Trade (Mar. 26, 1752) (on file with author).

295. 1786 R.I. Pub. Acts 16–17.

296. *Id.*

297. *Id.*

## III.
## BREATHING LIFE INTO THE EXCESSIVE FINES CLAUSE

In the Excessive Fines context, the "Court, in performing its self-assumed role as a constitutional historian, has been, if not a naked king, no better than a very ragged one."[298] But even with the additional historical evidence included in this Article revealing just how "distinctly embarrassing"[299] the Court's own historical analysis was, the Court has so firmly planted its flag in taking a historical approach, that it is unlikely to abandon history in its entirety.[300]

The additional evidence provided in this Article does not require the Court to do so. It does, however, make clear that limitations on the use of historical evidence should not be ignored. Thus, I propose a reinterpretation of the Clause that is more faithful to the historical record while allowing for consideration of contemporary practices and understandings. I begin by describing the contours of the reinterpretation I propose, turn next to an analysis of the role history can justifiably play in the reinterpretation, and conclude by raising additional contemporary considerations relevant to interpreting the Clause.[301]

### *A. Method of Reinterpretation*

The method I propose to reinterpret the Clause has three components that allow the Court to continue using history, while being candid about what historical evidence can and cannot provide. The first component involves identification of relevant questions that can be used as a frame for debating the Clause's scope. The second involves an assessment of the strength of the available historical evidence for use in that debate. The third component involves the debate itself, in which historical evidence is considered—according to its value—along with contemporary practices and norms, to interpret the Clause's meaning.

The first component—framing the debate—simply requires an identification of the definitional question at hand. Such questions are likely to arise naturally from the nature of the dispute being litigated (e.g., whether the

298. *See* Alfred H. Kelly, *Clio and the Court: An Illicit Love Affair*, 1965 SUP. CT. REV. 119, 155 (1965).

299. *Id.* at 123.

300. Each member of the Court on the bench in the decade in which the four Excessive Fines Clause cases were decided approved of the historical approach, including all five of the nine justices who served both in the decade the cases were decided and continue to serve today—Justices Breyer, Ginsburg, Kennedy, Scalia, and Thomas. *See* United States v. Bajakajian, 524 U.S. 321, 323 (1998); Browning-Ferris v. Kelco, 492 U.S. 257, 258 (1989).

301. While jurists and academics debate the appropriate factors to consider when overruling existing precedent—some arguing that proof that the precedent is incorrect is sufficient and others arguing that the precedent must be both incorrect and unworkable, *see, e.g.*, Caleb Nelson, *Stare Decisis and Demonstrably Erroneous Precedents*, 87 VA. L. REV. 1 (2001), both considerations exist here. The preceding Part demonstrates that the Court's definitional restrictions are incorrect. Further, the existing doctrine is also unworkable, as it is both internally inconsistent, *see supra* note 178, and has resulted in divisions and confusion in the lower courts, *see supra* note 92.

cost of incarceration is a "fine" for the purposes of the Clause). History can also play a role in identifying such questions, by serving as a jumping-off point—a place from which to identify the types of considerations that may have been in play at the Eighth Amendment's ratification. Using history in this way does not push for answers that the historical record cannot provide, acknowledging the indeterminate nature of the evidence. This interpretive method is similar to what Bernadette Meyler has called "common law originalism," a theory that recognizes that there is not one single common law, and as a result the historical record "cannot provid[e] determinant answers that fix the meaning of particular constitutional clauses, but instead . . . supplies[] the terms of a debate about certain concepts, framing questions for judges but refusing to settle them definitively."[302]

This approach is vastly different than the Court's use of history in the Excessive Fines cases. The Court engaged in a technique criticized by Alfred Kelly: "the creation of history a priori by what may be called 'judicial fiat.'"[303] The *Browning-Ferris* Court declared as a matter of historical truth that the ratifying generation would have understood fines to be restricted to monies payable to the government, and would have contemplated a division between punitive and nonpunitive penalties. Having announced the original meaning, in the following three Excessive Fines cases the Court was "quite content to quote the Court's earlier affirmation without further historical inquiry."[304]

The additional historical evidence provided in this Article, however, belies the Court's basic premise that history can supply a single, narrow definition of the Clause's key terms. Ironically, the Court acknowledged as much in stepping away from history when interpreting the meaning of "excessive," though in doing so ignored the evidence that colonial and early American history could provide on that point. Put simply, the Excessive Fines doctrine lacks historical justification.

In considering how to correct these interpretive errors, I am cognizant of the risk of slipping into Professor Kelly's second critique of the Court's use of history: using an "extended historical essay" as justification to break precedent without proper grounding "in an attempt to solve by judicial intervention some major contemporary socio-political problem."[305] In cases where this occurs, the Court acts as an advocate rather than a neutral arbiter, selecting only historical evidence that supports a particular conclusion, discounting or hiding evidence that undermines that position.[306]

It is for this reason that the second component of my proposed reinterpretation is an evaluation of the strength and value of the evidence on

302. Meyler, *supra* note 119, at 558.
303. Kelly, *supra* note 298, at 122.
304. *Id.* at 123.
305. *See id.* at 125–26.
306. *Id.* at 126, 155–58.

any given point. The more evidence showing that a question may have been answered in a particular way, the more credence that answer should be given in interpreting the Clause. For some questions, significant evidence exists as to how they may have been answered. But as is evident from the colonial and early American statutory and court records detailed herein, discrepancies exist across and within jurisdictions, practices and understandings change over time, and even a thorough examination of the record fails to provide definitive proof of the extent to which any particular idea was shared across the colonies and early states. Therefore, where the record reveals inconsistencies and contradictions (as in the case of the punitive/nonpunitive distinction) or where the nature of the evidence itself prohibits a specific understanding (as in the case of the record's silence regarding whether particular considerations of excess rose to a constitutional level), it should be treated as less persuasive.

It is also essential to account for the scope of the records used in the analysis when assessing the strength of the evidence. There is a significant difference in scope between the very few records relied on by the Court and the analysis of colonial and early American statutes and court records conducted for this Article.[307] The statutory records alone reveal the lack of a single understanding of the Clause's meaning at the time of ratification. It is possible that further analysis of additional court records as well as contextual sources such as newspaper accounts of the use of fines may shed further light on various understandings of both "fines" and "excess" in 1791. Therefore, even though the more robust historical analysis detailed in this Article greatly improves the strength of the historical evidence of the Clause's meaning, the fact that there is historical evidence yet to be tapped should factor into the weight of history in the overall debate.

It is the third component that provides an opportunity to debate the historical evidence with other considerations, including contemporary practices and norms. This method does not stake out a new mode of constitutional interpretation. In fact, it is exactly what the *Bajakajian* Court did upon finding that history could not supply the meaning of "excessive."[308] Further, considering historical evidence and contemporary practices and understandings has fidelity to the very first interpretations of the Eighth Amendment. In *Wilkerson v. Utah*,[309] in which the Court considered, for the first time, the Cruel and Unusual Punishment Clause, it looked to the historical use of various methods of execution as well as contemporary practices.[310] The third

307. *See supra* note 124.

308. United States v. Bajakajian, 524 U.S. 321, 334–40 (1998).

309. Wilkerson v. Utah, 99 U.S. 130, 133–36 (1878); *see also* Furman v. Georgia, 408 U.S. 238, 322 (Marshall, J., concurring) (citing *Wilkerson*, 99 U.S. at 133–36) (noting that the Court "felt bound to examine developing thought").

310. The Court has employed this interpretive method outside of the context of the Eighth Amendment, perhaps most notably in *Brown v. Board of Education*, 347 U.S. 483 (1954). The focus of the parties' arguments in *Brown* regarded the meaning of the Fourteenth Amendment at its

component of the proposed reinterpretation of the Clause allows for these various concepts to be weighed against each other, with the strongest evidence—rather than any particular form (historical, precedential,[311] or contemporary)—winning the day.

### *B. Reinterpreting the Clause*

In this Section I walk through the three steps detailed above in order to exhibit how the historical evidence detailed in this Article could be used within an analysis of the meaning of "fines" and "excessive." The examples of modern considerations I detail below are not intended to be all encompassing, but rather to exemplify the process by which historical information might be considered within a broader analysis of the Clause's meaning.

#### *1. Fines*

The Court has already identified two questions evident in the historical record regarding the scope of the term "fines": whether fines may be paid to third parties or must be paid exclusively to the sovereign; and whether fines can be distinguished by a punitive or nonpunitive purpose. The historical evidence I detail above also raises two additional questions that are likely to surface in modern litigation: to what acts may fines be applied; and what of economic value constitutes a fine. The extent of the evidence on each point varies both in terms of volume and uniformity. Therefore, I address each question in turn.

There is substantial evidence regarding the question of whether fines include sanctions paid to individuals or nongovernmental entities. From the earliest days of the colonies, fines were routinely paid to the sovereign, but also to victims and third parties with no governmental association.[312] There is slight evidence of discrepancies in understanding—the sheriff in *Goodall v. Virginia* who believed that fines were payable only to the sovereign,[313] for example—meaning that there was not a single, uniformly held understanding on this point. But given the extent of the evidence suggesting that the predominant practice associated with fines included payments to the government and individuals alike, this historical evidence has significant value in considering how to interpret the Clause. Given the similarities between historical and contemporary practices by which criminal sanctions are paid to individuals and private

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ratification in 1868. *Id.* at 489. Finding that the historical record contained evidence of the Clause's meaning, and that social developments related to public education exacerbated the inconclusive nature of the historical record, *id.* at 489–90, the Court looked to its precedent subsequent to ratification, *id.* at 490–92, as well as then-contemporary education practices and norms regarding the importance of education, *id.* at 492–94.

311. In the fines context, no precedent interpreting the Clause's terms existed prior to *Browning-Ferris v. Kelco*, 492 U.S. 257 (1989). *See supra* note 106 and accompanying text.

312. *See supra* Part II.A.

313. *See supra* notes 169–72 and accompanying text.

parties,[314] it is likely that there is little need to debate this point in interpreting the Clause today. Further, where this question has arisen in litigation in recent years, it has been as a response to the *Browning-Ferris* Court's definition, as opposed to any particular historical or contemporary concern regarding a fine's recipient.[315]

Turning next to the question of what a fine's purpose must be, the historical evidence is not so cut-and-dried. The bulk of the evidence detailed in this Article suggests that the type of punitive/nonpunitive distinction the Court announced would not have been contemplated at ratification.[316] Yet there is evidence that in at least some jurisdictions at some points in time, economic sanctions were assessed even absent a conviction, suggesting the sanctions were nonpunitive.[317] In contrast to the prior question regarding the fine's recipient, the Court should take caution in relying on this evidence too heavily given that there is more significant evidence of contradictory understandings.

In contrast, with respect to the question regarding acts for which a defendant may be subjected to fines, there is fairly widespread and uniform treatment. Throughout the colonial and early American record, fines were assessed in cases involving offenses seen as creating a harm that was understood as public in nature.[318] While many offenses also resulted in harm to private parties, in each instance there was at least some element of harm to the public.[319] The consistency of this evidence suggests that the historical use of fines in conjunction to public offenses should be treated as credible within the context of assessing the meaning of the Clause today.

Yet, the scope of the question to which that evidence can be put is limited to the general concept of public harm; the historical record cannot say whether a contemporary offense is public in nature. Society's notion of public harms changes over time. For example, conceiving a child out of wedlock was considered a crime against the public in colonial and early American times,[320] whereas today it is considered a private affair. The reverse is also true for

314. *Compare supra* notes 28, 48, 56 and accompanying text (describing modern economic sanctions payable to third parties including restitution, private treatment providers associated with probation and parole, and private collections services), *with supra* notes 143–68 and accompanying text (describing colonial and early American assignment of economic sanctions to third parties including restitution, bonds for good behavior, and costs including those associated with collections).

315. For example, the Florida Supreme Court rejected an Excessive Fines Clause claim raised by a person who had been ordered to repay workers compensation benefits because the payments were not paid to a sovereign, relying exclusively on the Court's definitional restriction. Wright v. Uniforms for Industry, 772 So. 2d 560, 561 (Fla. 2000). Even where the "to a sovereign" restriction has been rejected, the question has arisen only due to the *Browning-Ferris* Court's treatment of the term. *See, e.g.*, State v. Izzolena, 609 N.W.2d 541, 549 (Iowa 2000) ("We do not believe the State can make an end run around the Excessive Fines Clause by simply making a punishment payable to a victim.").

316. *See generally supra* notes 105–06.

317. *See supra* notes 200–03 and accompanying text.

318. *See, e.g.*, *supra* discussion of statutes in notes 135–211 and accompanying text.

319. *See, e.g.*, *supra* discussion of statutes in notes 135–211 and accompanying text.

320. *See, e.g.*, 1702 Conn. Pub. Acts 7.

actions that are criminalized today (such as sale of tobacco to a minor[321]), whether or not the actions were contemplated at the time of ratification (such as cyber stalking[322]). Therefore, the historical evidence only weighs in favor of a conclusion that fines are assessed for offenses against the public as a general matter.

Finally, there is significant evidence that fines would have been understood to include deprivations of anything of economic value. Since the founding of the American colonies, courts have assessed fines of money or tobacco, required the forfeiture of specific property, or mandated that labor be used to satisfy an economic sanction.[323] The strength of this evidence would be considered in light of contemporary practices—including the widespread use of forfeitures[324] and the less common use of service as a substitute for fines[325]—and modern norms.

But as with public offenses, the historical evidence cannot fully answer this question because it does not reveal whether a present-day deprivation has actually occurred. Colonial and early American understandings of property rights differ in fundamental ways from contemporary norms, particularly given that ownership of others through slavery or indenture and the inferior property interests of women were relevant factors to the assessment and distribution of fines in colonial and early American times.[326] Therefore, the debate on this question must necessarily focus on modern considerations of property rights, including whether the Clause offers protection to a person who suffers a deprivation of a legitimate property interest stemming from another person's conviction, which happens most frequently in the context of family relationships, such as joint marital property,[327] or where parents are assessed fees and costs after a child is found delinquent.[328]

Additional considerations on this point include whether the legitimacy of a property interest should depend on a generalized understanding of property as

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321. *See, e.g.*, 18 PA. CONS. STAT. ANN. § 6305 (West 2000).

322. *See, e.g.*, 47 U.S.C. § 223 (2012); NEB. REV. STAT. ANN. § 28-311.02 (West 2009).

323. *See supra* Part II.

324. *See, e.g.*, *supra* notes 29–31 and accompanying text.

325. *See* Bearden v. Georgia, 461 U.S. 660, 672 (1983) (noting that mandated community service may be an acceptable substitute for incarceration for failure to pay). While programs that allow debtors to voluntarily choose community service to pay down criminal debt may be a viable method of relieving such debt, Michelle Alexander has cautioned that the substitution of service for fines can be an extension of abusive post-Civil War practices through which the government used the inability to pay as an excuse to incarcerate and force labor from African Americans. ALEXANDER, *supra* note 29, at 152. I also urge caution in developing such programs to insure that people with mental illness or developmental disability have access to forgiveness even where participation in a particular type of service is untenable. *Cf. id.*

326. *See, e.g.*, *supra* notes 262–64.

327. *See* Bennis v. Michigan, 516 U.S. 442 (1996).

328. *See, e.g.*, IOWA CODE ANN. § 232.141 (West 2006); N.D. CENT. CODE ANN. § 27.20-49(3-4) (West 2008); S.C. CODE ANN. § 17-3-45(C-F) (2003); W. VA. CODE ANN. § 29-21-16(g)(1)–(5) (West 2002).

espoused in the context of the Fourth Amendment,[329] or on the laws of the relevant jurisdiction.[330] Further, courts should consider the extent to which a property interest is legitimate where the property is linked to the crime itself, as in cases involving criminal proceeds (e.g., money received in a bribe), contraband (e.g., illicit drugs), or instrumentalities (e.g., a car used to go to and from work and also to transport drugs).[331] While the historical evidence suggesting that a deprivation of anything of economic value is of great use in contemplating the Clause's meaning, it simply cannot answer these types of specific questions.

In sum, the historical evidence detailed in this Article weighs heavily in favor of the notion that a "fine"—regardless of recipient—is a deprivation of anything of economic value in response to a public offense. [332] The evidence is less persuasive regarding a fine's purpose, though it leans against the Court's punitive/nonpunitive division. While this historical evidence cannot fully or specifically provide a definition for the term "fine," it—along with contemporary considerations—may be a useful tool in the Court's analysis.

*2. Excessive*

The historical record and modern sentencing practices also raise several key questions regarding the meaning of excessiveness: whether and to what extent are the facts of a particular offense, the characteristics of a particular

329. *See, e.g.*, United States v. Jones, 132 S. Ct. 945, 949–50 (2012).

330. *See, e.g.*, United States v. $100,348.00 in U.S. Currency, 354 F.3d 1110, 119–21 (9th Cir. 2004) (looking to California law on gratuitous bailment to determine whether an individual had standing to assert an Excessive Fines claim).

331. Prior to *Bajakajian*, the Fourth Circuit crafted a totality of the circumstances test to assess the forfeiture of instrumentalities that would work well within my broader conceptualization of the Clause. *See* United States v. Chandler, 36 F.3d 358, 365 (4th Cir. 1994) (recognizing instrumentalities as legitimately owned property, but considering the nexus between the property and the crime when determining whether the deprivation of such property is justified or excessive).

332. Taxes, which are a deprivation of property to which an individual has a legitimate interest, would not be "fines" under this definition because they are not related to any public offense. In contrast, whether a public offense is labeled "civil" or "criminal" is irrelevant. *See* Austin v. United States, 509 U.S. 602, 606–10 (1993) (rejecting the government's contention that the Eighth Amendment is limited to criminal actions and reasoning that it covers punishments, whether labeled civil or criminal). For example, civil contempt sanctions, which are assessed against individuals who wrong the sanctity of the court, are public in nature and therefore well within the bounds of "fines," even though they might be labeled "civil." *See, e.g.*, Int'l Union, United Mine Workers of Am. v. Bagwell, 512 U.S. 821, 831 (1994). Further, under this construction, where punitive damages are allowed in order to deter conduct for the benefit of the public, there would be a strong argument that they are fines for the purposes of the Excessive Fines Clause. This would have the benefit of aligning the Clause's interpretation with the academy's interpretation of the historical use of punitive damages. *See supra* note 17.

I leave for a future project the question of whether the Excessive Fines Clause offers protection to a person who suffers a deprivation of a legitimate property interest stemming from another person's conviction. This happens most frequently in the context of family relationships, such as joint marital property, or where parents are assessed fees and costs after a child is found delinquent. *See, e.g.*, *supra* notes 332–33.

offender, or the effects of the fine on the defendant and his family relevant to excessiveness?

As with the fines, historical evidence regarding the meaning of "excessive" varies in terms of volume and uniformity. But particular care must be taken here given that—with the exception of the language of the Magna Carta—the available historical evidence may or may not have constitutional pedigree. Because the records are silent as to what drove particular decisions to impose or remit a sentence, we cannot know whether such actions were related to an understanding of constitutional excessiveness as opposed to simply fair sentencing.[333] While the evidence is still useful in interpreting the Clause, the lack of an explicit connection to the Constitution reduces the weight it should carry in assessing the Clause's meaning today.

Starting, then, with what does have a constitutional link, the Magna Carta's requirement of proportional sentencing is explicit. In three separate provisions, the Magna Carta mandates that punishment be proportionate to the magnitude of the crime and the level of the individual's fault.[334]

Likewise, Blackstone's writings on fines suggest that proportionality should be writ large, focusing not just on a bare comparison of the amount of harm and the amount of punishment, but "a thousand other incidents [that] may aggravate or extenuate the crime."[335] With both offense and offender characteristics, the American record reflects that broad view of proportionality as well, with a wide variety of factors specific to a given offense or to a particular offender seen as tied to offender's culpability for the offense.[336]

There are similarities between the offense and offender characteristics that were considered relevant during colonial and early American times and those considered relevant today—such as degree of harm caused, intent, duress, age, mental condition, status as a first-time offender, and so on. But as noted above with respect to fines, these concepts are helpful to understanding excessiveness only in broad strokes; the historical evidence does not answer the question of what specific offense and offender characteristics aggravate or mitigate culpability today.

In early American sentencing, for example, race and gender were seen as relevant to culpability and most often treated as aggravators when determining the appropriate fines to levy.[337] Today, those same immutable characteristics have no valid place in sentencing. As social mores develop, modern norms should weigh more heavily in the debate regarding the scope of the Clause's

333. *See supra* notes 236–38 and accompanying text.
334. *See supra* notes 220–23 and accompanying text.
335. *See supra* note 7.
336. *See supra* Part II.C.1.
337. *See, e.g.*, *supra* notes 262–64.

protections, as the relevance of particular offense or offender characteristics to culpability become evident.[338]

As with offense and offender characteristics, the Magna Carta also prohibited fines so great that they would prevent a defendant from maintaining a livelihood,[339] essentially setting a ceiling prohibiting fines that would permanently impoverish an individual. The extent to which this restriction was respected in the colonies and early American states varied across time and jurisdiction, though the bulk of the evidence suggests that the effect of a fine was seen as relevant to fair sentencing.[340]

Yet again, however, this evidence cannot answer questions regarding the extent to which a particular fine might result in impoverishment today. There were serious repercussions for failing to pay fines in colonial and early American times, including incarceration, corporal punishment, and indenture.[341] But the social context of such practices has changed so tremendously[342] that they are at best very difficult to compare to the vast web of collateral consequences in effect today.[343] Therefore, modern practices and norms must be brought to bear in assessing the scope of the Clause's protections.

In sum, the strongest historical evidence on the constitutional meaning of "excessive" would set both proportionality and effect as constitutionally relevant. With respect to proportionality, additional evidence suggests that proportionality was seen as broad in scope, including both offense and offender characteristics that reflect on the level of culpability in a given case. The evidence regarding effect on the offender is more complicated. The only evidence with explicit constitutional roots would support a per se bar on fines that would impoverish the defendant, whereas the weaker evidence from the colonial and early American records at times supports and at other times contradicts such a ceiling.

I now return to the cases of Mr. Carela-Tolentino and Natasha to illustrate the potential result if the Court were to reinterpret "excessive" to allow for consideration of offense and offender characteristics, as well as the effect of the fine. In Mr. Carela-Tolentino's case, the court levied against him a mandatory minimum fine of $25,000. Given the mandatory nature of the sentence, it is likely that some aggravating and mitigating factors are not included in the

338. *Cf.* Graham v. Florida, 560 U.S. 48, 85 (Stevens, J., concurring) ("Society changes. Knowledge accumulates. We learn, sometimes, from our mistakes.").

339. *See supra* notes 220, 224 and accompanying text.

340. *See supra* Part II.C.2.

341. *See id.*

342. *Cf.* Brown v. Board of Education, 347 U.S. 483, 489 (1954) (explaining that societal changes with respect to the status of public education between 1868 and 1954 exacerbated the inconclusive nature of the historical evidence).

343. *See supra* Part I.B.

record. Given what is found in the appellate record, there are several factors that a court engaging in an excessiveness inquiry in this case would consider.

First, the court would assess the nature of the offense, including the quantity and type of drug, as well as Mr. Carela-Tolentino's testimony that his intent in possessing the drugs was for personal use. Second, the court would consider Mr. Carela-Tolentino's characteristics, including whether his drug addiction reduced his culpability or provided support for his argument that the drugs were intended for personal use. The court could also factor in Mr. Carela-Tolentino's criminal history—this conviction was his first offense, a fact routinely recognized as relevant to just sentencing.[344] Third, the court would consider the fine's effect on Mr. Carela-Tolentino and his family to determine whether he would have a meaningful opportunity to pay the fine. Given his responsibility to provide for his five children, and his housing and employment limitations following the drug conviction, there is a strong possibility that Mr. Carela-Tolentino would never be able to extricate himself from the $25,000 fine.

In Natasha's case, the same three considerations discussed above would apply at sentencing as well as at the revocation hearing in which her suspended sentence was imposed. Not only is revocation an extension of the sentencing process, but the imposition of a period of incarceration for failure to pay a fine—as it was in the colonies and early American states—is inextricably linked with the issue of excessiveness. Therefore, at either stage—sentencing or revocation—the court would consider the characteristics of Natasha's offense, like the circumstances of the fight, the value of the broken window, and whether the damage was accidental or intentional. The court would also consider Natasha's individual characteristics, like her age at the time of the offense.[345] Further, at the revocation hearing, the court would also have available for consideration Natasha's compliance with all other aspects of her deferred sentence.[346] Finally, the court would consider the financial circumstances of Natasha's family. At sentencing, Natasha's mother was employed full-time, which may have supported one level of fine, while at revocation her employment hours had been reduced, which would have supported a lower level of fine.[347]

In any event, if the respective courts in Mr. Carela-Tolentino's and Natasha's cases found that the imposed fine was excessive given the nature of the offense, the offender's characteristics, and the effect on the offender, the Excessive Fines Clause would mandate a more proportionate fine. This analysis

344. *See* Gryger v. Burke, 334 U.S. 728, 732 (1948).

345. *See* Graham v. Florida, 560 U.S. 48, 67–68 (2010) (suggesting a lower degree of culpability given juveniles' reduced ability to assess the long-term consequences of their actions).

346. *Cf.* Pepper v. United States, 131 S. Ct. 1229 (2011).

347. For a discussion of the policy considerations in play with respect to victim restitution, see *infra* note 352 and accompanying text.

would be similar, though more protective, were the Court to adopt an understanding of the Clause that renders unconstitutional fines that risk the defendant's impoverishment. If that test were employed, and the effect of the fine on Mr. Carela-Tolentino or Natasha were so extreme that they may be unable to ever extricate themselves from the debt, then the Excessive Fines Clause would prohibit the fine altogether.

### *C. Additional Considerations*

This proposed reinterpretation of the Excessive Fines Clause leads to a variety of questions that are beyond the scope of this Article, but worth noting. I begin with related questions of constitutional interpretation, and then address policy issues regarding the use of fines.

Regarding the former, the reinterpretation provides an understanding of the role of proportionality within an excessive fines analysis, but does not provide a silver bullet for the mess that exists in Eighth Amendment proportionality review more broadly. As just one example of these interpretive problems, the Court often relies on intra- and inter-jurisdictional comparisons of punishments and offenses and assessments of legislative intent to assess the proportionality of a punishment.[348] Doing so uses majoritarian practices to set the bounds for a countermajoritarian right. As Youngjae Lee has noted, the Court risks creating a scheme that "all but defines the right against excessive punishment out of existence."[349] In the fines context, for example, many lower courts have treated statutory penalty ranges as practically determinative of the question of excess.[350]

While the reinterpretation I propose may counteract the overreliance on legislative enactments because it would require individualized consideration of offense and offender characteristics as well as the effect of the fine on the defendant, that raises a variety of policy questions.[351]

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348. *See, e.g.*, United States v. Bajakajian, 524 U.S. 321, 337–40 (1998).

349. Lee, *supra* note 19, at 695.

350. *See, e.g.*, United States v. 817 N.E. 29th Drive, Wilton Manors, Fla., 175 F.3d 1304, 1309–10 (11th Cir. 1999). The Court's heavy reliance on legislative enactments is further weakened because a single statute or guideline may lend itself to conflicting interpretations, as *Bajakajian* itself shows. *Compare Bajakajian*, 524 U.S. at 337–40, *with id.* at 348–51 (Kennedy, J., dissenting). I also have written previously about problems with the Court's use of statistics in analyzing the nature of an offense in the cruel and unusual punishment context. *See* Beth A. Colgan, *Constitutional Line Drawing at the Intersection of Childhood and Crime*, 9 STAN. J. C.R. & C.L. 79, 99–101 & n.103, 106 (2013) (drawing on arrest statistics).

351. In addition to the policy matters discussed herein, a shift toward individualized sentencing would also require courts to expand the quantity of information in assessing fines. However, in the vast majority of cases much of the relevant evidence would already be gathered to assess indigency for Sixth Amendment purposes. *See, e.g.*, MASS SUP. JUD. CT. R. 3:10 (assessing indigency by considering the defendant's liquid assets, the household's net monthly income, and "basic living costs" including "shelter, food, utilities, health care, transportation, clothing, education, and support payments"). The proposed interpretation of the Clause would also have other effects on court efficiency, which would likely cut both ways. On the one hand, by expanding the relevant

One policy consideration relates to the decision of Congress and state legislatures to impose such a vast array of collateral consequences—such as restrictions on housing, employment, and public benefits, as well as high levels of interest and collections costs. While such actions are within their purview so long as they are constitutionally sound, where employed they do reduce a defendant's ability to afford the payment of fines. This reinterpretation of the Excessive Fines Clause does not mandate the elimination of such policies, although it may prohibit the imposition of a fine where collateral consequences create too heavy a burden on a defendant.[352]

Another policy consideration relates to the value placed on sentencing uniformity, particularly given that the Clause requires individualized consideration in each case, which in turn renders any mandatory minimum penalty unconstitutional.[353] While there is no constitutional requirement for

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considerations of whether a fine is excessive to account more holistically for the ability of a defendant to pay, failure-to-pay hearings should decrease dramatically along with the administrative costs associated with attempting to collect from those with no means and incarcerating those who cannot pay. On the other hand, the number of excessive fines challenges may increase as the term "fines" is given broader scope. The extent to which challenges do increase, however, will likely vary from jurisdiction to jurisdiction—more new hearings will be needed, for example, in jurisdictions that have immunized restitution from the Excessive Fines Clause. *See supra* note 92. In other words, the most significant expansion will occur in jurisdictions where constitutional protection is needed most.

Further, although sanctions related to the administration of the criminal system were conceived of as a revenue-generating mechanism, the results have been at best a mixed bag. Due to a lack of transparent record keeping there is scant evidence in any jurisdiction of the costs and benefits of imposing and collecting economic sanctions. *See, e.g.*, REYNOLDS ET AL., *supra* note 48, at 23–24. While some jurisdictions assert that their collection practices have been successful, *see, e.g.*, Butterfield, *supra* note 42 (describing a collections program run by a sheriff's department in Macomb County, Michigan, that collected $1.5 million in fees from jail inmates in the preceding year, which was accomplished in part by seizing cars and re-incarcerating debtors), in many jurisdictions, there is evidence that it costs significantly more to collect economic sanctions than the amount collected, resulting in a net loss to local, state, and federal finances, *see, e.g.*, Chris Serres and Glenn Howatt, *In Jail for Being in Debt*, MINNEAPOLIS-ST. PAUL STAR TRIBUNE (Mar. 17, 2011), http://www.startribune.com/printarticle/?id=95692619 ("In Minnesota, judges have issued arrest warrants for people who owe as little as $85 [in unpaid civil debt]—less than half the cost of housing an inmate overnight."); MCLEAN & THOMPSON, *supra* note 23 (describing court administrators in Nevada as reporting that "only 23 percent of fines are successfully collected").

352. In other words, the consideration of the web of collateral consequences on a defendant's ability to pay necessitated by this interpretation merely sheds light on the scope of such consequences and a given legislative body's preference for various types of sanctions, but does not remove those policy decisions from their purview.

For example, the choice to impose severe collateral consequences gives insight into policy makers' commitment to victim restitution. There are indications that the scope of fines and related collections sanctions are so onerous, that in many cases it serves as a disincentive to pay, resulting in lower levels of restitution collection for victims. Harris, Evans & Beckett, *supra* note 10, at 1792. If a legislative body wanted to ensure victims received restitution, it has multiple policy options to make that happen. One option would be to create a public fund for victim restitution, into which funds received from defendants able to pay restitution would be placed. Other options include reducing interest rates and collections costs to more reasonable levels or reducing the collateral effects of fines on public benefits and the like, so that defendants are better able to afford restitution payments. *See supra* notes 52–57, 63–89 and accompanying text.

353. *Cf.* Miller v. Alabama, 132 S. Ct. 2455, 2475 (2012).

uniform sentencing,[354] the balance between individualization and uniformity is an important part of the modern sentencing discussion.

Uniformity reflects the concern that like cases be treated alike,[355] and thereby raises two questions: what differences in offense or offender characteristics and ability to pay warrant different treatment, and what is the appropriate mechanism for achieving uniformity? Generally, the debate has focused on the second question as a means to answer the first, with one camp focusing on uniformity of outcome,[356] pushing for strict rules that significantly limit judicial discretion, and the other pushing for uniformity of process, whereby courts could properly consider distinctions between offenses and offenders within the strictures of public policy considerations, including penal principles such as incapacitation, retribution, rehabilitation, and deterrence.[357]

Though the focus on outcome initially prevailed, resulting in limitations on the factors judges could consider at sentencing, concerns continue to mount that such restrictions have led to draconian sentencing and that sentencing restrictions merely transferred discretion from courts to prosecutors so that uniformity was never actually achieved.[358] So long as the results do not unduly

354. Williams v. Illinois, 399 U.S. 235, 243 (1970) ("The Constitution permits qualitative differences in meting out punishment and there is no requirement that two persons convicted of the same offense receive identical sentences."); *cf.* B.M.W. of N. Am. v. Gore, 517 U.S. 559, 603 (1996) (Scalia, J., dissenting) ("Criminal sentences can be computed, we have said, on the basis of 'information concerning every aspect of a defendant's life.'") (citing Williams v. New York, 337 U.S. 241, 250–52 (1949)).

355. *See, e.g.*, Pepper v. United States, 131 S. Ct. 1229, 1252 (2011) (Breyer, J., concurring).

356. Those advocating for a focus on outcome have understood outcome to mean the sentence handed down without consideration of the long-term consequences of the sentence. A fine of $1,000, for example, is understood as just that and nothing more. Yet a $1,000 fine to a person of means and a $1,000 fine to a person whose assets are restricted or who is living in poverty have tremendously different consequences. The person of means can write a check and his fine remains at $1,000. A person whose assets are tied up in a home or business or who have no assets in the first instance cannot. For those individuals, the $1,000 fine is likely to be subjected to interest, collection costs, late fees, the costs of additional hearings, and on and on. They might also be denied access to probation and parole services, thereby increasing the time of incarceration, or denied the ability to seal records, which in turn can limit employment and housing opportunities. For the person of means the fine can be dealt with in a day; for others, a fine may be a lifelong burden.

357. For a historical accounting of the development of these two camps beginning in the 1970s, see generally Michael M. O'Hear, *The Original Intent of Uniformity in Federal Sentencing*, 74 U. CIN. L. REV. 749 (2006).

358. The academy began raising concerns about the scope of prosecutorial discretion—particularly the power of prosecutors to determine sentencing outcomes through charging decisions—shortly after the federal shift toward cabining judicial discretion in the mid- to late 1970s. *See generally, e.g.*, James Vorenberg, *Decent Restraint of Prosecutorial Power*, 94 HARV. L. REV. 1521 (1981). In an important and provocative piece of more recent vintage, Professor William J. Stuntz linked the upswing in increased criminalization and harsh sentencing to the shift in discretion from judges to prosecutors, noting that "the story of American criminal law is a story of tacit cooperation between prosecutors and legislators, each of whom benefits from more and broader crimes, and growing marginalization of judges, who alone are likely to opt for narrower liability rules rather than broader ones." William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 510 (2001). This link between politics and the increase in prosecutorial discretion may have reached a

restrict a court's ability to consider aggravating and mitigating factors that address a fine's excessiveness, debates about appropriate mechanisms for achieving uniformity may properly continue within the bounds of the Excessive Fines Clause framework.

Fortunately, the historical record provides guiding principles for that debate. Throughout that record—from the Magna Carta and Blackstone's writings, to the myriad ways fines were assessed and remitted on American soil—it is clear that the spirit of the Excessive Fines Clause resounds with quite remarkable humanity and pragmatism. The idea that the government should account for the ways in which offense and offender characteristics may decrease culpability, should recognize the practical consequences of imposing fines on individuals and their families, and should not impoverish even those who have committed crimes, shows that at its core the Excessive Fines Clause sought to ensure that the humanity of those protected by the Clause be respected. If we adhere to those underlying principles, the Excessive Fines Clause may in fact be revived.

tipping point. In recent months, increased focus on mandatory minimum sentencing has brought attention to the lack of judicial discretion in sentencing. *See, e.g.*, Patrick Leahy & Rand Paul, *Rand Paul and Patrick Leahy: Join Us to Do Away with Mandatory Minimums*, U.S. NEWS & WORLD REPORT (Aug. 15, 2013), http://www.usnews.com/debate-club/is-eric-holder-making-a-good-move-on-mandatory-minimums/rand-paul-and-patrick-leahy-congress-is-read-to-do-away-with-mandatory-minimums.