NOTES

RESTITUTION AND THE EXCESSIVE FINES CLAUSE

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ABSTRACT

A criminal conviction often, if not always, involves the imposition of financial penalties on a defendant. Such penalties can be catastrophically debilitating for defendants. With such severe consequences possible, it is of little wonder the Eighth Amendment's prohibition on excessive fines exists. However, the exact state of the law surrounding the Excessive Fines Clause is anything but clear, especially when it comes to purportedly "remedial," rather than punitive, payments. Under current Supreme Court doctrine, purely remedial payments might not be constrained by the Excessive Fines Clause at all. This understanding has serious consequences for criminal defendants who frequently find themselves saddled with such payments. Remedial payments frequently come in the form of "criminal restitution" – a theoretically remedial payment that has seen growing popularity over the years. To partly address this blind spot in the law of the Excessive Fines Clause, this Note uses a historical lens to explore whether the Excessive Fines Clause is meant to constrain criminal restitution. It explores the origins of the Excessive Fines Clause and follows its gradual development until the day it was incorporated into the Bill of Rights.

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INTRODUCTION

Modern criminal restitution is a unique beast that has seen growing usage over time.[1] It is one of the most common remedies granted to crime victims in the modern criminal justice system.[2] Although use of restitution has grown, a crucial question associated with restitution remains unanswered: whether the Eighth Amendment's Excessive Fines Clause constrains such awards.[3] The Eighth Amendment to the U.S. Constitution states that "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."[4] The Supreme Court has not resolved the question of whether the word "fines" includes restitution awards, and there is conflict in the lower courts.

On the surface, this question may seem to be of little value—after all, restitution has been traditionally understood to be a disgorgement of the defendant's wrongful gains, or "forc[ing] a defendant to disgorge a profit wrongfully taken."[5] Under such a conceptualization, restitution could never actually violate the Excessive Fines Clause because disgorgements would always be proportionate to the wrong that the defendant committed.[6] However, in the modern criminal justice system, the value of restitutionary awards can be entirely disconnected from the defendant's gain.[7] Instead, modern criminal-justice restitution awards are often based on the victim's purported loss, which is a characteristic better described as compensatory rather than restitutionary.[8] With this expansion of restitution to include losses borne by the victim, the opportunity arises for the imposition of huge and disproportionate—yet purportedly restitutionary—judgments on defendants.[9]

For example, suppose a criminal defendant is charged with, and found guilty of, assault on another person. Suppose further that, in committing the assault, the defendant gained nothing of pecuniary value. Under California law, a court must issue a "restitution order" compelling the defendant to "fully reimburse the victim . . . for every determined economic loss incurred as the result of the defendant's criminal conduct . . . ."[10] So, if the victim suffered $10,000 in medical expenses,

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1. Courtney E. Lollar, *What Is Criminal Restitution?*, 100 IOWA L. REV. 93, 97 (2014).

2. *See* Kevin Bennardo, *Restitution and the Excessive Fines Clause*, 77 LA. L. REV. 21, 21 (2016) (citing Cortney E. Lollar, *Punitive Compensation*, 51 TULSA L. REV. 99, 103–04 (2015)).

3. *Id*. at 21; *see infra* Part II.

4. U.S. CONST. amend. VIII.

5. Lollar, *supra* note 1, at 101–02. Restitution is also occasionally known as victim compensation. *Id*.

6. The current test for whether the Excessive Fines Clause has been violated is the disproportionality test: "If the amount of the forfeiture is grossly disproportional to the gravity of the defendant's offense, it is unconstitutional." United States v. Bajakajian, 524 U.S. 321, 337 (1998). Since traditional restitution is purely based on the defendant's wrongful gain and requires him to discharge that amount and nothing else, restitutionary awards, by nature, cannot be disproportionate to the wrong committed. Lollar, *supra* note 1, at 101.

7. Lollar, *supra* note 1, at 101–02.

8. *Id*. at 102.

9. Because criminal restitution now allows for payments to be based on something else than the defendant's gain, it is now possible for the payment to be disproportionate to the defendant's wrong. *See id*.

10. CAL. PENAL CODE § 1202.4(f)(3).

the defendant will be made to pay that bill as part of his criminal restitution.[11] That payment is not disproportionate—the medical expenses are clear-cut and proportionate to the defendant's wrong. However, the equation becomes less clear when considering the potential scope of "economic loss."[12] Suppose that the assault resulted in severe psychological harm that seemingly will render the victim unable to work full-time for the next ten years, resulting in an estimated reduction in pay of $50,000 per year for the victim. In such a situation, the defendant might have to pay $500,000 in restitution to the victim for his crime.[13] The question of proportionality in such a situation becomes murkier.

This expansion of criminal restitution to include payments based on the victim's loss (rather than purely the defendant's gain) has become well-accepted.[14] Scholars have described this conception of criminal restitution as "the prevailing approach."[15] Additionally, multiple states have adopted this broad understanding of restitution by passing minimum restitution statutes, requiring the imposition of minimum sums of compensatory-style restitution for various criminal violations with only few exceptions.[16] Restitution is also frequently the "last part of an offender's sentence to be discharged," ensuring that offenders are forced to make the required restitution regardless of their personal circumstances, including inability to pay.[17] These features make restitution a force in the modern criminal justice system that is ripe with opportunities for abuse. Defendants seeking relief from this new understanding of criminal restitution may well turn to the Eighth Amendment for help, making the constitutional issue more pressing than ever before.

Because of its long-term neglect, the Excessive Fines Clause may be described as the ugly stepchild of the Eighth Amendment, receiving far less attention than its much more handsome brother, the Cruel and Unusual Punishments Clause.[18] Indeed, very little has been written about the Excessive Fines Clause at all.[19] Even though the Excessive Fines Clause may have been ignored for much of its history, it is still a consequential part of the Constitution.[20] As such, it deserves proper

11. *See* § 1202.4(f)(3)(B).
12. § 1202.4(f)(3).
13. *See* § 1202.4(f)(3)(D); § 1202.4(f)(3)(E).
14. Lollar, *supra* note 1, at 102.
15. *Id*.
16. *Id*. at 97 n.8; Bennardo, *supra* note 2, at 24–25.
17. Bennardo, *supra* note 2, at 21.
18. *See* Browning-Ferris Indus. v. Kelco Disposal, Inc., 492 U.S. 257, 264 (1989) (discussing the Constitutional Convention's lack of debate regarding the Excessive Fines Clause).
19. *Compare* Google Scholar Results for the Excessive Fines Clause, GOOGLE SCHOLAR, http://scholar.google.com (type "Excessive Fines Eighth Amendment" into search bar and click search icon) (last visited Nov. 23, 2020), *with* Google Scholar Results for the Cruel and Unusual Punishments Clause, GOOGLE SCHOLAR, http://scholar.google.com (type "Cruel and Unusual Eighth Amendment" into search bar and click search icon) (last visited Nov. 23, 2020) (showing substantial disparity in number of hits between the two clauses).
20. The Excessive Fines Clause is still used and applied in court nowadays, with a recent high-profile Supreme Court case. *See* Timbs v. Indiana, 139 S. Ct. 682 (2019).

attention. That is precisely what this Note hopes to achieve: the dual aims of providing an answer to the important constitutional question of whether the Excessive Fines Clause applies to restitution, while also adding to the constitutional scholarship surrounding it. In answering the question of whether the Excessive Fines Clause constrains restitution, this Note will explore the original understanding of the Excessive Fines Clause from a variety of historical perspectives, including those found in the foundational English treatises and in the laws and practices of the early American states.[21] Because the ultimate answer hinges heavily on the precise original meaning behind the word "fines" as it is found in the Eighth Amendment,[22] much of this Note's analysis focuses on historical understandings of the word.

The analysis proceeds in three main parts. Part I discusses the current state of the law and how it affects the understanding of restitution in relation to the Excessive Fines Clause. Part II covers the historical understandings of the Excessive Fines Clause from an English perspective, especially those of the great English thinkers, Sir Edward Coke and Sir William Blackstone. Part III addresses early American conceptualizations of the Excessive Fines Clause, focusing on colonial-era statutes and practices. The Note concludes that, properly understood, restitution should be subject to the Excessive Fines Clause.

I. MODERN COURTS' CONCEPTIONS OF RESTITUTION

A. The Supreme Court & Restitution

The current doctrinal landscape surrounding the Excessive Fines Clause is relatively underdeveloped because it stood practically untouched for over 150 years.[23] The Supreme Court's first interpretation of the Clause came in 1989 with its decision in *Browning-Ferris Industries v. Kelco Disposal, Inc*. That case involved an Eighth Amendment challenge to the constitutionality of a six-million-dollar civil jury punitive damages award.[24] Analyzing the Excessive Fines Clause through a historical lens, the Court noted that, given the Eighth Amendment's references to "bail," "fines," and "punishments," the Court's cases "long have understood it to apply primarily, and perhaps exclusively, to criminal prosecutions and punishments."[25] As such, the Excessive Fines Clause was not meant to disturb a jury award of punitive damages in a civil trial, affirming the judgment of the lower

21. *See infra* Parts III–IV.

22. *See infra* Part II.

23. Beth A. Colgan, *Reviving the Excessive Fines Clause*, 102 CALIF. L. REV. 277, 297 (2014).

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

25. *Id*. at 262. The Court stated that "[b]ail, fines, and punishment traditionally have been associated with the criminal process, and . . . the text of the Amendment suggests an intention to limit the power of those entrusted with the criminal-law function of government." *Id*. at 263 (quoting Ingraham v. Wright, 430 U.S. 651, 644 (1977)).

court.[26] However, the Court did not find occasion to announce the proper constitutional test for excessiveness.

Four years later, in *Austin v. United States*, a case addressing the applicability of the Excessive Fines Clause to in rem civil forfeitures, the Court interpreted the Excessive Fines Clause a second time.[27] There, the government sought civil forfeiture of the petitioner's mobile home and auto body shop as a result of his drug conviction and argued that the Eighth Amendment applied only to criminal proceedings.[28] The Court rejected this argument and held that "the question is not . . . whether forfeiture under [statutory law] is civil or criminal, but rather whether it is punishment."[29] This determination did not disturb the *Browning-Ferris* result—rather, it clarified that, when a state (as opposed to the private party in *Browning-Ferris*) goes after a person in either the criminal or civil context, the Eighth Amendment applies if the remedy sought was meant to be a punishment for the alleged wrongdoer.[30] With this, the Excessive Fines Clause now had a threshold requirement; if the remedy sought was punitive, then the Excessive Fines Clause applied.[31]

In dicta, the Court also considered the question of "remedial" forfeitures (i.e., restitution) and noted that "[w]e need not exclude the possibility that a forfeiture serves remedial purposes to conclude that it is subject to the limitations of the Excessive Fines Clause."[32] This is because even supposedly remedial measures taken could still be, in some part, punitive if they "serv[e] either retributive or deterrent purposes" and thus satisfy the Court's threshold punitive requirement for Excessive Fines Clause application.[33] Under this analysis, the Excessive Fines Clause applied to the forfeitures in *Austin* because they were punitive.[34] However, the Court stopped short of stating that purely compensatory restitution was constrained by the Clause.[35]

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26. *Browning-Ferris*, 492 U.S. at 280.

27. 509 U.S. 602 (1993).

28. *Id*. at 604–05, 607.

29. *Id*. at 610.

30. *See* State v. Cottrell, 271 P.3d 1243, 1251 (Idaho Ct. App. 2012) (citing *Browning-Ferris*, 492 U.S. at 260) ("[I]n a preceding case, the United States Supreme Court held that the federal Excessive Fines Clause was inapplicable to civil punitive damages between private parties.").

31. *See Cottrell*, 271 P.3d at 1250 (citing United States v. Bajakajian, 524 U.S. 321, 328 (1998); *Austin*, 509 U.S. at 609–10) ("The Excessive Fines Clause of the United States Constitution is a limit on the government's power to extract payments as punishment for an offense.").

32. *Austin*, 509 U.S. at 610.

33. *Id*. (quoting United States v. Halper, 490 U.S. 435, 448 (1989)). This conclusion that remedial sanctions do serve partially punitive aims has also been reached by academics. Beth A. Colgan, *The Excessive Fines Clause: Challenging the Modern Debtors' Prison*, 65 UCLA L. REV. 2, 41–43 (2018); Lollar, *supra* note 1, at 94. *But see Bajakajian*, 524 U.S. at 332 (stating that the forfeiture "served no remedial purpose" and thus was subject to excessive-fines analysis, implying that if it had served a remedial purpose, the opposite result might have occurred).

34. *Austin*, 509 U.S. at 618.

35. *See generally id*.

In spite of *Austin*'s wide-ranging opinion, the Court still did not adopt a constitutional test for excessiveness.[36] The question of what constitutional standard to use in the Excessive Fines Clause context was finally answered in *United States v. Bajakajian*, issued in 1998.[37] There, the government sought forfeiture of $357,144 because the defendant violated reporting requirements for transporting large sums of money.[38] Turning to history in much the same way that it did in *Browning-Ferris* and *Austin*, the Court concluded that the history of the Excessive Fines Clause was so scant and vague that a proper constitutional standard could not be derived from history alone.[39] Accordingly, the Court turned to other sources for inspiration and found it in the neighboring Cruel and Unusual Punishments Clause.[40] This clause's gross disproportionality test was imported into the Excessive Fines Clause context.[41] The Court held "[i]f the amount of the forfeiture is grossly disproportional to the gravity of the defendant's offense, it is unconstitutional."[42] With the trifecta of *Browning-Ferris*, *Austin*, and *Bajakajian*, the Excessive Fines Clause finally had the beginnings of a proper, Supreme Court-developed doctrinal base to guide the lower courts, although the question of restitution remained unanswered.

After this initial development, the Excessive Fines Clause doctrine went dormant again for twenty years until *Timbs v. Indiana*.[43] In a brief opinion, written two hundred years after the clause's adoption in the Bill of Rights, the Court held that the Excessive Fines Clause was incorporated against the states.[44] But the Court went no further.[45]

Throughout this thread of cases, the Court has never directly decided the question of whether the Excessive Fines Clause constrains restitution awards.[46] However, dicta in the Court's *Austin* and *Bajakajian* decisions suggest that the Court would consider restitution to be a fine.[47] Furthermore, the Court has hinted at the contours of how it would decide whether a particular restitution measure is a fine.[48] The test seems to be that the Excessive Fines Clause only constrains

36. *See id*. at 622–23.

37. 524 U.S. 321.

38. *Id*. at 324.

39. *Id*. at 335–36. Recent legal scholarship has criticized this point. Colgan, *supra* note 23, at 298–99. Beth Colgan's work is an extensive dive into colonial American history informing the Excessive Fines Clause and is recommended reading for a more general survey of the Excessive Fines Clause. *See, e.g*., Colgan, *supra* note 33.

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

41. *Id*.

42. *Id*. at 337.

43. *See* Timbs v. Indiana, 139 S. Ct. 682 (2019) (citing no other Excessive Fines opinion by the Court since *Bajakajian*).

44. *Id*. at 689.

45. *Id*.

46. Colgan, *supra* note 33, at 41.

47. *See Bajakajian*, 524 U.S. at 332; Austin v. United States, 509 U.S. 602, 610 (1993).

48. Paroline v. United States, 572 U.S. 434, 455–58 (2014); *Austin*, 509 U.S. at 610; Colgan, *supra* note 33, at 41 n.222.

restitution awards if such awards serve at least partially punitive aims.[49] Several state courts have reached this same answer in interpreting their own excessive fines clauses.

B. State Courts & Restitution

State court decisions have been inconsistent on this question, but the Iowa Supreme Court has given one of the most definitive answers on whether the Excessive Fines Clause constrains restitution. In *State v. Izzolena*,[50] the Iowa Supreme Court held that the State's own constitutional restraint on excessive fines—which uses essentially identical language to that of the Eighth Amendment—covers awards of restitution.[51] The court traced the history of the state's constitutional provision back to the 1689 Virginia Declaration of Rights and used Supreme Court case law (i.e., *Bajakajian* and *Austin*) to conclude that "[t]he clause served to limit the ability of government to use its prosecutorial powers to impose excessive monetary sanctions."[52] "Thus, the test developed to determine whether a particular sanction falls within the Excessive Fines Clause as a 'fine' is whether it is, at least in part, punishment."[53] The court then proceeded to analyze the criminal restitution awarded by the lower court and found that, in substantial part, it served punitive aims.[54] The court determined this by first explaining that "[e]ven though a sanction may serve a remedial purpose, it is still subject to the Excessive Fines Clause if it can only be explained as serving in part to punish."[55] Then the court found that the award, in addition to being remedial, served "other purposes normally associated with punishment such as retribution and deterrence."[56] This service of punitive aims was sufficient for the Excessive Fines Clause to be applicable.[57]

The Idaho Court of Appeals's conclusion in *State v. Cottrell* generally tracks the Iowa Supreme Court's analysis, but diverges on the standard to determine whether remedial sanctions are punitive.[58] First, the court noted that the state's constitution and the U.S. Constitution both have identical excessive fines clauses.[59] Accordingly, the Idaho Court of Appeals analyzed state case law along with Supreme Court precedent and found that the "payments or other imposed financial obligations are 'fines,' for purposes of the Eighth Amendment, only if they constitute *punishment*."[60] Thus, "the first step in any question regarding excessive fines

49. Colgan, *supra* note 33, at 18–19 (citing *Austin*, 509 U.S. at 609–10).
50. 609 N.W.2d 541 (Iowa 2000).
51. *Id*. at 549.
52. *Id*. at 548. (citing Browning-Ferris Indus. v. Kelco Disposal, Inc., 492 U.S. 257, 275 (1989)).
53. *Id*. (citing *Austin*, 509 U.S. at 610).
54. *Id*. at 549.
55. *Id*. (citing *Austin*, 509 U.S. at 621–22).
56. *Izzolena*, 609 N.W.2d at 549.
57. *Id*.
58. State v. Cottrell, 271 P.3d 1243 (Idaho Ct. App. 2012).
59. *Id*. at 1250.
60. *Id*. (citing United States v. Bajakajian, 524 U.S. 321, 328 (1998)).

is to determine whether payments are punitive or remedial," with only the former being constrained by the Excessive Fines Clause.[61] However, in a break from Iowa, the Idaho Court of Appeals focused on whether the "primary purpose" of the award was to punish,[62] rather than if the award could "only be explained as serving in part to punish."[63] Analyzing the state restitutionary statute under this scheme, the Idaho Court of Appeals noted that several factors indicated that the statute had a remedial, rather than a punitive, purpose.[64] The court considered such factors as whether the statute mandated restitution, whether the statute made a clear distinction between restitution and fines, and what standard of proof the statute required for a restitutionary award to be issued.[65] Because of these remedial factors, the court stated that it was "convinced that the primary purpose of restitution in Idaho is remediation."[66] The court then held that the restitution statute was not bound by either the federal or state Excessive Fines Clauses.[67]

These two cases do not illustrate the full picture of state-court decisions regarding the Excessive Fines Clause. State case law on the subject is so unclear that it has been called a "quagmire," especially with regard to the precise definition of a "fine" and whether it incorporates a punitive requirement.[68] Nevertheless, out of this body of case law, one overarching principle emerges: the importance of historical evidence in determining the meaning of the Excessive Fines Clause.[69] The Supreme Court, in particular, has interpreted the clause through a historical lens in all three of its major excessive fines cases during the *Bajakajian* era.[70] The fourth major case, *Timbs v. Indiana*, was decided in 2019 and also emphasized viewing the Excessive Fines Clause through a historical lens, further cementing historical analysis as the touchstone of understanding the clause.[71] Following the practice of the Supreme Court and various state courts, the analysis must begin with history.

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61. *Id*. at 1250. Idaho's analysis up to this point has generally tracked Iowa's. *Compare id*., *with Izzolena*, 509 N.W.2d at 547 (outlining the punitivity requirement of the Excessive Fines Clause). This analysis also generally correlates with the principles laid down by the Supreme Court. *See supra* Section I.A.

62. *Cottrell*, 271 P.3d at 1252–53.

63. *Izzolena*, 509 N.W.2d at 549.

64. *Cottrell*, 271 P.3d at 1252–53.

65. *Id*.

66. *Id*. at 1253.

67. *Id*. at 1254. The Idaho Supreme Court has yet to opine on the issue.

68. Colgan, *supra* note 23, at 295 n.92; *see, e.g*., State v. Johnson, 430 P.3d 494, 500–01 (Mont. 2018); *Izzolena*, 609 N.W.2d at 547; People v. Cowan, 47 Cal. App. 5th 32 (2020); *Cottrell*, 271 P.3d at 1252–53.

69. *See, e.g*., Timbs v. Indiana, 139 S. Ct. 682, 687–89 (2019); United States v. Bajakajian, 524 U.S. 321, 335–37 (1998); Austin v. United States, 509 U.S. 602, 611–19 (1993); Browning-Ferris Indus. V. Kelco Disposal, Inc., 492 U.S. 257, 264–73 (1989).

70. *Bajakajian*, 524 U.S. at 335–37; *Austin*, 509 U.S. at 611–19; *Browning-Ferris*, 492 U.S. at 264–73.

71. *Timbs*, 139 S. Ct. at 687–89.

II. ENGLISH UNDERSTANDINGS OF EXCESSIVE FINES

The Excessive Fines Clause finds its origins in the Magna Carta.[72] However, the Magna Carta does not speak of fines—it speaks of amercements. Clause fourteen of the Magna Carta reads: "A freeman is not to be amerced for a . . . offence save in accordance with the manner of the offence. . . ."[73] An amercement is similar to what we now think of as a fine, though it was originally a distinct concept.[74] It was a non-optional pecuniary penalty imposed by the king; the criminal was "in the King's mercy" and subject to whatever financial punishment that was to be handed down by the crown.[75] An amercement had two important features: first, it was considered to be punishment for a wrong, and second, payments made under force of an amercement were directed to the king, not to any other wronged party.[76] A fine, on the other hand, was an optional payment by which "the offender could obtain his discharge from prison."[77] In other words, a fine was an optional "alternative to imprisonment."[78] The distinction between an amercement and a fine did not survive the test of time, and the amercement slowly disappeared as the fine absorbed its dual requirements.[79]

By the seventeenth century in Britain, the distinction between an amercement and a fine had not yet been eliminated, but it rested on shaky ground.[80] The great Scottish jurist Sir Edward Coke's seminal work on law, *Institutes of the Laws of England*, which was published between 1628 and 1644, illustrates the dissolution of the line between a fine and an amercement.[81] There, he wrote that a "fine signifieth a percuniarie punishment for an offence, or a contempt committed against the king."[82] Coke's definition shows that the old understanding of a fine as an alternative to prison had been supplanted, if not wholly replaced, by the amercement's purpose as a punitive payment to the king.[83] While Coke recognized amercements

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72. Nicholas M. McLean, *Livelihood, Ability to Pay, and the Original Meaning of the Excessive Fines Clause*, 40 HASTINGS CONST. L.Q. 833, 839 (2013); *see Bajakajian*, 524 U.S. at 335–36 (analyzing the Magna Carta in determining the precise contours of the Excessive Fines Clause).

73. *See* The Magna Carta of Edward 1 (1297), 25 Edw. 1. The 1297 Magna Carta is the version that nominally holds legal weight in the United Kingdom today, but the same text appears in substantially the same form in the twentieth clause of the original. *See* The Magna Carta of John 1 (1215), 17 Joh. 1.

74. *See* JOHN C. FOX, HISTORY OF CONTEMPT OF COURT: THE FORM OF TRIAL AND THE MODE OF PUNISHMENT 121, 139 (1927) (explaining the original difference between a fine and an amercement); Calvin R. Massey, *The Excessive Fines Clause and Punitive Damages: Some Lessons from History*, 40 VAND. L. REV. 1233, 1259, 1261 (1987) (same); *see also Browning-Ferris*, 492 U.S. at 265 (1989) (defining a fine in amercement-like terms).

75. FOX, *supra* note 74, at 119–20; *see* Massey, *supra* note 74, at 1259.

76. Massey, *supra* note 74, at 1259; *see* FOX, *supra* note 74, at 119–36 (repeatedly stating that the person amerced was "in the [sovereign]'s mercy").

77. FOX, *supra* note 74, at 137; *see* Massey, *supra* note 74, at 1261.

78. Massey, *supra* note 74, at 1261.

79. *See* FOX, *supra* note 74, at 136 (noting that, by 1478, amercement "had become a matter of mere form").

80. *Id*.; Massey, *supra* note 74, at 1262–64.

81. 1 EDWARD COKE, INSTITUTES OF THE LAWS OF ENGLAND (17th ed., London, 1817).

82. *Id*. at *126b.

83. *Compare id*., *with* FOX, *supra* note 74, at 137.

separately in *Institutes*, his definition of a fine reveals a significant overlapping of the concepts.[84]

Furthermore, any differences that Coke might have recognized between a fine and an amercement were not reflected in actual English practice of the time.[85] Take the case of Titus Oates, for example. This case appeared before the King's Bench in 1685 when Mr. Oates was "fine[d] . . . 1000 marks upon each indictment" for his crimes.[86] Even though the court called this a fine, it exhibited the two key qualities of an amercement: it was payable to the king, and it was meant to punish Mr. Oates for his crimes.[87] The court's own confusion about the distinction between an amercement and fine illustrates the fading distinction between the two.[88]

While the mid-seventeenth-century texts demonstrate English confusion regarding the precise meaning of a "fine" and whether it was distinct from an amercement, eighteenth-century sources clarified the concept. By the time of Blackstone's *Commentaries on the Laws of England*, published between 1765 and 1770, the difference between a fine and an amercement was gone.[89] In his work, Blackstone stated that "the reasonableness of fines in criminal cases has . . . been usually regulated by the determination of the *magna carta*, c. 14, concerning amercements . . . ," reflecting his then-modern understanding that fines were indistinguishable from amercement-like payments and thus were subject to the same restrictions and requirements as amercements.[90]

Figuring into the timeline between Coke's and Blackstone's works is the actual passage of the oldest direct predecessor to the American Excessive Fines Clause: the 1689 English Bill of Rights.[91] The 1689 Bill of Rights was enacted some forty years after Coke's *Institutes* was published.[92] With the outsized influence that Coke had on English law, it is highly likely that some semblance of his understanding that fines contained amercement-like requirements was incorporated into the English Bill of Rights.[93] Furthermore, Blackstone's words—which came some eighty years after the 1689 Bill of Rights' enactment—confirm that, at least by Blackstone's time, scholars thought that the 1689 Bill of Rights's excessive fines

84. COKE, *supra* note 81, at *126b.

85. *See* Case of Titus Oates (1685), 10 How. St. Tr. 1079 (K.B.) (demonstrating that "fines" were used in an amercement-like sense in practice).

86. *Id.*

87. *Id.*

88. *Id.*

89. 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND *379.

90. *Id.*; Massey, *supra* note 74, at 1264.

91. Bill of Rights (1689), 1 W. & M.; *see* Massey, *supra* note 74, at 1243 ("[T]he lineage of the excessive fines clause is so obviously and directly traceable to the 1689 English Declaration of Rights.").

92. *See* Bill of Rights (1689), 1 W. & M.; Charles Butler, *Preface* to 1 EDWARD COKE, INSTITUTES OF THE LAWS OF ENGLAND, at xxvi (13th ed. 1787). Coke's work is also known as *Commentary Upon Littleton*. *Id.*

93. *See* JOHN H. BAKER, AN INTRODUCTION TO ENGLISH LEGAL HISTORY 165 (1979) (discussing the influence of Coke and his *Institutes*).

provision had amercement roots and incorporated amercement-like requirements.[94] This dovetails with what Coke originally envisioned in *Institutes*.[95] Thus the 1689 English Bill of Rights incorporated the Magna Carta's amercement requirements into its excessive fines provision and then passed them on to its direct descendant: the U.S. Constitution's Excessive Fines Clause.[96]

Two hundred years later, the Supreme Court agrees with this historical interpretation; it is this blended understanding of fines as containing amercement-like qualities that has survived the test of time.[97] However, if this were the end of the analysis, there would be two bars to the Excessive Fines Clause restriction of restitution: first, amercements were traditionally understood to involve payments to the king, not a private party; and second, amercements were imposed as punishment.[98] This first feature of amercements would bar the majority of restitution payments from the scope of the Excessive Fines Clause because restitution necessitates that the payment be made to the wronged party, and oftentimes the wronged party is not the U.S. government (the American equivalent to the "king").[99] The second feature—that amercements were imposed as punishment—would bar purely non-punitive payments from being cognizable.[100] This bar would include non-punitive restitution, as understood by the state of Idaho.[101] As a result of these two requirements, the Excessive Fines Clause would be applicable to only those awards that were payable to the government,[102] and served primarily punitive goals.[103] Thus traditional English history paints a very restrictive picture of what constituted a "fine" and what it required.[104] However, English history is not the only, or even the

94. 4 BLACKSTONE, *supra* note 89 at *379.

95. *Compare id*., *with* COKE, *supra* note 81, at *126b (showing similar conceptualizations of "fine").

96. *See* Massey, *supra* note 74, at 1243 ("[T]he lineage of the excessive fines clause is so obviously and directly traceable to the 1689 English Declaration of Rights.").

97. *See* Browning-Ferris Indus. v. Kelco Disposal, Inc., 492 U.S. 257, 265 (1989) (defining a fine in amercement-like terms, as Coke did).

98. COKE, *supra* note 81, at *126b; Massey, *supra* note 74, at 1259; *see* FOX, *supra* note 74, at 119–36 (stating repeatedly that the person amerced was "in the [sovereign]'s mercy").

99. *See* Colgan, *supra* note 33, at 24–32 (discussing how this limit removes a huge array of economic sanctions from excessive-fines restriction).

100. COKE, *supra* note 81, at *126b; *see* Massey, *supra* note 74, at 1259, 1264. Some scholars have even stated that the disappearance of the amercement led to the development of "other devices [that] assumed [the amercement's] functions," including the fine, "as a means by which to punish crimes." Massey, *supra* note 74, at 1264.

101. State v. Cottrell, 271 P.3d 1243, 1245 (Idaho Ct. App. 2012).

102. *See* Colgan, *supra* note 33, at 24–32 (discussing how this limit removes a huge array of economic sanctions from excessive-fines restriction).

103. *See* Colgan, *supra* note 33, at 18–24 (discussing the purported "partially-punitive" requirement for excessive-fines restriction).

104. The Supreme Court has essentially restricted its historical analysis of the Excessive Fines Clause to English understandings and American perspectives on those understandings rather than delving deeply into early American practices. *See e.g*., Browning-Ferris Indus. v. Kelco Disposal, Inc., 492 U.S. 257, 268–73 (1989) (demonstrating a strong focus on English history); United States v. Bajakajian, 524 U.S. 321, 335–36 (1998) (mentioning American history only in passing).

most relevant, source of evidence that should be considered.[105]

III. AMERICAN UNDERSTANDINGS OF THE EXCESSIVE FINES CLAUSE

The exploration of American history starts with the Eighth Amendment itself.[106] The immediate history surrounding the Excessive Fines Clause provides the best contemporary understanding of the meaning of a "fine." This is precisely where the Supreme Court began in *Browning-Ferris*.[107] But the Eighth Amendment received remarkably little debate when it was first proposed, and, as the Court put it, "the Excessive Fines Clause received even less attention."[108] The entirety of the debate on the congressional floor when the Eighth Amendment was first proposed is as follows:

> [T]he committee, who then proceeded to the [Eighth Amendment].
>
> 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 restricted from making necessary laws to any declaration of this kind.
>
> The question was put on the clause, and it was agreed to by a considerable majority.[109]

This brief debate shows that Congress' primary focus was the Cruel and Unusual Punishments Clause, not the Excessive Fines Clause.[110] But the dearth of debate on the Eighth Amendment when it was first proposed does not mean that the history of the Excessive Fines Clause is hopelessly obfuscated.[111] Despite its insignificance on the congressional floor, the Excessive Fines Clause has a rich and fertile American history from which to draw upon.

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105. *See Browning-Ferris*, 492 U.S. at 268 (noting that English history is not strongly preferred as a source of probative evidence).

106. U.S. CONST. amend. VIII.

107. *See Browning-Ferris*, 492 U.S. at 264 (starting the Court's analysis with the Eighth Amendment itself).

108. *Id.*

109. 1 ANNALS OF CONG. 782–83 (1789).

110. *Id.*

111. United States v. Bajakajian, 524 U.S. 321, 335–36 (1998).

The Eighth Amendment's Excessive Fines Clause was not unusual or new to the American people.[112] As has been described, its roots lie in the Magna Carta and the subsequent 1689 English Bill of Rights.[113] Additionally, as subjects of the English Crown, the American colonies inherited—as they explicitly declared—rights analogous to those of English subjects living in the home country.[114] These rights also necessarily included the provisions of the 1689 English Bill of Rights.[115] But America was not frozen in time; it frequently went off on its own journey of legal experimentation and evolution, separate from the laws and traditions of Great Britain.[116] In the time between the colonization of America and the passage of the Bill of Rights in 1789, America was well on its way to developing its own unique body of law.[117] It was these early and divergent American understandings of the law that were first written into early state constitutions or declarations of rights and then later incorporated into the federal Bill of Rights, including the Eighth Amendment.[118] Accordingly, any inquiry into the original meaning of the Excessive Fines Clause must pay due attention and deference to this unique era in American history.

A. State Statutes

Early American statutes against theft and other types of stealing changed the traditional English paradigm regarding what constituted a "fine"—i.e. requiring that payments be made to the government and that it be punitive—in two ways. First, in a departure from the traditional English understanding of a "fine" as possessing a "to the king" requirement,[119] early American statutes show that a fine could now be made payable to a third party rather than the government.[120] With this broadening of who was an acceptable payee of a "fine," restitution payments were now much more identifiable as a fine.[121] Second, the statutes reveal that restitution was considered to be punitive in its own right.[122] This is because restitution was often

112. *See supra* Part II.

113. *See supra* Part II.

114. Solem v. Helm, 463 U.S. 277, 286 (1983); Letter to the Committee of Merchants in London (June 6, 1766) *reprinted in* 1 PAPERS OF GEORGE MASON 71 (Robert Rutland ed. 1970).

115. *Solem*, 463 U.S. at 286.

116. Colgan, *supra* note 23, at 299–300.

117. *Id.*

118. As the Supreme Court has noted, at least eight of the original thirteen states had their own excessive fines clauses contained in their state constitutions or declarations of rights. Browning-Ferris Indus. v. Kelco Disposal, Inc., 492 U.S. 257, 264 (1989). Some of these state documents are noted as having major influence on the Constitution's Bill of Rights. *Browning-Ferris*, 492 U.S. at 266; *Solem*, 463 U.S. at 285 n.10.

119. *See supra* Part II.

120. 1700 Pa. Laws 9; 1702 Conn. Pub. Acts 11.

121. If the only acceptable payee for fines was the "king" (i.e. the government), then a large amount of restitutionary awards would not be cognizable as a fine. *See supra* Part II; Colgan, *supra* note 33, at 24–32 (discussing how this limit removes a huge array of economic sanctions from excessive-fines restriction).

122. *See, e.g.*, 1700 Pa. Laws 9; Section III.B, *infra*.

imposed in highly-punitive contexts, such as criminal proceedings.[123] It was also often imposed as the only statutorily-required punishment.[124] Finally, restitution was treated as essentially indistinguishable from more "traditional" punitive payments.[125] As a result, restitution is best understood to be inherently punitive, as a matter of early American law. These two developments—the removal of the "to the king" requirement, and the understanding of restitution as punitive—show that restitution was considered a "fine" in early American law.

The colony of Pennsylvania passed one of the first examples of a colonial statute possessing both of these characterizations in 1700.[126] Its statute, which was designed to punish stealing, declared that if goods were stolen and not returned, "the felon or thief shall pay to the owner thereof fourfold" of the value of items stolen—a payment that was designed to both compensate the owner for their losses and punish the wrongdoer for his crime.[127] One thing immediately stands out in this statutory language: the imposed payment was actually payable to an entity other than the government.[128] Additionally, the statute does not even explicitly reserve a component of the payment for the state or otherwise ensure that the government got its cut of the penalty charged.[129] Rather, the entity that was entitled to the *full* payment was the "owner" of the stolen goods,[130] standing in clear contrast to traditional amercements, which required payments to be made out to the king.[131]

The payment imposed by the statute was also substantially punitive, regardless of its partially remedial character.[132] First, the payment was imposed in the criminal context as a punishment for people who stole.[133] Second, the payment was required by statute, whereas other punishments, like branding and whipping, were optional, implying that the payment was considered punitive to the point where it could, by itself, sufficiently punish some criminals for their wrongdoing.[134] Third, the statute itself did not make any attempt to distinguish between the remedial component of the mandatory payment—paying the owner back the value of what was lost—and the punitive component—paying the owner *more* than the value of what was lost. Instead, it treated both components alike, incorporating them into one universal four-fold payment.[135] This congruous treatment between punishment and remedy lends credence to the view that, at the very least, colonial Americans

123. *See infra* Section III.B.
124. *Id.*
125. *See, e.g.*, 1702 Conn. Pub. Acts. 11; 1748 Va. Acts 356; Section III.B, *infra*.
126. 1700 Pa. Laws 9.
127. *Id.*
128. *Id.*
129. *Id.*
130. *Id.*
131. *Compare* COKE, *supra* note 81, at *126b, *with* 1700 Pa. Laws 9 (showing that the Pennsylvania law was in plain contradiction to Coke's understanding of a fine as requiring payment to the sovereign).
132. 1700 Pa. Laws 9.
133. *Id.*
134. *Id.*
135. *Id.*

did not think of remedial payments as deserving "special" treatment subject to different rules than punitive awards.[136] Ultimately, the payment here was designed to punish the wrongdoers, and its partially remedial features did not change that design.[137]

Such laws were not unique to Pennsylvania; a 1702 Connecticut statute against burglary and theft was quite similar to the Pennsylvania law.[138] It stated that anyone who stole "[s]hall forfeit treble the value of the Money, Goods or Chattels, [s]o [s]tollen [sic] or purloined, unto the owner or owners thereof."[139] Similarities between this statute and the Pennsylvania law are readily apparent.[140] It allowed for payments to be made to the wronged party, rather than to the sovereign.[141] The payments imposed were similarly punitive: the payment was imposed in a criminal context, it was mandatory, and the statute did not recognize any distinction between the punitive and the remedial components of the payment.[142]

However, there is one key difference between the Connecticut and Pennsylvania statutes. The Connecticut statute explicitly called the payment that it imposed "restitution."[143] The statute stated that "if any [s]uch offender be unable to make *re[s]titution*, or pay [s]uch threefold damages, [s]uch offender [s]hall be enjoyned [sic] to make [s]atisfaction by Service."[144] The entire payment was referred to as "restitution," in spite of the payment's punitive character in making the criminal pay beyond the value of what was stolen.[145] But just a few words after calling such a payment "restitution," the statute reversed course and called it "damages."[146] This interchangeable treatment of the terms restitution and damages underscores the indistinguishable nature of these components in colonial America; a payment could be both remedial and punitive at the same time.[147] It is this interchangeability that speaks to the inherent punitiveness of restitutionary payments.

These American understandings did not die out over the years. For example, a 1748 Virginia statute against stealing hogs required that payment be made to the wronged owner of the stolen hogs to the tune of "Four Hundred Pounds of Tobacco" for each hog stolen,[148] in addition to either public whipping or a payment

136. In other words, the compensatory component of the payment was not recognized as being distinct enough from the damages component to be portioned out and treated differently. *Id.*

137. 1700 Pa. Laws 9.

138. 1702 Conn. Pub. Acts 11.

139. *Id.*

140. *Compare* 1702 Conn. Pub. Acts 11, *with* 1700 Pa. Laws 9.

141. 1702 Conn. Pub. Acts 11.

142. *Id.*

143. *Id.*

144. *Id.* (emphasis added).

145. *Id.*

146. The initial imposition of the fine was threefold the value of the stolen property. The statute goes on to refer to the payment as "restitution" and then a few words later, refers to it again as "threefold damages." *Id.*

147. 1702 Conn. Pub. Acts 11.

148. 1748 Va. Acts 356 (1752 compilation).

made to the state.[149] Once again, the payment here was made payable to the wronged party and imposed in a punitive context.[150] Importantly, despite the statute allowing for the imposition of additional punishments beyond the payment of 400 pounds of tobacco, the initial payment of tobacco was not meant to be wholly remedial. The initial payment also served inherently punitive aims because the statute provided that half of the tobacco paid by the wrongdoer be made payable to the informer.[151] The possibility that the farmer could recover less than the full 400 pounds shows that at least some component of the initial payment was not purely remedial, for it would be unjust for the farmer to recover less than full compensation for his injuries. Rather, instead of being purely remedial, the payment, in some sense, was meant to incentivize informants to speak to governmental authority while also punishing wrongdoers with a duty to pay more than what they stole.[152] Regardless of the multiple purposes of the tobacco payment here, the statute made no attempt to distinguish between the remedial and punitive components of the initial tobacco payment. This lends yet more credence to the idea that, at least in Virginia in 1748, the fact that a payment had substantial remedial components did not strip it of its inherent punitiveness.[153]

These American understandings persisted even through the American Revolution. In 1784, Connecticut's original statute from 1702 still remained on the books. In fact, it had expanded to explicitly cover horse theft.[154] The punishment for horse theft still featured a payment made to the wronged party,[155] and it was still imposed in a punitive context. More precisely, a person who stole a horse was forced to pay back to the wronged owner treble the value of the horse as his punishment for his theft.[156] Once again, the law made no attempt to distinguish the damages and compensatory elements of this payment.[157] The statue even goes on to refer to the treble-value payment generally simply as "damages," even though the payment had a partially remedial character. This again demonstrates that the existence of a remedial element in a payment does not convert it from a punitive one to a non-punitive one.[158]

Statutes that exhibited these features covered a broad gauntlet of concerns.[159] Such colonial concerns ranged from theft, as mentioned above, to property damage,[160] to

149. *Id.*
150. *Id.*
151. *Id.*
152. Stated differently, people would be more likely to report stolen hogs if they knew they would get paid for it. *Id.*
153. 1748 Va. Acts 356.
154. 1784 Conn. Pub. Acts 244–45.
155. *Id.*
156. *Id.*
157. *Id.*
158. *Id.*
159. *See* Colgan, *supra* note 23, at 305 nn.148–50 (listing of statutes).
160. Colgan, *supra* note 23, at 305 n.149.

encouraging slaves to run away.[161] All of these statutes featured restitution as a substantial component of their punitive payment scheme.[162] Some of these punitive payments were also explicitly called "fines." For example, one 1791 South Carolina statute that outlawed gambling, which was passed the same year as the U. S. Bill of Rights, stated that a convicted swindler would be forced to "refund" his victims.[163] The same statute then went on to refer to the refund as a "fine" a few sentences later, even though the payment had was restitutionary in nature.[164]

These statutes reveal two key points: the amercement's "to the king" requirement died an early death, which allowed mandatory restitution to become an amercement-like penalty; and restitutionary payments that combined both remedial and punitive elements were considered to contain inherently punitive qualities.[165] First, a payment imposed on a wrongdoer could now contain restitution paid to a third party without running into the theoretical bar imposed by the "to the king" requirement. Second, restitutionary payments that combined both remedial and punitive elements were considered to contain inherently punitive qualities[166] because (1) such payments were often imposed in highly punitive and criminal contexts;[167] (2) the payments were often imposed as the sole mandatory punishment for a crime;[168] and (3) statues prescribing the payments did not distinguish between their restitutionary and punitive components, instead preferring to treat them as one and the same.[169] Ultimately, substantial statutory evidence shows that restitutionary and punitive payments were considered a part of the same pecuniary "toolbox" used to punish wrongdoers.[170] Together, these points demonstrate that restitution's compensatory characteristics do not immediately bar it from being a cognizable "fine" under the Excessive Fines Clause.

B. Common Practice

The statutory evidence presented must not be viewed in a vacuum, though; the common practice of colonial Americans also sheds substantial light on their understanding of a "fine." Such common practice substantially supports the two conclusions already reached. First, common practice of the colonists shows that fines

161. 1737 Md. Laws 9.

162. For a much more extensive listing of statutes, including several that prominently feature restitution, Beth A. Colgan's historical work on the Excessive Fines Clause is highly recommended. Colgan, *supra* note 23, at 305.

163. 1791 S.C. Laws 41.

164. *Id.*

165. 1702 Conn. Pub. Acts 11 (1901 compilation); 1700 Pa. Laws 9.

166. *See* 1700 Pa. Laws 9 (imposing a partially restitutionary payment as sole mandatory punishment).

167. 1784 Conn. Pub. Acts 244–45; 1702 Conn. Pub. Acts 11.

168. 1700 Pa. Laws 9; 1791 S.C. Laws 41; *see supra* Part III.A; ABSTRACT AND INDEX OF RECORDS OF THE INFERIOUR COURT OF PLEAS (SUFFOLK COUNTY COURT) HELD AT BOSTON 1680–1698 107–38 (1940) [hereinafter SUFFOLK RECORDS]; Colgan, *supra* note 23, at 315.

169. 1748 Va. Acts 356 (1752 compilation).

170. *See* 1791 S.C. Laws 41; 1700 Pa. Laws 9; 1702 Conn. Pub. Acts 1141; 1748 Va. Acts 356; 1784 Conn. Pub. Acts. 244–45; 1700 Pa. Laws 9.

were not required to be made out to a sovereign.[171] Rather, they could be made payable to a non-governmental entity, including to wronged parties in the form of restitution.[172] Second, restitution was treated as possessing punitive qualities in its own right. Partial or whole restitution payments were imposed in highly punitive contexts, often as the sole punishment for a crime, and were treated virtually identically to other forms of pecuniary punishment, such as damages awards.[173] Simply put, the common practice in colonial America shows that the Excessive Fines Clause applies to restitution.

First, early court cases show that colonists did not revive, by way of common practice, the ancient "to the king" requirement that was originally eliminated by their statutory laws.[174] Rather, the colonists most assuredly drove the final nail into the coffin of that English requirement with the 1798 Virginia case *Goodall v. Bullock*.[175] This case came a mere seven years after the ratification of the Bill of Rights. Goodall, the party sanctioned in the lower court, argued against his sanction on the basis that it violated the ancient requirement that a fine go to the sovereign.[176] The court promptly struck down that argument, holding that, because the injured party was not the government, but rather a private party, a fine could be paid to him.[177] Stated differently, the court considered the amercement "to the king" requirement as only existing because, in England, the sovereign was considered to be the injured party.[178] Accordingly, if a private party was injured, it was only natural that a fine (i.e., amercement) be directed to him.[179] The time and place of this case is especially relevant. The case appeared in Virginia, which drafted its Declaration of Rights—including an excessive fines provision—around twenty years prior to the case.[180] The Virginia Declaration of Rights is credited as a major influence on the federal Bill of Rights and Virginia's treatment of restitution under its Declaration of Rights can inform our understanding of the federal Bill of Rights.[181] Monetary sanctions, as understood by the American people (not just Virginians) at the time, did not have to go to the sovereign, meaning that restitutionary payments could be considered fines.[182]

Second, early cases overwhelmingly show that restitutionary payments were often imposed as a punishment. For example, in a 1672 case against a person named

171. 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 331 (1852).

172. *Id.*

173. *See supra* Section III.A.

174. WYTHE, *supra* note 171, at 331; Colgan, *supra* note 23, at 309.

175. WYTHE, *supra* note 171, at 331.

176. *Id.* at 331–32.

177. *Id.*

178. *Id.*

179. *Id.*

180. *Id.*

181. Browning-Ferris Indus. v. Kelco Disposal, Inc., 492 U.S. 257, 266 (1989).

182. WYTHE, *supra* note 171, at 331–32.

Alice Thomas, who was found guilty of "abetting accessary in Burglary," was ordered to "restore to" her victims threefold the value of goods stolen.[183] Regardless of the compensatory element that the imposed payment carried, it is best understood as a punitive fine. First, it was only imposed after Alice was found guilty by a jury, and it was a part of her sentence for her crimes.[184] Second, forcing her to pay treble value (i.e., triple the value) of what she stole back to the people she wronged is punitive in nature.[185] Finally, even though the payment had some remedial elements, the court did not single out these elements for special treatment.[186] Rather, both the remedial and punitive elements were combined and imposed in one universal payment meant to punish the wrongdoer, further demonstrating that a payment with remedial elements does not strip it of its inherent punitiveness.[187]

This is not to say that only "mixed-goal" payments—i.e., single payments that served both remedial and punitive goals—were considered to be punitive, to the exclusion of purely remedial payments. Rather, even purely remedial payments were considered inherently punitive, and such payments were often imposed as the sole punishment for a crime.[188] One of the best examples is an early case in the colony of Rhode Island that concerned an "Indian" who stole liquor out of the cellar of a certain William Cadman.[189] The jury found the Indian guilty and the court ordered him to pay exact restitution as his sole punishment.[190] The court then went further and stated that if the thief failed to pay restitution, he would be punished with "fifteene stripes."[191] In other words, the purely remedial payment was considered punitive enough to the point where it was a sufficient punishment for the theft by itself.[192] The threat of whipping was made to compel the payment, not to punish for the theft.[193]

Further bolstering this conception of restitution as a punitive penalty that is commensurate to a traditional fine is an abstract of court cases in Boston between the years of 1680 and 1698.[194] The abstract reveals that, out of 460 convictions issued in those years, "a remedial sanction was the sole form of punishment" in thirty of

183. 1 RECORDS OF THE SUFFOLK COUNTY COURT 1671–1680, at 82–83 (1933). Other punishments, including whipping, were also imposed. *Id*.

184. *Id*.

185. *Id*.

186. *Id*.

187. *Id*.

188. SUFFOLK RECORDS, *supra* note 168, at 107–38; Colgan, *supra* note 23, at 315.

189. RECORDS OF THE COURT OF TRIALS OF THE COLONY OF PROVIDENCE PLANTATIONS 1647–1662, 52–53 (1920) [hereinafter R.I. TRIALS]; Colgan, *supra* note 23, at 308–09.

190. R.I. TRIALS, *supra* note 189, at 52–53.

191. *Id*.

192. *Id*. A similar conclusion regarding the inherent punitiveness of pure restitution has been reached elsewhere. *See* Colgan, *supra* note 23, at 315–16 (discussing a case where three criminals convicted for the same crime received different sentences that included restitution in varying amounts).

193. R.I. TRIALS, *supra* note 189, at 52–53.

194. *See* SUFFOLK RECORDS, *supra* note 168, at 107–38; Colgan, *supra* note 23, at 315.

those cases.[195] Thus even purely remedial sanctions were considered inherently punitive to the point that they could serve as the sole punishment for a crime.[196]

The evidence adduced from the common practice of colonial Americans shows that they affirmatively denied the ancient English law that a fine be payable to the sovereign.[197] They also understood restitution, whether it appeared as part of a mixed-goal payment or in its "pure" form, to be inherently punitive.[198] These two points are bolstered by the text of the statutes that the colonies passed.[199] As such, a "fine" in early America included restitutionary payments in whatever form they may have assumed.

CONCLUSION

Restitution is a substantial and growing part of a modern court's toolbox of remedies.[200] In spite of its increasing modern usage, the Supreme Court still has not decided whether restitution payments are governed by the Excessive Fines Clause.[201] However, the Court has strongly indicated that the Excessive Fines Clause is best understood when viewed through a historical lens.[202] This historical lens reveals that, at common law, American courts have considered restitution a "fine" in its own right. History shows that the Excessive Fines Clause finds its roots in English history and the Magna Carta's amercements provision, which had very narrow and strict requirements—that such payments be punitive and be made out to the king.[203] These requirements were later incorporated into the definition of a "fine" in the English Bill of Rights.[204] Even though English law influenced the American colonies, the colonies also developed their own separate and unique understanding of a fine.[205] First, early Americans understood fines as being

195. Colgan, *supra* note 23, at 315. Although it may be inferred from the abstract that restitution was considered to be less punitive than other forms of punishment, that is not the main thrust here. The key fact is that restitution was considered punitive *at all*. *See* SUFFOLK RECORDS, *supra* note 168, at 107–38 (implying inherent punitiveness of restitution).

196. *See* SUFFOLK RECORDS, *supra* note 168, at 107–38; R.I. TRIALS, *supra* note 189, at 52–53; Colgan, *supra* note 23, at 315–16.

197. WYTHE, *supra* note 171, at 331–32.

198. *See supra* Section III.A.

199. *See supra* Section III.A.

200. Bennardo, *supra* note 2, at 21 (citing Lollar, *supra* note 2, at 103–04).

201. *Id*.

202. *See e.g*., Browning-Ferris Indus. v. Kelco Disposal, Inc., 492 U.S. 257, 264–73 (1989); Austin v. United States, 509 U.S. 602, 611–19 (1992); United States v. Bajakajian, 524 U.S. 321, 335–37 (1998); Timbs v. Indiana, 139 S. Ct. 682, 687–89 (2019).

203. *See supra* Part II.

204. *See supra* Part II.

205. *See supra* Part III.

properly payable to third parties rather than the sovereign.[206] Second, they understood restitution to be inherently punitive.[207] Combining these understandings supports the conclusion that restitution was considered a fine in its own right in early America. Under this historical backdrop, restitution should be subject to Excessive Fines Clause analysis and restriction.

206. *See supra* Part III.
207. *See supra* Part III.