DOES THE MAGNA CARTA EMBODY A PROPORTIONALITY PRINCIPLE?

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George Mason University Civil Rights Law Journal,
Vol. 25, No. 3, Forthcoming 2015

George Mason University Law and Economics Research Paper Series

15-18

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My object all sublime
I shall achieve in time—
To let the punishment fit the crime,
The punishment fit the crime.

Gilbert and Sullivan, "A More Humane Mikado," from *The Mikado* (1885)

INTRODUCTION

The year 2015 marks the 800th anniversary of the sealing of the Magna Carta. Hundreds of celebrations are planned, as reflected in a website established by a British organization dedicated to marking the event.[1] The praise heaped upon the Great Charter is seldom measured. In recognizing the Magna Carta we are said to be "Commemorating 800 Years of Democracy."[2] The Magna Carta is not solely of interest to the English-speaking world; consequently, its anniversary is "The Global Event To Which The Whole World Is Invited."[3] Commemorations will include: a United States Congressional delegation, a recreated thirteenth century beer, honorary postage stamps, a commissioned opera, a poem written by England's poet laureate, pop music and Calypso tributes, an anthem performed at Albert Hall and the Kennedy Center, and a performance of *King John* by the Globe Theatre.[4]

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[1] *Events*, THE MAGNA CARTA 800TH ANNIVERSARY, http://magnacarta800th.com/events/ (last visited Feb. 14, 2015).
[2] THE MAGNA CARTA 800TH ANNIVERSARY, http://magnacarta800th.com (last visited Feb. 14, 2015).
[3] *Events*, *supra* note 1.
[4] *Aspirations for the 800th Anniversary*, THE MAGNA CARTA 800TH ANNIVERSARY, http://magnacarta800th.com/magna-carta-today/2015-aspirations/ (last visited Feb. 14, 2015).

With respect to the last celebration, those attending the play will, alas, wait in vain for any reference to the Magna Carta. It is, or should be, curious that Shakespeare did not regard the event we consider to define King John's reign as having sufficient dramatic or historical importance to mention. Could this be a clue that modern accounts of the Magna Carta are somehow mistaken? That what is styled as historical interpretation is more accurately characterized as wishful projection?

This Article proposes to answer these questions by considering one use made of the Magna Carta in recent years. American scholars now argue that the Magna Carta embodies a "proportionality principle" mandating that the punishment fit the crime.[5] This principle, according to a familiar narrative, found expression centuries later in the English Bill of Rights, which was reproduced another century later in the American Bill of Rights.[6] The Eighth Amendment's prohibition on cruel and unusual punishments is thus said to originate in the dramatic encounter between the barons and King John on the fields of Runnymede. This story has proven to be of more than just academic interest. Justices on the U.S. Supreme Court have claimed the authority of the Magna Carta when infusing the prohibition against cruel and unusual punishments with a proportionality principle not immediately evident from the text of the Eighth

[5] *See, e.g.*, Erwin Chemerinsky, *The Constitution and Punishment*, 56 STAN. L. REV. 1049, 1063-65 (2004) (tracing "the principle of proportionality" to the Magna Carta); John F. Stinneford, *Rethinking Proportionality Under the Cruel and Unusual Punishments Clause*, 97 VA. L. REV. 899, 912 (2011) (tracing a "common law tradition requiring proportionality in punishment" to the Magna Carta); Michael J. Wishnie, *Proportionality: The Struggle for Balance in U.S. Immigration Policy*, 72 U. PITT. L. REV. 431, 445 (2011) ("Proportionality is a concept with ancient roots in Anglo-American law, dating at least to the Magna Carta." (citing Solem v. Helm, 463 U.S. 277, 284 (1983))). The claim appears in perhaps the most influential American law review article on the Eighth Amendment in the past few decades. *See* Anthony F. Granucci, *"Nor Cruel and Unusual Punishment Inflicted:" The Original Meaning*, 57 CALIF. L. REV. 839, 844-47 (1969). A recent law review article, more attentive to the language of the Magna Carta, produces a more nuanced interpretation. *See* Nicholas M. McLean, *Livelihood, Ability to Pay, and the Original Meaning of the Excessive Fines Clause*, 40 HASTINGS CON. L.Q. 833, 861 (2013) (referring to the "Magna Carta's traditional dual principles of proportionality and salvo content" (citing LEONARD W. LEVY, ORIGIN OF THE BILL OF RIGHTS 231-38 (1999))).

[6] *See, e.g.*, LEONARD W. LEVY, ORIGIN OF THE BILL OF RIGHTS 231-32 (1999).

Amendment. Thus emboldened, the Supreme Court has overturned supposedly disproportionate criminal sentences.[7]

This Article questions much of this narrative. The Chapters in the Magna Carta now cited for the principle that the punishment must fit the crime actually do not support that proposition because those Chapters do not concern criminal activity. Furthermore, scholars and jurists have anachronistically deployed the Magna Carta when interpreting the meaning of the "cruel and unusual punishments" clause. Part I traces the uses made of the Magna Carta by American jurists in advancing the thesis that the ancient document embodies a proportionality principle. The argument lately focuses on Chapters 20 to 22, which restrict "amercements" to those "in accordance with the degree of the offense." Amercement is said to be a penalty meted out for criminal activity; hence, it is argued, the authors of the Magna Carta thought that punishment ought to be proportionate to the gravity of the criminal offense.

Part II takes a closer look at Chapters 20 to 22, along with other Chapters of the Magna Carta and contemporaneous legal documents and historical events. Within the text of the Magna Carta, there are clues that amercement was not regarded as a *criminal* punishment. Twelfth and thirteenth century legal documents confirm that this penalty was imposed on individuals or collective entities that had abused the litigation process or had failed to discharge one of the noncriminal duties that defined the medieval political order. Finally, given the prevalence of violent crime and the tolerance of cruel criminal punishment, it is implausible to project humanitarian motives onto the authors of Chapters 20 to 22.

[7] Seminal Eighth Amendment cases citing the Magna Carta include: Solem v. Helm, 463 U.S. 277, 284-85 (1983) (holding life without parole sentence unconstitutional); Furman v. Georgia, 408 U.S. 238, 242-43(1972) (Douglas, J., concurring) (holding death penalty unconstitutional); Trop v. Dulles, 356 U.S. 86, 100 (1958) (holding banishment unconstitutional); Weems v. United States, 217 U.S. 349, 376 (1910) (holding that Eighth Amendment incorporates proportionality principle).

Part III takes up the ambiguity of what is intended by the "proportionality principle." Although Aristotle explored this principle with notable subtlety, the principle is also known to children and many animals. Virtually every legal document in recorded history embodies it, and at this banal level the Magna Carta does so as well. As jurists purport to extract more meaningful and specific lessons from the Magna Carta, however, their arguments lapse into poor scholarship and hopeless anachronism.

I. THE MAGNA CARTA IN EIGHTH AMENDMENT JURISPRUDENCE

The Eighth Amendment of the U.S. Constitution provides: "Excessive fines shall not be required, nor excessive bail imposed, nor cruel and unusual punishments inflicted." On its face, the Amendment imposes three limitations: (1) no excessive fines; (2) no excessive bail; and (3) no cruel and unusual punishment. Limitations (1) and (2), by prohibiting *excessive* fines and bail, arguably embody a proportionality principle. The third limitation speaks more broadly—all "punishment"— but a necessary logical inference is that the "not excessive" requirement in (1) and (2) applies only to the specified categories of fines and bail. The third limitation, prohibiting "cruel and unusual punishments" is broader in scope, but it does not, at least by its plain language, embody a proportionality principle. The phrase simply prohibits punishments that are "cruel and unusual," that is, barbaric and bizarre. This was the view of the U.S. Supreme Court and noted constitutional scholars through the nineteenth century.[8]

[8] In Wilkerson v. Utah, 99 U.S. 130, 135-36 (1878), the Court wrote:

> Difficulty would attend the effort to define with exactness the extent of the constitutional provision which provides that cruel and unusual punishments shall not be inflicted; but it is safe to affirm that punishments of torture, such as those mentioned by the commentator referred to, and all others in the same line of unnecessary cruelty, are forbidden by that amendment to the Constitution. Cooley, Const. Lim. (4th ed.) 408; Wharton, Cr. L., (7th ed.) sect. 3405.

One of the first American cases to hold that the "cruel and unusual punishments" clause embodied a proportionality principle was the 1878 North Carolina case, *State v. Driver*.[9] Because that case has proved to be foundational, it is worth detailing. *Driver* involved a defendant who had severely beaten his wife, was convicted of assault, and was sentenced to five years in the county jail.[10] The court summarized the defendant's own petition of appeal as follows:

> He states that while in a passion and under the influence of drink, he whipped his wife with a switch with such severity as to leave the marks for two or three weeks, and that he kicked her once, and that he had whipped her before, but not with the same severity. . . .[11]

The defendant challenged the sentence, which hardly shocks the modern conscience, as unconstitutional under the Eighth Amendment and state constitutional analog.[12] The court's reasoning in overturning the sentence is opaque. After conceding that there was "very little authority" for defendant's argument, Justice Reade persevered, observing that the Eighth Amendment draws upon the English Bill of Rights of 1689.[13] And then as an interpretative gloss

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See also In Re Kemmler, 136 U.S. 436, 447 (1890) (holding the Eighth Amendment prohibits modes of punishments that are "inhuman and barbarous"). A recent thoughtful law review article argues that implicit in the "cruel and unusual punishments" clause is a proportionality principle, but before making a sophisticated argument to this effect, the author makes the candid acknowledgment:

> The phrase "cruel and unusual punishments" . . . contains no obvious reference to proportionality. The 1785 edition of Samuel Johnson's dictionary defines the word "cruel" as "[b]loody; mischievous; destructive; causing pain." Similarly, the 1828 edition of Noah Webster's dictionary defines "cruel" as "[i]nhuman; barbarous; savage; causing pain, grief or distress; exerted in tormenting, vexing or afflicting." On its face, it is not obvious that a "bloody," "inhuman," or "barbarous" punishment is the same thing as an "excessive" or disproportionate punishment.

Stinneford, *supra* note 5, at 911.

[9] State v. Driver, 78 N.C. 423 (1878).

[10] *Id.* at 425.

[11] *Id.*

[12] *Id.* at 424-25 (challenging the sentence under U.S. CONST. amend VIII and N.C. CONST. art. I § 14).

[13] *Id.* at 427. The English Bill of Rights provides, in relevant respect: "as their ancestors in like cases have usually done... excessive bail ought not to be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." Bill of Rights, 1689, 1 W. & M., ch 2 (Eng.) (modern spelling used). The inspiration for this provision was almost certainly the Titus Oates affair of 1685, and it was intended to foreclose punishments that were statutorily unauthorized. The American Framers, based on a misreading of Blackstone, concluded that the provision in the English Bill of Rights was prompted by the Bloody Assizes of 1685, and intended to foreclose torture. *See* Stephen Parr, *Symmetric Proportionality: A New Perspective on the Cruel and Unusual Punishment Clause*, 68

on the English Bill of Rights, Justice Reade invoked the 1690 case against Lord Devonshire, in which the House of Lords overturned a £30,000 fine for simple assault as "excessive and exorbitant, against Magna Carta, the common right of the subject and the law of the land."[14] Here may be the first suggestion in an American judicial opinion that the "cruel and unusual punishments" clause authorizes judges to invalidate any criminal sentence deemed disproportionate, and it is noteworthy that the Magna Carta is immediately summoned as nebulous support for the proposition. However, which Chapter of the Magna Carta is relevant to the issue was left unclear. The *Driver* court's use of the phrase "law of the land" may be an allusion to Chapter 39 of the Magna Carta, but whatever the ambiguous phrase *lex terrae* in that Chapter means, the claim that it is related to the proportionality principle is risible.[15]

Any hope that *Driver* would provoke an energetic "cruel and unusual punishments" jurisprudence was disappointed: it seems to have disappeared into history's dustbin.[16] But then, three decades later, the U.S. Supreme Court dusted *Driver* off and featured it in the 1910 case, *Weems v. United States.*[17] In that case, a Philippine court, having convicted a customs official of falsifying a public document, imposed a sentence of fifteen years of what was called "cadena temporal," that is, the offender was to be chained around his ankle and wrists for the entirety of his prison term.[18] Unlike Driver's sentence, here was a barbaric punishment that seemed to cry out for judicial correction, and little ingenuity would have been required. The Court could have

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TENN. L. REV. 41, 43-47 (2000); Meghan J. Ryan, *Does the Eighth Amendment Punishments Clause Prohibit Only Punishments That Are Both Cruel and Unusual?*, 87 WASH. U. L. REV. 567, 576-80 (2010).

[14] *Driver*, 78 N.C. at 428.

[15] The most careful and convincing treatment of the phrase "law of the land" can be found in WILLIAM MCKECHNIE, MAGNA CARTA: A COMMENTARY ON THE GREAT CHARTER OF KING JOHN 379-81 (2nd ed. 1914).

[16] In subsequent decades, a few North Carolina defendants cited *Driver*, but never to their advantage. *See* State v. Farrington, 141 N.C. 844 (1906); State v. Reid, 106 N.C. 714 (1890); State v. Pettie, 80 N.C. 367 (1879).

[17] Weems v. United States, 217 U.S. 349 (1910). It should be acknowledged that two dissenting Justices suggested that the Eighth Amendment embodied a proportionality principle in *O'Neill v. Vermont*, 144 U.S. 323 (1892). The majority declined to address the issue, holding that the Eighth Amendment did not apply to the States.

[18] *Weems*, 217 U.S. at 364.

crafted a narrow opinion that focused on the unusual mode of punishment, which was unknown in English law; or perhaps the Court could have finessed the constitutional issue altogether, by invoking the hoary conflict of law rule that forecloses enforcement of foreign criminal law.[19] Instead, six Supreme Court Justices intimated that a proportionality principle existed somewhere within the Eighth Amendment.[20] In so doing, the Court suggested that the question had divided the state courts, but the only case identified on the affirmative side of the issue was *Driver*.[21] The *Weems* Court even quoted the language in *Driver* that had referenced the Magna Carta.[22]

However, as already observed, the precise Chapter in the Magna Carta that embodied the proportionality principle was unspecified.[23] The reasoning of *Driver* and *Weems*, to the extent it can be discerned, seems to have been: (1) the Magna Carta is a noble legal document; (2) the proportionality principle is a noble legal principle; and (3) ergo, the Magna Carta embodies the proportionality principle. The logical difficulties attending this syllogism prompted a search for more specific textual support. That support was supplied in *Trop v. Dulles*.[24] Albert Trop was an Army private in 1944, when he escaped from a stockade in Casablanca.[25] Picked up the next day, Trop was convicted of desertion, dishonorably discharged, and sentenced to three years imprisonment.[26] In 1952, his passport application was denied on the basis of the Nationality Act of 1940, which stripped all deserters of citizenship.[27] Trop challenged the denial of his

[19] *See* The Antelope, 23 U.S. (10 Wheat) 66, 123 (1825) ("The Courts of no country execute the penal laws of another.").
[20] *Weems*, 217 U.S. at 380-82.
[21] *Id.* at 375-76.
[22] *Id.* at 376.
[23] For decades, *Weems* went mostly unnoticed by American courts. A rare case relying on *Weems* is *Weber v. Commonwealth*, 303 Ky.56 (1946), which affirmed a 4-year sentence imposed for an assault-and-battery conviction. Citing *Weems*, the Kentucky court reasoned that the right to be secure from disproportionate punishment "is a right secured by Magna Charta and found in all state constitutions." *Id.* at 63-64.
[24] Trop v. Dulles, 356 U.S. 86 (1958).
[25] *Id.* at 87.
[26] *Id.* at 87-88.
[27] *Id.* at 88.

citizenship under the U.S. Constitution's Eighth Amendment's prohibition of "cruel and unusual punishments."[28]

The claim was an odd one for, as a dissenting Justice Frankfurter observed, no party to the case ever contested the government's legal authority to execute Trop for his crime.[29] For that matter, stripping someone of citizenship, also known as banishment, is the oldest of all human punishments.[30] Thus, it is impossible to argue that the penalty imposed on Trop was somehow "unusual." Surmounting these difficulties, the Supreme Court entered judgment in favor of Private Trop, educating the reader along the way on the historical backdrop for, and philosophical underpinnings of, the Eighth Amendment:

> The exact scope of the constitutional phrase 'cruel and unusual' has not been detailed by this Court. But the basic policy reflected in these words is firmly established in the Anglo-American tradition of criminal justice. The phrase in our Constitution was taken directly from the English Declaration of Rights of 1688, and the principle it represents can be traced back to the Magna Carta. The basic concept underlying the Eighth Amendment is nothing less than the dignity of man . . . . [citing *Weems*] . . . The Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society.[31]

Footnote 31, which the Court appends to its citation to the Magna Carta, consists, *in toto*, of the following: "See 34 Minn.[ ]L. Rev. 134; 4 Vand. L. Rev. 680."[32] The Minnesota Law Review citation is a 3½ page student note; nestled within is the assertion that the principle behind the "prohibition against cruel and unusual punishments" is "fundamental" and can be traced, *inter alia*, to the Magna Carta.[33] In a footnote, the unnamed student author indicates that the reference is to Chapter 20.[34] The other citation, "4 Vand. L. Rev. 680," is another student

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[28] *Id.* at 99-100.
[29] *Id*. at 123-24 (Frankfurter, J., dissenting).
[30] *See* Genesis 4:13-14 (God's banishment of Cain).
[31] Trop v. Dulles, 356 U.S. 86, 99-101 (1958) (citations omitted).
[32] *Id.* at 100 n.31.
[33] Note, *Constitutional Law—Cruel and Unusual Punishment Provision of Eighth Amendment as Restriction upon State Action Through Due Process Clause*, 34 MINN. L. REV. 134, 135 (1950).
[34] *Id.* at 135 n.20.

note (albeit one weighing in at 7 pages), with a single reference to Chapter 20 of the Magna Carta; the student author claims that the "root" of the Eighth Amendment is to be found therein.[35] The support for this claim is another student note, to wit, "34 Minn. L. Rev. 134."[36] In other words, *Trop v. Dulles* leads us into an excursion reminiscent of a Jorge Luis Borges story, but after all that work it turns out that the claim for the Eighth Amendment's origins in the Magna Carta derives from a pair of student notes, one of which cites the other, and neither of which engaged in anything other than assertion.

After *Trop*, claims that the Magna Carta illuminates the meaning of the Eighth Amendment could be pegged to specific language in the text of that ancient document. Chapter 20, mentioned by both student notes cited in *Trop*, provides:

> 20. A free man shall not be amerced for a trivial offense, except in accordance with the degree of the offense; and for a serious offense he shall be amerced according to its gravity, saving his contentment; and a merchant likewise, saving his merchandise; in the same way a villein shall be amerced saving his wainage; if they have fall in our mercy. And none of the aforesaid amercements shall be imposed except by the testimony of reputable men of the neighborhood.[37]

In the next section, this Article will provide a close analysis of this Chapter, but it is sufficient here to acknowledge the language—"in accordance with the degree of the offense"—that is evocative of the proportionality principle. In identifying this Chapter as relevant to the Eighth Amendment, the *Trop* Court transformed Eighth Amendment jurisprudence.[38]

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[35] John L. Bowers, Jr. & J. L. Boren, Jr., *The Constitutional Prohibition Against Cruel and Unusual Punishment—Its Present Significance*, 4 VAND. L. REV. 680, 682 (1951).
[36] *Id.* at 682 n.12.
[37] The translation of the Magna Carta used in this Article appears in Appendix 6 of J.C. HOLT, MAGNA CARTA 448-73 (2d. 1992). Other than Americanizing "offence" to "offense," the only change made is to Holt's translation of "salvo contenemento suo." Instead of his "saving his livelihood," I adopt the more literal "saving his contentment."
[38] Oddly, it is not clear whether this modernization was necessary to resolve the particular case. The majority opinion treats banishment as, in and of itself, a barbarous punishment. If so, Trop's punishment could have been struck down under the older view that the Eighth Amendment simply forecloses barbaric modes of punishment.

Before *Trop*, Chapter 20 had almost completely escaped notice by American courts.[39] Other Chapters of the Magna Carta, notably 39 and 55, were cited often in overturning punishments rendered not in accordance with the "law of the land,"[40] or without the "lawful judgment of [the defendant's] peers."[41] Yet it is difficult to find any judicial opinions referring to Chapter 20. The only case prior to the Civil War citing Chapter 20 was a 1799 Virginia case, *Jones v. Commonwealth,*[42] in which Justice Roane invoked the Magna Carta in overturning a criminal fine that was imposed on three defendants, jointly and severally.[43]

Reconstruction-era courts were more active and creative in their review of criminal punishments, but allusions to Chapter 20 remain rare.[44] Even in cases in which courts invoked the Magna Carta in striking down criminal sentences, Chapter 20 and the purportedly embedded proportionality principle went unnoticed. For example, in the 1875 New York case *People v.*

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[39] The author tried to capture any possible references to Chapter 20 with a variety of Westlaw searches, including: ("Magna Carta" "Magna Charta") /100 ("eighth amendment" punishment fine bail).

[40] The phrase appears in both Chapters 39 and 55 and was invoked by parties throughout the 19th century. *See, e.g.*, State v. Maxcy, 26 S.C.L. (1 McMul.) 501 (1837) (upholding law criminalizing vagrancy against challenge that such law was contrary to "the law of the land," including a discussion of the Magna Carta).

[41] The phrase appears in Chapter 39 and has been dubiously construed to support a jury trial right. *See, e.g.*, People v. Phillips, 1 Edm. Sel. Cas. 386 (N.Y. Sup. Ct. 1847) (challenging summary judgment under the Magna Carta).

[42] Jones v. Commonwealth, 5 Va. (1 Call) 555 (1799).

[43] *Id.* at 555-56..

[44] Even those courts that referred to Chapter 20 seldom focused on the language requiring that an amercement be "only according to the degree of the offense." Instead, it was the qualification that the amercement "sav[e] [the offender's] contentment" that attracted notice. This was a reservation that the amercement never be so severe that the offender be deprived of his means of living; and likewise, that a "merchant" never be denied his "merchandise," and a "villain" his "[w]ainage." Other language in the Magna Carta, relating to the "law of the land," was often confusingly invoked in tandem with the contentment language. Particularly illustrative is the 1870 North Carolina case Ex Parte Biggs, 64 N.C. 202 (1870), in which a local judge, offended by a newspaper editorial, disbarred a lawyer in a summary contempt proceeding. The Court struck down the punishment: "Such disfranchisement is *a deprivation of the means of living*; and as a punishment is forbidden in England by those parts of Magna Carta, which constitute parts of our own Constitution in Sections 14 and 17." *Id.* at 214 (emphasis added). It does not appear that the court gave close attention to the text of the Magna Carta. The language "deprivation of the means of living" hearkens back to the contentment language in Chapter 20. Yet, the court focused on Section 14 of the North Carolina Constitution of 1868, which tracks the language of the English Bill of Rights restricting excessive fines and bail, not any language in the Magna Carta. And Section 17 of the 1868 North Carolina Constitution tracks a different chapter of the Magna Carta altogether, which provides that life and property can be taken only as provided by "the law of the land." By contrast, the contentment language in Chapter 20 was aptly cited in an 1887 Florida case, but in a noncriminal context; the Chapter was used to explicate a bankruptcy homestead provision. Frese v. State, 23 Fla. 267 (1887).

Liscomb,[45] the relator in a habeas action was convicted of multiple misdemeanors. The trial judge imposed twelve one-year sentences consecutively to manufacture a twelve-year sentence.[46] The severe punishment would seem ripe for what today would be styled an Eighth Amendment proportionality challenge. The argument was apparently never considered. The Court reversed the sentence, drawing instead upon the famous Chapter 39 of the Magna Carta, and held the sentence was contrary to the law of the land.[47]

So the significance of *Trop* in 1954 was in identifying Chapter 20 of the Magna Carta as the ideological seed for a proportionality principle. According to *Trop*, or at least the student notes it cited, that principle flowered in the Eighth Amendment's prohibition against cruel and unusual punishment. In 1972, Justice Douglas developed this argument in *Furman v. Georgia*, which imposed a temporary moratorium on the death penalty.[48] His concurring opinion traced the influence of the Magna Carta on the Eighth Amendment, with the conduit said to be the English Bill of Rights of 1689.[49] The opinion also identified textual support in the Great Charter for a modernized understanding of the "cruel and unusual punishments" clause. Justice Douglas wrote that, "Chapter [20][50] clearly stipulated as fundamental law a prohibition of excessiveness in punishments."[51] In the years that followed, four more Justices argued that the Magna Carta's embodiment of a proportionality principle in Chapter 20, traced through the English Bill of

[45] People v. Liscomb, 60 N.Y. 559 (1875).
[46] *Id.* at 565.
[47] *Id.* at 565-56.
[48] Furman v. Georgia, 408 U.S. 238 (1972).
[49] *Id.* at 242-43 (Douglas, J., concurring).
[50] When the Magna Carta was reissued in 1216, 1217 and 1225, certain Chapters were dropped, others were condensed, and Chapter 20 involving amercements was renumbered Chapter 14. Because the 1225 Magna Carta was the version eventually adopted into law, some accounts refer to what this Article identifies as Chapter 20 as Chapter 14. Throughout this Article, I use the 1215 numbering.
[51] *Furman*, 408 U.S. at 242 (quoting Anthony Granucci, *"Nor Cruel and Unusual Punishments Inflicted:" The Original Meaning*, 57 CALIF. L. REV. 839, 845-846 (1969)).

Rights, found expression in the Eighth Amendment.[52] This view emerged in 1983 as the triumphant majority position in *Solem v. Helm*,[53] which overturned a life sentence imposed on a nonviolent offender:

> The principle that a punishment should be proportionate to the crime is deeply rooted and frequently repeated in common-law jurisprudence. In 1215 *three chapters of Magna Carta were devoted to the rule that "amercements" may not be excessive*. And the principle was repeated and extended in the First Statute of Westminster, 3 Edw. I, ch. 6 (1275). These were not hollow guarantees, for the royal courts relied on them to invalidate disproportionate punishments . . . . When prison sentences became the normal criminal sanctions, the common law recognized that these, too, must be proportional. See, *e.g.*, *Hodges v. Humkin*, 2 Bulst. 139, 140, 80 Eng.Rep. 1015, 1016 (K.B. 1615) (Croke, J.) ("imprisonment ought always to be according to the quality of the offence").[54]

As the italicized language above reflects, the *Solem* Court found not one, but three Chapters in the Magna Carta embodying the proportionality principle. In addition to the aforementioned Chapter 20, there are also Chapters 21 and 22 to cement the point:

> 21. Earls and barons shall not be amerced except by their peers and only in accordance with the nature of the offense.

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[52] Dissenting from the denial of certiorari in *Carmona v. Ward*, 439 U.S. 1091, 1093-94 (1979), Justices Marshall and Powell wrote:

> Few legal principles are more firmly rooted in the Bill of Rights and its common-law antecedents than the requirement of proportionality between a crime and its punishment. The precept that sanctions should be commensurate with the seriousness of a crime found expression in both the Magna Carta [citing Chapter 20] and the English Bill of Rights. And this Court has long recognized that the Eighth Amendment embodies a similar prohibition against disproportionate punishment.

Dissenting in *Rummel v. Estelle*, 445 U.S. 263, 288-89 (1980) (alteration in the original) (citations omitted) (again involving a life sentence for a so-called nonviolent offender), Justices Powell, joined by Brennan, Marshall, and Stevens, wrote:

> The principle of disproportionality is rooted deeply in English constitutional law. The Magna Carta of 1215 insured that "[a] free man shall not be [fined] for a trivial offence, except in accordance with the degree of the offence; and for a serious offence he shall be [fined] according to its gravity." By 1400, the English common law had embraced the principle, not always followed in practice, that punishment should not be excessive either in severity or length. One commentator's survey of English law demonstrates that the "cruel and unusual punishments" clause of the English Bill of Rights of 1689 "was first, an objection to the imposition of punishments which were unauthorized by statute and outside the jurisdiction of the sentencing court, and second, a reiteration of the English policy against disproportionate penalties."

[53] Solem v. Helm, 463 U.S. 277 (1983).

[54] *Id.* at 284-85 (emphasis added). A footnote after the word "amercement" in the italicized language explains: "An amercement was similar to a modern-day fine. It was the most common criminal sanction in 13th-century England." *Id.* at 284 n.8 (citing 2 F. POLLOCK & F. MAITLAND, THE HISTORY OF ENGLISH LAW 513-515 (2d ed. 1909).

> 22. No clerk shall not be amerced on his lay tenement except in the manner of the others aforesaid and without reference to the size of his ecclesiastical benefice.

Chapter 21 explicitly and Chapter 22 implicitly repeat the language ("in accordance with the nature of the offense") that evokes the proportionality principle.

To sum up, the *Solem* opinion articulates the argument that Chapters 20 to 22 embody a proportionality principle and illuminate the meaning of the Eighth Amendment. *Solem* was briefly extinguished as binding precedent in a subsequent case that upheld a life sentence imposed on a nonviolent offender.[55] Yet a pair of recent cases, which invalidated life sentences imposed on juveniles, have revived *Solem*. Those two cases, *Graham v. Florida*[56] and *Miller v. Alabama*,[57] portend an ambitious Eighth Amendment jurisprudence by a Court increasingly willing to invalidate non-capital sentences.[58] *Graham* and *Miller* take for granted that the Eighth Amendment embodies a proportionality principle and do not bother to cite the Magna Carta, the English Bill of Rights, miscellaneous student notes, or any other source for the proposition. Apparently, this is now settled law.[59]

Yet what is now settled was not always so. For many years, the Eighth Amendment was not understood to authorize courts to invalidate disproportionate criminal sentences. That was once a contested claim, and the Magna Carta was deployed to make the argument that the Eighth

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[55] In *Harmelin v. Michigan*, 501 U.S. 957 (1991), the Supreme Court upheld a mandatory life sentence on a defendant who possessed 672 grams of cocaine and threw into doubt the continuing vitality of *Solem v. Helm*.

[56] Graham v. Florida, 560 U.S. 48 (2010). Justice Kennedy's majority opinion cites *Solem* favorably many times, prompting a dissenting Justice Thomas to complain that "the Court soon cabined *Solem*'s rationale." *Id.* at 104 (Thomas, J., dissenting).

[57] Miller v. Alabama, 132 S.Ct. 2455, 567 U.S. ___ (2012).

[58] For speculations on the trajectory of the U.S. Supreme Court's Eighth Amendment jurisprudence after *Miller*, see Craig S. Lerner, *Sentenced to Confusion*, Miller v. Alabama *and the Coming Wave of Eighth Amendment Cases*, 20 GEO. MASON L. REV. 25 (2012).

[59] Chief Justices Roberts and Justice Alito dissented in *Miller*, but their opinions accept that the Eighth Amendment embodies a proportionality principle. Only Justices Scalia and Thomas reject this proposition. *See Miller*, 132 S.Ct. at 2483 (Thomas, J., dissenting, joined by Justice Scalia) (emphasis in the original) (citation omitted) ("the Cruel and Unusual Punishment Clause was originally understood as prohibiting tortuous *methods* of punishment—specifically methods akin to those that had been considered cruel and unusual at the time the Bill of Rights was adopted").

Amendment embodies a proportionality principle. The next section considers whether the Magna Carta really supports this proposition.

II. A CLOSER LOOK AT CHAPTERS 20 TO 22

This Section begins with the text itself. Attention to the language of Chapters 20 to 22, especially in tandem with other Chapters of the Magna Carta, undercuts the claim that these provisions contemplated criminal punishment. We then consider every reference to amercement in Glanvill's Treatise, written in the years 1187 to 1189; amercement there appears as a noncriminal penalty for an administrative offense or an abuse of the litigation process. Nor is it likely, this Section concludes, that thirteenth century Englishmen, who were tolerant of cruelty and were faced with high rates of violent crime, would have been moved to codify the proportionality principle in any respect meaningful to the modern observer.

A. *The Text*

We begin with the text of the 1215 Magna Carta, paying close attention to the words of Chapters 20 to 22. The similar and often identical language in the three Chapters, plus the language in Chapter 22 referencing the preceding two, "in the manner of the others aforesaid," reveals an intent to have the three Chapters considered together. The 1217 reissue of the Magna Carta, which collapses these Chapters into one, confirms this point. The three Chapters of the 1215 version of the Magna Carta broadly correspond to the three classes of men: commoners (Chapter 20), nobles (Chapter 21), and clergy (Chapter 22). Within Chapter 20 there is another

tripartite division of commoners, into freemen, merchants, and villeins. Significantly, all three Chapters concern "amercement."

This last point is obscured when modern editions of the Magna Carta translate amercietur as "fine."[60] But the authors of the Magna Carta were attentive to the difference between fines and amercements. Chapter 55 provides for the remission of all unlawful amercements *and fines*. When the authors of the Magna Carta intended to impose limits on fines, they knew how to do so, and the ordinary conclusion is that the restrictions of Chapters 20 to 22 were not intended to apply to fines. When the three Chapters were condensed into one in 1217, the authors of the Magna Carta, given the opportunity to correct a drafting error, persisted in limiting the scope of the renumbered Chapter to amercement.

Further evidence that the authors of the Magna Carta were attentive to the difference between amercements and fines can be discerned in Chapter 55. That Chapter states that all "fines" are "facti sunt nobiscum" or "made with us," while all "amerciamenta" are simply "facta" or "made." This reflects the primary distinction between the two penalties. Fines were negotiated with the royal judge, and hence were "made with us;" by contrast, amercements were imposed, and hence simply "made." That the authors of the Magna Carta took the trouble to recognize this distinction belies any suggestion that the language was chosen carelessly.

To return to Chapters 20 to 22, the text specifies one procedural restriction on amercements—that is, the penalty may be imposed only after having secured the consent of the offender's peers. The text of also specifies two substantive restrictions—that is, the amercement

[60] The author's research in preparing this Article included a trip to Salisbury Cathedral, home to one of the four extant copies of the 1215 Magna Carta. Next to the Magna Carta is a translation prepared by the British Library Board that perpetuates this misimpression. Chapter 20 is translated: "For a trivial offence, a free man shall be *fined* only in proportion to the degree of the offense. . . ." (emphasis added). Photographs taken on June 22, 2014 (on file with author). The Latin version of the 1215 Magna Carta is available in Appendix 6 of J.C. HOLT, MAGNA CARTA (2d ed. 1992).

must be proportioned to the offense *and* leave the offender in possession of his "contentment," or livelihood. The principle of proportionality is said to inform these two substantive restrictions, but a moment's reflection raises doubts. The two limiting principles can be harmonized in some cases, but they are neither identical nor are they both coincident with the principle of proportionality.

To be sure, with respect to minor offenses, the proportionate penalty could be one that is in accordance with the offense's gravity *and* leaves the offender with, at a minimum, his livelihood. But this is not the case with respect to serious offenses. Then, the proportionate penalty could strip the offender of *all* his property, his liberty, and even his life. It would sound bizarre to say that a murderer or rapist, although punished, must be left with his contentment intact.

This should be the first clue, from evidence internal to the text, that Chapters 20 to 22 are not about criminal offenses, or certainly not serious criminal offenses. And upon reflection, it is noteworthy that Chapters 20 to 22 do not refer to penalties for "crimen" (crimes) or "felonia" (felonies), but rather for "declicto," a tame word generally translated as "offenses." Another Chapter, however, unmistakably regulates the punishment of felonies. Chapter 32 provides, "We will not hold the lands of convicted felons for more than a year and a day, when the lands shall be returned to the lords of the fiefs." The disturbing implications of this Chapter of the Magna Carta generally result in its being ignored, lest that the pristine glory of the document be impaired. Chapter 32 seals the agreement of the king and the barons that anyone convicted of a felony faced the forfeiture of all his land. The issue separating the two sides was on the division of the spoils—how long the king was authorized to use the land before surrendering it to the convicted felon's lord. The Magna Carta's compromise was 366 days. Chapter 32 bracingly

suggests that Chapters 20 to 22 have no application to penalties for felonies. It is, after all, impossible that a convicted felon could be on the one hand left with his contentment, but on the other hand forced to forfeit all his property.

Additional proof that Chapters 20 to 22 have no application to felonies can be found in Chapter 39, which, like Chapter 32, unmistakably deals with criminal punishment. It provides: "No freemen shall be taken or imprisoned or disseised or outlawed or in any way ruined, nor will we go or send against him, except by the lawful judgment of his peers or by the law of the land." The final fifteen words of the sentence, by imposing grandiose procedural requirements, add luster to the Magna Carta and therefore figure prominently in the document's mythology. Interpretations of "judgment of his peers" and "law of the land" are often hopelessly anachronistic projections,[61] but it is sufficient to note that the Chapter imposes limitations on the imposition of punishments ranging from dispossession of property, imprisonment, exile, and even torture and death (presumably what is meant by "ruined"). Amercement is unmentioned in Chapter 39, which suggests that the authors of the Magna Carta regarded amercements as somehow apart from criminal punishments. Furthermore, Chapter 39 reflects concerns about criminal punishments—imprisonment, exile, and destruction—but says nothing about a principle of proportionality restricting their usage. The omission of any such restriction is significant. When the authors of the Magna Carta wished to import a proportionality principle they did so, as in Chapters 20 to 22. However, when speaking of criminal punishments, they declined.

In sum, within the four corners of the document, there is substantial evidence that Chapters 20 to 22 do not embody the principle that the punishment should be proportionate to the

[61] *See, e.g.*, MCKECHNIE, *supra* note 15, at 381 (rejecting Coke's interpretation of Chapter 39: "Anachronisms such as these must be avoided.").

crime. As we move beyond the text of the Magna Carta to consider twelfth and thirteenth century legal texts, this suspicion is confirmed.

B. *Contemporaneous Legal Texts*

To simplify a story both complicated and shrouded in uncertainty, amercement seems to have been a Norman innovation.[62] Anglo-Saxon law provided for fines—wer, bot, and wite—which were fixed according to the status of the offender and the victim, and to the gravity of the offense.[63] The transition to amercement is reflected in the Domesday Book of 1086, in which the phrase "in misericorida regis," or "in the mercy of the king," first appears.[64] Instead of a fixed tariff, amercement contemplates that all of one's property and even one's life is placed at the king's mercy.[65] The distinguished Magna Carta commentator, William McKechnie, notes that "[n]one of our authorities contains an entirely satisfactory account of how the change" from fines to amercement occurred.[66] Henry I's Charter of Liberties, issued in 1100, reflects dissatisfaction with amercement, as the King promised to abandon the penalty and return to the ways of his grandfather.[67] But the Charter seems never to have been seriously intended, and the practice of amercement not only persisted, but expanded in the twelfth century.[68]

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[62] JOHN FOX, THE HISTORY OF CONTEMPT OF COURT 120 (1927) ("There is little doubt that amercement was introduced in England by William the Conqueror.").
[63] Stinneford, *supra* 5, at 928.
[64] Fox, *supra* 62, at 121.
[65] *Id.*
[66] MCKECHNIE, *supra* note 15, at 285. McKechnie speculates that the system of bots and wites had become so burdensome, given the many constituencies that had to be paid off (the victim, the victim's lord, the king, etc.) that amercement arose as a sort of one-stop shopping, where the offender could buy peace by placing himself in the King's mercy. In theory, the offender's body and all of his property was placed in the king's mercy, but "a sort of tariff grew up, which the Crown usually respected in practice. . . ." *Id.* at 286.
[67] Chapter 8 of the Charter of Liberties provides:

> If any of my barons or men shall have done wrong, he shall not give a pledge in the mercy of his wealth as he used to do in my father's time or my brother's, but according to the measure of the wrong he shall pay compensation as he would have paid compensation before my father's time in

Indeed, Maitland asserts that "[v]ery likely there was no clause in Magna Carta more grateful to the mass of the people than [Chapter 20]."[69] If amercement was so prevalent that the public was grateful for its regulation, this is another clue that it was not exclusively, or even predominantly, a *criminal* penalty. Most law-abiding people do not end up as criminal defendants or—at least in reasonably just political regimes—expend substantial mental energy fretting about this possibility. People are more likely to imagine themselves or their kin as victims of violent crime than as defendants in such cases. This would certainly have been the case in thirteenth century England, with a highly undeveloped criminal justice system, a point to which this Article will return in the next part. Maitland's claim that the public was grateful for the regulation of amercements makes sense, however, if the penalty was a central sanction in the medieval political order, and it was imposed on private citizens and public officials to secure obedience on a wide range of noncriminal matters.

Among the guides to twelfth century English legal practice is Glanvill's *Treatise on the Laws and Customs of the Realm of England*, written between 1187 and 1189. The work deals primarily with civil litigation in the king's court, but the final chapter, Book XIV, is entitled "De placitis criminalibus," or "Criminal pleas."[70] The word amercement appears only once in Book XIV. Glanvill writes that the criminal process can be initiated either "if no specific accuser appears, . . . based on public notoriety," or "if a specific accuser appears," by an appeal. Glanvill

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> the time of my other predecessors. But if he shall be convicted of perjury or crime, he shall pay compensation in accordance with what is just.

University of London-Institute of Historical Research, *Henry I Coronation Charter*, EARLY ENGLISH LAWS, http://www.earlyenglishlaws.ac.uk/laws/texts/hn-cor/view/#edition,1/translation,1_0_c_7 (last visited Feb. 14, 2015).

[68] *See* JOHN HUDSON, THE FORMATION OF ENGLISH COMMON LAW: LAW AND SOCIETY IN ENGLAND FROM THE NORMAN CONQUEST TO MAGNA CARTA 80 (1996) ("[T]welfth-century records show that amercements, in particular for minor wrongs such as breaches of procedure, became quite standardized.").

[69] F.W. Maitland, *Introduction* to PLEAS OF THE CROWN FOR THE COUNTY OF GLOUCESTER xxxiv (F.W. Maitland ed., 1884) (1221).

[70] THE TREATISES ON THE LAWS AND CUSTOMS OF THE REALM OF ENGLAND COMMONLY CALLED GLANVILL 171-73 (G.D.G. Hall ed., trans., 1983).

continues: "If the appellor is vanquished [in trial by battle], he will be liable to amercement by the lord king," adding that "[t]he meaning of this has been sufficiently explained above."[71] By contrast, "if the accused is vanquished," then his life and limbs, as well as goods and chattels, are all in jeopardy.[72] In other words, amercement is not a potential penalty for those convicted of a crime; amercement is imposed on a person who erroneously initiates the criminal process.

It is unclear which of the earlier references to amercement Glanvill intended by the phrase "the meaning has been sufficiently explain[ed] above." A modern editor plausibly proposes a passage in Book IX about encroachments onto the King's property. Glanvill there writes:

> [When anyone] is convicted of encroachment by building upon royal land in a city, then those buildings which are proved to have been built on royal territory shall belong to the lord king and, notwithstanding this, he shall be liable to amercement by the lord king. Amercement by the lord king here means that he is to be amerced by oath of lawful men of the neighborhood, but so as not to lose property necessary to maintain his position.[73]

It is remarkable, although to my knowledge never remarked upon, how closely this passage in Glanvill tracks Chapter 20 of the Magna Carta. The similarity is so pronounced that one wonders whether the authors of the Magna Carta drew from this passage, or whether Glanvill and the authors of the Magna Carta drew from a common source. In both texts, amercement is limited procedurally—it can be imposed only by the "oath of lawful men of the neighborhood"—and substantively—the property taken must leave the offender with enough to "maintain his position." In Glanvill, the context has nothing to do with criminal law, but specifies the penalty for building on royal lands, which might be likened to the civil offense of trespass.

[71] *Id.* at 172.
[72] *Id.* at 172-73.
[73] *Id.* at 114.

Glanvill's text contains seven other references to amercement, none of which touch upon any issue remotely implicating the criminal law. Most of Glanvill's references to amercement involve penalties imposed on private parties who have abused the judicial process in some way. Amercement is said to be imposed upon a litigant, or his sureties, who brings a false claim in court[74] or against the church,[75] who fails to pay a fine,[76] who falsely alleges a seal is fraudulent,[77] or who fails to pursue an action he has initiated.[78]

Contemporaneous documents are similar. For example, the Curia Regis Rolls note that Geoffrey de Say brought a bad pleading in 1214 and was amerced.[79] Several passages from Bracton's *The Laws and Customs of England*, written around 1235, also treat amercement as the forfeiture of a bond if litigation is not diligently pursued.[80] The litigation process can, moreover, be burdened not only by delinquent parties but also by incompetent judges; and to this end, another reference in Glanvill reports that a judge who rendered a false judgment was liable to amercement.[81] This is consistent with references to amercement in other documents that cast it as the penalty imposed upon public officials who failed to do their jobs properly.[82]

But it was not only royal officials who had public duties in the medieval order. Law enforcement, in the absence of any official police force, was largely a matter of self-help and private monitoring. All men were joined together in collective entities, such as the frankpledge,

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[74] *Id.* at 43.
[75] *Id.* at 51.
[76] GLANVILL, *supra* note 70, at 98.
[77] *Id.* at 127.
[78] *Id.* at 169-170.
[79] HOLT, *supra* note 37, at 147-48.
[80] *See, e.g.*, 4 BRACTON ON THE LAWS AND CUSTOMS OF ENGLAND 366 ("if one finds pledges for prosecuting and does not prosecute[,] all will be in mercy, both pledges and principals.").
[81] GLANVILL, *supra* note 70, at 101.
[82] For example, during litigation in 1207 between Eustace de Vescy and Richard de Umfraville over custody of Henry Batail, the justices allowed a concord between the barons without the king's consent. The Pipe Rolls record that King John amerced the judges. *See* HOLT, *supra* note 37, at 148.

and were jointly responsible for the misdeeds of others.[83] Amercement was the crucial penalty in enforcing these arrangements. According to the *Oxford History of the Laws of England,* there are "numerous plea roll entries record[ing] chief pledges and tithings being amerced" for the failure to produce an accused or a fugitive for whom a collective was accountable.[84] Apart from one's formal responsibilities as a member of a collective entity, the legal system in thirteenth century England penalized failures to act in ways that may seem alien to a modern American or Englishman. For example, the penalty imposed on a private citizen who failed to inform the coroner of a dead body, or promptly to raise the hue and cry, was amercement.[85] One could multiply the examples, but the crucial idea is that amercement was not levied as a penalty for criminal conduct, but for the failure to discharge one's duties within the political order.

Modern legal codes distinguish at a threshold level between civil and criminal law, and then, within the criminal law, between felonies and misdemeanors. The law in medieval England was more fluid. If we project modern legal categories, a review of thirteenth century documents suggests that amercement was never the punishment imposed for serious crimes. In John Fox's *History of Contempt of Court* (1927), the author concludes that, "[i]n Henry II reign, 'to be in the King's mercy' was applicable to offenses less than felony. Such offen[s]es [were] then known as trespasses and later as misdemeanors."[86] In his history of English criminal law, James Fitzjames Stephen comes to the same conclusion. Focusing on the precise words used in Chapter 20, Stephen concludes that what the authors of that Chapter intended would "subsequently develop[] into the law relating to misdemeanours . . . ."[87] Stephen makes clear

[83] JOHN HUDSON, OXFORD HISTORY OF THE LAWS OF ENGLAND: 871-1216 717 (John Baker ed.,2012).
[84] *Id.*
[85] *Id.* at 718. Another reference in Glanvill provides that the remedy for a writ of constraining a tenant (i.e., for failing to discharge one's duties to one's landlord) included amercement. GLANVILL, *supra* note 70, at 113.
[86] FOX, *supra* note 62, at 122-23.
[87] 2 JAMES FITZJAMES STEPHEN, A HISTORY OF THE CRIMINAL LAW OF ENGLAND 198 (1883).

that these "misdemeanours" were generally not offenses of a truly criminal nature. Drawing upon, and quoting from, primary documents, Stephen writes:

> Under the head of amercements for misdemeanours occur a great variety of matters, some of which we should regard as indictable offences, as, for instance, harbouring a robber, and interfering with jurors; *but others are, according to our notions, far remote from criminal offences*, e.g. "Fossard was fined for a mortgage unjustly taken." "The hundred of Stanberg was amerced for denying before the justices what they had acknowledged in the County Court."[88]

In sum, much of what amercement involved was "far remote from criminal offenses." Chapters 20 to 22 reflected dissatisfaction with aspects of the legal system, but there is no evidence that this dissatisfaction was directed towards criminal punishment, or at the least towards punishment for the sort of crimes that would later be called felonies. It would be more accurate to regard Chapters 20 to 22, given their focus on *amercement*, as directed towards the unconstrained and sometimes exorbitant penalties that the medieval political order imposed for any manner of administrative offenses.

C. *Medieval Attitudes Towards Violence and Cruelty*

In modern England and the United States, police forces are lavishly funded and equipped, and prosecutors wield probing powers to ferret out criminal wrongdoing. By contrast, the thirteenth century "criminal justice system" was the work of amateurs. There were no police, no prosecutors, and for most criminals, a vanishingly small chance of being charged and convicted, assuming they were not caught red-handed.[89]

[88] *Id.* at 199 (emphasis added) (footnotes omitted).
[89] *See* H. R. T. Summerson, *The Structure of Law Enforcement in Thirteenth Century England*, 23 AM. J. LEGAL HIST. 313, 313 (1979) ("when many communities were surrounded by forbidding or impenetrable tracts of woods, heath or fen, . . . circumstances favoured the fugitive simply because it was so easy for him to get away").

In the absence of an effective justice system, violent crime was rampant. Cities were as rife with crime as rural areas. One historian writes, "This was a knife-carrying society, in which potentially fatal fights could easily arise."[90] In the period 1200-1400, estimates of homicide rates in London range from 10 to 50 per 100,000 inhabitants. In 1340, Oxford attained a homicide rate of 110 per 100,000 inhabitants, over one hundred times that of twenty-first century England.[91] Graphical depictions of the decline in English homicide rates from the thirteenth century to the present are obliged to employ a logarithmic scale to compress the exponential decline. Pollack and Maitland conclude: "We must not end this chapter without recording our belief that crimes of violence were common and that the criminal law was exceedingly inefficient [and] . . . even in quiet times few out of many criminals came to their appointed end."[92]

For those rare defendants caught and convicted of a serious crime, the list of gruesome punishments was long, stretching from blinding to castration to drawing and quartering.[93] Nor were such punishments reserved for rapists and murderers.[94] Although examples are legion, the case of Thomas of Eldersfield in 1217—an almost exact contemporary of the signing of the Magna Carta—is illustrative.[95] Convicted after trial by battle of trumped-up charges of assault and burglary, Thomas was blinded (his eyes dislodged from their sockets) and castrated (his

[90] HUDSON, *supra* note 68, at 57 (1996).
[91] *See* STEVEN PINKER, THE BETTER ANGELS OF OUR NATURE: WHY VIOLENCE HAS DECLINED 60 (2011).
[92] 2 FREDERICK POLLACK & FREDERIC WILLIAM MAITLAND, THE HISTORY OF ENGLISH LAW 555 (1895).
[93] *See* Larissa Tracy, *'Al defouleden is holie bodi' Castration, the Sexualization of Torture, and Anxieties of Identity if the* South English Legendary, *in* CASTRATION AND CULTURE IN THE MEDIEVAL AGES 95-96 (Larissa Tracy ed., 2013) ("William I brought a specifically Scandinavian flavor of justice to England . . .").
[94] *Id.* at 96. ("Henry I ordered all financiers in London castrated in 1125. . . .").
[95] For a colorful account of the Thomas saga, see Paul Hyams, *Tales from the Medieval Courtroom: The Fall and Rise of Thomas of Elderfield* (January 1985) (unpublished manuscript) (on file with California Institute of Technology's Humanities Working Papers), *available at* http://authors.library.caltech.edu/18859/1/HumsWP-0107.pdf.

testicles playfully kicked around by some local lads).[96] From this case and others like it, the conclusion is inescapable that the typical thirteenth century Englishman was not averse to punishments that shock the modern conscience. This should not be surprising, given that cruelty was not only commonplace, but treated as acceptable and even as a source of entertainment. After recounting several gruesome "sports" involving the torture of animals, the historian Barbara Tuchman concludes, "[a]ccustomed in their own lives to physical hardship and injury, medieval men and women were not necessarily repelled by the spectacle of pain, but rather enjoyed it."[97]

It is often said that the past is another country. For a modern Englishmen or American to enter into the mind of a thirteenth century Englishmen requires an act of the imagination. We need to imagine how human beings would think and feel in an age in which violent crime is rampant, few criminals are caught, and the prevailing attitude towards cruelty is one of acceptance and even flippancy. It is wildly unlikely that in such circumstances people would obsess over whether a murderer, rapist, or robber could be executed.[98] The twelfth century chronicler, Orderic Vitalis, made a notable observation in this regard about one such convicted criminal: "The murderer was bound to the tails of four wild horses and torn to pieces by them, *as a terrible warning to evil doers*."[99] Very public and very cruel punishments were, the chronicler teaches, intended as "terrible warnings" to would-be criminals.[100] Modern deterrence theory would regard this as a plausible solution,[101] although contemporary moral attitudes toward

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[96] *Id.* at 11.
[97] BARBARA TUCHMAN, A DISTANT MIRROR: THE CALAMITOUS 14TH CENTURY 135 (1978).
[98] On the shift in attitudes towards violence over centuries, see generally PINKER, *supra* note 91. Pinker draws heavily from the ideas of Norbert Elias.
[99] HUDSON, *supra* note 68, at 59 (quoting 4 ORDERIC VITALIS, THE ECCLESIASTICAL HISTORY, 274-76. (M. Chibnall ed. & trans., 1973)) (emphasis added).
[100] *Id.*
[101] *See, e.g.*, Michael K. Block & Joseph Gregory Sidak, *The Cost of Antitrust Deterrence: Why Not Hang a Price Fixer Now and Then?*, 68 GEO. L. J. 1131, 1132 (1980).

cruelty foreclose such punishments. There is no evidence that medieval Englishmen possessed identical moral allergies.

III. WHAT DO WE MEAN BY THE "PROPORTIONALITY PRINCIPLE"?

We are now in a position to answer the question posed in the Article's title. And the answer depends on what is intended by the "proportionality principle." At one level, of course the Magna Carta embodies a proportionality principle. Excluding the hopelessly crude or corrupt, every legal system in recorded history reflects an embrace of proportionality. In some respects, ancient systems of justice may have entailed a less finely-tuned calibration of culpability and punishment than is expected of twenty-first century Western legal systems. At oldest common law, for example, any unlawful killing was murder and was punishable by death; by contrast, Anglo-American jurisdictions today specify a dozen or more levels of homicide, with correspondingly graded sentences. But this does not prove Englishmen long ago were ignorant of proportionality. The laws of King Alfred (871-899 A.D.) bespeak an appreciation of the proportionality principle that at times puts modern codes to shame. Consider this passage:

> If the great toe be struck off let twenty shillings be paid him as *bot*. If it be the second toe, fifteen shillings. If the middle-most toe, nine shillings. If the fourth toe, six shillings. If the little toe be struck off let five shillings be paid him.[102]

To the best of my knowledge, no modern American legal code distinguishes aggravated assaults according to the size of the severed toe.[103]

As set forth above, the Magna Carta distinguishes some crimes, "felonia," which merit the forfeiture of all one's lands, from lesser offenses, "delicto," which merit the modest penalty

[102] 1 JAMES FITZJAMES STEPHEN, A HISTORY OF THE CRIMINAL LAW OF ENGLAND 56 (1883).
[103] For example, in Virginia any assault that results in a severed toe would constitute aggravated malicious wounding and would be punished as a Class 2 felony. *See* VA. CODE 18.2-51.2.

of amercement.[104] With respect to serious crimes, the Magna Carta contemplates a range of punishments, including exile and death, presumably pegged to the severity of the offense. With respect to misdemeanors and administrative offenses, the amercement distinguishes among the greater or lesser, making clear that in neither case should the offender be deprived of all of his property or even so much of it that he is denied his livelihood. All of this is true, but at this level of generality, the Magna Carta is no more distinguished in its appreciation of the proportionality principle than the Codes of Alfred or Hammurabi (1754 B.C.).[105]

Indeed, one need not be a great lawgiver or an Aristotle[106] to discern the truth of the proportionality principle. Two-year-olds in sandboxes draw distinctions based on the severity of the crime visited upon them: they respond differently when another child steals their shovel or hits them in the nose. This deflating observation calls into question the Supreme Court's claim in *Trop v. Dulles* that the proportionality principle is grounded in the Magna Carta and, more tendentiously, "the dignity of man."[107] It is, after all, not just two-year-olds who appreciate and apply the proportionality principle; animals get it as well. A dog responds differently if it is intentionally kicked or negligently tripped. The law of contracts better testifies to the dignity of man—our capacity to visualize the future, express intentions, and bind ourselves through voluntary agreements—than the criminal law principle of proportionality.

So the Magna Carta generally embodies a proportionality principle, but at that level the principle is trivial and obvious. The question is whether the Magna Carta has anything to say about the appropriate punishment for seventeen-year-old Terrance Graham, who committed

[104] *See supra* Part II.A.
[105] The sophisticated effort to proportion punishment and crime in Hammuabi's Code is explored in Martha T. Roth, *Mesopotamian Legal Traditions and the Laws of Hammurabi*, 71 CHI.-KENT L. REV. 13 (1995).
[106] *See* ARISTOTLE, NICOMACHIAN ETHICS Bk. V. Ch. 3.
[107] *See supra* at text accompanying note 52. .

several armed robberies.[108] Or Kuntrell Jackson, also seventeen years old, who participated in an armed robbery that resulted in the death of a store clerk.[109] Is a sentence of life without parole—a modern analog to the ancient or medieval punishment of banishment[110]—disproportionate? Does the Magna Carta have anything to say to these questions? The prosaic starting point is that the signers of the Magna Carta regarded death or worse as just punishments for the crimes of robbery or murder. So the modern scholar and jurist are obliged to propose a more sophisticated argument, to wit, that the Magna Carta encapsulates the principle that punishment should be calibrated to current attitudes toward the severity of a crime. The thin reed upon which this argument is piled is the phrase "in accordance with the severity of the offense" in Chapters 20 to 22.

An honest grappling with those Chapters reveals that the authors did not have serious crimes in mind. And it is noteworthy that American courts, litigants, and academics who invoke the majesty of the Magna Carta generally preserve a respectful distance from the text, contenting themselves with gestures in the direction of the Great Charter. Those courts that grapple with the text seldom produce analyses that merit passing marks. Consider again *Solem v. Helm*, the catalyst for what has become an increasingly active Eighth American jurisprudence. The passage quoted earlier claims support for "[t]he principle that a punishment . . . be proportionate to the crime" from the "three chapters of Magna Carta . . . devoted to amercements," adding that this principle was "repeated and extended in the First Statute of Westminster, 3 Edw. I, ch. 6

[108] Graham v. Florida, 560 U.S. 48 (2010). For example, the amicus brief filed by the Center for the Administration of Criminal Law on behalf of Graham claims support from the Magna Carta. Amicus Brief, Graham v. Florida, 560 U.S. 48 (2010), Nos. 08-7412, 08-7621, 2009 WL 2236773 at *8.
[109] Miller v. Alabama, 567 U.S. ___, 132 S.Ct. 2455 (2012). For example, the amicus brief filed by Amnesty International on behalf of Miller claims support from the Magna Carta. Miller v. Alabama, 567 U.S ___, 132 S.Ct. 2455 (2012), Nos. 10-9646, 10-9647, 2012 WL 174238 at *9-10.
[110] *See* Craig S. Lerner, *Life Without Parole as a Conflicted Punishment*, 48 WAKE FOREST L. REV. 1101, 1127-31 (2013).

(1275)," and evidenced by a later case, which is cited as "*Hodges v. Humkin,* 2 Bulst. 139, 140, 80 Eng.Rep. 1015, 1016 (K.B. 1615) (Croke, J.)".[111]

Half credit to Justice Powell for acknowledging that the Chapters are limited to amercement. But deductions are in order for failing to address what amercement was and how Chapters 20 to 22 have no application to serious crimes, which were addressed in other Chapters of the Magna Carta. The citation to the First Statute of Westminster supplies an aura of pedantry to the Court's argument, but it is doubtful that Justice Powell consulted the ancient statute. Chapter 6 of the 1275 statute is entitled, "Amercements shall be reasonable, and according to the Offense," but the text of the chapter provides a sense of what is intended:

> And that no City, Borough, nor Town, nor any Man amerced without reasonable Cause, and according to the Quantity of his Trespass; that is to say, every Freeman having his Freehold, a Merchant having his Merchandise, a Villain having his Gaynage, and that his or their Peers.[112]

The language is similar to Chapters 20 to 22 of the Magna Carta, suggesting a similar purpose. But Chapter 6 of the Statute of Westminster is obviously not addressed to *criminal* offenses: cities, boroughs and towns do not commit crimes. They do, however, like individual men, fail in the discharge of their duties to the Crown, and are therefore liable to amercement. The penalty is, furthermore, not assessed for felonies, but "trespass[es]." Felonies are explicitly addressed in other Chapters of the Statute of Westminster. For example, Chapter 12 speaks of the "Punishment of Felons refusing lawful Trial"; of course, the punishment is not amercement, but "strong and hard Imprisonment." And "strong and hard Imprisonment" was a term of art:

[111] *See supra* at text accompanying note 54.
[112] The Statutes of Westminster, 1275, 3 Edw. 1, c. 6 (Eng). The text of the 1275 Statute of Westminster is available online at https://ucadia.s3.amazonaws.com/acts_uk/1200_1299/uk_act_1275_statute_westminster.pdf.

"Custom settled it that the defendant who was put to [strong and hard imprisonment] was laid over with weights that would crush him to death unless he relented."[113]

The *Solem* Court's citation to *Hodges v. Humkin* is also noteworthy. Justice Powell apparently thought the case impressive, but it is possible he confused its author, Justice Croke, with a more distinguished jurist with one fewer letter. Or perhaps he hoped his readers would confuse Croke and Coke. In any event, apart from the fact that *Hodges* was decided nearly four centuries after the sealing of the Magna Carta, and therefore dubiously casts light on the Great Charter's original meaning, one must wonder: is this really the best precedent the Supreme Court could summon? References to *Hodges v. Humkin* are few and far between and are generally not flattering. In *Queen v. Rea* [Court of Queens Bench] (1865), for example, Justice Held was unimpressed when one of the litigants cited *Hodges*. Judge Held wrote that "[i]t is not easy to make the case intelligible" and goes on: "It may be observed that though Croke, J., took such a part in the decision, it is not reported in Croke's own reports, nor is it in any of the contemporaneous reports, . . . which detracts from [its] authority."[114] So to sum up: the *Solem* Court invoked the Magna Carta, but it failed to grapple with the text, inaptly cited a relevant statute, and dredged up an obscure and irrelevant case four centuries after the signing of the Magna Carta. Low marks indeed.

CONCLUSION

In Gilbert and Sullivan's *The Mikado*, a Japanese emperor announces that his sublime object is to let the punishment fit the crime. The "dull and prosy sinner" will be sentenced to

[113] JOHN H. LANGBEIN, RENEE LETTOW LERNER & BRUCE P. SMITH, HISTORY OF THE COMMON LAW: THE DEVELOPMENT OF ANGLO-AMERICAN INSTITUTIONS 61 (2009).
[114] Queen v. Rea, [1865] 17 Ir. Jur Rep. 219, 225.

listen to "mystical Germans/Who preach from ten to four."[115] The pool shark will suffer a possibly worse fate:

> He's made to dwell—
> In a dungeon cell
> On a spot that's always barred.
> And there he plays extravagant matches
> In fitless finger-stalls
> On a cloth untrue
> With a twisted cue
> And elliptical billiard balls![116]

Several American judicial opinions have invoked Gilbert and Sullivan in overturning or affirming criminal sentences challenged as disproportionate.[117] No one would suggest that these judges regarded *The Mikado* as binding precedent, but the clever lyrics gave a panache to the opinions that would otherwise be lacking. The same could be said of the use of *The Mikado* in this Article.

Perhaps judicial citations to the Magna Carta are of a similar nature. It is doubtful that Justice Powell, the author of *Solem v. Helm*, regarded the Magna Carta as binding authority. It is even more doubtful that he was uncertain as to the correct result in that case until he consulted the Magna Carta. More likely, of course, is that having reached the desired result, Justice Powell hunted for a citation to supply a gauzy magnificence to his opinion. And nothing fits that bill better, at least for modern Anglo-American lawyers, than the Magna Carta. Why this should be so is a long story, but it is sufficient here to point out that for centuries, during the Tudor period, the Great Charter was largely ignored, and, as noted in this Article's Introduction, Shakespeare's

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[115] THE COMPLETE PLAYS OF GILBERT AND SULLIVAN 331 (1997).
[116] *Id.* at 332.
[117] Recent criminal opinions citing *The Midako* include: *State v. Bowser*, 926 N.E.2d 714 (Ohio App. 3d 2010) (upholding "community-control sanction" as proportionate); *Watson v. United States*, 979 A.2d 1254 (D.C. 2009) (Schwelb, J., dissenting) (finding felony conviction for simple assault disproportionate); *State v. Brooks*, 739 So.2d 1223 (Fla. App. 5th 1999) (affirming trial court's decision to depart downwards in sentencing when defendant had consensual sex with minor).

King John makes no mention of it.[118] Edward Coke dusted off the Magna Carta and created a mythology that proved useful in parliamentary attacks on royal authority, but much of Coke's account has been dismissed by disinterested observers as "a skyscraper built out of . . . anachronisms."[119]

Many scholars have dissected anachronistic readings of other Chapters of the Magna Carta, manufactured to create a jury trial right and other rights nowhere present in the Great Charter. This Article's contribution has been to expose the anachronistic readings of Chapters 20 to 22. The claim that these Chapters, and the Magna Carta more broadly, embody a proportionality principle is true in a trivial sense that could be ascribed to every legal code in recorded human history. As one tries to extract more meaningful lessons, however, Chapters 20 to 22 are of little or no *legal* relevance to us, most notably because they are not addressed to the question of criminal punishment. The Magna Carta's significance today is not in explicating the law, but in mythologizing it, and in surrounding human-made law with the transcendence it perhaps requires, at some level, to enjoy legitimacy.

[118] *See* MCKECHNIE, *supra* note 15, at 120.
[119] Bill Shuter, *Tradition as Rereading, in* SECOND THOUGHTS: A FOCUS ON REREADING 79 (David Galef, ed., 1998) (quoting HERBERT BUTTERFIELD, MAGNA CARTA IN THE HISTORIOGRAPHY OF THE SIXTEENTH AND SEVENTEENTH CENTURIES 1969). The most caustic critique of the Magna Carta remains Edward Jenks, *The Myth of the Magna Carta*, 4 INDEPENDENT REVIEW 260 (1904).