

half centuries as the basic authority.<sup>6</sup> *Darnel's Case*,<sup>7</sup> in which the judges permitted the continued imprisonment of persons without bail merely upon the order of the King, was one of the moving factors in the enactment of the Petition of Right in 1628.<sup>8</sup> The Petition cited the Magna Carta as proscribing the kind of detention that was permitted in *Darnel's Case*. The right to bail was again subverted a half-century later by various technical subterfuges by which petitions for *habeas corpus* could not be presented,<sup>9</sup> and Parliament reacted by enacting the Habeas Corpus Act of 1679,<sup>10</sup> which established procedures for effectuating release from imprisonment and provided penalties for judges who did not comply with the Act. That avenue closed, the judges then set bail so high that it could not be met, and Parliament responded by including in the Bill of Rights of 1689<sup>11</sup> a provision "[t]hat excessive bail ought not to be required." This language, along with essentially the rest of the present Eighth Amendment, was included within the Virginia Declaration of Rights,<sup>12</sup> was picked up in the Virginia recommendations for inclusion in a federal bill of rights by the state ratifying convention,<sup>13</sup> and was introduced verbatim by Madison in the House of Representatives.<sup>14</sup>

Thus, in England, the right to bail generally was conferred by the basic 1275 statute, as supplemented; the procedure for assuring access to the right was conferred by the Habeas Corpus Act of 1679; and protection against abridgement through the fixing of excessive bail was conferred by the Bill of Rights of 1689. In the United States, the Constitution protected *habeas corpus* in Article 1, § 9, but did not confer a right to bail. The question is, therefore, whether the First Congress in proposing the Bill of Rights knowingly sought

<sup>6</sup> 1 J. STEPHEN, A HISTORY OF THE CRIMINAL LAW OF ENGLAND 233-43 (1833). The statute is summarized at pp. 234-35.

<sup>7</sup> 3 How. St. Tr. 1 (1627).

<sup>8</sup> 3 Charles 1, ch. 1. Debate on the Petition, as precipitated by *Darnel's Case*, is reported in 3 How. St. Tr. 59 (1628). Coke especially tied the requirement that imprisonment be pursuant to a lawful cause reportable on *habeas corpus* to effectuation of the right to bail. *Id.* at 69.

<sup>9</sup> *Jenkes' Case*, 6 How. St. Tr. 1189, 36 Eng. Rep. 518 (1676).

<sup>10</sup> 31 Charles 2, ch. 2. The text is in 2 DOCUMENTS ON FUNDAMENTAL HUMAN RIGHTS 327-340 (Z. Chafee ed., 1951).

<sup>11</sup> 1 W. & M. 2, ch. 2, clause 10.

<sup>12</sup> 7 F. Thorpe, *The Federal and State Constitutions*, H. R. Doc. No. 357, 59TH CONG., 2D SESS. 3813 (1909). "Sec. 9. That excessive bail ought not to be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

<sup>13</sup> 3 J. ELLIOT, THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE CONSTITUTION 658 (2d ed. 1836).

<sup>14</sup> 1 ANNALS OF CONGRESS 438 (1789).