The Enduring Value of the Past: Why History Suggests the Supreme Court Reconsider *Watson*, *Terry*, and the Doctrine that Followed

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Abstract

Two of the most important cases in U.S. criminal law, United States v. Watson and Terry v. Ohio, should be revisited according to the jurisprudence of late eighteenth-century America, when the Fourth Amendment came to be. This Note opens by comparing Kames's Historical Law-Tracts and Eden's Principles of Penal Law to illustrate contemporary discourse on natural law and positive law in relation to crime and punishment. This comparison demonstrates that America's Founders, through the Bill of Rights, embraced natural law principles like Eden to reject significant portions of the English criminal system, which had become heavily based in positive law with great approval from Kames. The Note then contextualizes the late eighteenth century in Anglo-American criminal law and analyzes the complexity in categorizing criminal conduct. This analysis showcases the state of the doctrine when the Constitution and Bill of Rights were being drafted to challenge assumptions made by the Supreme Court in Watson. It also questions the reliance by judges on Blackstone as an authoritative source for criminal law. Finally, the Note explicitly criticizes Watson and Terry, finding both opinions unjustifiable in light of the historical analysis conducted herein. The Watson Court improperly considered the relevant history, while the Terry Court unwisely ignored the historical context of the Fourth Amendment. Both cases are foundational, and both should be reconsidered.

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Introduction

In 1966, the Supreme Court decided in *Terry v. Ohio* that police officers may "stop and briefly detain a person" based on "reasonable suspicion," not "probable cause," stretching the Fourth Amendment's protection from restraints on liberty.[1] Not only have *Terry* stops themselves created significant harms for particular groups in the United States,[2] but the Supreme Court has applied *Terry* to justify further "evasion[s]" of constitutional protections from law enforcement.[3] Nine years later, relying on history—not

[1] *See* United States v. Sokolow, 490 U.S. 1, 7 (1989) ("In [*Terry*], we held that the police can stop and briefly detain a person for investigative purposes if the officer has a reasonable suspicion supported by articulable facts that criminal activity 'may be afoot,' even if the officer lacks probable cause."); United States v. Sokolow, 490 U.S. 1, 12 (1989) (Marshall, J., dissenting) ("The Fourth Amendment cabins government's authority to intrude on personal privacy and security by requiring that searches and seizures usually be supported by a showing of probable cause. The reasonable suspicion standard is a derivation of the probable cause command . . . .").

[2] *See* Susan A. Bandes, Marie Pryor, Erin M. Kerrison & Phillip Atiba Goff, *The Mismeasure of* Terry *Stops: Assessing the Psychological and Emotional Harms of Stop and Frisk to Individuals and Communities*, 37 Behav. Sci. L. 176, 180–87 (2019) (identifying harms to individuals, e.g., psychological harms to individuals with mental disabilities and pre-existing sexual trauma, and to communities, e.g., damage to trust, depressed civil and political engagement, and increased lawbreaking behavior).

[3] *See* United States v. Montoya De Hernandez, 473 U.S. 531, 558 (1985) (Brennan, J., dissenting) ("The Court supports its evasion of the warrant requirement . . . by analogizing to the *Terry* line of cases . . . today's opinion is the most extraordinary example to date of the Court's

Terry—the Supreme Court, in *United States v. Watson*, stretched the protections of the Fourth Amendment again. The majority in *Watson* held a warrant was not required for police officers to make full custodial arrests in certain circumstances.[4] Like *Terry*, the holding of *Watson* and its progeny, at the very least, altered the protections offered by the Fourth Amendment, but unlike *Terry*, *Watson*'s majority claimed history justified the holding. Today more than ever, American constitutional jurisprudence peers into the past to glean the meaning of the rather sparse words that organize government for and determine the rights of over three hundred million people. Through historical analysis of its own, this Note will show that the relevant history suggests reconsidering *Watson*, *Terry*, and the doctrine that followed, so that persons are protected from government intrusion in the way the Framers expected.

This Note is divided into three parts. Part I explores the natural law and positive law at the time of the Founding and drafting of the Constitution. To explore this debate, the Note compares two contemporary legal treatises, Lord Kames's *Historical Law-Tracts* and Sir William Eden's *Principles of Penal Laws*, finding that, at least for the Bill of Rights, the natural law principles espoused by Eden were more clearly embraced. Part II explores the development of Anglo-American criminal law in the late eighteenth century and analyzes the categorization of crimes in this period, building from the more philosophical analysis in Part I. In this part, the Note surveys important, contemporary treatises, especially Blackstone's *Commentaries*, Montesquieu's *Spirit of the Laws*, and Giles Jacob's *New Law-Dictionary*, showing the complexity in organizing the criminal law when America began and challenging the reliance of modern American courts on Blackstone. Finally, Part III critiques the Supreme Court's application of this history, and lack thereof, in two important criminal law cases: *United States v. Watson* and *Terry v. Ohio*. The Note challenges the reasoning of those cases based largely on observations from Part I and II.

Ultimately, this Note is a work of legal history that attempts to add a bit of clarity into an already well-explored, but still under-discovered, body of scholarship. The evidence discussed in this Note is not comprehensive, but it should be illustrative. Importantly, "[h]istory is not the past, but a map of the past drawn from a particular point of view to be useful to the modern traveler."[5] This Note aspires to be a map that helps the modern scholar, lawyer, or judge critically assess current understandings of criminal constitutional law. And it recognizes the special nature of legal history, described eloquently by Kames as follows:

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studied effort to employ the *Terry* decision as a means of converting the Fourth Amendment into a general 'reasonableness' balancing process . . . .").

[4] United States v. Watson, 423 U.S. 411, 414–24 (1976); *see also infra* Part III.A.

[5] Henry Glassie, Passing the time in Ballymenone: Culture and History of an Ulster Community 621 (1982).

> [T]he history of law is not confined to the feudal system. It comprehends particulars without end, of which one additional instance shall at present suffice. . . . In order to form a just notion of any statute, and to discover its spirit and intendment; we ought to be well informed how the law stood at the time, what defect was meant to be supplied, or what improvement made. . . .
>
> I have often amused myself with a fanciful resemblance of law to the river Nile. When we enter upon the municipal law of any country in its present state, we resemble a traveller, who, crossing the Delta, loses his way among the numberless branches of the Egyptian river. But when we begin at the source and follow the current of law, it is in that course no less easy than agreeable; and all its relations and dependencies are traced with no greater difficulty, than are the many streams into which that magnificent river is divided before it is lost in the sea.[6]

Though certainly "fanciful," Kames's comparison to the river Nile elucidates. While the law lacks a clear source point like a river, starting an analysis farther upstream provides a more manageable, informative body of evidence, rather than fighting through the "numberless branches" of later interpretations. This Note focuses on the Founding era to discern what it meant to be protected from government and to suggest where the Supreme Court went wrong discerning the same.

I. Competing Perspectives On Criminal Law: Eden And Kames

As will be explored further in Part III, the *Watson* Court improperly equated the modern with its historical antecedent and declared clarity where there was ambiguity, while the *Terry* Court ignored history and allowed government overreach unjustifiable in light of natural law principles. This Part will explore the tensions between positive law and natural law as applied to crime and punishment at the time of the Founding by looking at the illustrative treatises of Lord Kames (1696–1782) and Sir William Eden (1745–1814). The purposes of this Part are, mainly, to give a sense of the ideological debates present during the Framing of the Constitution, but also, to suggest that the Bill of Rights, including the Fourth Amendment, embraced natural law principles ignored by modern criminal law, in part because of the holdings in *Watson* and *Terry*.

Part IA identifies natural law and positive law as understood by America's Founders, recognizing the Bill of Rights to be based in natural law principles. Part IB describes why the author chose Kames and Eden for Part I of the Note. Part IC details Kames's and Eden's theories

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[6] Henry Home, Lord Kames, Historical Law-Tracts: The Fourth Edition with Additions and Corrections 4 (James A. Harris & Knud Haakonssen eds. 2019) (1792).

on punishment, recognizing both to be grounded in natural law. Part ID explores how Kames and Eden apply theory to the contemporary English criminal law, finding Kames separating from his own theory to praise the English system while Eden criticizes that system for its inconsistency with natural law. Part IE discusses the ideal state as imagined by Kames and Eden to explore how each theorist's ideas relate to the modern American state.

A. Natural Law vs. Positive Law

Before exploring the treatises, the analysis requires cursory, and inevitably too simplistic, descriptions of "natural law" and "positive law." Webster's 1828 Dictionary defined "law of nature" (natural law) to be "a rule of conduct arising out of the natural relations of human beings established by the Creator, and existing prior to any positive precept."[7] Essentially, natural law derives from collective morality, not any decision by a particular authoritative entity, and should guide human interaction regardless of the state apparatus. Positive law, on the other hand, has been described as "guidelines, statutes and codes which are imposed upon a country" and "dissimilar to natural law."[8] Positive law is the law that is created by a particular authoritative entity and exists only insofar as that entity exists. Notably, the common law could be separated from the "positive law"—in that common law forms through the decisions of courts while "positive law" could be constricted to the enactments of legislatures[9]—but, for the purposes of this Note, positive law subsumes the common law where it involves judicial lawmaking.[10]

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[7] To further clarify natural law, Webster gave the examples of "murder" and "fraud," which "would be crimes, independent of any prohibition from a supreme power." *Law*, Webster's Dictionary (1828), https://webstersdictionary1828.com/Dictionary/law [https://perma.cc/7CXM-Z2NU]; *see also Natural Law*, Black's Law Dictionary (2d ed. 1910), https://thelawdictionary.org/natural-law/ [https://perma.cc/2SCP-V5S2].

[8] *Positive Law*, Black's Law Dictionary (2d ed. 1910), https://thelawdictionary.org/positive-law/ [https://perma.cc/2X63-Y4AZ]; *see also The Term "Positive Law,"* Off. L. Revision Couns. U.S. House of Representatives, https://uscode.house.gov/codification/term_positive_law.htm (distinguishing natural law from positive law).

[9] Webster's 1828 dictionary describes "Unwritten or common law" as a "rule of action which derives its authority from long usage, or established custom, which has been immemorially received and recognized by judicial tribunals," which cannot be traced to "positive statutes" and only to the records of courts and reports of judicial decisions. Webster's, *supra* note 7.

[10] The phrase "judicial lawmaking" is included, not to pass any normative judgments on the activity, but to distinguish the common law that develops through alleged codification of the natural law from that which creates "new" rules. *See Judicial lawmaking*, Britannica, https://www.britannica.com/topic/court-law/Judicial-lawmaking-ref191256 [https://perma.cc/VZP2-4YQD]. The following discussion of Kames and Eden focuses on their treatises concerning the purpose of punishment and penal laws to explore how these jurists represent different legal philosophies at the time of the American Revolution; the source of the laws is less important. In addition, modern courts have viewed the common law as a form of positive law. *See, e.g.*, Judicial Watch, Inc. v. United States Senate, 432 F.3d 359, 363 (D.C. Cir. 2005) (rejecting the interpretation that standing, pursuant to *Lujan*, requires "the interest be one affirmatively protected by some positive law, *either* common law, statutory *or* constitutional") (Williams, J., concurring)

Enlightenment thinkers such as John Locke developed the ideas of natural law familiar to the founding generation.[11] These Enlightenment thinkers generally embraced ideas of natural rights and social contract theory, which are foundations of natural law as applied to government.[12] For example, Locke argued that the government only has its power from the consent of the governed, and people give this consent so the government may protect their natural rights—thus, the social contract. Importantly, the government does not determine natural rights, it only protects them. Laws intended to protect natural rights are consistent with and grounded by natural law. Positive law would be any law that does not protect natural rights, thereby creating new law. Examples of positive law include empowering an official to put any citizen to death without trial or making it illegal to possess a tool used only for coining.[13] As will be discussed, England's criminal justice system was criticized for its proliferation of capital offenses, known collectively as the "Bloody Code," which were disconnected from natural law principles.

The founding documents of the United States reflect positive law, natural law, and the tension between them. The most clear example of natural law comes in the most famous words of the Declaration of Independence, "We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness[,]" and the words that immediately follow, "That to secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the

(emphasis added); Sipe v. Equifax Info. Servs., LLC, No. 3:16-6103, 2017 U.S. Dist. LEXIS 7938, at *3 (S.D. W. Va. Jan. 20, 2017) (using the same phrase). Very recently, state judges have also treated these sources of law as equivalents in certain areas of constitutional law. *See* Lennette v. State, 975 N.W.2d 380, 415 (Iowa 2022) (Appel, J., concurring) ("*The common law or positive law* approach recognizes that the constitutional prohibition against unreasonable seizures and searches does not, despite numerous pronouncements to the contrary, impose a warrant requirement in all circumstances with carefully drawn exceptions.") (emphasis added).

[11] *See* Faretta v. California, 422 U.S. 806, 830 n.39 (1975) (citing Thomas Paine's description of the "natural right to plead [one's] own case" as an example of "the 'natural law' thinking that characterized the Revolution's spokesmen"); *cf.* Clinton Rossiter, *The Political Theory of Benjamin Franklin*, 76 Pa. Mag. Hist. & Biography 259, 260–61 (1952) ("[Benjamin Franklin] was the one American patriot to write influentially about the events of 1763–1776 without calling upon natural law, the rights of man, and the social contract."). America's Founders were students of the Enlightenment, reading Baron de Montesquieu, David Hume, and Adam Smith in addition to Locke. *See, e.g.*, Robert A. Ferguson, The American Enlightenment, 1750–1820 98 (1997) (describing John Dickinson's education); *see also id.* at 126 (describing the intellectual roots of the Declaration of Independence). Classical republicanism grew from these ideas and dominated early American thought. *See generally* Bernard Bailyn, The Ideological Origins of the American Revolution (1967); Joyce Appleby, Capitalism and a New Social Order: The Republican Vision of the 1790s (1984).

[12] *See* William Bristow, "2.1 Political Theory" *in Enlightenment*, Stan. Encyclopedia Phil. (2023), https://plato.stanford.edu/archives/fall2023/entries/enlightenment/ [https://perma.cc/YF98-URBA]; *cf.* Thomas McAffee, *The Bill of Rights, Social Contract Theory, and the Rights "Retained" by the People*, 16 S. Ill. L.J. 267, 267–68 & n.2 (1992) (identifying natural rights and social contract theory in context of government).

[13] *See* William Eden Auckland, Principles of Penal Law 298–302 (3d ed. 1775) (listing examples of laws of "positive institution").

governed . . . ."[14] The former quote identifies the natural rights recognized by America's Founders, and the latter quote describes the social contract. However, the Declaration of Independence is not the law, the Constitution is. While scholars argue the extent to which the Constitution embodies the natural law,[15] the history and text of the Bill of Rights make plain its natural law foundation.[16]

The first eight Amendments largely establish prohibitions against government that protect natural rights, while the final two amendments of the Bill of Rights suggest rights are protected by government, not defined by

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[14] The Declaration of Independence para. 2 (U.S. 1776).

[15] *Compare* John Hart Ely, Democracy and Distrust: A Theory of Judicial Review 49–50 (1980) (arguing the Constitution separated itself from the natural law tradition embodied by the Declaration of Independence and that references to the "natural law" by early American lawyers "functioned as little more than signals for one's sense that the law was not as one felt it should be"), *with* Charles S. Desmond, *Natural Law and the American Constitution*, 22 Fordham L. Rev. 235, 235–36 (1953) (arguing the Constitution itself "is explainable and understandable only in the light of natural law") *and* Harold R. McKinnon, *Natural Law and Positive Law*, 23 Notre Dame L. Rev. 125, 125 (1948) (arguing that natural law is the "foundation" of American jurisprudence "because it lies at the root of our juristic tradition" but a "stumbling block" of his time "because it is rejected by the prevailing philosophy" of the mid-twentieth century).

[16] Hamilton insisted a "bill of rights" to the Constitution was unnecessary because the document itself established appropriate protections, see The Federalist No. 84 (Alexander Hamilton), but the absence of an enumeration of certain rights raised objections to the Constitution, see Massachusetts v. Upton, 466 U.S. 727, 737 (1984) (Stevens, J., concurring) (citing 12 The Papers of Thomas Jefferson 438 (Boyd ed. 1955)). These objections led to the "affirmative prohibitions" on government action contained in the first eight Amendments. *See* Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519, 535 (2012). These prohibitions protect natural rights acknowledged by the Declaration of Independence, such as the right of speech or assembly, which are comprised within the term "liberty." *See* McIntyre v. Ohio Elections Comm'n, 514 U.S. 334, 336 n.1 (1995). Still, the Founders worried that affirmative prohibitions "could provide a 'plausible pretense' for the Government to claim powers not granted in derogation of the people's rights"—which led to the Ninth Amendment. *Upton*, 466 U.S. at 737 (Stevens, J., concurring); *see also* Richmond Newspapers v. Virginia, 448 U.S. 555, 579 & n.15 (1980) (Burger, C.J., plurality opinion) (describing the Ninth Amendment as a constitutional "saving clause"). The text of the Ninth Amendment—which reads, "[t]he enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people"—is clearly an expression of natural law. The Ninth Amendment on its face embraces Locke's social contract and asserts that natural rights are not recognized by government but protected by government. However, scholars disagree over its interpretation. *Compare* Thomas McAffee, *The Original Meaning of the Ninth Amendment*, 90 Colum. L. Rev. 1215, 1318 ("The history of the ninth amendment strongly suggests that this provision articulates no such theory [of natural rights and unwritten fundamental law in our constitutional system]."), *with* Steven J. Heyman, *Natural Rights, Positivism and the Ninth Amendment: A Response to McAffee*, 16 S. Ill. L.J. 327, 332–35 (1992) ("[T]he Ninth Amendment could limit powers by reference to rights only if the 'other[] [rights] retained by the people' derive from some independent source . . . a strong case can be made that these rights were understood to derive from natural rights doctrine."). Relatedly, the U.S. Supreme Court has protected unenumerated rights such as "the rights of association and of privacy, the right to be presumed innocent, and the right to be judged by a standard of proof beyond a reasonable doubt in a criminal trial, as well as the right to travel[.]" *See Richmond Newspapers*, 448 U.S. at 579–80 (Burger, C.J.). Finally, the Tenth Amendment on its face limits the powers of the national government to the terms of the Constitution, thus limiting the positive law that the government could establish.

it—a foundation of natural law.[17] Ultimately, England's abuses caused the Founders to be very concerned with "invasions on the rights of the people,"[18] and the Bill of Rights assured the new government would not do as the English government had done before through positive law. Based on the text and history of the documents, the above definitions of positive law and natural law, and the prior scholarship, this Note accepts the original Constitution to read largely as positive law but insists the Bill of Rights is an insertion of natural law principles.

B. The Texts: Why Kames and Eden?

Kames's *Law-Tracts* and Eden's *Principles* are valuable legal treatises for illustrating how natural law and positive law impacted ideas of government and criminal law at the time of America's Founding. Henry Home, better known as Lord Kames, was a thinker of the Scottish Enlightenment.[19] Kames wrote a philosophical history of Britain's law from the ancient systems of the Angli and Thuringi (two Germanic peoples who established kingdoms in the 6th and 7th centuries CE) to the overlapping but distinct Scottish and English jurisprudence of his day.[20] His *Historical Law-Tracts* proved a success, as it was reprinted in 1761, 1776, and 1792, translated to French in 1766, and earned Kames a place in the "Society of Citizens."[21] A contemporary of Kames, Sir William Eden, the future baron of Auckland, published the first edition of his treatise, *Principles of Penal Law*, in 1771.[22] Eden's *Principles* focused more on the law of his time in contrast to Kames's emphasis on legal history in the *Law-Tracts*. Eden admitted candidly in his *Principles* that he was advocating for a reformation of the English code of laws according to those "principles" which he described.

Kames's *Law-Tracts* and Eden's *Principles* were read by the founding generation. Most notably, Thomas Jefferson included extensive quotes from

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[17] *See Sebelius*, 567 U.S. at 535 (identifying "affirmative prohibitions . . . in the Bill of Rights" as restrictions on government); *Richmond Newspapers*, 448 U.S. at 579–80, n.15–n.16 (Burger, C.J.) (describing how certain unenumerated rights are constitutionally protected, in part, because of the Ninth Amendment's role as a "constitutional 'saving clause'").

[18] The Declaration of Independence para. 7 (U.S. 1776).

[19] *See* Kames, *supra* note 6, at ix–xii.

[20] *See generally id.*

[21] *Id.* at xiii–xix.

[22] Stephen M. Lee, *Eden, William, first Baron Auckland* (1744–1814), Oxford Dictionary Nat'l Biography (2009). William Eden was a member of the Eden family, which had an outsized role in British and colonial affairs in the eighteenth century. The last colonial Governor of Maryland was William's brother, Sir Robert Eden, and they were both likely relatives of Charles Eden, the second Governor of the Province of North Carolina. Jean B. Russo, *Eden, Sir Robert, first baronet* (1741–1784), Oxford Dictionary Nat'l Biography (2004); Troy O. Bickham, *Eden, Charles* (1673–1722), Oxford Dictionary Nat'l Biography (2004). The Auckland Islands south of New Zealand were given their name in honor of Eden. *Auckland Islands*, Britannica, https://www.britannica.com/place/Auckland-Islands [https://perma.cc/2UH9-V6T7].

both treatises in his Legal Commonplace Book (LeCB).[23] Commonplace books were collections of notes made by lawyers and students "to organize and make available to themselves for future reference the legal principles they gleaned from reading the reports on cases and the legal treatises that made up the main elements of eighteenth-century legal training."[24] Jefferson's inclusion of Kames and Eden in his LeCB indicates that the mind behind the Bill of Rights found both treatises noteworthy, identifying the works as important legal texts and marking them for future reference.[25] Evidence suggests Jefferson returned to Eden's *Principles* years later when advocating for criminal law reform in Virginia,[26] and the Supreme Court

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[23] *See* THOMAS JEFFERSON, JEFFERSON'S LEGAL COMMONPLACE BOOK 530 n.5 (David Thomas Konig & Michael P. Zuckert eds., Princeton ed. 2019).

[24] *Id.* at 1–2. According to the editors of the most recent reproduction of Jefferson's LeCB, "Jefferson seems mostly to have read through entire works, commonplacing those subjects he believed of particular importance as he reached them . . ." *Id.* at 2.

[25] It is generally accepted that Thomas Jefferson inspired the drafting of the Bill of Rights. *See, e.g.*, *The Bill of Rights: A Brief History*, AM. CIV. LIBERTIES UNION (Mar. 4, 2002), https://www.aclu.org/documents/bill-rights-brief-history [https://perma.cc/HRW8-TV2X]; Thomas Jefferson & James Madison, *Correspondence on a Bill of Rights (1787-1789)*, NAT'L CONST. CTR.: FOUNDER'S LIBRARY, https://constitutioncenter.org/the-constitution/historic-document-library/detail/thomas-jefferson-and-james-madison-correspondence-on-a-bill-of-rights [https://perma.cc/DBK2-Z32K]. Accordingly, the Supreme Court has recognized the importance of Jefferson (and Madison) when interpreting a right protected by the Bill of Rights. *See, e.g.*, Everson v. Bd. of Educ., 330 U.S. 1, 13 (1947) (interpreting First Amendment protection of religion).

[26] *See* 2 THOMAS JEFFERSON, THE COMMONPLACE BOOK OF THOMAS JEFFERSON: A REPERTORY OF HIS IDEAS ON GOVERNMENT, WITH AN INTRODUCTION AND NOTES BY GILBERT CHINARD 45–46 (John Hopkins ed. 1926); Michael Kraus, *Eighteenth Century Humanitarianism: Collaboration Between Europe and America*, 60 PA. MAG. HIST. & BIOGRAPHY 270, 270–71 (1936); Bradley Chapin, *Felony Law Reform in the Early Republic*, 113 PA. MAG. HIST. & BIOGRAPHY 163, 168–69 (1989). Jefferson seems to have been most impacted by Eden on matters of capital punishment. Eden characterized capital punishment as only appropriate when it was absolutely necessary. "Nothing, however, but the evident result of absolute necessity, can authorize the destruction of mankind by the hand of man." EDEN, *supra* note 13, at 25. Eden wrote that:

> The infliction of Death is not therefore to be considered, in any instance, as a mode of punishment, but merely as our last melancholy resource in the extermination of those from society, whose continuance among their fellow-citizens is become inconsistent with the public safety.

Id. Jefferson nearly copied this quote directly, rather than paraphrasing Eden's texts, as he had done elsewhere in his commonplace book. *See* JEFFERSON, COMMONPLACE BOOK, *supra* note 23, at 532. Jefferson also incorporated this quote into his proposed bill to the Virginia legislature to reform capital punishment:

> And whereas the reformation of offenders . . . is not effected at all by capital punishments, which exterminate instead of reforming, and should be the last melancholy resource against those whose existence is become inconsistent with the safety of their fellow citizens . . . .

64. A Bill for Proportioning Crimes and Punishments in Cases Heretofore Capital, 18 June 1779, NAT'L ARCHIVES: FOUNDERS ONLINE, https://founders.archives.gov/documents/Jefferson/01-02-02-0132-0004-0064 [https://perma.cc/E94R-GUQG]. This quote evokes discussions concerning the death penalty and whether the method of execution violates the Eighth Amendment's prohibition against "cruel and unusual punishment." In this chapter, Eden criticized, explicitly and implicitly, the history of rather "inhumane" punishments in the English penal system, a history of punishments that likely led the Framers of the Bill of Rights to include the Eighth Amendment. *See* Eden, *supra* note 13, at 25–29.

in 1885 referenced Eden's *Principles* authoritatively when interpreting the Fifth Amendment.[27] As for Kames's work, John Adams "endorsed [his] critique of feudalism," and Bentham read Kames's jurisprudence approvingly.[28] Yet, despite this evidence of readership, these treatises have received little attention in American legal scholarship thus far.[29]

These two treatises are particularly valuable, not because of their importance independently to the Founders, but because of what can be gained by comparing them. As described above, at least Thomas Jefferson read them both, but no evidence suggests the treatises were nearly as influential as Blackstone, Hale, or Hawkins. However, juxtaposing the treatises illustrates the tension between positive law and natural law in the Anglo-American tradition. Both Kames and Eden evoke a similar theory of punishment grounded in natural law principles. Yet, when assessing the contemporary English criminal law, Kames lauds the English system's turn to positive law while Eden criticizes the English system's departure from natural law principles. Understanding where the two treatises diverge in applying the principles to the state informs the critique of the Supreme Court's decisions in *Watson* and *Terry*. Modern U.S. criminal law is almost entirely positive law, yet the Bill of Rights—including the Fourth Amendment—was based in natural law. As shown below, Kames's *Law-Tracts* reads like a justification for a "war on crime," while Eden's *Principles* presents a critique salient to modern criminal justice advocates. Because Eden's treatise better embodies the natural law principles undergirding the Bill of Rights, modern American criminal law could learn from his *Principles* and better protect all persons from "invasions" on their rights.

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[27] *See* Nicholas McLean, *Livelihood, Ability to Pay, and the Original Meaning of the Excessive Fines Clause*, 40 Hastings Const. L.Q. 833, 863 & n.119 (2013) (citing Ex parte Wilson, 114 U.S. 417, 422 (1885)).

[28] Kames, *supra* note 6, at xiv–xv, xix. Note, John Adams was a "Federalist" and strong supporter of the Constitution, so he likely favored positive law, while Jeremy Bentham was one of the first legal positivists, see David Lyons, *Founders and Foundations of Legal Positivism*, 82 Mich. L. Rev. 722, 722 (1984), and a serious critic of the natural law elements of the Declaration of Independence and Bill of Rights, see Steven Macias, *Utilitarian Constitutionalism: A Comparison of Bentham & Madison*, 11 N.Y.U. J. L. & Liberty 1028, 1057 (2018) ("[With both documents], he complained of looseness of language and the idea of positive limitations on the sovereign legislature."); *accord id.* at 1046 ("That Bentham considered the language of natural rights nonsense is well enough known."). Bentham's legal ideas have also been recently compared to that of James Madison, the author of the U.S. Constitution. *See generally id.* at 1058–73. The Note finds that Kames's *Law-Tracts* accepted and even praised the positive law aspects of English criminal law, while Eden's *Principles* criticized the very same. *See infra* Part I.D. Therefore, Adams and Bentham's approval of Kames supports this finding, as they generally favor positive law.

[29] One example of the two treatises receiving considerable attention is David Lieberman, The Province of Legislation Determined: Legal Theory in Eighteenth-Century Britain (2002), but this book focused solely on English legal theory, not on the law of the United States or the relationship of these treatises to the Founders.

C. Theories on Punishment

Kames's *Historical Law-Tracts* and Eden's *Principles of Penal Law* espoused theories of punishment consistent with natural law—namely, arguing for proportionality. Kames's *Law-Tracts* prioritized criminal law, and he prefaced the historical analysis with an exposition of why punishment does and should exist. Kames explained, first, persons experience a "dread" of punishment following their own wrongful act and before punishment or forgiveness; second, all persons feel an "indignation" toward gross crimes even if they are not injured; and third, the person injured feels "resentment" no matter how slight the crime.[30] Thus, appropriate punishment relieves the dread, assuages the indignation, and gratifies the resentment.[31] In other words, punishment should match the dread, indignation, and resentment arising with any offense—all of which Kames defined in natural law terms.[32] These three elements of punishment reveal that it was a matter for all persons involved; punishment should bring resolution to the criminal,[33] the public at large,[34] and the person injured.[35] To achieve all these interests, the punishment must be proportional to the injury.[36] Proportionality assures that the criminal is relieved and not aggrieved, the public is assuaged and not outraged, and the person injured is gratified and not slighted.

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[30] *See* KAMES, *supra* note 6, at 10.

[31] *See id.*

[32] *See id.* at 8–11.

[33] The inclusion of "dread" suggests that personal accountability factors into appropriate punishment. The criminal should expect punishment because they recognize that their act was wrongful and will be redressed. KAMES, *supra* note 6, at 8 (asserting that "the sense of wrong" alone would not stop people from committing wrongs, but the "dread of punishment . . . is a natural restraint so efficacious, that none more perfect can be imagined"). Importantly, personal accountability for Kames is not so individualistic: dread comes not from one's own sense of wrong but from their recognition that they have done wrong within the society. Kames is assuming that the dread of punishment "must undoubtedly be universal," *id.* at 9, reflecting a belief in an innate, natural sense of justice.

[34] The inclusion of "indignation" reflects why injuries to individuals became public wrongs. Society at large is affected personally by the wrong, so society as a whole needs redress. Importantly, however, Kames said that indignation arises from "gross crimes." *See id.* at 11 ("Every heinous transgression of the law of Nature raise[s] indignation in all, and a keen desire to have the criminal brought to condign punishment."). Kames explained that "[a] slight injury done to a stranger, with whom we have no connection, raiseth our indignation, it is true, but so faintly as not to prompt any revenge." *Id.* That indignation varies with the severity of the injury suggests that the punishment, which assuages such an indignation, should be proportional to that severity.

[35] "Resentment" ultimately drives punishment for Kames. Like indignation, the degree to which "[r]esentment is raised" varies according to the "sense one ha[s] of the injury." *Id.* at 11. Because victims still had an active role in prosecution into the eighteenth century, *see infra* Part II.C, resentment drove the criminal process. Criminal proceedings only commence when the resentment is so great that the victim seeks redress. Once proceedings begin, the prosecution wields such resentment in pursuing punishment. KAMES, *supra* note 6, at 37, 45. Essentially, the criminal law evolved to channel "resentment" to assure the balance between "dread" and "indignation."

[36] *See* KAMES, *supra* note 6, at 20.

Eden's *Principles*, through more direct references to natural law, argued for proportionality in punishment as well. In his first chapter, Eden asked, "to what degree punishments may be carried"?[37] In his own words, "[t]he answer may in some measure be collected from those writings of Divine authority[.]"[38] This reference to these "writings of Divine authority" makes plain the natural law basis for Eden. Eden then wrote that it is the "unwritten law of God imprinted on the heart of Man; to that natural sympathy better felt than expressed, which forbids us to give unnecessary Pain to each other" or "to extend the severity of punishments beyond what is essentially necessary to the preservation and morality of society."[39] Specifically, Eden explained that, "punishment should be proportioned to the flagitiousness of the crime"—or, its moral offensiveness.[40] This moral offensiveness reflects an objective-like standard to guide punishment.[41] Ultimately, the

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[37] EDEN, *supra* note 13, at 5.

[38] *Id.*

[39] *Id.* at 5–6.

[40] Eden explained in his own footnote what he meant by the term "flagitiousness":

By the flagitiousness of a crime, I mean its abstract nature and turpitude, in proportion to which the criminal should be considered as more or less dangerous to society. And surely, in the eye of the Lawgiver, who as a Man must make allowances for the imbecillities of mankind, the abstract turpitude of the offence decreases in proportion to the inducements which naturally influence the mind of the offender.

Id. at 8–9 n.k. Notably, Cynthia Herrup found that, in the common law tradition, "felony" carried an understanding of significant moral offensiveness. Herrup described the early modern conception of felony, drawing from other secondary sources and legal treatises—including Pollock & Maitland and Blackstone. Herrup pointed out that, "[a] felonious act hurt someone deliberately; the wrong was malicious, not mistaken." CYNTHIA B. HERRUP, THE COMMON PEACE: PARTICIPATION AND THE CRIMINAL LAW IN SEVENTEENTH-CENTURY ENGLAND 2 (1987). Further, "felonies violated basic Biblical injunctions; they were sinful acts as well as crimes . . . . The influence of divine proscriptions in common law was more direct in criminal matters than in any other area of jurisprudence." *Id*. at 3. In her research of eastern Sussex around the turn of the seventeenth century, Herrup found that, of the 119 cases that "ended with orders for execution," only two did not concern "direct transgressions of the Ten Commandments." *Id*. As explored below, Eden's criticisms of the contemporary English system likely relate to the expansion of capital punishment to conduct that is not so flagitious as to deserve such a harsh punishment.

[41] *See* EDEN, *supra* note 13, at 5–6, 8–9; *cf.* 1 CHARLES DE SECONDAT, BARON DE MONTESQUIEU, THE SPIRIT OF THE LAWS 185 (Prometheus Books 2002) (1748) ("Liberty is in it's [*sic*] highest perfection when criminal laws derive each punishment from the particular nature of the crime. There are then no arbitrary decisions; the punishment does not flow from the capriciousness of the legislator, but from the very nature of the thing; and man uses no violence to man."). For example, murder is recognized as one of the most heinous acts three hundred years ago and today; therefore, according to those principles described before, murder *should* be punished most severely. *Cf.* WEBSTER'S, *supra* note 7 (identifying murder as example of natural law crime). Alternatively, forging money, though punished severely by England at the time of the Founding, is not recognized as one of the most heinous acts, so it should not be punished as severely as murder. The Supreme Court has adopted ideas of moral offensiveness in criminal law before. *See, e.g.*, District of Columbia v. Colts, 282 U.S. 63, 73–74 (1930) (declaring reckless driving to be a "grave offense" worthy of a jury trial because "[t]o drive such an instrumentality through the public streets of a city so recklessly 'as to endanger property and individuals' is an act of depravity that to characterize it as a petty offense would be to shock the general moral sense'"). Notably, this conception of proportionality—punishing conduct according to its moral offensiveness—does not create an unchangeable penal law; in fact, it encourages punishment to

proportionality arises from punishments only extending as far as necessary, guided by the "unwritten law of God" innately understood by all.

Kames's theory of punishment draws from natural law to reach the same emphasis on proportionality as Eden. Kames's formulation (1) requires the criminal to know their act is wrong and deserves punishment, (2) recognizes the public's desire for retribution varies with the degree of injury, (3) as does the injured party's desire, and so (4) punishment should balance the criminal's understanding of wrongfulness with desire for retribution from the public and individual. For Kames, the understanding of wrongfulness comes from that "unwritten law of God imprinted on the heart of Man" described by Eden.[42] For Eden, punishment may only extend so far as "essentially necessary" for "preservation" *and* "morality" of society, guided by the "unwritten law."[43] Thus, both theories rely on the "unwritten law"—the natural law—to determine proportionality. While these two treatises agree on the theory of punishment, they ultimately diverge when applying theory to practice.

D. Applying the Theory to Contemporary England

Eden and Kames agreed that punishment should balance the interests of the criminal and of society to reflect an innate, *natural* sense of justice. However, the two authors diverged significantly on application of this theory to contemporary England. Whereas Kames ultimately abandoned the natural law in favor of the interests of society, Eden did not waver in his *Principles*. Approving of the expansion of the English criminal code, Kames concluded that the England of his time was the "last and most shining period of our history."[44] Meanwhile, Eden viewed the English government as having deviated from its natural law foundations, creating a penal system that threatened the "safety of every individual" and the "general morality and happiness of the people."[45] For Eden, that system was in desperate need of reform. This Note argues that, by adhering closely to the natural law, Eden's criticisms of the English system better reflect the opinions of the Founders, especially

adapt with society. What shocks the moral sense today may not do so tomorrow. *See* Lawrence v. Texas, 539 U.S. 558, 578–79 (2003) (overruling *Bowers* which upheld "homosexual sodomy" laws and finding "[h]ad those who drew and ratified the Due Process Clauses of the Fifth Amendment or the Fourteenth Amendment known the components of liberty in its manifold possibilities, they might have been more specific. They did not presume to have this insight. They knew times can blind us to certain truths and later generations can see that laws once thought necessary and proper in fact serve only to oppress. As the Constitution endures, persons in every generation can invoke its principles in their own search for greater freedom.").

[42] *See* KAMES, *supra* note 6, at 8–9 (arguing while "[a] sense of wrong is of itself not sufficient to restrain the excesses of passion[,]" "the dread of punishment, which is felt even where there is no visible hand to punish, is a natural restraint so efficacious, that none more perfect can be imagined").

[43] *See* EDEN, *supra* note 13, at 5–6.

[44] KAMES, *supra* note 6, at 33.

[45] *See* EDEN, *supra* note 13, at 330–31.

the Framers of the Bill of Rights, who were discontented by England's burgeoning positive law.

1. Comparing Theories of Kames and Eden on Punishment by the State

Comparing Kames's and Eden's theories on state punishment reveals why the two treatises view contemporary England quite differently. Though Kames devised a delicate balance between offender, victim, and society to achieve a theoretical proportional punishment,[46] he ultimately argued that the government should do what it deems best for society. Kames wrote that, though preserving a "strict proportion betw[een] a crime and its punishment" is important, it should not be the "only or chief view of a wise legislature."[47] Instead, "municipal regulations" are justified to preserve the peace of society, regardless of the wrongfulness of the conduct.[48] Marking an ultimate departure from his appeals to natural law, Kames concluded that, "in regulating the punishment of crimes, two circumstances ought to weigh . . . the immorality of the action, and its bad tendency; of which the latter appears [most important], as the peace of society is an object of much greater importance, than the peace, or even life, of a few individuals."[49] This conclusion clearly departs from Blackstone's ratio—that "it is better that ten guilty persons escape, than that one innocent suffer"[50]—which has factored into the mythology and formulation of American law. After all, federal and state courts alike have invoked Blackstone's ratio when defending rights that guard against what Kames advocates for, tolerating conviction of the innocent for the sake of society.[51]

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[46] *See supra* Part I.C.

[47] Kames, *supra* note 6, at 41.

[48] *Id.* (writing "a crime, however heinous, ought to be little regarded, if it had no bad effect in society" but "a crime, however slight, ought to be severely punished, if it tend[s] greatly to disturb the peace of society"). For example, Kames argued treason should be punished stiffly, even if it never becomes an overt act, because treasonous acts "tend greatly to disturb the peace of society." *See id.*

[49] *Id.*

[50] 4 William Blackstone, Commentaries on the Laws of England 231 (Ruth Paley ed., Oxford Univ. Press 2016) (1783).

[51] *See, e.g.*, Coffin v. United States, 156 U.S. 432, 454–56 (1895) (invoking ratio for presumption of innocence); Schlup v. Delo, 513 U.S. 298, 325 (1995) (invoking ratio to support a "somewhat less exacting standard of proof on a habeas petitioner alleging a fundamental miscarriage of justice"); Prost v. Anderson, 636 F.3d 578, 582 (10th Cir. 2011) (Gorsuch, J.) (invoking ratio for presumption of innocence, right to trial by jury, and "a range of evidentiary and procedural guarantees secured by the Constitution and multifold statutes"); Ingram v. Wayne Cnty., 81 F.4th 603, 627 (6th Cir. 2023) (Thapar, J., concurring) (invoking ratio for speedy process); Pleasant Grove City v. Terry, 478 P.3d 1026, 1032–34 (Utah 2020) (invoking ratio to disallow legally impossible verdicts); State v. Grevious, 172 Ohio St. 3d 171, 191 (Ohio 2022) (Donnelly, J., concurring) (acknowledging ratio justifies "beyond-reasonable-doubt standard"); State v. Tucker, 982 N.W.2d 645, 666–67, 667 n.4 (Iowa 2022) (McDermott, J., dissenting) (invoking ratio to argue for more exacting review of mistakes by lower courts in criminal trials).

Alternatively, Eden prioritized natural law principles as a check on government. Eden explained that, "[s]tate-punishments are to be considered then as founded on, and limited by, first, natural Justice; secondly, public Utility: and it will be sh[o]wn, that, in the pursuit of those great ends, Wisdom and Mercy should go hand in hand."[52] Eden's "natural Justice" reflects what is right by the individual, while Eden's "public Utility" reflects what is right by society. Notably, punishments must be "founded on" and "limited by" the two ends of "natural Justice" and "public Utility." Therefore, for Eden, a punishment can only extend so far as it addresses these ends. Only what is absolutely necessary is justified by nature itself.

Whereas Kames prioritizes "the peace of society" above even the "life . . . of a few individuals," Eden insists that a state must consider the individual and society together. Eden's "natural Justice" and "public Utility" map onto Kames's "immorality of the action" and "its bad tendency," respectively. While Eden still recognizes the needs of society at large, his formulation places "natural Justice" in a leading role. In addition, Eden's "natural Justice" connects to his idea of "flagitiousness," or moral offensiveness, reflecting that the seriousness of a crime should primarily determine its punishment. Importantly, both Eden and Kames argued that punishments should be proportional based on natural law principles. And yet, Kames concluded that the interests of the society—the public at large—overrides the interests of the criminal and even the victim for a state determining how to punish.

2. Comparing Views of Kames and Eden on Contemporary England

Turning to contemporary England, Kames praised the English criminal code despite its significant divergence from natural law principles. Kames implicitly praised England in *Law-Tracts* by referring to his day as the "most shining period of history,"[53] approving severe punishment of even slight crimes if they "tend greatly to disturb the peace of society."[54] This approval of indiscriminate punishment is even more significant given the English criminal code at the time. In Kames's lifetime, England saw a proliferation of capital offenses known collectively as the "Bloody Code."[55] As Eden and

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[52] Eden, *supra* note 13, at 6.

[53] Kames, *supra* note 6, at 33.

[54] *Id.* at 41.

[55] *See* Executions: 700 Years of Public Punishment 140–41 (Jackie Keily ed., 2022); *see also* Stephen Halliday, Newgate: London's Prototype of Hell 76 (2012) ("A further device for keeping the prisons empty was the enactment, from the late seventeenth century, of what became known as the Bloody Code, whereby those found guilty of an increasing number of offences, principally involving property, were made subject to the death penalty. In 1688 there were about fifty capital crimes, most of which had been added by Acts of Parliament to the Common Law offences of treason, murder, arson, robbery and grand larceny, but from that date there followed a series of statutes creating new capital offences."). Writing in the mid-eighteenth century, Blackstone recognized that, "by act of parliament," over 160 "actions which men are daily liable to commit" were made "felonies without benefit of clergy; or, in other words, to

others criticize extensively, the punishments outlined in the "Bloody Code" far outweighed the seriousness of the crimes.[56] And yet, despite Kames's theory on punishment, he approves of this form of punishment wielded by the English government.

In contrast, Eden strongly criticized the contemporary English criminal law. Specifically, Eden recognized that the law of England at the time was burdened by obsolete and outdated statutes. He found these statutes to be disconnected from the "natural Justice" on which punishment should be limited—i.e. from the seriousness of the crime. For example, Eden criticized England's larceny statutes, as they determined punishment by the amount of money rather than the act itself. Eden recognized "[m]oney, which in its nature is of fluctuating value," to be an improper "standard-measure of criminality."[57] Importantly, Eden did not oppose the creation of all arbitrary laws, though he suggested that the state should limit any positive laws.[58]

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be worthy of instant death." BLACKSTONE, *supra* note 50, at 12 (citing OWEN RUFFHEAD, THE STATUTES AT LARGE, FROM MAGNA CHARTA, TO THE END OF THE LAST PARLIAMENT (1763)). That number explicitly excludes those felonies that allow the mitigation of benefit of clergy. *See* KEILY, *supra*, at 12 (finding the actual number of capital offences to be over 200).

[56] *See* EDEN, *supra* note 13, at 290–94. Like Eden, Blackstone gave a "staggering" criticism of the death penalty, especially as it related to the proliferation of capital crimes unconnected to the moral offensiveness of common law felonies—i.e. the Bloody Code. Holly Brewer provided an eloquent summary of his criticism:

> The red robes of the hanging judges would be stained with blood that indicted them and the legislators behind them if they executed any without a clear mandate from God. Those who "shed the blood of our fellow creature" must have the "fullest conviction of our own authority." "For life is the immediate gift of God to man" and cannot be taken but "by clear and indisputable demonstration" that God would command it. Not the lawbreaker, but the legislator is the criminal with blood on his hands if he levies the death penalty without this warrant from God. "The guilt of blood, if any, must lie at their doors, who misinterpret the extent of their warrant; and not at the doors of the subject, who is bound to receive the interpretations, that are given by the sovereign power."

HOLLY BREWER, BY BIRTH OR CONSENT: CHILDREN, LAW, & THE ANGLO-AMERICAN REVOLUTION IN AUTHORITY 217 (2005) (quoting BLACKSTONE, *supra* note 50, at 4–7, 14–15). While this Note will challenge relying on Blackstone's *Commentaries*, the *Watson* majority did rely on the treatise. *See infra* Part III.A. Blackstone criticized the expansion of "felony" to offenses beyond the "clear mandate of God," and Eden went even farther. Brewer found Thomas Paine, Thomas Jefferson, and Benjamin Rush all embraced these criticisms of "the bloody code" as well. BREWER, *supra*, at 217; *accord* Chapin, *supra* note 26, at 167–69 (describing Thomas Jefferson's efforts at reform). Therefore, if the Framers indeed adopted the common law, they likely would reject those English statutes which diverged so drastically from the common law—and natural law principles undergirding it. Notably, those statutes which formed the Bloody Code were passed in the lifetime of America's Founders; for example, the 1723 Waltham Black Act was passed when Benjamin Franklin was already an apprentice and Samuel Adams a toddler. *See* HALLIDAY, *supra* note 55, at 76–77.

[57] EDEN, *supra* note 13, at 292 (referencing a larceny statute alleged to apply since 1109—six centuries before Eden was writing—that made it a capital offense to steal over twelve pence); *see also* HERRUP, *supra* note 40, at 47 ("The division between grand and petty larceny (whether the stated value of the stolen property was twelve pence or more) had gone unchanged since the medieval era, so by the sixteenth and seventeenth centuries it failed to reflect accurately the true gravity of offenses.").

[58] According to Eden, even though "the emergencies of society" require the state, on occasion, "to deviate from the principles of justice and humanity," *see* EDEN, *supra* note 13, at 12, "[l]aws made on the spur of the occasion, should have a short and limited duration," *id.* at 18–19.

Essentially, laws that are necessary for a particular time should not be given the same permanence given to those laws that align with the "unchangeable" "principles of justice and humanity."[59] For example, following the plague in the mid-fourteenth century, Parliament passed the Statute of Labourers in 1351 prohibiting a raise in wages[60] and making it a capital offense for masons to "confederat[e]" accordingly.[61] Despite the labor shortage having long passed, this law remained on the books, carrying the same penalty as murder. Eden instructed that, "[o]bsolete and useless statutes should be repealed, for they debilitate the authority of such as still exist and are necessary."[62] These assertions reflect Eden the natural law adherent and Eden the reformer.[63]

Eden defines these laws to be positive laws. *See id.* at 305 (defining positive laws as "those, which do not flow from the general obligations of morality, and the general condition of human nature, but have their reason and utility, in reference to the *temporary* advantage of that particular community for which they are enacted").

[59] *See id*. at 12.

[60] Statute of Labourers 1351, 25 Edw. 3 c.2.

[61] *See* Labourers Act 1425, 3 Hen. 6. c.1; *see also* Eden, *supra* note 13, at 19–20.

[62] Eden, *supra* note 13, at 19.

[63] Similarly, Eden implied that the burgeoning criminal code and disproportionately severe punishments in England raised issues of consistent adjudication and due process. *See id.* at 20–21, 229. Eden made further criticisms of contemporary English trials and punishment relevant to modern and contemporary critics of the English system. First, Eden believes that punishment should be proportional to the wickedness of the crime, and death imposed only when absolutely necessary. *See* Eden, *supra* note 13, at 5–6, 25. Second, Eden finds most corporal punishments to be cruel and "inconsistent with decency and humanity." *See id.* at 58–59, 62–63. Third, Eden argues that infamy—a status that limits rights of the designated, including the right to testify—should be restricted to only those crimes that are infamous; for example, while it may be criminal to "engross corn" or "publish a pamphlet offensive to government," "mercantile avarice" or "political sedition" have "no connection with competence of testimony." *See id.* at 60–62. Notably, Eden would probably take great issue with the expansiveness of collateral consequences in the modern United States related to conviction. *See generally* Am. Bar Ass'n, *Collateral Consequences of Criminal Convictions: Judicial Bench Book*, National Criminal Justice Reference Service (Mar. 2018), https://www.ojp.gov/pdffiles1/nij/grants/251583.pdf [https://perma.cc/R8WR-G6ZN]. Fourth, Eden suggests that, as per the Magna Carta, fines should never be extended "so far, as to take from [the delinquent] the implements, and means of his profession, and livelihood; or to deprive his family of their necessary support." Eden, *supra* note 13, at 73. Eden also argued that "[a]s a further safeguard against possible oppression, all grants and promises of fines, and forfeitures, of particular persons, before conviction are illegal and void." *Id.* at 73–74. The criminal system in the modern United States, in the way it imposes costs and fines on the accused, pleaded, and convicted, runs afoul of those principles put forth by Eden here. *See generally* Alexandra Natapoff, Punishment Without Crime (2018). Finally, Eden recommends that trials for more serious crimes should be given a "proportionable delay" so that public passions may fade and the prosecution and defense may prepare, but not so long that the delay "destroy[s] the promptitude of punishment, which is requisite to make the suffering of the offender the apparent consequence of his offense." Eden, *supra* note 13, at 323–24. This balance put forth by Eden reflects the balance of the "speedy trial" and receiving effective assistance of counsel in the modern U.S. criminal system. While the Sixth Amendment says explicitly that "the accused shall enjoy the right to a speedy and public trial," the Supreme Court has interpreted the Sixth Amendment to guarantee a right to effective counsel as well. *See* McMann v. Richardson, 397 U.S. 759, 771 n.14 (1970); *see also* Strickland v. Washington, 466 U.S. 668, 686 (1984). Eden's observations on punishment and trials reflect natural law principles and reveal ideas that were relevant to and likely incorporated by the Framers of the Constitution and Bill of Rights.

In sum, Kames's *Law-Tracts* suggests that criminal law should be a tool to protect society, prioritizing the good of all over the good of any individual. Eden's *Principles* suggests, in contrast, that criminal law must account for both society and the individual, being careful not to punish individuals too harshly. Kames approves of the English system because he believed the Bloody Code effectively maintained a peaceful society, regardless of any overreach into relatively innocuous conduct. Eden strongly criticizes the system because he viewed the Bloody Code as extending beyond the "natural Justice" limit on punishment. Despite espousing a theory of punishment based on natural law, Kames praises the positive law of England. Eden, on the other hand, finds the divergence from the natural law unbefitting. These opposing perspectives embody different attitudes toward English criminal law that were passed on to America's Founders.

3. Comparing the Ideas of Kames and Eden on Criminal Law to the U.S. Constitution

America's Founding documents are not clear on the theoretical underpinnings of U.S. criminal law. Arguably, the Constitution embraces Kames's ideas by affording Congress the power to enact criminal laws relating to counterfeiting, piracy, crimes on the high seas, offenses against the law of nations, and treason, and the power to make other laws "necessary and proper" for carrying out those and other powers.[64] In addition, the First Congress passed a crime bill in 1790 that caused the Attorney General to remark a generation later that "we have copied, closely enough, the bloody code of England[.]"[65] This Crimes Act of 1790 did not include "rapes, nor arsons, nor burglaries, nor many others of a high grade,"[66] which would be justified according to natural law.[67] This evidence could suggest America's Founders adopted ideas like Kames's, but the story does not stop there.

The full story of early American criminal law requires looking deeper. The original Constitution placed internal limits on Congress, such as prohibiting "bills of attainder," and the Bill of Rights clearly limited the power of the U.S. government further.[68] Notably, the Bill of Rights was ratified

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[64] *Congressional Authority to Enact Criminal Law: An Examination of Selected Recent Cases*, Cong. Rsch. Serv. (Mar. 27, 2013), https://crsreports.congress.gov/product/pdf/R/R43023#:~:text=The%20Constitution%20vests%20Congress%20with,power%20to%20regulate%20interstate%20commerce [https://perma.cc/P9EN-3KLV].

[65] *Memoranda from Richard Rush [to President James Madison], 24 November 1816*, Founders Online, National Archives, https://founders.archives.gov/documents/Madison/03-11-02-0538 [https://perma.cc/XCG2-D3UF]. For a description of the Bloody Code, see Keily, *supra* note 55, at 12; Halliday, *supra* note 55, at 76–77.

[66] *See Memoranda from Richard Rush*, *supra* note 65.

[67] *See* Webster's, *supra* note 7. These examples were among the few felonies recognized in medieval England. *See* 1 Nigel Walker, Crime and Insanity in England 29 (1968).

[68] *See, e.g.*, U.S. Const. art. I, § 9 (prohibiting bills of attainder); Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519, 535 (2012) (identifying Bill of Rights as restrictions on government power).

after the Crimes Act of 1790. When pushing reform of Virginia's criminal code in the late 1770s, Thomas Jefferson, who inspired the Bill of Rights, wrote to a friend that, though the English common law tradition was simple to apply, it was "revolting to the humanised feelings of modern times."[69] This same reform effort saw Jefferson adopt Eden's ideas.[70] Importantly, most criminal law was managed by states at the time. Richard Rush, when acknowledging the similarity of the federal criminal code to the Bloody Code, recognized that the codes of "nearly all the states of the union" were more "mitigated"[71]—i.e. they were less severe. Therefore, limitations within the Constitution and Bill of Rights, and the divergence of criminal codes by the states, suggests America's Founders had a distaste for the Bloody Code of England—like Eden. At the very least, and most importantly, the Bill of Rights favored Eden's ideas in establishing protections from the arbitrary criminalization of conduct praised by Kames.

E. The Ideal Government for Eden and Kames

This section lastly considers the ideal government imagined by each of Eden and Kames. The analysis below reveals that the modern United States resembles Kames's notion of ideal government more than it does Eden's, suggesting a divergence from those natural law principles undergirding the Bill of Rights, including the Fourth Amendment.

Kames largely commended the English legal system of his time, viewing it as a model. For Kames, the government needed to wield the "power of the sword" to "create awe and submission in the people."[72] Rather than fostering a "love for the laws," good governance was about forcing the people to submit. This conclusion diverges significantly from the social contract of natural law; the people are not consenting to a collective body; rather, the collective body is forcing them to submit.[73] Ultimately, Kames's ideas about the ideal state mirror the contemporary English state—and resemble the modern American state.

Alternatively, Eden's ideal government gains favor from its citizens by clearly prescribing proportional punishments. Eden argued that "public virtue" is the "true end of government" and defined public virtue as "*the love of the laws*."[74] Eden's "public virtue bears a proportion to political freedom" as

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[69] *From Thomas Jefferson to George Wythe, 1 November 1778*, Nat'l Archives: Founders Online, https://founders.archives.gov/documents/Jefferson/01-02-02-0086 [https://perma.cc/9GPZ-9EQ5]; *accord Memoranda from Richard Rush*, *supra* note 65 ("Perhaps some explanation of the greater harshness of that of the U. States may be found in this: that most of its capital crimes . . . were made so by the old act of April 30, 1790. Now, it is since this epoch, that, both in Europe and in our own country, but especially in the latter, the progress of humane and enlightened reform has been so considerable.").

[70] *See* Jefferson, *supra* note 26, at 45–46; Chapin, *supra* note 26, at 168–69.

[71] *See Memoranda from Richard Rush*, *supra* note 65.

[72] Kames, *supra* note 6, at 33.

[73] *See supra* Part I.A (describing social contract theory).

[74] Eden, *supra* note 13, at 308 (emphasis in the original).

well.[75] Therefore, the ends of government are achieved by fostering public virtue, which relies directly on the political freedoms of the people. Both "harsh and sanguinary" and "vague and useless" laws threaten political freedom, thus undermining good governance.[76] Eden emphasizes the role of the individual in their relationship with the state, building on the social contract theory of the natural law tradition. The government exists because people recognize that they must sacrifice some freedoms for security, but the government should not extend beyond what people sacrifice.[77] Harsh, unclear, and useless laws threaten the implicit contract. After all, Eden declared that "[i]t is essential to political freedom, and consequently to public virtue, that no man be compellable to do any thing, to which the laws of society do not compel him; or to abstain from any thing which the laws have not prohibited."[78] Further, those laws must be "clearly obvious to common understandings, and fully notified to the people."[79]

Eden's ideas reflect the natural law embraced by the Framers of the Bill of Rights.[80] Accordingly, Eden's *Principles*, though not necessarily an inspiration to the Framers, reflects the same ideals they embraced. Because Eden's criticisms of the English state match those of America's Founders, and because modern American criminal law resembles late-eighteenth-century English law, America's Founders would find the current doctrine inconsistent with the Constitution. After all, the Fourth Amendment and the rest of the Bill of Rights were created to protect individuals from the government abuses of old England—abuses that have reemerged, in substantial part, because of *Watson* and *Terry*. These ideas will be explored further in Part III.

II. Defining Criminal Terms In The Constitution

The juxtaposition of Kames's and Eden's treatises in Part I demonstrates the contours of natural law and positive law as relevant to America's

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[75] *Id.*

[76] *Id.*

[77] *See supra* Part I.A (describing social contract theory); *cf.* Montesquieu, *supra* note 41, at 150 ("It is true that in democracies the people seem to act as they please; but political liberty does not consist in an unlimited freedom. In governments, that is, in societies directed by laws, liberty can consist only in the power of doing what we ought to will, and in not being constrained to do what we ought not to will . . . . Liberty is a right of doing whatever the laws permit, and if a citizen could do what they forbid he would be no longer possessed of liberty, because all his fellow-citizens would have the same power."). Notably, Montesquieu observed that England is the "[o]ne nation . . . in the world" that "has for the direct end of its constitution political liberty." *Id.* at 151. However, Montesquieu recognizes the limitation of his inquiry: "It is not my business to examine whether the English actually enjoy this liberty or not. Sufficient it is for my purpose to observe that it is established by their laws; and I inquire no further." *Id.* at 162. Unsurprisingly, Eden, who found this "direct end" of the English constitution to be largely unrealized, remarked that Montesquieu "was only acquainted with the theory of English law." Eden, *supra* note 13, at 319.

[78] Eden, *supra* note 13, at 309.

[79] *Id.* at 312.

[80] *See supra* Part I.A (describing how the Bill of Rights is grounded in natural law).

Founding and early criminal law. From the Declaration of Independence, which declares "unalienable Rights" originating from a "Creator," to the U.S. Constitution, whose preamble identifies the "People" as the source of law with no mention of God or a Creator, the modern observer can see concepts of natural law and positive law factoring significantly in the country's foundational documents.[81] However, as discussed in Part I, at the very least, the Bill of Rights was framed, in part, against English criminal law, which had diverged from natural law principles. This Note will not explore the philosophical contours further. Instead, this Note moves to investigate the historical background of U.S. constitutional law in the United States keeping in mind the natural law principles explored above.

As discussed in the introduction, criminal constitutional law has an outsized role in shaping the rights and liberties of modern U.S. residents. Part I explored ideas that shaped how the Founders viewed this area of law, while this section will track the law itself. This analysis will show how "felony" meant something very different when the Bill of Rights was imagined—crimes punishable by death—and how the modern felony-misdemeanor binary has little historical relevance. As a result, this analysis challenges the assumptions that support the Court's ruling in *Watson* about "felony" and "ancient" common law rules.

Part IIIA notes all criminal terms as they appear in the U.S. Constitution. Part IIIB identifies the medieval origins of the term "felony" and English criminal law. Part IIIC tracks the development of England's criminal legal system up to the American Revolution. Part IIID identifies how the treatises of Montesquieu, Blackstone, and Eden organize the criminal code, noting how Eden's criticisms of English law likely resemble the attitudes of America's Founders—at least, the drafters of the Bill of Rights. Part IIIE compares the approach of Giles Jacob and Blackstone to "felony" with an eye toward *Watson*'s holding, finding no clear common law rule and suggesting Blackstone should not be so authoritative.

A. Crime in the Constitution

As the United States Supreme Court has said constantly of late, one must start with the text.[82] In the U.S. Constitution, words like crime, felony, offense, or misdemeanor—terms grouped as "criminal terms" for the purposes of this Note—appear only sparingly. Though few, the criminal terms identified are interspersed across the Constitution. "Felony" appears twice in Article I,[83] "misdemeanor" appears once as a catch-all term in

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[81] *See* U.S. Const. pmbl.; The Declaration of Independence para. 2 (U.S. 1776).

[82] *See*, *e.g.*, Gamble v. United States, 139 S. Ct. 1960, 1965 (2019) ("We start with the text of the Fifth Amendment."); Fulton v. City of Phila., 141 S. Ct. 1868, 1894 (2021) (Alito, J., concurring) ("[A proper interpretation of the Free Exercise Clause] must begin with the constitutional text.").

[83] The first appearance of a criminal term comes in Article I, Section vi. In describing the privileges of U.S. Congressmen, Article I states that congressmen "shall in all Cases,

Article II's Impeachment Clause,[84] "crime" appears twice in Article III,[85] and "felony" and "crime" appear in Article IV.[86] In addition, the Fifth,[87] Sixth,[88] Thirteenth,[89] and Fourteenth[90] Amendments contain criminal terms.

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except Treason, Felony and Breach of the Peace, be privileged from Arrest during their Attendance at the Session of their respective Houses, and in going to and returning from the same . . ." U.S. CONST. art. 1 § 6 (emphasis added). This constitutional provision does not include a catch-all term like others do. The provision singles out three exceptions to the exception: (1) treason, (2) felony, and (3) breach of the peace. The next criminal term is used in outlining Congress's enumerated powers in Section viii of Article I. "The Congress shall have Power . . . [t]o define and punish *Piracies and Felonies committed on the high Seas*, and *Offenses against the Law of Nations* . . ." U.S. CONST. art. I, § 8 (emphasis added). Whether or not "offenses against the Law of Nations" is a catch-all term or a distinct offense is not so clear, and the Supreme Court has never addressed the question directly.

[84] Article II, Section iv provides that "[t]he President, Vice President and all civil Officers of the United States, shall be removed from Office on Impeachment for, and Conviction of, *Treason, Bribery, or other high Crimes and Misdemeanors*." U.S. CONST. art. II, § 4 (emphasis added). This clause clearly contains a catch-all provision—"or other"—though the catch-all provision contains its own qualifier—"high." Further, Blackstone used "crimes and misdemeanors" to include all offenses. *See* BLACKSTONE, *supra* note 50, at 3. Though the clause has drawn great interest of late, its meaning is not apparent on its face.

[85] This term appears where the original Constitution describes the nature of criminal trials. *See* U.S. CONST. art. III, § 2 ("The Trial of all *Crimes*, except in Cases of Impeachment; shall be by Jury; and such Trial shall be held in the State where the said *Crimes* shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed.") (emphasis added). Note, the Constitution specifies that this clause applies to "all Crimes," which suggests any criminal offense. But not all offenses were necessarily "crimes." *See* BLACKSTONE, *supra* note 50, at 3 (distinguishing between "crimes" and "misdeme[a]nors").

[86] The Interstate Extradition Clause of Article IV provides: "A Person charged in any State with *Treason, Felony, or other Crime*, who shall flee from Justice, and be found in another State, shall on Demand of the executive Authority of the State from which he fled, be delivered up, to be removed to the State having Jurisdiction of the *Crime*." *See* U.S. CONST. art. IV, § 2 (emphasis added). In this Clause, "other Crime" functions as the catch-all term for Treason and Felony. The use of "other Crime" to close out the clause also suggests that "Crime" encompasses both "Treason" and "Felony."

[87] The Fifth Amendment is the first amendment to use a criminal term. The Grand Jury Clause contains the first use: "No person shall be held to answer for *a capital, or otherwise infamous crime*, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger . . ." U.S. CONST. amend. V (emphasis added). Note, the appearance of "capital" and "infamous" here are the first and only uses in the Constitution. The Double Jeopardy Clause contains the second term: "nor shall any person be subject for the *same offence* to be twice put in jeopardy of life or limb . . ." *Id.* (emphasis added). Importantly, the clause uses "offence" here, not "crime." Finally, the Self-Incrimination Clause stated that no one "shall be compelled in any *criminal case* to be a witness against himself." *Id.* (emphasis added).

[88] The Sixth Amendment also uses criminal terms. "In all *criminal prosecutions*, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the *crime* shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence." U.S. CONST. amend. VI (emphasis added). Note, the Sixth Amendment uses the phrase "criminal prosecutions," not "criminal case" like the Fifth Amendment, and all the rights therein listed apply in "criminal prosecutions."

[89] Section 1 of the Thirteenth Amendment provides: "Neither slavery nor involuntary servitude, except as a punishment for *crime* whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction." U.S. CONST. amend. XIII, § 1 (emphasis added).

[90] Section 2 of the Fourteenth Amendment says: "when the right to vote at any election . . . is denied . . . or in any way abridged, *except for participation in rebellion, or other crime* . . . ."

However, none of these constitutional amendments or clauses were referenced by the Supreme Court in *Terry* or *Watson*. Instead, those foundational cases were decided based on the Fourth Amendment of the Constitution, which provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Nevertheless, the criminal terms that are used elsewhere in the Constitution appear in contemporary treatises. Exploring these treatises should help illuminate how the Founders thought of "crime," "felony," and "misdemeanor" so that the Court today might reconsider how precedents like *Watson* and *Terry* have treated these criminal terms.

B. A Brief Medieval History of Felony & Criminal Law

The Framers of the U.S. Constitution, Bill of Rights, and first state constitutions grounded the documents in an English legal tradition dating back centuries. This tradition, the common law, was the legal tradition transplanted to the American colonies. Scholars generally agree that the English common law tradition dates to at least the reign of Henry II in the late twelfth century, though it was clearly influenced by the legal traditions of the Anglo-Saxon kingdoms and the Normans.[91] The use of "felony" in the criminal law started around the same period.[92] Maitland suggested that the twelfth century saw a "marked shift" in the substance of criminal law

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U.S. Const. amend. XIV, § 2 (emphasis added). While the Thirteenth Amendment uses only "crime," the Fourteenth Amendment uses the phrase "participation in rebellion, or other crime," whereas "other crime" could encompass only those crimes related to or equivalent to participation in a rebellion. One might even argue that this phrase is more restrictive than that phrase in the Interstate Extradition Clause, which uses "other Crime" after Treason *and* Felony. Participating in a rebellion is treason but only one type of treason, and felony is broader still. Historically, at least, treason has been considered to fall under the category of felony. *See* Blackstone, *supra* note 50, at 62 ("Treason itself, says sir Edward Coke, was an[c]iently comprized under the name of felony . . . All treasons therefore, strictly speaking, are felonies; though all felonies are not treason.").

[91] Henry II is often referred to as the "father of the Common Law." *See* Halliday, *supra* note 55, at 4 (2012); Michael Nicholas, *King Henry II and his Legal Reforms*, *in* 6(2) The Histories 12, https://digitalcommons.lasalle.edu/the_histories/vol6/iss2/5 [https://perma.cc/8Z7B-TCXC]. F. W. Maitland, Lady Stenton, and R. C. van Caenegem have supported this classification. *See* John Hudson, The Formation of the English Common Law: Law and Society in England From King Alfred to Magna Carta 15 (2d ed. 2018). However, later scholars like Patrick Wormald have argued that important common developments date to the Anglo-Saxon kingdoms in place before the Norman conquest. *Id.* at 15–16 (citing Patrick Wormald, Legal Culture in the Early Medieval West: Law as Text, Image, and Experience (1999)). Hudson agrees with Wormald that some elements of the common law "were derived from Anglo-Saxon England . . . ." *Id.* at 16.

[92] *See* Nicholas, *supra* note 91, at 19.

where "the common law of crime, with its categorization of serious offences as felonies punishable by death, replaced an ancient system that laid far greater emphasis upon individual action aimed at compensation and other forms of payment."[93] However, Patrick Wormald argued that this "notion of serious offences being against the king, state, or community, and the general practice of punishing them by death, had emerged in the tenth and eleventh centuries."[94] Nevertheless, by the end of the twelfth century and before Magna Carta, the English common law recognized a felony to be a serious offense punishable by death and forfeiture.

The English criminal law saw other important developments alongside the hardening of the term "felony." Henry II (1154–89) established a system of prosecution by the state (the Crown), while trials by the petty jury replaced trial by ordeal early in the thirteenth century.[95] In the medieval period, the jury had a different role: for example, in cases of excuse like self-defense or insanity, the jury certified facts but did not grant acquittal, instead making a recommendation for the convicted to be pardoned by the King.[96] When the foundational Bracton treatise emerged in the early thirteenth century, there were still only a few felonies—homicide, rape, arson, grand larceny and robbery—and "no such thing as a misdemeanor."[97] Notably, the Bracton treatise conveyed the prevailing understanding then that serious crimes—felonies—required an evil-like intent.[98] Therefore, as early as the thirteenth century, jurists understood *mens rea*, or guilty mind, to be necessary for felony—the offense.

In this medieval period, the term "felony" also meant more than a serious offense. Professor Kamali best captures this history in her book, *Felony and the Guilty Mind in Medieval England*. Kamali puts forth a "multi-layered definition of felony" based on her assessment of the coroners' and plea rolls in the thirteenth and fourteenth centuries in England.[99] Kamali found that:

> A loaded term, felony might all at once denote the presence of deliberation and forethought, the exercise of reason and will, and the

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[93] Hudson, *supra* note 91, at 15 (citing Sir Frederick Pollock & F. W. Maitland, The History of English Law before the Time of Edward I 448ff (2d ed., Cambridge Univ. Press, 1988) (1895)).

[94] Hudson, *supra* note 91, at 15–16 (citing Wormald, *supra* note 91); *see also* Walker, *supra* note 67, at 15–18 (accepting this argument).

[95] *See* Walker, *supra* note 67, at 19.

[96] *See id.* at 19, 24.

[97] *See id.* at 29. However, lesser criminal offenses were most certainly recognized if not by a different name.

[98] *See* 2 Henry de Bracton, Bracton on the Laws and Customs of England 384 (Samuel E. Thorne trans., 1968) ("In crimes the intention is regarded, not the result. It does not matter whether one slays or furnishes the cause of death."); *accord* Walker, *supra* note 67, at 26 & n.20 ("[A] crime is not committed unless the will to harm be present . . . . In misdeeds, we look to the will and not the outcome.") (translating Henry de Bracton, De Legibus et Consuetudinibus Angliae (Woodbine ed., 1915)).

[99] *See* Elizabeth Papp Kamali, *Felony in the Archives*, *in* Felony and the Guilty Mind in Medieval England 49, 50 (2019).

> absence of necessity or chance. In some instances, felony involved great movements of passion . . . . Moreover, even when employed in legal records, "felony" often conjured an image of moral blameworthiness, sometimes rising to the level of wickedness or depravity.[100]

In other words, the term "felony" in early English common law communicated significantly greater seriousness compared to our modern legal definition, which typically denotes crimes punishable by at least one year of imprisonment. Accordingly, this project restrains its exploration of "felony" to its use as a description of a class of illegal conduct as English became the dominant language of jurisprudence.[101] This brief historical survey focused on "felony" particularly because "[t]he English criminal process was rooted in the common law of felony."[102]

C. An Evolution of the Criminal Law: From the Jury to Punishment

While the medieval origins remain important, the criminal law as known by the Founders could not be understood without tracking the later legal development. The English criminal law saw many important changes from the medieval era, through the early modern period, and up to the American Revolution. The scope of the term "felony" contracted into the contemporary, limited definition: an offense punishable by death.[103] Meanwhile, the number of offenses considered to be a "felony" grew significantly.[104] In addition, the criminal process, from accusation to trial to punishment, underwent important changes. Due to changing circumstances in England,[105] the jury transformed from a body made of neighbors with personal knowledge to "peers" who were necessarily detached.[106] The "petty" jury had not yet

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[100] *Id.* at 79.

[101] Eden confirms that the laws "were administered in an unknown language" as to "matters of record, indictments, pleas, verdicts, judgments [etc.]" until the Proceedings in Courts of Justice Act of 1730. EDEN, *supra* note 13, at 180 (citing [4] Geo. II c. 26). Notably, Eden provided the wrong citation, marking the legislation as *12* Geo. II c. 26, which would have placed the act in 1738, rather than 1730 when it was passed. *See id* at 180 n.h.

[102] HERRUP, *supra* note 40, at 2; *cf.* WALKER, *supra* note 67, at 15–16.

[103] Blackstone accepted that making an offense a felony expressed that conviction of such offense would be punishable by death. *See* BLACKSTONE, *supra* note 50, at 64–65. By the time of the American colonies, and certainly the Revolution, "felony" described capital offenses. Note, Blackstone and his contemporary, Giles Jacob, disagreed on whether forfeiture was also inseparable from felony, but this disagreement was largely historical. *See infra* Part II.E.

[104] *See* KEILY, *supra* note 55, at 12; HALLIDAY, *supra* note 55, at 76–77.

[105] *See* HERRUP, *supra* note 40, at 132–33 (finding as English population increased in size and became more mobile, social distance between classes grew, and number of indictments increased during early modern period); *accord* HALLIDAY, *supra* note 55, at 20–22 (noting the Tudors set up the Old Bailey courthouse in London to handle increasing cases).

[106] *See* HERRUP, *supra* note 40, at 132 (describing this transformation); *accord id.* ("In the early modern era, jurors were neither so familiar with the circumstances of cases as medieval jurors nor so distant as modern ones.").

secured its modern power,[107] while the "grand" jury had an outsized role.[108] During this transition, the responsibility for identifying and apprehending "criminals" fell on the community, and the bringing of criminal complaints was the responsibility of the victims[109]; however, the role of government officials was beginning to supplant it.[110] Criminal defendants did not have counsel in their trials until the eighteenth century, and even then, counsel was not uniformly provided.[111] Finally, this period of time saw an extension of the available mitigation to the otherwise "bloody" code through pardons,[112]

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[107] *Id.* at 133 (finding petty jury's "right to find any verdict free of judicial interference had not yet been secured" by the early seventeenth century).

[108] *Compare* HERRUP, *supra* note 40, at 113 ("Between 1625 and 1640, the grand jurors in the Quarter Sessions of eastern Sussex rejected a full quarter of the cases that they considered, a proportion showing quite clearly that indictment after accusation was not 'but a matter of course, a ceremony, matter of form' as it became by the eighteenth century."), *with* Sol Wachtler, Opinion, *Do We Need Grand Juries?*, N.Y. TIMES, Feb. 18, 1985, at A16, https://timesmachine.nytimes.com/timesmachine/1985/02/18/036243.html?pageNumber=16 [https://perma.cc/2G7J-E2XC] (former N.Y. state judge remarking prosecutors could by and large have grand juries "indict a ham sandwich," making grand jury "more often as the prosecutor's pawn than the citizen's shield").

[109] HERRUP, *supra* note 40, at 25–26 ("In early modern England, responsibility for prosecution in serious crime rested with the victim; if the accuser lost interest in prosecution, a conviction, even an indictment, was unlikely. Because the prosecution of alleged crimes was expensive, inconvenient and not particularly restitutive, some victims dropped their accusations well before the cases came to court.").

[110] *See id*. at 68 ("Since by the seventeenth century private complaints in criminal matters (appeals) had been virtually replaced by public accusations (indictments), public officials should have been in charge of investigations."). This change was not complete, however. *See id*. ("[W]hile some part in detection was played by constables, observing, investigating and accusing suspects seem to have remained as much a private concern as a governmental duty. The initiative in identifying and prosecuting misbehavior was shared between the formal representatives of the law—constables, coroners, magistrates—and ordinary people."). Note, the first police force did not form in the English-speaking world until 1829, four decades after the U.S. Constitution. *See* HALLIDAY, *supra* note 55, at 152.

[111] *See* HERRUP, *supra* note 40, at 3–4, 204. The underlying idea was that acquittal was not determined by "professional ability or technical knowledge," but by the self-evident nature of innocence that can only be shown by a person speaking their own cause. *Id.* at 3; *see also id*. at 5 ("The power of amateurs over prosecution made the criminal law seem closer to absolute justice than when lawyers or legal technicalities prevailed. Criminal verdicts depended in theory upon a single general issue: did the accused do the deed or not? Extenuating circumstances or special pleadings found no formal place before juries. Punishment, in theory, was equally simple: every felon deserved execution."). Meanwhile, the state had professionals participating as prosecutors in certain cases, although the practice was not uniform either. Herrup recognized John Langbein's finding that this era saw "the rise of a judicial prosecutor who presented cases to uninformed jurors" but disputed how widespread that practice actually was based on her research in Sussex. *See* HERRUP, *supra* note 40, at 158–59. Accordingly, the trials were far less adversarial than their American counterparts.

[112] Pardons by the Crown remained a method for sparing convicted felons from execution, and judges or juries often suggested which convicts were deserving. *See, e.g.*, WALKER, *supra* note 67, at 19 (describing the function of pardon in cases of insanity in the medieval period); *id.* at 24 (describing pardon in other cases where crimes lacked culpability); BREWER, *supra* note 56, at 191 (2005) ("Those who killed in self-defense were found guilty of murder but then bailed and urged to obtain a pardon.").

benefit of clergy,[113] and transportation.[114] Even as the body of "felony" increased, "official and popular appetites for executions were waning."[115]

The foregoing summary of the changes seen by the English criminal system from the fourteenth to eighteenth centuries provides a window into the law on which the United States based its system—by adoption and rejection. "Felony" represented those crimes punishable by death, and the number of crimes considered to be a "felony" exploded during the lifetimes of the Founders. Jurors needed to be detached from the facts, and grand juries served as an effective protection against improper accusations, while petty juries were more limited than today. The state made formal accusations and controlled investigations, but community participation was expected and required. Criminal defendants largely lacked legal representation, the state lacked a uniform method of prosecution, and trials were more inquisitorial than adversarial. And, despite—or perhaps, because of—the harshness in potential punishment, the types and availability of mitigation expanded. The discussion of criminal terms below as they appeared in eighteenth-century treatises must be understood through this legal landscape.

D. The Categorization of Crimes in the Eighteenth Century

The *Watson* Court supported its holding that police officers could make warrantless arrests, in part, on a common law rule about felonies. The majority also endorsed a separate rule for "a misdemeanor or felony committed in [an officer's] presence" based on the common law.[116] As will be discussed further in Part III, these holdings were based upon misunderstandings of the relevant common law. Part IID will show that the *Watson* Court misapplies historical common law, under which crimes were not categorized into "felony" and "misdemeanor," or comparable terms, as assumed by *Watson*'s majority. To do so, Part IID will assess three treatises: Montesquieu's *Spirit*

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[113] Benefit of clergy functioned like a personal pardon to avoid execution. *See* BREWER, *supra* note 56, at 185 n.3 (describing how benefit of clergy expanded to illiterate defendants and became more of a "formality" where judges assisted in applying mitigation); GILES JACOB, *Clergy*, NEW LAW-DICTIONARY (1729), http://lawlibrary.wm.edu/wythepedia/library/JacobNewLaw-Dictionary1729.pdf [https://perma.cc/ZXQ7-FE95] (finding benefit of clergy to be available unless explicitly "taken away by Statute" where the "Criminal" was indicted "on that very Statute").

[114] By the early eighteenth century, transportation emerged as the main form of mitigation, replacing benefit of clergy. *See* BREWER, *supra* note 56, at 214 (finding "only 13 percent of those convicted of felonies were actually executed; 74 percent, however, had their sentences commuted from death to transportation"); *id.* at 211–12 (finding the Transportation Act of 1717 alleviated some of the harsh punishments afforded to youths by sending them to the American colonies as "[a]bout fifty thousand such persons were sent from England to its North American colonies between 1718 and 1776 . . . .").

[115] Alice Ristroph, *Farewell to the Felonry*, 53 HARV. C.R.-C.L. L. REV. 563, 577 (2018); *see also* HALLIDAY, *supra* note 55, at 111 ("The way was opening up for a more sensitive approach to capital punishment and imprisonment, though it was another half-century before the Bloody Code itself began to moderate.").

[116] *See* United States v. Watson, 423 U.S. 411, 438 (1976) (Marshall, J., dissenting).

of the Laws, Blackstone's *Commentaries*, and Eden's *Principles*. Unlike modern American law, which groups crimes by how they are punished as a proxy for seriousness of the offense, these treatises discussed "crimes" or "offenses" based on the victims of those unlawful acts. For example, Montesquieu, Blackstone, and Eden all roughly divided offenses into crimes against God, crimes against the state, and crimes against people and/or property. The categorization of crimes during this period bears little significance to modern American criminal law, and this difference in approach challenges the assumptions made by the Supreme Court in *Watson*.

E. Why Do Categories Matter?

Montesquieu and Blackstone were likely the two most influential authors of secular law on America's Founders.[117] Meanwhile, Eden directly criticized Blackstone, using Blackstone's categories to make criticisms of the *Commentaries* and English criminal law. Accordingly, the categorization of crimes by the victim of the offenses in these three treatises, rather than by the wrongfulness of the acts or their punishments, suggests that these treatises—and their audiences—thought of organizing crimes quite differently from the felony-misdemeanor binary in modern American criminal law. Eden's criticisms and this distinction in approach indicate that the Court has inappropriately interpreted, or unwisely ignored, how America's Founders likely viewed crime when deciding the foundational criminal constitutional law cases *Watson* and *Terry.*

F. Victim-Based Categorization by Montesquieu and Blackstone

Montesquieu and Blackstone categorized offenses according to the offended. Montesquieu divided all offenses into four categories.[118] For each category, he clarified the "species" of crimes that would fall into it. For the first, "crimes that concern religion," Montesquieu included only those "which attack [religion] directly," excluding those that "disturb the exercise of it" or those "where there is no public act"—i.e. where one is accused for a lack of belief solely.[119] The second class of crimes are those "[prejudicial] to morals."[120] Montesquieu singled out "violation of public

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[117] *See* Donald S. Lutz, *The Relative Influence of European Writers on Late Eighteenth-Century American Political Thought*, 78 Am. Pol. Sci. Rev. 189, 193 (1984) (finding Montesquieu and Blackstone to be the two most cited secular authors between 1760 and 1805, respectively).

[118] Montesquieu, *supra* note 41, at 185 ("[T]he first species are prejudicial to religion, the second to morals, the third to the public tranquillity, and the fourth to the security of the subject.").

[119] *See id.*

[120] *See id.* at 186.

or private continence" as an example of this class.[121] Montesquieu's third class of crimes were "those which disturb the public tranquility."[122] His final category, crimes that attack "the security of the subject," enveloped many of the common law's ancient offenses and included elements of the other classes.[123] These crimes against person and property are "properly" punished when one "has actually *or* intentionally" harmed another, because the punishments "are a kind of retaliation, by which the society refuses security to a member, who has actually or intentionally deprived another of his security."[124]

Blackstone's categorization of "crimes and misdemeanors" formed the bulk of Book IV in his *Commentaries*.[125] Across Book IV, Blackstone divides offenses into five categories: "[1] those which are more immediately injurious to God and his holy religion [Chapter 4];[126] [2] such as violate

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[121] *Id.* "Continence" likely referred to self-restraint, particularly refraining from sexual intercourse. *See Continence*, Merriam-Webster (last visited Mar. 16, 2023), https://www.merriam-webster.com/dictionary/continence [https://perma.cc/34S3-CHR92WCS-YJN7].

[122] Montesquieu, *supra* note 41, at 186–87. In other words, these offenses are those which disturb the order of the society without hurting any individuals particularly. Like Eden, see *infra* Part II.D(3), Montesquieu gave a "ringing denunciation of any system of justice that conflates simple breaches of the peace" with "truly serious crimes that threaten the security of individuals or society." David W. Carrithers, *Montesquieu's Philosophy of Punishment*, 19 Hist. Pol. Thought 213, 231–32 (1998).

[123] Montesquieu, *supra* note 41, at 187.

[124] *Id.* at 187.

[125] The fourth book of *Commentaries* was unique in English jurisprudence because it was written to serve as an all-encompassing, introductory text to the criminal law; whereas, the earlier treatises by Coke, Hale, and Hawkins—along with the guides for practitioners—"aimed [at] an audience of professional lawyers or would-be lawyers." Blackstone, *supra* note 50, at vii. The editor's introduction notes that other works, such as Jacob's *The Modern Justice*, Fitzsimmond's *Free and Candid Disquisitions on the Nature and Execution of the Laws of England* (1751), and Dagge's *Considerations on the Criminal Law* (1772) also targeted wider audiences, though they "considered the criminal justice system in very general terms." Further, Book IV accomplished its task by "impos[ing] a coherent structure on matters that had previously seemed arcane." *Id.* at viii. Importantly, Blackstone derived most of his content from the earlier works of Coke, Hale, and Hawkins. This fact has important bearing on the usefulness of Blackstone's *Commentaries* for determining the state of the common law in his own era, since Coke, Hale, and Hawkins composed their landmark treatises generations before Blackstone. *See generally* Edward Coke, Institutes of the Lawes of England (1628–44); Matthew Hale, Historia Placitorum Coronae, or The History of the Pleas of the Crown (Emlyns ed., 1736) (1694); Matthew Hale, The History of the Common Law of England (1713); William Hawkins, A Treatise of Pleas of the Crown (1716–21). Because Blackstone draws content so heavily from potentially outdated legal treatises, one must be careful in accepting that any part of the *Commentaries* reflects late-eighteenth-century English law without digging deeper. *See* Blackstone, *supra* note 50, at vii–ix (identifying contemporary criticisms of the *Commentaries* and significant errors and omissions Blackstone made).

[126] Blackstone, *supra* note 50, at 28. Blackstone includes eleven offenses in this category: (1) apostasy (the total renunciation of Christianity), (2) heresy, (3) "reviling the ordinances of the church" or nonconformity, (4) blasphemy, (5) swearing or cursing, (6) witchcraft, (7) religious imposters, (8) simony (buying or selling ecclesiastical privileges like indulgences), (9) sabbath-breaking, (10) drunkenness, and (11) lewdness. Blackstone noted that, though these crimes carried considerable penalties in the centuries before, many were no longer punishable or only misdemeanors. For example, the Witchcraft Act (1735) stated that "no prosecution shall for the future be carried on against any person for conjuration, witchcraft, sorcery, or inchantment."

and transgress the law of nations [Chapter 5];[127] [3] such as more especially affect the sovereign executive power of the state, or the king and his government [Chapters 6–9];[128] [4] such as more directly infringe the rights of the public or commonwealth [Chapters 10–13];[129] and [5] such as derogate from those rights and duties, which are owing to particular individuals, and in the preservation and vindication of which community is deeply interested [Chapters 14–17]."[130] Notably, the last two categories were further subdivided.[131] Each of these categories includes a wide range of offenses: for example, offenses against the Commonwealth includes returning from transportation, punishable by death, and escaping arrest, "punishable by fine

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Id. at 40. Ultimately, this category proves largely historical rather than relevant to the contemporary criminal law.

[127] Blackstone's second category, "Offenses against the Law of Nations," received a rather brief treatment. Blackstone included only two offenses: violating the safe conduct granted by the King or ambassadors and piracy. *See id.* at 44–48. Blackstone also claimed that, in England, the law recognizes the rights of ambassadors fully, stopping any domestic legal process brought against them. *Id.* at 46–47. Blackstone remarked that these are the "principal cases, in which the statute law of England interposes, to aid and enforce the law of nations, as a part of the common law." *Id.* at 48.

[128] The third category, offenses against the King and government, "branches itself into a much larger extent" than either of the first two. BLACKSTONE, *supra* note 50, at 48. Blackstone began his discussion of this category with high treason, describing the seven distinct branches according to the 1351 Treason Act, *see id.* at 50–57 (citing 25 Edw. 3 c.2), and three new branches that arose in the centuries after. *See id.* at 57. Blackstone followed his description of treason by describing those other capital offenses against the King and government, which he deemed as "felonies." Blackstone listed five general felonies that are "immediately injurious to the king's prerogative," such as offenses relating to the coin, not amounting to treason, and serving a foreign prince. *Id.* at 65. After felonies, Blackstone described those offenses in this category that were not subject to capital punishment, though he did not use a blanket term like misdemeanor to describe them. Blackstone placed the rest of these offenses under two broad categories: praemunire and "other misprisions and contempts." *Id.* at 49. Praemunire is an ancient offense in England, where fourteenth century statutes prohibited asserting and maintaining papal jurisdiction, and a writ of summons by that name was given for violations. Blackstone noted that, "[the offense] took its original from the exorbitant power claimed and exercised in England by the pope, which even in the days of blind zeal was too heavy for our ancestors to bear." *Id.* at 68.

[129] The fourth category, offenses against the Commonwealth, saw Blackstone make his most extensive subdivisions. Despite having four separate chapters, Blackstone asserted that this category had five general species: (1) against public justice (Chapter 10), (2) against the public peace (Chapter 11), (3) against public trade (Chapter 12), (4) against the public health (Chapter 13), and (5) against the public police or economy (Chapter 13). BLACKSTONE, *supra* note 50, at 85. Notably, Blackstone claimed that this category "is subdivided into such a number of inferior and subordinate classes, that it would much exceed the bounds of an elementary treatise . . ." *Id.*

[130] Blackstone's final category, offenses against the individual, contained the more common and traditionally well-known crimes. *See* BLACKSTONE, *supra* note 50, at 116. For example, Blackstone devoted an entire chapter to homicide, and rape, kidnapping, arson, burglary, and theft all were included in this category. Blackstone also subdivided this category into three kinds: (1) against their persons (Chapters 14–15), (2) against their habitations (Chapter 16), and (3) against their property (Chapter 17). *See id.* Note, in separating habitations from property, Blackstone clearly implies a special status for one's home, like in American constitutional criminal law. *See* Payton v. New York, 445 U.S. 573, 597 n.45 (1980) ("'Now one of the most essential branches of English liberty is the freedom of one's house.' . . . We have long recognized the relevance of the common law's special regard for the home to the development of Fourth Amendment jurisprudence.").

[131] *See* BLACKSTONE, *supra* note 50, at 85, 116.

or imprisonment"[132]; while offenses against individuals includes murder and an attempt to rob, the former being a capital offense and the latter a "misdemeanor."[133] After his categories, Blackstone engaged the "sixth, and last, object of our enquiries": "the method of inflicting those punishments, which the law has annexed to particular offences; and which I have constantly subjoined to the description of the crime itself."[134] These chapters trace the entire criminal process—from arrest, to bail, plea, trial, conviction, and, finally, mitigation and execution. Notably, the *Watson* majority cabined its analysis to the chapter on arrests.

Blackstone's categorization of offenses reveals how the writer thought best to organize the sprawling criminal law of England. Blackstone, like Montesquieu, chose to arrange offenses according to the target of the illegal conduct. Alternatively, modern American law generally buckets offenses by the illegal conduct, as represented by the punishment. In needing to account for all the statutory offenses in England, Blackstone's categories included offenses of wide-ranging severity in the same category. By placing these offenses side-by-side, a critic of England's Bloody Code could more easily suggest the inconsistency and incoherence of the English criminal law. Eden's *Principles of Penal Law* did just that.

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[132] *See* Blackstone, *supra* note 50, at 86–87. Importantly, each one of these subcategories in the fourth category includes capital and noncapital offenses. For example, in offenses against public justice, "[a]n *escape* of a person arrested upon criminal process . . . is punishable by fine or imprisonment," while "*returning from transportation*" is a capital offense without benefit of clergy. *Id.* at 86–87. Ultimately, these offenses include everything from prison-breaking (public justice) to "riotous assembling" (public peace) and owling (public trade), including breaking quarantine (public health) and clandestine marriages (public peace and economy). Note, many examples of positive lawmaking appear in this category.

[133] Like the fourth category, the included offenses in the fifth category range widely in how they are punished, from felony without benefit of clergy for murder, to a transportable offense for attempt to rob, or only a fine for wilfully "spoil[ing] or destroy[ing] any timber or other trees . . . for the first two offenses." Blackstone, *supra* note 50, at 163. Note, murder did have benefit of clergy until the statutes of 23 Hen. 8. and 1 Edw. 6. *Id.* at 133. Meanwhile, the attempt to rob was a felony as late as Henry IV's reign (1399–1413) according to Hale's *Pleas of the Crown*, but it was "taken to be only a misdemeanor" and punished by fine and imprisonment until the statute of 7 Geo. 2 which made it a felony "transportable for seven years." *Id.* at 160.

[134] *See* Blackstone, *supra* note 50, at 255. Notably, Blackstone summarizes the five categories before beginning his discussion of the first category in Chapter 4. *See id.* at 27; *see also id.* at 116 (repeating categories before describing the last). Book IV does not end with its seventeenth chapter, however. Chapter 18 introduces and concludes the "fifth general branch or head" of preventing the commission of crimes and misdemeanors, though this very brief branch proves rather underwhelming. *See* C. R. H., *The Prevention of Crime, Not Merely Its Punishment*, 1 J. Am. Inst. Crim. L. & Criminology 9, 9 (1910) ("One would expect from this praise of preventive justice [by Blackstone] an exhibit of agencies and provisions of corresponding importance; but one is disappointed, for the brief chapter on 'the means of preventing offenses' touches merely the question of sureties and recognizance"). *But see id.* at 9 ("This is rather a small contribution to our investigation, though one of real value."). It is after this brief discussion of the "fifth" branch that Blackstone discusses the "sixth" from Chapter 19 on.

G. Eden's Categories: A Critique of the Commentaries and English Criminal Law

In *Principles*, Eden categorizes offenses like Montesquieu and Blackstone, yet criticizes Blackstone and the English criminal law at every step. Preliminarily, Eden's *Principles* aligns with an edition of Blackstone's *Commentaries* distributed before the American Revolution.[135] Earlier editions of Blackstone's *Commentaries* had significant differences from the final edition.[136] Most relevant, lecture notes preceding publication clarify Blackstone's categorization of crimes. The chapters in his earlier lectures are divided into (1) against Divine Law & against the Law of Nations, (2) against the King and Government, (3) against the Commonwealth, and (4) against the personal security, liberty, and property of individuals.[137]

In *Principles*, Eden divides crimes into six categories: (1) against religion, (2) relative to law of nations, (3) relative to the state, (4) relative to the persons of individuals, (5) relative to property, and (6) of positive institution.

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[135] The final edition of Eden's *Principles* was written in 1775. Because Eden's chapters follow closely the organization in Blackstone's 1762 lecture notes, it is very likely that Blackstone's *Commentaries* at the beginning of the American Revolution were organized more consistently with the lecture notes. *See generally An Abstract of the Common Law of England, taken from a Course of Lectures read by Doctor [afterwards Sir William] Blackstone*, *in* HARDWICKE PAPERS, vols. DCCXLV–DCCLIII [745–753] Add MS 36093–36101 (British Library Archives 1762).

[136] For example, notes from Blackstone's lectures (distributed by Blackstone prior to publishing his Commentaries as a treatise) did not divide Chapters 2 and 3, as in modern editions. In his lecture notes, Blackstone titled chapter 2 as "Of the Persons capable of Committing Crimes and their several Degrees of Guilt." *Course of Lectures*, *supra* note 135, Add MS 36100. Whereas, Blackstone's latest edition of the *Commentaries*, published in 1783, titled chapter 2 as "Of the Persons Capable of Committing Crimes," and "Of Principals and Accessories." BLACKSTONE, *supra* note 50, at Chs. 2–3. Blackstone corrected errors and made substantive changes between his published editions of the *Commentaries* as well. *See id.* at xv–xxi. The difference between how Blackstone delivered his *Commentaries* to contemporary students and how Blackstone edited it for later publication remains relatively unexplored in scholarship but may suggest further reason for doubting the reliability of the Commentaries as authoritative. *See also infra* Part II.E.

[137] While the lecture notes combined Offenses against "Divine Law" and "the Law of Nations" into Chapter 3, the other chapters made clear the larger categories. *See Course of Lectures*, *supra* note 135, Add MS 36100–01. The 1762 lecture notes divided the future *Commentaries* into Chapter 4 as "Of Offences more especially against the King and the Government; and first of High Treason," Chapter 5 as "Of other Crimes, affecting the King and his Government," Chapter 6 as "Of Offenses against the Commonwealth; and, first against the public Justice, and the public peace," Chapter 7 as "Of the remaining species of Offenses against the Commonwealth," Chapter 8 as "Of Crimes against Individuals; and first of Homicide, or destroying life," Chapter 9 as "Of other Crimes affecting the personal security and personal Liberty of Individuals," and Chapter 10 as "Of Crimes affecting the Habitation and Property of Individuals." *See id.* The contents of these eight chapters in the Blackstone lecture notes match the fourteen chapters of the latest edition of the *Commentaries*. *See* BLACKSTONE, *supra* note 50, Chs. 4–17. Only in his later editions did Blackstone separate out praemunire, misprisions and contempt, and offenses against public peace, public trade, public health, and public police or economy into their own chapters. Notably, all chapter titles in his latest edition of *Commentaries* refer to "Offences," but in his lectures, Blackstone designates wrongful acts against the King and individuals as "crimes," not "offenses," suggesting that these two bodies of offenses were of a different kind than the others. *Compare* BLACKSTONE, *supra* note 50, *with Course of Lectures*, *supra* note 135.

Eden's first two categories—against religion and relative to law of nations—are identical to those of Blackstone.[138] While Blackstone's approach was largely descriptive, Eden critiques the English government significantly. For example, Eden remarks that, "[e]ven England, the seat of national liberty and benevolence, became the bloody scene of intolerance and persecution," where "the ministers of peace and christianity [*sic*] were the active dispensers of death and desolation."[139] Because of this history, Eden argues that "[f]reedom of thought is the prerogative of human kind, a quality inherent in the very nature of a thinking being, a privilege which cannot be denied to him or taken from him."[140]

Eden's third category, crimes relative to the state, encompasses Blackstone's offenses against the King and Government and part of Blackstone's offenses against the Commonwealth—those offenses against the Commonwealth that Eden does not consider to be of positive institution.[141] Eden strongly opposes the application of "high treason" to the many offenses under England's criminal law.[142] Eden cautions readers that "the idea" of "the harmonious proportion of punishments[] should never be forgotten in acts of penal legislation."[143] Eden's criticism here resembles

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[138] *Compare* EDEN, *supra* note 13, at Chs. 12–13, *with* BLACKSTONE, *supra* note 50, Chs. 4–5.

[139] *See* EDEN, *supra* note 13, at 92.

[140] *Id.* at 91. Eden's conception of religion resembles greatly the ideas embraced by the First Amendment, evidencing similarity between Eden's ideas and those of the Framers. *See* Girouard v. United States, 328 U.S. 61, 68 (1946) ("The victory for freedom of thought recorded in our Bill of Rights recognizes that in the domain of conscience there is a moral power higher than the State. Throughout the ages, men have suffered death rather than subordinate their allegiance to God to the authority of the State. Freedom of religion guaranteed by the First Amendment is the product of that struggle."); Doe v. City of Lafayette, 377 F.3d 757, 776 & n.7 (7th Cir. 2004) (Williams, J., dissenting) (citing Stanley v. Georgia, 394 U.S. 557, 565–66 (1969)) ("Once again, the Court tied this freedom to fundamental principles of the First Amendment, holding that 'it is wholly inconsistent with the philosophy of the First Amendment' for the government to exercise 'the right to control the moral content of a person's thoughts.'"); *cf.* Schneiderman v. United States, 320 U.S. 118, 137 (1943) ("The constitutional fathers, fresh from a revolution, did not forge a political strait-jacket for the generations to come. Instead they wrote Article V and the First Amendment, guaranteeing freedom of thought, soon followed."). Blackstone's *Commentaries* make no such argument for freedom of thought, suggesting his conception of religion diverged from America's Founders. *See* 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 109–110 (Wilfred Prest ed., Oxford Univ. Press 2016) (1783) (describing how "freedom of speech" was limited to "proceedings in parliament" and deviated from common law).

[141] *Compare* EDEN, *supra* note 13, at Chs. 14, 17, *with* BLACKSTONE, *supra* note 50, at Chs. 6–13.

[142] *See, e.g.*, EDEN, *supra* note 13, at 141 ("It is merciless and absurd, to impute the same guilt, and give the same chastisement, to the leader of a rebellion, and the diminisher of a piece of money."). Specifically, Eden took issue with the offense which was Blackstone's sixth species of treason from the 1351 Treason Act and his second updated species of treason, counterfeiting the king's money. *See* BLACKSTONE, *supra* note 50, at 50–57 (identifying Blackstone's description of treason).

[143] EDEN, *supra* note 13, at 141. Eden returned to this idea within the same category. Eden repeated an idea expressed by Montesquieu: "In this branch of the penal system, lawgivers should be extremely cautious, not to confound atrocious breaches of the civil contract, with

a criticism made by James Madison in Federalist Paper No. 43, where Madison defended the need to limit the definition of treason because of its abuse in English history.[144]

Eden's fourth and fifth categories (relative to the persons of individuals & relative to property) closely resemble Blackstone's last category of offenses (against the personal security, liberty, and property of individuals).[145] Eden recognizes that "injuries and abuses, which relate to the persons of private subjects, are properly liable to penal laws" because they endanger "public morality" and compromise "political rules of rights."[146] However, Eden identifies that offenses in this category too often reflect a particular moment in time and lack a continuing justification, leading to disproportionate punishments across the system.[147] To avoid this problem, Eden suggests, "[*i*]*t would be a good general rule, to give at first a temporary limited duration to all new laws, which are capitally penal*; and particularly to those, which are made on the spur of the occasion."[148]

Finally, Eden adds a sixth category absent from Blackstone's *Commentaries*. Eden opens this category with a rather bold statement: "[e]very wanton, causeless, or unnecessary act of authority exerted by the legislature over the people, is tyrannical, and unjustifiable; for every member of the state is of right entitled to the highest possible degree of liberty, which is consistent with the safety and well-being of that state"—a statement mimicking Blackstone.[149] Eden then identifies contemporary English

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simple violations of the police." EDEN, *supra* note 13, at 205; *see also* Carrithers, *supra* note 122, at 231–32.

[144] While defending the necessity of defining treason as a crime generally, Madison notes the proposed Constitution intended to place important limits on treason that diverged from English criminal law because "new-fangled and artificial treasons have been the great engines by which violent factions, the natural offspring of free government, have usually wreaked their alternate malignity on each other . . . ." THE FEDERALIST NO. 43 (James Madison). Madison assures that creating a "constitutional definition" and "restraining the Congress . . . from extending consequences of guilt beyond the person of its author" were important constraints to avoid the problems seen in the English system. *Id.*

[145] Like Blackstone, Eden included in this category—and describes in separate chapters—murder, dueling, and suicide. *Compare* EDEN, *supra* note 13, at Chs. 18–22, *with* BLACKSTONE, *supra* note 50, at Chs. 14–17.

[146] EDEN, *supra* note 13, at 252; *accord* MONTESQUIEU, *supra* note 41, at 187 (arguing crimes against persons are "properly" punished when one "has actually or intentionally" harmed another because punishments "are a kind of retaliation, by which the society refuses security to a member who has actually or intentionally deprived another of his security").

[147] *See, e.g.*, EDEN, *supra* note 13, at 254–57 (pointing out slitting one's nose was a capital offense by statute, while forcible taking of a person and selling them in another country is "left as a mere misdemeanour at the common law").

[148] *Id.* at 259 (emphasis in original).

[149] *Id.* at 298. Blackstone opened Book I of his *Commentaries* with a similar statement. He wrote, "[E]very wanton and causeless restraint of the will of the subject . . . is a degree of tyranny. Nay, that even laws themselves, whether made with or without our consent, if they regulate and constrain our conduct in matters of mere indifference, without any good end in view, are laws destructive of liberty . . . ." BLACKSTONE, *supra* note 140, at 85. This shared phrase across Eden and Blackstone's treatises raises two possibilities: first, it could suggest that Eden agrees with Blackstone on this point, or second, Eden could have invoked the phrase to

offenses that violated this principle.[150] For Eden, these violating offenses are of "positive institution" because they "do not flow from the general obligations of morality, and the general condition of human nature; but have their reason and utility, in reference to the temporary advantage of that particular community for which they are enacted."[151] In other words, these offenses are products of positive law, not natural law. These offenses fall into Blackstone's category of offenses against the Commonwealth or individuals and their property, but Eden separates them. In adding this new category—crimes of positive institution—Eden sums up his sharp criticisms of the English penal system, explicitly, and of Blackstone, implicitly.

As explored in Part ID, the way Eden's *Principles* embraces natural law to critique the English system suggests his ideas were ideas shared by America's Founders. Jefferson clearly adopted some of Eden's ideas,[152] and Eden's *Principles* argues for freedom of thought, limiting the reach of treason, and reducing the arbitrariness of English criminal law, all of which are addressed by the U.S. Constitution.[153] Thus, Eden's criticisms of the English system and Blackstone's *Commentaries* are particularly noteworthy given that the Supreme Court has relied on the *Commentaries* extensively[154] even

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critique Blackstone. Note, the first interpretation does not require that the two authors agree in application. Rather, disagreement could arise from how each defines "wanton and careless" laws with respect to the contemporary laws of England. Nonetheless, the placement of the phrase in the authors' respective treatises might suggest that the second interpretation is more appropriate. While Blackstone essentially opened his *Commentaries* with this statement, Eden effectively ended his *Principles* with it. A reader, who likely read Blackstone before Eden, might be dissatisfied with how England's penal law upheld this principle. And they might wonder why, by Book IV, Blackstone's commentary on that law diverges so far from the principles in Book I. This idea has been at least implied by the work of modern scholars critiquing the role of natural law in Blackstone's *Commentaries*. *See* BLACKSTONE, *supra* note 140, at xxxi. Eden's use and location of the phrase invites the reader to consider whether the English law described thus far upheld such a lofty ideal.

[150] Eden lists approximately eighteen different statutory crimes that he saw as problematic here, including the law that it was felony without benefit of clergy "to remain one month in the realm, being an Egyptian" or "maliciously cut in pieces or destroy any manufacture of linen cloth or yarn, either when exposed to bleach, or dry." EDEN, *supra* note 13, at 304; *see also id.* at 303–05.

[151] *Id.* at 298, 305.

[152] *See* JEFFERSON, *supra* note 26, at 45–46; Chapin, *supra* note 26, at 168–69.

[153] The First Amendment protected the "freedom of thought" advocated for by Eden. *Compare* EDEN, *supra* note 13, at 91, *with* Girouard v. United States, 328 U.S. 61, 68 (1946). The Constitution prohibited bills of attainder and limited "corruption of blood," U.S. CONST. art. I, § 9; U.S. CONST., art. III, § 3, two significant parts of English criminal law specifically related to treason. *See* Ex parte Garland, 71 U.S. 333, 387 (1867) (Miller, J., dissenting) (describing "bills of attainder" and "corruption of blood"). The constitutional structure of government, federalism, and the Tenth Amendment work together to limit federal power to pass the arbitrary laws criticized by Eden. *See* CHARLES DOYLE, CONG. RSCH. SERV., R43023 CONGRESSIONAL AUTHORITY TO ENACT CRIMINAL LAW: AN EXAMINATION OF SELECTED RECENT CASES 1 (2013), but these limits have hardly been realized in the modern criminal justice system. *Cf. infra* Part III.B.

[154] *See* Jessie Allen, *Reading Blackstone in the Twenty-First Century and the Twenty-First Century through Blackstone*, *in* RE-INTERPRETING BLACKSTONE'S COMMENTARIES: A SEMINAL TEXT IN NATIONAL AND INTERNATIONAL CONTEXTS (Wilfrid Prest ed., 2014) (finding citations to Blackstone by the Supreme Court "began increasing gradually through mid-century and then rose precipitously from the 1990s to the current rate of about one in every thirteen decisions.").

though the Framers were likely critical of the system Blackstone described and the *Commentaries*.[155] Ultimately, a criticism of the English system like Eden's *Principles* more likely matches the ideals of America's Founders than the *Commentaries*. Nevertheless, Eden and Blackstone both categorized crimes by victim, not punishment, challenging assumptions underlying the "common law rule" suggested in *Watson*.

H. Defining "Felony": Comparing Jacob & Blackstone

As described in Part IID, Montesquieu, Blackstone, and Eden divided offenses according to the victim of the offense, not according to felony, misdemeanors, or like designations. Felonies and lesser offenses were included throughout the groups. The following section will explore these criminal terms. Specifically, this section will compare Blackstone's description and use of the other criminal terms with those in Giles Jacob's *Law Dictionary*. This section also suggests that Jacob's piece, rather than Blackstone's, could be a more appropriate source for applying historical understandings of felony to modern American criminal constitutional law. Regardless of which source is more appropriate, the divergence between the authors suggests a lack of a clear ancient common law rule to rely upon. Because *Watson* turned largely on how "felony" was understood by the Founders, this analysis challenges that foundation.

In his *Commentaries*, Blackstone concludes definitively that the historical term "felony" pertains to forfeiture alone, with capital punishment being neither necessary nor sufficient to classify an offense as a felony.[156] However, he recognizes that "all offences, now capital, are in some degree or other felony" because "[t]he idea of felony is indeed so generally connected with that of capital punishment, that we find it hard to separate them; and to this usage the interpretations of the law do now conform."[157] Therefore, "if a statute makes any new offence felony, the law implies that it shall be punished with death . . ."[158] In his organization of English criminal law, Blackstone introduces "felony" within the category of offenses that "more especially affect the sovereign executive power of the state, or the king and his government."[159] However, "felony" appears in all other categories of offenses.

Compiling his collection decades before Blackstone, Giles Jacob put forth a similar description of "felony" with some slight but significant differences. Specifically, Jacob asserted that, in 1108, King Henry I became the first monarch to order that Felons be hanged and "[t]he Judgment against a

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[155] *See infra* Part II.E.

[156] *See* BLACKSTONE, *supra* note 50, at 64.

[157] *Id.* at 62, 64.

[158] *Id.* at 64.

[159] *See id.* at 28, 94.

Man for *Felony* hath been the same since the Reign of this King . . ."[160] In other words, Jacob alleged that the historical term "felony" had been inextricably associated with capital punishment from around 1108 to at least 1729, when Jacob published his "law dictionary." Further, Jacob declared that "*Felony* was anciently every Capital Crime perpetrated with an evil Intention" so that "All Capital Offenses by the Common Law came generally under the Title of *Felony*: and could be express'd by no Word but *Felonice*; which must of Necessity be laid in an Indictment of *Felony*."[161] This latter description of felony separates Jacob's historical assessment from Blackstone's even more. Jacob suggested that something about the offense itself—an evil Intention—rather than just the punishment, historically distinguished a felony[162] while Blackstone claimed that only "by long use" did "we beg[i]n to signify by the term of felony the actual crime committed, and not the penal consequence."[163]

The difference in definition between the writings of Jacob and Blackstone likely results from how each author weighed relevant sources. Jacob and Blackstone cite the same sources, Coke's *Institutes* and Spelman's *Glossarium Archaiologicum*, and recognize the same definition for felony from each source.[164] However, Blackstone explicitly described Coke's theory as a "strange[] etymology" and rests his conclusion on Spelman's theory.[165] Jacob instead recognized the tension between Coke and Spelman's definitions but suggested an explanation to reconcile them: Coke's etymology matched the contemporaneous felony, "which is always intended to be done with a bitter or fierce Mind," while Spelman's etymology matched the

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[160] JACOB, *Felony*, *supra* note 113 ("And before the Reign of K. *Hen.* I. Felonies were punished with Pecuniary Fines; for he was the first who ordered Felons to be hanged, about the Year 1108. The Judgment against a Man for *Felony* hath been the same since the Reign of this King, *i. E.* That he be hanged by the Neck till Dead; which is entered *suspendatur per Collum, &c*.").

[161] *Id.* (citing EDWARD COKE, 1 INSTITUTES OF THE LAWES OF ENGLAND 391 (1628)).

[162] *See* JACOB, *Felony*, *supra* note 113.

[163] *See* BLACKSTONE, *supra* note 50, at 64.

[164] *See* JACOB, *Felony*, *supra* note 113 (finding, for Coke "[felony] is derived from the *Latin* word *Fel*, or from the old Sax. *Fell*, one signifying Gall, and the other Fiery; and his Reason is, because either of these Words are suitable to the Crime, which is always intended to be done with a bitter of fierce Mind," and, for Spelman, "[felony] comes from the *Saxon* word *Feah*, which signified a Reward of Estate, and the *German Lon*, which in *English* is Price; as this was formerly a Crime punished with the Price, *viz*, the Loss of Estate"); BLACKSTONE, *supra* note 50, at 62–63 (explaining that, for Coke, "[felony] is *crimen animo felleo perpetratum* [a crime perpetrated with bitterness], with a bitter or gallish inclination"); *id.* at 63 (explaining that, for Spelman, "felon" "is derived from two northern words; *fee*, which signifies . . . the fief, feud, or beneficiary estate; and *lon*, which signifies price or value[;]" "[f]elony is therefore the same as *pretium feudi* [the price of the fief], the consideration for which a man gives up his fief . . . such an act is as much as your life, or your estate, is worth"). Notably, both authors cite separate sources as well. Jacob cites Blount for an alternative theory that attributes "felony" to be from a Saxon word, *Felen* "i.e. *Errare, delinquere*, which seems to be most agreeable with the Offence." JACOB, *Felony*, *supra* note 113. Similarly, Blackstone cites "Prateus, Calvinus, and the rest" as sources deriving "felony" from a Greek word for "an imposter or deceiver" and the Latin words *fallo*, *fefelli*, and *fellonia*. BLACKSTONE, *supra* note 50, at 62.

[165] *See* BLACKSTONE, *supra* note 50, at 62–63.

historical felony, which was "punished by Pecuniary Fines" until Henry I "about the Year 1108."[166] Simply, Jacob found Coke's theory on "felony" descriptive of the offense since at least the early twelfth century and Spelman's theory descriptive of the offense before. Blackstone suggested Coke was mistaken and accepted Spelman without much qualification. Therefore, the disagreement between these writers over the history of "felony" is likely from differences in weighing these two sources.[167]

The disagreement between Blackstone and Jacob continues into terms related to felony. "Misdemeanor" is a term that floats through Blackstone's *Commentaries* like "felony." Blackstone described "crime" and "misdemeanor" as "mere synonymous" but conceded that "in common usage, the word, 'crimes,' is made to denote such offences as are of a deeper and more atrocious dye; while smaller faults, and omissions of less consequence, are comprized under the gentler name of 'misdemeanors' only."[168] Accordingly, Blackstone notes the contemporary distinction to be "crime" from "misdemeanor," where "felony" appears subsumed within Blackstone's "crime."[169]

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[166] *See* JACOB, *Felony*, *supra* note 113.

[167] Alternatively, the difference could be a result of imprecision in language. Neither author suggested explicitly what they mean by "anciently," for Jacob, or "by long use," for Blackstone. It is entirely possible that, "by long use," Blackstone referred to a period centuries earlier than Jacob's reference. Meanwhile, Jacob's "anciently" could refer to the centuries between the *Libri Feudorum*—a 12th-century text cited by Blackstone—and the beginning of his project in 1720. Note, Bracton, compiled in the thirteenth century, described "felony" requiring evil intent. *See* BRACTON, *supra* note 98.

[168] BLACKSTONE, *supra* note 50, at 3. Blackstone seems to employ the term "misdemeanor" as a catch-all term for offenses less serious than "crime." *See*, *e.g.*, *id.* at 27–28 (describing "some misdeme[a]nors" that are punished by municipal law alone). However, Blackstone's *Commentaries* also suggests that there are degrees of seriousness within the misdemeanors. For example, when discussing infancy, Blackstone wrote that "The law of England does in some cases privilege an infant, under the age of twenty one, as to common misdeme[a]nors; so as to escape fine, imprisonment, and the like . . . ." *Id.* at 14. Blackstone does not provide a contextual definition of "common," nor does he provide examples. However, later in the paragraph, Blackstone explained that, "where there is any notorious breach of the peace, a riot, battery, or the like . . . an infant, above the age of fourteen, is equally liable to suffer, as a person of the full age of twenty one." *Id*. This qualification implies that "common misdemeanors" are those misdemeanors which are *not* a "notorious breach of the peace" like a "riot, battery or the like." Shortly thereafter, Blackstone uses the phrase "inferior misdemeanors," though more context accompanies this phrase. *See id.* at 19. Notably, this use follows a discussion of treason, so the "inferior misdeme[a]nor" might be any misdemeanor, as all are inferior to treason, though the example provided, "keeping a brothel," is unlikely to fall into the "notorious" breaches separated from "common" misdemeanors. Finally, Blackstone describes the contemporary attempted murder to be a "great misdeme[a]nor." *See id*. at 129. This use has little context to suggest what "great" might mean, but based on the common understanding of "great" and the crime at issue, it is likely that this attempted murder—"bare assault, with intent to kill"—is one of the notorious breaches separated from "common" misdemeanors. *Id.* Note, however, that this rather serious offense is still only a misdemeanor.

[169] This crime-misdemeanor division does not map cleanly on modern American criminal law. At an even larger scale, Blackstone arranged the criminal law, his "public wrongs," in Book IV in a peculiar and orthodox way, seemingly abandoning the Enlightenment approach to rights that his early portions of the Commentaries embraced. *See* Duncan Kennedy, *The Structure of Blackstone's Commentaries*, 28 BUFF. L. REV. 205, 229 (1979) ("The analysis of crimes abandoned the earlier tripartite scheme of absolute rights of persons, relative rights

Alternatively, Jacob divided offenses into "Capital" and "not Capital" offenses. Jacob's Capital offenses are "those for which the Offender shall lose his Life," while not Capital Offenses are "where the Offender may forfeit his Lands and Goods, be fined, or suffer corporal Punishment, or both; but not Loss of Life."[170] Further, Jacob explained that "Capital *Offences* are comprehended under *High Treason, Petit Treason*, and Felony," while "*Offenses* not Capital include the remaining Part of the *Pleas of the Crown*, and come under the Title of Misdemeanors."[171] Considering "all Treasons include in them Felony" according to Jacob[172] and Blackstone,[173] Jacob effectively separated all offenses into "felony" and "misdemeanor," just like modern American criminal law.

This Note proposes that Jacob's *Law-Dictionary* offers a viable, and potentially more authoritative, alternative to Blackstone's *Commentaries*. First, Jacob's division of crimes tracks more cleanly onto modern American criminal law and his definition of felony appears more complete. Second, much of Blackstone's *Commentaries* were based on treatises out-of-date by the American colonies, let alone the Constitution and Bill of Rights.[174] Third, Blackstone made assertions about English law that were proven to be untrue or too absolute, calling into question his authority on "the law."[175] Fourth, Thomas Jefferson hardly included Blackstone's *Commentaries* in his own Legal Commonplace Book, as it is said that Jefferson found Blackstone's approach to be "dangerously" Tory.[176] Fifth, William Blackstone's *Commentaries* were not published until 1765, a mere decade before the American Revolution began, likely many years after most of the Framers received their legal education.[177] Finally, Ruth Paley, the editor of

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of persons, and rights of things. In its place, Blackstone offered a hierarchical arrangement: offenses against God and religion; against the law of nations; against the king and government; against the commonwealth; and against individuals.").

[170] JACOB, *Offence*, *supra* note 113.

[171] *Id.*

[172] *See id.*

[173] *See* BLACKSTONE, *supra* note 50, at 62 ("Treason itself, says sir Edward Coke, was anciently comprized under the name of felony . . . . All treasons therefore, strictly speaking, are felonies; though all felonies are not treason.").

[174] *See* BLACKSTONE, *supra* note 50, at ix, xxv–xxvi.

[175] *See* Martin Minot, *The Irrelevance of Blackstone: Rethinking the Eighteenth-Century Importance of the Commentaries*, 104 VA. L. REV. 1359, 1363 (2018); *see also* BLACKSTONE, *supra* note 50, at xxv–xxvi.

[176] JEFFERSON, *supra* note 23, at 588 n.2; *see also* Minot, *supra* note 175, at 1382–84 (a more robust analysis of Blackstone's significance, or lack thereof, in commonplace books). Given Thomas Jefferson's leading role in the Bill of Rights, his treatment of Blackstone should be particularly important when interpreting those amendments. *See Bill of Rights*, *supra* note 25; *see also* Everson v. Bd. of Educ., 330 U.S. 1, 13 (1947).

[177] Minot argued that the temporal connection between the American Revolution and Blackstone's *Commentaries* has been wrongly assumed to make the work widely influential on America's founding generation. Minot, *supra* note 175, at 1362–63. In other words, Minot challenged the assumption that publication, and even circulation, of the *Commentaries* suggests influence. Similarly, this Note challenges the assumption that the *Commentaries* were influential

Book IV for Oxford, best captures the problems with looking to Blackstone on matters of criminal law:

> Much of Book IV is irrelevant to any modern jurist. Its references to specific statutes meant that *it required constant updating*, even [] during Blackstone's lifetime, let alone in the centuries since. What is left is . . . the wider attempts to explain the laws and to supply a historical context and rationale for them. . . . The *Commentaries* continue in some respects to be regarded as authoritative . . . . This is especially true of the USA, where . . . originalists [] *somewhat surprisingly* hold that Blackstone, who was a Tory, a committed monarchist, and enemy of American independence, provided a portrait of English law as it would have been understood—*and accepted*—by the founding fathers.[178]

Importantly, Paley recognized that, even if Blackstone's *Commentaries* accurately described English law, America's Founders did not necessarily accept his description. However, within half a century, it is said that Abraham Lincoln, when asked about how to become a lawyer, answered, "Begin with Blackstone's *Commentaries*."[179] Therefore, while the Framers might not have looked to Blackstone for authority, succeeding generations did.[180]

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by pointing out that, even if the *Commentaries* were available and circulated by the Revolution, America's Founders were educated years before, which would diminish the influence that Blackstone's text might otherwise have had. *See id.* at 1393 ("While Blackstone's work crossed the Atlantic even before the publication of the American edition in 1772, the work did not especially influence the education of elite lawyers in the late eighteenth century.").

[178] Ruth Paley, *Introduction* to 4 William Blackstone, Commentaries on the Laws of England, at xxv–xxvi (Oxford ed. 2016) (emphasis added). Paley then added two examples of why citing Blackstone is problematic for the Supreme Court. First, Justice Alito quoted Coke *and* Blackstone for a definition of extortion in *Sekhar* even though Blackstone's reference was to Hawkins who referenced Coke. *Id.* at xxvi (citing Sekhar v. United States, 133 S. Ct. 2720 (2012)). Second, Justice Scalia cited Hale *and* Blackstone to support the assertion that, at the time of the Founding, the death penalty could, in *theory*, be applied to minors even though Blackstone was merely paraphrasing Hale from over 100 years before. Further, Blackstone's one reference to the death penalty for a minor involved a minor who was "spared precisely because the execution of children was indeed repugnant to jurists half a century before the passage of the eighth Amendment." *Id.* (citing Roper v. Simmons, 543 S. Ct. 551 (2005) (Scalia, J. dissenting)). Essentially, Blackstone so copied earlier jurists that his assertions often do not necessarily reflect the practice of law at the time of his writings. So, it would be improper to assert, without qualification, that what Blackstone wrote in his *Commentaries* reflected understandings of law at the Founding.

[179] Abraham Lincoln is said to have given this answer in 1834. Halliday, *supra* note 55, at 21 (2012); *see also* Mark E. Steiner, *Abraham Lincoln and the Rule of Law Books*, 93 Marq. L. Rev. 1283, 1302 (2010).

[180] This speculation raises an issue of contemporary American constitutional law. Even if the U.S. Supreme Court accepted that Blackstone's *Commentaries* were not authoritative on how the Founders understood and accepted English law, his *Commentaries* would not be irrelevant. In fact, it might be even more impactful on modern jurisprudence that Abraham Lincoln and the lawyers of the late 19th century looked to Blackstone for authority. Because the original Bill of Rights only applied to the federal government until the passage of the Fourteenth Amendment, some argue that the inquiry into original public meaning must be focused on 1868 to determine

Ultimately, Jacob and Blackstone disagree on the definition of "felony" and how to organize "felony" within English criminal law. Yet, the *Watson* majority relied upon a common law rule that does not appear to have been a clear rule—as what constituted a "felony" and "misdemeanor" was disputed, a basic premise for a rule based on that distinction. Part III will explore other issues with *Watson*, stemming from the "ancient common law rule."

III. Revisiting Watson and Terry

The discussion of Eden and Kames in Part I established the foundation for the critique of *Watson* and *Terry* below. According to natural law principles, conduct should be punished according to its own moral offensiveness.[181] Even if laws must be made that are regulatory, they should be limited in their scope and punishment to what is necessary to meet the goals and should not tread upon "natural Justice."[182] Seeing that government could easily justify laws as necessary to its goals, America's Founders introduced the Bill of Rights to assure this limitation.[183] This inference supports why, in *Watson*, the Court should have treated the historical "felony" differently from the modern "felony," and why, in *Terry*, the Court should have afforded more respect to the Fourth Amendment's protections, at least in proportion to the seriousness of the suspected crime.

As Part II explored in further detail, making conduct a "felony" made it a capital crime, and natural law teaches that only the most heinous acts should be made capital. America's Founders certainly did not intend to extend common law rules of arrest for the most heinous acts to such crimes as mail theft or carrying a concealed weapon, nor did they intend to have the security of one's person violated on reasonable suspicion of traffic offenses or the like. Eden recognized political freedom requires that no one should "be compel[ed] to do anything" unless laws that are "clearly obvious to common understandings" and "fully notified to the people" compel them to do so.[184] Our Founders would have only allowed this natural right to be abridged when individuals were suspected of particularly sinister conduct, not just for regulatory laws now called "felony." Accordingly, stop-and-frisk and zero tolerance policing should not be legally enforceable either.

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how the Bill of Rights applies to the states. *See* N.Y.S. Rifle & Pistol Ass'n, Inc. v. Bruen, 597 U.S. 1, 37 (2022) ("We also acknowledge that there is an ongoing scholarly debate on whether courts should primarily rely on the prevailing understanding of an individual right when the Fourteenth Amendment was ratified in 1868. . . ." or when the Bill of Rights was ratified in 1791). Therefore, according to this conception of "originalism," if the 1868 Congress believed that Blackstone spoke on behalf of late eighteenth-century English law, then through the vehicle of incorporation via the Fourteenth Amendment, Blackstone's *Commentaries* would be relevant to interpretations of the Bill of Rights as they apply to the states.

[181] *See supra* Part I.C.

[182] *See supra* Part I.D(1).

[183] *See supra* Part I.A.

[184] Eden, s*upra* note 13, at 309, 312

Part III directly discusses the two foundational cases for U.S. criminal constitutional law that are the focus of this Note: Part IIIA for *Watson* and Part IIIB for *Terry*. In *United States v. Watson*, 423 U.S. 411 (1976), the Court misunderstood the history, and in *Terry v. Ohio*, 392 U.S. 1 (1968), the Court should have looked to history. These cases are immensely important, not just because of their respective holdings, but because of the significant doctrine that followed.

A. United States v. Watson

In 1976, the Supreme Court altered the course of policing in America forever. Based on "its views of precedent and history," the Court concluded "that a warrant is not necessary for a police officer to make an arrest in a public place, so long as he has probable cause to believe a felony has been committed."[185] To reach this conclusion, the *Watson* majority held that the "ancient common law rule" allowed a peace officer to "arrest without a warrant for a misdemeanor or felony committed in his presence as well as for a felony not committed in his presence if there was reasonable ground for making the arrest."[186] To make this assertion, the majority relied mainly on English treatises—Blackstone and Hale—but included Halsbury's encyclopedia on English laws, a couple of English cases, a late-nineteenth-century history, and a law review article that all supposedly align with the treatises.[187] The majority followed with citations to early American cases and statutes which allegedly matched their claim.[188]

Justice Marshall disagreed sharply with the majority. Marshall argued that "an examination of the history relied on by the Court shows that it does not support the conclusion laid upon it."[189] Justice Marshall criticized the majority for ignoring how the meaning of "felony" has changed since the Fourth Amendment was passed, finding that "the ancient rule [from the common law] does not provide a simple answer directly transferable to our system" and the majority's "failure to recognize any tension in the common law rule at all[] drains all validity from [their] analysis."[190] Memorably,

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[185] United States v. Watson, 423 U.S. 411, 436 (1976) (Marshall, J., dissenting).

[186] *Id.* at 418.

[187] *Id.* at 418–19 (referencing 10 Halsbury's Laws of England 344–45 (3d ed. 1955); Blackstone, *supra* note 50, at 189–92; 1 J. Stephen, A History of the Criminal Law of England 193 (1883); 2 Sir Matthew Hale, Pleas of the Crown *72–74; Horace L. Wilgus, *Arrest Without a Warrant*, 22 Mich. L. Rev. 541, 547–50, 686–88 (1924); Samuel v. Payne, 1 Doug. 359, 99 Eng. Rep. 30 (K B. 1780); Beckwith v. Philby, 6 Barn. & Cress. 635, 108 Eng. Rep. 585 (K.B. 1827)).

[188] *Watson*, 423 U.S. at 419–20 (citing Kurtz v. Moffitt, 115 U.S. 487, 504 (1885); Rohan v. Sawin, 59 Mass. 281 (1850); Wakely v. Hart, 6 Binn. 316 (Pa. 1814); Tolley v. Mix, 3 Wend. 350 (N.Y. Sup. Ct. 1829); State v. Brown, 5 Del. 505 (Ct. Gen. Sess. 1853); Johnson v. State, 30 Ga. 426 (1860); Wade v. Chafee, 8 R.I. 224 (1865); Reuck v. McGregor, 32 N.J.L. 70, 74 (Sup. Ct. 1866); Baltimore & O. R. Co. v. Cain, 81 Md. 87, 100, 102, 31 A. 801, 803, 804 (1895)).

[189] *Watson*, 423 U.S. at 436 (Marshall, J., dissenting).

[190] *Id.* at 442.

Justice Marshall remarked, "[t]o apply the rule blindly today . . . makes as much sense as attempting to interpret Hamlet's admonition to Ophelia, 'Get thee to a nunnery, go,' without understanding the meaning of Hamlet's words in the context of their age."[191] Marshall cited distinct and overlapping sources to find ambiguity where the majority found clarity: he cited Blackstone's *Commentaries* and Halsbury's *Laws*,[192] elaborated on the law review article,[193] and explored cases and statutes across time and space.[194]

This Note argues that Justice Marshall generally had the right of it, insofar as the common law "does not provide a simple answer," and *Watson*'s holding should be reconsidered accordingly.[195] As will be shown below, the majority's holding is flawed because (1) "felony" as understood by the Framers is significantly different from "felony" as understood today; (2) the crimes considered a "felony" then were more limited; (3) the majority misrepresented or misinterpreted the rule by (a) improperly collapsing "justices of the peace" and "constables" into "peace officers" and (b) substituting "misdemeanor" for "breach of peace"; (4) there was no clear common law rule; and (5) the evidence of acquiescence to the "rule" does not hold up. Part IIIA will discuss these arguments in turn.

First, Marshall accurately suggested that "felony" meant something different for the Framers than it does today. Blackstone stated explicitly that felony was so tied to capital punishment that to make a crime a felony was to make it punishable by death,[196] but "felony" in the modern United States mainly denotes any crime that could be punished by at least one year of imprisonment.[197] However, one could argue that the reference (what the

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[191] *Id.* at 438 & n.2–n.3 ("[n.2:] W. Shakespeare, Hamlet, act iii, sc. 1, line 121–122; [n.3:] Nunnery was Elizabethan slang for house of prostitution"; citing *Nunnery*, Oxford English Dictionary (1933)).

[192] *See id.* at 439–40 (citing Blackstone, *supra* note 50, at 95; 9 Halsbury's Laws of England 450–793 (1909)). Notably, Marshall compared the statutes concerning threats against the King at common law and threats to the President in the modern day. *Id.* at 440 n.7 ("Indeed, by statute, it was no more than a high misdemeanor wilfully to discharge or attempt to discharge a pistol at or near the King of England.") (citing 9 Halsbury's Laws of England 459 (1909)). *Cf.* 18 U.S.C. § 871 (felony to make threats against President of United States); § 1751 (felony to assault President of United States)).

[193] *See id.* at 439–40 & n.4 (citing Horace L. Wilgus, *Arrest Without a Warrant*, 22 Mich. L. Rev. 541, 572–73 (1924)).

[194] Justice Marshall explored *Kurtz* like the majority, added *Carroll v. United States*, 267 U.S. 158 (1925) and *Ex parte Wilson*, 114 U.S. 417, 423 (1885), and used a few footnotes to compare felonies identified in Wilgus's law review article to statutes from Arkansas, Florida, Kentucky, Massachusetts, Oklahoma, and Washington State. *See Watson*, 423 U.S. at 439–40 & n.4–n.9.

[195] *Watson*, 423 U.S. at 442.

[196] *See* Blackstone, *supra* note 50, at 64 ("The idea of felony is indeed so generally connected with that of capital punishment, that we find it hard to separate them; and to this usage the interpretations of the law do now conform. And therefore if a statute makes any new offence felony, the law implies that it shall be punished with death . . . .").

[197] A 1987 D.O.J. study revealed that most states defined a felony as any crime punishable by at least one year of imprisonment. Bureau of Justice Statistics, *State Felony Courts and Felony Laws* (Aug. 1987), https://bjs.ojp.gov/content/pub/pdf/sfcfl.pdf [https://perma.cc/

word indicates) of "felony" provides for this difference, not its sense (what the word expresses), as "felony" in 1791 and "felony" in 2024 both denote crimes more serious than misdemeanors.[198] Marshall's opinion addressed this argument, albeit before the sense-reference distinction took its current form in legal scholarship. Marshall noted that, the difference between the modern "felony" and eighteenth-century "felony" "reflects more than changing notions of penology"; "[i]t reflects a substantive change in the kinds of crimes called felonies."[199]

This Note agrees that designating an offense as punishable by death by making it a "felony" is of a different sense entirely than designating an offense as punishable by at least a year of imprisonment. All capital crimes carry an identical maximum sentence, death, while there is a huge range in the severity of maximum punishments for felonies today. As discussed in Part I, the natural law principles embraced by the Founders require punishments to be proportional,[200] so all crimes (rightly) punishable by death would be of the same moral offensiveness, while crimes with different punishments would not. Therefore, all capital crimes accepted by the Founders would be of the same class—the most serious crimes—in a way that modern felonies are not. Thus, the sense of "felony" in the late eighteenth century was a class of crimes of the highest degree of moral offensiveness, not just crimes that are more serious than misdemeanors.

Second, Marshall properly recognized that the class of offenses considered to be felonies in 1776 were very different from those considered to be

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NFT5-2AVC]. Yet, the definition was not uniform across the states. *Id.* at 4. ("In the 39 States that use and define the term felony, common elements do exist in their felony definitions. . . . A common felony definition is one that identifies the place of imprisonment but not the duration . . . . Nearly as common is a definition that specifies the duration of imprisonment but not the place . . ."). Today, some states do not even use the felony-misdemeanor distinction. *See* Office of the Maine Attorney General, "Criminal Justice System," *Maine.gov*, https://www.maine.gov/ag/crime/criminal_justice_system.shtml [https://perma.cc/CT2M-5RBV] ("Crimes were traditionally classified as felonies (serious crimes punishable by more than one year in prison) and misdemeanors (less serious crimes punishable by one year or less in jail). Maine no longer uses these categories, but classifies crimes [according to five categories based on the maximum possible length of sentence]").

[198] In other words, "felony" today and "felony" in the late eighteenth century could express the same thing, crimes more serious than misdemeanors, even though the class of offenses to which each use of the term refers, to crimes punishable by over a year in prison and crimes punishable by death respectively, is different. For a succinct description of the sense-reference distinction, see Christopher R. Green, *Originalism and the Sense–Reference Distinction*, 50 St. Louis U. L.J. 555, 563–65 (2006). Green argued that "the *sense* of a constitutional expression is fixed at the time of the framing, but the *reference* is not, because it depends on the facts about the world, which can change." *Id*. at 560.

[199] United States v. Watson, 423 U.S. 411, 439 & n.6 (1976) (Marshall, J., dissenting) (citing Carroll v. United States, 267 U.S. 132, 158 (1925)) ("In England at the common law the difference in punishment between felonies and misdemeanors was very great. Under our present federal statutes, it is much less important, and Congress may exercise a relatively wide discretion in classing particular offenses as felonies or misdemeanors.").

[200] *See supra* Part I.C.

felonies in 1976.[201] The term "felony" at common law designated crimes of a particular moral offensiveness; it did not just indicate their punishment.[202] The four counts of possession of stolen mail for which Henry Watson was charged certainly did not match the moral offensiveness of *common law* felonies.[203] However, Marshall failed to note that England's criminal *statutes* had already expanded the body of felonies beyond the common law.[204] Given that this expansion drew criticism from Blackstone and Eden alike, the Framers likely did not adopt this overreach of England's government while rejecting others.[205] Specifically, this expansion occurred through positive law ignorant of natural law principles. Therefore, the Framers likely expected "felony" to encompass a more limited set of crimes, not the full range of felonies under the Bloody Code or modern American law.

Third, the *Watson* court made two critical errors in declaring the "ancient common law rule." The majority claimed that the common law "permitted" a "*peace officer*" to "arrest without a warrant for *a misdemeanor or* felony committed in his presence as well as for a felony not committed in his presence if there is reasonable ground for making the arrest."[206] This statement of the "rule" made two mistakes: first, it improperly conflates the officers given these powers according to Blackstone; and second, it substitutes "misdemeanor" for a subset of misdemeanors with a particular bad quality that would justify this rule.

The majority's first error comes from its failure to recognize its combination of two separate powers into this one "rule." The two powers are (1) to arrest without a warrant for an offense committed in one's presence and (2) to arrest for a felony not committed in one's presence but where there is reasonable ground for making arrest. The first power was given to "justices of the peace" according to Blackstone, which are not analogous to modern

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[201] *See Watson*, 423 U.S. at 440 ("Professor Wilgus has summarized and documented the cases: 'At common law, an assault was a misdemeanor, and it was still only such even if made with the intent to rob, murder, or rape. Affrays, abortion, barratry, bribing voters, challenging to fight, compounding felonies, cheating by false weights or measures, escaping from lawful arrest, eavesdropping, forgery, false imprisonment, forcible and violent entry, forestalling, kidnapping, libel, mayhem, maliciously killing valuable animals, obstructing justice, public nuisance, perjury, riots and routs, etc. were misdemeanors. . . .'").

[202] *See* EDEN, *supra* note 13, at 8–9; JACOB, *Felony*, *supra* note 113; HERRUP, *supra* note 40, at 2–3.

[203] Common law felonies included treason, murder, arson, robbery, and grand larceny, all punishable by death. *See* HALLIDAY, *supra* note 55, at 76; *accord* HERRUP, *supra* note 40, at 2–3. Petty thefts were not felonies. *See* Herrup, *supra* note 40, at 47, 143, 147, 161 (describing how devaluation of stolen property allowed thieves to avoid a felony conviction and death). Watson's theft resembles petty theft more than grand larceny.

[204] *See* HALLIDAY, *supra* note 55, at 76–77 (describing the proliferation of offenses known as the "Bloody Code"); KEILY, *supra* note 55, at 12 (same).

[205] *See*, e.g., JEFFERSON, *supra* note 26, at 45–46 (describing how Jefferson adopted Eden's ideas to pursue criminal reform); *see* BREWER, *supra* note 56, at 217 (describing Eden and Blackstone's criticisms of the Bloody Code); *see also supra* Part II.D(3) (describing how Framers rejected certain abuses of English system).

[206] *Watson*, 423 U.S. at 418 (emphasis added).

police officers.[207] The second power was given to "constables," which do analogize most closely to the modern officer. Specifically, Blackstone wrote that the constable "may, without warrant, arrest any one for a breach of the peace . . . [a]nd, in case of felony actually committed . . . he may upon probable suspicion arrest the felon . . . ."[208] Notably, Blackstone's source for this common law rule was Hale's *Pleas of the Crown*, which were *written* before the Bloody Code took shape, so the "felony" described here would be the "felony" at common law—those with a high degree of moral offensiveness.[209]

The majority's second error in its statement can be seen in Blackstone's enumeration of the common law for the constable. The common law did not give "justices of the peace" *or* "constables" the right to arrest without warrant for a misdemeanor committed in their presence; it only gave them this right for a "breach of peace."[210] While some breaches of the peace were misdemeanors, not all misdemeanors were a breach of the peace.[211]

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[207] Justices of the peace (JPs) functioned more like the modern magistrate judge than a modern police officer. JPs were officers of the *court*, which would place them clearly within the judiciary in the separation of powers scheme of the United States. *See* BLACKSTONE, *supra* note 50, at 191–92 (describing powers of JPs and constables); JACOB, *Justice of Peace*, *supra* note 113; JACOB, *Constable*, *supra* note 113.

[208] BLACKSTONE, *supra* note 50, at 190–91.

[209] *See* HERRUP, *supra* note 40, at 2–3. While Hale's *Pleas of the Crown* were published in 1736, Sir Matthew Hale died in 1676.

[210] It is worth noting here Blackstone's entire paragraph on arrests without a warrant, so that this distinction can be made obvious:

> Arrests by *officers, without warrant*, may be executed, 1. By a justice of the peace; who may himself apprehend, or cause to be apprehended, by word only, any person committing a felony or breach of the peace in his presence [1 Hal. P. C. 86.]. 2. The sheriff, and 3. The coroner, may apprehend any felon within the county without warrant. 4. The constable . . . hath great original and inherent authority with regard to arrests. He may, without warrant, arrest any one for a breach of the peace, and carry him before a justice of the peace. And, in case of felony actually committed, or a dangerous wounding whereby felony is like to ensue, he may upon probable suspicion arrest the felon; and for that purpose is authorized (as upon a justice's warrant) to break open doors, and even to kill the felon if he cannot otherwise be taken; and, if he or his assistants be killed in attempting such arrest, it is murder in all concerned [2 Hal. P. C. 88–96]. 5. Watchmen, either those appointed by the statute of Winchester, 13 Edw. I. c. 4. to keep watch and ward in all towns from sunsetting to sunrising, or such as are mere assistants to the constable, may [] arrest all offenders, and particularly nightwalkers, and commit them to custody till the morning [*Ibid*. 98].

BLACKSTONE, *supra* note 50, at 190–91. Importantly, the *Watson* Court gets the mistaken language of "felony and misdemeanor," not from any legislation or precedent, but from the Model Code of Pre-arraignment Procedure. *See* United States v. Watson, 423 U.S. 411, 422 & n.11 (1976) ("Among [the Model Code's] provisions was § 120.1, which authorizes an officer to take a person into custody if the officer has reasonable cause to believe that the person to be arrested has committed a felony or has committed a misdemeanor or petty misdemeanor in his presence.").

[211] Hale's *Pleas of the Crown* identify "breach of the peace" as one of three categories of "Offences of an Inferior nature . . . without relation to Office" with "Deceits and Cozenage" and "Nuisances." *See* SIR MATTHEW HALE, PLEAS OF THE CROWN, 134–51 (5th ed. 1716). Hale then gave seven examples of a breach: (1) affrays, (2) riots, (3) forcible entries, (4) forcible detainers, (5) barretries (stirring up lawsuits), (6) riding armed, and (7) going armed. *See id.* Blackstone included these offenses in his larger category of "Offenses against the Public Peace,"

The rule makes sense with this distinction in mind, because breaches of the peace generally involve violence, requiring officials to conduct arrests for public safety.[212] This justification does not hold for all misdemeanors. In addition, Article I of the U.S. Constitution states that congressmen "shall in all Cases, except Treason, Felony and Breach of the Peace, be privileged from Arrest . . ."[213] If a "breach of the peace" was equivalent to a "misdemeanor," then this constitutional exception would be superfluous, as "treason, felony, and misdemeanor" would include all crimes. In effect, the *Watson* Court's reduction of "breach of peace" to "misdemeanor" undermines the Constitution's text.

Fourth, the Blackstone rule adopted by *Watson* was not clearly the common law rule for America's Founders. Giles Jacob put forth a slightly different rule from Blackstone.[214] Jacob wrote that, in general, one may not be arrested without a warrant "[b]ut for Treason, Felony, and Breach of the Peace"—the exact phrase from Article I. [215] In those exceptional cases, "any Man may [make the] arrest" but "[i]f a wrong person is *arrested*, or one for Felony, where no Felony is done," it is "false imprisonment, liable to Damages."[216] Jacob's general rule of arrest reflects the necessity for community policing when no modern police force existed. The rule balanced a need to stop dangerous crimes, such as treasons, felonies and breaches of the peace, with the accused's right not to be falsely arrested. Implicit in this rule is the notion that arrests are an intrusion on the individual, an "assault," so if others tried to abuse this rule for arrests, they would be liable.

Jacob also specified the rule for justices of the peace and constables. A justice of the peace "may commit a Person that doth a Felony in his own View, without Warrant; but if it be on Information of another, he must make a Warrant under Hand and Seal."[217] At the same time, constables may "take into Custody any Persons whom he sees committing Felony, or a Breach of

beginning the chapter by identifying the following offenses as breaches of the peace and noting that some are felonious and some are not. *See* BLACKSTONE, *supra* note 50, at 94; *accord id.* at 98 ("Besides actual breaches of the peace, any thing that tends to provoke or excite others to break it, is an offence of the same denomination."). Blackstone's *Commentaries* separate these offenses from those against public trade, public health, or persons, all of which include misdemeanors. Elsewhere in the *Commentaries*, Blackstone distinguishes between misdemeanors and a breach of the peace. *See, e.g.*, BLACKSTONE, *supra* note 50, at 14 ("[t]he law of England does in some cases privilege an infant, under the age of twenty one, as to common misdemeanors" but not where "there is any notorious breach of the peace").

[212] *See* HALE, *supra* note 211, at 134–51 (describing "breach of the peace"); *cf.* MONTESQUIEU, *supra* note 41, at 187 (arguing individuals properly lose protection from punishment by depriving another of their security).

[213] *See* U.S. CONST. art. 6, § 1.

[214] As discussed before, Jacob may be a preferable source to Blackstone. *See supra* Part II.E.

[215] JACOB, *Arrest*, *supra* note 113 ("None shall be *arrested* for Debt, Trespass, etc., or other Cause of Action, but by Virtue of a Precept or Commandment out of some Court: But for Treason, Felony, or Breach of the Peace, any Man may *arrest* without Warrant or Precept.") (citing JOHN RASTELL, EXPOSITIONES TERMINORUM LEGUM ANGLIAE [LES TERMES DE LA LEY] 54).

[216] *Id.* at 49–50.

[217] JACOB, *Justice of Peace*, *supra* note 113.

the Peace; But if it be out of his Sight, where a Person is seized by another, he may not do it without Warrant."[218] Jacob's qualification makes the most important distinction to *Watson*: a constable may not arrest if it is out of sight *without* a warrant. Jacob's description of a constable's common law powers is in direct tension with the majority's so-called "common law rule" allowing arrests on probable cause of a felony *out of sight*.

Finally, the majority and Powell's concurrence improperly relied on the suggestion that there is "no historical evidence that the Framers or proponents of the Fourth Amendment . . . were at all concerned about warrantless arrests by local constables and other peace officers."[219] Interestingly enough, the majority's suggestion was based on the Second Congress passing a law which "invested United States marshals and their deputies with 'the same powers in executing the laws of the United States as sheriffs and their deputies in the several states have by law in executing the laws of their respective states.'"[220] To determine what powers sheriffs and their deputies had in the several states, the *Watson* majority looked at state law cases *after* passage of this Act.[221] While these cases could help in determining the powers of state officials even though they came after 1792, the Second Congress could *not* have read any of these court opinions. Yet, the majority relies on these court opinions to assert that "the common law rule authorizing arrests without a warrant generally prevailed in the States[.]"[222] As discussed before, the common law rule concerning warrantless arrests was unlikely to be what the majority believed it to be. Just because later courts have similarly misinterpreted the rule does not give it power. As Chief Justice Roberts has wisely noted, "even though we now have a thick body of precedent regarding the meaning of most provisions of the Constitution, our opinions

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[218] JACOB, *Constable*, *supra* note 113. Note, Jacob divides constables into the "High Constable" and "Petty Constables." The High Constable resembles the modern Sheriff, who oversees keeping the peace over an entire area and "usually chosen and sworn by the Justices of Peace, in their Sessions." *Id.* Meanwhile, petty constables "are their Assistants"—analogous to the typical police officer—and "are elected by Parishioners, and sworn by a Justice of Peace [] who may on just Cause remove them." *Id.* Blackstone makes explicit this distinction in Book I, see BLACKSTONE, *supra* note 140, at 228, and implies it in his chapter on arrests in Book IV. *See* BLACKSTONE, *supra* note 50, at 191 ("[I]f [the constable] or his assistants be killed in attempting such arrest, it is murder in all concerned.").

[219] *See* United States v. Watson, 423 U.S. 411, 429 (1976) (Powell, J., concurring) (citing NELSON LASSON, THE HISTORY AND DEVELOPMENT OF THE FOURTH AMENDMENT TO THE UNITED STATES CONSTITUTION 79–105 (1937)).

[220] *Id.* at 420.

[221] The cases cited by the court were Rohan v. Sawin, 59 Mass. 281 (Mass. 1850), Wakely v. Hart, 6 Binn. 316 (Pa. 1814), Tolley v. Mix, 3 Wend. 350 (N.Y. Sup.Ct. 1829), State v. Brown, 5 Del. 505 (Ct. Gen. Sess. 1853), Johnson v. State, 30 Ga. 426 (Ga. 1860), Wade v. Chafee, 8 R.I. 224 (R.I. 1865), Reuck v. McGregor, 32 N.J.L. 70, 74 (N.J. 1866), Baltimore & O. R. Co. v. Cain, 81 Md. 87, 100, 102 (Md. 1895). The earliest of these cases, *Wakely v. Hart*, came twenty-two years after the Second Congress passed this act in 1792.

[222] *Watson*, 423 U.S. at 420.

continue to respect the primacy of the Constitution's text,"[223] and the Fourth Amendment's text can only be understood in light of the common law at the time of its ratification, not as interpreted years later.

Ultimately, these five criticisms of the *Watson* Court's use of history should make one reconsider whether the case was rightly decided.[224] After all, the case turned on whether the Fourth Amendment allowed the government to conduct the arrest at issue, and the majority suggested that it did based on the implicit adoption of the "ancient common law rule" by the Framers. Alone or in combination, the arguments above support overturning *Watson* and its progeny. At the very least, the Court should recognize that the common law in this situation was not clear and should reconsider this holding accordingly, acknowledging the lack of historical support for *Watson*.[225]

Overturning or reconsidering *Watson* and its progeny would have a significant impact on the personal liberties of U.S. residents. The recent decision *Atwater*—described as "one of the most important carceral decisions in the criminal procedure pantheon"[226]—builds from the historical assessment in *Watson* and expands the power of police to the detriment of individual liberty.[227] These decisions have had massive implications for individual constitutional rights and police power in the modern United States—so they should at least be based on the actual balance struck by our country's Founders, not the balance accepted by a court two centuries after the Declaration of Independence.

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[223] Fulton v. City of Phila., 141 S. Ct. 1868, 1894 (2021); *see also Watson*, 423 U.S. at 442–43 (Marshall, J., dissenting) ("[T]he Court relies on the numerous state and federal statutes codifying the common law rule. But this . . . is no substitute for reasoned analysis. . . . [Even though] the national and state legislatures have steadily ratified the drift of the balance struck by the common law rule past the bounds of its original intent [and] a presumption of constitutionality attaches to every Act of Congress . . . it is well settled that the mere existence of statutes or practice, even of long standing, is no defense to an unconstitutional practice.").

[224] To recap why the majority's holding that an officer may arrest a person "if the officer has reasonable cause to believe that the person to be arrested has committed a felony or has committed a misdemeanor or petty misdemeanor in his presence" is flawed: (1) a "felony" was far more serious to the Framers than today, as it described crimes punishable by death, not just one year or more in prison; (2) those crimes considered to be a "felony" at common law were far more limited than now; (3) the *Watson* Court misinterpreted or misrepresented the rule itself by (a) improperly collapsing "justices of the peace" and "constables" into "peace officers" and (b) substituting "misdemeanor" for "breach of peace"; (4) contemporary legal treatises conflicted on the common law rule used to support this holding; and (5) the "evidence" of acquiescence to the practice of warrantless arrests by the Framers does not hold up.

[225] The Supreme Court is no stranger to finding that the common law is not clear on a matter of criminal constitutional law. As a matter of fact, in *Atwater*, the Court found the warrantless arrest power for *misdemeanors* to be less than clear. *See* Atwater v. Lago Vista, 532 U.S. 318, 327–28 (2001). Perhaps surprisingly, in *Atwater*, the Court accepted its earlier assertions about the common law made in *Watson*.

[226] Alexandra Natapoff, *Atwater and the Misdemeanor Carceral State*, 133 Harv. L. Rev. F. 147, 152 (2020)

[227] *See Atwater*, 532 U.S. at 339–40 (holding peace officers may arrest without a warrant for misdemeanors).

B. Terry v. Ohio

Whereas *Watson* is a case that used history uncritically and improperly, *Terry v. Ohio* represents a case where the Court should have looked closer at the history. As a seminal case of criminal procedure, *Terry* has been the subject of considerable scholarship. This Note limits its discussion of *Terry* to how the case ignored the distinctions between crimes in the common law tradition and ills that led to the ratification of the Fourth Amendment. The historic ills, known as general warrants, enabled English officials to conduct broad, discretionary, and often abusive searches.[228] The Fourth Amendment's protection from unreasonable searches and seizures, and the warrant requirement, intended to eliminate and prevent this practice. Because of *Terry* and its progeny, police today can replicate general warrants despite the Fourth Amendment. Accordingly, the Note asks that the *Terry* doctrine be reassessed.

In considering a constitutional challenge to "stop-and-frisk" policing, the *Terry* Court erred in fashioning a rule untethered to the historical basis of the Fourth Amendment, a mistake that has led to some of England's greatest abuses against the American colonies materializing in the present-day United States. The "*Terry* rule" lowered the standard of proof required for a police officer to stop persons and allowed cursory searches pursuant to that stop for *all* suspected crimes. This rule lacked a historical basis in two ways: first, the rule failed to recognize that similar rules at common law—e.g., the warrantless arrest rule discussed in Part IIIA—were limited according to the seriousness of the alleged crime, and second, the rule did not consider the historical background to the framing of the Fourth Amendment—e.g., general warrants. Accordingly, the *Terry* rule runs counter to the principles that underlie the Fourth Amendment and should be overturned or limited. The type of policing legitimate under *Terry* and its progeny makes clear why this case must be reconsidered. For example, modern zero-tolerance policing resembles the general warrants abhorred by the Founders but which are entirely legal. The Supreme Court must revisit *Terry* to preserve the Fourth Amendment as intended by its Framers.

Terry established carveouts in the Fourth Amendment's probable cause and warrant requirements for "stops" and "frisks." In *Terry*, the Supreme Court held that police officers may "stop" individuals in public—without probable cause to arrest—if the officer has a "reasonable suspicion" that the individual has committed, is committing, or is about to commit a crime.[229] Further, the officer may "frisk" that individual—without a warrant—if the

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[228] *See* Warden, Maryland Penitentiary v. Hayden, 387 U.S. 294, 301 & n.9 (1967).

[229] *See* Terry v. Ohio, 392 U.S. 1, 20–27 (1968); *see also* United States v. Sokolow, 490 U.S. 1, at 7; Maryland v. Buie, 494 U.S. 325, 339 (1990) (Brennan, J., dissenting) ("In *Terry*[], the Court held that a police officer may briefly detain a suspect based on a reasonable suspicion of criminal activity and may conduct a limited "frisk" of the suspect for concealed weapons in order to protect herself from personal danger.").

officer has "reason to believe" the individual is "armed and dangerous."[230] The Court recognized that a "stop" and "frisk" is a "seizure" and "search" subject to the Fourth Amendment.[231] However, the Court viewed stop-and-frisk as less intrusive than search-and-seizure and held only "reasonable suspicion" was required to justify the stop, not the probable cause standard of the Fourth Amendment.[232] Note, the opinion did not contain the words "felony" or "misdemeanor"; the Court did not connect their rule to the type of crime at all.

The *Terry* Court's holding was unsupported historically. The *Terry* majority referenced history and tradition for context, not analysis. The majority opinion recognized one side of the public debate over "stop-and-frisk." The majority argued "the authority of the police must be strictly circumscribed by the law of arrest and search as it has developed to date in the traditional jurisprudence of the Fourth Amendment"[233] but that "stop-and-frisk" policing "historically has not been" subject to a warrant procedure.[234] Because the majority found that, "as a practical matter," street policing should not be subjected to the warrant procedure, the majority considered "the Fourth Amendment's general proscription against unreasonable searches and seizures." The Court acknowledged that "the notions which underlie both the warrant procedure and the requirement of probable cause remain fully relevant[.]"[235] Despite this acknowledgement, the majority conducted a balancing test and only considered contemporary interests, ignoring the history which could have elucidated "the notions which underlie."[236]

Justice Douglas, the lone dissenter in *Terry*, saw in the history the error the majority made, though he did not look deep enough. When criticizing the majority's abandonment of probable cause, Douglas quoted *Henry v. United States*,[237] where the Court had previously said that "[t]he requirement of probable cause has roots that are deep in our history."[238] Accordingly, Douglas would have required probable cause for any "seizure" of a person.[239] In concluding his dissent, Douglas lamented that the "powerful hydraulic pressures throughout our history that bear heavily on the Court to

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[230] *Terry*, 392 U.S. at 27 ("The officer need not be absolutely certain that the individual is armed; the issue is whether a reasonably prudent man, in the circumstances, would be warranted in the belief that his safety or that of others was in danger.").

[231] *See id.* at 19.

[232] *See id.* at 25–27.

[233] *Id.* at 11 ("The heart of the Fourth Amendment, the argument runs, is a severe requirement of specific justification for any intrusion upon protected personal security, coupled with a highly developed system of judicial controls to enforce upon the agents of the State the commands of the Constitution.").

[234] *Id.* at 20.

[235] *Id.*

[236] *Id.*

[237] 361 U.S. 98 (1959).

[238] *Terry*, 392 U.S. at 37 (Douglas, J., dissenting).

[239] *See id.* at 38.

water down constitutional guarantees and give the police the upper hand . . . has probably never been greater than it is today."[240] Further, Douglas warned that, "if the individual is no longer to be sovereign, if the police can pick him up whenever they do not like the cut of his jib, if they can 'seize' and 'search' him in their discretion, we enter a new regime" which is a decision that "should be made only after a full debate by the people of this country."[241] Douglas's prediction came to fruition because of the doctrine that followed *Terry*.

Ultimately, *Terry* was wrongly decided because it devised a blanket rule unconnected to the common law tradition, failing to recognize the historical basis for the Fourth Amendment before opening the door for the ills of general warrants to be repeated. To properly account for "the Fourth Amendment's general proscription against unreasonable searches and seizures," the *Terry* Court should have at least limited the "stop" and "frisk" in proportionality to the suspected crime. As discussed in Part IIIA, Blackstone and Jacob recognized different exceptions to the warrant requirement at common law, but both authors found the exception to depend on the seriousness of the offense.[242] Notably, based on the natural law principles underlying the Fourth Amendment, the seriousness of the offense should be determined by its moral offensiveness when considering exceptions to these requirements.[243] As demonstrated in Part II, in the common law tradition, "felony" meant something different than in 1966: felonies and misdemeanors were not treated the same, and not all misdemeanors were viewed as equivalents. History shows that, if an exception to the Fourth Amendment like *Terry* does exist, the exception must be limited to the suspected crimes to which it applies. By failing to limit itself to serious crimes, *Terry* allowed for the expansion of its holding far beyond the limited application before the Court in 1966.

In ignoring the history behind the Fourth Amendment, the *Terry* opinion opened the door to police officers the ills of the general warrants. The U.S. Supreme Court best described general warrants in *Boyd v. United States*.[244] The *Boyd* Court first explained writs of assistance. These writs "authorized the examination of ships and vessels, and persons found therein, for the purpose of finding goods prohibited to be imported or exported, or on which the duties were not paid, and to enter into and search any suspected vaults, cellars, or warehouses for such goods."[245] In other words, officials were empowered, "in their discretion, to search suspected places for smuggled

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[240] *Id.* at 39.

[241] *Id.*

[242] *See* Blackstone, *supra* note 50, at 190–91; Jacob, *Arrest*, *supra* note 113.

[243] *See supra* Part I.C.

[244] 116 U.S. 616, 623 (1886).

[245] *Id*.

goods."[246] Then, importantly, *Boyd* explained the "grievous abuse[]" that were general warrants.[247] These general warrants gave officials authority to "search[] private houses for the discovery and seizure of books and papers that might be used to convict their owner of the charge of libel."[248] The *Boyd* Court ultimately concluded that "the men who proposed" the Fourth and Fifth Amendments would have never approved of the laws at issue in *Boyd* because "[t]he struggles against arbitrary power in which they had been engaged for more than twenty years would have been too deeply engraved in their memories to have allowed them to approve of such insidious disguises of the old grievance which they had so deeply abhorred."[249]

Though these abuses—writs of assistance and general warrants—mainly concerned the home, they were not so limited. The writs of assistance explicitly allowed searching ships and the persons found on them. The Framers recognized that these arbitrary grants of power could be easily extended, especially when left to the discretion of adversarial colonial officers. For example, when the delegation of Rhode Island notified George Washington of their ratification of the Constitution, they included a declaration with a statement that resembled the Fourth Amendment.[250] The fourteenth statement of Rhode Island's declaration provides:

> That every person has a right to be secure from all unreasonable searches and seisures of his person, his papers or his property, and therefore that all warrants to search suspected places, or seize any person, his papers or his property, without information upon oath, or affirmation, of sufficient cause are grevious and oppressive, and that all general warrants (or such in which the place or person suspected, are not particularly designated) are dangerous and ought not to be granted.[251]

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[246] *Id.* at 625.

[247] *Id.*

[248] *Id.* at 626.

[249] *Id.* at 630.

[250] *To George Washington from the Rhode Island Ratifying Convention, 9 June 1790*, Founders Online, National Archives, https://founders.archives.gov/documents/Washington/05-05-02-0313 [https://perma.cc/RSK5-Z5U6].

[251] *Id.* Massachusetts, led by future President John Adams, put forth something similar a decade before. *See* Mass. Const., art. XIV (1780). The Fourteenth Article of the Declaration of Rights in the Massachusetts Constitution of 1780 stated:

> Every subject has a right to be secure from all unreasonable searches and seizures of his person, his houses, his papers, and all his possessions. All warrants, therefore, are contrary to this right, if the cause or foundation of them be not previously supported by oath or affirmation, and if the order in the warrant to a civil officer, to make search in suspected places, or to arrest one or more suspected persons, or to seize their property, be not accompanied with a special designation of the persons or objects of search, arrest, or seizure; and no warrant ought to be issued but in cases and with the formalities prescribed by the laws.

4 John Adams, The Works of John Adams, Second President of the United States: with a Life of the Author, ed. Notes and Illustrations, by his Grandson Charles Francis Adams, 226–27 (Charles Francis Adams ed., 1856).

Note that the Rhode Island delegation equated general warrants to any warrant "in which the place or person suspected[] are not particularly designated," and declared those seizures of "any person, his papers or his property" to be "grievous and oppressive." The founding generation clearly feared arbitrary grants of authority generally. It was not by accident that the Fourth Amendment extended its protection to the "persons, houses, papers, and effects" of the people; the Framers intended the Fourth Amendment to cover more than just the writs and warrants of their day.[252]

Unfortunately, the *Terry* Court did not consider this historical background to the Fourth Amendment, making a grave error. In stopping the extension of arbitrary power at issue, the *Boyd* Court warned that, "illegitimate and unconstitutional practices get their first footing in that way, namely, by silent approaches and slight deviations from legal modes of procedure."[253] The *Terry* Court's shift to "reasonable suspicion" represented one of these "slight deviations," and a series of cases followed *Terry* that allowed "illegitimate and unconstitutional practices" to take root.[254] At the very least, the *Terry* holding should have been limited based on the suspected crime, as demanded by other common law rules like those discussed in *Watson*, which were familiar to the Framers. Accordingly, *Terry* should be overturned, or at least limited to when serious crimes are suspected, because the blanket rule is inconsistent with the Fourth Amendment and the doctrine that followed has allowed the ills bringing about the Fourth Amendment to repeat.

What has followed *Terry* makes clear why revisiting the case is of utmost importance. The type of policing enabled by *Terry* and its progeny resembles the general warrants and writs of assistance that the Framers "outspokenly opposed."[255] Recent reports—like the Department of Justice's review of the police department in Ferguson, Missouri—have demonstrated that modern American police forces are using methods of policing that the Founders would find "grievous and oppressive."[256] While the DOJ found the activities of police unconstitutional under current jurisprudence in the Ferguson report, for example,[257] this Note highlights those police practices

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[252] *See* United States v. Chadwick, 433 U.S. 1, 9 (1977) ("What we do know is that the Framers were men who focused on the wrongs of that day but who intended the Fourth Amendment to safeguard fundamental values which would far outlast the specific abuses which gave it birth.").

[253] Boyd v. United States, 116 U.S. 616, 635 (1886).

[254] *See* United States v. Montoya De Hernandez, 473 U.S. 531, 558 (1985) (Brennan, J., dissenting) (arguing the *Terry* line of cases has undermined the Fourth Amendment). For the harms from modern "legitimate" practices, see Bandes et al., *supra* note 2, at 180–87.

[255] United States v. Watson, 423 U.S. 411, 429 (1976) (Powell, J., concurring) (recognizing "Framers or proponents of the Fourth Amendment [were] outspokenly opposed to the infamous general warrants and writs of assistance").

[256] *See generally* U.S. Dep't of Just., Civil Rights Division, Investigation of the Ferguson Police Department (2015) [https://perma.cc/VVX4-7NHE] [hereinafter Ferguson Report].

[257] *See*, *e.g.*, *id.* at 18 ("This incident is also consistent with a pattern of suspicionless, legally unsupportable stops we found documented in FPD's records, described by FPD as

that are lawful under the *Terry* doctrine but nonetheless resemble the abuses feared by the Framers. The clearest example is "zero tolerance" policing.

"Zero tolerance" policing prioritizes a strict enforcement of *all* laws based on the idea that minor crimes will lead to more serious crimes.[258] For example, under zero tolerance policies, police officers are told to stop all drivers they observe committing a traffic violation, which gives officers legal cause to have the driver[259] and passengers[260] step out of the car and submit to a limited search of their person and vehicle[261] and to fully arrest the driver,[262] allowing further searches.[263] Note, none of these steps in the example are unconstitutional under *Terry* and its progeny. However, this zero-tolerance policing clearly goes against the Framers' understanding of "unreasonable searches and seizures," especially in its application to minor crimes.

"ped checks" or "pedestrian checks." Though at times officers use the term to refer to reasonable-suspicion-based pedestrian stops, or "*Terry* stops," they often use it when stopping a person with no objective, articulable suspicion. . . . To the extent that the words "ped check" suggest otherwise, the terminology alone is dangerous because it threatens to confuse officers' understanding of the law. Moreover, because FPD does not track or analyze pedestrian Terry stops—whether termed "ped checks" or something else—in any reliable way, they are especially susceptible to discriminatory or otherwise unlawful use."); *see also* U.S. Dep't of Just., Civil Rights Division, Investigation of the Baltimore City Police Department 27 (2016), https://www.justice.gov/opa/file/883366/dl?inline [https://perma.cc/] ("Our investigation reveals a widespread pattern of BPD officers stopping and detaining people on Baltimore streets without reasonable suspicion that they are involved in criminal activity. This conduct violates the Fourth Amendment, which allows police officers to briefly detain an individual for investigation where the officers possess reasonable suspicion that the person is involved in criminal activity, *see* Terry v. Ohio, 392 U.S. 1, 21 (1968).").

[258] *Traditional and Contemporary Policing Strategies*, *in* Policing: The Essentials 21, 31 (2021), https://us.sagepub.com/sites/default/files/upm-assets/120159_book_item_120159.pdf [https://perma.cc/Y98L-8555]. The authors cite a definition provided by the RAND Corporation that best describes this practice. The RAND Corporation definition of "zero tolerance policing" provides:

> [zero-tolerance policing] consists of stopping, questioning, and frisking pedestrians or drivers considered to be acting suspiciously and then arresting them for offenses when possible, typically for low-level offenses such as possessing marijuana. A defining difference between zero-tolerance interventions and other strategies are not discerning; the focus is on making stops and arrests to crack down on all types of disorder, generally defined. A common motivation is that the existence of even low-level offenses implies that an area is not well controlled, which in turn will lead to people committing more serious crimes there.

Id. at 31 & n.79.

[259] *See* Pennsylvania v. Mimms, 434 U.S. 106, 111–12 (1977) (holding police can ask drivers to step out of the car during a traffic stop without additional suspicion).

[260] *See* Maryland v. Wilson, 519 U.S. 408, 411–15 (1997) (extending *Mimms* to passengers in the car for whom the police have no independent reasonable suspicion).

[261] *See* Michigan v. Long, 463 U.S. 1032, 1047 (1983) (extending *Terry*'s rationale to include the vehicle being driven).

[262] *See* Atwater v. Lago Vista, 532 U.S. 318, 348–53 (2001) (holding drivers can be handcuffed, booked, and jailed for committing a "fine-only" or "nonjailable" traffic violation).

[263] *See, e.g.*, United States v. Robinson, 414 U.S. 218, 235 (1973) (allowing "full search" of any person subject to arrest); Colorado v. Bertine, 479 U.S. 367, 372–75 (1987) (allowing inventory searches of vehicles before vehicle is towed).

Zero-tolerance policing in its modern form resembles the practice of general warrants and would likely be intolerable to the proponents of the Fourth Amendment. The very justification for this form of policing, that "aggressive enforcement of laws and ordinances related to minor crimes and disorder will send a message to people who commit crime that the police will not tolerate any type . . . [so] people will be deterred from committing [future] crimes,"[264] seems to be in violation of the principles upon which the Fourth Amendment rests.[265] This justification indicates that these minor crimes are not targeted because they are great ills to society, but instead targeting minor crimes are a means by which greater crimes are stopped. Giving police officers this broad grant of authority, especially when traffic codes and municipal ordinances are so expansive, is analogous to the general warrants of the eighteenth century. Lord Camden's words in the famous general warrants case, *Entick v. Carrington*,[266] are illustrative:

> if [the possession of a copy of libel indicates criminality] be law . . . whenever a favorite libel is published . . . the whole kingdom in a month or two becomes criminal, and it would be difficult to find one innocent jury amongst so many millions of offenders . . . [and] if the power of search is to follow the right of seizure . . . [h]e that has it or has had it in his custody . . . consequently become the object of the search warrant. . ."[267]

Camden ultimately held that "such a power can[not] be justified by the common law," as even in cases of "murder, rape, robbery, and housebreaking . . . that are more atrocious that libelling" "such a proceeding was never heard of."[268]

In the quote above, Lord Camden raised three important concerns relevant to zero-tolerance policing. First, a wide definition of criminality would make everyone "criminal." Second, if everyone is "criminal," then the system would be incapable of administering justice (i.e., the jury would be no less criminal than the defendant). Third, if the power to search is coextensive with the power to seize, or the power to arrest, then all those people who are made "criminal," and can be properly seized, would be subject to searches. Implicit in these concerns is that, because administering this wide definition would be impracticable, the officer must use discretion to choose when and against whom it is enforced. Therefore, an officer with this grant of power must arbitrarily choose which citizens should be subjected to the

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[264] *Traditional and Contemporary Policing Strategies*, *supra* note 258, at 31.

[265] Most clearly, the Fourth Amendment stands to prevent individuals from being subject to unreasonable government intrusion into their home, possessions, and self. Accordingly, what is determined to be unreasonable will be based on those ideas explored in Part I and referenced in IIIA, particularly the moral offensiveness of the crime. As described in relation to *Watson*, government officers were given more power to arrest when the crime was more serious, and the *Terry* holding should have reflected this historical practice.

[266] [1765] EWHC KB J98.

[267] Entick v. Carrington [1765] EWHC KB J98.

[268] *Id.*

full administration of the law, or zero-tolerance. Modern zero-tolerance policing resembles the general warrants imagined by Lord Camden and, as a result, should run afoul of the Fourth Amendment.

Ultimately, the Supreme Court should reconsider *Terry* and its progeny in light of the history of the Fourth Amendment. Notably, courts have already been taking steps in altering *Terry*. For example, state courts have reconsidered the breadth of the holding in *Wardlow*, one of *Terry*'s progeny, based on new understandings of police practices.[269] The highest court in the United States should set the record straight to avoid any more divergence. For this task, the words of *Boyd* could guide: the Supreme Court must "adher[e] to the rule that constitutional provisions for the security of person and property should be liberally construed."[270] The police practices adopted since *Terry* are of the sort of "arbitrary power" that the proponents of the Fourth Amendment would have "deeply abhorred."[271] The Supreme

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[269] *See* Commonwealth v. Warren, 58 N.E.3d 333, 342 (Mass. 2016) (challenging *Wardlow*'s assumptions about flight from police based on report suggesting certain groups—such as "black males in Boston"—have been "disproportionately and repeatedly targeted for [police] encounters [which] suggests a reason for flight totally unrelated to consciousness of guilt."); People v. Horton, 142 N.E.3d 854, 867–68 (Ill. App. 2019) (distinguishing *Wardlow* because "[l]ike the Massachusetts Supreme Court [in *Warren*], we also have the benefit of a report on policing," and the report finds that Chicago Police Department "had engaged in a 'pattern or practice' of unreasonable force . . . [which] le[d] to 'fear and distrust' from citizens" so that "young minority men may flee from police to avoid 'the recurring indignity of racial profiling' as opposed to attempting to conceal criminal activity"); Mayo v. United States, 266 A.3d 244, 260–62 (D.C. 2022) (recognizing flight from police often supports a lawful *Terry* stop according to *Wardlow* but finding "current national conversation" makes clear "[t]here are many reasons an innocent person, particularly an innocent person in a highly policed community of color, might run from police"); *accord* United States v. Brown, 925 F.3d 1150, 1156 (9th Cir. 2019) (questioning flight from police as evidence of consciousness of guilt in light of report on Seattle police). *But see* Washington v. State, 287 A.3d 301, 336 (Md. 2022) (refusing to limit *Wardlow* like the courts in Massachusetts, Illinois, and the District of Columbia).

[270] Boyd v. United States, 116 U.S. 616, 635 (1886).

[271] Justice Sonia Sotomayor in her *Strieff* dissent identifies just how far this arbitrary power has grown from the doctrine begun by *Terry* and the dangers that poses to our society. She wrote:

> This Court has given officers an array of instruments to probe and examine you. When we condone officers' use of these devices without adequate cause, we give them reason to target pedestrians in an arbitrary manner. We also risk treating members of our communities as second-class citizens. . . . This Court has allowed an officer to stop you for whatever reason he wants . . . . The officer does not even need to know which law you might have broken so long as he can later point to any possible infraction—even one that is minor, unrelated, or ambiguous. . . . he may order you to stand "helpless, perhaps facing a wall with [your] hands raised." [*Terry*]. . . . The officer's control over you does not end with the stop. If the officer chooses, he may handcuff you and take you to jail for doing nothing more than speeding, jaywalking, or [driving without a seatbelt]. [*Atwater*]. . . . By legitimizing th[is] conduct . . . this case tells everyone, white and black, guilty and innocent, that an officer can verify your legal status at any time. It says that your body is subject to invasion while courts excuse the violation of your rights. It implies that you are not a citizen of a democracy but the subject of a carceral state, just waiting to be cataloged. We must not pretend that the countless people who are routinely targeted by police are "isolated." They are the canaries in the coal mine whose deaths, civil and literal, warn us that no one can breathe in this atmosphere. []. They are the ones who recognize that unlawful police stops corrode all our civil liberties and threaten all our lives. Until their voices matter too, our justice system will continue to be anything but.

Utah v. Strieff, 579 U.S. 232, 252–55 (2016) (Sotomayor, J., dissenting).

Court should recognize the history behind the Fourth Amendment and limit the *Terry* rule to only the most serious crimes. It is time the Court looks backwards to guide us forward.

Conclusion

Through diving into the past, this research hopes to guide the future. By necessity, and like most if not all historical research, this Note relied on illustration rather than completeness. Parts I, II, and III drew heavily from contemporary legal treatises in exploring the theory of the law, the meaning of the law, and the application of the law. Importantly, legal treatises are supposed to reflect the law, not be the law, yet the courts of the United States often turn to these documents when exploring what the common law meant when the country was founded. Majorities in cases like *Watson* and *Atwater* have affirmed this authority and answered constitutional questions according to these interpretations of the common law. This approach has some merit, because the common law itself is amorphous, and judges do not have the time to embark on an archival study for every issue. Judges rely on the authors of these treatises, such as Blackstone and Hale, who studied the history of the common law when putting their documents together.[272] Further, because America's Founders viewed treatises as representations of the common law, they were given authoritative power in the United States through the first constitutions.[273]

In comparing Kames's *Law-Tracts* and Eden's *Principles*, Part I demonstrated that at least the Framers of the Bill of Rights clearly embraced the natural law principles of Eden. Accordingly, *Watson* and *Terry* were flawed, in part, by ignoring the philosophical foundation of the Bill of Rights and Fourth Amendment. While placing the criminal law of the late eighteenth

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[272] *See* Michael Lobban, *Introduction: The Tools and the Tasks of the Legal Historian*, *in* Law And History: Current Legal Issues 1, 16 (2004).

[273] *Cf.* Wilson v. Arkansas, 514 U.S. 927, 933–34 (1995) ("Most of the States that ratified the Fourth Amendment had enacted constitutional provisions or statutes generally incorporating English common law, *see*, *e.g.*, N.J. Const. of 1776, § 22 . . . ("[T]he common law of England . . . shall still remain in force, until [it] shall be altered by a future law of the Legislature") . . . Ordinances of May 1776, ch. 5, § 6 [Virginia]. . . ("[T]he common law of England . . . shall be the rule of decision, and shall be considered as in full force, until the same shall be altered by the legislative power of this colony") . . . .); *accord* Atwater v. Lago Vista, 532 U.S. 318, 338 n.9 (2001) ("Founding-era receptions of common law, whether by state constitution or state statute, generally provided that common-law rules were subject to statutory alteration. *See*, *e.g.*, Del. Const., Art. 25 (1776) . . . ("The common law of England . . . shall remain in force, unless [it] shall be altered by a future law of the legislature") . . . N.Y. Const., Art. XXXV (1777) . . . ("[S]uch parts of the common law of England, and of the statute law of England and Great Britain . . . as together did form the law of [New York on April 19, 1775,] shall be and continue the law of this State, subject to such alterations and provisions as the legislature of this State shall, from time to time, make concerning the same"); 1778 N.C. Sess. Laws, ch. V . . . ("[A]ll such . . . Parts of the Common Law, as were heretofore in Force and Use within this Territory . . . which have not been . . . abrogated [or] repealed . . . are hereby declared to be in full Force within this State")).

century in the development of the Anglo-American tradition, Part II illustrated the lack of harmony among contemporary legal treatises in organizing criminal conduct. This part also challenged the reliance on Blackstone as an accurate reflection of contemporary criminal law. Therefore, the *Watson* Court was mistaken when they extracted a clean "ancient common law rule" from this body of sources, pointing primarily to Blackstone. Finally, Part III critiqued *Watson* and *Terry* directly, arguing that the cases should be overturned, or at least reconsidered, given that *Watson* mishandled the history—including their assessment of Blackstone—and *Terry* improperly ignored it. Ultimately, this Note showcased the importance of legal history in informing how we as a legal community preserve the principles that have preserved us.