ARTICLES

A LIBERTY-BALANCING APPROACH TO CRIME

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ABSTRACT

At its core, the criminal legal system is an ecosystem of institutions that seek to balance liberty interests. The insightful theories and complex practices of crime policy coalesce around questions on how crime impacts the liberties of individuals and communities to be safe, and how this correlates with the deprivation of liberty from offenders through our punishment system. But modern criminal policy, most often associated with the problems of overcriminalization and mass incarceration, has wholly abandoned any such delicate and nuanced balancing. Instead, the system thrives on sacrificing the liberties of offenders in a perverse and ineffective regime that leads to a net loss of liberty for all.

This Article argues for a new theoretical framework that prioritizes the liberty-balancing function rooted in criminal punishment. This Liberty-Balancing Approach incorporates contributions from constitutional and political theory to argue that substantive criminal laws should be conceptualized as a political exercise that defines and protects a narrow set of individual liberties. In turn, protecting these individual liberties must be contextualized within the broader community interests of public safety and building public trust. Finally, these criminal laws and ultimately their punishments must be properly balanced with depriving only as much liberty from the offender as is necessary and legitimate to achieving these social outcomes. This return to first principles in criminal law also explores the practical impacts of the Liberty-Balancing Approach, including rethinking victimless proxy crimes, crimes against organizations, and the liberty impacts on communities of color.

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INTRODUCTION

If defining and protecting liberty is one of the fundamental foundations of law, then its deprivation is the cornerstone of crime. American law is in a crisis of liberty that challenges the very legitimacy of its legal institutions. In just the past few years, the Court has attempted to balance diverse liberty interests in areas such as reproductive rights, affirmative action, free speech, religious freedom, and sexual-orientation with the clumsiness of a bludgeon.[1] Criminal law is no different. Decades of broadening police power, prosecutorial discretion, legislative prerogatives, and harsh sentencing have led to a crisis of overcriminalization that prioritizes public safety at the expense of punishing offenders fairly and effectively. This Article intervenes by reconceptualizing the substantive criminal law according to its roots in balancing diverse liberty interests. This Liberty-Balancing Approach necessarily calls for a radical reframing of punishment ethics and

1. *See* Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 231 (2022) (returning the issue of women's reproductive rights to obtain an abortion to the states, pitting the liberty to control one's body in reproduction against the state's interest to protect the liberty of the unborn); Students for Fair Admissions, Inc. v. President and Fellows of Harvard College, 600 U.S. 181, 230 (2023) (overturning affirmative action policies that gave preference to African-Americans and Latinxs in higher education admissions, pitting the liberty to be admitted to an institution of higher education based on objective merit against the liberty to form diverse and inclusive student bodies); 303 Creative LLC v. Elenis, 600 U.S. 570, 591–92, 601–03 (2023) (upholding free speech rights for religious web designer that declined to create a website for a gay couple's wedding, pitting expressive and religious liberty against liberties to not be discriminated against); *see also* Richard H. Fallon, Jr., *Strict Judicial Scrutiny*, 54 UCLA L. REV. 1267, 1306–08 (2007) (discussing a balancing of free speech and religious freedom doctrine).

practical reform in decriminalization and decarceration. By doing so, these forgotten principles of criminal law seek to achieve consequentialist goals of increasing liberty for all by restoring balance between the individual victim, the individual offender, and the broader community.

This Article draws from constitutional principles and political theory to build and substantiate the Liberty-Balancing Approach. Positivist legal institutions operate to prescribe and proscribe behavior to facilitate functioning societies, which necessarily define the scope of individual liberties and limit them appropriately when they intrude on the liberties of others or impact the entire community.[2] Consequently, principles of balancing liberty interests enjoy a rich history and application across the law, especially in constitutional jurisprudence.[3] As an example, these constitutional principles fuel constant theoretical and practical discussions in criminal procedure and national security; these debates are often characterized as a salient balancing of liberties between the state's interest in detecting offenders and keeping society safe while maintaining individuals' liberties of privacy and freedom from law enforcement agency (LEA) intrusion.[4] However, LEA power has vastly expanded over the past fifty years in ways that have facilitated the overcriminalization crisis.[5]

This pattern of LEA empowerment represents a consistent practice across a number of criminal legal institutions that have all contributed to overcriminalization that need not be rehashed here. It is enough to briefly state that mass incarceration facilitates the deprivation of liberty of nearly two million people, including many of whom that have not been convicted of a crime or are being incarcerated

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2. *See* DAVID HUME, A TREATISE OF HUMAN NATURE 351 (Lewis A. Selby-Bigge ed., Oxford: Clarendon Press, 1896) (1739) (ebook) ("Society is absolutely necessary for the well-being of men; and [laws] are as necessary to the support of society.").

3. *See* Chad Flanders, Compelling Interests and Compelled Speech 6–7 (Sept. 20, 2023) (unpublished manuscript) (on file with author) (criticizing *303 Creative* for whittling down traditional constitutional scrutiny that balances interests and instead simply boils down to declaring one right as superior to another); *id.* at 10–12 (discussing how the Court may be moving away from the traditional balancing of interests in constitutional scrutiny analysis, and instead is picking winners according to originalism based on developments such as *New York State Rifle & Pistol Ass'n v. Bruen*, 597 U.S. 1, 22–23 (2022)); *see also* Kate Weisburd, *Rights Violations as Punishment*, 111 CAL. L. REV. 1305, 1308–12 (2023) (arguing that depriving a person of their liberty under criminal punishment should trigger constitutional scrutiny analysis).

4. These liberties are enshrined in constitutional law, showing just how important they are to prevent the abuse of government power in the criminal legal system. *See* U.S. CONST. amend. IV; *see, e.g.*, Orin S. Kerr, *Searches and Seizures in a Digital World*, 119 HARV. L. REV. 531, 536 (2005) (recognizing existing doctrine that seeks to balance "law enforcement needs with individual interests in the deterrence of abusive law enforcement practices"); Arnold H. Loewy, *Search and Seizure in a Post-9/11 World*, 1 ELON L. REV. 181, 181 (2009) (questioning how the Fourth Amendment can "balance the rights of innocent citizens to be free from criminals, on the one hand, and [for citizens to be free from] police on the other" in a post-9/11 world that has seen increases in state surveillance).

5. *See* MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS 60–71 (2010) (describing the expansion of the LEA powers as an intentional tool to facilitate overenforcement and mass incarceration).

for civil violations.[6] While incarceration rates have plateaued, the growing danger of e-carceration and the expanding surveillance state that deprives nearly seven million people of various privacy and physical movement-related liberties remains.[7] Perhaps the most chilling impact of American "justice" is that as many as one hundred million people have criminal records,[8] and over 113 million adults—approximately one-third of the population—have experienced the tremendous loss of having an immediate family member incarcerated during their lifetime.[9] This crisis of overcriminalization represents an imbalance of liberty interests—one where we have collectively decided to put our thumb on the scale to heavily favor the community interests of public safety no matter the cost to the liberties of individual offenders. The empowerment, embeddedness, and often unmitigated growth of criminal legal institutions have all contributed to this overcriminalization crisis[10] that has forgotten the principles of balancing the diverse liberty interests at stake. The overcriminalization problem has become nothing short of a human rights crisis,[11] which lends itself to a liberty-focused framework that appreciates restoring rights and liberties to victims, offenders, and communities alike.

This Article focuses on the substantive criminal law as one such tool of overbreadth and overcriminalization. Like other areas of regulation, criminal law is indeed a tool of governance.[12] But because it operates more harshly, it should consequently operate more narrowly. While criminal law draws from abstract notions of morality, fairness, and justice, it can and should also be framed as defining a set of rights and liberties[13] that are so important that they must be protected under the

6. *See* Wendy Sawyer & Peter Wagner, *Mass Incarceration: The Whole Pie 2024*, PRISON POL'Y INITIATIVE (Mar. 14, 2024), https://www.prisonpolicy.org/reports/pie2024.html (estimating that 427,000 people are incarcerated in jails that have not yet been convicted, and another 31,200 people are detained in immigration facilities for civil immigration law violations); *see also* JOHN F. PFAFF, LOCKED IN: THE TRUE CAUSES OF MASS INCARCERATION—AND HOW TO ACHIEVE REAL REFORM 1 (2017) (stating that the incarceration rate is four to eight times higher than "other liberal democracies, including Canada, England, and Germany").

7. *See* VICTORIA LAW, "PRISONS MAKE US SAFER": AND 20 OTHER MYTHS ABOUT MASS INCARCERATION 9 (2021) (estimating that 6.7 million people in the United States are subject to other "forms of supervision includ[ing] house arrest, electronic monitoring, parole, and probation"); Michelle Alexander, *The Newest Jim Crow*, N.Y. TIMES (Nov. 8, 2018), https://www.nytimes.com/2018/11/08/opinion/sunday/criminal-justice-reforms-race-technology.html (describing e-carceration as the next generation of the criminal legal system that repurposes technology, such as electronic monitoring, to perpetuate and expand the reach and impact of the system).

8. *See Americans with Criminal Records*, SENT'G PROJECT, https://www.sentencingproject.org/app/uploads/2022/08/Americans-with-Criminal-Records-Poverty-and-Opportunity-Profile.pdf (last visited Jan. 17, 2025).

9. *See* Sawyer & Wagner, *supra* note 6.

10. *See generally* DOUGLAS HUSAK, OVERCRIMINALIZATION: THE LIMITS OF THE CRIMINAL LAW (2008) (criticizing the criminal legal system for having too much criminal law and too much punishment through a legal philosophical lens towards reformist policies to shrink the system).

11. *See* JAMES FORMAN, JR., LOCKING UP OUR OWN: CRIME AND PUNISHMENT IN BLACK AMERICA 231 (2017) (describing the mass incarceration problem as a human rights crisis).

12. *See generally* JONATHAN SIMON, GOVERNING THROUGH CRIME: HOW THE WAR ON CRIME TRANSFORMED AMERICAN DEMOCRACY AND CREATED A CULTURE OF FEAR (2007) (discussing crime policy as a method of governance).

13. This Article uses the terms "rights" and "liberties" synonymously. While philosophers have made distinctions between rights and liberties, those distinctions are not material to any proposed arguments in this

threat of criminal punishment. This necessarily considers the liberties of both sides of the crime and punishment dynamic. On one side, the offender commits a *crime* that impacts a victim by depriving that victim of some liberty interest, such as liberties of life, property, and bodily autonomy; such crimes also indirectly impact communal liberties by affecting how the collective community assesses its own safety. On the other side, the government punishes the offender by depriving them of some set of liberties, such as freedom of movement (incarceration), privacy (e-carceration or probation), and even forms of rehabilitation that require strict adherence to treatments (drug and mental health programs).[14] These punishments must consider the offender's liberty interests in being treated as a full member of society deserving of due process, and also must consider the importance of not depriving the offender of more liberty than what is needed to achieve the social goals of punishment.

The Liberty-Balancing Approach seeks to do exactly as its name suggests: provide a theoretical basis for balancing the individual liberties of victims to be free from infringements; the community interests of maintaining public safety, building public trust in legitimate legal institutions; and the individual liberty interests of offenders to be punished fairly and effectively.[15] In theory and in practice, this means critiquing and combatting the status quo of overcriminalization as an experiment that has failed to find balance.

This Approach first tries to rebalance the substantive criminal law by emphasizing the minimalist principles embedded in our philosophical and constitutional tradition.[16] The criminal law should only be used in narrow circumstances where criminal punishment is the only option to solve a social problem. Also, criminal law must serve a legitimate social goal, such as increasing public safety, while also upholding the public's trust in criminal legal institutions.

Further, the criminal law should only protect individual liberty interests of individual victims, which can be clearly defined and determined; this comes in sharp contrast to the status quo, which has prioritized amorphous community liberties of broad social harm ridden throughout a host of proxy and *malum prohibitum* regulatory crimes.[17] These narrowing principles require a rethinking or rather a remembrance of criminal law's role: to serve a narrow and minimalist governance function of protecting individual liberties for people to be free from criminal infringements.

Article. *See, e.g.*, Jeppe von Platz, *Are Economic Liberties Basic Rights*, 13 POL. PHIL. & ECON. 1, 3 (2013) (discussing basic rights as "liberties or entitlements that must be *respected* and *protected* by democratic legislation").

14. *See* CHRISTOPHER H. WELLMAN, RIGHTS FORFEITURE AND PUNISHMENT 48 (2017) (arguing that using the criminal law to protect rights is alone sufficient to justify state punishment).

15. *See, e.g.*, J. Harvie Wilkinson III, *In Defense of American Criminal Justice*, 67 VAND. L. REV. 1099, 1100 (2014) (defending American criminal justice as a careful balance of "competing rights and values").

16. *See infra* Part II.B.

17. *See infra* Part I.C.

Narrowing the criminal law to protect only individual liberties need not be in tension with broader communal goals. Instead, the Approach builds on the political philosophy that individual liberties should be viewed as inherently communitarian.[18] With this understanding, this Article ultimately argues that the best way to achieve community and individual interests such as public safety, public trust, and other broader social concerns is to limit the criminal law to protecting individual liberties. Individual liberties are not meant to be trump cards where one set of liberties trumps all others in a zero-sum game with winners and losers;[19] instead, a person's individual liberties must be contextualized by how they impact other individuals and the broader community to ensure a social contract under which we all can live. Thus, instead of pitting individual and communal liberties as two distinct camps at war with each other, the Liberty-Balancing Approach seeks to intertwine these interests for a net gain of liberty for all.

This Article explores, justifies, and defends the Liberty-Balancing Approach in three Parts. Part I briefly explains why the current overcriminalization crisis should be thought of as an imbalance of individual and community liberties. It considers five distinct aspects of criminal practice that makes a systemic case that criminal law and punishment prioritize community liberties at the expense of the individual liberties of offenders in ways that do not produce public safety benefits and delegitimize the rule of law due to discriminatory impacts.

Part II builds the theoretical contribution by conceptualizing and explaining the foundations of criminal legal minimalism as it relates to liberty. It also explains which individual liberties should be protected under the criminal law, and how individual liberties should be harmonized with broader community liberties. Finally, it explores how this balancing would work theoretically, and the considerations of politics, racial discrimination, and legitimacy under the Approach.

Part III translates this theory into practice by arguing that the Liberty-Balancing Approach would justify the abolition of victimless proxy crimes. The Approach's focus on protecting individual liberties means that drug and firearm crimes would not be justified in most circumstances, yet there might be carveouts based on social and constitutional complications.

Part IV discusses the limits and nuances of the Liberty-Balancing Approach. Crimes against organizations do not contemplate individual liberties of an actual human being, and yet organizations maintain enough of a sense of individualistic legal personhood that might justify maintaining a small number of criminal laws to protect organizations when they are the victims of crime. In addition, scholars have critiqued movements that promise to give people more liberty as mere facades that are meant to obfuscate the actual practice of criminal law. Race and discrimination scholars have argued that many symbolic acts of giving individuals more liberty only legitimizes a system that in practice takes those very same

18. *See infra* Part II.D.

19. *See infra* notes 189–94 and accompanying text.

liberties away. However, the Liberty-Balancing Approach seeks to mitigate these practical concerns by incorporating the importance of institutional legitimacy as one of the core community liberties that must be balanced with any deprivation of offenders' liberties.

Liberty is a unique framing, but it is not meant to be an all-inclusive theory of criminal law and punishment. Notwithstanding, the Liberty-Balancing Approach lays a foundation on which to build a more robust and effective criminal punishment system by considering the full range of liberties, deprivations thereof, and the political and social impacts of imbalance.

I. Overcriminalization as an Imbalance

Much has been written on the problem of overcriminalization,[20] but this Part conceptualizes that problem as an imbalance of competing liberty interests. Scholars and activists alike have framed mass incarceration in myriad ways that have shaped our understanding of how to think and react to the ever-changing landscape of punishment in this country. Mass incarceration has been criticized as being inefficient, too costly, discriminatory, criminogenic, physically dangerous, illegitimate, oversaturated with enforcement, and more.[21] While highlighting some of these points, this Part chooses a different framing by arguing that overcriminalization results when we prioritize victims' and communities' liberties over the individual liberties of the offender. Instead of balancing these competing liberty interests towards the common good of public safety and public trust in our legal institutions, we have pushed the scale in an unproductive way that deprives offenders of their liberty without delivering commensurate benefits to the liberties of victims and communities.

This Part briefly highlights five instances of the overcriminalization imbalance, which are far from exhaustive but are sufficient to illustrate the systemic problem. First, there is the big-picture conceptual relationship between the number of people we incarcerate and public safety as measured through crime rates. Taking an offender's liberty away by incarcerating them is theoretically supposed to benefit

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20. *See, e.g.*, Sanford H. Kadish, *The Crisis of Overcriminalization*, 374 Annals Am. Acad. Pol. & Soc. Sci. 157, 166 (1967) ("Not only does the use of the criminal law, therefore, divert substantial law-enforcement resources away from genuinely threatening conduct, but the whole criminal-justice system is denigrated by the need to process massive numbers of . . . impoverished people through clumsy and inappropriate procedures.").

21. *See, e.g.*, *infra* notes 202–07 and accompanying text explaining the discriminatory critiques of mass incarceration; Sheldon A. Evans, *Punishment Externalities and the Prison Tax*, 111 Cal. L. Rev. 683, 713–15 (2023) (explaining criminogenic impacts of mass incarceration); Francis T. Cullen, Cheryl Lero Jonson & Daniel S. Nagin, *Prisons Do Not Reduce Recidivism: The High Cost of Ignoring Science*, 91 Prison J. 48S, 54S-58S (2011) (reviewing several studies that separately found custodial incarceration increased crime rates); Devon W. Carbado, *Blue-on-Black Violence: A Provisional Model of Some of the Causes*, 104 Geo. L.J. 1479, 1485 (2016) (conveying the idea that frequent police encounters in the Black community increase exposure of those communities to police violence); *see* John J. DiIulio, Jr., *Two Million Prisoners Are Enough*, Wall St. J. (Mar. 12, 1999, 12:37 AM), https://www.wsj.com/articles/SB921187476975066509 (describing the rising inefficiency of the growing prison population).

potential future victims and communities by preventing crime.[22] Second, the discriminatory impact of overcriminalizing poor people of color erodes public trust and the overall legitimacy of the system. Third, overcriminalization as a concept can also be measured by the sheer number of criminal statutes that our legislatures enact, which demonstrates the overcriminalization mindset of our lawmakers. Fourth, mandatory minimum laws are a punishment tool used ubiquitously across the nation that show a penchant to punish individual offenders harshly for crimes that have little impact on individual victims or public safety. Fifth, even when offenders are imprisoned, they suffer deprivations of liberty that have little to do with public safety, further illustrating the status quo's obsession with depriving liberty from offenders even when there is no benefit to the liberties of victims and the community.

A. The Big Picture Imbalance

The cruel reality is that the many aspects of overcriminalization do not make us any safer. The promise of the tough-on-crime movement that facilitated mass incarceration was that locking up more offenders (and thus depriving them of their liberty) would make us all safer (and thus increase our liberties).[23] But this liberty tradeoff has not worked for at least the past fifty years.

As far back as the 1960s, scholars forcefully pushed against what they considered as a push towards overcriminalization that diverted resources away from important public safety threats and instead toward "process[ing] massive numbers of . . . impoverished people through clumsy and inappropriate procedures."[24] In 1973, a National Advisory Commission of federal, state, and even private industries produced a scathing report of the American prison system that concluded that "no new institutions for adults should be built and existing institutions for juveniles should be closed."[25] The Commission recognized that juvenile institutions were not able to serve the rehabilitative purposes they were founded upon, and that "[s]imilar considerations appl[ied] to adults."[26] And while "some offenders must be locked away" for public safety concerns, the Commission concluded that there were already "sufficient security-type institutions" that could meet the demand for this small number

22. *See* JEFFREY BELLIN, MASS INCARCERATION NATION: HOW THE UNITED STATES BECAME ADDICTED TO PRISONS AND JAILS AND HOW IT CAN RECOVER 5, 68–69 (2023) (overviewing theoretical and practical justifications for incarcerating persons, including politicians' promises that incarceration would lower crime rates).

23. *See id.*

24. Kadish, *supra* note 20; *see, e.g.*, BELLIN, *supra* note 22, at 5 ("Politicians claimed to be trying to solve the problem of crime. The critical flaw in the last fifty years of 'tough on crime' policies is that this never works."); *see also id.* at 67 (discussing case study of New York's harsh Drug Laws in the 1970s that were passed under the leadership of Governor Nelson Rockefeller under the promise that it would put drug dealers out of business and deter crime).

25. NATIONAL ADVISORY COMMISSION ON CRIMINAL JUSTICE STANDARDS AND GOALS, TASK FORCE REPORT ON CORRECTIONS 358 (1973).

26. *Id.*

of individuals that needed to be incapacitated.[27] Instead, the Commission argued for common-sense decarceartion, recognizing that there were many people in minimum and medium-security prisons that no longer needed to be incapacitated for public safety reasons, and recommending they "be removed to community programs."[28] The commissioners hoped this would make it possible to close down "work camps and prison farms" that continued the practices of convict leasing and hard labor, with the goal "to release substantial numbers of people from these facilities."[29]

These concerns that have been buried in the annals of criminal legal history should be deeply troubling. Even amidst this 1960s and 1970s era when crime was on the rise,[30] experts cautioned against the principles of retribution and incapacitation they saw on the horizon. And this warning came during a time when there were approximately 300,000 incarcerated people in the entire nation.[31] Even the staunchest defenders of tough-on-crime policies realized that by the late 1990s, after locking up over one million people, we had exhausted all of the public safety benefits of these policies.[32] Economists and criminologists recognized that the growing rates of incarceration during the 1990s and 2000s had minimal impacts on public safety, finding that these policies were only responsible for two to fifteen percent of the reduction in crime;[33] others challenged this with findings of their

27. *Id.*

28. *Id.*

29. *Id.*

30. The violent crime rate was 160.9 reported offenses per 100,000 population in 1960 and 596.6 reported offenses per 100,000 population in 1980. *United States Crime Rates 1960–2019*, DISASTER CTR., https://www.disastercenter.com/crime/uscrime.htm (last visited Jan. 20, 2025). The burglary rate was 508.6 reported offenses per 100,000 population in 1960 and 1,684.1 reported offenses per 100,000 population in 1980. *Id.* The robbery rate was 60.1 reported offenses per 100,000 population in 1960 and 251.1 reported offenses per 100,000 population in 1980. *Id.*

31. *See* James Cullen, *The History of Mass Incarceration*, BRENNAN CTR. FOR JUST. (July 20, 2018), https://www.brennancenter.org/our-work/analysis-opinion/history-mass-incarceration?page=all.

32. *Compare* John J. DiIulio, Jr., *Prisons Are a Bargain, by Any Measure*, N.Y. TIMES (Jan. 16, 1996), https://www.brookings.edu/articles/prisons-are-a-bargain-by-any-measure/ (arguing that mass incarceration and longer prison sentences were economically efficient and saved society money based on the incapacitation effects of locking up criminals who would otherwise be committing crimes), *with* DiIulio, *supra* note 21 (arguing, in 1999, that society had enjoyed all of the benefit of mass incarceration, and advocating for decarceration and alternative punishment programs).

33. Don Stemen, *The Prison Paradox: More Incarceration Will Not Make Us Safer*, VERA INS. JUST., July 2017, at 1 (finding that between 1980 and 2000, every ten percent increase in incarceration rate yielded a two to four percent reduction in crime rates); *see also* FORMAN, *supra* note 11, at 218 (summarizing criminology literature that credits "[t]he tough on crime movement" and incarceration for lowering the crime rate, although acknowledging other contributing factors); THOM BROOKS, PUNISHMENT: A CRITICAL INTRODUCTION 52 (2d ed. 2021) (summarizing studies that "reveal that the effects of deterrence upon crime rates are at most between about a two and five percent decrease in crime following a ten percent increase in the prison population" (citations omitted)); Robert J. Sampson, *The Incarceration Ledger: Toward a New Era in Assessing Societal Consequences*, 10 CRIMINOLOGY & PUB. POL'Y 819, 822 (2011) (estimating incarceration has had a ten to fifteen percent reduction in crime rates).

own that incarceration rates had no relation to reducing crime.[34] A growing number of empiricists have come to an even starker conclusion, finding that mass incarceration has created a criminogenic effect that makes crime worse.[35] Spending billions of dollars to support the overcriminalization regime[36] by depriving millions of people of their liberty interests cannot be justified if it is only responsible for such a small sliver of public safety benefits, and is even more problematic if it indeed carries a criminogenic effect. We are locking up more people for longer periods of time for both serious and minor offenses, yet this mass incarceration experiment has not delivered on its promises of making us any safer.

B. Discriminating Liberties

These realities are compounded with the philosophical and sociological aspects of how overcriminalization can erode public trust within Black, Latinx, and poor communities.[37] Black people are incarcerated at roughly five times the rate that White people are,[38] and in twelve states Black people make up more than half of the prison population.[39] Black people and White people use and traffic drugs at the same rates, yet Black people are 2.7 times more likely to be prosecuted for these crimes.[40] Black defendants who commit the same crimes as similarly situated

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34. *See* Jeffrey Fagan & Tracey L. Meares, *Punishment, Deterrence and Social Control: The Paradox of Punishment in Minority Communities*, 6 OHIO ST. J. CRIM. L. 173, 176 (2008) (finding that increasing the number of people incarcerated resulted in "stable if not *higher* levels of crime," decrying the lack of commensurate public safety benefit for the ever increasing rates of incarceration); John E. Eck & Emily B. Eck, *Crime Place and Pollution: Expanding Crime Reduction Options Through a Regulatory Approach*, 11 CRIMINOLOGY & PUB. POL'Y 281, 282 (2012) ("After a decade of enquiry, for example, researchers cannot confidently attribute the dramatic decline in U.S. crime during the 1990s to any government policy: police hiring, police practices, incarceration policies, or other criminal justice strategies."); THE REAL WAR ON CRIME: THE REPORT OF THE NATIONAL CRIMINAL JUSTICE COMMISSION 42 (Steven R. Donziger ed. 1996) (finding that there is "little or no correlation between rates of crime and the number of people in prison").

35. *See* Evans, *supra* note 21, at 714; Stephen J. Schulhofer, Tom R. Tyler & Aziz Z. Huq, *American Policing at a Crossroads: Unsustainable Policies and the Procedural Justice Alternative*, 101 J. CRIM. L. & CRIMINOLOGY 335, 336 (2011) ("Through its criminogenic impact, imprisonment has cross-cutting effects for the wider population, promising safety through deterrence at the same time as it increases victimization at the hands of former inmates.").

36. *See* Melissa S. Kearny, Benjamin H. Harris, Elisa Jácome & Lucie Parker, *Ten Economic Facts About Crime and Incarceration in the United States*, HAMILTON PROJECT, May 2014, at 1, 2 (documenting the $80 billion spent maintaining prison and incarceration systems in 2010).

37. *See* PFAFF, *supra* note 6, at 208 (noting that sixty percent of incarcerated persons are Black or Latino men); *see also* Dorothy E. Roberts, *Abolition Constitutionalism*, 133 HARV. L. REV. 1, 13 (2019) (noting that "[m]ost people sentenced to prison in the United States today are from politically marginalized groups—poor, black, and brown"); Kristin M. Budd, *Incarcerated Women and Girls*, SENT'G PROJECT (July 24, 2024) https://www.sentencingproject.org/fact-sheet/incarcerated-women-and-girls/ (noting that since 1980, women's incarceration has grown at twice the rate of men's).

38. *See* ASHLEY NELLIS, SENT'G PROJECT, THE COLOR OF JUSTICE: RACIAL AND ETHNIC DISPARITY IN STATE PRISONS 4 (2021).

39. *See id.* at 5.

40. *See* Diane Whitmore Schanzenbach, Ryan Nunn, Lauren Bauer, Audrey Breitwieser, Megan Mumford & Greg Nantz, *Twelve Facts About Incarceration and Prisoner Reentry*, HAMILTON PROJECT, Oct. 2016, at 1, 7.

White defendants receive longer prison sentences[41] and are less likely to be released on bail.[42] Black children are more likely to be tried as adults, which carry much higher sentences.[43] Further, there is a long tradition of discriminatory policing and enforcement tactics in poor communities of color.[44] Lady justice is not blind, and the scales she carries have never been equally balanced towards the liberties of all who come before her.[45] Consequently, a punishment system that disproportionately deprives certain racial groups of their liberty interests is one that necessarily relegates their political membership in that society to second-class citizenship.[46]

This race- and class-conscious understanding of criminal legal liberties is also important when considering how society views the rights of victims and the rights of offenders. Black and Latino men are disproportionately viewed as the prototypical "offender" due to numerous factors including media portrayal, cultural stereotypes,

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41. *See* Sonja B. Starr & M. Marit Rehavi, *Racial Disparity in Federal Criminal Sentences*, 122 J. POL. ECON. 1320, 1323, 1349 (2014) (using quantile regressions that account for criminal history, geography, and other legally permissible characteristics, finding that Black offenders receive sentences nine to thirteen percent longer on average than White offenders); U.S. SENT'G COMM'N, DEMOGRAPHIC DIFFERENCES IN FEDERAL SENTENCING 4 (2023) (finding that Black male offenders received sentences 13.4% longer, and Latino male offenders received sentences 11.2% longer, than White male offenders in federal sentencing).

42. *See* David Arnold, Will Dobbie & Crystal S. Yang, *Racial Bias in Bail Decisions*, 133 QUARTERLY J. ECON. 1885, 1885–86, 1923 (2018) (finding racial bias in setting bail amounts that disadvantage Black defendants when compared to White defendants after accounting for risk factors); *New Report Assesses Disparities in the Bail Bond System*, IND. U. PUB. POL'Y INST., https://policyinstitute.iu.edu/news-media/stories/bail-bond-brief.html (last visited Jan. 21, 2025) (citing national data that bail amounts are thirty-four percent higher for Black male defendants and nineteen percent higher for Latino male defendants when compared to their White counterparts).

43. *See* Celeste Fremon, *Black Kids Far More Likely To Be Tried as Adults and Sentenced to Adult Prisons, According to New Report*, WITNESSLA (Sept. 25, 2018), https://witnessla.com/as-youth-crime-continues-to-fall-black-kids-far-more-likely-to-be-tried-as-adults-according-to-new-report/ (citing national report finding that Black youth are "14% of the total youth population, but 47.3% of the youth who are transferred to adult court by juvenile court judges 'who believe the youth cannot benefit from the services of their court'" (quoting JEREE MICHELE THOMAS & MEL WILSON, NAT'L ASS'N SOC. WORKERS, THE COLOR OF YOUTH TRANSFERRED TO THE ADULT CRIMINAL JUSTICE SYSTEM: POLICY AND PRACTICE RECOMMENDATIONS 1 (2017))).

44. *See, e.g.*, CHARLES R. EPP, STEVEN MAYNARD-MOODY & DONALD P. HAIDER-MARKEL, PULLED OVER: HOW POLICE STOPS DEFINE RACE AND CITIZENSHIP 106 (2014); Tracey L. Meares, *Norms, Legitimacy and Law Enforcement*, 79 OR. L. REV. 391, 394–96 (2000); Devon W. Carbado, *Predatory Policing*, 85 UMKC L. REV. 548, 559–61, 564 (2017) (describing the constant police presence in Black communities as "predatory policing"); NIKKI JONES, *"The Regular Routine": Proactive Policing and Adolescent Development Among Young, Poor Black Men*, *in* PATHWAYS TO ADULTHOOD FOR DISCONNECTED YOUNG MEN IN LOW-INCOME COMMUNITIES: NEW DIRECTIONS IN CHILD AND ADOLESCENT DEVELOPMENT 33, 36, 39–40 (Kevin Roy & Nikki Jones eds., 2014) (describing the "regular routine" of police presence and intervention in Black communities as the constant "gaze" of law enforcement); Bernard E. Harcourt & Tracey L. Meares, *Randomization and the Fourth Amendment*, 78 U. CHI. L. REV. 809, 854–59 (2011).

45. *See* Georgia v. Brailsford, 3 U.S. 1, 4 (1794) ("Justice is indiscriminately due to all, without regard to numbers, wealth, or rank.").

46. *See, e.g.*, I. Bennett Capers, *Rethinking the Fourth Amendment: Race, Citizenship, and the Equality Principle*, 46 HARV. C. R.-C.L.L. REV. 1, 19, 26–28 (2011) (describing how policing policies undermines views of minorities as full citizens); JOHN BRAITHWAITE & PHILIP PETTIT, NOT JUST DESERTS: A REPUBLICAN THEORY OF CRIMINAL JUSTICE 57–59, 92, 132 (1990).

and political fearmongering.[47] How then do we view their liberties in the criminal legal system? As men of color, who have endured centuries of subjugation, their liberties are not prioritized and are often considered secondary to those of the victim. This racial problem is exacerbated because the prototypical "victim" of these crimes is perceived by society to be the traditional, middle-class White woman.[48] This contributes to racist tropes that devolve into the development of crime policy that seeks to protect the damsel-like White woman from the dangerous, animalistic, and depraved dark-skinned man who threatens the very foundation of society by besmirching her honor.[49] It is no coincidence that the victims' rights movement has strategically used the stories of White victims to pursue criminal justice reforms that have favored harsher punishments for offenders over the past generation.[50] As just one example of this, most criminal laws that are named after a victim to honor their plight have been named after White victims,[51] with the recent exception of the Kentucky statute named after Breonna Taylor.[52]

The ways that we racialize our perceptions of victims and offenders is an important factor that helps explain why we prioritize the rights of victims in an imbalance that disregards the rights of offenders. We are socialized to think that depriving the liberties of the prototypical offender—who most people identify in their mind's eye as a Black or Latino man—is more acceptable given their perceived second-class citizenship and historical subjugation. We are also trained to prioritize the individual liberties of prototypical victim—who most people identify in their mind's eye as a White woman—due to their perceived higher status.

It may be argued that punishment also functions to protect Black and Latinx victims in these communities, but this rationale cannot withstand economic, political,

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47. *See generally* KHALIL GIBRAN MUHAMMAD, THE CONDEMNATION OF BLACKNESS: RACE, CRIME, AND THE MAKING OF MODERN URBAN AMERICA (2019) (tracking the historical roots of the overcriminalization of Black Americans and the association of Blackness with criminality); Bailey Maryfield, *Implicit Racial Bias*, JUST. RSCH. & STAT. ASS'N, Dec. 2018, at 1, 2–6 (finding that implicit biases negatively impacted criminal justice outcomes for Black Americans).

48. *See* LISA L. MILLER, THE PERILS OF FEDERALISM: RACE, POVERTY, AND THE POLITICS OF CRIME CONTROL 182 (2008) (describing how the "iconic crime victim—innocent, middle-class, generally white—has become the central citizen subject around which a wide range of public policies are designed" (footnote omitted)).

49. *See* AYA GRUBER, THE FEMINIST WAR ON CRIME: THE UNEXPECTED ROLE OF WOMEN'S LIBERATION IN MASS INCARCERATION 100 (2020) (describing the political salience of portraying marginalized men and women as defendants, and victims as White women and children "who were subjected to men's unspeakable brutality—preferably sexual").

50. *See id.* at 98–101.

51. *See, e.g.*, Adam Walsh Child Protection and Safety Act of 2006, Pub. L. No. 109-248, 120 Stat. 587 (named after Adam Walsh); Megan's Law, Pub. L. No. 104-145, 110 Stat. 1345 (1996) (named after Megan Kanka); Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Act of 1994, Pub. L. No. 103-322, 108 Stat. 1796 (named after Jacob Wetterling); Brady Handgun Violence Prevention Act of 1993, Pub. L. No. 103-159, 107 Stat. 1536 (named after James S. Brady); Pam Lychner Sexual Offender Tracking and Identification Act of 1996, Pub. L. No. 104-236, 110 Stat. 3093 (named after Pam Lychner); Kari's Law Act of 2017, Pub. L. No. 115-127, 132 Stat. 326 (named after Kari Hunt Dunn).

52. *See* Breonna's Law, LOUISVILLE METRO CODE OF ORDINANCES, ch. 39, § 39 (2020) (ending no-knock warrants and mandating use of body cameras when executing warrants).

and social scrutiny.[53] While taking offenders off the streets has the appearance of doing good, the government's rampant abuse and overuse of punishment has actually destabilized these communities in ways that may be more harmful than the crimes that punishment is meant to deter.[54]

This disproportionate and racialized treatment in the name of public safety has failed to meet that express goal, while simultaneously contributing to a significant racial gap threatening the legitimacy of the criminal legal system. Surveys from the past twenty years consistently find that Black Americans have lower levels of trust and confidence in the criminal legal system than their White neighbors do.[55] Such a loss of respect for the rule of law can produce and has produced criminogenic effects.[56] Tommie Shelby goes even further by arguing that the discriminatory use of the criminal law severs the duty of Black, Latinx, and poor communities to follow the law.[57]

Even assuming, *arguendo*, that overcriminalization has fulfilled its promises of delivering public safety benefits, at what point would we consider the delegitimizing costs of this system? The racial discrimination and disproportionate impacts that overcriminalization has wrought on poor communities of color have strained public trust in criminal legal institutions in a way that has threatened the precarious foundation of legitimacy needed to maintain public order.

C. Statutory Overcriminalization

Overcriminalization is also a mindset that impacts legislative agendas. Each state in the union has hundreds of laws that criminalize serious crimes such as murder, rape, theft, arson, and the like; as well as less harmful behavior such as littering, loitering, and vagrancy. Most might agree that the first bucket of serious crimes justifies state action towards public safety. But the second bucket of crimes stretch those justifications to their breaking point. Scholars have counted nearly

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53. *See* RACHEL E. BARKOW, PRISONERS OF POLITICS 2 (2019) [hereinafter BARKOW, PRISONERS OF POLITICS].

54. *See supra* note 21 and accompanying text.

55. *See* Bruce Western & Christopher Muller, *Mass Incarceration, Macrosociology, and the Poor*, 647 ANNALS AM. ACAD. POL. & SOC. SCI. 166, 173 (2013) (collecting data on surveys showing disparities in trust and legitimacy in the criminal legal system); *see also* Lawrence W. Sherman, *Trust and Confidence in Criminal Justice*, 248 NAT'L INST. JUST. J. 23 (2002) (finding that approximately sixty percent of White people report confidence in the police compared to thirty-four percent of Black people, and that more than a third of White people reported confidence in local courts, compared to just one in six Black people).

56. *See* MAX WEBER, ECONOMY AND SOCIETY: AN OUTLINE OF INTERPRETIVE SOCIOLOGY 31 (Guenther Roth & Claus Wittich eds., Ephraim Fischoff, Hans Gerth, A. M. Henderson, Ferdinand Kolegar, C. Wright Mills, Talcott Parsons, Max Rheinstein, Guenther Roth, Edward Shils & Claus Wittich trans., 2d ed. Regents of the Univ. of Cal. 1978) (1968) (discussing foundational importance of legitimacy to the rule of law); *see also* Western & Muller, *supra* note 55, at 174 (finding that youths who doubt the legitimacy of the criminal legal system are more likely to use violence to solve their problems, thus contributing to the violence in poor inner-city communities); Schulhofer et al., *supra* note 35, at 338 (citing procedural justice empirical literature showing that people comply with the law based on their belief that law enforcement agencies are legitimate, rather than based on threats of sanction or force).

57. TOMMIE SHELBY, DARK GHETTOS: INJUSTICE, DISSENT, AND REFORM 204–218, 231 (2016).

4,000 different federal crimes,[58] potentially hundreds of thousands of criminal regulations,[59] and hundreds of new state criminal statutes being enacted every year.[60] Yet the vast majority of these laws are symbolic in nature with little impact on public safety.[61]

Even the conservative Heritage Foundation has decried these broad criminal laws that have "become unmoored from [their] historical foundations" and can result in absurd and unjust criminal outcomes.[62] For example, our federal and state governments criminalize so much behavior that it is estimated that seventy percent of Americans have committed a crime sometime in their lifetime that—if caught, prosecuted, and convicted—could carry jail time.[63] Another study argued that federal criminal law has become so broad that the average American could be prosecuted for committing as many as three felonies a day.[64] Criminalizing minor offenses that qualify as misdemeanors also subjects a person to criminal fines, surveillance, and a system from which it is very difficult to escape once you have been identified as a criminal.[65] This overbroad system is what leads to a twelve-year-old girl being arrested for eating French fries on the D.C. metro, a sixty-three-year-old grandmother being arrested for failing to trim her trees in Palo Alto, an Alaskan inventor being arrested by the FBI in SWAT gear for shipping scientific materials without putting a federally mandated sticker on the package, or a retired gardener spending seventeen months in jail for importing orchids without the proper paperwork.[66] These types of regulatory offenses that fill state and federal

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58. *See* John S. Baker, Jr., *Measuring the Explosive Growth of Federal Crime Legislation*, 5 FEDERALIST SOC'Y REV. 23, 27–28 (2004) ("There are over 4,000 offenses that carry criminal penalties in the United States Code. This is a record number and reflects a one-third increase since 1980."); *see also* Susan R. Klein & Ingrid B. Grobey, *Debunking Claims of Over-Federalization of Criminal Law*, 62 EMORY L. J. 1, 22 (2012) (arguing that the vast majority of these laws go unused, and that federal prosecutors in particular only use a handful of statutes for nearly sixty percent of their cases).

59. *See* Ronald L. Gainer, *Federal Criminal Code Reform: Past and Future*, 2 BUFF. CRIM. L. REV. 45, 74 (1998) (estimating that there may be "more than 10,000 regulatory requirements or proscriptions carrying criminal sanctions"); Thomas B. Leary, *The Commission's New Option That Favors Judicial Discretion in Corporate Sentencing*, 3 FED. SENT'G REP. 142, 144 (1990) (putting this figure at 300,000).

60. *See* BELLIN, *supra* note 22, at 61 (tracking the enactment of criminal statutes across several states during different time periods).

61. *See* AM. BAR ASS'N TASK FORCE ON FEDERALIZATION OF CRIM. L., THE FEDERALIZATION OF CRIMINAL LAW 2 (1998) [hereinafter THE FEDERALIZATION OF CRIMINAL LAW REPORT] (acknowledging that widespread federalization of criminal law had little impact on street crime, but was done primarily for the political gain of federal politicians).

62. *See* Edwin Meese III, *The Constitution and Crime*, HERITAGE FOUND. (Sept. 15, 2010), https://www.heritage.org/the-constitution/commentary/the-constitution-and-crime (discussing systemic and anecdotal evidence of overbroad criminal law and enforcement).

63. *See* HUSAK, *supra* note 10, at 24.

64. HARVEY SILVERGLATE, THREE FELONIES A DAY: HOW THE FEDS TARGET THE INNOCENT, at xix (2011).

65. *See generally* ALEXANDRA NATAPOFF, PUNISHMENT WITHOUT CRIME: HOW OUR MISDEMEANOR SYSTEM TRAPS THE INNOCENT AND MAKES AMERICA MORE UNEQUAL (2018) (criticizing the overcriminalization of misdemeanor offenses that are relatively minor yet make up the vast majority of crimes under which people are investigated, arrested, convicted, and sentenced).

66. Meese, *supra* note 62.

statutes are far from *necessary* last resorts for which there are no other legal alternatives to regulate such behavior.

Ultimately, these laws and the absurd results they often achieve are not designed to serve public safety, but rather to achieve personal gain. An American Bar Association Task Force did not mince words when it concluded that the vast majority of federal laws were enacted for political purposes so that politicians could signal to their constituents how seriously they took the issue of crime, even when the laws had little impact on public safety.[67] Bill Stuntz[68] and Rachel Barkow[69] have explained the political aspects of legislative overcriminalization as a combination of politicians pandering to their tough-on-crime base and their relationships with prosecutors who seek more, harsher, and broader criminal laws that give them an easier path to negotiate plea deals.[70]

The overcriminalization mindset in our legislatures that supports tens of thousands of criminal violations in our nation is an epidemic that serves no legitimate purpose other than political pandering. It has created a net so wide, that nearly all of us could be caught within it for relatively innocuous and every-day behavior. This gives LEAs and prosecutors the very discretion they need to target certain communities in a discriminatory attempt at governance and control. This pattern of expanding the substantive criminal law has further contributed to overcriminalization in drastically impactful ways that continues to maintain the imbalance that deprioritizes the liberties of offenders with little public safety benefits to show for it.

D. Mandatory Minimums

Mandatory minimum punishments are another important factor in the overcriminalization imbalance. Some might argue that overcriminalization and the overbreadth of criminal law could still be balanced with individual liberty if the punishment wrought upon the offender was slight. This argument has some merit because many regulatory crimes carry more lenient punishments. But even criminalizing such *de minimis* behavior[71] carries the indignity of being arrested, stigmatized,

67. *See* THE FEDERALIZATION OF CRIMINAL LAW REPORT, *supra* note 61, at 2 (acknowledging that widespread federalization of criminal law had negligible impact on street crime but was done primarily for the political gain of federal politicians).

68. *See* WILLIAM J. STUNTZ, THE COLLAPSE OF AMERICAN CRIMINAL JUSTICE 257–67 (2011) (explaining the relationship between legislative and prosecutorial power).

69. *See* BARKOW, PRISONERS OF POLITICS, *supra* note 53, at 7 (linking prosecutorial lobbying with state legislative definitions of criminal law).

70. *See also* MILLER, *supra* note 48, at 102–05 (discussing prosecutorial influence on legislative decision-making).

71. *See* JOEL FEINBERG, THE MORAL LIMITS OF THE CRIMINAL LAW 188–90 (1987) (discussing the *de minimis* principle and its justifications that would prohibit criminalizing behavior that causes little or no harm); R. Antony Duff, *"De Minimis" and the Structure of the Criminal Trial*, 42 L. & PHIL. 57, 58 (2023).

and the downstream consequences of having a criminal record.[72] Mandatory minimums add yet a further burden on criminal offenders by sending them to prison for several years based on criminalized conduct that does not impact or infringe upon others' individual liberties.

Mandatory minimums are used in all fifty states and the District of Columbia.[73] While these sentences are common for serious crimes such as murder, sexual assault, and even drunk driving, federal and state governments have expanded mandatory minimums to apply to a host of proxy crimes such as drug offenses, firearm offenses, and habitual offender laws to increase punishment for recidivists.[74] Mandatory minimums apply in over one-quarter of all federal criminal cases,[75] approximately three-fourths of which are drug trafficking offenses.[76] And they remain one of the driving forces of mass incarceration.[77]

The only safety valve for these problems is to trust prosecutorial discretion to properly decide when to appropriately charge an offender with a qualifying crime and when to seek a mandatory minimum sentence. But unfortunately, prosecutors exacerbate the problem by using mandatory minimums strategically to negotiate beneficial plea bargains by threatening offenders with these harsh minimum sentences;[78] prosecutors also exercise their discretion discriminatorily against Black and Latinx offenders.[79]

The liberty stakes are high, and the balancing aspects are minimal. The average federal sentence length for those subject to mandatory minimum penalties is

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72. *See* R. v. Sault Ste. Marie, 2 S.C.R. 1299, 1310–12 (1978) (criticizing the criminalization of public welfare and regulatory crimes because they still carry the stigmatization of being classified as a criminal or a felon); *see also* Evans, *supra* note 21, at 709 (describing the economic impacts that a criminal record can have on offenders who face an uphill battle trying to find work and often have to accept depressed wages).

73. *See* Alison Siegler, *End Mandatory Minimums*, *in* EXCESSIVE PUNISHMENT: HOW THE JUSTICE SYSTEM CREATES MASS INCARCERATION 77 (Lauren-Brooke Eisen ed., 2024) (outlining the history and wide adoption of mandatory minimum sentences).

74. *See id.*

75. *See* U.S. SENT'G COMM'N, QUICK FACTS: MANDATORY MINIMUM PENALTIES (2024) [hereinafter QUICK FACTS: MANDATORY MINIMUM PENALTIES] (recording "26.6% of all cases carried a mandatory penalty").

76. *See id.* (recording 72.3% of cases were for drug trafficking).

77. *See* Rachel E. Barkow, *Categorical Mistakes: The Flawed Framework of the Armed Career Criminal Act and Mandatory Minimum Sentencing*, 133 HARV. L. REV. 200, 214 n.123 (2019) ("More than half of the individuals in federal prison as of late 2016 were convicted of an offense carrying a mandatory minimum sentence and more than forty-two percent of all people in federal prison remained subject to a mandatory minimum penalty at sentencing." (citation omitted)); *see also* Alison Siegler, *End Mandatory Minimums: Inflexible, Harsh Sentences Exacerbate Crime and Racial Disparities Alike*, BRENNAN CTR. FOR JUST. (Oct. 18, 2021), https://www.brennancenter.org/our-work/analysis-opinion/end-mandatory-minimums.

78. *See* Jed. S. Rakoff, *Why Innocent People Plead Guilty*, N.Y. REV. (Nov. 20, 2014), https://www.nybooks.com/articles/2014/11/20/why-innocent-people-plead-guilty/ (describing prosecutorial use of mandatory minimums to negotiate plea deals).

79. *See* Sonja B. Starr & M. Marit Rehavi, *supra* note 41, at 1323 (finding that prosecutors bring charges that impose mandatory minimums sixty-five percent more often against Black defendants than similarly situated defendants of other races); Cody Tuttle, Racial Disparities in Federal Sentencing: Evidence from Drug Mandatory Minimums 5 (Feb. 19, 2023) (unpublished manuscript) (on file with author) (finding that the racial disparity of disproportionately using mandatory minimums against Black and Hispanic offenders can largely be explained by state-level racial animus).

151 months,[80] many for drug trafficking crimes.[81] States' mandatory minimums vary considerably, but still often require sending offenders to prison for several years.[82] Mandatory minimums are institutional design choices meant to harshly punish offenders by depriving them of tremendous liberties, and yet many of these sentences do not impact public safety or protect the individual liberties of potential victims.

E. Liberties of Incarceration

Once the criminal system has put somebody in prison or otherwise subjected them to punishment, the deprivation of their liberty has only begun.[83] Justin Driver and Emma Kaufman have outlined the trend that courts have been slowly whittling away the liberties of incarcerated persons while they are still in prison.[84] Aaron Littman has separately explored how regulatory and agency law impact prison conditions, and found these determinations often fail to properly balance individual harms to the offender with communal concerns.[85] This trend places extreme weight on the scale that deprives offenders of their liberty interests—without any proof of benefit to public safety—in ways that have substantiated and empowered policies that contribute to mass incarceration.[86]

While the Court has declared that the "right to have rights" is "not a license that expires upon misbehavior,"[87] it has systematically limited the liberty of incarcerated persons by weighing whether the prison regulation that "impinges on inmates' constitutional rights . . . is reasonably related to legitimate penological interests."[88] Somewhat similar to rational basis review, this standard gives incredible discretion to prison administrators to limit the liberties of incarcerated persons. Further, these administrators often argue that regulations limiting the liberty of incarcerated persons inside prison are necessary because they contribute to public safety. Over the

80. *See* QUICK FACTS: MANDATORY MINIMUM PENALTIES, *supra* note 75.

81. *See* Barkow, *supra* note 77, at 214 (discussing the prevalence of federal mandatory minimums penalties for drug trafficking crimes).

82. *See generally* David Bjerk, *Making the Crime Fit the Penalty: The Role of Prosecutorial Discretion Under Mandatory Minimum Sentencing*, 48 J. L. & ECON. 591, 592–93 (2005) (discussing the widespread use of mandatory minimums and how prosecutorial discretion contributes to their disparate use).

83. *See*, *e.g.*, Margo Schlanger, *The Constitutional Law of Incarceration, Reconfigured*, 103 CORNELL L. REV. 357, 362–88 (2018) (discussing the constitutional limitations of incarcerated persons' rights); Judith Resnik, Hirsa Amin, Sophie Angelis, Megan Hauptman, Laura Kokotailo, Aseem Mehta, Madeline Silva, Tor Tarantola & Meredith Wheeler, *Punishment in Prison: Constituting the "Normal" and the "Atypical" in Solitary and Other Forms of Confine*, 115 NW. U. L. REV. 45, 53–92 (2020) (same).

84. Justin Driver & Emma Kaufman, *The Incoherence of Prison Law*, 135 HARV. L. REV. 515, 525–542 (2021).

85. Aaron Littman, *Free-World Law Behind Bars*, 131 YALE L.J. 1385, 1398–1423 (2022).

86. *See* Driver & Kaufman, *supra* note 84, at 525–542.

87. Trop v. Dulles, 356 U.S. 86, 92, 102 (1958); *see also* Bell v. Wolfish, 441 U.S. 520, 545 (1979) (stating that people in the criminal legal system do not "forfeit all constitutional protections" when they are punished).

88. *See* Turner v. Safley, 482 U.S. 78, 89, 94–99 (1987) (upholding prisoners' right to marry and introducing a new standard of review for prisoners' constitutional claims).

past thirty years during the mass incarceration era, the Court has used this very balancing standard to limit prison visits,[89] to deny reading materials to incarcerated persons in solitary confinement,[90] to permit the involuntary administration of antipsychotic drugs,[91] to prevent Muslims from attending religious services,[92] and to prohibit face-to-face interviews between incarcerated persons and journalists.[93] As incarcerated persons' rights have become more statutory in nature, the Court has only decided a handful of cases in the past decade,[94] perhaps as a statement of its contentment with the status quo.

It is difficult to understand why limiting religious observance or prohibiting reading material in solitary confinement in prison makes the rest of us safer outside of the prison walls. This argument is self-defeating under the very logic of the overcriminalization movement. The promise of mass incarceration was that if we lock up the "bad" people and segregate them from the rest of society, this incapacitation will make us safer in and of itself. Once the offender is incapacitated, what need is there to further strip them of liberties to protect the rest of us? Perhaps if there was evidence that granting these liberties to incarcerated persons would somehow impact the outside world, such as if they were continuing to direct criminal organizations while inside prison. Perhaps if there was evidence that depriving these liberties would contribute to rehabilitative purposes that would result in better public safety outcomes when these incarcerated persons were released after their sentence, that might also carry some logical appeal. But the Court has not required any such scrutiny to justify depriving incarcerated persons these liberties.[95]

Harsh prison conditions impact the "safety, health, and prosperity of us all,"[96] since nearly every person in prison is ultimately released back into their community,[97] often without the resources necessary for successful re-entry. Although the Court has developed a liberty-balancing test to consider when prison regulations can infringe upon the liberties of offenders, it has completely imbalanced the scales

89. *See* Overton v. Bazzetta, 539 U.S. 126, 129–30, 132–37 (2003).

90. *See* Beard v. Banks, 548 U.S. 521, 524–25 (2006) (plurality opinion).

91. *See* Washington v. Harper, 494 U.S. 210, 226–27 (1990).

92. *See* O'Lone v. Estate of Shabazz, 482 U.S. 342, 351–53 (1987), *superseded by statute*, Religious Freedom Restoration Act of 1993, Pub. L. No. 103-141, 107 Stat. 1488 (codified as amended at 42 U.S.C. §§ 2000bb to 2000bb-4).

93. *See* Pell v. Procunier, 417 U.S. 817, 827–28 (1974).

94. *See* Driver & Kaufman, *supra* note 84, at 535.

95. *See supra* notes 87–93.

96. Beth A. Colgan, *Teaching a Prisoner to Fish: Getting Tough on Crime by Preparing Prisoners To Reenter Society*, 5 SEATTLE J. SOC. JUST. 293, 293–97 (2006) (describing arguments made by President George W. Bush era proponents of the prison-reentry movement).

97. *See* BARKOW, PRISONERS OF POLITICS, *supra* note 53, at 5 (recording that "roughly ten thousand people return to society from a term of incarceration every week").

in favor of depriving more and more liberty from offenders[98] in ways that do not serve public safety.

Conceptualizing overcriminalization as an imbalance of liberties that overemphasizes depriving offenders of their liberties in ways that do not deliver commensurate increases to the liberties of potential victims and communities forms the foundation of the Liberty-Balancing Approach. Punishing offenders in a way that appreciates and proportionately balances their liberties with those of others in the community requires a radical rethinking of how we criminalize behavior, how we hold people accountable for that behavior, and fundamentally a rebalancing of the relationship between the individual victim, the individual offender, and the community they both belong to.

II. Balancing Liberties in Criminal Punishment

A Liberty-Balancing Approach to reshaping the substantive criminal law to mitigate the impacts of overcriminalization starts with the contributions of criminal legal philosophers[99] that have conceptualized criminal law as an institution that defines and protects individual liberties.[100] Ekow Yankah has succinctly captured this literature by describing that each person possesses individual rights that neither the state nor others may violate without justification; thus, if somebody does violate another's individual liberty, the state may punish them to fulfill legitimate social policy goals.[101] As part of this consequentialist tradition, depriving the offender of their liberty by punishing them is justified if it increases individuals'

98. *See* Brandon Hasbrouck, *The Antiracist Constitution*, 102 B.U. L. Rev. 87, 145–46 (2022) (liberty restrictions related to punishment strip people of "fundamental privileges and immunities of citizenship, including restrictions on speech, family relations, and legal status—all of which are textbook examples of badges and incidents of slavery"); *see also* Gabriel J. Chin, *The New Civil Death: Rethinking Punishment in the Era of Mass Conviction*, 160 U. Pa. L. Rev. 1789, 1790 (2012) (characterizing modern punishment as tantamount to the outlawed practices of imposing "civil death" in which "most civil rights of a person convicted of a crime" are extinguished, which "put[s] that person outside the law's protection").

99. *See* Brooks, *supra* note 33, at 143–44, 148–49 ("Instead of taking a side between retributivist and other positions, the unified theory is an attempt to show how multiple penal goals can be brought together in a single framework . . . ."). Brooks acknowledges that he is only the most recent scholar to explore this idea, crediting Hegel and twentieth-century British philosophers Bosanquet, Bradley, Green, and Seth as the first to develop such unified theories of punishment. *See id*. at 149.

100. *See id*. at 150 (citing John Rawls, Political Liberalism 137 (1993)). For other theorists that characterize criminal law as a protection of rights, see John Stuart Mill, On Liberty 149 (The Project Gutenberg 2011) (1859) (ebook) (stating that laws are "the rules necessary for the protection of his fellow creatures"); Thomas Hill Green, Lectures on the Principles of Political Obligation § 189, 204 (Richard Lewis Nettleship ed., The Project Gutenberg 2020) (1941) (ebook) (arguing that "the justice of the punishment depends on the justice of the general system of rights"); Morissette v. United States, 342 U.S. 246, 260 (1952) (referring to larceny and theft crimes as "invasions of rights of property").

101. Ekow N. Yankah, *Pretext and Justification: Republicanism, Policing, and Race*, 40 Cardozo L. Rev. 1543, 1606–11 (2019); *see also* Tommie Shelby, The Idea of Prison Abolition 177–78 (2022) ("[C]riminal law, when legitimate, is designed to protect our most basic liberties, including our right not to be killed, sexually assaulted, or physically attacked. Justice requires that these liberties be secure."); Vincent Chiao, Criminal Law in the Age of the Administrative State 28 (Oxford Scholarship Online 2018) (ebook) (describing "the philosophy of criminal law" as being "dominated" by the concept that it is meant to vindicate "private rights").

liberties to be free from future criminal infringements. This Part explores this theoretical relationship between crime and liberty premise by premise.

First, the focus on individual liberties is important to understanding the dichotomy between the individual and the community in the context of "whose" liberties should be protected. Second, grounding this theory in western philosophy and constitutionalism explains "why" focusing on liberty is a worthwhile tool to reframe criminal legal analysis.[102] Third, we must also consider "what" liberties should be protected under criminal law. Fourth, individual liberties and community liberties, while distinct, should be conceptualized and contextualized together towards serving the common good. Finally comes the balancing act, pulling all of these premises together to understand what the Liberty-Balancing Approach strives to achieve.

A. Individualism

The starting point of a liberty-focused theory is wrestling with the difficult question of "who." In other words, whose liberties should the criminal law protect? From this question, we must then grapple with the uncomfortable nuances that certain liberties will overlap and conflict with others, and granting or promoting the liberties of one person might require that we must deny or limit the liberties of another person. Such is the delicate balance of the social tradition of law: it seeks to harmonize liberties between several stakeholders in order to facilitate a functioning society that minimizes interpersonal conflicts. This Section grapples with the "who" question in a way that prioritizes individuals over the community in criminal legal theory.

Let us start with the three different actors that have liberties in a criminal action. First, we have the offender whose action violates the criminal law. For example, an individual offender might steal somebody's watch. The offender has no right or claim to take the watch and consequently has committed theft. But even so, the offender does have liberty interests to be judged and punished justly. In this sense, the offender has an interest not to be unjustly harmed or over punished by the criminal system. Second, we have the victim who suffers some type of deprivation of liberty as a direct result of the offender's action. For instance, when the offender steals the victim's watch, the offender deprives the victim of their liberty to own and use private property, which is captured by the essence of theft crimes. Different types of crimes contemplate different types and qualities of deprivations of liberty, such as murder, rape, or fraud.

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102. *See* Kevin R. Reitz, *The Federal Role in Sentencing Law and Policy*, 543 ANNALS AM. ACAD. POL. & SOC. SCI. 116, 127 (1996) (recognizing of all government functions, the punishment power should be the most constrained because it is "the most extreme form of coercion used by government against its own citizens").

Finally, we have the broader community who might also suffer some deprivation of liberty from the offender's crime. This is where things get a bit unwieldly. Depending on how one might define the term "community,"[103] the offender's theft of a watch could be said to cause broad social harms to the community. High crime rates can cause economic divestment, decreased property values,[104] and psychological impacts on whether people in the community feel safe.[105] This fear and anxiety could be classified as a legitimate deprivation of community liberties of a public safety, public health, economic growth, or other ill-defined notions of communal sentiments. Although many individual community members were not directly impacted by the offender's theft, these individuals in the community may still be indirectly impacted by the crime.

These different parties to the criminal transaction show the primacy of individual liberties as a foundation of criminal law. Most crimes are structured to protect the individual liberties of victims; criminal punishment is structured to hold offenders accountable by depriving them of their liberty as well. And finally, this crime-punishment transaction are justified through consequentialist downstream impacts that it will have on community liberties such as public safety.

I argue that the concept of *individualism* should be the first guiding principle to reform substantive criminal law. Individualism would require that crimes only be defined to protect and mitigate negative impacts on individual persons' liberties. If an offender's action does not directly impact an individual victim's liberties, then the criminal law should have no place in punishing or regulating the offender; instead, civil law and other less punitive regulations could adequately deal with the offender and advance the goal of ensuring a functioning society.

The counter-argument might be that community liberties should also form the basis for punishing offenders. A few salient examples might include crimes that punish public drunkenness or loitering. Those who believe that communities are more than the sum of their individual parts might argue that the community has

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103. Although the concept of "community" is a bit abstract and ill-defined, I use the term to represent the collective interests of individuals. In other words, the community exists as a representation of individuals, not the other way around. Individuals can exist apart from a community, but a community cannot exist apart from its individual members. The definition of the term "community" in criminal law has been contested, which is partly my point. It is difficult to define, and there does not seem to be a consensus. *See, e.g.*, Robert Weisberg, *Restorative Justice and the Danger of "Community,"* 2003 UTAH L. REV. 343, 343–49 (discussing the definitional roots of the term "community" and "the community" in philosophy); John Rappaport, *Some Doubts about "Democratizing" Criminal Justice*, 87 U. CHI. L. REV. 711, 729–32 (2020) (exploring ideas of defining the "community" as a geographical jurisdiction and also as a set of values).

104. *See* COUNCIL OF ECON. ADVISERS, ECONOMIC PERSPECTIVES ON INCARCERATION AND THE JUSTICE SYSTEM 34–35 (2016), https://obamawhitehouse.archives.gov/sites/whitehouse.gov/files/documents/CEA%2BCriminal%2BJustice%2BReport.pdf [https://perma.cc/T79J-G4VC] (recording harms to physical health, property values, and economic investment as related to the crime rate).

105. *See* Sheldon A. Evans, *Punishment as Placebo*, 15–22 (Wash. Univ. St. Louis L. Sch., Working Paper No. 24-03-04, 2024), 98 S. CAL. L. REV. __, *15–22 (forthcoming 2025), (describing criminal law as prioritizing controlling public perception of *feeling* safe instead of actually delivering effective policy that achieved public safety).

distinct liberties that are separate and apart from its individual members. Consequently, somebody parading around the community in a drunken state does not impact the individual liberty of any one person, but rather impacts the broader community liberty of general feelings of safety and decorum. Further, such public drunkenness might lead to a more serious crime in the near future, such as the drunk offender assaulting somebody or damaging property. Loitering laws might offer a similar justification. A number of people "loitering" around a strip mall might not impact any individual liberties of passersby, but it may deprive the broader community's liberties of the same character as the previous example.

I reject the argument that community liberties should serve as the basis for criminal law for a few important reasons. First, the concept of a community is much harder to define than the concept of an individual. The latter is commonly understood as a single physical human being. Such an individual's basic liberties of life, property, bodily autonomy, and so forth are straightforward justifications to criminalize murder, theft, and other crimes against an individual victim. In addition, the individual offender's deprivation of liberty is similarly easy to grasp. Incarceration controls their physical body, e-carceration and other parole programs limit their physical movements, and even rehabilitation programs restrict their liberty as to what they can do with their bodies and their time. We can understand and measure these respective liberties because they are limited to the individual.

Using the criminal law to protect community liberties against indirect harms, however, may lead to broader applications of criminal law. Defining a community is a difficult starting point. Perhaps a legal jurisdiction is good enough, such as the State of California where California statutes apply, or the city limits of Los Angeles where city ordinances apply. Neighborhoods and suburbs of San Francisco are quite different demographically, geographically, and culturally than Tulare County in the middle of the state.[106] Should they all be considered the same community for purposes of the criminal law?[107] Or perhaps we should zoom in to micro-communities, such as homeowners' associations, school districts, and country clubs. Such private and public organizations, or other informal groups of people, might claim to be a community with distinct liberties they would want the criminal law to protect. When contrasted with these difficult questions about community, building the system around the concept of the individual is more readily understandable in both theory and practice.[108]

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106. *Compare* EMP. DEV. DEP'T, DEMOGRAPHIC PROFILES FOR LOCAL WORKFORCE INVESTMENT AREAS IN CALIFORNIA: SAN FRANCISCO COUNTY (2022), https://labormarketinfo.edd.ca.gov/file/Census2022/sanfrdp2022.pdf, *with* EMP. DEV. DEP'T, DEMOGRAPHIC PROFILES FOR LOCAL WORKFORCE INVESTMENT AREAS IN CALIFORNIA: TULARE COUNTY (2022), https://labormarketinfo.edd.ca.gov/file/Census2022/tulardp2022.pdf.

107. *See* Evans, *supra* note 21, at 686 n.11 (theorizing "the community" as physical neighborhoods and associations, but also as the broader voting body of a jurisdiction).

108. This is somewhat complicated by fictions that establish legal personhood for organizations, explored in Part IV.A *infra*.

Defining community liberties is similarly difficult. We could start to consider a host of possible candidates including public safety and reduced crime rates; public physical and mental health; public economic opportunity, such as the availability of private investment and employment; neighborhood property values; public aesthetics that seek to minimize blight and beautify public spaces; public transit impacting the public's freedom of movement; public education; public nuisances, such as noise and environmental concerns; the legitimate use and distribution of public resources; and even community morality.

Yet, even if we were to narrow this list to perhaps the most relevant community liberty of public safety, this is still a broad and somewhat unworkable concept that swallows all of the above. When an offender ends a victim's life, it is straightforward how this interferes with the victim's individual liberty. But we could also conceptualize driving sixty miles per hour in a twenty-five mile-per-hour neighborhood as threatening public safety; some might argue that openly carrying firearms makes the community feel less safe, while others would argue such open carry deters crime in the community; and proponents of Broken Windows practices may argue that graffiti, blight,[109] and even spitting on a sidewalk[110] could also impact public safety.[111] Jumping a turnstile could be criminalized because it provides a popular means for offenders to evade law enforcement pursuit.[112] Walking your dog could threaten public safety if the dog breaks away from its leash and bites someone. Where do we stop?

Philosopher Herbert Spencer recognized this very problem, arguing that, at a certain level of abstraction, every private action impacts the life of others and society as a whole.[113] Criminalizing these so-called community liberties to maintain safety, property values, and other concerns is simply too abstract and only serves to broaden the application of criminal law.

This argument towards individualism is certainly at odds with the status quo, and especially with the thousands of regulatory crimes on the books that seek to

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109. *See, e.g.*, Sheldon A. Evans, *Taking Back the Streets? How Street Art Ordinances Constitute Government Takings*, 25 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 685, 695–700 (2015) (citing patterns across multiple jurisdictions of criminalizing graffiti); MO. REV. STAT. § 574.075 (West 2024) (criminalizing drunkenness in certain public places); TEX. PENAL CODE ANN. § 49.02 (West 2023) (same); VA. CODE ANN. § 18.2-388 (West 2024) (same).

110. *See, e.g.*, MINNEAPOLIS, MINN., CODE OF ORDINANCES tit. 11, § 213.30 (repealed 2015) (criminalizing spitting in public places).

111. *See* Bernard E. Harcourt & Jens Ludwig, *Broken Windows: New Evidence from New York City and a Five-City Social Experiment*, 73 U. CHI. L. REV. 271, 273–75 (2006) (describing Broken Windows Theory as a criminological concept that targeting less serious crime could reduce more serious crime).

112. *See* N.Y. PENAL LAW § 165.15 (McKinney 2018) (criminalizing theft of services, which is used to punish jumping a turnstile and not paying for subway services, as a Class A misdemeanor).

113. *See* HERBERT SPENCER, SOCIAL STATICS; OR THE CONDITIONS ESSENTIAL TO HUMAN HAPPINESS SPECIFIED, AND THE FIRST OF THEM DEVELOPED 85–87 (D. Appleton et al. eds., 1888) (1865); *see also* JOEL FEINBERG, HARM TO OTHERS: THE MORAL LIMITS OF THE CRIMINAL LAW 21 (1984) (arguing that if criminal law was meant to stabilize public institutions as its core goal, then criminalization "would wander over the entire range of economic and political policy").

punish offenders for offenses that do not directly impact any individual. Such absurd crimes include trick-or-treating past the age of twelve,[114] attaching a flyer to a streetlight or telephone pole,[115] or bringing one's own chairs to a public beach.[116] This short list cements my argument. As I will argue below, these victimless crimes are unnecessary to protect social order and only serve to expand and exacerbate the impact of criminal law and punishment on society.

B. Traditional Minimalism

Yet another question for proposing a new framework for the substantive criminal law is "why." Why liberty, as opposed to countless other potential frameworks? This Section argues that focusing on liberty benefits from the framing of our constitutional and statutory ideals. Namely, it highlights the often-forgotten constitutional tradition to use the criminal law narrowly to prevent unnecessary trampling on individual liberties.

One of the uniting principles across western philosophy holds that the criminal law should be used narrowly. To give too much power to the people would result in mob justice and generational blood feuds of escalating violence;[117] but, to give too much power to the government would result in detrimental abuse and overuse of criminal punishment that veers on autocracy to target political enemies, religious and ethnic minorities, or to forward other perverse political incentives.[118] These historical (and modern) realities inspired the writings of John Locke and Thomas Hobbes that separately argued for balanced government power.[119] Jeremy Bentham and Cesare Beccaria[120] argued along a different rationale that penal

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114. NEWPORT NEWS, VA., CODE § 28-5(a) (2005) (allowing parents to accompany their young children—but only if they themselves do not wear "a mask of any type").

115. PERRY, FLA., CODE § 24-98 (2022).

116. *See* People v. Buckley, 536 N.Y.S.2d 948, 949 (N.Y. Dist. Ct. 1989) (discussing local law criminalizing use of beach chairs not provided by concessionaire).

117. *See, e.g.*, THE FEDERALIST NO. 15 (Alexander Hamilton) (arguing the necessity of governments to restrain the "passions of men" that "will not conform to the dictates of reason and justice, without constraint").

118. *See, e.g.*, BARKOW, PRISONERS OF POLITICS, *supra* note 53, at 2 (outlining the politicized nature of criminal policy that leads to perverse results).

119. Indeed, it is a long-held tradition in political philosophy that humanity emerged from the state of nature to create societies to mitigate the risks of physical danger in the former by creating social norms and laws to produce the latter. *See* JOHN LOCKE, SECOND TREATISE OF CIVIL GOVERNMENT 12 (The Project Gutenberg 2021) (1690) (explaining that one of the key benefits of a centralized government was to ensure impartiality and proportionality of punishment); THOMAS HOBBES, LEVIATHAN 117–21, 182–221 (Richard Tuck ed., 1996) (1651) (theorizing that state punishment is necessary to maintain social order).

120. *See, e.g.*, Richard S. Frase, *Punishment Purposes*, 58 STAN. L. REV. 67, 78 (2005). According to Beccaria, "[p]unishments that exceed what is necessary for protection of the deposit of public security are by their very nature unjust." CESARE BECCARIA, ON CRIMES AND PUNISHMENTS 13 (Henry Paolucci trans., Bobbs-Merrill Educational Publishing 1st ed. 1963) (1764). According to Bentham, "legislators and men in general are naturally inclined" toward "undue severity" because of "antipathy, or a want of compassion for individuals who are represented as dangerous and vile," and thus argued for more lenient punishments because of the tendency to err in the other direction. JEREMEY BENTHAM, *Principles of Penal Law*, *in* THE WORKS OF JEREMY BENTHAM 660, 728–29 (John Bowring ed. 1962) (1843).

restraint was necessary to limit the natural retributive impulses of the masses.[121] Along these lines, Norval Morris once noted that "[j]ustification for this utilitarian and humanitarian principle follows from the belief that any punitive suffering beyond societal need is, presumably, what defines cruelty."[122]

America's own constitutional tradition is founded on these principles. Thomas Jefferson understood the dichotomy of individual liberty and government power that were often in conflict.[123] As a judge, John Jay thought that a harsh punishment system upon which mercy had become "dormant" would be repugnant.[124] Alexander Hamilton believed that most countries of his day exercised criminal laws in ways that, without exceptions and safeguards, were overly cruel.[125] Thomas Paine argued that "[a]n avidity to punish is always dangerous to liberty. It leads men to stretch, to misinterpret, and to misapply even the best of laws."[126] The Founders were also troubled with grossly disproportionate punishments handed down by the Crown, and sought to mitigate the power of the central government to do so in ways that might affect the new country.[127]

The liberties found in the Fourth, Fifth, and Sixth Amendments are evidence of these concerns by placing procedural restrictions on government power in criminal justice.[128] The Eighth Amendment's Excessive Fines and Cruel and Unusual Punishment Clauses follow this tradition[129] but are concerned for persons already convicted of crimes. Thus, even convicted offenders have liberties to be protected from substantive criminal laws that impose punishments that are abhorrent to the ideals embedded in the Constitution.[130] Further, our institutional design of checks and balances that separate powers horizontally between the three branches of

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121. *See, e.g.*, Richard S. Frase, *Limiting Retributivism*, *in* THE FUTURE OF IMPRISONMENT 83, 94 (Michael Tonry ed., 2004).

122. Norval Morris, *The Future of Imprisonment: Toward a Punitive Philosophy*, 72 MICH. L. REV. 1161, 1163 (1974).

123. *See* Letter from Thomas Jefferson to Colonel Edward Carrington (May 27, 1788), https://founders.archives.gov/documents/Jefferson/01-11-02-0047 ("The natural progress of things is for liberty to yield, and government to gain ground.").

124. *See* Frimpong v. Republic, [2012] GHASC 3 at 28 (Ghana) ("I am now engaged in the most disagreeable part of my duty, trying criminals – punishment must of course become certain, and mercy dormant – a harsh system, repugnant to my feelings but nevertheless necessary." (quoting John Jay)).

125. THE FEDERALIST NO. 74 (Alexander Hamilton) ("The criminal code of every country partakes so much of necessary severity, that without an easy access to exceptions in favor of unfortunate guilt, justice would wear a countenance too sanguinary and cruel.").

126. THOMAS PAINE, DISSERTATION ON FIRST PRINCIPLES OF GOVERNMENT 22 (1795).

127. *See* BELLIN, *supra* note 22, at 134 (citing Thomas Jefferson's and George Mason's negative feelings towards the execution of Sir Walter Raleigh in 1618).

128. *See* U.S. CONST. amends. IV, V, VI. Although these amendments cover procedural protections of federal overreach, the principles are the same as they apply to substantive criminal law or more broadly punishment theory.

129. *Id.* amend. VIII.

130. *See* Sheldon A. Evans, *Towards a Federalism(s) Framework of Punishment,* 115 J. CRIM. L. & CRIMINOLOGY (forthcoming 2025) (manuscript at 9–20), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4769425 (discussing founding era purposes for protecting individual liberty by ensuring there were constitutional checks on the government's use of the criminal law).

government and vertically in our federalist system was structured, in part, to restrain government abuse of the criminal legal system.[131] As Justice Brandeis explained, the makers of our Constitution "conferred, as against the government, the right to be let alone—the most comprehensive of rights and the right most valued by civilized men."[132]

Principles of penal restraint still hold weight in the modern era. The constitutional vagueness doctrine and the rule of lenity uphold this tradition by striking down ambiguous and vague criminal laws that do not give defendants enough notice to proscribe their conduct.[133] Criminal statues in the federal and state systems also instruct judges to punish defendants only as much *as is necessary* to fulfill the goals of the criminal system.[134]

These traditions and ideals form the basis of a liberty-focused approach to criminal law.[135] The criminal law, at its core, is a government power that regulates how large groups of people should interact with each other to facilitate a functioning society.[136] Defining and prohibiting crimes recognizes that individual people and the larger community have an interest to be free from specific acts that infringe upon their liberty interests.[137] After all, individuals can infringe upon a victim's liberty perhaps more easily than the government.[138] The easy examples include the crimes

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131. For commentary on separation of powers in the criminal legal system, see BARKOW, PRISONERS OF POLITICS, *supra* note 53, at 126–29; Daniel Epps, *Checks and Balances in the Criminal Law*, 74 VAND. L. REV. 1, 4–6 (2021). For commentary on federalism and the criminal legal system, see Evans, *supra* note 130.

132. Olmstead v. United States, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting); *see also* Isaiah Berlin, *Two Concepts of Liberty*, *in* FOUR ESSAYS ON LIBERTY 15, 15–18 (Oxford Univ. Press 1969) (1958) (framing these rights in western democracies as the right to be left alone in accordance with negative freedoms of rights that limit government intervention in the lives of its citizens); Ran Hirschl, *"Negative" Rights vs. "Positive" Entitlements: A Comparative Study of Judicial Interpretations of Rights in an Emerging Neo-Liberal Economic Order*, 22 HUM. RTS. Q. 1060, 1063 (2000) (connecting this idea with more modern neoliberal ideals that seek to minimize government interventions); Ernest A. Young & Erin C. Blondel, *Federalism, Liberty, and Equality in* United States v. Windsor, 2012 CATO SUP. CT. REV. 117, 118 (2012–2013) (arguing that the "[c]onstitution's structural features" are designed to "secure the liberty of the people").

133. *See, e.g.*, Johnson v. United States, 576 U.S. 591, 595–597, 606 (2015) (striking down the residual clause in the Armed Career Criminals Act as unconstitutionally vague); *see also* Carissa Byrne Hessick, *Vagueness Principles*, 48 ARIZ. L.J. 1137, 1140–45 (2016) (explaining void-for-vagueness doctrine in criminal constitutional law); F. Andrew Hessick & Carissa Byrne Hessick, *Constraining Criminal Laws*, 106 MINN. L. REV. 2299, 2316–17 (2022) (outlining statutory principles of lenity to constrain criminal laws).

134. *See, e.g.*, Carissa Byrne Hessick & Douglas A. Berman, *Towards a Theory of Mitigation*, 96 B.U. L. REV. 161, 212–13 (2016) ("[V]ersions of the [parsimony] principle can be found in federal criminal law, some state sentencing systems, and other authoritative texts." (citations omitted)); *see also* 18 U.S.C. § 3553(a)–(b) (West 2024).

135. *See* Hessick & Hessick, *supra* note 133, at 2347–51 (describing the importance of liberty as a limiting function of criminal law); *see also* 18 U.S.C. § 3553(a)–(b) (West 2024).

136. *See supra* note 2 and accompanying text.

137. *See* Randy E. Barnett & John Hagel III, *Assessing the Criminal: Restitution, Retribution, and the Legal Process*, *in* ASSESSING THE CRIMINAL: RESTITUTION, RETRIBUTION, AND THE LEGAL PROCESS 1, 11 (Randy E. Barnett & John Hagel III eds., 1977) (defining crime as focusing "on the violation of rights and, in particular, the fundamental right of all individuals to be free in their person and property" from would-be offenders).

138. THE FEDERALIST NO. 63 (James Madison) ("Liberty may be endangered by the abuses of liberty as well as by the abuses of power.").

of homicide and theft that deprive the victim of well-recognized individual liberties of life and property.

This framing adopts Thom Brooks' approach in which "the criminal law aims at the protection of individual legal rights," which are in turn a "political conception of justice."[139] Since terms such as "liberty" and "rights" are often viewed in positivist political philosophy as things established and protected by governments, a liberty-based punishment framework must rest on a political foundation. As already contemplated above, this is a uniquely individualistic approach that focuses on the individual victim that possesses liberties worthy of protection.[140] A person's right to live imposes a duty on others not to infringe on that right unnecessarily or unjustifiably;[141] if an offender violates this duty by infringing on a victim's individual liberty, the criminal law steps in to regulate the offender's behavior and punish them. This is in contrast to the deontological tradition of human rights,[142] which Bentham largely rejected as "nonsense on stilts" because he realized that liberties are created by laws and enforced by states with sovereign authority.[143] Consequently, in order to be considered a *legal* right, as opposed to the more slippery concept of a *human* right, the right must be judicially enforceable.[144]

Understanding criminal law as a regulatory system that protects politically recognized individual liberties stands on the shoulders of giants in criminal philosophy who have argued for different but related limiting principles. The *harm* principle is one example that has been endorsed as far back as John Stuart Mill's *On Liberty*.[145] This harm principle portrays the criminal law as a way to punish

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139. *See* BROOKS, *supra* note 33, at 150 (citing JOHN RAWLS, POLITICAL LIBERALISM 137 (1993)); *see also supra* note 100 and accompanying text.

140. *See* BROOKS, *supra* note 33, at 150.

141. *See* Wesley N. Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 23 YALE L.J. 16, 32 (1913–1914) (stating that "[w]hen a right is invaded, a duty is violated" (citation omitted)); Joseph Raz, *On the Nature of Rights*, 93 MIND 194, 196 (1984).

142. *See, e.g.*, MALCOLM M. FEELEY & EDWARD L. RUBIN, JUDICIAL POLICY MAKING AND THE MODERN STATE: HOW THE COURTS REFORMED AMERICA'S PRISONS 174 (Alfred Blumstein & David Farrington eds., 1998) (observing that rights today tend to be deontological and not instrumentalist in nature).

143. *See* BRYAN S. TURNER, THE BODY & SOCIETY: EXPLORATIONS IN SOCIAL THEORY 122, 259 (Mike Featherstone ed., 3rd ed. 2008) (citing JEREMY BENTHAM, *Anarchical Fallacies: Being an Examination of the Declaration of Rights*, *in* NONSENSE UPON STILTS: BENTHAM, BURKE, AND MARX ON THE RIGHTS OF MAN (Jeremy Waldron ed., 1987)); *see also* EMILY ZACKIN, LOOKING FOR RIGHTS IN ALL THE WRONG PLACES: WHY STATE CONSTITUTIONS CONTAIN AMERICA'S POSITIVE RIGHTS 36–47 (2013) (recognizing that the individual enjoyment of rights depends on the exercise of government power).

144. *See* LAURENCE H. TRIBE, CONSTITUTIONAL CHOICES 111 (1985) (there is "a presumption in favor of the judicial enforceability of constitutional rights"); Mary Ann Glendon, *Interdisciplinary Approaches—Rights in Twentieth-Century Constitutions*, 59 U. CHI. L. REV. 519, 532–34 (1992) (suggesting that in this country, constitutional rights are not merely aspirational but contemplate judicial enforcement); Frank B. Cross, *The Error of Positive Rights*, 48 UCLA L. REV. 857, 866 (2001) (agreeing that "[s]tatelessness spells rightlessness," which literally is correct in the sense that one cannot have legal rights without the ability to enforce them through the state (citation omitted)); Antonio Carlos Pereira-Menaut, *Against Positive Rights*, 22 VAL. U. L. REV. 359, 370 (1988); David P. Currie, *Positive and Negative Constitutional Rights*, 53 U. CHI. L. REV. 864, 874 (1986) (recognizing that the government must provide a judicial remedy to enforce rights).

145. MILL, *supra* note 100, at 149–53.

harms and prevent future harms.[146] Mill believed that justice was inherently intertwined with liberty residing in the individual, but believed this to be based on moral rules rather than a purely political and positivist account.[147] Antony Duff developed a narrower conception under his *wrongfulness* principle, arguing that the criminal law is meant to punish moral wrongs according to a legal moralism account.[148] But moral wrongfulness fails to explain a host of crimes that have little to no moral weight,[149] and such wrongs are difficult to define without a political and legal infrastructure. Joel Feinberg gets a bit closer to the political realities of the punishment system by describing harm as a setback to a person's legitimate interest.[150] Larry Alexander and Kimberly Kessler Ferzan go further by defining criminality as the "conscious imposition of risks to others' legally protected interests."[151]

What these principles lack, which my framework attempts to capture, is the restraining principles inherently built into western philosophy and constitutional tradition. The harm principle is a victim-focused approach that justifies the criminal law on the basis of preventing harm to victims. Mill's focus on morality and harm also makes this framework much harder to define because of the ambiguity of these terms.[152] The wrongfulness approach is an offender-focused approach that focuses on the moral wrong committed by the offender. A liberty-focused approach attempts to bring these principles together by prioritizing the individual liberties of both the offender and the victim; it understands the government's role to protect victims' liberties through the limited and tailored deprivation of liberty from offenders.

In order to protect and balance these liberties, I propose minimalist principles of *necessity* and *legitimacy* that align with our philosophical and constitutional tradition.[153] By the term "necessity," I mean that the criminal law should be used only

146. *Id.*

147. *See* JOHN STUART MILL, UTILITARIANISM, LIBERTY, REPRESENTATIVE GOVERNMENT 75 (Aldine Press 1962) (1910).

148. R. Antony Duff, *Towards a Modest Legal Moralism*, 8 CRIM. L. & PHIL. 217, 218–21 (2014); *see also* David Lieberman, *Mapping Criminal Law: Blackstone and the Categories of English Jurisprudence*, *in* LAW, CRIME AND ENGLISH SOCIETY, 1660–1840, 139–61 (Norma Landau ed., 2002) (attributing the idea that criminal law is defined by the wrongfulness of the offender's act to Blackstone's commentaries).

149. *See generally* Stuart P. Green, *Why It's a Crime to Tear the Tag Off a Mattress: Overcriminalization and the Moral Content of Regulatory Offenses*, 46 EMORY L.J. 1533 (1997) (criticizing moral wrong approaches to criminality as failing to account for *malum prohibitum* crimes that have no moral weight).

150. *See* JOEL FEINBERG: HARM TO OTHERS 33–36 (1984).

151. LARRY ALEXANDER & KIMBERLY KESSLER FERZAN, REFLECTIONS ON CRIME AND CULPABILITY: PROBLEMS AND PUZZLE 83 (2018).

152. *See* Bernard E. Harcourt, *The Collapse of the Harm Principle*, 90 J. CRIM. L. & CRIMINOLOGY 109, 149–52 (1999) (arguing that much of the "harm prevention" type of utilitarianism might just be window dressing for old moral arguments against crime).

153. *See, e.g.*, Máximo Langer, *Penal Abolitionism and Criminal Law Minimalism: Here and There, Now and Then*, 134 HARV. L. REV. F. 42, 57 (2020) ("[B]y criminal law minimalism I mean a theory under which there is still a penal system that has armed public law enforcement, punishment, and, for the time being, imprisonment as tools to deal with social harm."); DAVID HAYES, CONFRONTING PENAL EXCESS: RETRIBUTION AND THE POLITICS OF PENAL MINIMALISM 24

when necessary—when no other effective alternatives to dealing with the offender's conduct exist.[154] Instead of using criminal law and incarceration as a first resort[155] to social problems that can lead to the very overbreadth associated with the Founders' fears, we should only employ them as a last resort in extraordinary circumstances.[156] Criminal law should not be a "default" reaction[157] with which we grow overly familiar, but rather a rare exercise of government power reserved for only the most serious anti-social behavior.[158] Our legal system is robust, and there are no shortage of legal alternatives that can be used to protect individual liberties of potential victims without criminally punishing offenders. Pecuniary, injunctive, and declaratory judgments are usually enough to deter bad behavior, provide recompense to the victim, and pass moral judgment by expressing condemnation upon the offender.[159] However, criminal law is exceptional because it has the power to take a supposedly dangerous person out of the community and segregate them in a way that protects others from future harm. I argue that the power to deprive the offender of this individual liberty on such a fundamental scale is the only value that criminal law has over tort, contract, and even constitutional protections.[160] Thus, this *necessity* principle would be applied to limit the power of

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(2019) ("A penal State that is minimalist in terms of size is . . . one that intrudes into each individual's autonomy no more than is strictly necessary to protect citizens from the setback to their liberty caused by criminal wrongdoing."); HUSAK, *supra* note 10, at 120 (arguing that external constraints are needed "to reverse the tendency for more and more criminal law to produce more and more punishment").

154. *See* Langer, *supra* note 153, at 57 (arguing that minimalist criminal justice systems should employ law enforcement or criminal punishment "fairly and only when no other tool could advance the goal of preventing or reducing harm"); *see also* WELLMAN, *supra* note 14, at 48 (arguing that if punishment is not necessary or sufficient to protect rights, then the state is not justified in punishing an offender).

155. *See* HUSAK, *supra* note 10, at 206 (positing that the "minimalist theory of criminalization . . . is superior").

156. *See* HAYES, *supra* note 153 ("[T]here should always be an expectation that criminal justice should be used as a last resort for resolving social problems."); Langer, *supra* note 153, at 74 (proposing that the Eighth, Fifth, or Fourteenth Amendments can be creatively construed to require that legislatures use their power to criminalize only as a last resort).

157. *See* Anna Roberts, *Dismissals as Justice*, 69 ALA. L. REV. 327, 367 (2017).

158. *See* KEVIN H. WOZNIAK, THE POLITICS OF CRIME PREVENTION: RACE, PUBLIC OPINION, AND THE MEANING OF COMMUNITY SAFETY 2 (2023) (arguing that criminal law became overbroad in part because political elites decided to use it as a "first respon[se] for all the nation's social problems that are related to poverty, deindustrialization, and unemployment").

159. *See, e.g.*, Michael R. Sisak, *Trump's Properties Could Be Seized If $454 Million Civil Fraud Debt Not Paid, Warns NY AG James*, PBS NEWS (Feb. 22, 2024, 10:22 AM), https://www.pbs.org/newshour/politics/donald-trumps-properties-could-be-seized-if-454-million-civil-fraud-debt-not-paid-warns-ny-ag-james (discussing the financial burdens that civil fraud judgments impose on Donald Trump); Ana Faguy, *Judge Denies Trump's Delayed Payment Request in E. Jean Carroll Case*, FORBES (Feb. 25, 2024, 12:48 PM), https://www.forbes.com/sites/anafaguy/2024/02/25/judge-denies-trumps-delayed-payment-request-in-e-jean-carroll-case/?sh=4b4b5d25a977 (same but for defamation case filed by E. Jean Carroll). These examples are not meant to unduly discuss President Trump's legal woes but are meant to illustrate the effectiveness of civil law to hold people accountable and even stigmatize and shame them as effectively as the criminal law.

160. *See* SHELBY, *supra* note 101, at 174–78 (arguing that incarceration should not be the primary method for preventing crime, but that less harmful alternatives exist).

legislatures from expanding what liberties should be protected under the criminal law,[161] and also could be applied to sentencing judges when considering the extent of liberty to be deprived from the offender.[162]

The second principle of *legitimacy* means that the government should only deploy the criminal law towards some legitimate purpose.[163] This is closely tied to *necessity*, but goes further by defining what social goals the government seeks to achieve through the criminal law. Perhaps the strongest legitimizing function of the criminal law is to protect individual liberties by providing public safety.[164] Certainly, self-serving political goals that uphold government power (and the power of individual politicians) would not be justified under this ideal because this would taint the criminal legal system with the very totalitarianism abuse that we seek to avoid.[165] Neither would justifications of pecuniary interest or discrimination serve legitimate government functions.[166] Principles of *necessity* and *legitimacy* are important to consider together because the government might be fully justified in using the criminal law narrowly to punish an offender for theft; but if it was discriminatorily punishing Black offenders for this conduct with little investment or interest in punishing white offenders, this would be an *illegitimate* and as a discriminatory use of government power that prioritized racial subjugation over public safety. Other government interests such as public health, economic concerns, public transit, and the like might be *legitimate* uses of the criminal power, but they would not be *necessary* because alternative legal and social tools exist that could regulate behavior towards these goals.

Necessity and *legitimacy* also build on our constitutional tradition of scrutiny. Strict scrutiny, intermediate scrutiny, and rational basis review are all essentially balancing exercises that seek to narrow the deprivation of individual liberties only

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161. *See* Trevor G. Gardner & Esam Al-Shareffi, *Regulating Police Chokeholds*, 112 J. CRIM. L. & CRIMINOLOGY ONLINE 111, 131–32 (2022–2023), https://scholarlycommons.law.northwestern.edu/cgi/viewcontent.cgi?article=1016&context=jclc_online (arguing that minimalist legislatures should focus on narrowing the scope of criminal law).

162. *See* Rachel E. Barkow, *Promise or Peril?: The Political Path of Prison Abolition in America*, 58 WAKE FOREST L. REV. 245, 284 (2023) (wondering whether "[i]nstead of framing the goal as the end of prisons, [it would] be better to shift to an agenda that sees prisons as a necessary last resort and seeks to improve what is left of them as much as possible, what Máximo Langer refers to as criminal law minimalism").

163. *See* HUSAK, *supra* note 10, at 132 (stating that the "the state must have a substantial interest in whatever objective the statute is designed to achieve," "the law must directly advance that interest," and "the statute must be no more extensive than necessary to achieve its purpose").

164. *See supra* note 119 and accompanying text.

165. *See supra* note 117 and accompanying text; *see also* Sheldon A. Evans, *Interest-Based Incorporation: Statutory Realism Exploring Federalism, Delegation, and Democratic Design*, 170 U. PA. L. REV. 341, 385–92 (2022) (outlining political theories that assert politicians are self-interested in getting re-elected and maintaining power).

166. *See, e.g.*, U.S. DEP'T OF JUST., CIV. RIGHTS DIV., INVESTIGATION OF THE FERGUSON POLICE DEPARTMENT 2–3 (2015), https://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/04/ferguson_police_department_report.pdf (finding that tickets and court fees were used to generate revenue for the police department).

in circumstances of legitimate government interests.[167] *Legitimacy* mirrors the first part of these tests, which ask whether there is a compelling, important, or legitimate government interest to restrict a person's individual liberty.[168] *Necessity* mirrors the second part of these tests, which ask whether the government's law is narrowly tailored, substantially related, or at least has a reasonable and rational link to achieving the government's interest.[169] As Kate Weisburd has questioned, why do such constitutional principles apply when deciding when the government can restrict the liberty of free speech or of equal protection under the laws, yet does not apply when the government seeks to restrict the most important liberty of all—to be free from incarceration or other government intrusion in the context of criminal punishment?[170] While the *necessity* and *legitimacy* principles are not nearly as developed as these constitutional tests, they nevertheless borrow from constitutional scrutiny principles towards achieving the same goals: balancing liberty interests by limiting government intrusion on individual liberties.

In sum, the Liberty-Balancing Approach draws historical support from the liberal ideal of narrowly tailoring criminal laws to maximize liberty. The limiting principles of *individualism*, *necessity*, and *legitimacy* work together to uphold the western political philosophical and American constitutional traditions of penal restraint to protect the liberties of individual victims and offenders. This need not be an exhaustive list of restraining principles, and neither is it meant to be. Instead, these principles cover the most important considerations that the Liberty-Balancing Approach seeks to highlight when attempting to correct the existing imbalances in our criminal legal system.

C. Criminal Legal Liberties

Yet another preliminary question that must be considered is "what" liberties are so fundamental to individual functioning that they deserve the protection of the criminal law. I define this specific and narrow range of liberties "criminal legal liberties." After all, the law cannot solve all of humanity's problems,[171] and neither should the criminal law be so broad as to protect all of humanity's liberties based on the traditional and minimalist principles articulated above.

One of the prevailing theories seeking to define which liberties are worth legal protection is the Capabilities Approach, advanced by Amartya Sen and Martha

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167. *See* Paul Gowder, *Note on Levels of Scrutiny, in* 14TH AMENDMENT COURSE READER ¶ 2 (June 14, 2019), https://opencasebook.org/casebooks/699-14th-amendment-course/resources/2.2.2-note-on-levels-of-scrutiny/ (describing these constitutional tests as a "an overall balancing test").

168. *See id.* at ¶¶ 2–4, 6, 11, 15 (explaining the different levels of constitutional scrutiny).

169. *See id.*

170. *See* Weisburd, *supra* note 3, at 1308–12 (arguing that criminal law should mirror strict scrutiny analysis when depriving offenders of liberty); *see also* Flanders, *supra* note 3, at 10–12, 14.

171. *See* Randy E. Barnett, *The Harmful Side Effects of Drug Prohibition*, 2009 UTAH L. REV. 11, 34 (discussing the failed war on crime, positing that "[l]egal institutions are not capable of correcting every ill in the world").

Nussbaum separately over decades and volumes of work.[172] For all of its complexities, the Capabilities Approach is a way of thinking about the range of options and abilities an individual has to develop and achieve a good life.[173] But the Capabilities Approach is intentionally broad, meaning it is not a ready-made fit for conceptualizing criminal legal liberties.[174] For instance, both Sen and Nussbaum have argued for different capabilities and rights that should be enjoyed by all people, including the capability to live a long life, to read and write,[175] and even to enjoy play and entertainment.[176] Further, both Sen's and Nussbaum's contributions also situate capabilities within political systems and existing social hierarchies. While Sen contributes his understanding of human capabilities as a broader set of opportunities that are impacted by a person's attributes and social environment,[177] Nussbaum situates her understanding within the government's role to facilitate and protect the rights and liberties of its citizens.[178] These contributions certainly serve the broader goals of outlining liberties that contribute to societal development, but the criminal law must be construed much more narrowly than criminalizing those who restrict others' liberty to play.[179]

This brings us back to the lingering question of which narrow and specific list of liberties should be protected as criminal legal liberties under threat of punishment? When thinking about the range of these liberties, we must consider the political nature of liberties, and the fact that different communities will define these liberties

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172. *See* Amartya K. Sen, *Capability and Well-Being*, *in* THE QUALITY OF LIFE 30, 30 (Martha C. Nussbaum & Amartya K. Sen eds., 1993).

173. This is consistent with others who take a "dignity" approach to rights, arguing that the freedoms and actions that give humans dignity form the basis of rights. *See, e.g.*, Jeremy Waldron, *How Law Protects Dignity*, 71 CAMBRIDGE L.J. 200, 217–19 (2012); Flavio Comim, *Measuring Capabilities, in* THE CAPABILITY APPROACH: CONCEPTS, MEASURES AND APPLICATIONS 157, 162–63 (Flavio Comim, Mozaffar Qizilbash & Sabina Alkire eds., 2008). For general outlines and introductions to rights and liberty literature, see generally WESLEY N. HOHFELD, FUNDAMENTAL LEGAL CONCEPTIONS: AS APPLIED IN JUDICIAL REASONING AND OTHER LEGAL ESSAYS (Walter W. Cook ed., Yale Univ. Press 1919) (1917); Leif Wenar, *The Nature of Rights*, 33 PHIL. PUB. AFFAIRS 223 (2005).

174. This is not a slight to the Capabilities Approach in the least, because it was never intended to have any explanatory power or application to the criminal law. Instead, it has been used extensively as a framework examining poverty, inequality, well-being, social justice, gender, health, disability, and many other social institutions. *See* David A. Clark, *The Capabilities Approach: Its Development, Critiques, and Recent Advances*, 11 (Glob. Pol'y Rsch. Grp., Working Paper No. 032, 2006).

175. *See* AMARTYA K. SEN, RESOURCES, VALUES AND DEVELOPMENT 497 (1984).

176. *See* MARTHA C. NUSSBAUM, CREATING CAPABILITIES: THE HUMAN DEVELOPMENT APPROACH 33–34 (2011) (listing ten capabilities that include things such as life, bodily integrity, emotion, and play). Indeed, Nussbaum's list of basic capabilities covers many different liberties, some of which would and would not be credible criminal legal liberties.

177. *See* Amartya K. Sen, *Reply*, *in* THE STANDARD OF LIVING 103, 109 (Geoffrey Hawthorne ed., 1987).

178. *See* MARTHA NUSSBAUM, WOMEN AND HUMAN DEVELOPMENT: THE CAPABILITIES APPROACH 74–75 (2000) (describing human capabilities and rights as a list that "can be endorsed for political purposes, as the moral basis of central constitutional guarantees").

179. For work that has used the Capabilities Approach in criminal legal analysis and philosophy, see Andrew von Hirsch & Nils Jareborg, *Gauging Criminal Harm: A Living-Standard Analysis*, 11 OXFORD J. LEGAL STUD. 1 (1991); ANDREAS VON HIRSCH, DESERVED CRIMINAL SENTENCES: AN OVERVIEW 67–69 (2017); Hamish Stewart, *The Limits of Consent and the Law of Assault*, 24 CANADIAN J.L. & JURIS. 205 (2011).

differently based on the political process.[180] But relying solely on the political process would fail to account for the minimalist principles above, in which political majorities could criminalize a broad set of activities that might even target the behavior of political and ethnic minorities as a way of socially governing these hierarchies.[181]

The Liberty-Balancing Approach is not as concerned with creating a definitive list of criminal legal liberties, but instead sets out restraining principles that should guide government actors, especially legislators, when deciding what to criminalize. However, the theory would have little impact without at least a first attempt below:

- The right to life,
- The right to sexual autonomy,
- The right to bodily autonomy,
- The right to be free from threats,
- The right to own and dispense of property.[182]

At first glance, this is a short list that oversimplifies the complexity of homicide, rape and sexual assault, battery and kidnapping, assault, and theft crimes respectfully. Even with such a short list, legislatures would be free to define crimes as they see fit along various degrees of these offenses, different definitions of the liberty to be protected, and so forth. But as argued above, keeping this list of criminal legal liberties narrow is intentional.[183] What makes these liberties unique to justify enforcement through the criminal law is that criminal punishment would be *necessary* as the only effective way to prevent such antisocial behavior through some sense of deterrence and incapacitation. Tort and contract remedies such as pecuniary, declaratory, or injunctive relief are insufficient to make the victim whole and hold the offender accountable.

Tort law often has parallel laws meant to achieve different social goals, such as to make the victim whole due to their loss of money, relationships, opportunity, or dignity. But these actions remain prosecutable under the criminal law for wholly different and unique reasons, namely to maintain public safety. For example, battery is actionable as a tort that a private plaintiff can bring against a defendant who

180. This is in line with Jamal Greene's work, arguing that rights should be determined by the democratic process inherent in legislatures, instead of the overreliance on judicially mandated rights. *See generally* JAMAL GREENE, HOW RIGHTS WENT WRONG: WHY OUR OBSESSION WITH RIGHTS IS TEARING AMERICA APART (2021) (arguing judge-made law defining rights outside of the political accountability of the democratic process is one reason that there is so much division in America with concern to these basic principles of our political identities).

181. *See, e.g.*, *infra* note 251 and accompanying text.

182. Protecting these liberties would also include criminalizing the inchoate attempts, solicitations, conspiracies, and accomplices seeking to deprive a victim of these liberties.

183. The problem with developing lists is that they are often inflexible, exhaustive, and subject to decades of critique. Both Nussbaum and John Rawls have separately attempted to create definitive lists of rights and liberties to be protected by the state, but they also kept their lists relatively short because they recognized that different communities will have different priorities, making it difficult to create a master list upon which all agree; Nussbaum ambitiously settled on ten, while Rawls settled on three. *See* NUSSBAUM, *supra* note 176, at 33–34; JOHN RAWLS, POLITICAL LIBERALISM 134 (1993) (attempting to find a political conception of what would be "an overlapping consensus" of what people with different backgrounds could endorse towards good governance).

physically struck them.[184] This holds the defendant accountable and achieves some pecuniary or dignitary recompense for the victim. The criminal law exists and should narrowly apply to achieve the different social goal of public safety, such as taking the defendant off the street or deterring the defendant significantly, so that they will no longer batter victims. Criminalizing and punishing battery is *necessary* because it is narrowly used in this case to achieve the *legitimate* social outcome of preventing the defendant and others from continuing to batter victims. Notice that such *necessity* does not require incarceration, but it does require some form of potential incapacitation or rehabilitative treatment towards better social outcomes. Criminalizing and punishing battery are also *necessary* because tort law is insufficient as an alternative to fulfill the social goal of public safety. Having to pay monetary damages will not likely deter or discourage people who enjoy striking others. This same logic holds true for similar crime-tort parallels like murder-wrongful death, theft-conversion, assault, kidnapping-false imprisonment, and sexual assault.

D. Legitimate Communitarianism

While there will always be tension between individual and community liberties, they need not always be in conflict; instead, this Section argues, consistent with our criminal legal tradition, that individualism and communitarianism should be conceptualized together. Individual liberties in our constitutional society and in criminal law do not exist as absolutes that trump all else, but as vehicles to facilitate the goals of building a successful community. This is both ironic and obvious. A person's liberties of life, property, bodily autonomy, and so forth, are almost always interpreted in ways that are beneficial to the broader community and to what legal philosophers describe as the common good. By considering the nuances of this approach, prioritizing individual liberties does not come at the expense of the community, but is a more defined and minimalistic way to achieve the very *legitimacy* that the Liberty-Balancing Approach argues for.

This line of thinking follows Yankah's theories that frame how individual liberties interact with their community. Yankah conceptualizes the criminal law as defining reciprocal duties "between a citizen and their civic community."[185] Under this framing, crimes are considered threats to social cohesion and prevent us from living together in a community where each individual has equal standing.[186] In other words, defining and punishing crimes is meant to maintain social order and public safety.[187] Consequently, individuals have a duty to work towards the good

184. *See* RESTATEMENT (SECOND) OF TORTS § 18 (AM. L. INST. 1965).

185. Ekow N. Yankah, *Republican Responsibility in Criminal Law*, 9 CRIM. L. & PHIL. 457, 465 (2013) (citation omitted).

186. *See generally id.*

187. *See* CHIAO, *supra* note 101, at 5 (arguing that criminal law is meant to promote the common good as defined by the stable and just rule of public institutions).

of the community,[188] and defining various laws and liberties that are enforced by the government should be interpreted to work towards this common good.[189]

This theory also finds support among constitutional scholars who argue that individual liberties have always been considered to operate towards the common good of society; therefore, liberty is not some natural deontological good in and of itself but is a consequentialist necessity towards building and maintaining the common good for all. For example, Adrian Vermeule has argued that our constitutional tradition was conceived as "a reasoned ordering to the common good" meant to protect individual rights towards the goal of greater public virtues such as justice, peace, prosperity, and morality.[190] According to Vermeule, "rights exist to serve;" they are not meant to "maximize the autonomy of each person" but instead are "component parts of the common good and contributors to it."[191] Richard Pildes adds to this by criticizing those who believe that liberties are some type of trump card that holders can invoke, regardless of how it impacts everyone else in the community.[192] Instead, he theorized that individual liberties "realiz[e] certain collective interests" and "their content is necessarily defined with reference to those interests."[193] In other words, an individual's liberty cannot be reduced to their interests alone, but must be exercised and enforced in the context of their contribution to common goods of society according to utilitarian balancing.[194] Jessica Bullman-Pozen has also found these principles imbedded in state constitutions that often protect a much larger number of individual liberties, but do so in the context of serving communal interests.[195] Jamal Greene has argued separately that

188. Richard Dagger, *Punishment as Fair Play*, 14 RES PUBLICA 259, 260–61 (2008) (using the concept of fair play to explain that building and maintaining society is a social endeavor, and the criminal law is meant to regulate and encourage fair play).

189. *See* Ekow N. Yankah, *When Justice Can't Be Done: The Obligation to Govern and Rights in the State of Terror*, 31 L. & PHIL. 643, 647–49 (2012) [hereinafter Yankah, *When Justice Can't Be Done*]; Ekow N. Yankah, *Legal Vices and Civic Virtue: Vice Crime, Republicanism and the Corruption of Lawfulness*, 7 CRIM. L. & PHIL. 61, 72 (2013) [hereinafter Yankah, *Legal Vices*] ("When citizens try to game the system to hoard outsized shares of social benefits and elevate their own good above the common good, they disrupt the civic bonds that hold us together."); Jud Campbell, *Republicanism and Natural Rights at the Founding*, 32 CONST. COMMENT. 85, 86 (2017) (explaining that at the founding, the creation and protection of constitutional rights were meant to "create a representative government that best served the public good").

190. *See generally* ADRIAN VERMEULE, COMMON GOOD CONSTITUTIONALISM: RECOVERING THE CLASSICAL LEGAL TRADITION 1 (2022).

191. *Id.* at 24.

192. Richard H. Pildes, *Why Rights Are Not Trumps: Social Meanings, Expressive Harms, and Constitutionalism*, 27 J. LEGAL STUD. 725, 731 (1998).

193. *Id. But see generally* RANDY E. BARNETT, RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY (2004) (forwarding a classical liberalism view that focuses on maximizing individual liberties).

194. *See* Pildes, *supra* note 192, at 731.

195. *See* Jessica Bulman-Pozen & Miriam Seifter, *State Constitutional Rights and Democratic Proportionality*, 123 COLUM. L. REV. 1855, 1869–72 (2023) (citing several state constitutions and their explicit framing of individual liberties as part of a larger communal project); *see also* Helen Hershkoff, *State Common Law and the Dual Enforcement of Constitutional Norms*, *in* NEW FRONTIERS OF STATE CONSTITUTIONAL LAW: DUAL ENFORCEMENT OF NORMS 151 (James A. Gardner & Jim Rossi eds., 2010) (recognizing that a number of states frame constitutional liberties as a limitation on private interference with another's individual liberties).

individual liberties should be subject to proportionality analysis, which ultimately would result in utilitarian balancing that appreciates the common good of the community and respects "the impact on individuals."[196]

This concept is familiar to most audiences in constitutional law, tort law, and even criminal law. The liberty to enjoy freedom of speech from government interference is neither absolute nor a trump card; rather, a government can intrude on a person's speech based on a balancing of the government interests and its impact on the individual rightsholder.[197] A person or business can normally use their home or property as they see fit, but if they create a nuisance, their interests must be balanced with those of the community.[198] And even the most treasured liberty of all, the liberty of life, is not a trump card in every situation in criminal law. For example, if somebody kills another person in self-defense,[199] or if killing a person is necessary to prevent a greater evil in a necessity defense,[200] the victim's liberty of life is contextualized based on its impact on the community. What binds these principles and different areas of law together is that individual liberty acts in service to and in balance with the common good of the community; in turn, political legitimacy is based on the role the government serves in securing and enforcing these individual liberties towards communal flourishing.[201]

Interpreting individual liberties as serving the broader community is a foundation for Yankah's important critique of criminal law. He deftly recognizes that a society that uses the criminal law to institutionalize and facilitate discrimination or predatory enforcement "cannot [] hope to keep alive the bonds of civic friendship."[202] In other words, the discriminatory use and abuse of the criminal system has a delegitimizing effect. In the context of the deeply racialized aspects of

196. Jamal Greene, *Foreword: Rights as Trumps?*, 132 HARV. L. REV. 28, 70 (2018).

197. *See* Flanders, *supra* note 3, at 13–18 (discussing the values of democratic legitimacy and transparency that are served by imposing a burden on the government to justify its deprivation of constitutional rights). *But see* Jonathan Scruggs, *From Guns to Websites: Clarifying Tiers of Scrutiny for Free-Speech Cases*, FEDSOC BLOG (July 14, 2022), https://fedsoc.org/commentary/fedsoc-blog/from-guns-to-websites-clarifying-tiers-of-scrutiny-for-free-speech-cases ("The argument against this approach jumps off the page. The Constitution doesn't mention anything about tiers or balancing. It is atextual, ahistorical, and very discretionary.").

198. *See* Patrick Bishop & Victoria Jenkins, *Planning and Nuisance: Revisiting the Balance of Public and Private Interests in Land-Use Development*, 23 J. ENV'T L. 285, 287–288 (2011) (discussing common law doctrines of public versus private interests in nuisance and land development law).

199. *See* Kimberly Kessler Ferzan, *Justifying Self-Defense*, 24 L. & PHIL. 711, 713–15 (2005) (discussing the liberty to protect oneself as a justification for killing another).

200. *See* Ian Howard Dennis, *On Necessity as a Defense to Crime: Possibilities, Problems and the Limits of Justification and Excuse*, 3 CRIM. L. & PHIL. 29, 31–33 (2009) (discussing common law utilitarian justifications for the necessity defense).

201. *See* R. A. DUFF, ANSWERING FOR CRIME: RESPONSIBILITY AND LIABILITY IN THE CRIMINAL LAW 45–49 (2007). *But see* CHIAO, *supra* note 101, at 27–29 (arguing that viewing criminal law as vindicating private rights is inconsistent with the need to legitimate public institutions).

202. *See* Yankah, *Legal Vices*, *supra* note 189, at 74.

American criminal justice that also prey on the poor, Yankah argues that this discrimination "seriously undermines [the] law's justificatory claim."[203]

This corroborates what legal sociologists and criminologists have recognized in poor and minority communities.[204] When these communities perceive unfair treatment in legal institutions—of which criminal law is chief—it undermines the law's legitimacy.[205] As discussed previously,[206] this is an unfortunate and intentional use of criminal law as a means of governing and subjugating low-income people of color, which directly inhibits many poor and minority individuals and entire communities from the freedom of full citizenship.[207]

When the criminal law operates in a way that disproportionately criminalizes and deprives individual minority offenders and low-income offenders in the name of public safety, it degrades and diminishes perhaps even more important social goals of legitimacy and public trust. This is the cruel irony of a discriminatory system. Regardless of its ability to deliver public safety, depriving the individual liberties of so many does not contribute to the common good. Under our minimalist principles, such discrimination is the antithesis of *legitimacy* because it justifies using the criminal law to subjugate these communities as a racist and abusive use of government power.[208]

Criminal law and punishment are not a zero-sum game[209] that pits individual liberties versus the community. Protecting and appreciating the individual liberties of offenders does not mean threatening or taking away liberties from victims or the

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203. Ekow N. Yankah, *Deputization and Privileged White Violence*, 77 STAN. L. REV. (forthcoming 2025) (manuscript at 46) (on file with author) (citing Melvin L. Rogers, *Race, Domination, and Republicanism*, *in* DIFFERENCE WITHOUT DOMINATION: PURSUING JUSTICE IN DIVERSE DEMOCRACIES (Danielle Allen & Rohimi Somanathan eds., 2020)).

204. *See* Monica C. Bell, *Police Reform and the Dismantling of Legal Estrangement*, 126 YALE L.J. 2054, 2085–88 (2017) (discussing legal estrangement and how it contributes to a better understanding of the literature of law enforcement legitimacy); Todd R. Clear & Dina R. Rose, *Individual Sentencing Practices and Aggregate Social Problems*, *in* CRIME CONTROL AND SOCIAL JUSTICE: THE DELICATE BALANCE 27, 42 (Darnell F. Hawkins, Samuel L. Myers, Jr., & Randolph N. Stone eds., 2003) (describing a kind of "[s]ocial isolation" from the state where "residents in disadvantaged communities become more disenchanted . . . and more removed from the civic community").

205. *See generally* PAUL H. ROBINSON, DISTRIBUTIVE PRINCIPLES OF CRIMINAL LAW: WHO SHOULD BE PUNISHED HOW MUCH? (2008) (discussing the concept of empirical desert that measures community mores of punishment as a baseline for its legitimacy); *see also* ZACHARY HOSKINS, BEYOND PUNISHMENT? A NORMATIVE ACCOUNT OF THE COLLATERAL LEGAL CONSEQUENCES OF CONVICTION 25 (2019) (recognizing that disproportionate punishment levied upon minority communities can undermine the state's legitimacy).

206. *See supra* Part I.B.

207. *See* BRAITHWAITE & PETTIT, *supra* note 46, at 102.

208. *See* Roberts, *supra* note 37, at 4, 7–8 (discussing historical connections between prisons and slavery); Paul Butler, *The System Is Working the Way It Is Supposed To: The Limits of Criminal Justice Reform*, 104 GEO. L.J. 1419, 1425 (2016) (criticizing reformist advocacy by arguing that the criminal legal system was built with the intention of subjugating people and that the system is not broken but accomplishes what it was designed to do).

209. *See generally* HEATHER MCGHEE, THE SUM OF US: WHAT RACISM COSTS EVERYONE AND HOW WE CAN PROSPER TOGETHER (2021) (arguing that racism's deprivation of liberties and opportunities for Black Americans leads to a net decline in wealth and prosperity).

community. But currently, criminal law suffers from tremendous imbalance that prioritizes the individual liberties of victims and purported community liberty of public safety while largely disregarding the individual liberties of offenders who are disproportionately low-income men of color.

E. The Balancing Act

Balancing the liberties of individual victims, individual offenders, and collective communities poses a difficult thought project. Ultimately, the Liberty-Balancing Approach proposes a new way of thinking about competing liberties, prioritizing some liberties over others, and doing so to achieve a net liberty gain for individuals, offenders, and communities alike. This short Section streamlines these premises into one operative approach.

The minimalist principles of necessity, legitimacy, and individualism serve as the Approach's North Star. Following these principles means that the government *should* not legislate, enact, and enforce criminal laws unless it is *necessary* to achieve a *legitimate* purpose. *Individualism* is also a central restraining principle and a check against government abuse based on the ambiguity inherent in using criminal law to protect vague and expansive communal liberties.

Necessity would do the majority of work to limit the government's power to enforce substantive criminal laws because the vast majority of crimes can be better and more efficiently regulated through some other source of law. *Malum prohibitum* regulatory crimes would largely be abandoned, repealed, or merely be relegated to desuetude under such a reform because these crimes can be adequately and properly handled through tort law, contracts, financial regulations, zoning ordinances, civil penalties and fines, red and yellow flag laws, civil forfeiture and confiscation, and a whole host of other legal avenues that do not carry the harsh punishment and stigma of the criminal law.

The government would also have to pass the test of *legitimacy* to ensure that any criminal law was instituted for a legitimate governmental purpose, such as providing public safety in a way that does not jeopardize the public trust. As theorized above, using the criminal law to protect individual liberties must be contextualized as benefiting the common good; consequently, criminal laws must protect the individual liberties of criminal offenders and victims alike towards the common good of a fair and functioning criminal legal system that *actually* produces public safety benefits.

Finally, *individualism* would narrow criminal laws to protect against direct infractions of or interferences with an individual victim's liberty interests. There would be no degrees of separation between the act of the offender and the deprivation of liberty from the victim. Otherwise, as discussed above, every action that negatively impacted the freedom of another person or could be vaguely related to a

broader societal interest could be criminalized.[210] In practice, this would mean rethinking and ultimately repealing victimless crimes that do not directly impact individual victims. Any other acts that pose a broader societal harm can and should be dealt with under other legal alternatives in ways that do not contribute to the carceral and surveillance state.

The theoretical foundations of the Liberty-Balancing Approach rely on minimalist principles that are meant to reprioritize individual liberties in service of the broader community. But this approach is more than a thought project; it contributes to the larger critique of the status quo in Part I, and the policy interventions explored below in Part III. Balancing liberties is elusive, but is worthwhile towards building the common good.

III. Crimes Without Liberties

Achieving a balance between the individual liberties of offenders, the individual liberties of victims, and community liberties is difficult in practice. The Liberty-Balancing Approach is a starting point—it is a foundation that helps us rethink crime policy in ways that prioritize the protection of individual liberty by reshaping criminalization and punishment in accordance with achieving the common good of public safety and promoting public trust and legitimacy.

While it would be folly to try and rebuild the entire criminal legal system in these brief pages, this Part explores one of the many ways the Approach would challenge perhaps the most widespread, most prosecuted, and most impactful crime policies in the modern era: victimless proxy crimes. First, this Part analyzes proxy crimes from the standpoint of protecting vaguely defined community liberty interests in a way that infringes on the individual liberties of offender and non-offender alike. Second, this Part explores the particular and nuanced liberty imbalances of drug and firearm proxy crimes that are worth resolving. These proxy crimes would have to meet the difficult, narrow standard of protecting the individual liberties of victims, respecting the liberty of offenders, and providing some public safety benefit that does not diminish public trust. Ultimately, such a balance may prove too elusive, which would therefore justify their abolition.

A. Proxies

Conceptualizing criminal legal liberties should be understood on a spectrum. At one end, *mala in se* crimes[211] are justified in part because they are the most obvious examples of crimes that impact an individual victim's liberty. Yet as we get further away from *mala in se* crimes, the Liberty-Balancing Approach calls into question

210. *See supra* Part I.A.

211. These crimes are those that we inherently know are morally wrong and proscribed behavior. Crimes such as murder, assault, and theft are understood as wrong because most humans share an intuition as to their wrongfulness. *See generally* Mark S. Davis, *Crimes* Mala in Se: *An Equity-Based Definition*, 17 Crim. Just. Pol'y Rev. 270 (2006) (analyzing several definitions of *mala in se* crimes and their use in criminal law).

crimes that do not impact an individual victim, but instead are used as proxies to (often ineffectively) protect vague community liberty interests.

Proxy crimes are problematic because they are designed to achieve a purpose other than to prevent the conduct they specifically proscribe.[212] This is quite different from traditional crimes that are intended to prevent the particular harm they inflict. For example, homicide is a crime that is specifically designed to punish, prevent, and assess accountability for the specific act of killing a human. Illegal firearm possession, however, is a proxy crime because it is not meant to protect society against the harm of the mere possession of a firearm; instead, it protects against *potential* crimes that can be committed with the firearm.[213] Although some might characterize a dangerous person having a firearm as a danger in and of itself, a situation truly becomes dangerous when the person uses—not merely possesses—the firearm. Illegal firearm possession qualifies as a *victimless* proxy crime because there is no direct victim that suffers any deprivation of liberty from an offender's mere possession of the firearm. The deprivation of the victim's individual liberty—and thus a criminal act—would only be triggered if the possessor of the firearm uses it against the victim.

While there are entire taxonomies to study these victimless proxy crimes,[214] drug and firearm crimes are the most impactful and deserve their own subsections below. Drug and firearm offenses make up approximately one-third of prosecutions at the state and federal levels.[215] These account for millions of cases annually that exhaust law enforcement agency (LEA) resources, expend judicial economy, and fill our prisons.[216] Further, there is little if any evidence that enforcing these proxy crimes makes us any safer by deterring violent and property crimes. Decades of experimentation and data collection have yielded mixed results at best on whether these policies are related to lowering crime rates.[217]

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212. *See* Douglas Husak, *Drug Proscriptions as Proxy Crimes*, 36 L. & PHIL. 345, 346 (2017); Richard H. McAdams, *The Political Economy of Entrapment*, 96 J. CRIM. L. & CRIMINOLOGY 107, 160 (2005) (describing a proxy crime as one that "bars conduct that neither causes nor risks harm but is correlated with other conduct that is harmful or risky").

213. *See* MICHAEL MOORE, PLACING BLAME: A THEORY OF THE CRIMINAL LAW 783 (1997) ("[W]e sometimes use one morally innocuous act as a proxy for another, morally wrongful act or mental state.").

214. *See, e.g.*, Andrew Cornford, *Preventive Criminalization*, 18 NEW CRIM. L. REV. 1 (2015); Youngjae Lee, *Proxy Crimes and Overcriminalization*, 16 CRIM. L. & PHIL. 469, 471–74 (2022) (describing various categories of proxy crimes).

215. For federal prosecutorial statistics, see Daniel Richman, *Political Control of Federal Prosecutions: Looking Back and Looking Forward*, 58 DUKE L.J. 2087, 2088 (2009) (finding that in 2007, roughly 25% of federal prosecutions were drug cases and 12% were gun cases). For state prosecutorial statistics, see BRIAN A. REAVES, U.S. DEP'T OF JUST., FELONY DEFENDANTS IN LARGE URBAN COUNTIES, 2009 – STATISTICAL TABLES 25 (2013) (finding that in 2009, 29% of the most serious convictions in the seventy-five largest U.S. counties were drug offenses and 3.4% were weapons offenses).

216. *See CSP STAT Criminal*, CT. STAT. PROJECT, https://www.courtstatistics.org/court-statistics/interactive-caseload-data-displays/csp-stat-nav-cards-first-row/csp-stat-criminal (Oct. 2024) (tracking the millions of these criminal cases across all fifty states).

217. *See* Jeffrey Fagan & John MacDonald, *Policing, Crime, and Legitimacy in New York and Los Angeles: The Social and Political Contexts of Two Historic Crime Declines*, *in* NEW YORK AND LOS ANGELES: THE UNCERTAIN FUTURE 219,

What then justifies victimless proxy crimes if they contribute to mass incarceration and increased surveillance, but do not make us any safer?[218] Professors Douglas Husak and Randy Barnett have separately argued that these proxy crimes are best understood as pretextual LEA tools of investigation.[219] First, victimless crimes are inherently difficult to enforce and prosecute because they lack the help of any cooperating victims. Many crimes are reported to LEAs by victims themselves, and prosecutors often rely on these victims' testimony to secure convictions. Without any such victims to speak of, LEAs must find other tools to detect and prosecute these proxy crimes.[220] Second, with regard to possession and trafficking crimes, the very nature of these crimes requires LEAs to surveil, enter, and intrude into private areas of our lives. How else can a police officer determine if a person possesses drugs or firearms? LEAs must develop legal tools and justifications to institute traffic stops, stop people on the street, frisk their bodies, enter their homes, inspect their garbage, and perform many other acts that step into our most intimate spaces.[221] Third, because drug or firearm possessors lack reliable characteristics that might lead LEAs to narrow their searches to certain individuals, LEAs instead cast a wide net that necessarily subjects innocent people to overly broad searches and infringes on our individual liberties. In an oversimplified example, LEAs must subject one hundred people to such searches to find one criminal offender.[222] In this way, proxy crimes only succeed by instilling fear of somewhat randomized—and sometimes illegal—police searches and intrusions into the entire

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238–43 (David Halle & Andrew A. Beveridge eds., 2013) (observing that the reduction in crime in both cities despite very different policing environments "could suggest that policing had a modest effect"); *see also* Husak, *supra* note 212, at 360. Husak notes that in New York:

> Street stops, which peaked at 685,000 in 2011, have declined to 46,000 by 2015— a 93% reduction. Yet rates of violent and nonviolent crime continue to plummet. 2015 proved to be the safest year in the modern history of New York City (although crime rates have moved upward in several other cities.

Id. (footnote omitted); *see generally* Kadish, *supra* note 20 (discussing the broader problems with criminalizing victimless crimes based on the relatively little public safety benefit they produce).

218. Professor Husak posed this same question more poignantly, asking "Why does an ineffective and counterproductive policy with no sound rationale, which contributes to mass incarceration and exacerbates racial tensions, continue to exist?" Husak, *supra* note 212, at 350.

219. *See* Barnett, *supra* note 171, at 23–28; Husak, *supra* note 212, at 356*; see also* Markus Dirk Dubber, *Policing Possession: The War on Crime and the End of Criminal Law*, 91 J. CRIM. L. & CRIMINOLOGY 829, 908–34 (2001).

220. *See* Barnett, *supra* note 171, at 23–26.

221. While the Court got this question right in *Griswold v. Connecticut*, 381 U.S. 479, 485 (1965), ("Would we allow the police to search the sacred precincts of marital bedrooms for telltale signs of the use of contraceptives?"), the same sanctity for privacy rights is not respected in criminal procedure.

222. Although this is an exaggerated example, it is not too far from the truth. For example, stop-and-frisk policies in New York City that were meant to get guns and drugs off the streets resulted in the searches of tens of thousands Black and Latinx youth, while only six percent of all reported stops were arrests. *See Stop-and-Frisk Data*, ACLU OF N.Y. (Mar. 14, 2019), https://www.nyclu.org/data/stop-and-frisk-data.

populace that will hopefully deter the one percent of people who are actual offenders.[223]

As is often the case, these expansive LEA powers fall disproportionately and dangerously on communities of color. *Terry* stops[224] and other interdiction methods are used pretextually to stop Black and Latinx people, infringing on their liberties of privacy and freedom of movement. And yet, all of these stops and seizures yield terribly low rates of detecting offenders.[225] Additionally, Devon Carbado has convincingly argued that when minority communities experience increased contact with LEAs, the likelihood of police killings, unjustified uses of force, and other affronts to the individual liberties of Black and Latinx people also increases.[226]

Through the lens of liberty, proxy crimes are designed to invade and infringe on all of our liberties—every-day citizens and criminal offenders alike—for the misguided and ineffective purpose of catching a small percent of offenders who themselves are *not* impacting others' liberty interests. To add insult to injury, this ever-increasing dragnet that requires us to give up significant portions of our liberties of privacy, ownership, and freedom of movement does not make us any safer, and simultaneously diminishes the public trust in the criminal justice system.[227]

This is a lose-lose proposition. Proxy crimes are unjustified under the Liberty-Balancing Approach because they punish victimless offenses while simultaneously infringing on individual liberties as part of the expansive LEA operations. While possession and trafficking of dangerous items like drugs and firearms should be regulated, the criminal law need not be a one-stop-shop for these public health and safety issues.[228]

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223. *See* David T. Hardy & Kenneth L. Chotiner, *The Potential for Civil Liberties Violations in the Enforcement of Handgun Prohibition*, *in* RESTRICTING HANDGUNS: THE LIBERAL SKEPTICS SPEAK OUT 194, 200 (Don B. Kates, Jr. eds., 1st ed. 1979) (explaining that possession of illegal substances is virtually impossible to detect except through searches, and since no amount of legal searches would deter offenders, "the police must use random or other illegal searches, which it is hoped can provide enough evidence against enough violators so that they can be convicted and severely enough punished to frighten the unapprehended majority of violators into voluntary compliance").

224. Terry v. Ohio, 392 U.S. 1, 27–31 (1968) (upholding the ability for police officers to stop people on the street if the officer has a reasonable suspicion that the person has committed, is committing, or is about to commit a crime).

225. *See Stop-and-Frisk Data*, *supra* note 222 (measuring data over twenty years, and finding that between sixty and ninety percent of people stopped by the NYPD were not arrested or given a summons); Press Release, ACLU, ACLU Analysis of D.C. Stop-and-Frisk Data Reveals Ineffective Policing, Troubling Racial Disparities (June 16, 2020), https://www.aclu.org/press-releases/aclu-analysis-dc-stop-and-frisk-data-reveals-ineffective-policing-troubling-racial (finding that in over 62,000 stops in a five-month period in Washington, D.C., "[o]nly 0.8% of all stops, and only 2% of non-traffic stops, led to the seizure of any weapon" and that violent crime increased during this period by 4%).

226. *See* Carbado, *supra* note 21, at 1485 (conveying the idea that frequent police encounters in the Black community increase the exposure of those communities to police violence).

227. *See supra* notes 4–5 and accompanying text.

228. There are myriad ways to increase public safety by regulating dangerous devices and substances without LEA interference. *See generally*, Jordan Blair Woods, *Traffic Without the Police*, 73 STAN. L. REV. 1471 (2021) (arguing for alternatives to regulating traffic without policing); *see also The Urgent Need to Remove Police from Traffic Enforcement*, TRANSP. ALT. (Feb. 15, 2023), https://transalt.org/blog/the-urgent-need-to-remove-police-

B. Drugs

Criminalizing the use, possession, and trafficking of controlled substances raises a number of individual and community liberty interests to consider under the Liberty-Balancing Approach. Catching people in the act of *using* these substances is rare, which is why most drug laws focus on criminalizing possession of the substance that presumes the offender is a drug user.[229] Trafficking laws commonly target the transportation and sale of these substances as a way to punish those who participate in the underground marketplace;[230] consequently, the amount of a controlled substance that an offender possesses is often presumed to evince their intent to sell it.

The larger debate centers on public safety and the *potential* crimes that a drug user might commit. By criminalizing the *use* and possession of drugs, we are actually trying to deter and punish related behaviors of being belligerent or dangerous, neglecting one's children, or committing other crimes due to the lack of judgment one suffers while intoxicated.[231] And as the argument might go, even drug users who are not intoxicated might commit crimes as a result of their need to support their usage lifestyle.

The Liberty-Balancing approach must first consider the various liberties in play, and the imbalance criminalization creates. Owning and transporting drugs is more than a possessory liberty interest; this also implicates liberties of self-autonomy and the freedom of one's own body.[232] When it comes to the use or possession of drugs, bodily autonomy should be viewed as the liberty to control what we put in our own bodies as long as it does not interfere with others' liberty. By criminalizing drug use and possession, the law limits the bodily autonomy of offenders as a proxy to protect the ill-defined downstream impacts that drug use and possession *could* have on others' individual liberty or community liberties. By definition, it is almost impossible to imagine a situation in which ingesting or otherwise using a

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from-traffic-enforcement (arguing for alternative methods to enforce traffic laws given the rates of police violence and misconduct in traffic stops).

229. *See, e.g.*, 21 U.S.C. § 844 (criminalizing the possession of controlled substances); IOWA CODE ANN. § 124.401 (West 2024) (criminalizing possession of controlled substances, as limited by weight). *See also* Robinson v. California, 370 U.S. 660, 667 (1962) (holding that it was unconstitutional for a statute to criminalize somebody's status as a drug addict in a case in which the defendant neither consumed narcotics nor was found guilty of any other illegal behavior).

230. *See, e.g.*, 21 U.S.C. § 841 (criminalizing distribution, manufacturing, or possessing with intent to distribute controlled substances as measured by weight); IOWA CODE ANN. § 124.414 (West 2024) (criminalizing the manufacture or sale of drug paraphernalia).

231. *See* Yankah, *Legal Vices*, *supra* note 189, at 62 (explaining the liberal critique of vice crimes in stating that "governmental power is appropriate to protect people from 'moral' wrong, the violation of one's rights by another"); Husak, *supra* note 212, at 356, 358 (discussing the proxy nature of drug crimes as avenues to deter "non-drug-related crimes" and further "general crime deterrence rather than the detection and confiscation of drugs").

232. *See* Barnett, *supra* note 171, at 32.

drug would impact the liberties of another person, since the *use* of the drug only impacts the bodily autonomy and biological chemistry of the user.

If we apply the principle of *individualism*, we can start to understand the absurdity of criminalizing drug use and possession. If a person uses or possesses a drug and enters a coma from an overdose, is this impact on their own life enough to criminalize the use or possession of the drug? If the person is experiencing homelessness, perhaps there are no downstream consequences to society other than their friends suffering from emotional loss. If the person is a spouse and parent of two, then we might care about the interests of their immediate family. But what about the interests of the user's barber who has now lost a client? Or the interests of the user's sister-in-law, who must now help support the user's destitute family? How should we define the individual victims in these types of cases? In a narrow sense, the only victim is the person who themselves overdosed on the drugs, which is a private matter of no public concern.[233] In a broader sense, anybody who is impacted by this proscribed social behavior could be considered a victim. This absurd logic is ever-present in proxy crimes when we fail to limit crimes to the *individualism* principle. Certainly, we want to use legal tools to prevent such harm to individuals in the first place, but if we criminalize drug possession as a proxy that *could* indirectly impact others' individual liberties downstream, then we can make a legitimate argument to criminalize nearly everything.[234]

There might also be ill-defined community liberties in play, such as broader public health concerns, the desire to prevent public intoxication and vagrancy, and even the desire for the community to build good character among its citizens.[235] But these community liberties would almost certainly fail the Liberty-Balancing Approach's *necessity* test because criminal law is ill-suited and insufficiently tailored to achieve any of these goals.[236] Public health programs and regulations are much better-suited to handle these social problems.

While drug use and possession are criminalized in various contexts, trafficking crimes raise a different but related set of concerns. Criminalizing drug trafficking limits the individual liberty of offenders to own and transport chattel property. Some might argue there is also a liberty interest to buy and sell goods and services in the marketplace, but this interest is vague and much harder to define. Such a

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233. *See* Yankah, *Legal Vices*, *supra* note 189, at 70 (explaining Aristotelean theory that "though weak-willed persons may corrupt their own character, this corruption does not injure the community and thus is a private concern").

234. *But see* HOWARD G. BUFFETT, OUR 50-STATE BORDER CRISIS: HOW THE MEXICAN BORDER FUELS THE DRUG EPIDEMIC ACROSS AMERICA 289 (2018) (citing a newspaper column questioning if drug crimes can really be classified as "victimless" given the amount of violence drug sales fund).

235. *See* Yankah, *Legal Vices*, *supra* note 189, at 62 (stating that "[l]aw is not appropriately concerned with one's ethical failings or the development of personal virtue").

236. *See id.*

liberty is also constrained by the well-accepted breadth of government power to regulate marketplaces for a host of dangerous products.[237]

Drug trafficking also serves as a proxy for other dangerous activities. There is no victim and no direct deprivation of liberty to another when a person possesses a certain amount of or transports an illicit drug. But such practices can lead to increased drug *usage* in the community that might have downstream consequences. Also, the illicit business of transporting and selling drugs, and law enforcement efforts to combat it, can cause tremendous amounts of downstream violence among competing drug cartels, organizations, and kingpins.[238] The very nature of the illicit business means that such competition cannot be resolved through legal mediation, courts, or binding contracts; one of the few ways to resolve such disputes is often through violent crime that deters and intimidates competitors.[239] Thus, those who uphold the status quo will argue that these drug crimes, by proxy, are designed to deter violent crime, property crime, and increase public safety.[240]

As with other proxy crimes, there is a tremendous imbalance of prioritizing the purported community liberties of public safety, health, and even morality over the individual liberties of offenders who do not directly victimize others. Further, there is evidence that drug proxy crimes do not actually succeed in mitigating the very violent and property crimes they are designed to deter.[241] Scholars have studied the drug war for decades, and a consensus has emerged that there is little correlation between these invasive drug laws and the decline of their respective proxy behaviors.[242] Indeed, there is evidence that these drug laws actually increase violent

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237. *See* Paul L. Joskow & Roger G. Noll, *Regulation in Theory and Practice: An Overview*, *in* STUDIES IN PUBLIC REGULATION 1, 1 (Gary Fromm ed., 1981) (studying the "new administrative agencies with powers to set prices, restrict entry, and control what products are produced, and how, [which] have come to affect the efficiency of industrial markets and the distribution of production and income throughout the economy").

238. *See* Bruce L. Benson, *Escalating the War on Drugs: Causes and Unintended Consequences*, 20 STAN. L. & POL'Y REV. 293, 294 (2009) (explaining data showing that "[d]rug enforcement causes property and violent crimes," as opposed to preventing them); *see also* THOMAS ZEITZOFF, VIOLENT EXTERNALITIES AND ELECTORAL INCENTIVES: UNDERSTANDING THE POLITICAL BASIS FOR 'MEXICO'S WAR ON DRUGS' 1–3 (2010), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1607425 (explaining the violence in Mexico caused by cartels and the War on Drugs).

239. *See* Jeffrey A. Miron & Jeffrey Zwiebel, *The Economic Case Against Drug Prohibition*, 9 J. ECON. PERSPS. 175, 177–78 (1995) (arguing that drug prohibition can increase violent crime); Jeffrey A. Miron, *Violence, Guns, and Drugs: Cross-Country Analysis*, 44 J.L. & ECON. 615, 618–23 (2001) [hereinafter Miron, *Violence, Guns, and Drugs*] (discussing the possible reasons why the uniqueness of drug prohibition might increase violence, including the lack of alternative to violence for dispute resolution).

240. *See* DAVID F. MUSTO, THE AMERICAN DISEASE: ORIGINS OF NARCOTIC CONTROL 296 (3d. ed. 1999) ("During the last seventy-five years responsible officials have stated that narcotics caused between fifty and seventy-five percent of all crimes, especially in large cities like New York. Narcotics have been blamed for a variety of America's ills, from crime waves to social disharmony.").

241. *See* Husak, *supra* note 212, at 348–49 (dismantling the four major justifications for the continued prohibition of illicit drugs).

242. *See, e.g.*, FRANKLIN E. ZIMRING, THE CITY THAT BECAME SAFE: NEW YORK'S LESSON FOR URBAN CRIME AND ITS CONTROL (2011) (using evidence from New York that showed that while the use of cocaine and heroin stayed flat, New York's crime rate dropped sharply); *see also* Miron & Zwiebel, *supra* note 239, at 178 (citing studies from the early 1990s showing weak evidence that drug consumption increases violence).

crime.[243] In other words, drug prohibition breeds more violent crime than drug use. For the very reasons explored above, criminalizing the drug marketplace necessarily requires violence as a reliable dispute resolution tool; thus, the drug marketplace is not inherently dangerous—prohibition is what makes it so.[244] It is also telling that nearly forty percent of all violent and property crimes involve an offender who is intoxicated with alcohol.[245] If public safety were the true priority of this liberty imbalance, we would criminalize alcohol as a proxy crime due to its statistically proven impact on increasing crime.

The lack of public safety benefits requires inquiry into whether criminalizing drug possession and trafficking serves *legitimate* government functions. Drug use has been racialized since the turn of the twentieth century.[246] By the end of World War I, drug addicts were identified "as a social menace and equated with the IWWs, Bolsheviks, anarchists, and other feared subgroups like . . . cocaine-using blacks and . . . opium-smoking Chinese."[247] Drug laws going back to the 1920s played on society's fear of racial minorities "because they seemed to undermine essential social restrictions that kept these groups under control."[248] Cocaine was rumored to help Black men withstand bullets; opium was feared to facilitate Chinese men's seduction of White women; marijuana was believed to incite violence among Chicanos; heroin was associated with young, reckless, and promiscuous gangs; and alcohol—which was heading towards being prohibited at the time—was associated with lazy immigrants crowding into and corrupting large cities.[249] Fast forwarding to the 1960s, President Nixon's aides have admitted that his war on crime and drugs was meant to target his political enemies—namely the anti-Vietnam War "Yippies" and Black Americans who rose in political power during the Civil Rights era.[250] And modern statistics solidify this intent, because

243. *See* Miron & Zwiebel, *supra* note 239, at 178–79 (considering evidence that prohibition may increase crime and violence more so than drug use); Barnett, *supra* note 171, at 22–23 (discussing criminogenic impacts drug prohibition can have on society).

244. *See* Miron, *Violence, Guns, and Drugs*, *supra* note 239, at 618–23 (discussing the unique nature of drug prohibition that results in increased violence).

245. *See* LAWRENCE A. GREENFELD, U.S. DEP'T OF JUST., ALCOHOL AND CRIME: AN ANALYSIS OF NATIONAL DATA ON THE PREVALENCE OF ALCOHOL INVOLVEMENT IN CRIME, at iii (1998) (finding that forty percent of violent crime, fatal vehicle accidents, and other crimes involved the use of alcohol before or during their commission).

246. *See* JOHANN HARI, CHASING THE SCREAM: THE FIRST AND LAST DAYS OF THE WAR ON DRUGS 15–18 (2015) (describing the developing international and domestic criminalization of illicit drugs associated with Mexican people (marijuana) and Black people (cocaine) based on exploiting racialized fear of these groups).

247. *See* MUSTO, *supra* note 240, at 241.

248. *Id.* at 294–95.

249. *Id.*

250. *See* ELIZABETH HINTON, FROM THE WAR ON POVERTY TO THE WAR ON CRIME: THE MAKING OF MASS INCARCERATION IN AMERICA 139–42 (2016) (detailing testimony from aides in the Nixon Whitehouse regarding the political motivations behind the "war on crime").

Black offenders to this day are disproportionately criminalized under the War on Drugs when compared with their White counterparts.[251]

These racialized policies and discriminatory enforcement against Black and Latinx communities make it hard for these proxy crimes to pass the *legitimacy* test. They fail to produce the legitimate government function of public safety and simultaneously erode the public trust in the legitimacy of criminal legal institutions. The discriminatory history and modern enforcement breed resentment in the Black and Latinx communities that bear the brunt of these drug-crime polices,[252] and in turn diminish the public trust in these communities in detrimental ways. Further, given the expansive drug interdiction powers of LEAs,[253] even law-abiding citizens must sacrifice some of their liberty in order to achieve the public policy goals of these ineffective drug crimes. This is a lose-lose situation where offenders and the entire community (including White people) lose liberty interests, yet there is no increase to communal liberty interests, public safety, or public trust.

Under the Liberty-Balancing Approach, there is no benefit to individual liberties in this context to even consider balancing. The government should bear the burden, through expertise or social leadership, to justify its deprivation of an offender's individual liberty based on its impact on others' individual liberty. If the government cannot meet that burden, then it should not be allowed to deprive offenders of their liberty.[254]

But a line must be drawn somewhere. To take an extreme example, should we allow people to possess, traffic, and ingest vials of the Ebola virus, or any other dangerous chemical substances? The answer is clearly no. But the criminal law need not be our first and only tool to regulate such dangerous behavior. Instead, the Liberty-Balancing Approach would question whether criminalization is *necessary*, since there are other alternatives to regulate and punish such behavior. If an Ebola-carrying person had the intent to do future harm to the public by releasing the disease, the criminal law could be used narrowly to incarcerate or segregate this dangerous person through an attempt or conspiracy crime, because they planned to deprive liberty interests from an untold number of victims.[255] Further, such extreme examples would not carry the same concerns of dragnet liberty deprivations or

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251. *See* Schanzenbach et al., *supra* note 40 and accompanying text; *see also* James Forman, Jr., *Racial Critiques of Mass Incarceration: Beyond the New Jim Crow*, 87 N.Y.U. L. REV. 21, 23–24 (2012) (discussing the racial motivations behind the war on drugs, but also highlighting the Black community's support for these policies).

252. *See* Yankah, *Legal Vices*, *supra* note 189, at 80 ("Our current drugs current policing system results in wealthy whites (and wealthy blacks) comfortably flouting the law at home while the police stop, harass, pat down and arrest poor people of color, often using the marijuana laws as standing license to police a segment of the population.").

253. *See* ALEXANDER, *supra* note 5.

254. *See* HUSAK, *supra* note 10, at 32 ("If we cannot expect authorities to defend their decisions about why given statutes are selectively enforced—like those prohibiting drug use, music piracy, and Internet gambling, for example—we should be reluctant to enact statutes that give authorities this discretion in the first place.").

255. *See supra* note 182.

disproportionate impacts on poor and minority communities. Whereas Ebola is both an extreme and easy case where civil law could do most of the work and criminal law might be justified in a narrow set of nefarious cases, the same public health and safety justifications do not exist to limit the individual liberties at stake for controlled substances.

The Liberty-Balancing Approach outright rejects the failed policies of using criminal punishment to solve the public health issues of drug use and abuse. The criminal law is simply not equipped to handle the social issues and proxies of drug use, possession, and sale. Rather, drug crimes should be understood as Husak and Barnett identified: they are proxy crimes that are primarily designed to infringe upon the liberty interest of all individuals for the misguided and ineffective LEA tactic of detecting a small number of offenders that themselves do not infringe on the liberties of others.

C. Firearms

Balancing liberties for firearm crimes is more complex than drug crimes because of the constitutional considerations of the Second Amendment.[256] Even in this context, the Liberty-Balancing Approach seeks to identify the individual liberties at issue and assess the imbalances criminalization creates. The stakes are incredibly high because they are measured in lives. There are approximately 100,000 shootings and 40,000 deaths from gunshots (mostly by suicide) every year.[257] This is a politically fraught issue, in which even a small shift in the right direction could save thousands of lives.[258]

There are a host of crimes that limit the use, possession, and trafficking of firearms that range from the types of firearms one can own to the types of people that can own them. The possession (and thus the presumed ownership) of assault weapons, modified weapons, firearm silencers, high-capacity magazines, and many other types of firearms and accessories is criminalized based on their perceived dangerousness and potential negative impact on public safety.[259] Trafficking these illegal firearms and accessories is also criminalized based on the dangerousness of the underground marketplace of firearm sales that usually involves dangerous people who seek to use these firearms for illegal purposes.[260] We also criminalize certain "dangerous" people, such as those who have previously been convicted of

256. *See* U.S. CONST. amend II.

257. Joseph Blocher, Samuel W. Buell, Jacob D. Charles & Darrell A.H. Miller, *Pointing Guns*, 99 TEX. L. REV. 1173, 1176 (2021).

258. *See id.*; *see also* BELLIN, *supra* note 22, at 36 ("More than two thirds of the homicides in the United States are firearm homicides . . . .").

259. *See, e.g.*, 18 U.S.C. § 922(o) (criminalizing the possession of machine guns); 26 U.S.C. § 5871 (criminalizing the possession of an unregistered silencer, short-barreled rifle, short-barreled shotgun, destructive device, or a sawed-off shotgun).

260. *See, e.g.*, 18 U.S.C. § 933 (criminalizing the shipment or transport of certain firearms as defined elsewhere in the statute).

felonies, from possessing firearms because we believe they are the most likely to use these tools for dangerous purposes.[261]

The individual liberties associated with firearms contemplate several points of view.[262] There is certainly a possessory liberty interest to own and possess chattel property, but possessing and owning firearms has also been associated with a more abstract individual sense of freedom and self-protection. The primary individual liberty interest has most often been associated with the liberty to maximize personal safety.[263] This sense of safety touches on the liberties of life and property, namely because people believe that firearms give them the ability to protect their own life and their property more effectively than other means would. With a firearm, individuals have the means to protect their home from potential invasion; they may feel they have more access to explore the wilderness and protect against wild animals; and firearms are also used for the lawful hunting of such animals. Firearm ownership and possession may also carry abstract liberties of association, expression, and cultural belonging. Indeed, there are many organizations across America that celebrate firearm ownership and enjoy large memberships of like-minded people.[264]

On the other side of this same coin, the presence of firearms in a community might make some people *feel* like they are in danger. Studies have shown that in certain communities, the presence of firearms and open-carry allowances makes people feel less safe.[265] Justice Stevens articulated this *feeling* in his dissent in *McDonald v. City of Chicago*, and tried to balance an individual's "interest in keeping and bearing a certain firearm" with how this might "diminish [another's] interest in being and feeling safe from armed violence."[266] The Court, however, has not followed Justice Stevens' balancing approach that we often see in other constitutional contexts,[267] but has instead adopted an originalist historical

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261. *See* JOHN SCALIA, U.S. DEP'T OF JUST., FEDERAL FIREARM OFFENDERS, 1992–98, at 4 tbl.3 (2000) (finding that in 1998, over seventy percent of defendants charged in U.S. district courts with only a firearm possession offense were charged with possession of a firearm by a prohibited person).

262. *See* Reva B. Siegel & Joseph Blocher, *Why Regulate Guns?*, 48 J.L. MED. & ETHICS 11, 11 (2020) (asserting that the American gun control debate takes a narrow view of public safety concerns, ignoring other legitimate interests like the "freedom and confidence to participate in every domain of our shared life").

263. *See* Joseph Blocher & Darrell A.H. Miller, *What is Gun Control? Direct Burdens, Incidental Burdens, and the Boundaries of the Second Amendment*, 83 U. CHI. L. REV. 295, 352–54 (2016) (discussing the safety rationale for the Second Amendment).

264. *See* Kim Parker, *Among Gun Owners, NRA Members Have a Unique Set of Views and Experiences*, PEW RSCH. CTR. (July 5, 2017), https://www.pewresearch.org/short-reads/2017/07/05/among-gun-owners-nra-members-have-a-unique-set-of-views-and-experiences/ (finding that thirty percent of Americans own a gun, and that nineteen percent of those individuals belong to the National Rifle Association).

265. *See, e.g.*, David Hemenway, Deborah Azrael & Matthew Miller, *National Attitudes Concerning Gun Carrying in the United States*, 7 INJ. PREVENTION 282, 283 (2001).

266. McDonald v. City of Chicago, 561 U.S. 742, 891 (2010) (Stevens, J., dissenting).

267. *See* District of Columbia v. Heller, 554 U.S. 570, 681–89 (2007) (Breyer, J., dissenting) (arguing that a sounder approach would be a "interest-balancing inquiry" that focuses on "practicalities" to determine what gun control laws would be consistent with the Amendment even if it is interpreted as protecting a "wholly separate interest in individual self-defense").

approach. In *New York State Rifle & Pistol Ass'n v. Bruen*,[268] the Court established a test that protects the individual liberty to possess a firearm unless some comparable restriction existed during the time of the Founding.[269] But the Court has always limited these holdings to protecting the individual liberty of a "law-abiding, responsible citizen[]," which maintains the status quo of criminalizing firearm possession for those deemed sufficiently dangerous for proxy justifications.[270] The problem with trying to determine somebody's dangerousness is its inherent subjectivity. Just two years after *Bruen*, the Court decided that people with restraining orders cannot possess firearms because there is historical precedent to restrict firearm possession from such dangerous people.[271] There are now several cases working their way through the courts seeking clarification of this standard; for instance, should we restrict a person's liberty of possessing a firearm if they were previously convicted of non-violent drug offenses[272] or non-violent fraud offenses?[273] Do these felony convictions make somebody "dangerous" enough to restrict their liberty?

The Liberty-Balancing Approach would stand in stark opposition to the Court's current constitutional history test and would instead contextualize and potentially limit the individual liberty to possess a firearm with how it contributes to the public good.[274] Given the different individual liberties in play, perhaps the most important question is whether limiting individual liberties of possession and trafficking balances with producing the requisite *legitimate* government interest of public safety. Firearms are used in the vast majority of homicides (67%), and also in a significant number of robberies (40%) and aggravated assaults (22%), to name a few serious crimes.[275] According to federal data, there is strong evidence that violent offenders tend to recidivate by committing future violent crimes (63.8%) at rates that outpace recidivism for non-violent crimes (39.8%).[276] But these statistics do not necessarily mean that gun control regulations increase public safety. After decades of data, multiple studies have concluded that there is no evidence that high rates of firearm

268. N.Y. State Rifle & Pistol Ass'n v. Bruen, 597 U.S. 1 (2022).

269. *Id.* at 17–22.

270. *Id.* at 26 (quoting *Heller*, 554 U.S. at 635).

271. United States v. Rahimi, 602 U.S. 680, 693–98 (2024).

272. *See* United States v. Jackson, 110 F.4th 1120, 1125 (8th Cir. 2023) (upholding 18 U.S.C. § 922(g)(1) that criminalizes firearm possession for all felonies and rejecting a "felony-by-felony" analysis).

273. *See* Range v. Att'y Gen., 69 F.4th 96 (3d. Cir. 2023) (holding that a false-statement conviction was insufficient to deprive the defendant of his Second Amendment rights).

274. *See, e.g.*, Robert J. Cottrol & Raymond T. Diamond, *The Second Amendment: Toward an Afro-Americanist Reconsideration*, 80 GEO. L.J. 309, 313–14 (1991) (characterizing debates on the Second Amendment as one of individual versus collective rights on who holds the rights to bear arms).

275. *See Crime in the United States 2014—Expanded Offense Data*, FBI, https://ucr.fbi.gov/crime-in-the-u.s/2014/crime-in-the-u.s.-2014/offenses-known-to-law-enforcement/expanded-offense (last visited Jan. 10, 2025).

276. U.S. SENT'G COMM'N, RECIDIVISM AMONG FEDERAL VIOLENT OFFENDERS 3 (2019), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2019/20190124_Recidivism_Violence.pdf.

ownership are related to violent crime rates.[277] For gun-rights advocates, this cuts against the argument that robust gun ownership by law-abiding Americans will deter criminals. But for gun-control advocates, this also cuts against the argument that limiting gun ownership will decrease violence.[278] One particular study is of interest because it was conducted by a team of medical researchers with a public health methodology. The study compiled more than thirty other studies and data sets to find inconclusive evidence that drug trafficking laws, bans on assault weapons, restrictions on open-carry liberties, and child-safety regulations reduced firearm homicides.[279] Instead, the only effective gun-control regulation that lowered firearm homicides was strengthening background checks.[280] These revelations have triggered questions even in liberal enclaves of whether these gun-control policies—which include criminalizing firearm possession and trafficking—are effective at increasing public safety.[281]

Given the inconclusiveness of nearly fifty years of data, the government would not be able to meet its burden to show that criminalizing gun possession and trafficking served a *necessary* government purpose to increase public safety. In addition, firearm proxy crimes fail the Liberty-Balancing Approach's *necessity* test because criminalization is not necessary to achieve the social goal of ensuring that firearms are kept out of the hands of dangerous people. Decarceration advocates have proven over many years that dedicating fewer resources to prosecuting these crimes and more resources to background checks and community violence intervention programs has broken "cycles of violence by connecting high-risk individuals

277. *See, e.g.*, Gary Kleck, Tomislav Kovandzic & Jon Bellows, *Does Gun Control Reduce Violent Crime*, 41 CRIM. JUST. REV. 488, 507 (2016) (finding that "the evidence fails to support the hypothesis that gun control laws reduce violent crime"); Lois K. Lee, Eric W. Fleegler, Caitlin Farrell, Elorm Avakame, Saranya Srinivasan, David Hemenway & Michael C. Monuteaux, *Firearm Laws and Firearm Homicides: A Systematic Review*, 177 JAMA INTERN. MED. 106, 115–17 (2017) (finding inconclusive evidence that gun control measures such as military-style assault weapon bans and trafficking laws reduced gun homicides).

278. *Compare* John R. Lott & David B. Mustard, *Crime, Deterrence, and Right-to-Carry Concealed Handguns*, 26 J. LEGAL STUD. 1 (1997) (finding evidence that areas that allow citizens to carry concealed handguns have lower violent crime rates), *with* Dan A. Black & Daniel S. Nagin, *Do Right-to-Carry Laws Deter Violent Crime?*, 27 J. LEGAL STUD. 209 (1998) (challenging Lott and Mustard's analysis and findings), *and* Ian Ayres & John J. Donohue, III, *Shooting Down the "More Guns, Less Crime" Hypothesis*, 55 STAN. L. REV. 1193 (2003) (same). *See generally* NAT'L RSCH. COUNCIL, FIREARMS AND VIOLENCE: A CRITICAL REVIEW (2005) (reviewing volumes of studies and literature, finding there is no credible evidence that the prevalence of gun ownership increases or decreases violent crime rates, but rather that it is almost a non-issue).

279. *See* Lee et al., *supra* note 277, at 115–17.

280. *Id.* at 116.

281. *Compare Fact Sheet: California's Gun Safety Policies Save Lives, Provide Model for a Nation Seeking Solutions*, OFF. OF GOV. GAVIN NEWSOM (June 2, 2022), https://www.gov.ca.gov/2022/06/02/fact-sheet-californias-gun-safety-policies-save-lives-provide-model-for-a-nation-seeking-solutions/ (arguing California gun control laws prevent firearm-related deaths), *with* Shawn Hubler & Amy Harmon, *California Has More than 100 Gun Laws. Why Don't They Stop More Mass Shootings?*, N.Y. TIMES (Jan. 29, 2023), https://www.nytimes.com/2023/01/29/us/california-gun-laws-mass-shootings.html (questioning the impact of California's more than one hundred gun-control laws).

to wraparound social services."[282] These types of public health approaches have been shown to be effective in other contexts, such as reducing motor vehicle deaths, that might be translated into reducing firearm-related deaths.[283] Around the nation, progressive prosecutors' experiments with more lenient enforcement of firearm crimes have produced mixed results.[284] But initial research of these innovative approaches to firearm decriminalization has shown "no significant effects on local crime rates," meaning crime has not increased even though fewer people are criminalized.[285] Further, more lenient policies appear to reduce recidivism for these low-level possession offenses.[286] Finally, for many of the same reasons stated above with drug crimes,[287] criminalizing the proxy possession and trafficking of firearms fails the Liberty-Balancing Approach's *individualism* test because the mere possession, transport, or sale of a firearm does not directly impact a cognizable liberty interest of an individual victim, but only crosses that threshold when the gun is used in a way that kills, injures, or puts a victim in fear for their life.

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282. Myah Ward, *Gun Control Legislation Isn't Going to Happen. Here's What Biden's Doing Instead*, POLITICO (Nov. 5, 2021, 10:51 AM), https://www.politico.com/news/2021/11/05/biden-gun-violence-legislation-519625 [https://perma.cc/UJQ3-9CQ2]; *see generally* JASON COBURN & AMANDA FUKUTOME, ADVANCE PEACE STOCKTON 2018–20 EVALUATION 8 (2021), https://static1.squarespace.com/static/591a33ba9de4bb62555cc445/t/600e4e99c7b03668060f1f7d/1611550368219/Advance+Peace+Stockton+Eval+Report+2021+FINAL.pdf [https://perma.cc/KXQ2-JBPT] (finding that organizations that employ former gang members as community violence interrupters to counsel at-risk youth are effective at deterring violence and saving substantial public-safety dollars).

283. *See* David Hemenway & Matthew Miller, *Public Health Approach to the Prevention of Gun Violence*, 368 N. ENG. J. MED. 2033, 2034–35 (2013) (arguing for a public health regulatory approach to reduce gun violence, including the manufacture of safer firearms).

284. *Compare* Conor Friedersdorf, *The Anti-Gun Laws that Make Progressives Uneasy*, ATLANTIC (Feb. 10, 2022), https://www.theatlantic.com/ideas/archive/2022/02/blue-americas-newgun-control-debate/622035 [https://perma.cc/R8ES-546H] ("Los Angeles County District Attorney George Gascón has chosen a different approach. Upon taking office in December 2020, he declared his intention to stop using a legal provision that allows prosecutors to seek longer sentences for convicted criminals who used guns in their crime."), *and* Jonah E. Bromwich, *Manhattan D.A. Acts on Vow to Seek Incarceration Only for Worst Crimes*, N.Y. TIMES (Jan. 6, 2022), https://www.nytimes.com/2022/01/06/nyregion/alvin-bragg-manhattan-da.html [https://perma.cc/52NG-3AU8] (noting that Manhattan District Attorney Alvin Bragg has "instructed prosecutors to avoid seeking jail time for . . . gun possession in cases where no other crimes are involved" and to "find alternatives to incarceration, especially for first-time offenders" to the extent consistent with public safety), *with* Astead W. Herndon, *They Wanted to Roll Back Tough-on-Crime Policies. Then Violent Crime Surged*, N.Y. TIMES (Feb. 18, 2022), https://www.nytimes.com/2022/02/18/us/politics/prosecutors-midterms-crime.html [https://perma.cc/T7ZJ-EUF2] (reporting on the backlash against these policies as crime rose), *and* Emily Bazelon & Jennifer Medina, *He's Remaking Criminal Justice in L.A. But How Far Is Too Far?*, N.Y. TIMES (Dec. 3, 2021), https://www.nytimes.com/2021/11/17/magazine/george-gascon-los-angeles.html [https://perma.cc/U5XB-JRTT] (same).

285. *See* Amanda Agan, Jennifer L. Doleac & Anna Harvey, *Prosecutorial Reform and Local Crime Rates* 1 (L. & Econ. Ctr. Geo. Mason Univ. Rsch. Paper Series No. 21-011, 2021), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3952764 (examining this relationship in the thirty-five jurisdictions that elected progressive prosecutors).

286. *See, e.g.*, Michael Mueller-Smith & Kevin T. Schnepel, *Diversion in the Criminal Justice System*, 88 REV. ECON. STUDS. 883, 883 (2021); Ally Jarmanning, *Not Prosecuting Low-Level Crimes Leads to Less Crime in Suffolk County, Research Finds*, WBUR (Mar. 29, 2021), https://www.wbur.org/news/2021/03/29/non-prosecution-low-level-crime-rollins-suffolk-county [https://perma.cc/U982-SNHF].

287. *See supra* Part III.B.

While the evidence is mixed on whether firearm proxy crimes have any effect on public safety, these crimes have been operationalized to deprive millions of individual offenders of their liberty in low-income and minority communities. Gun control laws have a complicated and racialized past that has been used to disarm and control subjugated communities as a way of upholding social order.[288] Going back to colonial times, firearm laws were used to disarm Catholics,[289] Native Americans,[290] Black enslaved persons,[291] and broad catchall demographics of all those deemed dangerous to the peace.[292] Indeed, this history undergirds the Second Amendment, which was originally intended to maintain militias to repel slave revolts or other uprisings.[293] One of the most impactful modern-era gun control laws was passed by conservative California Governor Ronald Reagan, who supported the law out of fear of the Black Panther Party that legally carried firearms to deter police brutality in Black communities.[294] James Forman, Jr. has also documented a telling anecdote from the other side of the aisle that complicates the racial history of gun control laws; he recounts that Black leaders in politics and in their

288. *See* Adam Winkler, *Racist Gun Laws and the Second Amendment*, 135 HARV. L. REV. 537, 540 (2022) (discussing historically racist roots of gun disarmament from people of color and disadvantaged groups).

289. *See* Joseph G.S. Greenlee, *The Historical Justification for Prohibiting Dangerous Persons from Possessing Arms*, 20 WYO. L. REV. 249, 263 (2020).

290. Michael A. Bellesiles, *Gun Laws in Early America: The Regulation of Firearms Ownership, 1607-1794*, 16 L. & HIST. REV. 567, 578–79 (1998).

291. *See* Thom Hartmann, *The Second Amendment Was Ratified to Preserve Slavery*, TRUTHOUT (Jan 15, 2013, 9:35 AM), http://ensign.ftlcomm.com/ensign2/mcintyre/pickofday/2013/001_january/january017/second.pdf (explaining the importance of well-armed militias in the South that patrolled and kept enslaved persons from revolting); Michael A. Bellesiles, *The Second Amendment in Action*, 76 CHI.-KENT L. REV. 61, 93 (2000) (discussing the importance of protecting white supremacy and upholding slavery as key understandings of the Second Amendment in the Antebellum South).

292. *See* United States v. Rahimi, 602 U.S. 680, 694–97 (2024) (discussing laws going back to English common law and colonial times that prohibited firearm ownership by individuals deemed to be dangerous to the peace).

293. *See supra* note 291; *see also* Cottrol & Diamond, *supra* note 274, at 323–26 (explaining that there were laws that required White men to own a firearm for the purpose of protecting against insurrection from Black and Native American people).

294. *See* Maria Mortenson, *Scattershot: Guns, Gun Control, and American Politics*, HARV. J. ON LEGIS. (May 23, 2022), https://journals.law.harvard.edu/jol/2022/05/23/scattershot-guns-gun-control-and-american-politics/; *see also* Adam Winkler, *The Right to Bear Arms has Mostly Been for White People*, WASH. POST: POSTEVERYTHING (July 15, 2016, 6:00 AM ET), https://www.washingtonpost.com/posteverything/wp/2016/07/15/the-right-to-bear-arms-has-mostly-been-reserved-for-whites/ (explaining the pattern of gun control legislation from Reconstruction to the modern era that gun control laws have in part been motivated to disarm militant Black Americans); *see also* Maya Itah, Comment, *How the Gun Control Act Disarms Black Firearm Owners*, 96 WASH. L. REV. 1191, 1194–95 (2021) (discussing how federal firearm offenses that criminalize drug crimes using firearms are construed broadly to disproportionately punish Black Americans); Cynthia Deitle Leonardatos, *California's Attempts to Disarm the Black Panthers*, 36 SAN DIEGO L. REV. 947, 979–81 (1999) (discussing then California Governor Ronald Reagan's support of gun control legislation that was targeted at disarming the Black Panthers).

communities supported these tough-on-crime gun-control laws based on their belief that the laws would deliver public safety benefits.[295]

But even *legal* Black firearm ownership has been criminalized to a certain extent because of racial bias. Even in the face of these societal perceptions and dangerous interactions with LEAs, there is a strong community of Black firearm owners who look to the Second Amendment as a constitutional right to protect themselves from White Americans in the form of lynch mobs, police brutality, and other infringements.[296] However, in line with history, Blackness and gun ownership have been criminalized to protect the status quo and prevent society's *perception* of dangerous people from possessing firearms as a proxy for what they might do with them. People unconsciously and inaccurately associate Blackness with criminality and violence.[297] Differential treatment of Black and White youth reflects research regarding implicit bias, including a "powerful racial stereotype" that Black men are "violence prone."[298] For example, if there are two similarly situated men openly carrying firearms in plain view, how does criminal law respond to each person's liberty? Race may certainly play a role, where people *may* be more uncomfortable if a Black man is carrying this firearm compared to a White man. The idealized firearm owner has long been associated with White, working class, rural men.[299] Such is not the case for Black people who *should* enjoy the same liberties of gun ownership that White people do. Indeed, the expansion of firearm ownership rights tend to privilege White gun owners.[300]

To a bystander who feels like a Black man carrying a firearm threatens their liberties to feel safe and thinks that this gun may be used in a crime against them, they may fear for their safety in the presence of a Black gun owner versus in the presence of a White gun owner.[301] In reality, this "reasonable" assessment of fear

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295. *See generally* FORMAN, *supra* note 11 (describing gun control debates in Washington, D.C. and the juxtaposition in the Black community that supported stronger gun control rights and those that believed gun control would restrict their rights of self-defense).

296. *See generally* NICHOLAS JOHNSON, NEGROES AND THE GUN: THE BLACK TRADITION OF ARMS (2014) (documenting the history of Black gun ownership as a self-defense response to White racial violence); Cottrol & Diamond, *supra* note 274, at 349–58 (explaining the historical roots of Black gun ownership for self-defense purposes from White mobs and racial control).

297. *See* Kristin Henning, *Boys to Men: The Role of Policing in the Socialization of Black Boys*, *in* POLICING THE BLACK MAN: ARREST, PROSECUTION, AND IMPRISONMENT 57, 59–65 (Angela J. Davis ed., 2017) (describing these perceptions and how Black parents specially educate their children on how to interact with police); Josh Gupta-Kagan, *The Intersection Between Young Adult Sentencing and Mass Incarceration*, 2018 WIS. L. REV. 669, 724 (2018).

298. Buck v. Davis, 137 S. Ct. 759, 776 (2010) (quoting Turner v. Murray, 476 U.S. 28, 35 (1986) (plurality opinion)); *see also* Commonwealth v. Sweeting-Bailey, 178 N.E.3d 356, 380 & n.9 (Mass. 2021) (Budd, C.J., dissenting) (quoting *id*).

299. *See* Levin, *infra* note 306, at 2193–94.

300. *See, e.g.*, Joseph Blocher & Reva B. Siegel, *Race and Guns, Courts and Democracy*, 135 HARV. L. REV. F. 449, 456 (2022) (pointing out how gun rights tend to favor White Americans).

301. *See, e.g.*, Michele L. Norris, *We Cannot Allow the Normalization of Firearms at Protests to Continue*, WASH. POST (May 6, 2020, 5:23 PM ET), https://www.washingtonpost.com/opinions/firearms-at-protests-have-become-normalized-that-isnt-okay/2020/05/06/19b9354e-8fc9-11ea-a0bc-4e9ad4866d21_story.html

drives many people to call the police to respond to perfectly legal acts by Black Americans.[302] Legally owning a firearm as a Black person in America can lead to dangerous interactions with LEAs.[303] Thus, LEA resources are wasted when they are deployed to assuage "reasonable" public fears of Black people exercising their liberties.[304]

This historically complex and racialized problem has led to firearm proxy crimes that are disproportionately enforced against minorities.[305] Approximately seventy percent of defendants convicted of a federal firearm offense are minorities, which comes as no surprise because Black and Latino men are disproportionately represented among those who are arrested and convicted for felonies.[306] One estimate found that one in three Black men had been convicted of a felony in America by 2010, meaning that thirty-three percent of this demographic do not enjoy the liberty to possess a firearm for their own self-defense.[307] But these statistics are complicated by the fact that young Black men are also the most likely group to be victims of gun violence.[308] Perhaps in a misguided effort to deter such violence in

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[https://perma.cc/PQ8X-LLM4] (criticizing the presence and liberty of White firearm owners to openly carry and brandish firearms at protests).

302. *See supra* note 298 and accompanying text.

303. *See, e.g.*, Lela Moore, *"I Am the 'Good Guy With a Gun'": Black Gun Owners Reject Stereotypes, Demand Respect*, N.Y. TIMES (Dec. 8, 2018), https://www.nytimes.com/2018/12/08/reader-center/gun-rights-black-people.html (detailing instances in which Black gun owners are often mistaken for criminals while legally carrying their firearms); *see also* JOHN K. ROMAN, URB. INST., RACE, JUSTIFIABLE HOMICIDE, AND STAND YOUR GROUND LAWS 6 (2013) (finding that White-on-Black homicides are far more likely to be ruled justified than Black-on-White homicides); Justin Murphy, *Are "Stand Your Ground" Laws Racist and Sexist? A Statistical Analysis of Cases in Florida, 2005–2013*, 99 SOC. SCI. Q. 439, 439 (2018) (finding that so-called "stand your ground" laws are biased against people of color).

304. *See, e.g.*, Janice Gassam Asare, *Stop Calling the Police on Black People*, FORBES (May 27, 2020, 3:09 AM ET), https://www.forbes.com/sites/janicegassam/2020/05/27/stop-calling-the-police-on-black-people/?sh=75d345f164c0 (documenting a larger trend of people calling the police to report legal behavior of Black Americans out of suspicion and fear); *see also* Jody Armour, *Race Ipsa Loquitur: Of Reasonable Racists, Intelligent Bayesians, and Involuntary Negrophobes*, 46 STAN. L. REV. 781, 787–94 (1994) (criticizing the reasonableness standard for self-defense as endorsing "typical" behaviors and understandings that perceive Blackness as an attribute that heightens dangerousness).

305. *See* Winkler, *supra* note 288, at 545 (finding that because Black and Latino people are disproportionately convicted of felonies, they are "a relatively large share of the people prohibited from possessing firearms"); *see also* CAROL ANDERSON, THE SECOND: RACE AND GUNS IN A FATALLY UNEQUAL AMERICA 1–9 (2021); U.S. SENT'G COMM'N, QUICK FACTS: FELON IN POSSESSION OF A FIREARM 1 (2018), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/quick-facts/Felon_In_Possession_FY18.pdf (finding that 54.2% of offenders convicted for being a felon in possession of a firearm in Fiscal Year 2018 were Black).

306. *See* EMILY TIRY, KELLY ROBERTS FREEMAN & WILLIAM ADAMS, URB. INST., PROSECUTION OF FEDERAL FIREARMS OFFENSES, 2000–16, at 19 tbl.14 (2021), https://www.ojp.gov/pdffiles1/bjs/grants/254520.pdf [https://perma.cc/W4y9-M8m3]; Winkler, *supra* note 288, at 545; *see also* Benjamin Levin, *Guns and Drugs*, 84 FORDHAM L. REV. 2173, 2194–97 (2016) (recounting statistics of racial disparities in weapons-offense arrests but adding the caveat that we do not have good data on the underlying number of offenses that are not charged).

307. Sarah K.S. Shannon, Christopher Uggen, Jason Schnittker, Melissa Thompson, Sara Wakefield & Michael Massoglia, *The Growth, Scope, and Spatial Distribution of People with Felony Records in the United States, 1948–2010*, 54 DEMOGRAPHY 1795, 1807 (2017).

308. *See* Marissa Edmund, *Gun Violence Disproportionately and Overwhelmingly Hurts Communities of Color*, CTR. FOR AM. PROGRESS (June 30, 2022), https://www.americanprogress.org/article/gun-violence-

these communities, these crimes are enforced to deprive offenders of their liberty interests to own firearms and to send them to prison for such ownership.[309] But enforcing firearm offenses does little to address the underlying causes of crime.[310] And by incarcerating more and more Black men, these crimes are actually making the problem worse than it would otherwise be if handled outside of the harsh criminal legal system.

This is the very real danger of overcriminalization operating through racialized proxy crimes. If we seek to limit the individual liberties of certain "dangerous" people from possessing firearms in the name of public safety, our biases will control who we criminalize as being dangerous. Consequently, modern criminal laws that disproportionately disarm Black and Latino men demonstrate the overbreadth that poisons public trust while failing to deliver public safety benefits.

If this racial history is not complicated enough, there is also a gender dynamic of dangerous and abusive relationships that should be considered.[311] Firearms in the home have been used for terrible crimes against offenders' own family. They have been used by one partner to intimidate and coerce the other, and they have also been used by partners to kill a physically abusive partner in self-defense.[312] Thus, the very ownership and presence of a firearm in the home of an abusive relationship can indeed impact abstract liberties and freedoms of the abused partner in dangerous ways. In such a situation, the presence of a firearm can be used to give credence to threats of violence and threats of reprisal should the abused partner ever leave or report the abusive partner to LEAs.

This is indeed a difficult balancing of liberties to consider for both race and gender-based violence and enforcement. Yet, there is still danger in construing criminal legal liberties so broadly to include the potential proxies of danger, violence, and other deprivations of liberty. There are a host of public health interventions that may indeed be appropriate to curb gun violence, and the Liberty-Balancing

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disproportionately-and-overwhelmingly-hurts-communities-of-color/ (citing studies showing that young Black Americans are the most likely to be victims of gun violence and that Black Americans are ten times more likely to be victims than White Americans); EDUC. FUND TO STOP GUN VIOLENCE & COAL. TO STOP GUN VIOLENCE, A PUBLIC HEALTH CRISIS DECADES IN THE MAKING 14 (2021) (finding that young Black men are twenty times more likely to die in a firearm homicide than young White men).

309. *See, e.g.*, James Forman, Jr., *The Society of Fugitives*, ATLANTIC (Oct. 2014), http://www.theatlantic.com/magazine/archive/2014/10/the-society-of-fugitives/379328/ (discussing how the racialized War on Drugs was repackaged and "resold as part of a war on guns").

310. *See supra* notes 277–79 and accompanying text.

311. *See, e.g.*, Susan P. Liebell, *Sensitive Places?: How Gender Unmasks the Myth of Originalism in* District of Columbia v. Heller, 53 POLITY 207, 209–10 (2021) (discussing the nuances of historical notions of men using firearms to protect their home from outsiders, yet challenging these norms of safety and protection "*within the home*" where firearms can create dangerous environments for women in abusive relationships).

312. *See* Elizabeth Tobin-Tyler, *Intimate Partner Violence, Firearm Injuries and Homicides: A Health Justice Approach to Two Intersecting Public Health Crise*s, 51 J. L. & MED. 64, 64 (2023) (citing that firearms accounted for fifty percent of domestic-violence-related killings of women); *see also* Natalie Nanasi, *Disarming Domestic Abusers*, 14 HARV. L. & POL'Y REV. 559, 562–66 (2020) (describing links between guns and intimate partner violence).

Approach must reject the vast amount of firearm crimes that deprive tremendous amounts of liberty interests from primarily Black Americans who are not directly infringing on the liberties of others. Firearm owners can register their firearms, submit to background checks, submit to red flag laws and gun seizure if they are displaying dangerous behavior, submit to limits on what firearms they can own, and so forth without being subject to criminal punishment.[313]

Admittedly, there must be some limits on individual liberties to possess and traffic firearms, but the limitation and criminalization of these liberties must be balanced according to how they impact community liberties and the common good. For example, a law that criminalizes the individual ownership of an operational nuclear warhead or a functional F-35 Fighter Jet would not likely carry the same overbreadth and discriminatory impact as general firearm possession and trafficking crimes. We certainly would want the government to intervene and confiscate a nuclear warhead before an individual had the chance to use it. Thus, although these crimes would qualify as proxies because they fail the *individualism* test, they can still be applied narrowly and do not require the wholesale dragnet system required to detect owners. But even for these possessory crimes, it might not be *necessary* to criminalize possession alone. Confiscation and a civil fine might be enough, but the criminal law would be appropriate to punish these dangerous possessors for attempt and conspiracy crimes if government could prove that the possessors intended on using these weapons to take the lives of people in the future.

Firearm crimes illustrate the nuances of balancing important liberties of individual firearm owners, potential victims, and government interests such as public safety and public trust. The Liberty-Balancing Approach does not seek to make light of gun violence and its terrible impact, but it does require us to question whether criminal punishment should be used to justify proxy crimes that deprive liberties from millions of Americans with little impact on the community liberty of public safety, yet with detrimental discriminatory impact on public trust.

IV. The Limits of Liberty

Balancing liberty interests according to minimalist principles towards the common good provides an important reformation ethic that rethinks how we criminalize a variety of proscribed acts. In the spirit of finding *balance*, this Part acknowledges several broader points of contention that complicate the Liberty-Balancing Approach. First, the minimalist principle of *individualism* means to combat the danger of overbreadth may itself be underinclusive when considering crimes against corporations or governments. This requires further consideration of

313. *See generally* Lisa Hepburn, Deborah Azrael & Matthew Miller, *Firearm Background Checks in States with and Without Background Check Laws*, 62 Am. J. Preventative Med. 227 (2022) (describing firearm background check laws and their efficacy); David B. Kopel, *Red Flag Laws: Proceed with Caution*, 45 L. & Psych. Rev. 39 (2021) (discussing and critiquing red flag laws that allow LEAs to confiscate a person's firearms).

how we conceptualize individualism in the context of legal personhood. Second, liberty-based theories and policy interventions have long been criticized as legitimizing discrimination instead of fixing it. The Liberty-Balancing Approach, however, seeks to assuage these criticisms in part because it prioritizes the community liberty and common good of public trust in minority communities.

A. Personhood

For all of the benefits that the minimalist principles of the Liberty-Balancing Approach would have on an overly broad and harsh criminal legal system, the restraint of *individualism* might foreclose using the criminal law to hold offenders accountable for a number of proscribed behaviors against corporations, governments, and other entities that would not qualify as a human "individual." This Section briefly considers this nuance and ultimately concludes that *individualism* should extend to legal personhood to allow the criminal law to protect some limited interests of organizations.

The underlying principle that helps us conceptualize organizations as both perpetrators and potential victims of crime is their status as fictionalized legal persons.[314] Organizations are not human individuals with physical bodies and sentient thoughts, but they are nevertheless real entities that objectively exist and have an impactful presence in society.[315] This type of legal personhood goes beyond merely acknowledging an organization as an aggregate representative of all of its individual constituents and instead conceptualizes the organization as its own unique entity with its own set of interests that are different than merely the aggregate liberties of its constituents.[316]

From a philosophical standpoint, organizations do not have liberty interests in the same way that individuals do. The liberty of the individual is one of the building blocks of society, and organizations are built on the premise that they have duties and interests towards individuals.[317] But if these interests are wrapped up in the organization's legal personhood as its own unique entity, an argument exists

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314. Corporations have enjoyed status as legal persons with established rights that date back before the Middle Ages to Roman and Papal Law. *See* JOHN JOSEPH WALLIS, BARRY R. WEINGAST & DOUGLASS C. NORTH, THE CORPORATE ORIGINS OF INDIVIDUAL RIGHTS 6–13 (2006), https://econweb.umd.edu/~wallis/MyPapers/Wallis_Weingast_North_COIR_EHA.pdf.

315. *See* Carla L. Reyes, *Autonomous Corporate Personhood*, 96 WASH. L. REV. 1453, 1491 (2021) (explaining the "real entity theory" that perceives corporations as "an independent reality that exists as an objective fact and has a real presence in society").

316. *See* Michael J. Phillips, *Reappraising the Real Entity Theory of the Corporation*, 21 FLA. ST. U. L. REV. 1061, 1068 (1994) ("Real entity theories . . . all distinguish themselves from the aggregate theory by maintaining that a corporation is a being with attributes not found among the humans who are its components.").

317. *See* Donna J. Wood & Jeanne M. Logsdon, *Business Citizenship: From Individuals to Organizations*, *in* 3 THE RUFFIN SERIES OF THE SOCIETY FOR BUSINESS ETHICS 59, 62 (2002) (explaining that corporate charters and businesses in early America were established to serve a public purpose but later turned more towards private purposes of building wealth and "are not autonomous entities with rights to completely independent actions").

that criminal law should protect the organization's unique interests that stand apart from those of its constituents.

There is overlap between an organization's interests and its constituents' liberties, as well as tensions that pit these things against each other. In civil litigation, corporations often bring suit as representatives of their constituents who themselves can seek redress if somebody has taken advantage of the business.[318] Constituents can also sue on behalf of the corporation in derivative lawsuits when constituents believe the corporate entity has mismanaged the business in ways that are detrimental to the constituents.[319] In criminal law, prosecutors also often indict officers of corporations along with the corporation itself for corporate crimes.[320]

Governments as organizational entities have also been theorized as having their own set of unique interests apart from their collective responsibility to represent constituents. The most interesting questions tend to happen at the local level regarding cities and municipalities. English common law treated many cities as incorporated municipalities, and thus treated the power of the city as tantamount to the power of corporations.[321] In American law, the power of cities is somewhat complicated by Dillon's Rule and home rule statuses that determine if cities are independent from their state governments' power.[322] But even absent home rule independence, cities have tremendous discretion in electing city councils, impaneling courts, running administrative systems,[323] and a host of other activities that are most directly responsible for delivering services to their constituents.[324]

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318. *See* Lyman Johnson, *Law and Legal Theory in the History of Corporate Responsibility: Corporate Personhood*, 35 SEATTLE U. L. REV. 1135, 1140–44 (2012) (describing constitutional precedent deeming corporations persons for purposes of the Fourteenth Amendment, including the right to sue and be sued); *see also, e.g.*, Citizens United v. FEC, 558 U.S. 310, 349 (2010) (holding that a private corporation can engage in protected political speech as an aggregate of the speech rights of its constituents).

319. *See* Stephen P. Ferris, Tomas Jandik, Robert M. Lawless & Anil Makhija, *Derivative Lawsuits as a Corporate Governance Mechanism: Empirical Evidence on Board Changes Surrounding Filings*, 42 J. FIN. & QUALITATIVE ANALYSIS 143, 144 (2007) (explaining and conceptualizing derivative lawsuits as shareholders asserting corporate governance powers over the corporate entity to address problems between shareholders and management).

320. *See generally* Julie R. O'Sullivan, *How Prosecutors Apply the Federal Prosecutions of Corporations Charging Policy in the Era of Deferred Prosecutions, and What That Means for the Purposes of the Federal Criminal Sanction*, 51 AM. CRIM. L. REV. 29 (2014) (explaining the prosecutorial decision-making process to bring criminal charges against a corporation, in tandem or in lieu of corporate directors).

321. *See* Gerald E. Frug, *The City as a Legal Concept*, 93 HARV. L. REV. 1057, 1095 (1980) (stating that "English cities were corporations indistinguishable as a legal matter from any other commercial corporation").

322. *See* Richard Briffault, *Our Localism: Part I—The Structure of Local Government Law*, 90 COLUM. L. REV. 1, 7–8 (1990) (explaining Dillon's Rule and home rule, stating that "[Dillon's] Rule has been formally abandoned by many states"); *see also* Ysursa v. Pocatello Educ. Ass'n, 555 U.S. 353, 362 (2009) (explaining that "[p]olitical subdivisions of States," are "subordinate governmental instrumentalities created by the State to assist in the carrying out of state governmental functions" (quoting Reynolds v. Sims, 377 U.S. 533, 575 (1964))).

323. *See* Nestor M. Davidson, *Localist Administrative Law*, 126 YALE L.J. 564, 569–71 (2017) (explaining the extent of local government power and administration).

324. *See* Richard Biersbach & Stephanos Bibas, *What's Wrong with Sentencing Equality*, 102 VA. L. REV. 1447, 1485–86 (2016) (recognizing that "local actors . . . [such as] zoning commissions, school boards, municipal court judges, homeowners' associations, business improvement districts, and a host of other discrete, special-

This level of power and accountability most often results in cities enjoying the same independent legal personhood that corporations enjoy for purposes of suing and being sued.[325] This includes the power of local governments and their agencies to sue private actors, as well as state and federal governments, for constitutional and statutory violations.[326] But scholars have noted that these powers represent two sets of interests: they vindicate the collective individual liberties of their constituents,[327] but they can also assert the city's own unique personhood and interests against infringement from other actors.[328]

In the context of criminal law, these interests of cities (as well as the federal and state governments' own legal personhood to sue and be sued) start to lose analogous application. While governments can bring civil suits and be sued, the criminal law only works one way by giving the government a monopoly on prosecuting individuals and other organizations. The government cannot criminally prosecute the government; instead, the government is limited to prosecuting individual government officers if they commit crimes against the government or others.[329] These realities show that organizations are not just a collective sum of their constituents, but are full legal persons with their own set of duties and liabilities.

This presents the consequential question of whether legal personhood of organizations in the civil context should be extended to the *individualism* principle of the Liberty-Balancing Approach. If these entities enjoy legal interests that they can assert independently from the aggregate liberties of their constituents, one might argue that the law should step in to criminalize behavior that infringes upon these organizations' interests. Embezzling money from a corporation may not directly impact a human individual, but it does infringe upon the corporation's own

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purpose institutions . . . serve goals of federalism" by providing on-the-ground services that also help to check hierarchical government power).

325. *See, e.g.*, Dave Fagundes & Darrell A.H. Miller, *The City's Second Amendment*, 106 CORNELL L. REV. 677, 694 (2021); JOHN MARTINEZ, 1 LOCAL GOVERNMENT LAW § 3:8 (2024) (discussing local government's power to assert aggregate rights of its constituents in lawsuits); City of Philadelphia v. New Jersey, 437 U.S. 617, 619, 629 (1978) (recognizing the ability of municipal city governments to sue state governments for violations of the Commerce Clause); Washington v. Seattle Sch. Dist. No. 1, 458 U.S. 457, 459, 487 (1982) (recognizing a city school district's standing to sue its own state government over an equal protection violation when the state passed a ballot measure prohibiting the district from implementing a school integration program).

326. *See* David J. Barron, *The Promise of Cooley's City: Traces of Local Constitutionalism*, 147 U. PA. L. REV. 487, 491, 568 (1999) ("[C]ities are often the institutions that are most directly responsible for structuring political struggles over the most contentious of public questions."); *see generally* Sarah L. Swan, *Plaintiff Cities*, 71 VAND. L. REV. 1227, 1232 (2018) (discussing affirmative litigation by municipalities as a form of institutional validation and "state building").

327. *See* Fagundes & Miller, *supra* note 325, at 694.

328. *See, e.g.*, *id.* at 696 nn.87–90 (documenting cases in which municipalities have asserted their own Tenth Amendment rights, and to protect their liberty as cities to facilitate jury trials and law enforcement due process); United States v. 50 Acres of Land, 469 U.S. 24, 30–31 (1984) (allowing the city of Duncanville, Texas, to assert its own Fifth Amendment right against the federal government under the Takings Clause).

329. *See generally* Robert Roberts, *The Supreme Court and Federal Prosecution of State and Local Government Corruption*, 14 PUB. INTEGRITY 399 (2014) (discussing the role and frequency of federal prosecutions of state and local public officials as a way of checking government power).

financial and legal interests to own and safeguard property. This argument could also apply to the attack on the United States Capitol on January 6th, 2021. While this attack did indeed impact individual Congressmembers' rights to be free from threats and assaults, many capitol rioters have been charged with crimes against the government itself, such as damaging the government's property, attempts to disrupt government proceedings, and even sedition.[330] If the government itself has its own unique interests to own property, conduct its business free from assault, and to legitimately govern without being overthrown, then these crimes *could* be justified as protecting the government's interests as a quasi-individual legal person.[331]

The theft and violent crimes contemplated above, even when not directed at an individual, are still antisocial behaviors that we might very well want to use the criminal law to deter. These extreme examples would pass the *necessity* test because these laws criminalize acts that are sufficiently narrow and for which there may be no other effective alternative regarding promoting the *legitimate* common good of public safety. However, there is a slippery slope if we allow an overly broad concept of legal personhood to swallow the limiting principle of *individualism*. Any community organization of three or four people that files papers with their Secretary of State could assert legal personhood and unique liberties that they would want protected under the criminal law.

Given these concerns, the best outcome would likely be to extend *individualism* to organizations that enjoy legal personhood, yet limit the criminal legal liberties that qualify for protection. This does carry the potential to be overbroad, but theft or embezzlement from a homeowner's association (HOA) implicates similar criminal *necessity* and *legitimacy* concerns as theft from an individual member of the HOA. Although a whole host of entities enjoy legal personhood, the criminal law would still be limited to protect only the *necessary* and *legitimate* liberties commonly applicable to human individuals. The Court has clarified that "[c]orporate identity has been determinative in several decisions denying corporations certain constitutional rights" because the historical function of many constitutional rights has "been limited to the protection of individuals."[332] In the criminal law, for instance, the right to life and the right to bodily autonomy might not be applicable to organizations, but the right to own property and to be free from threats and assaults should be protected.[333] This strikes the right balance by respecting the

330. *See 40 Months Since the Jan. 6 Attack on the Capitol*, U.S. DEP'T OF JUST., https://www.justice.gov/usao-dc/37-months-since-the-jan-6-attack-on-the-capitol (May 6, 2024) (summarizing the statistics for criminal charges, plea deals, trials, and sentencing related to the January 6th attack).

331. *See* Steven A. Koh, *Criminal Law's Hidden Consensus*, 101 WASH. U. L. REV. 1805, 1838 (2024) (discussing how underenforcement of crime would be "corrosive" to a civil society, and its proper functioning, using January 6th as an example).

332. First Nat'l Bank of Bos. v. Bellotti, 435 U.S. 765, 778 n.14 (1978).

333. Because organizations do not have a physical body, they cannot be physically killed or assaulted like individual human beings. However, organizations can own property and can be threatened in ways that impact the organization's functioning, which is worthy of robust protection.

legal personhood of organizations without broadening the types of interests they might seek to protect under the criminal law.

B. Legitimizing Deprivations

Yet another political reality that has served as a long-standing critique of rights- and liberty-based solutions in law is that these solutions merely serve as a guise to legitimize the deprivation of rights and liberties.[334] Paul Butler insightfully argued that a "criminal caste" of people is more tolerable if the government gives such caste members liberties before stripping them of the same.[335] Liberties do not always work to protect individuals from the criminal policies of an overbearing government.[336] Consequently, giving people more liberties does not necessarily mean they will actually enjoy them, or that their lives and outcomes will be improved as a result.

Butler and others assert a realist critique that liberties often mean little in practice. For example, Butler has critiqued the lofty promises of *Gideon v. Wainwright*,[337] a watershed moment in the defendants' rights movement that guaranteed a right to counsel for indigent criminal defendants.[338] But *Gideon* has largely become symbolic in a world without trials, and low-income Black people may have fared worse after *Gideon*.[339] Further, the focus on individual liberties in the criminal system treats the issue as an individual problem with an individual remedy, rather than a systemic problem requiring systemic remedies.[340] While a number of procedural justice scholars have written that the procedural fairness embodied in *Gideon* enhances the legitimacy of the legal system,[341] Butler argues that such perceived procedural fairness only serves to legitimize the actual brutality and discrimination of the system.[342]

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334. *See, e.g.*, Mark Tushnet, *The Critique of Rights*, 47 SMU L. REV. 23, 32 (1994) (criticizing whether the creation of new rights would be a net positive to the purported beneficiaries); *see also* Robin L. West, *Tragic Rights: The Rights Critique in the Age of Obama*, 53 WM. & MARY L. REV. 713, 715 (2011) (describing the critique of rights as "one of the most vibrant, important, counterintuitive, challenging set of ideas that emerged from the legal academy over the course of the last quarter of the twentieth century"); Justin Driver, *Reactionary Rhetoric and Liberal Legal Academia*, 123 YALE L.J. 2616, 2621 (2014); Matthew Clair & Amanda Woog, *Courts and the Abolition Movement*, 110 CALIF. L. REV. 1, 6 (2022).

335. Paul D. Butler, *Poor People Lose:* Gideon *and the Critique of Rights*, 122 YALE L.J. 2176, 2178–79, 2184 (2013).

336. *See* Fred O. Smith, Jr., *Policing Mass Incarceration*, 135 HARV. L. REV. 1853, 1877 (2022).

337. 372 U.S. 335 (1963).

338. *Id.* at 344.

339. *See* Butler, *supra* note 335, at 2178.

340. *Id.* at 2190–98.

341. *See, e.g.*, Jason Sunshine & Tom R. Tyler, *The Role of Procedural Justice and Legitimacy in Shaping Public Support for Policing*, 37 LAW & SOC'Y REV. 513, 519 (2003); *see also* Fred O. Smith, Jr., *Abstention in the Time of Ferguson*, 131 HARV. L. REV. 2283, 2356 (2018) ("[W]hen a sense of procedural fairness is illusory, this fosters a sense of second-class citizenship, increases the likelihood people will fail to comply with legal directives, and induces anomie in some groups that leaves them with a sense of statelessness.").

342. *See* Butler, *supra* note 335, at 2194.

Butler's critiques are not unlike those of Yankah; both theorists point to the political realities of using the language of liberty as a way to subjugate Black and Latinx Americans. Whereas Yankah is more optimistic that liberties can and should be used to further the common good,[343] Butler is more pessimistic in wondering if any of these fancy theories or semantics will really matter in practice—especially if the system was in part designed to achieve subjugation.[344]

The Liberty-Balancing Approach is somewhat designed specifically to account for Yankah's critiques of criminal law, but it would also assuage Butler's practical concerns. The Approach is a theoretical intervention with several practical outcomes that would ultimately mitigate the very discriminatory impacts Butler believes to be systemic. The Approach specifically ties liberty to political standing given the importance of structuring and defining individual criminal legal liberties towards the common good of establishing public trust in communities of color. Consequently, substantive criminal laws would be unjustified if they do not properly balance individual and community liberties towards this often-overlooked public trust.

Liberty detractors might still critique this approach as impractical since most offenders do not practically enjoy any liberties, and thus there would be little to balance as a counterweight to the overbreadth of the status quo. But this is an inescapable problem; creating new liberties or balancing existing liberties will only be as good as the legal and political infrastructures that enforce them.[345] This is similar to Erwin Chemerinsky's approach to constitutional liberty in the context of mass incarceration: focusing only on liberty is an empty solution; but, coupling liberty with fixing the architecture of civil remedies, accountability of government agencies, and injunctive relief is what gives the system its guardrails.[346] Reforming substantive criminal law according to the Liberty-Balancing Approach's minimalist principles as proposed in Part III, along with introducing accountability for Liberty-Balancing sentencing, would go a long way in finding the right balance of individual criminal legal liberties towards the communal common good.

Bill Stuntz posited a different point of political realism when he argued that the Warren Court's expansion of defendants' rights caused a political backlash that emboldened states to adopt harsher criminal practices to make up for the new liberties

343. *See generally* Yankah, *When Justice Can't Be Done*, *supra* note 189 (connecting the duty of every citizen to govern and to work towards the common good, which includes obeying the law).

344. *See generally* Butler, *supra* note 208 (criticizing criminal reform as ineffective because the system is designed to subjugate and is operating as intended).

345. *See supra* notes 138–43 and accompanying text.

346. *See* ERWIN CHEMERINSKY, PRESUMED GUILTY: HOW THE SUPREME COURT EMPOWERED THE POLICE AND SUBVERTED CIVIL RIGHTS 287–300 (2021) (focusing on remedies and accountability to enforce liberty interests of defendants).

afforded to defendants.[347] This type of political backlash is congruent with historian Elizabeth Hinton's work that argued that Nixon's "War on Crime" was ultimately a repositioning of political resources to combat the newly gained political power of Black Americans after the Civil Rights movement.[348] Stuntz's and Hinton's arguments present a powerful and cautionary tale that whenever a historically underrepresented community or downtrodden people gain liberties, pushback emerges from dominant groups in power that often seeks to reassert the status quo.

Regarding Stuntz's critique, this backlash from politically dominant groups often seeks to protect the interests of primarily middle-class, propertied citizens; these interests often come at the expense of depriving the liberties of low-income and minority communities.[349] To support Stuntz's point, there is evidence that White majorities vote according to their self-interests in ways that negatively impact minorities.[350] Derrick Bell's enduring thesis of interest-convergence might do some good in this context: White people will only vote in favor of policies that positively impact minorities if those policies also benefit White communities.[351]

We must break free from the flawed zero-sum game that fuels the "us-versus-them" mentality and leads to a net loss of liberty for all. Economist Heather McGhee has documented how these zero-sum attitudes in everything from segregated housing to public pools have led to a loss of wealth, health outcomes, educational opportunities, and other public resources for all.[352] Thus, when White communities seek to segregate and hoard resources to protect their liberty interests, this ironically leads to their own loss of liberties and a smaller pot of resources for the community.[353]

The punishment system cannot be seen as a zero-sum game. Locking up offenders for the benefit of the so-called "law-abiding citizen" is a farce because locking up the former does *not* make the latter safer. This is the message that the political majority needs to hear. The imbalances of overcriminalization does not make us any safer. Building new prisons to deprive liberty from entire generations of mostly Black and Latino men—but also low-income White men—does not

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347. *See* STUNTZ, *supra* note 68, at 217; *see also* Smith, *supra* note 336, at 1882 (characterizing Stuntz's work). *But see* Robert Weisberg, *Crime and Law: An American Tragedy*, 125 HARV. L. REV. 1425, 1443 (2012) (cautioning against interpreting Stuntz as criticizing or blaming the Warren Court).

348. *See supra* note 250 and accompanying text.

349. There are indeed small enclaves and jurisdictions in which the political majority is an ethnic minority, but even these areas would fall into the same trap of instituting favorable liberty laws for their interests that might be detrimental to the interests of others.

350. *See generally, e.g.*, Kent L. Tedin, Richard E. Matland & Gregory R. Weiher, *Age, Race, Self-Interest, and Financing Public Schools Through Referenda*, 63 J. POL. 270 (2001) (attempting to measure the self-interest of demographic groups in the context of school funding, thus providing evidence that Black and Latino voters must appeal to the self-interest of White voters).

351. Derrick A. Bell, Jr., Comment, Brown v. Board of Education *and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518, 523 (1980) ("The interest of blacks in achieving racial equality will be accommodated only when it converges with the interests of whites.").

352. *See generally* MCGHEE, *supra* note 209; *see also id.* at 6 (describing the zero-sum mentality of White Americans in contrast with Black Americans who do not subscribe to this narrative).

353. *See id.* at 19–20 (discussing how slavery and other institutions that failed to invest in public resources in an effort to keep them from Black people actually impoverished the South).

result in a net increase of liberty for the rest of us. Instead, it makes us less safe,[354] and has resulted in a police state in which LEAs have more power to surveil and infringe on all of our individual liberty interests.[355] Understanding that mass incarceration policies impede the liberty interests of the offender and make us less safe is the exact type of interest-convergence argument that is needed to bring the criminal legal system back into balance. According to Bell, we must use this message to ensure that the political White majority votes in favor of meaningful criminal legal reform that benefits us all, as opposed to embarking on a backlash campaign to reassert power.[356]

The legal and political concerns addressed in this Part illustrate that the Liberty-Balancing Approach can achieve measured reform if designed and implemented according to its ideals of minimalism and social realities. And while decarceration policies are not yet the norm, there is a shift happening towards liberty. We are collectively starting to realize that locking people up in prisons for longer periods of time does not make our communities any more safe, and does not result in a net increase of liberty. Admittedly, this does not mean that the Liberty-Balancing Approach is the only way to achieve a better future. But it indeed adds to these theoretical and practical punishment discussions that will usher in the next generation of reform.

CONCLUSION

Of all the problems and all the solutions described in the vast criminal legal literature, liberty seems like an odd methodological focus. Yet at the same time, it is strangely intuitive. The American punishment system is nothing more than an exchange of liberties to fulfill the broader community liberty of public safety, and perhaps even the darker social goal of subjugation. Unfortunately, as this past generation of mass incarceration and the growing surveillance state has taught us, the punishment system protects the liberties of some at the expense of others in ways that diminish perhaps the more important community liberty of public trust. The Liberty-Balancing Approach serves as a timely intervention that seeks to rethink and rebalance the discussion and practice of criminal punishment that appreciates the often-forgotten liberty interests of the offender, and that increases public safety and liberty for all.

Liberty is not the be-all and end-all. It is not the magic solution or the miracle cure. But it represents a set of important political questions, punishment principles, and pragmatic considerations that reframes the punishment system in ways that appeal to the American ideals of individuality and freedom. This is the hope of such a unifying theme of liberty; that in such unity, we can finally bridge the political divide to end a system that prioritizes the deprivation of liberty in an erroneous zero-sum mentality, and instead move towards a new framework that seeks to properly balance liberty so that all can benefit.

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354. *See supra* notes 21, 35, 243 and accompanying text.

355. *See supra* notes 219–23 and accompanying text.

356. *See* Bell, *supra* note 351, at 532–33 (considering racial equality strategies that would be supported by White people).