MINIMALIST CRIMINAL COURTS

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ABSTRACT

For many penal abolitionists, criminal courts have been complicit in mass incarceration. This Article argues that, unlike abolitionists, criminal justice minimalists should consider criminal courts part of the solution rather than the problem. Minimalist scholars have focused on advancing wide-scale public policy proposals, such as extensive decriminalization, through the work of legislatures. While such proposals are generally desirable, their sweeping nature may sometimes raise concerns over excessive risks to public safety and political feasibility.

The shortcomings of promoting minimalism through legislatures highlight the advantages of criminal courts. By virtue of their case-by-case adjudication, criminal courts can play a key role in ensuring that governments exercise their penal powers only as a last resort, while remaining sensitive to the unique circumstances of each individual case. Their ability to exercise discretion and consider specific contexts and situations allows them to apply minimalist principles more fairly and in less objectionable ways politically.

The Article points to three complementary potential principles that minimalism-oriented courts can and should adhere to: de minimis, ultima ratio *(last resort), and penal restraint. It also proposes how the values and goals of criminal justice minimalism can inform the design of each principle. Together and apart, these principles empower courts to play a major role in reducing the overreach of criminal law.*

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INTRODUCTION

Many penal abolitionists hold that criminal courts have been complicit in mass incarceration and essential to an irredeemably unjust and discriminatory system.[1] As abolitionist scholars explain, courts are "the legal pathway from an arrest to a prison sentence, with myriad systems of control in between."[2] As such, they share with other players in the criminal justice system—primarily the police, the prosecution, and prisons—the responsibility and the blame for the system's injustices.[3] In response, some

1. *See, e.g.*, Matthew Clair & Amanda Woog, *Courts and the Abolition Movement*, 110 CALIF. L. REV. 1, 6 (2022) (arguing that criminal courts "far more often [than the police and prisons] perpetrate state violence, including by bolstering police legitimacy and enabling police abuse and violence"); Dorothy Roberts, *How I Became a Family Policing Abolitionist*, 11 COLUM. J. RACE & L. 455, 461 (2021) (listing criminal courts as part of "a coherent carceral machine" that also includes law enforcement and prisons); Nicole Smith Futrell, *The Practice and Pedagogy of Carceral Abolition in a Criminal Defense Clinic*, 45 N.Y.U. REV. L. & SOC. CHANGE 159, 169 (2021) (criticizing society's "rel[iance] on a vast system of police, courts, and prisons as the necessary response to deep-rooted individual and societal challenges"); ANGELA Y. DAVIS, ARE PRISONS OBSOLETE? 107 (2003) ("[T]he prison industrial complex is much more than the sum of all the jails and prisons in this country. It is a set of symbiotic relationships among correctional communities, transnational corporations, media conglomerates, guards' unions, and legislative and *court agendas*." (emphasis added)).

2. Clair & Woog, *supra* note 1, at 9.

3. Despite the important role that abolitionist scholars have attributed to criminal courts in the perpetuation of injustices within the criminal justice system, the bulk of abolitionist literature has revolved around law enforcement and prisons, not courts. *See id.* at 25 ("Criminal courts are central to the crisis of mass criminalization, yet there has been far more analysis of police and prisons in

abolitionist scholars have explicitly called for the dismantling of criminal courts.[4] More often, scholars have done so implicitly by supporting the development of alternative, noncriminal mechanisms to address socially undesirable behavior—mechanisms that would ultimately replace criminal adjudication altogether.[5] Either way, criminal courts are clearly excluded from abolitionist work plans and futures.

This Article argues that, unlike abolitionists, criminal justice minimalists should consider criminal courts part of the solution rather than the problem. It demonstrates that, if provided with adequate guiding principles and legal devices, criminal courts can become major engines of positive change, putting minimalist principles into action.

Broadly speaking, criminal justice minimalists (also known as "criminal law minimalists" or "penal minimalists") believe that protecting public safety requires the work of a well-functioning criminal justice system capable of enforcing laws, punishing offenders, and deterring crime.[6] However, minimalists are also deeply concerned over the many negative potential effects of criminalization, enforcement, and punishment. Most minimalists, therefore, hold that for criminal law to be of positive value to society, governments must exercise their penal powers only as a "last resort."[7] As David Hayes explained, "[a] penal State that is minimalist in

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abolitionist theorizing than there has been of criminal courts."); Cynthia Godsoe, *The Place of the Prosecutor in Abolitionist Praxis*, 69 UCLA L. REV. 164, 183 (2022) ("[W]hile police and prisons have recently come under intense critical scrutiny . . . [abolitionist] legal scholars have largely overlooked the role of lawyers and judges.").

4. *See, e.g.*, Clair & Woog, *supra* note 1, at 7 (calling for the abolition of all criminal courts "as sites of coercion, violence, and exploitation"); Brendan D. Roediger, *Abolish Municipal Courts: A Response to Professor Natapoff*, 134 HARV. L. REV. F. 213, 227 (2021) (calling for the abolition of municipal criminal courts).

5. *See, e.g.*, Dorothy E. Roberts, *The Supreme Court, 2018 Term—Foreword: Abolition Constitutionalism*, 133 HARV. L. REV. 1, 46 (2019) (mentioning that "black feminist abolitionists have proposed community-based transformative justice responses that address the social causes of violence and hold people accountable without exposing them to police violence and state incarceration" (footnote omitted)); DAVIS, *supra* note 1, at 105–15 (describing abolitionist ideas of "alternative modes of making justice" that do not involve criminal adjudication or punishment).

6. *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."); Christopher Slobogin, Essay, *The Minimalist Alternative to Abolitionism: Focusing on the Non-Dangerous Many*, 77 VAND. L. REV. 531, 534–36 (2024) (advocating for a similar type of minimalist criminal justice system).

7. *See, e.g.*, Alessandro Corda, *The Transformational Function of the Criminal Law: In Search of Operational Boundaries*, 23 NEW CRIM. L. REV. 584, 585–86 (2020) ("A majority of scholars today advocate, whether explicitly or implicitly, for a minimalist account aiming for a criminal law that is . . . used only as a last resort in [countering] unwanted behavior." (footnote omitted) (emphases omitted)); DAVID HAYES, CONFRONTING PENAL EXCESS: RETRIBUTION AND THE POLITICS OF PENAL MINIMALISM 24 (2019) ("[T]here should always be an expectation that criminal justice should be used as a last resort for resolving social problems."); Langer, *supra* note 6, 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").

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."[8]

Scholars who support minimalist views have so far rarely addressed the role that criminal courts would play within a minimalist penal administration. Some do agree that minimalism can and should inform the work of all players in the criminal justice system and at all stages of the criminal process.[9] For example, Christopher Slobogin suggested that minimalism could be implemented by stripping armed police officers of many of their current routine tasks ("including dealing with people who are mentally ill and the unhoused and carrying out traffic enforcement, school security, and regulatory searches and seizures"), and by limiting traditional enforcement mechanisms (like stops or arrests) to dangerous individuals.[10] Similarly, Máximo Langer argued that minimalist principles should be incorporated into the work of prosecutors, requiring them to "not move forward with a citation, arrest, charging decision, formal diversion program, or other punitive measure unless there are no appropriate nonpunitive responses."[11]

But while a handful of minimalism-oriented scholars have acknowledged the potential of criminal courts to advance minimalism, they have refrained from describing in detail their envisioned minimalist criminal courts.[12] Instead, most scholars have focused on conceptualizing the minimalist legislature, pushing for extensive decriminalization or blanket limitations on the power of legislatures to criminalize.[13] As Trevor Gardner and Esam Al-Shareffi put it succinctly, minimalist legislatures would "be oriented toward narrowing rather than expanding the scope of

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8. HAYES, *supra* note 7, at 24 (emphasis omitted).

9. *See, e.g.*, Paul Roberts, *Criminal Law Theory and the Limits of Liberalism*, *in* LIBERAL CRIMINAL THEORY: ESSAYS FOR ANDREAS VON HIRSCH 327, 339–40 (A.P. Simester, Antje du Bois-Pedain, & Ulfrid Neumann eds., 2014) (arguing that "[m]inimalism is, for liberals, a genuine golden thread binding together disparate chapters and departments of criminal law into a coherent normative vision," and providing numerous examples of how minimalism can be integrated into the work of various players in the criminal justice system).

10. Slobogin, *supra* note 6, at 534, 557–59.

11. Langer, *supra* note 6, at 75.

12. *See, e.g.*, *id.* at 73–76 (arguing that the minimalist *ultima ratio* principle, according to which "criminal law should only be used [by legislatures] as a last resort," should also guide criminal courts); Roberts, *supra* note 9, at 339 ("Penal minimalism supplies a flexible, unified normative standard for appraising the liberal credentials of, inter alia . . . the law and practice of sentencing and punishment[] and the practical implementation of criminal law through . . . trials . . . ." (emphasis omitted)).

13. *See, e.g.*, Langer, *supra* note 6, at 75 & n.193 (providing examples of some of the "many scholars" who argued that "the last resort principle applies only to the work of the legislature"); Terry Skolnik, *Criminal Justice Reform: A Transformative Agenda*, 59 ALTA. L. REV. 631, 650–51 (2022) (discussing criminal justice minimalism only in the context of the legislature); Trevor George Gardner & Esam Al-Shareffi, *Regulating Police Chokeholds*, 112 J. CRIM. L. & CRIMINOLOGY ONLINE 111, 131–32 (2022) (same).

the criminal code."[14] For example, Andrew Ashworth and Jeremy Horder sought to promote criminal justice minimalism by devising four principles that would restrain legislatures' authority to enact penal statutes.[15] According to them, a minimalist legislature would "respect human rights," consider individuals' "right not to be subjected to State punishment," criminalize only as a "last resort," and avoid criminalization "where this would be counter productive."[16] Douglas Husak also concentrated on guiding the work of minimalist legislatures. In his important book *Overcriminalization: The Limits of the Criminal Law*, he listed seven constraints that legislatures would have to abide by to realize their potential to advance criminal justice minimalism.[17]

The interest of scholars in advancing criminal justice minimalism specifically via legislatures rather than criminal courts is understandable. First, whereas criminal courts can sometimes dismiss prosecutions for certain conduct,[18] the safest way to avoid prosecution is to fully decriminalize said conduct. Police officers, prosecutors, and courts have discretion—in varying degrees—not to act on a suspicion or move forward with a criminal case. But insofar as there is skepticism that they will exercise their authority fairly (or at all), minimalist outcomes can be guaranteed through full decriminalization of the conduct that could trigger a criminal prosecution.[19] While each criminal court handles a finite number of cases and, therefore, is arguably limited in its potential to promote minimalism, restricting the legislative power to criminalize bodes well for an immediate and more substantial minimalist outcome.[20]

Second, the appeal to minimalists of a sweeping measure like extensive decriminalization can be appreciated against the backdrop of the recent growing influence of abolitionist approaches on criminal justice, at least in

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14. Gardner & Al-Shareffi, *supra* note 13, at 131.

15. *See* ANDREW ASHWORTH & JEREMY HORDER, PRINCIPLES OF CRIMINAL LAW 31–35 (7th ed. 2013).

16. *Id.*

17. *See* DOUGLAS HUSAK, OVERCRIMINALIZATION: THE LIMITS OF THE CRIMINAL LAW 120 (2008) ("[T]he conjunction of the internal and external constraints I identify would go a long way toward achieving criminal law minimalism by imposing severe limits on the authority of the state to enact penal offenses.").

18. *See generally* William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 547–49, 558–65 (2001) (describing the power that courts and prosecutors have in this context).

19. *See, e.g.*, HUSAK, *supra* note 17, 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.").

20. *See generally* Alexandra Natapoff, *Misdemeanor Decriminalization*, 68 VAND. L. REV. 1055, 1057 (2015) (describing the dramatic potential results of full or partial decriminalization).

academic circles.[21] To be sure, the literature promoting criminal justice minimalism preceded the reemergence of abolitionism in legal academia in the 2010s and 2020s.[22] The more recent scholarship on minimalism, however, has explicitly promoted this approach as an "alternative" to abolitionism.[23] The motivation to show that significant decarceration can be attained without abolishing the criminal justice system can understandably lead scholars to highlight the more far-reaching proposals in the minimalist arsenal—extensive full decriminalization being one of them. Decriminalization aligns with the rhetoric and calls for action endorsed by abolitionist advocates that, as Amna Akbar observed, "are often focused on divesting, dismantling, and delegitimizing the infrastructure of criminalization."[24] Indeed, many abolitionist scholars have pointed to decriminalization as a positive step that furthers abolitionist goals[25]—a fact that minimalism-oriented scholars who support decriminalization happily bring up.[26]

Granted, some blanket limitations on the authority of legislatures to criminalize, as well as extensive decriminalization, are indeed desirable measures from the perspective of criminal justice minimalism. This Article nevertheless argues that their sweeping nature may sometimes raise concerns both about excessive risks to public safety and their political feasibility. More politically viable proposals may be those that merely pay lip service to the goals of criminal justice minimalism without substantially advancing them in practice. At the same time, even if extensive decriminalization in accordance with minimalist aspirations were achieved, it would still leave untouched a very large number of non-petty offenses, some of which might be overinclusive.[27]

The shortcomings of wide-scale minimalist proposals highlight the

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21. *See generally* Thomas Ward Frampton, Essay, *The Dangerous Few: Taking Seriously Prison Abolition and Its Skeptics*, 135 HARV. L. REV. 2013, 2014–16 (2022) (discussing the increasing prominence of abolitionist approaches in legal scholarship since 2015).

22. For instance, Ashworth promoted minimalism as early as the 1990s. *See* ANDREW ASHWORTH, PRINCIPLES OF CRIMINAL LAW 32–37 (3d ed. 1999).

23. *See, e.g.*, Langer, *supra* note 6, at 44 (considering minimalism "an alternative to penal abolitionism"); Slobogin, *supra* note 6 (titling his article *The Minimalist Alternative to Abolitionism*); *see also* 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").

24. Amna A. Akbar, *An Abolitionist Horizon for (Police) Reform*, 108 CALIF. L. REV. 1781, 1827 (2020).

25. *See, e.g.*, *id.* at 1827 & n.205; Allegra M. McLeod, *Prison Abolition and Grounded Justice*, 62 UCLA L. REV. 1156, 1226–27 (2015); PAUL BUTLER, CHOKEHOLD: POLICING BLACK MEN 233–34 (2017).

26. *See, e.g.*, Langer, *supra* note 6, at 56.

27. *See infra* Section I.A.

advantages of criminal courts. By virtue of their case-by-case adjudication, criminal courts can play a key role in ensuring that criminal law is administered only as a last resort while remaining sensitive to the unique circumstances of each individual case. In other words, courts are well suited to distinguish harmful social behaviors that warrant penal reaction from those that do not. Their ability to exercise discretion and consider specific contexts and situations allows them to apply minimalist principles more fairly and in less objectionable ways politically.[28]

Drawing on the experience of various legal systems—inside and outside the United States—this Article points to three complementary potential principles that minimalism-oriented courts can and should adhere to: *de minimis*, *ultima ratio*, and penal restraint. The *de minimis* principle requires that criminal courts dismiss prosecutions where the defendant's alleged conduct, albeit illegal, is minor.[29] The *ultima ratio* principle provides that courts should dismiss prosecutions where less harmful noncriminal alternatives are available.[30] The penal restraint principle guides courts that have convicted offenders to strive to avoid imprisonment and strongly favor non-custodial sanctions unless custody is necessary to achieve the goals of punishment.[31] Together and apart, these three proposed principles would empower courts to play a major role in reducing the overreach of criminal law, especially if designed in accordance with the goals and values of criminal justice minimalism.

The Article proceeds in three parts. Part I explores the indispensability of criminal courts to the advancement of criminal justice minimalism. It describes the shortcomings of relying solely on legislative reforms such as decriminalization on the one hand and the advantages of promoting minimalism through criminal courts on the other.

Part II proposes three principles that criminal courts should follow to promote minimalism effectively, namely, *de minimis*, *ultima ratio*, and penal restraint. It describes how these principles should be translated into legal rules that can be applied by courts to achieve minimalist goals.

Part III addresses potential challenges to the proposed three principles stemming from concerns regarding separation of powers, effectiveness, and unequal application.

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28. *See infra* Section I.B.
29. *See infra* Section II.A.
30. *See infra* Section II.B.
31. *See infra* Section II.C.

I. WHY SHOULD CRIMINAL COURTS BE CENTRAL TO MINIMALIST EFFORTS?

A. The Shortcomings of Focusing Solely on the Minimalist Legislature

In recent years, legislatures around the country have reportedly decriminalized a growing number of offenses.[32] Criminal justice minimalists would hope that this trend means that legislatures choose to legalize offenses (by deciding that "the state no longer has grounds for punishing that behavior in any way")[33] or at least to *fully* decriminalize them (by "formally mov[ing them] out of the criminal and into the civil realm").[34] However, this has rarely been the case. Legislatures in the United States more often deem certain offenses "nonjailable" yet still criminal.[35] In many cases, such decisions—also known as "partial decriminalization"—do not help to reduce criminal law's footprint and, actually, often increase it by "stripping defendants of counsel and other procedural protections"—benefits usually reserved for defendants who might be incarcerated.[36] Furthermore, legalization or decriminalization efforts have mostly revolved around just a few categories of petty and nonviolent offenses, particularly marijuana possession.[37] As Alexandra Natapoff observed, "[o]utside the marijuana context, only a few states have engaged in substantial reform beyond traffic offenses, and even that remains partial: most jurisdictions retain police and prosecutorial power to arrest and incarcerate for minor conduct."[38]

Legislatures' limited use of their decriminalization authority is hardly surprising. Fully decriminalizing violent or otherwise severe offenses could

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32. *See, e.g.*, Natapoff, *supra* note 20, at 1077 ("[D]ecriminalization is increasingly seen as an attractive response."); Darryl K. Brown, *Decriminalization, Regulation, Privatization: A Response to Professor Natapoff*, 69 VAND. L. REV. EN BANC 1, 1 (2016) ("[T]he two most important and promising trends in U.S. criminal justice this decade are sentencing reforms and legislation to decriminalize many offenses.").

33. Natapoff, *supra* note 20, at 1065.

34. *Id.* at 1069.

35. *See, e.g.*, *id.* at 1067 ("Far more commonly, legislatures engage in 'partial' decriminalization by simply eliminating jailtime as possible punishment for an offense."); Brown, *supra* note 32, at 4 ("[S]ome 'decriminalized' offenses in fact remain *crimes*, although now punishable only by fines, probation, or other sanctions short of jail time.").

36. Natapoff, *supra* note 20, at 1077.

37. *See, e.g.*, *id.* (describing some of the few categories of offenses that have been decriminalized in the United States); M. Eve Hanan, *Decriminalizing Violence: A Critique of Restorative Justice and Proposal for Diversionary Mediation*, 46 N.M. L. REV. 123, 123 (2016) ("The movement to reduce over-prosecution and mass incarceration has focused almost exclusively on non-violent offenders despite data showing that over half of all prisoners incarcerated within the United States are sentenced for crimes of violence.").

38. Natapoff, *supra* note 20, at 1077.

result in actual or perceived risks to public safety, in addition to being unpopular at best and politically suicidal at worst.[39] Criminal justice minimalists themselves do not advocate such steps, favoring instead the full decriminalization (or legalization) of nonharmful or minimally harmful conduct.[40] Legislatures, however, would hesitate to fully decriminalize not just severe but even minor offenses when, for instance, the aim is to prevent behaviors that could not be effectively deterred through alternative, noncriminal mechanisms.[41] More generally, as William Stuntz noted, legislatures that wish to support prosecution and law enforcement efforts can do so by criminalizing as much conduct as possible, including the most trivial behaviors.[42] Prosecutors can take advantage of these offenses by "charging defendants with several crimes for a single criminal episode," thereby pushing them to agree to a plea offer.[43] Meanwhile, the police can arrest more suspects (a result they frequently perceive as professionally desirable)[44] by enforcing any of the many acts criminalized by legislatures.[45] In essence, the broader the legislative criminalization, the simpler (and cheaper) the prosecution and law enforcement.[46] Conversely, legislatures may fear that legalizing or fully decriminalizing offenses could increase the challenges and costs associated with prosecution and law enforcement, resulting in under-prosecution or underenforcement of crimes.[47] On these grounds, Stuntz concluded that, for American legislatures, "too little criminalization tends to be riskier than too much."[48]

The discussion so far suggests that criminal justice minimalists should not rely solely on the willingness of legislatures in the United States to engage in extensive decriminalization or to avoid expanding criminal codes. The implication is not that scholars should refrain from promoting

39. *See generally* Stuntz, *supra* note 18, at 530 ("Voters . . . presumably have some idea of the set of results they would like to see: conviction and punishment of people who commit the kinds of offenses that voters fear. Legislators, one can fairly hypothesize, have an interest in producing those results (or at least taking credit for them), so that voters will continue to support them.").

40. *See, e.g.*, Langer, *supra* note 6, at 56 (arguing that criminal justice minimalists would approve steps like "the decriminalization or legalization of drug use; the decriminalization of sex work; [and] the decriminalization of undocumented immigration" in addition to "opposition to the expansion of criminal law through the creation of new crimes"); Slobogin, *supra* note 6, at 557 (mentioning favorably proposals that "many misdemeanors and minor felonies could either be decriminalized or handled through citations rather than custodial arrest").

41. *See generally* Brown, *supra* note 32, at 5–6 (explaining why legislatures may avoid legalizing or decriminalizing even "petty, mildly antisocial (or perhaps simply inconsiderate) conduct when a society no longer has norms that successfully discourage this conduct").

42. *See* Stuntz, *supra* note 18, at 534–39.

43. *Id.* at 520, 537–38.

44. *Id.* at 538 & n.133; Guy Rubinstein, *The Prosecutor-Oriented Exclusionary Rule*, 65 B.C. L. REV. 1755, 1767–68 (2024).

45. *See* Stuntz, *supra* note 18, at 538–39.

46. *Id.* at 537–39.

47. *Id.* at 550–52.

48. *Id.* at 549.

minimalism in criminal legislation. Indeed, criminalizing certain conduct merely to facilitate plea deals or arrests is itself a very strong justification for decriminalization. But to the extent that criminal justice minimalism is viewed as a more realistic alternative to abolitionism, minimalists should continuously search for the most promising ways to advance it.[49]

And yet, even if extensive legislative decriminalization in accordance with minimalist aspirations were achieved (either voluntarily or because of a new constitutional mandate),[50] the minimalist decriminalization project would still be incomplete, leaving a very large number of non-petty offenses untouched. Despite the potential of many of these offenses to be overinclusive—namely, criminalizing more than necessary—legislatures (and probably society at large) would choose "to err on the side of too much rather than too little."[51] Largely, they would do so in the knowledge that these prohibitions will not be fully enforced.[52] Various players down the line—primarily the police and prosecutors—may use their discretion not to act on a suspicion or move forward with a criminal case,[53] although in practice, police officers and prosecutors, who are naturally crime-control-oriented, will not always apply their discretion fairly or reasonably.[54] Individuals will inevitably be convicted of and punished—even incarcerated—for conduct that could be better addressed by other means.

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49. *See generally* Evan D. Bernick, *Eliminating Criminal Law*, 17 WASH. U. JURIS. REV. (forthcoming 2024) (manuscript at 28) (criticizing criminal justice minimalists' designation of abolitionism as unrealistic while they themselves admit that "[c]riminal-law minimalism is an unknown ideal in the United States").

50. *See generally* Langer, *supra* note 6, 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).

51. Stuntz, *supra* note 18, at 547.

52. *Id.* at 547–49.

53. *Id.*

54. *See, e.g.*, Brown, *supra* note 32, at 6 (arguing that a lot of minor, "nonjailable" offenses are "especially susceptible to biased and excessive enforcement"); Anna Roberts, *Dismissals as Justice*, 69 ALA. L. REV. 327, 342 (2017) ("Police are supposed to act as an escape valve, with discretion to refrain from an arrest; yet, incentives to arrest frequently make that a nugatory power. Prosecutors can decline to charge, and can move to dismiss after charges have been filed, but incentives and adversarial culture frequently block this power also." (footnotes omitted)). Former public defender and current scholar Josh Bowers provided real-life examples of cases he handled which involved "normatively innocent" defendants, who "did it . . . [but] did not thereby offend the public's moral code." Josh Bowers, *Legal Guilt, Normative Innocence, and the Equitable Decision Not to Prosecute*, 110 COLUM. L. REV. 1655, 1658 (2010) (quoting AKHIL REED AMAR, THE CONSTITUTION AND CRIMINAL PROCEDURE: FIRST PRINCIPLES 90 (1997)). In his article, Bowers explained why "prosecutors may be ill-suited to adequately consider relevant equitable factors in petty cases." *Id.* at 1660. An infamous example of biased policing is Ferguson, Missouri, where "[d]ata collected by the Ferguson Police Department from 2012 to 2014 shows that African Americans account for 85% of vehicle stops, 90% of citations, and 93% of arrests made by FPD officers, despite comprising only 67% of Ferguson's population," and that "FPD appears to bring certain offenses almost exclusively against African Americans." U.S. DEP'T OF JUST., C.R. DIV., INVESTIGATION OF THE FERGUSON POLICE DEPARTMENT 4 (2015), https://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/04/ferguson_police_department_report_1.pdf [https://perma.cc/EG58-UAX4].

The next section highlights the merits of judicial review as exercised by minimalist criminal courts.

B. The Promise of Minimalist Criminal Courts

The shortcomings of proposals to advance criminal justice minimalism through legislative decriminalization help to highlight the advantages of criminal courts as engines of positive change. To begin with, judges are commonly considered more objective, independent, and impartial than legislators, as well as prosecutors and the police.[55] As such, and as further explained in this Section, judges are arguably less committed to conviction and punishment and "much more likely than legislators . . . to take the interests of defendants into account."[56] This applies even though most American judges outside the federal system are elected.[57] It is true that in jurisdictions where voters favor harsh penal responses to crime, judges seeking reelection may wish to avoid being perceived as too lenient.[58] However important, this concern is neither necessarily the sole nor the most powerful one. Since elected judges often run for reelection unopposed and since they deeply care about their reputation in the eyes of colleagues and lawyers, voters' desires may often give way to other professional considerations, including the quality of judicial decisions.[59] Therefore, "even elected judges are much less politically accountable than legislators or elected prosecutors," as they "may not have the same need to please a set of voters that legislators and prosecutors have."[60]

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55. *See, e.g.*, Stuntz, *supra* note 18, at 557 ("Given prosecutorial discretion, legislatures have a natural bias toward overcriminalization. Courts are a good deal less prone to that bias."); Rachel E. Barkow, *Institutional Design and the Policing of Prosecutors: Lessons from Administrative Law*, 61 STAN. L. REV. 869, 908 (2009) (referring to Article III judges as "truly independent actor[s]" and as "certainly less biased than . . . fellow prosecutor[s]"); David Alan Sklansky, *Police and Democracy*, 103 MICH. L. REV. 1699, 1738 (2005) (explaining that judges "were a separate group, within the government, that could serve as a counterbalance against other governmental groups"); United States v. Leon, 468 U.S. 897, 917 (1984) ("Judges and magistrates are not adjuncts to the law enforcement team; as neutral judicial officers, they have no stake in the outcome of particular criminal prosecutions.").

56. Stuntz, *supra* note 18, at 541. *But see* Andrew Manuel Crespo, *The Hidden Law of Plea Bargaining*, 118 COLUM. L. REV. 1303, 1386–88 (2018) (questioning "Stuntz's heroic judicial account").

57. *See generally* David E. Pozen, *The Irony of Judicial Elections*, 108 COLUM. L. REV. 265, 266 (2008) ("Since the mid-nineteenth century, the majority of U.S. states have subjected at least some of their courts to popular elections; roughly ninety percent of state general jurisdiction judges are currently selected or retained this way.").

58. *See, e.g.*, Christopher Slobogin, *Lessons from Inquisitorialism*, 87 S. CAL. L. REV. 699, 720 (2014) (mentioning that "the democratic process can take its toll on judicial independence, especially when the right result looks 'soft' on crime"); Guy Rubinstein, *Selective Prosecution, Selective Enforcement, and Remedial Vagueness*, 2022 WIS. L. REV. 825, 857 (discussing possible effects of judicial elections on judges' motivation to suppress unconstitutionally obtained evidence).

59. *See* Stuntz, *supra* note 18, at 540–41 (discussing electoral concerns' important but limited influence on judicial decisions).

60. *Id.* at 540.

Furthermore, criminal courts adjudicating cases do not confront the challenges faced by legislatures when deciding which actions should be criminalized or decriminalized. As Stuntz noted, "[l]egislators define crimes prospectively," while "not know[ing] the precise mix of cases that will be brought under a given statute at the time they must vote on that statute."[61] This uncertainty about the future is more likely to result in over- rather than under-criminalization, as well as in avoidance of decriminalization.[62] Criminal courts, by virtue of their case-by-case adjudication and their dealing with concrete charges and defendants, do not have to make similar guesses about the future. Unlike legislatures, they can make decisions while remaining sensitive to the unique circumstances of each individual case. In certain cases, then, they can decide that, even though the behavior criminalized by the criminal statute involved is grave enough to be prohibited, the actual conduct of the defendant before them is significantly less severe and, therefore, merits different treatment. Indeed, many behaviors prohibited by criminal codes may seem severe in the abstract but, in some contexts, may prove to be less serious and hardly require any punitive reaction.[63] Importantly, judges—unlike legislatures—are almost invariably exposed to the perspective of individual defendants (or their attorneys) before handing down their decisions.[64]

Another upshot of the individual nature of adjudication is that it empowers courts to make bolder decisions, knowing that they "operat[e] in a relatively low-stakes context" (especially in contrast to legislatures).[65] To be sure, the effect of court decisions—especially those made by appellate courts—may exceed the contours of a particular case. But the immediate impact of an individual decision made by a criminal court is on the individual defendant, not on an unspecified number of future cases with unknown characteristics.[66]

These features of criminal courts and criminal adjudication make courts far more promising than legislatures as promoters of criminal justice minimalism. Courts are not only structurally more sympathetic to defendants, but they can also exercise discretion while considering specific

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61. *Id.* at 547.

62. *See supra* Section I.A.

63. *See, e.g.*, Stanislaw Pomorski, *On Multiculturalism, Concepts of Crime, and the "De Minimis" Defense*, 1997 BYU L. REV. 51, 95 ("Conduct which as a general rule is highly dangerous to society may not be dangerous at all, or may represent sub-minimal, trivial danger in exceptional, individual circumstances.").

64. *See* Stuntz, *supra* note 18, at 541 (explaining that "appellate judges can make law only in the context of cases, and, with rare exceptions, they decide cases—at least the sort of cases that involve published opinions—only after hearing (and reading) arguments from both sides").

65. Roberts, *supra* note 54, at 332 (discussing the individual nature of criminal cases and its possible empowering influence on judges' decision-making).

66. *Id.* (mentioning "the constraints that limit what can be achieved in individual cases").

contexts and situations without having to worry too much about the consequences for future cases. As such, they are in an optimal position to distinguish harmful social behaviors that warrant penal reaction under certain circumstances from those that do not. Criminal courts, therefore, are much better suited than legislatures to apply minimalist principles fairly and accurately, in ways less objectionable politically.

To realize their full potential to put minimalist principles into action, however, criminal courts must be provided with adequate guiding principles and legal devices.[67] With few exceptions, the ability of criminal courts in the United States to push for minimalism is highly limited at present.[68] The next Part introduces three such minimalist principles that can be translated into applicable legal doctrines.

II. CONCEPTUALIZING THE MINIMALIST CRIMINAL COURT: THREE PROPOSED PRINCIPLES

Theoretically, criminal courts are well-suited to actively promote criminal justice minimalism, but in practice, their hands are often tied.[69] This Part proposes three complementary guiding principles that can empower criminal courts to apply minimalism at different stages of the criminal process: *de minimis*, *ultima ratio*, and penal restraint. Some legal systems—inside and outside the United States—have adopted various versions of these principles. Nevertheless, this Part introduces these principles in more general terms, such that different jurisdictions would be able to choose how exactly to translate them into applicable legal doctrines that advance minimalism.

A. De Minimis

The *de minimis* principle—or in its full form *de minimis non curat lex* (often translated as "the law does not concern itself with trifles")[70]—can be traced back at least to thirteenth-century Europe.[71] In essence, it requires criminal courts to refrain from convicting an individual whose alleged act,

67. Stuntz, *supra* note 18, at 558 ("[T]he degree of [judicial] restraint [of legislatures' power to criminalize] is limited by the range of tools courts have.").

68. *Id.* at 528 ("Appellate courts lack the doctrinal tools to combat [overcriminalization]."); Roberts, *supra* note 54, at 331 (mentioning the commonly held "notion that judges can do little more than rubber-stamp prosecutorial discretion").

69. *See supra* notes 67–68 and accompanying text.

70. *See, e.g.*, Roberts, *supra* note 54, at 334–35.

71. *See generally* Max L. Veech & Charles R. Moon, *De Minimis Non Curat Lex*, 45 MICH. L. REV. 537, 537–44 (1947) (recounting the history of the principle).

albeit illegal, was particularly "trivial."[72] This principle and the idea it represents—that criminal law's reach should not extend to actions causing "minor harms"[73] or where a defendant's "'level of culpability' is [very] low (or non-existent)"[74]—are therefore far from novel. Yet, in the United States, despite being proposed by the Model Penal Code in 1962,[75] the *de minimis* principle's impact on the work of criminal courts is insignificant. Very few states have followed the Model Penal Code's lead by "adopt[ing] a true *de minimis* defence."[76] And as once observed by Husak, "[o]f the many defences sufficiently important to be included in the influential Model Penal Code, surely the *de minimis* defence has attracted the least scholarly attention and generated the fewest judicial opinions."[77]

The relationship between the *de minimis* principle and criminal justice minimalism is not confined to their similar names. Rather, in the long journey of reducing criminal law's footprint to a minimum without excessively risking public safety, a good starting point would be the significant share of offenses that involve "conduct that should not have been criminalized at all."[78] As described above, extensive criminalization can largely be explained by the wish of legislatures to support prosecution and enforcement efforts.[79] In particular, it is the result of long years of support

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72. *See, e.g.*, MODEL PENAL CODE § 2.12 (AM. L. INST., Official Draft and Revised Comments 1985) ("De Minimis Infractions"). According to this Section,

> The Court shall dismiss a prosecution if, having regard to the nature of the conduct charged to constitute an offense and the nature of the attendant circumstances, it finds that the defendant's conduct:
>
> (1) was within a customary license or tolerance, neither expressly negatived by the person whose interest was infringed nor inconsistent with the purpose of the law defining the offense; or
>
> (2) did not actually cause or threaten the harm or evil sought to be prevented by the law defining the offense or did so only to an extent too trivial to warrant the condemnation of conviction; or
>
> (3) presents such other extenuations that it cannot reasonably be regarded as envisaged by the legislature in forbidding the offense.
>
> The Court shall not dismiss a prosecution under Subsection (3) of this Section without filing a written statement of its reasons.

Id.

73. *See generally* JOEL FEINBERG, THE MORAL LIMITS OF THE CRIMINAL LAW: HARM TO OTHERS 188–90 (1984) (discussing the *de minimis* principle and its justifications).

74. R.A. Duff, *'De Minimis' and the Structure of the Criminal Trial*, 42 LAW & PHIL. 57, 58 (2023).

75. *See* MODEL PENAL CODE § 2.12 (AM. L. INST., Proposed Official Draft 1962).

76. Douglas Husak, *The De Minimis 'Defence' to Criminal Liability*, *in* PHILOSOPHICAL FOUNDATIONS OF CRIMINAL LAW 328, 332 (R.A. Duff & Stuart P. Green eds., 2011) (italics added); *see also* Roberts, *supra* note 54, at 334 ("[F]our states (Hawaii, Maine, New Jersey, and Pennsylvania) and Guam enacted statutes based on MPC 2.12."); Duff, *supra* note 74, at 58 ("Only five states adopted versions of this provision.").

77. Husak, *supra* note 76, at 328 (italics added).

78. HUSAK, *supra* note 17, at 3.

79. *See supra* Section I.A.

for harsh policing approaches such as "Broken Windows," where success depended on the extensive criminalization of conduct that officers could proactively enforce on the streets.[80] However, for reasons explained above,[81] and as Husak commented, in reality, "[c]riminal laws are relatively easy to enact but far more difficult to repeal."[82]

Precisely for this reason, criminal courts should be granted authority to apply the *de minimis* principle in individual cases. This authority could empower courts to exercise their discretion with precision in deciding whether defendants should be convicted, or whether to dismiss the criminal charges against them. Courts would then be able to consider not only the nature of the relevant criminal offense and the gravity of the defendant's conduct but also other circumstances that can point to the right decision.[83] Indeed, as Paul Robinson commented, the *de minimis* principle, when adopted into law, "can better accommodate important legality concerns with the discretion necessary for effective justice."[84] Another way of thinking about it is as a judicial intervention that, while not striking down or repealing any unjust criminal statutes, prevents the unjust conviction of an individual under particular circumstances.[85]

Without proposing model statutes,[86] we will briefly address three possible ways for criminal justice minimalism to inform their design.

First, the *de minimis* principle should not be reserved for extremely trivial conduct or highly unusual circumstances. According to the Model Penal Code's explanatory notes, for example, the proposed *de minimis* principle would "authorize[] courts to . . . ignore merely technical violations of law."[87] Such a narrow implementation of the principle, however, would render it almost worthless in the promotion of criminal justice minimalism. Courts would scarcely need to apply this circumscribed version of *de minimis* since absurd charges that would justify its application

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80. *See generally* ISSA KOHLER-HAUSMANN, MISDEMEANORLAND: CRIMINAL COURTS AND SOCIAL CONTROL IN AN AGE OF BROKEN WINDOWS POLICING 26–30 (2018) (describing the "Broken Windows Theory"). For a sharp critique of this approach to policing, see BERNARD E. HARCOURT, ILLUSION OF ORDER: THE FALSE PROMISE OF BROKEN WINDOWS POLICING (2001).

81. *See supra* Section I.A.

82. HUSAK, *supra* note 17, at 10.

83. *See* MODEL PENAL CODE § 2.12 (AM. L. INST., Official Draft and Revised Comments 1985).

84. Paul H. Robinson, *Legality and Discretion in the Distribution of Criminal Sanctions*, 25 HARV. J. ON LEGIS. 393, 400 (1988).

85. *See* Pomorski, *supra* note 63, at 99 (claiming that *de minimis* "should serve as a vehicle of decriminalization in cases where the conduct charged is either harmless or where the harm caused or threatened is not significant enough to justify a stigma of criminal conviction").

86. We agree with Robinson that "[l]egislatures must answer the difficult policy questions of what factors are relevant [to *de minimis* determinations] and define standards that best capture the intuitive concept they intend." Robinson, *supra* note 84, at 434.

87. MODEL PENAL CODE § 2.12 explanatory note (AM. L. INST., Official Draft and Revised Comments 1985).

could hardly be expected to be brought to begin with. Despite being technically illegal, "throwing rice at newlyweds is unlikely to be prosecuted as assault, tipping a mailman as bribing a federal officer, or playing various Halloween practical jokes as a nuisance."[88] A version of *de minimis* that is more loyal to the values of minimalism would be based on one of the rationales commonly attributed to this principle; that is, that "a formal criminal conviction [would] give[] the matter a degree of seriousness that might be disproportionate to the seriousness of the wrong."[89] In our opinion, a minimalism-informed *de minimis* principle should apply in cases where such disproportionality is apparent and reaches a level that society cannot tolerate, even where the relevant forbidden conduct is not exceptionally petty. A minimalist perspective would take into account a wide range of costs and burdens associated with the criminal process, including its coercive nature, ramifications for the liberty and dignity of individuals, severe collateral consequences, and disparate application. Rather than whether the behavior involved is trivial in the abstract, the question of *de minimis* should be whether its severity justifies the extreme costs of criminal prosecution.

Second, judicial *de minimis* determinations should always be based on the particular circumstances of the case and the defendant before the court, including those concerning the defendant's blameworthiness. Courts should not focus only on the act committed and its potential or actual ensuing harm, devoid of any context. A large share of courts in the United States handling *de minimis* claims have preferred the latter, a "much more restrictive approach."[90] So have various scholars.[91] Criminal justice minimalists should be alarmed by this approach, which usually works against *de minimis* claimants. Often, it results in "blanket carve-outs," namely, types of conduct to which criminal courts refuse to apply *de minimis* even where there are subjective circumstances that may convincingly support it.[92] This rigid approach is at odds with criminal justice minimalism, which strives to avoid

88. Pomorski, *supra* note 63, at 63.

89. Duff, *supra* note 74, at 70; *see also* FEINBERG, *supra* note 73, at 189–90 ("[L]egal coercion should not be used to prevent minor harms . . . [because] chances are always good that such a use of power would cause harm to wrongdoers out of all proportion both to their guilt and to the harm they would otherwise cause . . . ." (emphasis omitted)).

90. Pomorski, *supra* note 63, at 92–94.

91. *See, e.g.*, Husak, *supra* note 76, at 346 ("Clearly, the claim that a crime is *de minimis* describes the action rather than the agent who performed it." (italics added)). *But see* Yoram Rabin & Yaniv Vaki, *Stealing Food to Satisfy Hunger: The Case of Israel*, 52 ISR. Y.B. ON HUM. RTS. 345, 355 (2022) ("[T]he majority opinion held by scholars [in Israel] . . . is that in order to apply the *de minimis* defence, the particulars of the crime should be considered without ignoring the defendant and his situation.").

92. Roberts, *supra* note 54, at 357; *see also* Pomorski, *supra* note 63, at 93–94 ("If the defendant's conduct violated one of the interests of paramount importance, that alone, according to some courts, dooms a *de minimis* claim regardless of concrete facts of the individual case." (italics added)).

the use of criminal law wherever unnecessary and to the largest extent possible.[93] Indeed, as Stanislaw Pomorski noted, "[c]onduct which as a general rule is highly dangerous to society may not be dangerous at all, or may represent sub-minimal, trivial danger in exceptional, individual circumstances."[94] Minimalists, therefore, should favor a more flexible approach to *de minimis*, affording broad discretion to judges and authorizing them to consider the unique circumstances of each individual case.[95] An example of such an application of *de minimis* is a series of shoplifting cases where Israeli courts acquitted defendants even when the shoplifting involved was recurrent, or the stolen goods' worth was relatively substantial.[96] To be sure, shoplifting is criminally prohibited in Israel, and individuals convicted of even one instance of shoplifting may face a maximum penalty of three years' imprisonment.[97] Yet courts have been willing to acquit defendants when the evidence indicated that they were individuals living below the poverty line who had stolen food or other essential goods for themselves or their dependents or when other challenging personal circumstances were involved.[98]

Third, in cases where applying the *de minimis* principle is justified, criminal courts should be authorized to do so as early as possible in the process. Legal philosophers have yet to reach an agreement on "where [does *de minimis*] fit in the structure of the criminal trial."[99] Some scholars consider the *de minimis* principle a criminal defense, whereas others (including R.A. Duff) claim it should be regarded as "a bar to trial."[100] Discussing the competing (and admittedly complicated) stances on this question is beyond the scope of this Article. Suffice it to say that criminal justice minimalists, for pragmatic reasons, should endorse the view that *de minimis* should be a bar to trial. Treating *de minimis* as a defense would mean that a defendant with a *de minimis* claim must wait for a very late stage of the criminal trial to raise it and potentially be acquitted.[101] Conversely, treating *de minimis* as a bar to trial would allow the defendant to raise it much earlier, with a meritorious claim resulting in the dismissal

93. *See supra* notes 6–8 and accompanying text.

94. Pomorski, *supra* note 63, at 95.

95. In some cases, subjective circumstances may point to rejection of *de minimis* claims that would otherwise be accepted. *See, e.g.*, Roberts, *supra* note 54, at 357 ("[S]ome case law has declared that a prior record—generally, one or more prior convictions, but sometimes just one or more arrests—precludes dismissal." (footnotes omitted)). Depending on the circumstances, such a result may align with the goals of criminal justice minimalism.

96. *See* Rabin & Vaki, *supra* note 91, at 356–59.

97. § 384, Penal Law, 5737–1977 (Isr.).

98. *See* Rabin & Vaki, *supra* note 91, at 356–59.

99. Duff, *supra* note 74, at 60.

100. *Id.* at 70–72.

101. *Id.* at 60 (discussing some pragmatic differences between defenses and bars to trial).

of the criminal charges.[102] As Duff argued, "[w]hat grounds this version of *De Minimis* is not just the 'stigma' of conviction (and the collateral consequences that it can bring), but the burden of being prosecuted: that burden is disproportionate to the defendant's culpability."[103] Criminal justice minimalists, who would naturally support the minimization and prevention of the harmful effects of criminal law at the earliest stage possible, should therefore prefer the treatment of *de minimis* as a bar to trial rather than a defense. An early dismissal would not only be fairer to the defendant but also more efficient since it would allow the redirection of the costs and efforts associated with the prosecution of this case toward more pressing endeavors.[104] In some cases, a *de minimis* claim will not be raised by a defendant at an early stage of the process or, if raised, may be rejected by the court (for example, because the circumstances justifying it have yet to be established). The defendant should then be allowed to raise a *de minimis* claim—and the court should be allowed to accept it—at later stages too.

B. Ultima Ratio as a Directive to Courts

In the literature on criminalization or criminal justice minimalism, the concept of *ultima ratio*—stating that "the criminal law should be used only as a last resort"[105]—carries at least three different meanings. According to the first, *ultima ratio* is a moral ideal that should guide legislative criminalization choices,[106] resting on minimalist views about the role that the criminal justice system should play in society.[107] Legislatures should thus avoid "criminalization when alternative means to accomplish the legislative objective are available."[108] This meaning of *ultima ratio* does not legally narrow the authority of legislatures to criminalize and views it at most as a "moral duty,"[109] representing "the criminal law as it ought to be, rather than as it actually is."[110]

According to the second meaning, *ultima ratio* is a concrete directive

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102. *Id.*

103. *Id.* at 71.

104. *Id.* at 72 (discussing prosecutions' "significant costs, for the defendant, for the criminal justice system, for the polity," and the efficiency associated with early dismissals of cases).

105. Douglas Husak, *The Criminal Law as Last Resort*, 24 OXFORD J. LEGAL STUD. 207, 207 (2004) (emphasis omitted).

106. *See* Nils Jareborg, *Criminalization as Last Resort (*Ultima Ratio*)*, 2 OHIO ST. J. CRIM. L. 521, 522 (2005).

107. *See* sources cited *supra* note 7.

108. Husak, *supra* note 105, at 235; *see also* Jareborg, *supra* note 106, at 523 ("It is often—in fact, very often—claimed that criminalization is the legislator's *ultima ratio*. Criminalization should be used as a last resort, as 'uttermost means in uttermost cases.'").

109. Jareborg, *supra* note 106, at 522.

110. Husak, *supra* note 105, at 208.

constitutionally binding on legislatures, mandating them to adhere to the requirement of criminal law as a last resort when considering whether to criminalize.[111] Indeed, several legal systems outside the United States have treated *ultima ratio* as a constitutional mandate,[112] opening the gate for courts to enforce it where they find that it was violated by the legislature.[113]

The third meaning views *ultima ratio* as a principle that should affect the interpretation of statutory criminal prohibitions by courts, urging courts to interpret prohibitions narrowly to curb legislative overcriminalization. Thomas Frøberg, for example, called to "accept[] that the *ultima ratio* principle has a role to play not only in the delimitation of the scope of the criminal law by the legislator, but also when the precise boundaries of criminal statutes are drawn by the courts."[114]

In all the three meanings of *ultima ratio* in the literature, this principle ultimately aims to restrict the power of legislatures to determine what conduct should be criminalized. In the United States, as many scholars have observed, criminalization is far from a last resort and closer to a "first resort"[115] or "default response."[116] Legislative overcriminalization, as noted, is largely the product of legislatures' powerful incentives to criminalize and even more powerful disincentives to decriminalize.[117] The same set of incentives and disincentives makes it unlikely that legislatures around the

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111. *See, e.g.*, Langer, *supra* note 6, at 74 ("[T]he principle has been given constitutional status by courts and other authorities in a variety of countries, such as Colombia and Finland, and by a range of commentators." (footnotes omitted)); Kaarlo Tuori, *Ultima Ratio as a Constitutional Principle*, 3 OÑATI SOCIO-LEGAL SERIES 6, 9 (2013) (arguing that "*ultima ratio* [is] an instance of a broader constitutional law principle of proportionality"); Ariel L. Bendor & Hadar Dancig-Rosenberg, *Unconstitutional Criminalization*, 19 NEW CRIM. L. REV. 171, 207 (2016) ("[I]t may be argued that, although the *ultima ratio* principle has been developed in criminal law, its nature (the imposition of criminal liability only when it is essential) is an inevitable outcome of constitutional proper balancing. The principle reflects not only a desirable policy but, first and foremost, a constitutional obligation.").

112. *See, e.g.*, Langer, *supra* note 6, at 74.

113. *Id.* at 75 ("[I]n some countries, courts have applied the [*ultima ratio*] principle, which shows that there are ways in which courts can use this principle to assess the criminalization work of legislatures."); Joxerramon Bengoetxea, *Ultima Ratio and the Judicial Application of Law*, 3 OÑATI SOCIO-LEGAL SERIES 107, 114 (2013) (considering *ultima ratio* "a limitation on criminalisation of conducts [sic] or an obligation of restraint imposed on the legislator and which can be resorted to or taken into account by the judiciary" (citation omitted)); *cf.* Jareborg, *supra* note 106, at 522 ("If there are to be legally binding restrictions, they require constitutional support (including international commitments), and courts whose task it is to ensure that the legislators do not exceed their constitutional competence . . . .").

114. Thomas Frøberg, *The Role of the Ultima Ratio Principle in the Jurisprudence of the Norwegian Supreme Court*, 3 OÑATI SOCIO-LEGAL SERIES 125, 133 (2013) (italics added); *see also* Bengoetxea, *supra* note 113, at 117 ("If the judiciary considers that the legislator has overstepped and abused the *ultima ratio* principle by too easily and readily resorting to the criminal law in order to criminalise behaviour that could be policed through other means, the judiciary might opt for lenient interpretations, or other techniques of judicial decision-making—qualification of facts, strict requirements on evidence, mitigating consequences, to avoid incrimination." (italics added)).

115. Husak, *supra* note 105, at 208 (emphasis omitted).

116. Roberts, *supra* note 54, at 367.

117. *See supra* Section I.A.

country will voluntarily subscribe to a vague moral obligation to use their power to criminalize as a last resort. Although the Constitution can be interpreted creatively to mandate the application of *ultima ratio* to the work of legislatures (as Langer suggested),[118] expecting courts to adopt such an interpretation seems improbable, at least in the foreseeable future.

We offer here a version of *ultima ratio* different from the three meanings outlined in the current scholarship. Unlike them, our proposal does not seek to enforce proper legislative criminalization, nor does it "delimit[] . . . the scope of the criminal law."[119] Instead, we suggest authorizing criminal courts to dismiss criminal charges in individual cases when, based on their particular circumstances, they conclude that noncriminal—and less harmful—alternatives are available.[120] These may include, for instance, treatments, disciplinary proceedings, civil actions, or restorative justice programs. According to our proposal, courts would be empowered to apply *ultima ratio* independently and proactively, on a case-by-case basis, even when the criminal charges involved are not based on legislation that violated the *ultima ratio* principle.

Criminal courts, then, would promote criminal justice minimalism by ascertaining that, in each case, criminal law is employed as a last resort. As opposed to *de minimis*, criminal courts applying our proposed version of *ultima ratio* would not necessarily question the seriousness of the illegal conduct involved, nor would they necessarily think that convicting the defendant in this case is unjust. Rather, their motivation would be to avoid the use of criminal law where other solutions that do not compromise public safety are available. For example, a criminal court may decide against the application of *de minimis* in a case involving an individual with alcohol use disorder who repeatedly breaks into houses to steal in order to fund the condition. The court may regard this conduct to be harmful enough to warrant conviction and punishment but may still choose to dismiss the charges if it believes that sending the defendant to rehabilitation would, in the long term, protect public safety better.

For criminal justice minimalists, the potential benefits of authorizing criminal courts to apply the *ultima ratio* principle on a case-by-case basis are clear. Courts will be able to identify specific situations where a criminal prosecution is not the only feasible solution and fitting alternatives exist. In turn, courts could then promote minimalism in cases involving charges for

118. *See* Langer, *supra* note 6, at 74 ("[T]he Eighth Amendment prohibition against cruel and unusual punishment or the Fifth and Fourteenth Amendments' Due Process Clauses could be interpreted as including [the *ultima ratio* principle].").

119. Frøberg, *supra* note 114, at 133.

120. Notably, not all noncriminal alternatives are necessarily less harmful than criminal punishment. Judges should consider noncriminal alternatives' expected harm when deciding whether to apply the *ultima ratio* principle.

offenses that legislatures would not (and perhaps should not) decriminalize without striking down the criminal statute itself, leaving it and its expressive value intact.[121]

We propose adopting rules that would bolster the "gate-keeping function" of criminal courts,[122] allowing them to screen out cases where criminal prosecution is not the last resort.[123] It merits note that some judges around the country have already engaged in *ultima ratio*-based dismissals. In a fascinating article, Anna Roberts provided multiple examples of "judges dismissing cases in favor of a range of mechanisms that they find as suitable as—or more suitable than—the criminal law to achieve the relevant priorities."[124] As Roberts explained, this happens in some of the states where criminal courts are legally authorized "to dismiss a prosecution in furtherance of justice."[125]

Criminal justice minimalists can draw inspiration from dismissals in the furtherance of justice when designing their own proposals for legislation explicitly authorizing judicially applied *ultima ratio*. Unlike the arrangements that currently exist in most jurisdictions, however, minimalists should ensure that defendants and counsels (and perhaps others in the community)—in addition to the court itself (*sua sponte*)—are free to suggest alternatives to prosecution.[126] Given that defendants and members of their communities usually know their needs best, it makes little sense to limit their ability to argue for alternatives that may be better for them, even if courts may find some of these alternatives inappropriate. Furthermore, we support encouraging judges to be creative and open-minded regarding alternatives, allowing both traditional and nontraditional options, government-approved as well as NGO and private initiatives, prioritizing above all their potential to achieve positive results.

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121. Husak argued that criminal law's "expressive function" makes the implementation of *ultima ratio* by legislatures difficult to justify. According to him, "[e]ven though alternative modes of social control may do a better job reducing the incidence of criminality, they may fail to achieve an indispensable objective of the criminal sanction: expressing censure." Husak, *supra* note 105, at 222–34. As mentioned, our proposal addresses this concern by leaving the criminal statute itself intact.

122. *See* Valena E. Beety, *Judicial Dismissal in the Interest of Justice*, 80 MO. L. REV. 629, 629 (2015).

123. Beety pointed out that rules regarding the dismissal of criminal charges could be adopted by either state legislatures, or by "[t]he judiciary itself, notably by the state supreme court, [that] often creates rules with approval by the legislature." *Id.* at 661.

124. Roberts, *supra* note 54, at 366–68 (footnote omitted). Among the alternatives that courts preferred over criminal prosecutions were civil suits, disciplinary or administrative proceedings, public condemnation, and noncriminal rehabilitative efforts. *Id.*

125. *Id.* at 332 ("Fifteen states and Puerto Rico have enacted statutes that give the courts power to dismiss a prosecution in furtherance of justice.").

126. Currently, in most jurisdictions where this arrangement exists, only the prosecution and the court are free to propose this kind of dismissal, while the defense is fully or partially barred from doing so. *Id.* at 352 & n.158.

C. Penal Restraint

The two principles we have proposed thus far—*de minimis* and *ultima ratio*—are meant to screen out prosecutions that should not culminate in the criminal conviction of a defendant. But criminal courts can advance criminal justice minimalism even when rejecting such claims and, ultimately, convicting a defendant. Minimalism should inform not only the phase of guilt determination but also sentencing. Paul Roberts correctly observed that "liberal penal minimalism implies that both the quantitative amount of punishment imposed, and the particular forms and styles of hard treatment selected to implement it, should infringe liberty as little as possible, consistent with prevailing theories of proportionality in sentencing and advertised penal aims."[127] Therefore, criminal courts should refrain from imposing a punishment harsher than the one that would fulfill the desired goals of punishment. Specifically, courts should not impose imprisonment unless necessary.

The roots of the penal restraint principle (commonly known as parsimony) can already be found in the classic writings of Cesare Beccaria and Jeremy Bentham.[128] As scholars have explained, penal restraint is grounded in both utilitarianism and "limiting retributivism."[129] According to Norval Morris, for example, "[j]ustification for this utilitarian and humanitarian principle follows from the belief that any punitive suffering beyond societal need is, presumably, what defines cruelty."[130]

Quite surprisingly, the penal restraint principle is not foreign to American sentencing law at both the federal and state levels.[131] The Sentencing Reform Act, for example, provides that "[t]he court shall impose a sentence sufficient, but not greater than necessary, to comply with [certain indicated] purposes," including deterrence, retribution, and rehabilitation.[132]

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127. Roberts, *supra* note 9, at 340.

128. *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., 1963) (1764). According to Bentham, "[u]pon the principle of utility, if [punishment] ought at all to be admitted, it ought only to be admitted in as far as it promises to exclude some greater evil." JEREMY BENTHAM, AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION 170 (Oxford: Clarendon Press 1907) (new ed. 1823).

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

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

131. *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." (footnotes omitted)).

132. 18 U.S.C. § 3553(a)–(b) (2012). Richard Frase provided a brief explanation of various principles of punishment. *See* Frase, *supra* note 128, at 69–75.

However, as various scholars have argued,[133] and as the dire situation of mass incarceration in the United States demonstrates,[134] penal restraint exists in the books but is rarely practiced by criminal courts in action.[135]

While criminal justice minimalism would clearly support the consistent adherence of criminal courts to penal restraint, we argue that it is even more pressing to adopt a version of this principle that would explicitly focus on *incarceration* as a last resort. According to our version of the penal restraint principle, courts should strive to avoid imprisonment and, instead, strongly favor non-custodial sanctions unless fulfillment of the desired goals of punishment depends on custody. Our proposal is different from existing legislation in the United States that—to use Paul Roberts's language—focuses on the *amount* of punishment. Rather, our proposal is much closer to the version of penal restraint recommended in the Model Penal Code, which centers on the *form* of punishment:

> The Court shall deal with a person who has been convicted of a crime without imposing sentence of imprisonment unless, having regard to the nature and circumstances of the crime and the history, character and condition of the defendant, it is of the opinion that his imprisonment is necessary for protection of the public because:
>
> (a) there is undue risk that during the period of a suspended sentence or probation the defendant will commit another crime; or
>
> (b) the defendant is in need of correctional treatment that can be provided most effectively by his commitment to an institution; or
>
> (c) a lesser sentence will depreciate the seriousness of the defendant's crime.[136]

The penal restraint principle should posit incarceration as a last resort for two main reasons. First, incarceration has been revealed as the most harmful form of punishment for individuals and communities,[137] with especially

133. *See, e.g.*, Hessick & Berman, *supra* note 131, at 213 & n.205; Marc L. Miller & Ronald F. Wright, *Your Cheatin' Heart(land): The Long Search for Administrative Sentencing Justice*, 2 BUFF. CRIM. L. REV. 723, 746 (1999).

134. *See, e.g.*, Richard A. Bierschbach & Stephanos Bibas, *Rationing Criminal Justice*, 116 MICH. L. REV. 187, 188–89 (2017) (contrasting the parsimony principle that exists on paper with the actual situation of mass incarceration in the United States).

135. *See generally* Roscoe Pound, *Law in Books and Law in Action*, 44 AM. L. REV. 12, 15 (1910) (explaining the difference between the "law in the books" and the "law in action").

136. MODEL PENAL CODE § 7.01 (AM. L. INST., Official Draft and Revised Comments 1985) ("Criteria for Withholding Sentence of Imprisonment and for Placing Defendant on Probation").

137. Gresham Sykes famously listed some of the "pains of imprisonment" in 1958. *See* GRESHAM M. SYKES, THE SOCIETY OF CAPTIVES: A STUDY OF A MAXIMUM SECURITY PRISON 63–83 (Princeton University Press 2007) (1958).

disastrous implications for poor people of color.[138] Scholars and policymakers have also increasingly questioned its crime prevention qualities,[139] including its deterrent value[140] and its rehabilitative merits,[141] and suggested that imprisonment might actually have a "criminogenic" effect.[142] Scholars have also warned about the extremely high costs of incarceration—some of them indirect and not readily apparent.[143] Many of these costs—including the loss of one's work, the possible trauma and stigma associated with incarceration, and the exclusion from one's family and community—are often triggered regardless of the length of the prison sentence. Second, focusing on the "in/out" issue is more feasible than answering the question of the amount of punishment. Determining the minimal prison time that would achieve the goals of punishment under certain circumstances is probably far more difficult than deciding whether incarceration is at all necessary. In fact, a similar consideration influenced the Model Penal Code's proposal that focused on imprisonment as a last resort.[144]

Legislatures in the United States have generally refrained from adopting the Model Penal Code's version of penal restraint, but similar statutes exist elsewhere. In England and Wales, for example, the law provides:

> The court must not pass a custodial sentence unless it is of the opinion that—
>
> (a) the offence, or

138. *See, e.g.*, Dorothy E. Roberts, *The Social and Moral Cost of Mass Incarceration in African American Communities*, 56 STAN. L. REV. 1271, 1281–97 (2004).

139. *See, e.g.*, NAT'L RSCH. COUNCIL, THE GROWTH OF INCARCERATION IN THE UNITED STATES: EXPLORING CAUSES AND CONSEQUENCES 130–56 (Jeremy Travis, Bruce Western & Steve Redburn eds., 2014) (discussing "the crime prevention effects of incarceration").

140. *Cf.* Cheryl Marie Webster & Anthony N. Doob, *Searching for Sasquatch: Deterrence of Crime Through Sentence Severity*, *in* THE OXFORD HANDBOOK OF SENTENCING AND CORRECTIONS 173, 191 (Joan Petersilia & Kevin R. Reitz eds., 2012) ("[C]urrently in Western countries, with the methods and measures presently available, variation in sentence severity does not affect the levels of crime in society.").

141. *See, e.g.*, Justin Driver & Emma Kaufman, *The Incoherence of Prison Law*, 135 HARV. L. REV. 515, 560 (2021) ("Though the precise date that the theory died is difficult to pin down, conventional wisdom holds that by the end of the 1970s the prison was no longer understood as a form of treatment.").

142. *See, e.g.*, Francis T. Cullen, Cheryl Lero Jonson & Daniel S. Nagin, *Prisons Do Not Reduce Recidivism: The High Cost of Ignoring Science*, 91 PRISON J. 48S, 60S (2011) ("On balance, the evidence tilts in the direction of those proposing that the social experiences of imprisonment are likely crime generating.").

143. *See, e.g.*, Ben Gifford, *Prison Crime and the Economics of Incarceration*, 71 STAN. L. REV. 71, 88–93 (2019) (discussing costs associated with incarceration).

144. *See* MODEL PENAL CODE § 7.01 cmt. on "Need for Legislative Guidance" (AM. L. INST., Official Draft and Revised Comments 1985) ("How far it is feasible to construct such criteria for the exercise of judicial discretion with respect to sentence is a still unanswered question. It seems clear, however, that development of such criteria is both more feasible and more important when the decision involves a stark choice among sanctions that are different in their impact than when problems of more or less are all that is involved.").

> (b) the combination of the offence and one or more offences associated with it,
>
> was so serious that neither a fine alone nor a community sentence can be justified for the offence.[145]

Canadian law is quite similar in spirit, stating:

> A court that imposes a sentence shall also take into consideration the following principles: . . . .
>
> (d) an offender should not be deprived of liberty, if less restrictive sanctions may be appropriate in the circumstances; and
>
> (e) all available sanctions, other than imprisonment, that are reasonable in the circumstances and consistent with the harm done to victims or to the community should be considered for all offenders, with particular attention to the circumstances of Aboriginal offenders.[146]

Similar statutes exist in Australia[147] and New Zealand.[148] Though not identical, all these statutes hold that imprisonment should not be the default punishment and that courts should generally favor alternatives that would keep convicted offenders outside prison walls. To use the words of the Model Penal Code drafters, these statutes encourage criminal courts to answer the question "[w]hy imprisonment?" instead of "[w]hy not imprisonment?"[149] And to borrow the title of an influential report authored by the British Academy, they create "a presumption against imprisonment."[150]

The principle of penal restraint is clearly at odds with legislation that restricts judicial discretion in sentencing, such as mandatory minimum sentencing or three-strikes laws. The drafters of the Model Penal Code, who strictly opposed mandatory minimum sentences, explained that their proposed rule "reflects and repeats the Model Code's rejection

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145. Sentencing Act 2020, c. 17, § 230(2) (UK).

146. Criminal Code, R.S.C. 1985, c C-46, s 718.2 (Can.).

147. *Crimes Act 1914* (Cth) s 17A (Austl.) ("Restriction on imposing sentences").

148. Sentencing Act 2002, s 16 (N.Z.).

149. MODEL PENAL CODE § 7.01 cmt. on "Minimal Conditions for Imprisonment" (AM. L. INST., Official Draft and Revised Comments 1985); *see also* Herbert Wechsler, *Codification of Criminal Law in the United States: The Model Penal Code*, 68 COLUM. L. REV. 1425, 1451 (1968) ("This would reverse the attitude of many courts, which ask themselves if there is special reason for dispensing with a prison sentence and thus put the emphasis in the wrong place."); *Crimes Act 1914* (Cth) s 17A(2) (Austl.) ("Where a court passes a sentence of imprisonment on a person for a federal offence . . . the court: (a) shall state the reasons for its decision that no other sentence is appropriate; and (b) shall cause those reasons to be entered in the records of the court.").

150. BRITISH ACADEMY, A PRESUMPTION AGAINST IMPRISONMENT: SOCIAL ORDER AND SOCIAL VALUES (2014), https://www.thebritishacademy.ac.uk/documents/274/presumption-against-imprisonment-social-order-social-values.pdf [https://perma.cc/RN57-LEQS].

of . . . mandatory imprisonment, which leaves the court no discretion."[151] In England and Wales, for example, the legislature clarified that penal restraint would indeed be inappropriate where other statutes mandate minimum punishment.[152]

Criminal justice minimalists would naturally lean toward resisting mandatory minimum sentencing laws and call for their repeal.[153] But even when legislatures choose not to repeal such laws, they could still decide to amend them. For instance, they could limit judicial discretion as to the length of the imprisonment sentence but not as to whether imprisonment is the right kind of punishment to begin with. According to such a scheme, courts could be afforded discretion on avoiding imprisonment where better non-custodial alternatives are available. Only if they were to conclude that imprisonment is the sole suitable punishment would they have to impose the term of imprisonment dictated by the relevant mandatory minimum law.

Either way, our proposed penal restraint principle would advance criminal justice minimalism while directly tackling the problem of mass incarceration. It would do so without formally excluding incarceration as a potential response to crime or even to specific predetermined offenses. This version of the penal restraint principle can be expected to be much less objectionable politically than calls to abolish prisons altogether. In fact, over the last few decades, legislatures around the country have already reassessed—and in many instances have amended—statutes that demanded overly harsh punishment.[154] As Carol Steiker observed quite recently, "criminal justice reform has been having a moment,"[155] enjoying (sometimes) the support of both Democrats and Republicans.[156] Minimalists, therefore, would hope that legislatures are more open to adopting the penal restraint principle, continuing the trend of positive sentencing reform and decarceration in the country.

III. CHALLENGES

This Part responds to three possible challenges to the proposal to

151. MODEL PENAL CODE § 7.01 cmt. on "Need for Legislative Guidance" (AM. L. INST., Official Draft and Revised Comments 1985).

152. Sentencing Act 2020, c. 17, § 230(3) (UK) ("Threshold generally not applicable where mandatory sentence requirement applies").

153. *See, e.g.*, Langer, *supra* note 6, at 56 (mentioning "the repeal of harsh mandatory minimums even for violent crimes" as a step that minimalists would endorse).

154. *See, e.g.*, NAT'L RSCH. COUNCIL, *supra* note 139, at 73 ("According to annual reports issued by the National Conference of State Legislatures, several hundred state laws have been enacted since 2000 that in various ways make sentencing less rigid and less severe.").

155. Carol S. Steiker, *Keeping Hope Alive: Criminal Justice Reform During Cycles of Political Retrenchment*, 71 FLA. L. REV. 1363, 1365 (2019).

156. *Id.* at 1367–72.

promote minimalism through the work of criminal courts: that it raises separation of power concerns, that its effectiveness will be limited, and that the *de minimis*, *ultima ratio*, and penal restraint principles will be applied unequally.

A. Separation of Powers

The first possible challenge to our proposed principles is that they raise separation of powers concerns.[157] According to this argument, our proposals involve "second-guessing" of legislatures' authority to criminalize or punish conduct as they see fit,[158] as well as prosecutors' broad charging discretion.[159]

We support legislative authorization of courts to apply the principles of *de minimis*, *ultima ratio*, and penal restraint, as has been the case in multiple legal systems inside and outside the United States.[160] Recent increasing social and political willingness to tackle flaws in the criminal justice system suggests that more legislatures could follow this path, even when stopping short of extensive decriminalization.[161] Where such formal legislative empowerment exists, it is doubtful if apprehensions about the separation of powers arise at all. This is especially true given that our proposals would not authorize courts to annul criminal prohibitions, which would remain intact in criminal codes.[162] In this sense, courts will not differ greatly from prosecutors, who regularly exercise their discretion to refrain from fully enforcing the criminal code.[163]

Our proposals would, in fact, substantiate separation of powers values. Central to the idea of separation of powers is the concept of checks and balances.[164] Most judges and academics concur that maintaining the

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157. *See, e.g.*, Roberts, *supra* note 54, at 331 ("[C]ourts have invoked the separation of powers as a constraint on the circumstances in which dismissals [in the furtherance of justice or due to *de minimis* concerns] can be granted . . . .").

158. *See* Langer, *supra* note 6, at 74–75 (discussing a similar concern).

159. *See* Bordenkircher v. Hayes, 434 U.S. 357, 364 (1978) (discussing prosecutors' broad charging discretion).

160. *See supra* Sections II.A, II.B, II.C.

161. *See supra* notes 154–56 and accompanying text; Daniel Epps, *Checks and Balances in the Criminal Law*, 74 VAND. L. REV. 1, 59 (2021) ("[T]here is reason to think that American criminal justice is currently in the midst of a window in which reform that might have seemed unthinkable even a decade ago is possible.").

162. *See supra* notes 85, 121 and accompanying text.

163. To be sure, there are important normative justifications for this discretion. *See* Stephanos Bibas, *The Need for Prosecutorial Discretion*, 19 TEMP. POL. & C.R. L. REV. 369, 370 (2010) ("Even in a world of unlimited resources and sane criminal codes, [prosecutorial] discretion would be essential to doing justice."); *see also* W. Robert Thomas, *Does the State Have an Obligation Not to Enforce the Law?*, 101 WASH. U. L. REV. 1883 (2024).

164. The relationship between the concepts of "separation of powers" and "checks and balances" is complicated. *See* Epps, *supra* note 161, at 5 ("Although these two phrases are often used interchangeably in American constitutional discourse, they are not synonymous.").

separation of powers relies on providing government branches with both "the means to protect the exercise of their own functions" and the tools to "check the exercise of functions by the others."[165] The latter, in particular, is key for the protection of liberty and as a safeguard against tyranny.[166] Such safeguards are especially necessary in the context of criminal law, where "the accumulation of too much power in one branch"[167] is particularly dangerous.[168] Our proposals would serve as a necessary judicial check on both the legislative and the executive, in light of the legislatures' structural motivations to engage in over-criminalization and the prosecutors' barely limited power and discretion.[169]

Admittedly, courts have hesitated to review prosecutorial charging discretion,[170] sometimes invoking separation of powers concerns.[171] We find the appeal to such concerns unconvincing. Given the "far-reaching implications of this discretion," this is exactly where judicial review is essential.[172] It is especially so considering the reality of plea bargaining, where prosecutors largely control most aspects of the criminal justice system. As Rachel Barkow observed, "[a] system where upwards of ninety-five percent of all convictions result from pleas and where prosecutors make all the key judgments does not fit comfortably with the separation of powers."[173]

B. Effectiveness

Another possible challenge to our attempt to advance criminal justice

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165. M. Elizabeth Magill, *The Real Separation in Separation of Powers Law*, 86 VA. L. REV. 1127, 1147–52 (2000).

166. *See* Epps, *supra* note 161, at 5–6 ("[Checks and balances] strategies could more effectively protect liberty and other values than would dividing political power across functionally differentiated institutions.").

167. Rachel E. Barkow, *Separation of Powers and the Criminal Law*, 58 STAN. L. REV. 989, 1032–33 (2006).

168. *Id.* at 994–95.

169. *See supra* Section I.A.

170. *See, e.g.*, Wayte v. United States, 470 U.S. 598, 607 (1985) ("[T]he decision to prosecute is particularly ill-suited to judicial review.").

171. Shima Baradaran Baughman, *Subconstitutional Checks*, 92 NOTRE DAME L. REV. 1071, 1094 & n.135 (2017) (providing examples where "federal and state courts have found that prosecutorial discretion is protected by separation of powers").

172. Yoav Sapir, *Neither Intent nor Impact: A Critique of the Racially Based Selective Prosecution Jurisprudence and a Reform Proposal*, 19 HARV. BLACKLETTER L.J. 127, 139 (2003); *see also* Epps, *supra* note 161, at 71 ("Allowing for some review of charging and non-charging decisions could promote separation-of-powers values, even if doing so would allow courts to intrude on an area we typically think of as reserved for prosecutors."); Baughman, *supra* note 171, at 1099 ("Ironically, separation of powers, which is at the core of the constitutional requirement of checks and balances, has been used to consolidate power in the executive branch rather than maintain balanced power between the three branches.").

173. Barkow, *supra* note 167, at 1049.

minimalism through the work of courts has to do with its expected effectiveness. Some may claim that our proposed principles would not contribute much to the goals of minimalism since criminal courts have so far done little to curb overcriminalization and over-prosecution.[174] Others may argue that even if judges did want to advance minimalism, the prevalence of plea bargains and the shortage of trials would largely prevent them from doing so.[175]

Even if one believes that judges have not done enough to minimize over-incarceration, it would be wrong to say they have done nothing, especially when provided with adequate powers. For instance, judges authorized by their respective state laws to dismiss prosecutions in the furtherance of justice or due to meritorious *de minimis* claims have exercised their authority in varying degrees.[176] As Anna Roberts observed, "[t]hrough this dismissal power—and the fact that they exercise it—these judges demonstrate that there can be some oversight of the prosecution's use (or disuse) of its duty to do justice,"[177] and that "judges have the power to stand firm as gatekeepers of the criminal law, monitoring its use and pushing back against its overuse."[178] Conversely, in systems where such dismissals have not been formally authorized, judges have not dismissed prosecutions even where they thought that dismissal would be the just decision to make.[179] Hence, there are good reasons to think that judges who are granted tools to advance minimalism will often use them when appropriate.[180]

Furthermore, judges could promote minimalism even in a reality of "[p]lea [b]argaining as the [n]orm."[181] To begin with, plea bargaining would not interfere with the judges' authority to apply penal restraint. Judges alone have the "final authority to select an appropriate sentence from within a range of punishment."[182] This remains the case even when a plea agreement reached by the parties recommends that a judge impose a certain sentence,

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174. *See generally* Clair & Woog, *supra* note 1, at 9 (arguing that criminal courts "are sites where the cruel minutiae of the carceral system is perpetrated and legalized, allowing the millions of stops, searches, and arrests by police each year to become 2.3 million people imprisoned and separated from their families and more than 4.5 million people on probation and parole").

175. *See generally* William Ortman, *When Plea Bargaining Became Normal*, 100 B.U. L. REV. 1435, 1437 (2020) ("[A]round 95% of criminal convictions are based on guilty pleas, most of which are the result of plea bargains.").

176. *See* Roberts, *supra* note 54, at 339–50 (providing examples of such dismissals).

177. *Id.* at 349 (footnote omitted).

178. *Id.* at 348 (footnote omitted).

179. *Id.* at 338.

180. However, not all judges have exercised their dismissal authority, even where it would have been proper to do so. *Id.* at 356–60.

181. Stephanos Bibas, *Regulating the Plea-Bargaining Market: From Caveat Emptor to Consumer Protection*, 99 CALIF. L. REV. 1117, 1138 (2011).

182. Nancy J. King, *Judicial Oversight of Negotiated Sentences in a World of Bargained Punishment*, 58 STAN. L. REV. 293, 293–94 (2005).

given that judges are in no way obliged to accept it.[183] Insofar as there are no specific laws that mandate imprisonment, judges would be free to refrain from imposing imprisonment even when this is the sanction recommended by the parties.

Plea bargaining would also not prevent judges from promoting minimalism through our proposed *de minimis* and *ultima ratio* dismissals. Granted, prosecutors enjoy very broad discretion in their charging decisions, with very few constitutional limitations.[184] However, judges reviewing plea agreements can still choose to reject them where prosecutors have violated the "subconstitutional state law" that regulates prosecutorial decision-making.[185]As Andrew Crespo suggested, where state law gives judges the power to dismiss prosecutions due to *de minimis* or in the furtherance of justice, judges can exercise it to review plea bargains.[186] States that adopt *de minimis* or *ultima ratio* dismissals into law would then authorize criminal courts to advance minimalism even when the parties have reached a plea agreement. Notably, the possibility of a judicial *de minimis* or *ultima ratio* dismissal may promote minimalism even before a case reaches a court. The reason is that wariness about such dismissals may lead prosecutors to refrain from bringing charges in the first place or at least serve as a "bargaining chip" for defense attorneys negotiating for more lenient plea deals.

Lastly, our proposals' effectiveness depends on the expansion of available alternatives to criminal prosecution and incarceration. Alternatives to the traditional criminal process may include, for instance, restorative justice programs, problem-solving courts, or civil or disciplinary proceedings. Alternatives to incarceration may include monetary sanctions (like day fines or other "ability-to-pay reforms"),[187] electronic monitoring, or community service programs. Importantly, developers of such alternatives and judges considering them should beware of inadvertent "net-

183. *See, e.g.*, Candace McCoy, *Plea Bargaining as Coercion: The Trial Penalty and Plea Bargaining Reform*, 50 CRIM. L.Q. 67, 83 (2005) ("In sentence bargaining, judges can intervene when a plea-bargained punishment to which both the prosecutor and defender have agreed does not comport with the judge's determination of what the defendant deserves.").

184. Crespo, *supra* note 56, at 1305 ("[T]he constitutional law of criminal procedure that is ostensibly designed to regulate state power imposes virtually no constraints on prosecutors' plea bargaining practices at all.").

185. *Id.* at 1305–06. Crespo defines "subconstitutional state law" as "an interlocking set of legal frameworks that comprises the law of joinder and severance, the law of preclusion, the law of cumulative sentencing, the law of pretrial charge review, the law of dismissal and amendment, and the law of lesser offenses." *Id.* at 1306.

186. *Id.* at 1358–60.

187. *See* MITALI NAGRECHA, CRIM. JUST. POL'Y PROGRAM, THE LIMITS OF FAIRER FINES: LESSONS FROM GERMANY 113 (2020), https://www.fairtrials.org/app/uploads/2021/11/day-fines-germany.pdf [https://perma.cc/F2PK-7TDF] (urging jurisdictions deliberating the adoption of day fines to consider other, possibly fairer "ability-to-pay reforms").

widening."[188] In addition, to make sure that extensive decarceration efforts are indeed sustainable, "[i]t will be necessary to carefully assess available [social] services to determine if there are sufficient quality services in accessible locations to meet the needs of otherwise imprisoned members of the community."[189]

C. Unequal Application

The most troubling potential challenge to judicial promotion of minimalism is that courts would apply our proposed principles unequally. In some contexts, such as sentencing, expanded judicial discretion has been reported to contribute to inequality in outcomes, including greater racial disparities.[190] The risk, therefore, is that judges, equipped with new tools to dismiss prosecutions or avoid the imposition of imprisonment, would use them in biased or arbitrary ways.[191]

Jurisdictions interested in adopting the principles of *de minimis*, *ultima ratio*, or penal restraint should address this vital issue by implementing proper safety measures. These may include, for example, increased transparency requirements at the judicial level. Thus, judges should be required to explain the reasons for their decisions to apply—or to refrain from applying—any of these principles. Court decisions should also be appealable. In addition to an opportunity to correct biased or otherwise erroneous decisions, the possibility of decisions being appealed and overturned would also push judges to strive to apply these principles fairly and equally in the first place.[192] In the context of disparities in sentencing, for instance, judges were found to be particularly "responsive to changes in the likelihood of appellate reversal," and "the racial sentencing gap expanded most prominently after periods of more deferential appellate review."[193] Additionally, judicial discretion can be expected to be further structured by case law and perhaps by legislatures or professional

188. *See* Godsoe, *supra* note 3, at 201 ("A perhaps unintended, but pervasive, problem with efforts to decarcerate is net-widening, or expanding surveillance, control, and punishment of marginalized communities."); Avlana K. Eisenberg, *Mass Monitoring*, 90 S. CAL. L. REV. 123, 150 (2017) (discussing "concerns about [electronic monitoring's] net-widening effect").

189. NAT'L RSCH. COUNCIL, *supra* note 139, at 351; *see also* Langer, *supra* note 6, at 76 ("The elimination of mass incarceration and the reduction of punitiveness in the United States would require the use of other social and public policy tools such as ensuring that people have access to housing, food, education, health care, jobs and economic security, a healthy environment, and so forth.").

190. *See, e.g.*, Crystal S. Yang, *Free at Last? Judicial Discretion and Racial Disparities in Federal Sentencing*, 44 J. LEGAL STUD. 75, 77 (2015) (finding that expanded judicial discretion in sentencing "significantly increased racial disparities").

191. *See, e.g.*, Roberts, *supra* note 54, at 360–64 (raising similar concerns in the context of *de minimis* and dismissals in the furtherance of justice).

192. *See generally* Stuntz, *supra* note 18, at 541–42 (discussing why "judges dislike reversal").

193. Yang, *supra* note 190, at 77.

commissions. As the drafters of the Model Penal Code suggested in the context of their proposal of imprisonment as a last resort, "[t]he provision of statutory criteria, coupled with sentencing seminars or exercises at judicial conferences, for example, may be a substantial step toward reducing disparity."[194] We also recommend that the implementation of every one of our proposals be accompanied by research teams assigned the task of examining their effectiveness and fair application.[195]

Our proposed principles can also be expected to *minimize* racial and social inequality and unfairness. Currently, courts are limited in their ability to minimize the harmful effects of discriminatory policing and prosecution practices. Studies have confirmed the existence of racial biases in law enforcement and prosecution,[196] but the requirements for proving selective enforcement or selective prosecution are so demanding that such claims are consistently rejected.[197] The principles of *de minimis* and *ultima ratio* would give judges the power to dismiss cases likely reflecting conscious or implicit biases, even where selective enforcement or selective prosecution cannot be proven.[198] Furthermore, to the extent that substantive criminal law itself is understood to be a function of racial and social biases,[199] providing judges with the tools to dismiss prosecutions of conduct that should be addressed by other means becomes even more critical. As W. Robert Thomas explained, "maximal enforcement, even if carried out in a neutral, non-pretextual manner, threatens to either preserve [or] even expand unjust social hierarchies."[200] The racial and social reality of criminal law in the United States also supports the adoption of the penal restraint principle. As one influential report authored by the National Research Council's

194. MODEL PENAL CODE § 7.01 cmt. on "Need for Legislative Guidance" (AM. L. INST., Official Draft and Revised Comments 1985).

195. *See generally* Carol S. Steiker & Jordan M. Steiker, Essay, *Should Abolitionists Support Legislative "Reform" of the Death Penalty?*, 63 OHIO ST. L.J. 417, 429 (2002) (discussing the importance of "provisions that call for the evaluation of the success of proposed reforms after a period of time").

196. *See, e.g.*, Sapir, *supra* note 172, at 130–33 (discussing "empirical studies supporting the claim that there is a real problem of racial bias in the specific field of prosecutorial discretion").

197. *See* Rubinstein, *supra* note 58, at 829 ("[C]riminal defendants who raise selective prosecution or selective enforcement claims in court virtually always lose.").

198. *See* Pomorski, *supra* note 63, at 99 (suggesting that *de minimis* "can serve as an important check on overbroad discretionary powers of prosecutors, as well as police, who exercise de facto power of decriminalization by a practice of selective enforcement or nonenforcement"); Roberts, *supra* note 54, at 346 ("Judges applying [*de minimis* or dismissal in the furtherance of justice] statutes sometimes seize the opportunity to push back against aspects of the bias that pervades our criminal justice system.").

199. *See, e.g.*, Paul Butler, *Affirmative Action and the Criminal Law*, 68 U. COLO. L. REV. 841, 868 (1997) (discussing "the distorting influence of white supremacy on the political and legal processes by which 'criminals' are named and selected for punishment"); Alice Ristroph, *What Is Remembered*, 118 MICH. L. REV. 1157, 1170 (2020) (book review) ("Long before the arrival of the automobile, white Americans across the country knew that criminal law could be used for purposes of racial subordination.").

200. Thomas, *supra* note 163, at 19.

Committee on Causes and Consequences of High Rates of Incarceration stated, "[p]arsimonious use of punishment may not only minimize unnecessary use of penal sanctions including imprisonment, but also limit the negative and socially concentrated effects of incarceration."[201]

CONCLUSION

The success of the emerging criminal justice minimalism movement depends not only on strong moral foundations but also on achievable avenues to further its goals and values. In theory, sweeping legislative measures like extensive decriminalization would be ideal for the advancement of minimalism. In practice, they are often unfeasible and limited in their impact. Although criminal courts have suffered from scholarly inattention, this Article demonstrates they can become major engines of change, putting minimalist principles into action. To realize their full minimalist potential, however, they must be provided with adequate guiding principles and legal devices, including *de minimis*, *ultima ratio*, and penal restraint.

201. NAT'L RSCH. COUNCIL, *supra* note 139, at 327.