DOES THE STATE HAVE AN OBLIGATION NOT TO ENFORCE THE LAW?

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INTRODUCTION

Does the State have any obligation not to enforce its own law? Scholars have long debated whether and to what extent we—that is, us as citizens of the State—have an obligation to obey the law.[1] Frequently taken for granted, however, is an assumption that the State generally has a corresponding duty to enforce the law.[2] Now, to be sure, plenty of attention has been paid to special circumstances where the State ostensibly has discretion, maybe even an obligation, either not to enforce specific laws or not to enforce the law in

1. *See generally* Massimo Renzo & Leslie Green, *Legal Obligation and Authority*, STAN. ENCYCLOPEDIA PHIL. (June 30, 2022), http://plato.stanford.edu/entries/legal-obligation [https://perma.cc/F9XF-3QDK] (collecting citations); George Klosko, *The Moral Obligation to Obey the Law*, *in* THE ROUTLEDGE COMPANION TO PHILOSOPHY OF LAW 511–25 (Andrei Marmor ed., 2012) (same). The modern frame for these debates is usually traced to Robert Paul Wolff and M.B.E. Smith. *See generally* ROBERT PAUL WOLFF, IN DEFENSE OF ANARCHISM (1970); M. B. E. Smith, *Is There a Prima Facie Obligation to Obey the Law?*, 82 YALE L.J. 950 (1973).

2. This Essay uses the terms "duty" and "obligation" interchangeably. There is plenty of opportunity for space between the two concepts. *See generally* R.B. Brandt, *The Concepts of Obligation and Duty*, 73 MIND 374 (1964). But, at least at this stage of inquiry, nothing in the analysis hangs on an such distinction.

specific ways.[3] For one example, take prosecutorial discretion. The practical inability to respond to every legal violation informs standard, pragmatic vindications of the State's prerogative to decide where to focus its limited resources, which ultimately results in a species of the State not enforcing the law. For another, renewed advocacy against police violence has once again made salient a core, longstanding demand of civil rights advocates—namely, that the State should not selectively or pretextually enforce criminal statutes in a manner that systematically discriminates against or marginalizes minority groups. And for a third, classic debates in analytic jurisprudence have long debated whether immoral or unjust laws actually "count" as law; up for grabs here in the political background is a state actor's right and responsibility to refuse to enforce wicked laws.

But, for purposes of discussion, put aside the practical resource constraints. Put aside laws that are obviously unjust or unjustly applied. Even still, is there any remaining obligation on the State not to enforce the law? And if so, what might be the scope and content of such an obligation? Are the examples above—executive discretion, pretext, and wicked laws—bound together by some common justification, or are they only superficially similar?

This Essay sketches several reasons to think there exists a freestanding, defeasible obligation on the State not to enforce its own law. The modest ambition here is only to establish some outer limit on the State's obligation to enforce the law. Whatever this duty of non-enforcement requires, it should be understood to rule out maximal enforcement; whether it reaches further must be left to additional research. Nevertheless, even this narrow finding has bite. Although it cannot not fully account for prosecutorial discretion, unjust laws, and pretextual enforcement, a general obligation of the State not to enforce the law promises to unite these disparate phenomena under a single banner. In doing so, appreciating this non-enforcement improves theorizing about overcriminalization, abolitionism, and—given the impetus for this Symposium issue—burgeoning accounts of criminal law minimalism.[4]

Indeed, this Essay argues that, for two reasons, criminal law minimalists should embrace this account of an obligation on the State not to enforce the

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3. *See infra* Section II.A.

4. Discussion here follows the overlapping accounts of criminal law minimalism recently articulated by Máximo Langer, Christopher Slobogin, and Douglas Husak. *See generally* Máximo Langer, *Penal Abolitionism and Criminal Law Minimalism: Here and There, Now and Then*, 134 HARV. L. REV. F. 42 (2020); Christopher Slobogin, Essay, *The Minimalist Alternative to Abolitionism: Focusing on the Non-Dangerous Many*, 77 VAND. L. REV. 531 (2024); DOUGLAS HUSAK, OVERCRIMINALIZATION: THE LIMITS OF THE CRIMINAL LAW (2008). For a sympathetic account of criminal law minimalism, see JOHN BRAITHWAITE & PHILIP PETTIT, NOT JUST DESERTS: A REPUBLICAN THEORY OF CRIMINAL JUSTICE (1990). *See also id.* at 94 ("[R]epublican commitments would direct the criminal justice system towards the minimal type of institution which the liberal applauds.").

law. First, without it, criminal law minimalism risks flattening or oversimplifying the criminal law in a manner that does not actually solve the concerns giving rise to the need for an obligation not to enforce the law. As argued below, there is good reason to think that a richer, normatively thicker set of criminal prohibitions is preferable to an overly sparse criminal law—but only if coupled with a further commitment to something like an obligation not to enforce the law. Second, the obligation not to enforce the law is not itself reducible to current minimalist proposals to deprioritize criminal enforcement. In fact, the opposite may be true: an obligation to enforce the law arguably provides a more fundamental justification that grounds and gives at least some content to the enforcement priorities that underwrite criminal law minimalism.

I. TOWARD A DUTY AGAINST MAXIMAL ENFORCEMENT: MAKING SENSE OF THE STATE'S COMPETING OBLIGATIONS TO ENFORCE, AND NOT ENFORCE, THE LAW

It might sound odd to suggest that the State has an obligation *not* to enforce the law. The opposite—sure, that makes sense. Not for nothing, but at least some version of duty to enforce the law is enshrined in the U.S. Constitution.[5] Indeed, if recent fights around any number of hot-button political issues—from abortion to immigration, drug policy to progressive prosecutors—are to be believed, it seems an open question among many interlocutors even whether the State has discretion to decline to enforce the law, much less an affirmative obligation to do so.

So, in case there is any confusion, the target here is not to conclude the State *never* has an obligation to enforce the law. Often it does! Rather, the ambition of this Part is to motivate the idea that the State has a general obligation not to enforce the law. Part I shows how such an obligation is reflected in, although not exhausted by, well-known circumstances where we already expect that the State should abstain from enforcement. From here, Part II aims to establish the modest point that the State at least has an obligation not to *maximally* enforce the law.

A. The State's (Qualified) Duty to Enforce the Law

Start with the (hopefully uncontroversial) assertion that the State should enforce the law. The claim does not concern any specific law but rather the law generally. To be sure, there remains deep disagreement over what precisely is entailed by a concept like the rule of law and its relationship to

5. *See* U.S. CONST. art. II, § 3 (requiring that the President "shall take Care that the Laws be faithfully executed").

legitimate political authority.[6] Clearly there are limits to what and how the State can justifiably behave both toward and on behalf of its citizens and those it governs. Nevertheless, within these confines, one of the State's basic functions is to make and execute the law, which necessarily involves enforcing violations of those laws. We could characterize this claim in terms of obligation or duty. We might even think it is something stronger than that. Enforcement of the law is not just something that the State ought to do; rather, enforcement of the law is a defining characteristic identifying the State as "the State."[7] Put differently, what it is to be the State, at least in a society governed by the rule of law, is in part constituted by the ability and responsibility to make, maintain, execute, and enforce the law.

In referring here to the State, nothing is being assumed yet about the legislature, the executive, prosecutors, police officers, or any of the other common trappings of the State's enforcement apparatuses. For now, the focus is on enforcement as a formal concept. To conclude that the State has an obligation to enforce (or not enforce) the law leaves open the question of how to go about operationalizing that obligation.[8] Criminal law, of course, is the most well-known—and, these days, the most concerning—public institution of state enforcement. But there is no reason ex ante to treat the State's enforcement powers as coterminous with criminal punishment.[9] The State enforces the law through civil and regulatory mechanisms as well as criminal prohibitions.[10] More generally, what it means to enforce the law is itself an open question; the expression is hardly self-defining.

The aim for the remainder of Part I is to rule out a naïve, literal interpretation of the State's duty to enforce the law—namely, that the State's obligation requires the State to always, on all occasions, enforce all of its laws. To start getting traction on why this maximalist interpretation of

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6. For an abbreviated overview of current and historical disagreements, see Jeremy Waldron, *The Rule of Law*, STAN. ENCYCLOPEDIA PHIL. (Sept. 19, 2023), https://plato.stanford.edu/entries/rule-of-law/ [https://perma.cc/5YFQ-ZN3F].

7. This characterization might best be understood as the inverse of the claim, advanced by some natural law theorists, that the concept of law necessarily entails its obligation to obey. *See* THOMAS MCPHERSON, POLITICAL OBLIGATION 64 (H. Victor Wiseman ed., 1967); Lon L. Fuller, *Positivism and Fidelity to Law—A Reply to Professor Hart*, 71 HARV. L. REV. 630, 655–57 (1958).

8. For more on this point, see *infra* Section II.B.

9. *See* Benjamin Levin, *Criminal Law Exceptionalism*, 108 VA. L. REV. 1381, 1403 (2022) ("The criminal system and its component institutions reflect certain models of governing, managing, and responding to political and social problems . . . [that] aren't necessarily unique to criminal law . . . ."); *see also* DAVID GARLAND, PUNISHMENT AND MODERN SOCIETY: A STUDY IN SOCIAL THEORY 256 (1990). *See generally* VINCENT CHIAO, CRIMINAL LAW IN THE AGE OF THE ADMINISTRATIVE STATE (2019) (defending an account of criminal law as one of many regulatory institutions deployed by the modern administrative state).

10. Indeed, even when the State is not a party, it still enforces the law. Private litigation depends on state action to, at a minimum, create a legal forum, settle substantive and procedural disputes, and endow the prevailing party with legal powers that she did not have before. *See generally* William M. Landes & Richard A. Posner, *The Private Enforcement of Law*, 4 J. LEGAL STUD. 1 (1975).

the duty is unjustified, consider several examples for which there is a straightforward sense in which the State could enforce the law, but nevertheless we think that it need not—or, even stronger, it should not.

For starters, certainly the State has a duty not to enforce the law *in particular ways*. The State should not enforce the law selectively or pretextually, at least when the basis for the pretext is independently wrongful or morally objectionable. As an illustration, consider the role that jaywalking—that is, crossing the street at a location other than a designated crosswalk—statutes played in furthering systemic, race-based discrimination. Following the fatal police shooting of teenager Michael Brown in 2014, the Department of Justice conducted a systematic investigation of policing practices in Ferguson, Missouri. The DOJ's final report determined that local police, among many other abuses, drastically and disproportionately enforced jaywalking and similar pedestrian infractions against the city's Black citizens.[11] Ferguson is not unique: Jacksonville, Minneapolis, and Seattle are among several cities found to have engaged in systemic, race-based enforcement of pedestrian laws,[12] giving rise to the expression "walking while Black."[13] Put aside whether policing pedestrians is a worthwhile objective of a criminal law system.[14] Even assuming it is within the State's purview to prohibit jaywalking, and thereby to enforce that prohibition against all citizens, obviously the greater does not entail the lesser. State enforcement must be constrained by a

11. *See* C.R. DIV., U.S. DEP'T OF JUST., INVESTIGATION OF THE FERGUSON POLICE DEPARTMENT 67 (2015), https://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/04/ferguson_police_department_report.pdf [https://perma.cc/F4KM-5Q5D].

12. *See* C.R. DIV., U.S. DEP'T OF JUST. & DIST. OF MINN. CIV. DIV., U.S. ATT'Y'S OFF., INVESTIGATION OF THE CITY OF MINNEAPOLIS AND THE MINNEAPOLIS POLICE DEPARTMENT 32 (2023), https://www.justice.gov/d9/2023-06/minneapolis_findings_report.pdf [https://perma.cc/G3JJ-K52E]; Topher Sanders, Kate Rabinowitz & Benjamin Conarck, *Walking While Black*, PROPUBLICA (Nov. 16, 2017), https://features.propublica.org/walking-while-black/jacksonville-pedestrian-violations-racial-profiling/ [https://perma.cc/TW7L-TZ86] (cataloguing the proliferation and racialized enforcement of jaywalking statutes in Jacksonville, Florida); Press Release, Off. Of Pub Affs., U.S. Dep't of Just., Justice Department Releases Investigative Findings on the Seattle Police Department (Dec. 16, 2011), https://www.justice.gov/opa/pr/justice-department-releases-investigative-findings-seattle-police-department [https://perma.cc/WZH6-CP37].

13. Garnette Cadogan, *Walking While Black*, LITERARY HUB (July 8, 2016), https://lithub.com/walking-while-black/ [https://perma.cc/B7MC-NCCD]; *cf.* David A. Harris, Essay, "*Driving While Black" and All Other Traffic Offenses: The Supreme Court and Pretextual Traffic Stops*, 87 J. CRIM. L. & CRIMINOLOGY 544, 546 (1997) ("African-Americans sometimes say they have been stopped for the offense of 'driving while black.'"). *See generally Walking While Black*, MARSHALL PROJECT (Aug. 31, 2022, 6:50 PM), https://www.themarshallproject.org/records/4653-walking-while-black [https://perma.cc/6DCS-T9RG] (collecting sources on this topic).

14. *See generally* Michael Lewyn, *The Criminalization of Walking*, 2017 U. ILL. L. REV. 1167.

broader prohibition on using facially benign statutes to pretextually discriminate against minority populations.[15]

For another example, clearly it is *permissible* for the State not to enforce the law when it lacks the ability or capacity to do so. And insofar as the State has limited resources, it further seems permissible for state actors to select among various enforcement priorities (again, subject to constraints on pretext, etc.) even though the consequence of doing so is that some infractions and even some laws will inevitably go unenforced. Prosecutors in most U.S. jurisdictions have long retained a nigh-unassailable right to choose the cases they pursue that entails a power to decline to prosecute at least some colorable cases.[16] This right has seen its strongest expression lately in the progressive prosecutor movement. The rise (in profile, at any rate) of progressive prosecutors is motivated by a shared view that certain laws should not be enforced because of their unjust class- and race-based consequences.[17]

Moreover, prosecutorial discretion is only one instance of a broader family of situations where the executive declines to enforce a particular law or to enforce the law against a particular defendant. Federal immigration policy has been an object lesson in recent years. In 2012, the Obama administration's Department of Homeland Security adopted the Deferred Action for Childhood Arrivals (DACA) memorandum.[18] At its most basic, the DACA Memo offers assurance, albeit not a legal guarantee, that the federal government will refrain from enforcing immigration laws against qualifying individuals.[19] At the same time, red and blue states alike have battled with the federal government over immigration and drug enforcement policies. Although federal law is technically supreme, states have managed to effectively "nullify" certain federal laws by refusing to assist U.S.

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15. It is a separate question whether the State has an obligation not to enforce facially neutral statues where doing so, even absent pretext, would nevertheless disproportionately impact citizens along protected identities. *See infra* Section I.B.5.

16. *See* United States v. Fokker Services B.V., 818 F.3d 733, 741–42 (D.C. Cir. 2016). *But see* Stephanos Bibas, *The Need for Prosecutorial Discretion*, 19 TEMP. POL. & C.R. L. REV. 369, 369–70 (2010) (noting that a few states, as well as several civil legal systems, purport to reject the principle of prosecutorial discretion).

17. *See* Zachary S. Price, *Faithful Execution in the Fifty States*, 57 GA. L. REV. 651, 673–79 (2023) (cataloguing efforts).

18. *See* Memorandum from Janet Napolitano, Sec'y of Homeland Sec., to David V. Aguilar, Acting Comm'r, U.S. Customs & Border Prot., et al. (June 15, 2012) [hereinafter DACA Memo], https://www.dhs.gov/xlibrary/assets/s1-exercising-prosecutorial-discretion-individuals-who-came-to-us-as-children.pdf [https://perma.cc/PL5A-53QS].

19. DACA has been, and continues to be, challenged, revised, rescinded, and reinstated across now three administrations. *See* Giulia McDonnell Nieto del Rio & Miriam Jordan, *What is DACA? And Where Does It Stand Now?*, N.Y. TIMES (June 14, 2022), https://www.nytimes.com/article/what-is-daca.html [https://perma.cc/8WJH-RY9U].

officials in carrying out stated federal priorities.[20] Admittedly, it is a harder question whether the State may decline to enforce the law in the absence of resource constraints. Here, it is notable that disputes over progressive prosecutors and executive enforcement generally take up at least the rhetoric of scarcity.[21] That is, those exercising discretion take pains to highlight that they are merely allocating scarce resources; meanwhile, their critics accuse them of shirking their professional obligations by substituting personal preferences for political duties.

As a final, and perhaps most controversial, example, the State might have a duty not to ever enforce *specific laws*—namely, those are transparently unjust, wicked, or immoral. Take, for example, the Fugitive Slave Act of 1850, which required state officials to seize purportedly escaped slaves at the demand of asserted owners while denying seized individuals legal avenue to rebut accusations of ownership.[22] Many people then, and most everyone today, would agree that the Fugitive Slave Act is a transparently immoral law, and thereby the State had strong, arguably decisive, reason not to enforce it. For a more contemporary example, the criminalization of sodomy in the United States—a longstanding practice that survived, at least on paper, well into the 2000s—strikes a large portion of the population as wrong for a variety of moral or political grounds, such that it would be wrong for the State to enforce its anti-sodomy statutes.[23]

Again, the status of unjust laws—and thus, the State's obligations with respect to those laws—remains a contested situation. Some scholars have suggested that unjust or wicked laws in fact lack the full status of laws, such that the State would never be permitted to enforce them in the first place. Natural law theorists have long taken the position that *lex iniusta non est lex*—that is, an unjust law is no law at all.[24] According to Fuller, for example, blatantly immoral "laws" in fact lack the status of law; these laws-in-name-only cannot legitimately be enforced.[25] Others have suggested that

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20. *See* Trevor George Gardner, *Right at Home: Modeling Sub-Federal Resistance as Criminal Justice Reform*, 46 FLA. ST. U. L. REV. 527, 555–57 (2019).

21. *See e.g.*, DACA Memo, *supra* note 18, at 1 (defending the policy on the grounds that "enforcement resources [should] not [be] expended on these low priority cases but [should] instead [be] appropriately focused on people who meet our enforcement priorities").

22. Act of September 18, 1850, 9 Stat. 462 (1850) (repealed 1864); *see* ROBERT M. COVER, JUSTICE ACCUSED: ANTISLAVERY AND THE JUDICIAL PROCESS 159–91 (1975) (tracing constitutional adjudication by judges asked to enforce the Fugitive Slave Acts of 1793 and 1850); Joel Feinberg, *Natural Law: The Dilemmas of Judges Who Must Interpret Immoral Laws*, *in* PROBLEMS AT THE ROOTS OF LAW: ESSAYS IN LEGAL AND POLITICAL THEORY 18–20 (2003).

23. *See* Lawrence v. Texas, 539 U.S. 558, 578 (2003) (holding unconstitutional anti-sodomy laws because, inter alia, they serve no rational purpose beyond expressing the State's animus toward a minority population).

24. *See* THOMAS AQUINAS, SUMMA THEOLOGIAE PRIMA SECUNDAE, 1-70, Q. 96, A. 4 (Laurence Shapcote trans., Aquinas Institute 2017).

25. *See* Fuller, *supra* note 7, at 636–37.

unjust laws are laws like any other but that general moral demands permit state actors to refuse enforcement. Feinberg cashes out the conflict by appealing to role morality.[26] State actors asked to enforce immoral laws are faced with a conflict, on this view, between the political obligations they assume by virtue of agreeing to serve as an agent of the State and their general obligation as moral actors. Feinberg even imagines that such a person could defy the edicts of role morality in service of their general moral obligations.[27] And some legal positivists have simply bit the bullet, suggesting that immoral laws must in fact be enforced.[28] The positivist approach here instead seeks to push the problem earlier: the State has an obligation not to create immoral laws, compromising the legitimacy of its political authority when it does otherwise.[29]

The prior examples are meant to motivate the perhaps-obvious point that the State's duty to enforce the law is neither unlimited nor unqualified. Admittedly, none of these examples requires accepting that there is some counterpart obligation on the State that it not enforce the law—though, as will be seen, they are compatible with such a view. There is a difference between an obligation not to enforce specific laws and an obligation not to enforce the law generally. Denying the State's authority to engage in selective or pretextual enforcement is not the same as insisting that the State has a general obligation not to enforce the law. A prohibition on pretextual enforcement imposes a constraint on how, not whether, to enforce the law.[30] The cure for pretext is not necessarily to drop the case but rather to cure the pretext.[31] Meanwhile, prosecutorial discretion—and, in a larger-scale

26. *See* Feinberg, *supra* note 22, at 38–39. On role morality, see generally Diane Jeske, *Special Obligations*, STAN. ENCYCLOPEDIA PHIL. (Aug. 6, 2019), https://plato.stanford.edu/entries/special-obligations/ [https://perma.cc/ZEL8-DV92].

27. *See* Feinberg, *supra* note 22, at 39. *But see* ROBERT ALEXY, THE ARGUMENT FROM INJUSTICE: A REPLY TO LEGAL POSITIVISM 116–21 (Bonnie Litschewski Paulson & Stanley L. Paulson trans., 2002) (arguing that Kant's natural law theory entails a moral and legal obligation to obey even unjust laws).

28. *See, e.g.*, JOHN AUSTIN, THE PROVINCE OF JURISPRUDENCE DETERMINED 157 (Wilfrid E. Rumble ed., Cambridge Univ. Press 1995) (1832) ("The existence of law is one thing; its merit or demerit is another."); H.L.A. HART, THE CONCEPT OF LAW 208–12 (2d ed. 1994); H.L.A. Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593, 626 (1958).

29. *See generally* JOSEPH RAZ, THE MORALITY OF FREEDOM (1986). These days, it is probably fair to say that legal positivism of some variety has won out. But it is also fair to say that the focus of analytic jurisprudence has shifted considerably away from this framing. *See generally* SCOTT J. SHAPIRO, LEGALITY (2011) (surveying the turn from the Hart-Fuller debate to the Hart-Dworkin debate in its various forms); Scott Hershovitz, *The End of Jurisprudence*, 124 YALE L.J. 1160 (2015) (same).

30. *But cf.* Gabriel S. Mendlow, *Divine Justice and the Library of Babel: Or, Was Al Capone Really Punished for Tax Evasion?*, 16 OHIO ST. J. CRIM. L. 181, 185–92 (2018) (questioning whether pretext can be distinguished from substantive criminal prohibitions).

31. Ironically, one remedy for pretextual enforcement is not less but rather more enforcement—if the law were enforced universally against everyone, there would no longer be a complaint that enforcement is unfairly selective. Permissibility does not turn here on the agent's having right reasons.

version, a government's enforcement priorities—is at base understood to be grounded on the reality of scarce resources. But resource constraints are not the same as obligations. It is consistent with prosecutorial discretion that the state has an obligation to enforce the law as best it can under the relevant circumstances. Finally, even allowing for some kind of duty or obligation not to enforce specific laws, it does not obviously follow that the State has a general obligation not to enforce the law. After all, there is a difference between specific laws and "the law" as a concept. And while there have been a variety of approaches for addressing the supposed problem of immoral laws, it is not obvious that any embrace, either explicitly or implicitly, an obligation not to enforce the law. Notice, for example, that the natural law theorist solution to the problem of unjust laws is predicated on the assumption that the State otherwise has an obligation to enforce its genuine laws. That is, the State does not have to apply its general obligation to enforce the law in these special cases because, by definition, immoral laws turn out to lack the full status of law.

One might be tempted to use these examples, therefore, as a means only of sharpening the contours of the State's duty to enforce the law. However, the following section proposes a different tack, arguing instead that the State has a general obligation not to enforce the law. The claim here is a narrow one, arguing specifically that the State has an obligation not to maximally enforce the law.

B. The State's Obligation Not to (Maximally) Enforce the Law

Our legal experiences suggest that there are specific circumstances in which it might be permissible, desirable, or maybe even obligatory for the State not to enforce the law. Even if the examples above are not themselves proof of an obligation not to enforce the law, they all speak to an intuition that something like such a duty might be warranted. The aim now is to demonstrate that these examples can be understood as specific instances of a more general phenomenon—namely, that the State has an obligation not to maximally enforce the law.

How can we make sense of the apparent contradiction, whereby the State simultaneously has a general obligation to enforce the law and general obligation not to enforce the law? A promising path out is to recognize the

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By analogy, we prefer people to do the right thing, full stop, irrespective of their reasons for doing so. *See* T.M. SCANLON, MORAL DIMENSIONS: PERMISSIBILITY, MEANING, BLAME 56–62 (2008). Of course, doing the right thing for the wrong reasons leaves one vulnerable to criticism. *Id.*

defeasibility of both obligations.[32] The supposed tension between obligations is generated by the vagueness of scope attendant to each obligation. Contradiction only arises when we give each obligation its strongest interpretation. But a claim that the State has an obligation not to enforce the law need not be read broadly to mean that the State has an obligation *never* to enforce the law. Likewise, asserting that the State has an obligation to enforce the law also fails to establish *to what extent* the State must enforce the law. After all, the general obligation to enforce the law gives way both to practical resource constraints and plausibly to specific bad laws. These constraints help us to appreciate the positive obligation as requiring that the State enforce the law *as best it can*, consistent with its other obligations.

This qualifier—the State's enforcing the law "as best it can"—admits of a wide range. A natural foil for discussion would be to assume that the State's obligation to enforce the law as best it can requires *maximal enforcement* of the law. There are at least two versions of what it would mean to maximally enforce the law. A weak version of maximal enforcement would amount to enforcing the law as best it can subject to existing constraints on resources and political will. But this interpretation is nearly vacuous—it would require little more of the State than that it not squander the resources it already devoted to enforcement. A strong version of maximal enforcement amounts to enforcing the law as best the State can, which requires committing substantial resources—well above, at any rate, the resources we see committed in the status quo—to the task.[33] Even strong maximal enforcement need not amount to perfect enforcement; the State is unlikely to prevent every violation of its laws no matter how many resources it commits to the task. This strong sense of maximal enforcement is meant to rule out, then, only cases where the State does not enforce the law merely because it is incapable of doing so. It suffices for these purposes to assume some arbitrarily high rate of enforcement across the law.

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32. A separate approach would collapse the purported duty not to maximally enforce the law into the State's positive obligation to enforce the law. *Cf.* Joseph Raz, *About Morality and the Nature of Law*, 48 AM. J. JURIS. 1, 8 (2003) ("The authority of the government cannot derive from its ability to discharge the needed job; rather, it must depend on success (or the likelihood of success) in doing so."). For example, we might end up saying that the State has a duty to "reasonably" enforce the law, where reasonableness entails the exclusion of instances of enforcement that the here-described duty not to maximally enforce the law rules out. I am skeptical about this move for independent reasons, but at least for purposes of this Essay, nothing hangs on the ultimate determination. Regardless, at least at this stage of inquiry, redefining the State's obligation in this way risks begging the question at issue.

33. In reality, it may well be that the State could not fully enforce the law even if it wanted to. Indeed, it is plausible that most societies simply lack the resources or political will for this strong obligation to have any teeth. But, at least as a thought experiment, establishing the State's general obligation can prove valuable even where scarce resources act as an independent constraint.

So stated, what are the grounds for thinking that the State has an obligation not to maximally enforce the law? I argue below that maximal enforcement would amount to too much enforcement. To clarify: *maximal enforcement* is used here as a descriptive term for the State's arbitrarily high rate of enforcing the law. *Too much enforcement*, by contrast, is a judgment about the normative status of maximal enforcement. Below are several justifications in support of an obligation on the State not to maximally enforce the law on the grounds that to do so would result in too much enforcement.

1. Too Much Enforcement Is Inefficient

Start with the obvious point that maximal enforcement would almost certainly be an inefficient allocation of the State's resources. One of the State's obligations to its citizens is to enforce the law. But, of course, this is not the State's *only* obligation to its citizens. Provision and maintenance of public infrastructure, delivery of public services, provision of national defense—these and more are goals that citizens expect the State to pursue.[34] Maximal enforcement of the law is liable to surpass any point of diminishing returns such that resources spent on enforcing the law so vigorously would be better spent elsewhere. Why think desirable a society free of jaywalking if it comes at the cost of dilapidated, unnavigable streets?

Economists discuss a similar phenomenon with respect to the natural rate of unemployment. So too in the context of illegality it seems reasonable to suspect there exists a natural rate of illegality.[35] In this respect, unemployment and illegality are facts of the social world: people will lose their jobs, people will break the law.[36] To say there is a natural rate of these phenomenon is not to endorse or praise them; in general, the State should want its citizens employed and its laws obeyed.[37] The natural rate is meant to indicate, among other things, a point at which society would be better served spending its time and resources on other endeavors than employing

34. *See* ELIZABETH ANDERSON, VALUE IN ETHICS AND ECONOMICS 159 (1993) (describing the state's obligation to provide non-economic public goods).

35. *See, e.g.*, Paresh Kumar Narayan, Ingrid Nielsen & Russell Smyth, *Is There a Natural Rate of Crime?*, 69 ECON. & SOCIO. 663, 776 (2010) ("Overall, the results provide strong support for the hypothesis that there is a natural rate of crime."). *But cf.* Robert Cooter, *Prices and Sanctions*, 84 COLUM. L. REV. 1523, 1548–51 (1984) (defending, on law and economics grounds, a categorical prohibition on murder against complaints of inefficiency).

36. *See* Slobogin, *supra* note 4, at 536 ("Interpersonal harms are inevitable, whether we call them crimes or something else.").

37. *But see* EMILE DURKHEIM, THE RULES OF SOCIOLOGICAL METHOD (W.D. Halls trans., The Free Press 1982) (1895) (describing, and qualifiedly praising, criminal deviances as an ineliminable feature of society).

the last worker or stopping the last lawbreaker.[38] In other words, eliminating illegality past the natural rate would come at the cost of expenditures that would, all things considered, prove better for society as a whole.

2. *Too Much Enforcement Is Oppressive*

Maximal enforcement would not just be inefficient; it would be oppressive. Whatever the ultimate end of the State is, creating the conditions for human flourishing seems like a worthwhile consideration. At least in cosmopolitan, liberal democracies, human flourishing is intimately connected to the preservation of a core set of individual rights—rights of expression, private beliefs, reasonable mobility, self-determination, etc.—the protection of which is a partial responsibility of the State.

Yet maximal enforcement may well be incompatible with the preservation of these individual rights in any robust sense. Consider East Germany at the height of its Cold War status, where huge swaths of the civilian population had to be conscripted to spy on the remaining population (and on each other). Or consider Orwell's apocryphal perfection of such a society where state surveillance is de rigueur and omnipresent.[39] Or, more immediately, the Los Angeles Police Department's Operation LASER, which promised crime prevention through extreme monitoring. Partnering with big-data surveillance firm Palantir, the LAPD contacted targeted individuals upwards of thirty times per week either directly, through mailings and social media, or indirectly, through encounters with their friends and family members.[40] The central complaints from the program's targets echo those leveled by protestors in Ferguson, Jacksonville, and elsewhere—namely, the demoralizing cost of living every day in a community of aggressive police enforcement of even picayune infractions.[41]

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38. *Cf.* JOHN BRAITHWAITE, CRIME, SHAME AND REINTEGRATION 182 (1989) ("[E]ffective crime control by formal deterrence requires a frequency and severity of punishment that is fiscally impossible, and so destructive of civil liberties, so unjust, that it is also politically impossible.").

39. *See generally* GEORGE ORWELL, NINETEEN EIGHTY-FOUR (1949). Too much enforcement, and especially the harms of pervasive surveillance on human flourishing, are common themes in the literature of science fiction.

40. *See* Maha Ahmed, *Aided by Palantir, the LAPD Uses Predictive Policing to Monitor Specific People and Neighborhoods*, INTERCEPT (May 11, 2018, 9:15 AM), https://theintercept.com/2018/05/11/predictive-policing-surveillance-los-angeles/ [https://perma.cc/79U2-MRRH]; *cf.* Kate Weisburd, *Punitive Surveillance*, 108 VA. L. REV. 147, 173–84 (2022) (arguing that comprehensive surveillance practices can rise to the level of a form of incarceration). For a discussion of the LAPD's embrace of technologically driven predictive policing, see generally SARAH BRAYNE, PREDICT AND SURVEIL: DATA, DISCRETION, AND THE FUTURE OF POLICING (2020).

41. *See supra* notes 11–14 and accompanying text.

3. *Too Much Enforcement Is Self-Defeating*

Put aside totalitarian fictions (and realities) associated with maximal enforcement. By its own lights, maximal enforcement is a self-defeating strategy for ensuring widespread obedience to the law.

The State should want its citizens not just to follow the law but to follow the law for the right reasons. This is particularly true when the law codifies widely accepted moral judgments, whose endorsement we hope is the primary source of internal motivation.[42] We have good reason to expect individuals not to commit murder on the grounds that that murder is obviously morally wrong. It is some solace that an individual does not commit murder *merely* because murder is illegal but only small solace. Even in less morally salient cases, the State still has reason to desire that individuals follow the law for reasons other than just "because it is the law."[43] To continue an earlier example, one reason not to jaywalk is that it increases your risk of injury. It also exposes others to the risk of financial and emotional ruin should they fail to notice your jaywalking in time to avoid an accident.[44] Even mundane rules often may be embedded with moral motivations; they can exist for our protection and the protection of others.

Maximal enforcement is counterproductive because it is a terrible method for encouraging law abidingness for the right reasons. Legal scholars have long recognized the ample literature in social psychology suggesting that voluntary compliance is more effective than forced obedience.[45] Respect for the law for its own sake is the barest grounds for motivating compliance; to that point, philosophers and legal theorists alike continue to debate whether there even exists any such freestanding obligation on citizens to obey the law.[46] By demanding compliance through threats of maximal enforcement, the State risks eroding other reasons for action—reasons that are in themselves more motivating than the threat of

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42. *See infra* Section II.A.1.

43. *See* Gerard E. Lynch, *The Role of Criminal Law in Policing Corporate Misconduct*, 60 LAW & CONTEMP. PROBS. 23, 46 (1997) ("For society to function, most people have to obey the law for reasons of conscience and conviction, and not out of fear of punishment.").

44. *See* Jeremy Waldron, *Moments of Carelessness and Massive Loss*, *in* PHILOSOPHICAL FOUNDATIONS OF TORT LAW 387–88 (David G. Owen ed., 1995) (discussing the financial and emotional devastation that follows a car accident).

45. *See* Tom R. Tyler, Phillip Atiba Goff & Robert J. MacCoun, *The Impact of Psychological Science on Policing in the United States: Procedural Justice, Legitimacy, and Effective Law Enforcement*, 16 PSYCH. SCI. PUB. INT. 75, 78–80 (2015) (summarizing literature on the extent to which deterrence crowds out or undermines pro-social behavior); *accord* Emad H. Atiq, Note, *Why Motives Matter: Reframing the Crowding Out Effect of Legal Incentives*, 123 YALE L.J. 1070, 1079–87 (2014) (same). *See generally* TOM R. TYLER, WHY PEOPLE OBEY THE LAW 22–39 (2006).

46. *See supra* note 1 (collecting citations).

sanction.[47] As a result, maximal enforcement runs the risk of degrading citizens' reasons for obeying the law, making individuals at least marginally more inclined to disregard the law.[48] At worst, maximal enforcement threatens to create a vicious circle: maximal enforcement crowds out more powerful reasons for compliance, which decreases compliance, which creates a need for greater enforcement, and so on.[49] More generally, by focusing on enforcement, the State gives short shrift to other reasons likely to motivate, and motivate more strongly, compliance with the law.

4. *Too Much Enforcement Can Impede Progress*

Maximal enforcement impedes moral and social growth within society. Appreciating this point requires recognizing how the law can not only reflect and influence but also stultify public attitudes and morality.[50] Though the law reflects social values at a moment in time, these values are susceptible to change.[51] To that end, experimentation with illegality is a valuable method for testing the current law's normative status and desirability. This practice is less extreme than civil disobedience, where citizens intentionally and publicly violate unjust laws for the purpose of publicizing injustices with an aim toward reform.[52]

Consider two examples where underenforcement may have created space for revision of social norms. First, the underenforcement of drug laws, particularly those concerning possession of minor substances like marijuana, likely played a part in recently evolving attitudes toward

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47. *See, e.g.*, Jonathan M. Barnett, *The Rational Underenforcement of Vice Laws*, 54 RUTGERS L. REV. 423, 426 (2002) (arguing, in the context of vice laws, that "underenforcement is the most effective strategy for deterring consensual conduct that violates a widely shared moral norm").

48. *E.g.*, John Braithwaite, *Shame and Criminal Justice*, 42 CAN. J. CRIMINOLOGY 281, 287–91 (2000) (discussing the role of punishment in forming criminal subcultures); Todd Haugh, *Overcriminalization's New Harm Paradigm*, 68 VAND. L. REV. 1191 , 1201–05 (2015).

49. *See* BRAITHWAITE, *supra* note 38, at 142 ("You cannot take the moral content out of social control and expect social control to work. If there is no morality about the law, if it is just a game of rational economic trade-offs, cheating will be rife.").

50. *Cf.* Robert D. Cooter, *Three Effects of Social Norms on Law: Expression, Deterrence, and Internalization*, 79 OR. L. REV. 1 (2000) (taxonomizing conceptual frameworks concerning law's relationship to social norms).

51. *See* Cass R. Sunstein, *Social Norms and Social Roles*, 96 COLUM. L. REV. 903, 909 (1996) (coining the term "norm entrepreneurs" for people who seek to change social norms). *See generally* Benjamin Justice & Tracey L. Meares, *How the Criminal Justice System Educates Citizens*, 651 ANNALS AM. ACAD. POL. & SOC. SCI. 159 (2014).

52. Among other things, civil disobedience, at least in its classical formulation, requires submission to enforcement. *See* Martin Luther King, Jr., Letter from a Birmingham Jail (Apr. 16, 1963), *reprinted in* NAT. L. NAT. RTS. & AM. CONST., https://www.nlnrac.org/american/american-civil-rights-movements/primary-source-documents/letter-from-a-birmingham-jail [https://perma.cc/FTZ6-WWWQ] ("One who breaks an unjust law must do it openly, lovingly . . . and with a willingness to accept the penalty.").

recreational and medicinal drug use.[53] That is, the experience of drug use independent of its legal consequences provides citizens an opportunity to assess for themselves whether a status quo prohibition is necessary. Judging from individuals' experiences, the draconian status quo looks increasingly out of step with the values of the American people. It seems plausible that maximal enforcement would have stultified moral progress by preventing individuals from experiencing the alleged harm of drug use for themselves.

A similar example from earlier in the century concerns the eventual underenforcement of anti-sodomy laws. Underenforcement here made more plausible, inter alia, co-habitation of gay couples, something that activists had long championed as a form of acceptance via non-threatening exposure.[54] The gradual introduction of gay couples into civil society—culminating in the recognition of a constitutional right to same-sex marriage[55]—has powered (and in turn been powered by) an epochal shift in public attitudes toward homosexuality. Maximal enforcement of anti-sodomy laws—to say nothing of the host of other legal provisions discriminating against the LGBTQ community—would likely have slowed moral progress by keeping individuals shadowed within the large society.

These examples are carefully described. Underenforcement is a double-edged sword. As described here, *principled* underenforcement can be beneficial to the extent that it creates space for appraisal and reconsideration of public values. However, underenforcement can be used as a tool of exploitation when applied discriminatorily. It should not surprise that attitudes about recreational drug usage have changed most among college-educated whites; these are individuals best positioned to flout drug laws with impunity. By contrast, Black males between eighteen and thirty continue to be disproportionately convicted for drug crimes despite the fact that drug-usage rates do not vary substantially across racial groups.[56] Likewise, anti-sodomy laws themselves represent a case study in selective

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53. Emma E. McGinty et al., *Public Perceptions of Arguments Supporting and Opposing Recreational Marijuana Legalization*, 99 PREVENTATIVE MED. 80, 80 (2017) (noting that more than half of Americans support legalization or recreational marijuana, compared to twelve percent support in 1969).

54. *See* Andrew Sullivan, *Here Comes the Groom*, NEW REPUBLIC (Aug. 28, 1989), http://www.newrepublic.com/article/79054/here-comes-the-groom [https://perma.cc/79EZ-BF2Z].

55. *See* Obergefell v. Hodges, 576 U.S. 644, 675 (2015).

56. *See* ELIZABETH ANDERSON, THE IMPERATIVE OF INTEGRATION 174–75 (2010); *Table 1.23B–Illicit Drug Use in Lifetime: Among People Aged 12 or Older; By Age Group and Demographic Characteristics, Percentages, 2021 and 2022*, SAMHSA, https://www.samhsa.gov/data/sites/default/files/reports/rpt42728/NSDUHDetailedTabs2022/NSDUHDetailedTabs2022/NSDUHDetTabsSect1pe2022.htm [https://perma.cc/97ZM-LS8N]; Alana Rosenberg, Allison K. Groves & Kim M. Blankenship, *Comparing Black and White Drug Offenders: Implications for Racial Disparities in Criminal Justice and Reentry Policy and Programming*, 47 J. DRUG ISSUES 132, 132 (2017); Jamie Fellner, *Race, Drugs, and Law Enforcement in the United States*, 20 STAN. L. & POL'Y REV. 257, 261–65 (2009) (collecting citations). *See generally* MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS (2012).

enforcement. Although drafted broadly to prohibit specific sex acts without regard to participants' sex or gender, these laws were understood then and now to exist for the purposes of targeting the gay community.[57] But while recognizing that biased, pretextual enforcement of the law as a form of underenforcement is severely worrisome, the next section calls into question whether maximal enforcement offers a meaningful solution to this problem.

5. *Too Much Enforcement Exacerbates Structural Inequalities*

Maximal enforcement promises to entrench inequalities of hierarchy already present within society. This outcome is a function of the fact that hierarchies tend to make detection of illegality more difficult for those in privileged positions. For example, senior officers in large businesses are well-positioned to avoid liability for misconduct because the structure of modern commercial corporations makes it all but impossible to trace the contributions of individual members, particularly those higher up the corporate structure.[58] This dynamic is exemplified by the fact that prosecutors frequently have a problem reaching past low-level employees or middle managers who directly carried out some act of lawbreaking on behalf of the corporation.[59] The difficulty of detection is compounded by the costs of prosecution. Those in positions of privilege are also likely to be well-equipped to resist the State through adequate legal representation and deep pockets.[60] Consider how these dynamics played out in the recent prosecution of disgraced Theranos founder Elizabeth Holmes: multiple dilatory litigation tactics helped Holmes to remain out of jail for nearly five years from when federal prosecutors indicted her on a raft of fraud charges.[61] Contrast this experience with the depressingly well-documented

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57. *See* Christopher Leslie, *Creating Criminals: The Injuries Inflicted by "Unenforced" Sodomy Laws*, 35 HARV. C.R.-C.L. L. REV. 103, 110–12 (2000).

58. *See* Samuel W. Buell, *The Responsibility Gap in Corporate Crime*, 12 CRIM. L. & PHIL. 471, 475–81 (2018); Stephanie Collins, *Collective Responsibility Gaps*, 154 J. BUS. ETHICS 943, 946 (2019); W. Robert Thomas, *Corporate Criminal Law Is Too Broad—Worse, It's Too Narrow*, 53 ARIZ. ST. L.J. 199, 257–58 (2021); *cf.* Cindy R. Alexander & Mark A. Cohen, *Why Do Corporations Become Criminals? Ownership, Hidden Actions, and Crime as an Agency Cost*, 5 J. CORP. FIN. 1, 30 (1999) ("Even where the culprits are lower-level employees, corporate crime does not appear to be a random event beyond top management's control.").

59. *See* Thomas, *supra* note 58, at 253–59. *See generally* BRANDON L. GARRETT, TOO BIG TO JAIL: HOW PROSECUTORS COMPROMISE WITH CORPORATIONS (2014).

60. *See Corporate and White-Collar Prosecutions Hit New All-Time Lows in FY 2022*, TRAC FBI (Jan. 19, 2023), https://trac.syr.edu/reports/708/ [https://perma.cc/SC2U-PJKR] (noting that white-collar cases take more than one year to go from referral to filing—considerably longer than most federal crimes—while the same process takes nearly three years when the defendant is a corporation).

61. *See* Rachel Lerman, Jacob Bogage & Annabelle Timsit, *Theranos Founder Elizabeth Holmes Is Reporting to Prison. Here's What to Know.*, WASH. POST. (May. 30, 2023, 2:07 PM), https://www.washingtonpost.com/technology/2023/05/18/elizabeth-holmes-prison-time/ [https://perma

trend in the United States whereby innocent individuals unable either to pay state-imposed pre-trial bail or spend time in jail (thereby foregoing wages and risking unemployment, to say nothing of their liberty interests) instead plead guilty to a crime.[62]

To be sure, maximal enforcement will make it more likely that even privileged violators will be held accountable. However, it seems plausible that those already susceptible to enforcement would likely bear the brunt of a shift toward maximal enforcement. Such a result need not be the result of pretextual enforcement (as in the preceding section) but rather could come about through neutral, cost-effective enforcement strategies pursued against the background of historically unjust, or at least unequal, institutional structures.[63] Put simply, maximal enforcement, even if carried out in a neutral, non-pretextual manner, threatens to either preserve or even expand unjust social hierarchies.

6. *Too Much Enforcement Belittles the Citizenry*

The final argument against maximal enforcement concerns the expressive defects that such a policy suggests. An expressive theory of action argues that the attitudes we hold are instantiated and made real—with better or worse success, depending on how successfully the actions express the underlying attitude—by the actions we take in relevant contexts.[64] Raising my arm can express joy at seeing a friend, hostility toward a foe, patriotic vigor, urgency in catching a cab, etc. Expression thus is a publicly interpretive practice; though my epistemic privilege counts for something, I am not the sole arbiter of the meaning of my actions or the attitudes they convey.

.cc/E6XJ-EKJT]. Despite the widely publicized nature of Holmes's misconduct throughout 2015, charges were not filed until 2018. Press Release, U.S. Att'y's Off., N. Dist. Cal., Elizabeth Holmes Sentenced to More than 11 Years for Defrauding Theranos Investors of Hundreds of Millions (Nov. 18, 2022), https://www.justice.gov/usao-ndca/pr/elizabeth-holmes-sentenced-more-11-years-defrauding-theranos-investors-hundreds#:~:text=Federal%20criminal%20charges%20were%20initially, §%201343. [https://perma.cc/N8NH-QJP6].

62. *Compare* Julie R. O'Sullivan, *Is the Corporate Criminal Enforcement Ecosystem Defensible?*, 47 J. CORP. L. 1047 (2022), *with* Jed S. Rakoff, *Why Innocent People Plead Guilty*, N.Y. REV. (Nov. 20, 2014), http://www.nybooks.com/articles/archives/2014/nov/20/why-innocent-people-plead-guilty/ [https://perma.cc/VU6R-59R6] (detailing perverse incentives for defendants to accept guilty pleas even in cases of actual innocence).

63. As Anatole France noted acerbically, it is "the majestic equality of the laws, which forbid rich and poor alike to sleep under bridges, to beg in the streets, and to steal their bread." ANATOLE FRANCE, THE RED LILY 95 (Winifred Stephens trans., 1930) (1894).

64. *See* ELIZABETH ANDERSON, VALUE IN ETHICS AND ECONOMICS 18–20 (1993); Elizabeth S. Anderson & Richard H. Pildes, *Expressive Theories of Law: A General Restatement*, 148 U. PA. L. REV. 1503, 1525 (2000).

An expressive theory of law, then, evaluates state action on the basis of the attitude attributable to the State in light of its action.[65] Thus previous laws forbidding miscegenation expressed the State's view that non-white races are inferior; the State's action endorsed the stigmatization of minorities as second-class citizens not entitled to the full panoply of rights available to the majority.[66] Of course, expressive harms do not preclude other harms. The couple denied a marriage license because they come from different races suffers the expressive harm sketched above, but they also are denied legal benefits—tax incentives, visitation rights, etc.—otherwise available to married couples.[67] On the other hand, expressive harms are not a dressed-up form of hurt feelings. The State does wrong when it condones attitudes of first- and second-tier citizenship in a society ostensibly committed to equal status. There is no further requirement that an individual feel sad, frustrated, or maligned (although such feelings would be understandable) in order for harm to occur. The expressive harm results from the State's expressing the wrong type of attitudes toward its citizens.

Maximal enforcement is a state action that endorses wrongful attitudes toward its citizens.[68] Although the State outlaws a great variety of activity, we can expect that the State trusts its citizens to do the right thing under ordinary circumstances. Justice Oliver Wendel Holmes argued that law should be designed to deter the bad man, but he (rightfully) did not suggest that all people were in fact bad.[69] A policy of maximal enforcement, however, does endorse a view that all citizens are Holmesian bad men who will follow the law only when facing a near-constant, palpable risk of sanction.

As stated earlier, a maximal-enforcement regime might undermine citizens' voluntary willingness to obey the law for the right reasons—that is, for reasons other than the threat of sanction. This prospect promised harm in the form of degraded respect for the rule of law and, perversely, an increased propensity among citizens to disregard the law. To this we can add an accompanying expressive harm: through a policy of maximal

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65. *See* W. Robert Thomas, *The Conventional Problem with Corporate Sentencing (and One Unconventional Solution)*, 24 NEW CRIM. L. REV. 397, 402–08 (2021) (collecting citations).

66. *See* Anderson & Pildes, *supra* note 64, at 1540–45.

67. *See* Christine Hauser, *Kentucky Clerk Who Denied Same-Sex Marriage Licenses Must Pay $260,000 in Legal Fees*, N.Y. TIMES (Jan. 4, 2024), https://www.nytimes.com/2024/01/04/us/kim-davis-marriage-licenses-legal-fees.html [https://perma.cc/W523-6W9F] (noting that damages of $100,000 were awarded to a couple whose license was illegally denied).

68. *See, e.g.*, Gregory M. Gilchrist, *The Expressive Cost of Corporate Immunity*, 64 HASTINGS L.J. 1, 6 (2012); Mary Kreiner Ramirez, *Criminal Affirmance: Going Beyond the Deterrence Paradigm to Examine the Social Meaning of Declining Prosecution of Elite Crime*, 45 CONN. L. REV. 865, 916 (2013). *See generally* Avlana Eisenberg, *Expressive Enforcement*, 61 UCLA L. REV. 858 (2014) (distinguishing the expressive functions of legislation and enforcement).

69. *See* Oliver Wendell Holmes, Jr., *The Path of the Law*, 10 HARV. L. REV. 457, 459 (1897).

enforcement, the State expresses a view of its citizens as untrustworthy, would-be criminals who conform their conduct only under the threat of state coercion. Particularly in liberal democracies where the State is elected by, representative of, and answerable to its citizens, state endorsement of such a crassly cynical view of the citizens is, generously put, at odds with democratic virtues.

II. IMPLICATIONS FOR CRIMINAL JUSTICE REFORM: THE ROLE OF A NON-ENFORCEMENT DUTY IN A THEORY OF CRIMINAL JUSTICE MINIMALISM

Recognizing the State's obligation not to maximally enforce the law can contribute to theories of criminal justice reform. The invitation of this Symposium is to begin charting the terrain of criminal justice minimalism as a solution to overcriminalization and as an alternative to, and perhaps a bulwark against, outright abolitionism. Accordingly, the remainder of this Essay considers how a non-enforcement duty can contribute to the development of a unified theory of criminal law minimalism.

Criminal law minimalism seeks to stake out a middle position between two recent movements within scholarship about the U.S. criminal system: overcriminalization and abolitionism. Finding a middle position gets messy.[70] Overcriminalization is a critique of the status quo that admits of multiple solutions—of which criminal law minimalism is one.[71] Criminal law abolitionism is a solution to multiple, overlapping critiques of the status quo: abolitionists are united by a goal of getting rid of the criminal law system, even if their reasons for doing so differ.[72] Here, criminal law minimalism is framed as an alternative to abolitionism: it stakes out the position, contra the abolitionist, that some criminal law is worth preserving.[73] So, on the one hand, criminal law minimalism is a cry for no more criminal law than necessary, and on the other hand, it is a cry for more criminal law than none.

A. Maximal Enforcement vs. Too Much Law

Although still a nascent position within discussions of U.S. criminal law reform, various articulations of criminal law minimalism share two common features—what this Essay refers to, for convenience, as *doctrinal*

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70. *See* Benjamin Levin, *Criminal Law Minimalisms*, 101 WASH. U. L. REV. 1771 (2024) (cataloguing interpretations of a minimalist project).

71. *See e.g.*, HUSAK, *supra* note 4, at 178–96 (providing alternative theories of criminalization). *See generally* BRAITHWAITE & PETTIT, *supra* note 4.

72. *See* Thomas Ward Frampton, Essay, *The Dangerous Few: Taking Seriously Prison Abolition and Its Skeptics*, 135 HARV. L. REV. 2013, 2013–17 nn.2–24 (2022) (collecting citations).

73. *See* Langer, *supra* note 4, at 45, 77; Slobogin, *supra* note 4, at 534–35.

minimalism and *enforcement minimalism*, respectively. This section interrogates doctrinal minimalism, reserving enforcement minimalism for the next section.

Doctrinal minimalism responds to the idea that there is simply too much criminal law. Descriptively, a concern about too much criminal law means what it says: the quantity of criminal prohibitions is too high. Critics worried about overcriminalization argue there has been an unhealthy increase in criminal statutes, particularly for activities far removed from traditional crimes.[74] They note that there are now so many federal crimes that the exact number, though well into the thousands, is unknown—this in a system where the criminal is still ostensibly the purview primarily of state governments.[75] Normatively, there is a claim usually implied but sometimes made explicit that these are bad laws—bad not (necessarily) in the sense of being immoral or unjust but in the sense of being unnecessary, superfluous, redundant, or poorly considered.[76]

Doctrinal minimalism offers a solution to this type of overcriminalization by restricting the substance of the criminal law to cover only some core set of prohibitions. On this view, conduct should be criminalized only if the prohibition could be justified on the basis of longstanding penological or political first principles.[77] Several candidate principles have been suggested; frontrunners include wrongfulness, harm, desert, proportionality, and non-domination.[78] And while different first principles will invariably produce different constraints at the margins, any reasonable account of doctrinal minimalism would criminalize serious harms to others, and perhaps other core, malum in se offenses.[79] Conversely,

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74. *See e.g.*, Sara Sun Beale, Essay, *The Many Faces of Overcriminalization: From Morals and Mattress Tags to Overfederalization*, 54 AM. U. L. REV. 747, 753–56 (2005); Shon Hopwood, *Clarity in Criminal Law*, 54 AM. CRIM. L. REV. 695, 703 (2017).

75. *See* William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 517–19 (2001) (tracing the expansion of federal criminal law).

76. *See e.g.*, Erik Luna, *The Overcriminalization Phenomenon*, 54 AM. U. L. REV. 703, 712–18 (2005).

77. *Cf.* James Q. Whitman, Essay, *What Is Wrong with Inflicting Shame Sanctions?*, 107 YALE L.J. 1055, 1059 (1998) ("Even if [some punishments] were wholly unobjectionable from the point of view of *punishment* theory, they would still fail the test of a sane *political* theory.").

78. *See* Douglas Husak, *Six Questions About Overcriminalization*, 6 ANN. REV. CRIMINOLOGY 265, 276–78 (2023); *see* Langer, *supra* note 4, at 73. *See generally* BRAITHWAITE & PETTIT, *supra* note 4.

79. *See* Langer, *supra* note 4, at 58 (identifying "homicides, rape and other sexual assaults, domestic violence, aggravated assaults, home invasions, certain robberies, and arson"); see also BRAITHWAITE & PETTIT, *supra* note 4, at 94 (preserving prohibitions under the categories of "offences against the person," "offences against property," "offences against people's province," and "derivative crimes"). On the distinction between malum in se and mala prohibita, see KRISTINA E. MUSIC BIRO ET AL., AM. JUR., CRIMINAL LAW § 25 (2d ed. 2024) (distinguishing "acts wrong in themselves" (malum in se) from "acts which would not be wrong but for the fact that positive law forbids them" (mala prohibita)).

it would likely exclude from the province of the criminal law many existing criminal prohibitions surrounding narcotics, immigration, and sex work.[80]

Consider again the suggestion that the State has a duty not to maximally enforce the law. Is it possible that the problems attendant to maximal enforcement are merely an offshoot of, or otherwise derivative of, the problems attendant to overcriminalization? It is easy to motivate criticisms of maximal enforcement when considering examples like jaywalking; constructing an Orwellian police state to eradicate illegal street-crossing sounds crazy. To what extent do these arguments lose their force when we focus attention instead on much more serious instances of illegality? Much of the complaint about maximal enforcement seems to lack the same purchase as against, say, premeditated murder: efficiency arguments seem irrelevant, the stultifying of public morality seems misplaced, and so forth. More generally, perhaps criticisms about maximal enforcement get their purchase from bad (needless, trivial, redundant, etc.) laws. On this suggestion, the problem of maximal enforcement is a problem only in a society already degraded by too much law.

But no—the problem of too much enforcement is not merely an offshoot of the problem of too much law. To see this, imagine two idealized societies: Core City and Broad Society. The law in Core City consists of only a minimal set of laws, which then are maximally enforced. That is, Core City has solved the problem of too much law: it has identified the smallest set of laws necessary to maintain a functioning and flourishing society. Relevant here, and as seems to be the desire of critics of overcriminalization,[81] Core City's criminal law would be constrained to a subset of morally pernicious acts like murder, assault, mayhem, rape, robbery, etc.—viz., the prohibitions of an apocryphal malum in se system. Its laws would be discrete and not overlapping: there would be no specialized statutes for, say, carjacking, where the same misconduct could be captured by more fundamental prohibitions.[82] Crucially, Core City maximally enforces its core sets of prohibitions. By contrast, Broad Society has "too much" law, at least from the perspective of Core City. Here, there are overlapping laws, possibly superfluous ones, etc. Broad Society gets by with too much law by refusing to maximally enforce the law.

Broad Society is, all things considered, preferable to Core City's approach of minimal law maximally enforced. This is because, first, Core City cannot solve the previously identified problems of maximal

80. Langer, *supra* note 4, at 56.

81. *See supra* note 79.

82. Carjacking is a common crime described as a symptom of overcriminalization, and especially the over-federalization of criminal law. *See* Beale, *supra* note 74, at 755–56.

enforcement. And second, Broad Society has attractive features not available to Core City.

1. Criticisms of Maximal Enforcement Recur in Core City

Doctrinal minimalism cannot solve all the problems associated with maximal enforcement. To be fair, it is plausible that Core City could at least ameliorate some of these problems. The impact of efficiency arguments is muted in a narrowly malum in se criminal justice system. Appealing here to premediated murder helps to emphasize the obvious point that efficient allocations of state resources is not, and should not be, the sole determinant of state activity. It may be worth enforcing certain laws well past the point of efficient returns; to do otherwise risks condoning a view of ourselves as too willing to price human life and dignity.[83] A similar observation applies to the suggestion that maximal enforcement crowds out prosocial motivations. This sort of perversity argument rings a bit hollow to the extent that it suggests that enforcement would strip citizens of the reasons why most people do not run around murdering each other.

On the other hand, if jaywalking sets up a straw man, so too might focusing on premeditated murder. Not every infraction is like jaywalking, but neither is every prohibition like homicide. Grant for the sake of argument that maximal enforcement of first-degree murder is desirable. Does it really follow that we want maximal enforcement of even other core prohibitions?

Not likely, for the same reasons why the State ought not maximally enforce the law in general. Core City has the capacity to be every bit as oppressive of its citizenry—and in ways likely to reinforce existing hierarchies of inequality—notwithstanding its focus on a narrower set of core prohibitions. Does Operation LASER become acceptable if the LAPD deploys its omnipresent intrusiveness to prevent only serious wrongs? Or consider the decade-plus of complaints about enforcement responses to the Global War on Terror.[84] All parties agreed that mass terrorist attacks are morally horrific—and, presumably, the kind of thing that the State should aim to prevent. But identifying the appropriate wrongs to criminalize does

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83. *See generally* Cooter, *supra* note 35. Kaplow and Shavell argue that a focus on welfare-as-preferences will capture these goals. *See* LOUIS KAPLOW & STEVEN SHAVELL, FAIRNESS VERSUS WELFARE 317–20 (2002). Thus, relentlessly prosecuting murder cases, even if expensive, would be efficient on their account because it would maximize the welfare interest of members in society. This is not the place to engage with this strategy, but here goes one sentence: this solution risks preserving the pyrrhic dominance of economic analysis as a tool of public policy by rendering core economic assumptions vacuous. For more and better, see generally Don Herzog, *Externalities and Other Parasites*, 67 U. CHI. L. REV. 895 (2000).

84. *See generally* AT WAR WITH CIVIL RIGHTS AND CIVIL LIBERTIES (Thomas E. Baker & John F. Stack, Jr. eds., 2005).

not end the inquiry into state action; if anything, it starts the discussion of how and how much the State can enforce those violations in light of its fundamental obligations. It is one thing to act inefficiently in service of an alternative goal or end of state action. But what alternative purpose does maximal enforcement of the law serve? Such a commitment seems hard to explain on any grounds other than enforcing the law for the law's sake. Such a policy fails to identify the right object of concern for state action—the State's citizens, not its laws.

Similarly, Core City can be every bit as belittling of its citizenry as can any other regime committed to maximal enforcement—indeed, arguably more so. For a society awash in mala prohibita, there is at least some force to the idea that a threat of state enforcement is needed to motivate compliance with the law. But, honestly, how plausible does this already strained argument become when applied only to a core, minimalist criminal law? There is something particularly perverse in the State's expressing a total lack of confidence in its citizens to avoid serious moral violations on their own, such that draconian enforcement is somehow necessary.

2. *Core City Is Missing Out*

It is not just that Core City cannot escape entirely the problems of maximal enforcement. There are independent reasons to prefer the too-much-law approach of Broad Society to Core City's minimal law maximally enforced.

Consider why we might want overlapping laws not maximally enforced. Take, for example, laws criminalizing identity-based hate crimes.[85] Neither would exist in our society of minimal laws maximally enforced: instances of domestic violence would be prosecuted under more general "core" statutes for assault, battery, rape, etc. In other words, the special criminalization of domestic violence might be seen as superfluous legislation in the same sense that carjacking is superfluous legislation in light of prohibitions against theft and battery.[86]

Yet hate-crime and domestic violence statutes serve a valuable purpose, notwithstanding that the State would remain in a position to sanction the underlying misconduct in the absence of such a statute. This claim too turns

85. *See Hate Crimes: Laws and Policies*, U.S. DEP'T OF JUST. (Dec. 13, 2023), https://www.justice.gov/hatecrimes/laws-and-policies [https://perma.cc/Y5YS-L7Q4] (collecting federal hate crime laws); *see also* JAMES B. JACOBS & KIMBERLY POTTER, HATE CRIMES: CRIMINAL LAW & IDENTITY POLITICS 130–44 (1998) (presaging critiques of identity-based crime statutes common to the overcriminalization literature).

86. The claim here is not that certain crimes are necessarily incompatible with criminal law minimalism. As noted above, Langer suggests that domestic violence will still be criminalized in a minimalist society. *See* Langer, *supra* note 4, at 58.

on the expressive character of law. A prosecution for and conviction of domestic violence signifies a different sort of condemnation than would an assault or rape conviction.[87] Domestic violence charges convey, among other things, condemnation for violation of a uniquely intimate trust, degradation of a central and celebrated civil and social institution, and the State's intolerance for propping up longstanding, institutionalized gender inequalities. Domestic violence statutes are a normatively richer, but still well-defined, form of state-sponsored condemnation.[88]

A regime with domestic violence statutes—and similarly expressive statutes—requires something other than maximal enforcement. Otherwise, every instance of domestic violence would be accompanied by a host of more basic charges. This would wreak havoc on systems of punishment while blurring the particular flavor of condemnation. Moreover, what sort of message is sent by a society that maximally enforces all of its laws? Maximal enforcement conveys the rather banal message that lawbreaking is bad. In doing so, it flattens the expressive content derived from different rates of enforcement. This is unfortunate because we as a community derive meaning from how and why the State chooses to enforce.[89] After all, even in a society with a minimal set of laws, not all criminal laws are created equal. It is easy to imagine that prohibitions against murder and theft will make it into Core City, but it does not follow from the fact of inclusion that the two crimes are of equivalent significance and merit comparable dedication of resources. Should the State maximally enforce its laws against bicycle thieves in the same way that it maximally enforces its laws against serial killers? If so, what does such a practice say about the State's (dis)valuing of bicycle thieves as compared to serial killers? It is odd to insist that the State would commit equal resources to these very different projects.[90] At its worst, maximal enforcement of all laws conveys a certain fetishizing of law abidingness for its own sake.

A further advantage of an over-legislated society like Broad Society is its ability to react to technological and social change. Change occurs in two directions. On the one hand, change can expose new activities to outdated,

87. For discussion of whether, from an expressive perspective, crimes against domestic violence should be subsumed into the broader ambit of gender-based hate crimes, see Eisenberg, *supra* note 68, at 872–73.

88. Indeed, this gets to the real problem with carjacking statutes. It is not that they are superfluous; it is that their superfluity is deeply connected to racial animus. *See* Jon Hurwitz & Mark Peffley, *Public Perceptions of Race and Crime: The Role of Racial Stereotypes*, 41 AM. J. POL. SCI. 375, 386–91 (1997).

89. *See supra* note 68 and accompanying text. We also derive meaning, of course, from different forms and magnitudes of sanctions. Thomas, *supra* note 65, at 402.

90. Actually, the resources committed would likely be unequal. In all likelihood, the State would commit vastly more resources to thwarting bicycle thieves; there simply are not that many serial killers running around at any given time.

anachronistic laws. Digital property is subjected to a bevy of twentieth century rules themselves designed for a host of other media; this is why Google has long argued that email users are akin to HAM radio hobbyists.[91] A gig economy, led by Uber and DoorDash, is still struggling to fit into a seventeenth-century framework for the employment relationship, which itself is rooted explicitly in a master/slave archetype.[92] Several modern businesses and industries are built atop similar types of legal and regulatory arbitrage.[93] The claim here is not that old laws are bad or inapplicable; these laws remain useful in some contexts and ill-fitting in others.

A broader array of laws is beneficial in several respects. It provides society more leeway to be responsive to change by drawing from disparate legal doctrines—for example, the modern turn to the Foreign Corrupt Practices Act as a source of protecting human rights in a method previously anticipated by the centuries-old Alien Tort Statute.[94] In Broad Society, old laws remain in domains where they continue to be useful, other laws are repurposed to new domains, and new laws complement the gaps. Such an approach, however, requires that the State be judicious in its enforcement of the law. Applying all of these laws at once would overwhelm and wipe out the benefits of a legal system positioned to respond dynamically to new innovations. Legal flexibility is a benefit to such a society only when paired with an obligation not to enforce the law.

In summary, there are a variety of advantages, expressive and otherwise, to having a plethora of laws constrained by a general obligation not to enforce the law. To be sure, the claim here is not that Broad Society is necessarily better than Core City. Some people might reasonably conclude that the benefits of Broad Society are worth giving up, preferring instead to marry Core City's approach to law with Broad Society's approach to enforcement. The core insight is that doctrinal minimalism alone cannot solve the problems of maximal enforcement; or, put another way, the limits on enforcement outstrip the limits on legislating. Rather than see the problem of too much enforcement as merely an offshoot of the problem of too much law, we should see these two as intertwined but independent. Moreover, an obligation not to enforce the law serves as a release valve for

91. *See* Joffe v. Google, Inc., 729 F.3d 1262, 1267 (9th Cir. 2013).

92. *See* Elizabeth Pollman, *Corporate Disobedience*, 68 DUKE L.J. 709, 732–35 (2019).

93. *See e.g.*, Cheng Gao & Rory McDonald, *Shaping Nascent Industries: Innovation Strategy and Regulatory Uncertainty in Personal Genomics*, 67 ADMIN. SCI. Q. 915, 918–21 (2022); John T. Holden & Marc Edelman, *Regulating Vice: What the U.S. Marijuana Industry Can Learn from State Governance of Sports Gambling*, 2021 U. ILL. L. REV. 1051, 1076–77.

94. *See generally* Andrew Brady Spalding, *Corruption, Corporations, and the New Human Right*, 91 WASH. U. L. REV. 1365 (2014) (discussing how the FCPA should be considered the rightful heir to the protection of human rights once thought to be afforded by the ATS).

the advantages otherwise accrued by a society with too much law over one with minimal law maximally enforced.

B. Maximal Enforcement vs. Too Much Criminal Enforcement

As should be clear, it is not sufficient just to have fewer, more principled prohibitions; there also needs to be further constraints or principled rules about the role of criminal law in the State's broader enforcement toolkit.[95] Return then to *enforcement minimalism*—the second dimension of criminal law minimalism—which seeks to deemphasize or deprioritize the State's use of criminal enforcement and especially paradigmatically harsh treatment like incarceration.

As was true for doctrinal minimalism, there are several candidate principles underlying enforcement minimalism. Langer advocates for incorporating the *ultima ratio* principle into American criminal law, according to which criminal enforcement "should only be used as a last resort when no other social responses or public measures would suffice to adequately advance a legitimate goal."[96] Slobogin, writing specifically in the context of punishment, argues that incarceration should be prohibited absent specific evidence of dangerousness or high risk to the community.[97] And in this Symposium, Yoav Sapir and Guy Rubinstein imagine a minimalist function within adjudication, while Christopher Slobogin and Kate Weisburd defend one within plea bargaining and negotiations.[98]

But if the State's obligation not to enforce the law is not reducible to doctrinal minimalism, neither is it merely a restatement of the norms or principles behind enforcement minimalism. First, the obligation is broader than limitations on criminal law and so does not appeal directly or exclusively to criminal law principles.[99] The assertion here is the State has a general obligation not to enforce the law, whether or not the prohibition is (or even ought to be) criminal in nature. Indeed, the two positions are engaged in different, albeit complementary, projects. The non-enforcement duty is concerned with whether enforcement of the law is justifiable. Enforcement minimalism, by contrast, is concerned with whether the

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95. *Cf.* Husak, *supra* note 78, at 269 ("Allegations about overcriminalization are better construed as a complaint that a state utilizes the criminal law too often to address social problems that are best combatted in other ways.").

96. Langer, *supra* note 4, at 73.

97. *See* Slobogin, *supra* note 4, at 534, 543. *See generally* Christopher Slobogin, *Preventive Justice: How Algorithms, Parole Boards, and Limiting Retributivism Could End Mass Incarceration*, 56 WAKE FOREST L. REV. 97 (2021).

98. *See generally* Yoav Sapir & Guy Rubinstein, *Minimalist Criminal Courts*, 101 WASH. U. L. REV. 1955 (2024); Christopher Slobogin & Kate Weisburd, *Illigitimate Choices: A Minimalist(?) Approach to Consent and Waiver in Criminal Cases*, 101 WASH. U. L. REV. 1913 (2024).

99. *See supra* Section I.B.

criminal law provides the right venue for enforcement. In other words, even if criminal enforcement is a permissible vehicle for enforcing a violation, it remains an open question whether the State ought to enforce (and vice versa). In at least this narrow respect, enforcement minimalism might be seen then as instantiating specific, criminal-law principles that are, or at least can be, grounded on a broader obligation on the State not to maximally enforce the law.

Second, although criminal law minimalism constrains criminal enforcement, at least under some characterizations it does so by relocating enforcement away from the criminal law into non-criminal avenues. However, non-criminal enforcement can bring with it its own, and even the same, problems and pathologies of today's criminal system.[100] Meanwhile, the mere possibility of non-criminal alternatives does not fully get us to an answer about when the criminal law should occupy pride of place in any enforcement strategy. Consider the punishment of Pacific Gas & Electric (PG&E) as an example of how civil and regulatory alternatives can crowd out criminal justice.[101] In 2017, PG&E caused the deadliest wildfire in California history—its second fatal fire in as many years, and one of 1500 preventable conflagrations in the six years prior[102]—for which the utility company eventually pled guilty to 84 counts of involuntary manslaughter. Despite the seriousness of the charges, PG&E received a total sentence of only $3.5 million.[103] Relevant here, it turns out that these charges were designed to minimize the impact of criminal liability.[104] PG&E reportedly rejected a prior offer to plead guilty to a lesser crime—only one count of arson—because manslaughter guaranteed it a smaller fine.[105] The criminal law responded but only just enough to preserve creditor negotiations in the company's ongoing bankruptcy proceedings.[106] More generally, it is instructive that, in the context of business crimes, managers have reason to prefer criminal enforcement over its civil counterparts because of the range of substantive and procedural protections afforded through the former but

100. *See* Levin, *supra* note 9, at 1420–24.

101. Indeed, corporate criminal law is rife with examples—which, admittedly, raises the question whether corporate criminal law deserves to be considered criminal law. *See generally* Mihailis E. Diamantis & W. Robert Thomas, *But We Haven't Got Corporate Criminal Law!*, 47 J. CORP. L. 991 (2022).

102. See Ivan Penn, Peter Eavis & James Glanz, *How PG&E Ignored Fire Risks in Favor of Profits*, N.Y. TIMES (Mar. 18, 2019), https://www.nytimes.com/interactive/2019/03/18/business/pge-california-wildfires.html?action=click&module=RelatedLinks&pgtype=Article [https://perma.cc/C4H8-6FY8].

103. Thomas, *supra* note 65, at 421. This fine was largest amount permissible under the applicable statutes. *Id.*

104. *Id.* at 422.

105. *Id.* at 422 n.132.

106. *Id.*

not the latter.[107] Put simply, civil enforcement is often easier for the State than criminal enforcement—not the most reassuring observation for enforcement minimalism. In short, maximal enforcement is not solved by rerouting criminal enforcement to civil or regulatory alternatives.

CONCLUSION & FUTURE RESEARCH

This Essay has attempted to articulate and defend the view that the State has an obligation to enforce the law. All it attempts to do is to articulate some limit to the State's obligation to enforce the law; whatever this obligation requires, it should be understood to rule out maximal enforcement. Even still, such an obligation stands in tension with the State's ordinary duty to enforce the law. Have we done anything more to resolve this tension than to suggest that the State should not move heaven and earth to prosecute every infraction? Can we give further content to the obligation not to enforce the law, which could guide the State in its actual practices?

While these questions are ultimately left for further development, two immediate concerns come to mind. First, how far does the State's obligation not to enforce the law extend? The discussion here has been limited to maximal enforcement, both as a means of giving content to the obligation as well as providing a foil for its justification. Left unanswered, however, is whether this obligation covers more. There's a lot of space between "no enforcement" and "maximal enforcement." Second, how might the State's obligation not to obey the law be operationalized? One problem with general duties is that they do not obviously attach in any specific instance.[108] To that point, it is difficult to imagine any state actor invoking this general obligation in its decision making, particularly as a reason not to enforce the law in response to a specific instance of wrongdoing by a specific offender.

Although the State's obligation not to enforce the law is a general one, appreciating the basis for its necessity and the advantages it can accrue over other legal arrangements can provide a touchstone for constraining the State's enforcement in a principled way. Along this dimension, one brief

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107. *See* Vikramaditya S. Khanna, *Corporate Crime Legislation: A Political Economy Analysis*, 82 WASH. U. L.Q. 95, 97–98, 127–28 (2004). *See generally* V.S. Khanna, *Corporate Criminal Liability: What Purpose Does It Serve?*, 109 HARV. L. REV. 1477 (1996). Moreover, where firms do worry about criminal prosecution more than regulatory oversight, collateral consequences—that is, regulatory responses to criminal sanctions—are the primary concern. *See* W. Robert Thomas, *Incapacitating Criminal Corporations*, 72 VAND. L. REV. 905, 922–23 (2019).

108. *Cf.* Richard Primus, *The Future of Disparate Impact*, 108 MICH. L. REV. 1341, 1371–74 (2010) (describing a "visible victims" problem in respecting general norms). A loosely analogous distinction appears in Immanuel Kant's distinction between wide, imperfect duties and narrow, perfect duties. *See generally* Melissa Seymour, *Widening the Field for the Practice of Virtue: Kant's Wide Imperfect Duties*, *in* RECHT UND FRIEDEN IN DER PHILOSOPHIE KANTS 403 (2008). Wide duties permit discretion as to how satisfy the duty, including exceptions from it. *See id.* at 404–09.

suggestion—more a guidepost for future research than a solution—vests the distinction between justifications given for an institution and justifications given within that institution.[109] It may be the that the State's obligation not to enforce the law speaks to how to constrain the institutional design of systems of enforcement rather than how to resolve specific cases. Fitting with this, the more specific instances of non-enforcement described in Part I—unjust laws, pretext, executive discretions—might be considered specific instances of a general obligation. For example, we might now redescribe the phenomenon of prosecutorial discretion as follows: the State has discretion both (1) to underinvest in enforcement (or, maybe, just to decline to invest in maximal enforcement) and (2) to adopt neutral principles for selecting among possible enforcement actions in light of said underinvestment (as opposed to, say, taking matters as they come). The first type of discretion can be justified in part by appealing to the State's general obligation now to enforce the law, whereas the second type of discretion can be described by appealing to any number of theories internal to the institution, including (but not limited to) criminal law minimalism. More generally, the promise here is that appreciating the role of an obligation on the State not to enforce the law can help to lay common ground across developing theories of overcriminalization, abolitionism, and especially criminal law minimalism.

109. *See* John Rawls, *Two Concepts of Rules*, 64 PHIL. REV. 3, 6–8 (1955) (distinguishing the justification of a practice from the justifications for actions under the practice).