WHAT IS PENAL MINIMALISM?

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INTRODUCTION

How much and what kind of criminal justice do fair societies need? This question underlies many of the debates on the criminal legal system around the world. In public debates on this issue in the United States people have offered three main answers to this question in recent decades. Tough-on-crime supporters of mass incarceration have claimed that the United States needs a lot of criminal justice to protect citizens, bring justice to victims, and incapacitate criminal offenders. Police and prison abolitionists have argued that the United States needs no criminal justice at all since the criminal legal system is inherently and irremediably racist and oppressive.

And civil libertarians have argued that the United States needs a criminal legal system that is limited by constitutional rights.

In this article, I would like to discuss a fourth set of answers to this question. This fourth set of answers can be clustered under the term "penal minimalism"—or variations on this term such as "criminal justice minimalism" or "criminal law minimalism."[1] For minimalist accounts of the criminal legal system, a penal system that has armed public law enforcement and punishment is necessary to deal with certain types of social harms or wrongs. But this penal system should be fair and humane, and should be used only exceptionally when there are no other means of preventing and dealing with these social harms or wrongs.[2] Penal minimalism asks regular people, harm victims, legislators, the executive branch, police departments, police officers, district attorney offices, individual prosecutors, public defender offices, individual defense attorneys, probation officers, judges, and others to constantly pause, think, and discuss whether criminal law is a fair, a necessary and the most adequate way to deal with a given social situation or set of social situations before they appeal to it.[3] And penal minimalism asks these actors to engage with these questions in a way that never dehumanizes those who have contributed to or have been affected by these social harms and wrongs.[4]

To be clear, my goal in this piece is not anticipating or responding to challenges to penal minimalism from any of its alternatives. Rather, my goal is to lay out penal minimalism's central working parts and to distinguish it from its alternatives.[5] These alternatives include not only the three main discourses and accompanying policies that have prevailed in public debates in the United States in recent decades—tough-on-crime positions, penal abolitionism, and civil libertarianism—but also various scholarly theories about criminal law and the criminal legal system that this article also discusses and that, at times, have fed these main public discourses.

This article is organized as follows. Part I puts penal minimalism within the context of the most prominent public debates on the criminal legal

1. Even if I have used "criminal law minimalism" in the past, *see* Máximo Langer, *Penal Abolitionism and Criminal Law Minimalism: Here and There, Now and Then*, 134 HARV. L. REV. F. 42 (2020), I prefer the terms "penal minimalism" or "criminal justice minimalism" because "minimalism" not only refers to substantive criminal law but also covers other aspects of the criminal legal system from policing to post-sentencing. As between the two remaining terms, "criminal justice" has been criticized because there are many penal orders that are unjust, and this is why many people in the United States—including at times myself—avoid using the word "justice" and use the term "criminal legal system" instead. But for minimalists, if the criminal legal system met the requirements of minimalism, it could be properly referred to as "criminal justice."

2. *Id.* at 57.

3. *Id.* at 72–76; *infra* Parts II, III.

4. *See infra* Section II.C, Part III.

5. I am grateful to Carol Steiker for raising this point to me.

system in the United States. Part II describes three criminal law accounts that have self-identified as minimalist, including my own, and explains what differences and commonalities these three minimalist accounts present. Part III identifies what these accounts of the criminal legal system have in common and articulates the four core features of penal minimalism. Part IV names and discusses various other versions of penal minimalism. Part V identifies and discusses theories and policies that are different from minimalism. The final part concludes.

I. "MINIMALISM" AS A CONCEPTUAL AND NORMATIVE SPACE BETWEEN TOUGH-ON-CRIME POSITIONS, ABOLITIONISM, AND CIVIL LIBERTARIANISM IN THE UNITED STATES

A first way to think about penal minimalism in the United States is as a conceptual and normative space that is different from tough-on-crime positions, penal abolitionism, and civil libertarianism—the three competing accounts of the criminal legal system that have been most present in public discourse and public imagination in the United States since the 1960s.

Tough-on-crime positions have advocated for strict penal policies—such as high punishments and aggressive policing—to protect public safety. This discourse has supported "mass incarceration," a term which references the fact that, for a long time, the United States has been one of the countries, if not the country, that incarcerates the most people per capita in the world.[6] Just to take a few reference points, the United States incarcerates per capita almost twice as many people as Russia, more than twice as many people as Iran, more than three times as many people as Saudi Arabia, almost four times as many people as its neighbor Mexico, more than five times as many people as China and France, more than six times as many people as its neighbor Canada, almost seven times as many people as Italy, almost nine times as many people as Germany, and more than eleven times as many people as Norway.[7]

These levels of incarceration are not only among the highest in the world but have also disproportionally affected racial minorities historically and

6. Until recently, the United States was the country that incarcerated the most people per capita in the world. *See, e.g.*, Peter Wagner & Alison Walsh, *States of Incarceration: The Global Context 2016,* PRISON POL'Y INITIATIVE, https://www.prisonpolicy.org/global/2016.html [https://perma.cc/JRW6-Z3MP] (listing the United States as the country with the highest per capita incarceration rate in the world in 2016). For 2024, the United States is among the five top countries with the highest per capita incarceration rate in the world. *See Countries with the Largest Number of Prisoners per 100,000 of the National Population, as of January 2024*, STATISTA (Jan. 8, 2024), https://www.statista.com/statistics/262962/countries-with-the-most-prisoners-per-100-000-inhabitants/ [https://perma.cc/5LDC-4NZJ]; *Incarceration Rates by Country 2024*, WORLD POPULATION REV., https://worldpopulationreview.com/country-rankings/incarceration-rates-by-country [https://perma.cc/SR2G-KJWQ].

7. *See Incarceration Rates by Country 2024*, *supra* note 6.

contemporarily. The most recent data released by the Federal Bureau of Justice Statistics indicate that 32% of the state and federal prison population in the United States is Black, while Black people make up 14.4% of the American population.[8]

For minimalism, tough-on-crime positions and mass incarceration are unfair, unnecessary, and inhumane. It is then necessary to bring a substantial reduction of the footprint of the penal system, a fair criminal law enforcement, and a radical humanization of the penal system as it currently exists in the United States.[9]

On the other extreme of the spectrum, we find penal abolitionism. By abolitionism, I refer to the set of positions that have as their goal the total abolition of prisons, punishment, or the police.[10] For minimalists, despite the good intentions of many of its proponents, abolitionism is not an appealing option for several reasons.

First, "fully discarding police intervention, prison, or other potential punishments as a possible response to these situations . . . can itself be unfair, discriminatory, and inhumane; deprive the weak of protection against the powerful; harm the communities and individuals affected by these situations; and enable more of these harmful situations in the future."[11] One of the problems here, as Professor Trevor Gardner has masterfully put it, is that abolitionism would not protect the "security interest" that individuals and communities have—including here, the "security interest" of African Americans in the United States.[12]

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8. *See* E. ANN CARSON & RICH KLUCKOW, U.S. DEP'T OF JUST., PRISONERS IN 2022 – STATISTICAL TABLES (2023); Mohamad Moslimani, Christine Tamir, Abby Budiman, Luis Noe-Bustamante & Lauren Mora, *Facts About the U.S. Black Population*, PEW RSCH. CENTER (Jan. 18, 2024), https://www.pewresearch.org/social-trends/fact-sheet/facts-about-the-us-black-population/ [https://perma.cc/S8DG-5BUE]. Interestingly, recent data published by the U.S. Bureau of Justice Statistics also indicates that the gap between the percentage of people imprisoned and in the general population for other groups is currently lower or nonexistent for other minorities. 23% of the imprisoned population is Hispanic or Latinx, while Latinx people make 19.1% of the general population in the United States. 2% of the imprisoned population is American Indian or Alaska Native, while these groups represent 2.9% of the general population—though 11% of the prison population is multiracial or some other race and I wonder whether this might affect the percentages of the American Indian or Alaska Native, Black, and Latinx minority groups to some extent. *See* CARSON & KLUCKOW, *supra*; *Hispanic Heritage Month: 2023*, U.S. CENSUS BUREAU (Aug. 17, 2023), https://www.census.gov/newsroom/facts-for-features/2023/hispanic-heritage-month.html#:~:text=63.7%20million,19.1%25%20of%20the%20total%20population [https://perma.cc/VC5D-32WQ]; *American Indian/Alaska Native Health,* U.S. DEP'T HEALTH & HUM. SERVS., OFF. MINORITY HEALTH, https://minorityhealth.hhs.gov/american-indianalaska-native-health#:~:text=Together%2C%20the%20AI%2FAN%20alone,total%20U.S.%20population)%20in%202020%20 [https://perma.cc/692U-DQZP].

9. Langer, *supra* note 1, at 43–45, 63.

10. *Id.* at 44.

11. *Id.*; *see also id.* at 57–64.

12. Trevor George Gardner, *The Conflict Among African American Penal Interests: Rethinking Racial Equity in Criminal Procedure*, 171 U. PA. L. REV. 1699, 1700 (2023).

Second, it is unclear that the society "without police, prisons, and punishment" that abolitionists envision would be more just than many possible societies with such institutions.[13] Societies without prisons, punishment, and police would still have power relations and could include disciplinary or arbitrary societies. State power in these societies could be more oppressive and could provide the less powerful with less protection against the more powerful than in the set of possible societies that instead have punishment, criminal law, and a penal system.[14]

Unlike abolitionism, then, minimalism argues that the use of public enforcement and punishment can be justified.[15]

Civil libertarians sit somewhere in between tough-on-crime positions and police and prison abolitionists. For civil libertarians, the use of the criminal legal system should be limited by a defendant's substantive and procedural rights.[16] The criminal law and criminal procedure caselaw of the Warren Court would be an expression of this position.[17]

Minimalism agrees with civil libertarians that defendant's substantive and procedural rights are important as protection against unfair treatment and wrongful convictions. But minimalism argues that rights are per se insufficient for such a protection, and more broadly for a humane and fair criminal law policy.[18]

The differences between tough-on-crime positions, penal abolitionism, civil libertarianism, and minimalism just articulated tell us what minimalism is not.[19] But they do not tell us what minimalism is. The next two parts discuss this issue.

13. Langer, *supra* note 1, at 64; *see also id.* at 44–45, 64–70.

14. LUIGI FERRAJOLI, DIRITTO E RAGIONE 233–39, 332–36 (1989) [hereinafter FERRAJOLI, DIRITTO E RAGIONE]; Luigi Ferrajoli, *Il diritto penale minimo*, 3 DEI DELITTI E DELLE PENE 493, 514–16 (1985) [hereinafter Ferrajoli, *Il diritto penale minimo*]; *see also* Langer, *supra* note 1, at 44–45, 64–70.

15. Langer, *supra* note 1, at 57, 60–61, 64–66.

16. Shmuel T. Lock, *Crime and Civil Liberties: How Our Opinions Are Formulated,* 28 J. POL. SCI. 105 (2000).

17. *See*, *e.g.*, GEOFFREY R. STONE & DAVID A. STRAUSS, DEMOCRACY AND EQUALITY: THE ENDURING CONSTITUTIONAL VISION OF THE WARREN COURT 28 (2020) ("The justices of the Warren Court believed that the integrity of the judiciary was compromised when the rights of criminal defendants were not taken seriously."); Ira H. Carmen, *One Civil Libertarian Among Many: The Case of Mr. Justice Goldberg*, 65 MICH. L. REV. 301 (1966); Yale Kamisar, *The Warren Court and Criminal Justice: A Quarter-Century Retrospective*, 31 TULSA L.J. 1 (1995).

18. *See* discussion *infra* Parts II, III (analyzing minimalist works).

19. For an attempt to identify common ground between some of the main public discourses on criminal law in the United States, see Steven Arrigg Koh, *Criminal Law's Hidden Consensus,* 101 WASH. U. L. REV. (forthcoming 2024).

II. THREE MINIMALIST CRIMINAL LAW WORKS

In this part, I describe and analyze three criminal law works that have used the term "minimalist" to describe themselves. They include the work of Luigi Ferrajoli, an Italian legal philosopher that introduced the term "minimal criminal law" in Italy in the 1980s; the work of American philosopher Douglas Husak, who articulated a theory of criminalization in the first decade of the 2000s that he referred to as minimalist; and my own work from 2020 that has sparked and contributed to current discussions on minimalism in the United States and the legal literature in English, as well as this symposium.

A. Diritto Penale Minimo for Luigi Ferrajoli

Luigi Ferrajoli coined the expression *criminal law minimalism* (*diritto penale minimo* in Italian) in a debate with penal abolitionists in 1985.[20] For Ferrajoli, criminal law minimalism is a normative model that articulates the goal or goals of criminal law and the justification criteria that penal means must meet in relation to the goal or goals assigned to them.[21] This normative model can be used not only to legitimize, but also to morally and politically delegitimatize criminal law.[22]

In discussing theories of punishment, Ferrajoli rejects theories that do not meet his justification criteria. These theories include retributionism, which, according to Ferrajoli, falls into the naturalist fallacy because it assumes from the fact that punishment is retributive that it follows that punishment is normatively justified.[23] Similarly, he argues that rehabilitation (*prevenzione speciale*) commits the normative fallacy because it assumes a priori an unachieved or perhaps unachievable fact—that people who are punished get rehabilitated—thus assuming that the fact of rehabilitation follows from the normative ideal of rehabilitation (*deduciendo l'essere dal dover essere*).[24]

Ferrajoli instead values utilitarian general prevention or deterrence (*prevenzione generale*) because it distinguishes between the penal means that are an evil and the noncriminal goals that may justify the use of these means.[25] This makes possible the justification of punishment and of criminal

20. Luigi Ferrajoli, *Sul diritto penale minimo (risposta a Giorgio Marinucci e a Emilio Dolcini)*, 123 IL FORO ITALIANO 125, 126 (2000).
21. Ferrajoli, *Il diritto penale minimo*, *supra* note 14, at 493.
22. *Id.* at 500.
23. *Id.* at 502–03.
24. *Id.* at 503.
25. *Id.*

prohibitions based on these goals.[26] According to him, this type of justification was an element of the laic and liberal criminal law tradition of the seventeenth and the eighteenth centuries that he relies on in his work.[27]

However, Ferrajoli distinguishes between two versions of utilitarianism. The first version seeks to ensure the maximum possible utility for the majority that does not commit criminal offenses. He rejects this first version of utilitarianism because it has as its purpose only the security interests of those who are not subjected to punishment and thus makes it impossible to commensurate the costs and benefits of punishment.[28] This first version does not establish any limit to criminal punishment since the goal of preventing future crimes would justify the harshest punishments.[29] In this regard, this would be a "maximalist" theory of criminal law.

Instead, Ferrajoli embraces a second version of utilitarianism that also includes among its goals the interests of those who are punished, thus making commensurable the costs and benefits of punishment.[30] This second version establishes limits to criminal law, which is only justified if its intervention is reduced to the minimum necessary.[31] If the goal is imposing the minimum of necessary suffering to prevent future evils, only the minimum means—that is, the minimum of punishment and criminal prohibitions—would be justified.[32] According to Ferrajoli, this was the version of utilitarianism that Enlightenment and nineteenth century thinkers like Montesquieu, Beccaria, Bentham, Romagnosi, and Carmignani embraced.[33]

For Ferrajoli, then, his reformed penal utilitarianism requires not only the maximum possible utility for those who do not commit crimes, but also the minimum necessary evil to those who commit them.[34] Punishment has the goal not only of preventing crime, but also of preventing informal punishment—that is, preventing public or private informal reactions against those who commit crimes.[35] In other words, if the first goal of punishment is deterrence, the second goal of punishment is minimizing a violent reaction against the offender due to her/his/their commission of the crime.[36]

26. *Id.*
27. *Id.*
28. *Id.* at 504.
29. *Id.*
30. *Id.*
31. *Id.*
32. *Id.*
33. *Id.* at 505.
34. *Id.* at 509.
35. *Id.*
36. *Id.*

While the first goal indicates the minimum limit, the second goal indicates the maximum limit of punishment.[37] And Ferrajoli considers that between these two goals, the second one is the most important. While it is dubious that criminal law can effectively advance the first goal of deterrence—given the complex social, psychological, and cultural causes of crime that may not be neutralized only by the fear of punishment—it is much more certain it can advance the second goal.[38]

In this regard, then, the goal of punishment is the minimization of violence in two ways. First, it prevents the commission of crime. Second, it prevents revenge or other possible informal reactions.[39]

For Ferrajoli, criminal law is the law of the weaker or less powerful party—*la legge del piú debole*. At the moment of the commission of the crime, criminal law protects the weaker/less powerful party harmed or threatened by the crime—that is, the victim—against the stronger/more powerful party—that is, the criminal. After the crime is committed, it protects the weaker/less powerful party—that is, the criminal—against revenge by the stronger/more powerful party—the victim or those acting in solidarity with the victim.[40]

For Ferrajoli, then, a penal system is justified if the violence that it prevents—crime, revenge and arbitrary punishment—is higher than the violence of the crimes not prevented and of the punishment imposed on them.[41] Ferrajoli acknowledges that a calculus of this type is impossible to do.[42] But he argues that punishment can be justified as the *lesser evil*—that is, only if it is minor, and less afflictive and less arbitrary than other non-legal reactions—and more generally that the state monopoly on punishment is more justified the lower the costs of criminal law are vis-à-vis the costs of a punitive anarchy.[43]

The next step in Ferrajoli's minimalist theory follows from this second goal of punishment. This second goal, which includes minimizing informal public reactions and arbitrary punishment, can only be achieved if criminal law and criminal procedure rights and principles (*garanzie*) are respected.[44] These rights and principles—that he articulates and develops in his magnum opus *Diritto e ragione* (*Law and reason*)—are protections against arbitrary and wrongful punishment and include ten axioms: (1) the principle of

37. *Id.* at 511.
38. *Id.*
39. *Id.* at 511–12.
40. FERRAJOLI, DIRITTO E RAGIONE, *supra* note 14, at 325–30; Ferrajoli, *Il diritto penale minimo*, *supra* note 14, at 512.
41. Ferrajoli, *Il diritto penale minimo*, *supra* note 14, at 512.
42. *Id.*
43. *Id.*
44. *Id.* at 520.

retribution or that punishment can only be applied following the commission of a crime (*nulla poena sine crimine*); (2) the legality principle (*nullum crimen sine lege*); (3) the necessity principle (*nulla lex (poenalis) sine necessitate*); (4) the harm principle (*nulla necessitas sine iniuria*); (5) the materiality or external action principle (*nulla iniuria sine actione*); (6) the personal culpability or responsibility principle (*nulla action sine culpa*); (7) the jurisdictional principle (*nulla culpa sine iudicio*); (8) accusatorial principle or the principle of separation between judge and prosecution (*nullum iudicium sine accusatione*); (9) the burden of proof or verification principle (*nulla accusation sine probatione*); and (10) the defense principle (*nulla probation sine defensione*).[45]

(As a side note to Anglo-American readers, while American commentators often assume that the courts determine the extent of rights, many commentators from civil law jurisdictions do not make such an assumption and give their own content and scope to rights. They then often use their formulation of rights to criticize the existing criminal legal system, including the work by courts.)

Ferrajoli identifies this model of axioms with the rule of law—understood as an order in which public penal power is strictly limited by and linked to law, at the level of both criminal law substance and criminal procedure.[46] Minimal criminal law is a model that includes these axioms. The opposite extreme is maximum criminal law that is the model of criminal law of the absolute or totalitarian state in which public power is not disciplined by law and, consequently, does not have limits and conditions.[47]

For Ferrajoli, minimum criminal law includes not only the maximum degree of protection of citizens' freedoms against arbitrary penal power, but also an ideal of rationality and certainty, because minimum criminal law's interventions are predictable to the extent that they are based on cognitivist arguments based on what can be formally decided within the criminal process.[48] And a closure norm of minimal criminal law is the *favor rei* criterion.[49] The certainty that minimal criminal law aspires to is that no innocent be criminally convicted.[50]

Among the axioms that Ferrajoli articulates, I would like to further explore the content he gives and the limitations he infers from his necessity principle (*nulla lex (poenalis) sine necessitate*).[51] The first limitation has to

45. FERRAJOLI, DIRITTO E RAGIONE, *supra* note 14, at 69.
46. *Id.* at 81.
47. *Id.*
48. *Id.*
49. *Id.* at 82.
50. *Id.*
51. Ferrajoli also points out that the principle of necessity is conditioned by the harm principle. *Id.* at 467. But I will not analyze this issue here.

do with the creation of criminal offenses—that is, with criminalization. According to Ferrajoli, since punishment is the technique of social control more harmful to the freedom and dignity of citizens, the necessity principle requires that it be used like an extreme remedy.[52] If criminal law's only goal is to protect citizens and minimize violence, the only criminal prohibitions justified by their "absolute necessity" are the *minimum necessary prohibitions* needed to prevent harmful behavior that, when added to the informal reaction resulting from not adopting these criminal prohibitions, would constitute more total violence and a more serious harm to rights than the violation and harm institutionally generated by criminal law.[53]

The second limitation is on the type and amount of punishment he derives from punishment's goal of preventing informal or arbitrary reactions against those who commit criminal offenses. Any punishment qualitatively and quantitatively higher than necessary to prevent the more afflictive informal reactions against the defendant violates human dignity. That sets the maximum limit of punishment and if a defendant is punished more harshly than such a limit he is being reduced to a thing and sacrificed for the sake of others.[54]

A third point that is important to highlight on top of his theory of punishment and his model of axioms is that Ferrajoli finds penal abolitionism—regardless of what the libertarian and humanitarian intentions that animate it are —a regressive utopia that proposes, under the illusory assumption of a kind society or a kind state, models of surveillance and punishment without rules or external regulations.[55] In relation to this, criminal law—as painfully conceived with its complex system of rights from the Enlightenment—constitutes, historically and axiologically, a progressive alternative.[56]

Ferrajoli thus proposes a minimum criminal law model in the triple sense of (1) the maximum quantitative reduction of penal intervention based on his theory of punishment; (2) the largest extension of criminal law's due process (*garantistici*) restrictions and limits; and (3) the exclusion of other means of coercive intervention that exist in the abolitionist dystopias that he identifies.[57]

52. *Id.*
53. *Id.*
54. *Id.*
55. Ferrajoli, *Il diritto penale minimo*, *supra* note 14, at 517.
56. *Id.* at 517–18.
57. *Id.* at 521.

B. Douglas Husak's Criminal Law Minimalism

In the Anglo-American literature, the term "criminal law minimalism" and its variations started to be used in the 1990s.[58] The first edition of the prominent English scholar Andrew Ashworth's *Principles of Criminal Law*, first published in 1991, mentions "a minimalist system of criminal law" only once, while discussing complicity, without citing any source for it.[59] The 2019 edition of this manual, now authored by Jeremy Horder, elaborates a little further but not much. It says that "minimalist criminal law" refers to: (1) respect for human rights and other moral constraints, including the proportionality principle; and (2) the recognition that punishment may cause great suffering, hardship, and impoverishment and must in most circumstances be a measure of last resort.[60] However, there is no further elaboration on the term.

To find a full theory self-identified as "minimalist" in Anglo-American literature, we need to go to the work of American philosopher Douglas Husak who, apparently unaware of the work of Luigi Ferrajoli and other

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58. *See* JOHN BRAITHWAITE & PHILIP PETTIT, NOT JUST DESERTS: A REPUBLICAN THEORY OF CRIMINAL JUSTICE 25–26 (1990). In this important book, authors Braithwaite and Pettit refer to the spectrum between minimalist and maximalist doctrines based on the interventionist effect of the theory and say that their theory "is on the minimal end of the intervention spectrum." *Id.* at 26. But they also say that "these features are of secondary importance for our purposes. The first and most significant property of the theory is that it is consequentialist." *Id.* In addition, throughout the book, they characterize their theory as "republican." This is why I am not dedicating a section of this Part II to their work because it does not self-identify as "minimalist." But I will discuss their work later in this piece. In terms of the origins of the term "criminal law minimalist" and its variations, I did a search on March 27, 2024, in Google Ngram Viewer of the terms "minimalist criminal law," "criminal law minimalism," and "minimalist criminal justice" which did not generate any ngram plot—*see "Minimalist Criminal Law"*, GOOGLE BOOKS NGRAM VIEWER, https://books.google.com/ngrams/graph?content=%22minimalist+crimina+law%22&year_start=1800&year_end=2019&case_insensitive=on&corpus=en-2019&smoothing=3 [https://perma.cc/W4FZ-CSGB]; *"Criminal Law Minimalism"*, GOOGLE BOOKS NGRAM VIEWER, https://books.google.com/ngrams/graph?content=%22criminal+law+minimalism%22&year_start=1800&year_end=2019&case_insensitive=on&corpus=en-2019&smoothing=3 [https://perma.cc/TP9W-4FA9]; *"Minimalist Criminal Justice"*, GOOGLE BOOKS NGRAM VIEWER, https://books.google.com/ngrams/graph?content=%22minimalist+criminal+justice%22&year_start=1800&year_end=2019&case_insensitive=on&corpus=en-2019&smoothing=3 [https://perma.cc/AE6X-ZS8H]. A search of secondary sources made on February 18, 2024, in Westlaw of the term "minimalist criminal law" generated only four hits, the earliest one being from an article published in 2015. Mike C. Materni, *The 100*-plus-*Year-Old Case for a Minimalist Criminal Law (Sketch of a General Theory of Substantive Criminal Law)*, 18 NEW CRIM. L. REV. 331 (2015). A search in the same database of the term "criminal law minimalism" generated only twenty-three hits, the earliest one being an article published in 2008. Ethan J. Leib, Dan Markel & Jennifer M. Collins, *Voluntarism, Vulnerability, and Criminal Law: A Response to Professors Hills and O'Hear*, 88 B.U. L. REV. 1449 (2008). A search of the term "criminal justice minimalism" in the same database and on the same date generated zero hits. A search of the term "penal minimalism" in the same database and on the same date generated only one hit in 2011 from Argentine legal scholar Roberto Gargarella. Roberto Gargarella, *Penal Coercion in Contexts of Social Injustice*, 5 CRIM. L & PHIL. 21 (2011).

59. *See* ANDREW ASHWORTH, PRINCIPLES OF CRIMINAL LAW 363 (1st ed. 1991).

60. *See* JEREMY HORDER, ASHWORTH'S PRINCIPLES OF CRIMINAL LAW 75–77 (9th ed. 2019).

scholars outside of the Anglo-American world, borrows the term "minimalist criminal law" from Ashworth's work to describe the theory of criminalization that he articulates to criticize and provide a framework to eliminate overcriminalization and reduce the infliction of state punishment in his book *Overcriminalization: The Limits of the Criminal Law*.[61]

Interestingly, Husak says that he refers to his theory "as criminal law minimalism . . . more as a slogan than as the name of a unified account of the criminal law"—a point I will explore later.[62] But in this book Husak clearly articulates a theory of the limits of the penal sanction and, more specifically, a theory of criminalization "to distinguish those criminal laws that are justified from those that are not."[63] And he uses the term "criminal law minimalism" and similar variations throughout the book to refer to his theory.

Husak argues "that overcriminalization is objectionable mainly because it produces too much punishment" and says that "we inflict *too much* punishment because many of these punishments are unjust."[64] But there are different reasons why punishment can be unjust. Punishment may be unjust because it is excessive. But the concern by Husak in his book is that "[a] substantial amount of contemporary punishments are unjust because they are inflicted for conduct that should not have been criminalized at all."[65]

Husak articulates two types of constraints designed to limit the authority of the state to enact criminal offenses. The first are internal constraints that he derives "from the criminal law itself."[66] Three out of these four constraints are familiar to any liberal theory of criminal law. They include "the nontrivial harm or evil constraint," "the wrongfulness constraint," and "the desert constraint."[67] The fourth constraint is that those who want to criminalize conduct have the burden of proof that the requirements to criminalize a certain conduct are met because every person has a right not

61. DOUGLAS HUSAK, OVERCRIMINALIZATION: THE LIMITS OF THE CRIMINAL LAW 119 (2008) [hereinafter HUSAK, OVERCRIMINALIZATION]. Husak says that he "gratefully borrow[s]" the term from Andrew Ashworth. *Id.* at 60 (citing ANDREW ASHWORTH, PRINCIPLES OF CRIMINAL LAW 33 (4th ed. 2003)); *see also* Langer, *supra* note 1, at 54–55. Husak also used the term in some of his earlier work. *See* Douglas Husak, *The Criminal Law as Last Resort*, 24 OXFORD J. LEGAL STUD. 207, 207 (2004) [hereinafter Husak, *Last Resort*] (referring to a minimalist theory of criminalization).

62. HUSAK, OVERCRIMINALIZATION, *supra* note 61, at vi.

63. *Id.* at 3; *see also id.* at v. Husak adds: "I describe what follows as a *theory* of criminalization even though it might be construed as a *decision procedure* for justifying criminal laws. Although it is not exactly clear what makes a set of principles qualify as a theory, my account consists in more than a single consideration and aspires to be reasonably comprehensive." *Id.* at 55, n.3.

64. *Id.* at 3.

65. *Id.*

66. *Id.* at 55.

67. *Id.* (emphasis omitted).

to be punished given that state punishment involves hard treatment and moral censure.[68]

The second type of constraints are external to criminal law and derive from a theory of the state about what conditions must be met to justify infringements of the right not to be punished.[69] To develop these constraints, Husak relies on American standards to assess the constitutionality of statutes. He first rejects the rational basis standard, under which it would be constitutional to pass a criminal statute "if it is substantially related to a legitimate government purpose,"[70] because he considers that it does not meet "the level of justification we should demand before allowing the state to resort to penal sanctions."[71] This is because "the right not to be subjected to hard treatment and censure should not be overridden simply because majorities have a rational basis to enact a criminal offense. Legislatures should recognize constraints on the justifiability of penal statutes beyond those derived solely from the Constitution as it is presently construed."[72]

But interestingly, Husak also rejects a strict scrutiny standard, under which a criminal statute would be legitimate "if it is necessary to achieve a compelling government purpose."[73] Husak rejects such a standard even if he acknowledges it would be best to promote his minimalist agenda—which may be one of the reasons why Husak claims he uses "criminal law *minimalism* . . . more as a slogan than as the name of a unified account of the criminal law"[74]:

> This proposal . . . would be radical—probably too radical. To be sure, implementing the compelling state interest test throughout the entire criminal domain would best promote my minimalist agenda. Arguably, the right not to be punished should be protected as zealously as any right persons possess. The difficulty with this proposal, however, is that the compelling state interest test is probably too onerous in practice and might come close to obliterating the criminal law altogether. Constitutional scholars have long described applications of the compelling state interest test as strict in theory but fatal in fact. Precious few laws survive strict scrutiny. Requiring a compelling interest before allowing the state to resort to punishment may prove a recipe for paralysis. If we hope to retain a fair amount of the criminal law—minimalist sympathies

68. *Id.* at 92–103.
69. *Id.* at 120.
70. *Id.* at 123.
71. *Id.* at 124.
72. *Id.* at 125.
73. *Id.* at 123.
74. *Id.* at vi.

> notwithstanding—given offenses should be held to a somewhat less demanding standard. Thus a more moderate and cautious approach is advisable.[75]

In this sense, Husak departs from a minimalist position under the very standards that he adopts to articulate his theory. Instead, to "avoid the twin perils of too much and too little criminal law," Husak defends an intermediate scrutiny standard.[76] Under this scrutiny standard, the governmental interest that the law advances must be *substantial*, and, if so, the law must directly advance the government objective in a way that is "no *more extensive* than necessary to achieve its purpose."[77]

On the third element of this intermediate scrutiny standard, Husak further explains:

> To apply this condition, legislators must be prepared to entertain and evaluate alternative means to attain the statutory purpose. Strictly speaking, the challenged law need not be *necessary* to achieve its goal. All that is required is that no alternative that is equally effective be less extensive than the statute in question. Applying this condition throughout the corpus of penal laws would open up an entirely new area of investigation. Deciding whether and under what circumstances various options (both criminal and noncriminal) would be as effective but less extensive than a challenged offense would again necessitate research that criminal theorists have seldom recognized the need to undertake.
>
> In requiring that no alternative that is equally effective be less extensive than the statute in question, this final prong of intermediate scrutiny imposes a presumption against overinclusive criminal laws.[78]

In this regard, it is important to highlight that Husak rejects the *ultima ratio* principle—the principle that requires use of criminal law only as a last resort:

> Because this final prong of intermediate review should be construed only to create a presumption against overinclusive criminal legislation and does not entail that the challenged statute be necessary to achieve its objective, it is probably an exaggeration to say—along with a few prominent theorists—that the criminal law may be used only as a last resort. Commentators should, of course, remain mindful

75. *Id.* at 127.
76. *Id.*
77. *Id.* at 128.
78. *Id.* at 153–54 (emphasis omitted) (footnotes omitted).

> of the many nonlegal and noncriminal means to secure compliance with norms. Clearly, however, the theory of criminalization sketched here does not require the state to conduct a series of experiments in which alternative strategies to attain its objective are implemented and found to be deficient. Perhaps alternatives must literally be exhausted before a state is permitted to go to war, but not before a state is permitted to enact an offense. Moreover, although the details of a last-resort principle seldom are provided, the requirement is typically construed to suggest that alternative means of crime reduction be exhausted before penal sanctions may be employed. If a given law has important expressive functions, however, the fact that other measures may be more effective in preventing the proscribed conduct will not be decisive. A statute with important expressive purposes may pass our theory of criminalization, even if an alternative that is less extensive does as well or better in deterring crime.[79]

C. My Version of Penal Minimalism

In my own work discussing penal abolitionism, I have proposed criminal law minimalism as a more attractive alternative.[80] In terms of its content, I have argued that a minimalist account of criminal law should include an *ultima ratio* or last resort principle.[81] The last resort principle is not new, and it has been embraced by various legal systems and commentators around the world.[82] The basic idea behind it is that criminal law should only be used as a last resort when no other social responses or public measures would suffice to adequately advance a legitimate goal, such as addressing harmful behavior.[83] This is the case because punishment and other penal consequences impose a heavy burden on those to whom they are applied. Consequently, if there are non–criminal law social responses or public measures to adequately advance the goals that punishment aims to advance,

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79. *Id.* at 157–58 (emphases omitted) (footnotes omitted). As I have already explained elsewhere, *see* Langer, *supra* note 1, at 73 n.179, in his earlier article Husak argued that there was "a plausible basis for including the last resort principle among the substantive parts of a theory of criminalization" but maintained it was trivial because he considered it unhelpful in reversing the tendency to overcriminalize. Husak, *Last Resort*, *supra* note 61, at 235. I leave for another occasion a detailed analysis of Professor Husak's arguments.

80. Langer, *supra* note 1.

81. *Id.* at 72–76.

82. *See, e.g.*, Corte Constitucional [C.C.] [Constitutional Court], junio 20, 2001, Sentencia C-647/01 (Colom.), https://www.corteconstitucional.gov.co/relatoria/2001/C-647-01.htm [https://perma.cc/FJ2X-ZEFW]; Kaarlo Tuori, *Ultima Ratio as a Constitutional Principle*, 3 OÑATI SOCIO-LEGAL SERIES 6, 11 (2013) (describing the recognition of the principle by the Constitutional Law Committee of Parliament in Finland).

83. Langer, *supra* note 1, at 73.

these non–criminal law social responses or public measures should be used first.

As I explained elsewhere, this definition of the principle tried to remain open to different theories of the state, of punishment, of what a legitimate goal is, and of what it means to adequately advance it.[84] I articulated such an open-ended definition for two reasons. First, as the analysis already suggests and as I will further discuss, there is a range of possible minimalist penal theories, and my definition of the *ultima ratio* principle left room for minimalist theories that are different from my own version of penal minimalism. Second, I articulated an open-ended definition of the last resort principle because I could not embark in my previous article and still cannot embark here on the enormous tasks of articulating a theory of the state, a theory of punishment, a theory of what a legitimate goal is, and a theory of what an adequate mean is. However, it is important to explain a few points of departure for my minimalist conception of the criminal legal system in this respect. Also, since my previous work concentrated on discussing penal abolitionism, I did not flesh out there a full account of penal minimalism. In what follows, I sketch such an account that includes not only the *ultima ratio* principle, but also four other elements and principles.

1. Criminal Law Has a Legitimate Role to Play in the Protection of People's Interests and Rights

A first element of my account of penal minimalism is that criminal law and the criminal legal system have a legitimate role to play in the protection of people's interests and rights. The use of punishment is thus justified if it meets certain requirements.

I cannot articulate here a full theory of punishment. However, it is important to make a few points on the issue. There are various theories of punishment compatible with minimalism. But there are theories of punishment that are not. As I will discuss in more detail later, a minimalist theory of punishment may not use the defendant as a mere instrument to advance its goals and must sufficiently consider the defendant's interests in its justification of punishment. One of the consequences of these assumptions is that whatever the justification of punishment, the level of culpability of the defendant should set the maximum limit for the criminal sanction. In this regard, my account of penal minimalism includes negative retributivism since the innocent should never be intentionally convicted and the punishment of the guilty should never be higher than the level of culpability of the offender.

84. *Id.*

But I reject the notion—defended by versions of retributivism—that punishment cannot be lower than the culpability of the offender or even fully skipped based on consequentialist or other type of considerations.[85] Thus, if in a case or set of cases it is not necessary, fair, or wise to impose such a maximum limit to advance consequentialist or other types of considerations, these considerations set the maximum penalty.[86] For instance, if one of the goals of punishment includes preventing vigilantism, as is the case under Ferrajoli's theory, it is the minimum punishment that is sufficient to prevent vigilantism that would be necessary and thus justified.[87]

85. Kant's theory has been traditionally interpreted as a classic example of such a version of retributivism. *See infra* footnotes 183–85 and accompanying text. Among the many critiques of retributivism, see, for example, David Dolinko, *Three Mistakes of Retributivism,* 39 UCLA L. REV. 1623 (1992). Regarding other types of considerations that may give grounds to lower punishment below the culpability of the offender or even fully skip punishment, they may include forgiveness and mercy. On mercy and punishment, see, for example, Jeffrie Murphy, *Mercy and Legal Justice*, *in* FORGIVENESS AND MERCY 162 (1988); Martha C. Nussbaum, *Equity and Mercy*, 22 PHIL. & PUB. AFFS. 83 (1993); Carol S Steiker, *Criminalization and the Criminal Process: Prudential Mercy as a Limit on Penal Sanctions in an Era of Mass Incarceration*, *in* THE BOUNDARIES OF THE CRIMINAL LAW 27 (R.A. Duff, Lindsay Farmer, S.E. Marshall, Massimo Renzo & Victor Tadros eds., 2010).

86. In their piece for this symposium, Yoav Sapir and Guy Rubinstein make a similar point by proposing the principle of penal restraint as a minimalist principle for criminal courts, though focusing on whether a custodial sentence is necessary at all. *See* Yoav Sapir & Guy Rubinstein, *Minimalist Criminal Courts*, 101 WASH. U. L. REV. (forthcoming 2024).

87. FERRAJOLI, DIRITTO E RAGIONE, *supra* note 14, at 314–40, 393. In Ferrajoli's theory, the offender's interests and well-being are considered because punishment is justified as a way to prevent violent or arbitrary reactions against the offender for the commission of crime. Ferrajoli's system of liberal criminal law principles—that sets requirements for legitimate punishment—also aims at protecting the offender against arbitrary action by state officials. Among these principles, the harm principle and personal culpability or responsibility principle also set limits to punishment. *See id.* at 396–97. Interestingly, Husak does not explicitly articulate a theory of punishment in his work on overcriminalization. But he seems to assume that the culpability of the offender sets the maximum possible punishment. *See* HUSAK, OVERCRIMINALIZATION, *supra* note 61, at 83 ("[P]unishments may be undeserved when they are excessive. The desert constraint underlies the principle of proportionality."). His analysis also includes consequentialist and expressivist reasons as justifications for criminalization and punishment. *See id.* at 200 ("[W]hen state punishment is justified, consequentialist considerations play an indispensable role in its justification. My minimalist theory, which includes consequentialist elements, contains the resources to explain why punishment should be imposed by the state."); *id.* at 139–40 ("Feinberg was perhaps the first to argue—persuasively, I think—that the criminal law does not exist solely to decrease the amount of criminal behavior; it also has an *expressive* function. An important objective of the criminal law is to convey both to the offender and to the community the wrongfulness of his conduct. This objective persists even if no one's behavior is changed as a result of the expression." (footnote omitted)). One can thus infer that these consequentialist and expressivist reasons may justify lower punishment than the maximum required by the offender's culpability. Among minimalist works, Christopher Slobogin proposes an incapacitation theory of punishment that operates within the maximum retributive sentence. Under it, the defendant's culpability sets the maximum possible sentence, but every person sentenced to prison should be released unless it is more probable than not that the person will commit a crime during the time established by the maximum sentence and no non-prison alternative would just as effectively prevent the commission of a new crime. *See* Christopher Slobogin, Essay, *The Minimalist Alternative to Abolitionism: Focusing on the Non-Dangerous Many*, 77 VAND. L. REV. 531, 534 (2024). Slobogin's theory thus also takes the interests and well-being of offenders into account.

This necessity requirement works within the other principles of minimalism. Every theory of punishment assumes that there is a level of necessary punishment.[88] Under my conception of minimalism, this necessity requirement is, first, a way to lower the punishment below the level of culpability of an offender or to skip punishment altogether based on consequentialist or other type of considerations. In addition, punishment can only be pursued when no other non–criminal law social responses or public tools would suffice to adequately and as well address culpable wrongful harm or other culpable wrongs as criminal law and the criminal legal system. Also, punishment can never dehumanize those who engaged in or are affected by the commission of culpable wrongful harms or other culpable wrongs.

2. Minimalism Respects Criminal Law and Criminal Procedure Principles and Rights

As a second element of my account of penal minimalism, I assume that, at a minimum, in order to punish and use the criminal legal system the state must respect liberal principles such as versions of the wrongfulness principle, the desert principle, and criminal law and procedure rights—which are indeed human rights—such as the principle of legality, the right against unreasonable searches and seizures, the right to notice, the right to an impartial adjudicator, and the right to defense.[89]

3. The Ultima Ratio Principle

As already mentioned, another element of my conception of penal minimalism is the *ultima ratio* or last resort principle. Under the definition of the last resort principle I articulated in the past to leave room to various conceptions of penal minimalism, criminal law should only be used as a last resort, when no other social responses or public measures would suffice to adequately advance a legitimate goal, such as addressing harmful behavior.

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88. This is why I do not agree with one of the definitions of minimalism that Professor Benjamin Levin articulates in his piece to this symposium according to which minimalism would be "a belief in using criminal law (or criminal legal institutions) as little as necessary." *See* Benjamin Levin, *Criminal Law Minimalisms*, 101 WASH. U. L. REV. (forthcoming 2024). In a way, every criminal law theory can be presented as addressing this issue since even tough-on-crime theories of punishment would not go beyond what it is necessary in their own terms. What distinguishes minimalist from other theories is how it responds to the question, rather than the formulation of the question.

89. I also consider that a legitimacy requirement of states is that they be democratic. In other words, they must hold open elections, respect freedom of expression and of political participation, and the like. But I do not consider the democratic character of the state a necessary condition of penal minimalism. It is possible to imagine a "benevolent dictatorship" that embraces minimalism regarding the criminal legal system.

But as part of the sketch of my own conception of penal minimalism, I would like to articulate here another definition of the last resort principle that still leaves room for various conceptions of the state, of the goals of punishment, and other issues that I cannot address in this piece, but that more closely reflects my own conception of the principle. Under this definition of *ultima ratio*, public officials and private individuals should only use criminal law and the criminal legal system when their use would likely be an adequate and a better way to prevent or otherwise address culpable wrongful harms or other culpable wrongs than the use of other social responses or public measures.

In what follows, I briefly elaborate on the different elements of this definition of *ultima ratio* and on the principle more generally.

a. Legitimate Goals of Criminal Law and the Criminal Legal System

In terms of legitimate goals, the main goal of criminal law is preventing or otherwise addressing culpable wrongful harm or other culpable wrongs.[90] In other words, the criminal legal system is not a tool to advance any kind of social and public goals. Other areas of law and other public policy tools different from criminal law should be used to address other types of harms and public goals.

b. An Adequate and a Better Way to Prevent or Otherwise Address Culpable Wrongful Harms or Other Culpable Wrongs

In terms of when the use of criminal law and the criminal legal system would likely be an adequate and a better way to prevent or otherwise address culpable wrongful harms or other culpable wrongs than the use of other social responses or public measures, the interests of all of those affected should be considered, including crime victims and the society at large.

90. There is a long literature on whether respecting a harm principle is a necessary condition for the criminalization of behavior. *See, e.g.*, R.A. DUFF, ANSWERING FOR CRIME: RESPONSIBILITY AND LIABILITY IN THE CRIMINAL LAW 129–38 (2007); James Edwards, *Harm Principles*, 20 LEGAL THEORY 253 (2014); Andrew Ashworth & Lucia Zedner, *Prevention and Criminalization: Justifications and Limits*, 15 NEW CRIM. L. REV. 542 (2012); Nils Holtug, *The Harm Principle*, 5 ETHICAL THEORY & MORAL PRAC. 357 (2002); Arthur Ripstein, *Beyond the Harm Principle*, 34 PHIL. & PUB. AFFS. 215 (2006); David Rodin, *Justifying Harm*, 122 ETHICS 74 (2011); Hamish Stewart, *The Limits of the Harm Principle*, 4 CRIM. L. & PHIL. 17 (2010); Victor Tadros, *Harm, Sovereignty, and Prohibition*, 17 LEGAL THEORY 35 (2011). Since engaging with this debate is beyond the scope of this article, I leave the door open to the possibility that addressing certain wrongs that do not involve harm may be a legitimate goal of criminal law. I also leave the door open to discuss on another day whether and how the use of criminal law and the criminal legal system may include goals other than the prevention of culpable wrongful harm or other culpable wrongs—such as expressive goals—and this is one of the reasons why my definition here refers to "otherwise address[ing] other culpable wrongful harms or other culpable wrongs."

Minimalism does not underestimate the harm that crime causes and the right that victims and society at large have to security.[91] But only if the use of criminal law and the criminal legal system would likely be an adequate and a better way to address this harm and protect such a right, the use of criminal law and the criminal legal system is justified.[92]

Making such an assessment requires, first, determining whether the use of criminal law and the criminal legal system would be an adequate way to advance these goals.[93] For instance, studies indicate that many people who commit criminal offenses during their youth "grow out of crime" if they are left alone.[94] As young people mature, find jobs, enter into relationships, constitute a family, and the like, the factors that contributed to their commission of a criminal offense during their youth disappear. In these cases, a criminal law response to nonserious youth crime may not be an adequate response because it may be counterproductive—for example, it may have criminogenic effects that lead to the commission of further or more serious crimes—and it may impose unnecessary costs on young people, their family, and society at large since the issue may get resolved by itself. In this regard, there are situations in which the best response to certain wrongs is to do nothing.

Second, making an assessment on whether criminal law and the criminal legal system would likely be a better way to prevent or otherwise address an issue requires identifying non–criminal law responses to advance these goals and comparing their use to the use of criminal law and the criminal legal system. The more information and empirical studies decision-makers have available to identify noncriminal law responses and make such a

91. *See* Gardner, *supra* note 12.

92. Though I cannot articulate here a theory of when culpable wrongful harm is adequately addressed, this may include expressive dimensions that can be included in the last resort principle analysis together with other considerations. But what makes criminal law distinctive is not only that it may express opprobrium for the violation of an important social norm. Criminal law typically imposes hard treatment and harsh consequences against those who are punished and subjected to the criminal legal system. And these hard treatment and harsh consequences are typically more burdensome than the treatment and consequences imposed through other public measures from other areas of law such as torts and administrative law. These dimensions of punishment should also be included in the last resort principle analysis. One of the reasons I disagree with Husak's conclusion that the last resort principle is trivial is that he underestimates how burdensome punishment and the criminal legal system typically are vis-à-vis these other public tools. *See* Husak, *Last Resort*, *supra* note 61.

93. In analyzing whether the use of criminal law is an adequate way to address an issue, legislators, the executive branch, and the various actors of the criminal legal system should explore as part of their analysis the questions that W. Robert Thomas raises in his piece for this symposium, including whether the use of criminal law and the criminal legal system to address an issue and a case or set of cases is inefficient, oppressive, or self-defeating; impedes moral progress; exacerbates structural inequalities; and belittles the citizenry. *See* W. Robert Thomas, *Does the State Have an Obligation Not to Enforce the Law?*, 101 WASH. U. L. REV. (forthcoming 2024).

94. *See, e.g.*, Franklin E. Zimring & Máximo Langer, *One Theme or Many? The Search for a Deep Structure in Global Juvenile Justice*, *in* JUVENILE JUSTICE IN GLOBAL PERSPECTIVE 383 (Franklin E. Zimring, Máximo Langer & David S. Tanenhaus eds., 2015).

comparison, the better to apply the last resort principle. However, against what Husak suggests,[95] the last resort principle does not require the existence of empirical studies or that experiments be run before decision-makers may use criminal law and the criminal legal system or non-criminal law measures. Legislators and other public decision-makers constantly must act with insufficient or incomplete information, and they must often rely on their common sense and anecdotal information. The point is that if they have grounds to believe that a non–criminal law way to think about or to prevent or otherwise address culpable wrongful harm or other culpable wrong may be at least as good as criminal law and the criminal legal system to do so, they should use such non–criminal law way. This is one of the reasons why under the definition of *ultima ratio* I have articulated, the likelihood that the use of criminal law and the criminal legal system would be an adequate and a better way to prevent or otherwise address culpable wrongful harms or other culpable wrongs should be enough to use them.

Third, minimalism does not idealize all social and non-criminal responses to crime since they can be harsher or more burdensome on freedom than criminal law. For instance, small illiberal communities may address crime through social pressure, but at the price of imposing a certain ideology and religion that prevents people from choosing their own ideals of the good. Social, expert-based, or public preventative techniques may also address crime by eliminating the ability of people to choose their actions—but the use of these techniques would not be justified if the costs they impose on everyone's freedom to choose how to live their lives were higher than the benefits obtained from preventing or otherwise addressing crime.[96] Similarly, if, everything else being equal, non-criminal responses to a situation were harsher or more burdensome than a criminal law response—for example, deportation as an administrative measure versus a criminal fine to someone for being an undocumented immigrant—the criminal law response would be better.

Fourth, in applying the last resort principle, criminal law and the criminal legal system should be compared to not only other forms of social control but also other social responses and public measures.[97] For instance, investment in creating jobs and other opportunities in a neighborhood where

95. HUSAK, OVERCRIMINALIZATION, *supra* note 61, at 158.

96. *See, e.g.*, Ferrajoli, *Il diritto penale minimo*, *supra* note 14, at 517–18. In this sense, my account of minimalism includes as a target what Benjamin Levin calls "the degree of punitive or violent social control." Levin, *supra* note 88.

97. This is another difference with the way some commentators have interpreted this principle. *See, e.g.*, JONATHAN SCHONSHECK, ON CRIMINALIZATION 68 (1994) (framing the application of the principle as whether there is some *technique of social control* which will be successful in reducing the incidence of an action to an acceptable rate, but which is less intrusive or less coercive than a criminal statute).

culpable wrongful harm is (partially) caused by the lack of such opportunities can be an alternative to punishment and the criminal legal system, and is not necessarily a form of social control.

c. Who Must Apply the Last Resort Principle

In contrast to Ferrajoli, Husak, and other commentators, I conceive of the last resort principle as a maxim for not only the legislature but also other decision-makers in the criminal legal system, including laypeople, police officers, prosecutors, defense attorneys, probation officers, judges and others.[98] This is why my definition of the last resort principle refers to the use not only of criminal law, but of the criminal legal system. In that sense, *criminal justice minimalism* and *penal minimalism* are better terms than *criminal law minimalism* to the extent that the latter highlights the work of the legislature and the criminalization of behavior, while the first two terms make clear that minimalism addresses every actor and every stage of the criminal legal system from criminalization to enforcement, investigation, prosecution, adjudication, sentencing, collateral consequences, and punishment.[99]

d. Last Resort as a Behavioral Maxim for State Officials

The last resort principle requires, every time public officials consider whether to use criminal law and the criminal legal system—that is, every time public officials consider whether to criminalize certain behavior, set statutory sentences or sentencing guidelines for a crime, investigate a case, arrest someone, file charges, dismiss or divert a case, bind a case over for trial, enter a conviction, set a sentence in a concrete case, release a person from prison, and so on—that those public officials ask themselves two

98. On the last resort principle and related principles as a maxim that only addresses the legislature, see, for example, FERRAJOLI, DIRITTO E RAGIONE, *supra* note 14, at 467 (discussing the necessity principle that requires that criminal law be used only as an extreme remedy within his discussion on whether to criminalize behavior and at sentencing); Thomas Frøberg, *The Role of the Ultima Ratio Principle in the Jurisprudence of the Norwegian Supreme Court*, 3 OÑATI SOCIO-LEGAL SERIES 125, 128 (2013); Husak, *Last Resort*, *supra* note 61, at 208, 214–16; Nils Jareborg, *Criminalization as Last Resort (*Ultima Ratio*)*, 2 OHIO ST. J. CRIM. L. 521, 522 (2005).

99. *See* Langer, *supra* note 1. In this regard, in response to one of the questions that Benjamin Levin raises in his contribution to this symposium, the scope of my account of minimalism includes as targets the number of substantive criminal laws, the reach of substantive criminal law, the extent of carceral punishment, and the amount or intrusiveness of policing. *See* Levin, *supra* note 88. My account of minimalism also includes the other possible three targets that Levin mentions. *See supra* note 96; *infra* notes 105, 136. In addition, my account of minimalism also includes targets that are not mentioned by Levin, such as reduction of non-carceral punishment. On why criminal courts may be better situated than legislatures to advance penal minimalist goals, on how the last resort principle could be interpreted to enable criminal courts to advance these goals, and on other principles other than last resort that courts could use to implement such goals, see Sapir & Rubinstein, *supra* note 86.

things: (1) Is the use of criminal law and the criminal legal system likely an adequate way to prevent or otherwise address this issue or case?[100] And (2) are there any non–criminal law social responses or public measures that are likely at least as good as criminal law and the criminal legal system to prevent or otherwise address this issue or case?

These questions can be asked to and by every actor and at every stage of the criminal legal system. For instance, if there is a substance abuse crisis or a surge in undocumented immigration, and the legislature of a country is considering whether to pass a criminal statute to punish substance abuse or undocumented immigration, the last resort principle requires legislators to ask whether the use of criminal law is a likely adequate way to address the issue, and, if it is, whether there are any non–criminal law ways and alternative conceptions of justice that would likely be at least as good as criminal law and the criminal legal system to do so.

Even if a criminal law statute is passed prohibiting such conduct, police officers, immigration and public health officials and experts, prosecutors, defense attorneys, judges, and others should ask themselves whether the use of criminal law and the criminal legal system is likely an adequate way to address a case or set of cases, and whether there is one or more non–criminal law ways to think about and address them that is likely at least as good as criminal law and the criminal legal system to do so.[101] For instance, police officers, prosecutors, defense attorneys, and probation officers should ask themselves whether a drug case would likely be at least as well addressed by a substance abuse center as by the criminal legal system. These types of actors and immigration officers should also ask themselves if administrative or other non–criminal law measures may likely be as good as criminal law and the criminal legal system to address the case of one or more undocumented immigrants. Judges should also answer these questions when they decide how to adjudicate and sentence criminal cases.[102]

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100. As already mentioned, in analyzing whether the use of criminal law is an adequate way to address an issue, legislators, the executive branch, and the various actors of the criminal legal system should explore as part of their analysis the questions that Thomas, *supra* note 93, raises in his piece for this symposium.

101. This is why it is possible to characterize Thomas as minimalist because he argues for overlapping criminal laws combined with a general obligation of the State not to enforce the law. Thomas, *supra* note 93. His theory shows that it is conceptually possible to pursue minimal criminal justice by concentrating in the enforcement of criminal law—what he calls *enforcement minimalism*—instead of the criminalization of behavior through statutes by the legislature—what he calls *doctrinal minimalism*. Various progressive prosecutors in the United States have tried to advance this idea in practice, even if they so far have not called it minimalist.

102. This does not mean that the non–criminal law route should always prevail. As already discussed *supra*, if the non–criminal law measure were equally adequate to advance a goal but more burdensome than the criminal law one—for example, deportation versus a criminal fine—the criminal law response would be preferable.

e. Two Points on Last Resort as a Behavioral Maxim for State Officials

It is important to clarify two further points about the last resort principle as a maxim of behavior for these state officials.

The first point is that the last resort principle is not a license to disrespect or unfairly or unequally apply the law. The idea is that the principle can be applied within the margins of authority and discretion that each of these actors have within their roles. Legislators have wide authority and margins of discretion to decide how to approach and address social problems. Police officers have authority and discretion about the best way to approach various cases and situations. Prosecutors have authority and discretion, at least in many legal systems, on whether and how they prosecute (certain) cases. Defense attorneys have authority and margins of discretion about how they handle their cases. Judges often have some discretionary authority at sentencing. The point is that the last resort principle should be guiding how these actors exercise their margins of discretion and their powers within their authority.

The second point is whether last resort is a constitutional principle or just a moral or pragmatic principle. As I explained elsewhere, *ultima ratio* has been considered a constitutional principle in some legal systems.[103] It could then explicitly be included in a constitution, or constitutions could be interpreted as including such a principle. But this is a decision for the authorities and the people of each sovereign nation to make. If not given constitutional stature, *ultima ratio* can also be adopted explicitly by statutes, caselaw, or through statutory interpretation. But once again, these are decisions for the people, legislature, judges, and other authorities in specific jurisdictions to make. At a minimum, *ultima ratio* should be understood as a moral principle that should inform the decision-making, actions, and legal interpretation by the various actors of the criminal legal system.[104]

103. *See* Langer, *supra* note 1, at 74–75 (citing Corte Constitucional, Sentencia C-647/01, *supra* note 82)); Corte Constitucional [C.C.] [Constitutional Court], mayo 16, 2012, Sentencia C-365/12 (Colom.), https://www.corteconstitucional.gov.co/relatoria/2012/C-365-12.htm [https://perma.cc/2FR5-V36Q]); Tuori, *supra* note 82, at 9–11 (describing the recognition of the principle by the Finnish Parliament's Constitutional Law Committee and interpreting a German Constitutional Court's decision on the criminalization of abortion as an application of the principles of proportionality and of last resort).

104. On the distinction between last resort as a moral principle—which implies that people are treated unjustly when they are punished in violation of this principle—or as providing pragmatic non moral reasons not to criminalize—whose violation would not make punishment unjust, see Husak, *Last Resort*, *supra* note 61, at 228–35.

f. Last Resort as a Behavioral Maxim for Citizens

The final point about the last resort principle is that it should also be followed by lay people and victims of crime.[105] The principle also interrogates these actors about the need and wisdom of using criminal law and the criminal legal system—and how much of them to use—to address one or more situations.[106] After all, many criminal cases start because of criminal reports by neighbors and crime victims. And how regular people feel about culpable wrongful harm and other culpable wrongs, and how society and the state should react to them directly or indirectly, affects the criminal legal system.

4. The Anti-Dehumanization Principle

a. The Basic Idea

This is a fourth element of my account of penal minimalism.[107] Like last resort, the anti-dehumanization principle provides reasons why the use of criminal law should be minimized.[108] Under the anti-dehumanization principle, criminal-legal-system decision-makers must treat all those involved and affected by the infliction of culpable wrongful harm and other culpable wrongs—the (alleged) offender, the (alleged) victim, and other members of society—as fellow human beings, and must consider their interests and well-being in deciding whether and how to use the criminal legal system to address cases and situations. For minimalism, this includes protecting the interests and well-being of the (alleged) crime victim. But once the criminal process is set in motion, it is necessary to emphasize that the (alleged) offender be treated as a fellow human being and their interest and well-being be considered, since (alleged) offenders are often dehumanized and their interests and well-being are often set aside or given insufficient weight by various theories, policies, and practices about criminal law and the criminal legal system.[109]

105. In this sense, my account of minimalism includes as a target what Levin characterizes as "the ubiquity of punitive cultural impulses that have driven criminal policy." Levin, *supra* note 88, at 4.

106. Langer, *supra* note 1, at 75.

107. As Yoav Sapir and Guy Rubinstein persuasively argue in their contribution to this symposium, other principles, such as the *de minimis* principle and the penal restraint principle could also be added to the list of minimalist principles I cover in my own account of minimalism. *See* Sapir & Rubinstein, *supra* note 86.

108. I am grateful to David Sklansky for raising this point with me.

109. FERRAJOLI, DIRITTO E RAGIONE, *supra* note 14, at 325–30.

b. Treating Everyone as a Fellow Human Being

Treating everyone as a fellow human being is incompatible with degrading their human status as autonomous beings. This excludes referring to anyone involved or affected by the commission of culpable wrongful harms and other culpable wrongs as subhuman or non-human, prohibiting public officials from using any metaphors that convey such a message—for example, "the defendant is an animal." It also excludes denying the status of persons as autonomous beings—for example, treating adults as children that must be educated. It also excludes denying the equality between all human beings and their basic human rights.

c. Considering Everyone's Interests and Well-Being in the Discussion and Application of Specific Doctrines

The interests of all of those involved or affected by the infliction of culpable wrongful harm and other culpable wrongs must be considered in the discussion and application of any central criminal law and criminal legal system issue. For instance, any discussion and application of the *ultima ratio* principle throughout the different stages of the criminal legal system—criminalization, sentences established in criminal statutes, crime prevention by the police, investigation of crime, charging, individual sentencing, post-sentencing, etc.—would be misguided, if it did not include the interests and well-being of all the persons potentially affected by the criminal and non-criminal measures that could be adopted regarding certain situations and individual cases.

Even if criminal law is used in certain situations or cases, the interests of all of those involved or affected must be considered—again, making sure that these include the interest and well-being of (alleged) criminal offenders once the criminal process is set in motion.

5. The Bidirectional Accountability Principle

a. The Basic Idea

A fifth element that I include in my account of penal minimalism is what I call the bidirectional accountability principle. This principle also provides reasons for why the use of criminal law should be minimized. Criminal law holds accountable those who commit crimes.[110] But besides reflecting the choices of offenders for which they may be held accountable, situations that involve the commission of culpable wrongful harm, other culpable wrongs,

110. *See, e.g.*, R.A. DUFF, PUNISHMENT, COMMUNICATION, AND COMMUNITY (2001).

and crimes often reflect failures in social arrangements. In that sense, situations of culpable wrongful harm, other culpable wrongs, and crimes can work as a mirror that can show public officials and society the ways in which social arrangements have failed or contributed to their commission. And the criminal legal system, the state, and society at large may have to render accounts to the offender (and others affected by the commission of these acts), besides the offender having to render accounts to them.[111] Society's contributions to these situations do not necessarily exempt or even reduce the responsibility of offenders—particularly, in situations of serious wrongdoing.[112] However, officials and society must acknowledge these society's contributions to those wronged by them, consider them in their decisions, and address them.[113]

b. Applications of the Bidirectional Accountability Principle

Like the *ultima ratio* principle and the anti-dehumanization principle, the bidirectional accountable principle can be applied throughout the various stages of the criminal legal system.

When discussing whether to criminalize or adopt certain penalties for certain behavior or to address certain situations, the bidirectional accountability principle requires legislatures to reflect and identify the way in which the state has contributed to such behavior. Society's contributions to the causation of harm and other wrongs could also be considered throughout the various stages of the criminal legal system. They would be relevant to decide whether to criminalize certain conduct and which potential sentences to establish for them. They would also be relevant to determine public policies and to make decisions on individual cases

111. *See* R.A. Duff, *Discretion and Accountability in a Democratic Criminal Law*, *in* PROSECUTORS AND DEMOCRACY: A CROSS-NATIONAL STUDY 9, 34–39 (Máximo Langer & David Alan Sklansky eds., 2017).

112. *See, e.g.*, TOMMIE SHELBY, THE IDEA OF PRISON ABOLITION 60–61 (2022) ("Those greatly burdened by social injustices (and, at times, their more privileged allies) will sometimes justifiably break the law and evade law enforcement. They may do so for reasons of pressing economic need, self-defense against illegitimate state violence, or political resistance. . . . Matters are different with the kinds of serious wrongs I have in mind. The moral considerations against murder and rape, for example, provide sufficient and overriding reasons to refrain from these egregious wrongs, which cause great and irreparable harm and severe trauma. The fact that a person is oppressed can neither override these reasons nor render them inapplicable. The need to protect the vulnerable, including many who are themselves oppressed, is what justifies penalizing these grave wrongs through incarceration. . . . Forewarned by the public legal proscription and equipped with the capacity for rational and free action, offenders had an adequate opportunity to avoid this unwelcome and unpleasant treatment. They could have refrained from serious wrongdoing but chose not to.").

113. In this sense, my account of minimalism includes as a target what Levin refers to as the "subordinating effects of structural inequality." Levin, *supra* note 88, at 4.

regarding policing, prosecution, adjudication, individual sentencing, the serving of a sentence, post-release and post-sentence, and more.

For instance, there is a social crisis currently in California with hundreds of thousands of people who are houseless.[114] Should the state criminalize houselessness or behavior related to houselessness or increase the criminal penalties for them? Liberal criminal law principles and other principles such as the last resort principle and the anti-dehumanization principle—as already explained, all elements of my account of penal minimalism—provide elements to discuss these questions.[115] Among criminal law principles, the actus reus principle requires that there is some behavior, and one could argue that houselessness is a status or condition, rather than a behavior.[116] The wrongfulness principle requires that before behavior related to houselessness—such as sleeping in a public space—be criminalized, there must be wrongdoing by those engaging in such conduct.[117] The culpability principle establishes that harm may be the basis for criminalization only if it is culpable.[118] The last resort principle requires that before adopting new criminal law statutes or penalties, the state considers whether there are non–criminal law measures that could be adopted to address the houselessness crisis at least as well as the criminal law and the criminal legal system—such as creating shelters, affordable housing, or setting various support programs for people in such situations. The anti-dehumanization principle requires that houseless people be treated as fellow human beings and that their interests and well-being be considered when deciding whether to adopt new criminal statutes or penalties.

To the extent the state contributed to the houselessness crisis, the bidirectional accountability principle requires that the state also acknowledge its contribution and address the situation. This acknowledgment may have criminal law consequences that are not covered by the other minimalist principles. First, if the state were fully or partially responsible for the situation, this may exempt from or diminish the criminal

114. Another example that could be used to illustrate and apply the bi-directional accountability principle would be poor urban Black neighborhoods whose social conditions contribute to the commission of crime and to incarceration. On the need "to abolish" these neighborhoods, on the grounds of justice, see TOMMIE SHELBY, DARK GHETTOS: INJUSTICE, DISSENT, AND REFORM (2016). And for a connection between this critique and a position on the criminal legal system that may be regarded as minimalist, see SHELBY, *supra* note 112.

115. On the relationship between homelessness and the traditional liberal concept of negative freedom, see Jeremy Waldron, *Homelessness and the Issue of Freedom,* 39 UCLA L. REV. 295 (1991).

116. *See, e.g.*, Robinson v. California, 370 U.S. 660 (1962); RISA GOLUBOFF, VAGRANT NATION: POLICE POWER, CONSTITUTIONAL CHANGE, AND THE MAKING OF THE 1960S (2016).

117. For discussion on whether encampments are a justifiable response to homelessness, see, for example, Terry Skolnik, *Homeless Encampments: A Philosophical Justification*, 36 J.L. & SOC. POL'Y 97 (2023).

118. *See, e.g.*, Terry Skolnik, *Rethinking Homeless People's Punishments,* 22 NEW CRIM. L. REV. 73, 85–86 (2019).

responsibility of those who engage in culpable wrongful harm or other culpable wrong in this situation, thus requiring dismissals, alternative measures to punishment, or lower punishment.[119] Regardless of whether it leads to an exemption from or diminishment of criminal responsibility by those who directly engage in causing culpable wrongful harm or other culpable wrong, the state's acknowledgement of its contributions to the situation is a first step to address these issues regardless of whether there are legislative and other public policy discussions on whether new crimes should be created, or higher penalties may be established for certain crimes. Addressing these issues should contribute to social conditions that should reduce the causing of culpable wrongful harm and other culpable wrongs, and crime,[120] which in turn should lead to a lesser use of the criminal legal system—and to a fairer society.[121]

The bidirectional accountability principle is also important to reinforce the other principles I have articulated. Acknowledging society's contributions to harm, wrongs, and crime can help identify possible non-criminal responses to social issues that can work as good alternatives to the use of the criminal legal system under the *ultima ratio* principle. Acknowledging society's contributions can also be a way to generate empathy toward those who engage in the commission of crime so that they are not dehumanized, thus reinforcing the anti-dehumanization principle.

III. MINIMUM COMMON DENOMINATOR AMONG MINIMALIST ACCOUNTS

Is there anything in common between these criminal law works that self-define as minimalists? Or is the use of the term "minimalism" just a

119. There is a large literature on whether and to what extent people may be held criminally liable in unjust societies. *See, e.g.*, FROM SOCIAL JUSTICE TO CRIMINAL JUSTICE: POVERTY AND THE ADMINISTRATION OF CRIMINAL LAW (William C. Hefferman & John Kleinig eds., 2000); David L. Bazelon, *The Morality of the Criminal Law*, 49 S. CAL. L. REV. 385 (1976); David L. Bazelon, *The Morality of the Criminal Law: A Rejoinder to Professor Morse*, 49 S. CAL. L. REV. 1269 (1976); Stephen J. Morse, *The Twilight of Welfare Criminology: A Reply to Judge Bazelon*, 49 S. CAL. L. REV. 1247 (1976); Richard Delgado, "*Rotten Social Background": Should the Criminal Law Recognize a Defense of Severe Environmental Deprivation?*, 3 LAW & INEQ. 9 (1985); R.A. Duff, "*I Might Be Guilty, But You Can't Try Me": Estoppel and Other Bars to Trial*, 1 OHIO ST. J. CRIM. L. 245 (2003); Roberto Gargarella, *Penal Coercion in Contexts of Social Injustice*, 5 CRIM. L. & PHIL. 21 (2011); Stuart P. Green, *Just Deserts in Unjust Societies*, *in* PHILOSOPHICAL FOUNDATIONS OF CRIMINAL LAW 352 (R.A. Duff & Stuart P. Green eds., 2011); Barbara A. Hudson, *Beyond Proportionate Punishment: Difficult Cases and the 1991 Criminal Justice Act*, 22 CRIME L. & SOC. CHANGE 59 (1995); Rocío Lorca Ferreccio, *Pobreza y Responsabilidad Penal*, *in* EL CASTIGO PENAL EN SOCIEDADES DESIGUALES 173 (Roberto Gargarella, ed., 2012); Jeffrie G. Murphy, *Marxism and Retribution*, 2 PHIL. & PUB. AFFS. 217 (1973); Wojciech Sadurski, *Distributive Justice and the Theory of Punishment*, 5 OXFORD J. LEGAL STUD. 47 (1985); Victor Tadros, *Poverty and Criminal Responsibility*, 43 J. VALUE INQUIRY 391 (2009).

120. *See, e.g.*, Eric D. Gould, Bruce A. Weinberg & David B. Mustard, *Crime Rates and Local Labor Market Opportunities in the United States: 1979–1997*, 84 REV. ECON. & STAT. 45 (2002).

121. *See, e.g.*, SHELBY, *supra* note 112, at 16–17 ("Not only must systemic injustice in the broader society be meaningfully addressed, but prison reform will not be successful without such a redress.").

coincidence? I think there are four points in common between them that are central in all these works.

First, the three minimalist accounts include versions of classical criminal law principles and rights for the criminalization of behavior and for criminal punishment, such as versions of the harm principle, the wrongfulness principle, the personal responsibility principle, the proportionality principle, and the like. These principles set the types of conduct for which the state may subject persons to punishment[122] and the limits to the penal sanction—such as proportionality. When procedural, these principles and rights also set limits about how criminal cases may be policed, investigated, prosecuted, and adjudicated. These principles set a minimum normative floor about when and how criminal law and the criminal legal system may and may not be used. Punishment and the use of the criminal legal system are unfair unless they respect these principles. But for the three minimalist accounts I have been discussing, these principles are necessary but not sufficient conditions for just punishment.

Second, neither Ferrajoli nor Husak articulate an anti-dehumanization principle like the one I articulated in Section II.C.4 or equivalent as such. But Ferrajoli's theory of punishment and his theory of minimum criminal law more generally respect this principle since they consider the interests of the defendant, the crime victim, and society at large.[123] He also emphasizes how when the criminal process is set in motion, the (alleged) offender is the weaker party and their interests must be considered.[124] Husak is less explicit about it, but he also considers the three interests in articulating his theory of criminalization.[125] Husak emphasizes that every person has a right not to be punished given that state punishment involves hard treatment and moral censure and that consequently the burden of proof is on those who want to criminalize conduct.[126] In this regard, even if neither Ferrajoli nor Husak articulate this principle as such, the anti-dehumanization principle may be considered one of the principles not only of my conception of minimalism, but also of minimalism writ large.[127]

122. HUSAK, OVERCRIMINALIZATION, *supra* note 61, at 82.

123. FERRAJOLI, DIRITTO E RAGIONE, *supra* note 14, at 325–30; Ferrajoli, *Il diritto penale minimo*, *supra* note 14, at 504–12.

124. FERRAJOLI, DIRITTO E RAGIONE, *supra* note 14, at 329–30; Ferrajoli, *Il diritto penale minimo*, *supra* note 14, at 511–12.

125. *See, e.g.*, HUSAK, OVERCRIMINALIZATION, *supra* note 61, at 6 ("Crime exacts a terrible toll both on its victims and on society generally."); *id.* at 14 ("My central concern is that overcriminalization results in unjust punishments. The primary victims of this injustice are the persons who incur penal liability.").

126. *Id.* at 92–100.

127. FERRAJOLI, DIRITTO E RAGIONE, *supra* note 14, at 325–30; Ferrajoli, *Il diritto penale minimo*, *supra* note 14, at 504–12; HUSAK, OVERCRIMINALIZATION, *supra* note 61, at 92–100; *supra* Section II.C.4.

Third, the three accounts agree that criminal law should be used sparingly or exceptionally, and that there must be a principle that so requires on top of the traditional criminal law and procedure principles and rights. This principle requires that before criminal law is used, it must be compared to non–criminal law alternatives to address the issue criminal law aims to address. This principle thus implies that criminal law should not be the first response to most social problems. In the case of Ferrajoli, this is his necessity principle and the use of criminal law only as an extreme remedy. In the case of Husak, these are the requirements that come out from the intermediate review test.[128] In my case, it is my version of the last resort principle. But recall that Husak himself acknowledges that on this point he is departing from minimalism that would require strict scrutiny or a last resort principle, instead of the intermediate review test he adopts.[129] This is why one could consider that even according to Husak the last resort principle or variations of it would be a characteristic of minimalism.[130]

Fourth, the three accounts agree that criminal law has a role to play in addressing culpable wrongful harm or other culpable wrongs as long as it respects the three sets of principles just described.

My argument is then that penal minimalism has four core characteristics based on the three minimalist works I have discussed:

1. It embraces substantive and procedural principles and rights that come from the Enlightenment, from political liberalism, and from international human rights and that establish (a) what type of conduct may be criminalized and punished; (b) how and how much this conduct may be punished; and (c) and how this conduct may be investigated, prosecuted, adjudicated, and punished.

2. It treats every person that is involved or affected by the commission of culpable wrongful harm or other culpable wrongs as a fellow human being whose interests and well-being must be considered in deciding whether and how the criminal legal system should be used.

3. The last resort principle (or variations of it) requires that criminal law and the criminal legal system should only be used as a last resort when no other social responses or public measures would suffice to

128. As I already explained, in prior work Husak actually included the last resort principle within his account of minimalism. *See* Husak, *Last Resort*, *supra* note 61.

129. HUSAK, OVERCRIMINALIZATION, *supra* note 61, at 127; Husak, *Last Resort*, *supra* note 61.

130. *See also* Sapir & Rubinstein, *supra* note 86.

adequately advance a legitimate goal, such as addressing harmful behavior.[131]

4. Criminal law and the criminal legal system have a role to play in addressing culpable wrongful harm and other culpable wrongs as long as they respect the three sets of principles of penal minimalism.

IV. PENAL MINIMALISMS

Even if they share the four features articulated in the prior part, this article's description of the three accounts self-described as minimalist also shows that there is not a single account of criminal justice or penal minimalism. For instance, Ferrajoli and Husak do not articulate or give the same scope to traditional criminal law principles. Our versions of the last resort principle or variations on it are also very different from each other.[132] And neither Ferrajoli nor Husak include my bidirectional accountability principle or variations of it in their accounts. These differences are natural, and part of a legitimate and welcomed debate within criminal justice or penal minimalism. Normative theories, intellectual spaces, social movements, and public policy projects are stronger when they include lively debate and a mutual challenging of ideas within them.

It is also important to note that the three criminal law accounts self-described as minimalist that I have analyzed in this article do not exhaust the possible versions of criminal justice or penal minimalism for five different reasons.

First, there is a literature outside of the Anglo-American world on minimalism that has also made contributions to these debates.[133]

Second, there have been a few other works in the Anglo-American literature besides the three I have analyzed that have also embraced the term "minimalism,"[134] and several of the important contributions to this symposium add to this literature.

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131. Notice here that I am presenting here an articulation of the last resort principle that may accommodate various versions of penal minimalism, instead of my own conception of the last resort principle that I discussed in Section II.C.3.

132. *See, e.g.*, *supra* notes 98 and 99 and accompanying text. In the case of Husak, one could even question, based on his own account, whether his theory is truly minimalist given its position on this point.

133. *See, e.g.*, Alessandro Baratta, *Principios de Derecho Penal Mínimo*, *in* CRIMINOLOGÍA Y SISTEMA PENAL 299 (2004); RODRIGO D. LÓPEZ GASTÓN, DERECHO PENAL MÍNIMO (Julio César Faira ed., 2015).

134. *See, e.g.*, ASHWORTH, *supra* note 59; DAVID HAYES, CONFRONTING PENAL EXCESS: RETRIBUTION AND THE POLITICS OF PENAL MINIMALISM (2019); HORDER, *supra* note 60; Paul Roberts, *Criminal Law Theory and the Limits of Liberalism*, *in* LIBERAL CRIMINAL THEORY: ESSAYS FOR ANDREAS VON HIRSCH 327 (AP Simester, Antje du Bois-Pedain & Ulfrid Neumann eds., 2014); MARIE-

Third, minimalist accounts may differ not only regarding the requirements and conditions they set for the use of criminal law, punishment, and the criminal legal system, but also regarding which theories they embrace about justice, society, and the state. For instance, minimalism could be combined with libertarian theories of the state in the Nozickian tradition,[135] or with liberal theories of justice in the Rawlsian tradition.[136] In this regard, there may be deep differences between penal minimalisms.

Fourth, minimalist theories may minimize the footprint of the criminal legal system by concentrating on an aspect of it, rather than all aspects of it as my minimalist theory does. For instance, in his contribution to this symposium, Thomas distinguishes between *doctrinal minimalism*—that focuses on the criminalization of behavior by the legislature through statutes—and *enforcement minimalism*—that focuses on the enforcement of criminal law. And he then argues for the latter, not the former.[137] Similarly, one could further distinguish other forms of minimalism, such as *punishment minimalism* that would argue for a modest use of punishment, and so on.

Fifth, there have been criminal law theories that have not self-referred as minimalist but that can be characterized as minimalist since they share the four features of minimalism that I articulated in the previous part.[138] These include the works of classical liberal criminal law authors that explicitly or implicitly present these four features.[139]

EVE SYLVESTRE, "MOVING TOWARDS A MINIMALIST AND TRANSFORMATIVE CRIMINAL JUSTICE SYSTEM": ESSAY ON THE REFORM OF THE OBJECTIVES AND PRINCIPLES OF SENTENCING (2016). It is worth repeating that though it is possible that many criminal law scholars are implicitly minimalists, *see* Alessandro Corda, *The Transformational Function of the Criminal Law: In Search of Operational Boundaries*, 23 NEW CRIM. L. REV. 584, 585–86 (2020); Levin, *supra* note 88, at 23 ("On some level, I'm not sure who *isn't* a criminal law minimalist—at least when it comes to people who study criminal law."), the list of Anglo-American criminal law scholars who have embraced the term "minimalism" in their work that I have been able to find is very short. *See supra* note 58.

135. ROBERT NOZICK, ANARCHY, STATE, AND UTOPIA (1974).

136. JOHN RAWLS, A THEORY OF JUSTICE (rev. ed. 1999). I have combined my account of criminal law minimalism with this tradition, though without explicitly mentioning it. *See* Langer, *supra* note 1. It is in this sense that my account of minimalism includes as a target what Levin refers to as the "subordinating effects of structural inequality." Levin, *supra* note 88.

137. *See* Thomas, *supra* note 93.

138. It is possible that most criminal law scholars in the Anglo-American world are minimalist in this regard. *See, e.g.*, Corda, *supra* note 134, at 585–86 ("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 contrasting unwanted behavior." (footnote omitted)); Levin, *supra* note 88. But even if this were true, the act of identifying what these scholars share and naming it through the term "minimalism" is important for the reasons discussed at the beginning of Part V.

139. *See, e.g.*, Materni, *supra* note 58. Materni discusses the work of Italian nineteenth-century scholar Francesco Carrara as minimalist, even if, as far as I can tell, Carrara himself did not use the term "minimal criminal law" or variations of it in the works by Carrara that Materni refers to. *See* FRANCESCO

Among contemporary theories, liberal criminal law accounts that explicitly or implicitly embrace last resort or variations of it, as well as the other three features discussed, can be characterized as minimalist.[140] One could also consider the republican theory of criminal law by Braithwaite and Pettit as minimalist.[141] Bureaucratic, communitarian, democratic and reconstructivist accounts of criminal justice that are respectful of the four core features of minimalism would also be minimalist.[142] Important recent racial justice accounts of the criminal legal system in the United States also seem to share the four core features of criminal justice minimalism.[143]

CARRARA, CARDINI DELLA SCUOLA PENALE ITALIANA (1875); FRANCESCO CARRARA, PROGRAMMA DEL CORSO DI DIRITTO CRIMINALE (3d ed. 1867). Materni cites the 1859 edition of this work that I was not able to get. *See also* FRANCESCO CARRARA, 1 OPUSCOLI DI DIRITTO CRIMINALE (1870); FRANCESCO CARRARA, 5 OPUSCOLI DI DIRITTO CRIMINALE (3d ed. 1889). The closest is one reference in an 1874 work, FRANCESCO CARRARA, 4 OPUSCOLI DI DIRITTO CRIMINALE 525 (1874), referencing the Latin maxim *de minimis non curat Praetor* or "the praetor does not consider trifles." Materni cites the 1870 edition of this work that I was not able to get.

140. *See, e.g.*, JOEL FEINBERG, THE MORAL LIMITS OF THE CRIMINAL LAW: HARM TO OTHERS 26 (1984) (embracing liberal principles and rights and including a version of the last resort principle within his definition of the harm principle).

141. BRAITHWAITE & PETTIT, *supra* note 58.

142. *See, e.g.*, Joshua Kleinfeld et al., *White Paper of Democratic Criminal Justice*, 111 NW. U. L. REV. 1693 (2017). On the distinction between bureaucratic and democratic conceptions of the criminal legal system, see, for example, Joshua Kleinfeld, *Manifesto of Democratic Criminal Justice*, 111 NW. U. L. REV. 1367 (2017).

143. *See, e.g.*, Gardner, *supra* note 12; SHELBY, *supra* note 112, at 11 ("[U]nlike some [B]lack critical theorists, I do not regard the [B]lack radical tradition as diametrically opposed to all forms of liberalism. I believe that core ideas drawn from liberal-egalitarian thought in particular merit steadfast defense—a bedrock commitment to an equal and extensive set of basic liberties for all, prioritizing the well-being of the worst off, tolerance for different conceptions of human flourishing, and limiting economic inequality to protect both democratic practices and meaningful opportunities to secure valued positions in social life."); *id.* at 15–16 ("I continue to believe that incarceration has legitimate and socially necessary uses, including as punishment, and so prisons are not inherently unjust. Moreover, I think that the use of incarceration, under the right circumstances and in conjunction with other less harmful practices, can be worth its attendant risks and costs. I also believe that abolitionists' most compelling criticisms are properly directed, not at incarceration as such, but at background structural injustices in society, correctable failures of due process and prison administration, inhumane prison conditions, and inadequate public efforts to enable former prisoners to rejoin society on equal terms."); *id.* at 16 ("I strongly oppose U.S. mass incarceration, with its unprecedented and unrivaled rates of imprisonment and its highly punitive policies and unforgiving retributive ethos."). Shelby also says that he dissociates himself from a conception of reform that views criminal law and law enforcement "as the sole tools of crime control and harm prevention," and he adds that "crime can, and should, be controlled and prevented through a variety of means. Prisons are just one tool and best used, if at all, as a last resort." *Id.* at 16–17. He later says that "in the United States at least, we should radically reduce our reliance on prisons." *Id.* at 88. Shelby also mentions that many reformers would strongly agree with the claim that dehumanizing and inhumane practices exist in many prisons. *Id.* at 57–58; *see also id.* at 59 ("[H]uman beings should not be treated as if they were mere objects to be manipulated for this or that purpose . . . .").

V. NON-MINIMALIST THEORIES

Are most criminal law scholars in American legal academia minimalist in the sense I have articulated? It is hard to determine whether this is the case, because many criminal law scholars do not fully articulate their conception of criminal law—for example, on whether it includes the last resort principle—and I could not embark for this project on a survey of criminal law scholars that could answer this question.[144]

For sure, only a handful of scholars in the United States have used the term "minimalism" or its variations to identify themselves or their work.[145] So, even if most of them shared the four core features of minimalism, it would be progress to name what they have in common with a single term for multiple reasons. First, naming what these scholars share with a term creates a collective that, as such, constitutes an intellectual space where scholars can engage with each other, discuss the best ways forward on penal policy in different systems, and advocate for these ways forward. And people who are not scholars can also join this collective. Second, it makes clear that what distinguishes these criminal law scholars is not only that they embrace criminal law liberal principles. Third, regardless of how many scholars are minimalist, the conceptualization of penal minimalism that I have articulated makes clear that there are many scholars and criminal justice policies that do not share these principles.

The goal of this part is to show that there are various criminal law accounts in the United States and elsewhere that are not minimalist.[146] This part names various current theories and positions on criminal law, punishment, and the criminal legal system in academia and beyond that do not fit into this category to the extent that they do not share at least one of the four core characteristics stated above.

A. Theories That Do Not Follow the Principle of Proportionality Between Punishment and Culpability as Maximum Punishment Ceiling

Theories that do not require proportionality between the punishment of offenders and the culpability of the offender would not be minimalist because such principle of proportionality is included among the criminal law principles of minimalism.

144. I would encourage others to do such a survey.

145. *See supra* note 58.

146. This is also a way to address the question that Levin raises in his contribution to this symposium that he is "not sure who *isn't* a criminal law minimalist" and "that the foundational theoretical arguments that underpin minimalism don't necessarily differ from the theoretical arguments that drive much thinking about criminal law." *See* Levin, *supra* note 88.

A first prominent example in American academia is a set of utilitarian theories of punishment according to which in order to deter or diminish the utility from the commission of crime, punishment should be higher than the harm the offender brought given that under no system is there certainty that offenders will be convicted.[147] These theories would not be minimalist because they would justify the imposition of punishment that is disproportionate to the offender's culpability.[148] These theories can also be used to justify harsh or inhumane punishment, such as capital punishment or even more extreme punishment.[149]

To be clear, I am not "trashing" or maligning this type of utilitarian theory per se nor claiming that utilitarianism may not be integrated with versions of penal minimalism. In fact, utilitarianism has made important contributions to criminal law thought in general and to minimalism in particular. For instance, Cesare Beccaria is often rightly considered a precursor of this utilitarian tradition because he embraced the maxim "the greatest happiness shared by the greatest number,"[150] and he argued that "[f]or a punishment to attain its end, the evil which it inflicts has only to exceed the advantage derivable from the crime; in this excess of evil one

147. *See, e.g.*, Gary S. Becker, *Crime and Punishment: An Economic Approach*, 76 J. POL. ECON. 169, 196 (1968); Daniel Epps, *The Consequences of Error in Criminal Justice*, 128 HARV. L. REV. 1065, 1112 (2015) (arguing that "[l]imiting the number of people who can be punished requires punishing any individual defendant more to maintain the same level of deterrence" and then referring to satiating the public's desire for retribution in terms of vengeance rather than proportionality); Adrian Vermeule, *A New Deal for Civil Liberties: An Essay in Honor of Cass R. Sunstein*, 43 TULSA L. REV. 921, 927 (2008); LOUIS KAPLOW & STEVEN SHAVELL, FAIRNESS VERSUS WELFARE 317–36, 362 (2002); Cass R. Sunstein & Adrian Vermeule, *Is Capital Punishment Morally Required? Acts, Omissions, and Life-Life Tradeoffs*, 58 STAN. L. REV. 703 (2005).

148. Some of these theories assume that if the punishment is substantially higher than the harm or wrongdoing brought by the offense—let's say four times as high if there is a twenty-five percent probability of conviction—that would eliminate the commission of crime all together because potential offenders would rationally choose not to commit crime given its disutility. *See, e.g.*, KAPLOW & SHAVELL, *supra* note 147, at 319–31, 336. The fact that there is still a lot of crime in a society like the United States that has incarcerated so many people for long periods of time suggests that either the assumption of full rationality is mistaken or that it would be necessary to increase even more the use or level of punishment in the United States in a way that would make American penal policy even harsher than it has been under mass incarceration and even more of an outlier among nations in terms of punishment levels. Some of these theories acknowledge that deterrence may be imperfect. But they otherwise keep their rational actor assumptions in place, seem to assume that only a minority of possible offenders will be undeterred, or consider the interests of offenders less important than other people's interests. *See, e.g.*, *id.* at 331–32.

149. *See, e.g.*, Carol S. Steiker, *No, Capital Punishment Is Not Morally Required: Deterrence, Deontology, and the Death Penalty*, 58 STAN. L. REV. 751 (2005) (arguing that Sunstein and Vermeule's consequentialist argument in favor of capital punishment overlooks the distinction between purposeful versus reckless and knowing wrongdoing, does not discuss that capital punishment is frequently disproportionate, and cannot explain why under certain circumstances we would not be morally obligated to adopt punishment even far more brutal and extreme than execution such as rape, torture, or agonizing death).

150. CESARE BECCARIA, ON CRIMES AND PUNISHMENTS 8 (Henry Paolucci trans., 1963) (1764); *see also id.* at 15 n.20, 51.

should include the certainty of punishment and the loss of the good which the crime might have produced."[151] In this regard, he embraced a rational actor model that could lead to a punishment disproportionate to the culpability of the offender. But Beccaria also argued for moderate or mild punishment, clarity of the laws, certainty of punishment, and promptness of punishment as ways to prevent crime.[152] Beccaria also argued against cruel and uselessly severe punishments,[153] questioned that the death penalty was useful and necessary for the good order of society,[154] denounced torture and the conviction of the innocent,[155] and defended the rights of man.[156] In all these senses, Beccaria contributed to set the foundations of various elements of minimalism, even if his theory was not minimalist because it did not embrace proportionality between punishment and culpability.[157]

In addition, utilitarian theories can be combined with the principle of proportionality between punishment and the culpability of the offender.[158] In fact, as I already explained, Ferrajoli himself embraces a utilitarian theory of punishment. But his utilitarian theory of punishment respects the principle of proportionality between punishment and the culpability of the

151. *Id.* at 43. Beccaria continues immediately: "All beyond this is superfluous and for that reason tyrannical." *Id.* For Beccaria, punishments are tangible motives that "counterbalance the powerful impressions of the private passions that oppose the common good." *Id.* at 12; *see also id.* at 42. In this regard, "[p]unishments that exceed what is necessary for protection of the deposit of public security are by their very nature unjust, and punishments are increasingly more just as the safety which the sovereign secures for his subjects is the more sacred and inviolable, and the liberty greater." *Id.* at 13. Beccaria embraced a conception of proportionality between crimes and punishments, but it was associated with deterrence incentives rather than with the culpability of the offender: "[T]he obstacles that deter men from committing crimes should be stronger in proportion as they are contrary to the public good, and as the inducements to commit them are stronger. There must, therefore, be a proper proportion between crimes and punishments. . . . If an equal punishment be ordained for two crimes that do not equally injure society, men will not be any more deterred from committing the greater crime, if they find a greater advantage associated with it." *Id.* at 62–63; *see also id.* at 57.

152. *Id.* at 17, 37, 42–44, 55–58, 94, 99.

153. *Id.* at 9, 43.

154. *Id.* at 10, 45–52.

155. *Id.* at 10, 21, 28, 30–36.

156. *Id.* at 10. Among rights and limitations to punishment, he argued that the requirements for investigation and punishment must be established by law, *id.* 14, 19–20, that an impartial and independent magistrate must adjudicate criminal cases, *id.* at 14, against severe punishment, *id.* at 14, against judges in criminal cases having the authority to interpret laws, *id.* at 14–17, against the obscurity of the laws, *id.* at 17–18, for human conditions of imprisonment, *id.* at 19–20, for moral certainty about a defendant's guilt as a requirement for criminal conviction, *id.* at 21, for trial by jury, *id.* at 21–22, for public criminal proceedings, *id.* at 22, for the right to be presumed innocent, *id.* at 23, 30, against secret accusations, *id.* at 25–27, for the right to defense, *id.* at 37, and for an actus reus requirement, *id.* at 40.

157. It might even be possible to interpret Beccaria's work as setting some of the foundations for the last resort principle, since he argued that it was better to prevent crime than to punish it, that prohibiting "a multitude of indifferent acts is not to prevent crimes that might arise from them, but is rather to create new ones," that knowledge and the rewarding of virtue were two ways to prevent crime, and that perfecting education was the surest but most difficult way to prevent crime. *Id.* at 93–95, 98.

158. For a classical example, see, for example, John Rawls, *Two Concepts of Rules*, 64 PHIL. REV. 3, 3–13 (1955) (showing that utilitarianism can justify the practice of punishment, while retributivism can justify particular actions falling under it).

offender for three different reasons. First, he assumes that the goal of preventing vigilantism and other arbitrary reactions against the commission of crime can be achieved with low levels of punishment, and he argues that such low levels should set the maximum possible punishment level.[159] In addition, his second goal of punishment of deterring the commission of crime does not rely on a rational actor model that determines the level of punishment based on multiplying the level of harm by the probability of conviction.[160] Third, Ferrajoli's principles on harm and on personal culpability or responsibility also set limits to punishment.[161]

A second historical example in American law is a set of rehabilitation theories of punishment that advocated for indeterminate sentences without a maximum ceiling based on culpability—which could also lead to disproportionate punishment.[162] Once again, I am not "trashing" or maligning rehabilitation theories writ large or claiming that rehabilitation may not be integrated with versions of penal minimalism. A set of rehabilitation theories has contributed to humanizing offenders by claiming that they are redeemable beings and that we should be forgiving of them.[163] Many of these rehabilitation theories have also contributed to humanizing offenders by taking their interests into account by providing them programs or other support to help them, such as education, job training, addiction treatment, spiritual support, and so on.[164] In addition, rehabilitation can be combined with negative retributivism—under which desert would act as an upper ceiling of punishment—and provide grounds not to use the criminal legal system or punishment, or to impose punishments below that upper ceiling.[165]

159. FERRAJOLI, DIRITTO E RAGIONE, *supra* note 14, at 314–40, 393.

160. There is no reference to the probability of conviction in his analysis. *See id.* at 395–400.

161. *Id.* at 396–97.

162. For a historical account of criminological positivism that embraced indeterminate sentencing, see, for example, THE LIMITS OF CRIMINOLOGICAL POSITIVISM: THE MOVEMENT FOR CRIMINAL LAW REFORM IN THE WEST, 1870–1940 (Michele Pifferi ed., 2022). Some rehabilitation theories may also violate the anti-dehumanization principle because they are perfectionist and coercively impose a political ideology or religion on those subjected to punishment. Edgardo Rotman, *Do Criminal Offenders Have a Constitutional Right to Rehabilitation*, 77 J. CRIM. L. & CRIMINOLOGY 1023, 1025–26 (1986) (describing a first model of rehabilitation that conceives of correctional treatment as "a technical device to mold the personality of offenders and obtain their compliance with a predesigned pattern of thought and behavior.").

163. *See, e.g.*, Aliza Hochman Bloom, *Reviving Rehabilitation as a Decarceral Tool,* 101 WASH. U. L. REV. (forthcoming 2024).

164. *See, e.g.*, Kathryn M. Campbell, *Rehabilitation Theory*, in 2 ENCYCLOPEDIA OF PRISONS & CORRECTIONAL FACILITIES 831 (Mary Bosworth ed., 2005); Sonja Meijer, *Rehabilitation as a Positive Obligation*, 25 EUR. J. CRIME CRIM. L. & CRIM. JUST. 145, 146 (2017).

165. *See, e.g.*, MICHAEL TONRY, U.S. DEP'T OF JUST., OFF. OF JUST. PROGRAMS, RECONSIDERING INDETERMINATE AND STRUCTURED SENTENCING (1999), https://www.ojp.gov/pdffiles1/nij/175722.pdf [https://perma.cc/FRM3-9B8P] (explaining that the first draft of the Model Penal Code included among the purposes of sentencing rehabilitation and no disproportionate punishment).

A third prominent set of examples in American law are incapacitation theories of punishment that look at defendants exclusively in terms of dangerousness and that justify punishment that is not proportionate to the offense to neutralize them. A set of these theories have also dehumanized criminal offenders by using animal metaphors to refer to them. University of Pennsylvania Professor John DiLulio's super-predator metaphor to refer to juvenile offenders, incapacitation theories of punishment built upon that metaphor, or similar notions are examples.[166] Three-strikes-and-you're-out laws, high mandatory minima, and post-maximum sentence "civil" measures can be public policy manifestations of such a theory that has fed or underlaid tough-on-crime positions and mass incarceration in the United States.[167] However, like utilitarian and rehabilitation theories, it is important to point out that incapacitation theories can be combined with negative retributivism as a maximum ceiling of punishment, and if they do not dehumanize criminal offenders, can then be minimalist, as the work of Christopher Slobogin illustrates.[168]

B. Theories and Practices That Do Not Respect Other Criminal Law Principles and Rights or the Anti-Dehumanization Principle

There are other criminal justice theories, policies and practices that are not minimalist because they do not respect other criminal law and criminal procedure principles and rights or the anti-dehumanization principle—many of which have fed or underlaid tough-on-crime positions and mass incarceration.

In terms of criminalization, the passing of statutes that violate criminal law principles such as the actus reus requirement, or the harm or wrongfulness or desert principles, in a way that leads to justifying disproportionate, inhumane, widespread, unequal, or unfair penal treatment

166. *See, e.g.*, John DiLulio, *The Coming of the Super-Predators*, WASH. EXAM'R (Nov. 27, 1995, 5:00 AM), https://www.washingtonexaminer.com/?p=1558817 [https://perma.cc/8T7A-HWW4] ("No one in academia is a bigger fan of incarceration than I am. Between 1985 and 1991 the number of juveniles in custody increased from 49,000 to nearly 58,000. By my estimate, we will probably need to incarcerate at least 150,000 juvenile criminals in the years just ahead. In deference to public safety, we will have little choice but to pursue genuine get-tough law-enforcement strategies against the super-predators.").

167. On these measures and other factors that contributed to mass incarceration in the United States, see, for example, JAMES FORMAN JR., LOCKING UP OUR OWN: CRIME AND PUNISHMENT IN BLACK AMERICA (2017); DAVID GARLAND, THE CULTURE OF CONTROL (2001); MARIE GOTTSCHALK, CAUGHT: THE PRISON STATE AND THE LOCKDOWN OF AMERICAN POLITICS (2014); JONATHAN SIMON, GOVERNING THROUGH CRIME (2007); BRYAN STEVENSON, JUST MERCY: A STORY OF JUSTICE AND REDEMPTION (2015); LOÏC WACQUANT, PRISONS OF POVERTY (1999); BRUCE WESTERN, PUNISHMENT AND INEQUALITY IN AMERICA (2006).

168. *See* Slobogin, *supra* note 87.

and punishments is not minimalist. Many drug offenses and the criminalization of consensual behavior between adults are examples.[169]

Policing techniques that do not consider the interests and well-being of all those targeted by them violate the anti-dehumanization principle. Just to take a few examples from recent years in the United States, the widespread use of stop-and-frisk in New York and other cities did not sufficiently consider how these police policies substantially burden the interests and well-being of those who were targets and, in particular, how they disproportionally burdened minorities.[170] The same point applies to misdemeanor arrests that occur at higher rates against minorities without a legitimate justification.[171] Similarly, over-policing certain groups as a way to generate revenue for the criminal legal system—as happened in Ferguson, Missouri—clearly dehumanized these individuals and groups by instrumentalizing them without any justification for it.[172] Another example is the phenomenon of police killings that occur more frequently in the United States than in most if not all countries in the Global North and are also disproportionally concentrated in minorities.[173] Many of these police killings could be prevented, if the interests of those potential targets of police deadly violence were taken seriously.[174] Another example is how police practices and regulations often do not consider the interests of people with disabilities by ignoring their condition.[175]

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169. *See, e.g.*, DOUGLAS N. HUSAK, LEGALIZE THIS! THE CASE FOR DECRIMINALIZING DRUGS (2002).

170. For academic literature that encouraged a larger use of stop-and-frisk, see, for example, GEORGE L. KELLING & CATHERINE M. COLES, FIXING BROKEN WINDOWS: RESTORING ORDER AND REDUCING CRIME IN OUR COMMUNITIES (1996). For critiques of the implementation of these policies, see, for example, Floyd v. City of New York, 959 F. Supp. 2d 540 (S.D.N.Y. 2013); Jeffrey Fagan, Terry*'s Original Sin*, 2016 U. CHI. LEGAL F. 43; David Rudovsky & David A. Harris, Terry *Stops and Frisks: The Troubling Use of Common Sense in a World of Empirical Data*, 79 OHIO ST. L.J. 501 (2018).

171. ISSA KOHLER-HAUSMANN, MISDEMEANORLAND: CRIMINAL COURTS AND SOCIAL CONTROL IN AN AGE OF BROKEN WINDOWS POLICING (2018); ALEXANDRA NATAPOFF, PUNISHMENT WITHOUT CRIME: HOW OUR MASSIVE MISDEMEANOR SYSTEM TRAPS THE INNOCENT AND MAKES AMERICA MORE UNEQUAL (2018); Monica C. Bell, *Police Reform and the Dismantling of Legal Estrangement*, 126 YALE L.J. 2054 (2017); Megan Stevenson & Sandra Mayson, *The Scale of Misdemeanor Justice*, 98 B.U. L. REV. 731, 769–71 (2018).

172. U.S. DEP'T OF JUST., C.R. DIV., INVESTIGATION OF THE FERGUSON POLICE DEPARTMENT (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] [hereinafter DOJ REPORT].

173. *See, e.g.*, FRANKLIN E. ZIMRING, WHEN POLICE KILL 75–90 (2017); *Number of People Shot to Death by the Police in the United States from 2017 to 2024*, by Race*, STATISTA (Mar. 11, 2024), https://www.statista.com/statistics/585152/people-shot-to-death-by-us-police-by-race/ [https://perma.cc/6GMF-7E9H].

174. *See* ZIMRING, *supra* note 173; Rachel A. Harmon, *When Is Police Violence Justified?*, 102 NW. U. L. REV. 1119 (2008); Franklin E. Zimring, *Police Killings as a Problem of Governance*, 687 ANNALS AM. ACAD. 114 (2020).

175. *See* Barry Friedman, *Disaggregating the Policing Function*, 169 U. PA. L. REV. 925 (2021); Jamelia N. Morgan, *Policing Under Disability Law*, 73 STAN. L. REV. 1401 (2021); Jamelia Morgan, Essay, *Disability's Fourth Amendment*, 122 COLUM. L. REV. 489 (2022).

There are also penal policies outside of the policing context that do not consider the interests and well-being of those targeted by them. For instance, money bail used without consideration of the ability to pay—such as money bail systems that rely on fixed schedules by type of offense—does not adequately consider the interests and well-being of those who do have enough resources to post bail and they are then held in pretrial detention even if they do not represent a flight risk or provide any other legitimate ground for pretrial detention.[176] Also in terms of bail and pretrial detention, risk-assessment tools that treat defendants differently because of their race or other personal trait of this sort dehumanize these groups of people.[177]

Similarly, criminal prosecutions in jurisdictions that do not provide sufficient levels of funding and appropriate regulations to ensure that indigent defendants receive adequate legal representation also disregard the interests of these defendants that they are treated fairly and not wrongfully convicted.[178] Regarding plea bargaining, practices by prosecutors and judges that undermine the ability of defendants to truly consensually accept or reject a plea proposal—such as overcharging, improperly using pretrial detention, not disclosing elements of proof, or threatening or imposing disproportionate post-trial punishments to encourage guilty pleas—dehumanize and do not consider the interests and well-being of defendants.[179] Plea bargaining practices in which prosecutors act as de facto adjudicators of criminal cases without giving defendants a right to be heard or to legal representation or to access the elements of proof or to other basic

176. *See, e.g.*, Miguel F.P. de Figueiredo & Dane Thorley, *Pretrial Disparity and the Consequences of Money Bail*, 81 MD. L. REV. 557 (2022); Aurélie Ouss & Megan T. Stevenson, *Does Cash Bail Deter Misconduct?*, 15 AM. ECON. J.: APPLIED ECON. 150, 150 (2023).

177. For discussion on whether risk-assessment tools have such an effect, see, for example, Melissa Hamilton, *The Biased Algorithm: Evidence of Disparate Impact on Hispanics*, 56 AM. CRIM. L. REV. 1553 (2019); Julia Angwin, Jeff Larson, Surya Mattu & Lauren Kirchner, *Machine Bias*, PROPUBLICA (May 23, 2016), https://www.propublica.org/article/machine-bias-risk-assessments-in-criminal-sentencing [https://perma.cc/9TBS-7XYZ]; Jennifer L. Doleac & Megan Stevenson, *Are Criminal Risk Assessment Scores Racist?*, BROOKINGS (Aug. 22, 2016), https://www.brookings.edu/articles/are-criminal-risk-assessment-scores-racist/ [https://perma.cc/RY94-B7SL].

178. *See, e.g.*, Eve Brensike Primus, *The Problematic Structure of Indigent Defense Delivery*, 122 MICH. L. REV. 207 (2023).

179. *See, e.g.*, Máximo Langer, *Rethinking Plea Bargaining: The Practice and Reform of Prosecutorial Adjudication in American Criminal Procedure*, 33 AM. J. CRIM. L. 223 (2006) [hereinafter *Rethinking Plea Bargaining*]; Máximo Langer, *Plea Bargaining as Second-Best Criminal Adjudication and the Future of Criminal Procedure Thought in Global Perspective*, *in* RESEARCH HANDBOOK ON PLEA BARGAINING AND CRIMINAL JUSTICE 552 (Máximo Langer, Mike McConville & Luke Marsh eds., 2024) [hereinafter *Plea Bargaining as Second-Best Criminal Adjudication*]; Christopher Slobogin & Kate Weisburd, *Illegitimate Choices: A Minimalist(?) Approach to Consent and Waiver in Criminal Cases*, 101 WASH. U. L. REV. (forthcoming 2024). For defenses of plea bargaining in academia, see, for example, Michael Conklin, *Defenses for Plea Bargaining*, *in* RESEARCH HANDBOOK ON PLEA BARGAINING AND CRIMINAL JUSTICE, *supra*, at 313; Frank H. Easterbrook, *Criminal Procedure as a Market System*, 12 J. LEGAL STUD. 289 (1983); Robert E. Scott & William J. Stuntz, *Plea Bargaining as Contract*, 101 YALE L.J. 1909 (1992).

adjudication rights are also a violation of basic criminal procedure principles and rights.[180]

Prison conditions that do not ensure the right to safety and minimal well-being of inmates also show no or insufficient consideration of someone's interest and well-being.[181]

Unequal criminal law enforcement is also a violation of the anti-dehumanization principle. If police officers, prosecutors, judges, juries, and others unequally enforce the criminal law by arresting, charging, convicting, or sentencing minorities more often or more heavily just because of their skin color or other personal trait, these policies undermine the minorities' interests and well-being of being treated like members of any other group.[182] This treatment also expresses that some human beings are more valuable than others, in violation of this principle.

C. Theories That Do Not Include the Last Resort Principle

There are also criminal law theories that are not minimalist because they do not include the last resort principle or variations on it. Among them, there are liberal criminal law theories that do not include such principle. These include, for instance, liberal positive retributivist theories that require the imposition of punishment in response to certain wrongs. Among classical works, one could consider Kant's retributive theory of punishment as fitting here.[183] His work sets foundations for political liberalism, his third categorical imperative requires that human beings be treated as ends in

180. *See* Langer, *Rethinking Plea Bargaining, supra* note 179; Langer, *Plea Bargaining as Second-Best Criminal Adjudication*, *supra* note 179; Máximo Langer, Plea Bargaining, Conviction without Trial, and the Global Administratization of Criminal Convictions, 4 ANN. REV. CRIMINOLOGY 377 (2021).

181. *See, e.g.*, Sharon Dolovich, *Cruelty, Prison Conditions, and the Eighth Amendment*, 84 N.Y.U. L. REV. 881 (2009); Sharon Dolovich, *Prison Conditions*, *in* 4 REFORMING CRIMINAL JUSTICE: PUNISHMENT, INCARCERATION, AND RELEASE 261 (Erik Luna ed., 2017); Sharon Dolovich, *Evading the Eighth Amendment: Prison Conditions and the Courts*, *in* THE EIGHTH AMENDMENT AND ITS FUTURE IN A NEW AGE OF PUNISHMENT 133 (Meghan J. Ryan & William W. Berry III eds., 2020).

182. *See, e.g.*, DAVID COLE, NO EQUAL JUSTICE: RACE AND CLASS IN THE AMERICAN CRIMINAL JUSTICE SYSTEM (1999); KHALIL GIBRAN MUHAMMAD, THE CONDEMNATION OF BLACKNESS: RACE, CRIME, AND THE MAKING OF MODERN URBAN AMERICA (2010); Bell, *supra* note 171; Angela J. Davis, *Prosecutors, Democracy, and Race*, *in* PROSECUTORS AND DEMOCRACY: A CROSS-NATIONAL STUDY, *supra* note 111, at 195; Elizabeth Hinton & DeAnza Cook, *The Mass Criminalization of Black Americans: A Historical Overview*, 4 ANN. REV. CRIMINOLOGY 261 (2021); Sherod Thaxton, *Leveraging Death*, 103 J. CRIM. L. & CRIMINOLOGY 475 (2013).

183. Kant has long been considered as articulating such a retributivist theory of punishment. *See, e.g.*, Frederick Rauscher, *Kant's Social and Political Philosophy*, STAN. ENCYCLOPEDIA PHIL. (Apr. 11, 2022), https://plato.stanford.edu/entries/kant-social-political/#Pun [https://perma.cc/86ZJ-JQTW]. For revisionist accounts of this traditional understanding, see, for example, THOMAS E. HILL, JR., RESPECT, PLURALISM, AND JUSTICE: KANTIAN PERSPECTIVES 173 (2000); B. Sharon Byrd, *Kant's Theory of Punishment: Deterrence in Its Threat, Retribution in Its Execution*, 8 LAW & PHIL. 151 (1989); Jeffrie G. Murphy, *Does Kant Have a Theory of Punishment?*, 87 COLUM. L. REV. 509 (1987).

themselves, and his theory embraces proportionality since it always requires a punishment that is equal to the evil that the offender inflicted on his victim.[184] But by always requiring punishment and a punishment that is equal to the evil that the offender inflicted on his victim, his theory does not leave room for the type of considerations that the last resort principle includes.[185]

Some liberal theories aspire to a moderate use of criminal law since they embrace a conception of criminal law and a range of criminal law principles that substantially limit the criminalization of conduct and the use of the criminal legal system. Given their moderation ambitions, some of these theories can be considered fellow travel companions of minimalism.[186] But if these theories do not embrace the last resort principle or variations of it, these theories would not be minimalist in the sense I have articulated in this

184. *See, e.g.*, *Kant's Social and Political Philosophy*, *supra* note 183.

185. *See* IMMANUEL KANT, THE METAPHYSICS OF MORALS 104–10 (Mary Gregor trans., 1996).

186. One could possibly include here the important and insightful work by Antony Duff who has been a generous interlocutor to many generations of criminal law scholars. *See, e.g.*, R.A. Duff, *A Criminal Law for Citizens*, 14 THEORETICAL CRIMINOLOGY 293 (2010). Duff defends a liberal republican conception of criminal law that would lead to criminal law moderation, but that does not include the last resort principle or variations on it. *Id.* at 304. (In a footnote, Duff makes a reference to "last resort" but in a way that does not resemble in a meaningful way the definitions of the last resort principle I have provided in this article. Duff uses the term only to give content to the idea that we should "use criminal law to respond to genuine wrongs that have been committed, rather than to prevent wrongs that are so far only potential or contemplated." *Id.* at 304 n.28.) Duff also defends an inclusive conception of criminal justice and punishment. *See, e.g.*, R.A. Duff, *A Democratic Criminal Law* (Univ. of Minn. L. Sch., Legal Studs. Rsch. Paper Series, Research Paper No. 15-20, 2015), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2618698 [https://perma.cc/WD3G-DXXK]. However, he also says that "in a just system of law, it is plausible to hold that those who are substantive witnesses to a crime should recognize a civic duty . . . to report it." *Id.* at 9. Duff adds that it could be argued that the civic duties of victims as citizens include a duty, for instance, to report the crime that they have suffered. *Id.* Such a general civic duty of witnesses and victims to report crimes would go against the conception of the last resort principle that I have articulated, which would include a duty for witnesses and victims not to report a crime when a non-criminal response (including no response) to crime would likely be at least as good as a criminal response to address a case or situation. *See supra* Section II.C.3.f. In addition, Duff considers that fines "are a safe but unambitious mode of punishment for citizens" because they are a limited way to communicate to the offender that "he must undertake as a penance, as a form of symbolic reparation, for what he has done." *Id.* at 15–17. But from the conception of the last resort principle I have articulated in Sections II.C.3.c. and d., last resort applies at sentencing and fines may be the best punishment if they are at least as good as more burdensome forms of punishment to address a case. There is one point on which Duff could be interpreted as applying the last resort principle when he argues that imprisonment should be reserved for the most serious offenses given that it is exclusionary punishment. *Id.* at 17–18. However, important as it is, this would be a very limited scope for *ultima ratio*. I think Duff's account of criminal law does not include a last resort principle because it conceives of punishment as a way to communicate moral condemnation to the offender. And since non-criminal law measures and responses would not be an adequate way to communicate this moral condemnation, these non-criminal law measures and responses would never be an adequate way to address culpable wrongs—what Duff calls public wrongs under this account—or would never be as good as criminal law to address such culpable wrongs.

article.[187] This point also enables us to contrast minimalist positions on the criminal legal system with civil libertarian ones that do not embrace the last resort principle.

Reconstructive criminal law theories—under which criminal law is the embodied ethical life of a given community—can also lead to a non-minimalist criminal law, when the ethical life of a given community includes liberal criminal law and criminal procedure rights and principles and the anti-dehumanization principle, but not the last resort principle.[188] The same can be said about bureaucratic, communitarian, and democratic accounts of criminal law.[189]

D. Theories That Argue That Punishment and the Criminal Legal System Cannot Be Justified

Finally, another set of theories that are very present in American legal academia and public discourse today is penal abolitionism that argues that the police, prison, and punishment cannot be justified.[190] These theories are

187. Another possible example is the sophisticated work by MICHAEL S. MOORE, PLACING BLAME: A GENERAL THEORY OF THE CRIMINAL LAW (1997). Husak has critiqued Moore's theory for not being minimalist and I agree with his critique. *See* HUSAK, OVERCRIMINALIZATION, *supra* note 61, at 196–206 (stating that under Moore's theory, the moral desert of an offender is a sufficient reason to punish him and that the most important difference between his theory and Moore's legal moralism is that the latter does not accept Husak's test of intermediate scrutiny that, as I have explained, tries to play the role that the last resort principle plays in [other] minimalist theories). Professor Moore's response to Husak in this regard is that "'budget commitment' consequentialism is inevitable in government," that "there are many good things to achieve with our comparatively scarce public resources, of which retributive justice is only one," and that "[t]his includes sacrificing punishing some guilty in order to prevent more of the rights violations that violent crime represents; if a dollar of public resources expended could be either catch and punish a guilty offender or prevent his offense to start with, surely we should use it to do the latter." *See* Michael S. Moore, *A Tale of Two Theories*, 28 CRIM. JUST. ETHICS 27, 43 (2009). But Moore's response does not make his theory minimalist in the sense I have defined in this piece for three reasons. First, under minimalism nothing is sacrificed if the last resort principle is correctly applied. Second, the last resort as a moral principle is different from "budget commitment" consequentialism because the issue for the last resort principle is not where resources are best spent, but whether it is fair to use criminal law and punish someone when there are adequate and as good non–criminal law social responses and public measures to adequately address the case or situation. Third, "budget commitment" consequentialism is not part of Moore's criminal law theory but a set of considerations external to it.

188. On communitarian and reconstructive theories, see, for example, Joshua Kleinfeld, *Reconstructivism: The Place of Criminal Law in Ethical Life*, 129 HARV. L. REV. 1485 (2016).

189. On democratic criminal justice and its distinction with bureaucratic justice, see, for example, Kleinfeld, *supra* note 142.

190. The penal abolitionist literature has grown exponentially in recent years in the United States. *See, e.g.*, ANGELA Y. DAVIS, ABOLITION DEMOCRACY (2005); ANGELA Y. DAVIS, ARE PRISONS OBSOLETE? (2003); ANGELA Y. DAVIS, FREEDOM IS A CONSTANT STRUGGLE (2016); RUTH WILSON GILMORE, GOLDEN GULAG: PRISONS, SURPLUS, CRISIS, AND OPPOSITION IN GLOBALIZING CALIFORNIA (2007); Amna A. Akbar, *An Abolitionist Horizon for (Police) Reform*, 108 CALIF. L. REV. 1781 (2020); Thomas Ward Frampton, *The Dangerous Few: Taking Seriously Prison Abolition and Its Skeptics*, 135 HARV. L. REV. 2013 (2022); Allegra M. McLeod, *Confronting Criminal Law's Violence: The*

not minimalist because they reject that the penal system may ever adequately address culpable wrongful harm or other culpable wrongs.[191] Versions or outcomes of abolitionism may also violate the anti-dehumanization principle since, despite the good intentions of many abolitionists, they may adopt or lead to social responses or public measures that dehumanize those who cause harm or wrongs—for instance, by enabling vigilante justice or through certain medical responses against culpable harm or wrongs.[192] Abolitionism also rejects criminal law and criminal procedure rights and the last resort principle because it rejects the penal system.

CONCLUSION

This article has provided an account of penal minimalism.[193] It has argued that penal minimalism presents four core features. First, criminal law and the criminal legal system have a role to play in addressing culpable wrongful harm and other culpable wrongs. Second, minimalism embraces human rights and liberal criminal law and criminal procedure rights and principles. Third, minimalism requires that every person that is involved in or affected by the commission of culpable wrongful harm or culpable wrongs is treated as a fellow human being whose interests and well-being must be considered in deciding whether and how the criminal legal system should be used. Fourth, minimalism embraces the last resort principle (or variations of it), which requires that criminal law and the criminal legal system should only be used as a last resort when no other social responses or public measures would suffice to adequately advance a legitimate goal, such as addressing harmful behavior. At a time in which American society often debates about the criminal legal system in terms of the false dichotomy between abolitionism and mass incarceration, these four ideas are important and indicate a different way forward.

This article has also made clear that these four features do not exhaust minimalist accounts and discussions. Minimalist accounts can embrace a range of theories of punishment, policing, investigation, prosecution, adjudication, sentencing, and post-sentencing—though many theories about

Possibilities of Unfinished Alternatives, 8 HARV. UNBOUND 109 (2013); Allegra M. McLeod, *Envisioning Abolition Democracy*, 132 HARV. L. REV. 1613 (2019).

191. On possible relationships between penal minimalism and penal abolitionism, see Daniel S. Harawa, *In the Shadows of Suffering*, 101 WASH. U. L. REV. (forthcoming 2024); Langer, *supra* note 1.

192. FERRAJOLI, DIRITTO E RAGIONE, *supra* note 14, at 233–39, 332–36; Ferrajoli, *Il diritto penale minimo*, *supra* note 14, at 514–16; Langer, *supra* note 1, at 44–45, 64–70; *see also* Herbert Morris, *Persons and Punishment*, 52 THE MONIST 475 (1968).

193. A different question that I cannot address here is how criminal justice minimalism could be implemented in the United States and elsewhere. In this regard, see, for example, Vincent Chiao, Cooperation and the Retributive Sentiments (2024) (unpublished manuscript) (on file with author).

these issues are incompatible with minimalism. Minimalist accounts can also include other principles besides the four core features I have identified, such as what I have called the bidirectional accountability principle. Minimalism can be combined with bureaucratic, communitarian, democratic, liberal, non-extreme versions of penal abolitionist, racial justice, reconstructivist, republican, and other accounts of criminal punishment, criminal law, and the criminal legal system. Minimalism can also be combined with various theories of the state and of justice. In this regard, there is not a single penal minimalism. Rather, there are penal minimalisms. And each and all of them have insights to contribute to discussions about how to make and strive for a fair penal system and a just society in the United States and beyond.