

LIBERALISM, THE FOUNDING, AND AMERICAN CRIMINAL JUSTICE

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In the past decade, two groups have taken aim at the American political and legal experiment: critics of modern liberalism and contemporary criminal justice reformers. Liberal critics point to the corrosive effect of liberal ideas on governmental, legal, social, and private institutions. Criminal justice critics lament systemic racism and classism, power imbalances, overcriminalization, and mass incarceration. Broadly, both groups argue the American political and legal experiment was destined to fail, and has failed, given its ideological roots. This Article puts both into conversation and makes two arguments. First, it explores whether criticism of the liberal paradigm offers another explanatory horizon for the ills of American criminal justice. Second, it suggests there is strong evidence that these trends were not the original design of the Founders, who, while operating within the liberal tradition, sought to entrench certain premodern ideas into American criminal justice.

Four developments in the modern American criminal legal system—relating to lawmaking, procedure, adjudication, and punishment—provide evidence of the critique of the excesses of modern liberalism. First, the system has become almost entirely positivist, leaving officials to exclusively determine the boundaries of criminal law and definitions of punishment. Overcriminalization and confusion about what punishment is has resulted. In the procedural realm, core doctrines are nominalist and utilitarian in how they attempt to protect privacy and liberty. Third, the liberal, social-contractarian ethic that permits equating voluntary agreement with justice, however artificial or divorced from the truth, persists in plea-bargaining norms and practices, separating the legitimacy of criminal adjudication from reality. Finally, modern liberal premises

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* Professor of Law, Seton Hall Law School. I am grateful to Seton Hall University for providing the sabbatical that enabled the time and space for the research and writing of this Article. I also am indebted to the work of countless others who have helped me to think through the ideas presented here, including my colleagues David Opderbeck and Ed Hartnett, as well as Rick Garnett, Stephanos Bibas, and others who have encouraged my scholarly endeavors. This Article builds from the work of exceptional scholars in the political theory, history, law, and criminal justice disciplines. I have learned much from them. Finally, I wish to thank my lovely wife, Katherine, and my audacious and energetic children, Elizabeth, Eleanor, George, John Henry, Lucy, and Anna, for their innate curiosity, capacity for distraction, and infectious wonder.

manifest in a sentencing system primarily concerned with controlling risk—through quantified instrumentalization.

While these trends align with the pathologies of modern liberalism identified by critics, Founding thinking directly contradicts these developments. The Founders were not legislative positivists, either generally or with respect to criminal law and punishment. Second, criminal procedure protections were tethered to the world of things, not sentiments about interests. Third, juries were tasked with adjudicating criminal matters, determining truth, and injecting their normative views into the legal system. Finally, the moral underpinnings of criminal law animated Founding thought on sentencing and punishment. Thus, while modern liberal premises and excesses help to explain some systemic developments lamented by criminal justice scholars, these trends contradict aspects of the original design, meaning they are paradigmatic rather than originally intended.

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INTRODUCTION

In the 1990s, a public messaging campaign relating to the well-known food pyramid aimed to inspire better eating habits among America’s youth.¹ One commercial compared a bunch of different foods—some healthy, some not—before declaring that “you are what you eat.”² The writers of that commercial probably could have been more precise with their words. Of course, no one becomes a piece of food by virtue of eating it; “your body becomes like what you eat” is probably more accurate. But the attempted message was that what we eat affects who we will become because what we eat affects our bodily health. Modern medical and food science confirms as much,³ which is why policymakers aim to improve the number of healthy choices available for eating to hopefully reduce the onset of negative health conditions.⁴ In short, consumption has effects over time whether we will it that way or not. Being honest about that is crucial to health. This Article makes a similar argument, but about a completely different subject

1 See Brian Udall & Elias Nash, *How the Food Pyramid Has Changed Over Time*, TASTING TABLE (Oct. 19, 2023, at 17:38 ET), <https://www.tastingtable.com/1023664/how-the-food-pyramid-has-changed-over-time/> [<https://perma.cc/2MW7-5NJK>]; *The History of the American Food Pyramid*, ALIMENTARIUM, <https://www.alimentarium.org/en/fact-sheet/history-american-food-pyramid> [<https://perma.cc/J7FF-BEJJ>] (last visited Nov. 8, 2025).

2 PHAKENAM, *80’s Ads: ABC’s You Are What You Eat Upgrade*, at 00:14 (YouTube, Dec. 25, 2014), <https://www.youtube.com/watch?v=N7smVro0p-k> [<https://perma.cc/7UAM-8ZR6>].

3 See, e.g., *How Your Eating Habits Affect Your Health*, NIH: NEWS IN HEALTH (May 2017), <https://newsinhealth.nih.gov/2017/05/how-your-eating-habits-affect-your-health> [<https://perma.cc/3L2W-DTGN>].

4 See Mary T. Gorski & Christina A. Roberto, *Public Health Policies to Encourage Healthy Eating Habits: Recent Perspectives*, 7 J. HEALTHCARE LEADERSHIP 81 (2015).

matter: the legal realities in American criminal law and procedure that have contributed to the contemporary injustices lamented by so many.

It is no secret that in the past century, the theory and practice behind American criminal law and punishment have been the subject of much criticism and dispute. A particularly acute sense of the capacity for gross injustice within the American criminal justice system⁵ permeates public discussions.⁶ The phrase and condition of “mass incarceration,” while initially descriptive of the fact that the American jail and prison population is significantly higher than pretty much any other country,⁷ is now used to symbolize the ideological underpinnings of the American criminal system overall.⁸

Scholars like David Garland, Bill Stuntz, and Michelle Alexander have emphasized the reality of social control, including based on race and class, as endemic to the American criminal justice experience.⁹ Tom Tyler and Monica Bell have highlighted the alienation felt by those who encounter the system,¹⁰ and Judge Stephanos Bibas has discussed the “machinery” that creates and perpetuates misaligned incentives.¹¹ More recently, Alice Ristroph has explored the intellectual roots of mass incarceration, suggesting fundamental design flaws.¹² Some discuss whether the term “justice” belongs in the descriptive terms relating to administration of the criminal law and punishment.¹³ What was formerly thought to be a venue for justice is now simply the “criminal legal system,” rendering its distinction from other forms of

5 Referring to the “American criminal justice system” as a monolithic whole is not completely accurate. As I tell my first-year Criminal Law students and their upper-year colleagues in Constitutional Criminal Procedure, there are hundreds, if not thousands, of criminal justice systems in the United States with complex jurisdictional and institutional arrangements. I use the phrase “American criminal justice system” broadly in this Article to indicate that conglomeration of legal institutions and actors.

6 See *infra* Part I (detailing contemporary critiques from various angles).

7 *United States Profile*, PRISON POL’Y INITIATIVE (emphasis omitted), <https://www.pris-onpolicy.org/profiles/US.html> [https://perma.cc/7CF3-HBXD] (last visited Oct. 29, 2025).

8 See, e.g., Alice Ristroph, *An Intellectual History of Mass Incarceration*, 60 B.C. L. REV. 1949, 1952 n.7 (2019).

9 See DAVID GARLAND, *THE CULTURE OF CONTROL: CRIME AND SOCIAL ORDER IN CONTEMPORARY SOCIETY* (2001); MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* (2010); WILLIAM J. STUNTZ, *THE COLLAPSE OF AMERICAN CRIMINAL JUSTICE* (2011).

10 See Tom R. Tyler, *Procedural Justice, Legitimacy, and the Effective Rule of Law*, 30 CRIME & JUST. 283 (2003); Monica C. Bell, *Police Reform and the Dismantling of Legal Estrangement*, 126 YALE L.J. 2054 (2017).

11 See STEPHANOS BIBAS, *THE MACHINERY OF CRIMINAL JUSTICE* (2012).

12 See Ristroph, *supra* note 8 (discussing intellectual roots of present-day circumstances).

13 See, e.g., Benjamin Levin, *After the Criminal Justice System*, 98 WASH. L. REV. 899 (2023).

law questionable and impliedly underscoring its contribution to social injustice.¹⁴ Discontent transcends political affiliation, with think tanks on both sides of the political spectrum routinely criticizing the system.¹⁵ There is clear yearning by many for reform, renewal, and perhaps even reconstruction of a more humane reaction to harm after wrongdoing.¹⁶ There are calls for increased democratization at various points of the system.¹⁷ And others have gone so far as to make affirmative cases for abolishing the system entirely¹⁸ or, at the very least, ending incarceration as a mode of punishment.¹⁹

At the risk of piling on, this Article adds to the discussion, but with a different, broader horizon in mind: the ideological paradigm most often associated with the time in which the American legal system came to be, namely political and legal liberalism. In the past decade, political theory scholars like Patrick Deneen, in his book *Why Liberalism Failed*, which was recommended by former President Barack Obama despite their opposing political philosophies, have renewed interest in the argument that the liberal paradigm explains the alienating

14 *Id.* at 900.

15 See, e.g., *Heritage Scholars Help Shape Criminal Justice Reforms*, THE HERITAGE FOUND. (Feb. 2, 2021), <https://www.heritage.org/impact/heritage-scholars-help-shape-criminal-justice-reforms> [https://perma.cc/748A-AZDD]; Erica Bryant, *How to Fight for Justice in Your State and Community in 2025*, VERA (Jan. 7, 2025), <https://www.vera.org/news/how-to-fight-for-justice-in-your-state-and-community-in-2025> [https://perma.cc/9PSG-D2XV].

16 See, e.g., Steven Arrigg Koh, *Criminal Law's Hidden Consensus*, 101 WASH. U. L. REV. 1805 (2024).

17 See, e.g., Laura I. Appleman, *The Plea Jury*, 85 IND. L.J. 731, 766 (2010) (arguing for community adjudication over pleas); Rachel A. Harmon, *The Problem of Policing*, 110 MICH. L. REV. 761, 802–16 (2012) (discussing more effective police-regulation methods); Carissa Byrne Hessick & Michael Morse, *Picking Prosecutors*, 105 IOWA L. REV. 1537, 1578–87 (2020) (exploring the viability of prosecutor elections for reform); Daniel S. McConkie, Jr., *Plea Bargaining for the People*, 104 MARQ. L. REV. 1031, 1043–45 (2021) (emphasizing public participation in democratic processes such as jury service and advisory boards); Jed S. Rakoff, *Why Prosecutors Rule the Criminal Justice System—and What Can Be Done About It*, 111 NW. U. L. REV. 1429, 1432 (2017) (discussing prosecutorial power); Jocelyn Simonson, *Bail Nullification*, 115 MICH. L. REV. 585, 606–11 (2017) (exploring the possibility of community bail nullification); Tom R. Tyler, *From Harm Reduction to Community Engagement: Redefining the Goals of American Policing in the Twenty-First Century*, 111 NW. U. L. REV. 1537, 1560 (2017) (noting how policing that promotes public trust has value); Tracey Meares, *Policing and Procedural Justice: Shaping Citizens' Identities to Increase Democratic Participation*, 111 NW. U. L. REV. 1525 (2017) (discussing citizen engagement in criminal law); Joshua Kleinfeld, *Manifesto of Democratic Criminal Justice*, 111 NW. U. L. REV. 1367 (2017) (describing the need for injecting popular participation).

18 See, e.g., Dorothy E. Roberts, *The Supreme Court 2018 Term—Foreword: Abolition Constitutionalism*, 133 HARV. L. REV. 1 (2019).

19 See, e.g., John Washington, *What is Prison Abolition?*, NATION, (July 31, 2018), <https://www.thenation.com/article/archive/what-is-prison-abolition/> [https://perma.cc/5ZHV-2C62].

developments in the American political and legal experiment.²⁰ Deneen blames “structural[] liberal[ism].”²¹ Other scholars, like Francis Fukuyama, in *Liberalism and Its Discontents*, and Larry Siedentop, in *Inventing the Individual: The Origins of Western Liberalism*, have raised interesting questions about the roots and pathologies generated by liberal thought and modernity.²²

These critiques operate from the premise that ideas matter, rippling and manifesting throughout the system, whether intended or not.²³ As Siedentop wrote, “Deep moral changes, changes in belief, can take centuries to begin to modify social institutions. . . . [B]eliefs are . . . of primary importance [M]oral beliefs *have* given a clear overall ‘direction’ to Western history.”²⁴ Deneen’s thesis is similar: The American political and legal experiment was baptized and is awash in a particular set of liberal ideas that have run their course, breeding societal instability, division, and discontent.²⁵ Deneen and others also suggest much of this was by design or, at the very least, foreseeable.²⁶

20 PATRICK J. DENEEN, *WHY LIBERALISM FAILED* (2018); see Barack Obama Recommends “Why Liberalism Failed,” INST. FOR ADVANCED STUD. CULTURE (Dec. 28, 2018), <https://web.archive.org/web/20251210144646/https://iasculture.org/news/obama-recommends-why-liberalism-failed> [https://perma.cc/58UX-4RZ8] (retrieved through Internet Archive Wayback Machine).

21 PATRICK J. DENEEN, *REGIME CHANGE: TOWARD A POSTLIBERAL FUTURE* 10 (2023); see *id.* at 3–6.

22 FRANCIS FUKUYAMA, *LIBERALISM AND ITS DISCONTENTS* (2022); LARRY SIEDENTOP, *INVENTING THE INDIVIDUAL: THE ORIGINS OF WESTERN LIBERALISM* (2014).

23 Whether ideas or other forces more satisfactorily explain historical events is a contentious question debated by philosophers, historians, sociologists, and others. See HAROLD J. BERMAN, *LAW AND REVOLUTION: THE FORMATION OF THE WESTERN LEGAL TRADITION* 540–58 (1983) (discussing the shortcomings of modern sociological analyses, whether based on economics, materialism, politics, or notions of subordination and domination). I do not wish to resolve that debate here. Instead, this Article works from the same position as Berman in his seminal work, *Law and Revolution*, where he persuasively argues that the Weberian and Marxian explanations are insufficient to explain the developments of modern legal systems because they “leave one without any guidance concerning the general significance of ideology, politics, and law.” *Id.* at 541; see *id.* at 539–45 (noting the complexity in determining historical causes and how during some periods economic forces might be dominant, whereas during others political or ideological ones might be). In other words, paradigmatic *ideas* have effects.

24 SIEDENTOP, *supra* note 22, at 2. Brian Tierney makes a similar point in his historical examination of the idea of natural rights. BRIAN TIERNEY, *THE IDEA OF NATURAL RIGHTS: STUDIES ON NATURAL RIGHTS, NATURAL LAW, AND CHURCH LAW 1150–1625*, at 6 (1997) (noting how the story of natural rights involves events, thought, and language).

25 See DENEEN, *supra* note 20, at 45, 78; see also DENEEN, *supra* note 21, at 209 (referring to “systemic liberalism”).

26 See DENEEN, *supra* note 20, at 3–9; see also DENEEN, *supra* note 21, at 76. See generally D.C. SCHINDLER, *THE POLITICS OF THE REAL: THE CHURCH BETWEEN LIBERALISM AND INTEGRALISM* 3–42 (2021) (describing what “liberalism” is, *id.* at 4, and attributing it to the

For instance, Deneen and similar scholars emphasize how liberal ideas tend to assume (1) that a baseline of autonomous, individual freedom is the fundamental characteristic of human nature; (2) that society is primarily and artificially created through voluntary, contract-like agreements between individuals (whether out of fear or self-interest); (3) that construction of legitimate government, law, and social ordering depends exclusively on voluntary consent in the same style; (4) that law is primarily the product of choice and will; and (5) that government should, for the most part, rest its decisions on a sense of the aggregate desires of the governed and the maximization of private goods rather than a holistic notion of the common good.²⁷ These ideas, of course, support democratic legal institutions in many ways, and they convey, both explicitly and implicitly, ideas about the place of truth in the construction of a political and legal system.²⁸ They also are synergistic with modern legal positivism, utilitarian-based ethical thinking, nominalist epistemology, and negative notions of freedom, given their deference to human autonomy.²⁹

This Article is the first to put these critiques and contemporary criminal justice criticism in conversation to explore how, if at all, the present-day ills bemoaned by so many are illustrative of ideological premises characteristic of the liberal paradigm.³⁰ In doing so, it applies that critique to developments in the American criminal system to assess its explanatory force, exploring the extent to which paradigmatic and modern liberal ideas have rippled throughout the world of American criminal law and procedure, contributing to where things stand today. Much like a reviewing court, it does so by viewing the developments in a light favorable to the understanding of liberalism and its excesses offered by the liberal critics themselves.

American Founders); ROBERT R. REILLY, *AMERICA ON TRIAL: A DEFENSE OF THE FOUNDING* 5 (2020) (referencing the “poison-pill thesis”).

27 See, e.g., DENEEN, *supra* note 21, at 31–32, 47–49, 64–90.

28 See SCHINDLER, *supra* note 26, at 30–39.

29 See HEINRICH A. ROMMEN, *THE NATURAL LAW: A STUDY IN LEGAL AND SOCIAL HISTORY AND PHILOSOPHY* 109–18 (Thomas R. Hanley trans., B. Herder Book Co. 1947) (1947).

30 By political liberalism, I mean the philosophical ideas about human nature, authority, government, sovereignty, and legitimacy most traditionally associated with Enlightenment-era thinking that gave rise to modern, democratic political systems. As such, I do not mean to refer to modern-day political spectrums within American political experience. Of course, liberalism is not a monolithic concept and eludes simple definitions. There are variants within liberalism. Much ink has been spent distinguishing Lockean liberalism from Hobbesian liberalism, and neither is Rousseau’s liberalism. See, e.g., ROMMEN, *supra* note 29, at 78–80 (contrasting Locke and Hobbes); REILLY, *supra* note 26, at 225–47 (same). Locke himself disclaimed Hobbes. See REILLY, *supra* note 26, at 227–32; see also ISAIAH BERLIN, *Two Concepts of Liberty*, in *FOUR ESSAYS ON LIBERTY* 118, 126–27 (1969).

Of course, the roots of the American criminal justice system are not reducible to Enlightenment-era and classically liberal ideas. History is far too complex for such a sweeping causative claim. Harold Berman's *Law and Revolution* surveyed the myriad events informing the development of the Western legal tradition, of which the American experience is just one ongoing part.³¹ Bernard Bailyn's *The Ideological Origins of the American Revolution* conveys the multifarious sources of law in early colonial America, indicating a jumbled mix of Christian moralism and English common law inheritance, as well as socio-political and economic mores and structures at the time.³² And, of course, the American political and legal history with the scourge of slavery, and all that followed, adds remarkable complexity.³³

But while the origin story is complex, it is undeniable that the American criminal legal system has developed *within* a predominantly liberal paradigm. In other words, while there is evidence demonstrating that the American criminal justice system was not *conceived* in an exclusively liberal era,³⁴ and certainly not in a top-down fashion, its developing story has *occurred* while the premises connoting that paradigm are the most operative at any time in human history in approaches to the nature of law and the power of government. This Article explores the manifestation of these paradigmatic ideas in the American criminal law experience before juxtaposing them with Founding-era thought. Despite its complicated historical origins, which include many pre-liberal ideas about the same topics,³⁵ the American criminal justice system manifests these ideas more and more. Four crucial areas, relating to lawmaking, procedure, adjudication, and sentencing, that arguably comprise the most significant moments in any criminal system, illustrate this development.

31 See BERMAN, *supra* note 23.

32 See BERNARD BAILYN, *THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION* 22–54 (1967).

33 See STUNTZ, *supra* note 9, at 15–40 (discussing the effects of industrialization, domestic migration between the North and South, legislative Black Codes, and other developments following the Civil War).

34 See *infra* Part IV. See generally RONALD J. PESTRITTO, *FOUNDING THE CRIMINAL LAW: PUNISHMENT AND POLITICAL THOUGHT IN THE ORIGINS OF AMERICA* (2000). The works of Justice Wilson are particularly illustrative here. Justice Wilson, perhaps the most influential Founding Father on the Constitution other than James Madison, did not seem to convey an exclusively liberal understanding of law, nor did he share certain metaphysical presuppositions held by others at the time. MARK DAVID HALL, *THE POLITICAL AND LEGAL PHILOSOPHY OF JAMES WILSON 1742–1798*, at 45 (1997) (“Wilson’s categorization of law, with his insistence that human laws conform to natural law, was influenced by Scholastic authors such as Hooker.”).

35 See, e.g., REILLY, *supra* note 26, at 248–49.

First, overcriminalization and understandings of what punishment is reflect the modern liberal tendency towards legal positivism. While scholars, judges, and others complain about overcriminalization and dumb or unwise crimes, few deny legislative power to make them. Similarly, American constitutional doctrine has developed to be almost entirely deferential to legislative judgment about the nature of punishment, permitting myriad sanctions that look, smell, and feel like punishment to be regarded as civil, non-punitive consequences.³⁶ While legal positivism comes in many forms, and predates liberal ideas about law,³⁷ the liberal paradigm is uniquely welcoming given its core presuppositions about the origins and legitimacy of human authority. Moving substantive criminal law away from core concepts like moral culpability, in favor of legislatively crafted definitions, and judicial abdication of examination of the nature of punishment reflect the positivism that liberal ideas about the nature of authority and legitimacy permit. The simultaneous lamenting and attempted repurposing of prosecutorial power also fits this trend.

A second illustration comes through doctrines within constitutional criminal procedure. The Fourth Amendment and the doctrine that has evolved permit searches and seizures unless they are unreasonable.³⁸ The Court's doctrine evolved away from security in tangible things to concepts of privacy based on societal expectations, although more recently there has been a slight swing back.³⁹ Thus, the definition of what constitutes a search was untethered from the concept of security in real things in favor of grounding rights in ideas, or perhaps even worse, sentiments about things.⁴⁰ While initially alluring given its malleability, *Katz* is effectively nominalist at its core because it prioritizes feelings about privacy rather than the reality of things. This looks a lot like the sentimentalist positivism emanating from philosopher David Hume and modern thinkers like Abraham Maslow, where emotions determine what is right and the content of law.⁴¹ Unsurprisingly, that

36 See Joshua Kaiser, *We Know It When We See It: The Tenuous Line Between "Direct Punishment" and "Collateral Consequences,"* 59 HOW. L.J. 341, 343 (2016).

37 See ROMMEN, *supra* note 29, at 109–14 (referencing positivist attitudes in antiquity).

38 U.S. CONST. amend IV; see, e.g., *Katz v. United States*, 389 U.S. 347, 359 (1967); *Riley v. California*, 573 U.S. 373, 382 (2014).

39 Compare *Boyd v. United States*, 116 U.S. 616, 630 (1886), and *Katz*, 389 U.S. at 351–52, with *Florida v. Jardines*, 569 U.S. 1, 5 (2013), and *United States v. Jones*, 565 U.S. 400, 409 (2012).

40 See *Katz*, 389 U.S. at 361 (Harlan, J., concurring).

41 See ROMMEN, *supra* note 29, at 110; FUKUYAMA, *supra* note 22, at 58–59 (describing “self-actualization at the apex of human needs,” *id.* at 59).

test now permits widespread surveillance given purported shifts in societal attitudes towards privacy.⁴²

Moreover, consistent with the modern liberal paradigm, the exclusionary rule has a manic relationship with truth. The rule is effectively liberal, utilitarian policy administered by courts. It initially communicates that guarding against an unwarranted intrusion supersedes the purpose of the criminal law: sorting the guilty from the innocent, thereby placing liberty and truth at supposed cross-purposes.⁴³ This is why some, like Akhil Reed Amar, have called it “constitutional madness.”⁴⁴ Then exceptions to the rule, like the good faith exception, suggest the quest for truth might be dominant after all.⁴⁵ But in one more confounding sleight of hand, those exceptions are not rationalized accordingly; instead, they are justified through a balancing of harms relating to deterrence, meaning the metric is entirely instrumentalist.⁴⁶ Utilizing the exclusionary rule as the primary way to enforce constitutional violations has led to little real-world accountability for constitutional wrongs. As Michael Mannheimer has illustrated, the original counterweight was customary state law, developed over centuries, with litigation venues getting to the truth of the matter, rather than speculative judgments about the prospective deterrent value of applying the exclusionary rule.⁴⁷

The third venue involves adjudication. The normalization of plea bargaining to replace communal adjudication illustrates the liberal permission structure that allows powerful insiders to create and conquer new markets. Initially, the American constitutional framework and historical experience prioritized the role of jury-based determinations in criminal adjudication.⁴⁸ While not perfect by any means, the aspiration was that justice came with the judgment of the community, mindful of moral norms.⁴⁹ Juries are *not* a modern, liberal design.⁵⁰ But

42 See, e.g., Andrew Guthrie Ferguson, *Video Analytics and Fourth Amendment Vision*, 103 TEX. L. REV. 1253 (2025).

43 See, e.g., *Mapp v. Ohio*, 367 U.S. 643, 659 (1961) (“The criminal goes free, if he must, but it is the law that sets him free.”). Later, the majority juxtaposes rights and the search for factual guilt. See *id.* at 660.

44 Akhil Reed Amar, *The Future of Constitutional Criminal Procedure*, 33 AM. CRIM. L. REV. 1123, 1134 (1996).

45 See, e.g., *United States v. Leon*, 468 U.S. 897, 907–08 (1984).

46 See, e.g., *Herring v. United States*, 555 U.S. 135, 141 (2009).

47 See MICHAEL J. Z. MANNHEIMER, *THE FOURTH AMENDMENT: ORIGINAL UNDERSTANDINGS AND MODERN POLICING* 24–45 (2023).

48 See *infra* Section IV.C.

49 See JAMES Q. WHITMAN, *THE ORIGINS OF REASONABLE DOUBT: THEOLOGICAL ROOTS OF THE CRIMINAL TRIAL* (2008); LAURA I. APPLEMAN, *DEFENDING THE JURY: CRIME, COMMUNITY, AND THE CONSTITUTION* 13–17 (2015).

50 See WHITMAN, *supra* note 49; APPLEMAN, *supra* note 49, at 13–17.

that did not last for long, and the contractarian, liberal presuppositions took hold. Through a confluence of factors, examined historically by scholars like John Langbein and Albert Alschuler, and, more recently, Judge Bibas and Carissa Hessick, plea bargaining now dominates how criminal cases are resolved.⁵¹ While the results might be positive in some individual cases, the wider trend is illustrative of the consent, agreement, contractarian ethic associated with the liberal paradigm. Adjudication is legitimate because it was *agreed upon*, not because it represents the truth of what happened.⁵² As Thea Johnson has studied, the separation of actual and legal guilt is now completely normalized.⁵³ Adjudication is artificial rather than making the community decipher the reality of what happened. And it is no surprise that constitutional doctrine about the legitimacy of pleas reflects the epistemological priors of the liberal mind: an ideological obsession with voluntariness,⁵⁴ but a practical arrangement characterized by power and efficiency dynamics that leaves everyone at the table (assuming an invitation⁵⁵) feeling alienated.⁵⁶

The fourth illustration comes with examining the contemporary approach to punishment and ultimately sentencing policy: the obsession with instrumentalization and managing risk. Even the “desert” theorists are primarily concerned with utility and ground judgments either philosophically, with reference to “unfair advantage,”⁵⁷ or empirically, by citing democratic sensibilities considered authoritative by virtue of majoritarian attitudes.⁵⁸ This represents a judgment about human nature, primordial rights to self-preservation at all costs, and the nature of law more broadly. Punishment has become about managing risk in the name of the aggregate self-interest, whether in its vengeful

51 See John H. Langbein, *Understanding the Short History of Plea Bargaining*, 13 LAW & SOC'Y REV. 261 (1979); Albert W. Alschuler, *Plea Bargaining and Its History*, 79 COLUM. L. REV. 1 (1979); Stephanos Bibas, *Bringing Moral Values into a Flawed Plea-Bargaining System*, 88 CORN. L. REV. 1425 (2003); CARISSA BYRNE HESSICK, PUNISHMENT WITHOUT TRIAL: WHY PLEA BARGAINING IS A BAD DEAL (2021).

52 See, e.g., *Brady v. United States*, 397 U.S. 742, 748 (1970); *McCarthy v. United States*, 394 U.S. 459, 466 (1969).

53 See Thea Johnson, *Fictional Pleas*, 94 IND. L.J. 855 (2019).

54 See, e.g., *Brady*, 397 U.S. at 748; *McCarthy*, 394 U.S. at 466.

55 See McConkie, *supra* note 17, at 1051–61.

56 See Thea Johnson, *Public Perceptions of Plea Bargaining*, 46 AM. J. CRIM. L. 133, 152 (2019). Of course, one might respond that the dominance of plea bargaining is the result of lots of crime and not enough resources. That might be true, but how the system *chooses* (or fails) to allocate resources, or whether it is fine with not having enough to engage in community adjudication as originally intended, is emblematic of the broader argument.

57 Herbert Morris, *Persons and Punishment*, 52 MONIST 475, 478 (1968).

58 See Paul H. Robinson, *Empirical Desert*, in CRIMINAL LAW CONVERSATIONS 29, 29–31 (Paul H. Robinson, Stephen P. Garvey & Kimberly Kessler Ferzan eds., 2009).

and dehumanizing incapacitative forms,⁵⁹ or its supposedly benign rehabilitative possibilities.⁶⁰ Human beings—in all their complexity—have been lost in this indeterminate “machinery”⁶¹ and “process,”⁶² reducible to pawns to be managed rather than souls to be reintegrated.⁶³ Displacement of what it means to be a human being in society underlies this near-total transition in policy to instrumentalist and actuarial sentencing where obsessions with data have replaced modern qualms about the connection between fact and moral value.⁶⁴ It is not surprising that the temptation to control has led to the expansion of carceral outcomes.

These illustrations are this Article’s first contribution. They jibe with the core claim of the critics of liberalism: How the modern liberal paradigm approaches the most fundamental questions relating to jurisprudence helps explain some of the ills that have come to plague the American criminal system.⁶⁵ That horizon is bigger than disputes about race, economics and class, political parties and power, psychology, constitutional criminal procedure, or any other aspect of social and legal existence that might contribute to injustice. Instead, any search for the root causes of present-day problems must consider that perhaps they are illustrative of something deeper that relates to *ideas* about first principles relating to human nature, freedom, law, authority, and other topics. In this vein, these critiques add an explanatory horizon for present-day criminal justice ills.

Perhaps these injustices were altogether somewhat predictable given the ideologically liberal milieu in which the American criminal system exists. A system that marinates in a particular paradigm will come to seem more like that paradigm in the same way the human body’s health is affected by what it consumes and what it does. Ideas have consequences and we ignore them at our own peril. But, more narrowly, of course those ideas are not the *only* causes given the

59 See GARLAND, *supra* note 9, at 12.

60 But see C.S. LEWIS, *The Humanitarian Theory of Punishment*, in GOD IN THE DOCK: ESSAYS ON THEOLOGY AND ETHICS 287 (Walter Hooper ed., 1970).

61 BIBAS, *supra* note 11, *Introduction*, at xvi.

62 MALCOLM M. FEELEY, THE PROCESS IS THE PUNISHMENT: HANDLING CASES IN A LOWER CRIMINAL COURT 201 (1979); see *id.* at 199–201.

63 See BIBAS, *supra* note 11, at 9–13; Brian M. Murray, *Restorative Retributivism*, 75 U. MIA. L. REV. 855, 899–909 (2021); Ekow N. Yankah, *The Right to Reintegration*, 23 NEW CRIM. L. REV. 74, 75–81 (2020).

64 See LEWIS, *supra* note 60, at 289–90.

65 Some refer to this body of scholarship as “post-liberal.” See, e.g., Nathaniel Peters, *The Political Potential of Postliberalism*, PUB. DISCOURSE (Dec. 3, 2024), <https://www.thepublicdiscourse.com/2024/12/96569/> [<https://perma.cc/34ZZ-TM8Y>].

dialectical nature of law's creation.⁶⁶ Like all illustrations, they are depictions of a complicated story that simultaneously conveys some reality without doing so entirely. Thus, the claims are not designed to be treated as *exhaustively* causative.

But that contribution also suggests the following question: Did Founding designs relating to criminal justice foreordain these results? Some have advanced the claim that the American legal system, at its core, is fundamentally liberal in the modern sense, both in its inheritance and construction at the time of the Founding.⁶⁷ Whether that holds or the American political and legal experiment is, on the contrary, enmeshed with classical and medieval ideas is an interesting question that many have spent time examining.⁶⁸ Resolving that inquiry is beyond the scope of this Article. Instead, the claim here is that while many of the major ideas associated with the liberal paradigm can be seen in the *developments* that have occurred in the American criminal justice system, there is much evidence to counter the notion that they were definitively *intended*. While paradigmatic liberal ideas broaden the explanatory horizon, they also renew focus on Founding-era thinking that seems to directly contradict the trendlines.⁶⁹

The Article proceeds as follows.⁷⁰ Part I canvasses contemporary criticism of the American criminal justice system. While not exhaustive,

66 See BERMAN, *supra* note 23, at 529 (referencing the dialectical method that Scholastic philosophy brought to Western legal history).

67 See, e.g., DENEEN, *supra* note 20; MICHAEL P. ZUCKERT, *THE NATURAL RIGHTS REPUBLIC: STUDIES IN THE FOUNDATION OF THE AMERICAN POLITICAL TRADITION* (1996); SCHINDLER, *supra* note 26; REILLY, *supra* note 26, at 5 (referencing the work of Michael Hanby, Deneen, and Rod Dreher and their belief in the "poison-pill thesis").

68 See, e.g., REILLY, *supra* note 26; BAILYN, *supra* note 32; HALL, *supra* note 34, at 186–87 (noting scholarly discussions about whether the Founding was fundamentally Lockean or not); LOUIS HARTZ, *THE LIBERAL TRADITION IN AMERICA: AN INTERPRETATION OF AMERICAN POLITICAL THOUGHT SINCE THE REVOLUTION* (1955); GORDON S. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC 1776–1787* (1998 ed. 1969); ZUCKERT, *supra* note 67; STEVEN M. DWORETZ, *THE UNVARNISHED DOCTRINE: LOCKE, LIBERALISM, AND THE AMERICAN REVOLUTION* (1994); JEROME HUYLER, *LOCKE IN AMERICA: THE MORAL PHILOSOPHY OF THE FOUNDING ERA* (1995); JOHN COURTNEY MURRAY, *WE HOLD THESE TRUTHS: CATHOLIC REFLECTIONS ON THE AMERICAN PROPOSITION* (Rowman & Littlefield Publishers, Inc. 2005).

69 For example, and as discussed below, the original American understanding of sovereignty does not appear to be completely positivist. Justice Wilson, for instance, conceded total *political* sovereignty to the government, but not *absolute* sovereignty. HALL, *supra* note 34, at 101. Yet doctrine relating to defining punishment has trended in total deference to the whims of Congress. See *infra* Section III.A. Similarly, the logic behind juries and philosophies of punishment predate liberalism by centuries. See WHITMAN, *supra* note 49, at 126–29. The Founders' belief in the significance of juries suggests strong support for republican institutions.

70 Before outlining the structure of the argument, it is important to clarify what this Article does not aim to do. It does not attempt to make a wholesale critique of the modern, liberal premises that manifest in the above points in the American criminal system. Not only

its primary objective is to communicate the many angles by which the system overall has been critiqued and to show why zooming out to an even larger explanatory horizon might be helpful. Part II highlights core ideas associated with the modern liberal paradigm that emerged as *the* dominant ideological political and legal force before and after the Founding. Of course, the roots of these ideas are complex, and they were not created out of thin air.⁷¹ Part II also describes the position of the fiercest and most recent critics of liberalism and their views on the effects on the American experiment. The goal is to highlight the major premises and conclusions associated with modern liberal thought by critics before turning to present-day developments in criminal law, procedure, and punishment that resemble them.

Part III canvasses developments that have occurred in the American justice system. It highlights four major pinch points to illustrate the manifestation of paradigmatic liberal ideas worked out to their excess: the work of legislatures and courts on definitional issues relating to crime and punishment, constitutional criminal procedure relating to investigation and adjudication, the practice of plea bargaining, and the formation of sentencing policy. Developments within these four pillars illustrate the paradigmatic ideas, lending credence to the broader liberal critique in the field of American criminal justice. At their core, they all have evolved to reflect ideas endemic to the liberal paradigm. Belief in *complete* democratic sovereignty has resulted in extreme deference to legislative will in the definition of crime and punishment, licensing legal actors to expand substantive criminal law and the punitive state. In constitutional criminal procedure, major doctrines communicate that truth and liberty are at cross-purposes. The practice of plea bargaining conveys that adjudicatory legitimacy rests on the *will* of the parties—regardless of how far removed from reality—rather than the truth of the matter. And the sentencing world communicates the instrumentalization and objectification of persons through its obsession with quantifying and managing risk at all costs.

Part IV then responds to the suggested question by juxtaposing these developments with a countervailing force present at the

would that require much more work, but it is also not germane to the argument made here. They are the fruits of centuries of political and legal thought that predates the Enlightenment. See SIEDENTOP, *supra* note 22, at 75–78 (noting the “moral” revolution that plants the seeds for development of liberalism, *id.* at 77); TIERNEY, *supra* note 24, at 77 (discussing the medieval origins of the idea of natural rights).

71 For instance, the emphasis on the individual in liberal political thought was largely the result of medieval Christian philosophical and theological writings relating to human dignity that challenged older conceptions of societal organization. See *infra* Section II.A (discussing SIEDENTOP, *supra* note 22, and BERMAN, *supra* note 23); see also TIERNEY, *supra* note 24, at 43–77 (discussing historical origins of the idea of natural rights in canon law and medieval sources).

Founding that has since lost strength.⁷² Related to lawmaking, legislatures were not thought to possess total sovereignty or the capacity to redefine the nature of crime or punishment. Early American attitudes clearly limited criminal wrongdoing to moral culpability, and there is strong evidence that punishment had a definition beyond the powers of the legislature and some courts were willing to say so.⁷³ As to constitutional criminal procedure, original understandings of searches and seizures rooted security in things rather than ideas or sentiments, leaving *less* room for police action given entrenched customs and state and local law, which drew from a wellspring of sources deeper than liberal ones.⁷⁴ Further, the exclusionary rule was not the primary way to ameliorate constitutional harms; instead, courts were tasked with determining responsibility under existing state law, meaning there was a forum for litigating accountability for the constitutional violation rather than the prospective balancing framework that exists today, which prioritizes the *idea* of deterrence over actual accountability.⁷⁵ As for adjudication, juries were tasked with being the primary decisionmaker, suggesting *community* judgment in accord with moral and legal norms was the seminal value rather than contract-based justice.⁷⁶ Finally, Founding attitudes towards sentencing were not exclusively instrumentalist given assumptions about the nature of crime and punishment.⁷⁷

All four illustrations indicate how ideas *within* the modern liberal paradigm have displaced initial approaches that served as countervailing forces in the law. Whether that development is, on balance, a feature, or a bug, is a fundamental question. To ignore that question, however, might be paradigmatic itself⁷⁸ and perpetuates present-day discontent. As Heinrich Rommen said, “The hunger and thirst after justice are no less pressing than the ceaseless quest for truth.”⁷⁹ Recognizing that first principles matter, and their relationship to Founding thought, might help set reformers free to truly pursue justice moving forward.

72 Some might consider Part IV to conflict with my earlier caveat that the Article does not take a position on whether the American Founding was inherently liberal or not. There is no conflict. The argument is that the areas explored here have *developed* to resemble modern liberal ideas more and more, not that those areas were destined to develop that way.

73 See Brian M. Murray, *Original Understanding, Punishment, and Collateral Consequences*, 26 U. PA. J. CONST. L. 929, 967–77 (2024).

74 Cf. MANNHEIMER, *supra* note 47, at 45.

75 See Herring v. United States, 555 U.S. 135, 141 (2009).

76 See *infra* Section IV.C.

77 See PESTRITTO, *supra* note 34, at 142.

78 See SCHINDLER, *supra* note 26, at 38–40.

79 ROMMEN, *supra* note 29, at 134.

I. PRESENT-DAY CRITIQUES

Criticism of the American criminal justice experience is not new. The reality of mass incarceration means nearly a third of adults living in the United States have some form of criminal record.⁸⁰ Most people know someone who has been arrested, prosecuted, or punished for a crime. Certain communities, whether sorted by race or by class, have witnessed this more frequently than others, highlighting the disproportionate effects of policing and prosecutorial discretion.⁸¹ As the late Bill Stuntz articulated in *The Collapse of American Criminal Justice*, something seems to have gone terribly wrong.⁸²

Many commentators have lamented the results at various stages. Given the complexity associated with numerous jurisdictions in the United States, these criticisms run the gamut, whether taking a historical-legal, economic, psychological, critical-legal, sociological, or philosophical approach. Unsurprisingly, the original stain of slavery figures prominently in many criticisms.⁸³

Stuntz's work exemplifies a historical-legal approach to criticizing American criminal justice history. Stuntz sought to answer two questions: why the American criminal justice system began to unravel in the second half of the twentieth century and how it might be repaired.⁸⁴ For Stuntz, there were three answers to the first question. First, official discretion, held by police and prosecutors, replaced the rule of law, contributing to a culture of arbitrary enforcement at times.⁸⁵ Second, racial discrimination persisted and even got worse.⁸⁶ Some was de jure, and some was not, with official discretion providing cover.⁸⁷ Third, attitudes towards punishment swung violently from generally lenient to exceptionally punitive, resulting in incarceration rates that "quintupled."⁸⁸ The root causes of these trend lines are, according to Stuntz, a mix of legal and socio-democratic events.⁸⁹ Law developed to defer

80 See *Criminal Records and Reentry Toolkit*, NAT'L CONF. OF STATE LEGISLATURES (Mar. 18, 2025), <https://www.ncsl.org/civil-and-criminal-justice/criminal-records-and-reentry-toolkit> [<https://perma.cc/3D64-RGEM>].

81 See, e.g., *Racial and Ethnic Disparities*, PRISON POL'Y INITIATIVE, https://www.prison-policy.org/research/racial_and_ethnic_disparities/ [<https://perma.cc/6ZAS-3D5M>] (last visited Nov. 17, 2025).

82 See, e.g., STUNTZ, *supra* note 9, at 1–2.

83 See, e.g., *id.* at 41–46; ALEXANDER, *supra* note 9, at 22–26.

84 See STUNTZ, *supra* note 9, at 1.

85 See *id.* at 2–4 (referring to selective enforcement that generates “disorderly legal order,” *id.* at 4).

86 See *id.* at 4–7.

87 See *id.* at 4–5.

88 *Id.* at 5 (referencing transition from 200,000 prison inmates during the Nixon administration to 1.5 million by the Obama administration).

89 See *id.* at 6.

more to administrative discretion and local communities became less powerful, undercutting the moderating forces that balance punishment.⁹⁰ Stuntz proposed renewed invigoration of the original concept of equal protection promised by the Fourteenth Amendment and more “local democracy” as potential cures for these developments.⁹¹

Other historical-legal criticisms are similar, highlighting three components of the system: discretionary policing permitted by constitutional criminal procedure doctrine, the growth of prosecutorial discretion, and the replacement of jury trials with plea bargaining. For example, policing practices are widely criticized, for various reasons. Scholars lament developments in constitutional criminal procedure that seem to amplify the power of the police to investigate without accountability.⁹² While the Supreme Court continues to mention the warrant requirement,⁹³ plenty of searches and seizures are now permissible with little to no individualized suspicion, provided they are considered reasonable after the fact.⁹⁴ *Terry v. Ohio*, while never using the phrase “reasonable suspicion,” has served as the foundation for justifying intrusions in all sorts of venues.⁹⁵ Surveillance via technological advancement is, in many ways, the norm, and is constitutionally permitted.⁹⁶ Critics also emphasize the militarization of police capabilities post-9/11⁹⁷ and how doctrine insulates officials from accountability.⁹⁸ Additionally, plenty have studied and written about discriminatory results in policing.⁹⁹

In the last two decades, another law enforcement actor has come under increased scrutiny: the prosecutor. Think tanks, nonprofit organizations, academics, judges, and politicians study prosecutorial incentives and decisionmaking to penetrate discretionary black boxes.

90 See *id.* at 6–7 (describing suburban governance of urban areas through the county governance system and legal institutional changes, like the loss of jury trials).

91 *Id.* at 309; see *id.* at 285–309.

92 See Harmon, *supra* note 17, at 776–81.

93 See, e.g., *Riley v. California*, 573 U.S. 373, 382 (2014).

94 See, e.g., *Maryland v. King*, 569 U.S. 435, 448 (2013).

95 *Terry v. Ohio*, 392 U.S. 1 (1968); see, e.g., *Florida v. Harris*, 568 U.S. 237, 245 (2013).

96 See generally Ferguson, *supra* note 42. See DAVID GRAY, *THE FOURTH AMENDMENT IN AN AGE OF SURVEILLANCE* 23–67, 68 (2017).

97 See Rashawn Ray, *How 9/11 Helped to Militarize American Law Enforcement*, BROOKINGS (Sep. 9, 2021), <https://www.brookings.edu/articles/how-9-11-helped-to-militarize-american-law-enforcement/> [https://perma.cc/GUD8-GG6J].

98 See JOANNA SCHWARTZ, *SHIELDED: HOW THE POLICE BECAME UNTOUCHABLE* (2023); Billy Binion, *Clarence Thomas, the Supreme Court’s Most Conservative Justice, Trashes Qualified Immunity Again*, REASON (July 2, 2021, at 14:30 ET), <https://reason.com/2021/07/02/clarence-thomas-qualified-immunity-conservative-supreme-court-free-speech-police-abuse/> [https://perma.cc/877D-VH35].

99 *Race and Policing*, NAT’L ASS’N OF CRIM. DEF. LAWS. (Nov. 29, 2022), <https://www.nacdl.org/Content/Race-and-Policing> [https://perma.cc/6453-VVFM].

Scholars have emphasized the political and ethical pressures faced by prosecutors,¹⁰⁰ office cultures and dynamics and their effect on outcomes,¹⁰¹ the decision to charge,¹⁰² disclosure practices,¹⁰³ immunity and accountability,¹⁰⁴ and the role that prosecutors play in plea bargaining outcomes.¹⁰⁵ Prosecutorial elections are now covered frequently by national media, contrasting “tough-on-crime” and “smart-on-crime” candidates, as if they are mutually exclusive.¹⁰⁶

Additionally, critiques include the examination of plea bargaining as the central means by which adjudication occurs. While plea bargaining has been around for centuries in the American system, its dominance emerged in the late-nineteenth century.¹⁰⁷ Judge Bibas, in *The Machinery of Criminal Justice*, describes how its prevalence gives the American system an industrial and dehumanizing feel.¹⁰⁸ More recently, Carissa Hessick has written about how it is bad for everyone involved.¹⁰⁹ Dan McConkie and others have discussed how the practice omits the most significant players who might be affected by such determinations.¹¹⁰ Laura Appleman has emphasized how constitutional structures that connected adjudication with the local community’s jury trial right were designed to avoid these developments.¹¹¹ And Stuntz showed how those structures did a fairly decent job at moderating excessive punitiveness.¹¹²

100 See, e.g., Stephanos Bibas, *The Need for Prosecutorial Discretion*, 19 TEMP. POL. & C.R. L. REV. 369, 373–75 (2010).

101 See, e.g., Bruce A. Green, *Prosecutors and Professional Regulation*, 25 GEO. J. LEGAL ETHICS 873, 902–03 (2012); David Alan Sklansky, *The Problems with Prosecutors*, 1 ANN. REV. CRIMINOLOGY 451, 458, 460–61 (2018); Rachel E. Barkow, *Prosecutorial Administration: Prosecutor Bias and the Department of Justice*, 99 VA. L. REV. 271, 311–17 (2013).

102 See, e.g., Marc L. Miller & Ronald F. Wright, *The Black Box*, 94 IOWA L. REV. 125 (2008).

103 See, e.g., Jennifer Mason McAward, *Understanding Brady Violations*, 78 VAND. L. REV. 875 (2025).

104 See, e.g., Brian M. Murray, Jon B. Gould & Paul Heaton, *Qualifying Prosecutorial Immunity Through Brady Claims*, 107 IOWA L. REV. 1107 (2022); see also, e.g., McAward, *supra* note 103.

105 See HESSICK, *supra* note 51, at 11–34 (discussing the prosecutorial role in the rise of plea bargaining).

106 E.g., Fletcher McClellan & Amanda Hafler, *Tough or Smart on Crime? The Paradox of Criminal Justice Reform*, PA. CAP-STAR (Oct. 8, 2020, at 06:30 ET), <https://penncapitalstar.com/commentary/tough-or-smart-on-crime-the-paradox-of-criminal-justice-reform-fletcher-mcclellan-and-amanda-hafler/> [<https://perma.cc/S3RM-N2PA>].

107 See, e.g., BIBAS, *supra* note 11, at 19–20.

108 See *id.* at 18–20.

109 See HESSICK, *supra* note 51, at 157–82 (noting costs of plea bargaining).

110 See, e.g., McConkie, *supra* note 17, at 1043–45.

111 See APPLEMAN, *supra* note 49, at 13–38.

112 See STUNTZ, *supra* note 9, at 251.

Aside from historical-legal criticism, economic approaches have been used to rationalize and criticize American criminal justice practices. For instance, James Q. Wilson is largely known as the seminal authority on the notion of “broken windows” policing, which prioritizes quick and severe reactions to low-level crime to prevent the development of a culture of crime.¹¹³ This followed Wilson’s earlier work, which argued for increased incapacitation rather than for centralizing deterrence as the primary purpose of punishment.¹¹⁴ The common thread is that disincentivizing crime through severe punishment is the key to maximizing safety. The disincentive and the actual incarceration prevent crime. These arguments can be seen in the harsh policies associated with the War on Drugs, which severely punished all types of drug crimes, whether for individual possession or larger drug trafficking operations.¹¹⁵

For every proponent of harsher policing and sentencing due to economic approaches to criminal justice policy, there are opponents who argue the costs are too steep. Economic analyses of the system are prevalent nowadays and often engaged in by the government itself. For example, the Obama administration’s Council of Economic Advisers released a report in 2016 titled *Economic Perspectives on Incarceration and the Criminal Justice System*.¹¹⁶ That report justified economic analyses by noting how they are a “useful lens for understanding the costs, benefits, and consequences of incarceration and other criminal justice policies.”¹¹⁷ These criticisms also transcend political affiliation. Organizations like the Heritage Foundation, Cato Institute, Center for American Progress (CAP), and Brennan Center for Justice all criticize the system on economic grounds.¹¹⁸ The Heritage Foundation has

113 George L. Kelling & James Q. Wilson, *Broken Windows: The Police and Neighborhood Safety*, ATL., March 1982, at 29, 34.

114 See JAMES Q. WILSON, *THINKING ABOUT CRIME* 133–49 (rev. ed. 2013).

115 See Aaron Morrison, *50-Year War on Drugs Imprisoned Millions of Black Americans*, PBS NEWS (July 26, 2021, at 12:55 ET), <https://www.pbs.org/newshour/nation/50-year-war-on-drugs-imprisoned-millions-of-black-americans> [<https://perma.cc/24H9-RNT4>].

116 COUNCIL OF ECON. ADVISORS, *ECONOMIC PERSPECTIVES ON INCARCERATION AND THE CRIMINAL JUSTICE SYSTEM* (2016); see also Press Release, The White House, Off. of the Press Sec’y, CEA Report: Economic Perspectives on Incarceration and the Criminal Justice System, (Apr. 23, 2016), <https://obamawhitehouse.archives.gov/the-press-office/2016/04/23/cea-report-economic-perspectives-incarceration-and-criminal-justice> [<https://perma.cc/27DJ-VYF9>].

117 COUNCIL OF ECON. ADVISORS, *supra* note 116, at 3.

118 See, e.g., Tim Lynch, *Economic Perspectives on the Criminal Justice System*, CATO INST. (Apr. 25, 2016, at 15:39 ET), <https://www.cato.org/blog/economic-perspectives-criminal-justice-system> [<https://perma.cc/6TRU-53LV>] (emphasizing the need for deregulation in the field of collateral consequences); Christian E. Weller, Akua Amaning & Rebecca Vallas, *America’s Broken Criminal Legal System Contributes to Wealth Inequality*, CTR. FOR AM. PROGRESS (Dec. 13, 2022), <https://www.americanprogress.org/article/americas-broken-criminal->

published articles lamenting prioritization of economic costs to underwrite expansion of the criminal code.¹¹⁹ The Cato Institute argues for deregulation—in the world of collateral consequences for instance—as a means to free formerly incarcerated people to contribute to society.¹²⁰ The CAP has highlighted “the effects of incarceration on savings and ownership in the United States.”¹²¹ The Brennan Center has emphasized wealth gaps created by excessive incarceration.¹²²

Scholars also have canvassed the psychological character and effects of the criminal justice system to demonstrate how it is out of whack. Alienation is a persistent theme running through this work. Tom Tyler’s work on procedural justice is instructive, demonstrating how perceptions about legitimacy of institutions associated with the criminal justice system affect the efficacy of criminal justice policy overall.¹²³ Judgments about the justice or injustice of governmental activities play a role in long-term compliance with the law.¹²⁴ Alienation may run deeper than attitudes about procedural justice, however. For instance, some who encounter the law maintain they are simultaneously controlled and estranged by it.¹²⁵ In turn, responding to this sense of alienation requires more than neutral procedures.¹²⁶

Critical legal scholars have emphasized this alienation for certain groups within society, especially given the American history of racial discrimination. Michelle Alexander’s *The New Jim Crow: Mass Incarceration in the Age of Colorblindness* makes this argument in full force.¹²⁷ It details how incapacitation-based sentencing policies relating to the

legal-system-contributes-to-wealth-inequality/ [https://perma.cc/7K3T-T9MZ]; Ames Grawert & Terry-Ann Craigie, *Mass Incarceration Has Been a Driving Force of Economic Inequality*, BRENNAN CTR. FOR JUST. (Nov. 4, 2020), <https://www.brennancenter.org/our-work/analysis-opinion/mass-incarceration-has-been-driving-force-economic-inequality> [https://perma.cc/7LV8-38DA]; John-Michael Seibler, *Here’s What Opponents of Criminal Justice Reform Get Wrong*, THE HERITAGE FOUND. (Nov. 30, 2018), <https://www.heritage.org/crime-and-justice/commentary/heres-what-opponents-criminal-justice-reform-get-wrong> [https://perma.cc/SB2W-29FP].

119 See, e.g., Paul Rosenzweig, *The Over-Criminalization of Social and Economic Conduct*, THE HERITAGE FOUND. (Apr. 17, 2003), <https://www.heritage.org/crime-and-justice/report/the-over-criminalization-social-and-economic-conduct> [https://perma.cc/QEV8-82Z4].

120 See, e.g., Lynch, *supra* note 118 (emphasizing the need for deregulation in the field of collateral consequences).

121 Weller, Amaning & Vallas, *supra* note 118 (footnote omitted).

122 See, e.g., Grawert & Craigie, *supra* note 118.

123 See LEGITIMACY AND CRIMINAL JUSTICE: INTERNATIONAL PERSPECTIVES (Tom R. Tyler ed., 2007).

124 See TOM R. TYLER, *WHY PEOPLE OBEY THE LAW* 3–4 (2006).

125 See Bell, *supra* note 10, at 2057.

126 See *id.* at 2126–48 (providing strategies for “dismantling estrangement,” *id.* at 2131).

127 See ALEXANDER, *supra* note 9.

War on Drugs target racial groups to create a permanent underclass.¹²⁸ While seemingly colorblind on their face, Alexander argues these sentencing policies and practices are anything but, resulting in systemically racist outcomes.¹²⁹ Similarly, but with a different focus on procedure, Stuntz illustrated how enlarging law enforcement discretion and innovations in constitutional criminal procedure contributed to the conditions that allowed racist law enforcement practices to persist.¹³⁰ Other scholars have highlighted the de jure roots of modern-day approaches to enforcing the law against certain groups. For example, Black Codes crippled Reconstruction-era efforts to implement the equality promises embedded in the Thirteenth Amendment.¹³¹ In short, racially discriminatory attitudes have warped criminal justice.

Other critiques of American criminal justice are sociological in nature. David Garland chronicled shifting attitudes toward crime, policing, and sentencing based on two primary causes: changes in social organization and neoconservative politics.¹³² More recently, Alice Ristroph explored the socio-intellectual roots of mass incarceration, asking, “[W]hat were we thinking” when expanding the carceral apparatuses that define the present moment?¹³³ She argues that the “crisis” bemoaned by many might be more normative than reformers would like to concede, both in an intellectual and legal historical sense.¹³⁴ Ristroph writes:

[O]ther key phenomena associated with a contemporary crisis have in fact been attributes of American criminal law since the early days of the republic. Substantive criminal prohibitions have always sprawled broadly, reaching many forms of trivial misconduct. The actual fate of any defendant has always depended upon the vagaries of enforcement, the discretion of individual officials, and the social and class position of the particular defendant. . . . [R]acialized enforcement is not a recent development; enforcement practices have shown patterns of racial bias at least since the end of the Civil War.¹³⁵

128 See *id.* at 224–25.

129 See *id.* at 128–36 (discussing sentencing policies and police discretion).

130 See STUNTZ, *supra* note 9, at 216–43.

131 See RANDY E. BARNETT & EVAN D. BERNICK, *THE ORIGINAL MEANING OF THE FOURTEENTH AMENDMENT: ITS LETTER AND SPIRIT* 117–19 (2021) (discussing the effect of Black Codes).

132 See GARLAND, *supra* note 9, at 138.

133 Ristroph, *supra* note 8, at 1950.

134 *Id.* at 1950; see *id.* at 1950–56.

135 *Id.* at 1952 (footnote omitted).

She notes how mass incarceration is the logical outgrowth of an exceptionalist attitude, held by contemporary legal actors, about the distinctive features of criminal law.¹³⁶

Each of the above-mentioned critiques proceeds from certain methodological presuppositions. Further, some are interdisciplinary, melding observations from various fields to buttress their arguments. Many, if not all, provide insights into the complexity accompanying the ills pervading American criminal justice today. They also share a common feature: As critiques, they emerged *within* the modern, liberal paradigm in which we find ourselves. That commonality begs an important question: Does the paradigm itself, in addition to its ability to germinate such critiques, offer *any* additional explanation for contemporary conditions and discontent?¹³⁷

The next Part lays the groundwork for answering that question by exploring the realm of paradigmatic ideas associated with modern liberalism. It also describes the core critique of the most recent critics, like Deneen, and the pool of ideas associated with liberal thought that legal actors and institutions have swum in since the Founding.

II. THE MODERN LIBERAL PARADIGM AND RECENT CRITICS

The Western legal tradition is now fundamentally liberal, although it was not always that way.¹³⁸ The literature on liberalism as a political, social, and legal phenomenon is vast given that it is the dominant political theory in the West.¹³⁹ Moreover, the paradigm, like any intellectual tradition, is not monolithic, contains diverse views that

136 See *id.* at 1955 (“The very belief that criminal law is exceptional—uniquely necessary, uniquely determinate, and uniquely circumscribed in its content—may have fueled the expansion of a system that is in fact none of those things.”).

137 It is important to understand the nature of the claim being advanced here. I am not supposing that the modern liberal paradigm is “the” cause of modern-day criminal justice conditions. Such a decisive causative claim would be nearly impossible to make. Instead, the task here is exploration of whether the major premises of modern liberal thinking *manifest* in present-day conditions and practices that themselves are the subject of critique. Part III suggests that the modern liberal paradigm *permits* these developments but does not *require* them. Part IV notes how Founding thought and approaches to certain criminal justice issues, which occurred within the larger liberal tradition, can be distinguished from present-day developments and conditions.

138 See BERMAN, *supra* note 23, at 49–84 (discussing tribal and other legal systems before the rise of the liberal tradition).

139 See, e.g., *id.* at 7–10, 273–92 (describing major ideas in the Western legal tradition and rise of secular law in the late Middle Ages); SIEDENTOP, *supra* note 22, at 225–77 (noting new forms of government in modern liberal world); FUKUYAMA, *supra* note 22, at 1–18 (describing classical liberalism); DENEEN, *supra* note 20, at 1–20 (noting how liberalism as the dominant political theory is fading).

might conflict, and is dynamic.¹⁴⁰ Attempting to catalogue all the attributes of the liberal paradigm that have informed developments in law is beyond the focus of this Article, which instead explores how *modern* liberal ideas offer an explanatory horizon for the present criminal justice moment. Hence, this Part takes a “bundle of concepts” approach to defining the paradigm, aiming to highlight the development of core liberal premises, modern shifts in understanding, and contemporary criticism of the effects of those shifts.

A. *Historical Roots*

Siedentop argues that the roots of liberalism were planted in ancient and medieval times after the Christian idea of individual moral equality replaced a prior ethic recognizing the family or tribe as the linchpin of social organization.¹⁴¹ The ancient polis was understood as a conglomeration of families that functioned as religious units, making “[r]eligion, family and territory . . . inseparable,” which also explains why “exile was the most severe punishment.”¹⁴² Simultaneously, Greek and Roman political thought emphasized a natural order, which then permitted natural inequality to operate as the baseline social organizing principle.¹⁴³ Tom Holland has described how those hierarchical principles permitted relationships based on domination and

140 Shane D. Courtland, Gerald Gaus & David Schmidtz, *Liberalism*, STAN. ENCYCLOPEDIA OF PHIL. (Feb. 25, 2026), <https://plato.stanford.edu/entries/liberalism/> [<https://perma.cc/R4G4-B2WZ>] (“Liberalism is more than one thing. On any close examination, it seems to fracture into a range of related yet sometimes competing visions.”). For example, Hobbes and Locke are figures whose thought is emblematic of liberal premises. *Id.* While Hobbes’s writings predate most liberal writings, their influence is significant. See Jeremy Waldron, *Hobbes and the Principle of Publicity*, 82 PAC. PHIL. Q. 447 (2001). Hobbes and Locke differ greatly on certain questions, such as the nature of the state of nature (hostile versus cooperative) or the purpose of government (security versus protection of natural rights). See Courtland, Gaus & Schmidtz, *supra*. Hobbes’s theory ends up with the Leviathan, who has absolute power to maintain peace, whereas Locke’s theory suggests limited government simply to protect equal stations of liberty. See *id.*; see also REILLY, *supra* note 26, at 225–47 (distinguishing Lockean theory from Hobbesian approaches).

141 See SIEDENTOP, *supra* note 22, at 12–13 (noting how the family, rather than the individual, was the primary societal and religious unit in antiquity); see also *id.* at 21 (“The ancient city was not an association of individuals.”); *id.* at 243–44.

142 *Id.* at 25. Siedentop notes how “Aristotle . . . famously argued that the life of the citizen was the only life worth living.” *Id.*

143 See *id.* at 40–47; see also *id.* at 115 (“Christian beliefs did reshape practices in one crucial area from an early date. They destroyed the ancient family. That is, they destroyed the family as a cult or religious association.”); *id.* at 116 (“The early church insisted on the equal obligations imposed by the bond of marriage. . . . [W]omen were no longer confined by the statuses of the ancient family.”).

subordination, relating to immutable characteristics like race, sex, and other attributes.¹⁴⁴

In contrast, Christian thinkers—over centuries—emphasized the sacred relationship between the individual and the divine, a relationship all human beings share by virtue of the *imago Dei* and the Incarnation.¹⁴⁵ Siedentop puts it this way:

Followers of Jesus began to claim that his sacrificial life and death amounted to a dramatic intervention in history, a new revelation of God's will. Understanding that revelation would, in due course, provide crucial underpinning for what we understand as the nature and claims of the individual. It provided the individual with a foothold in reality.¹⁴⁶

This new understanding was divinely mandated, juxtaposing ancient rationalism and the notion of a divine will.¹⁴⁷ Individual moral equality was divinely ordained, leading to—in Saint Paul's language—the opportunity for a “new creation.”¹⁴⁸ This challenged notions of natural inequality, initiating a moral revolution that required unpacking God-given human identity.¹⁴⁹ As Siedentop puts it, “Suddenly there [was] a need to find a standard to govern *individual* action,” creating countless questions for political, legal, and social affairs.¹⁵⁰

Many of these questions were worked out in subsequent centuries amidst historical events and societal evolutions. Several developments essentially made the individual will the primary locus of analysis, planting seeds for the concept of equal natural rights that underwrites modern liberal thinking. For instance, Christian martyrdom amounted to a new definition of heroism that placed the individual in *opposition* to society rather than in total subservience to it.¹⁵¹ The construction of basilicas where *all* were welcome to “assemble[] . . . as ‘souls’” to receive the sacraments undermined inherited social statuses.¹⁵²

Similarly, the formation of monastic communities far away from urban centers implicitly permitted recognition of new forms of

144 See TOM HOLLAND, *DOMINION: HOW THE CHRISTIAN REVOLUTION REMADE THE WORLD* 92 (2019).

145 See SIEDENTOP, *supra* note 22, at 246–47 (“The idea of the incarnation is the root of Christian egalitarianism.” *Id.* at 247.).

146 *Id.* at 58.

147 See *id.* at 55 (“The concept of the will began to provide a new foundation for philosophical reflection by the first century AD. A gap opened up between the rationalism of earlier thought and this new voluntarism.”).

148 *Id.* at 58 (quoting 2 Corinthians 5:17).

149 See *id.* at 60–61 (“Paul overturns the assumption of natural inequality by creating an inner link between the divine will and human agency.” *Id.* at 61.).

150 *Id.* at 61–62 (emphasis added).

151 See *id.* at 80.

152 *Id.* at 120; see *id.* at 120–21.

community based on voluntary consent rather than inheritance or organic development.¹⁵³ Monks—equally concerned with their individual salvation—*chose* to come together, making the “dominant moral fact” of their associations voluntariness, or a “sociability founded on the role of individual conscience.”¹⁵⁴ Further, those communities chose to internally govern themselves through elections.¹⁵⁵ Similar female communities “marked the emergence of women from the ancient family, from the permanent subordinations of the domestic sphere.”¹⁵⁶ These were early examples of a “new foundation for social order.”¹⁵⁷

A significant historical development was the Church’s development of its own internal processes—built from the roots mentioned above and in reaction to perceived secular overreach—to generate legal structures that were later mirrored by secular states.¹⁵⁸ The Church claimed its own authoritative realm which, by necessity, planted the seeds for development of the secular state and natural rights several centuries later.¹⁵⁹ As Siedentop puts it:

[T]he church came to feel an imperious need to protect and regulate itself, to define itself as a separate body, provided with its own laws and means of discipline. . . .

. . . It must develop its own legal system, a system that would make it possible to wrench control over its affairs from secular hands. The church needed its own legislation, its own system of courts, its own forms of discipline. . . .

The question of law thus became central. If the church was to develop a system of law, it would have to define the proper

153 See *id.* at 86 (“The movement of monks into the wilderness involved a rejection of traditional forms of community . . .”).

154 *Id.* at 88, 95.

155 See *id.* at 97–99 (noting the “democratizing of the idea of authority” in Benedict’s Rule, *id.* at 97).

156 *Id.* at 95.

157 *Id.* at 99.

158 See BERMAN, *supra* note 23, at 273–94 (discussing the evolution of secular systems).

159 See SIEDENTOP, *supra* note 22, at 134 (“Distinguishing spiritual from temporal power rests on the premise of the individual conscience.”); *id.* at 197 (“In the long run, it contributed to the emergence of constitutionalism in Europe.”); *id.* at 359 (noting how liberal developments in the sixteenth through nineteenth centuries mirrored those in canon law from the twelfth through fifteenth centuries); HEINRICH A. ROMMEN, *THE STATE IN CATHOLIC THOUGHT: A TREATISE IN POLITICAL PHILOSOPHY* 483–503 (4th prtg. 1955) (discussing the assertion of institutional liberty by the Church). Contemporary scholars, such as Garnett, have discussed these ideas at length. See, e.g., Richard W. Garnett, *The Freedom of the Church*, 4 J. CATH. SOC. THOUGHT 59 (2007).

relationship between the church and lay rulers, between the sacred and the secular.¹⁶⁰

Berman showed how the Papal Revolution grounded liberty of conscience, required theological and philosophical attention to the notion of a higher law, its content, and relationship to positive law, contributed to the creation of internal structures that resemble the contemporary bureaucracies and the notion of the separation of powers, and required attention to regulating individual behavior rather than groups.¹⁶¹ Dual sovereignties—governing spiritual and secular—emerged.¹⁶² One byproduct was the development of strict procedures and burdens of proof in criminal matters, with particular attention to intentionality as the distinguishing feature of crime.¹⁶³

Perhaps most significantly, the Church, in its own justifications for authority relating to sovereignty, and in developing its own body of law, emphasized voluntary associations and self-government.¹⁶⁴ It impliedly communicated that “[n]o subject of a sovereign has an intrinsic obligation to obey any other person as such.”¹⁶⁵ Interestingly, the early modern states latched on to absolute sovereignty to justify absolute power, which then was reacted to by modern liberal philosophers like John Locke, who searched for legitimate justifications for authority and settled on the idea of the social contract built from notions of

160 SIEDENTOP, *supra* note 22, at 198.

161 See BERMAN, *supra* note 23, at 199–253 (discussing the developing body of Church law that governed various human affairs); SIEDENTOP, *supra* note 22, at 133 (discussing “[t]he idea of an overarching moral framework for legislation”). Siedentop also describes how the Church—given its concern about individual moral behavior—essentially developed the concept of intentionality that underlies the notion of criminal mens rea. See SIEDENTOP, *supra* note 22, at 147. In Siedentop’s words, only at this time could “Rome . . . offer a central agency for general reform.” *Id.* at 195; see also DENEEN, *supra* note 20, at 22–23 (“Many of the institutional forms of government that we today associate with liberalism were at least initially conceived and developed over long centuries preceding the modern age, including constitutionalism, separation of powers, separate spheres of church and state, rights and protections against arbitrary rule, federalism, rule of law, and limited government.”).

162 See REILLY, *supra* note 26, at 67–69 (discussing the “[m]edieval [r]oots of [c]onstitutionalism,” *id.* at 66).

163 See BERMAN, *supra* note 23, at 181–95 (discussing early criminal law in Western legal systems); SIEDENTOP, *supra* note 22, at 230 (“[B]asic forms of legal procedure . . . were invented by canon lawyers . . . before being adopted by secular courts in the late thirteenth century.”).

164 See SIEDENTOP, *supra* note 22, at 179–88 (“[I]t was as a model of human association that monasticism had its greatest success. For it consisted of self-governing societies founded, at least in principle, on consent, and working under a rule that recognized the moral equality of brothers.” *Id.* at 188.); see also *id.* at 234 (describing corporate law’s emphasis on voluntary association and self-government).

165 *Id.* at 238.

consent from earlier centuries.¹⁶⁶ As Siedentop writes, “The example of the church as a unified legal system founded on the equal subjection of individuals thus gave birth to the idea of the modern state.”¹⁶⁷

Those ideological developments coincided, in the early modern period, with political and religious strife that required a solution for peace. The liberal tradition’s emphasis on the individual’s relationship to the transcendent—prior to group organization—emerged into a principle for “limiting politics.”¹⁶⁸ Thus, one justification for liberalism is its pragmatic aims, enabling diverse communities to exist peacefully while honoring individual freedom.¹⁶⁹ The tradeoff, according to Francis Fukuyama, was the “lower[ing] [of] the aspirations of politics . . . as a way of ensuring . . . peace and security.”¹⁷⁰

These developments in the centuries before the modern era were concerned with the relationship between individuals sharing moral status and the role of authority and law.¹⁷¹ Natural rights springing from a natural law based on moral equality was the next philosophical development.¹⁷² Individual liberty and the notion of moral equality “opened the way for the eventual development of the notions of

166 See *id.* at 207 (“For although it was the popes who first claimed a ‘sovereign’ authority within their sphere, it was not long before secular rulers came to understand their authority in the same way.”); REILLY, *supra* note 26, at 107 (noting how the American Revolution involved “reestablishment” of medieval constitutionalism that had been usurped by claims of absolute political sovereignty (emphasis omitted)); *id.* at 213 (describing how Francisco Suárez and nearly 150 writers between the thirteenth and nineteenth centuries held “the principle that government is based upon the consent of the governed” (quoting Alfred O’Rahilly, *Some Theology About Tyranny*, 15 IRISH THEOLOGICAL Q. 301, 303 n.6 (1920))); JOHN LOCKE, TWO TREATISES OF GOVERNMENT 171 (Lee Ward ed., Hackett Publ’g Co. 2016) (1689).

167 SIEDENTOP, *supra* note 22, at 207.

168 REILLY, *supra* note 26, at 33; see *id.* at 33–36 (connecting ancient thought to medieval development of this principle). Reilly credits Christian philosophy with the genesis of modern liberalism because the relationship between the direct relationship between the individual and the divine required a “distinction between the sacred and the secular.” *Id.* at 52.

169 See FUKUYAMA, *supra* note 22, at 5.

170 *Id.* at 6.

171 See SIEDENTOP, *supra* note 22, at 332 (referencing the “roots of liberalism” as “belief in a fundamental equality of status as the proper basis for a legal system; belief that enforcing moral conduct is a contradiction in terms; a defence of individual liberty, through the assertion of fundamental or ‘natural’ rights; and, finally, the conclusion that only a representative form of government is appropriate for a society resting on the assumption of moral equality”).

172 See TIERNEY, *supra* note 24, at 54–77 (canvassing “rights” language in medieval sources, such as the Decretists, that predate modern liberal sources by centuries).

popular sovereignty and consent.”¹⁷³ As Siedentop writes, “That conversion laid the foundation of modern liberalism.”¹⁷⁴

B. *Modern Liberal Premises*

Siedentop’s work indicates how historical liberal ideas are not the same as *modern liberalism*, which is a political phenomenon that contains its own meaning of the term “liberal,” emphasizing atomistic individual freedom, the relationship between individuals and state power, increased secularization, and market-friendly utilitarianism.¹⁷⁵ The revolutionary principle of individual moral equality developed into “the claim for equal liberty.”¹⁷⁶ Working out the concept of “equal liberty” generates the modern liberal paradigm and its unique focus on justifications for authority, law, and obligation. Thus, it is worth zooming in on some of the major ideas associated with *modern liberalism* that grew from the tradition.¹⁷⁷

There are three paradigmatic ideas worth highlighting. First, modern liberal ideas have a different conception of human nature, the origin of society, and the human capacity for certain types of knowledge. Individual freedom¹⁷⁸ is the preeminent organizing

173 REILLY, *supra* note 26, at 46; *see also* TIERNEY, *supra* note 24, at 45 (noting the possibility that “natural rights had grown up before Aquinas” and “enter[ed] the mainstream of Western political thought through other channels”).

174 SIEDENTOP, *supra* note 22, at 244.

175 *Id.* at 338; *see id.* at 333, 337–38 (noting how liberal undercurrents “encouraged an ‘atomized’ picture of the world,” *id.* at 337, and developments of “liberal heresy,” *id.* at 338); *id.* at 363 (describing modern liberal developments that over-prioritize utilitarianism and individualism); FUKUYAMA, *supra* note 24, *Preface*, at ix (noting evolution of classical liberalism); *see also* TIERNEY, *supra* note 26, at 77 (“The first natural rights theories were not based on an apotheosis of simple greed or self-serving egotism; rather they derived from a view of individual human persons as free, endowed with reason, capable of moral discernment, and from a consideration of the ties of justice and charity that bound individuals to one another.”).

176 SIEDENTOP, *supra* note 22, at 244.

177 Throughout this Article I reference *modern liberalism* given that there is extensive debate about whether the pathologies associated with liberalism are, in fact, the results of classical liberalism, the liberal tradition, or a modern spin on one or both. *See, e.g.*, DENEEN, *supra* note 20, at 56 (“The argument still continues over whether this represents a fundamental break with, or fundamental fruition of, the liberal project.”); *see also, e.g.*, FUKUYAMA, *supra* note 22, at 19–29 (juxtaposing classical liberalism and modern liberalism to explain sources of discontent).

178 Of course, there are different understandings of the terms liberty and freedom, including within the liberal tradition. Some liberals conceive liberty in a negative fashion, such as Isaiah Berlin. *See* BERLIN, *supra* note 30, at 122. For these thinkers, liberty is about the absence of constraint. *See id.* For others, liberty is about self-autonomy and self-actualization. *See* Courtland, Gaus & Schmidtz, *supra* note 140, § 1.3 (discussing “positive liberty” within the liberal tradition); *see also* FUKUYAMA, *supra* note 24, at 31–65 (describing different expressions and emphases relating to individual autonomy that differ from classical

principle because there is a baseline belief in certain natural, pre-social rights.¹⁷⁹ Individual autonomy underwrites economic, property, and political rights.¹⁸⁰ At the same time, and perhaps paradoxically given the belief in intrinsic freedom, some modern liberal ideas permit skepticism about the human capacity to comprehend reality, especially moral constraints on freedom.¹⁸¹

Second, the paradigm assumes legal authority requires justification,¹⁸² and almost exclusively grounds the legitimacy of authority with expressions of individual consent. Authority, law, and all forms of association derive legitimacy through individual will.¹⁸³ This supports notions of absolute sovereignty and the growth of legal positivism, and affects how other types of law might hold human law accountable. Fukuyama describes how law primarily came to be seen as networks of rules to resolve conflicts about autonomy rather than having a higher purpose.¹⁸⁴

Third, the liberal conception of freedom and legal legitimacy generates an understanding of the common good characterized by aggregation of self-interest born from natural rights. Maximizing private goods thought to be connected to natural rights, through quantification, is the emphasis. Put in Rawlsian terms, the goal is ensuring “equal

liberalism). Another approach conceives freedom as the capacity to choose the good, including the development of virtue and serving others. See JOHN A. RYAN & FRANCIS J. BOLAND, *CATHOLIC PRINCIPLES OF POLITICS* 172–73 (The Macmillan Co., rev. ed. 1943) (1922).

179 See Maurice Cranston, *Liberalism*, in 4 *THE ENCYCLOPEDIA OF PHILOSOPHY* 458, 458–61 (Paul Edwards ed., 1967) (“[A] liberal is a man who believes in liberty.” *Id.* at 458.); SIEDENTOP, *supra* note 22, at 292 (noting that “the idea of natural rights” developed from the “egalitarian moral intuitions generated by the church”); DENEEN, *supra* note 20, at 23 (“Liberty was fundamentally reconceived, even if the word was retained.”).

180 See FUKUYAMA, *supra* note 22, at 2; TIERNEY, *supra* note 24, at 49 (“A common theme, in modern discourse on rights is the relationship between rights and free choice. . . . The right holder has autonomy or ‘sovereignty’ in the relevant sphere.”).

181 Nominalist ideas like those from Ockham later show up in Locke’s epistemology. Siedentop discusses how liberalism’s emphasis on natural rights that are pre-social opened the space for nominalist epistemology by severing the idea of the individual from inherited societal statuses. See SIEDENTOP, *supra* note 22, at 306–20. Fukuyama notes how “[i]ndividuals are assumed to be the best judges of their own interests.” FUKUYAMA, *supra* note 22, at 5.

182 See JOHN STUART MILL, *The Subjection of Women*, in 21 *COLLECTED WORKS OF JOHN STUART MILL* 259, 262 (John M. Robson ed., 1984) (noting how “the burthen of proof is supposed to be with those who are against liberty; who contend for any restriction or prohibition”).

183 See SIEDENTOP, *supra* note 22, at 293 (“The primary unit of subjection to authority was identified as the individual.”); DENEEN, *supra* note 20, at 25 (noting move to view norms and social structures as “sources of oppression, arbitrariness, and limitation”).

184 See FUKUYAMA, *supra* note 22, at 2.

basic liberties.”¹⁸⁵ This understanding fits neatly with economic prioritization of markets and an efficiency ethic.¹⁸⁶ In an age of increased confidence in the human ability to comprehend via scientific and technological methodologies, instrumentalizing law as a science is the desire. Justice Oliver Wendell Holmes, in the *Path of the Law*, expressed this sort of confidence in the ability to make rules that are responsive to the world as it is, rather than metaphysical reflection on how it ought to be.¹⁸⁷ Rommen considered this the partnership of liberal rationalism and legal positivism.¹⁸⁸

These paradigmatic ideas are explored in further detail below before showing how they manifest in contemporary approaches to criminal law, procedure, and punishment.

1. Human Nature: The Individual, Societal Origins, and the Capacity for Knowledge

The paradigm contains certain presuppositions about human nature and how human beings acquire knowledge about the world. It emphasizes the individual as the basic organizing unit of society.¹⁸⁹ This focus has complex roots but likely stems from developing ideas relating to human dignity in medieval Scholastic theology and philosophy.¹⁹⁰ This Section highlights two dominant modern ideas relating to human nature that represent a marked shift from the preceding period.

First, there is the notion that human beings are, for the most part, autonomous, self-interested agents rather than naturally oriented to community.¹⁹¹ This notion likely developed from changing theological and philosophical understandings about the nature of God and the creation of human beings. David Schindler and others have articulated how the dominant theological conception of God changed to

185 Leif Wenar, *John Rawls*, STAN. ENCYCLOPEDIA OF PHIL. § 4.3 (Sep. 3, 2025), <https://plato.stanford.edu/entries/rawls/> [<https://perma.cc/8GSG-T8YZ>].

186 See FUKUYAMA, *supra* note 22, at 31–46.

187 See Oliver Wendell Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 469 (1897).

188 See ROMMEN, *supra* note 29, at 142–45. Rommen tells the story of the partnership of Enlightenment-era rationalism and legal positivism. See *id.*

189 See SIEDENTOP, *supra* note 22, at 332 (noting the individual roots of liberalism).

190 See *id.* at 300–01 (emphasizing the split within Christian Scholastic thought between Augustinian-inspired emphases on moral equality and the will versus Aristotelian-inspired syntheses pursued by Thomas Aquinas).

191 See *id.* To be clear, the idea that human beings have dignity as individuals was *not* invented by liberalism. Liberalism instead represents a particular sort of growth from earlier premises planted by pre-modern thinkers, like Augustine, who located individual dignity by reference to the *imago Dei*, not to mention the significance of Christian doctrine relating to the Incarnation. See *id.*

emphasize God's contingent will rather than God's intellect.¹⁹² If the image of God changes, then the nature of human beings, assumed to be created with the *imago Dei*, does as well.¹⁹³ As such, late medieval and early modern writers began emphasizing the primacy of individual will—divine and human—over intellect.¹⁹⁴ That had implications for ideas relating to the nature of law, sovereignty, consent, and the legitimacy of authority.¹⁹⁵

Second, some modern thinkers convey epistemological skepticism about the ability to comprehend the relation between facts and value, contributing to the chasm between morality and law.¹⁹⁶ Epistemological skepticism developed from the work of medieval nominalists like Ockham, and major figures like Descartes, Hobbes, Locke, Kant, and Hume, who, over several centuries, suggested disconnect between ideas and an objective reality.¹⁹⁷ These developments contribute to legal positivism because they undercut the idea that human law might be constrained by a discernible reality beyond it.

The modern liberal understanding of human nature is effectively a reaction against classical and medieval metaphysical conceptions of the same. It questions earlier belief in the inherent rationality and sociability of human beings.¹⁹⁸ Human behavior is largely the product of individual will, reacting to desire, passion, and self-interest.¹⁹⁹ Social cooperation is therefore contrived rather than natural. Although there are differences between thinkers like Hobbes and Locke on this point,²⁰⁰ “natural liberty” for individuals is the starting point.²⁰¹ Relationships are generally artificially constructed and transactional and

192 See SCHINDLER, *supra* note 26, at 21–29 (describing the “liberal[],” *id.* at 21, conception of God as “*potentia absoluta*” given the emphasis on God’s will as primary, leading to indeterminate choice as the cardinal feature of human liberty, *id.* at 24).

193 See SIEDENTOP, *supra* note 22, at 307–09 (discussing Ockham’s theory of divine nature and its corresponding effect on understanding human freedom).

194 See *id.* at 303–05 (discussing the Augustinian emphasis on individual will that necessitates expressive space for it beyond the state).

195 See REILLY, *supra* note 26, at 172–224 (describing grounds for natural rights and absolute sovereignty).

196 See *id.* at 121 (discussing Hume’s problem with the “is-ought” distinction). Older philosophers, such as Aristotle and Aquinas, who started with different metaphysical premises, did not hold this problem. See *id.* at 29 (discussing Aristotelian and Thomistic views of nature).

197 See ROMMEN, *supra* note at 29, at 73–79 (discussing modern nominalism).

198 See SCHINDLER, *supra* note 26, at 21; REILLY, *supra* note 26, at 174–75.

199 See, e.g., REILLY, *supra* note 26, at 182–83; ROMMEN, *supra* note 29, at 76–77.

200 See REILLY, *supra* note 26, at 240–47 (noting Locke’s understanding of the state of nature as more social than Hobbes); see also TIERNEY, *supra* note 24, at 4 (referencing scholarship noting Locke’s understanding of community).

201 DENEEN, *supra* note 20, at 48 (“Hobbes and Locke both—for all their differences—begin by conceiving natural humans not as parts of wholes but as wholes apart.”).

can be retracted as easily as created given the individual tendency to self-interest. Social contract theory emerged and described a political and social order that is untethered from any broader philosophical frame. Justification of human authority is a byproduct of human will in the same way that God's choice determines goodness.²⁰² The exercise of power, even in procedurally acceptable forms, becomes the primary way to resolve disputes, rather than striving for something greater.²⁰³

This conception of human nature correlates with philosophical nominalism, which holds that human beings only can know the names of things rather than their essences.²⁰⁴ Those names also have an arbitrariness to them.²⁰⁵ With this understanding (or lack thereof), objective order disappears as a measuring stick for ordering human affairs. This skepticism underwrites a simpler definition of law that reduces its essential ingredient to its force rather than its connection to reality or an objective good, which is no longer fully knowable.²⁰⁶ The work of John Austin, which came much later and emphasizes law as command, is emblematic of the fruit of this position.²⁰⁷ So is the utilitarian legal thinking of Jeremy Bentham and John Stuart Mill.²⁰⁸ And Hume's grounding of right and law in sentiment is closely related.²⁰⁹ The turn to empiricist usefulness occurs, becoming the crux of what is good.²¹⁰ It also underwrites a definition of liberty that is basically atomistic, meaning liberty is primarily understood in opposition to restraint

202 See SIEDENTOP, *supra* note 22, at 309–15 (describing Ockham's theory of the individual freedom paralleling his understanding of God's freedom). Interestingly, according to Siedentop, Ockham's theory of the will was sanctioned by "the biblical golden rule" which, at root, is an expression of God's will. *Id.* at 317.

203 See SCHINDLER, *supra* note 26, at 30.

204 See REILLY, *supra* note 26, at 108–13 (discussing the understanding of nominalism).

205 See *id.* at 108 (discussing nominalism).

206 See ROMMEN, *supra* note 29, at 90 ("Basically a skeptic in metaphysics, Locke could not attain to certainty in moral philosophy, a prolongation of metaphysics.").

207 See JOHN AUSTIN, *THE PROVINCE OF JURISPRUDENCE DETERMINED* (London, John Murray 1832).

208 See ROMMEN, *supra* note 29, at 90; JOHN STUART MILL, *Austin's Lectures on Jurisprudence*, in 21 COLLECTED WORKS OF JOHN STUART MILL, *supra* note 182, at 51, 53–55.

209 See ROMMEN, *supra* note 29, at 112 ("Thus the morality of an action is determined not by its conformity with reason but simply by the sentiment of approval . . ."). As will be shown later, this maps nearly perfectly onto the *Katz* formulation for determining whether a search has occurred. See *infra* Section III.B.1. Replace "expectation" of privacy, *Katz v. United States*, 389 U.S. 347, 361 (1967) (Harlan, J., concurring), with "sentiment[s]" of privacy, ROMMEN, *supra* note 29, at 112, and the doctrine looks Humean.

210 See ROMMEN, *supra* note 29, at 112–13 ("The single remaining explanation and ground of these sentiments is the usefulness of the action to serve human needs Out of repeated individual experiences which evidence the utility of an action, arises the presumption of standards of behavior and the fixing of habits.").

rather than as cooperative with the good. Negative liberty is arguably the currency of liberalism.²¹¹

While elaborated on below, the ramifications for resolving disputes are notable. Reducing human agency to the raw exercise of the will, in response to forces in the world that cannot be truly apprehended, begets a sense of arbitrariness in relationships and institutions and denies any foundational unifying principle. Fragmentation is conceded as the default state for human affairs.²¹² As Schindler writes: Aside from “putting all religious matters out of play,” “[t]he only way to resolve differences that are totally arbitrary is . . . through violence, the forceful imposition of one ‘particular opinion’ in a way that excludes the others”²¹³ More importantly, for the purposes of this Article, this empowers human beings to trample political and legal order and boundaries.

This understanding of the individual foreshadows the nature of society in the modern liberal paradigm. Social affairs are not organic and due to a given rational and social nature; instead, they result *exclusively* from the consent of individuals, both express and tacit, and are motivated by self-interest.²¹⁴ While this emphasis on liberty might be traced to earlier, preliberal ideas relating to inherent dignity grounded in “moral equality,” the modern liberal turn is marked by the untethering of liberty, will, and “rights” from the good.²¹⁵

As such, modern liberal thinkers utilize the mythical “state of nature” as the starting point for many of their reflections.²¹⁶ This approach conceives human beings “as non-relational agents, which in a subsequent moment interact with others to form something like a

211 See BERLIN, *supra* note 30, at 122–25. *But see* Courtland, Gaus & Schmidt, *supra* note 140, § 1.3 (discussing late nineteenth- and twentieth-century “positive liberty” liberal thinkers).

212 See SCHINDLER, *supra* note 26, at 33–34 (“[T]he primacy of potency implies a tendency to internal collapse and fragmentation—a movement away from an elevating unity rather than toward it—and so generally requires an extrinsic impress of restraint and regulation.” (emphasis omitted)).

213 *Id.* at 30 (emphasis omitted).

214 See ZUCKERT, *supra* note 67, at 24 (“The first characteristic of human beings in the state of nature is a lack, the lack of relations of rightful authority, of superiority and subordination”); DENEEN, *supra* note 20, at 32 (“Human beings are thus, by nature, nonrelational creatures, separate and autonomous. . . . [T]he legitimacy of all human relationships—beginning with, but not limited to, political bonds—becomes increasingly dependent on whether those relationships have been *chosen*, and chosen on the basis of their service to rational self-interest.” (emphasis added)).

215 SIEDENTOP, *supra* note 22, at 332; *see* ZUCKERT, *supra* note 67, at 24 (noting how “rights precede the institution of government” and do not correspond to duties or obligations).

216 SCHINDLER, *supra* note 26, at 120 .

political community.”²¹⁷ Some of these thinkers, like Hobbes, conceive this individualistic baseline as fundamentally competitive, making societal construction an act of necessity.²¹⁸ Alternatively, Locke has a more cooperative view of the establishment of political order, with some references to reason as an organizing principle.²¹⁹ But either way, the origin story is about the exercise of individual power, due to the preeminence of individual will.²²⁰ Schindler deems this to be one of the key modern liberal mistakes because it grounds rights in violence rather than in natural realities.²²¹

This origin story fits with faith in free market economics, which understand private ordering through economic transactions as the chief way to maximize both private and social good.²²² One can see the modern belief in the premise that flows from the state of nature: that “human beings are ‘rational utility maximizers,’ meaning . . . they use their considerable cognitive skills to maximize their individual self-interest.”²²³ Voluntary transactions are presumptively good in this

217 *Id.* at 121. Schindler argues that this premise about human nature is demonstrably false when one looks at human experience:

As a matter of fact there is no human nature outside of existing human beings, and there are no existing human beings that are not already related to others—most obviously in family, but families too always bear relations to each other in larger communities. These relations are part of what it means to be human, and indeed the more these relations are given a meaningful order and form, enhanced with the dignity of culture, and so forth, the more *properly* human they are. Human beings are more *naturally* human the more they belong to a community and thus participate in a political order.

Id. at 120–21.

218 See REILLY, *supra* note 26, at 178 (noting absolute sovereignty as a necessity); see also ZUCKERT, *supra* note 67, at 28 (comparing Hobbesian and Lockean premises about the state of nature and the results that follow).

219 See REILLY, *supra* note 26, at 240–41. There is disagreement about whether Locke’s work should be viewed as a break from the preliberal tradition or partially within it. See generally DWORETZ, *supra* note 68. That is beyond the scope of this Article. What matters is that Locke’s theory is synergistic with an artificiality to political and legal order, even if it does not reduce those orders to complete artificiality. See generally *id.* (discussing Locke’s theistically informed political theory that enables constraints on human government and law).

220 See SCHINDLER, *supra* note 26, at 123; ZUCKERT, *supra* note 67, at 29 (noting how Locke’s “doctrine of consent” implies that “all government is a human artifact, constructed from human agreement or conventions”).

221 See SCHINDLER, *supra* note 26, at 30–31.

222 See FUKUYAMA, *supra* note 22, at 34 (noting the “enthroning of consumer welfare as the ultimate measure of economic well-being”).

223 *Id.* at 40. Fukuyama notes how this individualism is not completely incorrect; rather, it is an *incomplete* understanding of human nature, which takes into account the pursuit of intangible goods. See *id.* at 42–43.

regard. Strands of these ideas rationalize plea-bargaining norms and buttress the constitutional doctrine that legitimizes it.

This view also has significance for the meaning of the common good, if that term even applies. Maximization of individual desire is the new lodestar.²²⁴ Aggregate individual interests are the measuring stick rather than something else.²²⁵ Legal systems deferential to the will of the parties comprising them makes restraint difficult.

2. Nature of Human Authority and Law: Consent, Legitimacy, and Legal Positivism

The paradigm requires justification for human authority because authority constrains the baseline state of natural freedom. Unlike periods that predated modern liberalism, and that recognized the principle of consent as one aspect of legitimate authority, modern authority obtains legitimacy *exclusively* based on the principle of consent.²²⁶ Authority originates in the transference of individual power to some greater entity, usually in some form of government. Authoritative legitimacy is the product of agreement as expressed by human will.²²⁷ Put differently, “The act of choice came to be seen as something separate from and more valuable than the substance of what was being chosen.”²²⁸ Human will—and all its manifestations—is thus the defining feature of authority, and in turn the rules that emanate from that authority—namely, law.

These ideas are friendly to legal positivism because they emphasize the will to power as the essential ingredient of law. Positive law is generally not characterized by its orientation to objective value, good, or even reality. Instead, as William Blackstone wrote, and Austin

224 Cf. SCHINDLER, *supra* note 26, at 116–17 (“[P]olitical order is founded on rights rather than the reverse.” *Id.* at 117.).

225 Cf. SIEDENTOP, *supra* note 22, at 7 (“Since the sixteenth century and the advent of the nation-state, people in the West have come to understand ‘society’ to mean an association of individuals.”).

226 The principle of consent as relevant to the legitimacy of government and law is not a modern liberal concept. Prior to the dominance of liberalism, it was considered fundamental to the legitimacy of medieval notions of constitutionalism. See BERMAN, *supra* note 23, at 396 (discussing constitutionalism in medieval urban law). The modern liberal paradigm emphasizes its *primacy* for legitimacy. See, e.g., REILLY, *supra* note 26, at 96–107; ROMMEN, *supra* note 29, at 74–79; ZUCKERT, *supra* note 67, at 27–29.

227 See DENEEN, *supra* note 20, at 31 (“Legitimacy is conferred by consent.”).

228 FUKUYAMA, *supra* note 22, at 50 (describing philosophical ideas of Martin Luther, Jean-Jacques Rousseau, and Kant on this point). As discussed below, Kant’s prioritization of the act of choice over sought-after goods resembles the Supreme Court’s decision to make the legitimacy of pleas contingent on “knowledge, voluntariness, and intentionality” rather than substantive justice. See *infra* Section III.C.2.

confirmed, law is a rule governing action that commands.²²⁹ What matters is the force that backs up the command, not the connection between the positive law and higher forms of law.²³⁰

As with the preceding section, there is variation in the major modern thinkers. It matters whether one's viewpoint is sympathetic to Hobbes's *Leviathan* or Locke's *Second Treatise*. Hobbes's understanding of law obliterates any nonhuman check on positive law.²³¹ In contrast, Locke's emphasis on natural rights seems to communicate a check on human positive law, although the conflict between some of his theistic leanings and broader epistemological skepticism might engender confusion about boundaries.²³² Rommen argued that even a charitable reading of Locke that is open to natural law and order plants seeds for an essentially positivistic understanding of law overall.²³³ As Rommen puts it:

Locke's philosophy of law does not view the law as an objective order of norms out of which individual rights flow by intrinsic necessity; the rights of the individual are prior, and in them originates whatever order exists. *Order is consequently the product of contracts between individuals*, who are induced by their rather selfish interests to enter into these contractual relations. . . . The state is the utilitarian product of individual self-interest, cloaked in the solemn and venerable language of the traditional philosophy of natural law.²³⁴

This view suggests the paradigm effectively underwrites legal positivism in three ways. First, it is fiercely individualistic, grounding authoritative legitimacy solely in expressions of individual will.²³⁵ Second, it is skeptical about moral and legal claims associated with traditional versions of natural law that maintained confidence in human reason without exclusively relying on it.²³⁶ Third, given this skepticism, it lays the groundwork for exclusive philosophical reliance on human reason,

229 See 1 WILLIAM BLACKSTONE, COMMENTARIES *44–45; AUSTIN, *supra* note 207, at 5–6.

230 See AUSTIN, *supra* note 207, at 6.

231 See ROMMEN, *supra* note 29, at 77–79 (describing Hobbes's emphasis on will and the power of the state and government); REILLY, *supra* note 26, at 174.

232 See REILLY, *supra* note 26, at 225–47; DWORETZ, *supra* note 68, at 7–8 (discussing the significance of competing interpretations of Locke).

233 See ROMMEN, *supra* note 29, at 90 (emphasizing that while Locke recognized inalienable rights in the state of nature, those rights are what contrive the political and legal order, rather than the order preceding the rights).

234 *Id.* at 89 (emphasis added).

235 See *id.* at 93; DENEEN, *supra* note 20, at 69 (“The assumption is that legitimate limits upon liberty can arise only from the authority of the consent-based liberal state.”).

236 See ROMMEN, *supra* note 29, at 93 (“The second is the nominalist attitude which found expression in the separation of eternal law and natural moral law, of God's essence and existence, of morality and law.”).

foreshadowing the positivist thirst for making law into an empirical science.²³⁷

Deneen refers to this as the “new science of politics” built on a “belief in an expanding and potentially limitless human capacity to control circumstance and effect human desires upon the world.”²³⁸ It resembles Justice Holmes’s view of the future of the law.²³⁹ Further, because individual choice grounds legal legitimacy, expansions of law that can be characterized as promoting freedom—whether through direct creation of rights or preserving social peace—are permissible. As Deneen writes, “If the expansion of freedom is secured by law, then the opposite also holds true in practice: increasing freedom requires the expansion of law.”²⁴⁰ In this sense, expansion of state power plus the hollowing out of intermediate associations is justified because in theory, at least, it promotes individual freedom.²⁴¹ Directly relevant to the criminal justice topics in this Article, and consistent with contemporary critiques from within the criminal law field, Deneen writes how “declining civic norms require centralized surveillance, highly visible police presence, and a carceral state to control the effects of its own successes while diminishing civic trust and mutual commitment.”²⁴²

More broadly, and for purposes here, it is helpful to think of what legal positivism is, at root. Essentially it makes the field of law entirely the province of human will, whether for good or bad. In contemporary discussions, that is represented by the idea that law is purely the product of power dynamics, such as the ruling class, however organized, benefiting itself.²⁴³ Or, as Rommen paraphrases it, “The law indicates what the sociological situation is.”²⁴⁴ This parallels contemporary critiques that emphasize the racist and classist roots of criminal law and

237 See *id.* at 93–94 (noting the genesis of civil law systems seeking to regulate “down to the minutest detail,” *id.* at 94).

238 DENEEN, *supra* note 20, at 26; see *id.* at 35 (referencing deploying “natural science and a transformed economic system to seek mastery of nature”). Deneen seems to agree with Rommen that distinctions between Hobbes and Locke are not particularly significant because both lead to “the liberated individual and the controlling state” in order to liberate the individual. *Id.* at 38.

239 See Holmes, *supra* note 187, at 457–59.

240 DENEEN, *supra* note 20, at 49.

241 See *id.* at 59 (“At the heart of liberal theory and practice is the preeminent role of the state as agent of individualism.”); *id.* at 62 (“[S]tate expansion secures the end of individual fragmentation, in turn requiring further state expansion to control a society without shared norms, practices, or beliefs. . . . Informal relationships are replaced by administrative directives, political policies, and legal mandates . . .”).

242 *Id.* at 63.

243 See ROMMEN, *supra* note 29, at 127 (“The positive law, on the other hand, is ‘the boundary, fixed for the time being by the social groups struggling for power and influence in the state, of their authority and their influence’.” (citation omitted)).

244 *Id.*

procedure.²⁴⁵ Further, when combined with technological acumen, legal positivism becomes, to a degree, an *elite* endeavor that *excludes* large groups.²⁴⁶

There is a different, more conventional type of legal positivism, however, which is more fundamentally liberal and less sociological. Rommen calls this “moderate positivism” because its primary emphasis is still rooted in the individual that is centric to the liberal paradigm.²⁴⁷ For this form, “Law is the will of the state that is expressly declared to be such”²⁴⁸ Law is what is willed into existence by human beings through their willed organs of the state. There are no other forms of law that might bind that law either. Historically, this conception supported the notion of absolute state sovereignty.²⁴⁹ At an individual level, this supports individualistic private ordering at all costs, supporting a concept like caveat emptor, which effectively governs the constitutional law of guilty pleas, as will be discussed below.²⁵⁰

Moreover, and as will be discussed below, this approach takes higher forms of law off the table as *legally* acceptable grounds of critique of the positive law.²⁵¹ It licenses legislative positivism in the form of overcriminalization and redefining the nature of punishment. It is synergistic with plea-bargaining markets that replace adjudication. Finally, it assists with consolidation of power in the hands of prosecutors, which is simultaneously lamented and rationalized depending on the policy persuasion of the critic. Both the critics of modern liberalism and contemporary criminal justice commentators describe how the will to power reigns supreme.

245 See *supra* Part I.

246 See DENEEN, *supra* note 20, at 131–53. As discussed below, this helps to explain the insider/outsider dynamic in American criminal practice, which scholars like Judge Bibas, Jocelyn Simonson, Josh Bowers, and others have highlighted. See, e.g., BIBAS, *supra* note 11, at 29; Jocelyn Simonson, *The Place of “the People” in Criminal Procedure*, 119 COLUM. L. REV. 249, 255 (2019); Josh Bowers, *The Normative Case for Normative Grand Juries*, 47 WAKE FOREST L. REV. 319, 320 (2012).

247 ROMMEN, *supra* note 29, at 130.

248 *Id.* at 128.

249 See *id.*

250 See *infra* Section III.C. Interestingly, those two logical results—based in a theory of the will as the essential ingredient of law—seem like they could conflict in certain circumstances. Founding law exclusively on force, or even violence, but in the name of protecting freedom through personal safety, might be experienced by some as alienating.

251 See ROMMEN, *supra* note 29, at 130 (“One may not look upon it as non-binding from the viewpoint of a natural law, but only from the viewpoint of ethics. . . . Legal dualism, the doctrine of a natural law functioning as real law concomitant with and superior to the positive law, is flatly repudiated.”).

3. Aggregating the Common Good

The paradigm has a fundamentally different conception of the general good. The common good is not a holistic, comprehensive concept. It is a “‘minimalist’ conception” that prioritizes individual liberty, reducible to subjective self-interest.²⁵² As a result, it often goes by other terms. One example involves “public welfare,” understood through a utilitarian, cost-benefit lens, with emphasis on the aggregation of tangible, privately obtained goods.²⁵³

This conception of collective good is the logical outgrowth of the first principles mentioned above.²⁵⁴ Because a zone of individual autonomy is the starting point, any conception of collective good must account for the preservation or maximization of that space, with an eye towards self-preservation and the minimization of tangible harm to others. This is why some commentators have argued that the fruit of liberal thinking will always trend in the direction of atomistic conceptions of liberty, breeding division rather than unity.²⁵⁵

Whereas “classical liberals” suggested private ordering was ideal,²⁵⁶ in more recent times the *state* is tasked with determining the content of the common good with this preference for liberty in mind. It is the role of the state to define and maximize space for this sort of aggregation to develop and occur. Because human beings would otherwise be in conflict, the state is tasked with the job of protection in an external sense. Whether that happens with limited or active government is largely contingent on *which* liberal source is consulted.

For example, Hobbes’s *Leviathan* emerges because the state ensuring safety is the precondition for maximum liberty.²⁵⁷ Only the state is large enough to effectuate this civil peace.²⁵⁸ Similarly, twentieth-century liberals emphasize “welfare state” and “social justice” liberalism.²⁵⁹ Conversely, Locke’s emphasis on natural rights to property is used to justify limited government because maximal protection for liberty and

252 SCHINDLER, *supra* note 26, at 72.

253 See ROMMEN, *supra* note 29, at 89 (“The hidden root of this position is, of course, an overconfidence, born of optimism, in the typically individualist presumption that the common good is nothing real, that it is merely the sum of the particular goods or interests of individuals.”).

254 See SCHINDLER, *supra* note 26, at 72.

255 See *id.* at 85 (“The individuals can have a real potential for community *only if* the good that brings them together precedes them in reality as already given. Without the priority of an actual common good, the best one can have is a set of individuals bound together through interlocking particular goods.” (footnote omitted)).

256 FUKUYAMA, *supra* note 22, at 27; see *id.* at 19–30.

257 See REILLY, *supra* note 26, at 173–76.

258 See *id.*

259 Courtland, Gaus & Schmidtz, *supra* note 140, § 2.2.

property will ensure social peace.²⁶⁰ This is why commentators suggest liberalism has a chameleon-like quality, meaning it can germinate into a libertarian utopia or a totalitarian nightmare, depending on *who* holds the power.²⁶¹

Either way, a more robust definition of the common good, which entertains the intangible and metaphysical depths of human affairs, is off the table because it would seem to automatically infringe baseline freedom.²⁶² It cuts against the core idea of self-determination. Nominalist skepticism about moral goods (whether tangible or intangible) is at work here as well, breeding skepticism about *any* authority having the capacity to ascertain a robust notion of the common good to utilize as a reference point or organizational principle. Liberal order thus aims to preserve its axiomatic conception of liberty and ironically uses that to forcefully adjudicate disputes. State-sponsored procedural force, without reference to a deeper sense of the good, is representative of the paradigm. As Schindler writes, “power relations between private interests, bureaucratic management, and empty process” are the alienating result.²⁶³

More foundationally, there is an instrumentalization of the common good, especially given the apparent synergies between utilitarian cost-benefit analyses and scientific precision aided by technology. Modern science and technological advancement provide the tools to actualize cost-benefit analyses justified by the liberal nod to instrumentalization of the good. Scientific and technological methodologies that emphasize the quantifiable appear in the moral value vacuum given the philosophical nominalism and skepticism referenced above. Pragmatic tinkering is the name of the game.

Rommen writes: “All that remained . . . was empiricist positivism. The good and the just are what is here and now deemed useful to the self-interest of individuals and to their life in common.”²⁶⁴ Justice Holmes’s forecast that legal authority would be better grounded in economic or other science comes to fruition.²⁶⁵ The quantification of law is the measuring stick for what law is and what it should be. While elaborated on below, this obsession with an instrumentalized, quantifiable common good is evident in the way the criminal system

260 See DWORETZ, *supra* note 68, at 75–77.

261 See FUKUYAMA, *supra* note 22, at 17 (discussing different sides pushing liberalism to its “extremes”).

262 See SCHINDLER, *supra* note 26, at 72, 92 (“From the liberal perspective, the political good, because it is the only one given a priori, becomes the whole, while what is called the integral good becomes a part” *Id.* at 92.).

263 *Id.* at 93.

264 ROMMEN, *supra* note 29, at 113.

265 See Holmes, *supra* note 187, at 469.

predominantly approaches adjudication under the exclusionary rule and risk-based sentencing, which is effectively a nod to precision-based actuarial analysis as the path to justice.

C. *Present Pathologies*

Modern liberalism has had many critics from various angles relating to political, social, economic, and foreign affairs.²⁶⁶ This Section could not possibly canvass them all; instead, it summarizes some recent work that identifies and criticizes liberal pathologies.

Deneen has argued that liberalism, as experienced in the United States, has failed because it ultimately has succeeded in its core aims.²⁶⁷ He suggests that much of the societal discontent that currently exists stems from the logical outgrowth of the modern liberal ideological paradigm, which developed from several mistaken premises about human nature, social affairs, authority, and individual autonomy, evincing a “false anthropology.”²⁶⁸ For Deneen, the fact that Western legal systems are “structurally liberal” is the linchpin to understanding the current malady.²⁶⁹ Those assumptions are “1) . . . individualism and the voluntarist conception of choice, and 2) human separation from and opposition to nature.”²⁷⁰ Schindler recognizes this anthropological issue as fundamentally a claim about metaphysical reality (or lack thereof).²⁷¹ These premises then engendered certain pathologies that have morphed into societal ills in various contexts, including hollow preservation of “peace” through “the essentially coercive means of political action, police and military force, and lawyers.”²⁷²

Deneen’s core argument is that modern liberalism redefined the traditional understanding of liberty and is a form of “anticulture” that severs social bonds.²⁷³ In short, the idea that liberty equals self-actualization through expressions of individual autonomy replaced an older

266 See generally, e.g., *LIBERALISM AND ITS CRITICS* (Michael J. Sandel ed., 1984); DENEEN, *supra* note 20; FUKUYAMA, *supra* note 22; DENEEN, *supra* note 21.

267 See DENEEN, *supra* note 20, at 3.

268 *Id.* at 19; see *id.*, *Preface to the Paperback Edition*, at xii (noting that “liberalism’s core value of individual autonomy creates structures that result in a felt loss of liberty for many citizens”).

269 DENEEN, *supra* note 21, at 10 (juxtaposing the notion of “structurally liberal” with contemporary criticism about structural racism).

270 DENEEN, *supra* note 20, at 31.

271 See SCHINDLER, *supra* note 26, at 5–9 (recognizing liberalism as the “incarnation of the disincarnation,” *id.* at 9).

272 *Id.* at 36 see *id.* at 34–37 (detailing several contemporary forms of discontent).

273 DENEEN, *supra* note 20, at 65; see *id.* at 64–90; see also FUKUYAMA, *supra* note 22, at 117.

understanding that understood liberty as self-rule through virtue.²⁷⁴ Ironically, the modern understanding, despite conceiving liberty as the absence of constraint, calls for the creation of more law that constrains the customs, culture, traditions, and intermediate associations that permitted individuals to freely develop the capacity for self-rule.²⁷⁵ Deneen writes:

Liberalism thus disassembles a world of custom and replaces it with promulgated law. Ironically, as behavior becomes unregulated in the social sphere, the state must be constantly enlarged through an expansion of lawmaking and regulatory activities. . . .

. . . The logic of liberalism thus demands near-limitless expansion of the state and the market.²⁷⁶

Deneen's boldest claim is that the Founding generation in the United States *intentionally* operationalized core liberalism through social contract theory and their emphasis on natural rights, creating "an encompassing political ecosystem in which we have swum."²⁷⁷ Schindler's argument parallels Deneen's, arguing that the Declaration of Independence represents "the actual inauguration of a political order" founded on the worst impulses of liberalism.²⁷⁸ For purposes of this Article, two observations are particularly noteworthy: (1) the tendency of modern liberalism to generate more law and (2) its synergies with the thirst for control and mastery of nature, often expressed through science, technology, and the free market.

274 See DENEEN, *supra* note 20, *Preface to the Paperback Edition*, at xiii ("Liberalism reconceives liberty as the opposite of this older conception."); SCHINDLER, *supra* note 26, at 19 n.47 ("Liberalism is precisely the inheritance of the tradition on a new basis, outside of the tradition . . .").

275 See DENEEN, *supra* note 20, *Preface to the Paperback Edition*, at xiv.

276 *Id.*

277 *Id.* at 4–5; *see id.* at 1–2. While Deneen spends most of the book criticizing liberalism, he argues that its premises were intentionally instantiated in the American Founding. *See id.* at 45. While Part III evaluates Deneen's critique of the effects of modern liberalism more broadly, Part IV challenges his argument that the American legal experiment wholeheartedly absorbed such ideas.

278 SCHINDLER, *supra* note 26, at 41; *see* THE DECLARATION OF INDEPENDENCE (U.S. 1776); SCHINDLER, *supra* note 26, at 44 ("The American Revolution imposed a particular intellectual and cultural horizon . . ."). The crux of Schindler's argument is that the Declaration of Independence symbolizes the false anthropology underlying modern liberal impulses, and in the worst way, because it appeals to a particular understanding of God that underwrites the modern notion of freedom that cannot tolerate constraints and is obsessed with raw choice. *See* SCHINDLER, *supra* note 26, at 57–61. Zuckert presents a more positive outlook about the natural rights presented in the Declaration, not to mention how they form a political amalgamation with other historical circumstances informing the Founding. *See* ZUCKERT, *supra* note 67, at 239–41.

Deneen argues that modern liberalism, paradoxically, has broadened the authority of the state and the field of law.²⁷⁹ The liberal paradigm begets law without a “common moral horizon.”²⁸⁰ The modern conception of liberty requires legal intervention to eradicate sources of restraint within the society, whether cultural, associational, religious, or something else. As he writes, the liberal “‘cure’ by which individuals could be liberated from authoritative cultures . . . requires expansion of legal redress, police proscriptions, and expanded surveillance.”²⁸¹ Put differently, “[T]he more completely the sphere of autonomy is secured, the more comprehensive the state must become. . . . With the liberation of individuals from these associations, there is more need to regulate behavior through the imposition of positive law.”²⁸² Schindler, similarly, suggests that this motivation stems from the “political establishment” of an understanding of God defined by unrestrained potency and freedom.²⁸³ Human beings are unleashed to create law within this framework.

Deneen also argues that modern liberal ideas essentially commodify human experience given how they feed the desire for mastering and controlling experience through science, technology, and economics.²⁸⁴ Fukuyama notes how this developed into “neoliberalism,” which aims to locate new markets for capturing and exploring, maximizing and actualizing self-interest.²⁸⁵ Efficiency ethics pervades these spaces, thereby alienating and intruding upon other forms of association. Unsurprisingly, welfare becomes synonymous with economic well-being, which, as Fukuyama rightly notes, “is . . . problematic . . . because it fails to capture intangible aspects of well-being.”²⁸⁶ For Fukuyama, this is a modern trap set by the individualistic premises above, which are incomplete descriptors of human affairs.²⁸⁷

Deneen holds that modern liberal ideas underwrite the development of an elite that maintains power under the guise of democracy, when it is really a managerial class.²⁸⁸ This elite contains the markers

279 See DENEEN, *supra* note 20, at 142.

280 FUKUYAMA, *supra* note 22, at 120; see DENEEN, *supra* note 20, at 18–19, 29, 38.

281 DENEEN, *supra* note 20, at 29.

282 *Id.* at 38.

283 SCHINDLER, *supra* note 26, at 29.

284 See DENEEN, *supra* note 20, at 36–37 (referencing control through “scientific and economic mastery,” *id.* at 36).

285 FUKUYAMA, *supra* note 22, at 20; see *id.* at 19–29.

286 *Id.* at 36; see *id.* at 34–36.

287 See *id.* at 43.

288 See DENEEN, *supra* note 20, *Preface to the Paperback Edition*, at xvii (referencing JAMES BURNHAM, *THE MANAGERIAL REVOLUTION: OR WHAT IS HAPPENING IN THE WORLD NOW* (Putnam & Co., Ltd. 1944) (1942), as emblematic of the liberal tendency to create an elite); DENEEN, *supra* note 21, at 29–39.

of achievement and exerts its will to preserve its own position.²⁸⁹ It is a restrictive group of insiders, operating as a “new aristocracy.”²⁹⁰ Deneen connects the emergence of this group to Lockean ideas about how rationality and personal industry will advance wealth and prosperity.²⁹¹ This group has a specific skillset biased towards technological proficiency and quantification as it is concerned with “risk management, cost-benefit analyses, actuarial calculations, ‘consultation’ for efficiency maximization, and the like.”²⁹² As will be discussed below, Deneen’s description of the elite resembles the contemporary criticism of the criminal system as administered by insiders—whether prosecutors or economists running algorithms—with little accountability to the public.²⁹³

III. FOUR PARADIGMATIC ILLUSTRATIONS IN CRIMINAL LAW, PROCEDURE, ADJUDICATION, AND PUNISHMENT

The bundle of concepts described in Part II—emblematic of the modern liberal emphasis on will and power—helps to explain realities in four key areas of the criminal system. Substantive criminal lawmaking is expansive, both through legislation and prosecutorial discretion, and courts defer to legislative definitions of punishment. Constitutional criminal procedure under the Fourth Amendment, specifically with respect to the definition of what constitutes a search and the meaning of the exclusionary rule, is nominalist and skeptical that truth and liberty might work together. Third, the normalization of plea bargaining resembles consent-based norm construction: The will is preeminent, especially the state’s will. Resolution of criminal charges through transactional power dynamics—think charge bargaining—is the norm and emblematic of the liberal march to tap new markets, whatever the cost. Finally, attitudes towards sentencing are almost entirely instrumentalist and biased towards the quantitative. Punishment is primarily understood as a science rather than as a matter of moral practice.

A. *Crime and Punishment Without Boundaries: Legislative Positivism and Prosecutorial Power*

The United States is awash in substantive criminal law provisions and a network of punitive collateral consequences that indicate

289 See DENEEN, *supra* note 21, at 29–31.

290 DENEEN, *supra* note 20, at 135.

291 See *id.* at 137.

292 DENEEN, *supra* note 21, at 31.

293 Compare *id.* at 29–39, with BIBAS, *supra* note 11, at 29, 49. See *infra* Section III.B.2.

significant overcriminalization and excessive punitiveness. This Section focuses on three developments that illustrate the liberal association with legal positivism referenced above. First, nearly all substantive criminal law has expanded considerably, redefining the criminal law away from clear notions of moral culpability. Second, prosecutorial power—either to enforce or decline prosecution—exemplifies the modern, liberal connection with power and law. Third, nearly all jurisdictions have enacted an elaborate network of so-called “collateral” consequences that broaden the boundaries of punishment.

1. Expansion and Redefinition of Crime

Overcriminalization is emblematic of the paradigm’s openness to legislative positivism devoid of moral and legal constraints. It is no secret that criminal codes have exploded with provisions in the past century. As Stuntz noted: “[C]riminal liability rules grew broader, the number of overlapping criminal offenses mushroomed, and the definition of crimes grew more specific. . . . [L]egislators, not appellate judges, became the system’s chief lawmakers. . . . American criminal codes have become more code-like and more expansive.”²⁹⁴

In addition to Stuntz, Harvey Silverglate, in *Three Felonies a Day*, details this explosion at both the federal and state level.²⁹⁵ Alexandra Natapoff has described the explosion of misdemeanor prosecutions that dominate American criminal justice.²⁹⁶ Brenner Fissell, more recently, has detailed the volume of local criminal offenses on the books.²⁹⁷ Fissell argues localities who wish to reduce the criminal law footprint are hampered by expansive state law.²⁹⁸

Criminal statutes, in addition to expanding, overlap considerably. Examples include proliferation in types of gun charges—think lack of registration, possession, and use during commission of other offenses—as well as theft definitions that go far beyond traditional understandings of unlawful takings.²⁹⁹

In addition to the sheer quantity of criminal provisions, the most significant change has been the hollowing of the concept of mens rea. The idea of the criminal state of mind was the *distinctive* feature of

294 STUNTZ, *supra* note 9, at 260.

295 See HARVEY A. SILVERGLATE, *THREE FELONIES A DAY: HOW THE FEDS TARGET THE INNOCENT* (First American ed. 2009).

296 See generally ALEXANDRA NATAPOFF, *PUNISHMENT WITHOUT CRIME: HOW OUR MASSIVE MISDEMEANOR SYSTEM TRAPS THE INNOCENT AND MAKES AMERICA MORE UNEQUAL* (2018).

297 Cf. Brenner M. Fissell, *Against Criminal Law Localism*, 81 MD. L. REV. 1119, 1121 (2022).

298 See *id.* at 1138.

299 See STUNTZ, *supra* note 9, at 262–64.

criminal law because it connected the idea of crime with the moral realm.³⁰⁰ Blackstone's criminal intent connoted a "vicious will";³⁰¹ Justice James Wilson, a leading American Founder, understood malintent as *the* cardinal, defining feature of criminal behavior.³⁰² But, as Stuntz wrote, "Criminal intent has become a modest requirement at best, meaningless at worst."³⁰³ More specifically, intentional action became criminal if it was voluntary rather than indicative of malintent in the traditional, moral sense.³⁰⁴ A voluntary, harmful action became the basis of criminal liability, rather than a voluntary, malicious, and harmful action.³⁰⁵

To be clear, the causes of legislative overcriminalization are many, including those outlined by scholars like Stuntz, who have detailed the political incentives driving substantive criminal law.³⁰⁶ That said, it seems more than coincidental that the rise in expansive criminal codes—deviating from a century or more of common law-dominated criminal law—happened at roughly the same time as the corresponding obsession with legislative technique, textualism, and legal engineering.³⁰⁷ As Stuntz writes, Justice Scalia's obsession with "The Rule of Law as a Law of Rules" has ideological origins.³⁰⁸ In the criminal law realm, the culmination is the extra detailed provisions of the Model Penal Code (MPC),³⁰⁹ based on the "goal . . . to rationalize criminal law" by "resolv[ing] as many issues as possible with legislative text."³¹⁰ The project reflects Rommen's observations about modern legal positivism seeking to make law into a science.³¹¹ Most state legislatures adopted MPC-style provisions, converting assessments of criminal liability into matters of statutory interpretation rather than determining blameworthiness.³¹²

This construction, expansion, and conversion of criminal law into a hyperspecialized, text-based endeavor is consistent with two cardinal

300 See *id.* at 261 ("[T]he kind of intent Morissette lacked was not cognitive or motive-based; it was moral.").

301 *Id.* at 262; 4 BLACKSTONE, *supra* note 229, at *21.

302 See JAMES WILSON, *Of the Nature of Crimes; and the Necessity and Proportion of Punishments*, in 2 COLLECTED WORKS OF JAMES WILSON 1087, 1103–04 (Kermit L. Hall & Mark David Hall eds., 2007).

303 STUNTZ, *supra* note 9, at 260.

304 See *id.* at 262.

305 See *id.*

306 See *id.* at 264–65.

307 See *id.* at 265.

308 *Id.* (quoting Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175, 1175 (1989)).

309 MODEL PENAL CODE (A.L.I. 1985).

310 STUNTZ, *supra* note 9, at 266–67.

311 See ROMMEN, *supra* note 29, at 126.

312 See STUNTZ, *supra* note 9, at 267.

features of legal positivism within the liberal paradigm. First, it impliedly communicates that legal boundaries relating to criminal law are purely the product of human will, typically expressed through legislatures. There is no “nature” to criminal law that precedes human whims about the topic. At best, something akin to Mill’s “harm principle” carries the day.³¹³ Social harm, without more, is sufficient to permit classification as a crime, *if the legislature says so*.³¹⁴ This partially explains modern examination of the criminal-civil distinction.³¹⁵ When humans solely determine the boundaries of categories that may have ontological realities, some will perceive arbitrariness in labeling different types of social harm.³¹⁶

Second, it signifies an incredible amount of confidence in the human ability to determine the boundaries of human law through precision-style word engineering. As mentioned above, the MPC was a twentieth-century project that aimed to modernize criminal law.³¹⁷ The MPC is lengthy and quite wordy. Ask any first-year law student to describe the utility of the mens rea definitions in the MPC as compared to common law concepts like “malice” or “willfulness” and puzzled looks will emerge. Whereas the MPC projects the appearance of precision, parsing the meaning of the words used in the Code quickly resembles the judicial opining about the meaning of different states of mind in common law cases. What is all that different, after all, between interpreting the MPC’s lengthy provisions and the judicial opinions of skilled judicial minds?

Perhaps most interestingly, the expansion of criminal codes—both in their breadth and depth—has transferred power to another institutional actor: the prosecutor, who, in theory, is supposed to represent the “will” of the people.

2. Obsession with Prosecutorial (Will) to Power

The paradigm helps to explain why there is so much focus on prosecutors as the key to enforcing or reforming criminal justice. In the past two decades, prosecutorial power has been simultaneously

313 See JOHN STUART MILL, ON LIBERTY 9 (Elizabeth Rapaport ed., 1978) (1859).

314 See *id.*

315 See, e.g., Sandra G. Mayson, *Collateral Consequences and the Preventive State*, 91 NOTRE DAME L. REV. 301 (2015). The Supreme Court has waffled back and forth on what constitutes crime and punishment. See, e.g., *Trop v. Dulles*, 356 U.S. 86, 97 (1958) (plurality opinion).

316 See, e.g., Alec C. Ewald, “Civil Death”: *The Ideological Paradox of Criminal Disenfranchisement Law in the United States*, 2002 WIS. L. REV. 1045. But see Mary Sigler, *Defensible Disenfranchisement*, 99 IOWA L. REV. 1725 (2014).

317 See Paul H. Robinson & Markus D. Dubber, *The American Model Penal Code: A Brief Overview*, 10 NEW CRIM. L. REV. 319, 322, 326 (2007).

lauded and regretted by judges, scholars, and defense attorneys.³¹⁸ Whether critical or not, both sides have impliedly conceded that the prosecutorial will to power is the fulcrum on which criminal justice depends, both broadly and in individual cases.³¹⁹ At best, prosecutors are viewed as the key to ensuring public safety, whether through harsh tactics or data-driven reform. At worst, prosecutors are viewed as effectively tyrannical. Both views represent two sides of the same Hobbesian coin that either lauds or regrets the necessity of the Leviathan.³²⁰ But the paradigm now undergirds the debate.

Contemporary prosecutorial practice and scholarship evidence this trend. In today's plea-dominated world, prosecutors hold the cards, deal them, and set the boundaries for discussion based on their charging actions.³²¹ In short, they are the primary agents determining the normative reach of the criminal law given their discretionary decisions relating to enforcement or declination.³²² This is why scholars spend so much time detailing existing approaches and arguing for different normative grounds for decisionmaking. Indictment via information pervades state prosecutorial practice and is constitutional.³²³ Even when presentation to grand juries is required by law, there is strong reason to believe that they no longer serve as the normative check once desired.³²⁴ The developed concentration of prosecutorial power is an iteration of the liberal obsession with questions relating to sovereignty and absolute authority, which must be located somewhere.

Justice Robert Jackson detailed the pivotal place of prosecutors in determining the boundaries of justice.³²⁵ That view projects a nobility that few scholarly commentators maintain is possible given current conditions. Instead, the debate is about controlling power dynamics already assumed. Jeffrey Bellin has highlighted the paradoxes of prosecutorial power.³²⁶ Marc Miller and Ronald Wright have studied prosecutorial discretion in charging, which has an undue effect on case

318 See, e.g., Stephanos Bibas, *Plea Bargaining Outside the Shadow of Trial*, 117 HARV. L. REV. 2463, 2470–76 (2004).

319 See *id.* at 2470.

320 See THOMAS HOBBS OF MALMESBURY, *LEVIATHAN, OR THE MATTER, FORME, & POWER OF A COMMON-WEALTH ECCLESIASTICALL AND CIVILL* 246 (photo. reprt. 1929) (London, Andrew Croke 1651).

321 See BIBAS, *supra* note 11, at 41–43; HESSICK, *supra* note 51, at 49–55.

322 See Justin Murray, *Prosecutorial Nonenforcement and Residual Criminalization*, 19 OHIO STATE J. CRIM. L. 391, 392 (2022).

323 See *Hurtado v. California*, 110 U.S. 516, 538 (1884).

324 See Andrew D. Leipold, *Why Grand Juries Do Not (and Cannot) Protect the Accused*, 80 CORN. L. REV. 260, 311 (1995).

325 See Robert H. Jackson, U.S. Att'y Gen., *The Federal Prosecutor*, Address at the Second Annual Conference of United States Attorneys (Apr. 1, 1940).

326 See Jeffrey Bellin, *The Power of Prosecutors*, 94 N.Y.U. L. REV. 171 (2019).

outcomes.³²⁷ Judge Bibas has detailed the effect of warped prosecutorial incentives in the plea-bargaining world.³²⁸ Scholars like Rachel Barkow, David Sklansky, and Bruce Green have emphasized how office design and internal structures affect prosecutorial behavior.³²⁹ Others have analyzed prosecutorial political accountability.³³⁰

The common thread in this strand of scholarship is (1) the recognition of the outsized influence that prosecutors play in *determining* outcomes in lieu of community-based adjudication without (2) necessarily embracing an alternative. Prosecutorial *will* is either *the law* or *experienced as the law*. This holds whether the discretion exercised is favorable or not to victims, the community, or defendants.

The recent political investment in prosecutorial elections illustrates this paradigmatic trend.³³¹ Both sides of the political spectrum view prosecutorial elections as determinants of what the law *will be*. Heavy investment in recent elections connotes the stakes of transferring authority to prosecutors in the same vein that Hobbes's participants transmit natural authority to the sovereign out of self-interest for protection, thereby conceding normative constraints.

In the American political spectrum, the right seeks to elect "tough-on-crime," incapacitation-minded prosecutors; simultaneously, the left seeks to elect reform prosecutors who will protect communities viewed as the targets of vengeful and discriminatory policies in the past by initiating alternative resolutions and practices like expungement.³³² When total sovereignty over the criminal law is at stake, electoral significance increases greatly. Who holds the power, rather than the content of the law, is the fundamental question. Both sides view prosecutors as mini-Leviathans reporting for duty to ensure public safety, however defined by the prosecutor's will.

327 See Miller & Wright, *supra* note 102.

328 See Stephanos Bibas, *Designing Plea Bargaining from the Ground Up: Accuracy and Fairness Without Trials as Backstops*, 57 WM. & MARY L. REV. 1055 (2016).

329 See *supra* note 101 and accompanying text.

330 See, e.g., Marissa Hoechstetter, *Carissa Byrne Hessick Wants to Hold Prosecutors Accountable*, MS. MAG. (July 18, 2019), <https://msmagazine.com/2019/07/18/carissa-byrne-hessick-wants-to-hold-prosecutors-accountable/> [<https://perma.cc/3DE2-EF66>].

331 See, e.g., *National Database of Prosecutor Elections and Contributions*, UNIV. OF N.C. SCH. OF L., <https://law.unc.edu/academics/centers-and-programs/prosecutors-and-politics-project/ppp-database/> [<https://perma.cc/QFZ7-UE9S>] (last visited Jan. 17, 2026).

332 McClellan & Hafler, *supra* note 105.

3. Expansion and Redefinition of Punishment

Under current law, what counts as punishment is essentially a legislative question that courts are reluctant to disturb.³³³ This is another example of legislative positivism affecting the current situation. As will be discussed below, Founding-era thought had a particular understanding of punishment that differed considerably from current Supreme Court doctrine, which is almost entirely deferential to legislative whim. Put simply, existing doctrine partially denies an ontological reality to punishment, thereby permitting expansion of the carceral state through deference to legislative classifications about whether consequences are punitive or collateral.³³⁴

Scholars have detailed the manic trajectory of the constitutional definition of punishment.³³⁵ In a nutshell, the Court initially considered punishment to have a broader definition than current doctrine allows, a result few, if any, considered beyond the province of the judicial role.³³⁶ The narrowing of the definition of punishment happened mid-twentieth century when the Court eschewed philosophical coherence for instrumentalist reasons,³³⁷ effectively permitting legislative classification of state-imposed suffering post-conviction to determine whether the punishment label attaches or not. Joshua Kaiser has detailed how judicial deference to legislative labeling establishes a presumption of nonpunitive state action.³³⁸ Additionally, and as Wayne Logan has detailed in his work on the Ex Post Facto Clause, it is historically inaccurate.³³⁹

333 Cf. BIBAS, *supra* note 11, at 25.

334 A potential counterpoint here might go like this: Existing doctrine simply leaves the determination of what the “reality” of punishment is to a body other than judges. Cf. *id.* But that sort of total deference to the legislature does not seem contemplated by the constitutional design or the historical arguments that preceded it, which were gravely concerned with the notion of parliamentary supremacy to determine the nature of reality.

335 See, e.g., Murray, *supra* note 73, at 940–54; Kaiser, *supra* note 36, at 345 (“Although the Court’s original definition of punishment was easily applicable and consistent with commonsense and philosophical definitions, a number of doctrinal mistakes created the much more vague and unstable definition that exists today.”).

336 See, e.g., *Cummings v. Missouri*, 71 U.S. (4 Wall.) 277, 298 (1867); *Ex parte Garland*, 71 U.S. (4 Wall.) 333, 381 (1867).

337 See John F. Stinneford, *Punishment Without Culpability*, 102 J. CRIM. L. & CRIMINOLOGY 653, 669–73 (2012).

338 See Kaiser, *supra* note 36, at 349 (discussing the *Hawker v. New York*, 170 U.S. 189 (1898), opinion’s “drastic yet unrecognized shift from *Cummings/Garland*”).

339 See WAYNE A. LOGAN, *THE EX POST FACTO CLAUSE: ITS HISTORY AND ROLE IN A PUNITIVE SOCIETY* 3 (2022); U.S. CONST. art. I, § 10, cl. 1.

Current doctrine only permits a post-conviction consequence to count as punishment if it follows a conviction and is intended to be punitive or has punitive effects that connote punitive intent.³⁴⁰ While that understanding is defensible, the Court's definition of punitive purpose is quite narrow, rendering the understanding incomplete. Retributive purposes allow for the consequence to be classified as punitive.³⁴¹ But non-retributive purposes such as deterrence or incapacitation are insufficient, unless other conditions are met.³⁴²

These trends are consistent with the modern liberal ideas mentioned above for a few reasons. First, they defer to legislative whim rather than probing the reality of the thing itself. This indicates acceptance of the will as the primary determinant of reality and impliedly accepts the nominalist assertion that there is a chasm between perception and reality. At worst, the doctrine self-imposes *judicial incapacity* to decipher what punishment *is*. At best, it punts that question to the totally sovereign legislature which, as will be discussed below, directly contravenes Founding understandings of legislative authority.

Second, the determination correlates entirely to legislative understanding of purpose rather than other considerations. What the legislature *decides* presumptively controls determination of the question.³⁴³ The legitimacy, classification, and nature of the conviction consequence is entirely contingent on legislative fiat. As the Court held in *United States v. Salerno*, the absence of a legislative label of punishment means the state action is nonpunitive if there is a rational, nonpunitive purpose.³⁴⁴ That principle is now enshrined in constitutional law given *Kansas v. Hendricks*, where the Court determined that civil detention of convicted sex-offenders was not a punishment.³⁴⁵ Similarly, in *Smith v. Doe*, the absence of a legislatively assigned *retributive* purpose was

340 See *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168–69 (1963). The Court identified several factors as relevant to the question, including whether the measure (1) imposes “an affirmative disability or restraint,” *id.* at 168; (2) “has historically been regarded as a punishment,” *id.*; (3) “comes into play only on a finding of *scienter*,” *id.*; (4) “promote[s] the traditional aims of punishment—retribution and deterrence,” *id.*; (5) is applicable to behavior that “is already a crime,” *id.*; (6) “may rationally be connected,” *id.* at 168–69, to an “alternative purpose,” *id.* at 168; and (7) “appears excessive in relation to the alternative purpose,” *id.* at 169.

341 See, e.g., *Smith v. Doe*, 538 U.S. 84, 102 (2003).

342 See, e.g., Murray, *supra* note 73, at 947.

343 See John F. Stinneford, *Is Solitary Confinement a Punishment?*, 115 NW. U. L. REV. 9, 19 (2020) (citing *Bell v. Wolfish*, 441 U.S. 520, 538–39, 546 (1979), as an example).

344 See *United States v. Salerno*, 481 U.S. 739, 747 (1987). Stinneford writes: “It asserted that unless the government labels its action as a punishment, the action will be considered a nonpenal regulation so long as it has a rational relationship to a nonpenal purpose and is not excessive in relation to that purpose.” Stinneford, *supra* note 343, at 20.

345 See *Kansas v. Hendricks*, 521 U.S. 346, 366 (1997); see also Murray, *supra* note 73, at 936–39 (citing *Hendricks*, 521 U.S. at 366).

fatal to the classification of a post-conviction consequence as punishment, notwithstanding the existence of a deterrence rationale, which of course is a traditional punitive purpose.³⁴⁶ The Court in *Doe* conceded the reason for these doctrinal developments: “To hold that the mere presence of a deterrent purpose renders such sanctions ‘criminal’ . . . would severely undermine the Government’s ability to engage in effective regulation [. . .].”³⁴⁷ That stroke conceded the definition of punishment to legislative positivism.

Unsurprisingly, these trends support an enlarged network of post-conviction consequences that are presumptively considered nonpunitive despite the reality that they *only* apply *if* a conviction has occurred.³⁴⁸ *Doe* licenses state-imposed consequences with nonretributive purposes that look, smell, and act like punishment to be classified as nonpunitive.³⁴⁹ As mentioned elsewhere, “These principles all but guarantee that any consequence that is automatically imposed after a conviction is punishment only if it can be shown that its purpose is *exclusively* retributive.”³⁵⁰ Whereas collateral consequences always have existed, they have proliferated in the past century in the age of regulation.³⁵¹ Since *Kennedy v. Mendoza-Martinez*, the Supreme Court has never held a collateral consequence to be punishment.³⁵² Legislative classification presumptively determines punitive realities.

346 See *Smith*, 538 U.S. at 94 (finding that while the notification provision of the Act, 1994 Alaska Sess. Laws ch. 41, § 12(a), “was intended as a nonpunitive regulatory measure,” the registration provision “point[ed] in the opposite direction”); *id.* at 102–03.

347 *Id.* at 102 (first omission in original) (quoting *Hudson v. United States*, 522 U.S. 93, 105 (1997)) (quote corrected). *Hudson* acknowledged deterrence is a criminal and civil purpose, a principle the Court has repeated. See, e.g., *Bennis v. Michigan*, 516 U.S. 442, 452 (1996) (describing how forfeiture of property similarly “serves a deterrent purpose distinct from any punitive purpose . . . ‘both by preventing further illicit use of the [property] and by imposing an economic penalty . . . rendering illegal behavior unprofitable’” (alteration in original) (quoting *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 687 (1974))).

348 See Stinneford, *supra* note 337, at 679 (“[T]he Supreme Court has avoided defining what a punitive purpose is . . . [and] has been less reluctant to say what a punitive purpose is *not*.”).

349 See *Murray*, *supra* note 73, at 938–39 (discussing *Smith*, 538 U.S. 84).

350 *Id.* at 939 (emphasis added).

351 See *National Inventory of Collateral Consequences of Conviction*, THE COUNCIL OF STATE GOV'TS JUST. CTR., <https://csgjusticecenter.org/publications/the-national-inventory-of-collateral-consequences-of-conviction/> [<https://perma.cc/ZW89-Y8ZC>] (last visited Nov. 8, 2025).

352 See *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168 (1963); cf. *Smith*, 538 U.S. at 105–06 (“The [Alaska Sex Offender Registration] Act is nonpunitive . . .”); *United States v. Ursery*, 518 U.S. 267, 292 (1996) (“We hold that these *in rem* civil forfeitures are neither ‘punishment’ nor criminal for purposes of the Double Jeopardy Clause.”); *Hudson*, 522 U.S. at 105 (holding that debarment sanctions with a “deterrent purpose” are not criminal).

B. Constitutional Criminal Procedure: Nominalism, Sentimentalism, and Utilitarian Balancing

This Section describes two ways in which constitutional criminal procedure under the Fourth Amendment illustrates the paradigm. First, when it comes to defining a search, doctrine has waffled back and forth between security in things versus security in sentiment, with the latter winning out, as determined by Supreme Court Justices. Second, the Court has chosen to enforce the protections of the Fourth Amendment through consequentialist speculation about deterring future violations rather than redressing individual wrongs. This instrumentalizes rights rather than honoring them.

1. From Security in Things to Security in Expectations

The Fourth Amendment to the United States Constitution protects “persons, houses, papers, and effects, against unreasonable searches and seizures.”³⁵³ For nearly a century and a half, that text, when it came to searches, was interpreted to grant security in tangible things.³⁵⁴ Mid-twentieth century, the Court, concerned that the text might be underinclusive in its ability to protect liberty and privacy, shifted its approach to focus on expectations of privacy in *Katz*.³⁵⁵

Katz marked an evolution away from security in real things—referenced by the constitutional text—to security in human sentiment that comes and goes. This exemplifies paradigmatic nominalism about the nature of things and Humean sentimentalism about the nature of morality. Justice Black was correct: *Katz* wished away difficult thinking about the items in the text, and the reality of how those things might connote privacy in certain ways but not others, in favor of tethering boundaries to individual and societal expectations of privacy.³⁵⁶ Further, *Katz* located the boundaries of search doctrine in the ability of the Justices—the elites of all legal elites—to discern privacy expectations.³⁵⁷

353 U.S. CONST. amend. IV.

354 See, e.g., *Boyd v. United States*, 116 U.S. 616, 621–22 (1886).

355 See *Katz v. United States*, 389 U.S. 347, 351–53 (1967); *id.* at 361 (Harlan, J., concurring) (determining the definition of “search” by looking to subjective and objective expectations of privacy).

356 See *id.* at 364 (Black, J., dissenting) (questioning the methodology employed by the majority and Justice Harlan).

357 See MANNHEIMER, *supra* note 47, at 75. As will be discussed below, Mannheimer, in *The Fourth Amendment: Original Understandings and Modern Policing*, has forcefully demonstrated how the Fourth Amendment initially was understood to permit local control of federal officials who might abuse enforcement authority. See *infra* Section IV.B; MANNHEIMER, *supra* note 47, at 24.

While *Katz* initially enlarged the definition of a search and subjected governmental intrusions to additional scrutiny, later cases reversed the trend. This is due to multiple conditions, including, but not limited to, changing societal views on privacy and the widespread availability of invasive technologies. A half century later, changing societal mores relating to privacy now permit widespread surveillance under the same doctrine and some Justices of the Court have sought to return to security in things by deciphering their modern analogues.³⁵⁸ Those Justices have recognized the insecurity that reliance on *Katz*-style expectations provides; as such, they have sought to return to security in things.³⁵⁹ *Katz*'s effects—perhaps unforeseen at the time—now do little to disturb an age of surveillance.³⁶⁰

The *Katz* test exemplifies three aspects of the modern liberal paradigm mentioned above. First, it concedes skepticism about deciphering the reality of things and their relation to privacy. Rather than do the heavy lifting of determining whether constitutional text might be interpreted to include items not specifically mentioned, the Court added a new inquiry designed to encompass the text but not mirror it. Second, *Katz* seeks to resolve what is essentially a normative problem—the boundaries of privacy vis-à-vis enforcement of the criminal law—by grounding rights in human sentiment. Third, *Katz* doubled down on *judicial* determinations of the boundaries of search doctrine—with or without reference to the Fourth Amendment itself—under the cover of deference to popular sentiment.³⁶¹

The *Katz* Court was concerned that the constitutional text was outdated and therefore unable to handle technological intrusions engaged in by the government that seemed to breach conventional expectations of privacy.³⁶² In *Katz*, the government had bugged a public phone booth.³⁶³ Because neither the phone booth nor the phone line itself was a “person[], house[], paper[], [or] effect[]” of the phone caller, the seemingly private conversation would have fallen outside

358 See, e.g., *Carpenter v. United States*, 138 S. Ct. 2206, 2268 (2018) (Gorsuch, J., concurring); *United States v. Jones*, 565 U.S. 400, 420 (2012) (Alito, J., concurring in judgment) (analogizing the placement and use of a GPS on a modern car to a constable sneaking into a carriage).

359 See, e.g., *Jones*, 565 U.S. at 404–06. Contrast *Florida v. Jardines*, 569 U.S. 1, 6 (2013) (focusing on “curtilage of the house”), with *id.* at 12 (Kagan, J., concurring) (focusing on *Katz*, 389 U.S. 347).

360 See GRAY, *supra* note 96, at 78.

361 This resembles Deneen's observation that modern liberalism empowers an elite who claims to act in the best interest of the people, whether the people know it or not. See DENEEN, *supra* note 20, at 164; see also *supra* notes 288–93 and accompanying text.

362 U.S. CONST. amend. IV; see *Katz*, 389 U.S. at 353–59.

363 See *Katz*, 389 U.S. at 352.

the definition of a search under existing law at the time.³⁶⁴ That result seemed unfathomable to several Justices given that few people consider phone calls—by virtue of their connection to a third-party provider—to contain zero privacy.

In response, the *Katz* majority asserted that the caller maintained a privacy interest in the phone conversation.³⁶⁵ The majority's opinion has an unclear rationale; instead, the most important takeaway from *Katz* was Justice Harlan's concurring opinion. Justice Harlan identified two considerations for determining whether governmental activity amounted to a search, which now hinged on whether the person had a reasonable expectation of privacy in the place or thing intruded upon.³⁶⁶ A court must ask whether the individual had a subjective expectation of privacy and whether that expectation is one that society recognized as reasonable.³⁶⁷ If both prongs are met, then the government's action has violated the expectation and thereby engaged in a cognizable Fourth Amendment search, meaning justification is now required for the action to be reasonable.³⁶⁸

Initially, the *Katz* formulation broadened the range of governmental activity that might be labeled a search.³⁶⁹ But that was before technological advancements penetrated broader society, eliminating the gap between governmental capability and individual experience with the technology. The dangers of the *Katz* formulation thus became apparent in *Kyllo v. United States*, where Justice Scalia qualified the strength of the *Katz* test once individuals could regularly access the technological advancement used by the government.³⁷⁰ After *Kyllo*, the Court has had to reckon with the fact that cutting-edge technological advancement is no longer only possessed by governmental actors. This has resulted in remarkable shifts in societal expectations relating to privacy considering that millions now routinely share personal data, papers, and other information.

Contrast the approach in *Katz* with that taken by Justice Scalia in *United States v. Jones*, where the government attached a GPS device to a vehicle to chart its movements.³⁷¹ Instead of deciding the case on *Katz* grounds, four Justices agreed with Justice Scalia's analysis that the attachment and use of the device amount to a search given the status of

364 See *id.* at 353–54.

365 See *id.* at 352.

366 See *id.* at 361 (Harlan, J., concurring).

367 See *id.*

368 Cf. *id.*

369 See GRAY, *supra* note 96, at 78.

370 See *Kyllo v. United States*, 533 U.S. 27, 31–41 (2001) (referencing public use of the technology).

371 See *United States v. Jones*, 565 U.S. 400, 403 (2012).

the vehicle as an “effect.”³⁷² When pressed by Justice Alito, Justice Scalia aimed to clarify the nature of the definition of a search as the term is used in the Constitution, engaging with the notion that a search has a particular reality that must be deciphered, regardless of the method employed by the government.³⁷³ As such, the definition is tethered to the nature of the *governmental activity*, not the views of the person searched or the broader society at large, which can shift and change like a weather vane, based on conditions beyond the control of the individual.

The doctrinal move in *Katz* exemplifies modern paradigmatic views about the nature of things and the basis of rights. Whereas the constitutional text tethered concepts of liberty and privacy to the world of things, including their limits, *Katz* relocates those concepts to the minds and will of individuals and society at large, and as discerned by a subset of professionals. Further, *Katz* is an example of sentimentalist positivism working its way into constitutional law. The Court effectively shifted the focus away from security in things to security in sentiment and convention.

Nearly half a century later, sentiments regarding privacy have changed considerably and so have the protections once thought secure through *Katz*. Unsurprisingly, this is quite dissatisfying to privacy advocates.³⁷⁴ Moreover, it breeds a degree of anxiety about where search doctrine really stands. For example, the defendant in *California v. Greenwood* was shocked to learn that trash placed in opaque bags carried no privacy protection.³⁷⁵ Whether items in trash bags remain one’s “effects” or not after they leave the house and are placed on the curb is one question, but the Court chose to decide the case based on whether one’s expectations of privacy are reasonable.³⁷⁶ In other words, there is a sort of permanent instability—whether it comes through the status of various forms of eavesdropping and

372 *Id.* at 404 ; *see id.* at 404–11.

373 *See id.* at 411 n.8 (distinguishing the meaning of “search” in the regular sense from the constitutional sense (quoting *Oliver v. United States*, 466 U.S. 170, 183 (1984))).

374 *See, e.g.*, LAURA HECHT-FELELLA, BRENNAN CTR. FOR JUST., *THE FOURTH AMENDMENT IN THE DIGITAL AGE: HOW CARPENTER CAN SHAPE PRIVACY PROTECTIONS FOR NEW TECHNOLOGIES* 9 (2021).

375 *See California v. Greenwood*, 486 U.S. 35, 39–44 (1988).

376 U.S. CONST. amend. IV; *see Greenwood*, 486 U.S. at 39–44.

surveillance,³⁷⁷ curtilage,³⁷⁸ discarded trash,³⁷⁹ or the usage of different types of technology.³⁸⁰ The shifting sands of sentiment—*Katz*’s expectations, or better yet, the Court’s ability to determine expectations—keep everyone guessing and feeling a bit less secure than they would like.

2. The Exclusionary Rule

Although it was not always the case, the exclusionary rule is the primary route by which the Fourth Amendment is enforced. While there are reasons to criticize that development, that is not the focus of this Section. Instead, it describes three ways that the rule illustrates the modern liberal paradigm. First, by removing relevant evidence from the factfinder, it shares the modern, liberal notion that liberty and truth may be in conflict as a matter of law. This also suggests that enforcement of the criminal law and constitutional criminal procedure are intrinsically at cross-purposes.

Second, in practice, it illustrates liberal utilitarian premises by replacing important normative questions with pragmatic policy concerns. Third, while the exclusionary rule affords a remedy in the wake of a constitutional violation, it does so in a peculiar way. Instead of aiming to redress the effect of the violation on the person harmed, the rule only applies if excluding the evidence would deter similar violations *in the future*. The remedy is contingent on prospective, speculative calculation, by a judicial *elite*, about not-yet-realized future harms despite different subjective valuations by both sides.

a. The Rule’s Justification

The exclusionary rule was not always constitutional doctrine. Prior to *Mapp v. Ohio*,³⁸¹ there was much disagreement about the rule’s propriety, and the Court had specifically held against its application in state courts for various reasons.³⁸² One reason was that it foreclosed

377 See, e.g., *United States v. White*, 401 U.S. 745, 754 (1971) (plurality opinion) (holding that there is no expectation of privacy that a conversation will not be recorded by an informant); *Florida v. Jardines*, 569 U.S. 1, 11–12 (2013) (determining protections relating to dog sniffs in curtilages); *United States v. Knotts*, 460 U.S. 276, 285 (1983) (permitting a beeper placed in a car).

378 See, e.g., *Jardines*, 569 U.S. at 6–7; *United States v. Dunn*, 480 U.S. 294, 303–05 (1987) (discussing the limits of the “open fields” doctrine).

379 See, e.g., *Greenwood*, 486 U.S. at 39–44.

380 See, e.g., *United States v. Jones*, 565 U.S. 400, 404–11 (2012).

381 *Mapp v. Ohio*, 367 U.S. 643 (1961).

382 See, e.g., *Wolf v. Colorado*, 338 U.S. 25, 28–32 (1949) (refraining from incorporating the exclusionary rule against the states given that the rule was not “an essential ingredient of the right,” *id.* at 29, and given state rules of evidence), *overruled by*, *Mapp*, 367 U.S.

consideration of relevant evidence for accurate adjudication of the criminal matter at hand.³⁸³ In other words, the rule was thought to undercut the primary function of the criminal law: sorting the guilty from the innocent through factually accurate determinations.

Mapp tabled that consideration and was the first case to hold that the rule was an “essential ingredient” of the rights promised by the Fourth Amendment.³⁸⁴ In doing so, it impliedly communicated that the rights within the Fourth Amendment, when enforced, would be at odds with the truth-finding function of the rules of evidence and the purposes of the criminal law.³⁸⁵ This communicates a modern development of earlier liberal premises about the nature of law, its connection to reality, and the scope of its aspirations for accurate adjudication.

At the same time, *Mapp* was careful to not classify the exclusionary rule as a right itself. While the rule was “essential” to enforcing Fourth Amendment rights, it was not so essential that it was part of the right.³⁸⁶ The Court used the word *essential* but really meant *helpful*. The rationales provided by *Mapp* for the exclusionary rule confirm as much, as they are entirely consequentialist rather than related to the nature of the violation at issue. Instead of discussing the egregious nature of the constitutional violation or the resulting dignitary harms as grounds for the rule, the Court focused on harms to judicial integrity and the need to deter future constitutional violations.³⁸⁷ Later decisions dropped the first rationale, noting the rule is purely a prophylactic measure designed to deter constitutional violations.³⁸⁸ Individual defendants do not hold a right to exclusion.³⁸⁹ Rather, they can seek application of the exclusionary remedy if permitting introduction of the evidence would incentivize similar violations in the future.³⁹⁰ In short, the exclusionary rule is justified on a utilitarian deterrence-based rationale.³⁹¹ The defendant’s case is just the instrument.

643; *Weeks v. United States*, 232 U.S. 383 (1914) (discussing enforcement of the Fourth Amendment by federal courts), *overruled by*, *Elkins v. United States*, 364 U.S. 206 (1960).

383 *See Wolf*, 338 U.S. at 31–33.

384 *Mapp*, 367 U.S. at 656.

385 *See id.* at 657–59.

386 *Id.* at 657 (noting “that the exclusionary rule is an essential part of . . . the Fourth and Fourteenth Amendments”).

387 *See id.* at 657–59.

388 *See, e.g., Herring v. United States*, 555 U.S. 135, 142 (2009).

389 *See id.*

390 *See id.* at 141 (“[T]he exclusionary rule is not an individual right and applies only where it ‘result[s] in appreciable deterrence.’” (second alteration in original) (quoting *United States v. Leon*, 468 U.S. 897, 909 (1984))); *see also Leon*, 468 U.S. at 908–09.

391 *See Herring*, 555 U.S. at 141 (“[W]e have focused on the efficacy of the rule in deterring Fourth Amendment violations in the future.” (first citing *United States v. Calandra*, 414 U.S. 338, 347–55 (1974); and then citing *Stone v. Powell*, 428 U.S. 465, 486 (1976))).

This illustrates the second point mentioned above: The exclusionary rule replaces normative concerns about the nature of constitutional violations and the harms they cause—both publicly and to individuals—with pragmatic considerations where courts are tasked with literally trying to keep the peace and not much else. While alternative remedial solutions to constitutional violations exist, they are sparingly pursued, and entangled with other doctrines, such as the protections afforded by qualified immunity.³⁹² That is emblematic of the modern liberal premise that seeks to remove significant normative questions from the realm of the state, while impliedly communicating normative commitments through purportedly neutral determinations.

b. The Rule in Practice: Balancing of Harms, Not Truth

The last point is evidenced by the deterrence rationale underlying the exclusionary rule, which guides how courts determine whether to apply it in concrete cases. Because deterring future constitutional violations determines whether the rule applies in an individual case before a court, the doctrine focuses on the mindset of the wrongdoer who committed the purported constitutional violation.³⁹³ This jibes perfectly with classic deterrence-based philosophical thinking, whether articulated by Locke or Bentham, and presumes rational calculation by the actors involved.³⁹⁴ It also is not neutral, despite its claim to be so.

Courts are tasked with balancing harms relating to deterrence, meaning the metric is entirely instrumentalist.³⁹⁵ Utilitarian in character, it aims to resolve competing calculations of deterrence with reference to culpability concepts built on the liberal economic belief in the rational actor. Resolving these questions runs into a classic problem confronting utilitarian thinking: how to reconcile competing valuations of the ends. Unsurprisingly, the defense bar has one idea, prosecutors another, and courts are stuck in the middle.

Courts have settled on examining the state of mind of the officer who committed the violation.³⁹⁶ The higher the amount of willfulness,

392 See RONALD JAY ALLEN, JOSEPH L. HOFFMANN, DEBRA A. LIVINGSTON & WILLIAM J. STUNTZ, *CRIMINAL PROCEDURE: INVESTIGATION AND RIGHT TO COUNSEL* 683–750 (2d ed. 2005).

393 See *Herring*, 555 U.S. at 143 (noting that justifications for enforcing the exclusionary rule “var[y] with the culpability of the law enforcement conduct”).

394 See LOCKE, *supra* note 166, at 124–25; JEREMY BENTHAM, *AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION* chs. I, XV (Batoche Books 2000) (1781).

395 See *Herring*, 555 U.S. at 141.

396 See *id.* at 143.

the more likely it is that the exclusionary rule will apply.³⁹⁷ This is because an intentional actor seems more capable of being deterred than a negligent one, notwithstanding that regular torts conceive negligence standards to foster deterrence.³⁹⁸ Nonetheless, intentional violations of the Fourth Amendment result in exclusion, whereas unintentional, negligent, and good faith violations generally do not.

Utilizing the exclusionary rule as the primary way to enforce constitutional violations has led to little real-world accountability for constitutional wrongs. As Mannheimer has illustrated, and as will be discussed below in Section IV.B, the original means to redressing constitutional violations under the Fourth Amendment was through customary state law, developed over centuries, with litigation venues that did not table the search for truth.³⁹⁹ They were not concerned with speculative judgments about the prospective deterrent value of applying the exclusionary rule. Adjudication was about redressing the constitutional wrong that had occurred, not speculating as to how to prevent those that might in the future.⁴⁰⁰

C. *The Rise of Plea Bargaining: Transactional Resolution at all Costs*

Plea bargaining is, by far, the dominant mode of criminal adjudication in all federal and state criminal cases. Approximately ninety-five percent of all cases are resolved via plea.⁴⁰¹ This was not always the case; prior to the mid-twentieth century, most criminal cases were resolved through jury-based adjudication.⁴⁰² In fact, as will be discussed in Section IV.C, this was the preference of nearly everyone associated with the criminal system, including judges.⁴⁰³ The Founders set up institutional arrangements to permit that preference to continue. However, nearly 250 years later, those arrangements have been abandoned.

The plea-bargaining norm represents the modern liberal obsession with contract-based relationships as the ultimate symbol of

397 See *id.* (“[A]n assessment of the flagrancy of the police misconduct constitutes an important step in the calculus . . .” (quoting *United States v. Leon*, 468 U.S. 897, 911 (1984))).

398 See *id.* at 143–44. But see *id.* at 153–54 (Ginsburg, J., dissenting) (arguing that negligent activity may be deterred).

399 See MANNHEIMER, *supra* note 47, at 88–89; see also *infra* Section IV.B.

400 See *infra* Section IV.B. To be clear, the argument here is not about whether deterring future violations is important. Obviously it is. The observation is that the normative basis for the exclusionary rule exemplifies the paradigm’s focus.

401 See LINDSEY DEVERS, BUREAU OF JUST. ASSISTANCE, U.S. DEP’T OF JUST., PLEA AND CHARGE BARGAINING: RESEARCH SUMMARY 1 (2011).

402 See HESSICK, *supra* note 51, at 14 (noting fifteen and thirty-five percent plea rates in New York City and Boston respectively around 1840).

403 See *infra* Section IV.C.

legitimacy, whether political, due to underlying premises relating to “equal liberty,” or economic, due to the pursuit of efficient transactional outcomes. The world of criminal adjudication developed into a transactional frontier and, ultimately, a marketplace.⁴⁰⁴

1. The Ideological Underpinnings of Plea Bargaining

Many scholars have studied the historical rise of plea bargaining and sought to identify probable contributing factors to its normalization.⁴⁰⁵ This Section cannot possibly recount them all. Instead, it argues that the ideological paradigm allowed for the transformation of adjudication into something different entirely.⁴⁰⁶

Hessick, in *Punishment Without Trial*, details how approximately a century after the Founding, judges started to reward defendants who pled guilty with lighter sentences.⁴⁰⁷ The change in judicial behavior introduced a different calculation for defendants who now had to consider whether exercising their right to a jury trial would have negative ramifications.⁴⁰⁸ Prosecutorial behavior began to change as well; prosecutors “began to actively incentivize or pressure defendants into giving up the right to a trial.”⁴⁰⁹ Prior to these changes, judges, including Supreme Court Justices, generally were skeptical of guilty pleas.⁴¹⁰ And in the early twentieth century, when these practices became more public, professionals and scholars widely criticized them as too lenient and fostering crime.⁴¹¹ Notably, criticism was directed at the negative effects of plea bargaining on controlling crime rather than the absence of a constitutional right once thought essential to preserving liberty.⁴¹² Additionally, critics lamented how prosecutors essentially had been handed the power to nullify legislative crime policy.⁴¹³

There are several ways that the plea-bargaining norm illustrates the modern liberal paradigm. First, plea bargaining illustrates the

404 See Bibas, *supra* note 318, at 2467.

405 See, e.g., HESSICK, *supra* note 51, at 11–34; Alschuler, *supra* note 51, at 16–26; BIBAS, *supra* note 11, at 18–20; Langbein, *supra* note 51, at 265–70.

406 As mentioned above, the claim here is not causative. Instead, it is that the paradigm easily *permits* developments in the direction of plea bargaining.

407 See HESSICK, *supra* note 51, at 15–16.

408 See *id.*

409 *Id.* at 15.

410 See *id.* at 14–17 (describing the shift in judicial behavior, as well as skepticism of prosecutorial bargaining to dismiss charges).

411 See *id.* at 18 (discussing William Ortman, *When Plea Bargaining Became Normal*, 100 B.U. L. REV. 1435, 1460 (2020)).

412 See *id.* at 19 (“But the most pervasive criticism . . . [was] that defendants were not being held responsible for their crimes and they were getting less punishment than they deserved.”).

413 See *id.*

premise that assigns ultimate legitimacy to contractual-style exchanges to order human affairs, whether politically or economically.⁴¹⁴ The construction of the contract, rather than its connection to substantive justice, determines legitimacy.

On the surface, this seems to resemble precisely what the modern liberal idea lionizes: free choice for the parties. Over time, however, and much like Deneen suggests in his critique, it is the *state's freedom of choice* to approve charges and cases as it sees fit that has been preserved.⁴¹⁵ While the criminal law has expanded and the thirst for efficiency has increased, few would suggest that defendants have much of a choice; instead, it is the prosecutors who hold nearly all the cards.⁴¹⁶

Plea bargaining also is consistent with the efficiency ethic that pervades modern liberal thinking. Pleas can be an efficient way to resolve disputes, especially in a marketplace with finite resources, and actors have come to think of them that way.⁴¹⁷ But the lack of resources argument cannot explain normalization entirely considering that there are more federal judges, and with fewer trials, than fifty years ago, and resources have stayed the same, if not increased.⁴¹⁸ Instead, as Hessick suggests, plea bargaining took communal criminal adjudication—seemingly designed to be inefficient and based on decisional methodology directly contrary to notions of efficiency, namely morality—and turned it into a marketplace for modern faith in efficiency and expertise to reign.⁴¹⁹ Put simply, juries might be unpredictable, unsophisticated, uneducated, and, as some readily admit, capable of irrational action in a modern sense.⁴²⁰ The paradigm cannot tolerate those results.⁴²¹ As she writes, the present system “makes punishment cheap, simple, and predictable.”⁴²²

Ironically, however, the quest for efficiency permits space for the consolidation of state power in the name of expertise and progress.

414 See Robert E. Scott & William J. Stuntz, *Plea Bargaining as Contract*, 101 YALE L.J. 1909 (1992).

415 See DENEEN, *supra* note 20, at 41.

416 See, e.g., Paul Heaton, Sandra Mayson & Megan Stevenson, *The Downstream Consequences of Misdemeanor Pretrial Detention*, 69 STAN. L. REV. 711 (2017) (discussing incentives to plead guilty).

417 See Bibas, *supra* note 318, at 2465–66.

418 See HESSICK, *supra* note 51, at 26.

419 See *id.* (“The number of jury trials may also have decreased because the very idea of juries became inconsistent with our ideas about modern government, progress, and expertise.”).

420 See *id.* at 26–27.

421 See *id.* at 28 (noting how experts and professionals started to see juries “as an antiquated institution that were too quick to acquit defendants,” “inefficient,” and “made up of amateurs”).

422 *Id.* at 33.

Whereas plea bargaining suggests voluntary resolution of the dispute by individual wills sanctioning an agreement, it is *the state's will* that continues to gain power, effectively shattering the foundational premise about equal liberty legitimizing outcomes.⁴²³ The system has evolved from jury-focused adjudication with few pleas to majority pleas constructed by the parties to pleas largely *determined and managed* by prosecutors themselves.⁴²⁴ And as the critics of prosecutorial power mentioned in Part I note, prosecutorial dictates are not necessarily any more “rational” than the jury-based decisionmaking that was forsaken.⁴²⁵

2. Costs: Insider Adjudication, Accuracy, and Truth

The modern liberal premises that underwrite the plea-bargaining norm come at great cost and, in fact, result in choice asymmetries for the parties. The first cost is that plea bargaining turns public criminal adjudication into a mostly private transaction, undercutting opportunities for norm construction. Even worse, it has the veneer of the idealized transaction constructed by equal parties when the terrain is far from fair. Second, plea bargaining resembles the nominalist modern liberal tendency: While pleas require a factual basis, case outcomes often disconnect factual guilt from legal guilt.⁴²⁶ Finally, by embracing the transactional paradigm, constitutional doctrine relating to the validity of pleas focuses almost entirely on voluntariness rather than substantive justice.⁴²⁷

Plea bargaining displaces community adjudication and norm construction with professional and insider preferences. As Judge Bibas chronicled, insiders essentially construct a market with certain prices for different types of cases.⁴²⁸ In theory prosecutors might aim to represent communal preferences in their approach towards cases. There are plenty of theories of prosecutorial decisionmaking supporting that normative case,⁴²⁹ and the Supreme Court itself has ratified that view

423 See *id.* at 48–55 (discussing power imbalances in bargaining).

424 See *id.* at 11–34.

425 *Id.* at 28; see *id.* at 28–32 (noting how prosecutorial “policies are just orders that come down from on high; they are not based on rigorous empirical study,” *id.* at 29); *supra* notes 100–12 and accompanying text.

426 See Johnson, *supra* note 53, at 857.

427 See Owen M. Fiss, *Against Settlement*, 93 YALE L.J. 1073, 1075 (1984) (noting the shortcomings of settlement given their displacement of adjudicatory justice).

428 See Bibas, *supra* note 318, at 2506 n.177.

429 See, e.g., Bruce A. Green & Rebecca Roiphe, *A Fiduciary Theory of Prosecution*, 69 AM. U. L. REV. 805 829 (2020); Jeffrey Bellin, *Theories of Prosecution*, 108 CALIF. L. REV. 1203 1206 (2020); cf. Murray, *supra* note 322, at 393.

by classifying prosecutors as ministers of justice.⁴³⁰ But the reality is that by the time those preferences are filtered down to line prosecutors,⁴³¹ subjected to incentive structures and resource pressures,⁴³² and confronted with demographic and democratic realities,⁴³³ insider preferences within the machinery of criminal justice dominate case outcomes. Adjudication becomes a matter of negotiation rather than fact-finding and normative guilt or innocence determinations.⁴³⁴

As McConkie has outlined, this effectively replaces communal adjudication with insider adjudication, thereby undercutting the ability of communities to demarcate the boundaries of criminal law and punishment.⁴³⁵ Joshua Kleinfeld has noted how this reality gives unaccountable bureaucracies this most important adjudicatory role, permitting internal structures that make it more difficult to check punitive excess.⁴³⁶ Some scholars, including Josh Bowers, Daniel Epps, and William Ortman, have argued for injecting jury-style adjudication into various phases of the criminal system to counteract these tendencies.⁴³⁷

The Supreme Court's approach to assessing the validity of pleas is consistent with the transactional-ethic characteristic of the modern liberal paradigm. Essentially, the Court has said that a plea is valid if a defendant makes it knowingly, voluntarily, and intelligently (KIV).⁴³⁸ The rule—in a very Rawlsian sense—aims to protect choice rather than any particular good: namely, the accuracy of the adjudication.⁴³⁹ As Fukuyama notes, “The act of choice came to be seen as something

430 See *Berger v. United States*, 295 U.S. 78, 88 (1935).

431 Green's work is helpful here. See Bruce Green, *The Price of Judicial Economy in the US*, 26 INT'L J. LEGAL PRO. 105, 108 (2019). See generally Bruce Green, FORDHAM SCH. OF L., <https://www.fordham.edu/school-of-law/faculty/directory/full-time/bruce-green/> [<https://perma.cc/HKX4-KTHE>] (last visited May 27, 2026).

432 See BRUCE FREDERICK & DON STEMEN, *THE ANATOMY OF DISCRETION: AN ANALYSIS OF PROSECUTORIAL DECISION MAKING—TECHNICAL REPORT* (2012). There also is evidence that line prosecutors and defense attorneys are troubled by their roles as case managers. See, e.g., Nat'l Dist. Att'ys Ass'n, *NDAA Unveils Eye-Opening National Prosecutor Retention Survey Findings*, MEDIUM (July 9, 2024), <https://ndaajustice.medium.com/ndaajustice-unveils-eye-opening-national-prosecutor-retention-survey-findings-1aa4307e728c> [<https://perma.cc/4PM3-LFT4>].

433 See STUNTZ, *supra* note 9, at 7, 30 (referencing county versus urban governance).

434 See HESSICK, *supra* note 51, at 166–67.

435 McConkie, *supra* note 17, at 1051; see also Fiss, *supra* note 427, at 1078–82 (discussing the absence of “authoritative consent,” *id.* at 1079).

436 See Kleinfeld, *supra* note 17, at 1402.

437 See, e.g., Bowers, *supra* note 246, at 335–43; Daniel Epps & William Ortman, *The Informed Jury*, 75 VAND. L. REV. 823, 858 (2022).

438 See *Boykin v. Alabama*, 395 U.S. 238, 240–44 (1969).

439 Cf. FUKUYAMA, *supra* note 22, at 53 (“[Rawls] argued . . . that justice is prior to the good—that is, that rules protecting choice of goods have priority over any particular good that individuals seek.”).

separate from and more valuable than the substance of what was being chosen.”⁴⁴⁰

The problem, of course, and as others have noted, is that this rule is quite hollow in practice, which resembles, in many respects, the deterioration of the idealized freedom underlying traditional liberal thinking.⁴⁴¹ First, despite the Court’s suggestion in *Bordenkircher v. Hayes*, the parties are not equal.⁴⁴² The defendant’s main bargaining chip is the ability to push for a trial whereas, given punitive sentencing codes, the state can threaten lengthy incarceration.

Modern constitutional doctrine, by largely focusing on minimal standards of voluntariness in achieving the result rather than substantive justice in adjudication, reflects as much. In *Santobello v. New York*, the Supreme Court, despite centuries-long skepticism of the practice, effectively encouraged plea bargaining by upholding an agreement that was favorable to a defendant.⁴⁴³ While a win for defendants in that individual case, as Hessick notes, the Supreme Court, in *Brady v. United States*, hollowed the idea of voluntariness to basically mean consent given regardless of the degree of pressure faced by the defendant.⁴⁴⁴ Thus, the plea-bargaining norm resembles the modern liberal desire for choice—even if self-destructive—in ordering human affairs. But the appearance of the capacity to make the choice is what is honored, rather than examining where that choice leads.⁴⁴⁵

Thus, the Court’s doctrine essentially relegates questions about the normative validity of the plea to secondary at best. The KIV standard asks whether the defendant is aware he is making a plea and that it will result in a conviction and that the plea is uncoerced.⁴⁴⁶ But there is no constitutional requirement that the plea accurately accords with the facts underlying the charges.

This illustrates the third major cost of the effects of the modern liberal paradigm: the severing of factual and legal guilt because most defendants plead to charges that do not totally capture the nature of

440 *Id.* at 50.

441 See, e.g., Nirej Sekhon, *Willing Suspects and Docile Defendants: The Contradictory Role of Consent in Criminal Procedure*, 46 HARV. C.R.-C.L. L. REV. 103, 118–23 (2011).

442 But see *Bordenkircher v. Hayes*, 434 U.S. 357, 362–63 (1978) (noting that the parties “arguably possess relatively equal bargaining power,” *id.* at 362 (quoting *Parker v. North Carolina*, 397 U.S. 790, 809 (1970) (Brennan, J., dissenting))).

443 See *Santobello v. New York*, 404 U.S. 257, 262–63 (1971); HESSICK, *supra* note 51, at 22 (referencing how *Santobello* “encouraged” plea bargaining for the first time (quoting *Santobello*, 404 U.S. at 260)).

444 See *Brady v. United States*, 397 U.S. 742, 753 (1970); HESSICK, *supra* note 51, at 21–22.

445 Cf. FUKUYAMA, *supra* note 22, at 51–53 (describing Kantian choice theory).

446 See *Boykin v. Alabama*, 395 U.S. 238, 242–44 (1969).

the case.⁴⁴⁷ The Supreme Court has sanctioned charge bargaining as constitutionally permissible.⁴⁴⁸ Johnson has detailed this phenomenon at length, referring to these outcomes as “fictional pleas.”⁴⁴⁹ Scores of pleas disconnect factual and legal guilt to accomplish case processing in an efficient manner.⁴⁵⁰ Of course, this may work to the advantage of some defendants who avoid more serious charges or lengthier sentences.

At the same time, it has a broad systemic effect because it signals that the accuracy of the disposition is largely irrelevant. What matters is that the case was *resolved* via something resembling bargained-for-exchange, not whether right or justice was accomplished. This development resembles the nominalist shift away from discovering the reality of things.⁴⁵¹ Pleas resolve through *naming* rather than *adjudicating*.⁴⁵² For some, this is a tragedy given the degree of individual involvement in the deception; judges, tasked with assessing the validity of pleas, accept the prosecutorial and defense representation that inducement was not part of the process when everyone knows the motivations for pleas are reduced sentences.⁴⁵³ Whether a tragedy or not, it represents a system comfortable with inaccuracy in a place that should prioritize getting to the truth.⁴⁵⁴ It should not be a surprise, however, that truth-based adjudication has been replaced in this fashion given the nominalist premises mentioned in Part II.⁴⁵⁵

447 See, e.g., Jenia I. Turner, *Transparency in Plea Bargaining*, 96 NOTRE DAME L. REV. 973, 995–97 (2021).

448 See, e.g., *Padilla v. Kentucky*, 559 U.S. 356, 373 (2010) (referencing creative plea bargaining to avoid immigration consequences).

449 Johnson, *supra* note 53, at 855 (defining a fictional plea as “one in which a defendant pleads guilty to a crime he has not committed, with the knowledge of the defense attorney, prosecutor, and judge”).

450 See *id.* at 857, 863.

451 See, e.g., Craig A. Carter, *Ideas Have Consequences: Why the Rise of Nominalism Is Such a Big Deal*, CREDO MAG. (Oct. 21, 2021), <https://credomag.com/2021/10/ideas-have-consequences-why-the-rise-of-nominalism-is-such-a-big-deal/> [<https://perma.cc/7LGS-76GE>]; see also *supra* Section II.B.

452 See HESSICK, *supra* note 51, at 166 (“Plea bargaining encourages lies because it replaces fact-finding with compromise.”).

453 See *id.* at 168 (discussing deception within plea colloquies when everyone knows what is really going on).

454 See *id.* at 166 (“It . . . encourages lies in the courtroom—a place where people are supposed to tell the truth.”).

455 See *supra* Section II.B.

D. Punishment Theory and Sentencing: The Logic of Self-Interest and Quantification

Modern punishment theory and sentencing policy are uniquely focused on the paradigmatic concerns mentioned above, namely, the purported maximization of individual freedom for non-wrongdoers through the efficient promotion of public safety. This goal has, depending on the era, been used to justify severe sanctions—like incapacitation—and more lenient sentencing regimes focused on rehabilitation and alternative modes of punishment. There are two common threads.

First, the paradigm generally rejects retributivist justifications and aims as irrational, outdated, and backward. Even the most famous modern retributivist arguments, such as those presented by H.L.A. Hart, Michael Moore, John Finnis, and Paul Robinson, are essentially instrumentalist spins on the relevance of retribution. Second, given its consequentialist premises, the paradigm favors quantitative methodologies for determining punishment and sentencing policy. Modern scholarship is driven by the quest for efficiency in criminal justice policy. Crime and punishment are treated as actuarial problems to be managed by experts.⁴⁵⁶

1. Modern Punishment Theory

Legal thinkers have sought to develop punishment theory for millennia. Most theories are either retributivist or utilitarian, with several modern spins on both general classifications. Of course, this Article cannot catalogue them all, including critics like Michel Foucault, who, using modern skepticism, question whether punishment can be justified at all.⁴⁵⁷ The modern paradigm is the seedbed for these theories. Bentham's utility principles, Foucault-style criticism,⁴⁵⁸ and even modern retributivism all reflect the paradigm.

⁴⁵⁶ See LEWIS, *supra* note 60, at 289.

⁴⁵⁷ See PETER KARL KORITANSKY, THOMAS AQUINAS AND THE PHILOSOPHY OF PUNISHMENT 2–3 (2012). For instance, as Peter Koritansky tells it, two influential modern thinkers—Friedrich Nietzsche and Foucault—deny punishment even has a reality. *See id.* Instead, they argue that punishment is a descriptive term for either delight in the imposition of suffering or the means by which social control is accomplished. *See id.* Their theories are uniquely modern as well in that they are built from nominalist premises, not to mention exceptional skepticism, except about the validity of their own observations. *See id.* at 3; *see also supra* Section II.B.

⁴⁵⁸ The hollowing of punishment into a game of utility was understandably considered by some to involve little more than power dynamics finding their expression in institutional arrangements. *See* MICHEL FOUCAULT, DISCIPLINE AND PUNISH: THE BIRTH OF THE PRISON 138 (Alan Sheridan trans., Vintage Books, 2d ed. 1995) (1975). This is the core critique of a figure like Foucault, who doubts that punishment has any intrinsic nature. *See*

a. The Obsession with Measured Utility

Because the first organizing principle of the paradigm is liberty, any restraints on liberty must have sufficient justification. This justification became the efficient maximization of public safety. Bentham-style utilitarianism and its variations largely underwrite this approach, focusing on deterrence, rehabilitation, or incapacitation.⁴⁵⁹ Interestingly, perhaps given the inherent subjectivism plaguing utilitarianism, this approach has resulted in periods of extremely harsh punishment and more lenient approaches. Put differently, the separation of punishment and justice permits quite a bit of rationalization, permitting the instrumentalization and alienation of persons, whether for good or bad.

Bentham's theory of utility maximization stems from his acceptance of the notion that human beings are self-interested agents at their core, seeking pleasure and avoiding pain.⁴⁶⁰ Similarly, Lockean punishment theory prioritizes self-preservation as the "sole purpose of the right to punish."⁴⁶¹ As such, the aggregation of individual goods replaces a robust notion of the common good.⁴⁶² Further, the social fabric is, at best, an instrumental good for private good.⁴⁶³

The principle of utility, which serves as the basis of Bentham's ethical system, also underwrites what punishment *is*. Punishment, per Bentham, is a contrived response on the part of political society to maximize happiness.⁴⁶⁴ Its justification hinges on its ability to maximize the happiness of the community. An underlying assumption is that utility

KORITANSKY, *supra* note 457, at 2–3. Instead, it is the product of societal and individual forces that aim to control. *See id.* Punishment, in other words, is just a *name* for state-sanctioned violence. *See id.*

459 *See* KORITANSKY, *supra* note 457, at 11 (“[U]tilitarians insist that the moral and political justification of punishment is exclusively derived from the beneficial consequences that punishment can promote, such as rehabilitation, deterrence, and the protection of society from a dangerous criminal.”).

460 *See* BIBAS, *supra* note 11, at 14 (“Utilitarians such as . . . Bentham saw criminal law as a mechanism to inflict enough pain to outweigh the pleasure of crime and so deter rational wrongdoers.”).

461 PESTRITTO, *supra* note 34, at 77 (emphasis omitted) (discussing the Lockean theory of punishment).

462 *See* BENTHAM, *supra* note 394, ch. I, ¶ I.

463 *See* KORITANSKY, *supra* note 457, at 14–15.

464 *See* BENTHAM, *supra* note 394, ch. XII, § 2, ¶ XXXVI (referencing punishment as “artificial consequence, annexed by political authority” (emphasis omitted)).

maximization and retribution are fundamentally in conflict.⁴⁶⁵ Cesare Beccaria thus favored punishment for deterrence purposes.⁴⁶⁶

Vincent Chiao's *Criminal Law in the Age of the Administrative State* is a good example of this approach.⁴⁶⁷ Chiao suggests that retributive theories, by focusing on responding to wrongdoing, are insufficiently concerned with preventing wrongdoing in the first place, which is actually necessary to maximize public welfare.⁴⁶⁸ Hence, the subgoals of the modern utilitarian punishment paradigm are either deterrence, incapacitation, or rehabilitation, which, so the argument goes, are connected to ensuring public welfare *in the future*. Put a bit differently, the paradigm embraces a "new science of politics" with "success . . . measured in purely quantitative terms."⁴⁶⁹

Given the individualist roots of Bentham's theory, he ironically admits that punishment is primarily about controlling action, whether through "reformation,"⁴⁷⁰ "disablement,"⁴⁷¹ or "in the way of example."⁴⁷² Peter Koritansky describes this as a penology centered on "threat."⁴⁷³ Bentham did "dream[] up the Panopticon."⁴⁷⁴ The critique about modern liberalism actually *undercutting* freedom seems apt here, given the sorts of rationalizations that might occur under a pure utilitarian theory.

Recognizing these problems, the most famous twentieth-century legal philosopher—H.L.A. Hart—attempted to reinject desert as an aim of punishment to restrain the worst utilitarian impulses.⁴⁷⁵ Hart's theory, while rejecting retributive justifications, understands desert "as a limitation upon the means by which the general justifying aim of punishment may be pursued."⁴⁷⁶ In other words, desert is necessary to restrain and moderate Bentham's logic, but not categorically reject it.

465 See, e.g., Leora Dahan Katz, *The Dogma of Opposing Welfare and Retribution*, 29 LEGAL THEORY 2, 5 (2023) (describing contemporary critiques of retribution as backward and opposed to public welfare).

466 See BIBAS, *supra* note 11, at 14.

467 See VINCENT CHIAO, *CRIMINAL LAW IN THE AGE OF THE ADMINISTRATIVE STATE* 32 (2019).

468 See *id.* As Katz argues, Chiao seems to mistake retributivist theories for limited theories of state responsibility. See Katz, *supra* note 465, at 7–9. But not all retributivist theories coincide with a notion of limited governmental powers. See *id.* at 9 ("[T]he commitment to retributive punishment does not ground a commitment to a minimal state.").

469 REILLY, *supra* note 26, at 190.

470 BENTHAM, *supra* note 394, ch. XV, ¶ XIV (emphasis omitted).

471 *Id.* (emphasis omitted).

472 *Id.* ch. XV, ¶ IX.

473 KORITANSKY, *supra* note 457, at 19.

474 BIBAS, *supra* note 11, at 14.

475 See H.L.A. HART, *Punishment and the Elimination of Responsibility*, in PUNISHMENT AND RESPONSIBILITY: ESSAYS IN THE PHILOSOPHY OF LAW 158, 181 (2d ed. 2008).

476 KORITANSKY, *supra* note 457, at 31.

Desert, in short, is relevant because it is *useful*, not because it is right.⁴⁷⁷ This results in a disjointed theory that wishes for the benefits of desert as a purpose without acknowledging its demands as a justification.⁴⁷⁸

b. Modern Instrumentalist Desert

The modern paradigm manifests in the most well-known contemporary retributivist theories. Examples include theories presented by Herbert Morris, John Finnis, and Paul Robinson.

For instance, Morris presented his “unfair advantage” theory of punishment, which builds from the idea that modern legal rules result in benefits and burdens.⁴⁷⁹ The criminal law imposes a burden on subjects by requiring “self-restraint by individuals over inclinations that would, if satisfied, directly interfere or create a substantial risk of interference with others.”⁴⁸⁰ Immediately, one can see the influence of notions of baseline liberty for atomistic individuals otherwise in conflict. In Morris’s account, criminal acts involve an individual who “renounces a burden” that “others have voluntarily assumed,” resulting in “an advantage which others, who have restrained themselves, do not possess.”⁴⁸¹

Morris’s theory is basically built from the fixation on equal liberty and the need for the state to guarantee it. Or, as Koritansky puts it, Morris’s social arrangement consists of individuals in a cooperative endeavor where the cardinal rule is mutual exchange that must not be violated.⁴⁸² For Morris, this balancing of benefits and burdens forms the basis for a retributivist theory of punishment.⁴⁸³ Finnis’s theory is quite similar; he notes how “[i]f free-willing criminals were to retain this advantage, the situation would be as unequal and unfair as it would be for them to retain the tangible profits of their crimes.”⁴⁸⁴ Desert is

477 See *id.* at 31–32 (noting that Hart’s principle permits desert “only to the extent that it prevents criminals from being punished more than they deserve, but he rejects the parallel insistence that criminals must be punished so *much as* they deserve,” *id.* at 32).

478 See *id.* at 37 (“How is it consistent to condemn punishments that inflict more suffering than what the criminal deserves without acknowledging that they do in fact deserve some degree of punishment? . . . What Hart fails to consider is the inseparability between saying that criminals should not receive more punishment than what they deserve and saying that they deserve some amount of punishment.”). Koritansky cites John Morison, *Hart’s Excuses: Problems with a Compromise Theory of Punishment*, in *THE JURISPRUDENCE OF ORTHODOXY: QUEEN’S UNIVERSITY ESSAYS ON H.L.A. HART* 117, 125 (Philip Leith & Peter Ingram eds., 1988), for these arguments. See KORITANSKY, *supra* note 457, at 37 & n.37.

479 Morris, *supra* note 57, at 478.

480 *Id.* at 477.

481 *Id.*

482 See KORITANSKY, *supra* note 457, at 50.

483 See *id.*

484 JOHN FINNIS, *NATURAL LAW & NATURAL RIGHTS* 263 (2d ed. 2011).

useful for resetting the balance of benefits and burdens, however calculated *ex ante*. Koritansky notes how this theory “rebuilds retributivism upon the firm foundation of the liberal state.”⁴⁸⁵

This sort of thinking ultimately becomes wedded to contemporary empiricism and quantitative methodologies. It is perhaps best expressed in Robinson and John Darley’s arguments in *The Utility of Desert*.⁴⁸⁶ They argue that sentencing mindful of desert principles furthers the utilitarian purposes of punishment, like deterrence, and overall legitimacy of the system.⁴⁸⁷ Because this is a democratic legal system, and mindful of critics, Robinson argues that the typical charge leveled against retribution—that it is too mystical and irrational to be useful—can be overcome.⁴⁸⁸ His empirical work shows that intuitions and sentiments about the quantity of punishment are shared in a cardinal and ordinate way.⁴⁸⁹ In other words, there is empirical evidence that majorities agree about the big sentencing questions, adding a democratic flavor to desert’s utility.⁴⁹⁰

2. Examples of Modern Policy Rationalizations

The obsession with utilitarian purposes manifests in contemporary methodologies used to argue for criminal justice reform. Efficient welfare maximization is the goal. One might call this the economization of criminal justice. For some, aiming to reform offenders, through rehabilitative processes, is the best investment. For others, locking up dangerous persons to minimize future crime is wisest. A third group aims to signal the costs of crime for offenders, deterring bad behavior. For all, accurately quantifying risk determines the credibility of one’s rationalizations for different policy directions.

While it is impossible to catalogue all the work put forth in this space, a few recent examples illustrate the point. First, consider the Model Penal Code, which serves as the primary starting point for code-based criminal law reform in the United States.⁴⁹¹ Michael Tonry has argued how the original Code prioritized crime prevention rather than

485 KORITANSKY, *supra* note 457, at 53. Later, Koritansky notes how “the political philosophy underlying the unfair advantage theory is generally derived from the liberal tradition and is loosely based upon a broad version of the social contract theory. . . . [W]e may well wonder if the problem with contemporary retributivism is the political philosophy from which it is derived.” *Id.* at 66–67.

486 Paul H. Robinson & John M. Darley, *The Utility of Desert*, 91 NW. U. L. REV. 453 (1997).

487 *See id.*

488 *See* Robinson, *supra* note 58, at 32.

489 *See id.* at 33–34.

490 *See id.*

491 MODEL PENAL CODE (A.L.I. 1985).

justice.⁴⁹² While Robinson has argued that later reforms reintroduced retributive concepts like proportionality and blameworthiness,⁴⁹³ Katz notes how modern sentencing policy still defaults towards utilitarian objectives.⁴⁹⁴ For instance, the U.S. Sentencing Guidelines are known and have been criticized for their incapacitative tendencies, focusing on “dangerousness,” “criminal record[s],” and other nonretributive details.⁴⁹⁵ And a quick glance at the U.S. Sentencing Commission’s website nowadays illustrates the thirst for data-based arguments that can efficiently reform perceived punitive excesses.⁴⁹⁶

Judge Bibas and Stuntz also illustrated how by the twentieth century, sentencing aims fluctuated between rehabilitation and incapacitation, which implicitly conveyed the “fundamental shape of criminal justice in practice,” namely, “a mechanism of social control through prison.”⁴⁹⁷ The roots predated the past half century. After all, penitentiaries gained steam in the nineteenth century.⁴⁹⁸ Rehabilitative justifications permitted institutionalization of wrongdoers “to instill new, law-abiding habits and discipline.”⁴⁹⁹ By the late 1970s, incapacitation justified imprisoning the dangerous. These are two sides of the same coin concerned with paying for the reduction of risk. Incapacitation is viewed as an up-front investment: Incarcerate more dangerous persons to prevent them from committing costly future crimes. Indeed, as Stuntz emphasized, the imprisonment rate increased dramatically between 1972 and 2000.⁵⁰⁰

Sure enough, this logic has been under attack during the first two decades of this century. Tellingly, the primary mode of attack has come from *within* the premises of the modern liberal paradigm. The recent reform to replace cash-bail systems is a good example. Reformers made various arguments based on minimizing risk through the efficient

492 See Michael Tonry, *Can Twenty-First Century Punishment Policies Be Justified in Principle?*, in *RETRIBUTIVISM HAS A PAST: HAS IT A FUTURE?* 3, 7 (Michael Tonry ed., 2011).

493 Paul H. Robinson, *Mitigations: The Forgotten Side of the Proportionality Principle*, 57 HARV. J. ON LEGIS. 219, 220 (2020).

494 See Katz, *supra* note 465, at 14.

495 *Id.* (noting how the Sentencing Guidelines “fail to take account of the many retributive factors that would affect (and mitigate) sentencing, while attributing decisive significance only to criminal record (primarily as an indicator of dangerousness) and severity”).

496 See *Interactive Data Analyzer*, U.S. SENT’G COMM’N, <https://ida.ussc.gov/analytics/saw.dll?Dashboard> [<https://perma.cc/QP55-4RLX>] (last visited Nov. 13, 2025).

497 BIBAS, *supra* note 11, at 15; see *id.* at 14–15.

498 See *id.* at 20–23; *History of Corrections in America*, NAT’L INST. OF CORR. (Apr. 14, 2026), <https://nicic.gov/resources/nic-library/corrections-trends/history-corrections-in-america> [<https://perma.cc/RMH5-WAKV>].

499 BIBAS, *supra* note 11, at 20.

500 See STUNTZ, *supra* note 9, at 33.

usage of data and resources.⁵⁰¹ Despite lurking, unresolved constitutional questions about bail, the most influential work in this space demonstrated how existing bail systems were arguably overinclusive by detaining individuals who were unlikely to flee or commit additional crimes. Scholars like Paul Heaton, Sandy Mayson, and Megan Stevenson utilized economic analyses to demonstrate this argument, as well as the negative externalities that accompany the existing system, such as detention-induced guilty pleas.⁵⁰² An entire cottage industry developed with the task of creating the ideal risk assessment tool, using demographic group identity data to pinpoint which individuals had markers of dangerousness.⁵⁰³ Policymakers then utilized these analyses to reform bail systems.⁵⁰⁴

These are just a few modern examples of how the modern liberal paradigm dominates discussions about detention policy. Whether relating to pretrial bail detention or post-conviction sentencing regimes, quantifying risk to maximize public welfare is the zeitgeist.

IV. FOUR FOUNDING COUNTERWEIGHTS

The inherited and designed institutions ratified at the Founding represent a complicated amalgamation of traditional and modern liberal ideas, belief in the virtue of institutional republicanism, and historical political realities.⁵⁰⁵ This Part presents evidence of this

501 See, e.g., Allie Preston, *The Case for Cash Bail Reform*, CTR. FOR AM. PROGRESS (Aug. 9, 2023), <https://www.americanprogress.org/article/the-case-for-cash-bail-reform/> [<https://perma.cc/4S3E-WYZF>].

502 See Heaton, Mayson & Stevenson, *supra* note 416 (discussing downstream consequences of pretrial detention on inducing guilty pleas).

503 See *Pretrial Risk Assessments*, AM. BAIL COAL., <https://ambailcoalition.org/risk-assessments/> [<https://perma.cc/SH46-SA3S>] (last visited Nov. 13, 2025).

504 See *Bail in the News & Around the Country*, AM. BAIL COAL., <https://ambailcoalition.org/bail-on-the-newswire/> [<https://perma.cc/23FE-8ZUA>] (last visited Nov. 13, 2025).

505 See generally, e.g., DWORETZ, *supra* note 68, at 32–33 (distinguishing theistic Locke from bourgeois Locke in contemporary scholarship); BAILYN, *supra* note 32, at 55–93 (discussing republican ideology underlying the American Revolution); HARTZ, *supra* note 68, at 13 (noting Locke’s persistent influence on American culture and institutions); REILLY, *supra* note 26, at 249 (noting the consistency between Founding thought and earlier political ideas); *id.* at 217 (“To demonstrate that there was a pre-Enlightenment version of the principles essential to the American independence is not to suggest that the Founding was unaffected by the Enlightenment. But all too often it has been taken to be the sole property of eighteenth-century *philosophes*.”); KODY W. COOPER & JUSTIN BUCKLEY DYER, *THE CLASSICAL AND CHRISTIAN ORIGINS OF AMERICAN POLITICS: POLITICAL THEOLOGY, NATURAL LAW, AND THE AMERICAN FOUNDING* (2022) (noting American arguments that were “in substantial continuity with the older tradition,” *id.* at 41); ZUCKERT, *supra* note 67 (referencing the “amalgamation in which the natural rights commitment has remained senior partner but

ideological mixture that suggests the Founders supported arrangements that contradict the developments mentioned above.

First, Founding thought—with only a few exceptions—viewed criminal law and punishment as distinctive aspects of a legal system constrained by nonhuman law and morality. One of the primary charges against King George III in the Declaration of Independence was tyrannical usurpation of authority, and several Founders made arguments against Parliamentary supremacy, whether relating to criminal law and punishment or legislation overall.⁵⁰⁶ In short, Founding thought—including revolutionary justifications—was predominantly *not positivist*.⁵⁰⁷ Second, existing republican institutions were tasked with protecting privacy and property rights, working in tandem with the *new, additional* protections provided by the federal Constitution. Further, those rights had content to be discovered based on the nature of the things itemized in the Amendment itself. Local communities were tasked with determining normative boundaries.

Third, criminal adjudication was entrusted to communal and popular institutions in the republican tradition, not professional dealing. Juries were viewed as a bulwark against tyrannical institutions that might overreach, overcriminalize, overpunish, and abuse power. This was the chosen institutional arrangement despite inefficiencies that might result.⁵⁰⁸ Finally, the Founding generation did not focus exclusively on utilitarian theories of punishment that quantifiably instrumentalized persons for policy objectives. Instead, swift, clear, and firm punishment tethered to moral culpability was the desired course to allow the community, state, government, and wrongdoer to move on with their lives.⁵⁰⁹

A. *The Early American Approach to Boundaries of Criminal Law and Punishment*

Founding-era thinkers conceived criminal law as distinctive yet limited. Punishment also had a particular meaning. Criminal law was defined primarily by its connection to moral culpability. Punishment involved state-imposed suffering with a punitive purpose in response to criminal wrongdoing. Both understandings inherently recognized

has brought into its political orbit English Whig historical commitments, Protestant political theology, and premodern political republicanism,” *id.* at 240–41).

506 See THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776); JAMES OTIS, THE RIGHTS OF THE BRITISH COLONIES: ASSERTED AND PROVED 70 (Boston, Edes & Gill 1764).

507 See Murray, *supra* note 73, at 951; *cf.* REILLY, *supra* note 26, at 286–87 (noting limitations of political sovereignty).

508 See, e.g., Ramos v. Louisiana, 140 S. Ct. 1390, 1397 (2020).

509 See BIBAS, *supra* note 11, at 9–12.

legislative limits. Further, the Founders were concerned about prosecutorial overreach in criminal prosecution. So much so, in fact, that they explicitly mentioned it as a grievance against the King.⁵¹⁰ The constitutional amendments that intentionally erect obstacles for criminal prosecution are evidence of this concern.⁵¹¹ As mentioned above, the trend lines have gone in the opposite direction.

The Founders acknowledged moral and legal restraints on human lawmaking generally and particularly with respect to criminal law and punishment.⁵¹² Benjamin Wright, Jr., in *American Interpretations of Natural Law*, showed how the Founders were familiar with natural law concepts and generally held that they constrained human authorities, whether through reference to rights or higher law.⁵¹³ This is a definite rejection of the Hobbesian absolute sovereignty and scientific positivism that liberal critics sometimes associate with the Founders.⁵¹⁴ Robert Reilly notes how Hobbes's "dictum was . . . Authority, not truth, decides the law."⁵¹⁵ Thomas Jefferson, John Adams, and Alexander Hamilton all lamented Hobbes's understanding that virtue and nature were the product of convention.⁵¹⁶ Arguments favoring the Revolution

510 See THE DECLARATION OF INDEPENDENCE para. 20 (U.S. 1776) (protesting the King "[f]or depriving us in many cases, of the benefits of Trial by Jury").

511 See U.S. CONST. amends. IV–VII.

512 See Murray, *supra* note 73, at 951 (noting that the Founders were not positivists). Early case law seems to confirm this point. See, e.g., *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87, 135–139 (1810) (discussing limitations on legislative power); *Terrett v. Taylor*, 13 U.S. (9 Cranch) 43, 52 (1815) (referencing "principles of natural justice"); *Dash v. Van Kleeck*, 7 Johns. 477, 505 (N.Y. Sup. Ct. 1811) (noting implied limitations on legislative powers); see also, e.g., BENJAMIN FLETCHER WRIGHT, JR., *AMERICAN INTERPRETATIONS OF NATURAL LAW: A STUDY IN THE HISTORY OF POLITICAL THOUGHT* 293–99 (1931) (noting several examples in early courts that referenced implied legislative limits while using different terminology).

513 See WRIGHT, *supra* note 512, at 119 ("[A]ll of them make something more than a purely formal statement of allegiance to the concept of natural law."). Of course, there is plenty within the liberal tradition that distinguishes between natural rights and natural law. But the broader point here is that the Founders recognized non-positive law constraints on the positive law.

514 See REILLY, *supra* note 26, at 172. Reilly makes the compelling argument that the institutional structures chosen by the Founders directly contradict Hobbesian political philosophy, which aimed to consolidate sovereignty. See *id.* at 172–73 (noting how Hobbes "was willing to advocate almost anything to achieve the goal of unified civil government," *id.* at 173).

515 *Id.* at 186.

516 See *id.* at 192–93 (quoting Jefferson, Adams, and Hamilton in their direct criticism of Hobbesian political theory). Jefferson and Adams also appear to have read Locke in continuity with Aristotle and others from the broader liberal tradition. *Id.* at 232–47 (first quoting Letter from Thomas Jefferson to Henry Lee (May 8, 1825), <https://founders.archives.gov/documents/Jefferson/98-01-02-5212> [<https://perma.cc/8P6H-BJ4Y>]; and then quoting John Adams, The Letters of Novanglus (Jan. 23–Apr. 1775), <https://www.masshist.org/publications/adams-papers/view?&id=PJA02dg5> [<https://perma.cc/ZL2Q-9FBD>]).

consistently referenced natural law and natural rights in reaction to parliamentary assertions of absolute authority to define nature.⁵¹⁷ Those principles were the providers of peace.⁵¹⁸ And most state constitutions at the time—with their references to natural law—directly contradict this idea.⁵¹⁹ Debates between Federalists and Anti-Federalists consistently referenced natural law ideas, meaning they shared belief in a nonhuman governing standard.⁵²⁰

The Founders were not legislative positivists when it came to law overall, the nature of the criminal law, or punishment. They viewed criminal law as distinctive given its connection to moral culpability, which was tethered to reflections on right and wrong.⁵²¹ The Constitution makes specific references to “crime,” implying a definition that precedes legislative determination.⁵²² John Stinneford’s work suggests that when a word appears in the Constitution, like “crime,” it was understood to have specific meanings at common law that had developed from a “synthesis of morality and tradition.”⁵²³ Ronald Pestritto’s historical research demonstrates that several states absorbed and intentionally kept English common law concepts relating to criminal law.⁵²⁴

Most specifically, criminal law was tethered to moral blameworthiness, not legislatively determined harms.⁵²⁵ This view had solidified for

517 See *id.* at 255–57 (citing revolutionary documents, James Otis’s works, Adams, and others).

518 See COOPER & DYER, *supra* note 505, at 229 (“[N]atural law is the ‘mother of . . . peace.’” (alteration in original) (quoting JAMES WILSON, *Of the General Principles of Law and Obligation*, in 1 COLLECTED WORKS OF JAMES WILSON, *supra* note 302, at 464, 465 (quoting RICHARD HOOKER, *OF THE LAWE OF ECCLESIASTICAL POLITIE* 94 (1922)))).

519 See WRIGHT, *supra* note 512, at 112.

520 See *id.* at 135, 139–42 (describing the debate between figures like Wilson, Gerry, and Hamilton about the necessity of a Preamble and Bill of Rights).

521 See William E. Nelson, *Emerging Notions of Modern Criminal Law in the Revolutionary Era: An Historical Perspective*, 42 N.Y.U. L. REV. 450, 450–52 (1967).

522 See Murray, *supra* note 73, at 962 (noting places in the Federal Constitution).

523 Stinneford, *supra* note 337, at 656. Stinneford has written about the meaning of “crime” as well as “cruel” and “unusual” in the Eighth Amendment. See generally *id.*; John F. Stinneford, *The Original Meaning of “Cruel,”* 105 GEO. L.J. 441 (2017) [hereinafter Stinneford, *Cruel*]; John F. Stinneford, *The Original Meaning of “Unusual”: The Eight Amendment as a Bar to Cruel Innovation*, 102 NW. U. L. REV. 1739 (2008) [hereinafter Stinneford, *Unusual*].

524 See PESTRITTO, *supra* note 34, at 110 (citing ELIZABETH GASPAR BROWN, *BRITISH STATUTES IN AMERICAN LAW 1776–1836*, at 23–26 (1964) (“Rather than devise completely new statutes to deal with all anticipated contingencies, delegates to constitutional conventions and state general assemblies found it expedient to utilize existing and familiar bodies of law . . .” *Id.* at 23.)) (“When America declared its independence, most states transferred the English common law to their citizens.”).

525 See Stinneford, *supra* note 337, at 659.

centuries, if not millennia, by the time of the Founding.⁵²⁶ Further, the Supreme Court held it for at least a century after the Founding.⁵²⁷ Various sources indicate that blameworthiness determined the boundaries of the criminal law. First, English common law held it so.⁵²⁸ Second, Founding-era dictionaries suggest this understanding.⁵²⁹ Third, the Founders held this view. For example, Justice Wilson's definition of crime hinged on the concept of moral blameworthiness.⁵³⁰ Malicious intention was the linchpin of crime.⁵³¹ Hamilton, writing as "Publius," linked punishment to moral transgressions.⁵³² Early American court decisions and criminal codes also indicate this view.⁵³³

As for the meaning of punishment, the Founders considered any state-imposed suffering for a punitive purpose following a criminal conviction to be punishment.⁵³⁴ A punitive purpose could be retributive or something else, such as deterrence, rehabilitation, or incapacitation.⁵³⁵

Wilson had no qualms about foregrounding prevention of crime, or public safety, as the purpose of punishment. Deterrence-based actions in the wake of a conviction could not alter what punishment *is*, contra existing Supreme Court doctrine in a case like *Doe*.⁵³⁶ Around the Civil War, the Court confirmed this view in cases like *Cummings v. Missouri*⁵³⁷ and *Ex parte Garland*.⁵³⁸ Both cases held collateral consequences to be punishment given they responded to past conduct considered wrongdoing.⁵³⁹ Similarly, this is why Wilson considered "banishment"—effectively the most severe form of incapacitation—to be

526 See *id.*; 2 HENRY DE BRACTON, ON THE LAWS AND CUSTOMS OF ENGLAND 384 (George E. Woodbine, ed., Samuel E. Thorne trans., Harv. Univ. Press 1968) (c. 1235) (noting malice as a key ingredient of crime).

527 See, e.g., *Felton v. United States*, 96 U.S. 699, 703 (1878) (acknowledging that punishment is linked to guilt).

528 See DE BRACTON, *supra* note 526, at 384.

529 See Murray, *supra* note 73, at 965 (noting several definitions suggesting crime involved moral wrongdoing).

530 See WILSON, *supra* note 302, at 1088–1101.

531 See *id.* at 1101.

532 PESTRITTO, *supra* note 34, at 136–37 (“For Publius, punishment meant that crimes are moral violations, and humans are held morally accountable for criminal behavior.” *Id.* at 137.).

533 See Nelson, *supra* note 521, at 450–52; Murray, *supra* note 73, at 967–68.

534 See Murray, *supra* note 73, at 968–77.

535 See *id.*

536 See *Smith v. Doe*, 538 U.S. 84 (2003).

537 *Cummings v. Missouri*, 71 U.S. (4 Wall.) 277 (1867).

538 *Ex parte Garland*, 71 U.S. (4 Wall.) 333 (1867).

539 See Murray, *supra* note 73, at 940–41.

punishment.⁵⁴⁰ Additionally, fines, imprisonment, and public shaming (in the pillory) were all punishment.⁵⁴¹ In other words, a state action for a punitive purpose that follows a criminal conviction tethered to blameworthiness amounts to punishment.

Other Founders simply assumed that punitive purposes included more than retribution and that punishment could take many forms. What they held in common is that state action following a criminal conviction amounted to punishment. Benjamin Rush—a leading proponent of criminal justice reform at the time and advocate for penitentiaries—never questioned that measures designed to rehabilitate or incapacitate remained punishment.⁵⁴² The notion that classification of a state intervention as civil transformed its punitive character would have been confusing to several thinkers at the time.⁵⁴³ Punishment primarily gained its name from connection to the conviction based on moral wrongdoing, not the legislatively assigned purpose to avoid that classification.⁵⁴⁴ Philosophical thinkers who influenced the Founders also held this view.⁵⁴⁵ Simply put, a conviction plus a state action with a punitive purpose, even a nonretributive one, amounted to punishment.⁵⁴⁶

In contrast, existing Supreme Court doctrine, which holds that nearly all indirect consequences of conviction are nonpunitive, does not fit with the historical understanding.⁵⁴⁷ Instead, it fits with the modern liberal paradigm that defers to legislative positivism on difficult questions. The Founding view—given its unwillingness to punt the question to the legislature for the most part—would permit widening the range of post-conviction state actions that count as punishment, thereby subjecting the excesses of the punitive state to more legal scrutiny. This was a position that courts did not blink at even with the limited authority assigned to courts under the Constitution.

The Founders also had specific concerns about executive overreach with criminal prosecution. In addition to a fixed understanding of crime, the Constitution erects specific hurdles to make creating

540 See JAMES WILSON, *Of Crimes Against the Right of Individuals to Their Property*, in COLLECTED WORKS OF JAMES WILSON, *supra* note 302, at 1118, 1119 (“In Lorrain, so long ago as the fourteenth century, forgery was punished with banishment.”).

541 See JAMES WILSON, *Of Crimes Against the Right of Individuals to Personal Safety*, in COLLECTED WORKS OF JAMES WILSON, *supra* note 302, at 1137, 1140 (“The punishment of these offences, at the common law, has generally been by fine and imprisonment only: cases, however, very enormous have been punished by the pillory also.”).

542 See PESTRITTO, *supra* note 34, at 21–28.

543 See Murray, *supra* note 73, at 971–73.

544 See *id.* at 973–74.

545 See *id.* at 975.

546 See *id.* at 973.

547 See, e.g., *Smith v. Doe*, 538 U.S. 84 (2003).

crimes and prosecution more difficult. Wary of “punishment without culpability,” the Framers enshrined protections such as the Ex Post Facto Clause.⁵⁴⁸ The notion that prosecutors would serve as de facto judge and jury was terrifying to the Founders.⁵⁴⁹ Professional prosecution was not the norm for various reasons.⁵⁵⁰ As discussed below, the Founders empowered juries to counteract the danger that prosecutors would, through their power, determine the boundaries of justice.

B. *Original Understandings and the Fourth Amendment*

This Section identifies three ways that Founding approaches to the Fourth Amendment are contrary to the modern liberal paradigm. They relate to the definitions of searches, remedies, and the nature of individualized suspicion. First, existing doctrine relating to the nature of searches deviates from Founding thought. Search doctrine originally located protection in tangible things buttressed by popular sentiment rather than expectations alone. Second, as Mannheimer has shown, the Amendment was meant to regulate the potentially abusive actions of federal officials through a combination of popular normative checks and deference to already-established customs relating to searches and seizures.⁵⁵¹ Third, existing doctrine relating to the meaning of probable cause and reasonable suspicion is a source of great frustration and befuddlement given it is one of the few areas where Founding approaches persist despite the modern liberal paradigm’s thirst for quantification.

The Founding approach to determining what counts as a search involved understanding the meaning of the terms in the Fourth Amendment with reference to already existing legal authorities that had developed over centuries. It differs from the Court’s main approaches, which waffle between *Katz*’s reasonable expectation of privacy and notions of trespass.⁵⁵² Yet the Founding approach actually synthesizes both because it views the items mentioned in the Amendment as inherently private *by virtue of their development into explicit text*,

548 Stinneford, *supra* note 337, at 665; *see id.* at 665–66 (“Although the Constitution does not explicitly mention substantive limits to Congress’s power to define crime, the various provisions . . . imply such a limit.” *Id.* at 666.).

549 *See* AKHIL REED AMAR, *THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION* 83 (1998).

550 *Cf.* Mike Fox, *From Marketplace to Bureaucracy: The Evolution of Private Prosecution in America*, CATO INST. (Jan. 29, 2026, at 12:14 ET), <https://www.cato.org/blog/marketplace-bureaucracy-evolution-private-prosecution-america> [<https://perma.cc/Z4J5-SDJ2>].

551 *See* MANNHEIMER, *supra* note 47, at 6.

552 Compare the Court’s approach in *Katz v. United States*, 389 U.S. 347 (1967), with *Florida v. Jardines*, 569 U.S. 1 (2013), and *United States v. Jones*, 565 U.S. 400 (2012).

suggesting the binary is a false choice.⁵⁵³ As Mannheimer writes, the Amendment reflects how “[w]hat begins as social practice evolves into social understanding and expectation, which sometimes morphs into enforceable rights and interests, which often hardens into positive law.”⁵⁵⁴

In other words, the Fourth Amendment protects the areas recognized by custom and social usage that informed the text of the Amendment, but that understanding does not ossify how the text applies in later eras because that understanding leaves room for analogy as custom and social usage change.⁵⁵⁵ This view appeared in *Kyllo*, which simultaneously acknowledged the limitations of trespass concepts and the utility of privacy analogies.⁵⁵⁶

The key idea—which runs contrary to the paradigm’s thirst for originality—is the reality of custom as a barometer of security for privacy protection. Customs are real in an operative sense, not sentiments, with the latter informing but not defining them. The law develops to reflect them, tethering legal concepts to external forces *that predate* the discernment of the judge. For the Founders, who often revered the English common law, custom was a source of law.⁵⁵⁷ Customs that withstand the test of time implicitly contain a kernel of reasonableness because local adherence bespeaks a form of consent.⁵⁵⁸

As to the definition of a search, Founding thought located the meaning of a search in the rules around searches of “persons, houses, papers, [or] effects,” whether labeled as trespasses or privacy violations.⁵⁵⁹ This is more tangible than the *Katz* test, which references expectations rather than requiring courts to locate a specific right or interest reflective of the items in the Amendment.⁵⁶⁰ It is easier to measure a custom that has developed into a cognizable legal interest in *actual law* than to discern a nationwide expectation.⁵⁶¹ Mannheimer

553 See MANNHEIMER, *supra* note 47, at 70 (noting how “[r]easonable expectations of privacy depend largely on ‘customary social usage,’” as does “the common law of trespass” (quoting *Georgia v. Randolph*, 547 U.S. 103, 121 (2006))).

554 *Id.*

555 See *id.* at 77 (“[T]he Fourth Amendment evolves with the common law upon which it is premised.”).

556 See *Kyllo v. United States*, 533 U.S. 27 (2001); MANNHEIMER, *supra* note 47, at 76–77.

557 See MANNHEIMER, *supra* note 47, at 78 (“At the time of the framing period, the common law was seen as indistinguishable from custom.”).

558 See *id.* at 79 (“The durability and longevity of a custom were thought to stand in as a surrogate for more formal democratic mechanisms.”).

559 *Id.* at 83 (alteration in original) (quoting U.S. CONST. amend. IV).

560 See *Katz v. United States*, 389 U.S. 347, 361 (1967) (Harlan, J., concurring).

561 Interestingly, Tierney’s work details this contrast when discussing how earlier scholarship argued that rights were understood in the classical world as “things” rather than “powers.” TIERNEY, *supra* note 24, at 16 (“To a modern jurist a right is a power; to a classical

writes, “[W]e can think of a search as a quest for information conducted contrary to law, broadly conceived . . . protecting us from intrusion in our ‘persons, houses, papers, and effects.’”⁵⁶² The nominalist move in *Katz* is skeptical about judicial discernment of such tangible interests and instead opts for judicial construction.

As for process and remedies, the Fourth Amendment likely was meant to regulate police conduct with reference to state law because state law was a barometer of what was considered reasonable.⁵⁶³ This meant that the Fourth Amendment, in addition to its substantive protections, served as another federalism-style check on federal officials who might operate with their own set of incentives and who were far removed from local situations.⁵⁶⁴ Mannheimer writes how this understanding amounted to a *democratic* means to ensure “the people’s security in their persons, houses, papers, and effects” because “the people themselves decided, through state constitutions, statutes, and court decisions, [how] they should be protected.”⁵⁶⁵ For Mannheimer, this represents the “Local Control Model” of the Fourth Amendment, where “individual rights are protected by structural principles.”⁵⁶⁶

This contrasts with the “Warrant Model,” which focuses on ex ante process determined by judicial officials, and the “Reasonableness Model,” which defers to the substantive after-the-fact musings of judicial officials in suppression hearings, and sometimes juries during criminal and civil trials.⁵⁶⁷ The former is the *technical* rule, while the

jurist a *ius* was a thing.”). Tierney later provides evidence that the notion of a “subjective” right emerged in the Middle Ages, although its full expression came with modernity. *See id.* at 43–77.

562 MANNHEIMER, *supra* note 47, at 87 (quoting U.S. CONST. amend. IV).

563 *See id.* at 4 (noting how “‘unreasonable’ is best understood in a similar way, as ‘inconsistent with state law’” (emphasis omitted)); *id.* at 6 (“What makes a search or seizure ‘unreasonable’ . . . is that it is impermissible under the law of the State where the search or seizure occurred.”).

564 *See id.* at 6 (“At the founding, those who pressed for a Bill of Rights were not trying to hold federal agents to uniform search-and-seizure principles across the Nation. They were trying to hold them to the limitations on searches and seizures established by the laws of the several States.”).

565 *Id.*

566 *Id.* at 8.

567 *Id.* at 15–16; *see id.* at 15–17. The Warrant Model is evidenced by the notion of a presumptive warrant requirement, which the Supreme Court has repeated ad nauseam for the better part of a century, while permitting myriad exceptions. *See, e.g.,* *Katz v. United States*, 389 U.S. 347 (1967); *Chimel v. California*, 395 U.S. 752 (1969); *Schneckloth v. Bustamonte*, 412 U.S. 218 (1973); *Mincey v. Arizona*, 437 U.S. 385 (1978); *Riley v. California*, 573 U.S. 373 (2014); *Carpenter v. United States*, 138 S. Ct. 2206 (2018); *see also* MANNHEIMER, *supra* note 47, at 17 (“The Warrant Model has technically won out but the warrant requirement is shot through with so many different exceptions that one could argue that the Reasonableness Model is truly ascendant.”). The Reasonableness Model holds that warrants are merely one path to showing reasonableness but not always required. *See, e.g., Riley*,

latter is the *actual* rule given the number of exceptions to the so-called warrant requirement.⁵⁶⁸ That approach also is utilized to adjudicate the parameters of the exclusionary rule, which nowadays involves judicial speculation (rather than jury-based adjudication) about the prospective utility of suppressing evidence.⁵⁶⁹

For purposes here, the point is that the parameters of the Fourth Amendment—meaning its constraints as well as its relationship to remedies—were tethered to solidified understandings reflected in law at the time, and were the product of decades of refinement, rather than policy-oriented judicial construction.⁵⁷⁰ The sort of freewheeling judicial policymaking that existing doctrine permits—with the definition of searches and the utility of applying the exclusionary rule, as determined solely by *judicial officials*—deviates from how the Fourth Amendment was thought to relate to existing legal structures at the time of its adoption. It was one part of a larger, democratic legal apparatus containing inherited legal constraints to be acknowledged rather than a blank slate to be interpreted according to judicial proclivities. As Mannheimer notes:

[T]he best way to understand the Fourth Amendment, as a historical matter, is as a reservation of local control over federal searches and seizures. . . .

. . . What the colonists objected to was subjection to search-and-seizure policies dictated by a distant central government in which they had no say. What they sought was local control of searches and seizures by democratically elected and accountable local officials.⁵⁷¹

This approach contradicts the other two models, which, while supported by some historical evidence, ultimately locate authority *away* from democratic institutions, hamstringing the sort of normative check that the Founders envisioned. Indeed, initial legislative acts by early Congresses seem to confirm as much. Mannheimer notes how the Judiciary Act of 1789 and the Militia Act of 1792 calibrated federal

573 U.S. 373; *Mitchell v. Wisconsin*, 139 S. Ct. 2525 (2019) (plurality opinion); *City of Indianapolis v. Edmond*, 531 U.S. 32 (2000); *see also* MANNHEIMER, *supra* note 47, at 16 (noting how the Reasonableness Model prefers adjudication *after* the intrusion).

568 *See supra* note 567.

569 *See* MANNHEIMER, *supra* note 47, at 18–19 (criticizing Amar’s theory supporting the Reasonableness Model).

570 *See id.* at 23 (“When they spoke of reasonableness, they meant the reason of the common law. And the common law, as we will see, is the law of the State where the search or seizure occurs.”).

571 *Id.* at 24–25. Mannheimer later writes, after discussing the Wilkesite cases and the Writs of Assistance controversy, that, for the Founders, “Control over searches and seizures had to be not only democratic but local.” *Id.* at 27 (emphases omitted); *see id.* at 25–33.

officer power to existing state level authority.⁵⁷² Further, the Anti-Federalists, in arguing for the Fourth Amendment within the Bill of Rights, were specifically concerned with holding federal officials to the demands of state law.⁵⁷³ While the judiciary had a role, it was limited to adjudicating remedies *after* local law on search and seizure had been locally determined.⁵⁷⁴ In sum, while the “Fourth Amendment does subject federal officials to a standard of reasonableness . . . it is not a free-standing reasonableness standard to be constructed freehand by unelected federal judges.”⁵⁷⁵ Instead, its parameters were to be set by accountable local officials doing the difficult legal work that seeks to balance community preferences, custom, and other reflections.⁵⁷⁶

One area where the Court has resisted the paradigm—with much criticism by the way—is with its understanding of the nature of individualized suspicion. Despite complaints by judges, scholars, and commentators, the doctrine remains tethered to preparadigmatic notions of reasonableness that are not reducible to mathematical certainty or quantification.

For a brief time, it looked like the Court was headed in the paradigmatic direction. Leading up to *Illinois v. Gates*, where the Court adopted the totality of the circumstances test,⁵⁷⁷ the Court began to suggest necessary conditions for probable cause determinations in cases like *Draper v. United States*⁵⁷⁸ and *Spinelli v. United States*.⁵⁷⁹ But *Gates* declared that probable cause determinations, while about probabilities, involve a “practical, nontechnical conception”⁵⁸⁰ based on “factual and practical considerations”⁵⁸¹ and common sense.⁵⁸² This sort of thinking also permeates reasonable suspicion determinations, which underwrite most investigative stops. Most recently, the Court, in *Kansas v. Glover*, used similar language when describing the meaning of reasonable suspicion.⁵⁸³ The standard hinges on inferences made by

572 See *id.* at 37 (“[B]y following state law, federal officials were necessarily acting reasonably under the Fourth Amendment.”); see also Judiciary act of 1789, ch. 20, 1 Stat. 73; Act of May 2, 1792, ch. 28, 1 Stat. 264.

573 See MANNHEIMER, *supra* note 47, at 62–63 (referencing arguments made in Maryland, Virginia, and Massachusetts).

574 See *id.* at 67.

575 *Id.* at 45.

576 See *id.*

577 See *Illinois v. Gates*, 462 U.S. 213, 230–31 (1983).

578 See *Draper v. United States*, 358 U.S. 307, 313 (1959).

579 See *Spinelli v. United States*, 393 U.S. 410, 418 (1969).

580 *Gates*, 462 U.S. at 231 (quoting *Brinegar v. United States*, 338 U.S. 160, 176 (1949)).

581 *Id.* (quoting *Brinegar*, 338 U.S. at 175).

582 *Id.*

583 See *Kansas v. Glover*, 140 S. Ct. 1183, 1187–88 (2020).

“reasonable and prudent men”⁵⁸⁴ rather than “scientific certainty”⁵⁸⁵ and “permit[s] officers to make ‘commonsense judgments.’”⁵⁸⁶

These holdings, predictably, frustrate many who have absorbed paradigmatic premises as the lodestar of rationality and criticize existing doctrine as irrational given it permits inaccurate suspicions to be viewed as reasonable. As such, the doctrine has been criticized for preventing the possibility of utilizing modern methodologies to produce more accurate justifications for searches.⁵⁸⁷

C. *The Constitutional Preference for Jury-Based Adjudication*

While plea bargaining occurred at the time of the Founding, the Constitution enshrined specific institutions to further community-based adjudication of criminal law and punishment. The idea that insider adjudication would become the norm likely would have sounded alarms given concerns about abuse of power.⁵⁸⁸ The Declaration of Independence specifically complained about King George III depriving colonists of the right to trial by jury.⁵⁸⁹ Building from the scholarly work of Appleman, Amar, Judge Bibas, and Hessick, this Section demonstrates how the Founders sought to guarantee popular checks on criminal adjudication. They did this *despite* awareness of its likely inefficiency.⁵⁹⁰

Amar, in *The Bill of Rights*, argued that “[t]he dominant strategy to keep agents of the central government under control was to use the populist and local institution of the jury.”⁵⁹¹ Adjudication was to remain local. The constitutional structure and inherited legal practices confirm as much. Article III of the Constitution and the Fifth, Sixth, and Seventh Amendments guarantee the role of juries in certain

584 *Id.* at 1188 (emphasis omitted) (quoting *Navarette v. California*, 572 U.S. 393, 402 (2014)).

585 *Id.* (quoting *Illinois v. Wardlow*, 528 U.S. 119, 125 (2000)).

586 *Id.* (quoting *Wardlow*, 528 U.S. at 125).

587 See, e.g., Michael L. Rich, *Machine Learning, Automated Suspicion Algorithms, and the Fourth Amendment*, 164 U. PA. L. REV. 871 (2016); Sherry F. Colb, *Probabilities in Probable Cause and Beyond: Statistical Versus Concrete Harms*, LAW & CONTEMPORARY PROBS., Summer 2010, at 69.

588 See AMAR, *supra* note 549, at 83 (referencing how grievances against King George III included deprivations of jury trial rights).

589 See THE DECLARATION OF INDEPENDENCE para. 20 (U.S. 1776). The Supreme Court explicitly mentioned this in *Duncan v. Louisiana*, 391 U.S. 145, 151–53 (1968).

590 See *United States v. Haymond*, 139 S. Ct. 2369, 2378–79 (2019) (plurality opinion); see also Kleinfeld, *supra* note 17, at 1381 (noting a preference for “a criminal system built of ill-fitting parts” that preserves “pockets of nonbureaucratic reason and authority”).

591 AMAR, *supra* note 549, at 83.

situations.⁵⁹² Further, *all* state constitutions authored between the Declaration of Independence and 1787 solidified the jury trial right in criminal cases.⁵⁹³ James Madison considered the trial by jury “as one of the best securities to the rights of the people” and thus it should “remain inviolate.”⁵⁹⁴ Jefferson even preferred popular participation in the judicial branch over the legislature.⁵⁹⁵

These institutional arrangements erected by the Founders were a creature of legal history, political theory, and political realities at the time.⁵⁹⁶ For the Founders, jury-based adjudication was crucial to self-governance.⁵⁹⁷ Amar has noted how jurors were “[p]upils” who would learn about the law while serving, creating a loop that would result in better adjudication and better law in the future.⁵⁹⁸ Further, by permitting direct participation in the judiciary, jury adjudication would breed respect for democratic and legal institutions.⁵⁹⁹ It also would *prevent* insider adjudication.⁶⁰⁰ Alexis de Tocqueville marveled at the American preference for juries:

592 U.S. CONST. art. III; *id.* amends. V–VII; see AKHIL REED AMAR, *AMERICA’S CONSTITUTION: A BIOGRAPHY* 233–46 (2006) (discussing the presumptive role of juries in the original constitutional framework); Akhil Reed Amar, *Reinventing Juries: Ten Suggested Reforms*, 28 U.C. DAVIS L. REV. 1169, 1169–72 (1995) (describing “the Founders’ Constitution and the Bill of Rights,” *id.* at 1172).

593 See AMAR, *supra* note 549, at 83.

594 *Id.* at 84 (quoting Amendments offered in Congress by Madison (June 8, 1789), reprinted in EDWARD DUMBAULD, *THE BILL OF RIGHTS: AND WHAT IT MEANS TODAY* 206, 209 (1957) (“[T]he trial by jury, as one of the best securities to the rights of the people, ought to remain inviolate.” (quoting Amendments offered in Congress by Madison, *supra*, at 209)).

595 See Carissa Byrne Hessick, *The Right to a Jury and the Rise of Guilty Pleas Across Common Law Countries*, 93 GEO. WASH. L. REV. 1299, 1300 (2025) (citing Letter from Thomas Jefferson to the Abbé Arnoux (July 19, 1789), in 15 *THE PAPERS OF THOMAS JEFFERSON* 282, 283 (Julian P. Boyd ed., 1958)).

596 Hessick notes how “the right to a jury trial was no American invention.” *Id.* at 1300. Hessick describes English history and figures who lauded juries. See *id.* at 1300–01.

597 See AMAR, *supra* note 549, at 88–92 (noting how Madison, Hamilton, and other early constitutional interpreters understood the jury as a popular and local institution that supported the federal structure of the Constitution); cf. MANNHEIMER, *supra* note 47, at 24–45 (discussing the local model of Fourth Amendment adjudication).

598 See AMAR, *supra* note 549, at 93–94.

599 See *id.* at 94–96 (noting how a delegate to the Constitutional Convention thought it would “confirm the people’s confidence in government,” *id.* at 96 (quoting 2 JONATHAN ELLIOT, *THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION* 288 (photo reprinted 1987) (New York, Burt Franklin 1827))).

600 See *id.* at 94 (quoting the “Federal Farmer,” who noted that “common people should have a part and share of influence, in the judicial as well as in the legislative department” (quoting OBSERVATIONS LEADING TO A FAIR EXAMINATION OF THE SYSTEM OF GOVERNMENT PROPOSED BY THE LATE CONVENTION; AND TO SEVERAL ESSENTIAL AND NECESSARY ALTERATIONS IN IT. IN A NUMBER OF LETTERS FROM THE FEDERAL FARMER TO THE REPUBLICAN (New York, 1787), reprinted in 2 *THE COMPLETE ANTI-FEDERALIST* 214, 249 (Herbert J. Storing ed., 1981))).

The jury . . . serves to communicate the spirit of the judges to the minds of all the citizens; and this spirit, with the habits which attend it, is the soundest preparation for free institutions. It imbues all classes with a respect for the thing judged and with the notion of right. . . . It teaches men to practice *equity*; every man learns to judge his neighbor as he would himself be judged. . . .

. . . It may be regarded as a gratuitous public school, ever open, in which every juror learns his rights, enters into daily communication with the most learned and enlightened members of the upper classes, and becomes practically acquainted with the laws

. . . I look upon [the jury] as one of the most efficacious means for the education of the people which society can employ.⁶⁰¹

Appleman has shown how, despite a period of Supreme Court precedent suggesting otherwise, the jury right was considered fundamental as an individual and *communal* right.⁶⁰² Participation was a popular right.⁶⁰³ Several other scholars share this view, arguing that the Founders went all in on the jury as a check on criminal justice.⁶⁰⁴ Appleman notes how juries were tasked with determining “moral culpability,” punishment, “restor[ation],” and “repa[ration].”⁶⁰⁵ Interestingly, the Court has started to return to this view, requiring jury

601 AMAR, *supra* note 549, at 93 (alteration in original) (second, third, fourth, fifth, and seventh omissions in original) (emphasis added) (emphasis omitted) (quoting 1 ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 284–85 (Phillips Bradley ed., Alfred A. Knopf, Inc. 1945) (1835)).

602 See Laura I. Appleman, *The Lost Meaning of the Jury Trial Right*, 84 IND. L.J. 397, 399 (2009) (arguing that the Sixth Amendment enshrines a “collective right to a jury trial”). de Tocqueville noted how popular participation “places the real direction of society in the hands of the governed.” AMAR, *supra* note 549, at 88 (quoting 1 DE TOCQUEVILLE, *supra* note 601, at 282).

603 See Appleman, *supra* note 603, at 438. Of course, whether ideal juries are achievable is a legitimate question, and one that has particular salience given historical problems relating to jury selection, including constitutional problems relating to bias. See, e.g., Thomas Ward Frampton, *The First Black Jurors and the Integration of the American Jury*, 99 N.Y.U. L. REV. 515 (2024) (studying early efforts to integrate juries); Thomas Ward Frampton, *For Cause: Rethinking Racial Exclusion and the American Jury*, 118 MICH. L. REV. 785 (2020) (explaining how challenges for cause adversely affect jury composition); EQUAL JUST. INITIATIVE, *RACE AND THE JURY: ILLEGAL DISCRIMINATION IN JURY SELECTION* 8–17 (2021).

604 See, e.g., Appleman, *supra* note 604, at 399; Stephanos Bibas, *Originalism and Formalism in Criminal Procedure: The Triumph of Justice Scalia, the Unlikely Friend of Criminal Defendants?*, 94 GEO. L.J. 183, 196–97 (2005); Steven A. Engel, *The Public’s Vicinage Right: A Constitutional Argument*, 75 N.Y.U. L. REV. 1658, 1674, 1685 (2000); AMAR, *supra* note 549, at 91–96.

605 Appleman, *supra* note 602, at 407; Laura I. Appleman, *Local Democracy, Community Adjudication, and Criminal Justice*, 111 NW. U. L. REV. 1413, 1417 (“[P]unishment was not something left to the judge but rather a responsibility and right of a defendant’s immediate society.”).

involvement in phases where finding facts are crucial to legal judgments.⁶⁰⁶

Historical study indicates that the Founders' intuitions about juries moderating punitive excess were somewhat prescient. Stuntz noted how the constitutional preference resembled early American practice, with juries determining guilt and innocence and sometimes sentencing.⁶⁰⁷ Juries, through their determinations, communicated normative sensibilities to the prosecution about charging.⁶⁰⁸ This involved moral judgments given the focus on blameworthiness in substantive criminal law at the time.⁶⁰⁹ And juries even answered certain legal questions that cut to the core of criminal justice.⁶¹⁰ Data indicates that in periods with less plea bargaining, imprisonment rates were significantly lower.⁶¹¹

In sum, the Founders were not elitists or deferential to outsiders when it came to criminal adjudication. Their chosen course shows exactly the opposite. Through constitutional enshrinement, they sought to *guarantee* popular involvement in criminal adjudication, injecting "populism, federalism, and civic virtue."⁶¹² Adams argued that the "common People should have as compleat a Controul . . . in every Judgment of a Court."⁶¹³ It was only later that plea bargaining became dominant due to individual and systemic embrace of the efficiency ethic that characterizes the paradigm described above.⁶¹⁴

D. Early American Understandings of Punishment

Founding-era thought relating to punishment involved a mix of complex attitudes. Many Founders consistently recognized the distinct

606 See *Apprendi v. New Jersey*, 530 U.S. 466, 477–85, 490 (2000) (holding that facts that increase the penalty beyond the statutory maximum must be submitted to a jury); *Blakely v. Washington*, 542 U.S. 296, 301–02 (2004) (holding that a jury must determine all facts beyond a reasonable doubt that are essential to a sentence).

607 See STUNTZ, *supra* note 9, at 30, 83–84.

608 See *id.* at 30 (noting the practice of "jury nullification" to send messages to overzealous prosecutors); BIBAS, *supra* note 11, at 5–6.

609 See STUNTZ, *supra* note 9, at 30 (describing how urban juries made moral evaluations when deciding cases).

610 See Marcus Alexander Gadson, *State Constitutional Provisions Allowing Juries to Interpret the Law Are Not as Crazy as They Sound*, 93 ST. JOHN'S L. REV. 1, 1–4 (2019).

611 See STUNTZ, *supra* note 9, at 31–34 & tbl. 3 (showing imprisonment rates were significantly lower between 1880–1972 than in 2000).

612 AMAR, *supra* note 549, at 97.

613 John Adams, *Diary Notes on the Right of Juries* (Feb. 12, 1771), <https://founders.archives.gov/documents/Adams/05-01-02-0005-0005-0004> [<https://perma.cc/ZLQ7-YEVR>].

614 See Hessick, *supra* note 595, at 1323–24 (describing efficiency-based incentives for pleas).

nature of the criminal law given its socio-moral roots. Centuries of ideas and practice inherited from the Anglo-American legal tradition imbued the criminal law with notions of moral culpability, naturally leading to retributive justifications as the norm for punishment.⁶¹⁵ But the Founders also recognized different purposes for punishment and focused on proportionality.

At the time of the Founding, law achieved legitimacy given how well it reflected “communal moral consensus” rather than “imposition by distant bureaucrats.”⁶¹⁶ Stinneford has made a similar argument relating to interpreting the Cruel and Unusual Punishments Clause in the Eighth Amendment.⁶¹⁷ The Founders recognized there was wisdom in the lengthy legal tradition that preceded the Founding. That wisdom was the product of centuries of refinement and only partially connected to modern liberal ideas.

Punishment was meant to reflect and maintain that moral consensus. Justice Wilson referred to this as the “moral sense” that underwrites legal legitimacy while constraining positive law.⁶¹⁸ Importantly, that moral consensus also had roots in the idea that crime was associated with older notions of sin, which *all* members of the community could commit. As Judge Bibas puts it:

An erring criminal was a sinner just like everyone else. . . . Most wrongdoers, then, were viewed as brothers whom fellow citizens should help up again after their falls. The job of the criminal justice system was to reclaim the errant sheep and reintegrate them into the flock. Society should hate the crime but love and redeem the criminal.⁶¹⁹

Judge Bibas argues that social circumstances resulted in a more lenient practical approach to punishment.⁶²⁰ He contrasts the American approach to the death penalty, which was reserved for considerably fewer crimes than in the English criminal code.⁶²¹ Minor crimes also received lighter punishments.⁶²²

In Judge Bibas’s view, the purpose of punishment was altogether different, yet more comprehensive, than modern justifications and

615 See PESTRITTO, *supra* note 34, at 149.

616 BIBAS, *supra* note 11, at 2.

617 U.S. CONST. amend. VIII; see Stinneford, *Cruel*, *supra* note 523, at 447; Stinneford, *Unusual*, *supra* note 523, at 1745.

618 JAMES WILSON, *Of the Law of Nature*, in 1 COLLECTED WORKS OF JAMES WILSON, *supra* note 302, at 500, 511; see *id.* at 511–12.

619 BIBAS, *supra* note 11, at 2–3.

620 See *id.* at 7.

621 See *id.* at 6–7 (“Though crimes carried fixed penalties, colonial justice was more lenient in practice because criminal procedure left plenty of room for mercy.” *Id.* at 7.).

622 See *id.* at 7.

purposes because it was designed to be reintegrative given the nature of local community living.⁶²³ Punishment was meant to repair and then allow for the offender to begin anew with a clean slate which, depending on the trade of the offender, might have been a communal necessity.⁶²⁴ After all, “[m]ost people had to go back to living among those whom they had wronged.”⁶²⁵ As such, lengthy incarceration, which always results in some measure of incapacitation, was *not* the default position.⁶²⁶ Contrast this with the class separation and othering that occurs due to modern prisons and criminal recordkeeping apparatuses, with the former largely removed from public scrutiny and the latter resulting in a permanent stain that stalls full reintegration.⁶²⁷

Of course, the Founding era involved a period of criminal justice reform, and the motivations for those efforts also are mixed. Utilitarian reform ideas, involving the influence of Beccaria, were swirling at the time of the Founding.⁶²⁸ Still others note the rise of penitentiaries and rehabilitation-centric movements.⁶²⁹ And the influence of Locke looms large as his theory of punishment is mostly concerned with crime prevention.⁶³⁰

But as Pestritto shows, much criminal justice reform had non-instrumentalist roots involving the older liberal tradition concerned with natural law, human dignity, moral culpability, and proportionality.⁶³¹ There is as much evidence, if not more, for reform based on notions of justice as there is for utilitarian calculation.⁶³² Pestritto uses Pennsylvania’s reform experience—often cited as evidence of the moderation achieved by utilitarian principles—as influenced by ancient, medieval,

623 See *id.* at 9 (“The point was to make the wrongdoer remorseful and get him to make amends, so the victim and community would forgive him and welcome him back into the community.”).

624 See *id.* at 9–12 (noting how in Massachusetts those who had been convicted “routinely went on to hold town offices as selectmen, constables, surveyors, assessors, clerks, tythingmen, commissioners, and justices of the peace,” *id.* at 12).

625 *Id.* at 12.

626 See *id.* at 9.

627 See Murray, *supra* note 63, at 899–909.

628 See, e.g., MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW, 1780–1860*, at 2 (1977); WILLIAM E. NELSON, *AMERICANIZATION OF THE COMMON LAW: THE IMPACT OF LEGAL CHANGE ON MASSACHUSETTS SOCIETY, 1760–1830*, at 39, 118, 125 (1975).

629 See PESTRITTO, *supra* note 34, at 63 (referencing the work of David Rothman and Adam Hirsch on asylums and penitentiaries).

630 See *id.* at 76 (“[Locke’s] notion of reparation is utilitarian, not retributive. . . . Locke’s emphasis is almost entirely on prevention.”).

631 See *id.* at 132–38.

632 See *id.* at 109–12 (“The examination of the early American politics of punishment does suggest, however, that just deserts was a fundamental element in an approach to punishment” *Id.* at 111.).

and religious notions of justice.⁶³³ In short, reformers consistently referenced the limits of the moral law—whether inspired by religion or natural law—as a constraint on punishment.⁶³⁴

The sources of these constraints were many. State constitutions consistently referenced higher principles of law.⁶³⁵ Jefferson's effort to reform Virginia's penal code rested on his understanding that crime involves moral culpability and that punishment should be calibrated to the severity of the crime.⁶³⁶ Similarly, Benjamin Franklin argued against punishments that were merely the product of legislation, leaving higher law behind, and abandoning proportionality based on justice.⁶³⁷

Justice Wilson's musings on punishment are instructive. Justice Wilson grounded legal validity in its connection to the "moral sense."⁶³⁸ As such, punishment reacted to the moral culpability associated with crime; it responds to the *extra* injury that crime inflicts personally and socially.⁶³⁹ Justice Wilson, therefore, justifies punishment on retributive terms and uses that justification as a constraint on any nonretributive purposes that punishment might serve.⁶⁴⁰ Justice Wilson did *not* embrace Beccarian utilitarian thinking, which he questioned constantly.⁶⁴¹ He railed against existing punishment regimes that were over-inclusive, disproportionate, and altogether harmful.⁶⁴² Justice Wilson utilized this theory to argue for milder punishments.⁶⁴³ As Pestritto notes, he thought "[p]unishment must be based upon a broader understanding of justice and must have as its end the happiness of the people."⁶⁴⁴

This nuanced understanding was shared by other Founders who recognized the need for the criminal law and punishment to connect to broader concerns about societal happiness beyond the aggregation of self-interest. George Washington repeatedly emphasized broader

633 *See id.* at 112–15.

634 *See id.* at 113–17.

635 *See id.* at 121.

636 *See id.* at 124–25.

637 *See id.* at 126–28.

638 Wilson, *supra* note 618, at 511–12.

639 *See* Wilson, *supra* note 302, at 1102–04 (citing three examples where bad disposition plus act connotes crime, including treason).

640 *See* PESTRITTO, *supra* note 34, at 131–32 (noting Justice Wilson's theory of proportionality).

641 *See, e.g.,* Wilson, *supra* note 302, at 1095.

642 *Id.* ("Instead of being, as it ought to be, an emanation from the law of nature and morality; it has too often been avowedly and systematically the reverse. It has been a combination of the strong against the weak, of the rich against the poor, of pride and interest against justice and humanity.").

643 *See* PESTRITTO, *supra* note 34, at 131–32.

644 *Id.* at 131.

justice-oriented principles during his public life.⁶⁴⁵ Madison argued for connecting punishment to robust notions of moral culpability and specifically denounced the “specious errors of [Beccaria].”⁶⁴⁶ Hamilton criticized Hobbes’s theories, which grounded political society and punitive institutions in individual self-interest.⁶⁴⁷ Many Founders embraced teleological notions of human nature and their significance for political philosophy.⁶⁴⁸

In short, the Founding era did not wholeheartedly embrace modern liberal ideas about punishment. Instead, it was a complex mix of ideas, with many holding traditional views about the constraints that moral law imposes on human law. They were influenced by several figures, including pre-modern liberal thinkers, as well as Enlightenment-era figures.⁶⁴⁹ Social circumstances and existing legal institutions supported ideas about punishment that were not entirely instrumentalist. Of course, Founding punishment practices were not perfect; the scourge of slavery existed, and there were plenty of punishments that were dehumanizing and degrading. The question, for purposes here, however, is whether there is a straight line between Founding *thinking* and present-day circumstances. That seems unlikely.

CONCLUSION

The pathologies affecting the health of American criminal justice are many and they are complicated. Some of the symptoms—overcriminalization, excessive punitiveness, diminished security in property, privacy, and person, plea bargaining, and instrumentalized alienation in sentencing—resemble core, paradigmatic ideas associated with the modern liberal tradition. These illustrations help to elucidate the nature of root causes and point to the real-world effects of first principles relating to human nature, law, authority, and government.

Moreover, they suggest that the origins of the current situation are remarkably complex. Modern liberal ideas were part of, but do not define, the thinking that resulted in the legal framework that has developed for nearly 250 years. There is strong evidence that the Founders were concerned with the possibility of some of what has come to

645 See *id.* at 133.

646 *Id.* at 135; see *id.* at 134–35 (alteration in original) (emphasis omitted) (quoting Letter from James Madison to Thomas S. Grimké (Jan. 15, 1828), in 3 LETTERS AND OTHER WRITINGS OF MADISON 611, 612 (Philadelphia, J.B. Lippincott & Co. 1865)).

647 See *id.* at 135 (discussing Hamilton’s criticism of Hobbes in his essay ALEXANDER HAMILTON, THE FARMER REFUTED (New York, James Rivington 1775), reprinted in 1 THE PAPERS OF ALEXANDER HAMILTON 81 (Harold C. Syrett eds, 1961)).

648 See COOPER & DYER, *supra* note 505, at 44–45.

649 See PESTRITTO, *supra* note 34, at 139–42 (referencing the “synthesis of approaches” present at the Founding, *id.* at 142).

pass, leading them to establish institutions, such as juries, as counter-vailing forces that could resist the worst paradigmatic impulses. That means the American legal tradition likely already contains some of the desired antidotes necessary to treat contemporary injustice.