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Freedom from Incarceration: Why is This Right Different from All Other Rights?

Sherry F. Colb
Cornell Law School, sfc44@cornell.edu

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FREEDOM FROM INCARCERATION:
WHY IS THIS RIGHT DIFFERENT
FROM ALL OTHER RIGHTS?

SHERRY F. COLB*

American constitutional jurisprudence has long accepted the notion that the exercise of certain rights can only be restricted by the government if the restriction satisfies strict scrutiny. The Supreme Court has identified such rights as fundamental, often by relying on an expansive interpretation of the word “liberty” in the due process clause of the fourteenth amendment. In this Article, Professor Colb argues that the Supreme Court has failed to recognize the right to physical liberty itself as a fundamental right. She demonstrates that, at present, conduct that is not itself constitutionally protected may serve as the basis for imprisonment, even if the government lacks a compelling interest in preventing the conduct. Professor Colb argues that a governmental decision to restrict a person’s fundamental freedom from incarceration, like the decision to restrict any other fundamental right, should be subjected to strict scrutiny. She demonstrates the inadequacy of possible justifications for the Supreme Court’s present failure to protect the freedom from incarceration. Finally, Professor Colb begins the process of scrutinizing decisions to incarcerate by positing possible applications of her theory.

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* Assistant Professor, Rutgers School of Law, Camden. A.B., 1988, Columbia College; J.D., 1991, Harvard University. I wish to express thanks to Randy E. Barnett, Vincent A. Blasi, Erwin Chemerinsky, Michele A. Coyle, Michael C. Dorf, Brian Leiter, Henry P. Monaghan, Nancy J. Moore, Richard D. Parker, Dennis M. Patterson, Elyn R. Saks, and Laurence H. Tribe, for their helpful comments and suggestions. I also wish to thank Susan N. Lanzatella for her tireless research assistance, even as the bar examination approached.
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INTRODUCTION

In March 1994, a Singapore court sentenced Michael Fay, an eighteen-year-old United States citizen, to be caned for spraying graffiti on cars and committing other acts of vandalism.\(^1\) The procedure was to involve "six skin-splitting strokes on the bare buttocks with a half-inch-thick, four-foot rattan cane."\(^2\) In the months following Fay's sentencing, many public officials and commentators in the United States wrote letters and articles denouncing the government of Singapore for its cruelty and pleading with the government to have mercy on Michael Fay and spare him this penalty.\(^3\) The pleading was to little avail, however. Fay was caned on May 5, 1994.\(^4\)

The caning episode brought to light a debate that surfaces from time to time in the United States. If we caned people in America for graffiti, said some, perhaps Americans would have greater respect for the law and our crime rate would be lower.\(^5\) Perhaps, said others, but the price would be too high. In this country, we have individual rights, and our Constitution stands in the way of those who would like to create a police state. Disorder is sometimes the price of liberty.\(^6\) If Michael Fay had committed his crime in America, said the defenders of liberty, the Constitution would have protected him from the barbaric punishments of Singapore.\(^7\)

If Michael Fay had smoked a marijuana cigarette in this country (instead of spraying graffiti in Singapore), he could have lost his lib-

\(^2\) Id.
\(^3\) See id. (discussing public debate over Fay's sentence).
\(^7\) See id.
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...erty from confinement for up to a year, assuming no prior drug convictions. Indeed, there is every reason to believe that Congress or any state legislature could, if it so desired, pass a statute that would subject people who spray graffiti, possess marijuana, or park on the wrong side of the street to life imprisonment without the possibility of parole, consistent with the Supreme Court's reading of the Constitution. In the United States, so long as a statutory prohibition does not implicate constitutionally protected conduct, the convict may always be subjected to a prison sentence. Though our courts provide procedural protections to ensure that the facts of every case are fairly adjudicated, they do not substantively scrutinize the necessity and value of a particular criminal law even though a person's liberty from incarceration hangs in the balance. While many of us were outraged by the notion of caning graffiti artists and are confident (or at least hopeful) that some part of the Bill of Rights would prevent a similar occurrence in this country, we do not sufficiently scrutinize the penalty of incarceration as a deprivation of the fundamental right to be free from physical confinement.

This Article explains and criticizes the courts' failure to address imprisonment as a serious incursion on an individual's constitutionally protected liberty. At first glance, this critique may strike the reader as radical, in light of the ubiquitous nature of imprisonment in our criminal justice system. In fact, however, the thesis of the Article does not call for the destabilization of the institution of imprisonment for those committing offenses that frustrate a compelling governmental interest. Such offenses would indisputably include, but would not be limited to, violent acts like murder and assault. The Article instead calls for a close examination of laws providing for the incarceration of individuals whose actions violate the criminal law but do not otherwise cause serious harm to society's interests. This approach would render the Court's current analysis of the criminal law consistent with its well-

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8 Under 21 U.S.C. § 844(a) (1988 & Supp. V 1993), the statutory maximum prison sentence for simple possession of a controlled substance (when there are no prior drug convictions) is one year imprisonment. However, in the case of possession of a mixture or substance that contains cocaine base (i.e., crack), the maximum prison sentence is 20 years imprisonment if it is a first conviction and the mixture or substance is more than five grams. See also United States Sentencing Commission, Guidelines Manual, § 2D2.1 (1994) (providing penalties for simple possession of narcotics that depend on type of drug involved and presence of prior convictions).

9 See Harmelin v. Michigan, 501 U.S. 957, 994-95 (1991) (finding that sentence of life in prison without possibility of parole for possession of more than 650 grams of cocaine did not constitute cruel and unusual punishment, despite defendant's status as first-time felon). Although Harmelin did not expressly overrule Solem v. Helm, 463 U.S. 277, 303 (1983) (holding that eighth amendment proscribes life sentence without parole for seventh nonviolent felony), it appears to have done so sub silentio.
developed doctrine regarding civil commitment of the mentally ill. The Article works from the premise that a law cannot deprive individuals of fundamental rights without strong substantive justification and that this required justification cannot consist of the mere fact that the law is a criminal law.10

Part I contrasts the United States Supreme Court’s approach to deprivations of liberty from confinement with its approach to other deprivations of fundamental rights derived from the substantive “liberty” portion of the due process clause. While subjecting other fundamental rights deprivations to strict scrutiny, the Court analyzes deprivations of liberty from confinement using only rational basis scrutiny.

Part II considers the argument that the procedural requirement of “notice” that must accompany all criminal statutes distinguishes prison from other fundamental rights deprivations. Part II concludes, however, that the notice requirement does not adequately justify the lower level of scrutiny applied to prison as opposed to other substantive due process rights deprivations.

Part III then outlines three possible but problematic justifications for refusing to apply strict scrutiny to incarceration: first, if we can prohibit the act, we can imprison the actor; second, an abundance of procedural protection can substitute for substantive constitutional protection; and third, courts must defer to the legislative branches in criminal matters in the same way as they defer to the executive branch in military matters. These notions may explain, but ultimately prove incapable of justifying, the disparate treatment of the deprivation of liberty from incarceration. Part III therefore concludes that the Court should apply strict scrutiny when evaluating criminal laws imposing imprisonment as a penalty.

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10 One might wonder why this thesis would not apply equally to property, since the fourteenth amendment lists “property” along with “liberty” as protected by due process. See U.S. Const. amp; XIV, § 1 (“[N]or shall any State deprive any person of life, liberty, or property, without due process of law...”). The answer is that the thesis does not proceed from a textual observation that the due process clause lists “liberty” or from an historical argument that the Framers believed liberty to be a protected fundamental right. It proceeds from a contemporary constitutional law perspective, according to which (1) there are a limited number of rights that are deemed “fundamental”; (2) these rights cannot be burdened without compelling justification; (3) under the current doctrine and under any view of ordered liberty, such rights include freedom from physical confinement; and (4) the current doctrine should be true to the first three premises. None of this analysis entails the proposition that property is as important as liberty. On the contrary, our current doctrine reflects the view that freedom from confinement is of greater constitutional significance than property rights. See, e.g., In re Winship, 397 U.S. 358, 367-68 (1970) (requiring that guilt be proven beyond reasonable doubt in criminal cases (which typically involve possibility of incarceration), even though civil cases (which typically involve monetary damages) require proof by preponderance of evidence).
Part IV sets forth a model of how strict scrutiny might operate in the context of the right to liberty from incarceration and addresses some of the potential practical problems that might arise if such a model were adopted by the courts.

I

The Inconsistency

The Supreme Court subjects deprivations of fundamental rights to the most exacting standard of strict scrutiny. An individual's interest in being free of physical confinement is a fundamental right. As this Part will demonstrate, deprivations of the right of physical liberty should therefore be subjected to strict scrutiny analysis. This Part also demonstrates, however, that this fundamental right has been treated differently from all other fundamental rights under the Court's jurisprudence.

A. Fundamental Rights Doctrine

In examining laws claimed to violate constitutionally protected individual rights, the Supreme Court has recognized some rights as "fundamental." These rights include those enumerated explicitly in the Constitution as well as those that the Court has recognized as essential to the "liberty" protected by the fourteenth and fifth amendment due process clauses. No government in the United States, then, may deprive its citizens of "liberty"—however that is defined—in the absence of "due process."12

Under Supreme Court precedent, a law or policy that burdens a fundamental right is invalid if it does not meet the exacting standards of "strict scrutiny."13 Strict scrutiny requires that state action limiting the exercise of a fundamental right serve a compelling governmental

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11 See note 15 infra (listing rights protected as fundamental).
12 The due process requirement is both substantive and procedural. See Mugler v. Kansas, 123 U.S. 623, 660-61 (1887) (first recognizing that due process includes substantive as well as procedural component); see also Planned Parenthood v. Casey, 112 S. Ct. 2791, 2804 (1992) (stating that due process clause is not exclusively procedural); Duncan v. Louisiana, 391 U.S. 145, 147-58 (1968) (incorporating against states right to jury trial through fourteenth amendment); Malloy v. Hogan, 378 U.S. 1, 8 (1964) (incorporating against states fifth amendment right to be free from compelled self-incrimination through fourteenth amendment); Wolf v. Colorado, 338 U.S. 25, 27-28 (1949) (incorporating against states fourth amendment right against unreasonable search and seizure through fourteenth amendment).
13 See note 15 infra (citing specific instances of application of fundamental rights strict scrutiny). For a thorough discussion of strict scrutiny as a standard of judicial review, see Laurence H. Tribe, American Constitutional Law §§ 16-7 to -12, at 1454-65 (2d ed. 1988). For an attack on the Supreme Court's application of "interest scrutiny" as a systematically unprincipled and incoherent approach to balancing, see Hans A. Linde, Who Must Know
interest and be the least restrictive means to serve that end. The Supreme Court has employed the standard of strict scrutiny to analyze a wide variety of restrictions on individual conduct.

Although the application of strict scrutiny inevitably entails subjective value judgments, this fact does not, in my view, delegitimize the enterprise of applying the compelling interest test. The determination of the scope of constitutional rights requires interpretation and elaboration. Because article III of the Constitution grants federal judges the power and the responsibility of interpreting and applying the law, it follows that to whatever extent "judging" includes subjective value judgments, it is the courts' responsibility to make these judgments.

In requiring judges to review claims of constitutional right, I would favor the judicial employment of a harm model, one deriving from the proposition that criminal prohibitions should be limited to behavior causing harm to others. See generally Joel Feinberg, The Moral Limits of the Criminal Law: Harmless Wrongdoing (1988). My preferred harm model, however, is not absolute. I would permit the criminal law to pursue purely moral ends but would claim that such ends do not constitute compelling governmental interests that would justify burdening a fundamental right such as the right to freedom from incarceration.

See L. Tribe, supra note 13, §§ 16-7 to -12, at 1454-65 (discussing application of strict scrutiny); see also cases cited in note 15 infra.

See, e.g., Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 113 S. Ct. 2217, 2233-34 (1993) (invalidating ordinance banning ritual animal sacrifice); R.A.V. v. City of St. Paul, 112 S. Ct. 2538, 2547-49 (1992) (invalidating law singling out conduct expressing message of specified types of group-animus as viewpoint-based discrimination); Texas v. Johnson, 491 U.S. 397, 402-20 (1989) (invalidating law banning flag-desecration as viewpoint-based restriction against message of contempt for government); Roberts v. United States Jaycees, 468 U.S. 609, 618 (1984) (recognizing that "certain kinds of highly personal relationships" should be afforded special associational protection under the Constitution); Zablocki v. Redhail, 434 U.S. 374, 383-87 (1978) (reaffirming fundamental right to marry); Roe v. Wade, 410 U.S. 113, 155-56 (1973) (holding that because woman's right to decide whether to terminate pregnancy is fundamental, only compelling interest can justify state regulation which impairs that right); Planned Parenthood v. Casey, 112 S. Ct. 2791, 2819 (1992) (modifying Roe standard by holding that law which burdens right to abortion may be upheld if it is neither designed to, nor has the effect of, creating an undue burden on woman's ability to choose to terminate pregnancy); Eisenstadt v. Baird, 405 U.S. 438, 453-56 (1972) (extending recognition of fundamental right to contraception to the unmarried); Shapiro v. Thompson, 394 U.S. 618, 629-31 (1969) (finding that durational residency requirements for welfare unjustifiably burden right of interstate travel); Loving v. Virginia, 388 U.S. 1, 12 (1967) (invalidating antimiscegenation law as denying equality with respect to fundamental right to marry); Harper v. Virginia State Bd. of Elections, 383 U.S. 663, 666-68 (1966) (invalidating poll tax providing differential access to the vote based on wealth); Griswold v. Connecticut, 381 U.S. 479, 486 (1965) (noting that marriage is "right of privacy older than the Bill of Rights" and recognizing fundamental rights of procreation and use of contraception); Sherbert v. Verner, 374 U.S. 398, 403-06 (1963) (holding that first amendment free exercise clause requires that unemployment compensation be extended to unemployed individuals who could not work on Saturday for religious reasons); Skinner v. Oklahoma ex rel. Williamson, 316 U.S. 535, 541 (1942) (prohibiting sterilization of thief on ground that because procreation is fundamental right, government entity depriving some but not others of right to procreate must justify that differential treatment by showing that it is narrowly tailored to serve compelling state interest); Meyer v. Nebraska,
The fundamental rights recognized by the Court have been derived primarily from the fourteenth amendment due process clause, either by extending the application of liberties explicitly enumerated in the Bill of Rights to action of the states through the incorporation doctrine,16 or as unenumerated liberties.17 These substantive due process rights have been recognized as "implicit in the concept of ordered liberty."18 One consequence of recognizing these rights as implicit in the word "liberty" is that "liberty" in the due process clause means more than just freedom from incarceration.19

B. Liberty from Confinement as a Fundamental Right

The Supreme Court has long recognized that liberty from confinement is a fundamental right. In Meyer v. Nebraska,20 the Court said that [w]ithout doubt, [the liberty defined by the fourteenth amendment] denotes not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men.21

262 U.S. 390, 399 (1923) (recognizing right to "marry, establish a home, and bring up children" as central to liberty protected by due process clause).

16 See, e.g., Duncan, 391 U.S. at 147-58 (incorporating sixth amendment right to trial by jury); Klopfer v. North Carolina, 386 U.S. 213, 219-26 (1967) (incorporating sixth amendment right to speedy trial); Malloy, 378 U.S. at 8 (incorporating fifth amendment privilege against self-incrimination); Gideon v. Wainwright, 372 U.S. 335, 336-45 (1963) (incorporating sixth amendment right to assistance of counsel); Mapp v. Ohio, 367 U.S. 643, 643-60 (1961) (holding that evidence obtained by searches and seizures which violate fourth amendment is inadmissible in state courts).

17 The enumerated rights that individuals have against the federal government can be found in the first eight amendments to the Constitution, and unenumerated rights are derived from the fifth amendment due process clause and arguably, the ninth amendment.

18 Palko v. Connecticut, 302 U.S. 319, 325 (1937). Over the years, the standard for determining whether a particular right is fundamental under the due process clause has become less stringent. See L. Tribe, supra note 13, § 11-2, at 773 (describing this liberalization in context of incorporation of Bill of Rights). The precise standard to be applied in determining whether a right is fundamental is not of critical importance for our purposes though, because under any measure, however restrictive, the liberty from physical confinement would qualify as a fundamental right.

19 See, e.g., Casey, 112 S. Ct. at 2859 (Rehnquist, C.J., concurring in judgment and dissenting in part) ("In construing the phrase 'liberty' incorporated in the Due Process Clause of the Fourteenth Amendment, we have recognized that its meaning extends beyond freedom from physical restraint.").

20 262 U.S. 390, 399-401 (1923) (holding law prohibiting teaching of foreign language to young children unconstitutional under fourteenth amendment).

21 Id. at 399 (citations omitted).
Implicit in this statement is the presupposition that "freedom from bodily restraint" is a component of the substantive right to "liberty" enumerated in the due process clause. Although the Court's view that liberty extended beyond this core to protect the right to contract has been rejected categorically, the idea that liberty of person is a necessary component of the fourteenth amendment's protection of liberty has not been questioned.

Twenty-eight years before Meyer was decided, the first Justice Harlan, dissenting in Hooper v. California, quoted an early New York case stating that

"[l]iberty, in its broad sense[,] as understood in this country, means the right, not only of freedom from actual servitude, imprisonment[,] or restraint, but the right of one to use his faculties in all lawful ways, to live and work where he will, to earn his livelihood in any lawful calling, and to pursue any lawful trade or avocation." As in Meyer, the implicit and undisputed premise is that while one might take a broad or narrow view of liberty, the word "liberty," without question, encompasses the freedom from confinement.

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22 See West Coast Hotel Co. v. Parrish, 300 U.S. 379, 391-93, 395-96 (1937) (holding that liberty guaranteed under Constitution is not "absolute and uncontrollable," and permits regulation of contracts in public interest, and overruling Adkins v. Children's Hosp., 261 U.S. 525 (1923)).

23 155 U.S. 648 (1895).

24 Id. at 662-63 (Harlan, J., dissenting) (quoting In re Application of Jacobs, 98 N.Y. 98, 106 (1885)) (alterations and emphasis in original).

25 For the origins of this notion, consider the following theory:

The phrase, "life, liberty or property without due process of law" came to us from English common law; and there seems to be little question that, under the common law, the word "liberty" meant simply "liberty of the person" or, in other words, "the right to have one's person free from physical restraint."... It is unquestionable that when the First Congress adopted the Fifth Amendment and inserted the Due Process Clause, they took it directly from the then existing State Constitutions, and they took it with the meaning it then bore. Charles Warren, The New "Liberty" Under the Fourteenth Amendment, 39 Harv. L. Rev. 431, 440 (1926) (developing this theory at length). Professor Monaghan has observed that Board of Regents v. Roth, 408 U.S. 564 (1972), abandoned the generous view of "life, liberty and property" in the procedural due process context, in favor of analyzing separately the specific words in the phrase in a manner that did not include "the full range of state conduct having serious impact upon individual interests." Henry L. Monaghan, Of "Liberty" and "Property," 62 Cornell L. Rev. 405, 409 (1977). Even under this parsimonious reading of the due process clause, however, the word "liberty" would still surely include freedom from physical restraint. See Powell v. Pennsylvania, 127 U.S. 678, 692 (1888) (Field, J., dissenting) ("As said by the Court of Appeals of New York, in People v. Marx, 'The term "liberty," as protected by the Constitution, is not cramped into a mere freedom from physical restraint of the person of the citizen, as by incarceration, but is deemed to embrace the right of man to be free in the enjoyment of the faculties with which he has been endowed by his Creator, subject only to such restraints as are necessary for the common welfare.'..." (quoting People v. Marx, 2 N.E. 29, 33 (N.Y. 1885))); Munn v. Illinois, 94 U.S. 113, 142 (1876) (Field, J., dissenting) ("By the term 'liberty,' as used in [the..."),
In addition to recognizing the fundamental status of liberty in the process of defining or refusing to define other rights as fundamental, the Supreme Court has specifically addressed the substantive right to liberty in the context of civil commitment of the mentally ill. In *Parham v. J.R.*, for example, the Court recognized a child's "substantial liberty interest in not being confined unnecessarily." In *O'Connor v. Donaldson*, the Court held that an adult who does not present a danger to herself or to others, but who is nonetheless confined in a state mental hospital, suffers a deprivation of her constitutional right to liberty from physical confinement.

In the process of considering whether the harmless mentally ill might be confined, the *O'Connor* Court addressed the argument that the state interest in improving a patient's standard of living justifies the civil commitment. "That the State has a proper interest in providing care and assistance to the unfortunate goes without saying." Nonetheless, the Court rejected this interest as a basis for confinement, noting that a person who is mentally ill might prefer her own home "to the comforts of an institution." The Court similarly rejected the notion that the mentally ill might be confined to protect the public from exposure to them. "Mere public intolerance or animosity cannot constitutionally justify the deprivation of a person's physical liberty."

In order to justify such a deprivation, then, the state must have a stronger interest necessitating that confinement than the merely "legitimate" interest in improving the citizens' comfort level. The state needs an interest as strong as that present when the relevant individual poses a danger to herself or to others. As the Court said in

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27 Id. at 600.
29 See id. at 576.
30 Id. at 575.
31 Id.
32 Id.
33 Some might argue that posing a danger to oneself because one wishes to commit suicide should not necessarily be a ground for confinement. See Derek Humphry, Final Exit: The Practicalities of Self-Deliverance and Assisted Suicide for the Dying 17 (1991)
O'Connor, "[t]hat a wholly sane and innocent person has a constitutional right not to be physically confined by the State when his freedom will pose a danger neither to himself nor to others cannot be seriously doubted." This powerful affirmation of the fundamentality of the right to liberty from confinement emerged in Foucha v. Louisiana. This case involved the institutional confinement of a man found not guilty by reason of insanity of an aggravated burglary and an illegal discharge of a firearm. The Supreme Court held that the state could not continue to confine him if he were no longer both mentally ill and dangerous. The Court explained that freedom from bodily restraint has always been at the core of the liberty protected by the Due Process Clause from arbitrary governmental action. It is clear that commitment for any purpose constitutes a significant deprivation of liberty that requires due process protection. We have always been careful not to minimize the importance and fundamental nature of the individual's right to liberty.

C. The Valid Conviction Rule

What happens to the fundamental liberty from physical confinement when an "innocent" person who is neither mentally ill nor dangerous performs an act that is prohibited by the criminal law? Perhaps because of its obvious implications for the incarceration of convicts, the Court in Foucha supplemented its praise for the fundamental right to liberty by stating that a "State, pursuant to its police power, may of course imprison convicted criminals for the purposes of deterrence and retribution." (asking rhetorically, "Aren't these archaic laws [subjecting those who assist a suicide in England to a sentence of up to 14 years imprisonment] ready to be changed to situations befitting modern understanding and morality?"); The Hemlock Society USA, Mission Statement ("The Hemlock Society USA believes terminally ill people should have the right to self-determination for all end-of-life decisions.") (on file with the New York University Law Review). This is not, however, because the state lacks a compelling interest in protecting citizens from danger. It is instead because many view suicide as itself a fundamental right. Cf. Cruzan v. Director, Missouri Dep't of Health, 497 U.S. 261, 278-79 (1990) (recognizing substantive due process right to bodily integrity that includes right of competent person to refuse life-saving medical treatment).

34 O'Connor, 422 U.S. at 573 n.8; see also Humphrey v. Cady, 405 U.S. 504, 509 (1972) (noting that commitment to mental hospital is "massive curtailment of liberty").
36 Id. at 1782.
37 Id. at 1786-87.
38 Id. at 1785 (internal quotation marks and citations omitted).
39 Id. But deterrence of and retribution for what? Citing Brandenburg v. Ohio, 395 U.S. 444 (1969) and Robinson v. California, 370 U.S. 660 (1962), the Foucha Court noted...
Along the same lines, in *Meachum v. Fano*, the Supreme Court determined that the right to liberty from confinement does not survive a criminal conviction. The Court restated this principle in *Vitek v. Jones*. There the Court held that transferring a prisoner to a mental hospital implicated a fourteenth amendment liberty interest and required procedural due process protection beyond the criminal trial itself. In defining the liberty interest retained by the prisoner, the Court stated "[u]ndoubtedly, a valid criminal conviction and prison sentence extinguish a defendant's right to freedom from confinement." Such a conviction and sentence sufficiently extinguish a defendant's liberty "to empower the State to confine him in *any* of its prisons."

The Court clearly treats the fundamental right to liberty differently from all other fundamental rights. Though liberty from confinement is an essential, core right of citizenship, a criminal conviction nonetheless extinguishes that right. While a criminal conviction must be "valid," this requirement places minimal substantive limits upon the government. A valid conviction entails many procedural prote-
however, the only substantive component of a "valid" conviction is that the criminal conduct not be constitutionally protected as a fundamental right. Thus, for example, a person cannot be deprived of her liberty as a punishment for free speech, association, or the

See text accompanying notes 130-46 infra.

See, e.g., Eisenstadt v. Baird, 405 U.S. 438, 454-55 (1972) (invalidating criminal prohibition against distribution of contraceptives to unmarried couples); Griswold v. Connecticut, 381 U.S. 479, 485 (1965) (invalidating criminal prohibition against use of contraceptives by married couples). Of course, even those laws criminalizing conduct that is not a fundamental right must be rationally related to a legitimate state objective. See, e.g., Williamson v. Lee Optical, Co., 348 U.S. 483, 487-88 (1955) (upholding law restricting optometrists' privileges as rationally related to health); United States v. Carolene Products Co., 304 U.S. 144, 152 (1938) (holding that laws would be sustained if known or reasonably inferable facts afforded support for legislation); see also Robert W. Bennett, "Mere" Rationality in Constitutional Law: Judicial Review and Democratic Theory, 67 Calif. L. Rev. 1049, 1049 (1979) (noting that "Supreme Court has long insisted, as a matter of constitutional doctrine, that legislative action must be rationally related to the accomplishment of some legitimate state purpose"); Hans A. Linde, Due Process of Lawmaking, 55 Neb. L. Rev. 197, 199 (1976) (discussing "judicial formula that a law is invalid by virtue of the fifth or the fourteenth amendment unless it is a rational means toward some intended legislative end"). For an example of the application of the rational basis test in the equal protection context, see City of New Orleans v. Dukes, 427 U.S. 297, 303 (1976) (holding that to be constitutionally permissible, classification must be "rationally related to a legitimate state interest").

Since courts, for the most part, presume that state legislatures act within the bounds of the Constitution, a statute will not be invalidated if any justification can reasonably be found. See, e.g., Ferguson v. Skrupa, 372 U.S. 726, 732 (1963) (upholding law limiting the practice of debt-adjustment to licensed attorneys after nominal rational basis scrutiny and stating that questions of utility of such legislation "are properly addressed to the legislature, not to us"). Professor Tribe has observed that "[d]espite its venerable origins, the requirement that legislation be rationally related to a legitimate governmental purpose or a recognizable community value can serve as little more than a source of pressure on government to articulate purposes that fit a challenged law," given the courts' refusal to inquire into actual (rather than conceivable) legislative purpose and the context in which the law exists. L. Tribe, supra note 13, §15-2, at 1306. But see City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 446 (1985) (finding legislation distinguishing mentally retarded from other citizens violated equal protection clause because not rationally related to legitimate state interest). For a more thorough discussion of rational basis review and its application, see Cass R. Sunstein, Naked Preferences and the Constitution, 84 Colum. L. Rev. 1689, 1713 (1984) (arguing that "although the rationality test is highly deferential, its function is to ensure that classifications rest on something other than a naked preference for one person or group over another").

See, e.g., New York Times Co. v. Sullivan, 376 U.S. 254, 277 (1964) (holding that tort of defamation is subject to first amendment constraints and stating that "[w]hat a State may not constitutionally bring about by means of a criminal statute is likewise beyond the reach of its civil law"); Yates v. United States, 354 U.S. 298, 327 (1957) (overturning criminal convictions of members of Communist Party for speech too remote to constitute incitement).

refusal to answer a question that might incriminate her. This substantive validity requirement is no different, however, from that imposed upon a zoning ordinance or a licensing system, either of which also must be "rational" and must withstand strict constitutional scrutiny if it burdens additional fundamental rights. This means that there is no substantive burden of justification that the government must bear by virtue of its decision to regulate conduct through incarceration, even though that decision deprives a citizen of a fundamental right.

By way of example, consider the case of a hypothetical defendant, John Doe, who is charged with the crime of eating a hashish brownie in the state of Ames. The state's investigation of the crime conforms in all respects with the dictates of the fourth and fifth amendments. The state provides Doe with an excellent attorney. Doe's criminal trial is entirely fair, and the admissible evidence of Doe's guilt is overwhelming. The jury finds Doe guilty beyond a reasonable doubt, Doe is sentenced to the statutory minimum of five years in prison, and his conviction is sustained on appeal. At no point must the state prove that it has a compelling interest in stopping people from eating hashish.

If eating hashish were itself a fundamental right, then Doe could demand that the state prove as part of its case that the statute under which he was prosecuted passes strict scrutiny. By confining Doe for his ingestion of hashish, however, the state does not merely burden Doe's putative right to eat hashish; it burdens his right to be free from

50 See, e.g., Kastigar v. United States, 406 U.S. 441, 453 (1972) (holding that protection afforded by grant of immunity for self-incriminating statements should be coextensive with protection afforded by privilege against compulsory self-incrimination).

51 See note 47 supra.

52 There may be eighth amendment limits upon the length of incarceration for a given offense, but recent Supreme Court decisions suggest that such limits are minimal at best. See, e.g., Harmelin v. Michigan, 501 U.S. 957, 994-95 (1991) (finding that sentence of life in prison without possibility of parole for sale of 650 grams of cocaine did not constitute cruel and unusual punishment, despite defendant's status as first-time felon).

53 Where there is no compelling interest in preventing the conduct, there is also no compelling interest in punishing it. To the extent that conduct is serious and harmful enough to give rise to a compelling interest in retribution (an interest independent of whether the punishment will deter further wrongdoing), there is also necessarily a compelling interest in preventing the conduct in the first place. For further discussion of the relationship between the respective interests in prevention and retribution, see text accompanying notes 224-26 infra.

54 See note 15 and accompanying text supra. One commentator has argued that heightened scrutiny of legislation criminalizing drug use might be required under the ninth amendment. See Randy E. Barnett, Reconceiving the Ninth Amendment, 74 Cornell L. Rev. 1, 35 (1988) (proposing that "the Ninth Amendment can be viewed as establishing a general constitutional presumption in favor of individual liberty").
confinement. The state may nevertheless deprive him of his liberty from incarceration without substantive justification as long as there is no right to engage in the prohibited conduct. Governments may, in other words, place behind bars those who engage in trivial, non-threatening activity, provided the activity is prohibited by the criminal law and does not qualify as a fundamental right.\footnote{The state must also prove that the statute passes “rational basis” scrutiny, but this burden is not very demanding in practice. See note 47 supra. The Court’s treatment of liberty, while peculiar, is mirrored in its approach to the death penalty. Just as the state does not have to justify incarceration of “validly convicted” individuals, it does not need to defend imposition of the death penalty. The Supreme Court has, of course, held that death may be “cruel and unusual punishment” under various circumstances. See, e.g., Lockett v. Ohio, 438 U.S. 586, 605 (1978) (holding that death penalty statutes violate eighth amendment unless they permit jurors to give effect to mitigating evidence); Coker v. Georgia, 433 U.S. 584, 597 (1977) (holding that execution of rapists violates eighth amendment); Furman v. Georgia, 408 U.S. 238, 309 (1972) (Stewart, J. concurring) (arguing that giving jurors too much discretion in capital sentencing violates eighth amendment because it results in arbitrary imposition of death penalty); see also Callins v. Collins, 114 S. Ct. 1127, 1130 (1994) (Blackmun, J., dissenting from the denial of certiorari) (indicating his view that no sentence of death may be constitutionally imposed under current death penalty scheme). However, the Court has also indicated there need not be a close fit between prevention of murder and the imposition of the death penalty. See Gregg v. Georgia, 428 U.S. 153, 186-87 (1976) (plurality opinion). In other words, though there is undisputedly a compelling interest in preventing murder, governments may execute murderers without showing either that execution actually prevents murder or that there are no less restrictive means of prevention. One might argue that because murder is such a heinous crime, there is a compelling interest not only in preventing but also in punishing murder in the most severe manner possible. The Supreme Court has not, however, relied on the compelling nature of retribution—or any other compelling interest argument—to defend capital punishment, but has instead rested primarily on the assumption that if the imposition of death is not disproportionate in relation to the crime of conviction, then the government has fully satisfied its substantive burden of justification. Id. at 187. The right to life, like the right to liberty from confinement, is undoubtedly a fundamental right. Yet, as with the right to liberty from confinement, deprivations of the right to life have not been subjected to strict scrutiny. The Court has, for some reason, seen fit to treat criminal penalties as sui generis.}

As Part I demonstrates, courts should recognize that incarceration deprives an individual of a fundamental right. Part II addresses the argument that notice provides an adequate basis for deprivation of this fundamental right.

II

Notice

If courts begin to recognize the fundamental right to be free from incarceration and treat it like other fundamental rights, the issue of the effect of notice on the analysis arises. All citizens are put on notice by the criminal law that engaging in particular conduct subjects them to incarceration. As this Part will demonstrate, however, notice
alone provides an inadequate justification for deprivations of the fundamental right to liberty.

A. The Notice Distinction

There is one significant distinction between governmental burdens upon most fundamental rights, and upon the right to be free from physical confinement. The individual who wishes to enjoy her liberty from confinement generally can do so simply by obeying the criminal law. She is entitled to notice of what acts are permissible and impermissible, and once she takes advantage of that notice, she must only refrain from violating its dictates to stay out of prison. She may, in other words, continue to enjoy all of her fundamental rights as long as she complies with the law.

In the case of most infringements upon fundamental rights, by contrast, the state does not provide notice and an opportunity to avoid the burden altogether. The state typically burdens liberties directly, by prohibiting their exercise, rather than indirectly, by requiring that individuals do something or refrain from doing something in order to preserve them. For example, the government might prohibit interracial marriage directly but would be unlikely to legislate that an individual forfeits her right to marry interracially if she ingests hashish. That is, of course, the way in which deprivations of liberty from confinement typically do work: the law requires that we refrain from vio-

56 The Court has consistently required states to provide notice of prohibited conduct subject to criminal penalties, as well as notice of what those penalties are. See, e.g., Miller v. Florida, 482 U.S. 423, 429 (1987) (explaining constitutional prohibition against ex post facto laws); Kolender v. Lawson, 461 U.S. 352, 357 (1982) (finding criminal statute which failed to define relevant terms void for vagueness under due process clause); Buckley v. Valeo, 424 U.S. 1, 77 (1976) (explaining due process requirement that defendants be on notice that conduct violates criminal law).

57 She may take advantage of notice by educating herself on the content of the criminal law. Whether she undergoes this process of education or not, she will be presumed to know what is and what is not a crime. See, e.g., Gilmore v. Taylor, 113 S. Ct. 2112, 2127 (1993) (Blackmun, J., dissenting) (stating general presumption that citizens know the law); Atkins v. Parker, 472 U.S. 115, 130 (1985) (noting that citizens are presumed to know the law).


59 But see Planned Parenthood v. Casey, 112 S. Ct. 2791, 2826-31 (1992) (invalidating husband-notification provision of Pennsylvania abortion law that made exercise of right to abortion contingent upon signed statement from woman that she notified her spouse).
lating its dictates in order to avoid losing our liberty from confinement.

Accordingly, if an individual were deprived directly and without notice of her liberty from confinement, she would have cause to complain that the state had unconstitutionally taken away her fundamental right to liberty. To find herself incarcerated, an individual must have either presented a danger to society or performed or been responsible for the performance of some act or omission prohibited by the government through its criminal law. Deprivations of the right to liberty from confinement, then, may be imposed without substantive justification only when they are imposed indirectly.

**B. Notice as an Inadequate Explanation**

The provision of notice certainly enhances the procedural fairness of incarcerating those who violate criminal statutes. It does not, however, eliminate concerns about depriving an individual of a fundamental right when that deprivation is not necessary to serve a compelling governmental interest. Notice and the alternative of compliance do not fully satisfy the government's obligation to respect fundamental rights.

The insufficiency of notice as a basis for the extinction of an otherwise fundamental right is evident when we consider the right to procreate. The first major case in which the Supreme Court recognized this right as fundamental was *Skinner v. Oklahoma ex rel. Williamson*. The case involved an Oklahoma statute providing for the sterilization of a specified class of recidivist criminals. The question at issue was whether, consistent with the United States Constitution, some types of criminals could be subjected to sterilization while others

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60 See Addington v. Texas, 441 U.S. 418, 427 (1979) (requiring state, in context of civil commitment, to demonstrate that individual to be confined is mentally ill and dangerous); O'Connor v. Donaldson, 422 U.S. 563, 575 (1975) (implying that dangerous individuals may be confined in holding that nondangerous individuals may not). For commitment standards in a related context, see Foucha v. Louisiana, 112 S. Ct. 1780, 1784 (1992) (holding that individual found not guilty by reason of insanity "may be held as long as he is both mentally ill and dangerous, but no longer"); Jones v. United States, 463 U.S. 354, 364 (1983) (allowing state to confine, subject to statutorily prescribed review, defendant found not guilty by reason of insanity); Younberg v. Romeo, 457 U.S. 307, 316 (1982) (explaining that "'[l]iberty from bodily restraint always has been recognized as the core of the liberty protected by the Due Process Clause from arbitrary governmental action' " (quoting Greenholtz v. Nebraska Penal Inmates, 442 U.S. 1, 18 (1979) (Powell, J., concurring in part and dissenting in part))); Jackson v. Indiana, 406 U.S. 715, 738 (1972) (holding that person found incompetent to stand trial cannot be committed indefinitely solely on the basis of incompetency).

61 316 U.S. 535 (1942).
were spared this penalty. Had the case involved the imposition of a prison sentence for one but not for the other of two similar offenses, there is little question that the Court would have approved the disparity as rationally related to a legitimate state interest. However, recognizing that the fundamental right to procreate was involved, the Court applied strict scrutiny. The Court in Skinner ultimately struck down the statute at issue, on the ground that Oklahoma lacked a compelling interest to which the disparate imposition of sterilization upon criminals like Skinner was narrowly tailored. Though Skinner was a criminal, on notice that his prohibited conduct could be punished with sterilization, subject to the valid conviction rule, this fact played no role in the Court’s analysis of infringements upon Skinner’s right to procreate.

Consider another example in the area of procreation. While the issue has not gone to the Supreme Court, lower courts and commentators have addressed the legality of requiring women convicted of criminal child abuse to undergo a Norplant implant as an alternative to incarceration. At the center of this discussion is the assumption that

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62 Id. at 536. The statute involved was Oklahoma's Habitual Criminal Sterilization Act, Okla. Stat. Ann. tit. 57 §§ 171-195 (West 1935). The Act allowed a “habitual criminal” to be “rendered sexually sterile without detriment to his or her general health.” Skinner, 316 U.S. at 537. The Court found that because a provision of the Act “immunized” offenses arising from prohibitory laws, revenue acts, embezzlement, or political offenses, the law discriminated in burdening the fundamental right to procreate. Id. at 541. The Court then applied strict scrutiny and struck down the law, concluding that the legislature lacked a compelling reason for this disparate treatment. Id. at 541-42.

63 Skinner, 316 U.S. at 541. The Court found the legislation in question to involve “one of the basic civil rights of man.” Id. It explained that both “[m]arriage and procreation are fundamental to the very existence and survival of the race.” Id.

64 Although the outcome of the case turned on an equal protection rationale, strict scrutiny was applied only because of the inequality in the deprivation of a fundamental right. Id. The Court stated that “[w]hen the law lays an unequal hand on those who have committed intrinsically the same quality of offense and sterilizes one and not the other, it has made as invidious a discrimination as if it had selected a particular race or nationality for oppressive treatment.” Id. (citing Yick Wo v. Hopkins, 118 U.S. 356, 369 (1886); Gaines v. Canada, 305 U.S. 337 (1938)). Later cases also cited Skinner as the source for the classification of the right to procreate as a fundamental right. See, e.g., Roe v. Wade, 410 U.S. 113, 152 (1973); Griswold v. Connecticut, 381 U.S. 479, 502 (1965) (White, J., concurring in judgment).

65 Skinner, 361 U.S. at 541-42.

66 See, e.g., Madeline Henley, The Creation and Perpetuation of the Mother/Body Myth: Judicial and Legislative Enlistment of Norplant, 41 Buff. L. Rev. 703, 707-08 (1993) (discussing how myths about women’s reproductive role in society are used to justify Norplant as criminal sentence); Steven S. Spitz, The Norplant Debate: Birth Control or Woman Control, 25 Colum. Hum. Rts. L. Rev. 131, 131 (1993) (arguing that states, “under the guise of the health and welfare functions of a state’s police power, . . . utilized Norplant to limit a woman’s ability to reproduce”); Kristyn M. Walker, Judicial Control of Reproductive Freedom: The Use of Norplant as a Condition of Probation, 78 Iowa L. Rev. 779, 780 (1993) (asserting that “Norplant is unreasonable condition of probation [because]
because the right to procreate is fundamental, the deprivation of that right (in the form of enforced birth control) may be incompatible with the Constitution, absent narrow tailoring to a compelling state interest. Many understand this to be the case in spite of the fact that the women subject to the deprivation could have avoided their predicament by following the dictates of the criminal law, of which they were on notice.

We see from these cases that courts continue to protect an individual’s right to procreate even when the individual could have preserved her rights by conforming her conduct to the law. This faithful protection of fundamental rights undermines the argument that the notice feature of the criminal law justifies the Court’s readiness to per...
mit the deprivation of liberty from incarceration without applying strict constitutional scrutiny.

Some commentators, however, nonetheless distinguish the liberty right. Professor Kathleen Sullivan, for example, describes as "dangerous" "a prosecutor's offer of non-execution or non-imprisonment to a confessed killer of her own children on condition that she submit to be sterilized." 69 The implication here is that the murderer retains the fundamental right to procreate but forfeits any interest in life or liberty, by virtue, presumably, of the relevant eighth amendment jurisprudence legalizing the death penalty and essentially eliminating proportionality review for prison terms, respectively. This position is untenable. It would be arbitrary to designate procreation as an inalienable fundamental right while liberty from confinement and life itself are left vulnerable to undisciplined political mood. The better view recognizes that life, liberty, and procreation are all fundamental rights whose deprivation through the criminal process must survive eighth amendment as well as strict substantive due process scrutiny.

A recent case involving the first amendment right to freedom of speech similarly demonstrates the inadequacy of notice in justifying restrictions upon fundamental rights. In Simon & Schuster, Inc. v. New York State Crime Victims Board, 70 the Supreme Court invalidated a statute requiring that income from works describing an individual's crimes be deposited into an escrow account, to compensate the victims and other creditors of the self-described criminal. The New York legislature enacted the statute in question 71 in reaction to concerns that the infamous serial killer, David Berkowitz, also known as "Son of Sam," would profit from the sale of his story while his victims' families remained without restitution. 72 Because of its ori-

71 N.Y. Exec. Law § 632-a (McKinney 1982 & Supp. 1991). For a discussion of the terms and provisions of the statute, see notes 74-77 and accompanying text infra. The statute states:

Every person, firm, corporation, partnership, association or other legal entity contracting with any person or the representative or assignee of any person, accused or convicted of a crime in this state, with respect to the reenactment of such crime, by way of a movie, book, magazine article, tape recording, phonograph record, radio or television presentation, live entertainment of any kind, or from the expression of such accused or convicted person's thoughts, feelings, opinions or emotions regarding such crime, shall submit a copy of such contract to the board and pay over to the board any moneys which would otherwise, by terms of such contract, be owing to the person so accused or convicted or his representatives.

N.Y. Exec. Law § 632-a(1).
gins, the New York statute came to be known as the “Son of Sam” law.\textsuperscript{73}

The Son of Sam law\textsuperscript{74} required entities contracting with accused or convicted criminals for descriptions of their crimes to provide the Crime Victims Board with a copy of the contract.\textsuperscript{75} Any income earned by the accused or convicted criminal under that contract also had to be paid to the Crime Victims Board and put in escrow for the victims of the crime.\textsuperscript{76} Victims could recover damages against the criminal for up to five years after the money was put in escrow.\textsuperscript{77}

The case that ultimately reached the Supreme Court arose out of a contract between Simon & Schuster and Henry Hill, who admitted his crimes in a book authored by Nicholas Pileggi.\textsuperscript{78} When the Crime Victims Board came to learn of and examine the book, the Board ordered Simon & Schuster to turn over all money it owed to Henry Hill.\textsuperscript{79} Simon & Schuster subsequently brought suit under 42 U.S.C. § 1983, seeking a declaratory judgment and injunction barring the enforcement of the Son of Sam law.\textsuperscript{80} When the case reached the Supreme Court, two lower federal courts had found the statute to be consistent with the first amendment.\textsuperscript{81}

The Supreme Court applied strict constitutional scrutiny to the Son of Sam Law,\textsuperscript{82} because “[a] statute is presumptively inconsistent with the First Amendment if it imposes a financial burden on speakers because of the content of their speech.”\textsuperscript{83} The Court reasoned that the Son of Sam law imposed such a burden by singling out expression

\textsuperscript{73} Id.
\textsuperscript{74} The Son of Sam law was amended by the New York legislature before it came under the Supreme Court's scrutiny. See N.Y. Exec. Law § 632-a (McKinney Supp. 1991). The amended section created priorities for claims against the account, including subrogation claims of the state for payment to the victims, civil judgments obtained by victims, and taxes due to state and local authorities. \textit{Simon & Schuster}, 502 U.S. at 110 (citing N.Y. Exec. Law § 632-a(11)).
\textsuperscript{75} \textit{Simon & Schuster}, 502 U.S. at 109 (citing N.Y. Exec. Law § 632-a(1)).
\textsuperscript{76} Id.
\textsuperscript{77} Id. Funds would also be released for providing legal representation for the accused or convicted criminal, see N.Y. Exec. Law § 632-a(8), for the necessary expenses of producing the moneys paid into the account, for subrogation claims of the state for payments to crime victims, and for claims for creditors of the criminal other than the victims. \textit{Simon & Schuster}, 502 U.S. at 110.
\textsuperscript{79} \textit{Simon & Schuster}, 502 U.S. at 114-15.
\textsuperscript{80} Id. at 115.
\textsuperscript{82} See \textit{Simon & Schuster}, 502 U.S. at 118.
\textsuperscript{83} Id. at 115 (citing \textit{Leathers v. Medlock}, 499 U.S. 439, 447 (1991)).
for a financial penalty and by targeting that expression based upon its content. The Court reasoned:

whether the First Amendment "speaker" is considered to be Henry Hill, whose income the statute places in escrow because of the story he has told, or Simon & Schuster, which can publish books about crime with the assistance of only those criminals willing to forgo remuneration for at least five years, the statute plainly imposes a financial disincentive only on speech of a particular content.

After applying strict scrutiny, the Court invalidated the statute, finding it overinclusive. In the state's effort to address its admittedly compelling interest "in ensuring that victims of crime are compensated by those who harm them" and "in ensuring that criminals do not profit from their crimes," it designed a statute that applied in cases not implicating those interests. The Court concluded that regulations must be "'narrowly tailored' to advance the interest asserted by the State," and "[a] regulation is not 'narrowly tailored' ... where, as here, 'a substantial portion of the burden on speech does not serve to advance [the State's content-neutral] goals.'"

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84 Id. at 116. The Court indicated that regardless of who the first amendment speaker is, the statute clearly exacts a financial penalty which serves as a disincentive to speak. Id.
85 Id. The Court might have rested its decision on a narrower ground by finding the statute's presumptively impermissible burden to be imposed upon the noncriminal publisher rather than upon the criminal. In this way, the Court could have left for another day the question of whether a criminal has cause to complain about a forfeiture that results from the violation of a criminal statute, a forfeiture that could have been avoided simply by obeying an already-existing criminal law. Many of Henry Hill's crimes pre-dated passage of the Son of Sam law. Id. at 112. Though one might distinguish notice that conduct is criminal from notice of royalty forfeiture, the Court did not rely on the fact that Henry Hill was only on notice that he might be subject to criminal penalties but not to the potential loss of royalties in determining either that strict scrutiny applied or that the Son of Sam law violated the Constitution. Id. at 115-16.
86 Id. at 121. The Court indicated that the statute, as written, applied to works on any subject that expressed the thoughts of accused or convicted persons about their crimes, even tangentially. Additionally, the Court found that the statute defined the phrase "person convicted of a crime" so broadly that it extended to authors who merely admitted in their books that they had committed a crime even if never actually convicted or even accused. Id.
87 Id. at 118.
88 Id. at 121.
89 Id. at 122 n.* (quoting Ward v. Rock Against Racism, 491 U.S. 781, 799 (1989) (second alteration in original)). Just as the Supreme Court did not rely on the innocence of Simon & Schuster for its conclusion that strict scrutiny ought to apply, it similarly did not rely upon the fact that individuals not actually convicted of any crime would be subject to the law. In discussing the statute's breadth, after determining that strict scrutiny was the appropriate standard of review, the Court noted that the statute's "broad definition of 'person convicted of a crime,'" included people never even accused of any criminal conduct. 502 U.S. at 121. Even here, however, the Court's concern was not that presumptively innocent individuals, entitled to retain their fundamental rights, would suffer from
In the area of first amendment freedom of speech, then, we see that the Court applies the same strict scrutiny to impositions on criminals' freedom as it applies to impositions upon the innocent. Though Henry Hill freely admitted his guilt in the commission of numerous felonies, and though he was on notice that his behavior violated the criminal law and could subject him to imprisonment, the Court protected his freedom of speech nonetheless. Simon & Schuster, like the procreation cases, rests on the premise that an individual's fundamental rights may not be compromised unless that compromise is necessary to serve a compelling state interest, even when she has received notice that her conduct was illegal.

One might wonder at this point whether perhaps the doctrines of Skinner, the Norplant cases, and Simon & Schuster are misconceived. Perhaps they, and not the valid conviction rule, should be adjusted. They do not, however, represent an unusual approach in our legal system. Many rights rest on the premise that taking a known risk does not automatically constitute a waiver. One example is the right to abortion. Although the Court has never suggested that minors have a right to engage in consensual sexual intercourse, it nonetheless holds

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90 If the criminal is already in prison, however, prison security needs justify lesser scrutiny of all rights deprivations. See O'Lone v. Estate of Shabazz, 482 U.S. 342, 353 (1987) (limiting scrutiny of alleged first amendment free exercise clause violations in prison to determination of whether challenged restriction is "reasonably related to legitimate penological objectives"); Turner v. Safley, 482 U.S. 78, 91 (1987) (same); Bell v. Wolfish, 441 U.S. 520, 522 (1979) (upholding rule prohibiting inmates from receiving hardcover books, unless mailed directly from publishers, book clubs, or bookstores, for security reasons); Jones v. North Carolina Prisoners' Labor Union, Inc., 433 U.S. 119, 129 (1977) (holding that "[i]n a prison context, an inmate does not retain those First Amendment Rights that are "inconsistent with his status as a prisoner or with the legitimate penological objectives of the corrections system"") (quoting Pell v. Procunier, 417 U.S. 817, 822 (1974)). These cases demonstrate that once an individual is convicted of a crime and taken into custody, her constitutional rights are severely curtailed in the interests of prison security. In other words, the fact of imprisonment itself justifies limits on the exercise of other constitutional rights that would excessively burden the government as custodian. See, e.g., Wolff v. McDonnell, 418 U.S. 539, 556 (1974) ("[T]he fact that prisoners retain rights under the Due Process Clause in no way implies that these rights are not subject to restrictions imposed by the nature of the regime to which they have been lawfully committed."). Absent some nexus to prison, however, a criminal actor retains the same first amendment protection enjoyed by law-abiding citizens.

91 Indeed, the Court has strongly indicated the contrary. See Michael M. v. Superior Court, 450 U.S. 464, 467 (1981) (upholding even an unequal statutory rape law).
that a minor's right to choose abortion is protected. One might argue that engaging in sexual intercourse, knowing that it might lead to pregnancy, constitutes a waiver of the right not to procreate, just as knowingly violating the criminal law is currently held to waive the right to freedom from confinement. This argument has been rejected, however, in favor of the view that even people on notice of the consequences of their actions are entitled to a searching review of whether it is constitutionally appropriate to permit those consequences to follow. As we will see, the existence of the eighth amendment ban on cruel and unusual punishment similarly supports the view that violating the law does not waive the right to have the consequences of that violation substantively scrutinized.

III
EXPLAINING THE COURT'S CONFUSION

As we have seen, notice does not provide a workable distinction between the fundamental right to liberty, which is subject to the “valid conviction rule,” and other fundamental rights, which survive valid convictions. Yet there remains a strong intuitive appeal to the argument that prison is somehow different. This Part considers three potential explanations for the Supreme Court's failure to provide the same safeguards for liberty as it does for other fundamental rights.

A. A False Equation

In part, the Court's unwillingness to question incarceration that results from a valid conviction follows from an implicit equation between the following two propositions: “you cannot do X” and “you will go to prison if you do X.” The import of this equation is that if the government may prevent an activity, because there is no fundamental right to engage in that activity, then the government may elect instead to deprive people of their liberty from incarceration as a penalty for engaging in the activity.

Consider the following illustration of this equation. Assume that a federal statute prohibits possession of a certain fruit—the megafruit—anywhere in the United States. Rather than punishing vi-


93 See notes 94-128 and accompanying text infra (discussing the false equation).

94 The government might prevent an activity by failing to provide authorization, zoning, or building permits, for example.
olators, however, the statute's enforcement mechanism simply employs a megafruit interdiction policy at the border.\textsuperscript{95} If government agents confiscated all megafruit coming into this country at the border as contraband, it might be possible to deny all United States citizens access to megafruit. If an individual believed that she had a right to possess and enjoy megafruit, she could bring a due process challenge to the interdiction policy, on the ground that it impermissibly burdens her substantive right to have megafruit. If the Supreme Court heard such a case and decided it in favor of the government, the only liberty lost would be the liberty to possess megafruit, perhaps justified under rational basis scrutiny on the ground that it carries some health risk.

Alternatively, suppose that a statute provides that instead of confiscating the fruit, the government may imprison any individual caught with the forbidden fruit. Under the Court's precedents, this scenario would be indistinguishable from the confiscation case. In either situation, an individual's interest in the megafruit is burdened. If there is a fundamental right to have megafruit, then that burden must be narrowly tailored to serve a compelling governmental interest. If there is not such a fundamental right, then the threat of imprisonment is burdensome only to those who intend to thwart the government's policy, and if the policy is rational, the burden is tolerable.

The above equation might be sound if the threat of imprisonment, like the hypothetical interdiction policy, effectively eliminated the possibility of violation—that is, if the deterrent effect of the criminal statute were 100%. One might say, under such circumstances, that either interdiction at the border or the threat of imprisonment effectively makes the megafruit unavailable to people in the United States.\textsuperscript{96} A major difficulty with this equation appears, however, when an individual does violate the criminal statute and is consequently incarcerated. The equation fails at this point because imprisonment of megafruit possessors inflicts a greater hardship on the possessor than would the act of withholding the fruit. Just as an armed robber who kills an uncooperative victim cannot seriously maintain that what he did was the equivalent of stealing the victim's money, the government that incarcerates an uncooperative,

\textsuperscript{95} For purposes of this hypothetical case, assume that the megafruit cannot be grown in the United States.

\textsuperscript{96} Even 100% deterrence would not, of course, eliminate the burden of the threat of incarceration from citizens' lives. As an illustration of this burden, consider the important difference between having one's money stolen by a pickpocket and having one's money demanded at gunpoint. The potential for imprisonment (or death), even if never realized, is daunting in its own right. Therefore, even if 100% deterrence could be achieved with the threat of imprisonment, the cost of such a threat would still arguably be greater than the mere inability to enjoy the megafruit.
megafruit-possessing citizen must acknowledge that it has done more than simply make megafruit unavailable to that citizen.

In contrast, then, to the usual concern in fundamental rights analysis that the law will "work" and will thereby burden the exercise of rights just as it was intended to do, the concern when protecting liberty from confinement arises most prominently when the law does not "work"—that is, when individuals violate the law and thereby become subject to the deprivation of their liberty. In the latter case, the conduct targeted by the law need not be protected in order for the law to raise constitutional problems.\(^9\)

The Court often fails to concern itself with this distinction, however, when evaluating criminal statutes that impose incarceration as a penalty. Consider *Bowers v. Hardwick*,\(^9\) a case in which the Court found no underlying fundamental right to the conduct of the accused criminal. In *Hardwick*, the Supreme Court considered whether a statute criminalizing sodomy and providing a sentence of up to twenty years imprisonment for violators was unconstitutional as applied to homosexuals. The Court held that the fundamental right of privacy in matters of procreation\(^9\) did not extend to consensual sexual relations.

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9 One might describe this distinction as one between the means and the ends of the criminal legislation in question. The ends—preventing people from engaging in unprotected activity—may be constitutionally beyond reproach. However, the means employed in doing so—imprisonment of those who disobey the prohibition—raises serious constitutional questions.

In the area of ninth amendment rights, Professor Barnett has described the relationship between governmental powers and individual rights as a "power-constraint" relationship, in which the enumeration of individual rights (as well as the existence of unenumerated rights recognized by the ninth amendment) circumscribes the means by which the federal government may fulfill ends that are otherwise legitimate by virtue of its constitutionally enumerated powers. See Barnett, supra note 54, at 11-16. According to Barnett, "[t]he Supreme Court appears to have adopted a means-constraints approach when enumerated rights are at issue." Id. at 12. Within this paradigm, the means/ends dichotomy may suggest that because liberty from confinement is a fundamental right, the federal government's power to regulate interstate commerce in megafruit may not (without compelling reasons) be achieved through imprisonment of those who possess the fruit, even though regulating megafruit does not itself collide with any fundamental right (e.g., to possess megafruit). The fourteenth and fifth amendment right to liberty from confinement accordingly constrains the means by which the government may pursue an otherwise allowable end that does not inherently implicate a fundamental right.

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97 See, e.g., Roe v. Wade 410 U.S. 113, 154 (1973) (holding that abortion decision is included in right to privacy); Eisenstadt v. Baird, 405 U.S. 438, 453 (1972) (holding that state law violated equal protection clause by providing dissimilar treatment of right of privacy for married and unmarried persons); Griswold v. Connecticut, 381 U.S. 479, 485-86 (1965) (striking down state statute forbidding use of contraceptives as unnecessarily broad and violative of "zone of privacy created by several fundamental constitutional guarantees"); Skinner v. Oklahoma ex rel. Williamson, 316 U.S. 535, 541-43 (1942) (holding that state law authorizing forced sterilization deprives individual of "basic liberty" and violates equal protection clause).
between individuals of the same sex.  

Having denied the existence of a fundamental right, the Court did not even evaluate whether incarceration, as provided by the statute, served some compelling interest in preventing or punishing sodomy. Instead, the majority applied rational basis scrutiny, stating explicitly that "[t]his case does not require a judgment on whether laws against sodomy between consenting adults in general, or between homosexuals in particular, are wise or desirable." In other words, the Court allowed that incarceration of people who engage in homosexual sodomy might or might not promote any worthwhile (much less compelling) interest, but permitted such incarceration nonetheless. Thus, while the burdening of a criminal's freedom of speech through content-based regulation must survive the most exacting scrutiny, the absolute deprivation of liberty involved in incarceration need not do so. The Hardwick Court's only concern was the burden upon the individual's interest in engaging in homosexual sodomy.

The Court failed to recognize that the Georgia sodomy law at issue in Hardwick burdened more than just the acts it prohibited. Unlike, for example, a zoning law prohibiting cohabitation by unrelated adults of the same gender or a regulation that only licenses "straight" bars, the Georgia provision also burdened an individual's freedom from confinement, by allowing the imprisonment of anyone who committed an act of sodomy. Such confinement adds an additional burden to the substantive prohibition of the specified conduct.

Confinement for engaging in conduct differs from merely making that conduct unavailable.

Although Justice Powell joined the opinion of the Court in Hardwick, he wrote a concurring opinion in which he expressed discomfort with the equation between declaring that sodomy is not a fundamental right, on the one hand, and permitting imprisonment of individuals

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100 Hardwick, 478 U.S. at 190-91.
101 Id. at 191.
102 Id. at 190.
104 Of course, there are convincing arguments that Hardwick is radically inconsistent with the Court's prior precedents and that its holding regarding homosexual sodomy is seriously flawed. See L. Tribe, supra note 13, § 15-21, at 1427-28 (discussing Court's error in Hardwick); Laurence H. Tribe & Michael C. Dorf, Levels of Generality in the Definition of Rights, 57 U. Chi. L. Rev. 1057, 1065-68 (1990) (arguing that Court defined right at issue very specifically, thereby disconnecting it from existing rights). My discussion of this case is not intended to suggest otherwise, but rather to consider the separate constitutional burden of imprisonment.
who engage in acts of sodomy, on the other.\textsuperscript{105} He began by stating, "I agree with the Court that there is no fundamental right—\textit{i.e.}, no substantive right under the due process clause—such as that claimed by respondent Hardwick, and found to exist by the Court of Appeals."\textsuperscript{106} Powell hastened to add, however, that "[t]his is not to suggest . . . that respondent may not be protected by the Eighth Amendment of the Constitution."\textsuperscript{107} The Georgia law did not, in other words, merely prohibit sodomy; it punished sodomy with \textit{imprisonment}. In my view," Justice Powell continued, "a prison sentence for such conduct—certainly a sentence of long duration—would create a serious Eighth Amendment issue."\textsuperscript{108} He pointed out that "[u]nder the Georgia statute a single act of sodomy, even in the private setting of a home, is a felony comparable in terms of the possible sentence imposed to serious felonies such as aggravated battery, first-degree arson, and robbery."\textsuperscript{109}

Professor John Jeffries, a former law clerk to Justice Powell, described Powell's views in the following way: "Where there was no public display, no use of force, and [no] involvement with minors, [sodomy] was essentially harmless. Society did not have to approve such behavior, but it could not constitutionally prosecute and imprison those who engaged in it."\textsuperscript{110} Jeffries quotes Powell as saying that it would violate the eighth amendment "‘to punish him criminally (imprisonment) for conduct based on a natural sexual urge, privately and with a consenting partner.’"\textsuperscript{111} Though Professor Jeffries describes this view as a moderate approach to sodomy, the approach may say as much about Justice Powell's attitude toward prison as it does about his views of sodomy.

If the eighth amendment, outside of the death penalty context, will not be held to contain a proportionality principle, as recent precedent suggests,\textsuperscript{112} the argument for a due process right to liberty from confinement most plausibly makes sense of Justice Powell's intuitions. Even though sodomy is not protected, in his view, liberty from confinement may be. Preventing and punishing private, consensual acts of sodomy do not constitute important enough interests to justify a

\textsuperscript{105} Hardwick, 478 U.S. at 197 (Powell, J., concurring).
\textsuperscript{106} Id.
\textsuperscript{107} Id.
\textsuperscript{108} Id.
\textsuperscript{109} Id. at 197-98 (citations omitted).
\textsuperscript{110} John C. Jeffries, Jr., Justice Lewis F. Powell, Jr. 519 (1994).
\textsuperscript{111} Id. at 522 (quoting remarks reconstructed from Justice Powell's Conference notes).
\textsuperscript{112} See Harmelin v. Michigan, 501 U.S. 957, 994-95 (1991) (holding that mandatory life sentence without possibility of parole for cocaine possession did not violate eighth amendment).
deprivation (certainly not a long deprivation) of liberty from confinement.

After his retirement, Justice Powell announced that he may have made a mistake in voting with the majority in *Hardwick*. Justice Powell qualified his concession, however, by adding that the case was not very important. One way to make sense out of this unusual announcement is to understand what Justice Powell may have meant in saying that he had made a "mistake." If he was implying that he now believes homosexual sodomy to be a fundamental right, his considering *Hardwick* unimportant would be quite surprising. A decision sanctioning an outright ban on constitutionally protected conduct is surely an important one. Furthermore, the holding in *Hardwick* provided powerful support for the general proposition that governmental discrimination against gay and lesbian Americans is constitutionally permissible.

Justice Powell might still believe, however, as he did when he wrote his concurring opinion, that homosexual sodomy is not a fundamental right and that banning this conduct is therefore acceptable. He may also still believe, as he suggested in his opinion in *Hardwick*, that sodomy is not the kind of conduct that may be constitutionally subject to imprisonment. At the time of the decision, he voted with the majority because the issue of imprisonment had not been raised, and Hardwick himself had not even been prosecuted or convicted of the crime. Justice Powell's change of heart may represent his current position that a criminal law providing imprisonment for conduct not constitutionally subject to imprisonment ought to be invalidated in

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113 Ruth Marcus, Powell Regrets Backing Sodomy Law, Wash. Post, Oct. 26, 1990, at A3 (reporting that Powell told group of New York University law students, "I think I probably made a mistake in that one").
114 Id. (reporting Powell's statement that "[s]o far as I'm concerned it's just a part of my past and not very important . . . . I don't suppose I've devoted half an hour" to contemplating the decision after it came down from the Court).
115 See L. Tribe, supra note 13, § 16-33, at 1616 n.47 (noting that *Hardwick*'s holding "indicates how unlikely it is that homosexuality will be deemed quasi-suspect in the near future"). But see Cass R. Sunstein, Sexual Orientation and the Constitution: A Note on the Relationship Between Due Process and Equal Protection, 55 U. Chi. L. Rev. 1161, 1166 (1988) (arguing that Supreme Court's rejection of homosexual sodomy as fundamental right under due process clause in *Hardwick* does not foreclose recognition of sexual orientation as constituting suspect classification for equal protection purposes).
116 Justice Powell told a reporter that the decision in *Hardwick* was "inconsistent in a general way with *Roe*" and that "the dissent had the better of the arguments," suggesting that he now accepts sodomy to be a fundamental right under the due process clause. See J. Jeffries, supra note 110, at 530 (citing Anand Agneshwar, Ex-Justice Says He May Have Been Wrong, Nat'l L.J., Nov. 5, 1990, at 3). However, his assertion that the case was unimportant is incompatible with a view that the conduct is protected as a fundamental right.
a declaratory judgment action. In other words, he may believe now that the view articulated in his concurring opinion should have led him to vote in favor of the respondent. Under this reading, however, the case may not be an important one because Hardwick was never incarcerated (beyond one night in jail) for his act of sodomy. If the relevant unconstitutional deprivation were liberty from confinement rather than sodomy, the distinction between the correct and the incorrect outcomes in *Hardwick* would be largely advisory.

What Justice Powell rejected and apparently continues to reject, then, is the equation between the legitimacy of prohibiting conduct and the legitimacy of penalizing that conduct through imprisonment once it occurs, an equation implicit in the Court's general failure to subject prison sentences to strict scrutiny. Moreover, the Court itself has similarly rejected this equation in the death penalty context. It has held that to impose the death penalty on an individual for the crime of rape or for the crime of felony murder—absent a showing that the felon behaved recklessly with respect to the possibility of death—would violate the eighth amendment's prohibition against cruel and unusual punishments. These determinations did not amount to a finding that the death penalty was overly burdensome to the "right" to commit rape or to commit felonies resulting in death. Yet equating the criminal punishment of conduct, such as imprisonment of megafruit possessors, with the placement of obstacles in the path of that conduct, such as megafruit interdiction, would produce the following argument: if it is acceptable to burden rape and felony murder, acts that do not constitute protected conduct, then it is also acceptable to provide the individual with the option of either avoiding the prohibited conduct altogether or suffering the consequences, here execution.

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119 It is true that "death is different," see, e.g., *Gilmore v. Taylor*, 113 S. Ct. 2112, 2117 (1993) (stating that "the Eighth Amendment requires a greater degree of accuracy and fact finding [in a capital case] than would be true in a noncapital case"), and that rights provided in the capital context are not necessarily generalizable to the noncapital context, id. (citing *Herrera v. Collins*, 113 S. Ct. 833 (1993); *Boyde v. California*, 494 U.S. 370 (1990); *Beck v. Alabama*, 447 U.S. 625 (1980)). This unique treatment of the death penalty, however, does not detract from the Court's acknowledgment, through the death penalty cases, that punishment of an activity is distinct from prevention of an activity. In other words, even though the Court might allow imprisonment but not execution of rapists, it must acknowledge that just as execution of rapists deprives them of their lives, so then does their imprisonment deprive them of their liberty from confinement.
The premise of the eighth amendment prohibition against cruel and unusual punishment is a rejection of this "greater includes the lesser" reasoning. The eighth amendment requires that punishments be scrutinized even when they penalize conduct that is itself unprotected. The jurisprudence of the eighth amendment accordingly constitutes a recognition that criminal penalties provide more than simply a deterrent or burden upon the specified criminal conduct. The cases recognize that there will be people who violate the criminal law in spite of the penalties they might face, so that the punishment itself must not be "cruel and unusual." The government may therefore stop an individual from committing rape or felony murder without offense to the Constitution, but may not simply give that individual the choice of avoiding the crime or suffering the death penalty.

One might respond that just as the eighth amendment refutes the equation between burdens and criminal penalties, it simultaneously dispenses with the need for separate due process scrutiny of such penalties. The eighth amendment, in that sense, may provide both a sword with which to attack the constitutionality of various criminal penalties and a shield against a substantive due process attack on the very same penalties. After all, if deprivation of liberty or life in the form of criminal punishment must be narrowly tailored to serve a compelling state interest, then an eighth amendment requirement that it also not be cruel and unusual would appear to be redundant.

There are a number of responses to this argument. First, the conclusion that a punishment that satisfies strict scrutiny would necessarily satisfy the eighth amendment is not valid. For example, one could conceive of a crime that the state has a compelling interest in preventing but that could only be addressed effectively by public mutilation of the convict. The Court might nonetheless hold that such a punishment constitutes cruel and unusual punishment under our evolving standards of decency, even though it is the least restrictive means of addressing a serious crime.

More importantly, the argument fails even if we accept the assumption that strict scrutiny under the due process clause would always provide greater protection than the eighth amendment. The

120 Although the eighth amendment is theoretically a sword to be used against all criminal penalties, it would be difficult to locate in the current doctrine any eighth amendment limits upon either the availability or the length of incarceration for a given offense after the Court's decision in Harmelin v. Michigan, 501 U.S. 957 (1991). See note 9 supra.

121 See, e.g., Peter M. Spett, Confounding the Gradations of Iniquity: An Analysis of Eighth Amendment Jurisprudence Set Forth in Harmelin v. Michigan, 24 Colum. Hum. Rts. L. Rev. 203, 205 n.1 (1992-93) (discussing notion that eighth amendment conceptualizes cruel and unusual punishments to include ban on "barbarous and torturous penalties" and "punishment such as . . . whipping, and cutting the ears off criminals").
argument that the Bill of Rights defines the outer boundary of individual liberties is one that has been rejected by the Supreme Court on many occasions. The Court's unenumerated rights jurisprudence constitutes a rejection of the proposition that the Bill of Rights (including the eighth amendment), precludes more extensive protection for individual freedom.

Strict scrutiny of criminal penalties would, of course, provide not only more protection than, but also more of the same kind of protection as, the eighth amendment. Therefore, one could argue that while in general we may locate additional rights in the due process clause, we cannot find two constitutional rights that overlap substantially, such as the due process rights to life and liberty and the right against cruel and unusual punishment. The response to this argument is that the Constitution is not the word of God, composed on one occasion with no superfluous verbiage. The fifth amendment might contemplate limb amputation as legitimate criminal punishment by requiring that individuals not be "twice put in jeopardy of life or limb," while the eighth amendment might render limb-removal unconstitutional cruel and unusual punishment. Similarly, the eighth amendment might implicitly contemplate punishments that are not narrowly tailored to serve compelling state interests, while the fourteenth amendment jurisprudence, begun much later than the ratification of the eighth amendment, might place such penalties off limits, when the fundamental right to liberty from confinement is involved.

In an opinion for the Court in United States v. James Daniel Good Real Property, a case involving the seizure of real property subject to civil forfeiture, Justice Kennedy accordingly emphasized that "[w]e have rejected the view that the applicability of one constitutional amendment pre-empts the guarantees of another." He continued that

[t]hough the Fourth Amendment places limits on the Government's power to seize property for purposes of forfeiture, it does not pro-

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122 See, e.g., Planned Parenthood v. Casey, 112 S. Ct. 2791, 2805 (1992) (citing cases demonstrating that Court has never accepted view that liberty encompasses no more than those rights guaranteed expressly within first eight amendments to Constitution). For an earlier discussion of the Court's rejection of the Bill of Rights as a boundary for individual liberties, see Poe v. Ullman, 367 U.S. 497 (1961), in which Justice Harlan recognized that "the full scope of the liberty guaranteed by the Due Process Clause cannot be found in or limited by the precise terms of the specific guarantees elsewhere provided in the Constitution." Id. at 543 (Harlan, J., dissenting on jurisdictional grounds).

123 U.S. Const. amend V.


126 Id. at 499.
vide the sole measure of constitutional protection that must be afforded property owners in forfeiture proceedings. So even assuming that the Fourth Amendment were satisfied in this case, it remains for us to determine whether the seizure complied with our well-settled jurisprudence under the Due Process Clause.127

In other words, the existence of the fourth amendment does not foreclose the applicability of procedural due process requirements.128 This conception of constitutional overlap is equally applicable to the eighth amendment and substantive due process. The ban on cruel and unusual punishment therefore does not define the outer boundary of constitutional protection against imprisonment. It does, however, affirmatively demonstrate that punishment, including a prison sentence, cannot be justified solely by resort to the unprotected nature of the prohibited conduct.

Thus, the equation between burdening unprotected conduct and punishing that conduct with imprisonment is flawed. Although it is tempting to equate the two because of punishment's role as a deterrent to prohibited conduct, one must consider the validity of punishment as a separate constitutional matter. The eighth amendment requires scrutiny of every form of punishment, with a concomitant determination of whether it is cruel and unusual. Substantive due process additionally requires strict scrutiny of every deprivation of a fundamental right. Because incarceration involves both punishment and the deprivation of a fundamental right, incarceration must accordingly withstand scrutiny under both the eighth amendment and the due process clause of the fourteenth (or fifth) amendment. Equating a ban on conduct with incarceration for that conduct fails to place any

127 Id. at 500.

128 Note, however, that the Court has sometimes said the opposite. In Albright v. Oliver, 114 S. Ct. 807 (1994), in the context of a claim regarding a pretrial deprivation of liberty, Chief Justice Rehnquist stated in a plurality opinion that when a specific amendment provides explicit constitutional protection against a particular type of governmental behavior, that amendment, and not substantive due process, should be the basis for evaluating the claim. Id. at 813 (plurality opinion). The better principle is the one that allows for potential constitutional redundancy, for the reasons given in the text. Moreover, the principle that fourteenth amendment substantive due process is general, open-ended, and can only inadequately inform judicial decisionmaking is particularly perverse in Albright. The alternative theory in Albright uses the fourth amendment, as applied to the states through the fourteenth amendment. Therefore, substantive due process is the vehicle for application of the fourth amendment in the first place. Finally, while the eighth amendment addresses all kinds of punishment, the right against deprivations of liberty from confinement exists whether or not there has been a criminal conviction occasioning punishment. Therefore, the appropriately specific amendment to use in evaluating incarceration is not obvious. Cf. L. Tribe & M. Dorf, supra note 124, at 101-04 (discussing inherent flexibility of any notion of rights that is tied to the specificity of their articulation in a given case).
substantive burden upon the government to justify its decision to regulate conduct through incarceration.

B. Blinded by Procedure

As emphasized above, there is currently an absence of substantive limitations on the availability of incarceration as a means of social control. This absence, however, is overwhelmed by, and perhaps attributable in part to, the presence of abundant procedural protections from incarceration. The intuition that criminal defendants already have enough constitutional rights is an appealing one. In other words, the Court and constitutional scholars may be unwilling to scrutinize imprisonment substantively because they are permitting procedure to serve as a surrogate for substance in the area of the criminal law.\(^{129}\)

From the time that the government decides to investigate a crime through the moment of conviction, the criminal suspect is cloaked with numerous procedural safeguards. The police may not perform unreasonable searches and seizures, and any evidence discovered as a result of such searches and seizures will be excluded from the state’s case at trial.\(^{130}\) The police may not question a suspect in custody without providing warnings,\(^ {131}\) and if the suspect asks for an attorney, the police may not question the suspect outside the presence of her attorney (appointed if necessary) absent initiation by the suspect.\(^ {132}\) All confessions obtained in violation of these principles are also excluded from the state’s case at trial.\(^ {133}\) Identification of a suspect must be


\(^{132}\) Edwards v. Arizona, 451 U.S. 477, 484-87 (1981) (holding that once individual invokes her right to counsel while in custody, any statements made in response to interrogation outside presence of counsel will be suppressed, unless initiated by the suspect); see also Minnick v. Mississippi, 498 U.S. 146, 150-56 (1990) (extending Edwards to interrogation that takes place after suspect has met with counsel but outside presence of counsel). But see Davis v. United States, 114 S. Ct. 2350, 2355-56 (1994) (holding that ambiguous or equivocal reference to counsel after waiver of Miranda rights is not invocation of the right to counsel under Edwards).

\(^{133}\) Unlike coerced confessions, see New Jersey v. Portash, 440 U.S. 450, 456-60 (1979) (holding that testimony given in response to grant of immunity is “essence of coerced testi-
reliable and free of improper suggestion. And in federal cases, the prosecution may not proceed unless a grand jury has issued an indictment.

The defendant, perhaps most importantly, has a right to a trial by jury. Once the trial begins, the defendant has a right to testify, as well as a right not to do so. The judge and the prosecution may not comment adversely on a defendant’s failure to testify. The defendant has a right to compel the production of witnesses and evidence in her favor, and the state must produce any exculpatory evidence in its possession upon request. The defendant has a right to be present at trial, and to confront, or cross examine, all of the state’s witnesses. She also has a right to the assistance of counsel at trial, whether or not she can afford to pay for that assistance. Finally, she has the right to a judgment of acquittal if the state cannot prove guilt.

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134 See Simmons v. United States, 390 U.S. 377, 382-86 (1968) (holding that under some circumstances, photographic array used in identification process may be unduly suggestive); Stovall v. Denno, 388 U.S. 293, 302 (1967) (arguing that totality of circumstances must be considered to determine whether identification was result of unnecessarily suggestive conduct by police).

135 U.S. Const. amend. V; see Ex parte Wilson, 114 U.S. 417, 423-26 (1885) (giving indictment requirement broad scope).

136 U.S. Const. amend. VI; see Duncan v. Louisiana, 391 U.S. 145, 150 n.14 (1968) (finding right to jury trial so “necessary to an Anglo-American regime of ordered liberty” that it merited incorporation against states through fourteenth amendment).


138 U.S. Const. amend. V.

139 Griffin v. California, 380 U.S. 609, 615 (1965) (holding that fifth amendment prohibits comments by prosecution on an accused’s silence or instructions by court that silence is evidence of guilt).


141 Brady v. Maryland, 373 U.S. 83, 87 (1963) (“[T]he suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or punishment . . . .”).

142 See Diaz v. United States, 223 U.S. 442, 454-59 (1912) (holding that, while the sixth amendment gives criminally accused right to attend trial, defendant may waive this right). Cases after Diaz clarified further limits on this right. See Taylor v. United States, 414 U.S. 17, 19-20 (1973) (holding that judge need not warn defendant that if defendant absents herself during trial she waives right to be present); Illinois v. Allen, 397 U.S. 337, 342-43 (1970) (conditioning right to be present at trial on defendant’s adherence to decorous and respectful behavior).


beyond a reasonable doubt, or if the jury is not told that the state bears this burden of persuasion.

Only the person accused of a crime receives such an impressive array of procedural rights. The fact that a defendant could lose her liberty no doubt accounts for the existence of so many safeguards. Far from enjoying a lesser constitutional status, then, the right to liberty from incarceration might appear to enjoy much greater security than the other rights incorporated within the word "liberty" in the due process clause.

The appearance is deceptive. The procedural protections ideally ensure that individuals who are innocent of the charges against them are acquitted and that all defendants are treated humanely and fairly in the process of assessing their guilt or innocence. In addition, investigatory procedural rights protect an individual's privacy from unwarranted intrusion and require that state officials do not resort to brutality in their attempts to solve a crime. However, procedural rights do nothing for the person who is fairly adjudged guilty of violating the criminal law. In other words, procedural rights do not require the state to justify its confinement of an individual who committed the charged offense.

The individual who is caught in possession of megafruit in violation of the criminal law is not concerned primarily about the right to confront witnesses against her or about proof of guilt beyond a reasonable doubt. She is concerned that the state ought not deprive her of her most precious liberty, freedom from incarceration, to protect an

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146 See Sullivan v. Louisiana, 113 S. Ct. 2078, 2082 (1993) (holding that reasonable doubt instruction that violates due process because it fails to convey proper burden of proof can never be harmless error).
147 See, e.g., Argersinger v. Hamlin, 407 U.S. 25, 39-40 (1972) (holding that sixth amendment right to counsel extends to misdemeanor trial in which defendant is actually sentenced to incarceration).
148 Although the goal of minimizing erroneous convictions is one of several goals of the criminal justice system, many would argue that it is the goal of the highest priority. The Supreme Court has often stated that it is "a fundamental value determination of our society that it is far worse to convict an innocent man than to let a guilty man go free." In re Winship, 397 U.S. at 361 (Harlan, J. concurring); see also Williams v. United States, 401 U.S. 646, 653 (1971) (plurality opinion) (prioritizing truth-finding functions of trials); Tehan v. United States ex rel. Shott, 382 U.S. 406, 416 (1966) (finding impairment of truth-finding function of primary concern in criminal cases).
149 Conversely, giving an individual additional substantive rights cannot adequately compensate for a loss of procedural protection. See O'Connor v. Donaldson, 422 U.S. 563, 585-87 (1975) (Burger, C.J., concurring) (arguing that individual cannot be deprived of liberty from confinement through civil commitment (i.e., without the extensive procedural protections provided by the criminal process) simply because individual will then be granted substantive right to medical treatment; therefore, individual properly confined does not thereby acquire any substantive right to medical treatment).
interest that may not be very important. Just as imprisonment of this individual is not the equivalent of making megafruit unavailable to her, similarly, making the state prove that she indeed possesses the fruit is not the equivalent of making the state justify imprisonment for such possession.

If there is indeed a fundamental right to liberty from confinement, then that right must receive substantive as well as procedural protection, strict scrutiny as well as proof beyond a reasonable doubt. Procedure cannot serve as a proper surrogate for substance.

Consider the following example. A state passes a law requiring hospitals to obtain a husband's consent before performing an abortion on a married woman. Jane Roe, a married woman, comes to the hospital seeking an abortion. Her husband, John Roe, refuses to consent to that abortion. No one could seriously argue that instead of striking down the law, a court could require a hearing in which the state must prove that John Roe is indeed married to Jane Roe and that he refuses to consent to her abortion. Such a hearing would be irrelevant to the right to abortion, because the husband-consent requirement itself violates the undue burden substantive test. Procedure cannot serve as a substitute for substance because the ultimate legitimacy of procedure is contingent on the legitimacy of the substantive law that it serves to apply.

C. A Philosophy of Deference

We have seen that the equations of prevention with punishment and of procedure with substance play a role in creating the common but flawed intuition that deprivations of liberty from incarceration should not be subject to strict scrutiny. These equations set the right to liberty from incarceration apart from other fundamental rights by conceiving of its deprivation as purely an instrument of social control that is accompanied by uniquely abundant procedural safeguards. Perhaps the equations are made because prisons serve a central function in the enforcement of the criminal law. In this sense, we tend to equate criminal justice with prison and defer to them both.

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151 See Casey, 112 S. Ct. at 2831; see also id. at 2842-43 (Stevens, J., concurring in part, dissenting in part) (applying undue burden test to find most of Pennsylvania statute unconstitutional); Michael C. Dorf, Facial Challenges to State and Federal Statutes, 46 Stan. L. Rev. 235, 272 n.153 (1994) (arguing that undue burden test in Casey reflects plurality's understanding of what strict scrutiny entails in abortion context).
The criminal justice system plays an important symbolic role in our national consciousness. The system ideally protects citizens from danger, from anarchy, and from moral chaos. It constitutes an army of sorts, charged with fighting the enemy from within, the "criminal." As with the military, we tend to defer to the criminal justice system because we perceive ourselves as incompetent to evaluate its efficacy. The workings of the criminal law in this sense occupy an opaque box — like the jury room — upon whose contents we are afraid to gaze.

We tolerate military policies that would never survive civilian review. We also refuse to ask jurors to explain their deliberation process, and we countenance the rejection of a jury verdict only when "no reasonable juror" could have possibly come to a given conclusion consistent with our legal system. Similarly, we strike down a criminal statute only when (1) the statute bears no reasonable relation to any legitimate state interest, (2) the purported criminal has been punished for conduct that is itself protected by the Constitution, or (3) the punishment is barbaric or grossly disproportionate to the crime at issue. It is tempting to let the legislative guardians of citizens' se-


153 See, e.g., Goldman v. Weinberger, 475 U.S. 503, 507 (1986) (stating that judicial review of military regulations is "far more deferential than constitutional review of similar laws or regulations designed for civilian society" in the context of a free exercise clause case); Chappell v. Wallace, 462 U.S. 296, 304 (1983) (holding, in race discrimination case, that unique disciplinary structure of military and Congress's activity in that field both constitute special factors that prevent enlisted military personnel from recovering damages against their superior officers for constitutional violations); Rostker v. Goldberg, 453 U.S. 57, 65-68 (1981) (citing cases applying high level of deference in addressing overbroad restraints on first amendment activity and deprivations of substantive due process in the military, in the context of a gender discrimination claim).

154 See, e.g., In re Winship, 397 U.S. 358, 368 (1970) (reversible error to convict when no reasonable juror could have found guilt beyond a reasonable doubt).

155 See note 47 supra.

156 See note 15 and accompanying text supra.

157 See, e.g., Spett, supra note 121, at 205-06 n.11 (stating that eighth amendment prohibits as cruel and unusual punishment "barbarous and torturous penalties" and "punishments such as ... whipping, and cutting the ears off criminals"); see also Farmer v. Brennan, 114 S. Ct. 1970, 1977 (1994) (holding that prison officials may be held liable under eighth amendment for prison conditions if they knew of substantial risk of serious harm to inmate subjected to these conditions and they disregarded that risk); Hudson v. McMillian, 112 S. Ct. 995, 1000 (1992) (finding use of excessive physical force against prisoner violation of eighth amendment, even without showing of permanent injury); Wilson v. Seiter, 501 U.S. 294, 303 (1991) (requiring that prisoner demonstrate deliberate indifference on the part of prison authorities as necessary part of proving eighth amendment claim arising from prison conditions); Rhodes v. Chapman, 452 U.S. 337, 347 (1981) (holding that prison conditions may constitute cruel and unusual punishment under contemporary stan-
curity do as they see fit. But as the cases providing an abundance of procedural due process make clear, courts must be concerned with the unchecked use of incarceration in the criminal justice system.

In defending deference to criminal justice, one might argue that criminal justice itself represents a compelling state interest and that legislative and executive flexibility are necessary to serve that end. If we place too many limitations upon the criminal justice system, it will fail to function. People must learn to obey the criminal law, whether it prohibits activity that is *malum prohibitum* or *malum in se.*1 The burden of self-justification should be on the criminal who flouts the law rather than on the government from which that law emanates.

This argument proves too much, however. If a law, for example, prohibits the exercise of the right to free speech, then the “compelling interest in the law” approach would permit enforcement of that law. If, on the other hand, fundamental rights are different and cannot be compromised for the abstract principle of “respect for the law,” then deprivations of liberty from confinement, like prohibitions against protected speech, cannot be justified simply by invoking the need for obedience to law, without reference to the content of a particular law.

In this way, the argument that securing obedience to the criminal law constitutes an inherently compelling interest is circular. The significance of designating a right as “fundamental” under the due process clause is that legislation burdening such a right must be justified by a compelling governmental interest. That compelling interest must be one that is independent of the passage of the legislation itself. Otherwise, the only legitimate challenge to deprivations of fundamental rights would consist of disputes about the process by which the law came into being. Simply put, the requirement that a law be justified cannot be met by mere appeal to the fact that the law is indeed a law. This is particularly true when we consider the fact that criminal statutes are enacted by the same process as all other statutes. To give all criminal laws an elevated status, then, would arbitrarily remove the normal constitutional barriers to passage of legislation burdening the exercise of fundamental rights.

Moreover, if we assume arguendo the legitimacy of placing the criminal law and its enforcement beyond constitutional attack, then criminal procedure rules become utterly inexplicable. Police officers, those law enforcement officials who most resemble the military in

dards of decency if they deny the “minimal civilized measure of life’s necessities”); Estelle v. Gamble, 429 U.S. 97, 104 (1976) (first extending eighth amendment to prisoner’s complaint of deprivation suffered while in prison).

158 These phrases mean, respectively, “wrong because prohibited” and “wrong in itself.” Black’s Law Dictionary 959-60 (6th ed. 1990).
their need to be armed and in their direct confrontation with the armed enemy, are subjected to significant restraints on their ability to fight even serious crime. They must normally have probable cause and a warrant to perform searches;\textsuperscript{159} they must warn individuals under arrest about their rights;\textsuperscript{160} and they may use deadly force only in a limited set of circumstances.\textsuperscript{161} Similarly, judges and juries, the individuals charged with adjudicating the truth of criminal complaints, must acquit individuals against whom the evidence is very strong but does not eliminate all reasonable doubt.\textsuperscript{162} The fact-finders must also ignore or be shielded from probative evidence that came to light as a result of constitutional violations.\textsuperscript{163} If our goal is truly to empower the criminal justice system because it serves an inherently compelling governmental interest, providing it with substantive carte blanche while simultaneously burdening it with disabling procedural limitations would seem a seriously misguided strategy.

Finally, the importance of criminal justice in general cannot logically support the substantive deference entailed in applying mere rational basis scrutiny to criminal laws providing for incarceration. One could legitimately worry that questioning the incarceration of murderers would be devastating to personal security. Successful substantive challenges to the use of incarceration, however, would necessarily concern only the more ambiguous offenses that do not endanger the community’s safety. The restriction through incarceration of a dangerous and violent criminal would not, in other words, be subject to serious challenge because restraint of a dangerous person is necessary to the community’s security.\textsuperscript{164} Rather, the use of incarceration is

\textsuperscript{159} See Katz v. United States, 389 U.S. 347, 353 (1967) (broadly interpreting fourth amendment warrant requirement).


\textsuperscript{161} See Tennessee v. Garner, 471 U.S. 1, 3 (1985) (requiring more than probable cause to justify use of deadly force against fleeing felon).

\textsuperscript{162} See In re Winship, 397 U.S. 358, 368 (1970) (finding criminal conviction to be reversible error when no reasonable juror could have found guilt beyond reasonable doubt).


\textsuperscript{164} For this reason, mentally ill and dangerous individuals may be committed to institutional confinement. See text accompanying notes 26-38 supra. For this reason as well, pretrial detention without bail is permissible for dangerous accused offenders. See Salerno v. United States, 481 U.S. 739, 751 (1987) (emphasizing need for proof that each individual
most vulnerable to attack when the "offense" itself is not much of an offense at all.

We do not, for example, incarcerate individuals who use marijuana primarily to restrain them. Our concern with drugs involves issues of diminished productivity, potential health risks, and perhaps the moral judgment that pursuit of pleasure ought to be confined to particular, permissible avenues. Therefore, there is a generalized interest in limiting the amount of drug use in our society. From the perspective of the person incarcerated for smoking marijuana, however, these generalized goals and priorities do not sufficiently explain why her physical liberty has been taken away. If incarceration is not necessary to a compelling interest, then the state does not confront the "enemy" when it incarcerates the criminal; it confronts decent individuals and strips them of their most prized freedom—their liberty from confinement. Though it may be necessary to national security to require absolute obedience and conformity on the battlefield, it serves neither national security nor respect for the law to allow the government to incarcerate at will. By allowing almost anything to be a crime, punishable by imprisonment, the state teaches its citizens that criminal justice does not necessarily coincide with actual justice; it teaches contempt for the law that may impair obedience not only to the laws inspiring that contempt, but to the most necessary and important laws as well. It may be no coincidence that in the United States, there are more people in prison as well as more violent crime, per capita, than in almost any other industrialized nation.

arrestee presents an identifiable and articulable threat to community); see also text accompanying notes 177-90 infra (discussing potential impact of strict scrutiny upon various criminal laws currently in existence).

See, e.g., Mark A.R. Kleiman, Against Excess: Drug Policy For Results 27-28, 67-69 (1992) (indicating that dangers of drugs include bad results of intoxicated behavior, decrease in reliability of individual on drugs in carrying out responsibilities inherent in our social system, and questioning rationale behind criminal legislation against recreational use of drugs).

Cf. Randy E. Barnett, Bad Trip: Drug Prohibition and the Weakness of Public Policy, 103 Yale L.J. 2593, 2596 (1994) (reviewing Steven B. Duke & Albert C. Gross, America's Longest War: Rethinking Our Tragic Crusade Against Drugs (1993)) (explaining that "the inflation of crimes diminishes the significance attached to each. As more conduct is criminalized in order to 'send a message' of societal disapproval, enforcement of each crime declines. Consequently, the message actually delivered to prospective criminals becomes less meaningful.").

As we have seen, the equation between prohibition and punishment, the substitution of process for substance, and a deferential approach to criminal justice are all inadequate bases for treating the fundamental right to liberty from physical confinement differently from other fundamental rights. Therefore, this fundamental right must be subjected to the most exacting scrutiny. Part IV attempts tentatively to suggest how strict scrutiny might work in the context of liberty from physical confinement.

IV
CONSTRUCTING A BETTER DOCTRINE

If we acknowledge that liberty from confinement is indeed a fundamental right, and we take seriously the resulting unconstitutionality of conditioning retention of this fundamental right on conduct to be chosen at will by the legislature, it is necessary to apply strict scrutiny to every law that deprives an individual of that fundamental right.168

Until this point, this Article has addressed the theoretical objections to such a proposal and has demonstrated that they are unconvincing. It has established that liberty from confinement cannot be relegated to the status of unprotected aspects of daily life, subject to any regulation that is not utterly irrational. It has shown that notwithstanding the unconstitutionality of such an approach, liberty from confinement has in fact been treated in this very fashion. Demonstrating this doctrinal inconsistency has been the primary goal of this Article, and a full examination of the consequences and choices accompanying an adoption of strict scrutiny for deprivations of liberty from confinement would entail years of judicial development. In this Part, however, I begin the process of describing the meaning of strict scrutiny of deprivations of liberty from confinement. I also raise some potential difficulties with the application of this heightened standard of review to much of the criminal law and offer some tentative solutions as well.

168 Professors Murphy and Coleman have similarly observed in connection with deprivations of liberty and life that constitute the core of criminal penalties that "[a]dapting constitutional language from a somewhat different context, one might seek to discover if criminal punishment, as a mechanism that encumbers fundamental rights of persons, is indeed the least restrictive means that could be employed to accomplish whatever compelling goals or interests the state currently seeks to attain through punishment." Jeffrie G. Murphy & Jules L. Coleman, The Philosophy of Law: An Introduction to Jurisprudence 113 (1984).
A. Strict Scrutiny of Incarceration

In most instances, once the courts recognize that some activity or status constitutes a fundamental right, the government tends to adopt a hands-off policy toward that activity or status. The government does not, for example, levy special taxes on contraception or procreation. Nor does it place limits on consenting adults' freedom to marry the individuals they choose. When the government does attempt to place explicit limits upon fundamental rights such as free speech, such limits are typically struck down. In a sense, it is easy to manage a fundamental rights jurisprudence in which strict scrutiny is "fatal in fact." The government regulates at will outside the area of fundamental rights, while it attempts to avoid regulating at all within that area. It may be harder to regulate a fundamental right in moderation, as the government would have to do with the fundamental right to liberty from confinement, than to abstain from regulation altogether.

The "hands-off" jurisprudence typically associated with fundamental rights is not a feasible alternative to adopt as we begin to acknowledge the status of liberty from confinement as a fundamental right. Courts cannot simply invalidate imprisonment in the way that they can invalidate bans on contraception. Imprisonment is often necessary for a variety of reasons. For example, certain classes of criminals are dangerous to society, and alternatives to confinement (other than death) would not adequately restrain such criminals from continuing to pose a threat to the security of free citizens. Physical restraint, in other words, is an important part of the government's capacity to ensure public safety. In addition, the eighth amendment lim-

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169 This is of course only true when there are two individuals, see Reynolds v. United States, 98 U.S. (8 Otto) 145, 164-66 (1878) (holding that even religious practice does not insulate polygamy from criminal prosecution), and when the two individuals are of the opposite sex, cf. Bowers v. Hardwick, 478 U.S. 186, 196 (1986) (holding that homosexual sodomy may be constitutionally criminalized by the states).

170 See, e.g., Texas v. Johnson, 491 U.S. 397, 399 (1989) (holding that conviction for flag desecration is inconsistent with first amendment); American Booksellers Ass'n v. Hudnut, 771 F.2d 323, 334 (7th Cir. 1985) (finding ordinance prohibiting pornography that discriminates on the basis of sex an infringement on right to free speech).

171 For the use of this phrase to describe the nature of strict scrutiny, see Gerald Gunther, The Supreme Court, 1971 Term—Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for Newer Equal Protection, 86 Harv. L. Rev. 1, 8 (1972).

172 The area of abortion has been a notable exception to this rule. Legislatures have, since the time that Roe v. Wade, 410 U.S. 113, 155-56 (1973), announced abortion's status as a fundamental right, attempted to test the limits of the decision by enacting laws presenting various obstacles to reproductive choice. See, e.g., Planned Parenthood v. Casey, 112 S. Ct. 2791, 2810 (1992) (examining various restrictions on access to abortion); Thornburgh v. American College of Obstetricians & Gynecologists, 476 U.S. 747, 772 (1986) (striking down various abortion restrictions, including a waiting period).
its the availability of punishments other than prison for crime.\textsuperscript{173} When other alternatives are unconstitutional under the eighth amendment, that fact necessarily affects the resulting need for prison.

This proposal therefore does not call for the elimination of prison. It requires instead a close evaluation of criminal laws that utilize imprisonment as a penalty for violations. The evaluation ought to consist of asking two familiar questions: (1) Does the incarceration of individuals who commit this offense serve a compelling state interest? and (2) Is the deprivation of liberty from confinement narrowly tailored to serve the compelling state interest?

1. Compelling Interests

The compelling interest inquiry may result in the more significant transformation of the criminal law because it will place some unprotected conduct beyond the reach of incarceration. The classification of compelling state interests, like the recognition and delimitation of fundamental rights, is a process that will occasion debate. This fact, however, does not release judges from their obligation to engage in this process as a necessary part of fundamental rights constitutional analysis.

In addition to the question of hard cases, one might understandably express alarm at the prospect of having the courts apply strict scrutiny to every single criminal prosecution seeking a penalty of incarceration. Such a requirement might appear at first glance to present an excessive burden upon an already taxed criminal justice system. In fact, the burden would not have to be so great. The identification of compelling interests sufficient to justify incarceration could take place on a categorical rather than an individual, case-by-case basis.

The Supreme Court has effectively managed the disposition of a different fundamental right through such categorical judgments. In

\textsuperscript{173} See, e.g., Coker v. Georgia, 433 U.S. 584, 592 (1977) (holding that death penalty is cruel and unusual punishment for crime of rape). Though the Court has not explicitly addressed the eighth amendment status of punishments such as whipping and limb amputation, even conservative scholars such as Judge Robert Bork have indicated their belief that such punishments would be unconstitutional. See, e.g., May It Please The Court 234 (Peter Irons & Stephanie Guitton eds., 1993) (quoting oral argument in Gregg v. Georgia, 428 U.S. 153 (1976), where Justice Stewart is listed as asking the following question: "What if a state said for the most heinous kind of first-degree murders we are going to inflict breaking a man on the wheel and then disemboweling him while he is still alive and then burning him up: What would you say to that?" Then-Solicitor General Bork is listed as responding as follows: "I would say that that practice is so out of step with modern morality and modern jurisprudence that the state cannot return to it. That kind of torture was precisely what the framers thought they were outlawing when they wrote the cruel and unusual punishments clause.").
the first amendment area, the Court has identified several forms of speech that are not constitutionally protected, including obscenity,\textsuperscript{174} fighting words,\textsuperscript{175} and defamation.\textsuperscript{176} The lower courts and eventually the Supreme Court could similarly identify categories of activities for which the penalty of incarceration could be imposed.

To reduce the abstraction of this discussion, consider various potential interests that might justify incarceration of individuals convicted of crimes in the United States. Least controversial perhaps is the proposition that there is a compelling interest in protecting citizens from violence and the threat of violence. Therefore, the state may utilize incarceration to restrain violent criminals and disable them from committing further acts of violence, to deter other potential violent criminals, and to punish the violence, thereby giving effect to the societal outrage that rightly accompanies a serious harm. It follows from this analysis that from a fundamental rights due process standpoint, incarceration for such crimes as murder, rape, assault, battery, and robbery would be beyond constitutional reproach.

A second-tier compelling state interest might be the interest in protecting citizens' property. Just as in the fourth amendment context, the prevention of property deprivation is not as compelling as the prevention of physical violence.\textsuperscript{177} Nonetheless, most courts would find that the state does have a compelling interest in protecting private property and therefore in addressing crimes that threaten private property. Incarceration of those who commit crimes such as burglary, larceny, auto theft, and embezzlement would therefore generally survive the compelling interest prong of strict scrutiny. Incarceration of such criminals restrains them from further predatory behavior while it deters other potential predators as well. Hard cases might arise when the amount of property appropriated is negligible.\textsuperscript{178} Courts may accordingly develop a doctrine requiring a minimum loss of property

\textsuperscript{174} See Miller v. California, 413 U.S. 15, 23 (1973) ("This much has been categorically settled by the Court, that obscene material is unprotected by the First Amendment.").

\textsuperscript{175} See Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942) (enumerating types of speech, including "fighting words," which are not entitled to first amendment protection).

\textsuperscript{176} See New York Times Co. v. Sullivan, 376 U.S. 254, 279-80 (1964) (recognizing that reckless defamation is not protected by first amendment).

\textsuperscript{177} See Tennessee v. Garner, 471 U.S. 1, 11 (1985) (holding, in case of burglary suspect, that fourth amendment prohibits use of deadly force to prevent escape of suspect who poses no threat of physical injury to others); cf. U.S. Const. amend. V (allowing government to appropriate private property as long as it provides just compensation).

\textsuperscript{178} Such a hard case might arise, for example, when the crime at issue is shoplifting a small quantity of food.
before the state's concern in addressing the act rises to the level of a compelling interest.\textsuperscript{179}

One category of laws that presents a strong case for invalidation as violating the liberty from confinement consists of laws that provide for incarceration for use or possession of recreational drugs such as marijuana. Although few courts take the position that there is a constitutional right to use marijuana,\textsuperscript{180} it does not follow that users and possessors of marijuana may be incarcerated. Like the hypothetical megafruit discussed above,\textsuperscript{181} marijuana may be made unavailable or taxed without constitutional infirmity, solely because the use of marijuana is not itself protected. If the government chooses to incarcerate those who use and possess marijuana, however, it must first articulate a compelling interest that justifies an infringement upon the liberty from confinement.

The paternalistic argument that the government incarcerates the marijuana user to protect her from herself is exceedingly weak, given the data available about marijuana use.\textsuperscript{182} While an argument could be made that drug pushers are invariably involved in property and violent crimes to protect their business, their involvement in such crimes can be prosecuted directly.\textsuperscript{183} Moreover, even if their predatory behavior may be treated as inseparable from their drug business, this fact certainly does not transform the drug user herself into a

\textsuperscript{179} Cf. Roe v. Wade, 410 U.S. 113, 163-64 (1973) (finding that state's interest in protecting fetus is not compelling until fetus reaches viability, and that state may not, therefore, impose criminal penalties for abortions obtained before point of viability).

\textsuperscript{180} But see Ravin v. State, 537 P.2d 494, 504 (Alaska 1975) (concluding that under Alaska's state constitution, citizens have a basic right of privacy in their homes, which encompasses the right to noncommercial possession and ingestion of marijuana).

\textsuperscript{181} See text accompanying note 95 supra.

\textsuperscript{182} Professor Barnett cites a study which points out that "[d]espite years of federally subsidized research, the claimed adverse health effects of marijuana are still highly speculative." Barnett, supra note 166, at 2602. He quotes a study that reported the following:

"Approximately 100 million Americans over the past three decades have smoked (or eaten) marijuana. Millions of these have used marijuana on a regular, almost daily basis for decades. Despite these massive numbers of long-term users, no reliable evidence has appeared that such use has any adverse effects on their physical health. . . .

Other societies have used marijuana for centuries. Yet in no society has any official or respected study found serious adverse physical effects on humans from smoking marijuana. Indeed, in no less than nine official investigations of the problem, in both the United States and elsewhere, none have found any significant adverse effects on human health, even mental health."

Id. (quoting S. Duke & A. Gross, supra note 166, at 51).

\textsuperscript{183} See notes 193-226 and accompanying text infra (discussing overinclusiveness analysis).
Therefore, the interest in preventing all marijuana use, while not an unconstitutional end, is also probably not a compelling purpose sufficient to justify the incarceration of users and possessors. A judge who agrees with this argument would consequently invalidate laws providing for the incarceration of such individuals.

Another area of the criminal law that would become vulnerable if liberty from confinement were treated as a fundamental right is the consensual sexual area, including laws criminalizing homosexual activity and fornication. Unlike the case of drug use and possession, there are many who believe that the conduct of consensual sexual activity is itself a protected fundamental right under the due process clause of the fourteenth amendment. Even if courts refuse to recognize this privacy right, however, they still might not consider the prevention and punishment of such conduct compelling state interests justifying incarceration. Justice White, speaking for the Court in Hardwick, for example, made a point of avoiding an evaluation of the wisdom of the sodomy law. He stated that “[t]his case does not re-

184 For an example of the differentiation between users and sellers in another context, see Stanley v. Georgia, 394 U.S. 557, 566-68 (1969) (holding that private use of obscene materials is constitutionally protected, even though sale may be prohibited).

185 One might argue that there is a compelling interest in preventing and punishing conduct that is immoral, even if it harms no one. See generally J. Feinberg, supra note 13 (discussing and evaluating legitimacy of criminalizing conduct that is morally illicit, but that does not adversely affect anyone’s interests). This argument, however, would do away with much of substantive due process. Laws prohibiting contraception, abortion, and interracial marriage, for example, were justified on just such grounds. Justice Stevens has suggested that “the fact that the governing majority in a State has traditionally viewed a particular practice as immoral is not a sufficient reason for upholding a law prohibiting the practice; neither history nor tradition could save a law prohibiting miscegenation from constitutional attack.” Bowers v. Hardwick, 478 U.S. 186, 216 (1986) (Stevens, J. dissenting).

186 Such laws include 21 U.S.C. § 844(a) (Supp. IV 1992) (providing maximum prison sentence of one year for possession of controlled substance when convict has no prior drug convictions); Cal. Health & Safety Code § 11357(a) (West 1991) (“[E]very person who possesses any concentrated cannabis shall be punished by imprisonment in the county jail for a period of not more than one year or by a fine of not more than five hundred dollars . . . .”); Mass. Gen. Laws Ann. ch. 94C, § 34 (West 1984) (providing maximum jail sentence of six months for possession of marijuana); Mont. Code Ann. § 45-9-102(2) (1993) (providing maximum jail sentence of six months imprisonment for criminal possession of marijuana or its derivatives in amount not exceeding 60 grams of marijuana or one gram of hashish).


188 See, e.g., L. Tribe, supra note 13, § 15-21, at 1427-28 (criticizing Hardwick); Tribe & Dorf, supra note 104, at 1108 (asserting that Constitution’s text points toward recognizing broader right of “intimate personal association in the privacy of the home”).
quire a judgment on whether laws against sodomy between consenting adults in general, or between homosexuals in particular, are wise or desirable. The compelling interest test would require such an inquiry, as long as imprisonment remained an available punishment for consensual sodomy. Moreover, it is quite unlikely that the Supreme Court would find a compelling interest in addressing such conduct, to which opposition tends to be purely moral (or religious), given that there is no credible claim that a harm is actually being addressed.

2. Narrow Tailoring

Once the particular interest proposed to justify legislation is deemed by a court to be compelling, the next step must be to evaluate the relationship between the deprivation of a fundamental right and the advancement of the compelling interest. One reason for this evaluation of close "fit" or narrow tailoring is that without such an evaluation, any compelling interest could be invoked to justify any legislation. A ban on all political speech, for example, could be justified by the compelling interest in preventing violence. It is the evaluation of fit that ensures that the purported compelling interest is indeed served (and served well) by the deprivation of the fundamental right. Justice Blackmun explained this process in his dissenting opinion in Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah. He said, in connection with a different fundamental right (the right to the free exercise of religion):

A State may no more create an underinclusive statute, one that fails truly to promote its purported compelling interest, than it may create an overinclusive statute, one that encompasses more protected conduct than necessary to achieve its goal. In the latter circumstance, the broad scope of the statute is unnecessary to serve the interest, and the statute fails for that reason. In the former situation, the fact that allegedly harmful conduct falls outside the stat-

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189 Hardwick, 478 U.S. at 190.
190 As noted above, see note 13 supra, I am here embracing a harm model, one that does not recognize purely moral opposition to conduct as constituting a compelling governmental interest sufficient to override a fundamental right. Though one might adopt an alternative model that holds moral claims to be compelling, such a model would not permit the invalidation of any law as violating a fundamental right, because the violation of any law will offend some conception of morality. See Hardwick, 478 U.S. at 199 (Blackmun, J., dissenting) (asserting in connection with law banning sodomy that "[i]ke Justice Holmes, I believe that '[i]t is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV" (quoting Oliver W. Holmes, The Path of the Law, 10 Harv. L. Rev. 457, 469 (1897))). For a detailed evaluation of the argument that morality alone may justify criminal legislation, even where the legislation addresses no harm, see generally J. Feinberg, supra note 13.
ute's scope belies a governmental assertion that it has genuinely pursued an interest "of the highest order." If the State's goal is important enough to prohibit [the exercise of a fundamental right] . . . , it will not and must not stop at [the fundamental right].

a. Overinclusiveness. The first requirement of narrow tailoring, the requirement that legislation depriving individuals of a fundamental right not be overinclusive, has two potential implications. The first is that the conceptual scope of the statute not extend beyond areas that actually serve the compelling interest. For example, a statute that provides for the incarceration of those engaging in premarital sex, to further the compelling interest in public health by shielding citizens from deadly diseases, would be overinclusive. It would extend beyond those instances of sexual activity that spread deadly diseases. A narrower law, better tailored to the alleged compelling interest, would provide for the incarceration of only those individuals with deadly diseases engaging in premarital sex. This kind of logic animated the Court's decision in *Schneider v. New Jersey.* In that case, the Court invalidated four ordinances forbidding distribution of leaflets. The ordinances were defended as necessary to prevent either fraud, trespass, or littering. The Court rejected these defenses and refused to uphold the ordinances, noting that there were other ways to accomplish these legitimate aims without abridging freedom of speech and press. Fraud, street littering, and trespass could themselves be denounced and punished as offenses.

The second implication of the overinclusiveness inquiry has an empirical component. Instead of asking at a theoretical level, as the

192 Id. at 2250-51 (Blackmun, J., dissenting) (citing Zablocki v. Redhail, 434 U.S. 374, 390 (1978) (invalidating certain restrictions on marriage as "grossly underinclusive with respect to [their] purpose"); Supreme Court v. Piper, 470 U.S. 274, 285 n.19 (1985) (finding rule excluding nonresidents from the bar of New Hampshire "is underinclusive . . . because it permits lawyers who move away from the State to retain their membership in the bar")). (additional citation omitted).

193 Assume for purposes of this discussion that premarital sex is not itself a protected fundamental right. For an example of a statute criminalizing such conduct, see Minn. Stat. Ann. § 609.34 (West 1987) ("When any man and single woman have sexual intercourse with each other, each is guilty of fornication, which is a misdemeanor.").

194 308 U.S. 147 (1939).

195 Id. at 164.

196 Id. at 162-64.

197 Id. at 164.

198 Id.; see also Talley v. California, 362 U.S. 60, 63 (1960) (invalidating ordinance barring distribution of handbills except those labelled with the names and addresses of those who prepared, distributed, or sponsored the handbills). The Court in *Talley* rejected counsel's suggestions that the ordinance was intended to identify those responsible for fraud, false advertising, and libel, in part because the ordinance was "in no manner so limited." Id. at 64.  

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first inquiry does, whether the scope of the statute is limited to addressing the proffered compelling interest, the question becomes whether at a practical level, there are not less restrictive alternatives that would achieve the same compelling interest without violating the relevant fundamental right.

To understand this inquiry, consider again the public health hypothetical case discussed above. The government might argue that the incarceration of all individuals engaging in premarital sex is necessary to protect the public health, even though much of the conduct is harmless, because many sick individuals are unaware of their illness until they have communicated it to many partners. Tailoring the prohibition (and hence incarceration) to the sick individuals, in other words, would not deter those mistakenly believing themselves to be healthy.

A similar argument was made in defense of an employer's fetal protection policy excluding all fertile women from positions that could expose them to lead levels deemed harmful to fetuses. Judge Posner argued in his dissenting opinion at the Court of Appeals that "there are many careless pregnancies, as is shown by the frequency of abortion and of illegitimate birth." Accordingly, many women would work in a lead-contaminated atmosphere and become pregnant without having planned the pregnancies and therefore without being immediately aware of their pregnancies. Thus, warning pregnant women or excluding pregnant women alone would be inadequate to protect the fetus from lead.

Although this argument was made in the context of an employment discrimination action rather than a constitutional challenge, the logic is quite similar. A less restrictive alternative would not do the job of protecting the fetus, even though it might provide a better theoretical fit with the interest in fetal protection. The Supreme Court held that fetal protection did not constitute a Bona Fide Occupational Qualification under Title VII and the Pregnancy Discrimination Act and that the policy therefore constituted illegal pregnancy-

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200 Id. at 906 (Posner, J., dissenting). For a more complete discussion of the implications of Judge Posner's attitude toward women as reflected in this dissenting opinion, see Sherry F. Colb, Words That Deny, Devalue, and Punish: Judicial Responses to Fetus-Envy?, 72 B.U. L. Rev. 101, 135-38 (1992) (criticizing Judge Posner’s dissent on many counts, including his failure to treat normal female life as the norm and his characterization of woman and her fetus as two separate beings).
202 Id. § 2000e(k).
based discrimination. The Court, therefore, did not have occasion to evaluate Judge Posner's argument, which assumed that an employer has a legitimate interest in protecting its employees' fetuses.

The flipside of the empirical defense articulated above is the second kind of overinclusiveness attack on a statute calling for incarceration. Such an attack would consist of the following argument: to address the compelling interest articulated, one need not deprive anyone of her fundamental right to liberty from confinement; one might utilize a method that does not affect the individual's fundamental rights. Just as the abstract overinclusiveness of a statute might be constitutionally justified by the concrete necessity of extending its scope, the abstract "fit" between the compelling interest and rights deprivation might be constitutionally inadequate, because using a different means could do the job equally well. In the context of our public health example, such an argument would attack even the imprisonment of only those people engaging in premarital sex who are themselves diseased, on the theory that a fine would be a less restrictive means of achieving the same compelling goal.

This highly empirical aspect of the overinclusiveness inquiry is very problematic. Although fines are available as a less restrictive alternative to prison, the threat of a fine may not be sufficient to deter antisocial behavior. Since the threat of prison itself has not come close to creating a crime-free United States, one might legitimately wonder whether it might be unwise and even dangerous to substitute the lesser threat of a monetary sanction for that of imprisonment.


204 Although the eighth amendment forbids the imposition of "excessive fines," U.S. Const. amend. VIII ("nor excessive fines imposed"); see, e.g., Austin v. United States, 113 S. Ct. 2801, 2803 (1993) (applying eighth amendment's excessive fines clause to in rem civil forfeiture proceedings), it is unlikely that a fine deemed necessary to serve a compelling interest (in place of prison), would be found "excessive" for purposes of the eighth amendment.

205 Indeed, according to Professor John J. DiIulio, Jr. of Princeton University and the Brookings Institution, as reported by A.M. Rosenthal, the crime rate has been rising steadily over the last several decades. The crime rate (number of property and violent crimes per 100,000 people) was 190 in 1960, 400 in 1970, and approximately 600 in the 1990s. A.M. Rosenthal, Crime in America: Prison Saves Lives, N.Y. Times, June 3, 1994, at A27. After an in-depth study of crime and punishment in America, Lawrence M. Friedman concluded that although imprisonment and the death penalty must have some deterrent effect on behavior, "[i]t is pretty certain that it is less than most people think; the constant clamor for more prisons, more executions, more police, assumes a potency that is almost surely a delusion." Lawrence M. Friedman, Crime and Punishment in American History 14 (1993).

206 The problem with the use of fines is that many may view fines as de facto licensing fees for criminal activity. The impact of such a "tax on crime," while likely to include some
It is arguable that using less restrictive alternatives to prison to address serious crime would likely result in an even higher crime rate. Most of the time, there will not be data from which one could infer the relative deterrence rates of different penalties, and therefore courts would be left to judge competing legislative speculations about degrees of deterrence.\footnote{207}

In order to avoid the difficulty of this type of inquiry, the Court could treat incarceration as it treats deprivations of other fundamental rights. For example, when the Court examines the constitutionality of a burden on speech, it posits that the law will be effective in its literal objective and determines only if its objective coincides conceptually with the purported compelling state interest.\footnote{208} The case of \textit{R.A.V. v. City of St. Paul}\footnote{209} provides a good illustration. In \textit{R.A.V.}, the Supreme Court found that a city ordinance prohibiting bias-motivated fighting words constituted discrimination against ideas based on their content and viewpoint.\footnote{210} In response to the city’s argument that such content- and viewpoint-based discrimination survives strict scrutiny because “it is narrowly tailored to serve compelling state interests. . . . [in helping] to ensure the basic human rights of members of groups that have historically been subjected to discrimination[,]”\footnote{211} the Court stated:

\begin{quote}
We do not doubt that these interests are compelling, and that the ordinance can be said to promote them. But the “danger of censorship” presented by a facially content-based statute requires that that weapon be employed only where it is “necessary” to serve the asserted [compelling] interest.” The existence of adequate content-neutral alternatives thus “undercut[s] significantly” any defense of such a statute, casting considerable doubt on the government’s protestations that “the asserted justification is in fact an accurate level of deterrence, will not approach that of imprisonment. For example, an individual might decide that killing his enemy is valuable enough to him to make a fine of $10,000 a reasonable price. When imprisonment is an option, however, people who proceed in spite of the available penalty are probably assuming that they will not get caught rather than viewing imprisonment as an acceptable cost of their activity.\footnote{207} Given the crime rate in the United States, it would be counterfactual to assume that any measure would completely eliminate any given crime. The issue is the effectiveness of an alternative to incarceration as a deterrent.\footnote{208} See, e.g., \textit{Simon \\& Schuster, Inc. v. New York State Crime Victims Bd.}, 502 U.S. 105, 118-23 (1991) (explaining that although preventing criminals from profiting from their crimes is compelling interest, law providing for forfeiture of book royalties, on the assumption that royalties will be successfully attached by the Crime Victims Board, is not narrowly tailored to interest because its scope extends beyond those cases in which criminals are profiting from their offenses).\footnote{210} 112 S. Ct. 2338 (1992).\footnote{211} Id. at 2547.\footnote{211} Id. at 2549.
description of the purpose and effect of the law." The dispositive
question in this case, therefore, is whether content discrimination is
reasonably necessary to achieve St. Paul's compelling interests; it
plainly is not. An ordinance not limited to the favored topics, for
example, would have precisely the same beneficial effect.\footnote{212}

This response indicates a refusal to embark on an empirical inves-
tigation of the actual effects of the legislation at issue. It can hardly be
"plain" that a law prohibiting all fighting words would, as an empirical
matter, have "precisely the same beneficial effect" as a law singling
out the type of fighting words that threaten the safety and security of
oppressed groups for protection. The question of which legislation
would better serve the compelling interest as an empirical matter is
one that could only be answered by resort to facts about the world. A
logical assessment of the alternative ordinances would be inadequate.

The Court, however, confined its analysis to the theoretical scope
of a law banning all fighting words, without attention to content, as
compared to a law banning only those fighting words directed at op-
pressed groups. On the assumption that the respective bans on fight-
ing words would both effectively protect the minority groups, the
Court noted that the content-neutral ban would do so without implic-
ing the fundamental right against content-based censorship and
consequently found the St. Paul ordinance to be unconstitutional
under the first amendment.\footnote{213}

Taking R.A.V. as a model, the inquiry into overinclusiveness of
laws imposing imprisonment would generally resemble that under-
taken in the areas of other fundamental rights and would accordingly
analyze the conceptual fit between imprisonment and the compelling
interest purportedly served. If the statute at issue allowed imprison-
ment for some conduct that did not implicate the compelling interest,
it would be presumptively overinclusive and invalid. Conversely, if
the statute allowed imprisonment of only those committing acts
that do implicate the compelling interest, it would presumptively
not be overinclusive and therefore would survive the overinclusive-
ness component of the compelling interest test. If very strong
evidence could be assembled in defense of either the need for
imprisoning more individuals or the equal or greater efficacy of
a less restrictive penalty than prison for a particular crime,\footnote{214}

\footnote{212} Id. at 2549-50 (citations omitted) (alterations in original).
\footnote{213} Id. at 2550.
\footnote{214} One example of this might be studies demonstrating that chemical castration of con-
victed rapists is more effective in protecting the public from recidivism than is imprison-
ment. Of course, the eighth amendment issue of whether such a measure constitutes cruel
and unusual punishment would have to be addressed and would necessarily inform the
the presumption in favor of the conceptual approach might be rebutted.\textsuperscript{215}

One final issue that might arise in connection with the overinclusiveness inquiry is the length of a prison sentence. One might argue, in connection with a particular prison sentence, that it would be possible to serve the compelling governmental interest with a shorter sentence. In other words, \((X \text{ minus } D)\) years in prison may be a constitutionally required less restrictive alternative to \(X\) years in prison because it deprives the individual of less freedom from incarceration and would be equally effective in serving the proffered compelling interest. This argument is flawed.

For a sentence of any length, one could argue that a day less in prison would not substantially reduce deterrence, restraint, or retribution, and that the actual sentence is therefore unconstitutionally overinclusive. The same argument, however, could then be used to challenge the new, one-day-shorter sentence, and so on. This day-by-day analysis of the length of a prison sentence results in an absurd outcome: the conclusion that no finite prison sentence can survive strict scrutiny.\textsuperscript{216} Such an outcome would be both impractical and insupportable from the perspective of the need to control serious antisocial conduct.

\textsuperscript{215} Cf. Sherry F. Colb, Assuming Facts Not in Evidence: A Response to Russell M. Coombs, Reforming New Jersey Evidence Law on Fresh Complaint of Rape, 25 Rutgers L.J. 745 (1994) (arguing, in context of evidence of delay in reporting rape, that relevance of delay may no longer be determined solely by resort to commonsense intuitions when strong empirical evidence has been assembled that rebuts those intuitions). One example of such rebuttal is evident in Burson v. Freeman, 112 S. Ct. 1846 (1992), in which the Supreme Court scrutinized a mandated electioneering-free zone around polling places. Id. at 1848. The Court discussed historical facts about persistent voter intimidation and election fraud and the effects of various legislative responses to these problems, see id. at 1852-55, and determined that “this wide-spread and time-tested consensus [among the States] demonstrates that some restricted zone is necessary in order to serve the States’ compelling interest in preventing voter intimidation and election fraud,” id. at 1855.

\textsuperscript{216} This analysis calls to mind the riddle about the impossibility of giving a surprise quiz. The riddle goes as follows: A teacher announces on Monday that there will be a surprise quiz one day that week. What day will it be? It cannot be Friday, because once Friday came, the students would know it has to be Friday and it therefore would not be a surprise. It cannot be Thursday, because since it cannot be Friday, the students would know on Thursday that it has to be that day and it therefore would not be a surprise, and so on until Monday. While every step makes sense, the outcome—that the surprise quiz is impossible once announced—is nonsense.
The case of Burson v. Freeman confronts a similar puzzle in the context of the first amendment. A political party worker challenged a Tennessee statute prohibiting solicitation of votes and display of campaign materials within one hundred feet of the entrance to a polling place on election day. The Supreme Court determined that "[a]s a facially content-based restriction on political speech in a public forum, [the statute] must be subjected to exacting scrutiny: The State must show that the 'regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end.'" The state claimed its regulation was aimed at protecting both the citizens' freedom in voting for the candidates of their choice and the right to vote in an election conducted with integrity and reliability. After recognizing that the asserted interests were indeed compelling, the Court turned to the narrow tailoring aspect of strict scrutiny.

The Court stated that "[w]hile we readily acknowledge that a law rarely survives such scrutiny, an examination of the evolution of election reform, both in this country and abroad, demonstrates the necessity of restricted areas in or around polling places." Nevertheless, the question of how large a restricted zone would be legitimate remained. The Court determined that one hundred feet was not overly burdensome. It asserted that "[r]educing the boundary to 25 feet, as suggested by the Tennessee Supreme Court, is a difference only in degree, not a less restrictive alternative in kind."

Similarly, small reductions in prison sentences should not be viewed as constitutionally mandated, less restrictive alternatives. A harder question is presented, however, when long prison sentences, that therefore could be made significantly shorter, are at issue. Should the state have to demonstrate that something far short of life imprisonment, for example, would not serve the state's proffered compelling interest equally well? Although courts might accept an affir-
ative response to this question, I would tentatively suggest that the answer should be no.

First, as outlined above, even long prison terms have not successfully reduced the rate of serious crime to an acceptable level in the United States. Therefore, the notion that prison sentences are unnecessarily long, that they could be much shorter and still serve the government's interest in controlling serious criminal activity, is not very convincing. Second, when a court determines that an individual's conduct has undermined or subverted a compelling state interest, that determination arguably introduces an additional compelling state interest into the picture: the interest in retribution.

Quite apart from the specific and general deterrent effect of long sentences on crime rates, many believe that justice requires that serious crimes be punished. If a crime is not serious, then a person who commits that crime should not lose her liberty from incarceration at all. But if a court determines that an offense is serious enough to implicate a compelling state interest, it may very well follow that society has a further compelling interest in punishing anyone who commits that crime.

Once a court recognizes that a crime is serious enough to justify imprisonment, the question of how long a sentence can be before it exceeds that length necessary to serve the compelling interest in retribution is very different from the usual question that arises in overinclusiveness analysis. Instead of calculating how to accomplish a definable goal, the retribution question requires a legislator or judge to quantify the degree of moral outrage accompanying a given offense and respond appropriately to that outrage. The cases elaborating the meaning of narrow tailoring do not make clear how one would quantify the amount of prison time "necessary" to serve the compelling interest in retribution. The Supreme Court has refused, in its eighth

224 See note 205 supra.

225 Such a belief explains why the Simon Wiesenthal Center continues to search for Nazi war criminals, in an effort to bring them to justice, in spite of the fact that few remain alive, that those who continue to live are unlikely to repeat their crimes, and that current and future genocide is unlikely to be affected by whether a handful of Nazi war criminals are successfully tried and punished. The moral position underlying the search is that the victims of such crimes have an interest in having those responsible for their suffering held accountable. See Simon Wiesenthal Center, The Eastern Office of the Simon Wiesenthal Center 4 (1993) (explaining that Wiesenthal legacy includes mission of documenting crimes of genocide that took place during Holocaust and bringing those responsible to justice) (on file with the New York University Law Review). Lord Owen, international mediator of the conflict in the former Yugoslavia, has said that "[t]here can be no amnesty for war criminals," and that "the moral order of this world is marred if those who are guilty of war crimes are not brought to justice." Quoted in Anthony Lewis, 'The Civilized World', N.Y. Times, July 1, 1994, at A25.
amendment jurisprudence, to second guess states' determinations of
the appropriate length of prison sentences.\textsuperscript{226} I would accordingly (al-
beit tentatively) suggest that courts leave the issue of sentence length
out of the overinclusiveness inquiry, once it is determined that some
prison term for the relevant conduct would otherwise satisfy the de-
mands of strict scrutiny.

\textbf{b. Underinclusiveness.} The second requirement of narrow tai-
loring is that a law infringing upon a fundamental right not be under-
inclusive. This requirement means that the law must extend equally to
the various situations in which the compelling interest advanced by
the government is implicated rather than extending only to a limited
subset of such situations. A classic example of an underinclusive law
is one that purports to serve a compelling interest in addressing a
problem that has nothing to do with speech, but deals with the prob-
lem only when it manifests itself in terms of a particular message or
viewpoint. Justice Blackmun noted in his concurrence in \textit{Simon &
Schuster}, for instance, that the Son of Sam law was underinclusive,
presumably in serving the compelling interest in compensating victims
from the fruits of crime.\textsuperscript{227} The only criminal gains that would be for-
feited by virtue of the law would be gains derived from speech about
crime. The underinclusive statute is selective and does not adequately
serve the proffered compelling state interest.

The requirement that a law frustrating the exercise of a funda-
mental right not be underinclusive ensures that the government is
truly serving its claimed compelling state interest rather than another
interest that is less important or even illegitimate. In \textit{City of Rich-
mond v. J.A. Croson Co.},\textsuperscript{228} for example, Justice O'Connor described
the importance of applying strict scrutiny to legislation utilizing sus-
pect classifications as a means of "smok[ing] out" illegitimate uses of
race by assuring that the legislative body is pursuing a goal important
enough to warrant use of a highly suspect tool."\textsuperscript{229} Justice O'Connor
went on to explain that strict scrutiny "ensures that the means chosen
'fit' this compelling goal so closely that there is little or no possibility

\textsuperscript{226} See, e.g., Harmelin v. Michigan, 501 U.S. 957, 994-95 (1991) (holding that life sen-
tence without possibility of parole for cocaine possession was not cruel and unusual pun-
ishment); see also note 55 supra. By noting the Supreme Court's approach, I do not
endorse its position that the ban on cruel and unusual punishments does not contain a
proportionality requirement. The eighth amendment would indeed appear to be the most
appropriate vehicle for making a moral judgment about how much retribution is too much.
\textsuperscript{228} 488 U.S. 469 (1989).
\textsuperscript{229} Id. at 493.
that the motive for the classification was illegitimate racial prejudice or stereotype." The underinclusiveness prong of strict scrutiny thus exposes pretextual invocations of a compelling state interest by revealing when the state has neglected areas in which an authentic concern about this interest would have dictated further legislation.

Beyond uncovering those occasions when the government does not consider the proffered interest to be compelling enough to pursue thoroughly, the underinclusiveness inquiry ensures that citizens are not treated unequally in their exercise of fundamental rights without good reason. The compelling interest provides the good reason, both for depriving some individuals of their fundamental rights and for providing differential access to such rights, but it only "works" if the legislation coincides with the compelling interest and all of its manifestations.

In the context of fundamental rights analysis, the underinclusiveness inquiry is doctrinally indistinguishable from the equal protection fundamental rights inquiry. To understand this identity, consider a case discussed earlier in this Article, *Skinner v. Oklahoma ex rel. Williamson*. The law challenged in *Skinner* triggered the application of strict scrutiny, because it deprived some but not all criminals of the fundamental right to procreate. Finding no compelling interest justifying the distinction between the different kinds of criminals, the Court struck down the Oklahoma statute. Had the Court conducted an underinclusiveness inquiry as part of fundamental rights analysis (as opposed to equal protection fundamental rights analysis), it would have noted that the state could not provide any compelling interest that extended only to some but not all the recidivist thieves covered by the Oklahoma statute. In other words, whatever compelling interest might be advanced (for example, in preventing theft) could not be confined to the class of criminals to which Skinner belonged.

Like the fundamental right to procreate at issue in *Skinner*, the right to be free from physical confinement must not be denied differentially unless the purported compelling interest coincides with the boundaries of the denial. If one activity were punished by imprisonment while another were not, it would be necessary to explain the distinction in terms of a compelling interest, presumably the same

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230 Id.
231 316 U.S. 535 (1942); see text accompanying notes 61-65 supra.
232 Id. at 541.
233 Id. at 541-42.
compelling interest that justified incarceration for the one act in the first place.\textsuperscript{234}

To see when underinclusiveness analysis might prove fatal, consider the premarital sex example from above.\textsuperscript{235} Recall that the compelling interest proffered in defense of a statute permitting imprisonment of individuals who engage in premarital sex was the need to prevent the spread of deadly diseases through sexual contact. We determined that the statute would be presumptively overinclusive (and therefore invalid) for reaching the conduct of those individuals who are healthy and therefore do not implicate the compelling interest in public health. We determined further that the state could rebut this presumption with strong evidence that only the imprisonment of all those engaging in premarital sex could actually prevent the spread of disease through sexual contact. We turn now to the underinclusiveness potential of this hypothetical statute.

\textsuperscript{234} I refer here to cases that provide the incarceration analogue to \textit{Skinner}, in which one kind of activity is punished by imprisonment while a similar activity is not. Although one might also take into account differences in length of incarceration in applying underinclusiveness analysis, I would favor an approach that did not scrutinize differences in length, for some of the same reasons that I favored this approach for purposes of overinclusiveness analysis. See text accompanying notes 216-26 supra. Small differences in sentence length—in contrast to the difference between incarceration and no incarceration—are not significant enough to require strict scrutiny, either in the context of comparing possible sentences for one individual (overinclusiveness) or in the context of comparing different sentences imposed upon different individuals (underinclusiveness). Greater differences in sentence length would, in turn, reflect differential judgments about deterrence, the review of which would require the kinds of subtle empirical determinations that have not normally been a part of strict scrutiny. See text accompanying notes 216-26 supra.

If one were to decide to apply underinclusiveness analysis to prison sentences of different lengths, one consequence would be to subject the sentencing disparities between offenses involving powder cocaine and those involving cocaine base (i.e., crack) to strict scrutiny. Under the Sentencing Guidelines, an offense involving 200 to 300 grams of cocaine is equivalent, for sentencing purposes, to the same offense involving between two and three grams of cocaine base. See United States Sentencing Commission, Guidelines Manual, § 2D1.1(c)(10) (1994). Until now, federal courts of appeals have uniformly rejected constitutional challenges to this disparity. See, e.g., United States v. Coleman, 24 F.3d 37, 38-39 (9th Cir.) (rejecting argument that disparate sentencing for crack and powder cocaine constitutes racial discrimination, given disparate impact on black defendants, because there is no evidence of racially discriminatory intent), cert. denied, 115 S. Ct. 261 (1994); United States v. Williams, 971 F.2d 410, 414 (9th Cir. 1992) (reiterating position that crack/powder cocaine disparity survives rational basis scrutiny, because crack is more potent, more addictive, more affordable, and more prevalent); United States v. Harding, 971 F.2d 410, 414 (9th Cir. 1992) (holding that distinction between crack and powder cocaine does not, on its face, violate equal protection clause), cert. denied, 113 S. Ct. 1025 (1993); United States v. Levy, 904 F.2d 1026, 1034 (6th Cir. 1990) (holding that disparity in sentences between crack and powder cocaine does not violate eighth amendment), cert. denied, 498 U.S. 1091 (1991).

\textsuperscript{235} See text accompanying note 193 supra.
The underinclusiveness question is: why is only premarital sex punished with imprisonment? If the purpose of the statute is to prevent the spread of disease, then all diseased individuals should be punished for having sex. The category of all diseased individuals could theoretically include married as well as unmarried individuals, particularly since some deadly diseases that are sexually transmitted can also be contracted through avenues other than sexual intercourse. Moreover, if no married people are in fact diseased at any given time, then a law extending to all diseased individuals would not apply to them for that reason. There is no need, in other words, to create an exemption for married people, if the compelling interest to be served is that in preventing the spread of disease.

The statute is therefore unconstitutional. Its underinclusiveness (exempting married persons) demonstrates that the statute is not truly serving the concededly compelling interest in preventing the spread of deadly disease. It is quite likely that the statute instead simply imposes the state's moral judgments about premarital sex upon its citizens. The statute is also unconstitutional because it treats married people differently from unmarried people with respect to the fundamental right to liberty from confinement without a compelling interest to justify that disparate treatment.

B. What Counts as a Deprivation?

As with any fundamental right, the right to be free from physical confinement is not self-defining and can be described as existing on a continuum, along which lines must be drawn. Some individuals might feel confined, for example, when they are forced to sit and figure out how much tax they owe the federal government. Others might feel confined when they must stop for a few moments at a red light or a stop sign before driving into an intersection. No one would seriously argue, however, that these slight burdens on one's freedom of movement ought to trigger strict scrutiny as deprivations of liberty from confinement.236

A jurisprudence of liberty that extended strict scrutiny to the institution of stop signs237 would resemble the Lochner238 jurisprudence

236 See Ronald Dworkin, Taking Rights Seriously 266-78 (1977) (arguing against general right to "liberty," conceived as right to be free of all government regulation, but arguing for recognition of specific, important "liberties").

237 I assume here that the law requiring a vehicle to stop does not provide for prison as a penalty for violation. If it did, then strict scrutiny would be appropriate because of the prison penalty and not because the stop sign itself deprives the driver of her constitutionally protected liberty from confinement.

of the early-twentieth-century, during which the Court closely scruti-
nized all legislation regulating private economic transactions.239 Short
of subjecting every law that in any way limits people's freedom to
heightened scrutiny, how do we decide when a deprivation is severe
enough to require justification by a compelling state interest?

The need to draw lines in designating the appropriate area for
application of strict scrutiny is not foreign to fundamental rights juris-
prudence. A case involving the right to marry provides one example
of how the Court has chosen to draw such lines. In Zablocki v.
Redhail,240 the Supreme Court considered the constitutionality of a
Wisconsin law providing that a noncustodial parent of minor children
to whom he must pay support under a court order or judgment may
not marry without court approval. The Court observed that "the right
to marry is part of the fundamental 'right of privacy' implicit in the
Fourteenth Amendment's Due Process Clause."241 In deciding what
level of scrutiny to apply, the Court noted that "[s]ince our past deci-
sions make clear that the right to marry is of fundamental importance,
and since the classification at issue here significantly interferes with
the exercise of that right, we believe that 'critical examination' of the
state interests advanced in support of the classification is required."242
When a law significantly interferes with the exercise of a fundamental
right, then, the law triggers strict scrutiny. The Court explained fur-
ther that

[b]y reaffirming the fundamental character of the right to marry, we
do not mean to suggest that every state regulation which relates in
any way to the incidents of or prerequisites for marriage must be
subjected to rigorous scrutiny. To the contrary, reasonable regula-
tions that do not significantly interfere with decisions to enter into
the marital relationship may legitimately be imposed.243

In other words, state action that does not significantly interfere with a
fundamental right need only be "reasonable," a requirement common
to all laws.244

239 The Court required a real and substantial relationship between statutes and their
purposes. See Liggett Co. v. Baldridge, 278 U.S. 105, 111 (1928); Lochner, 198 U.S. at 56,
64; Jacobson v. Massachusetts, 197 U.S. 11, 31 (1905). For further discussion of the Loch-
ner line of cases, see L. Tribe, supra note 13, §§ 8-3 to -7, at 568-586 (discussing develop-
ment and philosophy of Lochner style "strict and skeptical means-ends analysis").

241 Id. at 384.
242 Id. at 383 (citing Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307, 312, 314
(1976)).
243 Id. at 386.
244 See note 47 supra.
The line the Court draws would be equally appropriate in the case of the right to liberty from confinement. Any civil or criminal law requiring that citizens act or refrain from acting in a particular way will limit freedom to some extent. Such limits do not rise to the level of a deprivation of liberty from confinement, however, unless they are significant or substantial. A significant deprivation of liberty from confinement would necessarily include both a spatial and a temporal component. A public street may be closed for repairs for months, but the degree to which that limits freedom of movement is slight. Citizens may go anywhere on public property other than that street. It would therefore be false to say that they are physically confined. Similarly, an eye-witness to a traffic accident who is called to the police station to describe the accident is confined to a small space (the station house), but only for the brief period of time it takes to recount the events surrounding the accident. On the other hand, when both the temporal and the spatial components of liberty from confinement implicated by a law are substantial, there is a deprivation of liberty from confinement.

When we consider easy cases, the importance of time and space in examining the nature of a deprivation is apparent. A sentence of a month in jail is indisputably a deprivation of liberty from confinement. A prisoner cannot go on any public street or park but must stay within the bounds of the jail. The time involved is also significant. A month in confinement is not an hour-long interview with a police officer or a stop at a traffic light. In order to place a person in jail for a month, the state must have a compelling interest that necessitates such confinement.

We have examined some easy cases in which the deprivations are either so temporally or spatially minimal that they cannot possibly be described as significantly interfering with liberty from confinement or so great that they must be so described. Though ultimately courts will be left to resolve the hard cases, we shall briefly consider how some of these might be addressed.

First, consider pretrial detention of criminal suspects. We know that restrictions on movement far short of imprisonment qualify as "seizures" of the person for fourth amendment purposes and therefore require some justification.245 A brief "stop" by police, however,
requires less in the way of justification than does an arrest, even though both intrusions are considered seizures. In contrast to this procedural protection from unreasonable searches and seizures, the application of strict scrutiny to restrictions placed on fundamental rights appears to be an on/off proposition. Judges would therefore need to decide whether this feature of fundamental rights jurisprudence would be extended to the right to liberty from confinement. If not, they would have to consider whether several discrete levels of scrutiny or a sliding scale would be appropriate and how the various intrusions would be ordered along the continuum.

Stops by the police and pretrial custodial detention are the two main pretrial encroachments upon liberty that would have to be confronted. Brief stops by the police do not significantly intrude upon one’s liberty from confinement from a temporal perspective and should therefore not require a compelling interest. Accordingly, stopping an individual to question her about an offense in the enforce-

246 Compare Terry, 392 U.S. at 22-23 (requiring reasonable suspicion for a stop) with Brinegar v. United States, 338 U.S. 160, 176 (1949) (requiring probable cause for an arrest).

247 But see United States v. O’Brien, 391 U.S. 367, 376-77 (1968) (requiring lesser level of scrutiny for burdens on speech mixed with conduct that are intended to advance a purpose unrelated to suppression of free expression).


249 The fact that such a stop would require reasonable suspicion under the fourth amendment because it qualifies as a seizure does not, of course, dictate its treatment as a substantive due process right. See notes 123-28 and accompanying text supra. Similarly, the fact that a stop qualifies as a “seizure” under the fourth amendment does not render interrogation that takes place during such a stop “custodial” for purposes of Miranda. See Berkemer v. McCarty, 468 U.S. 420, 439 (1984) (explaining that “comparatively non-threatening character” of Terry stops remove them from dictates of Miranda v. Arizona, 384 U.S. 436 (1966)).
ment of which there is no compelling interest would not violate substantive due process. Pretrial incarceration in a jail cell, by contrast, is significant both temporally and spatially and should accordingly require justification by a compelling interest. This interest would ordinarily be the same compelling interest that would justify incarceration as a penalty for the offense for which the suspect is arrested.

The Supreme Court's holding in *United States v. Salerno* provides a useful example of what strict scrutiny of pretrial detention might include. The case involved the question of whether a suspect may constitutionally be held in custody prior to trial if she poses an identifiable and articulable threat to individuals or to the community. In upholding the Bail Reform Act of 1984, which provided for such detention, the Court emphasized the fact that the law "carefully limits the circumstances under which detention may be sought to the most serious of crimes." Such crimes included "crimes of violence, offenses for which the sentence is life imprisonment or death, [and] serious drug offenses." In defending the constitutionality of pretrial detention, the Court explained that in various areas, "we have found that sufficiently compelling governmental interests can justify detention of dangerous persons." Once again implying the need for a compelling interest, the Court added that "[t]he government's interest in preventing crime by arrestees is both legitimate and compelling." And finally, in approving the statute, the Court focused on the statute's guarantee of an individualized determination that no less restrictive alternative to incarceration exists: "[I]n a full-blown adversary hearing, the Government must convince a neutral decisionmaker by clear and convincing evidence that no conditions of release can reasonably assure the safety of the community or any person." Such an individualized determination of narrow tailoring is not required in the case of any other fundamental right and may not be

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251 Id. at 751.
253 *Salerno*, 481 U.S. at 747.
254 Id.
255 Id. at 748.
256 Id. at 749. Of course, the notion that preventing "crime" is compelling without regard to the substance of the crime is deeply flawed; this notion accounts for the Court's failure to treat liberty from confinement as a fundamental right in the context of the criminal law. However, the Court's decision to use the language of the compelling interest test in addressing the deprivation of liberty from confinement outside the context of the "valid conviction rule" reveals the fundamental nature of the right, notwithstanding the Court's failure to understand that crime-fighting in the abstract cannot, without more, constitute an inherently compelling state interest.
257 Id. at 750.
necessary in this context either. The Court's approach in Salerno is useful, however, in helping us envision the process of strict scrutiny that would appropriately accompany deprivations of liberty from confinement at the pretrial stage.

Courts would also need to address lesser restrictions upon liberty than prison that are imposed after conviction. Sentencing individuals to probation or supervised release and requiring them to meet with a probation officer on a regular basis are closer to a brief stop or station-house interview than to imprisonment. Full-time community service might be a closer case. Since most people must work in order to obtain food and shelter, however, such a requirement would probably not rise to the level of a significant deprivation of liberty from confinement. House-arrest, yet another penalty that falls short of actual imprisonment, would probably be classified on the significant deprivation side of the line, although a sliding-scale approach would provide less scrutiny for house-arrest than for an actual prison sentence. Any particular decision to place a marginal case on one or the other side of the line might seem arbitrary; however, that arbitrariness should not obscure the ease with which the most common cases may be categorized, nor should it be viewed as unique to liberty from incarceration. Every right must have a boundary, and the boundary of a right, like the border of a nation, is always the most vulnerable to attack.

C. Practical Difficulties and Some Tentative Solutions

The most complex practical issue that will arise if courts adopt the compelling interest test for deprivations of the fundamental right to liberty from confinement is this: how much civil disobedience will be tolerated? In other words, under what circumstances may a citizen decide on her own that the state lacks a compelling interest that would justify confinement for specified conduct and accordingly engage in the conduct and later challenge the constitutionality of the confinement? Traditionally, a citizen has been permitted to violate an unconstitutional law and later cite the invalidity of the law as a defense in a criminal proceeding. Indeed, even in a habeas corpus proceeding, when federal courts normally may not announce or apply new constitutional rules granting relief to a petitioner, there is an exception that applies when the new rule involves the announcement that the primary conduct criminalized by the law is itself constitutionally pro-

This "primary conduct" exception, moreover, has been extended to cases in which the petitioner's punishment is unconstitutional. Therefore, when a criminal statute commands a citizen to act or refrain from acting, the citizen may ignore the law and avoid imprisonment if the statute is ultimately invalidated. This approach, like the primary conduct exception to the Court's nonretroactivity principle in habeas corpus cases, should be extended to cases in which the unconstitutionality of the criminal statute rests upon its imposition of incarceration rather than upon its prohibition of constitutionally protected conduct.

The more difficult questions arise when the source of the command is not a statute but a police officer or judge. The situation involving a police officer's command was arguably addressed in Michigan v. DeFillipo. In DeFillipo, the Court held that when the police arrest a person for violating a statute that is ultimately invalidated, evidence seized during a search incident to that arrest is not rendered inadmissible by virtue of the fact that the police were enforcing an unconstitutional law. The Court explained that at the time of the arrest,

there was no controlling precedent that this ordinance was or was not constitutional . . . . A prudent officer . . . should not have been required to anticipate that a court would later hold the ordinance unconstitutional.

Police are charged to enforce laws until and unless they are declared unconstitutional. . . . Society would be ill-served if its police officers took it upon themselves to determine which laws are and which are not constitutionally entitled to enforcement.

Extending this principle to arrests for violations of laws that are ultimately held not to serve a compelling interest, the police officer involved cannot be expected (and perhaps should not even be allowed) to decide what governmental interests are and are not compel-

259 See Butler, 494 U.S. at 415 (explaining exception for protected primary conduct); Teague, 489 U.S. at 307, 311 (same).
261 Of course, where the challenge is to the constitutionality of imprisonment, rather than the constitutionality of the underlying prohibition, the petitioner would not be privileged to engage in the prohibited activity without suffering any consequences. In other words, unlike a holding that prohibiting marijuana use is unconstitutional, a holding that imprisoning those who use marijuana is unconstitutional would still leave open alternative punishments, punishments that do not violate a fundamental right, for the individual who smoked marijuana.
263 Id. at 37-38.
Accordingly, the officer should have the authority to arrest people for violating the criminal law, even though there is a possibility that the consequent pretrial detention may turn out to be unconstitutional. Once a petitioner establishes that incarceration for a given offense is unconstitutional, the police would then lose the authority to arrest individuals for such a crime. An individual planning to commit a given offense might bring a declaratory judgment action, in which he would have to show only a reasonable probability of arrest.265

The threat of incarceration for failure to comply with judicial orders presents additional concerns. These concerns arise whenever a court uses its contempt power. There are two kinds of contempt, civil and criminal. In the case of civil contempt, an individual has disobeyed an order of the court, typically an order given in the context of civil litigation, and any incarceration “is intended to force [the] defendant into doing what he was ordered to do.”266 When the individual subject to the contempt order is a party to the relevant litigation, she may not appeal the order until there is a final judgment in the action.267 Like an individual who is arrested by the police, an individual incarcerated for civil contempt may only challenge the constitutionality of the incarceration at a later point. Also, as in the case of arrest, once the unconstitutionality of incarceration for a particular contempt is established, judges would be bound by that precedent in subsequent cases.

The second kind of contempt, criminal contempt, is a willful disregard of the court’s authority. The purpose of a criminal contempt proceeding is to “vindicate the authority of the court and to deter similar derelictions” in the future.268 Unlike in the case of civil contempt, a person who is punished by incarceration for criminal contempt does

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264 One could imagine, for example, that some police officers might decide not to arrest individuals for domestic violence, on the theory that there is no compelling interest at stake. Cf. Beverly Balos & Mary L. Fellows, Law and Violence Against Women: Cases and Materials on Systems of Oppression 227 (1994) (describing lawsuits filed against various police departments during 1970s that arose from failure of police to enforce laws against domestic violence and to respond to calls from battered women). Such nonenforcement should be disciplined rather than encouraged.

265 Michael Hardwick, for example, would have been able to seek a declaratory judgment action before he was actually arrested under such a regime, because the injury complained of would become the pretrial detention itself, not merely the threat of future prosecution.


267 3 Charles A. Wright, Federal Practice and Procedure: Criminal 2d § 715, at 868 (1982); see Fox v. Capital Co., 299 U.S. 105, 107 (1936) (citing as settled law that “except in connection with an appeal from a final judgment or decree, a party to a suit may not review upon appeal an order fining or imprisoning him for the commission of a civil contempt”).

268 C. Wright, supra note 267, § 702, at 809.
not hold the "keys to his prison," and therefore cannot end the imprisonment by complying with the original court order. Criminal contempt is divided into direct and indirect contempts, distinguished by whether the contumacious conduct took place in the presence of the judge. If an individual is tried for criminal contempt, the argument that the order was unconstitutional will not bar criminal punishment, unless there was no opportunity for effective review of the decree. This principle naturally extends to an order that serves no compelling interest and therefore cannot constitutionally be enforced through incarceration.

An important question arises in the contempt context: what happens if an individual is sued and ultimately ordered to do something in which the government has no compelling interest, and the individual refuses to comply with the order? Consider the following example. The state of Ames passes a law providing a cause of action for damages to individuals who witness public displays of affection. The law does not itself provide for incarceration, so it may perhaps be justified on the ground that many people find public kissing offensive, and it is legitimate to accommodate that preference. Assume that John Doe kisses Jane Roe in public, and Joe Smith witnesses the event and sues the couple under the Ames statute. When Joe prevails and is unable to collect damages from John and Jane, he sues on the judgment, and the court orders John and Jane to pay or be held in contempt. May they be placed in jail until they agree to pay, or may they be incarcerated as a punishment for their failure to obey the order and pay, even though there is no compelling interest in preventing public kissing?

This is a difficult case, and one could mobilize a defense of either an affirmative or a negative response. A defense of the affirmative

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269 See id. § 704, at 826.

270 The Supreme Court has recently further developed the distinction between civil and criminal contempt. In International Union, United Mine Workers of America v. Bagwell, 114 S. Ct. 2552 (1994), the Court explained that "[c]ontempts involving out-of-court disobedience to complex injunctions often require elaborate and reliable factfinding," id. at 2560, and held that in that particular case, in which a contempt fine was imposed on the union for "widespread, ongoing, out-of-court violations of a complex injunction," the contempt should be considered criminal and therefore subject to criminal procedural protections such as the jury trial right, id. at 2562.


272 See Walker v. City of Birmingham, 388 U.S. 307, 317-18 (1967) ("[T]he way to raise [a constitutional challenge to a temporary injunction] was to apply to the [state] courts to have the injunction modified or dissolved. . . . This case would arise in quite a different constitutional posture if the petitioners, before disobeying the injunction, had challenged it in the [state] courts, and had been met with delay or frustration of their constitutional claims.")
answer might assert that although there is no compelling governmental interest in preventing public kissing, more is at stake than the particular conduct proscribed by the law. A judge has ordered an individual to do something, and the individual has defied the court. Unlike the legislature, which does not engage in direct confrontations with citizens, one could argue that “[w]ithout the authority to force compliance with their orders, courts would be merely advisory and could not function.” Therefore, the compelling interest at stake is the interest in vindicating the authority of the court rather than the interest in preventing public kissing. The court would certainly be unable to function if people could ignore its orders with impunity.

The response to this argument, however, is that it may prove too much. If the compelling nature of a court order can rest on the need for judicial authority generally, then the compelling nature of a particular law might rest on the need for obedience to the legislature generally. This latter argument would lead to the absurd conclusion that no law is unconstitutional, because there is a compelling interest in the law that justifies every law. The latter proposition cannot be true, so we must judge particular statutes and particular court orders on their own merits.

This response does not seem satisfactory. Disobeying a judge is a threat to society, a threat independent of what the judge has ordered, in a way that is not true in the case of disobeying the legislature. One might analogize the importance of obeying a court’s orders to the value placed on testifying truthfully and not obstructing justice; this value is independent of the content of the particular proceeding. It is also the case that once John Doe and Jane Roe are adjudicated as owing money to Joe Smith, the compelling interest at stake may well be to give Joe Smith the money that now rightfully belongs to him, the same interest that the government would have in preventing theft, for example. The failure of the defendants to pay after being ordered to do so also automatically satisfies the least restrictive alternative prong of the compelling interest test.

If courts adjudicate cases and controversies that do not themselves involve compelling interests, a strong argument exists that there is still a compelling interest in allowing the court to function effectively. Thus, the Supreme Court spoke convincingly when it asserted that “[t]he power to punish for contempt is inherent in all courts; its existence is essential to the preservation of order in judicial proceed-

ings, and to the enforcement of the judgments, orders, and writs of the courts, and consequently to the due administration of justice."\textsuperscript{274}

\textbf{Conclusion}

When we speak of justice, we often mean to describe the harsh and punishing side of the law. Justice consists of holding individuals accountable for their actions, of protecting society from harmful individuals, and of ensuring that societal outrage is given expression without resort to self-help. Justice is a worthy pursuit, and no government need apologize for making it the highest priority.

We must ask ourselves, however, what it is we are punishing when we allow the incarceration of any and all criminals. The fact that conduct is prohibited by the criminal law does not reveal very much about the conduct, because the enactment of criminal legislation is no different, involves no more rigorous or demanding a process, than the enactment of noncriminal legislation. Because the legislative process is no more rigorous, the process of judicial review should be. The right to be free from physical confinement is, and ought to enjoy the status of, a fundamental right. Procedural due process cannot be a surrogate for substance, and imprisonment therefore must be justified not only by a valid conviction, but by a valid law. Such a law must only deprive people of their fundamental right to liberty from confinement when confinement is necessary to serve a compelling governmental interest. Only when courts apply such scrutiny to the criminal law will it be possible to say that prison is an acceptable place to put criminals because they deserve no better. Only then will the word "crime" justifiably evoke society's outrage and its passion for retribution.

\textsuperscript{274} Ex Parte Robinson, 86 U.S. (19 Wall.) 505, 510 (1874).