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Standing and Criminal Law

F. Andrew Hessick* & Sarah A. Beneckyt

According to the Supreme Court, the “irreducible constitutional minimum of Article III standing” is a concrete, particularized injury in fact that is traceable to the defendant and redressable by a favorable judgment. But this set of requirements does not apply in criminal cases. The federal government has authority to bring prosecutions for any violation of federal criminal law, regardless of whether the crime caused concrete harm to the United States or anyone else, and even though the punishment for the crime does not redress an injury in any conventional sense.

This Article argues that the difference in standing requirements between civil and criminal cases is unwarranted. The various justifications provided for standing—the text of Article III, historical practice, principles of separation of powers, and a host of practical considerations—all support imposing the same standing requirements in civil and criminal cases. Moreover, maintaining the different standing requirements has various undesirable consequences. It results in the government having broader access to the courts to enforce its interests than individuals to enforce their rights, and it tends to devalue civil rights relative to government interests. It also encourages the proliferation of criminal laws. Because a lower standing threshold applies to criminal cases, criminal law is a more robust and flexible tool for regulation than civil laws conferring individual rights. This advantage incentivizes Congress to regulate through criminal law—thus contributing to the problems of overcriminalization and mass incarceration.

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CONTENTS

INTRODUCTION	962
I. AN OVERVIEW OF ARTICLE III STANDING	969
A. Standing in Civil Cases.....	971
B. Standing in Criminal Cases.....	974
II. WHY THE DISPARITY BETWEEN CIVIL AND CRIMINAL STANDING IS UNWARRANTED.....	979
A. Text of Article III	980
B. The Traditional Role of the Judiciary	981
C. Separation of Powers	989
D. Other Justifications for Standing Doctrine	997
1. <i>Quality of Decision-Making</i>	997
2. <i>Preserving Judicial Resources</i>	998
3. <i>Prioritizing the Injured</i>	999
4. <i>Preventing Premature Adjudication</i>	1000
5. <i>Liberty</i>	1001
III. CONSEQUENCES OF THE DIFFERENCE IN STANDING REQUIREMENTS	1001
A. A Broader Range of Interests Protectable by Criminal Law	1002
B. The Devaluation of Individual Rights.....	1003
C. The Incentivizing of Criminalization	1004
CONCLUSION	1011

INTRODUCTION

A common complaint about the federal criminal justice system is overcriminalization.¹ There are thousands of federal crimes,²

1. Shon Hopwood, *Clarity in Criminal Law*, 54 AM. CRIM. L. REV. 695, 699 (2017) (discussing the problem of overcriminalization under federal law); DOUGLAS HUSAK, OVERCRIMINALIZATION: THE LIMITS OF THE CRIMINAL LAW 34, 34–44 (2008) (criticizing the vast volume of federal criminal legislation). Even presidential administrations have recognized the problems of overcriminalization. See Protecting Americans from Overcriminalization through Regulatory Reform, Exec. Order No. 13980, 86 Fed. Reg. 6817 (Jan. 22, 2021).

2. Neil M. Gorsuch, *Law's Irony*, 37 HARV. J. L. & PUB. POL'Y 743, 747 (2014) (“But today we have about 5000 federal criminal statutes on the books, most added in the last few decades. And the spigot keeps pouring, with hundreds of new statutory crimes inked every few years. Neither does that begin to count the thousands of additional *regulatory* crimes buried in the federal register.”); William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 514 (2001) (“[T]he number of distinct crimes in Title 18 is almost certainly over one thousand. And even that larger number is much less than half the total number of federal offenses.”). The exact number is unknown. See Gary Fields & John R. Emshwiller,

many of which are overlapping and excessively broad.³ They criminalize a staggering range of conduct, much of which seems hardly worthy of punishment. Examples include laws making it a crime to sell canned cream corn with more than ten black or brown kernels per 600 grams⁴ and for someone to sell ready-to-serve gravy with sliced turkey if it's not at least fifteen percent turkey by weight.⁵

The lion's share of the blame for this overcriminalization falls on our political system. Powerful lobby groups favor the proliferation of criminal laws,⁶ and they do so without significant opposition.⁷ Moreover, in an effort to appear tough on crime, members of Congress support broad criminal laws to regulate disfavored conduct,⁸ even if civil law or some other measure would be more effective.⁹

The Supreme Court has also received a good deal of blame for failing to combat overcriminalization. Traditionally, courts were one of the major bulwarks against overcriminalization.¹⁰

Many Failed Efforts to Count Nation's Federal Criminal Laws, WALL ST. J. (July 23, 2011) (quoting a retired Justice Department official who stated that "[y]ou will have died and resurrected three times," and still be trying to figure out the answer" to the number of federal crimes).

3. See Stuntz, *supra* note 2, at 518 (observing that federal criminal laws are "deep as well as broad: that which they cover, they cover repeatedly"); see also, e.g., *United States v. Wells*, 519 U.S. 482, 505 (1997) (noting "at least 100" separate federal laws outlawing misrepresentation).

4. 21 U.S.C. § 333 & 21 C.F.R. § 155.130(b)(1)(ii)(a).

5. See, e.g., 21 U.S.C. §§ 458, 461 & 9 C.F.R. § 381.167. The X account @CrimeADay illustrates the breadth of federal criminal law by tweeting about absurd federal offenses. @CrimeADay, X, <https://twitter.com/CrimeADay> (last visited Mar. 13, 2023).

6. See Stuntz, *supra* note 2, at 544 (noting that federal agents and federal prosecutors are powerful lobbyists for federal criminal legislation).

7. Rachel E. Barkow, *Separation of Powers and the Criminal Law*, 58 STAN. L. REV. 989, 1030 (2006) ("Because the targets of regulation are weak and the voices in favor of broader laws and longer punishments are powerful, the political system is biased in favor of more severe punishments."); Stuntz, *supra* note 2, at 553 ("[I]n criminal law, interest groups tend to operate only on one side [O]rganized interest group pressure to narrow criminal liability is rare.").

8. Stuntz, *supra* note 2, at 530 (noting the phenomenon of symbolic criminal laws for political gain).

9. See John C. Coffee, Jr., *Does "Unlawful" Mean "Criminal"?: Reflections on the Disappearing Tort/Crime Distinction in American Law*, 71 B.U. L. REV. 193, 199 (1991) (arguing that "overlaying the criminal law on the civil law may disrupt" structures better regulated through civil law).

10. See, e.g., THE FEDERALIST NO. 78 (Alexander Hamilton) (stating that "the firmness of the judicial magistracy is of vast importance in mitigating the severity and confining the operation of" oppressive, punitive laws).

Doctrines such as the rule of lenity and equity of the statute—and in more recent times, the void for vagueness doctrine—limited the reach of criminal laws.¹¹ Critics have argued that, over the years, the Court has abandoned some of those doctrines and diluted others to the point that they no longer provide a real restraint on criminal law.¹² Perhaps worse, the Court has encouraged overcriminalization through decisions refusing to limit prosecutorial power,¹³ as more criminal laws provide more options for prosecutors to exercise their discretion to secure convictions.¹⁴

These criticisms tend to focus on doctrines that deal directly with criminal law and criminal procedure. But developments in one area of the law often have effects in other areas of the law. Criminal law is no exception. Doctrinal evolution outside criminal law may influence the development of criminal law, including overcriminalization. This Article identifies an unlikely doctrine that contributes to overcriminalization—the doctrine of Article III standing.

11. See, e.g., F. Andrew Hessick & Carissa Byrne Hessick, *Constraining Criminal Laws*, 106 MINN. L. REV. 2299, 2327 (2022) (noting that courts could narrow criminal statutes through equity but could not expand them beyond their text); Shon Hopwood, *Restoring the Historical Rule of Lenity as a Canon*, 95 N.Y.U. L. REV. 918, 932 (2020) (noting the historical importance of the rule of lenity); THE FEDERALIST NO. 78, *supra* note 10, (Alexander Hamilton) (suggesting that federal courts would limit punitive laws to “guard” against unjust laws by “mitigating the severity and confining the operation of” those laws).

12. Hopwood, *supra* note 1, at 699 (“Applying diluted and random forms of lenity and the void-for-vagueness doctrine has always been problematic, but it is especially so in this era of overcriminalization and excessive punishment.”); Mila Sohoni, *Notice and the New Deal*, 62 DUKE L.J. 1169, 1223 (2013) (arguing that “courts have made too sharp a retreat from policing constitutional constraints” that would limit overcriminalization).

13. See Stuntz, *supra* note 2, at 569 (arguing that increased “prosecutorial discretion” creates a “bias toward overcriminalizing”).

14. For example, the Supreme Court’s decision in *United States v. Dixon*, 509 U.S. 688 (1993), permitting prosecutors to bring multiple charges for a single misdeed, incentivizes Congress to enact more overlapping criminal laws to provide prosecutors with tools to secure easier convictions. Likewise, *Bordenkircher v. Hayes*, 434 U.S. 357 (1978), which permits prosecutors to follow through on threats to increase charges for defendants who refuse to plead guilty, incentivizes the enactment of overlapping criminal laws because prosecutorial threats would be empty if there were not additional criminal laws under which the prosecutors could bring charges. See Carissa Byrne Hessick, *The Myth of Common Law Crimes*, 105 VA. L. REV. 965, 1016 (2019) (“[J]udges are at least partially responsible for their greatly diminished role in criminal prosecutions. They have refused to place limits on the plea-bargaining process, and they routinely ‘rubber stamp cooperation, charging, and plea decisions.’” (quoting Rachel E. Barkow, *Institutional Design and the Policing of Prosecutors: Lessons from Administrative Law*, 61 STAN. L. REV. 869, 880 (2009))).

Standing doctrine implements Article III's case or controversy requirement.¹⁵ To establish standing, the plaintiff must demonstrate he has suffered, or is imminently about to suffer, a "concrete," "particularized" "injury in fact," that the injury "was likely caused by" the defendant, and that the injury will "likely be redressed by judicial relief."¹⁶ The Supreme Court has proclaimed that these requirements are the "irreducible constitutional minimum" of Article III standing.¹⁷

These standing requirements significantly limit the ability of plaintiffs to bring suit in federal court. Violations of rights alone do not support standing; instead, the violation must result in some consequential harm.¹⁸ Moreover, not all harms suffice for standing.¹⁹ For example, neither mental distress caused by illegal government action²⁰ nor stigma resulting from being a member of a discriminated group constitutes an injury supporting standing.²¹ Similarly, injuries to commonly shared interests—such as the interest in government compliance with the law—cannot support standing.²²

15. *TransUnion LLC v. Ramirez*, 594 U.S. 413, 423 (2021) ("Article III confines the federal judicial power to the resolution of 'Cases' and 'Controversies.' For there to be a case or controversy under Article III, the plaintiff must have . . . standing.").

16. *Id.*; see also *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560–61 (1992).

17. *Spokeo, Inc. v. Robins*, 578 U.S. 330, 338 (2016) (quoting *Lujan*, 504 U.S. at 560); *Sprint Commc'ns Co. v. APCC Servs., Inc.*, 554 U.S. 269, 273–74 (2008) (stating that the "irreducible constitutional minimum" is "(1) an injury in fact (*i.e.*, a 'concrete and particularized' invasion of a 'legally protected interest'); (2) causation (*i.e.*, a 'fairly . . . trace[able]' connection between the alleged injury in fact and the alleged conduct of the defendant); and (3) redressability (*i.e.*, it is 'likely' and not 'merely "speculative"' that the plaintiff's injury will be remedied by the relief plaintiff seeks in bringing suit)" (quoting *Lujan*, 504 U.S. at 560–61)).

18. *TransUnion*, 594 U.S. at 427 ("Under Article III, an injury in law is not an injury in fact. Only those plaintiffs who have been *concretely harmed* by a defendant's statutory violation may sue that private defendant over that violation in federal court.").

19. See F. Andrew Hessick, *Probabilistic Standing*, 106 NW. U. L. REV. 55, 65 n.51 (2012) ("[N]ot all personal interests will suffice.").

20. *Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc.*, 454 U.S. 464, 485 (1982) ("[P]sychological consequence presumably produced by observation of conduct with which one disagrees . . . is not an injury sufficient to confer standing under Art. III . . .").

21. *Allen v. Wright*, 468 U.S. 737, 759 (1984).

22. *E.g.*, *United States v. Richardson*, 418 U.S. 166, 178–79 (1974).

Article III standing has provoked significant scholarly commentary, most of it negative.²³ Critics have attacked Article III standing doctrine as confused,²⁴ incoherent,²⁵ unjustified,²⁶ and easily manipulated.²⁷ But one major glitch in the doctrine that has received little attention is its inapplicability in criminal cases.²⁸

Because Article III's case and controversy provision describes all suits actionable in federal court, one would think that standing requirements must be satisfied in all federal actions. But that is not the case. Federal courts have not applied those requirements to criminal prosecutions brought by the United States.²⁹

23. *Am. Bottom Conservancy v. U.S. Army Corps of Eng'rs*, 650 F.3d 652, 655 (7th Cir. 2011) (Posner, J.). (noting the "strong criticisms by reputable scholars" of standing doctrine).

24. See, e.g., Eugene Kontorovich, *Posner's Pragmatic Justiciability Jurisprudence: The Triumph of Possibility over Probability*, 86 U. CHI. L. REV. 1117, 1117 (2019) ("Standing doctrine is famously confused . . .").

25. William Baude, *Standing in the Shadow of Congress*, 2016 SUP. CT. REV. 197, 227 ("The way to make [*Spokeo*] . . . coherent is to say that only injuries recognized in some form by the common law will suffice. But this is a position that the Court has (rightly) rejected . . ."); Gene R. Nichol, Jr., *Standing for Privilege: The Failure of Injury Analysis*, 82 B.U. L. REV. 301, 316 (2002) (highlighting "standing's absurdities"); John A. Ferejohn & Larry D. Kramer, *Independent Judges, Dependent Judiciary: Institutionalizing Judicial Restraint*, 77 N.Y.U. L. REV. 962, 1010 (2002) (referring to standing as a "jumbled mess.").

26. Leading Cases, *Justiciability – Class Action Standing – Spokeo, Inc. v. Robins*, 130 HARV. L. REV. 437, 442 (2016) ("[I]t is difficult to see how [standing's requirements] serve[] standing doctrine's broader principles . . .").

27. Rachel Bayefsky, *Constitutional Injury and Tangibility*, 59 WM. & MARY L. REV. 2285, 2370 (2018) ("[T]he inquiry into whether harm is concrete invites courts to make contestable judgments . . .").

28. Very few articles address the topic. But see Edward A. Hartnett, *The Standing of the United States: How Criminal Prosecutions Show that Standing Doctrine Is Looking for Answers in All the Wrong Places*, 97 MICH. L. REV. 2239 (1999) (challenging the view that Article III imposes the injury-in-fact requirement for standing because that requirement does not apply in criminal cases); Ann Woolhandler & Caleb Nelson, *Does History Defeat Standing Doctrine?*, 102 MICH. L. REV. 689, 695–96 (2004) (relying on the historical distinction between private and public rights to argue that standing should apply differently in criminal cases).

29. See *Sessum v. United States*, No. 1:18-cv-06228, 2020 WL 1243783, at *9 (S.D.N.Y. Mar. 16, 2020) (concluding that "individualized" and "concrete" harm requirements do not apply in criminal cases); *Sierra v. City of Hallandale Beach*, 996 F.3d 1110, 1125 (11th Cir. 2021) (Newsom, J., concurring) ("[N]o one doubts—or ever doubted—that federal criminal prosecutions are 'Cases' within the meaning of Article III" despite the lack of concrete, particularized injury in fact.); Hartnett, *supra* note 28, at 2245 ("[N]o federal judge, if pressed, would seriously contend that Article III requires that the United States must suffer an injury in fact that is 'personal,' 'concrete and particularized,' and 'actual or imminent, not conjectural or hypothetical' before litigation on its behalf can be brought in federal court."). More precisely, Article III standing requirements have been relaxed for any suit in which the United States asserts a sovereign interest. See F. Andrew Hessick, *Quasi-Sovereign Standing*,

The United States regularly brings criminal prosecutions for offenses that do not cause it any identifiable concrete “injury in fact.” A simple example is a prosecution for possession of an illicit substance. Merely possessing a drug does not concretely harm the federal government. Indeed, only a small subset of federal crimes, such as fraud against the government, injure the United States.

Not only does the United States escape the injury-in-fact requirement, it also need not demonstrate redressability to bring criminal prosecutions. The typical judgment in a criminal case is a term of imprisonment, but that imprisonment is meant to punish; it is not meant to make the United States or victim whole. It accordingly does not redress any harm that the government or anyone else may have suffered.³⁰

The upshot of these different requirements is that the United States has significantly broader ability to bring criminal prosecutions than individuals do to vindicate their rights. The United States can prosecute for any violation of criminal law. Individuals, by contrast, can sue to vindicate their rights only if that violation results in factual harm.

These differential standing requirements are unjustified. They are not supported by the text of Article III or historical practice. Nor does the separation of powers—which the Court has said is the most important principle driving Article III standing³¹—justify the

94 NOTRE DAME L. REV. 1927, 1930 (2019); see also *Alfred L. Snapp & Son, Inc. v. Puerto Rico ex rel. Barez*, 458 U.S. 592, 601 (1982) (stating violation of a sovereign interest supports standing). The most common and most important actions falling into that category are criminal prosecutions.

30. No doubt, some victims might feel vindicated by court orders that impose punishment on perpetrators. But the Court has concluded that “psychic satisfaction” of that sort does not constitute redressability for Article III standing. *Steel Co. v. Citizens for a Better Env’t*, 523 U.S. 83, 107 (1998). Moreover, making the victim whole is not the reason for criminal punishment. The reason for criminal punishment is to punish; civil suits are the mechanisms for making the victim whole. Kenneth Mann, *Punitive Civil Sanctions: The Middleground Between Criminal and Civil Law*, 101 YALE L.J. 1795, 1796 (1992) (“[T]he criminal law is meant to punish, while the civil law is meant to compensate.”). What is more, if remedying the *victim’s* harm were the goal of the suit, the victim, as opposed to the government, would be the appropriate party to bring suit, because redressability requires that a favorable decision redress “injury to the complaining party” *Warth v. Seldin*, 422 U.S. 490, 499 (1975).

31. *Raines v. Byrd*, 521 U.S. 811, 820 (1997) (“[T]he law of Art. III standing is built on a single basic idea—the idea of separation of powers.” (quoting *Allen v. Wright*, 468 U.S. 737, 752 (1984))); see also, e.g., *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 157 (2014) (“The law of Article III standing . . . is built on separation-of-powers principles” (quoting *Clapper v. Amnesty Int’l USA*, 568 U.S. 398, 408 (2013))).

different treatment. The more relaxed standing requirements for criminal prosecutions mean that the federal courts protect a broader set of interests for the United States than for individuals. They also have the effect of devaluing individual rights by limiting the enforceability of those rights, while not imposing a similar discount on the government's interest in enforcing criminal laws.

The differences in standing requirements also encourage the proliferation of more criminal laws. Because of the lower standing requirements, criminal law is a more robust and flexible tool for regulation than civil laws conferring individual rights. For example, Congress cannot attempt to prevent drunk driving accidents by authorizing private civil actions against anyone who poses a risk to others by driving while intoxicated. It is only if the person injures others that a private civil suit can be brought. By contrast, Congress can authorize criminal prosecutions against intoxicated drivers, even if they never injure anyone. Thus, because only the criminal law—with its different standing requirements—can accomplish certain policy goals, Congress is incentivized to create more crimes, thus contributing to the problem of overcriminalization and mass incarceration.

This Article advances this argument—that the different standing requirements are unjustified and incentivize the creation of more criminal laws. Part I provides an overview of Article III standing. After describing the requirements of standing, it illustrates how those requirements do not apply to the United States in criminal cases. Part II demonstrates why the difference in Article III standing's requirements in civil and criminal cases is unwarranted. It points out that neither the text of Article III nor historical practice supports imposing the different standing requirements. It also argues that various principles the Court has considered in fashioning standing—such as separation of powers and protecting the autonomy of rightsholders—do not support the more relaxed standing requirements in criminal cases.

Part III moves from criticism of the standing disparity to its consequences. The lower threshold for standing in criminal cases results in the government having broader access to the federal courts to enforce its interests than individuals do to vindicate their rights. The government has standing to prosecute any crime, regardless of the crime's consequences; by contrast, individuals have standing only when the violation of their rights results in

additional harm. This difference devalues individual rights relative to government interests.

The difference in standing requirements also increases the government's incentive to regulate through criminal law. The injury-in-fact requirement limits the utility of civil actions. Individuals cannot sue to challenge behavior because it increases the risk of injuries that are commonly shared by the public. Moreover, because of the slippery nature of defining injury in fact, Congress cannot know in advance the extent to which individuals will have standing to enforce rights Congress creates. These limitations do not apply to criminal law, making it a more nimble, flexible, and predictable regulatory tool than civil law. Criminal law is consequently a more attractive option than private civil actions for Congress to use in implementing its policies.

Finally, this Article concludes by offering some thoughts on how standing law should be modified to remove the differences between civil and criminal cases.

I. AN OVERVIEW OF ARTICLE III STANDING

When Congress sets policy through the enactment of legislation, it has two general mechanisms at its disposal to secure compliance with the law. The first is civil action. Civil actions provide remedies to individuals to vindicate their rights under the law.³² Through a civil action, an individual can obtain retrospective relief, such as damages to compensate them for past violations, and prospective relief, such as an injunction, to prevent future violations.³³ The other mechanism to enforce the law is criminal action. Criminal actions punish those who violate the law. Typical punishments are imprisonment or fines. In the federal system, only the government may bring criminal actions.³⁴

32. F. Andrew Hessick, *The Separation-of-Powers Theory of Standing*, 95 N.C. L. REV. 673, 702 (2017) ("Causes of action provide the means for vindicating private rights.").

33. Mackenzie Salvi, Note, *You Can't Say That: Constitutionality of Injunctions as a Remedy in Defamation Cases*, 2020 U. ILL. L. REV. 697, 711 (2020) ("[W]hen a court is asked to issue an injunction on future speech, it forms prospective relief instead of retrospective relief. Retrospective relief, like money damages or criminal sanctions, are only imposed in response to, or to correct, past conduct.").

34. *Linda R.S. v. Richard D.*, 410 U.S. 614, 619 (1973) ("[A] private citizen lacks a judicially cognizable interest in the prosecution or nonprosecution of another."). Historically, private individuals could bring prosecutions, though they did so in the name of the

Civil and criminal actions thus both enforce the law, but they do so in different ways. Civil actions enforce the law by authorizing private individuals to go to court to vindicate their rights, while criminal actions authorize the government to go to court to seek punishment of the person who violated the law.³⁵ In either case, the remedies are designed to encourage people to obey the law.³⁶

In the federal system, the task of adjudicating civil and criminal actions falls to the Article III courts. But Article III courts cannot hear all alleged violations of the law. Article III of the Constitution authorizes the federal judiciary to resolve only “Cases” and “Controversies.”³⁷ Thus, a federal court cannot hear a dispute that does not constitute a case or controversy.³⁸ Various justiciability doctrines implement this case-or-controversy requirement.³⁹ The most important of those justiciability doctrines is standing.⁴⁰

government. See I. Bennett Capers, *Against Prosecutors*, 105 CORNELL L. REV. 1561, 1573 (2020) (“[T]hroughout colonial America and in England private prosecution was the norm.”). Some states continue to permit that practice. See Margaret Z. Johns, *Reconsidering Absolute Prosecutorial Immunity*, 2005 BYU L. REV. 53, 110 n.434 (listing various states allowing private prosecutions).

35. This description of the difference between civil and criminal actions is necessarily generalized and rough. Drawing the line between civil and criminal actions is notoriously hard to do. See Aaron Xavier Fellmeth, *Civil and Criminal Sanctions in the Constitution and Courts*, 94 GEO. L.J. 1, 3 (2005) (“It is no exaggeration to rank the distinction [between civil and criminal law] among the least well-considered and principled in American legal theory.”). Among other things, some civil actions have punitive aspects, such as when an individual seeks punitive damages and the government seeks civil penalties; likewise, some criminal actions have remedial aspects, such as when the government seeks restitution in criminal cases. Still, it is generally true that civil actions are meant to provide remedies for violations of individual rights while criminal actions are meant to punish those who violate the law.

36. John C. Jeffries, Jr., *The Right-Remedy Gap in Constitutional Law*, 109 YALE L.J. 87, 106 (1999) (noting the deterrent function of both remedies).

37. U.S. CONST. art. III, § 2.

38. *Raines v. Byrd*, 521 U.S. 811, 818 (1997) (“No principle is more fundamental to the judiciary’s proper role in our system of government than the constitutional limitation of federal-court jurisdiction to actual cases or controversies.” (quoting *Simon v. E. Ky. Welfare Rts. Org.*, 426 U.S. 26, 37 (1976))).

39. *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 352 (2006) (“The doctrines of [justiciability] originate in Article III’s ‘case’ or ‘controversy’ language . . .”).

40. *Allen v. Wright*, 468 U.S. 737, 750 (1984) (“The Art. III doctrine that requires a litigant to have ‘standing’ to invoke the power of a federal court is perhaps the most important of these doctrines.”).

A. Standing in Civil Cases

“Standing defines who may bring suit in federal court”⁴¹ To have Article III standing, plaintiffs must demonstrate they have suffered, or are imminently about to suffer, an “injury in fact.”⁴² That injury must be to a “legally protected interest,” and it must be “concrete and particularized.”⁴³ The injury must also be “fairly trace[able]” to the actions of the defendant, and it must be susceptible to “redress[] by a favorable decision.”⁴⁴ According to the Court, these requirements are the “‘irreducible constitutional minimum’ of Article III standing.”⁴⁵ A federal court lacks constitutional authority to hear a suit if these requirements are not met.

Over the years, the Court has fleshed out these requirements. For example, for an injury to be sufficiently “particularized,” it must “affect the plaintiff in a personal and individual way.”⁴⁶ A plaintiff thus cannot bring suit as a “concerned bystander[],” asserting standing based on an injury suffered by another person.⁴⁷ Moreover, the particularization requirement demands that the injury not be a “generalized grievance” that is widely shared by other people in an “undifferentiated” way.⁴⁸ For this reason, even though all members of the public share an interest in the government’s obeying of the law, the government’s violation of that interest does not constitute a basis for standing.⁴⁹

41. F. Andrew Hessick, *Cases, Controversies, and Diversity*, 109 NW. U. L. REV. 57, 65 (2014).

42. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992) (internal quotation marks omitted).

43. *Spokeo, Inc. v. Robins*, 578 U.S. 330, 339 (2016) (first quoting *Lujan*, 504 U.S. 555, 560 (1992)) (emphasis omitted in second).

44. *Lujan*, 504 U.S. at 560–61 (quoting *Simon v. E. Ky. Welfare Rts. Org.*, 426 U.S. 26, 41–42 (1976) (internal quotation marks omitted)).

45. *Uzuegbunam v. Preczewski*, 141 S. Ct. 792, 797 (2021) (quoting *Spokeo*, 578 U.S. 330, 338 (2016)).

46. *Lujan*, 504 U.S. at 560 n.1.

47. *Hollingsworth v. Perry*, 570 U.S. 693, 707 (2013) (“Article III standing is not to be placed in the hands of concerned bystanders, who will use it simply as a vehicle for the vindication of value interests.” (internal quotation marks omitted)).

48. *United States v. Richardson*, 418 U.S. 166, 176–77 (1974).

49. *TransUnion LLC v. Ramirez*, 594 U.S. 413, 428–29 (2021) (“[T]he public interest that private entities comply with the law cannot ‘be converted into an individual right by a statute that denominates it as such, and that permits all citizens (or, for that matter, a subclass of citizens who suffer no distinctive concrete harm) to sue.’” (quoting *Lujan*, 504 U.S. at 576–77)); *Lujan*, 504 U.S. at 575; *Fed. Election Comm’n v. Akins*, 524 U.S. 11, 23 (1998) (stating that

The Court has also clarified the concreteness requirement. To qualify as concrete, the alleged injury cannot be “abstract” but must cause “real” harm to the plaintiff.⁵⁰ Thus, the Court has said, the violation of a legal right alone is insufficient for standing.⁵¹ Instead, a plaintiff must allege a factual injury such as monetary or physical harm that results from the violation of that right.⁵² Even if Congress enacts a statute authorizing a private right of action to vindicate a right, a person has standing to bring such an action only if the violation of the rights results in some real-world harm.⁵³

More than that, the Court has concluded that not all real-world harms constitute concrete harms. It has said that an injury is concrete only if it has a “‘close relationship’ to a harm ‘traditionally’ recognized as providing a basis for a lawsuit in American courts.”⁵⁴ Consistent with that reasoning, the Court has concluded that the violation of a plaintiff’s principles or beliefs does not constitute a cognizable injury, no matter how fervently the plaintiff holds that belief.⁵⁵ Likewise, it has said that the stigma resulting from being a member of a discriminated group does not suffice,⁵⁶ nor does the emotional distress a person feels from seeing others disobey the law.⁵⁷

“‘common concern for obedience to law’” is not a basis for standing) (quoting *L. Singer & Sons v. Union Pacific R.R. Co.*, 311 U.S. 295, 303 (1940)) (internal quotation marks omitted); *Linda R.S. v. Richard D.*, 410 U.S. 614, 619 (1973).

50. *TransUnion*, 594 U.S. at 424.

51. *See id.* at 426.

52. *Id.* at 424–25; *Spokeo*, 578 U.S. at 342–43.

53. *TransUnion*, 594 U.S. 413 at 426. (“Congress’s creation of a statutory prohibition or obligation and a cause of action does not relieve courts of their responsibility to independently decide whether a plaintiff has suffered a concrete harm under Article III . . .”).

54. *Id.* at 424 (quoting *Spokeo*, 578 U.S. at 341). Whether an injury is sufficiently tied to a historical analog depends significantly on how one defines the harm asserted and the level of generality at which one assesses historically recognized actions—both of which involve discretionary judgments by the courts. *See Bayefsky*, *supra* note 27, at 2311.

55. *Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc.*, 454 U.S. 464, 486 (1982) (“[S]tanding is not measured by the intensity of the litigant’s interest or the fervor of his advocacy.”); *Sierra Club v. Morton*, 405 U.S. 727, 739 (1972) (explaining that “a mere ‘interest in a problem,’ no matter how longstanding the interest . . . is not sufficient” to confer standing).

56. *See Allen v. Wright*, 468 U.S. 737, 759 (1984).

57. *Valley Forge*, 454 U.S. at 485 (“[P]sychological consequence presumably produced by observation of conduct with which one disagrees . . . is not an injury sufficient to confer standing under Art. III . . .”).

Moreover, the Court has held that an increase in the risk of harm in the future does not constitute a concrete injury supporting standing.⁵⁸ Instead, the Court has said, the relevant harm for standing is the harm that is threatened, and a plaintiff suffers an injury only when that threatened future harm manifests itself.⁵⁹ For example, in *TransUnion*, the Court held that, although generating inaccurate credit reports created a risk of a person being denied credit, that risk alone did not constitute concrete harm.⁶⁰ It was only if the inaccurate reports were disseminated to creditors that the plaintiff would suffer injury.⁶¹

The Court has also expanded on the causation requirements of traceability and redressability. To satisfy the redressability requirement, the plaintiff must show that a favorable decision remedies the injury that forms the basis for standing.⁶² Accordingly, the relief must remedy the plaintiff's injury; it does not suffice if the relief remedies an injury suffered by another person.

Along similar lines, the redressability requirement demands that the Court's order itself provide the redress. Collateral consequences resulting from the Court's order do not suffice.⁶³

58. *TransUnion*, 594 U.S. at 436. ("[T]he mere risk of future harm, standing alone, cannot qualify as a concrete harm . . .").

59. *Id.* ("If the risk of future harm materializes and the individual suffers a concrete harm, then the harm itself, and not the pre-existing risk, will constitute a basis for the person's injury and for damages.").

60. *Id.* at 435.

61. *Id.* Of course, a completed injury is not a prerequisite to standing. An imminently impending harm is enough. *See id.* Still, neither an increase in risk nor a high risk of harm can, by themselves, support standing; standing is available only when threatened harm is imminent. *Id.*

To be sure, in *Lujan*, the Court suggested that the imminence requirement is meant to ensure that the injury has a substantial probability of occurring, stating that the "purpose" of the imminence requirement "is to ensure that the alleged injury is not too speculative . . ." 504 U.S. 555, 564–65, 564 n.2 (1992). If that is so, a high probability of an event occurring in the distant future should suffice for standing. But the Court has not framed the inquiry that way, instead treating imminence as a prerequisite separate from substantiality of risk. *TransUnion*, 594 U.S. at 435 ("[A] person exposed to a risk of future harm may pursue forward-looking, injunctive relief to prevent the harm from occurring, at least so long as the risk of harm is sufficiently imminent and substantial.").

62. *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 107 (1998) (proclaiming that to have standing, a plaintiff must seek "an acceptable Article III remedy" that will "redress a cognizable Article III injury.").

63. *Lujan*, 504 U.S. at 562 (stating that redressability is not satisfied if relief "depends on the unfettered choices made by independent actors" that the court cannot control or

For example, although an injunction might make a person feel whole for past harms suffered, that sense of gratification does not constitute adequate redress.⁶⁴ Only retrospective relief aimed at making the plaintiff whole for the past harm constitutes adequate redress.

Moreover, the Court has said, the plaintiff must establish redressability for each remedy sought.⁶⁵ Thus, because an injunction redresses future injuries, a plaintiff seeking an injunction cannot allege only that she has suffered past injuries; instead, she must establish that she faces a threat of future harms that an injunction will remedy.⁶⁶

B. Standing in Criminal Cases

Although standing disputes typically arise only in civil suits, standing's injury-in-fact, traceability, and redressability requirements should equally apply to criminal cases. After all, those requirements are the "irreducible constitutional minimum" of Article III standing

predict (quoting *ASARCO Inc. v. Kadish*, 490 U.S. 605, 615 (1989))). The Court has not always been entirely consistent on this point. For example, in *Friends of the Earth, Inc. v. Laidlaw Env't Servs. (TOC), Inc.*, 528 U.S. 167, 185–86 (2000), the Court concluded that the deterrence resulting from civil penalties paid to the government redressed the injury alleged by a private plaintiff. Recognizing the tension with its other decisions, the *Laidlaw* Court limited its holding to situations in which a plaintiff faces an ongoing injury "that could continue into the future if undeterred" by the penalty. *Id.* at 188.

64. *Steel Co.*, 523 U.S. at 106–07 (It "does not suffice" that a plaintiff "will be gratified by seeing petitioner punished for its infractions and that the punishment will deter the risk of future harm."). Tying standing to remedies is suspect. As Professor Fallon has noted, evaluating standing per remedy unduly undermines the ability of courts and Congress to protect rights. See Richard H. Fallon, Jr., *Of Justiciability, Remedies, and Public Law Litigation: Notes on the Jurisprudence of Lyons*, 59 N.Y.U. L. REV. 1, 42 (1984). It is also dubious because remedies for which a plaintiff unquestionably has standing often do not redress injuries any better than remedies for which the plaintiff does not have standing. Consider damages for harms that cannot be quantified, such as pain and emotional suffering. In that case, damages are only a second-best substitute for making a person whole. But an injunction also may be a second substitute to make whole a person who has suffered a past harm. The injunction does not remove the past harm, but it may make the plaintiff feel better. In that circumstance, the injunction operates much in the same way as substitute damages.

65. *TransUnion*, 594 U.S. at 431 ("[P]laintiffs must demonstrate standing for each claim that they press and for each form of relief that they seek (for example, injunctive relief and damages)."); *Summers v. Earth Island Inst.*, 555 U.S. 488, 493 (2009) ("[A plaintiff] bears the burden of showing that he has standing for each type of relief sought.").

66. See *City of Los Angeles v. Lyons*, 461 U.S. 95, 105–07, 106 n.7 (1983) (holding that past injury does not assume standing to pursue injunctive relief).

in *any* “case” or “controversy.”⁶⁷ Accordingly, one would think that, to bring a criminal prosecution, the United States must establish that it has suffered a concrete and particularized injury in fact that is traceable to the defendant and will likely be redressed by a favorable judicial order.⁶⁸ But courts do not require the United States to satisfy these standing requirements in criminal cases. In their view, criminal prosecutions seek to vindicate the “sovereign” interests of the United States, and the various requirements of standing do not apply when the United States files an action to vindicate a sovereign interest.⁶⁹

For example, when the United States brings a criminal prosecution, it need not demonstrate that it has suffered a concrete, particularized injury from the offense it is prosecuting.⁷⁰ Indeed, for most crimes, the United States *could not* make such a showing. Aside from the narrow body of crimes where the United States itself is the victim of a crime, such as when a person steals federal property, the commission of a federal crime rarely inflicts any sort of concrete harm on the United States.⁷¹ The victim of the crime is the person that is hurt. Moreover, for many federal crimes—such as mislabeling bug spray,⁷² possessing illicit drugs,⁷³ possessing a firearm while being a felon,⁷⁴ drunk driving on federal land,⁷⁵ and

67. *Lujan*, 504 U.S. at 560; *accord*. *Uzuegbunam v. Preczewski*, 141 S. Ct. 792, 797 (2021).

68. See Hartnett, *supra* note 28, at 2246–47 (arguing that, if Article III standing requirements are to be taken seriously, they should apply to criminal cases).

69. See Hessick, *supra* note 29, at 1930. Criminal actions are not the only ones in which the United States may assert sovereign interests. See *Alfred L. Snapp & Son, Inc. v. Puerto Rico ex rel. Barez*, 458 U.S. 592, 601 (1982) (recognizing that sovereignty may be asserted in other types of actions). But criminal actions are by far the most common actions in which the United States presses sovereign interests, and accordingly the lower threshold for standing has the most consequence in prosecutions.

70. See *Sierra v. City of Hallandale Beach*, 996 F.3d 1110, 1125 (11th Cir. 2021) (Newsom, J., concurring) (“[N]o one doubts—or ever doubted—that federal criminal prosecutions are ‘Cases’ within the meaning of Article III . . . [despite the lack of] concrete, particularized ‘injury in fact’”); Hartnett, *supra* note 28, at 2245 (“[N]o federal judge, if pressed, would seriously contend that Article III requires that the United States must suffer an injury in fact that is ‘personal,’ ‘concrete and particularized,’ and ‘actual or imminent, not conjectural or hypothetical’ before litigation on its behalf can be brought in federal court.”).

71. See 18 U.S.C. § 641 (making it a crime when anyone “steals . . . any record, voucher, money, or thing of value of the United States . . .”).

72. 7 U.S.C. §§ 136j(a)(2)(A), 136l.

73. 21 U.S.C. §§ 841(a)(1), 844(a).

74. 18 U.S.C. § 922(g).

75. *Id.* § 13(b).

removing the tag off of a mattress if you don't own it⁷⁶ — there is not even an identifiable victim that has been harmed.⁷⁷

But the absence of harm to the United States does not result in the dismissal of prosecutions for lack of standing. Instead, courts permit the United States to bring a criminal prosecution against any person who violates a federal criminal law, without any inquiry into whether the crime concretely harmed the United States.⁷⁸

The Court has never seriously grappled with how the United States satisfies Article III's concrete and particularized injury requirement when it brings a criminal prosecution. The only justification provided by the Court is a passing reference in dicta that any violation of federal criminal law constitutes a violation of the United States' "sovereignty," and that violation forms an injury in fact supporting standing.⁷⁹ But it is difficult to see how violations of sovereignty are sufficiently concrete to support standing.⁸⁰ Sovereignty is the right to make laws.⁸¹ That right is violated when a person breaks the law. But the violation of that right is no more concrete than the harm to personal dignity or autonomy that individuals suffer when their rights are violated — which the Court has made clear is too abstract to support standing.⁸²

76. Stuart P. Green, *Why It's a Crime to Tear the Tag off a Mattress: Overcriminalization and the Moral Content of Regulatory Offenses*, 46 EMORY L.J. 1533, 1610 n.264 (1997).

77. This is not meant to suggest that harm is irrelevant to criminal law. The goal of many criminal laws is to outlaw conduct that does create harm. See Barry Friedman, *Are Police the Key to Public Safety?: The Case of the Unhoused*, 59 AM. CRIM. L. REV. 1597, 1615 (2022) ("We generally do not tend to criminalize conduct unless the conduct creates harm, even when that harm is rather attenuated or unlikely."). But other criminal laws are not aimed at addressing harms. More important for purposes of this argument, not all criminal violations actually result in harm.

78. See Hartnett, *supra* note 28, at 2246–47 (making this same observation).

79. Vt. Agency of Nat. Res. v. United States *ex rel.* Stevens, 529 U.S. 765, 771 (2000) ("[T]he injury to its sovereignty arising from violation of its laws . . . suffices to support a criminal lawsuit by the Government . . .").

80. *Sierra v. City of Hallandale Beach*, 996 F.3d 1110, 1125 (11th Cir. 2021) (Newsom, J., concurring) ("[I]f symbolic harm to the United States's 'sovereignty' constitutes a 'concrete' and 'particularized' injury with respect to *any* violation of federal law, then those words, it seems to me, have ceased to have any real meaning.").

81. *Am. Banana Co. v. United Fruit Co.*, 213 U.S. 347, 358 (1909) ("The very meaning of sovereignty is that the decree of the sovereign makes law.").

82. To be sure, some violations of sovereignty may involve actual harm—such as when a foreign country disputes the borders of the United States. See *Cent. R.R. Co. v. Jersey City*, 209 U.S. 473, 479 (1908) ("[B]oundary means sovereignty, since, in modern times, sovereignty is mainly territorial . . ."); cf. *Alfred L. Snapp & Son Inc. v. Puerto Rico ex rel.*

Because it need not demonstrate a concrete, particularized harm to maintain a criminal prosecution, the United States has vastly broader authority to resort to the federal courts to prosecute crimes than individuals do to vindicate their rights. Any violation of criminal law will support a prosecution, but individuals may bring civil suits only for those violations of rights that result in additional harm.

Consider the crime of attempt. A person is guilty of an attempted crime if he takes a significant step in committing that crime. The person need not complete the crime; the step toward trying to commit the crime is the basis for punishment.⁸³ Attempt thus punishes conduct that by itself does not cause harm but that increases the risk of a future completed crime.⁸⁴ For example, suppose a would-be murderer poisons a glass of water on federal land. Poisoning the water itself is not a concrete harm; it only becomes harmful if someone drinks it. Poisoning the water merely increases the risk of harm. The individual who would have died lacks standing to bring a civil suit for damages, because the increased risk in harm is not a sufficient injury for standing.⁸⁵ Even if Congress enacted a statute authorizing such a suit,⁸⁶ the would-be victim would not have standing because of *TransUnion's* conclusion that increased risk is not a cognizable injury under

Barez, 458 U.S. 592, 602 (1982) (noting the quasi-sovereign interest in protecting borders). But most breaches of criminal law do not involve actual harm to the United States.

83. *E.g.*, *United States v. Harris*, 7 F.4th 1276, 1285–86 (11th Cir. 2021) (“A conviction for attempt requires proof only that the defendant possessed the mens rea required for the underlying crime and took a substantial step toward the commission of that crime.” (quoting *United States v. Amede* 977 F.3d 1086, 1099 (11th Cir. 2020)) (internal quotation marks omitted)).

84. *See* Jane Bambauer & Andrea Roth, *From Damage Caps to Decarceration: Extending Tort Law Safeguards to Criminal Sentencing*, 101 B.U. L. REV. 1667, 1682–83 (2021) (“[I]nchoate crimes that never come to fruition (i.e., attempt, solicitation, conspiracy) still involve either a substantial step toward a crime, or risky or immoral preparatory or motivational acts that create risk by rendering a harmful act more likely.”).

85. Nor would the past poisoning be a basis for the person to seek prospective relief, such as an injunction, because the past poison attempt does not create a threat of future poisoning. *See City of Los Angeles v. Lyons*, 461 U.S. 95, 105–07, 106 n.7 (1983).

86. Generally, in tort law, claims based solely on unrealized risk are not compensable. *See* John C.P. Goldberg & Benjamin C. Zipursky, *Unrealized Torts*, 88 VA. L. REV. 1625, 1636 (2002) (“Criminal law sometimes prohibits and punishes genuinely inchoate wrongs—uncompleted wrongful acts. Tort law does not.”). But Congress could write a statute authorizing recovery for increased risks, so long as those risks implicated one of Congress’s powers, such as interstate commerce. *See* U.S. CONST. art. I, § 8.

Article III.⁸⁷ Yet the government would have standing to prosecute the poisoner for the attempt, because any violation of the criminal law provides a basis for the federal government to bring a prosecution.⁸⁸

The traceability requirement also does not apply in criminal cases. Traceability requires that the defendant caused the injury that forms the basis for standing.⁸⁹ But because the United States need not demonstrate that it suffered a harm, it need not show that the defendant caused the harm. For example, if a donor gives money to an author because that author defames people, a victim of that defamation would not have standing to sue the donor because the harm of defamation was traceable to the author, not the donor.⁹⁰ The United States, however, would have standing to bring a criminal action against the donor (assuming a criminal law prohibited such conduct).

Likewise, the United States need not demonstrate redressability to establish standing in criminal cases. The typical “remedy” in criminal cases is a sentence of imprisonment or monetary fine.⁹¹ Imprisonment does not provide redress to the United States—even for crimes that harm the United States.⁹² For example, if a person steals federal property, imprisonment does not compensate the United States or otherwise make the United States whole for the loss of property. Imprisonment may give a sense of vengeance or retribution, but gratification of that sort does not suffice.⁹³ Imprisonment may also deter the perpetrator from committing other future crimes that injure the United States. But the basis for imprisonment is not to deter future crimes—it is to punish past

87. See *supra* notes 58–61 and accompanying text.

88. See 18 U.S.C. § 1113 (outlawing attempted murder on federal land).

89. *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 158 (2014) (defining traceability as “a sufficient ‘causal connection between the injury and the conduct complained of’” (quoting *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560–61 (1992))).

90. The hypothetical is loosely based on the efforts of Thomas Jefferson and Alexander Hamilton to recruit journalists to publish articles slandering their opponents.

91. Nicolas Petit, *A Theory of Antitrust Limits*, 28 GEO. MASON L. REV. 1399, 1421 (2021) (“Criminal remedies consist in sentencing and fines.”).

92. Monetary fines are another common punishment. Fines may offset harms that the United States suffers from a crime, but the amount of the harm to the United States is not tightly tied to calculating such compensation.

93. *Steel Co. v. Citizens for a Better Env’t*, 523 U.S. 83, 107 (1998) (holding that “psychic satisfaction” does not constitute redressability for Article III standing).

crimes, as illustrated by the refusal to punish based solely on the possibility of an individual committing a future crime.⁹⁴

By contrast, monetary fines do provide some redress for harms suffered by the United States. But even those fines are typically not calibrated to remedy the injury the United States suffers; like criminal sentences of imprisonment, they depend on the defendant's offense level and criminal history instead of being tailored to the actual harm the defendant caused.⁹⁵ Rather, civil actions provide the means for the United States to recover for its losses.⁹⁶

The relaxed requirements for criminal standing mean that the United States has significantly broader ability to bring criminal actions than individuals do to bring civil actions. The United States need not demonstrate that it suffered an injury from the offense, nor must it show that punishing the offender will benefit the United States. Indeed, the United States can bring prosecutions in a wide variety of circumstances where victims would not have the ability to bring tort suits.

What this means is that, because of the differences in standing requirements in civil and criminal cases, Congress has fewer options to regulate through civil than through criminal law. Congress cannot, for instance, as effectively regulate risk through civil actions, nor can it use civil actions to prevent undesirable conduct if no concrete harm results. Instead, it must turn to criminal law to accomplish those goals.

II. WHY THE DISPARITY BETWEEN CIVIL AND CRIMINAL STANDING IS UNWARRANTED

The difference in the requirements to establish standing in civil cases and criminal cases is unwarranted. Standing doctrine derives from the text of Article III, but nothing in the text of Article III

94. Carissa Byrne Hessick & F. Andrew Hessick, *Recognizing Constitutional Rights at Sentencing*, 99 CALIF. L. REV. 47, 71 (2011) ("A person who has not yet committed a punishable act is not culpable and therefore not deserving of punishment."); see also John Bronsteen, *Retribution's Role*, 84 IND. L.J. 1129, 1129–30 (2009) (arguing that "retributive considerations determine who may be punished" and the upper bounds of punishment, while "utilitarian considerations" set the precise punishment).

95. See U.S. SENT'G GUIDELINES MANUAL § 5E1.2 (U.S. SENT'G COMM'N 2015).

96. The False Claims Act, for example, allows the Government to bring suit to recoup its losses incurred through fraud. See 31 U.S.C. §§ 3729–30.

suggests that different standing requirements should apply in civil and criminal cases. Historical practice also does not support the distinction because, historically, the same threshold requirements applied in civil and criminal cases. Nor do more abstract principles and policies support the distinction. Separation of powers—which is the major policy consideration that has driven the development of standing doctrine—suggests that, to the extent that the requirements for standing in civil and criminal cases should differ, the threshold should be higher in criminal cases. And the various other justifications occasionally invoked by courts and commentators support, at best, applying the same standing requirements in civil and criminal cases.

A. Text of Article III

Standing derives from Section 2 of Article III of the Constitution. That section extends the judicial power to nine categories of “Cases” and “Controversies.”⁹⁷ Nothing in the text of this provision suggests that standing’s requirements should differ between criminal and civil cases.

The provision authorizing federal jurisdiction over criminal cases extends the judicial power to “all Cases . . . arising under . . . the Laws of the United States.”⁹⁸ That provision is also the basis for exercising jurisdiction in civil cases that arise under federal law. The provision does not differentiate between civil and criminal cases. It authorizes the exercise of the judicial power over any “cases,” civil or criminal, so long as they arise under federal law. Because the word “cases” in this provision refers to both civil and criminal actions, it should have the same meaning regardless of whether an action is civil or criminal.⁹⁹ Accordingly, the same

97. U.S. CONST. art. III, § 2.

98. *Id.* The theory is that violations of federal criminal law arise under federal law. *See* *Osborn v. Bank of the U.S.*, 22 U.S. (9 Wheat.) 738, 823 (1824) (concluding that a case arises under federal law if federal law “forms an ingredient” of the case). Article III’s extension of judicial power to “Controversies to which the United States shall be a Party” likely does not support criminal jurisdiction, because Founding-era controversies probably included only civil cases. *See* 1 WILLIAM BLACKSTONE, COMMENTARIES app. Note E at 420–21 (St. George Tucker, ed., Philadelphia, William Young Birch & Abraham Small 1803) (explaining that the term “controversy” referred only to disputes “of a civil nature”).

99. *See* *Clark v. Martinez*, 543 U.S. 371, 378 (2005) (holding that a statutory provision that “applies without differentiation” to various categories should be interpreted to have the

standing requirements implementing the term “cases” should apply in civil and criminal cases.

To be sure, as many scholars have argued, it is possible that the term “cases” in Article III refers to criminal and civil disputes, while the term “controversies” includes only civil disputes.¹⁰⁰ This difference in the scope of those terms may provide a basis for applying different standing requirements to “cases” and to “controversies.” But it does not provide a basis for distinguishing standing in civil “cases” from standing in criminal “cases.” Instead, the same standing requirements should apply to both.¹⁰¹

B. The Traditional Role of the Judiciary

Historical practice also supports applying the same standing doctrine to both civil and criminal cases. The Court has regularly looked to historical practice in developing standing doctrine, stating that the doctrine ensures that federal courts adjudicate only

same meaning for each category, reasoning that “[t]o give these same words a different meaning for each category would be to invent a statute rather than interpret one.”).

100. See 1 BLACKSTONE, *supra* note 98, at app. note E at 420–21 (explaining that the term “case” referred to all disputes, “whether civil or criminal”); James E. Pfander, *Rethinking the Supreme Court’s Original Jurisdiction in State-Party Cases*, 82 CALIF. L. REV. 555, 607 n.207 (1994) (collecting sources arguing that the word “cases,” unlike “controversies,” includes criminal cases). Other scholars have offered different theories for the distinction between “cases” and “controversies.” Professor Amar has argued that the reason for the different terms was to highlight the distinction between disputes over which Congress did have the power to limit federal jurisdiction (“controversies”) and disputes over which it did not (“cases”). See Akhil Reed Amar, *Reports of My Death Are Greatly Exaggerated: A Reply*, 138 U. PA. L. REV. 1651, 1656–57 (1990). Professor Pushaw has argued that “controversy” referred to a dispute requiring resolution by a neutral judge. Robert J. Pushaw, Jr., *Article III’s Case/Controversy Distinction and the Dual Functions of Federal Courts*, 69 NOTRE DAME L. REV. 447, 450 (1994). Neither Amar’s nor Pushaw’s theory suggests different standing requirements in criminal and civil cases.

101. That the same standing test should apply to civil and criminal cases does not establish what that test should be. It may be the injury-in-fact test that courts currently apply, or it may be the right-based test that applied before *Association of Data Processing Service Organizations, Inc. v. Camp*, 397 U.S. 150, 152–53 (1970). Though there are good reasons to think that the latter is the better test. See, e.g., F. Andrew Hessick, *Standing, Injury in Fact, and Private Rights*, 93 CORNELL L. REV. 275, 293–94 (2008) (describing the historical basis for the rights-based test); Gene R. Nichol, Jr., *Rethinking Standing*, 72 CALIF. L. REV. 68, 77 (1984) (criticizing the incoherence of the injury-in-fact test).

those disputes that are “traditionally amenable to, and resolved by, the judicial process.”¹⁰²

In pre-Revolutionary English and early American practice, the role of the judiciary was to vindicate legal rights.¹⁰³ The legal system recognized two types of rights: private rights and public rights. These types of rights largely corresponded to our civil and criminal laws today.

Private rights, also called “civil rights,”¹⁰⁴ were rights held by individuals—the analogue of our individual rights today. Included among these rights were the rights to personal security, life, and property, as well as rights deriving from familial and other relationships.¹⁰⁵ Violations of private rights were “civil injuries,”¹⁰⁶ and the person whose right was violated could file suit to seek a remedy for that violation.¹⁰⁷

Public rights were those held by the general community.¹⁰⁸ Violations of public rights were “public wrongs,” and they constituted “crimes and misdemeanours.”¹⁰⁹ These public rights included all the various criminal prohibitions, such as “treason, murder, and robbery.”¹¹⁰ As the representative of the community, the government was the proper party to vindicate the violation of

102. *Vt. Agency of Nat. Res. v. United States*, 529 U.S. 765, 774 (2000) (“Article III’s restriction of the judicial power to ‘Cases’ and ‘Controversies’ is properly understood to mean ‘cases and controversies of the sort traditionally amenable to, and resolved by, the judicial process.’” (quoting *Steel Co. v. Citizens for a Better Env’t*, 523 U.S. 83, 102 (1998))).

103. *See Hessick*, *supra* note 101, at 280–81 (describing how the historical function of courts was to vindicate rights).

104. 4 WILLIAM BLACKSTONE, COMMENTARIES *5.

105. 1 BLACKSTONE, *supra* note 98, at *117–41; 2 JAMES KENT, COMMENTARIES ON AMERICAN LAW 1 (O.W. Holmes, Jr., ed., 12th ed., Boston: Little, Brown & Co. 1873) (“The absolute rights of individuals may be resolved into the right of personal security, the right of personal liberty, and the right to acquire and enjoy property. These rights have been justly considered, and frequently declared, by the people of this country, to be natural, inherent, and unalienable.”).

106. 4 BLACKSTONE, *supra* note 104, at *1.

107. *Id.* at *5 (stating that individuals could bring suit for “infringement or privation of the civil rights which belong to individuals”).

108. *See id.*; FRANCIS PLOWDEN, JURA ANGLORUM 484 (London, E. & R. Brooke 1792).

109. 4 BLACKSTONE, *supra* note 104, at *1 (defining “public wrongs” as “crimes and misdemeanours”); *id.* at *5 (“A crime or misdemeanour, is an act committed, or omitted, in violation of a public law . . .”).

110. *Id.*

a public right by prosecuting the violator (though victims could also bring suit in the name of the king).¹¹¹

Although many private and public rights derived from the common law, the legislature could create new rights by statute.¹¹² Statutes could confer new rights on private individuals,¹¹³ and they could create new crimes enforceable by the government.¹¹⁴

For both private and public rights, the prerequisite to seeking judicial intervention was the violation of a right; factual harm was not required. The victim of a private wrong could bring civil action by filing the appropriate writ, and the basis for judicial intervention was the violation of a private right.¹¹⁵ Factual injury, concrete or otherwise, was not required.¹¹⁶ The violation of a legal right that did not result in factual harm warranted nominal damages.¹¹⁷ Likewise, concrete harm was not required for criminal prosecutions. The basis for a criminal prosecution was the violation of a public right. For example, courts could punish conspiring to kill the king,¹¹⁸ even if the conspirators did not actually kill

111. See *id.* at *2. (“[B]ecause the king, in whom centers the majesty of the whole community, is supposed by the law to be the person injured by every infraction of the public right belonging to that community, and is therefore in all cases the proper prosecutor for every public offence.”). There is disagreement about whether private individuals could bring suit in the public interest in some situations. Compare Raoul Berger, *Standing to Sue in Public Actions: Is It a Constitutional Requirement?*, 78 YALE L.J. 816, 822–25 (1969) (arguing that under early English practices third-party strangers could seek mandamus) and Cass R. Sunstein, *What’s Standing After Lujan? Of Citizen Suits, “Injuries,” and Article III*, 91 MICH. L. REV. 163, 171–72 (1992) (same), with Louis L. Jaffe, *Standing to Secure Judicial Review: Public Actions*, 74 HARV. L. REV. 1265, 1274 (1961) (suggesting that only individuals with “a special interest” could sue) and Bradley S. Clanton, *Standing and the English Prerogative Writs: The Original Understanding*, 63 BROOK. L. REV. 1001, 1043–47 (1997) (arguing that “mandamus was not available to disinterested strangers.” (internal quotation marks omitted)).

112. See Woolhandler & Nelson, *supra* note 28, at 694.

113. *Id.* (“[L]egislatures may create statutory duties or ‘entitlements’ owed to private persons; these entitlements can be treated as private rights for standing purposes, and the legislature may permit individuals to seek compensation for losses caused by their breach.”).

114. *Id.*; 4 BLACKSTONE, *supra* note 104, at *2–3 (noting the power of “the legislature” in “forming” the “criminal law”).

115. Hessick, *supra* note 101, at 281.

116. *Id.* (“While factual injury alone was never sufficient to warrant redress, legal injury alone was adequate for some actions.”).

117. *Id.*

118. 4 BLACKSTONE, *supra* note 104, at *15 (“[T]reason in conspiring the king’s death is by the English law punished with greater rigour than even actually killing any private subject.”).

the king.¹¹⁹ The violation alone constituted the public wrong warranting punishment.

History thus does not suggest that there was some fundamental difference between the role of the judiciary in criminal and civil cases. In both civil and criminal actions, the court's role was to vindicate rights. For civil actions, it was the violation of a private right; for criminal actions, the violation of a public right.¹²⁰ Although the function of both public and private rights was to protect concrete interests, demonstrating a concrete injury was not a prerequisite to bring suit.¹²¹ The violation of a right alone could support an action.¹²²

Of course, the Supreme Court has not followed this historical practice for private rights. In *Spokeo* and then again in *TransUnion*, the Court held that the violation of a private right does not provide a basis for standing. Rather, the Court said, "standing requires a concrete injury," even when the plaintiff has alleged the violation of a private right.¹²³

That said, the Court has not entirely eschewed history in assessing Article III standing in cases involving private rights. But instead of following the history establishing that concrete injury is not required to bring an action, the Court has used history to determine *which* injuries are sufficiently concrete. According to the Court, not all factual injuries are sufficient to support standing. For example, emotional distress resulting from the government's failure to obey the Constitution is not a cognizable injury.¹²⁴

119. *Id.* ("[When] the object whereof is the king's majesty, the intention will deserve the highest degree of severity . . .").

120. Woolhandler & Nelson, *supra* note 28, at 695–96.

121. To be sure, to maintain some actions, factual injury was required. *See* Hessick, *supra* note 101, at 280. But other actions did not require factual injury. The existence of at least some actions that did not require concrete injury demonstrates that factual injury was not a necessary prerequisite.

122. This is true not only for common-law rights, *see id.*, but also for statutory rights, *see* 5 SIR JOHN COMYNS, A DIGEST OF THE LAWS OF ENGLAND 359–60 (Samuel Rose ed., 4th ed. 1800) ("As, in an action founded on a statute, the plaintiff ought to aver every fact necessary to inform the court that his case is within the statute . . ."); SIR EDWARD COKE, THE SECOND PART OF THE INSTITUTES OF THE LAWS OF ENGLAND 55 (1642) ("[I]f any man feeleth himself grieved, contrary to any article in any Statute, he shall have present remedy in Chancery . . .").

123. *Spokeo, Inc. v. Robins*, 578 U.S. 330, 341 (2016).

124. *See* *Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc.*, 454 U.S. 464, 485 (1982).

Whether the asserted injury supports standing depends on whether the injury has a “close historical or common-law analogue . . .”¹²⁵ History is relevant, in other words, because standing may rest on modern harms that are comparable to harms that historically provided the basis for judicial relief.

Using history in this way is highly questionable. The reason that courts could historically hear any given action was that the action aimed to vindicate a right. But instead of following this reason, the Court has concluded that history creates a catalogue of particular actions that Article III permits courts to hear. Article III, the Court has reasoned, defines the federal judicial power based on how the judicial power was historically *used* instead of how it was historically *understood*.¹²⁶ That approach misses the forest for the trees. One would think that if history is useful in defining the judicial power, what matters is the historical understanding of judicial power, as opposed to the particular ways in which the judicial power happened to be deployed.¹²⁷ In other words, the question should be whether the court is exercising its power to vindicate rights – not whether the particular injury that the plaintiff has asserted is historically actionable.

To be fair, the Court has not limited standing solely to harms that were actionable in 1789. First, recognizing that old injuries may appear in new forms, the Court has stated that a harm need not be “an exact duplicate” of a traditional harm to support standing.¹²⁸ But the deviation from historical harm cannot be significant. There must be a “close relationship” between the asserted harm and the

125. *TransUnion LLC v. Ramirez*, 594 U.S. 413, 424 (2021); *see also id.* (requiring a “‘close relationship’ to a harm ‘traditionally’ recognized as providing a basis for a lawsuit in American courts” (quoting *Spokeo*, 578 U.S. at 341)).

126. The Court has not applied this narrow historical approach to other constitutional provisions. For example, the Court has not relied on history to conclude that the Second Amendment protects only those arms that were in existence in 1791; instead, it has relied on history to announce broader principles protecting the possession of arms. *D.C. v. Heller*, 554 U.S. 570, 625 (2008) (concluding that the Second Amendment is not confined to eighteenth-century weapons).

127. *See* Cass R. Sunstein, *Standing and the Privatization of Public Law*, 88 COLUM. L. REV. 1432, 1438 (1988) (“The first, prominent in *Lochner* itself, was that the judiciary existed largely to protect common-law interests from governmental incursions.”).

128. *TransUnion*, 594 U.S. at 425.

historical harm.¹²⁹ That requirement limits standing for modern harms, such as those alleged in *TransUnion* involving the failure to follow procedures aimed at protecting consumer privacy.¹³⁰

Second, and more significant, the Court has explicitly recognized the possibility of standing resting on entirely new categories of harms that were not historically cognizable. It has said that an injury can support standing if it has a “close historical or common-law analogue.”¹³¹ That test is disjunctive. An injury suffices if it has a historical ancestor or a common-law analogue. Standing accordingly may rest on an injury that bears a close relationship to a harm that provides the basis for a common-law suit, even if that common-law action was not recognized at the Founding.¹³² For example, in *TransUnion* itself, the Court listed intrusion upon seclusion as an example of a harm that may provide the basis for standing, even though that tort was not recognized until the late nineteenth century.¹³³

But this extension of standing to harms with newer common-law analogues is still a far cry from letting the federal judiciary play its traditional role of vindicating rights. The focus is still on the harms protected against by the common law, not the rights created by it.¹³⁴ More importantly, it extends standing based only on judicially created common law; it does not permit standing based on new injuries recognized by the legislature. That scheme is ahistorical. Historically, courts had the power to vindicate legislative rights to the same extent that they could vindicate

129. Just how close the analogy must be is an open question. See *Sierra v. City of Hallandale Beach*, 996 F.3d 1110, 1121 (11th Cir. 2021) (Newsom, J., concurring) (“Just how closely analogous to a common-law tort must an alleged injury be in order to be ‘concrete’?”).

130. See *TransUnion*, 594 U.S. at 434 (“[T]here is ‘no historical or common-law analog where the mere existence of inaccurate information, absent dissemination, amounts to concrete injury.’” (quoting *Owner-Operator Indep. Drivers Ass’n v. U.S. Dep’t of Transp.*, 879 F.3d 339, 344–45 (D.C. Cir. 2018))).

131. *TransUnion*, 594 U.S. at 424 (emphasis added).

132. Although the Court has recognized that standing may rest on harms analogous to newer common-law actions, it still has required that those actions be “traditionally recognized as providing a basis for a lawsuit.” *Id.* at 433. This use of the word “traditionally” suggests that, even if not recognized at the founding, the common-law action must have a long pedigree.

133. See William L. Prosser, *Privacy*, 48 CALIF. L. REV. 383, 389 (1960) (tracing the tort’s origins to *De May v. Roberts*, 9 N.W. 146 (Mich. 1881)).

134. *TransUnion*, 594 U.S. at 425 (stating that standing exists for “injuries with a close relationship to harms traditionally recognized as providing a basis for lawsuits in American courts”).

common-law rights.¹³⁵ But instead of using history to provide a justification that legislatures have the power to define the types of harms that warrant judicial relief, the Court has used history to *limit* the power of Congress to recognize the types of harms warranting relief in the federal courts.

These criticisms aside, taking seriously *TransUnion's* approach—that an injury is concrete only if it has a close “historical or common-law analogue”—and applying it to criminal cases would significantly alter the standing of the United States to bring criminal prosecutions.¹³⁶ The United States would no longer have standing to bring prosecutions for violations of criminal laws. Instead, it would have standing to prosecute only crimes that have historical or common-law analogues.

Just as the law historically recognized a finite set of private rights and actions, there was historically a finite set of criminal laws.¹³⁷ Those crimes included many of the core crimes recognized today, such as murder, rape, and assault.¹³⁸ Under *TransUnion's* approach, applied to criminal cases, the United States would have standing to prosecute these offenses.

On the other hand, the United States would not have standing to prosecute crimes that do not have historical antecedents. This body of crimes is vast. It includes common offenses, such as the crime of possession of marijuana,¹³⁹ as well as many regulatory offenses.¹⁴⁰ It would also put into question the standing of the United States to prosecute for the inchoate offenses of solicitation

135. See Hessick, *supra* note 101, at 280 (“The legislature could restrict and regulate [existing] rights and could create new rights . . .” (footnote omitted)).

136. *TransUnion*, 594 U.S. at 424.

137. Indeed, there were a smaller number of crimes than torts. As Blackstone explained, although some torts did not constitute a crime, “every public offense is also a private wrong” that could be the basis for an action. 4 BLACKSTONE, *supra* note 104, at *5.

138. See, e.g., *id.* at *41–251 (detailing various common-law crimes).

139. 21 U.S.C. § 841.

140. *Morissette v. United States*, 342 U.S. 246, 258–59 (1952) (distinguishing between common-law offenses and regulatory offenses that were unknown at common law). By some estimates, there are over 300,000 separate federal regulatory crimes. Vikramaditya S. Khanna, *Corporate Crime Legislation: A Political Economy Analysis*, 82 WASH. U. L. Q. 95, 96 (2004).

and attempt because those inchoate offenses largely developed after the Constitution was ratified.¹⁴¹

Moreover, developments in the common law would not provide a basis to expand the standing of the United States to prosecute crimes not recognized at the founding. It has long been settled that the federal courts do not have the power to make criminal common law.¹⁴²

Applying *TransUnion*'s approach to criminal cases also blows a hole through the Court's suggestion that the standing of the United States rests on the violation of "sovereignty" resulting from the breach of the criminal law. Historically, an intrusion on sovereignty was not a basis for criminal prosecution.¹⁴³ Instead, the "public wrong" resulting from the violation of a particular criminal law provided the basis for the criminal prosecution.¹⁴⁴ To be sure, the violation of a criminal law entailed an injury to sovereignty in some sense because it resulted from disobedience of government authority. But that injury to sovereignty was not the reason for

141. See 2 WAYNE R. LAFAVE & AUSTIN W. SCOTT, JR., CRIMINAL LAW 486 (1986) ("Whether the offense of solicitation was known to the common law before the nineteenth century is uncertain."); *id.* at 496-97 (stating that the doctrine of attempt "crystalized" between 1784 and 1801). Conspiracy, by contrast, appears to have been mostly developed by the early eighteenth century. See 1 W. HAWKINGS, PLEAS OF THE CROWN 348 (6th ed. 1787) ("[T]here can be no doubt, but that all confederacies whatsoever, wrongfully to prejudice a third person, are highly criminal . . ."); *Poulterers' Case*, 77 Eng. Rep. 813, 814 (K.B. 1611) ("[A] false conspiracy betwixt divers persons shall be punished, although nothing be put in execution . . ."); see also LAFAVE & SCOTT, *supra* (describing the development of conspiracy in the seventeenth and eighteenth centuries).

142. *United States v. Hudson*, 11 U.S. 32, 34 (1812).

143. Disputes about sovereignty typically arose between different countries, and those countries ordinarily resolved those disputes through diplomacy and war. See THE FEDERALIST NO. 6, *supra* note 10, at 24 (Alexander Hamilton) (noting "the uniform course of human events" is to resort to war to resolve sovereign disputes); see also, e.g., *Missouri v. Illinois*, 180 U.S. 208, 241 (1901) ("If Missouri were an independent and sovereign State all must admit that she could seek a remedy by negotiation, and, that failing, by force. Diplomatic powers and the right to make war having been surrendered to the general government, it was to be expected that upon the latter would be devolved the *duty* of providing a remedy and that remedy, we think, is found in the constitutional provisions we are considering.") (emphasis added).

144. 4 BLACKSTONE, *supra* note 104, at *1 (equating "public wrongs" with "crimes and misdemeanours").

judicial intervention. Instead, it was the violation of the particular public right that constituted the crime.¹⁴⁵

In short, historical practice does not support the way in which current standing doctrine distinguishes between the government and private individuals. For both, the violation of a right was the basis for an action. Although the Court essentially still applies that standard in assessing the standing of the government in criminal cases, it has limited the standing of private individuals by recognizing standing only for the precise actions historically recognized. Applying that same crabbed historical test to criminal cases would significantly limit the ability of the government to bring prosecutions.

C. Separation of Powers

Another major justification the Court has given for Article III standing doctrine is separation of powers.¹⁴⁶ Indeed, the Court has suggested that “separation of powers” is the “single basic idea” underlying Article III standing.¹⁴⁷ According to the Court, standing protects the separation of powers by “prevent[ing] the judicial process from being used to usurp the powers of the political branches”¹⁴⁸ while simultaneously confining “the federal courts to a properly judicial role”¹⁴⁹

Of course, stating that standing confines the federal judiciary to its appropriate role merely begs the question of what constitutes the proper role of the judiciary. There has been significant disagreement about that role. At one end are those who argue that

145. One might argue that these public wrongs establish the broader principle that injuries to sovereignty were cognizable in the courts. But abstracting in this way conflicts with the particularistic approach in *TransUnion*. *TransUnion* held that individuals could bring suit for violations of rights with “historical . . . analogue[s].” 594 U.S. 413, 424 (2021). It did not take abstractly from historical practice to hold that standing can rest on the violation of any right. See *id.* at 2204–05 (refusing to recognize standing for violation of newly created statutory right).

146. *Article III Standing—Separation of Powers—Class Actions—TransUnion v. Ramirez*, 135 HARV. L. REV. 333, 338 (2021) [hereinafter *Standing*] (“Modern standing doctrine has . . . developed in light of these separation of powers concerns.”).

147. *Raines v. Byrd*, 521 U.S. 811, 820 (1997) (quoting *Allen v. Wright*, 468 U.S. 737, 752 (1984)); see also, e.g., *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 157 (2014) (“The law of Article III standing . . . is built on separation-of-powers principles” (quoting *Clapper v. Amnesty Int’l USA*, 568 U.S. 398, 408 (2013))).

148. *Clapper*, 568 U.S. at 408.

149. *Spokeo, Inc. v. Robins*, 578 U.S. 330, 338 (2016).

the function of the federal courts is simply to provide remedies to those who suffer violations of their rights.¹⁵⁰ Under this view, the role of the judiciary is to protect individuals who suffer harms in ways that distinguish those individuals from the rest of society,¹⁵¹ and Article III standing should be limited to those who seek remedies to redress violations of their rights.¹⁵²

At the other end are those who argue that the federal judiciary plays a fundamental role in enforcing the Constitution.¹⁵³ In their view, the function of federal courts is not only to remedy violations of law but also to articulate constitutional values, to protect the public interest, and to ensure government compliance with the law.¹⁵⁴ Under this view of the judiciary, standing should be expansive. A plaintiff should have standing to seek remedy for any violation of the law, regardless of whether the plaintiff suffered a factual injury because of the violation.¹⁵⁵

The Supreme Court has adopted the former, narrower view of the role of the judiciary in justifying standing doctrine.¹⁵⁶ Invoking *Marbury v. Madison*, the Court has proclaimed that the “province” of the judiciary “is, solely, to decide on the rights of individuals,”¹⁵⁷

150. See RICHARD H. FALLON, JR., JOHN F. MANNING, DANIEL J. MELTZER & DAVID L. SHAPIRO, *HART AND WECHSLER’S THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 73 (6th ed. 2009); Antonin Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 SUFFOLK U. L. REV. 881, 894–95 (1983) (arguing that the role of the courts is to provide remedies to individuals who suffer personalized injuries not shared in common with others).

151. Scalia, *supra* note 150, at 894 (“[T]he law of standing roughly restricts courts to their traditional undemocratic role of protecting individuals and minorities against impositions of the majority . . .”).

152. *Summers v. Earth Island Inst.*, 555 U.S. 488, 492 (2009) (“Article III of the Constitution restricts [the judiciary] to the traditional role of Anglo-American courts [of] redress[ing] or prevent[ing] actual or imminently threatened injury to persons caused by . . . violation of law.”).

153. FALLON ET AL., *supra* note 150, at 73; Henry P. Monaghan, *Constitutional Adjudication: The Who and When*, 82 YALE L.J. 1363, 1368–71 (1973).

154. Monaghan, *supra* note 153, at 1368–71.

155. *Id.* at 1371.

156. See *Summers*, 555 U.S. at 492 (“Article III of the Constitution restricts [the judiciary] to the traditional role of Anglo-American courts [of] redress[ing] or prevent[ing] actual or imminently threatened injury to persons caused by . . . violation of law.”); *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560–61 (1992) (limiting standing to plaintiffs who seek redress for their injuries). Although the dispute resolution model underlies standing, several other justiciability doctrines rest on the “special functions” model. See Hessick, *supra* note 41, at 64–65 (providing examples).

157. *Lujan*, 504 U.S. at 576 (quoting *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 170 (1803)); accord *TransUnion LLC v. Ramirez*, 594 U.S. 413, 422–23 (2021).

not to protect the public interest.¹⁵⁸ “Vindicating the *public* interest,” it has said, is the role of the political branches.¹⁵⁹ According to the Court, requiring plaintiffs to demonstrate concrete injury to establish standing ensures that plaintiffs assert only their interests rather than the public interest.¹⁶⁰

There are reasons to question the accuracy of the Court’s claim that the role of the federal judiciary is solely to decide on the rights of individuals. Article III confers on federal courts the authority to hear a variety of disputes that do not involve individuals. It expressly authorizes them to resolve controversies between states, between the states and the United States, and suits involving foreign countries.¹⁶¹ Indeed, accepting the Court’s description suggests that the federal judiciary may lack jurisdiction over criminal cases because criminal actions seek to vindicate sovereign interests, not individual rights.¹⁶²

Moreover, *Marbury* itself does not support the Court’s claim that concrete injury is necessary to establish standing. In stating that the role of the court “is, solely, to decide the rights of individuals,” *Marbury* did not purport to define the full scope of federal jurisdiction.¹⁶³ Instead, *Marbury* made that statement only to demonstrate that the federal judiciary does not have the power to review political decisions. That is apparent when one reads the full quotation from *Marbury*:

The province of the court is, solely, to decide on the rights of individuals, not to enquire how the executive, or executive officers, perform duties in which they have a discretion.

158. *Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc.*, 454 U.S. 464, 474–75 (1982) (quoting *Warth v. Seldin* 422 U.S. 490, 499–500 (1975)).

159. *Lujan*, 504 U.S. at 576 (“Vindicating the *public* interest . . . is the function of Congress and the Chief Executive.”); *TransUnion*, 594 U.S. at 429 (“[T]he choice of how to prioritize and how aggressively to pursue legal actions against defendants who violate the law falls within the discretion of the Executive Branch, not within the purview of private plaintiffs (and their attorneys).”).

160. *TransUnion*, 594 U.S. at 423 (“Requiring a plaintiff to demonstrate a concrete and particularized injury caused by the defendant and redressable by the court ensures that federal courts decide only ‘the rights of individuals.’” (quoting *Marbury*, 5 U.S. (1 Cranch) at 170)).

161. U.S. CONST. art. III, § 2 (“The judicial [p]ower shall extend . . . to controversies to which the United States shall be a [p]arty;—to [c]ontroversies between two or more [s]tates; . . . and between a [s]tate . . . and foreign [s]tates . . .”).

162. See *TransUnion*, 594 U.S. at 423.

163. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 170 (1803).

Questions, in their nature political, or which are, by the constitution and laws, submitted to the executive, can never be made in this court.¹⁶⁴

Read in context, the statement that the court's province "is, solely, to decide the rights of individuals" stands for the proposition that courts only have the power to enforce rights and lack the power to second-guess political determinations.¹⁶⁵ This conclusion forms the basis for today's political question doctrine. *Marbury* thus hardly compels the conclusion that the role of the courts is only to decide on the rights of individuals who have suffered concrete harm.

In any event, even if we accept that the Court is correct that the province of the judiciary "is, solely, to decide the rights of individuals,"¹⁶⁶ that view of the role of the judiciary does not support a more stringent standing requirement in civil suits than in criminal cases. That is because if the role of the court is to remedy violations of individual rights, concrete factual injury should not be required to establish Article III standing. Instead, the only question should be whether the plaintiff has alleged a violation of one of his rights. Individuals should have standing to sue whenever their rights are violated, regardless of whether that violation resulted in some other concrete, particularized injury.

Recalibrating standing doctrine in this way would result in parallel standing requirements in civil and criminal cases. Just as the United States has standing to bring criminal actions for any violations of criminal law regardless of whether those criminal offenses result in concrete harm, individuals would have standing to sue for violations of their rights regardless of whether the violation resulted in additional concrete harm.

Recognizing standing for any violation of an individual right would not intrude on the power of the other branches of government. It would not infringe on the power of Congress because a suit seeking to vindicate a right does not ask the courts to legislate. It seeks only to enforce a right that already exists.¹⁶⁷ If anything, recalibrating standing in this way would empower

164. *Marbury*, 5 U.S. (1 Cranch) at 170.

165. *Id.*

166. *Lujan*, 504 U.S. at 576 (quoting *Marbury*, 5 U.S. (1 Cranch) at 170); see also *TransUnion*, 594 U.S. at 423.

167. Hessick, *supra* note 32, at 704.

Congress because it would confer on Congress greater authority to create civil rights vindicable in federal courts.

Nor would recognizing standing for any violation of an individual right infringe on the executive power to enforce the law. The executive power conferred by Article II no doubt includes the ability to bring suit to vindicate the public interest.¹⁶⁸ Moreover, Article II obliges the executive to “take Care that the Laws be faithfully executed[.]”¹⁶⁹ But these executive powers and duties do not empower the executive to bring suit to vindicate an individual’s rights. For example, the executive cannot bring suit to recover for a tort committed against a third party.¹⁷⁰ As then-representative John Marshall put it, “[a] private suit instituted by an individual, asserting his claim to property, can only be controlled by that individual. The executive can give no direction concerning it.”¹⁷¹ Because the executive cannot enforce private rights, a private individual does not usurp the role of the executive by bringing suit to vindicate his rights.¹⁷²

168. *In re Debs*, 158 U.S. 564, 586 (1895) (“[W]henever the wrongs complained of are such as affect the public at large, and are in respect of matters which by the Constitution are entrusted to the care of the Nation, and concerning which the Nation owes the duty to all the citizens of securing to them their common rights, then the mere fact that the government has no pecuniary interest in the controversy is not sufficient to exclude it from the courts . . .”).

169. U.S. CONST. art II, § 3.

170. See Hessick, *supra* note 32, at 728. One possible exception is that the executive may bring suit on behalf of a citizen in its capacity as *parens patriae*. See, e.g., *Late Corp. of the Church of Jesus Christ of Latter-Day Saints v. United States*, 136 U.S. 1, 57–58 (1890). But even then, the government is acting as agent of the citizen, asserting the citizen’s rights on behalf of the citizen. See *id.* This inability of the government to bring suit to enforce private rights is not an idiosyncratic restriction on the government. As a general matter, a third party cannot bring suit to vindicate the rights of another person. See *Powers v. Ohio*, 499 U.S. 400, 410 (1991) (“[A] litigant . . . cannot rest a claim to relief on the legal rights or interests of third parties.”).

171. Speech of the Hon. John Marshall, Delivered in the U.S. House of Representatives of the United States on the Resolutions of the Hon. Edward Livingston, Relative to Thomas Nash, Alias Jonathan Robbins (Mar. 7, 1800), in 4 THE PAPERS OF JOHN MARSHALL 82, 99 (Charles T. Cullen ed., 1984) (1799–1800); see also JOHN LOCKE, TWO TREATISES OF GOVERNMENT 126 (Thomas I. Cook ed., Hafner Publ’g Co. 1947) (1690) (stating that the right of “taking reparation [for violation of private right] . . . belongs only to the injured party” (emphasis removed)).

172. See Hessick, *supra* note 32, at 728. Individual rights are not the only laws that fall outside the executive’s enforcement power under Article II. There are many other laws that the federal executive is not charged with enforcing. For example, the United States does not have the authority to prosecute state criminal laws, see *Willamette Iron Bridge Co. v. Hatch*, 125 U.S. 1, 9 (1888), and the federal courts do not have cognizance over prosecutions by states for violations of their criminal laws, see *Wisconsin v. Pelican Ins. Co.*, 127 U.S. 265, 297 (1888).

In rejecting this view that the violation of a right alone supports standing, the Court in *TransUnion* fretted that if an individual has standing to bring suit whenever an individual right is violated, Congress could authorize any person to bring an action for statutory damages against anyone who violated federal law.¹⁷³ According to the Court, such a scheme would impermissibly expand the power of the Article III judiciary and intrude on the executive's function of enforcing the law because it would permit individuals to vindicate the public interest in seeing that others comply with the law.¹⁷⁴

It is true that, if the violation of a right alone can support standing, Congress could confer broad standing on individuals to enforce federal law by creating a private right to compliance with federal law. But this does not mean that an individual who sues to enforce that right would intrude on the executive power to protect the public interest. A private right confers a private interest on an individual. An individual who sues to enforce that right is simply vindicating his private interest.¹⁷⁵

To be sure, vindicating a private right may benefit the public. For example, if a statute creates a right in all individuals not to have factories emit toxic pollutants regardless of whether they are actually exposed to those emissions, a plaintiff who sues to enforce that right will benefit other people who have been exposed to those emissions. But that benefit is collateral. The basis for the suit is to vindicate the individual plaintiff's right against toxic emissions.

173. *TransUnion LLC v. Ramirez*, 594 U.S. 413, 428 (2021) (“[I]f the law of Article III did not require plaintiffs to demonstrate a ‘concrete harm,’ Congress could authorize virtually any citizen to bring a statutory damages suit against virtually any defendant who violated virtually any federal law.”).

174. *Id.* at 429 (“A regime where Congress could freely authorize *unharmed* plaintiffs . . . would infringe on the Executive Branch’s Article II authority [T]he choice of how to prioritize and how aggressively to pursue legal actions against defendants who violate the law falls within the discretion of the Executive Branch”); see also *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 577 (1992) (“To permit Congress to convert the undifferentiated public interest in executive officers’ compliance with the law into an ‘individual right’ vindicable in the courts is to permit Congress to transfer from the President to the courts the Chief Executive’s most important constitutional duty, to ‘take Care that the Laws be faithfully executed.’” (citing U.S. CONST. art. II, § 3)).

175. Louis L. Jaffe, *Standing to Secure Judicial Review: Private Actions*, 75 HARV. L. REV. 255, 286 (1961) (“If [a plaintiff] has a ‘legally protected interest,’ he represents not ‘the public’ but himself and is entitled to the remedy.”).

The current doctrine of standing already recognizes this point. Under current doctrine, a plaintiff has standing to sue to prevent emissions if that plaintiff is exposed to those emissions.¹⁷⁶ Prevailing in that suit also benefits other members of the community. But that collateral benefit does not deprive the plaintiff of standing.

Separation of powers principles may support more rigorous standing requirements when an individual sues the federal government. In those cases, an individual is using the courts to force the other branches of government to act.¹⁷⁷ But in the run-of-the-mill case where one individual sues another for the violation of a right, those separation of powers concerns do not apply.¹⁷⁸

Far from supporting more stringent standing in civil cases than in criminal cases, principles of separation of powers suggest, if anything, that standing in criminal cases should be narrower than standing in civil cases. One of the major reasons for the separation of powers in the Constitution is to prevent the government from abusively depriving individuals of their life, liberty, and property.¹⁷⁹ Dispersing power among the different branches reduces that risk because it precludes one branch from acting unilaterally.¹⁸⁰

176. See *Friends of the Earth, Inc. v. Laidlaw Env't Servs. (TOC), Inc.*, 528 U.S. 167, 181 (2000) (holding that exposure to polluted river established standing); *Sierra Club v. EPA*, 699 F.3d 530, 531, 533 (D.C. Cir. 2012) (holding that exposure to "hazardous air pollutants" constituted sufficient injury for standing).

177. *Lujan*, 504 U.S. at 578 ("[I]t is clear that in suits against the government, at least, the concrete injury requirement must remain."); see Andrew Hessick, *Establishing Standing after Spokeo v. Robins*, CASETEXT (May 19, 2016), <https://casetext.com/analysis/establishing-standing-after-spokeo-v-robins> ("The concrete injury requirement makes sense in [cases against the government] insofar as the motivating principle underlying standing is separation of powers, and the concrete injury requirement protects the separation of powers by limiting the ability of individuals to use the courts to force the government to act.").

178. *Spokeo v. Robins*, 578 U.S. 330, 347 (2016). (Thomas, J., concurring) ("[W]here one private party has alleged that another private party violated his private rights, there is generally no danger that the private party's suit is an impermissible attempt to police the activity of the political branches . . .").

179. See THE FEDERALIST NO. 47, *supra* note 10, at 228 (James Madison) ("The accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny."); *id.* at 229 ("[T]here can be no liberty, where the legislative and executive powers are united in the same person, or body of magistrates . . .") (internal quotation marks omitted).

180. See *Mistretta v. United States*, 488 U.S. 361, 380 (1989) ("[T]he separation of governmental powers into three coordinate Branches is essential to the preservation of

In that light, the importance of strictly observing the separation of powers through standing is greater in criminal cases than in civil cases.¹⁸¹ Criminal prosecutions are the means by which the government imposes some of the most significant deprivations of individual liberty and other important interests.¹⁸² Convictions may result in imprisonment or even death, and they also often result in other restrictions on the offenders' freedoms.¹⁸³ Many provisions in the Constitution—such as the prohibitions on ex post facto laws and bills of attainder, as well as the various rights in the Fifth and Sixth Amendments—signify concern over the abuse of criminal punishment. Limiting prosecutions through strict application of standing doctrine would further curtail the government's ability to impose punishment through criminal law.

Civil suits do not present a comparable threat of deprivation by the government. Unlike in a criminal action, the purpose of civil actions is not to deprive individuals of their liberty or life. Instead, the purpose is to vindicate individual rights. Moreover, the potential deprivations in civil suits are less significant than in criminal cases. Most civil suits seek damages. Although some suits may seek injunctions restricting the way a person may act, the deprivation of liberty from an injunction is less significant than that resulting from imprisonment.¹⁸⁴ Finally, unlike with criminal

liberty.”); Rebecca L. Brown, *Separated Powers and Ordered Liberty*, 139 U. PA. L. REV. 1513, 1518–19 (1991) (arguing that the separation of powers enhances individual liberty by protecting individual rights). Of course, preventing accumulation of power is not the only reason for separating powers. Scholars have identified various other goals served by the separation of powers, including promoting efficiency by allocating specific tasks to institutions designed to complete those tasks; promoting accountability for particular acts by specifying which institution has that task; increasing the likelihood that law furthers the common good by having different constituencies participate in its development; and increasing the impartial administration of the law by preventing prosecutors from serving as judges in each case. W.B. GWYN, *THE MEANING OF THE SEPARATION OF POWERS: AN ANALYSIS OF THE DOCTRINE FROM ITS ORIGIN TO THE ADOPTION OF THE UNITED STATES CONSTITUTION* 127–28 (1965).

181. Barkow, *supra* note 7, at 1031 (“The inefficiency associated with the separation of powers serves a valuable function, and, in the context of criminal law, no other mechanism provides a substitute.”).

182. Hessick & Hessick, *supra* note 11, at 2347.

183. See Eisha Jain, *Prosecuting Collateral Consequences*, 104 GEO. L.J. 1197, 1199 (2016) (describing “collateral consequences” of conviction).

184. *Zadvydas v. Davis*, 533 U.S. 678, 690 (2001) (“Freedom from imprisonment—from government custody, detention, or other forms of physical restraint—lies at the heart of the liberty that [the Due Process] Clause protects.”); *Foucha v. Louisiana*, 504 U.S. 71, 80 (1992)

prosecutions, the government does not have the exclusive power to bring civil suits. Individuals may bring civil actions. The broad ability to bring civil actions reduces the likelihood that the government will use civil suits abusively, because government officials themselves may be subject to suit brought by individuals.¹⁸⁵

These differences between civil and criminal cases suggest that standing's requirements should be more stringent when the government brings a criminal case than when an individual files a civil case. If a function of the separation of powers is to protect rights and prevent government abuse of those rights, it should be more difficult for the government to establish standing to deprive individuals of their rights than it is for individuals to establish standing to vindicate their rights. The current regime—under which courts have broader power to imprison individuals than to vindicate their rights—turns the separation of powers on its head.

D. Other Justifications for Standing Doctrine

Although the historical and separation of powers arguments are the primary justifications invoked by the current Court for Article III standing's requirements, a handful of other reasons have been offered to justify the requirements of Article III standing—in particular, the concrete-injury requirement—in civil cases.¹⁸⁶ But these other arguments also do not justify the different standing requirements in civil and criminal cases.

1. Quality of Decision-Making

One common argument is that requiring concrete injury increases the quality of decisions by making courts more attuned to the real-world consequences of their decisions, since courts will be

("Freedom from bodily restraint has always been at the core of the liberty protected by the Due Process Clause from arbitrary governmental action.").

185. Cf. Margaret H. Lemos, *Aggregate Litigation Goes Public: Representative Suits by State Attorneys General*, 126 HARV. L. REV. 486, 539 (2012) ("[H]eightedened procedural protections are unnecessary in the legislative context because generally applicable rules are unlikely to target particular disfavored individuals or groups for arbitrary or malicious treatment.").

186. See, e.g., *Am. Bottom Conservancy v. U.S. Army Corps of Eng'rs*, 650 F.3d 652, 656 (7th Cir. 2011) (Posner, J.) (justifying standing doctrine on the "practical" grounds that it "is needed to limit premature judicial interference with legislation, to prevent the federal courts from being overwhelmed by cases, and to ensure that the legal remedies of primary victims of wrongful conduct will not be usurped by persons trivially or not at all harmed by the wrong complained of.").

making decisions based on imminent or already-incurred harms instead of hypotheticals.¹⁸⁷ But if this argument provides some basis for requiring concrete injury in civil cases, it does not justify dispensing with the injury requirement in criminal cases. A court should not decide questions of criminal law in the abstract any more than they should questions of civil law. Limiting standing to cases in which the United States suffers a real-world harm would avoid such abstract determinations.

Against this, one might argue that crimes often do involve real-world harms, even if the United States is not the victim. But the same argument could be made in civil cases. Interest groups often wish to bring suit to enforce rights and laws, even if they have not personally experienced harm. But they do not have standing to bring those suits.

One might also argue that, even if a criminal case does not present a concrete injury, the possibility of a jail sentence provides incentives for the court to decide carefully. In other words, the severity of the consequences of the court's judgment in a criminal case provides adequate incentives to decide carefully. But that argument applies equally to civil cases. Judgments in civil cases can likewise have real-world consequences, even if they do not remedy concrete injuries.

2. *Preserving Judicial Resources*

A second argument sometimes made to support the concrete-injury requirement in civil cases is that it protects judicial resources.¹⁸⁸ Judicial resources are limited, and confining standing to suits in which a plaintiff suffers a concrete injury ensures that those limited resources are spent only when a real harm is at stake. But that argument applies equally to criminal cases. The United

187. See, e.g., Gene R. Nichol, Jr., *Injury and the Disintegration of Article III*, 74 CALIF. L. REV. 1915, 1927 (1986) ("Examination of these effects serves to fine tune the judicial decisionmaking process since abstract rulings based on hypothetical impacts are more apt to be unwise ones.").

188. Hessick, *supra* note 101, at 323 ("Efficient allocation of resources is another reason to require injury in fact."); *Am. Bottom Conservancy*, 650 F.3d at 656 (Posner, J.) (justifying standing doctrine on the "practical" ground that it "is needed . . . to prevent the federal courts from being overwhelmed by cases").

States brings an astounding number of criminal cases each year.¹⁸⁹ The judiciary lacks the capacity to try all those cases. The United States has addressed the problem by aggressively seeking guilty pleas, typically through offering a concession—such as agreeing to drop some charges or by requesting leniency at sentencing—in exchange for the defendant’s pleading guilty.¹⁹⁰ Over ninety-seven percent of criminal cases are resolved through guilty pleas.¹⁹¹ The Court has explicitly stated that the system depends on guilty pleas and has even fashioned constitutional doctrines to facilitate plea bargaining and guilty pleas.¹⁹²

Extending the concrete-injury requirement from civil cases to criminal cases would alleviate that docket pressure. The United States would be able to bring prosecutions in only those rare cases in which the United States suffered concrete injury. Of course, this is not to say that the concrete-injury requirement should be extended to criminal cases; rather, the point is the resources justification for standing in civil cases does not support applying more stringent standing requirements in civil cases than in criminal cases.

3. *Prioritizing the Injured*

Another argument sometimes given for standing’s requirements in civil cases is that standing ensures that the principal victims of wrongdoing have priority in receiving remedies.¹⁹³ But this goal of prioritizing the primary victims of

189. U.S. District Courts—Criminal Defendants Commenced, Terminated, and Pending (Including Transfers), During the 12-Month Periods Ending September 30, 2022 and 2023 (2023) (reporting 66,147 federal criminal case filings in 2023 and 68,482 in 2022), https://www.uscourts.gov/sites/default/files/data_tables/jb_d_0930.2023.pdf.

190. Russell M. Gold, Carissa Byrne Hessick & F. Andrew Hessick, *Civilizing Criminal Settlements*, 97 B.U. L. REV. 1607, 1614–15 (2017) (“Most disputes in the criminal system settle [through plea bargains.]”).

191. CARISSA BYRNE HESSICK, PUNISHMENT WITHOUT TRIAL: WHY PLEA BARGAINING IS A BAD DEAL 24–25 (2021).

192. See, e.g., *Bordenkircher v. Hayes*, 434 U.S. 357, 365 (1978) (holding that due process does not prohibit the prosecutor from bringing harsher charges if the defendant refuses to plead); see generally HESSICK, *supra* note 191, at 46–48.

193. *Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc.*, 454 U.S. 464, 473 (1982) (“Art. III aspect of standing also reflects a due regard for the autonomy of those persons likely to be most directly affected by a judicial order.”); *Am. Bottom Conservancy*, 650 F.3d at 656 (Posner, J.) (arguing that standing doctrine “ensure[s]

wrongful conduct over bystanders does not justify different standing requirements in civil and criminal cases. Many crimes have identifiable victims who deserve remedies for the injuries they have suffered. Allowing the United States to bring prosecutions in those cases may also interfere with the ability of those victims to receive the remedies they would receive in civil suits if standing were expanded. For example, suppose Dan runs a store in competition against Paul's store. Dan coerces shoppers not to shop at Paul's store, threatening to kneecap them if they shop at Paul's store. Paul contemplates bringing a civil antitrust action against Dan, but before he does so, the United States brings a criminal antitrust action against Dan. How that claim is resolved may affect Paul's case. If a court concludes from the United States' argument that Dan did not violate the antitrust laws, that determination may preclude Paul from recovering under his suit.¹⁹⁴

4. Preventing Premature Adjudication

Yet another justification for standing requirements is that they protect against premature judicial assessment of legislation.¹⁹⁵ Courts should refrain from passing on the meaning of a statute—or, more importantly, the constitutionality of a statute—unless it is necessary to do so in the course of remedying a wrong.¹⁹⁶ But that concern applies to all legislation, both civil and criminal. There is no reason to think that a court is better positioned to pass earlier on a criminal statute than on a civil statute. The decisional capacities

that the legal remedies of primary victims of wrongful conduct will not be usurped by persons trivially or not at all harmed by the wrong complained of"); Lea Brilmayer, *The Jurisprudence of Article III: Perspectives on the "Case or Controversy" Requirement*, 93 HARV. L. REV. 297, 306 (1979) (discussing the "fairness problems that would arise if an ideological challenger—a challenger without the traditional personal stake—were permitted to litigate a constitutional claim.").

194. Res judicata would not apply, of course, because of the different standard of proof. Nevertheless, a court's determination may influence subsequent proceedings. For example, if a court issues an opinion concluding that Dan did not violate the law, that opinion will carry significant weight in a subsequent proceeding.

195. *Am. Bottom Conservancy*, 650 F.3d at 656 (Posner, J.) ("[Standing] doctrine is needed to limit premature judicial interference with legislation . . .").

196. *Valley Forge Christian Coll.*, 454 U.S. at 471 (stating that the "judicial power . . . to declare the rights of individuals and to measure the authority of governments . . . 'is legitimate only in the last resort, and as a necessity in the determination of real, earnest and vital controversy,'" and that standing enforces this limitation (quoting *Chi. & Grand Trunk Ry. Co. v. Wellman*, 143 U.S. 339, 345 (1892))).

of a court are the same in criminal and civil cases. Premature adjudication of a criminal statute may cause just as much disruption and strife as premature adjudication of a civil statute in a private action. Thus, to the extent that the function of standing is to prevent premature adjudication, it applies equally to criminal law.

5. Liberty

Another argument is that standing promotes liberty by preventing unwarranted lawsuits. The theory is that less rigorous standing requirements would expand the ability of individuals to bring suit, and the increase in potential suits would unduly discourage individuals from acting. But that argument supports more restrictive standing in criminal cases than in civil ones. Criminal penalties are harsher than civil remedies and consequently deter more free acts. The ease with which the United States can bring criminal prosecutions already discourages individuals from acting in ways that are legal because of the possibility of facing criminal charges.¹⁹⁷ Limiting the ability of the United States to bring those prosecutions would reduce that deterrence, furthering individual liberty.

III. CONSEQUENCES OF THE DIFFERENCE IN STANDING REQUIREMENTS

The discrepancy in Article III standing requirements has several consequences. First, the discrepancy results in a system that recognizes a broader set of cognizable interests for the government than for individuals. Second, and closely related, the discrepancy in standing requirements devalues individual rights. It results in a system that values government interests more than individual rights insofar as any violation of a government interest is a basis for judicial intervention in a criminal suit, but only those violations of rights that result in additional harms provide a basis for federal judicial relief in a civil suit. Third, it incentivizes criminalization by constraining Congress's power to create individual rights that can

197. See, e.g., *Reno v. Am. C. L. Union*, 521 U.S. 844, 872 (1997) ("The severity of criminal sanctions may well cause speakers to remain silent rather than communicate even arguably unlawful words, ideas, and images."); Gina-Gail S. Fletcher, *Deterring Algorithmic Manipulation*, 74 VAND. L. REV. 259, 273 (2021) (noting that "uncertainty" in criminal law leads to "overdeterrence of honest actors").

be vindicated in the Article III courts while at the same time leaving Congress's power to create criminal law unhindered. Criminal law thus provides a more expansive and powerful tool for Congress to implement policies than does civil law.

A. A Broader Range of Interests Protectable by Criminal Law

The different standing requirements in criminal and civil cases results in a system that recognizes a broader set of cognizable interests for the government than for individuals. The injury-in-fact requirement limits the types of interests that an individual can vindicate through a civil action. It is only if the violation of an interest results in concrete harm that the individual can bring suit in federal court. By contrast, because injury in fact is not a prerequisite to bringing a criminal action, criminal law can protect a much broader array of interests.

Recall the example discussed earlier in which a person poisons water to kill another person. Because of the injury-in-fact requirement, the individual whose water has been poisoned does not have standing to bring a tort action for the poisoning. Risk of harm, the Court has said, is not a cognizable harm for individual standing. By contrast, standing doctrine poses no impediment to the government bringing a criminal action for attempted murder.

The breadth of the government's standing in criminal cases is illustrated by the sheer variety of crimes that the government may prosecute. Federal law makes it a crime to "[a]llow[] a pet to make noise . . . that frightens wildlife by barking, howling, or making other noise";¹⁹⁸ snorkel within 100 yards of the Hoover Dam;¹⁹⁹ and knowingly conceal a part of a civil aircraft that was involved in any sort of accident.²⁰⁰ Just like thwarted inchoate offenses, these crimes regularly do not cause a harm that would be a cognizable basis for standing in a civil case, yet the government has standing to bring prosecutions for these violations.

That arrangement is backwards. If the primary purpose of the courts is to vindicate rights and protect liberty, the range of individual interests that the courts are capable of vindicating should at least be comparable to the range of government interests

198. 36 C.F.R. § 2.15(a)(4).

199. 43 C.F.R. § 423.36(a)(1).

200. 49 U.S.C. § 1155(b).

that the courts are capable of vindicating. The consequence is not simply that the courts vindicate a broader range of interests for the government than for individuals. The disparity also results in a greater willingness of the courts to act when faced with requests to punish through imprisonment than to redress violations of rights suffered by individuals.

B. The Devaluation of Individual Rights

A related consequence of the difference in standing is that it discounts the value of individual rights but not of government interests. Rights have practical value only to the extent that they are enforceable.²⁰¹ As Chief Justice Marshall put it, “[E]very right, when withheld, must have a remedy, and every injury its proper redress.”²⁰² Standing limits enforceability. Even if a right protects against conduct that might lead to harm, standing doctrine limits enforcement to violations that actually lead to harm. That limitation on enforceability reduces the value of the right by restricting the scope of protection provided by the right.²⁰³

Consider a law that requires banks to encrypt customer accounts and authorizes individuals who have bank accounts to bring a cause of action against their banks if the banks fail to encrypt accounts. That protection has value.²⁰⁴ A customer would be willing to pay more to have an account at a bank that provides encryption than to have an account at a bank that does not. But standing limits the value of that protection. A customer would not have standing to bring this action if the customer did not suffer any consequential harm because of the bank’s failure to encrypt. Standing thus refuses to recognize the value of protection itself;

201. *W. Maid v. Thompson*, 257 U.S. 419, 433 (1922) (Holmes, J.) (“Legal obligations that exist but cannot be enforced are ghosts that are seen in the law but that are elusive to the grasp.”); *Wood & Selick, Inc. v. Compagnie Generale Transatlantique*, 43 F.2d 941, 943 (2d Cir. 1930) (Hand, J.) (“[A] right without any remedy is a meaningless scholasticism . . .”); see also Daryl J. Levinson, *Rights Essentialism and Remedial Equilibration*, 99 COLUM. L. REV. 857, 882 (1999) (arguing that rights exist only to the extent that they are enforced).

202. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 153 (1803) (“It is a settled and invariable principle, that every right, when withheld, must have a remedy, and every injury its proper redress.” (citing 3 BLACKSTONE, COMMENTARIES *109)).

203. See Stephen M. McJohn, *A New Tool for Analyzing Intellectual Property*, 5 NW. J. TECH. & INTELL. PROP. 101, 111 (2006) (arguing that “restrictions on standing” to enforce patent rights render those rights “less valuable”).

204. Hessick, *supra* note 101, at 316 (“Rights have value.”).

it recognizes only the value of the harms that result when the protections are not provided.

No similar discount occurs for criminal law. The government has standing to prosecute any violation of criminal law. Consequential harm is not a prerequisite. So far as standing is concerned, the interest created by criminal law, in contradistinction to the consequences that result from violating the criminal law, has value itself worthy of vindication. The systematic discounting of individual rights but not of government interests signifies that the courts think it is more important to recognize the government's ability to seek punishment than it is to vindicate individual rights.

C. The Incentivizing of Criminalization

The differential standing doctrines also incentivize Congress to implement policy through criminal laws instead of through civil actions. The disparity in standing does so by making criminal law more enforceable than civil action.

Article I of the Constitution confers on Congress the lawmaking power. Congress has broad discretion in choosing how to exercise that power. It not only has discretion to choose which policies to pursue through legislation, but it also has discretion to choose how to implement those policies. Among other things, Congress can choose to protect an interest with precision by writing a law conferring a narrow right, or it can choose to create a broader zone of protection for the interest by writing a law that confers a broader right.

For example, suppose Congress wants to prevent credit card fraud. A narrow way to protect that interest is to create a right against credit card fraud and authorize any person who is a victim to bring an action against the perpetrator. Under this approach, a person can bring an action only after the fraud has occurred. A broader way to protect against credit card fraud would be to create a right against practices that create a high risk of credit card fraud. For example, the law could prohibit businesses from printing entire credit card numbers on paper receipts and authorize a person to sue for statutory damages any business that violates this right.

One reason for the broader right is to increase protection of the interest. The narrow right against fraud might fail to deter the conduct because detecting fraud and identifying perpetrators can be difficult. It is much easier to determine when a business prints a

credit card number on a receipt. The broader right could lead to fewer instances of credit card fraud and reduce the amount of vigilance individuals need to exercise against the fraud.²⁰⁵

But the concrete-injury requirement limits Congress's ability to protect interests through broader rights by restricting the enforceability of those rights. Even if Congress enacted the law against printing credit card numbers on receipts, individuals would not have standing to sue businesses simply for violating that law.²⁰⁶ Individuals would have standing to sue businesses only if they suffered concrete harms because of the printing—for instance, if someone used a receipt to commit credit card fraud.²⁰⁷ As Justice Thomas put it in his *TransUnion* dissent, “despite Congress’ judgment that such misdeeds deserve redress,” standing’s injury-in-fact requirement means that those misdeeds “are so insignificant that the Constitution prohibits consumers from vindicating their rights in federal court.”²⁰⁸

The same limitation does not apply to criminal law. Because the concrete-injury requirement does not apply to criminal law, Congress does not face the same constraints in seeking to prevent harm through prophylactically broad criminal laws. Thus, if Congress enacted a criminal law prohibiting printing credit card numbers on receipts, the government would face no standing obstacles to prosecuting violations of that law.

Because of the relaxed standing requirement in criminal cases, criminal law provides Congress with a more nimble and powerful tool for preventing harm. With criminal law, Congress can provide preventative protections and regulate risk in a way that it cannot with civil actions. Congress can choose to create broad or narrow limitations through criminal law without having to speculate about

205. Similar logic underlies restraining orders that aim to prevent harassment by prohibiting the restrained person from coming within some distance—say, 300 feet—of the plaintiff instead of by specifically prohibiting harassment.

206. See *TransUnion LLC v. Ramirez*, 594 U.S. 413, 434 (2021) (“The mere presence of an inaccuracy in an internal credit file, if it is not disclosed to a third party, causes no concrete harm.”).

207. See, e.g., *Spokeo, Inc. v. Robins*, 578 U.S. 330, 342 (2016). For example, in *Spokeo* itself, the Court found that a procedural violation could not give rise to Article III standing for a claim under the Fair Credit Reporting Act (FCRA). *Id.* Despite the fact that “Congress plainly sought to curb the dissemination of false information by adopting procedures [in the FCRA] designed to decrease that risk[,]” the Court explained how the dissemination of inaccurate information, “without more, could [not] work any concrete harm.” *Id.*

208. *TransUnion*, 594 U.S. 413 at 443.

whether the federal courts will refuse to enforce the law for lack of standing. Criminal law is more effective because it is more enforceable than its civil counterpart. This differential in effectiveness incentivizes Congress to regulate through criminal laws instead of civil ones.

One might argue that the pressure standing creates toward enacting criminal laws instead of private rights is minimal because individuals can enforce their rights in non-Article III forums. Because it derives from Article III, standing doctrine applies only to Article III courts.²⁰⁹ Accordingly, the argument goes, Congress might enact private rights with an eye toward them being enforced in state courts or administrative tribunals.²¹⁰ But, for many reasons, those tribunals are not attractive substitutes.

Relying on state courts would result in disparate enforcement of rights because states have differing standing doctrines.²¹¹ Some states, such as North Carolina, have more lenient standing requirements than the federal one. Under the North Carolina Constitution, “every person for an injury done him in his lands, goods, person, or reputation shall have remedy by due course of law; and right and justice shall be administered without favor, denial, or delay.”²¹² But other states, such as California, follow the Article III doctrine.²¹³ The differences in states’ standing doctrines would result in a lack of uniformity. Individuals residing in North Carolina whose federal rights were violated but who suffered no other harms would be able to sue, but individuals residing in California could not. And even in states with more lenient standing laws, the state courts may be less willing to enforce federal statutory rights than federal courts would be if they could hear the

209. See David Krinsky, *How to Sue Without Standing: The Constitutionality of Citizen Suits in Non-Article III Tribunals*, 57 CASE W. RES. L. REV. 301, 306 (2007) (noting that Article III standing does not apply in administrative tribunals); see also *ASARCO Inc. v. Kadish*, 490 U.S. 605, 617 (1989) (“[T]he constraints of Article III do not apply to state courts . . .”).

210. See *Standing*, *supra* note 146, at 341 (“*TransUnion* may push more class actions into state courts . . .”).

211. See Matthew Hall & Christian Turner, *The Nature of Standing*, 29 WM. & MARY BILL RTS. J. 67, 73–74 (2020) (describing the different state standing doctrines).

212. N.C. CONST. art. I, § 18.

213. See Hessick, *supra* note 41, at 65–68.

claims. One of the reasons for the creation of a federal judiciary was the fear that state judges would not be sympathetic to federal claims.²¹⁴

Nor do administrative tribunals provide an adequate way to enforce federal rights. To start, it is doubtful that those tribunals could vindicate those civil rights. Vindicating rights through adjudication requires the exercise of judicial power,²¹⁵ and Article III confers the judicial power on Article III courts.²¹⁶ Tribunals outside of Article III thus typically cannot enforce rights.²¹⁷ Although the Court has recognized several exceptions to this rule against non-Article III adjudication, none of those exceptions cover ordinary tort claims brought by one individual against another if the tort is unrelated to a broader administrative scheme.²¹⁸

214. William Cohen, *The Broken Compass: The Requirement that a Case Arise "Directly" Under Federal Law*, 115 U. PA. L. REV. 890, 893, 906–07, 912 (1967) (discussing federal courts' expertise in, and sympathy toward, federal law as a general matter); see also Martin H. Redish & John E. Muench, *Adjudication of Federal Causes of Action in State Court*, 76 MICH. L. REV. 311, 330 (1976) ("By having power to control directly the actions of federal officials, state courts that may be unfamiliar with or antagonistic to federal programs can interfere with the execution of those programs." (citation omitted)); AM. L. INST., *STUDY OF THE DIVISION OF JURISDICTION BETWEEN STATE AND FEDERAL COURTS* 166–67 (1969) ("Where the difficulty is not misunderstanding of federal law, but lack of sympathy – or even hostility – toward it, there is a marked advantage in providing an initial federal forum.").

215. See *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 219 (1995) ("'[J]udicial Power' is one to render dispositive judgments." (quoting Frank H. Easterbrook, *Presidential Review*, 40 CASE W. RES. L. REV. 905, 926 (1990))).

216. U.S. CONST. art III, § 1 ("The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.").

217. *Stern v. Marshall*, 564 U.S. 462, 483 (2011) ("Under 'the basic concept of separation of powers . . . that flow[s] from the scheme of a tripartite government' adopted in the Constitution, 'the "judicial Power of the United States" . . . can no more be shared' with another branch than 'the Chief Executive, for example, can share with the Judiciary the veto power, or the Congress share with the Judiciary the power to override a Presidential veto.'" (quoting *United States v. Nixon*, 418 U.S. 683, 704 (1974))).

218. *Id.* at 494. The Court has recognized five major exceptions to Article III: the territorial exception, the military exception, the adjunct exception, the consent exception, and the public rights exception. See F. Andrew Hessick, *Federalism Limits on Non-Article III Adjudication*, 46 PEPP. L. REV. 725, 729–30 (2019). None provides a general power to agencies to vindicate individual rights. The territorial exception, under which Article I tribunals may adjudicate disputes in the territories of the United States, authorizes enforcement only in the territories. See *N. Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 65–66, 65 n.16 (1982) *superseded by statute*, 28 U.S.C. § 157. It provides no recourse to plaintiffs outside the territories. Likewise, the military exception, which authorizes military commissions and courts martial, see *Solorio v. United States*, 483 U.S. 435, 436 (1987), provides no basis for the enforcement of civil rights. The adjunct exception permits Article I tribunals to make preliminary determinations of fact and law that form the basis for judgments by Article III

It is true, of course, that if a plaintiff lacks standing to bring their civil claim, that claim does not constitute a case and controversy within Article III.²¹⁹ But that does not mean a non-Article III tribunal may adjudicate that claim. Adjudication still requires the exercise of judicial power.²²⁰ Outside the inapplicable exceptions noted above, only Article III courts may exercise the federal judicial power.²²¹ The case and controversy requirement limits the circumstances in which the courts may exercise judicial power.²²² They may use that power only to resolve disputes that constitute cases and controversies. But this limitation on the Article III courts does not mean that *other* branches may exercise judicial power in non-cases or controversies.

Drawing an analogy to the legislative power illustrates the point. No one thinks that, because Congress cannot legislate

courts, *see* *Crowell v. Benson*, 285 U.S. 22, 56–59 (1932). It does not empower agencies to vindicate rights because it does not permit them to render dispositive judgments. The consent exception likewise does not provide a basis for general vindication of rights because it authorizes Article I adjudication only if the parties consent to it.

The public rights exception authorizes Article I adjudication of claims to which the government is a party, as well as claims between private individuals if the claims are closely tied to a broader administrative scheme. *See* *Thomas v. Union Carbide Agric. Prods. Co.*, 473 U.S. 568, 570 (1985) (“Congress has the power, under Article I, to authorize an agency administering a complex regulatory scheme to allocate costs and benefits among voluntary participants in the program without providing an Article III adjudication.”); *Wellness Int’l Network, Ltd. v. Sharif*, 575 U.S. 665, 689–90 (2015) (Roberts, C.J., dissenting) (describing the public rights exceptions). It does not justify Article I adjudication of claims between private parties alleging violations of rights created by Congress that are not tied to a broader administrative scheme.

219. *Carney v. Adams*, 592 U.S. 53, 58 (2020) (“The Constitution grants Article III courts the power to decide ‘Cases’ or ‘Controversies.’ . . . The doctrine of standing implements this requirement . . .”).

220. *Stern*, 564 U.S. at 465–66 (describing as “the most prototypical exercise of judicial power: the entry of a final, binding judgment *by a court* with broad substantive jurisdiction, on a common law cause of action, when the action neither derives from nor depends upon any agency regulatory regime.”).

221. *See id.* at 494 (stating that outside those exceptions, “Congress may not vest in a non-Article III court the power to adjudicate, render final judgment, and issue binding orders in a traditional contract [or tort] action arising under state law, without consent of the litigants, and subject only to ordinary appellate review.” (quoting *Thomas v. Union Carbide*, 473 U.S. 568, 584 (1985))).

222. *Hollingsworth v. Perry*, 570 U.S. 693, 704 (2013) (“Article III of the Constitution confines the judicial power of federal courts to deciding actual ‘Cases’ or ‘Controversies.’”); James E. Pfander, *Article I Tribunals, Article III Courts, and the Judicial Power of the United States*, 118 HARV. L. REV. 643, 704–05 (2004) (describing cases holding that the “cases and controversies” requirement is a “necessary condition for the exercise of the judicial power.”).

outside the areas enumerated in Article I,²²³ the *executive* branch may exercise legislative power in those areas. The President does not have the power, for example, to enact laws outlawing jaywalking simply because Congress lacks the power to do so. Instead, the enumerated areas in Article I simply limit Congress's legislative authority. So too, the Article III restriction of judicial power to cases and controversies does not suggest that Article I tribunals can exercise that power over disputes that do not constitute cases or controversies.

To be sure, the relaxed standing standard for the United States is not limited to criminal prosecutions. A lower threshold applies in any action by the United States to vindicate a sovereign interest. For example, the United States has equally broad standing to bring an action enforcing a law, providing for civil penalties for violations of the law. Thus, one might argue, Congress has an incentive to enact any laws authorizing actions by the United States, instead of criminal laws specifically.

This line of reasoning does not refute the point that Congress has an incentive to enact criminal laws over private civil actions. After all, criminal laws make up a major category of laws enforceable by the United States. It just means that Congress might have incentives to enact laws authorizing civil actions by the United States as well as criminal laws.

But there are reasons to think that Congress would prefer criminal laws. As Professor Stuntz and others have persuasively argued, Congress already has significant incentives to enact new criminal laws.²²⁴ A variety of factors—including the political attractiveness of appearing tough on crime, unbalanced lobbying efforts, the expansion of the administrative state, and broad prosecutorial discretion²²⁵—push Congress to enact more criminal

223. See U.S. CONST. art. I, § 8 (enumerating the areas in which Congress may legislate).

224. Stuntz, *supra* note 2, at 529–33 (discussing the incentives for legislatures to enact criminal laws).

225. See, e.g., Glenn Harlan Reynolds, *Ham Sandwich Nation: Due Process When Everything Is a Crime*, 113 COLUM. L. REV. SIDEBAR 102, 104 (2013); Erik Luna, *The Overcriminalization Phenomenon*, 54 AM. U. L. REV. 703, 707–11 (2005); JAMES R. COPLAND & RAFAEL A. MANGUAL, MANHATTAN INST., *OVERCRIMINALIZING AMERICA: AN OVERVIEW AND MODEL LEGISLATION FOR THE STATES* (2018); GENE HEALY, *GO DIRECTLY TO JAIL: THE CRIMINALIZATION OF ALMOST EVERYTHING*, at vii (2004).

laws.²²⁶ These incentives to create criminal law may work in tandem with the incentives against creating private actions resulting from Article III standing. Given the choice of different types of laws enforceable by the United States when legislating, Congress will choose to proceed by criminal law.

This increased pro-criminal-law bias resulting from the more relaxed standing requirements in criminal cases is particularly troubling because the existing incentives to enact criminal laws have resulted in the well-recognized problem of overcriminalization. There is a vast number of federal criminal laws. Conservative estimates suggest that the U.S. Code alone has around 4,500, not including regulations.²²⁷ The laws cover a huge amount of conduct, much of which no one would suspect of being criminal, and new criminal offenses are added every year.²²⁸ As many others have noted, this overcriminalization increases the power of the police by expanding the circumstances under which they may conduct searches and seizures. And it expands the power of the prosecutor because the volume of criminal laws allows prosecutors to bring many charges against defendants with an eye toward dropping charges in exchange for a guilty plea.²²⁹

The additional incentives for Congress to fashion policy through criminal laws resulting from the differential standing requirements exacerbate this problem. They encourage Congress to focus on criminalization, rather than civil rights, to implement policies. The result is that Congress is more likely to regulate in ways that expand the opportunities for government intrusions and

226. See Barkow, *supra* note 7, at 1029–31 (“The political process is more skewed when it comes to crime, particularly federal legislation aimed at substantive crime definition and sentencing.”).

227. Shon Hopwood, *Clarity in Criminal Law*, 54 AM. CRIM. L. REV. 695, 703 (2017).

228. The X account @CrimeADay is perhaps one of the best examples illustrating this phenomenon, tweeting about absurd offenses that Congress has criminalized. @CrimeADay, *supra* note 5. See, e.g., 21 U.S.C. §§ 458, 461 & 9 C.F.R. § 381.167 (making it a federal crime to sell ready-to-serve gravy with sliced turkey if the gravy is not at least fifteen percent turkey by weight); 21 U.S.C. § 333 & 21 C.F.R. § 155.130(b)(1)(ii)(a) (making it a federal crime to sell canned cream corn with more than ten black or brown kernels per 600 grams); see also Transcript of Oral Argument at 52, *Lange v. California*, 141 S. Ct. 2011 (2021) (No. 20-18) (Gorsuch, J.) (“[W]e live in a world in which everything has been criminalized. And some professors have even opined that there’s not an American alive who hasn’t committed a felony . . .”).

229. Stuntz, *supra* note 2, at 509 (“As criminal law expands, both lawmaking and adjudication pass into the hands of police and prosecutors; law enforcers, not the law, determine who goes to prison and for how long.”).

imprisonment instead of by providing a mechanism for allowing wronged individuals to vindicate their rights.

CONCLUSION

The difference in Article III standing requirements between plaintiffs in civil actions and the United States in criminal prosecutions is unwarranted. Neither the text of Article III nor history supports the differences. Instead, both suggest that the standing inquiry should be the same in civil and criminal actions. Likewise, the other principles that courts have looked to in developing the standing doctrine—principles such as separation of powers and preserving the autonomy of rightsholders—do not support the more relaxed standing requirements in criminal cases; if anything, they suggest that standing should be laxer in civil rather than criminal cases.

The difference in the standing requirements has real-world consequences. By recognizing a broader judicial power to enforce criminal law than civil law, the disparity in standing requirements prioritizes the former over the latter, and it devalues individual rights. It also contributes to overcriminalization—and all the attendant problems, such as broader government intrusions on individuals and mass incarceration—by creating an incentive for Congress to use criminal law instead of civil law to regulate.

Of course, there is more than one way to remove the differences between civil and criminal standing requirements, and this Article has not focused on which approach is best. Yet it is clear that expanding standing in civil cases is preferable to narrowing it in criminal cases. Achieving parity by narrowing standing in criminal cases to situations in which the United States demonstrates injury in fact would have serious repercussions on the criminal justice system and society generally. Huge swaths of criminal laws would be rendered practicably unenforceable, and Congress would be significantly hampered in its effort to prevent harms by regulating risk. By contrast, expanding standing in civil cases to permit standing whenever a right is violated would increase Congress's power to prevent harms. The concern that such an expansion would grant too much access to the courts and allow private individuals to become general law enforcers should not be overstated. Congress would control access to the courts, and Congress could limit private justice if things got out of hand.

