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CRIMINAL LAW IN THE SHADOW OF VIOLENCE

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What makes a crime violent*? The word "violence" triggers deeply held intuitions about physical harm, but it is also the source of considerable dispute and contestation. The intuitive familiarity of the concept of violence, in conjunction with its actual malleability, enables it to serve as an important source of legitimation for the criminal justice system. But these same features of the concept of violence may also contribute to the dysfunction of American criminal justice. Policies ostensibly designed to reduce "violent crime" are too readily embraced by the fearful without sufficient critical scrutiny. The shadow of violence impedes criminal justice reform, leaving in place policing and punishment policies that often fail to prevent, and may even exacerbate, incidents of actual physical harm. This Article situates the law and rhetoric of "violent crime" in historical and political context in order to encourage reflection on our concern with violence and more rigorous evaluation of the steps we take to address that concern.*

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INTRODUCTION

Violence stalks the criminal law. It lurks on the sidelines of most discussions of crime, and it sometimes pounces to claim center stage. Fear of crime, to a substantial degree, is fear of violence.[1] Those who champion criminal law reform in the direction of decriminalization or more lenient sentencing find themselves impeded by the specter of violence. Consider, for example, the once-frequent invocations of Willie Horton, the murderer who was released from prison only to commit rape and robbery.[2] Or consider the influential "broken windows" argument, which called for aggressive prosecution of low-level, nonviolent crime on the theory that tolerance of those offenses would eventually lead to higher rates of violent crime.[3] And it is not just the public (influenced, it seems, by the media[4]) and political officials who tend to equate any criminal activity with actual or prospective violence. Violence undergirds the pedagogy of criminal law. In American law schools, substantive criminal law courses nearly always cover the law of homicide; they frequently cover the law of rape; they rarely devote substantial attention to the property and drug offenses that constitute a far greater portion of criminal activity.[5] From the general

1. *See, e.g.*, Gerald E. Frug, *City Services*, 73 N.Y.U. L. REV. 23, 71 (1998) ("[F]ear of crime is associated with a burglary, robbery, rape, or assault perpetrated by a stranger."); Ute Gabriel & Werner Greve, *The Psychology of Fear of Crime: Conceptual and Methodological Perspectives*, 43 BRIT. J. CRIMINOLOGY 600, 606 (2003) ("The stereotypical 'crime' takes place outdoors and involves the violent activity of a stranger."). For further discussion of stranger violence distinguished from violence between intimates, see *infra* Part II.C.

2. "Perhaps the single most politically influential crime story of recent years was the Willie Horton controversy of the late eighties." Joseph E. Kennedy, *Monstrous Offenders and the Search for Solidarity Through Modern Punishment*, 51 HASTINGS L.J. 829, 887 (2000). By many accounts, George H.W. Bush won the 1988 presidential election in part by leading voters to associate his opponent, former Massachusetts governor Michael Dukakis, with the furlough program that released Horton.

3. *See* George L. Kelling & James Q. Wilson, *Broken Windows: The Police and Neighborhood Safety*, ATLANTIC MONTHLY, Mar. 1982, at 38.

4. "If it bleeds, it leads." As many commentators have noted, media coverage focuses disproportionately on violent crime, and distorts perceptions of actual criminal offending in other ways. See, e.g., Rachel Barkow, *Administering Crime*, 52 U.C.L.A. L. REV. 715, 749 (2005) ("[T]he news media tends to focus its coverage on violent crimes, even though the vast majority of crimes are nonviolent."); Sara Sun Beale, *The News Media's Influence on Criminal Justice Policy: How Market-Driven News Promotes Punitiveness*, 48 WM. & MARY L. REV. 397, 453–58 (2006); Perry L. Moriearty, *Framing Justice: Media, Bias, and Legal Decisionmaking*, 69 MD. L. REV. 849, 860-871 (2010) (discussing disproportionate emphasis on violent crimes, with specific attention to coverage of juvenile crime and crimes by nonwhite offenders).

5. This pedagogical emphasis is partly due to the predominance of the case method in U.S. law schools. The summary disposition of most ordinary drug and property offenses with a plea bargain leaves no appellate opinions for law school casebooks. Of course, the structure of a criminal law course need not mirror exactly patterns of criminal conduct. Possession offenses put a lot of people in jail, but possession doesn't take very long to teach. Still, it is remarkable that the drug offenses that

public to the specialists, everyone seems to think of crime in terms of violence.

Everyone but the criminals, perhaps. If violent crime is understood to refer to unlawful threats or applications of physical force, it is but a small fraction of criminal offenses actually committed. It is difficult to trace the exact percentages, but the ratio of physically violent offenses to all crimes is probably substantially less than one in four and possibly less than one in twenty.[6] There is, of course, geographic variation. The United States has considerably more lethal crime than do comparable developed nations.[7] In America as elsewhere, though, physically injurious crime is still only a small fraction of all criminal activity.[8]

I have equated violent crime with crimes that involve actual or threatened physical injury, but the meaning of violence requires further consideration. A surprising feature of the phrase "violent crime" is how un-self-consciously it is used. Relatively few jurisdictions—and even fewer scholars, perhaps—have offered a clear account of what makes a crime *violent*.[9] Often, the meaning of "violent crime" varies depending on the pur-

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constitute such a large portion of criminal proceedings in the United States should receive so little attention in criminal law courses.

6. About one in four felony prosecutions is for a violent offense, but since misdemeanors are overwhelmingly nonviolent, the overall rate of violent crime is probably far less than one in four. (And most prosecutions for violent felonies involve assault or robbery charges; murder and rape are each less than one percent of all felony prosecutions.) Surveys of crime victims also report a violent crime rate of about one in four—but of course, many nonviolent offenses leave no "victim" who could report the offense. *See* BUREAU OF JUSTICE STATISTICS, DEP'T OF JUSTICE, CRIMINAL VICTIMIZATION (2007), *available at* http:// bjs.ojp.usdoj.gov/ content/ pub/ pdf/ cv07.pdf. Violent crimes (setting aside acquaintance rape and domestic assaults, discussed below) are more likely than other offenses to be detected and prosecuted, but less than five percent of arrests are for violent offenses. *See* FED. BUREAU OF INVESTIGATION, DEP'T OF JUSTICE, CRIME IN THE UNITED STATES, PERSONS ARRESTED (2007), *available at* http:// www2.fbi.gov/ ucr/ cius2007/ arrests/ index.html.

7. *See* FRANKLIN E. ZIMRING & GORDON HAWKINS, CRIME IS NOT THE PROBLEM: LETHAL VIOLENCE IN AMERICA xi (1997).

8. Obviously, the proportion of violent crime to all crime decreases as the law criminalizes a broader range of (nonviolent) conduct. Even within the category "violent crime," most offenses are "simple batteries which involve no physical injury, most injuries sustained in such cases do not require medical treatment, and most cases requiring medical treatment do not require hospitalization." Kennedy, *supra* note 2, at 830 (citing Bureau of Justice statistics).

9. For example, the introduction to a recent volume of empirical research on racial and ethnic patterns in violent crime discusses the ambiguity of the concepts of race and crime, but offers no similar analysis of the concept of violence. *See* Darnell F. Hawkins, *Editor's Introduction* to VIOLENT CRIME: ASSESSING RACE & ETHNIC DIFFERENCES xvi-xvii (Darnell F. Hawkins ed., 2003) ("[I]mportant questions regarding the validity and utility of the notion or concept of 'race' remain."); *id.* at xvi (noting that for some analysis, "'crime' (including criminal violence) does not represent a phenomenon whose definition is uniformly clear or unconstestable"). Scholarship on domestic violence has been somewhat more attentive to the definition of violence. *See, e.g.*, Michelle Madden Dempsey, *What Counts as Domestic Violence? A Conceptual Analysis*, 12 WM. & MARY J. WOMEN & L. 301, 306–11 (2006). For further discussion of domestic violence, see *infra* Part II.C.

Congress has enacted several federal laws that rely on and define the term "violent crime" or "crime of violence." These sometimes circular definitions have generated considerable litigation and much dispute among lower federal courts. The laws, and the lower courts' disputes over them, are discussed infra Part III.

pose for which the category is deployed. For reporting purposes, violent crime includes only a few enumerated offenses that involve injury to human bodies: murder, manslaughter, rape, assault, and robbery.[10] These offenses are a relatively small portion of criminal activity. For sentencing purposes, violent crime is defined much more broadly. A number of sentencing laws impose enhanced penalties on offenders with prior convictions for "violent crime."[11] These laws typically define violent crime in terms of *risk* of physical injury—or even more remotely, "potential risk." These broad definitions have led courts to consider new candidates—such as burglary of an unoccupied home, drunk driving, or obstruction of justice—to bear the mantle of violent crime. In a criminal justice system built on and sustained by the specter of violence, the relative rarity of homicide and rape may create a temptation to find other crimes to do the work of violence. As the scope of the criminal law and the scale of imprisonment has expanded, so too has the concept of violence.

Violence is a concept both intuitively familiar and highly manipulable, and it plays important roles in the criminal law. Most importantly, violence seems to bridge the empirical and the normative. On one hand, violence brings to mind concrete facts—the physical body and its undeniable vulnerability. We humans can be restrained, injured, and killed. Various social and political constructs vary from place to place and time to time, but mortality is a cold, hard, inescapable fact. Many sociologists, political scientists, and philosophers have focused on these material, seemingly factual dimensions of violence, arguing that the term should be a purely descriptive one and the *legitimacy* of any act of violence should be a separate inquiry. Others, however, have argued that violence is inevitably normative, and any descriptive account will rely on explicit or implicit moral judgments. These latter arguments bring to light the other dimension of violence: its association with violation, with wrongfulness. Violence is, again, a dual concept, used to describe both the overwhelming of the human body and the transgression of social and cultural norms. Scholars have suggested that violence trades on this dualism; it uses the seemingly empirical and undeniable fact of pain and injury to give reality to more ephemeral human constructions.[12]

As we trace the concept of violence through the law of violent crime, it turns out that the dual dimensions of violence sometimes run seamlessly into one another. We might think of the concept of violence as a Mobius strip, that perplexing three-dimensional shape with only one surface and

10. *See* BUREAU OF JUSTICE STATISTICS, DEP'T OF JUSTICE, CRIMINAL VICTIMIZATION IN THE UNITED STATES, 2007—STATISTICAL TABLES (March 2, 2010), *available at* http:// bjs.ojp.usdoj.gov/ index.cfm? ty= pbdetail &iid= 1743.

11. *See infra* Part III.

12. *See generally* RENE GIRARD, VIOLENCE AND THE SACRED (1977); ELAINE SCARRY, THE BODY IN PAIN: THE MAKING AND UNMAKING OF THE WORLD (1985).

only one edge. If we train our attention on one small segment of the strip, it seems possible to identify two separate surfaces. Yet an ant on a Mobius strip can cross its entire flat surface without ever crossing the edge. In the study of violence, one might begin with concrete facts of human embodiedness and physical vulnerability; one might strive to set aside value judgments. But as we trace the seemingly empirical, positive notion of violence, like ants on a Mobius strip we eventually find ourselves enmeshed in the normative, and if we continue farther, we wind up back again in the material world. Indeed, a study of violence disturbs the settled lines we draw between the categories of fact and value, empirical and normative.[13]

As the recent redefinition of violent crime in terms of risk illustrates, the rhetoric of violence does not always correspond to actual physical harm. To speak of violent crime, and certainly to predicate enhanced sentences on the classification of prior offenses as violent, is often a strategic choice. In the criminal law, violent crime seems to verify the need for, and justice of, the state's own violence in policing and punishment. But, as this Article shows, the "violent" character of certain criminal offenses is not entirely pre-legal. Across time and jurisdictions, the criminal law has constructed violence differently. I want to consider the possibility that through the rhetoric of violence, criminal law pulls itself up by its own bootstraps.

Or pulls itself down. As many commentators have noted, there is a tremendous perceived need for criminal law reform in the United States, and apparent political inability to achieve such reform.[14] This conundrum, I suggest, stems partly from a failure to attend adequately to violence. Fear of violence is nearly universal and cannot be dismissed. To some extent, this fear is a fear of death and pain. But the term "violence" extends beyond actual bodily injury; it becomes an abstraction, and eventually that abstraction may become a repository for all we find repulsive, transgressive, or simply sufficiently annoying. Paradoxically, all the talk about violent crime has not produced sufficient critical analysis of what we classify as violent. Fears persist, and we are presently ill-equipped to disentangle understandable concern for bodily safety from irrational fear, prejudice, or thoughtless punitiveness. We need to think more carefully about what we mean by violence, and what it is that we find objectionable in it. Criminal law reform requires us to take violence seriously.

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13. The argument here is not that there are no "facts" of life (or of human bodies). *Cf.* JUDITH BUTLER, BODIES THAT MATTER: ON THE DISCURSIVE LIMITS OF "SEX" ix-xi (1993). Instead of reducing violence to an entirely contingent and constructed category, I want to emphasize its dualism. In thinking about violence, we are always moving between matter and mind.

14. *See, e.g.*, DOUGLAS HUSAK, OVERCRIMINALIZATION: THE LIMITS OF THE CRIMINAL LAW (2008); William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505 (2001).

To begin that task, this Article surveys conceptions of violence in several areas of criminal law. Criminal law was once a common law field, where abstract claims of reason and judicial intuitions mattered explicitly, but is now primarily statutory, with more emphasis on the semantic details of particular statutes. Of course, common law principles influence modern penal codes, and the common law tradition can help reveal the conceptual underpinnings of existing law. Two common law categories examined in Part I—"crimes against the person" and *mala in se* crimes—overlap substantially with common understandings of violent crime, and these categories illustrate the physical and normative dimensions of violence. But conceptions of violent crime are not necessarily consistent across time or even in a given era. Part II studies several specific substantive offenses to show how the criminal law's treatment of physical injury has varied with time and context. Part III turns from substantive offenses to sentencing law, examining in detail several federal sentencing provisions that (re)define violent crime to include risky conduct. For many years, these federal provisions fueled a rapid expansion in the kinds of crimes labeled violent; recent Supreme Court decisions may have stopped that expansion and reclaimed a narrower definition of violence. In Part IV, I consider likely implications of all these variable conceptions of violence. Because physical violence is widely feared and deeply condemned, the prospect of it helps legitimate the state's exercise of coercive power through the criminal justice system. But because we are inconsistent—and increasingly profligate—in using the label *violence*, we sustain an ever more punitive criminal law even as it fails to prevent many incidents of actual physical harm.

I. COMMON (LAW) VIOLENCE

To answer the question, *what is a violent crime*, it would help to know what kind of question it is. The inquiry may be one of positive law, or of statutory interpretation. But it also seems to invite explorations in normative legal theory, philosophy, and political theory, among other disciplines. And when courts or legislatures consider what counts as violence, they rely either implicitly or explicitly on conceptual constructs. Even if the definition of violence is a question of positive law, one can and should ask about the conceptual and normative presuppositions that underlie the positive law. Statutory definitions of the term "violent crime" will be explored in Part III, but first, it is useful to consider what modern conceptions of violent crime have inherited from the common law.

The crimes traditionally characterized as violent, such as murder, rape, and assault, fall within two overlapping common law categories. First, violent crimes are those that were classified as "crimes against the person" at common law, and second, violent crimes are those most often and easily identified as *mala in se*. These two categories, I suggest, illu-

minate two features of violence that have often been emphasized across various disciplines: its association with the physical vulnerabilities of the human body, and its association with violation or wrongfulness.

A. Crimes Against the Body

The common law category of crimes against the person survives in many modern criminal codes, and some courts have explicitly equated this category with violent crime.[15] In the past and today, the phrase crimes against the person has referred to offenses involving the use or threat of physical force, such as murder, rape, and battery.[16] In short, crimes against the *person* are crimes against the *body*. It is a curious phraseology, for beyond the criminal law, the legal conception of personhood is decidedly disembodied. A legal person is simply an entity with rights and duties.[17] Corporations can be legal persons, as can governments; a legal person need not be made of flesh and blood. But neither a corporation nor a government can be a victim of the offenses typically classified as crimes against the person.[18] In the specific domain of criminal law, the term "person," when used to refer to a target of crime, refers to the human body.[19]

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15. *See, e.g.*, Begay v. United States, 553 U.S. 137, 144–48 (2008); State v. Francis, 554 So. 2d 257 (La. Ct. App. 1989); *cf.* United States v. Taylor, 64 M.J. 416, 420–23 (C.A.A.F. 2007) (dissenting opinion).

16. *See* BLACK'S LAW DICTIONARY 401 (8th ed. 2004) (defining "crimes against persons" as the "category of criminal offenses in which the perpetrator uses or threatens to use force"); *see also* 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND *205–19 (listing murder, mayhem, forcible abduction and marriage, rape, sodomy, assault, battery, wounding, false imprisonment and kidnapping as crimes against the person); 2 WAYNE R. LAFAVE, SUBSTANTIVE CRIMINAL LAW §§14–18 (2d ed. 2003). As discussed in more detail below, the threat of injury is often sufficient to constitute a "crime against a person." Moreover, neither wounding nor pain is necessary for a crime against the person; crimes of physical restraint, such as kidnapping and false imprisonment, were and are crimes against the person.

17. *See* Bryant Smith, *Legal Personality*, 37 YALE L.J. 283, 283 (1928) ("To be a legal person is to be the subject of rights and duties."). For a more recent discussion (but one that reflects relatively little change in the legal concept of personhood), *see* Jessica Berg, *Of Elephants and Embryos: A Proposed Framework for Legal Personhood*, 59 HASTINGS L.J. 369 (2007).

18. Thus a corporation can be a perpetrator of homicide, but not a victim of it. In *People v. Ebasco Servs., Inc.*, 354 N.Y.S.2d 807 (1974), a state court considered a statute that provided, "'A person is guilty of criminally negligent homicide when, with criminal negligence, he causes the death of another person.'" 354 N.Y.S.2d at 810 (quoting N.Y. PENAL LAW § 125.10 (1965)). Another provision of New York's homicide law provided, "'"Person," *when referring to the victim of a homicide*, means a human being who has been born and is alive." *Id.* (quoting N.Y. PENAL LAW §125.05(1) (1970)). In *Ebasco*, the corporate defendant asserted that it was not a person for purposes of the homicide statute and so could not be guilty of homicide. The court rejected the argument: "[T]he statute . . . equates 'person' with human being only in regard to the victim of the homicide. This statute does not require that the person committing the act of homicide be a human being . . . ." *Id.* at 810–811.

19. Each of the two meanings of *person*—the embodied human, and the not-necessarily-embodied legal agent—has a long historical pedigree. Conceptions of legal personhood were developed at least by the seventeenth century. *See generally*, THOMAS HOBBES, LEVIATHAN (1651). But in eighteenth century America, persons-as-bodies crept into the Bill of Rights: the Fourth Amendment protects the right of the people "to be secure in their persons." U.S. CONST. amend. IV.

The category has both practical and conceptual significance. In some instances, crimes against the person (or "offenses against the person") may appear to be simply an organizational label—the title of a chapter of a penal code. In other circumstances, however, it is a concept whose precise parameters may play a role in the determination of legal outcomes. The definitions of some substantive offenses require a "crime against a person" as a predicate offense.[20] The category also sometimes determines the applicable evidentiary rules.[21] Additionally, sentencing decisions may turn on whether the offender has committed crimes against the person.[22] In these circumstances and others, whether a particular offense constitutes a crime against the person is more than a matter of labels.[23]

Moreover, as Stuart Green has argued, the labels we give to categories of crimes "can provide a window into the deeper moral and social content of specific offenses."[24] Green's observation is consistent with the call, made by Andrew Ashworth and others, for "representative labeling" in the substantive criminal law.[25] The argument is that the names and precise definitions of offenses should accurately reflect the moral or social harm of the defendant's conduct. To call a crime an offense "against the person" is to identify the harm of the offense as an injury to a human body.

Whatever the cause and consequences of classification, the offenses we choose to call crimes against the person tend to reflect the fact that humans live in flesh susceptible to a "thousand natural shocks"—and as many or more unnatural ones.[26] As the common law became codified, early criminal statutes often spelled out the different sorts of shocks in surprising detail. The United Kingdom's Offences Against the Person Act of 1861 lists dozens of separate ways to break the law by harming a human body: impeding a person endeavoring to save himself from ship-

20. *See, e.g.*, State v. Mahoe, 972 P.2d 287, 294–95 (Haw. 1998) (finding that harassment was a crime against the person and thus could serve as a predicate offense for a burglary statute that required "intent to commit . . . a crime *against a person or against property rights*") (emphasis in original).

21. *See, e.g.*, United States v. Taylor, 64 M.J. 416 (C.A.A.F. 2007).

22. See infra Part III.

23. *See* Stuart P. Green, *Prototype Theory and the Classification of Offenses in a Revised Model Penal Code: A General Approach to the Special Part*, 4 BUFF. CRIM. L. REV. 301, 323–24 (2000) (listing various consequences of the classification of a crime as one "involving danger to the person" or "against property").

24. *Id.* at 324.

25. *See* Andrew Ashworth, *Towards a Theory of Criminal Legislation*, 1 CRIM. L.F. 41 (1989); Jeremy Horder, *Rethinking Non-Fatal Offences against the Person*, 14 OXFORD J. LEGAL STUD. 335, 336–37 (1994).

26. The phrase is Shakespeare's, from Hamlet's expression of his wish to escape his vulnerable flesh:

> To die: to sleep;
> No more; and by a sleep to say we end
> The heart-ache and the thousand natural shocks
> That flesh is heir to, 'tis a consummation
> Devoutly to be wish'd.

WILLIAM SHAKESPEARE, HAMLET, act 3, sc. 1.

wreck; shooting with intent to harm; attempting to choke; maliciously administering poison; not providing apprentices or servants with food whereby life is endangered; causing bodily injury by gunpowder; setting spring guns with intent to harm; casting stone upon a rail car with intent to endanger a person therein; causing bodily harm by "furious driving"; and so on.[27] This specificity was common to early criminal codes, and it applied to sentencing as well as offense definition.[28]

As jurisdictions have moved from the narrowly defined offenses in early criminal codes to more general offenses, there have been opportunities to consider the broad interests implicated by offenses "against the person." Again, the United Kingdom provides a useful example: the Offences Against the Person Act has been subject to much criticism and many reform proposals, and both the proposed reforms and commentary on those reforms attempt to identify just what is at stake in a crime "against a person." Two key points emerge. First, as I have already suggested, it's about the (victim's) body. Jeremy Horder identifies "a number of mostly incommensurable values . . . attaching to the possession and integrity of body parts" that are infringed by these offenses.[29] Second, for some but not all offenses against the person, we care not only about the victim's body but also about the defendant's mind. The traditional understanding of crimes against the person is a category somewhat broader than violent crime. As a subset of the broader category, the term violence has been interpreted in Britain to require the *intentional infliction* of physical injury: in a violent crime, harm to the victim is not merely caused, but deliberately inflicted.[30] The view that violence requires an element of intention may be in some question today, as explored below in the discussion of modern crimes of risk and danger, but the U.S. Supreme Court's most recent interpretations of "violent crime" seem to reassert an intent requirement for violence.[31]

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27. Offences Against the Person Act 1861, 24 & 25 Vict., c.100 (U.K.).

28. Horder quotes a colorful excerpt from the laws of King Alfred that specifies different penalties for striking out another's eye depending on whether it remains in the victim's head, and five different penalties for striking off a toe, depending on which toe is severed. Horder, *supra* note 25, at 337. Echoing Jeremy Bentham, Horder notes the "manifest absurdity" of all these separate, narrowly defined offenses. "The country squire who has his turnips stolen, goes to work and gets a bloody law against stealing turnips. It exceeds the utmost stretch of his comprehension to conceive that the next year the same catastrophe may happen to his potatoes." *Id.* at 338 (quoting a manuscript by Bentham cited in GERALD J. POSTEMA, BENTHAM AND THE COMMON LAW TRADITION 264 (1986)).

29. Horder, *supra* note 25, at 344; *see also id.* at 347 (noting that under the principle of representative labeling, crimes against the person should be defined in a way that reflects the value at stake: "the value of the health and integrity of one's body and of one's bodily functions").

30. *See* John Gardner, *Rationality and the Rule of Law in Offences Against the Person*, 53 CAMBRIDGE L.J. 502, 504–06 (distinguishing crimes of violence from the broader category of crimes against the person, and emphasizing that violence requires the intentional infliction of injury).

31. *See infra* Part III.

On this account, crimes against the person reflect societal concerns with physical injuries, and violent crimes are a subsidiary group of crimes against the person that involve deliberate inflictions of physical harm. To be sure, physical injury is not the sole concern implicated by crimes against the person. Demonstrating, maybe, a view of the home as an extension of the person, both burglary and arson were classified as "special forms" of crimes against the person at common law.[32] And in another indication that *person* can mean more than *body*, the Offences Against the Person Act distinguishes offenses not only on the basis of the kind of injury, but also on the identity of the victim. Clergymen, magistrates, peace officers, grain-sellers, and seamen are protected by separate assault provisions.[33]

A more contemporary example provides one more illustration of the multiple meanings of the term person, and shows that those multiple meanings prevent crimes against the person from serving as a perfect corollary to violent crime. A U.S. military court recently classified adultery as a "crime against the person" of one's spouse.[34] Earlier military opinions had described adultery as a "violation of the marital bonds" but not a "crime against the person," but in *United States v. Taylor*, the Court of Appeals for the Armed Forces cited the policy rationales for the spousal privilege to justify adoption of a broader understanding of the term "person."[35] In doing so, the court acknowledged the dissent's argument that this interpretation was at odds with the traditional equation of crimes against persons with crimes of violence.[36] But as we have seen, *person* is not universally a reference to the physical body. Of course, we need not go all the way to corporate personhood to think of adultery as a crime against the person of the spouse. If we adopt a conception of personhood that recognizes the noncorporeal dimensions of individual identity, adultery can be understood to wrong the person even if it does not inflict physical pain upon, or even involve any physical contact with, the wronged spouse. (Indeed, perhaps adultery is a failure to make the right kind of physical contact.) To adopt such a theory would expand significantly the

32. John Poulos, *The Metamorphosis of the Law of Arson*, 51 MO. L. REV. 295, 324 (1986); *see also* BLACKSTONE, *supra* note 16, at *220. Under federal sentencing law in the United States, burglary is characterized as a violent crime. *See infra* Part III.

33. *See* Offences Against the Person Act 1861, 24 & 25 Vict., c.100 (U.K.), §§36–40.

34. United States v. Taylor, 64 M.J. 416, 417 (C.A.A.F. 2007). In his trial for adultery, Sergeant Jason Taylor, who had confessed his infidelity to his wife, sought to exclude her testimony of the confession. *Id.* at 416. The Military Rules of Evidence recognize a marital communications privilege which one spouse may invoke to prevent the other from testifying, but this privilege does not apply in a prosecution for "a crime against the person or property of the other spouse." *Id.* at 417.

35. *Id.* at 419–20.

36. *Id.* at 420; *see also id.* at 421 ("In my view, the common and approved usage of [the language] 'crimes against the person of the other spouse' . . . refers to crimes of violence against that spouse . . . . [T]his construction is in accord with the long-standing recognition in criminal law that crimes 'against the person' refer to offenses of violence against a person.") (Ryan, J., dissenting).

category crimes against the person, and could lead to the classification of more crimes as violent.

While we're thinking about adultery, let's observe that even when crimes against the person are crimes against the body, the criminal law has distinguished among the various bodies that stand in need of legal protection. Once we look beyond homicide, crimes against the person seem to branch into crimes against male persons and those against females. A 1946 article on "Non-Homicide Offenses Against the Person" devotes forty-three of its eighty-eight pages to crimes explicitly defined in terms of women's bodies: abduction (of a female person), rape, abortion and "contraceptivism."[37] Elsewhere, this catalog of crimes against the person examines offenses that explicitly contemplate *male* victims: mayhem, or the malicious infliction of bodily injury that impedes the victim's ability to fight; and dueling.[38] Even ostensibly gender-neutral crimes such as assault and battery are subdivided into gender-specific applications such as wife-beating and hazing.[39]

These crimes against *gendered* persons lend some credence to the claim that there is no such thing as "the body"—the law perceives only male bodies and female bodies.[40] And similarly, perhaps there is no way to define a crime against a person, or a crime of violence, that avoids complicated intersections of moral judgments and assumptions about gender. Certainly discussions of rape and domestic violence regularly encounter these issues. But it is worth noting that courts and legislatures have often strived for a neutral, nonmoral definition of crimes against persons, even if they have strived in vain. The category of crimes against the person has often been explicitly distinguished from offenses against *morality* such as consensual sodomy, prostitution, or (setting aside the *Taylor* court) consensual adultery.[41] It is tempting to think that the right account of violence will lie beyond moral disagreement.[42] A gun, a bullet, a wound, a corpse:

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37. Rollin M. Perkins, *Non-Homicide Offenses Against the Person*, 26 B.U. L. REV. 119, 143-85 (1946).

38. *See id.* at 199-206. For more on mayhem, see *infra* Part II.A.

39. *See id.* at 121.

40. *Cf.* MOIRA GATENS, IMAGINARY BODIES: ETHICS, POWER AND CORPOREALITY 24 (1995) ("Discourses which employ this image of the . . . body assume that the metaphor of the human body is a coherent one, and of course it's not. At least I have never encountered an image of a human body. Images of human bodies are images of either men's bodies or women's bodies.").

41. *See, e.g.*, State v. Snedden, 73 P.3d 995, 996 (Wash. 2003) (noting trial court's finding that because indecent exposure did not involve physical injury, it was properly classified as a crime against morality rather than a crime against the person); *cf.* Leigh B. Bienen, *Defining Incest*, 92 NW. U. L. REV. 1501, 1503 (1998) (asking whether incest should be classified as an "offense against the person" or a "crime against morality").

42. Once again, the U.K.'s Offences Against the Person Act, and proposed reforms to it, provides an illustrative example. Some have proposed that the law should encompass mental injuries in addition to physical ones. But while even trivial physical contact may be criminal, the U.K. Law Commission and commentators have been reluctant to extend the criminal law to minor mental injuries such as distress or anxiety because under such a regime, "the possibility of judges and juries criminalizing

these seem concrete, factual categories. But as we walk along the Mobius strip, we soon find ourselves back in the contested territory of the normative.

B. Mala in se

It may be that our physical bodies are the subject of our strongest moral intuitions.[43] Among these intuitions, it seems, is a deep aversion to the infliction of physical pain or injury. H.L.A. Hart described human physical vulnerability as a "truism" that dictated the "minimum content" of law, suggesting that it would not make sense to have a legal system at all unless the laws sought first and foremost to protect our fragile bodies.[44] Not surprisingly, then, the crimes traditionally classified as violent also tend to be categorized as *mala in se*—acts that are wrong in themselves, independently of any statute or positive law.

Indeed, the historical origins of the *mala in se-mala prohibita* distinction lie in an effort to place limits on the power of human rulers to set the parameters of permissible conduct. In the fifteenth and sixteenth centuries, the distinction was invoked to identify offenses which the king could not grant specific subjects leave to disobey.[45] If an offense was *malum prohibitum*—wrong only because the king had prohibited it—the king could allow specific exceptions and license a subject to commit the otherwise prohibited conduct. But for *mala in se* offenses, the king bore no power to permit exceptions. A *malum in se* offense was a crime against the law of nature.[46] Think again of the distinctions we draw between empirical and normative: *mala in se* is clearly a normative concept, but it represents a kind of moral realism.[47] The inherent wrongness of some acts is asserted as a matter of fact; it is not a socially constructed or contingent circums-

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immorality *per se* would . . . be an unacceptable danger . . . ." Horder, *supra* note 25, at 350. In other words, to punish the infliction of *de minimis* physical injury is not understood as the criminalization of immorality, but to punish the infliction of mental distress would run into disfavored moralizing. The physical body, on this account, occupies the empirical, material world, in contrast to the moralized realm of the mind and emotions.

43. *See* GEORGE LAKOFF & MARK JOHNSON, METAPHORS WE LIVE BY (2d ed. 2003).

44. H.L.A. HART, THE CONCEPT OF LAW 190 (1961) ("[M]en are both occasionally prone to, and normally vulnerable to, bodily attack. . . . If men were to lose their vulnerability to each other there would vanish one obvious reason for the most characteristic provision of law and morals: *Thou shalt not kill.*").

45. A good source of historical background is the student note attributed to Herbert Wechsler. *See* Note, *The Distinction Between Mala prohibita and Mala in se in Criminal Law*, 30 COLUM. L. REV. 74 (1930); *see also* JEROME HALL, GENERAL PRINCIPLES OF CRIMINAL LAW (2d ed. 1960).

46. *See, e.g.*, WILLIAM HAWKINS, A TREATISE OF THE PLEAS OF THE CROWN 389 (Morton J. Horwitz & Stanley N. Katz eds., Arno Press 1972) (1721).

47. Moral realism is, roughly, the view that moral claims are claims of fact that can be true or false. *See, e.g.*, Peter Railton, *Moral Realism*, 95 PHIL. REVIEW 163 (1986); RUSS SHAFER-LANDAU, MORAL REALISM: A DEFENSE (2005).

tance but a reality that even the most powerful of humans cannot deny or alter.

With time, the terms *mala in se* and *mala prohibita* began to be used somewhat differently. For example, they have been used to distinguish between common law offenses (*mala in se*) and violations of statute (*mala prohibita*). Immigration courts often equate *mala in se* offenses with "crimes of moral turpitude" that render an alien deportable.[48] And sometimes, courts use the concepts as tools of statutory construction. Some courts have interpreted criminal statutes to require proof of a culpable mental state unless the *actus reus* of the statute involves *mala in se* activity, in which case courts are more willing to impose strict liability.[49] For one state court taking this approach, the two "classic examples" of *mala in se* conduct that can be punished in the absence of evidence of the defendant's actual mental state are felony murder and statutory rape.[50] True, the felony murder defendant may not have intended to kill, and the statutory rape defendant may have believed he was engaging in consensual sex with an adult woman. But on the theory that felonies, and extramarital sex, are inherently culpable conduct, courts have permitted criminal liability for felony murder and statutory rape. Of course, this argument for felony murder or statutory rape liability becomes much weaker if we are unconvinced that all modern felonies, or all extramarital sexual encounters, are in fact inherently blameworthy.[51]

There is little doubt that murder and rape as defined at common law (as intentional crimes) qualify as *mala in se*. In addition to murder and rape, the other crimes traditionally classified as violent—assault, battery, robbery—all appear regularly on lists of *mala in se* offenses.[52] And, to return to the original conception of *mala in se*, most of us would probably doubt the legitimacy of a king or government that declined to punish these things. As Hart put it, the prohibition of such conduct seems to be the "minimum content" of the substantive criminal law. Similarly, Andrew

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48. *See, e.g.*, *In re* Ajami, 21 I. & N. Dec. 949, 950 (B.I.A. 1999) ("Moral turpitude has been defined as an act which is per se morally reprehensible and intrinsically wrong or malum in se . . . .").

49. *See, e.g.*, Baker v. State, 377 So. 2d 17, 19 (Fla. 1979) ("Statutes which impose strict criminal liability, although not favored, are nonetheless constitutional, particularly when the conduct from which the liability flows involves culpability or constitutes malum in se as opposed to malum prohibitum."). A few courts use the terms somewhat differently—to these courts, whether a crime is *malum prohibitum* or *malum in se* is just a question of positive law. *See* State v. Lycett, 650 P.2d 487, 494 (Ariz. Ct. App. 1982) (holding that legislative choice to impose *mens rea* or not determines whether a crime is *malum prohibitum* or *malum in se*); State v. Walker, 195 S.W.3d 293, 298 (Tx. App. 2006) (equating "malum prohibitum" with public welfare offenses and declining to impose a mental state requirement on such a statute).

50. *Baker*, 377 So.2d at 19.

51. *See, e.g.*, Nelson E. Roth & Scott E. Sundby, *The Felony-Murder Rule: A Doctrine at Constitutional Crossroads*, 70 CORNELL L. REV. 446 (1985) (critiquing modern felony murder rule).

52. *See* LaFave, *supra* note 16, at § 1.6(b).

Ashworth observed that "crimes such as murder, rape and robbery are part of almost every modern criminal code, and indeed as *mala in se* they feed the dominant conception of criminal law."[53] To be sure, the category *mala in se* has traditionally extended much farther than violent crime. Blackstone and other commentators classified both crimes against the person and crimes against property as *mala in se*, and Blackstone also included perjury within the category.[54] But when contemporary scholars or courts need to cite examples of *mala in se* offenses, they nearly always name the same group of usual suspects: murder, rape, assault, and robbery.[55]

But we should not overstate the degree of consensus. Almost as soon as the *mala in se–mala prohibita* distinction appeared, it had its critics. In his comment on Blackstone's *Commentaries*, Jeremy Bentham mocked the latter's "acute distinction between *mala in se*, and *mala prohibita*: which being so shrewd, and sounding so pretty, and being in Latin, has no occasion to have any meaning to it: accordingly it has none."[56] More recent commentators have expressed similar sentiments.[57] The juxtaposition of Blackstone's appeals to the laws of nature and Bentham's staunch positivism reminds us again of the difficulties of fixing firmly an account of violent crime. Categories such as crimes against the person, and *mala in se* crimes, offer some initial insights into historical understandings of violence, but they also begin to suggest the instability of those understandings.

C. Between Body and Norm

The close association of violent crime with each of the common law categories discussed above illustrates two possible characteristics of violence: (intentional) physical restraint or injury to a human body, and the wrongfulness of such restraint or injury. Notably, the same two criteria

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53. Andrew Ashworth, *Conceptions of Overcriminalization*, 5 OHIO ST. J. CRIM. L. 407, 409 (2008).

54. *See* BLACKSTONE, *supra* note 16, at *vii, *137.

55. *See, e.g.*, Peck v. Dunn, 574 P.2d. 367, 369 (Utah 1978) (murder, rape, and kidnapping as examples of *malum in se* crimes); Commonwealth v. Penn, 61 Va. Cir. 25 (Va. Cir. Ct. 2003) (murder, rape, and robbery as "obvious examples" of *mala in se* crimes); Richard Delgado, *A Comment on Rosenberg's New Edition of The Hollow Hope*, 103 NW. U. L. REV. 147, 148 n.12 (2008) ("Examples of *mala in se* crimes include murder, rape, and battery.") (citing BLACK'S LAW DICTIONARY).

56. JEREMY BENTHAM, A COMMENT ON THE COMMENTARIES (1776), *reprinted in* THE COLLECTED WORKS OF JEREMY BENTHAM, at 3, 63 (J.H. Burns & H.L.A. Hart eds., 1977); *see also* Gov't of Virgin Islands v. Richards, No. F40/01, 2001 WL 1464765, at *4 n.5 (V.I. 2001) (noting that crimes may move between the categories *mala in se* and *mala prohibita* "as societal norms shift").

57. *See, e.g.*, Dan Kahan, *Ignorance of Law is an Excuse – But Only for the Virtuous*, 96 MICH. L. REV. 127, 151 (2007) ("It goes without saying that the line between prohibitum and in se will often be blurry. It should go without saying as well that drawing the line will often be a controversial and even politically perilous task for a court to undertake.").

have been the focus of a wide range of studies of violence outside of the context of criminal law. Neither criterion is universally accepted as a necessary element of violence, as demonstrated by references to "structural violence" and "psychological violence," neither of which need involve physical injury, and "legitimate violence," which is clearly defined to exclude wrongfulness. Still, the considerations of physicality and legitimacy are nearly always on the table when scholars undertake an account of violence, and the thinkers who would reject one of these criteria usually do so in order to focus more attention on the other.

Studies of violence proliferated in the United States in the 1960s and early 1970s, thanks to a confluence of violent events at home and abroad. The 1960s saw, on American soil, the assassinations of John F. Kennedy, Robert F. Kennedy, and Martin Luther King, Jr.; scores of physical and sometimes fatal clashes between political protesters and armed officials; the open advocacy of physical resistance by Black Panthers and other activists; and, finally, an increase in "ordinary," or not explicitly politically motivated, violent crime.[58] Reports of American conduct in Vietnam, including the My Lai massacre, drew further attention to physical violence. All of this took place at a time when the still-fresh memories of the Third Reich seem to have undermined the presumptions of legitimacy usually enjoyed by state authorities—or as Noam Chomsky put it then, restive Americans refused to "take their place alongside the 'good Germans' we have all learned to despise."[59] In this context, the word violence was more easily seen as a descriptive, empirical category of physical action rather than an inherently condemnatory term. Violence could be committed by state and nonstate actors alike, and it could be legitimate or illegitimate.[60]

For example, the National Commission on the Causes and Prevention of Violence (appointed by President Lyndon Johnson after the assassination of Robert Kennedy) defined violence as "the threat or use of force that results, or is intended to result, in . . . injury . . . [to] persons . . . or property," and the Commission explicitly declined to adopt a definition that included an "implicit value judgment."[61] The Commission hardly avoided value judgments, but it shifted them from the definition of violence to the concept of legitimacy, emphasizing the need to distinguish between legitimate and illegitimate violence. This particular Commission was the fourth presidential commission in five years to take up the problem of physical violence within the United States—the problem of "domes-

58. *See, e.g.*, MICHAEL W. FLAMM, LAW AND ORDER: STREET CRIME, CIVIL UNREST, AND THE CRISIS OF LIBERALISM IN THE 1960S (2005).

59. NOAM CHOMSKY, AMERICAN POWER AND THE NEW MANDARINS 368 (1969).

60. *See* HANNAH ARENDT, ON VIOLENCE (1968).

61. NAT'L COMM'N ON THE CAUSES AND PREVENTION OF VIOLENCE, TO ESTABLISH JUSTICE, TO INSURE DOMESTIC TRANQUILITY, 286 (1969).

tic violence" as that term was first used.[62] Physical conflict was all too familiar, and at least some of that conflict was associated with morally compelling challenges to racial and economic inequality. In this context, violence was not merely the stuff of foreign wars or the practice of psychopathic deviants. It was close to home; it was, in the words of H. Rap Brown, "as American as cherry pie."[63]

But even then, there were exceptions. Other commentators took precisely the opposite tack and emphasized illegitimacy, rather than bodily restraint or injury, as a necessary condition of violence.[64] In a 1968 essay, philosopher Newton Garver argued that "[v]iolence in human affairs is much more closely connected with the idea of violation than with the idea of force. What is fundamental about violence is that a person is violated."[65] Garver, and others influenced by Gandhian or Marxist thought, connected violence with illegitimacy or injustice—and illegitimacy with violence, so that an unjust state of affairs could be labeled "structural violence" whether it involved direct physical force or not. On this account, racism, poverty, and economic and educational inequalities are all "violent."[66] Other scholars agreed that the term violence should be reserved for conduct we wish to condemn, but proposed to limit it to wrongs that entailed physical harm.[67]

Such stark disagreements led the philosopher Robert Paul Wolff to declare the concept of violence "inherently confused" and a waste of time as a scholarly inquiry.[68] Perhaps, however, the same dualism that produces

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62. In 1964, the Warren Commission published its report on President Kennedy's assassination; in 1967, the President's Commission on Law Enforcement and Administration of Justice published a report on crime; and in 1968, the Kerner Commission published a report on civil disorders. The U.S. Constitution uses the phrase "domestic violence" to refer to internal riots or rebellions: "The United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against Invasion; and on Application of the Legislature, or of the Executive (when the Legislature cannot be convened) against domestic Violence." U.S. CONST. art. IV, § 4.

63. H. RAP BROWN, DIE, NIGGER, DIE!: THE POLITICAL AUTOBIOGRAPHY OF JAMIL ABDULLAH AL-AMIN (1969). Brown's phrase is startling, and memorable, because it evokes not just national pride but wholesomeness: it associates violence with a cozy domesticity.

64. For an overview of several such arguments, see Dempsey, *supra* note 9, at 307–09 (discussing "legitimist" accounts of violence).

65. Newton Garver, *What Violence Is*, THE NATION, June 24, 1968, at 819. Garver's claim is a conceptual one; it is probably not accurate as a historical or etymological claim. Whatever the present connection between violence and violation, the words entered the English language at considerable historical distance. "Violence" first appeared around 1290, via the French *violentia*, which was itself taken from Latin. "Violate" appeared around 1432, directly from the Latin *violare*. The Latin roots are probably related, but early English usages of violence and violate were quite distinct.

66. The use of the term "structural violence" to describe social injustices was popularized by Johan Galtung, *Violence, Peace, and Peace Research*, 6 JOURNAL OF PEACE RESEARCH 167, 171 (1969).

67. *See* Joseph Betz, *Violence: Garver's Definition and a Deweyan Correction*, 87 ETHICS 339 (1977). For a more recent defense of a "moralized" conception of violence, see Thomas Pogge, *Coercion and Violence*, *in* JUSTICE, LAW, AND VIOLENCE 65, 65–69 (James B. Brady & Newton Garver eds., 1991).

68. Robert Paul Wolff, *On Violence*, 66 J. PHIL. 601, 602 (1969).

these contradictory accounts of violence also gives violence its political potency. Perhaps what makes violence hard to define is precisely what makes it *worthy* of scholarly inquiry.

Consider violence as a lens through which to understand moral epistemology. Or, in more ordinary terms: pinch yourself. Physical pain is one way we distinguish reality from dreams or imaginings. More broadly, for each of us, simple bodily experiences such as hunger, fatigue, and pain represent reality—not the whole of reality, to be sure, but that part of reality about which we have the least doubt. In Elaine Scarry's words, "[t]o have pain is to have *certainty*."[69] Accordingly, the infliction of pain and other exercises of physical dominion over vulnerable bodies are powerful ways to construct reality. The subtitle to Scarry's well-known book *The Body in Pain* is *The Making and Unmaking of the World*, and her study of war and torture considers the ways in which those practices make, or unmake, the reality in which their victims live. Humans live in the world as embodied and physically vulnerable creatures. Those of us who enjoy regular physical comfort—those of us for whom the needs of the body are not at stake—may sometimes forget this, but an illness or accident is a quick reminder.

It seems likely that the certainty, the manifest reality, of bodily experience underlies accounts of violence that eschew legitimacy and focus only on physical force. Set aside questions of right or wrong, these accounts urge; let's first acknowledge our bodies and their vulnerabilities. But precisely because injury, pain, and ultimately, death are seemingly incontrovertible, the body is an especially effective medium through which to represent and reinforce contested moral or political claims. One might think of the apparatus of Kafka's penal colony, which literally writes the sentence of the condemned man on his bound body. After several hours, "[e]nlightenment comes to the most dull-witted. . . . Nothing more happens than that the man begins to understand the inscription . . . . You have seen how difficult it is to decipher the script with one's eyes; but our man deciphers it with his wounds."[70] In slightly (but only slightly) less direct ways, war, torture, and physical punishments can bring their own forms of "enlightenment."

The lesson, then, of this initial survey of violence is that at common law and beyond, the concept spans body and norm. References to violence typically bring to mind both the fact of bodily vulnerability and moral condemnation of those who would exploit that vulnerability. As appealing

69. SCARRY, *supra* note 12, at 13. More precisely, Scarry argues that "'having pain' may . . . be . . . the most vibrant example of what it is to 'have certainty,' while . . . 'hearing about pain' may exist as the primary model of what it is 'to have doubt.'" *Id.* at 4. It is certainly true that we sometimes doubt claims by others to be in pain, but I am not convinced that we are *more* inclined to doubt those claims than others we cannot verify.

70. Franz Kafka, *In the Penal Colony*, *in* THE COMPLETE STORIES 150 (Nahum Glazer ed., 1971).

as empirical definitions of violence may be to scholars, the word itself seems to bear normative implications. As we turn from broad criminal law categories to specific substantive offenses, we will continue to see these dual characteristics of violence at work.

II. CODIFYING/CLASSIFYING VIOLENCE

A. Murder, Mayhem, and Manly Sport

Murder may be the crime of crimes, the very paradigm of what a crime should be.[71] It also may represent what we fear most of violence. The victim's body is overcome, but that is not the worst of it. As Michael Oakeshott argued in interpreting Thomas Hobbes's phrase "fear of violent death," being killed intentionally by a fellow creature is far worse than simply dying of natural causes.[72] So intentional killing seems a good candidate for a *malum in se* act, a prelegal wrong that demands the criminal law's response. As mentioned above, Hart claimed that the prohibition and punishment of murder is the "minimum content" of the criminal law.

But notice: murder is not defined solely in terms of intentional killing, and it does not even always require an intentional killing. The lines between degrees of murder, between murder and manslaughter, or between murder and justifiable homicide in self-defense, are not obvious dictates of bodily necessity. They are constructed by the criminal law itself, and the law in turn by (sometimes contested) claims of tradition and culture.

Consider three moments in the law of murder and manslaughter. In the fourteenth century and fifteenth centuries, murder was a crime defined by stealth and secrecy—not necessarily by premeditation.[73] A sneak attack, or efforts to conceal the body after the crime, made a killing into murder. Even a killing "in the heat of passion" could be murder, if the victim were attacked from behind rather than confronted openly.[74] Today, stealth may

71. In the human rights field, it is commonly said that genocide is the "crime of crimes," and some early decisions by the International Criminal Tribunal for the Former Yugoslavia adopted a hierarchy of offenses with genocide at the top. An appeals chamber later rejected the hierarchy, but many commentators still urge the view that genocide is the crime of crimes. *See, e.g.*, William A. Schabas, *Genocide, Crimes Against Humanity, and Darfur: The Commission of Inquiry's Findings on Genocide*, 27 CARDOZO L. REV. 1703, 1716–17 (2006). Those who characterize genocide as the crime of crimes often describe it as a particularly egregious form of murder. *See id.* at 1716 ("The argument that genocide is more serious than crimes against humanity, in the same sense that premeditated murder is more serious than intentional murder, has been widely accepted over the years. Genocide requires proof of intent to destroy an ethnic group . . . ."). *Cf.* Harry V. Ball & Lawrence M. Friedman, *The Use of Criminal Sanctions in the Enforcement of Economic Legislation: A Sociological View*, 17 STAN. L. REV. 197, 207 n.39 (1965) ("The ideal type of traditional, nonregulatory, noneconomic crime is 'murder.'").

72. *See* Michael Oakeshott, *Letter on Hobbes*, reprinted in 29 POL. THEORY 834 (2001).

73. *See* THOMAS A. GREEN, VERDICT ACCORDING TO CONSCIENCE: PERSPECTIVES ON THE ENGLISH CRIMINAL JURY TRIAL 1200–1800, 51–57 (1985).

74. *See id.* at 57.

be an element of some definitions of murder, but it is certainly not a necessary condition or the differentiating factor between murder and manslaughter.[75]

A second way to draw the distinction between murder and manslaughter, one much more familiar to us than the emphasis on stealth, is the common law provocation doctrine. By the seventeenth century, a killing that would otherwise be murder would be classified as manslaughter if it was committed "in the heat of passion," immediately following adequate provocation and absent any chance for the defendant to cool off.[76] The common law took a categorical approach to adequate provocation: defendants had to show that their passion was inflamed by a triggering event that fit within a recognized form of provocation. Discovering one's wife in infidelity was the classic form of provocation, but a physical attack or false arrest could also qualify.[77]

In a third iteration of the murder–manslaughter distinction, provocation was replaced by some American jurisdictions in the twentieth century with a related but more flexible inquiry into "extreme emotional distress."[78] Inspired by the Model Penal Code, these jurisdictions permitted juries to consider manslaughter charges even in the absence of the standard categories of provocation recognized at common law.[79]

At different times, then, the law's evaluation of fatal violence has varied. But even within a given historical moment, these mechanisms for distinguishing murder from manslaughter have been the subject of controversy. Common law provocation doctrine has been criticized as a shield for male violence, especially violence toward women.[80] But the reform of provocation law has yielded mixed results; some research suggests that the modern "extreme emotional disturbance" approach may exempt from criminal liability even more violence against women than did the traditional provocation doctrine.[81] Whatever the merits of these critiques, the key

75. Many state homicide statutes include "lying in wait" as a factor distinguishing first degree murder from lesser degrees. In addition, a few American jurisdictions identify lying in wait as one basis of eligibility for the death penalty. *See* H. Mitchell Caldwell, *The Prostitution of Lying in Wait*, 57 U. MIAMI L. REV. 311, 324 (2003).

76. *See, e.g.*, JEREMY HORDER, PROVOCATION AND RESPONSIBILITY 23–42 (1992).

77. *See, e.g.*, Donna K. Coker, *Heat of Passion and Wifekilling: Men Who Batter/Men Who Kill*, 2 S. CAL. REV. L. & WOMEN'S STUD. 71, 72 (1992) (adultery as "*the* paradigm example of provocation").

78. *See* Victoria Nourse, *Passion's Progress: Modern Law Reform and the Provocation Defense*, 106 YALE L.J. 1331, 1339–40 n.52 (1997) (describing the Model Penal Code approach).

79. *See id.*

80. *See, e.g.*, HORDER, *supra* note 25; Emily L. Miller, *(Wo)manslaughter: Voluntary Manslaughter, Gender, and the Model Penal Code*, 50 EMORY L.J. 665 (2001). But some historical research suggests that wives who killed their husbands were at least as likely as male killers to be subject to reduced criminal liability. *See* Carolyn B. Ramsey, *Intimate Homicide: Gender and Crime Control, 1880–1920*, 77 U. COLO. L. REV. 101 (2006).

81. Nourse, *supra* note 78, at 1332 ("[R]eform challenges our conventional ideas of a 'crime of passion' and, in the process, leads to a murder law that is both illiberal and often perverse."). Nourse

point is that the lines between murder and manslaughter are historically and geographically contingent, and, at particular moments, deeply contested.[82]

Sometimes, murder extends even more broadly than intentional killing, and here too there is often disagreement over the lines drawn by homicide law. Almost every U.S. state has a felony murder rule that permits a murder conviction for unintentional killings that occur while the defendant is committing a felony.[83] These rules are the persistent target of academic criticism, usually on the ground that a felony murder conviction imposes punishment and condemnation in excess of a hapless defendant's culpability.[84] Gerard Lynch has argued that the intense debates over the legitimacy of felony murder stem from the use of the label "murder" and the possibility of capital punishment for the crime.[85] If jurisdictions abandoned the language of felony murder and instead provided that an accidental death in the course of a felony would increase the sentence, Lynch suggests, much of the controversy would disappear.[86] Lynch is probably right that this change would quiet many critics of the felony murder rule, but the change would also likely produce a new round of criticisms. Now that felony murder is longstanding tradition, there are many commentators determined to defend its status *as* murder.[87] It seems likely that Guyora Binder is correct that "there can be no universally valid answer to the question of the justice of 'the' felony murder rule," given that felony murder rules "work in conjunction with other rules of criminal liability to map a particular society's moral intuitions about violence and malice."[88] The felony murder rule and the murder–manslaughter distinction are hardly the only possible illustrations of the historical and political contingencies of murder law. Similar points could be made regarding the definitions of

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presents an empirical study that suggests that under the more flexible MPC approach, men who kill women have been able to reduce murder charges to manslaughter in circumstances where the defendant's emotional disturbance was triggered by the woman's decision to leave him.

82. As Nourse puts it, provocation doctrine "is in extraordinary disarray," and "a case classified as manslaughter in one jurisdiction is just as easily defined as murder in another . . . ." *Id.* at 1341. Susan Estrich has argued that these inconsistencies and other political disputes allow defendants to "get[] away with murder." SUSAN ESTRICH, GETTING AWAY WITH MURDER: HOW POLITICS IS DESTROYING OUR CRIMINAL JUSTICE SYSTEM (1998). Estrich's title only underscores the issue: if the precise content of the category "murder" were obvious and undisputed, the defendants that Estrich would like to see in prison would probably be there.

83. *See* JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW §31.06 (5th ed. 2009) (identifying Hawaii, Kentucky, and Michigan as the exceptional states without a felony murder rule).

84. *See, e.g.*, Roth & Sundby, *supra* note 51.

85. *See* Gerard E. Lynch, *Towards a Model Penal Code Second (Federal?): The Challenge of the Special Part*, 2 BUFF. CRIM. L. REV. 297, 303-05 (1998).

86. *See id.*

87. *See, e.g.*, David Crump & Susan Waite Crump, *In Defense of the Felony Murder Doctrine*, 8 HARV. J. L. & PUB. POL'Y. 359 (1985).

88. Guyora Binder, *The Origins of American Felony Murder Rules*, 57 STAN. L. REV. 59, 207 (2004)

separate degrees of murder, or the rules that distinguish murder from justifiable homicide.[89]

What of lesser injuries—assault, wounding? The cultural contingency of our conceptions of violence is similarly evident in the criminalization of conduct that injures but does not kill. A vivid illustration of the point can be found in the legal evolution of mayhem. Mayhem is the root of the modern term "maim," and at common law, the crime of mayhem involved the same kind of disfiguring injury that today we would call maiming. But the precise description and rationale for the common law crime is of interest: Mayhem was

> the violently depriving another of the use of such of his members, as may render him the less able in fighting, either to defend himself, or to annoy his adversary. And therefore the cutting off, or disabling, or weakening a man's hand or finger, or striking out his eye or foretooth, or depriving him of those parts, the loss of which in all animals abates their courage, are held to be mayhems.[90]

Mayhem was a wounding that interfered with a man's ability to fight, and the most serious mayhem was castration—the depriving of those parts necessary for courage. Moreover, though mayhem was classified as an offense against the person, the crime was apparently first understood as a violation of the king's entitlement to the bodies of his subjects.[91] To commit mayhem was to damage a potential soldier of the king.

Today, maiming is an independent offense in only a few jurisdictions, and where it survives, it is defined without reference to military interests or the victim's fighting prowess.[92] But the rationale for the offense is still framed in terms of the state's interest, not the victim's: the prohibition of maiming recognizes the state's interest in "the preservation of the natural completeness and normal appearance of the human face and body . . . ."[93] It is important to frame the protected interest as one belonging to *the state* because consent is not a defense to maiming.[94] In fact, the next frontier of maiming law will likely involve disputes over individuals' ability to secure

89. *See* David Crump, *"Murder, Pennsylvania Style": Comparing Traditional American Homicide Law to the Statutes of Model Penal Code Jurisdictions*, 109 W.VA. L. REV. 257, 264 (2007) (arguing that the premeditation-deliberation formula used by many states to distinguish first degree murder is "vague, indeterminate, and shifting"); Darrell A.H. Miller, *Guns as Smut: Defending the Home-Bound Second Amendment*, 109 COLUM. L. REV. 1278, 1341-50 (2009) (presenting evidence that self-defense doctrine is deeply unsettled and contested).

90. *See* BLACKSTONE, *supra* note 16, at *205-06.

91. *See* LAFAVE, *supra* note 16, at §16.5(a).

92. *See* Annemarie Bridy, *Confounding Extremities: Surgery at the Medico-ethical Limits of Self-Modification*, 32 J.L. MED. & ETHICS 148, 153 (2004).

93. LAFAVE, *supra* note 16, at §16.5(b).

94. The issue has not been litigated in the United States recently, but a 1961 state court opinion rejected a claimed defense of consent. State v. Bass, 120 S.E.2d 580, 586 (N.C. 1961).

elective surgical modifications.[95] Thus the past and present of mayhem/maiming reveals changing conceptions of violence and its wrongfulness. What was once an affront to the king's military interests is now an affront to a public interest in "natural completeness" and "normal appearance."

Whether or not social interests in "normal appearances" are held to trump individual preferences for alteration, the principle that a victim's consent does not vitiate the offense is typical for crimes involving bodily injury.[96] A few exceptions, however, remind us again that crimes against the person are often crimes against gendered persons. First, the victim's lack of consent is usually a necessary element of sexual assault, as discussed in further detail in Part II.B. Second, there is a considerable jurisprudence concerning "manly diversions" or "manly sport"—physical combat in the context of consensual competitive activity.[97]

From the boxing ring to the soccer pitch, from ancient duels to modern street ball, physical contests have produced physical injuries, criminal prosecutions, and claims of consent. A few patterns emerge from those cases. For example, a defendant is most likely to be subject to assault charges if his harmful acts broke the accepted rules of the sport.[98] The extent of the injury can also determine the likelihood that a court will accept a consent defense. According to one nineteenth century source, maiming was the threshold beyond which consent was irrelevant: "Every one has a right to consent to the infliction upon himself of bodily harm not amounting to a maim."[99] This could produce absurd results, as one British opinion notes: consent is a valid defense to charges for cutting off someone's nose, since one's nose can't be used as a weapon, but consent is no defense for the knocking out of a tooth, as the ability to bite is presumably useful in a fight.[100]

Though there are some patterns in the jurisprudence of sports violence, there are also notable inconsistencies. The general likelihood that the activity will cause injury (as opposed to the severity of a specific in-

95. *See* Bridy, *supra* note 92.

96. *See* Vera Bergelson, *The Right to Be Hurt: Testing the Boundaries of Consent*, 75 GEO. WASH. L. REV. 165, 173–83 (2007) (discussing the general rule against consent as defense, and exceptions to it, in U.S. criminal law).

97. The concept of "manly diversions" appeared in a famous British opinion on prizefighting, *R v. Coney*, (1882) 8 Q.B.D. 534, which recognized that participants' consent to engage in sporting events protected one another from assault charges so long as they abided by the rules of the sport, but rejected prize-fighting as a legitimate sport.

98. *See, e.g.*, People v. Jones, 346 N.E.2d 389, 390 (Ill. App. Ct. 1976); *see also* Jack Anderson, *Citius, Altius, Fortius? A Study of Criminal Violence in Sport*, 11 MARQ. SPORTS L. REV. 87, 94–97 (2000); Jeff Yates & William Gillespie, *The Problem of Sports Violence and the Criminal Prosecution Solution*, 12 CORNELL J.L. & PUB. POL'Y 145 (2002).

99. JAMES FITZJAMES STEPHEN, DIGEST OF THE CRIMINAL LAW, art. 206 (1883).

100. *See* R v. Brown, [1994] 1 A.C. 212 (H.L.) 262 (appeal taken from Eng.).

jury) appears to be "more or less legally irrelevant."[101] Instead, courts consider the "social utility" and public acceptance of the activity.[102] British law prohibits prize-fighting but allows professional boxing; the distinction, apparently, is that boxers are bound by the famous Queensberry rules while prize-fights are unregulated free-for-alls.[103] As many commentators have noted, though, the precise reasons that the courts have given for prohibiting prize-fighting could easily be applied to boxing as well. "For money, not recreation or personal improvement, each boxer tries to hurt the opponent more than he is hurt himself, and aims to end the contest prematurely by inflicting a brain injury serious enough to make the opponent unconscious . . . ."[104] In permitting boxing, courts simply "mak[e] a value-judgment, not dependant upon any general theory of consent . . . ."[105] Of course, most, if not all, decisions about the scope of the substantive criminal law will require value judgments, but the importance of value judgments may be especially acute when the question concerns violence.

B. Sex and/or Violence

What I have been arguing about murder and assault—that to a substantial degree, the perceived wrong of these offenses is a contested construction, reflected in changes in the substantive offense definition—is even more evident in the law of rape. Though rape has long been understood as both a crime against a person and a *malum in se* offense, our understanding of which individual is wronged by rape, and of the nature of that wrong, has shifted with time. There is a tremendous literature on the ways in which rape law has been and continues to be shaped by social and cultural understandings of gender, sexuality, marriage, morality, and property.[106] Over the past thirty or more years, rape has received substantial at-

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101. Cheryl Hanna, *Sex Is Not A Sport: Consent and Violence in Criminal Law*, 42 B.C. L. REV. 239, 249 (2001).

102. *Id.* at 250; *see also* Anderson, *supra* note 98, at 92–93. Hanna discusses Regina v. Bradshaw, 14 Cox C.C. 83 (1878) (Eng.), which involved a "'friendly game of football'" in which the defendant charged at a player on the opposing team and kneed him in the stomach. The victim died of a ruptured intestine. The court acquitted the defendant, noting: "'No doubt the game was, in any circumstance, a rough one; but [the court] was unwilling to decry the manly sports of this country, all of which were no doubt attended with more or less danger.'" Hanna, *supra* note 99, at 250–51 (quoting Regina v. Bradshaw, 14 Cox C.C. 83, 84–85 (1878) (Eng.)). As Hanna notes, "To criminalize football in England would have been absurd and unimaginable." *Id.* at 250.

103. *See* Sen. John McCain & Ken Nahigian, *A Fighting Chance for Professional Boxing*, 15 STAN. L. & POL'Y REV. 7, 9–10 (2004).

104. *Brown*, 1 A.C. at 265.

105. *Id.*; *see also* Neil Papworth, *Boxing and Prize-Fighting: The Indistinguishable Distinguished?*, 2 SPORT & L.J. 5 (1994).

106. *See, e.g.*, SUSAN BROWNMILLER, AGAINST OUR WILL: MEN, WOMEN AND RAPE 376 (1975) (arguing that the law of rape is "rooted still in ancient male concepts of property"); SUSAN ESTRICH, REAL RAPE 29–56 (1987) (discussing distrust of women in common law of rape); *id.* at 57–79 (ar-

tention in academic commentary, legislative reform, and public advocacy and education.[107] Here, I leave aside many important and still unsettled questions about rape law to focus on two issues of force and violence. Specifically, I consider the elimination of requirements of physical force or physical resistance from the legal definition of rape, and the debate over whether rape is better described as a crime of sex or one of violence.[108] Together, these developments illustrate the extent—and maybe, the limits—of the legal and cultural construction of violence.

At common law, rape was unquestionably a violent crime—when it was a crime. Physical force was an element of the offense, which was typically defined as "carnal knowledge of a woman forcibly and against her will."[109] Many jurisdictions required proof of the victim's "utmost" physical resistance to prove the separate element of nonconsent.[110] If anything, the resistance requirement may have rendered those rapes that were visible to the law even more violent than they otherwise might have been.[111] Given this legal understanding, nonconsensual sex that did not leave the victim bloodied and bruised was not necessarily recognized as an offense at all.

In the United States, a central platform of rape law reform was the abolition of force and resistance requirements from rape statutes.[112] The ad-

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guing that modern law continues to distrust women complainants, albeit through different doctrinal devices); Anne M. Coughlin, *Sex and Guilt*, 84 VA. L. REV. 1 (1998); Jill Elaine Hasday, *Contest and Consent: A Legal History of Marital Rape*, 88 CAL. L. REV. 1373 (2000).

107. One recent commentator claims that "no serious crime has received as much attention from legal reformers[] as rape." Samuel H. Pillsbury, *Crimes Against the Heart: Recognizing the Wrongs of Forced Sex*, 35 LOY. L.A. L. REV. 845, 853 (2002).

108. There are, of course, many other important components of efforts to rehaul rape law. For more comprehensive overviews than I offer here, see Richard Klein, *An Analysis of Thirty-Five Years of Rape Reform: A Frustrating Search for Fundamental Fairness*, 41 AKRON L. REV. 981 (2008); Cassia C. Spohn, *The Rape Reform Movement: The Traditional Common Law and Rape Law Reforms*, 39 JURIMETRICS J. 119, 124 (1999).

109. BLACKSTONE, *supra* note 16, at *210. Until the 1950s, most U.S. jurisdictions defined rape in language identical or very similar to Blackstone's. *See* STEPHEN SCHULHOFER, UNWANTED SEX: THE CULTURE OF INTIMIDATION AND THE FAILURE OF LAW 18 (1998).

110. One of the most striking, and most cited, statements of the resistance requirement comes from a 1906 opinion of the Wisconsin Supreme Court: "[T]here must be the most vehement exercise of every physical means or faculty within the woman's power to resist the penetration of her person, and this must be shown to persist until the offense is consummated." Brown v. State, 106 N.W. 536, 538 (Wis. 1906).

111. *See* Spohn, *supra* note 108. The requirement does seem to invite bloody conflict: for example, a New York court reversed a conviction for rape of a victim who had been threatened with a box cutter, then choked by the defendant, because the woman failed to "oppose[] the man to the utmost limit of her power." People v. Hughes, 343 N.Y.S.2d 240, 242 (N.Y. App. Div. 1973). But the resistance requirement still has some defenders. *See* Michelle J. Anderson, *Reviving Resistance in Rape Law*, 1998 U. ILL. L. REV. 953, 958–59 (1998) (arguing that victim's resistance can be effective deterrent to rape); Meredith J. Duncan, *Sex Crimes and Sexual Miscues: The Need for a Clearer Line Between Forcible Rape and Nonconsenual Sex*, 42 WAKE FOREST L. REV. 1087, 1102–03 (2007) (arguing for evidentiary value of resistance requirement).

112. *See* Spohn, *supra* note 108, at 124; *see also* People v. Barnes, 721 P.2d 110, 115–21 (Cal. 1986) (discussing abandonment of resistance requirement); Margaret A. Clemens, Note, *Elimination*

vocates of reform were more successful with the latter proposal than the former. Few if any jurisdictions still require proof of the victim's resistance, but many require proof of force or threat of force (unless the victim is unconscious).[113] Depending on how the jurisdiction defines force, a force element to rape may function as a de facto resistance requirement, especially in acquaintance rape cases: if the victim does not fight back against a nonstranger assailant, it will be difficult for the prosecution to establish that the defendant acted with the necessary force.[114] To reform advocates, the persistence of force requirements is a continuing flaw of rape law, and it would be better to define the offense in terms of the victim's nonconsent, without reference to the defendant's use of force.[115]

But at the same time that reform advocates were urging the elimination of resistance and force requirements, many of the reformers also argued that the crime should be understood in terms of violence rather than sex. "RAPE IS VIOLENCE NOT SEX!" proclaims educational literature from rape counselors, echoing the claims of several feminist scholars.[116] Several considerations motivated the emphasis on violence. Reformers wanted to shift attention from the victim (and her sexual history) to the perpetrator, and they wanted to combat the perception that rape was simply an overabundance of otherwise normal sexual passion.[117] They sought to highlight the similarities between rape and crimes such as murder, robbery, or assault—crimes about which few would ever suggest that the victim asked for it. And reformers wanted to remove some of the sexual shame that made it difficult for victims to speak publicly about rape.

Recall the dual dimensions of violence: it's about the body, and it's about wrongfulness. Arguments that rape is violence and not sex can be understood as part of a strategy to increase social condemnation of rape.

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of the Resistance Requirement and Other Rape Law Reforms: The New York Experience, 47 ALB. L. REV. 871 (1983).

113. *See* David P. Bryden, *Redefining Rape*, 3 BUFF. CRIM. L. REV. 317, 321–22 (2000); *id.* at 358, n. 161 (noting that the "utmost" resistance requirement has been "universally repealed").

114. *See id.* at 356; ESTRICH, *supra* note 106, at 60.

115. *See* SCHULHOFER, *supra* note 107.

116. *See* Pillsbury, *supra* note 107, at 943 n.284 (quoting material from the Rape Response & Crime Victim Center); *id.* at 882–85 (detailing the "rape is violence" literature and citing sources). The claim that rape is better understood in terms of violence than in terms of sex is usually traced to BROWNMILLER, *supra* note 104. For a discussion (and critique) of the claim that rape is not sexual, with a focus on assaults in prisons, see Alice Ristroph, *Sexual Punishments*, 15 COLUM. J. GENDER & L. 139 (2006).

117. As Andrea Dworkin noted, the claim that rape is violence rather than sex was (intentionally) a victim-centered perspective.

> When feminists say *rape is violence, not sex*, we mean . . . that from our perspective as victims of forced sex, we do not get sexual pleasure . . . ; contrary to the rapist's view, . . . rape is not a good time for us. This . . . is only half the story: because for men, rape and sex are not different species of event.

ANDREA DWORKIN, LETTERS FROM A WAR ZONE 179–80 (1989). *See also* Martha Chamallas, Lucky: *The Sequel*, 80 IND. L.J. 441, 461 (2005) (reviewing rationale for the argument that rape is violence and not sex).

Sex, which is also about the body, is (at least sometimes) good, while violence is always bad. Accordingly, the rape law reform movement never widely embraced Catharine MacKinnon's claim that "[r]ape is not less sexual for being violent."[118] MacKinnon explicitly questioned the dichotomy between sex and violence, suggesting that coercion might be "integral to male sexuality," and accordingly, "rape may even be sexual to the degree that, and because, it is violent."[119] Notably, MacKinnon's work is inspired by Marxist thought in several respects, and as noted above, Marxism is one important source of conceptions of violence as structural or institutional rather than directly corporeal.[120] With such a view of violence, MacKinnon could claim that "[w]omen are raped by guns, age, white supremacy, the state—only derivatively by the penis."[121]

For those who think of violence in terms of wrongs to the body, it was important to distinguish rape from (good) sex, and even from bad sex.[122] But the strategy has not been entirely successful; by some accounts, it has been a dramatic failure. And the disappointing consequences of the claim that rape is violence and *not* sex may show that there are limits to the degree to which we can deconstruct and reconstruct popular conceptions of violence. We walk the Mobius strip, and now find ourselves again confronting the materiality of the body and a notion of violence that demands blood, bruises, and broken bones.

The failure, if there is in fact a failure, of the rape is violence argument is this: when sexual encounters lack a blatant exercise of physical force to overpower the victim, fact-finders, prosecutors, judges, and even the participants tend not to believe that a rape has occurred.[123] Changes to rape law may have rendered "stranger rape" cases easier to prosecute, but the new laws appear to have little effect on the incidence and successful prosecution of coerced sex between acquaintances.[124] As Samuel Pillsbury puts it, "[a] sexual attack by a stranger [with] a gun or knife . . . matches many people's images of rape and violence. But forced sex incidents do

118. CATHARINE A. MACKINNON, TOWARD A FEMINIST THEORY OF THE STATE 173 (2d ed. 1991).
119. *Id.*
120. *See generally id.* at 3.
121. *Id.* at 173.
122. *See* Lynne Henderson, *Getting to Know: Honoring Women in Law and in Fact*, 2 TEX. J. WOMEN & L. 41, 59 (1993).
123. *See* Pillsbury, *supra* note 107, at 847–48 and especially sources cited in n.5; *see also* Donald Dripps, *After Rape Law: Will the Turn to Consent Normalize the Prosecution of Sexual Assault?*, 41 AKRON L. REV. 957, 971–73 (2008) (discussing a divergence between "elite opinion" and "popular opinion" as to what constitutes rape).
124. Several studies have found that changes to the substantive law of rape have made little difference in reporting, prosecution, and conviction rates. *See, e.g.*, CASSIA SPOHN & JULIE HORNEY, RAPE LAW REFORM: A GRASSROOTS REVOLUTION AND ITS IMPACT 77–105 (1992); Stacy Futter & Walter R. Mebane, Jr., *The Effects of Rape Law Reform on Rape Case Processing*, 16 BERKELEY WOMEN'S L. J. 72, 83–85 (2001); Spohn, *supra* note 106, at 128–30.

not play out this way . . . ."[125] To be sure, some who have resisted the rape is violence claim have also demonstrated skepticism about the concept of acquaintance rape itself, but there are others who condemn acquaintance rape but fear that to classify it as violent will skew the public perception of what counts as rape.[126]

Broadly, rape presents complicated questions about the relationship between bodies and mental states that are central to the concept of violence. I noted above that violence is usually understood as the intentional infliction of injury; we (usually) think there is a difference between being stumbled over and being kicked.[127] But rape statutes are notoriously circumspect as to what the defendant must intend.[128] Again, the easy case is one where the victim clearly refuses sex and the defendant intentionally overpowers her (or him).[129] What, though, of the defendant who makes a reasonable mistake about the victim's consent, or even an unreasonable one, or the defendant who is willfully blind, or indifferent, or negligent? In the realm of sexual encounters, there is considerable activity between kicks and stumbles.

And though rape law reformers sought to redirect attention from the victim's mental state to the defendant's, the victim's mental state continues to matter as well. Rape will inevitably raise the question of the relationship between violence and (non)consent. But consent is a mess that we have not figured out.[130] There are, to be sure, cases at the extremes that we confidently label consent or nonconsent, but a huge portion of human interaction falls between these poles. This is especially true of sexual interactions. Advocates for rape victims have, understandably and appropriately, emphasized that no means no. The focus on clear cases of nonconsent, however, leaves unaddressed the equally important, and perhaps more prevalent, problems of silence, ambiguous consent, or superficial

125. Pillsbury, *supra* note 107, at 879. Pillsbury goes on to argue that "our paradigmatic conception of rape, at least with respect to forced sex, cannot rest as heavily on violence as some recent reformers have insisted." *Id. See also* Christina E. Wells & Erin Elliott Motley, *Reinforcing the Myth of the Crazed Rapist: A Feminist Critique of Recent Rape Legislation*, 81 B.U. L. REV. 127, 151 (2001).

126. *See* Katharine K. Baker, *Sex, Rape, and Shame*, 79 B.U. L. REV. 663 (1999).

127. "[E]ven a dog distinguishes between being stumbled over and being kicked." OLIVER WENDELL HOLMES, JR., THE COMMON LAW 2 (Little, Brown & Co. ed., ABA Publishing 2009) (1881).

128. *See* Dana Berliner, *Rethinking the Reasonable Belief Defense to Rape*, 100 YALE L.J. 2687, 2691 (1991) ("Only a few jurisdictions indicate which level of intent suffices for a rape conviction. Most states simply fail to discuss levels of intent in rape cases."); Robin Charlow, *Bad Acts in Search of a Mens rea: Anatomy of a Rape*, 71 FORDHAM L. REV. 263, 272–82 (2002) (discussing statutes and case law to demonstrate "The Morass of *Mens rea* in American Rape Law").

129. Rape may be the best example of a crime against a gendered person, and we tend to imagine rape victims as female. This perception may be both the cause and effect of indifference to sexual assaults in prisons. *See generally* Ristroph, *supra* note 116.

130. *Cf.* Dripps, *supra* note 123, at 958 ("The turn to consent [in rape law] is essentially lawless, because there is no determinate and widely-shared understanding of what constitutes consent.").

consent.[131] And, of course, notwithstanding the slogan that no means no, fact-finders in particular cases continue to disagree about whether consent was clearly present, clearly absent, or somewhere in between.

Even assuming we agreed on what consent was and how to ascertain it, there remain disputes about whether violence requires nonconsent. The Supreme Court once explained that rape was a violent crime "because it normally involves force, or the threat of force or intimidation, to overcome the will and the capacity of the victim to resist."[132] But as we have already seen, there are many activities classified as violent irrespective of the alleged victim's will: murder, maiming, and most other inflictions of serious physical injury. In many of those cases, courts and commentators have held that consent is irrelevant precisely *because* the activity is violent.[133]

I identify these questions about the necessary elements of rape, and of violence, not to resolve them but to emphasize that they are and will likely remain unsettled. The ongoing struggles to define and prosecute rape illustrate the law's normative construction of violence—and the limits of legal construction. On some accounts, the failure to recognize forced sex or unwanted sex between acquaintances as rape is a manifestation of persistent gender bias. But it's not just a question of what we think about women. It's also a question of what we think about violence, and what we think *is* violence. Most seem to agree that a knife at the throat is violent; without the knife, we are not so sure.

C. Domesticated Violence

Domestic violence is not new, but it is (relatively) newly criminal. Beginning in the late 1960s, a concerted reform effort sought to bring the weight of criminal investigation, prosecution, and punishment on men who physically abused their intimate partners.[134] Central to this effort was an attempt to change social norms—not only expectations about marital relationships and gender roles, but also expectations about violence.[135] If the

131. *See* Ristroph, *supra* note 116, at 180–81; *see also* Doug Husak & George C. Thomas III, *Date Rape, Social Convention, and Legal Mistakes*, 11 L. & PHIL. 95, 122–25 (1992).

132. Coker v. Georgia, 433 U.S. 584, 597 (1977).

133. This argument was made in *R v. Brown*, a much scrutinized British decision concerning consensual homosexual sado-masochism. *See* R v. Brown, [1994] 1 A.C. 212, 235 (rejecting the argument that "the law should not punish the consensual achievement of sexual satisfaction" on the rationale that "sado-masochism is not only concerned with sex. [It] is also concerned with violence.").

134. *See generally* ELIZABETH M. SCHNEIDER, BATTERED WOMEN AND FEMINIST LAWMAKING (2000). Though early reformers placed the most attention on male violence against female partners, and though such violence still receives substantial attention, many have recognized that the problem of domestic violence encompasses child abuse, elder abuse, and against male victims, and that women can sometimes be the abusers rather than the abused.

135. On the history of a husband's prerogative to beat his wife, see Reva B. Siegel, *"The Rule of Love": Wife Beating as Prerogative and Privacy*, 105 YALE L.J. 2117 (1996).

prototypical crime in the popular imagination is one of violence, it is also one committed by a stranger—an unexpected encounter on a dark street, or a home invasion by an unwelcome intruder.[136] Here again, the popular conception is at odds with reported data. Bureau of Justice statistics (which, as noted above, define violent crimes as murder, rape, robbery, and assault) put the nationwide percentage of violent crimes committed by strangers at slightly less than 50%.[137] Were it not for robbery, the only one of these enumerated violent crimes typically committed by a stranger to the victim, the percentage would be far lower.[138] Nonetheless, the imagined criminal is a threatening stranger rather than a familiar face. To bring attention, and condemnation, to abuse within the home, violence needed to be domesticated.

The reform efforts achieved considerable success, though advocates emphasize that domestic abuse is a continuing problem and more work remains to be done. My aim here is not to evaluate the effects of law reform on incidents of violence or on arrest and conviction rates. Instead, domestic violence law—as it was, as it is, and as advocates think it should be—provides further illustrations of the contested and contingent parameters of violence. Here, as elsewhere in the criminal law, our intuitions about violence seem to begin with strong intuitions about the physical body and the wrongfulness of injury. But here, as elsewhere in the criminal law, the strength and content of common intuitions become more variable when the injured bodies are viewed in their broader social and political context.

Several aspects of domestic violence law are worth noting here. First, there is the matter of terminology, and the matter of the body: the framing of the problem as one of *violence*, *assault*, and *battering*. With those words, advocates drew attention to physical vulnerability and injury, and they could appeal to widely held intuitions about the wrongfulness of deliberately inflicted physical harm.[139]

Of course, as the discussion of assault law and *mala in se* crimes in Part I indicated, most deliberate inflictions of physical injury were illegal even before feminists began emphasizing the problem of domestic vi-

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136. *See* Frug, *supra* note 1, at 71.

137. Fed. Bureau of Investigation, *Crime in the United States*, UNIFORM CRIME REPORTS 18-23 (2004), *available at* http:// www2.fbi.gov/ ucr/ cius_04/ documents/ CIUS2004.pdf.

138. *See* Carissa Byrne Hessick, *Violence Between Lovers, Strangers, and Friends*, 85 WASH. U. L. REV. 343 (2007).

139. *See, e.g.*, LIZ KELLY, SURVIVING SEXUAL VIOLENCE 139 (1988) (discussing choice of terminology as effort to change normative expectations about what was acceptable); SCHNEIDER, *supra* note 134; Martha Minow, *Words and the Door to the Land of Change: Law, Language, and Family Violence*, 43 VAND. L. REV. 1665 (1990) (discussing importance of language in framing social and legal responses to abuse); Martha R. Mahoney, *Legal Images of Battered Women: Redefining the Issue of Separation*, 90 MICH. L. REV. 1, 6 (1991) ("We have had neither cultural names nor legal doctrines specifically tailored to [this] particular assault on a woman's body and volition . . . .").

olence. An early question for reformers, then, was how to make this particular form of injury visible to the law. To a substantial degree, reform efforts have focused on the procedural rules of the criminal justice system rather than substantive offense definitions. For example, jurisdictions abandoned the traditional rule that police could make a warrantless arrest for a misdemeanor only if the offense occurred in the officer's presence, and adopted new policies that permitted or even required arrests for incidents of violence that had occurred within the privacy of the home.[140] These policies sought to deny police the discretion to ignore claims of domestic abuse. Similarly, in many jurisdictions mandatory prosecution or "no-drop" policies curtailed prosecutors' power of declination.[141] And various changes to trial procedure were adopted in efforts to improve conviction rates once domestic violence cases were brought to court.[142]

None of these procedural changes has been uncontroversial, though the controversies do not always reflect disputes about the nature or normative status of violence. In many instances, critiques of procedural reforms in the domestic violence context are arguments about means rather than ends; critics question whether mandatory arrest and prosecution policies do in fact protect women from abuse and respect women's autonomy.[143] Of greater interest for purposes of this Article are the ways in which domestic violence advocacy has challenged conceptions of what constitutes the kind of violence that the law should condemn. We may learn much from the reformers' efforts to identify the specific substantive wrong that domestic violence law should seek to eliminate.

As noted above, many incidents of domestic abuse are violations of general criminal prohibitions such as assault, battery, or kidnapping, and such general statutes are widely used to prosecute domestic violence.[144] But some commentators have argued for the codification of a separate offense.[145] The harm of domestic violence, it is argued, is distinct from the harm perpetrated by an ordinary physical assault, or even a series of as-

140. *See* Alafair S. Burke, *Domestic Violence as a Crime of Pattern and Intent: An Alternative Reconceptualization*, 75 GEO. WASH. L. REV. 552, 559 (2007). As Burke notes, most domestic violence cases are prosecuted as misdemeanors. *See id.* at 582.

141. *See* Cheryl Hanna, *The Paradox of Hope: The Crime and Punishment of Domestic Violence*, 39 WM. & MARY L. REV. 1505 (1998).

142. *See* Burke, *supra* note 140, at 559–60.

143. *See, e.g.*, Linda G. Mills, *Killing Her Softly: Intimate Abuse and the Violence of State Intervention*, 113 HARV. L. REV. 550 (1999) (identifying and critiquing a range of mandatory intervention policies, and arguing for an alternative "survivor-centered" model); *see also* Linda L. Ammons, *Mules, Madonnas, Babies, Bathwater, Racial Imagery and Stereotypes: The African-American Woman and the Battered Woman Syndrome*, 1995 WIS. L. REV. 1003, 1015–16 (criticizing "essentialist" model of domestic violence).

144. *See* Cheryl Hanna, *No Right to Choose: Mandated Victim Participation in Domestic Violence Prosecutions*, 109 HARV. L. REV. 1849, 1889 (1996) (noting the applicability of general criminal prohibitions of violence to intimate abuse).

145. *See* Burke, *supra* note 140; Deborah Tuerkheimer, *Recognizing and Remedying the Harm of Battering: A Call to Criminalize Domestic Violence*, 94 J. CRIM. L. & CRIMINOLOGY 959 (2004).

saults, by a stranger. Generic criminal law "decontextualizes" violence by focusing on discrete transactions; in doing so, it "conceals the reality of an ongoing pattern of conduct occurring within a relationship characterized by power and control."[146] The call to codify domestic violence as a separate offense is a call to reconcile the criminal law with the understanding of domestic violence in other disciplines, such as sociology or feminist theory. Beyond the criminal law, "domestic violence is widely understood as an ongoing pattern of behavior defined by both physical *and non-physical* manifestations of power."[147] In other words, in this view domestic violence is not a uniformly and exclusively physical form of abuse. Even the inflictions of physical injury that do occur within a pattern of domestic violence may appear trivial if they are viewed in isolation from the larger pattern.[148]

Accordingly, proposals to codify an independent domestic violence offense draw upon RICO, the federal anti-racketeering statute, to criminalize a pattern of conduct rather than single episodic events. For example, Alafair Burke has proposed a crime of "Coercive Domestic Violence," which would occur when "[a] person attempts to gain power or control over an intimate partner" through "two or more incidents of assault, harassment, menacing, kidnapping, or any sexual offense."[149] Deborah Tuerkheimer has suggested an even broader offense of battering, defined as the intentional pursuit of a "course of conduct" toward a household or family member that the defendant knows or should know "is likely to result in substantial power or control over the family or household member."[150] The "course of conduct" essential to battering could be established with proof of any two criminal acts.[151] Tuerkheimer has argued against an approach that limits the necessary predicate acts to assault, kidnapping, and other physically harmful offenses that "'actually "look" like domestic violence.'"[152] Domestic violence, on Tuerkheimer's account, is not necessarily a matter of physical pain or physical injury.[153] While retaining the language of violence and battering, Tuerkheimer urges us to look for domina-

146. Tuerkheimer, *supra* note 145, at 960–61.

147. *Id.* at 962–63 (emphasis added).

148. *See* Burke, *supra* note 140, at 573–74 ("When a single act of violence is viewed outside of the broader pattern of abuse in which it occurred, jurors lack the context necessary for determining credibility and the truth. They may treat the case with apathy if they assume that a relatively minor confrontation was an isolated incident . . . .") (internal citation omitted).

149. *Id.* at 601–02 (internal citation omitted).

150. Tuerkheimer, *supra* note 145, at 1019–20.

151. *Id.* at 1020.

152. Deborah Tuerkheimer, *Renewing the Call to Criminalize Domestic Violence: An Assessment Three Years Later*, 75 GEO. WASH. L. REV. 613, 618 (2007) (quoting Burke, *supra* note 140, at 599).

153. *See also* Deborah M. Weissman, *The Personal is Political—and Economic: Rethinking Domestic Violence*, 2007 BYU L. REV. 387 (domestic violence as structural violence).

tion that is as easily based on psychological manipulation as on superior physical force.

Even in the absence of independently codified domestic violence offenses, this area of law reform may have already modified judgments of what counts as violence. Every state provides a mechanism for victims of domestic abuse to obtain a civil protection order against the abuser.[154] These orders typically require the subject to refrain from contacting the victim, and importantly, frequently require the subject to leave, and stay away from, the home he shared with the victim.[155] Jeannie Suk has argued that through criminal enforcement of these protection orders, prosecutors have effectively redefined what constitutes domestic violence. The defendant's mere presence in the shared home has become a "proxy" for violence and is punishable as an independent violation.[156] According to Suk, this approach "reflects a theory of [domestic violence] as operating often without actual violence but with the terrifying and inconsistent uses of the threat of violence to control the victim."[157]

All of this is to say that domestic abuse provides one more illustration of the contingent and contested parameters of violence. A reform campaign that began by emphasizing the vulnerable, injured body has evolved into an argument that domestic violence is not necessarily physical. Of course, no advocate for abused women would want to minimize the physical harms often inflicted on such women. But as the concept of violence has become domesticated, it has grown beyond any necessary association with physical injury. Relationships of dominance, inequality, and exploitation, as well as a perceived omnipresent threat of injury, now characterize the law's conception of violence in the home.

III. CONSTRUCTING VIOLENCE

The analysis so far has focused on perceptions of violence in the substantive definition of offenses. As we have seen, most traditional descriptions of violence for purposes of substantive criminal law include crimes that involve only the threat of physical force as well as those that involve

154. *See* Jeannie Suk, *Criminal Law Comes Home*, 116 YALE L.J. 2, 13–14 (2006).

155. *See id.*

156. *See id.* at 17–20.

157. *Id.* at 21. More specifically, Suk examines ways in which contemporary domestic violence prosecutions render alleged abusers as burglars, subject to greater penalties than may be authorized by misdemeanor assault statutes. *See id.* at 22–42. Suk calls burglary "the archetypal crime of home invasion"; it is unclear from her text whether burglary is the archetype of all crime or only of crimes against the home. *See, e.g.*, *id.* at 23 (arguing that Blackstone understood burglary as "the archetypal crime," period); *id.* at 41 (referring to burglary as "the archetypal crime of a stranger's intrusion into the home"). This Article argues that violent crimes are paradigmatically criminal activity, but perhaps this claim is consistent with Suk's argument. As elaborated in Part III, burglary has been recast as a violent crime (rather than a property crime) by a number of modern legal developments.

its actual exercise. For example, robbery is considered a violent crime, though robbery itself requires only a threat of force—if the threat is realized and force used, the defendant is guilty of an independent offense of assault or battery, or in the worst case, homicide. These common references to threats of force in descriptions of violence seem to assume the possibility of immediate injury.[158] Again, with a knife at the throat, the immediacy seems well established. And in the traditional understanding of violent crimes, a threat seems to require not only a real and imminent possibility of injury, but also intent—a deliberate choice to put another in fear of bodily harm.

But the ground keeps moving. The previous part detailed changing conceptions of violence in rape law and domestic violence law. A still greater innovation in the concept of violence, as far as criminal law is concerned, is a contemporary shift from *threat* to *risk*. This shift has occurred most noticeably in sentencing law, and it is helping fuel the vast expansion of the U.S. prison population. Several federal statutes refer to "crime[s] of violence" or "violent crimes" as predicates for mandatory minimum sentences, penalty enhancements, or other impositions.[159] These statutes define violence to include not only the use, attempted use, or threatened use of physical force but also the *risk* of physical injury.

If violence requires neither the actual exercise of physical force nor an intentional threat to exercise it, but merely the risk of force or injury, then the number of crimes that qualify as violent has exploded. Indeed, if we think criminals will generally prefer to avoid detection and arrest, there may be few crimes that don't involve at least a remote chance that force will be used or someone get hurt. On a sufficiently broad version of the risk-based account, one that encompasses accidental injuries, "violent crime" is a redundancy; *all* crime is violent.

The reconceptualization of violence to include the risk of injury was a barely noted but very influential part of sentencing reform in the United States. At the federal level, the 1984 Comprehensive Crime Control Act added to federal law a new definition of a crime of violence: one that involves "the use, attempted use, or threatened use of physical force against the person or property of another," *or* any felony that "by its nature, involves *a substantial risk* that physical force against the person or property

158. In fact, threats divorced from immediate danger are not always characterized as violent. Hence the crime of making threats has sometimes been classified as a nonviolent crime. *See, e.g.*, United States v. Philibert, 947 F.2d 1467 (11th Cir. 1991), *overruled by* United States v. Bonner, 85 F.3d 522 (11th Cir. 1996); *see generally* Jeremy D. Feinstein, Note, *Are Threats Always "Violent" Crimes?*, 94 MICH. L. REV. 1067 (1996) (discussing split among federal circuits as to whether threats are always violent offenses).

159. *See, e.g.*, 18 U.S.C. § 924(c)(1) (2006) (imposing mandatory minimum sentences for a violent crime); 28 U.S.C. § 994(h) (2006) (recommending Sentencing Commission to set prison terms near maximum limit for crimes of violence). Although I focus on federal statutes here, some states have adopted similar sentencing provisions. See *infra* note 222.

of another may be used in the course of committing the offense."[160] In contrast to the traditional understanding of violent crime, this definition expands the concept of violence on two fronts: it counts force against *property* as violence, and it counts the *risk* of force as violence.[161]

Two other widely used provisions of federal law define violent crime without this reference to force against property, but with a similar element of risk. The federal Armed Career Criminal Act (ACCA) defines a "violent felony" as one that "has as an element the use, attempted use, or threatened use of physical force against the person of another" or "is burglary, arson, or extortion, involves use of explosives, or *otherwise involves conduct that presents a serious potential risk of physical injury to another.*"[162] And the U.S. Sentencing Guidelines (authorized by the Sentencing Reform Act, itself part of the Comprehensive Crime Control Act of 1984) use almost identical language to define violent crime.[163] The classification of a prior offense as violent under these provisions can entail serious consequences for the convicted person: enhanced sentences, including mandatory minimums, and possible deportation for noncitizens.[164]

These federal statutes have made the question of what constitutes violent crime into a matter of statutory construction. To decide whether a defendant's prior conviction qualifies as a violent crime, courts take a "categorical approach" that examines the statutory elements of the offense, rather than the particular details of the given defendant's violation.[165] In

160. 18 U.S.C. § 16 (2006) (emphasis added), adopted as part of the Comprehensive Crime Control Act of 1984, Pub. L. 98-473.

161. At least one federal court has interpreted the "force against property" element narrowly, and perhaps circularly, to require violent force against property. *See* Sareang Ye v. I.N.S., 214 F.3d 1128, 1133-34 (9th Cir. 2000). *Cf.* United States v. Rutherford, 175 F.3d 899, 905 (11th Cir. 1999) (finding no "substantial difference" between definition of violent crime in 18 U.S.C. § 16 and U.S. SENTENCING GUIDELINES MANUAL § 4B1 (2008)).

162. 18 U.S.C. § 924(e)(2)(B) (2006) (emphasis added).

163. U.S. SENTENCING GUIDELINES MANUAL § 4B1.2(a) (2008). This sentencing guideline refers to "burglary of a dwelling" in its list of enumerated violent crimes; the ACCA refers more generally to "burglary." A separate guideline governs immigration offenses and defines violence somewhat more narrowly. *See also* U.S. SENTENCING GUIDELINES MANUAL § 2L1.2 (2008) (defining "[c]rime of violence" to refer to any of a list of enumerated offenses, including murder, manslaughter, kidnapping, and aggravated assault, among others, or any offense "that has as an element the use, attempted use, or threatened use of physical force against the person of another").

164. *See, e.g.*, James v. United States, 550 U.S. 192, 192 (2007) (deciding whether attempted burglary is a violent felony for purposes of fifteen-year mandatory minimum under the ACCA); *Sareang Ye*, 214 F.3d at 1133-34 (deciding whether burglary constitutes crime of violence that would subject defendant to deportation).

165. *See* Leocal v. Ashcroft, 543 U.S. 1, 7 (2004) (categorical approach to analyzing predicate offenses under 18 U.S.C. § 16); Taylor v. United States, 495 U.S. 575, 600-02 (1990) (same for 18 U.S.C. § 924(e)). This general rule is subject to one narrow exception for some burglary convictions. The ACCA classifies "burglary" as a violent offense, but does not define burglary. In *Taylor*, the Supreme Court relied on legislative history to develop a "generic" definition for purposes of the federal ACCA. *Taylor*, 495 U.S. at 598-99. When the text of a state criminal statute does not clearly fall within or without the generic federal definition of burglary, courts may consider the actual indictment, information, or jury instructions from the defendant's trial in order to determine whether the defendant's burglary satisfied the federal definition. *See id.* at 602. The Court has rejected efforts to widen

other words, a crime's violent character is assessed on the face of the statute under which the defendant was convicted. For purposes of the ACCA, the critical question is whether the statutory definition includes the use of force (or threatened or attempted force) or "'otherwise involv[es] conduct that presents a serious potential risk of physical injury to another.'"[166] The first prong of this definition—use, threatened use, or attempted use of force—is largely consistent with the conceptions of violence we have seen in the common law and in modern definitions of substantive offenses. But the second prong's reference to "a serious potential risk of physical injury"[167] is a substantial expansion of the concept of violence, and under this prong, federal courts have classified as violent many offenses that are neither crimes against the person nor *mala in se* offenses. A few specific examples help elucidate the moving parameters of the concept of violence.

First, it is worth noting that even before one reaches the residual clauses of the ACCA or U.S.S.G. 4B1.2—that is, the clauses referring to "a serious potential risk of physical injury"—each of these provisions has arguably expanded the concept of violent crime by legislative fiat.[168] Both the ACCA and the Sentencing Guidelines designate burglary and extortion as violent offenses.[169] Burglary, traditionally defined as entry into a dwelling with intent to commit a felony therein, was arguably a crime against the person at common law, but it has not been classified as violent for the federal government's statistical tracking purposes.[170] (But some prosecutors have used burglary statutes to expand the concept of domestic violence, as discussed in Part II.C.[171]) And extortion, an offense that does not require threats of physical harm, was classified at common law as a property offense rather than a crime against the person.[172] The legislative history of the ACCA reveals an explicit effort to reclassify burglary as violent, on the basis of the claim that burglary creates *risks* of personal injury.[173]

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this exception and permit consideration of police reports in order to determine whether an instant violation was "violent." *See* Shepard v. United States, 544 U.S. 13, 16 (2005).

166. *James*, 550 U.S. at 197 (quoting 18 U.S.C. § 924(e)(2)(B)(ii) (2006)).

167. 18 U.S.C. § 924(e)(2)(B)(ii) (2006).

168. *See* U.S. SENTENCING GUIDELINES MANUAL § 4.B1.2(a)(2) (2008).

169. *See* 18 U.S.C. § 924(e); U.S. SENTENCING GUIDELINES MANUAL § 2B1.1 (2008).

170. *See, e.g.*, John Poulos, *The Metamorphosis of the Law of Arson*, 51 MO. L. REV. 295, 324 (1986) ("[C]ommon law arson, like common law burglary, was classified not as a crime against property, but as a special form of crime against the person, an offense against the habitation of individuals.") (citing BLACKSTONE, *supra* note 16, at *220).

171. See supra n. 157.

172. *See, e.g.*, Scheidler v. National Organization of Women, Inc., 537 U.S. 393, 402 (2003) ("At common law, extortion was a property offense . . . ."). *Scheidler* was part of protracted litigation concerning protests at abortion clinics, and the Supreme Court held that violence aimed to discourage women from obtaining abortions could not constitute "extortion" because it involved no cognizable deprivation of property. *See id.* at 402–03.

173. "While burglary is sometimes viewed as a non-violent crime, its character can change rapidly, depending on the fortuitous presence of the occupants of the home when the burglar enters, or their

Given this legislative history, it may be unsurprising that the Supreme Court would eventually confront the question whether *attempted* burglary is also a violent crime under the ACCA.[174] Note that attempted burglary does not satisfy the first prong of the ACCA's definition—"the use, attempted use, or threatened use of physical force against the person of another"—since burglary itself does not require any use of force against a person.[175] If attempted burglary were to be a violent crime, it would need to fall under the ACCA's second prong—the residual clause capturing crimes that "otherwise involv[e] conduct that presents a serious potential risk of physical injury to another."[176]

In *James v. United States*, the Supreme Court found that attempted burglary presented a sufficient risk of injury to qualify as a violent crime.[177] Writing for a five-Justice majority, Justice Alito first emphasized the risks of burglary itself, then argued that a failure to complete the crime, such as a failure to enter the home, did little to alleviate those risks. "The main risk of burglary arises not from the simple physical act of wrongfully entering onto another's property, but rather from the possibility of a face-to-face confrontation between the burglar and a third party . . . ."[178] On this reading, it is the mere chance of confrontation that renders the substantive crime violent; there is no requirement of actual confrontation and certainly no requirement that any resulting confrontation involve a threat or use of force. Violence is a matter of risk, and "[a]ttempted burglary poses the same kind of risk."[179] To the defendant's argument that attempted burglaries would sometimes pose virtually no chance of physical injury, Justice Alito emphasized that the statute required only "potential risk." "[T]he combination of the two terms suggests that Congress intended to encompass possibilities even more contingent or remote than a simple 'risk,' much less a certainty."[180] Citing various dictionaries, Justice Alito explained that *potential* means "existing in possibility," while *risk* means "the possibility of loss, injury, disadvantage, or destruction."[181] Thus, all the ACCA requires is the possibility of a possi-

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arrival while he is still on the premises." S. REP. NO. 98-190, at 4 (1984).

174. *See* James v. United States, 550 U.S. 192 (2007).

175. *Id.* at 192 (quoting 18 U.S.C. § 924(e)(2)(B)); *see also id.* at 197 ("The parties agree that attempted burglary does not qualify as a 'violent felony' under clause (i) of [the] ACCA's definition because it does not have 'as an element the use, attempted use, or threatened use of physical force against the person of another.'").

176. *Id.* at 197 (quoting 18 U.S.C. § 924(e)(2)(B)(ii)).

177. The Justices split along somewhat unusual lines: Justice Alito wrote for the majority, joined by Chief Justice Roberts and Justices Kennedy, Souter, and Breyer. *See id.* at 195. Justice Scalia dissented, joined by Justices Stevens and Ginsburg, *see id.* at 214, and Justice Thomas wrote a separate dissent, *see id.* at 231.

178. *Id.* at 203.

179. *Id.*

180. *Id.* at 207–08.

181. *Id.* at 207 n.5.

bility, and that turns out to be an easy standard to satisfy for any court inclined to categorize a crime as violent. Under Justice Alito's methodology, even air pollution constitutes a crime of violence.[182]

For two decades or so after Congress adopted the "potential risk" formula, lower federal courts applied it to find a wide range of offenses—including walking away from a prison honor camp,[183] failure to report to a halfway house,[184] theft or attempted theft of an unoccupied car,[185] and tampering with an automobile[186]—all to be violent felonies that could trigger the fifteen-year mandatory sentence of the federal felon-in-possession statute or increased penalties under the federal sentencing guidelines. As discussed below, several of these classifications have been reversed in recent years. But it is important to notice what the language of risk permits. We have come a long way from mayhem. By shifting our focus from injury, or intentional threat thereof, to mere risk, we may have created a violence bubble. Anything *dangerous* is also *violent*. Apparently, it need not even be all that dangerous: "potential risk" is sufficient.

Under this federal violence jurisprudence, the question whether a crime poses a sufficient risk of injury is not an empirical question to be decided by a fact-finder, but a question of law within the judicial province. In *James*, the defendant argued that for a court to construe attempted burglary as a violent felony for purposes of a sentence enhancement would violate his Sixth Amendment right to a jury.[187] The Court rejected this claim, explaining that the determination whether attempted burglary is a violent felony is "statutory interpretation, not judicial factfinding."[188] Earlier, the Court had emphasized that it had no statistics on the risks of burglary, but it is unclear whether such statistics would matter.[189] Violence is

182. To counter Justice Scalia's charge that the phrase "serious potential risk of physical injury" was unconstitutionally vague unless interpreted narrowly by the Court, Justice Alito cited several criminal statutes that use similar language, including a California law that criminalizes "air pollution that 'results in any unreasonable risk of great bodily injury to, or death of, any person." *See id.* at 210 n.6 (quoting CAL. HEALTH & SAFETY CODE ANN. § 42400.3(b) (2006)).

183. United States v. Springfield, 196 F.3d 1180, 1185 (10th Cir. 1999).

184. United States v. Bryant, 310 F.3d 550, 554 (7th Cir. 2002).

185. United States v. Sun Bear, 307 F.3d 747, 753 (8th Cir. 2002), *abrogated by* United States v. Williams, 537 F.3d 969, 970–71 (8th Cir. 2008).

186. United States v. Johnson, 417 F.3d 990, 997 (8th Cir. 2005) (auto tampering a violent felony for purposes of both 18 U.S.C. § 924(e) and U.S. SENTENCING GUIDELINES MANUAL § 4B1.1), *abrogated by Williams*, 537 F.3d at 970–71; *see also* U.S. SENTENCING GUIDELINES MANUAL § 2K2.1; United States v. Meacham, 567 F.3d 1184 (10th Cir. 2009).

187. Specifically, Alphonso James argued that a judicial determination that attempted burglary was violent would violate *Apprendi v. New Jersey*, 530 U.S. 466 (2000), which held that a defendant had a Sixth Amendment right to have a jury make any factual determinations that increased the maximum sentence authorized by law. *See id.* at 497; *see also* James v. United States, 550 U.S. 192, 213–14 (2007).

188. *James*, 550 U.S. at 214.

189. *See id.* at 210.

a question of risk, on this approach, but the assessment and evaluation of risk is a question of law rather than one of fact.

Thus, the ACCA *permits* a court to classify almost any crime as violent, but whether a given crime will in fact be labeled violent depends on the judicial assessment of risk. And it now appears that there are limits on what some judges will label as violence. Recent Supreme Court decisions have rejected classifications of drunk driving and failure to report to weekend confinement as violent crimes, and they appear to have at least slowed the expansion of the category of violence in lower federal courts.[190] In *Begay v. United States*, the Court acknowledged that drunk driving "presents a serious potential risk of physical injury to another" but found that this offense "is simply too unlike the provision's listed examples [such as burglary, arson, and extortion] for us to believe that Congress intended the provision to cover it."[191] In other words, the Court could not believe that Congress meant the residual clause of ACCA to be taken literally. Instead, the Court read the clause to require that a crime pose risks similar in both degree and kind to the risks posed by the offenses explicitly designated as violent.[192] Burglary, arson, extortion, and crimes involving the use of explosives all involve "purposeful, 'violent,' and 'aggressive' conduct," the Court noted.[193] An offense like drunk driving, or any offense that involves merely reckless or negligent conduct, is not "violent" within the meaning of the ACCA.[194] Though the plain language of the ACCA's residual provision refers only to "conduct that presents a serious potential risk of physical injury,"[195] the *Begay* Court effectively read into the statute an additional mens rea requirement of purposeful or knowing imposition of risk.[196]

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190. *See* Chambers v. United States, 555 U.S. 122 (2009); Begay v. United States, 553 U.S. 137 (2008); Leocal v. Ashcroft, 543 U.S. 1 (2004).

191. 533 U.S. at 140–42 (quoting United States v. Begay, 377 F.Supp. 2d 1141, 1145 (N.M. 2005)).

192. *Begay*, 533 U.S. at 142.

193. *Id.* at 144–45. Of course, there is a bewildering circularity in the reference to violence here. The Court had previously emphasized that burglary—breaking and entering with intent to commit a crime—is "violent" because it involves the risk of physical injury. *See supra* note 163 (discussing *Taylor v. United States*). Thus it makes little sense to distinguish burglary from crimes that impose mere risks of injury on the grounds that burglary is "violent."

194. *Begay*, 533 U.S. at 145.

195. 18 U.S.C. § 924(e)(2)(B)(ii) (2006).

196. Thus to the *Begay* Court, reckless or negligent pollution could not constitute a crime of violence. *See Begay*, 533 U.S. at 146. Unsurprisingly, given his majority opinion in *James*, Justice Alito dissented in *Begay*. *See id.* at 159 ("Requiring that an offense must also be 'purposeful,' 'violent,' or 'aggressive' amounts to adding new elements to the statute . . . .") (Alito, J., dissenting). One commentator has argued that *Begay*'s emphasis on intentional conduct is inconsistent with the "categorical approach" required by earlier Supreme Court opinions. *See* David C. Holman, *Violent Crimes and Known Associates: The Residual Clause of the Armed Career Criminal Act*, 43 CONN. L. REV. 209, 214–15 (2010).

Applying *Begay*'s requirement of "purposeful, 'violent,' and 'aggressive' conduct," *Chambers v. United States* found that the crime of failure to report to confinement was not a violent felony for purposes of the ACCA.[197] After emphasizing that failure to report was merely "a form of inaction" rather than intentionally harmful conduct, the Court—this time, with no dissenters—explicitly turned to empirical evidence to assess the risks of physical injury associated with failure to report.[198] The government had argued that failure to report to confinement evinces "the offender's special, strong aversion to penal custody" and thus suggests a willingness to use physical force to avoid custody.[199] But the Court cited a recent report from the United States Sentencing Commission that of 160 cases in which a federal court had applied the sentencing guideline concerning failure to report, not one involved an offender who used physical force during his commission of the offense or at his eventual apprehension.[200] The government had cited one federal and two state cases in which offenders had fired at officers to avoid recapture, but these three cases were simply not enough to establish a sufficient risk in the eyes of the Court.[201]

These cases demonstrate that in federal jurisprudence, "violent crime" is a judicial construction. Judges are, no doubt, influenced by widely held perceptions of violence and probably by patterns of offending, so judicial constructions are likely to reflect *social* constructions. As discussed in Part I, violence occupies a space between body and norm; the concept conjures images of bodily harm but also intuitions of great moral wrong. It may strain the notion of risk too much to label as violent a crime of omission such as failure to report. And drunk driving, which unquestionably poses great risks of injury and thousands of actual injuries, may simply be too common an occurrence, something too many of us do, to bear the mantle of violence.

Even after *Chambers*, the ACCA's definition of violent crime remains the source of many conflicts among the federal circuits.[202] In a separate opinion in *Chambers*, Justice Alito called for Congress to amend the law and simply enumerate the specific crimes it considered to be violent. Such an approach would provide more clarity, but it also might make more explicit the fact that the federal government defines violence differently depending on which interests are at stake. For purposes of reporting crime to the public—and thus, for purposes of evaluating the performance of the criminal justice system—the federal government's Uniform Crime Reports (UCR) system includes only five offenses in the category "violent

197. 129 S. Ct. 687, 692–93 (2009).
198. *Id.*
199. *Id.* at 692.
200. *See id.*
201. *See id.*
202. *See id.* at 694–95 n.2 (Alito, J., concurring in the judgment) (listing cases).

crime."[203] By defining violent crime narrowly for reporting purposes, law enforcement agencies are able to avoid perceptions of their own ineffectiveness and mass disorder. If the ACCA and other federal sentencing laws were to list the crimes that count as violent for purposes of imposing a longer sentence, the likely length of that list might draw uncomfortable contrasts with much shorter list that enables jurisdictions to claim low rates of violent crime.

IV. WHAT VIOLENCE HATH WROUGHT

If we turn from narrow statutory definitions of violent crime to survey the law and politics of crime in the United States more broadly, we see a landscape that satisfies few, if any, observers. True, crime rates are down in recent years, but incarceration rates are at record highs, and fear of crime is still widespread and acute.[204] Few public officials would openly characterize the war on drugs as lost, but no one seems to expect victory, either.[205] This "war," like the war on crime more generally, is enormously expensive, diverting public resources from education, social services, and other programs more likely to contribute to social productivity.[206] And crime and punishment in America continue to be shaded by race and class: among both crime victims and convicted offenders, we see disproportionate numbers of racial minorities and the poor.[207]

The American criminal justice system is the pride of no one. Public leaders at both ends of the political spectrum have urged various reform measures to curtail the scope of the substantive criminal law, to make sentencing more rational, and to reduce racial bias in the criminal process. For the most part, these proposals have failed to gain traction; for years, it seems the only politically feasible reforms have been those that lengthen the already overstretched arm of the criminal law. We are deeply dissatisfied with what we have, and unwilling or unable to change it in any way

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203. *See supra* note 9 (discussing Bureau of Justice designation of murder, manslaughter, rape, robbery, and assault as violent).

204. On the decline in crime rates in the 1990s, see FRANKLIN E. ZIMRING, THE GREAT AMERICAN CRIME DECLINE (2007). On incarceration rates, see PEW CENTER ON THE STATES, ONE IN 100: BEHIND BARS IN AMERICA 2008 (2008), *available at* http:// www.pewcenteronthestates.org/ uploadedFiles/ 8015PCTS_ Prison08_ FINAL_ 2-1-1_ FORWEB.pdf. On fear of crime, see Beale, *supra* note 4, at 453–58.

205. Many commentators not in public office have declared the war over and drugs victorious. *See, e.g.*, Ethan A. Nadelmann et al., *The War on Drugs Is Lost*, NAT'L REV., Feb. 12, 1996; Ben Wallace-Wells, *How America Lost the War on Drugs*, ROLLING STONE, Dec. 13, 2007, at 90.

206. *See, e.g.*, LANI GUINIER & GERALD TORRES, THE MINER'S CANARY: ENLISTING RACE, RESISTING POWER, TRANSFORMING DEMOCRACY 264–67 (2003). For an argument that the war on drugs has impacted education in ways beyond the mere diversion of resources, *see* Eric Blumenson & Eva S. Nilsen, *How to Construct an Underclass, or How the War on Drugs Became a War on Education*, 6 J. GENDER RACE & JUST. 61 (2002).

207. *See* William J. Stuntz, *Unequal Justice*, 121 HARV. L. REV. 1969, 1979 (2008).

other than to create more of what we dislike. This dystopia, I suggest, is at least partly produced by the conceptions of violence discussed in this Article.

Violence, as we have seen, seems grounded in material reality: the fact of bodily vulnerability. And it seems to appeal to widely held normative intuitions about the wrongfulness of physical aggression. But we have also seen that the parameters of this category are manipulable and contested. By invoking violence so often and so inconsistently, Americans may have created a system that fails to prevent physical harm even as it relies on the specter of such harm. In this Part, I explore the work that violence appears to do. First, as suggested at the outset, the perceived threat of violence legitimates the criminal justice system. Second, and more narrowly, the image of violent crime is directly linked to policies of mass imprisonment. Third, the peculiar images of violence prevalent in the United States appear to sustain policing and punishment practices that actually leave some bodies—especially those of racial minorities in impoverished urban areas—in greater physical danger. And finally, perceptions of violence may alter relationships and expectations between rulers and the ruled, generating a new form of political governance.

A. Legitimation

The possibility of violent crime is a central source of legitimation for the criminal justice system. We humans are physically vulnerable creatures, and we expect law to provide a measure of protection. That simple insight is familiar across disciplines and eras. Long ago Thomas Hobbes identified fear of a violent death as central to human psychology and as the driving force behind humans' self-constitution into political societies.[208] Along similar lines, H.L.A. Hart characterized efforts to protect vulnerable human bodies from physical injury as the "minimum content" of a legal system.[209] But the point here is not simply that we want to be protected from violence. The claim is that a belief that our system of criminal law and punishment does provide substantial protection—and could and should provide even more—sustains public support for that system.

It is important to be precise here. I do not argue that Americans are content with their criminal justice system as it stands. To the contrary, as emphasized above, the system has many critics of various political stripes, and public opinion research in this area consistently reveals high levels of dissatisfaction.[210] Although I am not sure that the criminal law faces "[a]

208. *See* THOMAS HOBBES, LEVIATHAN 138 (George Routledge and Sons, 2d ed. 1886).

209. *See* HART, *supra* note 42, at 189.

210. *See, e.g.*, JULIAN V. ROBERTS & LORETTA J. STALANS, PUBLIC OPINION, CRIME, AND CRIMINAL JUSTICE (1999).

crisis of legitimacy" across the board, there is certainly good evidence that perceptions of the criminal law's legitimacy are especially low among racial minorities.[211] The claim I am making here is a claim about what we understand the justifying purpose of the criminal justice system to be—not a claim about whether it fulfills that purpose as well as we would like.

To say that the prospect of violent crime is an important source of legitimation is simply to say that this prospect underlies public support for the basic institutions of the criminal justice system. The primary reason to have criminal laws, police forces, and prisons is to address the problem of violent crime. The system's central purpose, in the public understanding, is not to enforce morality or even to deter purely self-regarding harmful behavior such as private drug use. The system exists to protect public safety.[212]

One can see ample evidence of the particular concern with violent crime in the sociological literature on "penal populism." For more than a decade, scholars have closely scrutinized public opinions on crime and punishment to understand the nature, source, and effects of those opinions.[213] In particular, scholars have sought to understand an apparent increasing punitiveness among citizens in several Western democracies, including the United States.[214] While some evidence suggests that the public does not necessarily demand the severe penalties that policymakers have enacted, there is clearly substantial support for criminal justice policies that impose substantially more punishment than was typical before the late twentieth century.[215] And studies of that public support repeatedly find a pronounced concern with *violent* crime.[216] Nonviolent offenses simply do

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211. *See* Jeffrey Fagan, *Legitimacy and Criminal Justice*, 6 OHIO ST. J. CRIM. L. 123, 123–27 (2008).

212. *See, e.g.*, DAVID GARLAND, THE CULTURE OF CONTROL: CRIME AND SOCIAL ORDER IN CONTEMPORARY SOCIETY 12 (2001) ("Today, there is a new and urgent emphasis upon the need for security, the containment of danger, the identification and management of any kind of risk. Protecting the public has become the dominant theme of penal policy.").

213. *See, e.g.*, JULIAN V. ROBERTS ET AL., PENAL POPULISM AND PUBLIC OPINION: LESSONS FROM FIVE COUNTRIES (2003); ROBERTS & STALANS, *supra* note 210; Julian V. Roberts, *American Attitudes About Punishment: Myth and Reality*, *in* SENTENCING REFORM IN OVERCROWDED TIMES: A COMPARATIVE PERSPECTIVE 250 (Michael Tonry & Kathleen Hatlestad eds., 1997); Julian V. Roberts, *Public Opinion and Youth Justice*, 31 CRIME & JUST. 495 (2004).

214. *See* JOHN PRATT, PENAL POPULISM 12–14 (2007).

215. *See* ROBERTS ET AL., *supra* note 210, at 61 ("[T]he pressure of public opinion by itself is not sufficient to explain the rise of punitive policies."); Francis T. Cullen, Bonnie S. Fisher & Brandon K. Applegate, *Public Opinion About Punishment and Corrections*, 27 CRIME & JUST. 1, 8 (2000) (detailing public support for more punitive crime policies, but also showing that such support is "mushy," especially for nonviolent offenses).

216. *See, e.g.*, Cullen, Fisher & Applegate, *supra* note 212, at 38 (noting support for mandatory "three strikes" laws is based on a concern with habitual violent offenders); *id.* at 59 (describing violent crime as "the [g]reat [d]ivide [b]etween [p]unitiveness and [n]onpunitiveness"); JOHN DOBLE, CRIME AND PUNISHMENT: THE PUBLIC'S VIEW 14 (1987) (noting particular focus on highly publicized violent crimes, such as murders of children).

not generate the same public outrage and demand for severe punishments.[217]

It is worth reiterating that the public is hardly satisfied with the criminal justice system as it actually operates. But perceptions that the system does not provide adequate protection against violent crime lead to demands for more criminal law enforcement, not less. Importantly, incidents of violent crime are frequently portrayed as evidence that the system is not punitive enough.[218] There is a widespread assumption that more policing, more prosecutions, and more punishment are the only measures that will effectively reduce violent crime. Proposals to reduce criminal sentences are countered with charges that leniency will unleash violence.

More than a decade ago, Frank Zimring and Gordon Hawkins observed the particular salience of physically violent offenses, and argued that scholars and policymakers should "change the subject" from crime to violence.[219] This call to focus on actual physical violence has largely gone unheeded. But perhaps to most Americans, the relevant subject already was, and still is, violence. The problem is that "violence" functions as a catch-all category, one driven by our fear of physical harm but capacious enough to capture many other activities. Today, the perceived threat of violence continues to justify the criminal justice system as an undifferentiated whole. Indeed, as discussed in Parts IV.B and IV.C below, the image of physical violence has led to general support for policing and punishment—support that seems to waver little no matter how those resources are directed, and even if they are directed away from actual incidents of physical injury.

B. Confinement

The specter of violence provides legitimacy to the American criminal justice system as a whole, but because incarceration rates are such a distinctive feature of that system, it is worth noting separately the interplay between perceptions of violence and American policies of mass imprisonment. As a purely descriptive matter, scholars offer two primary accounts of the mechanics that have generated unprecedented rates of incarceration. On the most widely adopted account, the United States prison population is so large because prison sentences in this country are much longer than in other nations.[220] On an alternative (but not necessarily mutually exclu-

217. *See, e.g.*, Cullen, Fisher & Applegate, *supra* note 212, at 59.

218. *See, e.g.*, PRATT, supra note 214, at 18–19.

219. ZIMRING & HAWKINS, *supra* note 7, at xii ("We hope to change the subject, in both scholarly and policy analysis in the United States, from crime control to the control of lethal violence.").

220. *See, e.g.*, JAMES AUSTIN ET AL., UNLOCKING AMERICA: WHY AND HOW TO REDUCE AMERICA'S PRISON POPULATION 1 (2007) ("This generation-long growth of imprisonment has occurred not because of growing crime rates, but because of changes in sentencing policy that resulted in

sive) account, the number of people in prison in the U.S. is driven by extraordinarily high admissions rates.[221] For purposes of this Article, one need not adopt either explanation to the exclusion of the other. Rather, it is important to see that the perceived threat of violent crime underlies *both* unusually long prison sentences and unusually high rates of prison admission.

Part III detailed ways in which "violent crime," broadly defined, serves as the basis for mandatory minimum sentences and sentence enhancements in federal criminal law. Many states have similar provisions.[222] Importantly, however, many of the offenders serving long sentences in federal prisons, and almost half of long-term prisoners in state facilities, have *not* been formally classified as violent offenders.[223] Instead, violent crime underwrites most long sentences in a more attenuated, symbolic way. On this point, the relationship between violent crime and drug offenses is especially important.

The long prison sentences distinctive to the United States are imposed primarily for drug offenses, offenses which are not formally labeled "violent."[224] But support for severe penalties for drug offenses is unquestionably fueled by an association of drugs with violence. There is considerable evidence that political leaders have explicitly sought to link drug use to violent crime in order to win support for the war on drugs.[225] The strategy

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dramatic increases in the proportion of felony convictions resulting in prison sentences *and* in the length-of-stay in prison that those sentences required.").

221. John Pfaff has recently argued that empirical studies of incarceration rates should focus on admissions rather than snapshots of the prison population at a given moment, but he has emphasized that more empirical work needs to be done. *See* John F. Pfaff, *The Empirics of Prison Growth: A Critical Review and Path Forward*, 98 J. CRIM. L. & CRIMINOLOGY 547 (2008). Of course, it is possible and very likely that unusually high rates of incarceration in the United States are driven by both high admissions and long sentences. *See, e.g.*, Todd R. Clear & James Austin, *Reducing Mass Incarceration: Implications of the Iron Law of Prison Populations*, 3 HARV. L. & POL'Y REV. 307, 312 (2009) ("The *Iron Law of Prison Populations* states that the size of a prison population is completely determined by two factors: *how many people go to prison* and *how long they stay*.").

222. *See, e.g.*, DEL. CODE ANN. tit. 11 § 1448(e)(1) (2007) (imposing mandatory minimum five-year sentence on an offender convicted of weapon possession with two or more prior violent felony convictions); MISS. CODE ANN. § 99-19-83 (2007) (imposing mandatory sentence of life imprisonment on any person convicted of a third felony if either prior conviction was for a "crime of violence"); N.Y. PENAL LAW § 70.08 (McKinney 2009) (defining "persistent violent felony offender" and setting mandatory minimum sentences).

223. *See, e.g.*, Federal Bureau of Prisons, Quick Facts about the Federal Bureau of Prisons, available at http:// www.bop.gov/ news/ quick.jsp (indicating that about 25% of all federal prisoners are held for weapons offenses, robbery, arson, homicide or other traditionally "violent" offenses); *Sourcebook of Federal Sentencing Statistics*, U.S. SENTENCING COMM'N, Table 22, (2008), http:// ftp.ussc.gov/ ANNRPT/ 2008/ Table22.pdf (indicating that only about 4.4% of new prisoners entering the federal system were sentenced as career criminals or armed career criminals under USSG §4B1); *Prisoners in 2007*, BUREAU OF JUSTICE STATISTICS, 22 (Dec. 2008), http:// bjs.ojp.usdoj.gov/ content/ pub/ pdf/ p07.pdf (about 47% of state prisoners serving sentences in excess of one year are nonviolent offenders).

224. *See, e.g.*, BUREAU OF JUSTICE STATISTICS, *supra* note 9.

225. *See generally* KATHERINE BECKETT, MAKING CRIME PAY: LAW AND ORDER IN CONTEMPORARY AMERICAN POLITICS (1997). For years, the official U.S. National Drug Control

enjoyed great success—so much, perhaps, that it cannot now be reversed even in the face of empirical evidence that undermines the claimed drugs-violence association. In the 1990s, the United States Sentencing Commission established a "Drugs□Violence Task Force" to study the relationship between drug offenses and violence.[226] The task force examined three possible ways that drugs might contribute to violence: users might commit violence while under the influence of drugs; they might commit robbery or other violent theft offenses in order to fund drug habits; and dealers and other participants in the illegal drug market might use violence when deals go awry.[227] Of these three possibilities, the third drugs-violence link was best supported by empirical evidence, but even there the empirical support was weak at best.[228] And the task force found no evidence that long prison sentences for drug offenders decreased either drug use or violence; indeed, some evidence suggested that these policies may increase violence.[229] Notwithstanding these findings, some members of the task force resisted the implications of this research, finding that to concede that the punitive approach to drug use was "misguided" would be "simply too politically risky . . . ."[230] In other words, the drugs-violence connection is a political truth in the United States, even if not an empirical one.

Because empirical researchers have not devoted a great deal of attention to prison admission rates, the relationship between perceptions of violence and admissions rates remains murky. The limited research available suggests that admissions rates are significantly determined by policing practices.[231] Increased police patrolling, especially increased numbers of "stop-and-frisks," leads to increased prison admissions. And importantly, the theory of the stop-and-frisk is a theory of violence. Since the Supreme Court's 1968 decision in *Terry v. Ohio*,[232] police are explicitly permitted to stop an individual on mere suspicion that "criminal activity may be afoot,"[233] a standard that has proved remarkably easy to satisfy.[234] Once an individual is stopped, the officer may frisk him if the officer suspects him

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Strategy has emphasized a drugs-violence connection. *See, e.g.*, U.S. NATIONAL DRUG CONTROL STRATEGY OF 1999, 24 (1999) ("[D]rug trafficking and violence go hand in hand.").

226. Deborah W. Denno, *When Bad Things Happen to Good Intentions: The Development and Demise of a Task Force Examining the Drugs-Violence Interrelationship*, 63 ALB. L. REV. 749, 749 (2000) (providing an account of the task force, and its failures, from one of its members).

227. *See id.* at 755.

228. *See id.* at 755–58.

229. *See id.* at 757–58.

230. *Id.* at 758.

231. *See* Jeffrey Fagan, Valerie West & Jan Holland, *Neighborhood, Crime, and Incarceration in New York City*, 36 COLUM. HUM. RTS. L. REV. 71, 93–94 (2004) (explaining that aggressive street policing leads to increased drug arrests and jail admissions, which in turn lead to increased prison admissions).

232. 392 U.S. 1 (1968).

233. *Id.* at 30.

234. *See* David A. Harris, *Factors for Reasonable Suspicion: When Black and Poor Means Stopped and Frisked*, 69 IND. L.J. 659, 660 (1994).

to be armed and dangerous—again, a low standard that has been interpreted to permit frisks in the vast majority of cases.[235] In short, the available research provides reason to believe that expanded police authority to stop and frisk suspects helps fuel prison admissions in the United States. And that stop-and-frisk authority is justified by the perceived need to protect the officer and the public from the "armed and dangerous" offender. Violence, again, is doing the work.

C. Exposure

Paradoxically, for all the rhetoric of violence in criminal justice policy, existing practices may do far less than they could to address and prevent actual incidents of physical injury. As the concept of violence has become a tool wielded for political ends, it has shielded from scrutiny policing practices that actually leave vulnerable bodies exposed. Indeed, the particular images of violence that have seized the public imagination appear to have produced policies that do not so much prevent physical harm as redistribute it, leaving racial minorities and the poor especially exposed.

The paradigm crime discussed at the outset of this Article is a violent attack by a stranger.[236] This perception has fueled a discourse and politics of crime that pits predators against victims.[237] On the predator–victim model, there is a clear social and moral distinction between offender and victim, and responsibility for the offense lies clearly and completely with the offender. The victim is innocent, as is the larger society. This way of thinking about violent crime "fits" some offenses much better than others, and it makes some violent offenses much more visible than others. Stranger violence—a rape by a stranger, a kidnapping, or child molestation by an adult unknown to the victim—is quickly noticed and loudly condemned. As a few scholars have recently emphasized, the "obsession with stranger

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235. *See Terry*, 392 U.S. at 30–31. On the relative ease with which police can satisfy the *Terry* standard, see Harris, *supra* note 231. As a formal matter, the authority to stop a suspect for questioning does not automatically trigger the authority to frisk that suspect, but in practice justification for the stop is usually treated as justification for the frisk. *See* William J. Stuntz, *The Distribution of Fourth Amendment Privacy*, 67 GEO. WASH. L. REV. 1265, 1270 n. 26 (1999) ("Suspicion of the presence of a weapon gives rise to the authority to 'frisk' a suspect, but that suspicion typically arises from suspicion of a crime - the sort of crime that tends to be associated with weapons. ... [That] is the case in the many *Terry* stops associated with the policing of drug trafficking."). *But see* Stephen A. Saltzburg, Terry v. Ohio*: A Practically Perfect Doctrine*, 72 ST. JOHN'S L. REV. 911, 967–70 (1998) (arguing that a "reasonable suspicion" requirement for frisks unduly interferes with law enforcement and should be replaced with automatic license to frisk for most police stops).

236. *See, e.g.*, Frug, *supra* note 1, at 71; Hessick, *supra* note 138, at 349.

237. The political and rhetorical power of crime victims has increased so substantially that a recent article updated Herbert L. Packer's classic article *Two Models of the Criminal Process* with not one but two victims-rights centered models. *See* Kent Roach, *Four Models of the Criminal Process*, 89 J. CRIM. L. & CRIMINOLOGY 671 (1999) (discussing and supplementing Herbert L. Packer, *Two Models of the Criminal Process*, 113 U. PA. L. REV. 1 (1964)).

danger" has left violence by intimates comparatively unpatrolled.[238] But the stranger–nonstranger line is not the only respect in which some types of violence are more visible than others. Violent crime is widely perceived in gendered and racialized terms, with a nonwhite male offender and a white female victim.[239] In fact, most victims of violent crime are nonwhite men,[240] and these victims are least protected by existing policing and prosecution strategies.[241]

Physically violent crime is concentrated in certain geographic areas: namely, poor, urban, minority communities.[242] Policing in those communities is directed largely at detecting drug markets.[243] But as discussed above, violence and drugs do not inevitably go hand in hand. The enormous investment in the drug war almost certainly diverts resources from the prevention of non-drug-related physical violence. And the bodies that bear the brunt of that policy choice are not young blond girls, but young black men.

The continued exposure of poor urban communities to violence is especially regrettable given evidence that the criminal justice system may function more effectively when it targets physically injurious crimes than when it responds to other kinds of crime. Violence leaves a trace, as it were, and captures public attention. As a consequence, police and prosecutors have far less discretion in responding to physically violent crime than they do in responding to drug and nonviolent property crime.[244] And

238. Jennifer M. Collins, *Lady Madonna, Children at Your Feet: The Criminal Justice System's Romanticization of the Parent-Child Relationship*, 93 IOWA L. REV. 131, 176–77 (2007); *see also* Hessick, *supra* note 138.

239. *See* Aya Gruber, *The Feminist War on Crime*, 92 IOWA L. REV. 741, 774–83 (2007); *see also id.* at 796 ("The victims' rights movement and popular media painted a picture of young, white, innocent, non-poor female victims terrorized by monstrous, ethnic, poor men.").

240. *See Criminal Victimization, 2008*, BUREAU OF JUSTICE STATISTICS (Sept. 2009), http://bjs.ojp.usdoj.gov/ content/ pub/ pdf/ cv08.pdf. Women are victims of sexual assaults more often than men, but men experience higher rates of victimization for all other violent crimes measured by the National Crime Victimization Survey. *See id.* at 4. Moreover, "[w]ith the exception of simple assault, blacks experienced higher rates than whites for every violent crime measured by the NCVS." *Id.* For a discussion of historical data consistent with these recent surveys, see RANDALL KENNEDY, RACE, CRIME AND THE LAW 19–20 (1997).

241. *See generally* KENNEDY, *supra* note 240; Stephen L. Carter, *When Victims Happen To Be Black*, 97 YALE L.J. 420 (1988); Alexandra Natapoff, *Underenforcement*, 75 FORDHAM L. REV. 1715 (2006).

242. *See* Ruth D. Peterson & Lauren J. Krivo, *Race, Residence, and Violent Crime: A Structure of Inequality*, 57 U. KAN. L. REV. 903, 903–05 (2009).

243. *See, e.g.*, TODD CLEAR, IMPRISONING COMMUNITIES: HOW MASS INCARCERATION MAKES DISADVANTAGED NEIGHBORHOODS WORSE 54–55 (2007) (discussing "[e]nforcement practices that concentrate undercover work on apprehending street dealers in impoverished neighborhoods"); Fagan, West & Holland, *supra* note 231.

244. *See* R. Richard Banks, *Race-Based Suspect Selection and Colorblind Equal Protection Doctrine and Discourse*, 48 UCLA L. REV. 1075, 1108 (2001) (noting that low levels of violent crime give law enforcement opportunities for more profile-based policing); *cf.* Daniel Richman, *The Past, Present, and Future of Violent Crime Federalism*, 34 CRIME & JUST. 377, 378 (2006) ("[W]hether or not a violent crime has occurred is generally undisputable.").

where individuals have discretion, they have an opportunity for discrimination. Not surprisingly, then, the evidence of racial discrimination in law enforcement is strongest in the context of drug prosecutions.[245] Moreover, leaving aside any question of human discrimination, the criminal justice system may just be more likely to sort accurately the guilty from the innocent in the context of crimes of physical injury. Virtually all DNA exonerations to date have occurred in rape or murder cases.[246] True, the exonerations show that the system has made mistakes in these violent crime cases, but they also show that the mistakes in these cases are, at least sometimes, detectable. Again, violence leaves a trace. As DNA technology and forensic science improve, we might expect that the most accurate conviction rates will occur in cases with substantial physical evidence that can identify the defendant. Those cases are likely to be rapes and murders.

If the criminal law does best when violence—the old-fashioned, physically harmful kind—is involved, then perhaps the law needs a renewed focus on "true" violence. Perhaps the energies of law enforcement should be directed anew toward the protection of vulnerable bodies from actual injuries. Of course, as demonstrated in this Article, the substantive criminal law of traditionally violent crimes, such as murder and rape, suggests that even old-fashioned violence is not a fixed or non-normative category. Renewed attention to vulnerable bodies might narrow the scope of the criminal law, but it might do so with inegalitarian effects. There is always the question of which bodies will be perceived as most vulnerable.

D. Governance

So far, I have examined the ways in which conceptions of violence shape attitudes toward, and the policies of, the American criminal justice system. There is one other likely implication of violence worth considering, one that extends beyond criminal justice to characterize American politics more broadly. Recent studies by David Garland and Jonathan Simon examine ways in which the victim of violent crime has become a cultural model for the representative citizen.[247] Through the image of the victim, the specter of violent crime has become a form of governing. This form of governing emphasizes citizens' vulnerability rather than their

245. *See, e.g.*, Gabriel J. Chin, *Race, The War on Drugs, and the Collateral Consequences of Criminal Conviction*, 6 J. GENDER RACE & JUST. 253, 254 (2002); *see also* DAVID COLE, NO EQUAL JUSTICE 141–46 (2000).

246. *See* Brandon L. Garrett, *Judging Innocence*, 108 COLUM. L. REV. 55, 74 (2008) (reporting that 99% of DNA exonerations involved charges of rape, murder, or both).

247. *See* DAVID GARLAND, THE CULTURE OF CONTROL: CRIME AND SOCIAL ORDER IN CONTEMPORARY SOCIETY (2001); JONATHAN SIMON, GOVERNING THROUGH CRIME: HOW THE WAR ON CRIME TRANSFORMED AMERICAN DEMOCRACY AND CREATED A CULTURE OF FEAR (2007).

agency, and it cultivates fear in order to ensure dependence on government institutions.

As Garland puts it, "this vision of the victim as Everyman" means that criminal justice policy has become increasingly personal and increasingly antagonistic toward both civil liberties and social welfare programs.[248] Gone is the idea of an abstract "public interest" that might encompass many goals, including both crime prevention and other forms of social justice. Instead, "[a] zero-sum policy game is assumed wherein the offender's gain is the victim's loss, and being 'for' victims automatically means being tough on offenders."[249] On Garland's account, the conception of the victim as representative citizen deemphasizes "the instrumental reasoning of crime control analysis" in favor of "the visceral emotions of identification and righteous indignation."[250] Or, as put by President Reagan's Victims Task Force Report, "'You cannot appreciate the victim problem if you approach it solely with your intellect.'"[251]

Jonathan Simon extends this analysis to argue that "[c]rime has become so central to the exercise of authority in America" that the ruling elites can be said to be "governing through crime."[252] Simon distinguishes governing *through* crime from governing crime: the latter phrase refers to efforts to control crime, but the former refers to the strategic use of crime (or fear of crime) to consolidate and legitimize political power.[253] Those who seek merely to govern crime likely want to decrease it, but those who govern through crime may actually find high crime rates beneficial. When leaders govern through crime, their targets are not exclusively or even primarily criminal offenders, but the law-abiding members of society who perceive themselves as always potential victims.[254]

On these two accounts, the increased salience of crime—and in particular, violent crime—has dramatically reshaped the relationship between government and citizens and has undermined support for "the open society."[255] Garland describes a "crime complex" that leaves citizens fearful, frustrated, and powerless; the citizen as victim feels all the time that "'something must be done' and 'someone must be blamed'" yet is unable

248. GARLAND, *supra* note 247, at 11; *see also* SIMON, *supra* note 247, at 279 (arguing that crime victims "are encouraged to consider the prosecution and punishment of the criminal [as] the primary collective contribution to their healing" and "discouraged from expecting the state to address their medical bills, job losses, or family poverty").

249. GARLAND, *supra* note 247, at 11.

250. *Id.* at 144.

251. *Id.* (quoting PRESIDENT'S TASK FORCE ON VICTIMS, FINAL REPORT (1982)). *See also* PRATT, *supra* note 214, at 16–17 (discussing the anti-intellectual themes of violent crime discourse).

252. SIMON, *supra* note 247, at 4.

253. *Id.* at 5.

254. *See, e.g.*, *id.* at 20–21.

255. *Id.* at 25.

to be the one that does something.[256] Ultimately, the crime complex leads to "practices that seek to make society less open and less mobile: to fix identities, immobilize individuals, quarantine whole sections of the population, erect boundaries, close off access."[257] Simon traces several ways in which the governance model of the war on crime is now structuring the war on terror: a strong emphasis on executive authority over legislative, judicial, or citizen-initiated measures; hostility toward civil liberties, based on a judgment that such liberties undermine security; and policies of mass confinement defended by claims that incapacitation of the dangerous is essential to public safety.[258]

Particularly striking in this model of governance is the tendency of democratic majorities to undermine or even give away democratic and liberal institutions. To a substantial degree, it is the people who demand security and who empower the officials that claim to be able to provide it. When the business of governing is primarily the business of protecting, it is no longer clear that the people are fit to do it themselves.

CONCLUSION: A LITTLE HONEST VIOLENCE

> Of all malicious act abhorr'd in heaven,
> The end is injury; and all such end
> Either by force or fraud works other's woe
> But fraud, because of man peculiar evil,
> To God is more displeasing; and beneath
> The fraudulent are therefore doom'd to' endure
> Severer pang.
>
> ~ Dante[259]

> Some will rob you with a six-gun,
> And some with a fountain pen.
>
> ~ Woody Guthrie[260]

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256. GARLAND, *supra* note 247, at 163–64.
257. *Id.* at 165.
258. *See* SIMON, *supra* note 247, at 264–72. More recently, Simon has traced the relationship between the rise of private home ownership, on one hand, and increased fears of violent crime, on the other. Suburbanization, Simon argues, has helped fuel policies of mass incarceration. *See* Jonathan Simon, *Consuming Obsessions: Housing, Homicide, and Mass Incarceration Since 1950*, 2010 U. Chi. Legal F. 165.
259. DANTE, THE INFERNO, CANTO XI, 23–29.
260. WOODY GUTHRIE, PRETTY BOY FLOYD (RCA Victor Record Company 1940).

In this Article, I have traced various conceptions of violence, but I have not scrutinized the normative judgment undergirding much of the criminal law: that violence (assuming we are able to define it) is worse than other forms of wrongdoing. In Dante's *Inferno*, however, that normative judgment is reversed. Those who do violence occupy the first circle of hell, but those who commit fraud—"man['s] peculiar evil"—are punished more severely in the second circle.[261] Dante's hierarchy (particularly salient in the wake of Bernie Madoff and Robert Stanford) brings to mind a quip from the philosophical literature on violence that proliferated in the 1960s and 70s: "[h]ow refreshing a little honest violence would be!"[262]

The question, however, is whether we are capable of being honest about violence—whether we even know what it would mean to be honest about violence. We return, again, to what we think we know: we live in vulnerable bodies that feel pain and need protection. The body is a fact that no critical theorist can deconstruct. The criminal law is a necessary feature of any society of vulnerable embodied persons. *We must punish violence*. Or so it seems, until we discover that we are not always sure what counts as violence, and the criminal law doesn't always punish what seems to be violence, and in fact, the greatest source of violence might be the criminal law itself. We might gain some traction by returning to a focus on physical vulnerability and physical injury, but as the history of criminal law shows, such a focus is no guarantee of consistency. In any case, the centrality of the concept and rhetoric of violence to the criminal law suggests that those who would change the law must pay attention to violence. And if we cannot offer a renewed assertion of what violence *is*, perhaps we can begin with increased self-awareness about how we make and re-make violence.

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261. *See* DANTE, *supra* note 256. Medieval law also showed strong disapproval of secrecy. Recall the 14th century version of the murder-manslaughter distinction, which classified sneak attacks and deceptive killings as murder, and straightforward, out-in-the-open killings as manslaughter. *See* GREEN, *supra* note 71. Or, consider this seventh century law:

> If anyone burns a tree in the woods he shall pay the full fine: he owes 60 shillings because fire is a thief. If anyone chops down many trees in a woods and it is discovered he shall pay 30 shillings for each of three trees. He need not pay more no matter how many there are because the ax is an informer, not a thief.

Quoted in WILLIAM IAN MILLER, HUMILIATION AND OTHER ESSAYS ON HONOR, SOCIAL DISCOMFORT, AND VIOLENCE 66 (1993).

262. Gerald Runkle, *Is Violence Always Wrong?*, 38 J. OF POL. 367, 375 (1976).