

Criminal Law in the Shadow of Violence

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Violence stalks the criminal law. It lurks on the sidelines of most discussions of crime, and it sometimes pounces to claim center stage. References to crime and criminals conjure up not the shoplifter or the writer of bad checks, but the murderer and the rapist; at the very least, we imagine an armed and dangerous thief rather than a merely sneaky one. A violent crime is an ideal type, in a sense: it is the kind of crime that we are most confident *should* be a crime.

But it is the shadow of violence, rather than manifest physical brutality, that shapes the criminal law. Violent crime, as that phrase has been traditionally used, is but a small fraction of criminal offenses actually committed. Though it is difficult to trace the exact percentages, the ratio of violent offenses to all crimes is probably substantially less than one in four and possibly less than one in twenty.¹ This is true across jurisdictions. There is, of course, some geographic variation. America has considerably more lethal crime than comparable developed nations.² In America as elsewhere, though, physically injurious crime is still only a small fraction of all criminal activity. Nor is the attention to violent crime best understood as the cautious monitoring of a canary in a coal mine; it does not

¹ 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 non-violent offenses leave no “victim” who could report the offense. See U.S. Dep’t of Justice, Bureau of Justice Statistics, *Criminal Victimization 2007*, available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/cv07.pdf>. Violent crime (setting aside acquaintance rape, discussed below) is more likely than other crime to be detected and prosecuted, but less than 5 percent of arrests are for violent offenses. See U.S. Dep’t of Justice, *Crime in the United States 2007*, available at <http://www.fbi.gov/ucr/cius2007/arrests/index.html>.

² Franklin E. Zimring & Gordon Hawkins, *Crime Is Not the Problem: Lethal Violence in America* xi (1997).

appear to be the case that higher rates of violent crime are linked to higher rates of nonviolent crime.³

Violent crime is the exception rather than the rule, but it is an exception that claims disproportionate attention. Those who champion criminal law reform in the direction of decriminalization or more lenient sentencing find themselves impeded by the specter of violence: remember Willie Horton, the murderer who was released from prison only to become a rapist. And it is not just the public and political officials who are fixated on violent crime. 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.⁴

To some degree, the emphasis on homicide, rape, and other physically injurious crimes is just one more manifestation of a widely recognized social and cultural fascination with violence. As newscasters—and many others—know, if it bleeds, it leads. The strategic display of violence is a familiar device.⁵ Still, in the field of criminal law, the image and the reality of violence is not mere indulgence of lurid interests. Violence is doing a lot of work. Violent crime provides legitimacy to the criminal law—this is one sense in which violent crime is an ideal type. Should doubts be raised about the wisdom or morality of criminal laws and state-imposed punishment, the image of a brutal attack quickly dispels the skepticism.⁶

³ Id. at 3-4; but see Delbert S. Elliott, *Life-Threatening Violence is Primarily a Crime Problem: A Focus on Prevention*, 69 U. Colo. L. Rev. 1081, 1085-91 (1998) (arguing that if we trace offenders' criminal histories rather than overall crime rates, it becomes clear that an individual's participation in minor crimes frequently progresses to the commission of life-threatening offenses).

⁴ 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 patterns of criminal conduct. Possession offenses put a lot of people in jail, but possession doesn't take very long to teach.

⁵ Consider the vivid opening paragraphs of Michel Foucault's *Discipline and Punish*, or the opening paragraphs of court opinions in death penalty cases.

⁶ This was the structure of the influential broken windows argument. Aggressive prosecution of low-level, nonviolent crime was justified, George Kelling and James Wilson argued, because tolerance of those offenses would eventually lead to higher rates of violent crime. George L. Kelling & James Q. Wilson, *Broken Windows: The Police and Neighborhood Safety*, *Atlantic Monthly*, Mar. 1982, at 38.

To call violent crime an ideal type invites questions about the content of that type.⁷ What is violence, anyway? Sometimes it seems to need no definition—which is a good thing, because it turns out to be very difficult to define. We know violence when we see it, as long as we don’t look too closely. A surprising feature of the phrase “violent crime” is how un-self-consciously it is used. Relatively few jurisdictions—and even fewer scholars, it seems—have taken the trouble to explain what makes a crime violent. If we look to practice and positive law, we see that violent crimes are traditionally those that injure human bodies. But as just noted, actual injuries to bodies are relatively rare. It turns out that as the scope of the criminal law and the scale of imprisonment has expanded, so too has the concept of violence. In legal doctrine, this expansion has occurred most explicitly in the application of sentencing schemes that use the category “violent crime” (or a sister category, “crimes against the person”) as a trigger for sentence enhancements and mandatory minimums. Such laws have led court to consider new candidates to bear the mantle of violent crime. Is burglary of an unoccupied home violent? Is obstruction of justice violent? Is drunk driving? 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.

This chapter examines violent crime in order to illuminate the concept of violence. In the process, we gain insights into the criminal law as well. What we learn of violence is the dualism of the concept: violence always seems to bridge the normative and the empirical. On one hand, violence brings to mind concrete facts—the physical body and its undeniable vulnerability. We humans can be restrained, injured, and killed—more precisely, we can restrain, injure, and kill one another. Amidst all the social and political constructs that vary from place to place and time to time, mortality is a cold, hard, inescapable fact. Of death and taxes, it is in fact only death that is truly certain.

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

⁷ Max Weber distinguished between the ideal type, as an analytic construct, and a normative ideal toward which we strive. We may not strive to create violent crime (though, I will suggest, that is not entirely clear), but much criminal law discourse treats violent crime as an ideal type, a coherent analytical category that represents what the criminal law should target. Notably, Weber also observed that ideal types “cannot be found empirically anywhere in reality.” Weber, *Methodology of the Social Sciences* 90 (Shils & Finch ed. 1949).

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. Rene Girard, Elaine Scarry, and other scholars have suggested that violence trades on this twosomeness; it uses the seemingly empirical and undeniable fact of pain and injury to give reality to more ephemeral human constructions.⁸ 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 chapter shows, the violence of crime is not entirely prelegal. Across time and jurisdictions, the criminal law has constructed violence differently. I want to consider the possibility that through violence, criminal law pulls itself up by its own bootstraps.

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 shape with only one surface and only one edge. If we train our attention on one small segment of the strip, it seems possible to identify two separate surfaces. But 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 questions of legitimacy. 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.

I will return to this point, but I want now to distinguish my argument from claims of radical social construction. The argument here is not that there are no "facts" of life (or of human bodies). 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. In a delightful passage, Judith Butler quotes critics of her claims that gender is a social construct: "But what about the materiality of the body, *Judy*?"⁹ And Butler responds that materiality is itself constructed.¹⁰ That is not the argument here. It seems

⁸ Rene Girard, *Violence and the Sacred* (1977); Elaine Scarry, *The Body in Pain* (1986).

⁹ Judith Butler, *Bodies That Matter: On the Discursive Limits of "Sex"* ix (1993). The emphasis is in the original. "I took it that the addition of "Judy" was an effort to dislodge me from the more formal "Judith" and recall me to a bodily life that could not be theorized away." Id.

¹⁰ Id. at x-xi. Butler goes on to explain, "[t]hinking of the body as constructed demands a rethinking of the meaning of construction itself." Id. at xi.

possible that the flesh does place limits on what society can construct or on what law can accomplish; at any rate, I want to leave room to consider that possibility. When we think about violence, we will keep encountering the materiality of the body.

To the criminal law all this matters not just conceptually but practically. As many commentators have noted, there is a large gap between perceived need for criminal law reform and the political will to effect such reform.¹¹ That gap, 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 prejudice or thoughtless punitiveness. Criminal law reform requires us to take violence seriously.

The following inquiry into violent crime moves between forest and trees and back to forest again. First, I examine violent crime as a general legal category, and the relation of this category to two other classifications—crimes against the person and *mala in se* crimes. Then I examine the trees: I discuss specific substantive offenses including murder, mayhem and assault, and rape. A separate section considers relatively recent innovations in federal criminal law that radically redefine the forest to include many more trees. Specifically, I consider modern laws that base mandatory and enhanced sentences on prior convictions for violent crime, defining violence in terms of risk and danger rather than in terms of actual or threatened injury. I conclude with reflections on the role violence plays in perfecting the criminal law, and on the challenges of identifying the truth about violence.

What Is a Violent Crime?

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, or political theory. And when courts or legislatures consider

¹¹ See, e.g., Paul H. Robinson & Michael T. Cahill, *The Accelerating Degradation of American Criminal Codes*, 56 *Hastings L.J.* 633(2005); William Stuntz, *The Pathological Politics of the Criminal Law*, 100 *Mich. L. Rev.* 505 (2001).

what counts as violence, they rely either implicitly or explicitly on conceptual constructs. So even if the definition of violence is a question of positive law, one can and should ask about the normative presuppositions that underlie the positive law.

As a matter of historical practice and contemporary law, crimes classified as violent have been those that involve physical injury to human persons. Offenses that involve actual injury are most easily classified as violent, but threatened injury or risk of injury may sometimes qualify a crime as violent. Homicide is unquestionably a violent crime, as are assault, battery, and rape.¹² These examples make clear that violent crimes overlap considerably with two other legal categories. First, violent crimes are those classified as “crimes against the person” at common law, and second, violent crimes are those most often and easily identified today as *mala in se*. And these two categories, I suggest, illuminate two features of violence that have recurred in scholarly studies of the concept: its association with the physical vulnerabilities of the human body, and its association with violation or wrongfulness.

Crimes against the person

The common law category of crimes against the person survives in many modern criminal codes, and some courts have explicitly equated crimes against the person with violent crime.¹³ 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 homicide, rape, and battery.¹⁴ 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.¹⁵ Corporations can be legal persons, as

¹² Rape, robbery, aggravated and simple assault, and homicide are the only offenses classified as “violent crimes” by the U.S. Department of Justice for its statistical tracking purposes.

¹³ See, e.g., *State v. Francis*, 554 So. 2d 257 (La. App. 1989); c.f. *United States v. Taylor*, 64 M.J. 416, 421 (U.S. Armed Forces 2007) (dissenting opinion).

¹⁴ See *Black’s Law Dictionary* (7th ed. 1999) (defining crimes against the person 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 (1st American ed. 1772) (reprint 1992) (listing murder, mayhem, forcible abduction and marriage, rape, sodomy, assault, battery, wounding, false imprisonment and kidnapping as crimes against the person); 2 Wayne R. LaFare, *Substantive Criminal Law* §§14-17 (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.

¹⁵ 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

can governments; a legal person doesn't need flesh and blood. But neither a corporation nor a government can be a victim of the offenses typically classified as crimes against the person.¹⁶ In the specific domain of criminal law, the term person, when used to refer to a target of crime, refers to the human body.¹⁷

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 incorporate references to crimes against the person.¹⁸ In many jurisdictions, sentencing decisions can turn on whether the offender has committed crimes against the person.¹⁹ The category sometimes determines the applicable evidentiary rules.²⁰ In these circumstances and others, whether a particular offense constitutes a crime against the person is more than a matter of labels.²¹ And, 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.”²² Along similar lines, Andrew Ashworth and others

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).

¹⁶ Thus a corporation can be a perpetrator of homicide, but not a victim of it. In *People v. Ebasco Services, 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). 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)). In this case, 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. The statute does not require that the person committing the act of homicide be a human being. . . .” *Id.* at 810-811.

¹⁷ 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. [Hobbes] 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.”

¹⁸ See, e.g., *State v. Mahoe*, 972 P.2d 287, 294-95 (Hi. 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”).

¹⁹ [Minnesota; Washington]

²⁰ See, e.g., *United States v. Taylor*, 64 M.J. 416 (U.S. Armed Forces 2007).

²¹ 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”).

²² *Id.* at 324.

have called for “representative labeling” in the substantive criminal law. The notion is that the names and precise definitions of offenses should indicate the moral or social harm of the defendant’s conduct.²³ To call a crime an offense “against the person,” then, 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.²⁴ Early codifications of criminal law 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 shipwreck; 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.²⁵ As Jeremy Horder has observed, this specificity was common to early criminal codes, and it applied to sentencing as well as offense definition.²⁶

²³ 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).

²⁴ 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 heartache and the thousand natural shocks
That flesh is heir to, ‘tis a consummation
Devoutly to be wish’d.

William Shakespeare, *Hamlet*, Act III, scene 1.

²⁵ *Offences Against the Person Act 1861*; [compare to early American criminal codes, e.g. Alabama].

²⁶ 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* n. ___, at 337. Echoing Jeremy Bentham, Horder notes the “manifest absurdity” of a separate offense for doing violence to grain-sellers. “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 G. Postema, *Bentham and the Common Law Tradition* 264 (1986)).

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. Horder identifies “a number of mostly incommensurable values ... attaching to the possession and integrity of body parts” that are infringed by these offenses.²⁷ 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. Within 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.²⁸ 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 interpretation of “violent crime” seems to reassert an intent requirement for violence.²⁹

So crimes against the person reflect social 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, these are not the only concerns implicated by this category of offense. Demonstrating, maybe, a view of the home as an extension of the person, both burglary and arson were classified as crimes against the person at common law.³⁰ 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.³¹

²⁷ Horder, *supra* n. ___, 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 one’s bodily functions”).

²⁸ See John Gardner, *Rationality and the Rule of Law in Offences Against the Person*, 53 *Cambridge L.J.* 502, 504-506 (distinguishing crimes of violence from the broader category of crimes against the person, and emphasizing that violence requires the intentional infliction of injury).

²⁹ See *infra* ___.

³⁰ Blackstone, *supra* n. ___, at 220; see also John Poulos, *The Metamorphosis of the Law of Arson*, 51 *Mo. L. Rev.* 295, 324 (1986).

³¹ See *Offences Against the Person Act 1861*, §§36-40.

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.³² 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.³³ 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.³⁴ But as we have seen, *person* is not always a reference to the physical body. Of course, we need not go all the way to incorporate 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 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.)

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 43 of its 88 pages to crimes explicitly defined in terms of women’s bodies: abduction (of a female person), rape, abortion and “contraceptivism.”³⁵ Elsewhere, this catalog of crimes against the person examines offenses that explicitly contemplate *male* victims: mayhem, or

³² *United States v. Taylor*, 64 M.J. 416 (U.S. Armed Forces 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.

³³ *Id.* at 419-20.

³⁴ *Id.* at 420; see also 64 M.J. at 421 (“In my view, the common and approved usage of the language ‘crime[s] against the person of the other spouse’ ... refers to crimes of violence against that spouse.... [T]his construction is in accord with the longstanding recognition in criminal law that crimes ‘against the person’ refer to offenses of violence against a person.”) (dissenting opinion).

³⁵ Rollin M. Perkins, *Non-Homicide Offenses Against the Person*, 26 B.U. L. Rev. 119, 143-85 (1946).

the malicious infliction of bodily injury that impedes the victim's ability to fight; and dueling.³⁶ Even ostensibly gender-neutral crimes such as assault and battery are subdivided into their particular applications such as wife-beating and hazing.³⁷

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.³⁸ 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. But it is worth noting that courts and legislatures have often strived for a neutral, non-moral 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 adultery, consensual sodomy, or prostitution. It is tempting to think that the right account of violence will lie beyond moral disagreement.³⁹ A gun, a bullet, a wound, a corpse: 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.

Mala in se

It may be that our physical bodies are the subject of our strongest moral intuitions.⁴⁰ 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

³⁶ Id. at 199-206. For more on mayhem, see *infra* ___.

³⁷ Id. at 121.

³⁸ C.f. Moira Gatens, *Imaginary Bodies: Ethics, Power and Corporeality* 24 (1996) (“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.”).

³⁹ 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 immorality per se would ... be an unacceptable danger.” Horder, *supra* n. ___, 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.

⁴⁰ George Lakoff & Mark Johnson, *Metaphors We Live By* (2003 ed.).

foremost to protect our fragile bodies.⁴¹ 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.⁴² If an offense was *mala prohibita*—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 *mala in se* offense was a crime against the law of nature.⁴³ 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.⁴⁴ The inherent wrongness of some acts is asserted as a matter of fact, and not a socially constructed or contingent fact but a fact that even the most powerful of humans cannot deny or alter.

With time, the terms *mala in se* and *mala prohibita* were used to distinguish between common law offenses and violations of statute. Today, the concepts are most likely to be invoked in statutory analysis, especially in the context of alleged impositions of strict liability in the criminal law. Courts often interpret 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.⁴⁵ The question is still one about the limits of

⁴¹ 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.”).

⁴² A good source of historical background is the student note attributed to Herbert Wechsler. See Note, *The Distinction Between Mala in Se and Mala Prohibita in Criminal Law*, 30 *Colum. L. Rev.* 74 (1930); see also Jerome Hall, *General Principles of Criminal Law* (2d. ed. 1947).

⁴³ See, e.g., William Hawkins, *A Treatise of the Pleas of the Crown* 389 (1721 [1721]).

⁴⁴ 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 *Philosophical Review* 163 (1986); Russ Shafer-Landau, *Moral Realism: A Defense* (2003).

⁴⁵ See, e.g., *Baker v. State*, 377 So.2d 17 (Fla. 1979) (“Statutes which impose strict criminal liability, while disfavored, are nonetheless constitutional, particularly when the conduct from which the liability flows involves culpability or constitutes *mala in se* as opposed to *mala prohibita*.”). A few courts use the terms somewhat differently—to these courts, whether a crime is *mala prohibita* or *mala in se* just a question of positive law. See *State v. Walker*, 195 S.W.3d 293, 298 (Tx. App.-Tyler 2006) (equating “*mala prohibita*” with public welfare offenses and declining to impose a mental state requirement on such a statute); *State v. Lycett*, 650

government power, but here the limit is on the power to punish without proof of a culpable mental state, rather than the power to decline to punish at all. And the two “classic examples”⁴⁶ of mala in se conduct that can be punished in the absence of evidence of the defendant’s actual mental state? Felony murder and statutory rape—an accidental killing in the course of a felony, or intercourse with an underage child.⁴⁷ 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.⁴⁸

There is little doubt that murder and rape as defined at common law (as intentional crimes) qualify as malum in se. In addition to homicide and rape, the other crimes traditionally classified as violent—assault, battery, robbery—all appear regularly on lists of mala in se offenses.⁴⁹ 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. “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.”⁵⁰ 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.⁵¹ But when contemporary scholars or courts need to cite examples of mala in se

P.2d 487, 494 (Ariz. App. 1982) (holding that legislative choice to impose mens rea or not determines whether a crime is malum prohibitum or malum in se).

⁴⁶ Baker v. State, 377 So.2d 17.

⁴⁷ See, e.g., State v. Anderson, 666 N.W.2d 696, 698-99 (Minn. 2003) (common law felony murder rule justified because common law felonies were mala in se); Garnett v. State, 632 A.2d 797, 813 (Md. 1993) (statutory rape as mala in se offense).

⁴⁸ 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).

⁴⁹ LaFave & Scott, Criminal Law.

⁵⁰ Andrew Ashworth, Conceptions of Overcriminalization, 5 Ohio St. J. Cr. L. 407, 409 (2008).

⁵¹ Blackstone, supra n. ___.

offenses, they nearly always name the same usual suspects: murder, rape, assault, and robbery.⁵²

But we should not overstate the degree of consensus. Almost as soon as the *malum in se / malum prohibitum* 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."⁵³ 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.

Between body and norm

The categories of "crimes against the person" and *mala in se* offenses, and the close association of violent crime with each of these categories, illustrate two possible criteria for violence: (intentional) physical restraint or injury to a human body, and the wrongfulness of such restraint or injury. Notably, the same two criteria 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," "psychological violence," and "legitimate violence." 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.

Recall the discussion in Chapter One of the studies of violence in the United States in the 1960s. As we saw, at that time the country saw much violence that was not necessarily linked to ordinary crime. 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

⁵² E.g., *Commonwealth v. Penn*, 61 Va. Cir. 25 (Va. Cir. Ct. 2003) (murder, rape, and robbery as "obvious examples" of *mala in se* crimes); *Peck v. Dunn*, 574 P.2d. 367, 369 (Utah 1978) (murder, rape, and kidnapping as examples of *malum in se* crimes); Richard Delgado, A Comment on Rosenberg's New Edition of *The Hollow Hope*, 103 Nw. U. L. Rev. Col. 147, 148 n. 12 (2008) ("Examples of *mala in se* crimes include murder, rape, and battery.") (citing Black's Law Dictionary).

⁵³ 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).

political protesters and armed officials; and the open advocacy of physical resistance by Black Panthers and other activists. 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 German’ we have all learned to despise.”⁵⁴ 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 non-state actors alike, and it could be legitimate or illegitimate.⁵⁵

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.”⁵⁶ 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 “domestic violence” as that term was first used.⁵⁷ 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.”⁵⁸

⁵⁴ Noam Chomsky, *American Power and the New Mandarins* 368 (1969).

⁵⁵ For more on this point, see the discussion of Hannah Arendt’s theory of violence in Chapter One.

⁵⁶ National Commission on the Causes and Prevention of Violence, *Final Report*, 286 (1969).

⁵⁷ 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.” Art. IV, sec. 4.

⁵⁸ Brown’s phrase is startling, and memorable, because it evokes not just national pride but wholesomeness: it associates violence with a cozy domesticity.

But even then, there were exceptions. Other commentators took precisely the opposite tact and emphasized illegitimacy, rather than bodily restraint or injury, as a necessary condition of violence. 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.”⁵⁹ Garver, and others influenced by Gandhian or Marxist thought, connected violence with illegitimacy or injustice—and illegitimacy with violence, so that any 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.”⁶⁰ 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.⁶¹

Such stark disagreements led Robert Paul Wolff to declare the concept of violence “inherently confused” and a waste of time as a scholarly inquiry. Perhaps, however, the same dualism that produces 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. For each of us, our own simple bodily experiences of hunger, fatigue, and especially, 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.”⁶² Accordingly, the infliction of pain and other exercises of physical

⁵⁹ Newton Garver, *What Violence Is*, *The Nation*, June 24, 1968, p. 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 *violencia*, 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.

⁶⁰ The use of the term “structural violence” to describe social injustices was popularized by Johan Galtung, *Violence, Peace, and Peace Research*, *Journal of Peace Research* 6, no. 3 (1969): 167-191.

⁶¹ Joseph Betz, *Violence: Garver’s Definition and a Deweyan Correction*, *Ethics* 87 (July 1977): 339-351. For a more recent defense of a “moralized” conception of violence, see Thomas Pogge, *Coercion and Violence*, in *Justice, Law, and Violence* 65-69 (James B. Brady & Newton Garver ed., 1991). [Zizek]

⁶² Scarry, *supra* n. __, 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. I am less convinced by the second part of

dominion over vulnerable bodies are powerful ways to construct reality. Scarry's subtitle 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 a severe illness or accident is a quick reminder.

I suspect it is the certainty, the manifest reality, of bodily experience that leads to 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."⁶³ In slightly (but only slightly) less direct ways, war, torture, and physical punishments can bring their own forms of enlightenment.

What has all this to do with violent crime? It may shed some light on what is so fascinating about violence. But the account of violence's power to make the world seems applicable, if anywhere, to strategic, orchestrated violence rather than usually isolated acts of criminal violence. In much of this book, I examine the regulation of *official* violence, the ways in which the laws of policing and punishment helps render those practices legitimate while preserving their world-making functions. For the moment, there are two important reasons to consider unofficial, criminal violence.

First, looking closely at violent crime helps us see what characteristics it shares with official uses of force. To a considerable degree, the crimes that have been considered violent for centuries involve intentional physical force against the body. The intentionality of violence may be integral to understanding its capacity to make or unmake the world, as Scarry says, and also to understanding why we (usually) try to avoid it. In discussing Thomas Hobbes and the "fear of a violent

this claim. It is certainly true that we sometimes doubt claims by others to be in pain, but I am not sure that we are particularly inclined to doubt those claims.

⁶³ Franz Kafka, In the Penal Colony, in *The Complete Stories* 150 (Nahum Glazer ed. 1971).

death,” Michael Oakeshott emphasized that “death itself is not the significant thing in Hobbes’s argument.”⁶⁴ Humans don’t want to die, but more importantly, they don’t want to be killed, and most importantly, they don’t want to be killed by a fellow man. Another illustration comes from Holmes’s oft-quoted claim that “even a dog distinguishes between being stumbled over and being kicked.”⁶⁵ It is the kick that we more readily call violent. Intentional force against the body is characteristic to many policing and punishment practices. Since this book aims to untangle assumptions of the legitimacy of those practices, it helps to begin by examining what they might share with the acts we readily call violent.

Second, a scrutiny of policing and punishment practices must consider this basic intuition: “in the beginning was a crime.”⁶⁶ A common picture of crime and punishment is this: against a baseline of peace, the criminal commits an act of disruptive violence, a *mala in se* act to which the state has a duty to respond. That depiction needs examination. We need more information about how the law regulates private violence—or, perhaps, how it constructs certain private acts as violent. Here, an admittedly brief tour of the substantive criminal law of violent crime provides reason to doubt the claim that criminal law merely codifies and responds to obvious, prelegal wrongs. And it gives reason to worry that the official response to crime may bear more characteristics of violence than crime itself.

Murder and Mayhem

Murder may be the crime of crimes, the very paradigm of what a crime should be.⁶⁷ It also may represent what we fear most of violence. The victim’s

⁶⁴ Michael Oakeshott, Letter on Hobbes, reprinted in 29 *Political Theory* 835 (2001). Oakeshott goes on to argue that being killed is shameful, because it signifies “failure in the ‘race’ for precedence which constitutes human life—failure, not in competition with the natural world, but in competition with other human beings.” *Id.* I am not sure that that it is competitiveness that makes us averse to being killed by others, but I think Oakeshott (and Hobbes) are right that humans have particular aversions to violent death, and that this conception of violence appears to require intentional human action.

⁶⁵ Oliver Wendell Holmes, Jr., *The Common Law* 3 (Boston, 1881).

⁶⁶ Hannah Arendt uses this phrase in a somewhat different context to illustrate the violent foundations of political communities. Hannah Arendt, *On Revolution* (1965). C.f. John 1:1 (“In the beginning was the Word.”).

⁶⁷ 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 William A. Schabas, *Genocide, Crimes Against Humanity, and Darfur: The Commission of Inquiry’s Findings on Darfur*, 27 *Cardozo L. Rev.* 1703, 1716-17 (2006). Those who characterize genocide

body is overcome, but that is not the worst of it. As Oakeshott suggested, being killed intentionally by a fellow creature is far worse than simply dying. So intentional killing seems a good candidate for a malum in se act, a prelegal wrong that demands the criminal law's response. If we follow Hart, the prohibition and punishment of murder is the "minimum content" of the criminal law.

But notice: murder is a category much narrower than intentional killing (and sometimes, it encompasses certain unintentional killings). The lines 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.⁶⁸ 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.⁶⁹ (Today, stealth may be an element of murder, but it is hardly a necessary condition or the differentiating factor between murder and manslaughter.) A second way to draw the distinction between murder and manslaughter, one still 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.⁷⁰ 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

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...."). C.f. 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.'").

⁶⁸ See Thomas A. Green, *Verdict According to Conscience: Perspectives on the English Criminal Jury Trial 1200-1800* 51-57 (1985).

⁶⁹ *Id.* at 57.

⁷⁰ See, e.g., Jeremy Horder, *Provocation and Responsibility* (1992).

provocation, but a physical attack or false arrest could also qualify.⁷¹ Provocation as the distinction between murder and manslaughter was in turn replaced by some American jurisdictions in the twentieth century with a related but more flexible inquiry into “extreme emotional distress.”⁷² 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.

Common law provocation doctrine has been criticized as a shield for male violence, especially violence toward women.⁷³ But some historical research suggests that wives who killed their husbands were as or more likely to be subject to reduced criminal liability,⁷⁴ and other research indicates that the “extreme emotional disturbance” reform leaves women worse off than the traditional provocation doctrine.⁷⁵ Whatever the merits of these various attempts to distinguish murder from manslaughter, the key point is that the lines are historically and geographically contingent, and, at particular moments, deeply contested.⁷⁶

Sometimes, murder extends more *broadly* than intentional killing, and here too there is often dissensus 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. These rules are the persistent target of academic criticism.⁷⁷ Gerard Lynch has

⁷¹ See, e.g., Donna K. Coker, Heat of Passion and Wife-Killing: Men Who Batter/Men Who Kill, 2 S. Cal. Rev. L. & Women’s Stud. 71, 72 (1992) (adultery as “paradigm example” of provocation).

⁷² See Victoria Nourse, Passion’s Progress: Modern Law Reform and the Provocation Defense, 106 Yale L.J. 1331, 1339-40 (1997) (describing the Model Penal Code approach).

⁷³ See, e.g., Horder, *supra* n. __; Emily L. Miller, (Wo)manslaughter: Voluntary Manslaughter, Gender, and the Model Penal Code, 50 Emory L.J. 665 (2001).

⁷⁴ Carolyn Ramsey, Intimate Homicide: Gender and Crime Control, 1880-1920, 77 U. Colo. L. Rev. 101 (2006).

⁷⁵ Nourse, *supra* n. __, 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 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.

⁷⁶ 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. In a provocative book, Susan Estrich 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). But 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.

⁷⁷ See, e.g., Roth & Sundby, *supra* n. __.

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.⁷⁸ 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. 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.⁷⁹ 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.”⁸⁰

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.⁸¹

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

⁷⁸ Gerard E. Lynch, *Towards a Model Penal Code (Second?)*: The Challenge of the Special Part, 2 *Buff. Crim. L. Rev.* 297, 303-05 (1998).

⁷⁹ See, e.g., David Crump & Susan Waite Crump, *In Defense of the Felony Murder Doctrine*, 8 *Harv. J. L. & Pub. Pol.* 359 (1985).

⁸⁰ Guyora Binder, *The Origins of American Felony Murder Rules*, 57 *Stan. L. Rev.* 59, 207 (2004)

⁸¹ Blackstone, 4 *Commentaries*, *supra* n. ___, at 205-06.

entitlement to the bodies of his subjects.⁸² 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.⁸³ 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."⁸⁴ It is important to frame the protected interest as one belonging to *the state*, because consent is not a defense to maiming.⁸⁵ In fact, the next frontier of maiming law will likely involve disputes over individuals' ability to secure elective surgical modifications.⁸⁶

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." Notably, this particular "offense against the person," while literally an offense against the victim's *body*, is not legally constructed as an injury to the person-as-*agent* whose body is altered. The victim's consent does not vitiate the offense.

The same no-consent-defense approach generally applies to assault, the modern offense under which today's maimings would typically be prosecuted. Consent is not usually recognized as a defense to crimes involving bodily injury⁸⁷—with a few exceptions that remind us again that crimes against the person are crimes against gendered persons. First, the victim's lack of consent is usually a necessary element of sexual assault; more on that below. Second, there is a considerable jurisprudence concerning "manly diversions" or "manly sport"—physical combat in the context of consensual competitive activity.⁸⁸

⁸² LaFave & Scott, *Criminal Law*, supra n. __, at §7.17(a).

⁸³ See Annemarie Bridy, *Confounding Extremities: The Medico-Ethical Limits of Self-Modification*, 32 *J. L. Med. & Ethics* 148, 153 (2004).

⁸⁴ LaFave & Scott, *Criminal Law*, supra n. __, at §7.17(b).

⁸⁵ 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).

⁸⁶ See Bridy, supra n. __.

⁸⁷ See Vera Bergelson, *The Right to Be Hurt: Testing the Boundaries of Consent*, 75 *Geo. Wash. L. Rev.* 165, 173-183 (2007) (discussing general rule against consent as defense, and exceptions to it, in U.S. criminal law).

⁸⁸ The phrase "manly diversions" comes from a famous British opinion on prizefighting, *R. v. Coney*, 8 Q.B. 534 (1882), 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.

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.⁸⁹ 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.”⁹⁰ (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.⁹¹)

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 injury) appears to be “more or less legally irrelevant.”⁹² Instead, courts consider the “social utility” and public acceptance of the activity.⁹³ 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. 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....”⁹⁴ In permitting boxing, courts simply “mak[e] a value judgment, not dependant on

⁸⁹ See, e.g., *People v. Jones*, 346 N.E.2d 389, 391 (Ill. App. Ct. 1976); see also Jack Anderson, *Citius, Altius, Fortius? A Study of Criminal Violence in Sport*, 11 Marq. Sports L. Rev. 87, 95-96 (2000); Jeff Yates & William Gillespie, *The Problem of Sports Violence and the Criminal Prosecution Solution*, 12 Cornell J. L. & Pub. Pol. 145 (2002).

⁹⁰ James Fitzjames Stephen, *Digest of the Criminal Law*, art. 206 (1883).

⁹¹ *R. v. Brown*, 97 Cr. App. R. 44, 73 (1993).

⁹² Cheryl Hanna, *Sex Is Not A Sport: Consent and Violence in Criminal Law*, 42 B.C. L. Rev. 239, 249 (2001).

⁹³ *Id.* at 250; see also Anderson, *supra* n. ___, at 92-93. Hanna discusses *Regina v. Bradshaw*, 14 Cox C.C. 83, 84 (1878), 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.” As Hanna notes, “To criminalize football in England would have been absurd and unimaginable.” Hanna, *supra* n. ___, at 250.

⁹⁴ *R. v. Brown*, 97 Cr. App. R. at 75.

any theory of consent.”⁹⁵ Of course, most if not all decisions about the scope of the substantive criminal law will require value judgments, and the importance of value judgments may be especially acute when the question concerns violence.

Sex 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 clearly true 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, have 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.⁹⁶ Over the past 30 or more years, rape has received substantial attention in academic commentary, legislative reform, and public advocacy and education.⁹⁷ 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 statutory elimination of requirements of physical force or physical resistance, and the debate over whether rape is better described as a crime of sex or one of violence.⁹⁸ Together, these developments demonstrate 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, and in addition, many jurisdictions required proof of the victim’s “utmost” physical resistance to prove

⁹⁵ *Id.*; see also Neil Papworth, *Boxing and Prize-Fighting: The Indistinguishable Distinguished?* 2 *Sport & L.J.* 5 (1994).

⁹⁶ See, e.g., Susan Brownmiller, *Against Our Will* 376 (1975) (arguing that the law of rape is “rooted still in ancient male concepts of property”); Susan Estrich, *Real Rape* 28-56 (1987) (discussing distrust of women in common law of rape); *id.* at 57-79 (arguing that modern law continues to distrust women complainants, albeit through different doctrinal devices); Anne Coughlin, *Sex and Guilt*, 84 *Va. L. Rev.* 1 (1998); Jill Hasday, *Contest and Consent: A Legal History of Marital Rape*, 88 *Cal. L. Rev.* 1373 (2000).

⁹⁷ One recent commentator claims that “no serious crime has received as much attention from legal reformers.” Samuel H. Pillsbury, *Crimes Against the Heart: Recognizing the Wrongs of Forced Sex*, 35 *Loyola L.A. L. Rev.* 845, 853 (2002).

⁹⁸ 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* 119, 124 (1999).

the separate element of nonconsent.⁹⁹ If anything, the resistance requirement probably rendered those rapes that were visible to the law even more violent than they otherwise might have been.¹⁰⁰ In the United States, a central platform of rape law reform was the abolition of force and resistance requirements from rape statutes.¹⁰¹ The advocates 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).¹⁰² 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 non-stranger assailant, it will be difficult for the prosecution to establish that the defendant acted with the necessary force.¹⁰³ 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.¹⁰⁴

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

⁹⁹ At common law, rape was "carnal knowledge of a woman forcibly and against her will." Blackstone, Commentaries, supra n. ___. Until the 1950s, most U.S. jurisdictions defined rape in language identical or very similar to Blackstone's. See Stephen Schulhofer, *Unwanted Sex* 18 (1998). 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).

¹⁰⁰ See Spohn, supra n. ___. 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 (App. Div. 1973). But the resistance requirement still has some defenders. See Michelle Anderson, *Reviving Resistance in Rape Law*, 1998 U. Ill. L. Rev. 953, 958-59 (arguing that victim's resistance can be effective deterrent to rape); Meredith Duncan, *Sex Crimes and Sexual Miscues*, 42 Wake Forest L. Rev. 1087, 1101-03 (2007) (arguing for evidentiary value of resistance requirement).

¹⁰¹ See Spohn, supra n. ___, at 124; see also *People v. Barnes*, 721 P.2d 110, 115-21 (Cal. 1986) (discussing abandonment of resistance requirement); Note, *Elimination of the Resistance Requirement and Other Rape Law Reforms: The New York Experience*, 47 Alb. L. Rev. 871 (1983).

¹⁰² See David P. Dryden, *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").

¹⁰³ See *id.* at 356; Estrich, supra n. ___, at 60.

¹⁰⁴ Schulhofer.

the claims of several feminist scholars.¹⁰⁵ 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.¹⁰⁶ 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. 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."¹⁰⁷ 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."¹⁰⁸ 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.¹⁰⁹ So MacKinnon could claim that "[w]omen are raped by guns, age, white supremacy, the state—only derivatively by the penis."¹¹⁰

¹⁰⁵ See Pillsbury, *supra* n. __, 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* n. __, at __. For a discussion (and critique) of the claim that rape is not sexual, with a focus on assaults in prisons, see Alice Ristoph, *Sexual Punishments*, 15 *Colum. J. Gender & L.* 139 (2006).

¹⁰⁶ As Andrea Dworkin noted, the claim that rape is violence not 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 (1993).

¹⁰⁷ Catharine A. MacKinnon, *Toward a Feminist Theory of the State* 173 (1989).

¹⁰⁸ *Id.*

¹⁰⁹ See *supra* __.

¹¹⁰ MacKinnon, *supra* n. __, at 173.

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.¹¹¹ 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.¹¹² 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.¹¹³ As Samuel Pillsbury puts it, “[a] sexual attack by a stranger [with] a gun or a knife ... matches many people’s images of rape and violence. But forced sex incidents do not play out this way.”¹¹⁴ 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 yet don’t want to classify it as violent.¹¹⁵

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

¹¹¹ See Lynne Henderson, *Getting to Know: Honoring Women in Law and Fact*, 2 *Tex. J. Women & L.* 41, 59 (1993); 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).

¹¹² See Pillsbury, *supra* n. __, 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).

¹¹³ 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 & Julia Horney, *Rape Law Reform: A Grassroots Revolution and Its Impact* 77-104 (1992); Stacey Futter & Walter R. Mebane Jr., *The Effects of Rape Law Reform on Case Processing*, 16 *Berkeley Women’s L. J.* 72, 83-85 (2001); Spohn, *supra* n. __, at 128-30.

¹¹⁴ Pillsbury, *supra* n. __, 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 Crazy Rapist: A Feminist Critique of Recent Rape Reform Legislation*, 81 *B.U. L. Rev.* 127, 151 (2001).

¹¹⁵ See Katharine K. Baker, *Sex, Rape, and Shame*, 79 *B.U. L. Rev.* 663 (1999).

injury; we (usually) think there is a difference between being stumbled over and being kicked. But rape statutes are notoriously circumspect as to what the defendant must intend.¹¹⁶ Again, the easy case is one where the victim clearly refuses sex and the defendant intentionally overpowers her (or him).¹¹⁷ What, though, of the defendant who makes a reasonable mistake, or 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.¹¹⁸ There are, to be sure, cases at the extremes that we confidently label consent or non-consent, but a huge portion of human interactions 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 non-consent, however, leaves unaddressed the equally important, and perhaps more prevalent, problems of silence, ambiguous consent, or superficial consent.¹¹⁹ 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 non-consent. In *Coker v. Georgia*, the Supreme Court 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."¹²⁰ But as we have already seen, there are many activities classified as violent irrespective of the alleged victim's

¹¹⁶ 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."); Bryden, supra n. __, at 325; Robin Charlow, Bad Acts in Search of a Mens Rea: Anatomy of Rape, 71 Fordham L. Rev. 263, 278-82 (2002) (discussing statutes and case law to demonstrate "the morass of mens rea in American rape law").

¹¹⁷ 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 cause and effect of indifference to sexual assaults in prisons. See generally Ristroph, supra n. __.

¹¹⁸ C.f. Dripps, supra n. __, 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.").

¹¹⁹ See Ristroph, supra n. __, at 180-81.

¹²⁰ 433 U.S. 584, 597 (1977).

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.¹²¹

I identify these questions about the necessary elements of rape, and of violence, not to answer 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.

Danger

Another thought on the knife at the throat: few suggest that the knife must break skin in order to be violent. As we have seen, most traditional descriptions of violence for purposes of criminal law include crimes that involve only the threat of physical force as well as those that involve 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, in the worst case, homicide. These common references to threats of force in descriptions of violence seem to assume the possibility of immediate injury.¹²² Again, with a knife at the throat, the immediacy seems well-established. And in the traditional classification of violent crimes, a threat seems to require not only a real possibility of injury, but also intent—a deliberate choice to put another in fear of bodily harm.

But the ground is moving. Possibly the greatest innovation in the concept of violence, as far as criminal law is concerned, is a contemporary shift from *threat* to *risk*. 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

¹²¹ This argument was made in *R. v. Brown*, a much scrutinized British decision on homosexual sadomasochism. See *R. v. Brown*, 97 Cr. App. R. 44, 51 (1993) (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.”).

¹²² Notably, the crime of making threats has sometimes been classified as a non-violent 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 ever non-violent offenses).

number of crimes that qualify as violent has exploded. Indeed, given wrongdoers' aversion to detection and arrest, there may be few crimes that don't involve at least a chance that force will be used or someone get hurt. And the wrongdoer need not choose to harm anyone; a risk of accidental injury is enough. On a sufficiently broad version of the risk-based account, "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 of another may be used in the course of committing the offense."¹²³ 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.¹²⁴

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 U.S. Sentencing Guidelines (authorized by the Sentencing Reform Act, itself part of the same Comprehensive Crime Control Act of 1984) define a "crime of violence" as any felony 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."¹²⁵ And the federal Armed Career Criminal Act (ACCA) adopts the same language.¹²⁶ The classification of an offense as violent under these provisions can entail serious consequences for the convicted person: enhanced sentences, including mandatory minimums in some cases, and possible deportation for non-citizens.¹²⁷

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

¹²⁴ 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). C.f. *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 4B1 of the Sentencing Guidelines).

¹²⁵ U.S.S.G. § 4B1.2(a) (2008) (emphasis added).

¹²⁶ 18 U.S.C. §924(3)(2)(B).

¹²⁷ See, e.g., *James v. United States*, 550 U.S. 192, ___ (2007) (deciding whether attempted burglary is a violent felony for purposes of 15-year mandatory minimum under Armed Career

Over the last twenty-five years, federal courts have applied this definition of violence to find a wide range of offenses—from theft of an unoccupied car,¹²⁸ to walking away from a prison honor camp,¹²⁹ to failure to report to a halfway house,¹³⁰ to operating a dump truck without permission¹³¹—all to be violent felonies that could trigger the 15-year mandatory sentence of the federal felon-in-possession statute. We have come a long way from mayhem. By shifting our focus from injury, or intentional threat thereof, to mere risk, we have created a violence bubble. Anything *dangerous* is also *violent*. Apparently, it need not even be all that dangerous. Note that it is not even actual, manifest risk that is required: a violent crime is one that involves “*potential risk*,” a phrase that the Supreme Court has understood as a signal that “Congress intended to encompass possibilities even more contingent or remote than a simple ‘risk,’ much less a certainty.”¹³² And the Court’s interpretive approach may have stretched the category even further than the statutory language itself: to decide whether a given offense is violent, the Court considers the elements as defined in the relevant state or federal statute, not the facts of the defendant’s particular crime.¹³³ Thus the Court has held that attempted burglary is a violent felony even if in some specific cases, “attempted burglary might not pose a realistic risk of confrontation or injury to anyone.”¹³⁴

This federal expansion of the concept of violent crime went relatively unchecked until the Supreme Court’s recent opinion in *Begay v. United States*.¹³⁵ There, the Court reasserted the importance of intent to the concept of violence and held—in real tension with the plain language of the ACCA—that drunk driving was not a crime of violence.¹³⁶ The statutory language, remember, requires only “conduct that presents a serious potential risk of physical injury to another.”¹³⁷ Whatever we think of the moral culpability of drunk drivers, it seems clear that their conduct presents a serious potential risk of physical injuries to others. (It

Criminal Act); Sareang Ye, 214 F.3d at 1133-34 (deciding whether burglary constitutes crime of violence that would subject defendant to deportation).

¹²⁸ [Sun Bear]

¹²⁹ *United States v. Springfield*, 196 F.3d 1180, 1185 (10th Cir. 1999).

¹³⁰ *United States v. Bryant*, 310 F.3d 550, 554 (7th Cir. 2002).

¹³¹ *United States v. Johnson*, 417 F.3d 990, 997 (8th Cir. 2005), overruling recognized by *United States v. Williams*, 537 F.3d 969 (8th Cir. 2008).

¹³² *James v. United States*, 550 U.S. 192, __ (2007).

¹³³ *Id.*

¹³⁴ *Id.*

¹³⁵ 128 S. Ct. 1581 (2008).

¹³⁶ *Id.* at 1596-88.

¹³⁷ 18 U.S.C. §924(e)(2)(B).

was just a year prior to *Begay* that Justice Alito, who would dissent in *Begay*, wrote for the Court and emphasized that the ACCA required only “potential risk” rather than manifest risk.¹³⁸) But the *Begay* majority held that the statutory definition of violence must be interpreted in light of the enumerated example felonies of burglary, arson, and the use of explosives.¹³⁹ Those crimes, the majority explained, “all involve purposeful, ‘violent,’ and ‘aggressive’ conduct.”¹⁴⁰ Drunk driving, which the Court characterized as a “strict liability crime,” failed to evince the same kind of intent to harm and thus was not a violent felony for purposes of the ACCA.¹⁴¹ Motivated, maybe, by the dog’s distinction between kicks and stumbles, the Court effectively wrote an intent requirement into the statutory definition of violence.¹⁴²

After *Begay*, some federal circuits have revisited their classifications of other offenses, such as automobile theft, as crimes of violence.¹⁴³ It remains to be seen, however, whether *Begay* will pierce the violence bubble or simply represent an isolated hiccup. If, as I suggested at the outset, the legitimacy of the criminal law is closely linked to fear of violence, then there are considerable incentives to label the crimes that are actually committed as violent. If we are to expand the concept of violence to prop up an increasingly far-reaching criminal law, risky conduct may be the new frontier of violence.¹⁴⁴

¹³⁸ *James v. United States*, 550 U.S. 192 (2007).

¹³⁹ *Begay*, 128 S. Ct. at 1584-85.

¹⁴⁰ *Id.* at 1586. Note that the majority used the term “violent” to elaborate its definition of violence, illustrating the we-know-it-when-we-see-it approach that often shapes discussions of violence.

¹⁴¹ *Id.* at 1588. See also *United States v. Trejo-Galvan*, 304 F.3d 406, 407 (deciding that drunk driving was not a crime against the person, based on the “accepted common law definition” of a crime against the person as “an offense that, by its nature, involves a substantial risk that the offender will intentionally employ physical force against another person”). The characterization of drunk driving as a strict liability crime is questionable. At any rate, it illustrates that legal outcomes often turn on how a court chooses to construe a party’s intentions, a subject I return to in Chapter Seven.

¹⁴² See *supra* __ [Holmes].

¹⁴³ See, e.g., *United States v. Williams*, 537 F.3d 969, 971-75 (8th Cir. 2008) (applying *Begay* to conclude, contra earlier Eighth Circuit opinions, that auto theft is not a crime of violence). [Add discussion of parallel definitions of violence in state sentencing law.]

¹⁴⁴ [To be added to this section: a discussion of the attempt, early in the 1990s, to characterize all drug crime as violent. E.g., 1993 Schumer hearing on mandatory minimums; see 6 Fed. Sent. R. 63; Associated Press, *Drug Sentencing Pleases Some, Angers Others*, *Tulsa World*, Nov 14, 1993 (attributing statement “all drug crimes are inherently violent” to Richard Samp of Washington Legal Foundation, an organization that defended mandatory minimum sentences). Stuntz: drug war has been a not-very-effective proxy for fighting violent crime. *Unequal Justice*, 121 *Harv. L. Rev.* 1969]

The Perfection of Criminal Law

Leave aside the operation of a dump truck without permission. There is a sense in which the old kind of violent crimes—murders most of all—are perfect crimes: *mala in se* acts that represent exactly what, if anything, a crime should be. Moreover, the criminalization of violence may represent a necessary condition for the legitimacy of a legal system; that was Hart’s claim about the minimum content of law. When we focus on violent crime, we may be trying to perfect the criminal law: to make it be all that it can be.

There is some evidence that the criminal justice system functions better when it responds to violence (again, the actual-injury kind rather than the potential-risk model) 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 non-violent property crime.¹⁴⁵ And 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.¹⁴⁶ Moreover, leaving aside any question of human discrimination, the criminal justice system may just be more likely to sort the guilty from the innocent in the context of crimes of physical injury. Most DNA exonerations to date have occurred in rape or murder cases. 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 forensics science improves, 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 kind—is involved, then a better way to perfect the criminal law would be to urge 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 the first half of this chapter, the substantive criminal

¹⁴⁵ C.f. 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.”); see also R. Richard Banks, *Race-Based Suspect Selection and Colorblind Equal Protection Doctrine and Discourse*, 48 *U.C.L.A. L. Rev.* 1075, 1108 (2001) (noting that low levels of violent crime give law enforcement opportunities for more profile-based policing).

¹⁴⁶ 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 (1999).

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 inequalitarian effects. There is always the question of which bodies are perceived as most vulnerable.

Importantly, if it's the overwhelming of human bodies that worries us, then of course we must consider not just crime, but policing and punishment. That, of course, is the subject of the remainder of this book. And it is a subject that should breed skepticism about efforts to perfect the criminal law. Such efforts typically identify some discrete blemish and set about to correct it. Consider the extraordinary attention paid by academic commentators to such topics as the death penalty, wrongful convictions, and, of course, debates over the substantive law of violent offenses such as provocation rules or the definition of rape. I don't contest the importance of any one of these issues, but in terms of the numbers, they are marginal: a tiny fraction of criminal defendants face a death sentence; wrongful conviction rates are estimated liberally at less than 10% and usually much lower than that; and murders and rapes—while even one is too many—remain relatively infrequent. All this attention to issues at the margins means leaving in place, and perhaps legitimizing, criminal law's core.

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 man's peculiar evil,
To God is more displeasing; and beneath
The fraudulent are therefore doom'd to endure
Severer pang.¹⁴⁷

In this chapter, 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 most modern jurisdictions, crimes that cause physical injury are punished more severely than fraud or property crimes. (The law of constitutional criminal procedure reflects a similar judgment: *Miranda* doctrine prohibits physically coerced confessions but permits police deception.) In Dante's *Inferno*, however, this normative judgment is reversed. Those who do violence occupy the first circle of hell, but those who

¹⁴⁷ Dante, *The Inferno*, Canto XI, 23-29.

commit fraud—“man’s peculiar evil”—are punished more severely in the second circle.¹⁴⁸ 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: “how refreshing a little honest violence would be!”¹⁴⁹

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. Maybe violence, as much as fraud, is a distinctively human evil after all. 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.

¹⁴⁸ Medieval law 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* __. Or, consider this 7th century law: “If anyone burns a tree in the woods he shall pay the full fine: he owes 60 shillings because the 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).

¹⁴⁹ Gerald Runkle, “Is Violence Always Wrong?” *Journal of Politics* 38, no. 2 (1976): 375